

**IDAHO
ATTORNEY
GENERAL'S
ANNUAL REPORT**

**OPINIONS
AND
SELECTED INFORMAL
GUIDELINES
FOR THE YEAR
1991**

Larry EchoHawk
Attorney General

Printed by The Caxton Printers, Ltd.
Caldwell, Idaho

CONTENTS

Roster of Attorneys General of Idaho	v
Introduction	vi
Roster of Staff of the Attorney General	1
Organizational Chart of the Office of the Attorney General	2
Official Opinions — 1991	3
Topic Index to Opinions	131
Table of Statutes Cited	135
Selected Informal Guidelines — 1991	141
Topic Index to Selected Informal Guidelines	221
Table of Statutes Cited	227

ATTORNEYS GENERAL OF IDAHO

GEORGE H. ROBERTS	1891-1892
GEORGE M. PARSONS	1893-1896
ROBERT McFARLAND	1897-1898
S. H. HAYS	1899-1900
FRANK MARTIN	1901-1902
JOHN A. BAGLEY	1903-1904
JOHN GUHEEN	1905-1908
D. C. McDOUGALL	1909-1912
JOSEPH H. PETERSON	1913-1916
T. A. WALTERS	1917-1918
ROY L. BLACK	1919-1922
A. H. CONNER	1923-1926
FRANK L. STEPHAN	1927-1928
W. D. GILLIS	1929-1930
FRED J. BABCOCK	1931-1932
BERT H. MILLER	1933-1936
J. W. TAYLOR	1937-1940
BERT H. MILLER	1941-1944
FRANK LANGLEY	1945-1946
ROBERT AILSHIE (Deceased November 16)	1947
ROBERT E. SMYLIE (Appointed November 24)	1947-1954
GRAYDON W. SMITH	1955-1958
FRANK L. BENSON	1959-1962
ALLAN G. SHEPARD	1963-1968
ROBERT M. ROBSON	1969
W. ANTHONY PARK	1970-1974
WAYNE L. KIDWELL	1975-1978
DAVID H. LEROY	1979-1982
JIM JONES	1983-1990
LARRY ECHOHAWK	1991



Larry EchoHawk
Attorney General

INTRODUCTION

Dear Idahoan:

It's a special pleasure for me to introduce this volume of official opinions of the Office of the Attorney General for calendar year 1991 — the first volume of opinions issued under my administration.

In law as in medicine, "an ounce of prevention is worth a pound of cure." For me, the most satisfying effect of these opinions lies in just such prevention. By clarifying complex legal issues, they help public officials deal more effectively with issues, bring about legislative solutions to potentially costly problems, and — most importantly — save taxpayers substantial money by avoiding unnecessary litigation.

My first priority as Attorney General has been to continue to raise the level of professionalism within the Office, and to give talented attorneys the rewards and challenges that will encourage them to remain in public service. I am fortunate to have a top-quality staff, and I believe you will find that these opinions represent legal analysis of the highest caliber. I commend them to you.

Best Wishes,

LARRY ECHOHAWK
Attorney General
State of Idaho

ANNUAL REPORT OF THE ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL

Staff Roster For 1991

ADMINISTRATIVE

Larry EchoHawk — Attorney General
John J. McMahon — Chief Deputy
Lois Hurless — Office Administrator
Tara Orr — Business Manager
Vivian Klein — Legislative & Public Affairs Assistant
Jean McNeil — Public Information Officer
Deann Lone Bear — Executive Secretary
Dan Kelsay — Computer Systems Manager
Sandra Rich — Administrative Secretary/Receptionist

DIVISION CHIEFS

Clive J. Strong — Natural Resources
David G. High — Civil Litigation
Michael Kane — Criminal
Michael DeAngelo — Health & Welfare
Steve Tobiason — Legislative & Public Affairs
Terry Anderson — Business Regulation & Finance

DEPUTY ATTORNEYS GENERAL

Peter Anderson	E. Scott Harmon	John Reubelmann
James Baird	Lois Hart	Marilyn Scanlan
Stephanie Balzarini	Jack Haycock	Steven Scanlin
David Barber	Michael Henderson	Steve Schuster
Kevin Beaton	Thomas Holden	Val Seigel
Lore Bensel	John Homan	Michael Sheeley
Carol Brassey	Joel Horton	Larry Sirhall
Ron Bruce	Donald Howell	Teresa Sobotka
Dallas Burkhalter	Margaret Hughes	Theodore Spangler
Corey Cartwright	Mary Hughes	Myrna Stahman
Richard Christensen	John Hummel	Michael Stoy
Doug Conde	Michael Jones	Steve Strack
Ann Cosh	Rinda Just	Deborah Straight
Brett Delange	Lynne Krogh-Hampe	Weldon Stutzman
Larry Dunn	Jim Leuenberger	Evelyn Thomas
Elaine Eberharter-Maki	Chris Lockwood	Lynn E. Thomas
Mary Feeny	Lori Mann	Bill von Tagen
Curt Fransen	Kay Manweiler	Francis Walker
Roger Gabel	A. René Martin	Lawrence Wasden
Robert Gates	Nancy Matthews	Tom Watkins
Michael Gilmore	Susan Mattos	Will Whelan
Leslie Goddard	John McCreedy	Susan Wiebe
Stephen Goddard	Tim McNeese	Timothy Wilson
Fred Goodenough	Steve Mendive	Lenard Wittlake
Jeanne Goodenough	Carl Olsson	Scott Woodbury
Brad Goodsell	Brad Purdy	
Brad Hall	Phillip Rassier	

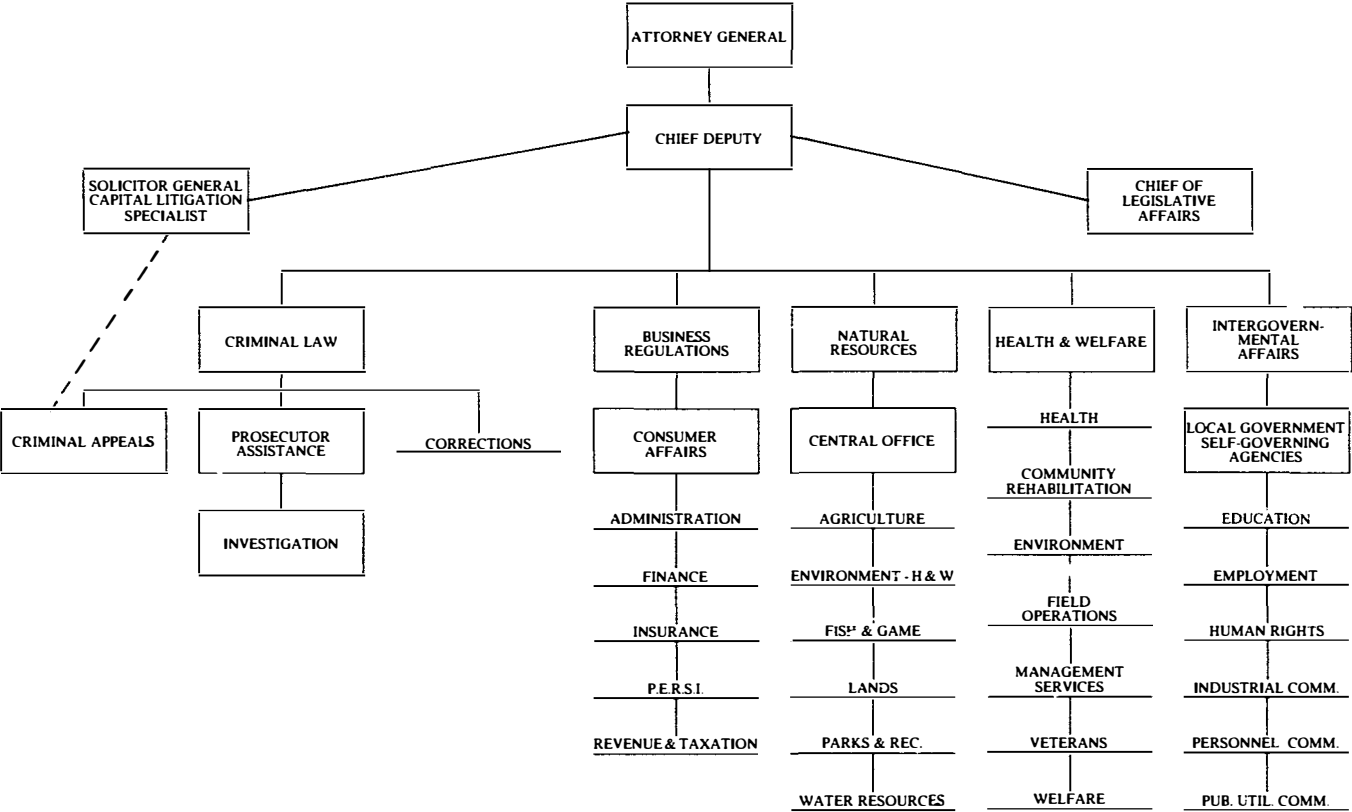
INVESTIGATIVE SERVICE

Russell T. Reneau — Chief Investigator
Scott Birch Allan J. Ceriale Richard T. LeGall Randall Everitt

NON-LEGAL PERSONNEL

Kriss Bivens	Alyssa Goade	Sharon Noice
Judy Blackwood	Ann Lang	Elsie O'Leary
Karen Bolian	Margaret Lawless	Jean Rosenthal
Kathie Brack	Pat McCoy	Paula Saul
Paulette Chapelle	Patty McNeill	Sharon Sawin
Carrie Clark	Ronda Mein	Erica Scarrow
Jeanne Dillion	Dora Morley	Debra Stufflebeam
Marilyn Freeman	Julie Myers	Sandy Turpen

ORGANIZATION CHART — Office of the Attorney General



**OFFICIAL OPINIONS
OF
THE ATTORNEY GENERAL
FOR 1991**



Larry EchoHawk
Attorney General
State of Idaho

ATTORNEY GENERAL OPINION NO. 91-1

The Honorable Cecil D. Andrus
Governor, State of Idaho
Statehouse
Boise, Idaho 83720

Per Request for Attorney General's Opinion

QUESTION PRESENTED:

Does the State of Idaho have the authority to intervene into the pregnancy of a woman suspected of using illegal drugs in an effort to control the woman's conduct and protect the health of the fetus?

CONCLUSION:

The state does have a compelling interest in protecting potential human life from gestational drug abuse and in further protecting a child's right to be born with a sound mind and body. In the instance of known gestational drug abuse the state's compelling interest will override the woman's interest in personal privacy, bodily integrity and parental autonomy and permit some degree of state intervention.

ANALYSIS:

Minnesota is the only state in the nation which has enacted legislation permitting intervention into the pregnancy of a woman suspected of using illegal drugs. Minn. Stat. § 626.5561 (1990). The constitutionality of that statute has not been tested, nor are there any judicial decisions defining the state's interest in protecting the fetus from gestational drug abuse. The following analysis, therefore, draws upon case law and statutes in related fields of law and represents this office's best attempt to determine the probable judicial reaction to legislation permitting the state to intervene into a woman's pregnancy in order to protect a fetus.

1. Protection of Fetus Under Current Idaho Law

Idaho's Child Protective Act, Idaho Code § 16-1601, et seq., presently would not permit the state to intervene in the case of gestational drug abuse in order to protect the fetus. Idaho Code § 16-1602(e) defines a child as "an individual who is under the age of eighteen (18) years." This definition does not extend to the unborn.

Attempts to intervene under similar child protection statutes on behalf of the fetus have failed in other jurisdictions. In *In Re Dittrick*, 80 Mich.App. 219, 263 N.W.2d 37 (1977), the Bay County Department of Social Services petitioned for and received a probate court order granting temporary custody of an unborn child. The Department argued that the parents' parental rights over another child had been permanently terminated earlier in the year and the parents were not fit to care for the unborn child. The court of appeals reversed, holding that the probate court lacked jurisdiction over an unborn fetus:

We recognize that the word "child" could be read as applying even to unborn persons. However, our reading of other sections of Chapter XIIA of the Probate Code convinces us that the Legislature did not intend application of these provisions to unborn children. . . .

The Legislature may wish to consider appropriate amendments to the Probate Code. Indeed, the background of the present case has convinced us that such amendments would be desirable. However, the Code as now written did not give the probate court jurisdiction to enter its original order in the present case.

263 N.W.2d at 39.

Similarly, in *In Re Steven S.*, 126 Cal.App.3d 23, 178 Cal.Rptr. 525 (1981), the State of California, under provisions similar to the Idaho Child Protective Act, filed a petition to detain a pregnant woman who allegedly suffered from an undiagnosed psychiatric illness and was viewed as a threat to her unborn child. The trial court entered an order of detention, and the child was born approximately two months later. The Court of Appeals of California dismissed the mother's appeal for mootness, but took the opportunity to rule that a fetus did not come within the definition of "child" for purposes of the Act:

[W]hen the Legislature determines to confer legal personality on unborn fetuses for certain limited purposes, it expresses that intent in specific and appropriate terms; the corollary, of course, is that when the Legislature speaks generally of a 'person,' as in section 377, it impliedly but plainly excludes such fetuses (Emphasis in original.)

Accordingly, we strictly construe the language of this section and find the order of the juvenile court sustaining jurisdiction over the unborn fetus lacking in statutory authority.

178 Cal.Rptr. at 527-28.

Idaho's Child Protective Act could be amended by the Idaho Legislature to provide specific legal rights and protections for the unborn. New Jersey, for instance, has incorporated the unborn into its child protection statutes. N.J.S.A. § 30:4C-11 provides:

Whenever it shall appear that any child within this State is of such circumstances that his welfare will be endangered unless proper care or custody is provided, an application setting forth the facts in the case may be filed with the Bureau of Childrens Services by a parent or other relative of such child, by a person standing in loco parentis to such child, by a person or association or agency or public official having a special interest in such child or by the child himself, seeking that the Bureau of Childrens Services accept and provide such care or custody of such child as the circumstances may require. Such application shall be in writing, and shall contain a statement of the relationship to or special interest in such child which justifies the filing of such application. *The provisions of this section shall be deemed to include an application on behalf of an unborn child when the prospective mother is within this State at the time of application for such services.* (Emphasis added.)

It has been argued that this statute empowers the state to intervene into a pregnancy on behalf of the fetus. Note, *Fetal Rights Proposal*, 21 St. Mary's L.J., 259, 292 (1989). However, there have been no reported cases showing that New Jersey has in fact used this provision to intervene during pregnancy.

In summary, the present Idaho Child Protective Act does not provide protection for the unborn. An action brought under the Act on behalf of a fetus would in all likelihood be dismissed for lack of jurisdiction. The Act could be amended, as done in New Jersey, to provide for the unborn. However, the procedural structure of the Child Protection Act as presently structured comes into play only after the birth of the child and would require significant amendment to cover this situation.

2. Fetal Rights - the Abortion Case Law

In *Roe v. Wade*, 410 U.S. 113 (1973), the United States Supreme Court held the State of Texas' anti-abortion statutes unconstitutional. In doing so the Court addressed the conflict between the state's interest in potential life (a fetus) and a woman's right to terminate the pregnancy as a right of personal privacy protected by the fourteenth amendment. After detailed discussion regarding the judicial evolution of a person's right to privacy, the Court held:

This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of

rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.

410 U.S. at 153. The Court further stated that this fundamental right to privacy, although broad enough to encompass the decision to terminate a pregnancy, was not absolute or unqualified. The state may limit this fundamental right to privacy when the state's interest becomes "compelling." 410 U.S. at 155. Further, the Court held that the state's interest in potential life becomes compelling at viability. 410 U.S. at 163.

The Court's opinion in *Roe v. Wade*, however, does not stand for the proposition that a state's interest in potential life does not begin until the fetus reaches viability. Declining to resolve the question of when life begins, the Court stated:

Logically, of course, a legitimate state interest in this area need not stand or fall on acceptance of the belief that life begins at conception or at some other point prior to live birth. In assessing the State's interest, recognition may be given to the less rigid claim that as long as at least *potential* life is involved, the State may assert interests beyond the protection of the pregnant woman alone.

410 U.S. at 150 (emphasis original).

In the recent U. S. Supreme Court opinion in *Webster v. Reproductive Health Services*, 492 U.S. ____ , 106 L.Ed. 2d 410, 109 S.Ct. ____ (1989), a three-justice plurality (Rehnquist, White, Kennedy) effectively eliminated viability as the point when the state's interest is deemed compelling:

[W]e do not see why the State's interest in protecting potential human life should come into existence only at the point of viability, and that there should therefore be a rigid line allowing state regulation after viability but prohibiting it before viability. The dissenters in *Thornburgh*, writing in the context of the *Roe* trimester analysis, would have recognized this fact by positing against the "fundamental right" recognized in *Roe* the State's "compelling interest" in protecting potential human life throughout pregnancy. "[T]he State's interest, if compelling after viability, is equally compelling before viability." *Thornburgh*, 476 US, at 795, 90 L. Ed 2d 779, 106 S Ct 2169 (White, J., dissenting); see id., at 828, 90 L Ed 2d 779, 106 S Ct 2169 (O'Connor, J., dissenting) ("State has compelling interests in ensuring maternal health and in protecting potential human life, and these interests exist 'throughout pregnancy'").

106 L.Ed.2d at 436.

Justice O'Connor, in a separate opinion, refused to join the plurality opinion in

overturning the *Roe* trimester framework because the issue presented in *Webster* did not warrant reexamination of *Roe v. Wade* or its trimester analysis. Nonetheless, Justice O'Connor noted in her separate opinion a previous dissent in which she criticized the trimester framework:

The state interest in potential human life is likewise extant throughout pregnancy. In *Roe*, the Court held that although the State had an important and legitimate interest in protecting potential life, that interest could not become compelling until the point at which the fetus was viable. *The difficulty with this analysis is clear: potential life is no less potential in the first weeks of pregnancy than it is at viability or afterward. At any stage in pregnancy, there is the potential for human life. . . . The choice of viability as the point at which the state interest in potential life becomes compelling is no less arbitrary than choosing any point before viability or any point afterward. Accordingly, I believe that the State's interest in protecting potential human life exists throughout the pregnancy.* (Emphasis added.)

Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 460 (1983). See also, *Thornburgh v. American College of Obstetrics and Gynecology*, 476 U.S. 747, 828 (1986).

Justice Scalia in a separate opinion in *Webster* was prepared to overrule *Roe v. Wade*. Thus, Justice Scalia assuredly would join Justices Rehnquist, White, Kennedy and O'Connor in the view that the state's interest in potential life is compelling at all stages of pregnancy.

In the context of personal privacy and the freedom to choose whether to carry a fetus to term, five justices presently on the United States Supreme Court have rejected the view that fetal viability is the benchmark for establishing a "compelling" state interest in potential life. The impact of this change in the abortion context remains to be seen. However, in the instance of gestational drug abuse the state is faced with a completely different issue: the live birth of a child intentionally carried to term by its mother. The impact of the *Webster* decision is dramatic in that it eliminates fetal "viability" as the threshold for state assertion of a compelling interest and therefore makes possible intervention into the early stages of fetal development.

3. Fetal Rights in Other Contexts

Although the United States Supreme Court in *Roe v. Wade*, 410 U.S. 113 (1973), held that a fetus is not considered a person for purposes of the fourteenth amendment, *id.* at 158, the Court expressly recognized that in certain areas of the law a fetus does possess legal rights. *Id.* at 161. *Roe* does not prohibit the state from extending to the fetus legal benefits and protection in these other areas.

In Idaho, for example, the Probate Code recognizes children conceived before yet born subsequent to a decedent's death. Idaho Code §§ 15-2-108, 15-2-302. Idaho's Worker's Compensation Law similarly includes posthumously-born children as dependents under the Act. Idaho Code § 72-102(8)(c). For purposes of domestic relations, Idaho Code § 32-102 provides: "A child conceived, but not yet born, is to be deemed an existing person so far as may be necessary for its interests in the event of its subsequent birth."

Dramatic changes toward the legal status of the fetus have likewise occurred in tort law. A century ago a fetus in this country possessed no legal rights that would enable it upon birth to seek damages for injuries sustained while in its mother's womb. *Dietrich v. Inhabitants of Northampton*, 138 Mass. 14 (1884). Justice Holmes reasoned that a fetus was merely a part of the mother and, as such, possessed no independent cause of action for prenatal injury. Similarly, until recent years wrongful death statutes were held inapplicable to the death of a fetus and provided no cause of action for the surviving parents. W. Prosser, *Handbook of the Law of Torts*, § 55 (4th ed. 1971).

The common law perception that the fetus is a legal nonentity for tort purposes has now been thoroughly rejected. In regard to a child's cause of action for prenatal injuries, § 869(1) of the Restatement of Torts (Second) states:

One who tortiously causes harm to an unborn child is subject to liability to the child for the harm if the child is born alive.

The drafter's comment to this section provides:

The rule stated in Subsection (1) is not limited to unborn children who are "viable" at the time of the original injury, that is, capable of independent life, if only in an incubator. If the tortious conduct and the legal causation of the harm can be satisfactorily established, there may be recovery for any injury occurring at any time after conception.

In *Volk v. Baldazo*, 103 Idaho 570, 651 P.2d 11 (1982), the Idaho Supreme Court rejected the common law legal status of the fetus and held that a cause of action can be brought for the death of a viable fetus under Idaho's wrongful death statutes. Idaho Code §§ 5-310, 5-311. The court expressly declined to address whether a wrongful death action could be based upon the death of a non-viable fetus. In regard to prenatal injury to a child, the court stated:

Based on what we deem to be the modern trend and the clear weight of authority, we hold that in Idaho a cause of action will lie on behalf of a viable child who sustains prenatal injuries, but is subsequently born alive. Our

holding is limited to the instant circumstances where it is alleged that the fetus was viable at the time of injury. We intimate no view, and reserve for another time any view, on whether such a cause of action will lie on behalf of a child for such negligence committed prior to its conception. *See, e.g., Jorgensen v. Meade-Johnson Laboratories, Inc.*, 483 F.2d 287 (10th Cir. 1973) (a cause of action for prenatal injuries held to be stated when mother took birth control pills prior to conception of mongoloid twins, and pills caused chromosomal abnormalities in mother's womb). Likewise we state no opinion today as to the existence of a cause of action for injuries to a fetus subsequent to conception but prior to viability. *See e.g., Bennett v. Hymers*, 101 N.H. 483, 147 A.2d 108, 110 (1958) (fetus is a separate organism from the time of conception).

Hence we hold that if the Volk child had survived the injuries, it would have been able to pursue a cause of action on its own behalf for any injury sustained subsequent to viability.

103 Idaho at 572-73.

As the law evolved toward recognizing legal remedies for prenatal injuries, the right to recover was premised upon the strong principle that *a child had a right to be born with a sound mind and body*. The Supreme Court of New Jersey articulated this principle in *Smith v. Brennan*, 157 A.2d 497, 503 (1960):

The semantic argument whether an unborn child is a "person in being" seems to us to be beside the point. There is no question that conception sets in motion biological processes which if undisturbed will produce what everyone will concede to be a person in being. If in the meanwhile those processes can be disrupted resulting in harm to the child when born, it is immaterial whether before birth the child is considered a person in being. And regardless of analogies to other areas of the law, *justice requires that the principle be recognized that a child has a legal right to begin life with a sound mind and body*. If the wrongful conduct of another interferes with that right, and it can be established by competent proof that there is a causal connection between the wrongful interference and the harm suffered by the child when born, damages for such harm should be recoverable by the child. (Emphasis added.)

See also, Womack v. Buckhorn, 187 N.W. 2d 218 (Mich. 1971) (child recovered for prenatal injury sustained as result of automobile accident during fourth month of pregnancy); *Gordon v. Gordon*, 301 N.W. 2d 869 (Mich.App. 1981) (child held to have right to bring action against his mother for prenatal injury sustained as result of negligent use of prescription drug).

Thus, we conclude that in the case of gestational drug abuse the child's right to be born with a sound mind and body is further enhanced by the state's compelling interest as *parens patriae* in protecting potential human life from unwarranted harm or birth defects.

4. A Woman's Right to Privacy and Bodily Integrity Does Not Encompass Gestational Drug Abuse

The pregnant woman who is abusing drugs has several legal interests of her own at stake. The woman has a fundamental right to privacy, which incorporates the right to be free from unwarranted governmental intrusion into her personal life. Similarly, she has the right to her own bodily integrity. *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Schmerber v. California*, 384 U.S. 757 (1966). This right to privacy includes the right to make decisions which will impact her and the fetus she is carrying, *Roe v. Wade*, *supra*. (Like the U.S. Constitution, the Constitution of Idaho does not specifically provide a personal "right to privacy." There is no case law in Idaho which would afford citizens of Idaho greater protection in their right to privacy than afforded by the U.S. Constitution and federal case law enunciating that right.)

The woman's right to privacy in this instance differs from the conduct in question in *Griswold*, *Eisenstadt*, and *Roe*. A woman's right to privacy does not include the right to use illegal drugs. *State v. Kelly*, 106 Idaho 268, 678 P.2d 60 (App. 1984), *cert. denied*, 469 U.S. 918; *State v. Kincaid*, 98 Idaho 440, 566 P.2d 763 (1977); *State v. O'Bryan*, 96 Idaho 548, 531 P.2d 1193 (1975); *State v. Erikson*, 574 P.2d 1 (Alaska 1978). The Supreme Court of Alaska stated in *Ravin v. State*, *supra*:

[W]e think this right [privacy] must yield when it interferes in a serious manner with the health, safety, rights and privileges of others or with the public welfare. No one has an absolute right to do things in the privacy of his own home which will affect himself or others adversely. Indeed, one aspect of a private matter is that it *is* private, that is, that it does not adversely affect persons beyond the actor, and hence is none of their business. When a matter does affect the public, directly or indirectly, it loses its wholly private character, and can be made to yield when an appropriate public need is demonstrated. (Emphasis original.)

537 P.2d at 504. Here there can be no serious argument that the use of illegal drugs which can badly damage a fetus is protected under the fourteenth amendment. To the extent that intervention into a woman's pregnancy involves her right to privacy, the state *does* have a compelling state interest throughout the pregnancy to ensure the health of potential human life and ensure that a fetus is born drug-free and free from the birth defects associated with gestational drug use.

This office perceives no contradiction between a woman's right to an abortion during the early stages of pregnancy and the right of the state during those same stages of pregnancy to require a certain degree of prenatal care once the woman elects not to have an abortion and to carry the child to full term. Alan M. Dershowitz, a professor of law at Harvard University, explains this distinction:

Now, I am not a "fetal-rights" advocate. I favor *Roe v. Wade*. I believe that a pregnant woman should have the right to choose between giving birth or having an abortion. But I am a human-rights advocate, and I believe that no woman who has chosen to give birth should have the right to neglect or injure that child by abusing their collective body during pregnancy.

Once a woman has made the decision to bear a child, the rights of that child should be taken into consideration. What happens to the child in the womb may have significant impact on his or her entire life

There is a principled distinction between totalitarian intrusions into the way a woman treats her body, and civil-libertarian concerns for the way a woman treats the body of the child she has decided to bear. That principled distinction goes back to the philosophy of John Stuart Mill and is reflected in the creed that "your right to swing your fist ends at the tip of my nose." In the context of a pregnant woman's rights and responsibilities in relation to the child she has decided to bear, the expression might be: "Your right to abuse your own body stops at the border of your womb."

A principled person can fully support a woman's right to choose between abortion or birth, without supporting the very different view that the state should have no power to protect the health of a future child.

Congressional Record, Senate, August 1, 1989, S 9323.

5. The Woman's Right to Parental Autonomy Does Not Encompass Gestational Drug Use

The final right the woman may assert is her right to parental autonomy. This right is also not absolute. The state, acting in the capacity as *parens patriae*, has the right to intervene to protect innocent children from harmful decisions of their parents and has exercised that right even when such intervention subordinates the fundamental right to freedom of religion.

Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before

they have reached the age of full and legal discretion when they can make that choice for themselves.

Prince v. Commonwealth of Massachusetts, 321 U.S. 158, 170 (1944). See also, *Jehovah's Witnesses v. King County Hospital Unit No. 1*, 278 F.Supp. 488 (W. D. Wash. 1977), *aff'd*, 390 U.S. 598 (1968); *In Re Clark*, 185 N.E.2d 128 (Ohio 1962); *Hoener v. Bertinato*, 171 A.2d 140 (N.J. 1961).

The Supreme Courts of New Jersey and Georgia have, in fact, ordered medical treatment for pregnant women in the final stages of pregnancy in order to save the life of the fetus. In *Raleigh Fitkin-Paul Morgan Memorial Hospitals v. Anderson*, *supra*, a pregnant woman was at high risk of hemorrhaging, which if left untreated would probably result in her death and the death of the unborn child. Based upon her religious beliefs, the woman would not consent to a blood transfusion. The Supreme Court of New Jersey reversed the trial court's refusal to enter an order requiring such medical treatment, and held:

We are satisfied that the unborn child is entitled to the law's protection and that an appropriate order should be made to insure blood transfusions to the mother in the event that they are necessary in the opinion of the physician in charge at the time.

We have no difficulty in deciding with respect to the infant child. The more difficult question is whether an adult may be compelled to submit to such medical procedures when necessary to save his life. Here we think it is unnecessary to decide that question in broad terms because the welfare of the child and the mother are so intertwined and inseparable that it would be impracticable to attempt to distinguish between them with respect to the sundry factual patterns which may develop. The blood transfusions (including transfusions made necessary by the delivery) may be administered if necessary to save her life or the life of her child, as the physician in charge at the time may determine.

201 A.2d at 538.

In *Jefferson v. Griffin Spalding County Hospital*, 274 S.E.2d 457 (1981), the Supreme Court of Georgia ordered a Caesarian section as well as all necessary blood transfusions to be performed upon a woman who refused the operation due to her religious beliefs. The medical evidence showed that the woman had complete placenta previa which indicated a 99% certainty that the child would not survive natural childbirth. The Georgia Supreme Court held *per curiam*:

The Court finds that the State has an interest in the life of this unborn, living human being. The Court finds that the intrusion involved into the life of Jessie Mae Jefferson and her husband, John W. Jefferson, is outweighed by the duty of the State to protect a living, unborn human being from meeting his or her death before being given the opportunity to live.

274 S.E.2d at 460. Justice Smith stated in his concurring opinion:

In the instant case, it appears that there is no less burdensome alternative for preserving the life of a fully developed fetus than requiring its mother to undergo surgery against her religious convictions. Such an intrusion by the state would be extraordinary, presenting some medical risk to both the mother and the fetus. However, the state's compelling interest in preserving the life of this fetus is beyond dispute. See *Roe v. Wade*, supra; Code § 26-1202 et seq. Moreover, the medical evidence indicates that the risk to the fetus and the mother presented by a Caesarean section would be minimal, whereas, in the absence of surgery, the fetus would almost certainly die and the mother's chance of survival would be no better than 50 per cent. Under these circumstances, I must conclude that the trial court's order is not violative of the First Amendment, notwithstanding that it may require the mother to submit to surgery against her religious beliefs.

274 S.E.2d at 461. *See also, Application of Jamaica Hospital*, 491 N.Y.Supp.2d 898 (Sup.Ct. 1985) (physician appointed as guardian of unborn child and ordered to do all necessary to save life of eighteen-week-old fetus, including administering blood transfusions to the mother over her objections); *Crouse Irving Memorial Hospital, Inc., v. Paddock*, 485 N.Y.Supp.2d 443 (Sup.Ct. 1985) (court ordered pregnant woman to receive blood transfusions to protect the welfare of fetus that was to be prematurely delivered).

It must be noted that the conflict between the mother and the fetus in the preceding cases involved a basic fundamental right enumerated in the First Amendment to the U.S. Constitution. The mother's right to religious freedom was nonetheless overridden by the state's interest in protecting potential human life. An individual's penumbral right to privacy, in the context of illegal drug use, cannot logically ascend to so heightened a level of protection as religious freedom. It follows that if a state has the right to intervene and order drastically intrusive medical treatment for a pregnant woman over her objections in an effort to save the life of an unborn child, the state also has the ability to regulate the conduct of pregnant women shown to be abusing illegal drugs. The harm prevented by intervention is great, and the intrusion into the mother's life, forced abstinence, is minimal in comparison.

6. The State's Interest Justifies Intervention

Idaho's present interest in the context of gestational drug abuse is in protecting potential human life, *Webster, supra*, and protecting a child's right to be born with a sound mind and body. *Raleigh Fitkin-Paul Morgan Memorial Hospital v. Anderson*, 201 A.2d 537 (N.J. 1964); *Jefferson v. Griffin Spalding County Hospital*, 274 S.E.2d 457 (Ga. 1981). Further, the state has an interest in protecting society from long-term financial burdens associated with gestational child abuse. "The state is under no obligation to allow otherwise 'private' activity which will result in numbers of people becoming public charges or otherwise burdening the public welfare." *Ravin v. State*, 537 P.2d 494, 509 (Alaska 1975). See also *State v. Albertson*, 93 Idaho 640, 470 P.2d 300 (1970). (Idaho statute requiring use of a helmet when operating a motorcycle held to be a permissible infringement upon an individual's right to privacy due, in part, to the public expense of providing health care for injuries sustained as a result of improper safety equipment.); *State v. Laitinen*, 459 P.2d 789 (Wash. 1969).

The effects of cocaine and narcotic drug use upon fetal development have come under increasing scrutiny within the medical profession in the last five years. Recent studies indicate that the use of illegal drugs, especially cocaine, can have devastating effects upon a developing fetus. Cocaine has been scientifically linked to perinatal strokes, myocardial infarctions, intrauterine growth retardation, kidney and genitourinary tract malformation, and significantly reduced head circumference. Cocaine use at all stages of pregnancy is linked to a higher incidence of abruptio placenta and neurobehavioral deficiencies. The instances of newborn infants with cocaine or narcotics in their systems are well documented, and the physical difficulties they face are dramatic and heartbreaking. In addition, infants born to drug-addicted mothers face a much higher risk of hepatitis and human immunodeficiency virus (HIV). Chasnoff, *Temporal Patterns of Cocaine Use in Pregnancy: Perinatal Outcome*, 261 JAMA 1741 (1989); Chasnoff, *Drug Use in Pregnancy: Parameters of Risk*, 35 Pediatric Clinics of North America 1403 (1988); Lynch, *Cocaine Use During Pregnancy*, 19:4 JOGNN 285 (1990); Keith, *Substance Abuse in Pregnant Women*, 73 Obstetrics and Gynecology 715 (1989).

The medical evidence indicates that drug use at all stages of pregnancy places the fetus at risk of significant damage. The evidence further indicates that intervention into the first trimester of the pregnancy will significantly improve the chances of normal development and childbirth. Chasnoff, *Temporal Patterns of Cocaine Use in Pregnancy: Perinatal Outcome*, 261 JAMA 1741 (1989).

An informal survey performed by the State of Idaho Department of Health and Welfare indicates there were seventeen documented cases of prenatal illegal drug use in the year 1990. A national survey estimates that the frequency of drug use by pregnant

women is one in ten. Chasnoff, 1986-1987, *Cocaine and Pregnancy*, Childbirth Educator, Winter: 34-12. Drug abuse is more concentrated in the urban areas of the country, but nonetheless there is no reason to assume the problem does not exist in Idaho and that a significant risk of harm exists for a significant number of children to be born in Idaho in the future.

CONCLUSION

The state does have a compelling interest in protecting potential human life from gestational drug abuse and in further protecting a child's right to be born with a sound mind and body. In the instance of known gestational drug abuse the state's compelling interest will override the woman's interest in personal privacy, bodily integrity and parental autonomy and permit some degree of state intervention.

The prospect of state intervention on behalf of the fetus and the newborn has brought a wide variety of suggested remedies. Such suggestions include criminal prosecution for gestational drug abuse, mandatory drug testing for all pregnant women, civil commitment for pregnant women shown to be using drugs, mandatory reporting requirements for medical providers in instances of gestational drug abuse, postnatal reporting requirements of medical providers for newborns showing symptoms of withdrawal, state child protective actions on behalf of newborns showing symptoms of withdrawal, and finally, educational and prenatal care programs for pregnant women known to be using illegal drugs or with past histories of drug use. Each proposal for state intervention carries policy and cost considerations as well as legal parameters limiting state action. Once the focus for state intervention has been determined this office will be readily available to assist in further legal analysis and preparing appropriate legislation.

AUTHORITIES CONSIDERED:

1. *Constitutions*

First Amendment, U. S. Constitution.

Fourth Amendment, U. S. Constitution.

2. *Idaho Statutes*

Idaho Code §§ 5-310, 5-311.

Idaho Code §§ 15-2-108, 15-2-302.

Idaho's Child Protective Act. Idaho Code § 16-1601, et seq.

Idaho Code § 16-1602(e).

Idaho Code § 32-102.

Idaho Code § 72-102(8)(c).

3. *Other State Statutes*

Minn. Stat. § 626.5561 (1990).

N.J.S.A. § 30:4C-11.

4. *United States Supreme Court Cases*

Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983).

Eisenstadt v. Baird, 405 U.S. 438 (1972).

Griswold v. Connecticut, 381 U.S. 479 (1965).

Prince v. Commonwealth of Massachusetts, 321 U.S. 158 (1944).

Roe v. Wade, 410 U.S. 113 (1973).

Schmerber v. California, 384 U.S. 757 (1966).

Thornburgh v. American College of Obstetrics and Gynecology, 476 U.S. 747 (1986).

Webster v. Reproductive Health Services, 492 U.S. ____ , 106 L.Ed. 2d 410, 109 S.Ct. ____ (1989).

5. *Federal Cases*

Jehovah's Witnesses v. King County Hospital Unit No. 1, 278 F.Supp. 488 (W. D. Wash. 1977).

6. *Idaho Cases*

State v. Albertson, 93 Idaho 640, 470 P.2d 300 (1970).

State v. Kelly, 106 Idaho 268, 678 P.2d 60 (App. 1984).

State v. Kincaid, 98 Idaho 440, 566 P.2d 763 (1977).

State v. O'Bryan, 96 Idaho 548, 531 P.2d 1193 (1975).

Volk v. Baldazo, 103 Idaho 570, 651 P.2d 11 (1982).

7. Other State Cases

Application of Jamaica Hospital, 491 N.Y.Supp.2d 898 (Sup.Ct. 1985).

In Re Clark, 185 N.E.2d 128 (Ohio 1962).

Crouse Irving Memorial Hospital, Inc., v. Paddock, 485 N.Y.Supp.2d 443 (Sup.Ct. 1985).

Dietrich v. Inhabitants of Northhampton, 138 Mass. 14 (1884).

In Re Dittrick, 80 Mich.App. 219, 263 N.W. 2d 37 (1977).

Gordon v. Gordon, 301 N.W. 2d 869 (Mich.App. 1981).

Hoener v. Bertinato, 171 A.2d 140 (N.J. 1961).

Jefferson v. Griffin Spalding County Hospital, 274 S.E.2d 457 (1981).

Raleigh Fitkin-Paul Morgan Memorial Hospital v. Anderson, 201 A.2d 537 (N.J. 1964).

Ravin v. State, 537 P.2d 494 (Alaska 1975).

Smith v. Brennan, 157 A.2d 497 (1960).

State v. Erikson, 574 P.2d 1 (Alaska 1978).

State v. Laitinen, 459 P.2d 789 (Wash. 1969).

In Re Steven S., 126 Cal.App.3d 23, 178 Cal.Rptr. 525 (1981).

Womack v. Buckhorn, 187 N.W. 2d 218 (Mich. 1971).

8. Publications

Note, Fetal Rights Proposal, 21 St.Mary's L.J., 259, 292 (1989).

W. Prosser, *Handbook of the Law of Torts*, § 55 (4th ed. 1971).

9. *Other Authorities*

Statement of Torts (Second) § 869(1).

261 JAMA 1741 (1989).

35 Pediatric Clinics of North America 1403 (1988).

19:4 JOGNN 285 (1990).

Childbirth Educator, Winter: 34-12.

Congressional Record, Senate, August 1, 1989, S.9323.

73 Obstetrics and Gynecology 715 (1989).

DATED this 1st day of February, 1991.

LARRY ECHOHAWK
Attorney General
State of Idaho

Analysis by:

Francis P. Walker
Deputy Attorney General

ATTORNEY GENERAL OPINION NO. 91-2

TO: The Honorable Steve Antone
Idaho State Representative
Chairman, Revenue and Taxation Committee
STATEHOUSE MAIL

Per Request for Attorney General's Opinion

QUESTION PRESENTED:

Will H.B. 92 and H.B. 94 withstand scrutiny under the federal and state constitutions?

CONCLUSION:

It appears H.B. 92 and H.B. 94 will withstand a challenge made under the due process and contract clauses of the federal and state constitutions. The bills will also probably withstand scrutiny under art. 11, § 12, of the Idaho Constitution. However, a separation of powers challenge will likely succeed.

ANALYSIS:

H.B. 92 amends Idaho Code § 63-3027A, affecting computation of Idaho income taxes paid by nonresidents. The bill is retroactive to January 1, 1985. H.B. 94 amends Idaho Code §63-3622D by limiting the production exemption for sales and use taxes, effective January 11, 1991. The bill also prohibits refunds or credits of taxes previously paid under the act unless a written claim was made by January 11, 1991. The bills have been proposed to prevent refunds that might otherwise be authorized under two recent Idaho Supreme Court opinions, *Moses et ux. v. Idaho State Tax Commission*, ____ Idaho ____, 799 P.2d 964 (1990) and *Idaho State Tax Commission v. Haener Bros., Inc.* (S.Ct. Slip Op. No. 17729, December 11, 1990).

Due to the retroactive nature of these bills, they will likely face several federal and state constitutional challenges: (1) that they violate the due process clause, (2) that they impair contractual obligations, (3) that they violate art. 11, §12, of the Idaho Constitution, preventing certain types of retroactive laws, and (4) that they violate the principle of separation of powers. These arguments will be addressed in turn.

I. DUE PROCESS

One argument likely to be raised to defeat a retroactive application of House Bills 92 and 94 is that such an application violates the due process clause of the United States

Constitution. The United States Constitution prohibits retroactive criminal laws - ex post facto laws. However, it does not prohibit retroactive civil laws per se. Rather, such laws are subject to examination under the due process clause, and, if they affect social welfare or economic rights, they are upheld if they are rationally related to a legitimate state purpose. See *McGowen v. Maryland*, 336 U.S. 420, 425-426 (1961).

The United States Supreme Court has been especially amenable to retroactive laws in the area of taxation. This is in part because the Court considers a tax to be neither a penalty nor a contractual liability, but rather a way of apportioning the costs of government among those who enjoy its benefits. *Welch v. Henry*, 305 U.S. 134 (1938). Thus, the Court has enunciated a flexible standard to determine the validity of a retroactive tax: "In each case it is necessary to consider the nature of the tax and the circumstances in which it is laid before it can be said that its retroactive application is so harsh and oppressive as to transgress the constitutional limitation." *Id.*, 305 U.S. at 147.

Initially, in determining whether retroactive tax laws were excessively harsh and oppressive, courts appeared concerned with the type of tax at issue. Retroactive gift and estate taxes were deemed harmful because it was thought that taxpayers relied on current law in deciding how to plan their estates or whether to accept gifts. See, e.g., *Untermeyer v. Anderson*, 276 U.S. 440 (1928). A retroactive tax on gifts was considered to interfere with a vested right. *Id.* Retroactive income taxes, on the other hand, were considered less harmful, as courts reasoned taxpayers would not have altered their work behavior even if they had known of the change in tax rates. *Welch, supra*. Thus, reliance was not an issue in the income tax context.

Over time, other policy considerations surpassed the importance of the type of tax involved. Thus, retroactive gift and estate taxes are now routinely upheld along with retroactive income taxes. See, *United States v. Hemme*, 476 U.S. 558 (1986) (upholding retroactive gift tax). Rather than focusing on the particular type of tax at issue, the Court now weighs numerous policy concerns to determine whether the "harsh and oppressive" standard of *Welch* has been violated: whether the taxpayer would have altered his behavior if he had foreseen the new tax, whether he has notice of the tax, and whether the law imposed a new tax or merely increased a tax rate. *U.S. v. Darusmont*, 449 U.S. 292 (1981). Other courts have balanced notice, reliance, the number of prior years the retroactive tax reaches back, the government interest in obtaining revenue, the extent to which the retroactive tax interferes with a vested right, and the extent to which the tax imposes a new liability as opposed to increasing an existing tax rate. See, e.g., *Purvis v. United States*, 501 F.2d 311 (1974); *First Nat'l Bank in Dallas v. United States*, 420 F.2d 725 (1970); *State ex rel. Van Emmerick v. Janklow*, 304 N.W. 2d 700 (S.D. 1981). What can be gleaned from these cases is that the validity of a retroactive tax appears to depend upon a broad variety of policy considerations couched within a due process framework.

While the standard applied to retroactive taxes is amorphous, the conclusions drawn by courts are not. There are numerous opinions upholding retroactive taxes against due process attacks. Indeed, it is difficult to uncover a recent case where a due process argument has succeeded. This has led one scholar to remark as early as 1935 that “arbitrary retroactivity may continue . . . to rear its head in tax briefs, but for practical purposes, in this field, it is as dead as a wager of law.” Ballard, *Retroactive Federal Taxation*, 48 Harvard L. Rev. 592 (1935).

Given the case law of recent decades, neither bill should be considered invalid under federal interpretations of the due process clause. The most frequently cited due process concern of the courts is detrimental reliance by the taxpayer. In the present case, however, it is difficult to argue that taxpayers have relied on prior law since it is the previous tax commission practices, with which many taxpayers undoubtedly complied, that are reinstated by House Bills 92 and 94. Similarly, the proposed bills do not impose a new tax on taxpayers, but rather, in most instances, withhold refunds for money already collected.

If there is a troubling area here, it is the number of years back House Bill 92 reaches. The bill is retroactive to 1985, a six year period. While a statute of limitation may in practice shorten this period, it is nevertheless disturbing when a law attempts to reach a transaction more than half a decade old. However, there is precedent for tax laws reaching back this far. In *Prather v. C.I.R.*, 322 F.2d 931 (1963), the Ninth Circuit upheld a statutory change in the accounting method for income taxes which reached back four years. The court found the case a close call. Despite “the terrible penalty of the income bunching,” *id.* at 934, caused by the retroactive accounting rules, the Ninth Circuit found that “constitutionality was saved by two provisions” of the new law: (1) the income bunching was alleviated by a ten-year carry forward, and (2) the new law gave adversely affected taxpayers a six-month grace period within which to return to their old method of accounting. *Id.*

Similarly, in *State ex rel. Van Emmerik v. Janklow*, 304 N.W.2d 701 (S.D. 1981), the South Dakota Supreme Court upheld retroactive legislation that reached back eleven years to ratify an unauthorized level of a utilities sales tax. The 3-2 majority opinion drew a sharp dissent from one justice who found the eleven-year retroactivity “unprecedented in the annals of American Jurisprudence,” 304 N.W.2d at 710. Another justice, concurring in part and dissenting in part, would have limited the valid reach back to the three-year statute of limitations: “Such a result would merely strain the time limits of prior decisions; to go further would shatter the concept of a reasonable time limitation. . . .” *Id.* at 709. Certainly, the vast majority of retroactive tax laws do not reach so far back as those upheld in *Prather* and *Janklow* or that proposed in House Bill 92. However, the United States Supreme Court has never set an express time limit on retroactive laws and House Bill 92 appears to meet all other due process concerns.

Consequently, under federal law, it is our opinion that both bills should survive a due process challenge.¹

II. CONTRACT CLAUSE

Another argument likely to be raised is that the proposed retroactive tax bills violate the contract clauses of both the federal and state constitutions. U.S. Const. art. I, § 10, and Idaho Constitution art. 1, § 16. This argument will fail.

The contract clause of the federal Constitution prohibits any state law from impairing contract obligations. Similarly, the Idaho Constitution prohibits passage of a law that will impair contract obligations. Litigants periodically argue that retroactive laws impair contractual obligations. The theory behind these contentions is generally that retroactive provisions revive fully discharged liabilities, *see Romein v. General Motors Corp.*, 462 N.W.2d 555 (Mich. 1990), or affect existing contract consideration. *See Janklow, supra*.

In the area of taxation, these arguments fail. Taxes are not considered contractual in nature, but instead statutory. *Welch*, 305 U.S. at 146. Thus, the contract clause may not be implicated in a case involving retroactive taxation. Additionally, the contract clause, instead of being read literally, is “accommodated to the inherent police power of the State to safeguard the vital interest of the people.” *Energy Reserves Group, Inc. v. Kansas Power and Light Co.*, 459 U.S. 400 (1983). To test the valid accommodation of the contract clause and the state’s police power, the United States Supreme Court applies a three-pronged test: whether a state law has substantially impaired a contractual relationship; whether there is a legitimate public purpose for the regulation; and whether the means by which the contracting parties’ rights and responsibilities are adjusted are reasonable in light of the deference given to legislative action. *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978). Retroactive taxes pass this three-pronged test since they usually do not impair a contractual relationship and, even if they do, they constitute a legitimate exercise of police power for a public purpose. *See, e.g., Janklow, supra*.

While precedent from other jurisdictions indicates an argument under the contract clause would not succeed, it is worth noting that one early Idaho opinion adopted a peculiarly broad interpretation of the contract clause. In *Oregon Short Line RR Co. v. Berg*, 52 Idaho 499, 16 P.2d 373 (1932), the Idaho Supreme Court struck down additional taxes on taxpayers, reasoning the taxes impaired obligations under limited liability contracts created by municipal special assessment district bonds. The court, in *Berg*, stated:

[W]hile a tax is considered not a contract, the bond and the obligation thereof as between the bondholder and the property owner within the improvement

district clearly becomes a contract of limited liability. To now in effect increase the liability upon these bonds to the extent of the special additional tax on internal taxpayers would, to that extent, impair the obligation of their contract by increasing their liability.

52 Idaho at 504-505, 16 P.2d at 374.

The *Berg* opinion's precedential value may be questionable since it is from an era of substantive due process, when the contract clause was carefully protected. Nevertheless, it serves as an example of the Idaho Supreme Court's willingness, at least at one time, to read the contract clause prohibition broadly. More recent Idaho Supreme Court decisions have not interpreted the contract clause in this manner. For example, in *Simmons v. Idaho State Tax Commission*, 111 Idaho 343, 723 P.2d 887 (1986), the court held that a homeowner's exemption did not impair contract obligations even though the exemption shifted the burden of retiring bonds from one class of taxpayers to another.

Thus, despite the *Berg* caveat, it is our opinion that a contract clause argument will not prevail. The more recent Idaho Supreme Court opinions have narrowed the court's earlier interpretation of the contract clause. In addition, neither H.B. 92 nor H.B. 94 would impair any substantial contractual right, as it is unlikely employees would have ceased working or manufacturers stopped purchasing production materials, had they foreseen the passage of these bills. Additionally, even if the bills do affect contract obligations, they serve a legitimate public purpose, protecting state revenue. Thus, these bills should withstand any challenge under the contract clause of either the federal or state constitution.

III. THE IDAHO CONSTITUTION'S RETROACTIVITY CLAUSE

Another challenge to the bills will be raised under the retroactivity clause of the Idaho Constitution, art. 11, § 12. While such a challenge probably would not succeed, art. 11, § 12, nevertheless does pose some risk to House Bills 92 and 94.

Article 11, § 12, states:

The legislature shall pass no law for the benefit of a railroad, or other corporation, or any individual, or association of individuals retroactive in its operation, or which imposes on the people of any county or municipal subdivision of the state, a new liability in respect to transactions or considerations already passed.

The Idaho Supreme Court has indicated the two clauses in the statute are to be read

independently. *Butler v. City of Blackfoot*, 98 Idaho 854, 574 P.2d 542 (1978). The first clause prohibits retroactive legislation for the benefit of a railroad, corporation, individual or association of individuals. The second clause prohibits any law that imposes on the people of any county or municipality a new liability in respect to transactions or considerations already past.

A challenge under the first clause should fail. There are a number of cases construing this clause and they suggest that retroactive legislation for the benefit of the public does not violate this section. See, *Powell v. McKelvey*, 56 Idaho 291, 53 P.2d 626 (1935); *Rogers v. Hawley*, 19 Idaho 751, 115 P. 687 (1911). Thus, while there is some broad language in *Butler*, 98 Idaho at 858, 574 P.2d at 546, suggesting the first clause in art. 11, § 12, was intended to prevent retroactive laws generally, a reading of other precedent indicates that as long as the retroactive legislation is for the public good, this clause is not violated. Here, H.B. 92 and H.B. 94 are designed to protect the state treasury, and thus are for the public good. They do not violate the first clause of art. 11, § 12.

The second clause of art. 11, § 12, is more problematic. It states simply:

The legislature shall pass no law . . . which imposes on the people of any county or municipal subdivision of the state, a new liability in respect to transactions or considerations already past.

This clause was originally passed to limit the municipal bonds that legislatures could validate. Idaho Constitutional Convention, Proceedings and Debates, Vol. II, p. 1071. Unfortunately, the actual language is broader than the original purpose. On its face the provision only prohibits the passage of laws which impose a new liability for past transactions and which are aimed at citizens of a particular county or municipality. If the Idaho Supreme Court interprets the clause in this manner, it would not apply to House Bills 92 and 94, since their aim is statewide.

There is only one case interpreting this clause, *Butler, supra*, and it seems to conflict with the literal reading discussed above. In *Butler*, the court addressed legislation purporting to ratify invalid municipal assessments. The court concluded the statute at issue violated this clause, as it imposed a new pecuniary liability in respect to past transactions. The court stated its reasoning in the broadest of terms, declaring that the second clause of art. 11, § 12, was passed “to prevent *any* law imposing new liabilities for past transactions.” *Butler*, 98 Idaho at 858, 574 P.2d at 546 (emphasis added). The court went on to remark that art. 11, § 12, not only “prohibits retroactive legislation in appropriate cases, but also prohibits the imposition of laws imposing new pecuniary liabilities ‘in respect to transactions or considerations already past.’” *Butler*, 98 Idaho at 859, 574 P.2d at 547.

It is difficult to determine what weight to give this language. On the one hand, it can be dismissed as dicta or confined to the context of the case, a case involving *municipal* assessment costs. On the other hand, this is the only opinion that interprets the second clause of art. 11, § 12, and, consequently, the current Idaho Supreme Court may feel bound by its language, sweeping as it is. If so, the court would conclude a *statewide* tax falls within the prohibition of this clause.²

In addition to this issue, there is a question of what is meant by the term “new liability,” contained in art. 11, § 12. Retroactive increases in tax rates are not considered a “new” tax. *See, e.g., United States v. Darusmont*, 449 U.S. 292 (1981). Thus, an argument can be made that these bills do not impose a “new liability” on past transactions, but merely increase an already existing liability. However, in *Butler*, the court, in addressing retroactive legislation validating prior assessments, held that a new liability had been imposed and appropriate adjustments would have to be made to the reassessment roll. This reasoning may indicate the court’s unwillingness to treat an alteration in a tax rate or assessment as something other than the imposition of a new liability for purposes of art. 11, § 12.

In conclusion, it is not clear how the court will apply art. 11, § 12, of the Idaho Constitution. The first clause of the provision poses no problem for House Bills 92 and 94. The second clause will not be an issue unless the court adopts the broad language and reasoning of *Butler*. However, because the purpose behind art. 11, § 12, was narrow, and its language is clear, it is our opinion that the court will limit the effects of this section and hold that it does not apply to this case. Nevertheless, there is some risk to the validity of H.B. 92 and H.B. 94 posed by the *Butler* opinion.

IV. SEPARATION OF POWERS

The final argument which will be raised is that the proposed bills violate the separation of powers provision contained in art. 2, § 1, of the Idaho Constitution. This is the line of attack most likely to succeed and the area where the bills are most vulnerable.

Under art. 2, § 1, of the Idaho Constitution, the governmental powers are divided into three distinct departments, the legislative, executive and judicial. “[N]o person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any powers properly belonging to either of the others. . . .” *Id.* Thus, the legislature makes laws, the executive enforces them and the judiciary interprets them. The legislature has no power to interpret law or to overrule an opinion of the supreme court.

House Bills 92 and 94 purport to retroactively amend existing tax laws. However, these retroactive amendments follow briskly on the heels of recent supreme court

decisions reducing income tax owed by nonresidents under Idaho Code § 63-3027A and broadly interpreting the production exemptions contained in Idaho Code § 63-3622(D). See *Moses, supra*, and *Haener, supra*. The question posed then is: Do these retroactive amendments essentially abrogate a supreme court decision and, thereby, usurp the judicial role?

Courts in other jurisdictions have varied widely in how they view this issue. A number of courts have specifically addressed retroactive tax legislation passed after a judicial interpretation of the previous tax statute. The most prominent case disallowing such a retroactive tax is *Phelps Dodge Corporation v. Revenue Division of the Dept. of Taxation*, 702 P.2d 10 (N.M. Ct. App. 1985) (*cert. denied* by New Mexico Supreme Court). In *Phelps*, a taxpayer sought a refund for tax years 1980 through 1983 based upon a 1983 opinion by the court holding that certain mining companies were exempt under the state code from compensating and gross receipts tax. However, the New Mexico Legislature in 1984 retroactively amended statutory provisions addressing these exemptions and the refund was denied. In amending the statute, the legislature used especially confrontational language, stating its original legislative intent had been misconstrued by the court. The court refused to apply the new bill retroactively, reasoning that the bill sought to abrogate the interpretation of the exemption statute contained in its previous opinion and to preclude that opinion from being accorded normal effect. *Phelps*, 702 P.2d at 13.

Similarly, in *Federal Express Corp. v. Skelton*, 578 S.W.2d 1, (Ark. 1979), the legislature attempted to “clarify legislative intent” and retroactively amend tax exemption provisions after a judicial interpretation of those provisions. The Supreme Court of Arkansas held that the retroactive legislation violated the separation of powers principle. The court stated that the legislature did not have the “authority to retrospectively abrogate judicial pronouncements of the courts . . . by a legislative interpretation of the law.” *Skelton*, 578 S.W.2d at 7-8.

However, in *State ex. rel. Van Emmerick v. Janklow*, 304 N.W.2d 700 (S.D. 1981), the South Dakota Supreme Court upheld retroactive legislation which increased to four percent a tax on sales by public utilities after the court had already construed the statute as authorizing a tax of only three percent. The court in *Janklow* upheld this retroactive legislation without commenting on the separation of powers issue. The dissent, however, argued that this principle had been violated.

Moving away from the tax arena are a number of cases holding that retroactive legislation following a contrary judicial interpretation of a statute will be sustained even in the face of a separation of powers challenge. The most strenuous defender of this approach is the Michigan Supreme Court. In *Romein v. General Motors Corp.*, 462 N.W.2d 555 (1990), that court addressed retroactive legislation affecting worker's

compensation offsets. The court had previously construed a worker's compensation statute as mandating certain offsets, although these offsets had a detrimental impact on workers injured before the effective date of the statute. The legislature then retroactively amended the statute, eliminating offsets for that class of workers, to alleviate the financial hardship the offsets imposed. The court in *Romein* upheld this retroactive legislation even though the new act stated that the court had misconstrued the offset provision. "This enactment is a valid exercise of the Legislature's authority to retroactively amend legislation perceived to have been misconstrued by the judiciary." *Id.* at 566. The court went so far as to state that it would be usurping the legislative function if it struck down the curative legislation:

Indeed, if the defendants' separation of powers claim had merit as applied to the curative statute challenged here, the power of the Legislature to enact curative and remedial legislation would be severely curtailed, even where the statute does not violate constitutional due process limits. This would represent a judicial usurpation of what is properly a legislative function.

Romein, 462 N.W.2d at 567. It should be noted that the *Romein* court was almost evenly divided, with especially sharp dissents. The chief justice narrated the history of the dispute as follows:

The 1987 Legislature was displeased with the decision of this Court in *Chambers*, so it sought to correct our "erroneous" decision by providing its own "interpretation" of the intent of the 1981 Legislature. However, as pointed out by the appellants, only a fraction of the senators and representatives who voted in favor of [the 1981 bill] were still around to "interpret" the 1981 legislative intent with 1987 P.A. 28.

Id. at 573. He concluded that the legislature's attempt in 1987 to abrogate the court's interpretation of the 1981 statute violated separation of powers:

In my opinion, the net effect of 1987 P.A. 28 was nothing more than an attempt to "overrule" the decision of this Court in *Chambers*, to render the *Chambers* opinion null and void, as if it was never released. This Court cannot surrender to this invasion into the constitutionally granted authority of the judicial branch.

Id. at 576-77.

The Idaho Supreme Court has only once addressed the issue of whether curative legislation usurps the judicial role. In *Powell v. McKelvey*, 56 Idaho 291, 53 P.2d 626 (1935), the court implied that retroactive legislation which ratified a state contract for

construction of a street subway did not violate the separation of powers principle. The court quoted approvingly from an Illinois opinion which stated that curative legislation validating the issuance of bonds did not “invade the province of the judiciary.” *Worley v. Idleman*, 120 N.E. 472 (Ill. 1918).

It is our opinion that in addressing House Bills 92 and 94 the Idaho Supreme Court will not consider *Powell* binding precedent. The language quoted by the court on separation of powers was essentially tagged on the end of the opinion as dicta. The court had not been asked by either party in the case to address the separation of powers principle. Finally, and most importantly, the opinion was not addressing retroactive legislation which nullified a supreme court’s prior interpretation of a statute. Consequently, *Powell*’s precedential effect is questionable.

In determining the validity of H.B. 92 and H.B. 94 under the separation of powers clause, the Idaho Supreme Court will essentially be working from a clean slate. It can either follow jurisdictions such as Arkansas and New Mexico, which prohibit the legislature from retroactively altering the substance of a statute following judicial construction, but allow retroactive legislation which merely ratifies unauthorized acts; or it can follow the Michigan Supreme Court’s lead and uphold retroactive legislation which substantively alters statutes already construed by the court. While courts are split and there is ample precedent to back either choice, as discussed below, it is our opinion that the Idaho Supreme Court will likely conclude H.B. 92 and H.B. 94 violate the separation of powers clause.

There are a number of reasons the court is likely to reach this conclusion. First, the two leading cases holding that this type of legislation violates the separation of powers clause are factually similar to the case at hand. Both *Phelps* and *Skelton* involved retroactive legislation abrogating the effects of appellate court interpretations of tax statutes. The court is likely to be struck by this similarity and consequently find the reasoning in those opinions particularly persuasive. *Romein*, on the other hand, the leading case upholding retroactive legislation against a separation of powers challenge, does not involve a tax statute, but rather worker’s compensation legislation. While this in and of itself should not be dispositive, the fact that courts are traditionally more deferential to carrying out the remedial purposes of worker’s compensation statutes may lessen the weight the Idaho Supreme Court will accord that opinion as it addresses these tax bills.

A second reason the Idaho Supreme Court would likely find HB 92 and HB 94 violative of separation of powers has to do with the distinction many courts draw between legislation that abrogates a prior court ruling and legislation that is merely “curative,” or “ratifying” or “remedial” in nature.

Illinois, for example, disallows retroactive legislation which changes the substantive words of a statute following a judicial construction. See, *Roth v. Yackley*, 396 N.E.2d 520 (Ill. 1979). However, retroactive laws which merely ratify previously unauthorized conduct are not considered to violate the separation of powers clause, so long as they do not alter the substantive language in statutes already judicially construed. See *Schlenz v. Castle*, 417 N.E.2d 1336 (Ill. 1981). An application of this distinction can be seen in *Bates v. Board of Education*, 555 N.E. 2d 1 (Ill. 1990), where the Illinois Supreme Court recently upheld that part of a statute which merely ratified a previous issuance of bonds at an interest rate greater than the 7% permitted under the court of appeals' interpretation of the school code; yet also invalidated, on the separation of powers principle, that part of the same statute which purported to retroactively increase the 7% statutory cap on the interest rate.

The Washington Supreme Court has found that legislation which purports to clarify an *ambiguous* statute already construed by the court raises separation of powers concerns. See *Johnson v. Morris*, 557 P.2d 1299 (1976), and *Marine Power v. Washington State Human Rights Commission*, 694 P.2d 697 (Wash. App. 1985). By contrast, under the Washington rule, the legislature is free to amend an *unambiguous* statute following a judicial construction of the statute. However, such amendments are presumed to apply only prospectively. *Marine Power*, 694 P.2d at 701. The court in *Marine Power* did apply the amendment at issue retroactively because it was purely remedial in nature and did not affect vested rights.

In short, it is difficult to reconcile all the opinions which have addressed the effect of retroactive legislation on the separation of powers principle. However, courts appear to be more receptive to such legislation if it only ratifies a prior unauthorized act or is purely remedial in nature. Retroactive legislation which substantially alters the clear language of statutes already construed by an appellate court and essentially annul that court's opinion are met with a greater degree of hostility. See *Phelps*, *supra*. But see *Romein*, *supra*. The supreme court is unlikely to view these bills as merely ratifying unauthorized tax commission practices. Rather, the court will probably conclude the bills substantively alter statutory language the supreme court has already deemed unambiguous and, in effect, nullify the court's prior opinions. The court will take this into account when determining the validity of these bills.

A third reason the Idaho Supreme Court would likely find retroactive legislation violative of separation of powers is because when such legislation seeks "to abrogate the interpretation" given to the prior statute by a court decision, it works "to preclude the decision . . . from being accorded normal *stare decisis* effect." *Phelps*, 702 P.2d at 13. The Idaho Supreme Court, in recent years, has repeatedly stressed the value of *stare decisis* in its decisions as providing predictability for those who depend upon its rulings. It is our opinion that this factor would weigh heavily in the court's deliberations on the question of retroactive legislation that abrogates a prior court ruling.

Additionally, the court is likely to perceive an affront in the passage of these bills. The bills, it is true, have been artfully drafted to avoid any language suggesting the court misconstrued the tax statutes or that the legislature is engaging in the judicial role of “clarifying” or “interpreting” the tax statutes. On their face the bills merely retroactively amend the statutes. However, in addressing these bills, the court will look at substance over form, *see e.g., Koon v. Bottolfsen*, 66 Idaho 771, 169 P.2d 345 (1946), and be aware of the implications of these bills. The bills substantively alter statutes already construed by the court. In addition, they are being proposed within months of the opinions whose effects they will nullify. In fact, the *Haener* decision is still pending before the court on rehearing. Certainly, these bills are an effort to protect the state treasury, and the supreme court will no doubt weigh this factor heavily, especially if the fiscal impacts of *Moses* and *Haener* are as large as predicted. Nevertheless, it is difficult to conceive how these bills, which essentially abrogate the court’s decisions in *Moses* and *Haener*, would not be perceived by the court as a usurpation of its power.

Finally, the court will be concerned with how its ruling will affect the future balance of power. If it upholds these bills, almost any retroactive bill could withstand a separation of powers attack. *See, e.g., Kouri v. Equitable Life Assurance Society of the United States*, 716 F. Supp. 1018 (E.D. Mich. 1989) (federal decision interpreting Michigan law and holding that since the Michigan appellate courts had found no separation of powers concern with retroactive worker’s compensation offset statutes at issue in *Romein*, *supra*, retroactive insurance legislation would also be upheld). The Idaho Supreme Court will carefully consider a “slippery slope” argument here.

In conclusion, the separation of powers principle presents a serious problem. Clearly, the court could determine the bills do not violate this principle and support its position with case law from Idaho and from other jurisdictions. *See Powell, supra*, and *Romein, supra*. However, because this case is strikingly similar on the facts to *Phelps* and *Skelton*, because the bills do not fit the pattern of legislation found to be merely “curative,” and because the court is unlikely to want to put itself at risk of having future opinions interpreting tax and possibly other civil statutes nullified by bills such as the ones at issue, the court will probably conclude H.B. 92 and H.B. 94 violate the separation of powers clause.

V. CONCLUSION

The retroactive legislation contained in H.B. 92 and H.B. 94 will probably be challenged on a number of constitutional grounds, including, (1) due process, (2) contract clause, (3) the retroactivity provisions of art. 11, § 12, of the Idaho Constitution, and (4) separation of powers. The bills should withstand an attack under the due process and contract clauses as well as under art. 11, § 12, of the Idaho Constitution. However, it is the opinion of the office that the Idaho Supreme Court will be sympathetic to an attack premised on separation of powers.

AUTHORITIES CONSIDERED

1. *United States Constitution*

U.S. Const. art. I, § 10.

2. *Idaho Constitution*

Art. 1, § 16.

Art. 2, § 1.

Art. 11, § 12.

3. *Idaho Statutes*

Idaho Code § 63-3027A.

Idaho Code § 63-3622D.

4. *Cases*

Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978).

Bates v. Board of Education, 555 N.E.2d 1 (Ill. 1990).

Butler v. City of Blackfoot, 98 Idaho 854, 574 P.2d 542 (1978).

Deonier v. Public Employee Retirement Board, 114 Idaho 721, 760 P.2d 1137 (1988).

Energy Reserves Group, Inc. v. Kansas Power and Light Co., 459 U.S. 400(1983).

Federal Express Corp. v. Skelton, 578 S.W.2d 1 (Ark. 1979).

First Nat'l Bank in Dallas v. United States, 420 F.2d 725 (1970).

Herndon, 87 Idaho 335, 393 P.2d 35 (1964).

Idaho State Tax Commission v. Haener Bros., Inc. (S.Ct. Slip Op. No. 17729, Dec. 11, 1990).

Johnson v. Morris, 557 P.2d 1299 (1976).

Jones v. State Board of Medicine, 97 Idaho 859, 555 P.2d 399 (1976).

Koon v. Bottolfsen, 66 Idaho 771, 169 P.2d 345 (1946).

Kouri v. Equitable Life Assurance Society of the United States, 716 F.Supp. 1018 (E.D. Mich. 1989).

Marine Power v. Washington State Human Rights Commission, 694 P.2d 697 (Wash. App. 1985).

McGowen v. Maryland, 336 U.S. 420 (1961).

McGowen v. Maryland, 366 U.S. 420 (1961).

Moses et al. v. Idaho State Tax Commission, ____ Idaho ____, 799 P.2d 964 (1990).

Oregon Short Line RR Co. v. Berg, 52 Idaho 499, 16 P.2d 373 (1932).

Phelps Dodge Corporation v. Revenue Division of the Dept. of Taxation, 702 P.2d 10 (N.M. Ct. App. 1985).

Powell v. McKelvey, 56 Idaho 291, 53 P.2d 626 (1935).

Prather v. C.I.R., 322 F.2d 931 (1963).

Purvis v. United States, 501 F.2d 311 (1974).

Rogers v. Hawley, 19 Idaho 751, 115 P.687 (1911).

Romein v. General Motors Corp., 462 N.W.2d 555 (Mich. 1990).

Roth v. Yackley, 396 N.E.2d 520 (Ill. 1979).

Schlenz v. Castle, 417 N.E.2d 1336 (Ill. 1981).

Simmons v. Idaho State Tax Commission, 111 Idaho 343, 723 P.2d 887 (1986).

State ex rel. Van Emmerick v. Janklow, 304 N.W.2d 700 (S.D. 1981).

State ex rel. Van Emmerik v. Janklow, 304 N.W.2d 701 (S.D. 1981).

U.S. v. Darusmont, 449 U.S. 292 (1981).

United States v. Hemme, 476 U.S. 558 (1986).

Untermeyer v. Anderson, 276 U.S. 440 (1928).

Welch v. Henry, 305 U.S. 134 (1938).

Worley v. Idleman, 120 N.E. 472 (Ill. 1918).

5. OTHER

Ballard, *Retroactive Federal Taxation*, 48 Harvard L. Rev. 592 (1935).

DATED this 14th day of February, 1991.

LARRY ECHOHAWK
Attorney General
State of Idaho

Analysis By:

DAVID G. HIGH
Deputy Attorney General
Chief, Business Regulation and State Finance Division

MARGARET HUGHES

¹ While these bills would withstand a due process attack under federal law, there is a caveat when it comes to Idaho law. In the area of social and economic regulation, federal courts and the vast majority of state supreme courts apply the "rational basis" test to determine whether the legislation meets due process requirements. *McGowen v. Maryland*, 366 U.S. 420, 425-426 (1961). Such legislation will be upheld if it is rationally related to a legitimate government objective. However, the Idaho Supreme Court has not always applied this test to social and economic legislation. It has, on occasion, applied the "means-focus" test and upheld such legislation only if it "substantially furthers some specifically identifiable legislative end." *Jones v. State Board of Medicine*, 97 Idaho 859, 867, 555 P.2d 399, 407 (1976), cert. denied, 431 US 914 (1977). This higher standard allows the court to more closely scrutinize social and economic legislation. See, *Jones, supra*; and *Deonier v. Public Employee Retirement Board*, 114 Idaho 721, 760 P.2d 1137 (1988).

² If the court reaches this conclusion, it would have to distinguish *Herndon*, 87 Idaho 335, 393 P.2d 35 (1964), authorizing limited retroactive effect of an income tax law. However, *Herndon* merely follows the common and accepted practice of applying a new tax law retroactively by a few months, whereas here, one bill is retroactive six years, which is highly unusual and not the general practice in the tax area.

ATTORNEY GENERAL OPINION NO. 91-3

TO: Stanley F. Hamilton
Director, Department of Lands
Statehouse Mail
Boise, Idaho 83720

QUESTION PRESENTED:

If the State Land Board acquires the Lindstrom Peak property which was the subject of Benewah County Ordinance No. 69, must the board abide by the terms of the county ordinance in its management activities, or should the department consider the constitutional endowment mandate as having precedence and manage accordingly without the restrictions of the ordinance?¹

CONCLUSION:

The Idaho State Land Board need not abide by the Benewah County zoning ordinance in managing state lands for school trust purposes. The board, in its discretion, may look to the land use restrictions specified by the Benewah County ordinance for advice and recommendation in determining the future use and administration of these lands.

ANALYSIS:

Before addressing the substance of your question, a short review of the facts may be helpful. As we understand it, the property in question involves several sections and portions of sections of land in Benewah County. This land was acquired by the Idaho Department of Fish and Game approximately 48 years ago, and has been managed since that time as a wildlife and recreation area. Recently, the Department of Fish and Game transferred the Lindstrom Peak lands to a private owner. The Department of Lands is now negotiating with the private owner to acquire the Lindstrom Peak lands. The department has determined that if such lands are acquired by the state, the best use of the lands is for timber production.

At present, the Lindstrom Peak lands are not subject to a county wide zoning ordinance, and Benewah County has not completed the comprehensive planning process required by Idaho Code §67-6508. Prior to completion of the transfer of the Lindstrom Peak lands to the Department of Lands, however, the Benewah County Board of County Commissioners adopted Ordinance No. 69. This ordinance stated that it was enacted in accordance with Idaho Code §67-6523, which authorizes counties to adopt emergency zoning ordinances if a governing board finds that there is an imminent

peril to the public health, safety or welfare. Ordinance No. 69 prohibits use of the Lindstrom Peak lands for any use other than wildlife management or recreation “pending a review of the area in context with a County Wide Zoning Ordinance to be developed by a newly appointed Zoning Commission.”

Ordinance No. 69 has since expired and been replaced with an interim ordinance including the same terms, in accordance with Idaho Code § 67-6524. Other than the interim ordinance, there is no comprehensive plan or permanent zoning ordinance affecting the Lindstrom Peak lands.

The Local Planning Act

The Local Planning Act, Idaho Code §§ 67-6501 to 67-6537, addresses the extent to which state agencies must abide by local zoning ordinances:

The state of Idaho, and all its agencies, boards, departments, institutions, and local special purpose districts, shall comply with all plans and ordinances adopted under this chapter *unless otherwise provided by law*. In adoption and implementation of the plan and ordinances, the governing board or commission shall take into account the plans and needs of the state of Idaho and all agencies, boards, departments, institutions, and local special purpose districts.

Idaho Code § 67-6528 (emphasis added).

The section requires state agencies to comply with local zoning ordinances, but exempts state agencies from compliance if “otherwise provided by law.” Such an exemption clearly exists for the state board of land commissioners (land board) by virtue of art.9, §§7 and 8, of the Idaho Constitution (governing management of endowment lands), and title 58, chapter 1, of the Idaho Code (governing management of the state’s public lands).

The Idaho Constitution

The powers of the land board to manage state endowment lands are defined by art.9, § 7, of the Idaho Constitution:

The governor, superintendent of public instruction, secretary of state, attorney general, and state auditor shall constitute the state board of land commissioners, who shall have the direction, control, and disposition of the public lands of the state, under such regulations as may be prescribed by law.

The primary regulatory authority to manage state trust lands is vested in the land board. See, e.g., *Barber Lumber Co. v. Gifford*, 25 Idaho 654, 139 P. 557 (1914). Past attempts by the legislature to vest the management of state lands in bodies other than the land board have failed. For example, in 1935, the legislature created a State Water Conservation Board and vested it with the power to acquire and sell or otherwise dispose of rights of way, easements or property. The court ruled the statute unconstitutional, in part because: “it may well be said that the legislature has no power to divest the Land Board of the ‘control and disposition of the public lands of the state’ or of the right of ‘protection, sale or rental’ of state lands.” *State Water Conservation Bd. v. Enking*, 56 Idaho 722, 735, 58 P.2d 779, 784 (1936), *overruled on other grounds*, *State Dept. of Parks v. Idaho Dept. of Water Administration*, 96 Idaho 440, 530 P.2d 924 (1974), and *Idaho Water Resource Bd. v. Kramer*, 97 Idaho 535, 548 P.2d 35 (1976).

The direction and control of state trust lands, however, is subject to “such regulations as may be prescribed by law.” Although the scope of this constitutional provision has not been subject to court interpretation, a similar provision in art.15, §7, was addressed in *Idaho Power Co. v. State*, 104 Idaho 570, 661 P.2d 736 (1983). At the time, art.15, §7, provided:

There shall be constituted a Water Resource Agency, composed as the Legislature may now or hereafter prescribe, which shall have the power to formulate and implement a state water plan for optimum development of water resources in the public interest . . . *all under such laws as may be prescribed by the Legislature.* (Emphasis added.)

The decision in *Idaho Power Company* involved a challenge to a 1977 statute requiring the water resource board to submit the state water plan to the legislature for adoption, rejection, or amendment by concurrent resolution. The legislature argued that:

[T]he concluding phrase in Art. 15, § 7, “all under such laws as may be prescribed by the legislature,” subordinates the powers of the agency to those of the legislature, giving the legislature authority to amend or reject the formulated water plan of the Board.

Idaho Power Co., 104 Idaho at 572, 661 P.2d at 738. The court rejected this argument, holding instead that the final phrase “all under such laws as may be prescribed by the legislature” applies primarily to procedural matters, and “not to the specific, substantive grants of power enumerated in Art. 15, §7.” *Id.* at 573, 661 P.2d at 739.

Similarly, the constitutional powers vested in the board of regents of the University of Idaho by art.9, §10, which states that the regents shall act “under such regulations as may be prescribed by law,” are not subject to substantive legislative regulation:

The regulations which may be prescribed by law and which must be observed by the regents in their supervision of the university, and the control and direction of its funds, refer to methods and rules for the conduct of its business and accounting to authorized officers. Such regulations must not be of a character to interfere essentially with the constitutional discretion of the board, under the authority granted by the constitution.

State v. State Board of Education, 33 Idaho 415, 427, 196 P. 201, 204 (1921).

An analysis similar to that employed in *Idaho Power Company* and *State Board of Education* applies to art.9, §7. The phrase “under such regulations as may be prescribed by law” must be read to avoid substantive conflicts with the primary constitutional directives for the management of trust lands found in art.9, §8:

It shall be the duty of the state board of land commissioners to provide for the location, protection, sale or rental of all lands heretofore, or which may hereafter be granted to or acquired by the state by or from the general government, under such regulations as may be prescribed by law, and in such manner as will secure the maximum long term financial return to the institution to which granted or to the state if not specifically granted

Besides the constitutional duty to manage state lands in a manner that ensures long-term financial gain, the state retains trust responsibilities founded in federal law. State endowment lands were granted to Idaho to support public schools by two acts of Congress: the Organic Act of the Territory of Idaho, and the Idaho Admission Bill. By granting the lands to the state to be used for the benefit of a named beneficiary, the federal acts created a trust that must be used solely for the benefit of public schools within Idaho. The allowable limits on state administration of the school lands are established through fundamental principles of trust law:

The grant of lands for the various purposes by the federal government to the state constitutes a trust and the state board of land commissioners is the instrumentality created to administer that trust, and is bound upon principles that are elementary to so administer it as to secure the greatest measure of advantage to the beneficiary of it.

Barber Lumber Co. v. Gifford, 25 Idaho 654, 666, 139 P. 557, 561 (1914).

One of the “elementary principles” necessitated by the creation of the school lands trust is that the trustees owe a duty of undivided loyalty to the trust beneficiaries, to the exclusion of all other interests. *County of Skamania v. State*, 102 Wash. 2d 127, 685 P.2d 576, 580 (1984). Such elementary principles of trust law require that management

decisions be made by bodies whose loyalties are not divided by their duty to promote the welfare of local constituencies. It follows that the land board, in exercising its duty as trustee of trust lands, is not bound by local zoning ordinances.

Other states' attorneys general addressing this question have reached similar conclusions. The Attorney General of Utah, for example, found that "it is doubtful that the state could even constitutionally authorize local zoning of trust lands in any manner contrary to the state's trust responsibility. That is, a statute or practice which purports to authorize local zoning of trust lands is probably not valid if it results in suppression of value to the benefit of other unrelated public or private interests." Utah Attorney General Op. No. 87-44 (June 23, 1989).

The Arizona Attorney General has similarly found that local zoning authorities must yield to management decisions made by the primary trustee of school lands:

A trustee must act with undivided loyalty to the trust beneficiaries, to the exclusion of all other interests. The proper and orderly management of trust lands located state-wide and of state-wide importance requires the Commissioner to be responsible to state officials rather than to the officials of each local jurisdiction.

Arizona Attorney General Op. No. 187-157 (December 10, 1987).

Given the state's trust responsibilities and the restrictions placed on the legislature's regulation of the Land Board's management powers, the Local Planning Act cannot be interpreted as subjecting the management of state lands to the substantive provisions of local zoning ordinances.

Idaho Statutes

The same conclusion is reached by an analysis of the more specific provisions in the Idaho Code directing how land-use decisions are made for state lands. Where two statutes address the same subject matter, the more specific will prevail. *State v. Wilson*, 107 Idaho 506, 508, 690 P.2d 1338, 1340 (1984).

Although the legislature cannot enact substantive statutes that conflict with the constitutionally-vested trust responsibilities of the land board, it can vest the board with additional powers to regulate the state's public lands. *State ex rel. Andrus v. Click*, 97 Idaho 791, 804, 554 P.2d 969, 982 (1976); *St. Joe Improvement Co. v. Laumierster*, 19 Idaho 66, 70, 112 P. 683, 684 (1910). One of the additional statutory duties of the board is to "integrate and unify the policy and administration of land use in the state" by classifying public lands with respect to their value for forestry, reforestation, watershed

protection and recreational purposes. Idaho Code § 58-132. Such authority extends to “state land now owned or hereafter acquired.” *Id.*

Idaho statutes carefully define the relative roles that the land board and boards of county commissioners are to play in such land use decisions:

[I]t shall be the duty of the state board of land commissioners . . . to determine the best use or uses, viewed from the standpoint of general welfare, to be made of state land now owned or hereafter acquired

In determining the best use or uses of land, the state board of land commissioners may call upon the Idaho division of tourism and industrial development and/or other state departments, divisions and agencies for inventories, classifications, maps and other data relative to land, and said Idaho and other state departments, divisions, and agencies shall furnish the said board with inventories, classifications, maps and other data upon request of the board. *Said board may also call upon the boards of county commissioners in counties wherein the lands are situated for advice and recommendations in determination of future use and administration of said lands.*

Id. (emphasis added).

The Idaho Code also provides a specific procedure to be followed when acquiring new tracts of land:

The state board of land commissioners may select and purchase, lease, receive by donation, hold in trust, or in any manner acquire for and in the name of the state of Idaho such tracts or leaseholds of land as it shall deem proper, and after inventory and classification as provided herein, shall determine the best use or uses of said lands

Idaho Code § 58-133.

These sections demonstrate the legislature’s determination that management of state lands would be hopelessly fragmented if local governments were allowed to dictate the uses to be made of such lands. Therefore, in order to “integrate and unify” the management of such lands, the legislature vested the land board with the exclusive authority to determine the best uses to be made of such lands.

The Lindstrom Peak lands are not currently owned by the state, however, and some parties may assert that the land board, if it acquires such lands, must take them subject to any present zoning restrictions. The land use decision process in Idaho Code §§58-132

and 58-133, however, expressly extends to newly acquired lands. The land board is not required to abide by any land-use designation that may have been imposed on such lands prior to their coming into state ownership, but is authorized and directed to determine the best use of such lands upon their acquisition.

Idaho Code § 58-132 addresses local land-use planning concerns by including a mechanism for discretionary consultation with county commissioners, stating that the land board “may” call upon county commissioners for “advice and recommendations.” This consultation process, however, does not require compliance with local zoning ordinances. The word “may,” when examined in the context of Idaho Code § 58-132, is used in a directory, not a mandatory, sense. “If a statute is merely a guide for the conduct of business and for orderly procedure rather than a limitation of power, it will be construed as directory.” 1A Sutherland, *Statutory Construction*, § 25.03 (4th ed. 1984).

Further evidence that the word “may” is used in a directory sense is that the word “shall” is used in the same paragraph of Idaho Code § 58-132 to require state departments, divisions, and agencies to cooperate with the land board in the classification of lands. When mandatory and directory verbs are used in the same paragraph of a statute, it can be fairly inferred that the legislature intended the verbs to have their ordinary meaning. 2A Sutherland, *supra*, § 57.11. “This is especially true where ‘shall’ and ‘may’ are used in close juxtaposition under circumstances that would indicate that a different treatment is intended for the predicates following them.” *Id.*

Given the specific provisions of Idaho Code §§ 58-132 and 58-133, and the limited consultation role specified therein for county commissioners in the assignment of land-use designations to state lands, it can only be concluded that the land board is not bound by the terms of the Local Planning Act and is not required to abide by county zoning ordinances.

AUTHORITIES CONSIDERED:

1. *Idaho Constitutional Provisions*

Idaho Constitution art. 9, § 7.

Idaho Constitution art. 9, § 8.

Idaho Constitution art. 9, § 10.

Idaho Constitution art. 15, § 7.

2. *Idaho Statutes*

Idaho Code § 58-132.

Idaho Code § 58-133.

Idaho Code § 67-6508.

Idaho Code § 67-6523.

Idaho Code § 67-6524.

Idaho Code § 67-6528.

3. *Idaho Cases*

Barber Lumber Co. v. Gifford, 25 Idaho 654, 139 P. 557 (1914).

Idaho Power Co. v. State, 104 Idaho 570, 661 P.2d 736 (1983).

Idaho Water Resource Bd. v. Kramer, 97 Idaho 535, 548 P.2d 35 (1976).

State ex rel. Andrus v. Click, 97 Idaho 791, 554 P.2d 969 (1976).

State v. State Board of Education, 33 Idaho 415, 196 P. 201 (1921).

State v. Wilson, 107 Idaho 506, 690 P.2d 1338 (1984).

State Water Conservation Bd. v. Enking, 56 Idaho 722, 58 P.2d 779 (1936).

St. Joe Improvement Co. v. Laumierster, 19 Idaho 66, 112 P. 683 (1910).

4. *Other Cases*

County of Skamania v. State, 102 Wash. 2d 127, 685 P.2d 576 (1984).

5. *Other Authorities*

Arizona Attorney General Op. No. I87-157 (December 10, 1987).

Benewah County Ordinance No. 69.

1 A and 2A Sutherland, *Statutory Construction*, §§ 25.03 and 57.11 (4th ed. 1984).

Utah Attorney General Op. No. 87-44 (June 23, 1989).

DATED this 7th day of March, 1991.

LARRY ECHOHAWK
Attorney General
State of Idaho

Analysis by:

Steven W. Strack
Deputy Attorney General
Natural Resources Division

¹ For purposes of answering this question, we have assumed that the Benewah County ordinance was enacted in accordance with the requirements of the Local Planning Act.

ATTORNEY GENERAL OPINION NO. 91-4

TO: The Honorable Mark G. Ricks
Idaho State Senator
STATEHOUSE MAIL

The Honorable Ron J. Beitelspacher
Idaho State Senator
STATEHOUSE MAIL

The Honorable Pam Bengson Ahrens
Idaho State Representative
STATEHOUSE MAIL

Per Request for Attorney General's Opinion

QUESTION PRESENTED:

To what extent do the federal and state constitutions and the federal Voting Rights Act place restrictions on the reapportionment process in Idaho?

CONCLUSION:

The fourteenth amendment of the United States Constitution requires that districts be of equal population. The fifteenth amendment, as implemented by the Voting Rights Act, mandates that a legislative plan not impair a minority's ability to participate in the political process and elect representatives of their choice. Finally, the Idaho Constitution both limits divisions of counties and specifies the number of legislators allotted to each district.

ANALYSIS:

Pursuant to art. 3, § 2, of the Idaho Constitution, the Idaho State Legislature is preparing to reapportion the State of Idaho. We have been asked to discuss the effects the United States Constitution, the Voting Rights Act and the Idaho Constitution will have on this reapportionment. Our analysis is divided into four parts. In part one, we define key terms. Part two addresses the equal population requirement. Part three analyzes the current law on racial and partisan discrimination and suggests how to avoid problems in these areas. Finally, in part four, we turn to the Idaho Constitution and address: (1) division of counties; (2) creation of multi-member districts; and (3) a timetable for the legislature to complete its reapportionment plan.

I. DEFINITIONS

The following are definitions of terms used throughout this opinion.

1. **Congressional Plans** - Congressional plans are plans that divide the state into districts for the purpose of electing members to the United States Congress. These congressional districts are governed by art. I, § 2, of the United States Constitution and must be *as equal as practicable* in population.

2. **Floterial District** - A floterial district encompasses within its boundaries two or more other districts, each electing a member or members to a legislative or other public body. A floterial district is used when none of the encompassed districts is by itself entitled to another seat, but the combined district populations do entitle the area as a whole to additional representation.

3. **Fracturing** - Fracturing is drawing district lines so that a minority population is broken up among several districts, thus keeping them a minority in every district.

4. **Gerrymandering** - Drawing districts with odd shapes to create an unfair partisan advantage is called gerrymandering. Packing and fracturing are the most common gerrymandering techniques.

5. **Ideal Population** - This is the starting point for determining the extent to which district populations are not equal. The “ideal” district population is usually equal to the total state population divided by the total number of districts. For example, if a state’s population is four million and there are forty legislative districts, the “ideal” population is 100,000.

6. **Legislative Plans** - Legislative plans draw districts for the purpose of electing members to the state legislature. Under the fourteenth amendment of the United States Constitution, legislative districts must be substantially equal in population.

7. **Multi-member Districts** - A multi-member district is a district represented by two or more legislators elected at large by the voters of the district.

8. **Overall Range** - The “range” is a statement of the population deviations of the most populous district and the least populous district, expressed in either absolute or relative terms. For example, if the ideal district population is 100,000, the largest district in the plan has a population of 102,000 and the smallest district has a population of 99,000, then the range is +2,000 and -1,000, or +two percent and -one percent. The “overall range” is the sum of the deviation of the most and least populous districts, disregarding the “+” and “-” signs. In the preceding example, the “overall range” is 3,000 people, or three percent.

9. **Packing** - Packing is drawing district boundary lines so that members of a minority are concentrated, or "packed," into as few districts as possible. They become a super majority in the packed districts - 70, 80, or 90 percent. They can elect representatives from those districts, but their votes in excess of a simple majority are not available to help elect representatives in other districts.

10. **Single-member Districts** - In single-member districts, the voters in the district elect only one legislator to a political body.

II. SUBSTANTIAL EQUALITY

The primary requirement of legislative districts is that they be substantially equal in population. The United States Supreme Court, in *Reynolds v. Sims*, 377 U.S. 533, 568 (1964), held that the equal protection clause of the fourteenth amendment of the United States Constitution "demands no less than substantially equal state legislative representation for all citizens, of all places as well as of all races."

"Substantial equality" of population has come to mean that a state legislative plan probably will not be thrown out if its overall range is less than ten percent.¹ For example, assuming legislative districts would be perfectly equal if they each contained 100 citizens (the "ideal population"), but the smallest district actually contains 96 individuals, while the largest contains 104, the overall range would be eight percent. If the overall range of a legislative plan is kept below ten percent, the plan is *prima facie* constitutionally valid. *Connor v. Finch*, 431 U.S. 407, 418 (1977).

The legislature should be on notice that the success of a legislative plan with an overall range of less than ten percent is not guaranteed. However, once a legislative plan has an overall range of less than ten percent the challenger bears the burden of proving the plan violates the equal protection clause. See *Gaffney v. Cummings*, 412 U.S. 735, 740-41 (1973). The challenger cannot bear this burden merely by offering an alternative plan with a lower overall range, but must affirmatively demonstrate a constitutional violation, such as racial discrimination or partisan gerrymandering. See *REAPPORTIONMENT LAW: THE 1990'S* 31 (NCSL 1989).

The Idaho Legislature can take precautionary steps to ensure that a plan with an overall range of less than ten percent stands up in court. Three-judge federal courts called upon to adopt redistricting plans within the ten percent overall range, have applied three criteria to demonstrate the plans were fair: (1) that the districts be composed of contiguous territory, (2) that the districts be compact, and (3) that districts attempt to preserve communities of interest.² See *Carstens v. Lamm*, 543 F. Supp. 68 (D. Colo. 1982). This office strongly recommends that the Idaho Legislature utilize the above criteria in order to avoid a possible challenge to its legislative plan. Due to state

constitutional limits discussed below in Part IV, these criteria can not be used in deciding the extent to which counties must be divided to create districts. However, once a decision to split a county has been made, the three criteria -- contiguous territory, compactness and preserving communities of interest -- should be used to determine exactly where district lines should fall.

Clearly, legislative plans within the ten percent standard have a good chance of standing up in federal court. By contrast, a legislative plan with an overall range greater than ten percent "creates a prima facie case of discrimination. . . ." *Brown v. Thomson*, 462 U.S. 835, 842-843 (1983). To date, the only "rational state policy" justifying an overall range of more than ten percent in a legislative plan has been recognition of the boundaries of political subdivisions. See *Mahan v. Howell*, 410 U.S. 315 (1973) (upholding a Virginia legislative plan with a sixteen percent overall range because the Virginia General Assembly's peculiar authority to enact legislation dealing with particular subdivisions justified an attempt to preserve political subdivision boundaries in drawing house districts); and *Brown v. Thomson, supra*, (1983) (upholding Wyoming's state policy of using counties as legislative districts and ensuring each county at least one representative, even though that policy created an overall range of eighty-nine percent). It is our opinion the *Thomson* decision is an aberration and should not be relied on to depart from the ten percent range. Appellants in that case did not directly challenge the eighty-nine percent overall range, but only the effect of giving a particular county its own representative. *Id.* at 846.

Despite *Thomson* and *Mahan*, the United States Supreme Court has generally not been sympathetic to plans that fall outside the ten percent limit, even if the plans protect political subdivisions. See *Chapman v. Meier*, 420 U.S. 1 (1975), and *Connor v. Finch*, 431 U.S. 407 (1977).

The Idaho Supreme Court addressed the issue of population equality in *Hellar v. Cenarrusa*, 106 Idaho 586, 682 P.2d 539 (1984) (*Hellar III*), and struck down a plan with a deviation of approximately thirty-three percent. The court concluded the plan could not be justified on the basis of maintaining county boundaries, given the fact that several alternative plans both maintained county lines and fell within the ten percent limit. *Id.*, 106 Idaho at 589-90, 682 P.2d at 542-43. Thus, the Idaho Supreme Court has not considered protection of political subdivisions a policy that easily justifies deviation from equal population principles.

In conclusion, legislative plans with an overall range greater than ten percent will be struck down unless they are necessary to promote a rational state policy, in particular, to respect the boundaries of political subdivisions. However, this justification is not readily accepted by the United States Supreme Court. Based on the reasoning in *Hellar, supra*, and Idaho's new constitutional amendment, see art. 3, § 5, the Idaho Supreme Court is

also unlikely to accept this justification. On the other hand, legislative plans with an overall range of less than ten percent are *prima facie* constitutionally valid, and are substantially more likely to stand up in court. Thus, the Idaho legislature should ensure its legislative plan has an overall range of less than ten percent.

II. DILUTING MINORITY VOTES

When a legislative plan discriminates against racial or language minorities, the Voting Rights Act of 1965, 42 U.S.C. §1973 (1982), is implicated. When a plan discriminates against a partisan minority, the equal protection clause is implicated. We discuss each in turn.

A. Discrimination Based on Race or Language

1. Background

The Voting Rights Act of 1965 was designed to protect the right to vote as guaranteed by the fifteenth amendment and to enforce the fourteenth amendment. Section 2 of the Act attempts to secure political power for racial and language minorities by prohibiting states and political subdivisions from using voting qualifications, prerequisites to voting, or any other practices which result in a denial or abridgement of the right to vote on account of race or language. 42 U.S.C. § 1973(a) (1982). A violation of the act is established if “based on the totality of the circumstances . . . the political process” is not “equally open” to members of a racial or language minority in that its members “have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.” 42 U.S.C. § 1973(b) (1982). The Voting Rights Act prohibits conduct that *results* in a denial or abridgement of the rights of racial minorities. There is no requirement of discriminatory *intent*. 42 U.S.C. § 1973(a) (1982).

In *Thornberg v. Gingles*, 478 U.S. 30 (1986), the plaintiffs challenged a North Carolina redistricting plan on the ground that the multi-member districts contained in the plan impaired the ability of blacks to participate equally in the political process and elect representatives of their choice.³ Justice Brennan, writing for the majority, discussed factors a court should consider when determining whether the “totality of the circumstances” indicates a violation of section 2. The two most important factors to consider are racial polarization (racial bloc voting), and the electoral success of minority candidates (whether the minority “experiences substantial difficulty in electing representatives of their choice”). *Id.* at 48, n. 15.

In addition to these objective factors, the minority group must prove:

(1) that the minority is *sufficiently large* and *geographically compact* to constitute a majority in a single-member district;⁴

(2) that it is *politically cohesive*; and

(3) that, in the absence of special circumstances, bloc voting by the white majority usually defeats the minority's preferred candidate.

Id. at 50-51.

The *Thornberg* Court struck down most of the challenged districts, concluding they were characterized by racially polarized voting, a history of official discrimination in voting matters and campaign appeals to racial prejudice. The Court held that those factors, together with the use of multi-member districts, impaired the ability of geographically insular and politically cohesive groups of black voters to participate equally in the political process and to elect representatives of their choice. *Id.* at 80.

At first glance, the Voting Rights Act appears to pose little problem in Idaho. A challenger, under *Thornberg*, must demonstrate that the minority would have to be sufficiently large and compact to constitute a majority, if given a single-member district. Due to the small number of minority members in Idaho, it is unlikely this standard could be met.

However, the discussion does not stop here. Justice Brennan in a footnote left open what standard would apply if a challenger alleged a minority's ability to *influence* the election process was impaired, as opposed to its ability to *elect* representatives. *Thornberg* at 46, n. 12. Thus, although the criteria enunciated in *Thornberg* do not pose a problem, the opinion nevertheless raises warning signals.

This raises the question whether a minority that is too small to constitute a majority in any single district could nevertheless argue that the legislative plan impaired its ability to *influence* the political process, or fragmented the minority among too many districts. The vast majority of federal courts have ignored footnote 12 in *Thornberg* and have refused to entertain challenges that do not meet the brightline *Thornberg* test of having a minority large enough to *elect* a candidate. See *McNeil v. Spring Field Park Dist.*, 851 F.2d 937 (7th Cir. 1988); and *Monroe v. City of Woodville, Miss.*, 881 F.2d 1327 (5th Cir. 1989). An exception to this trend can be found in *East Jefferson Coalition v. Jefferson Parish*, 691 F. Supp. 991, 1006 (E.D. La. 1988), where a federal district court concluded that Justice Brennan's footnote, combined with legislative history, indicated that minorities insufficient in number and compactness to constitute a majority of a

single-member district could nevertheless be afforded relief if “a proposed remedy [would] . . . provide them the ability to influence elections.” *Parish* has not been followed in the federal courts. Consequently, despite Justice Brennan’s footnote 12, federal case law indicates that the *Thornberg* criteria are to be applied to all vote dilution claims.

The Idaho Legislature must nonetheless consider the strong possibility that the Idaho Supreme Court may choose to protect racial minorities to a greater extent than do federal courts. The Idaho Supreme Court has not yet addressed what protections the Idaho Constitution may afford minorities in the voting rights context. However, in *Hellar III*, *supra*, the court noted that voting rights are protected by the Idaho Constitution’s equal protection clause, and this clause may be construed independently of the federal Constitution. Additionally, as discussed below, the Idaho Supreme Court has adopted a substantially stronger stand against partisan gerrymandering than has the federal judiciary. Finally, unlike the federal courts, the Idaho Supreme Court has no reason to fear it will be swamped by minority challenges to legislative plans if it opens the door to claims of vote dilution.

In conclusion, due to the small numbers of minorities in Idaho, a challenge such as the one brought in *Thornberg*, alleging an impairment of the ability to *elect* representatives should pose little threat to a legislative plan. A more difficult question arises if the minority alleges that its ability to influence the electoral process has been impaired or that its members have been unnecessarily split among districts. The Idaho Supreme Court has yet to determine what guarantees the state constitution affords minorities in the voting context but has adopted a much tougher standard against gerrymandering than have the federal courts. Consequently, this office recommends that the legislature take steps to ensure its plan does not impair a racial or language minority’s ability to participate in the political process and elect representatives of their choice. This office suggests the legislature avoid dividing compact communities primarily composed of a racial or language minority.

B. Discrimination Based on Party

Legislative districts, despite compliance with the one-person-one-vote criteria, are sometimes drawn to create an unfair partisan advantage. Partisan minorities, faced with so-called “gerrymandering,” must look either to the equal protection clause or the Idaho Constitution for a remedy.

1. Federal Law

Traditionally, federal courts have avoided the issue of gerrymandering. However, in 1986, the Supreme Court for the first time stated outright that partisan gerrymandering

is a justiciable issue. *Davis v. Bandemer*, 478 U.S. 109 (1986). A plurality of the Court concluded the equal protection clause prohibited gerrymandering, but set an exacting standard for prevailing on such a claim. A claimant alleging partisan gerrymandering must prove “*intentional* discrimination against an identifiable political group and an actual discriminatory effect on that group.” *Id.* at 127. Additionally, the level of the “discriminatory effect” must be high:

[m]ere lack of proportional representation will not be sufficient to prove unconstitutional discrimination Rather, unconstitutional discrimination occurs only when the electoral process is arranged in such a manner that will consistently degrade a voter’s or a group of voters’ influence on the political process as a whole.

Bandemer has only been interpreted once by a lower court. In *Badham v. March Fong Eu*, 694 F.Supp. 664 (N.D. Cal. 1988), the court threw out a claim that congressional districting in California discriminated against Republicans. After finding the complaint *did* sufficiently allege discriminatory intent, the court applied a two-pronged test, requiring (1) a history of disproportionate results and (2) “strong indicia of lack of political power and the denial of fair representation.” *Id.* at 670. The court concluded that because there were no allegations that the claimants were being “entirely ignored[d] by their . . . representatives” and because they had not been “shut out” of the political process, there was no equal protection violation.

In conclusion, under federal law, a claim of partisan discrimination is not easy to make out. The partisan minority must essentially be shut out of the political process, a difficult claim to prove.

2. Idaho Law

While a claimant would have difficulty prevailing under federal law, the same may not be true under Idaho law. The Idaho Supreme Court has addressed partisan gerrymandering only once. In so doing, it took a much stronger stand on the issue than has the United States Supreme Court.

In *Hellar v. Cenarrusa*, 106 Idaho 586, 682 P.2d 539 (1984) (*Hellar III*), the court discussed a legislative plan which contained “unrefuted” evidence of gerrymandering. *Id.* at 590, 682 P.2d at 543. The Idaho Supreme Court by-passed the federal criteria and looked neither at discriminatory *intent* nor the *effect* of shutting a minority party out of the political process. The mere fact that the districts were oddly shaped and splintered traditional neighborhoods was sufficient for the court to conclude partisan gerrymandering had occurred. Additionally, the court was troubled that no incumbents had been pitted against each other. This appears to run directly contrary to the United States

Supreme Court's approach in *Karcher v. Daggett*, 462 U.S. 725, 740-741 (1983), suggesting that "avoiding contests between incumbent representatives" might even *justify* some variance from the equal population requirement. Nevertheless, the Idaho Supreme Court appears to have found this policy a *per se* indicator of invidiousness and partisan gerrymandering.

The bottom line here is that the Idaho Supreme Court in *Hellar III* created its own standard to avoid partisan gerrymandering. This office suggests a number of precautionary steps the legislature should take to meet this standard. First, if both parties assist fully in drafting the plan, it is far less likely the court would conclude the minority party is shut out of the political process. Second, in drawing boundaries, the legislature should avoid oddly shaped districts and splintered neighborhoods that might establish discrimination against the minority party. Finally, as much as the legislature may wish to minimize contests between incumbents, it must realize the Idaho Supreme Court has not been sympathetic to this policy.

IV. THE IDAHO CONSTITUTION

The Idaho Constitution has recently been amended. See art. 3, §§2, 4, and 5. These amendments provide new guidelines for reapportionment regarding: (1) when counties may be divided; (2) what limits there are on multi-member districts; and (3) what timeline should be established for reapportionment.

A. Division of Counties

The first issue raised by the new amendments involves the extent to which counties may be divided to create districts.

Prior to the 1986 amendments, art. 3, § 5, of the Idaho Constitution stated:

A senatorial or representative district, when more than one county shall constitute the same, shall be composed of contiguous counties, and no county shall be divided in creating such districts.

The Idaho Supreme Court, in *Hellar v. Cenarrusa*, 104 Idaho 858, 861, 664 P.2d 765, 768 (1983), (*Hellar I*), concluded that the prohibition against dividing counties applied only to districts composed of more than one county. By contrast, a large county *could* be divided so long as the districts into which it was divided were wholly contained within that county and contained no members from another county. *Id.*

The second circumstance where a county could be divided was if the division was necessary to comply with the federal Constitution:

[w]here art. 3, § 5, of the Idaho Constitution conflicts with the equal representation mandate of the Fourteenth Amendment of the U.S. Constitution, the latter will prevail. However, in order for the fourteenth amendment to displace the Idaho constitutional provision, there must be no possibility of compliance with both.

Hellar I, 104 Idaho at 860, 664 P.2d at 767. Thus, under *Hellar I*, if a district was composed of more than one county, those counties could also be divided, if necessary to meet the requirements of the federal Constitution. The court concluded such a division was not necessary in that case, since an alternative plan met federal constitutional requirements without splitting counties.

Largely in response to *Hellar I, II* and *III*, the Idaho Constitution was amended. Art. 3, § 5, now states:

A senatorial or representative district, when more than one county shall constitute the same, shall be composed of contiguous counties, and a county may be divided in creating districts only to the extent it is reasonably determined by statute that counties must be divided to create senatorial and representative districts which comply with the constitution of the United States. A county may be divided into more than one legislative district when districts are wholly contained within a single county

The new art. 3, § 5, largely reiterates the *Hellar I* holding: the legislature is free to divide a county in creating districts if the districts are wholly contained within the county; if they are not, counties can be divided only as necessary to meet federal constitutional mandates.

This office concludes that the new language interposes a different standard of review into the issue: if the legislature determines by statute that a division of counties is necessary to meet the requirements of the U. S. Constitution, and if this determination is not arbitrary, capricious or unreasonable, it should be upheld. Thus, unlike *Hellar*, a court applying the new art. 3, § 5, to a legislative plan, should not conduct a *de novo* review of whether it was necessary to divide counties to meet federal constitutional requirements. Rather, the court should decide if the legislature's resolution of this issue was reasonable and, if so, should uphold the legislative plan.⁵

Under what circumstances would a court conclude the legislature's determination was not reasonable? The most obvious circumstance would be if a challenger offered an alternative plan which *both* fell below the ten percent overall range and divided substantially fewer counties than did the legislature's plan. Such an alternative plan, by meeting equal population requirements while minimizing county divisions, could easily

call into question the reasonableness of the legislature's determination of which counties had to be divided to meet federal constitutional mandates.

To avoid this scenario, this office recommends adherence to the following guidelines. First, and most importantly, the legislature should make every effort to minimize county divisions. Second, if a county must be divided, the legislature should be prepared to demonstrate that the basis for the division is either to comply with equal population requirements or to avoid a Voting Rights Act violation. Counties should not be divided to protect either a party or an incumbent. Third, if equal population requirements do mandate county divisions, the legislature should avoid unnecessarily reducing the overall range at the expense of county lines. The legislature must balance the federal constitutional mandate of equal population principles with the state constitutional principle of protecting county lines. The Idaho Supreme Court might not be sympathetic to a plan which further reduces the overall range, say to four or one percent, at the expense of county boundaries, since this further reduction is not mandated by the federal Constitution. Fourth, if a county must be divided, the legislature should avoid excessively fragmenting that county. If a county is splintered among several districts, the voters from the splintered county may have their interests neglected. This runs counter to the policy contained in art. 3, § 5, and may be considered indicative of gerrymandering. Fifth, the legislature should try not to divide counties into bizarrely shaped districts. Again, this could be viewed as evidence the county division was based on gerrymandering or protection of incumbents, rather than federal constitutional mandates.

We have considered a challenge based on a plan which falls below the ten percent range and divides fewer counties. Alternatively, a challenger might offer a plan which divides still fewer counties but only at the cost of *increasing* the overall range above the ten percent limit. Such an alternative plan should not be a threat to the legislature's plan. The new art. 3, § 5, by its terms, gives the first and highest priority to the United States constitutional requirement of equal population. Consequently, it is our opinion that the Idaho Supreme Court would not look favorably on an alternative plan with an overall range greater than ten percent, even if the plan divided fewer counties, so long as the legislature's own plan fell below the ten percent limit and only divided counties to the extent reasonably necessary to meet the equal population requirements.

B. Multi-Member Districts

The next issue raised by the state constitutional amendments concerns the limits placed on multi-member districts.

At the outset, we note there is some confusion over what the term "multi-member district" means in Idaho. Under federal law, a multi-member district is a district

represented by two or more legislators of a legislative body, elected at large by the voters of the district. *See e.g., Whitcomb v. Chavis*, 403 U.S. 124 (1971). Under this definition, every district in Idaho is a multi-member district. This definition runs counter to what some in Idaho understand a multi-member district to be. In *Hellar v. Cenarrusa*, 106 Idaho 571, 574, 682 P.2d 524, 527 (1984) (*Hellar II*), the Idaho Supreme Court indicated that of the thirty-three districts in Idaho, only six of them are multi-member -- the six containing more than one senator. The court did not count the twenty-seven districts containing only one senator and two representatives as multi-member districts.

Unfortunately, this confusion over terminology creates ambiguity regarding the new state constitutional provisions addressing multi-member districts. For the purpose of our analysis, we adopt the definition enunciated by the United States Supreme Court. We do so because this definition more closely comports with what appears to have been one of the purposes behind the constitutional amendments, namely, limiting all districts, even those referred to in the constitution as multi-member districts, to just one senator and two representatives.

The Idaho Constitution limits the number of legislators that multi-member districts may contain. In separate provisions, the Idaho Constitution addresses two types of multi-member districts: those composed of more than one county and those composed of only one county. We discuss each type of district in turn.

First, the Idaho Constitution expressly limits the number of legislators to be apportioned to a multi-member district composed of more than one county. Art. 3, § 5, states in pertinent part:

Multi-member districts may be created in any district *composed of more than one county* only to the extent that two representatives may be elected from a district from which one senator is elected. (Emphasis added.)

Read literally, this provision requires that a multi-member district, composed of more than one county, must contain exactly one senator and two representatives. This reading appears to comport with legislative intent. One policy behind art. 3, § 5, is to protect the smaller counties. By requiring that multi-member districts composed of more than one county contain just one senator and two representatives, small counties are protected. Without this provision, small counties could be attached to larger counties to form districts. Equal population requirements could be met by giving these districts a high number of legislators, but the smaller county's vote would essentially be swallowed up by the vote of the larger county. Consequently, Idaho's new constitutional provision, limiting the number of legislators per district, curtails the extent to which small counties may be joined to large counties to create districts.

Having addressed the number of legislators that may be apportioned to multi-member districts composed of more than one county, we now turn to the number of legislators who may be apportioned to multi-member districts composed of only one county. More specifically, may districts, such as district eleven (Canyon County), continue to run at large more than one senator and two representatives? This office suggests that the only safe answer is No.

Art. 3, § 5, is silent as to multi-member districts composed of only one county. However, limitations on these districts are provided in other amendments as well as by Idaho tradition and legislative history. Art. 3, § 2, provides that the senate shall consist of "not less than thirty nor more than thirty-five members." Art. 3, § 4, states that the legislature shall be apportioned to "not less than thirty nor more than thirty-five legislative districts. . . ." This tracking between the number of districts and the number of senators indicates each district is to be apportioned only one senator. In addition, art. 3, § 2, states "the legislature may fix the number of members of the house of representatives at not more than two times as many representatives as there are senators." This language, along with Idaho's traditional two-to-one ratio between representatives and senators, indicates each district is to be allotted two representatives.

This interpretation of art. 3, §§ 2 and 4, is buttressed by legislative history. On March 1, 1985, Representative Haagenson explained proposed amendments, H.J.R. 2, to the State Affairs Committee. These amendments were identical to the amendments adopted the following year. Representative Haagenson stated that under the amendments, "there will be two representatives and one senator from each district." Thus, the legislative history also suggests that in the future all multi-member districts, including those composed of only one county, may consist of only one senator and two representatives.

In conclusion, the Idaho Constitution very possibly limits the number of legislators in all districts. As the legislature drafts its plan, it would be prudent to allot each legislative district only one senator and two representatives.

C. A Time Frame

The final issue raised by the new amendments is when the legislature must complete the reapportionment. Pursuant to art. 3, § 4, the legislature following the 1990 census must be elected under the new plan. This would be the fifty-second legislature, which convenes on January 11, 1993. In order to comply with this requirement, the current legislature must have its plan in place prior to the primaries for the fifty-second legislature. By statute, these primaries are presently scheduled to take place on May 26, 1992. Idaho Code § 34-601. To avoid any last minute rush, the legislature may choose to call a special session in 1991, and thereby give itself sufficient time to draft its legislative plan before the next primaries take place.

V. CONCLUSION

As the legislature undertakes its reapportionment task, it will want to take a number of steps to ensure its legislative plan stands up in court. First, the overall range of the plan should be less than ten percent. Second, the plan should not discriminate against racial or language minorities. A community with a racial or language minority that is numerous, compact and politically cohesive should be split only if absolutely necessary to meet equal population requirements. Third, partisan minorities should not have their vote diluted. Thus, the legislature should avoid oddly shaped districts and splintered neighborhoods indicative of gerrymandering. Fourth, the legislature should minimize the division of counties into districts not wholly contained within the county. If such counties must be divided, this division should be based on equal population principles or the Voting Rights Act. Counties should not be divided to protect parties or incumbents. Fifth, the legislature should limit districts to only one senator and two representatives. Sixth, the legislative plan must be completed before the next legislative primaries take place. These precautionary steps should help ensure the legislature's reapportionment plan withstands judicial scrutiny.

AUTHORITIES CONSIDERED:

1. *Constitutions*

U.S. Constitution, art. I, § 2.

U.S. Constitution, fourteenth amendment.

U.S. Constitution, fifteenth amendment.

Idaho Constitution, art. 3, § 2.

Idaho Constitution, art. 3, § 4.

Idaho Constitution, art. 3, § 5.

2. *Federal Statutes*

42 U.S.C. § 1973 (1982).

3. *Idaho Statutes*

Idaho Code § 34-601.

4. *United States Supreme Court Cases*

Brown v. Thomson, 462 U.S. 835 (1983).

Chapman v. Meier, 420 U.S. 1 (1975).

Connor v. Finch, 431 U.S. 407 (1977).

Davis v. Bandemer, 478 U.S. 109 (1986).

Gaffney v. Cummings, 412 U.S. 735 (1973).

Karcher v. Daggett, 462 U.S. 725 (1983).

Mahan v. Howell, 410 U.S. 315 (1973).

Reynolds v. Sims, 377 U.S. 533 (1964).

Thornberg v. Gingles, 478 U.S. 30 (1986).

Whitcomb v. Chavis, 403 U.S. 124 (1971).

5. *Federal Cases*

Badham v. March Fong Eu, 694 F. Supp. 664 (N.D. Cal. 1988).

Carstens v. Lamm, 543 F. Supp. 68 (D.Colo. 1982).

East Jefferson Coalition v. Jefferson Parish, 691 F. Supp. 991 (E.D. La. 1988).

McNeil v. Spring Field Park Dist., 851 F.2d 937 (7th Cir. 1988).

Monroe v. City of Woodville, Miss., 881 F.2d 1327 (5th Cir. 1989).

6. *Idaho Cases*

Hellar v. Cenarrusa, 104 Idaho 858, 664 P.2d 765 (1983).

Hellar v. Cenarrusa, 106 Idaho 571, 682 P.2d 524 (1984).

Hellar v. Cenarrusa, 106 Idaho 586, 682 P.2d 539 (1984).

7. Other Authorities

REAPPORTIONMENT LAW: THE 1990'S 31 (NCSL 1989).

DATED this 8th day of March, 1991.

LARRY ECHOHAWK
Attorney General
State of Idaho

Analysis By:

MARGARET HUGHES

¹ This standard is much less exacting than that applied to congressional districts. Congressional districts are governed by art. I, § 2, of the United States Constitution rather than the equal protection clause. The United States Supreme Court has determined that congressional districts must be as equal in population as "practicable" and has thrown out plans with an overall range of less than 1%. See *Karcher v. Daggett*, 462 U.S. 725 (1983).

² The term "communities of interest" means "distinctive units which share common concerns with respect to one or more identifiable features such as geography, demography, ethnicity, culture, socio-economic status or trade." *Carstens v. Lamm*, 543 F. Supp. 68, 91 (D.Colo. 1982).

³ Legislative plans challenged under the Voting Rights Act usually involve multi-member districts. This is so because multi-member districts generally contain more voters, and thus further dilute the minority vote, especially if the minority is insular and compact. Thus, even in Idaho where only two house representatives are allotted per district, these districts included are one hundred percent larger in voter population than they would be if there was only one house representative per district.

⁴ "The single-member district is the appropriate standard to measure minority group potential to elect because it is the smallest political unit from which legislators are elected." *Id.* at 50, n. 17.

⁵ This level of deference would only apply to the narrow issue of whether counties must be split to meet federal constitutional mandates. Such deference would not apply to separate issues of equal population, racial discrimination and gerrymandering. Thus, for example, the court could conclude the legislature reasonably determined counties must be split, yet throw out the legislative plan because its overall range was too high or it diluted the voting power of a racial or party minority.

ATTORNEY GENERAL OPINION NO. 91-5

TO: Michael D. Crapo
President Pro Tempore
STATEHOUSE MAIL

Tom Boyd
Speaker
STATEHOUSE MAIL

QUESTIONS PRESENTED:

1. Are the additions to the State Water Plan developed pursuant to Idaho Code Section 42-1734 *et seq.*, such as the *Comprehensive State Water Plan: Payette River Reaches*, “changes” to the State Water Plan as contemplated by Article XV, Section 7 of the Idaho Constitution?

2. If the answer to question one above is yes, does the Legislature, during its current regular session have jurisdiction to review and approve, reject or amend the *Comprehensive State Plan: Payette River Reaches*?

3. If your answer to question one above is no, does the Legislature, during its current regular session, have jurisdiction pursuant to Idaho Code Section 42-1734B(6) to review and approve, reject or amend the *Comprehensive State Plan: Payette River Reaches*?

CONCLUSION:

1. No. The term “change” in section 7, art. 15, of the Idaho Constitution only refers to deletions or revisions to the existing State Water Plan. Since the *Comprehensive State Plan: Payette River Reaches* by the Idaho Water Resource Board is an addition of a new component to the existing State Water Plan, it is not a change under section 7, art. 15, of the Idaho Constitution.

2. Not applicable.

3. Section 7, art. 15, of the Idaho Constitution does not prohibit legislative action on the Payette River Plan during the current legislative session. While Idaho Code § 42-1734B(6) provides for one method of legislative review of such river plans, it does not preclude the legislature from enacting a specific law approving, amending or rejecting the *Comprehensive State Plan: Payette River Reaches*.

INTRODUCTION

The Idaho Water Resource Board (Water Board) adopted the *Comprehensive State Water Plan: Payette River Reaches (Payette River Plan)*, on February 1, 1991, and submitted it to the legislature on the same day. The *Payette River Plan*, among other things, prohibits hydropower development within certain reaches of the Payette River. This provision has proven controversial because Gem Irrigation District (district) seeks to build a hydroelectric facility on the North Fork of the Payette River. The Federal Energy Regulatory Commission (FERC) issued to the district a preliminary permit for the North Fork Project, FERC Project No. 10396, 43 FERC ¶ 62,185. A preliminary permit preserves an applicant's priority to develop a project while the applicant investigates the feasibility of the project. The district's permit will expire no later than May 1, 1991. Thus, the district must submit an application for a license to the FERC by that date to preserve the right to develop the project. If the *Payette River Plan* is approved by the legislature, however, the state prohibition against construction of hydroelectric facilities on the Payette River will affect the district's ability to obtain a FERC license for the project because the Federal Power Act requires the FERC to consider state comprehensive water plans when issuing licenses. 16 U.S.C. § 803 (1988).

Gem Irrigation District contends on constitutional and statutory grounds that the legislature does not have jurisdiction to act on the *Payette River Plan* during this session of the legislature. This opinion was requested to provide the legislature guidance on these legal issues.

ANALYSIS:

Question No. 1

The first question raised turns upon the interpretation of section 7 of article 15 of the Idaho Constitution (section 7). This provision was added to the Idaho Constitution in 1964 and authorized the creation of a "Water Resource Agency . . . which shall have power to formulate and implement a state water plan for optimum development of water resources in the public interest" *Id.* Subsequently, section 7 was amended to provide as follows:

[2] Additionally, the State Water Resource Agency shall have power to formulate and implement a state water plan for optimum development of water resources in the public interest. [3] The Legislature of the State of Idaho shall have the authority to amend or reject the state water plan in a manner provided by law. [4] *Thereafter any change in the state water plan shall be submitted to the Legislature of the State of Idaho upon the first day of a regular*

session following the change and the change shall become effective unless amended or rejected by law within sixty days of its admission to the Legislature.¹

(Emphasis added).

Your first question concerns the meaning of this amendment. The district argues that the *Payette River Plan* constitutes a “change” to the State Water Plan within the meaning of the fourth sentence of section 7. Since the *Payette River Plan* was not submitted on the first legislative day, the district asserts that the constitution precludes legislative consideration of the *Payette River Plan* during this session of the legislature.

Whether the *Payette River Plan* is a *change* to the State Water Plan depends upon what is meant by the term “state water plan.” In order to understand what this term means it is necessary to retrace the implementation of article 15, section 7.

Article 15, section 7, was added to the Idaho Constitution in 1964. The following year the Idaho Legislature implemented the new section of the Idaho Constitution by creating the “Water Board and by designating it as the “Water Resource Agency” contemplated by section 7. Act of March 30, 1965, ch. 320, 1965 Idaho Sess. L. 901. The legislature directed the water board in section 4(c) of this act to “*progressively formulate an integrated, coordinated program for conservation, development and use of all unappropriated water resources of this state . . .*” (Emphasis added).²

The water board in 1972 released the *Interim State Water Plan, Preliminary Report* (“*Interim Plan*”) for review. This review process of public information meetings and formal hearings provided a forum for citizens to voice their opinions on what policies and goals the water board should include in the State Water Plan. The water board then adopted a report entitled *The Objectives, Part I of the State Water Plan* (“*The Objectives*”) on March 8, 1974 and *The State Water Plan—Part Two* (“*Part Two*”) on December 29, 1976.

The Objectives stated, in part, as follows:

The projects and programs necessary to implement the objectives will be identified and evaluated for each major river basin and presented in separate basin reports. Basin Reports will be prepared for the Panhandle basins, Snake River basins, and Bear River basins. These three major reports, to be completed by 1977, and *The Objectives*, will constitute the Idaho State Water Plan.

Id. at Foreword. Thus, from the outset the legislature and the water board interpreted the term “state water plan” to be a series of documents that would be developed over

time containing state-wide policies and specific water basin plans. Moreover, in *Idaho Water Resource Board v. Kramer*, 97 Idaho 535, 548 P.2d 35 (1976), the Idaho Supreme Court adopted this interpretation of the language regarding “formulation” of the State Water Plan in section 7 and Idaho Code § 42-1734(b), now codified at Idaho Code § 42-1734A(1). The court stated:

I.C. § 42-1734(b) requires that respondent “. . . *progressively* formulate an integrated, coordinated program for conservation, development and use of all unappropriated water resources of this state. . . .” [Emphasis supplied.] *To progressively formulate a plan implies that the plan is to be adopted over a period of time, in stages, in a continuous step by step manner, and not in one complete act.*

Id. 97 Idaho at 549, 548 P.2d at 49 (emphasis added). When the electorate approved the amended section 7, they approved of this prior interpretation of this language. See *Reynolds v. Continental Mortgage Co.*, 85 Idaho 172, 183, 377 P.2d 134, 141 (1962).

Since the State Water Plan is progressively formulated over time, the contents or required components of a state water plan will also change over time, as circumstances and experience may dictate. In other words, we view the process as a dynamic one. Thus, the fact that the water board and the legislature define the requisite components of a complete state water plan at one time does not prevent either body from redefining what the components of a state water plan should be in the future. Indeed, in 1988 the Idaho Legislature enacted substantial amendments to the statutory authority of the water board. Act of April 6, 1988, ch. 370, 1988 Idaho Sess. L. 1090. This act added a detailed procedure for the preparation of a comprehensive state water plan and for the protection of rivers as natural or recreational rivers and redefined, in part, the components of the State Water Plan.³ Specifically, Idaho Code § 42-1734A provided, in part, as follows:

(2) *The board may develop a comprehensive state water plan in stages* based upon waterways, river basins, drainage areas, river reaches, groundwater aquifers, or other geographic considerations. The *component* of the comprehensive state water plan prepared for particular water resources and waterways *shall contain*, among other things, the following:

. . .

(4) The comprehensive state water plan may designate protected rivers. Designations shall be based upon a determination by the board that the value of preserving a waterway for particular uses outweighs that of developing the waterway for other beneficial uses and shall specify whether a protected river is designated as a natural or recreational river.

Id. (emphasis added). Based upon this expanded definition of what constitutes the State Water Plan, we now turn to the question of whether the *Payette River Plan* adopted by the water board constitutes a “change” to the State Water Plan.

What actions constitute “changes” to the State Water Plan within the meaning of the fourth sentence of section 7?

The fundamental goal in construing a constitutional provision is ascertaining the intent of the framers. *Engelking v. Investment Board*, 93 Idaho 217, 221, 458 P.2d 213, 217 (1969). The Idaho Supreme Court has applied ordinary rules of statutory construction to ascertain the intent of the framers of constitutional provisions. *Moon v. Investment Board*, 97 Idaho 595, 596, 548 P.2d 861, 862 (1976). If a statutory provision is clear, the statute must be read literally without any construction. *Ottesen v. Board of Comm’rs of Madison County*, 107 Idaho 1099, 1100, 695 P.2d 1238, 1239 (1985). If a statute is ambiguous, then we may go outside the statute to determine the legislative intent. *St. Benedict’s Hospital v. County of Twin Falls*, 107 Idaho 143, 148, 686 P.2d 88, 93 (App. 1984). These rules of statutory construction apply to the present case.

The critical inquiry is determining the meaning of the term “change” in the fourth sentence. The ordinary meaning of the term “change” is that it refers to “the action of making something different in form, quality, or state: the fact of becoming different” Webster’s Third New International Dictionary at 374 (1971). Under this broad definition, a deletion of language in the State Water Plan, a revision of language, or the addition of new language would each be a “change.” However, such a broad interpretation of the term “change” is not consistent with the language of section 7 or with the legislative implementation of section 7.

The third and fourth sentences of section 7 provide for two different methods of legislative review. One method, stated in the third sentence, applies to the State Water Plan; the second method, stated in the fourth sentence, applies to “changes” to the State Water Plan. The first method gives the legislature discretion to prescribe the method of review “in the manner provided by law.” Art. 15, § 7. The second method provides a more limited degree of legislative review.

The two methods of legislative review apparently apply seriatim. The word “thereafter” at the beginning of the fourth sentence suggests that the review embodied in the third sentence will occur first. Thus, before the State Water Plan or a component thereof undergoes review under the fourth sentence, it must undergo review under the third sentence. In other words, it is not until a component is added to and becomes part of the State Water Plan that it can “thereafter” be changed.

The question then becomes whether the *Payette River Plan* is an *addition of a new component* to the State Water Plan or a *revision* (a “change”) to the State Water Plan as presently constituted. In 1988 the legislature described the step by step development that the State Water Plan was to take. Specifically, Idaho Code § 42-1734A(2) provides that the comprehensive plan would be developed in stages, based upon geographical considerations. Because the *Payette River Plan* is a new plan for a specific geographical area, we consider it to be the addition of a new component of the State Water Plan and therefore, to be reviewed by the legislature in accordance with sentence three of section 7. Any future revisions to the State Water Plan that affect this geographical component would be reviewed pursuant to sentence four.

Common sense supports this analysis of section 7. The need for legislative review is greater when the legislature reviews a new component of the State Water Plan. The third sentence of section 7 provides that greater review by giving the legislature discretion to prescribe the method of review “in the manner provided by law.” Once a component has received comprehensive legislative review, there is a much lesser need for detailed legislative review when a “change” is made because of the prior comprehensive review of the plan or component of the plan by the legislature. The only question regarding changes to the plan is whether the legislature believes it to be an acceptable addition to the balance struck under the original plan. The fourth sentence provides that more limited degree of legislative review. Therefore, we interpret the term “change” in the fourth sentence of section 7 as including only deletions or revisions to the existing State Water Plan. The term “change” does not include the addition of new geographic components to the State Water Plan, such as the *Payette River Plan*, that are developed as a part of the progressive formulation of the State Water Plan.

This interpretation is consistent with the review provided by the legislature in Idaho Code § 42-1734B(8), which states in part as follows: “A protected river shall not become a final part of the comprehensive state water plan until approved by law.” Another well known rule of statutory construction requires a statutory provision be interpreted in a manner that makes it constitutional. *Nelson v. Marshall*, 94 Idaho 726, 730, 497 P.2d 47, 51 (1972). If the *Payette River Plan* were a “change” within the meaning of the fourth sentence of section 7, then Idaho Code § 42-1734B(8) would be unconstitutional, because the fourth sentence of section 7 provides that “changes” may be approved in the absence of any affirmative action of the legislature. In contrast, our interpretation results in the Legislative review under the third sentence of section 7, and this sentence provides the legislature discretion to determine the manner of review in accordance with laws it enacts.

Question No. 2

Your second question asks, if the answer to question one is yes, whether the legislature

has jurisdiction, during its current regular session, to review and approve, reject or amend the *Payette River Plan*? Because the answer to question one is no, it is unnecessary to respond to question No. 2.

Question No. 3

Your third question asks whether the legislature, during its current regular session, has jurisdiction pursuant to Idaho Code § 42-1734B(6) to review and approve, reject or amend the *Payette River Plan*? Subsection 6 of Idaho Code § 42-1734B provides, in part, as follows with respect to legislative review of a newly adopted plan or component thereof:

(6) The comprehensive state water plan and any component thereof developed for a particular waterway or waterways is subject to review and amendment by the legislature of the state of Idaho by law *at the regular session immediately following the board's adoption* of the comprehensive state water plan or component thereof.

(Emphasis added.) This provision of Idaho Code § 42-1734B(6) is the current implementation by the legislature of the following third sentence of section 7: "The Legislature of the State of Idaho shall have the authority to amend or reject the state water plan *in a manner provided by law.*" (Emphasis added.)

The water board adopted the *Payette River Plan* on February 1, 1991. The *Payette River Plan* designated several reaches of the Payette River as a recreational river and included a prohibition on the construction of hydropower projects for those reaches. The prohibition on hydropower construction is effective from its date of adoption by the water board, subject to being amended or rejected by the legislature. Idaho Code § 42-1734A(7).

In accordance with the relevant provisions of Idaho Code § 42-1734B(6), the water board is required to submit the newly adopted plan to the legislature for its review at the next regular session. Because the water board's adoption of the *Payette River Plan* occurred after the start of the 1991 legislative session, the water board was not required to submit the plan to the legislature for its review until the 1992 legislative session. However, since the water board submitted the *Payette River Plan* to the legislature immediately upon its adoption on February 1, 1991, the question arises as to the authority of the legislature to take action on the plan during the current session. In other words, does Idaho Code § 42-1734B(6) preclude the legislature from acting on the *Payette River Plan*?

The legislature possesses all legislative power and authority except as restrained by

the constitutions of the state or of the United States. Idaho Const., art.3, §1; *Koelsch v. Girard*, 54 Idaho 452, 33 P.2d 816 (1934). Since the subject of your question is the limitation in another statute, Idaho Code §42-1734B(6), the legislature has the discretion to change the manner of review by enactment of a subsequent statute. Here, enactment of a law approving the *Payette River Plan* would be a specific implementation of the third sentence of section 7, and this subsequent enactment would take precedence over the provisions of Idaho Code § 42-1734B(6). Thus, Idaho Code §421734B(6) does not preclude legislative action on the *Payette River Plan* during the current session.

AUTHORITIES CONSIDERED:

1. *Idaho Constitutional Provisions*

Article 3, § 1 of the Idaho Constitution.

Article 15, § 7 of the Idaho Constitution.

2. *Idaho Statutes*

Act of March 30, 1965, ch. 320, 1965 Idaho Sess. L. 901.

Act of April 6, 1988, ch. 370, 1988 Idaho Sess. L. 1090.

Idaho Code § 42-1734 (later amended by Act of April 6, 1988, ch. 370, 1988 Idaho Sess. L. 1090, 1093).

Idaho Code § 42-1734A.

Idaho Code § 42-1734B.

3. *Idaho Cases*

Engelking v. Investment Board, 93 Idaho 217, 458 P.2d 213 (1969).

Idaho Water Resource Board v. Kramer, 97 Idaho 535, 548 P.2d 35 (1976).

Koelsch v. Girard, 54 Idaho 452, 33 P.2d 816 (1934).

Moon v. Investment Board, 97 Idaho 595, 548 P.2d 861 (1976).

Nelson v. Marshall, 94 Idaho 726, 497 P.2d 47 (1972).

Ottesen v. Board of Comm'rs of Madison County, 107 Idaho 1099, 695 P.2d 1238 (1985).

Reynolds v. Continental Mortgage Co., 85 Idaho 172, 377 P.2d 134 (1962).

St. Benedict's Hospital v. County of Twin Falls, 107 Idaho 143, 686 P.2d 88 (App. 1984).

4. *Other Statutes*

16 U.S.C. § 803 (1988).

5. *Other Authorities*

Webster's Third International Dictionary (1971).

DATED this 8th day of March, 1991.

LARRY ECHOHAWK
Attorney General
State of Idaho

Analysis By:

David J. Barber
Deputy Attorney General
Natural Resources Division

Phillip J. Rassier
Deputy Attorney General
Natural Resources Division

Clive J. Strong
Deputy Attorney General
Chief, Natural Resources Division

¹ For ease of reference, the quotation adds a numeric designation to the sentences in section 7. Since the quotation begins with the second sentence, the numeric designation begins with the numeral two.

² Section 4 of the Act of March 30, 1965, was codified at Idaho Code § 42-1734.

³ The procedures for protection of rivers as natural or recreational rivers implemented Policy 2B of the amended Idaho State Water Plan dated December 12, 1986.

ATTORNEY GENERAL OPINION NO. 91-6

TO: Bruce Collier
Sun Valley City Attorney
KNEELAND, KORB & COLLIER
P.O. Box 249
Ketchum, ID 83340

Per Request for Attorney General's Opinion

QUESTIONS PRESENTED:

1. Does the vendor of a ski lift ticket which is sold from a location within the City Limits of the City of Sun Valley have a responsibility to collect, and liability for, local option sales tax from the purchaser of the ticket?

2. Does the City of Sun Valley have the power under both the tax code¹ and state law to require the collection of local option tax for building materials not purchased within the city limits of Sun Valley, but delivered in Sun Valley for use in construction of real property improvements located within Sun Valley?

CONCLUSIONS:

1. A vendor who sells a ski lift ticket from a location within the city limits of the City of Sun Valley has a responsibility to collect city sales tax from the purchaser of the ticket. The tax thus collected must be remitted to the City of Sun Valley in the manner provided in the city's municipal sales tax ordinance.

2. The City of Sun Valley may impose its sales tax on sales made in the city. For the sale of goods, a sale is in the city when title passes in the city. Under the Uniform Commercial Code, title passes either when provided by contract between the parties or, if there is no express contractual provision, when the seller completes his responsibilities regarding delivery of the product sold. In no case does title pass before identification of specific goods to the sale. When delivery of building materials occurs in the City of Sun Valley, and there is no specific provision in the sales contract to the contrary, title passes at the time of delivery. That is the time of sale. If the seller is a retailer required to have a city sales tax permit, the city may require the seller to collect city sales tax on the sale and remit the tax to the city.

ANALYSIS:**Statement of facts:**

Our understanding of the facts relating to your questions is set out below. We have not undertaken an independent review of these facts. Instead, we have relied on the statements contained in the request letter and representations of facts made in telephone conversations with the city attorneys of the cities of Sun Valley and Ketchum. We understand the relevant facts to be as follows:

Lift tickets. The Sun Valley Company sells tickets that allow the purchaser to use ski lifts operated by the company. These lift tickets are sold at various locations: some in the City of Sun Valley, some in the City of Ketchum and some not in either city. The tickets may be valid for a day, a weekend, a season or another period. During the period for which the tickets are valid, the purchaser may use them to ride on any of the company's ski lifts. Lifts on Dollar Mountain and Elkhorn Mountain are located in the City of Sun Valley. Lifts on Bald Mountain are in Blaine County and, except the base of the Warm Springs Lift which is in Ketchum, are not in either city.

Building materials. Property owners or their contractors purchase building materials from retailers (such as lumberyards) located outside the City of Sun Valley. There are no retailers of building materials known to have retail stores within the city limits of the City of Sun Valley. Some retailers are located in the City of Ketchum. Others are located elsewhere. The purchasers use the building materials to construct buildings and other real property improvements located in the City of Sun Valley.

THE "RESORT CITY SALES TAX"

The City Property Tax Alternatives Act, Idaho Code §§ 50-1043 through 50-1049, authorizes resort cities to impose certain "local option nonproperty taxes" including "a sales tax upon part or all of sales subject to taxation under Chapter 36, Title 63, Idaho Code." See Idaho Code § 50-1046. Chapter 36, title 63, Idaho Code is the "Idaho Sales Tax Act." See, Idaho Code § 63-3601. The City of Sun Valley exercised the authority granted by The City Property Tax Alternatives Act. It adopted a city ordinance imposing a sales tax. The Idaho Supreme Court has reviewed and affirmed the constitutionality of Sun Valley's tax in *Sun Valley Co. v. City of Sun Valley*, 109 Idaho 424, 708 P.2d 147 (1985).

To focus upon the issues about which you seek our opinion, we assume that the City of Sun Valley is a qualified resort city under Idaho Code § 50-1044 and that the enactment of its ordinance imposing the tax is procedurally correct.²

THE SALE OF SKI LIFT TICKETS

Idaho Code § 50-1046 states:

50-1046. City local-option nonproperty taxes permitted by sixty per cent majority vote. A sixty per cent (60%) majority of the voters of any resort city voting on the question may approve and, upon such approval, any city may adopt, implement, and collect, subject to the provisions of this act, the following city local-option nonproperty taxes: (a) an occupancy tax upon hotel, motel, and other sleeping accommodations rented or leased for a period of thirty (30) days or less; (b) a tax upon liquor by-the-drink, wine and beer sold at retail for consumption on the licensed premises; and (c) a sales tax upon part or all of sales subject to taxation under chapter 36, title 63, Idaho Code.

Sun Valley's tax is the third type of tax, i.e., a tax on "part or all of sales subject to taxation under [the Idaho Sales Tax Act]." The city may only tax sales that are also subject to the state sales tax. It may choose to exempt from its tax sales that the state taxes, but it may not tax sales that the state exempts. The first issue is whether the sale of lift tickets is subject to the state sales tax.

The Idaho sales tax is imposed on retail sales. Idaho Code § 63-3619 imposes the tax. It states:

63-3619. Imposition and rate of the sales tax. An excise tax is hereby imposed upon each sale at retail at the rate of five per cent (5%) of the sales price of all property subject to taxation under this act and such amount shall be computed monthly on all sales at retail within the preceding month.

The word "sale" means:

63-3612. Sale. The term "sale" means and includes any transfer of title, exchange or barter, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property for a consideration and shall include any transfer of possession through incorporation or any other artifice found by the state tax commission to be in lieu of, or equivalent to, a transfer of title, an exchange or barter. "Sale" shall also include:

...

(e) Admission charges.

(f) Receipts from the use of or the privilege of using tangible personal property or other facilities for recreational purposes.

...

This definition does not limit "sale" to sales of tangible personal property. By its express terms, the statute defines "sale" to "also include" transactions that, but for this statutory language, would not be subject to a tax imposed only on the sale of tangible personal property. Two of these additional sales are the amounts charged for "admissions" and certain recreational charges.

There is little reason to question that the Sun Valley Company's ski facilities, including its ski lifts, are used for "recreational purposes."

A 1987 decision of the Wyoming Supreme Court holds that state's sales tax does not apply to the purchase of ski lift tickets. See, *State Board of Equalization v. Jackson Hole Ski Corporation*, 737 P.2d 350 (Wy, 1987), modified 745 P.2d 58 (Wy, 1987). However, that decision is based upon statutory language that differs significantly from that found in the Idaho Sales Tax Act. The Wyoming statute at issue in that case imposed Wyoming's sales tax on "the sales price paid for each admission to any place of amusement, entertainment, recreation, games or athletic event." See, § 39-6-404(a)(viii) W.S.1977, as quoted in Id 737 P.2d at 354. The facts in that case were that individuals who did not purchase ski lift tickets were not excluded from the U.S. Forest Service land on which the Jackson Hole Ski Corporation conducted its skiing operations. No entry fee to this area was charged. For this reason, a charge for using a ski lift was not within the ordinary meaning of an "admission to any place of amusement. . . ." Accordingly, a regulation purporting to tax all charges by ski resorts and all charges for transporting persons by ski lifts was beyond the authority of the statute. The regulation was held invalid.

In contrast to the Wyoming statute, the Idaho Sales Tax Act does not limit the scope of sales subject to tax to admissions. Instead, it also includes, "receipts from the use of or the privilege of using tangible personal property or other facilities for recreational purposes." Idaho Code § 63-3612(f) quoted above. Since the Wyoming decision did not address a statute such as Idaho Code § 63-3612(f), it is inapplicable to the question you have asked.

The sale of lift tickets is clearly subject to the Idaho Sales Tax. It is proper for a resort city to include the sale of lift tickets in the scope of its tax. Sun Valley's ordinance imposing its sales tax expressly does so. Section 3-1-2 of the city's municipal tax ordinance defines sale to include:

"Sale" shall also include:

E. Admission charges and charges for ski lift tickets;

F. Receipts from the use or privilege of using tangible personal property or other facilities for recreational purposes and this shall specifically include, among other things, receipts from the sale of ski lift tickets;

The remaining issue for taxing the sale of lift tickets turns on which sales are, and which sales are not, subject to Sun Valley's sales tax. This is an issue because lift tickets are sold from locations both within and outside the city. The purchaser of a lift ticket may use ski lifts located both within and outside the city.

Sun Valley's tax ordinance makes no attempt to tax sales that occur outside the city. Section 3-1-3 (A) of the ordinance imposes the city tax. It states:

Tax Imposed: The City hereby imposes and shall collect a Municipal sales tax upon each sale at retail within the City³ at the rate of two percent (2%) of the sales price of all property which would be subject to taxation by the State of Idaho under the provisions of the Idaho Sales Tax Act, including its subsequent amendments thereto;

[Emphasis added.]

The Idaho sales tax is not a tax on property. The Idaho Supreme Court describes it as follows:

A sales tax is not a tax on property but rather an excise tax -- a levy on certain transactions designated by statute. Leonardson et al. v. Moon et al, 92 Idaho 796, 451 P.2d 542 (1969).

Boise Bowling Center v. State, 93 Idaho 367, 461 P.2d 262 (1969).

We must interpret Sun Valley's ordinance as placing the city's tax on the same legal incident on which the state tax falls, i.e., the sale itself rather than the object of the sale. When the incident of the tax occurs in the city, the city's tax applies. The city's ordinance, by its language, limits the tax to "sale[s] at retail within the City." It is not necessary to determine a location for the object of the sale (the use or privilege of using ski lifts located both in and outside the city). A skier who purchases a ticket in the city is subject to the city's sales tax, even if the skier decides to use lifts outside the city. A skier who purchases a ticket at a location outside the city is not subject to the city's sales tax, even if the skier decides to use lifts inside the city. It is the point of sale, not the location of the ski lift the skier may use, that determines the incident of the tax.

The alternative argument, that the location of the object of the sale determines its taxability, is subject to serious legal and practical difficulties. The object of the sale is not

only the use of the lifts, but also the privilege of using the lifts. If the privilege of using the lifts were the incidence of the tax, Sun Valley could claim tax on all the sales, whether made in the city or outside the city. The city of Ketchum, which is also a resort city imposing the local option sales tax, could make the same claim. These competing claims raise the possibility of taxing the same transaction more than once at the local level. This may be double taxation prohibited by art. 7, § 5, of the Idaho Constitution. A construction of statutes that avoids a constitutional conflict is preferred. *Scandrett v. Shoshone County*, 63 Idaho 46, 116 P.2d 225 (1941). Applying the city sales tax only to sales occurring in the city avoids the possible conflict of taxing authority between the two cities.

It is worth noting that state courts in other states have reached similar conclusions about the application of local sales taxes. The location of the taxable incident has most often controlled the application of the tax. See, *City of Pomona v. State Board of Equalization et al.*, 53 Cal.2d 305, 1 Cal.Rptr. 489, 347 P.2d 904 (1959); *Mobil-Teria Catering Co., Inc. v. Spradling*, 576 S.W.2d 282 (Mo.1978); and *Bullock v. Dunigan Tool & Supply Co., Inc.*, 588 S.W.2d 633 (Tex.Civ.App.1979).

Based on the foregoing it is our conclusion that the vendor of a ski lift ticket sold from a location within the city limits of the City of Sun Valley has a responsibility to collect city sales tax from the purchaser of the ticket. The tax thus collected must be remitted to the City of Sun Valley in the manner provided in the city's municipal sales tax ordinance.

SALE OF BUILDING MATERIALS

Because the Resort City Sales Tax is limited to transactions subject to the state sales tax, it is necessary to review how the Idaho Sales Tax Act taxes building materials. The basic rule is in Idaho Code § 63-3609(a):

63-3609. Retail sale -- Sale at retail. The terms "retail sale" or "sale at retail" mean a sale of tangible personal property for any purpose other than resale of that property in the regular course of business or lease or rental of that property in the regular course of business where such rental or lease is taxable under section 63-3612(h), Idaho Code.

(a) All persons engaged in constructing, altering, repairing or improving real estate, are consumers of the material used by them; all sales to or use by such persons of tangible personal property are taxable whether or not such persons intend resale of the improved property.

Sun Valley's Municipal Sales Tax ordinance uses identical language to define "retail sale" and "sale at retail." See, § 3-1-2.

There is an important difference between the taxes imposed by the Idaho Sales Tax Act and the tax imposed by Sun Valley. Sun Valley imposes only a sales tax. The Idaho Sales Tax Act imposes both a sales tax (Idaho Code § 63-3619) and a use tax (Idaho Code § 63-3621). Use taxes are a usual complement to sales taxes. They are imposed upon the privilege of using tangible personal property within the taxing jurisdiction. Their primary purpose is to avoid economic disadvantage to merchants within the taxing jurisdiction. Without use taxes, goods can be purchased outside the taxing jurisdiction and used in the jurisdiction without payment of the tax that would be required if the same goods were purchased from a merchant within the jurisdiction. Justice Felix Frankfurter of the United States Supreme Court has described the difference between these two taxes:

A sales tax and a use tax in many instances may bring about the same result. But they are different in conception, are assessments upon different transactions, and in the interlacings of the two legislative authorities within our federation may have to justify themselves on different constitutional grounds. A sales tax is a tax on the freedom of purchase. . . . A use tax is a tax on the enjoyment of that which was purchased.

McLeod v. J. E. Dilworth Co. et al., 322 U.S. 327, 64 S.Ct. 1023, 1025-1026, 88 L.Ed. 1304 (1944).

Thus, in *McLeod*, the state of Arkansas could not impose its sales tax on the sale of goods purchased in Tennessee and subsequently shipped to and used in Arkansas. But, in a case decided the same day, *General Trading Co. v. State Tax Commission of Iowa*, 322 U.S. 335, 64 S.Ct. 1028, 88 L.Ed. 1309 (1944), the Court held that the state of Iowa could require a Minnesota seller to collect from its customers Iowa use tax on goods purchased in Minnesota and subsequently shipped to and used in Iowa.

Sun Valley imposes only a sales tax. As observed earlier regarding the sale of lift tickets, the city's ordinance imposes the tax "upon each retail sale within the city." For its tax to apply to building materials, the sale of the materials must occur within the city. Although the State of Idaho can and does require an out-of-state seller to collect Idaho use tax on property sold to an Idaho customer for delivery into Idaho (see Idaho Code § 63-3621), there is no statutory basis for the City of Sun Valley to require the collection of a city use tax on property delivered in the City of Sun Valley. It can only require collection of its sales tax on sales transactions that occur in the city.

The facts as stated to us are that there is no known retail outlet of building materials in Sun Valley. That fact does not prevent taxable retail sales of building materials from occurring in the city. The Idaho Sales Tax Act and Sun Valley's sales tax ordinance use identical language to define the word "sale":

The term "sale" means and includes any transfer of title, exchange or barter, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property for a consideration. . . .

Idaho Code § 63-3612 and § 3-1-2 of the Sun Valley sales tax ordinance.

Under this provision, a sale occurs when title transfers. The applicable law governing when title transfers for sales tax purposes is article 2 of the Uniform Commercial Code as adopted in Idaho. *Old West Realty v. Idaho State Tax Commission*, 110 Idaho 546, 548-549, 715 P.2d 1318 (1986). Idaho Code § 28-2-401 reads:

28-2-401. Passing of title -- Reservation for security -- Limited application of this section.

Each provision of this chapter with regard to the rights, obligations and remedies of the seller, the buyer, purchasers or other third parties applies irrespective of title to the goods except where the provision refers to such title. Insofar as situations are not covered by the other provisions of this chapter and matters concerning title become material the following rules apply:

(1) Title to goods cannot pass under a contract for sale prior to their identification to the contract (section 28-2-501), and unless otherwise explicitly agreed the buyer acquires by their identification a special property as limited by this act. Any retention or reservation by the seller of the title (property) in goods shipped or delivered to the buyer is limited in effect to a reservation of a security interest. Subject to these provisions and to the provisions of the chapter on Secured Transactions (chapter 9), title to goods passes from the seller to the buyer in any manner and on any conditions explicitly agreed on by the parties.

(2) Unless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods, despite any reservation of a security interest and even though a document of title is to be delivered at a different time or place; and in particular and despite any reservation of a security interest by the bill of lading . . .

(a) if the contract requires or authorizes the seller to send the goods to the buyer but does not require him to deliver them at destination, title passes to the buyer at the time and place of shipment; but

(b) if the contract requires delivery at destination, title passes on tender there.

(3) Unless otherwise explicitly agreed where delivery is to be made without moving the goods,

(a) if the seller is to deliver a document of title, title passes at the time when and the place where he delivers such documents; or

(b) if the goods are at the time of contracting already identified and no documents are to be delivered, title passes at the time and place of contracting.

(4) A rejection or other refusal by the buyer to receive or retain the goods, whether or not justified, or a justified revocation of acceptance reverts title to the goods in the seller. Such reversion occurs by operation of law and is not a "sale."

Under this provision of the Uniform Commercial Code, title passes, and thus the sale occurs, at the time the seller delivers the building materials to a building site in the City of Sun Valley "unless otherwise explicitly agreed" between the buyer and seller. When title passes at a place of delivery in Sun Valley, the sale is "within the City" under § 3-1-3 of the city's sales tax ordinance. The seller is required to collect and remit the city's sales tax on such a sale.

Courts in other states have used the passage of title to determine the application of local sales taxes. *See, Shell Oil Company v. Director Of Revenue*, 732 S.W.2d 178 (Mo. 1987) (Shell Oil Company required to collect St. Louis County sales tax on aviation fuel Shell sold to airlines that was delivered from Texas via a third party into the fuel tanks of aircraft at Lambert Field in St. Louis); *Matter of Gunther's Sons v. McGoldrick*, 255 App. Div. 139, 5 N.Y.S.2d 303 (1938), *aff'd* 279 N.Y. 148, 18 N.E.2d 12 (1938) (furs sold by New York City retailer but held in "free storage" until shipped to out-of-city purchasers by common carrier were not subject to New York City's sales tax because title did not pass until the furs were delivered to the out-of-city purchaser).

In summary, we conclude that the City of Sun Valley may impose its sales tax on sales made in the city. For the sale of goods, a sale is made in the city when title passes to the buyer in the city. Under the Uniform Commercial Code, title passes either when provided by contract between the parties or, if there is no express contractual provision, when the seller completes his responsibilities regarding delivery of the product sold. In

no case does title pass before identification of specific goods to the sale. When delivery of building materials occurs in the City of Sun Valley, and there is no specific provision in the sales contract to the contrary, then title passes at the time of delivery and that is the time of sale. In that case, if the seller is a retailer required to have a city sales tax permit, the city may require the seller to collect city sales tax on the sale and remit the tax to the city.

AUTHORITIES CONSIDERED:

1. Statutes

Idaho Code § 28-2-401.

Idaho Code §§ 50-1043 through 50-1049.

Chapter 36, Title 63, Idaho Code.

Idaho Code § 63-3609.

Idaho Code § 63-3612.

Idaho Code § 63-3619.

Idaho Code § 63-3621.

2. Cases

Boise Bowling Center v. State, 93 Idaho 367, 461 P.2d 262 (1969).

Bullock v. Dunigan Tool & Supply Co., Inc., 588 S.W.2d 633 (Tex.Civ.App.1979).

City of Pomona v. State Board of Equalization et al., 1 Cal.Rptr. 489, 347 P.2d 904 (1959).

General Trading Co. v. State Tax Com'n of Iowa, 322 U.S. 335, 64 S.Ct. 1028, 88 L.Ed. 1309 (U.S.Iowa, 1944).

Matter of Gunther's Sons v. McGoldrick, 255 App. Div. 139, 5 N.Y.S.2d 303 (1938), aff'd 279 N.Y. 148, 18 N.E. 2d 12 (1938).

McLeod v. J. E. Dilworth Co., 322 U.S. 327, 64 S.Ct. 1023, 88 L.Ed. 1304 (U.S.Ark., 1944).

Mobil-Teria Catering Co., Inc. v. Spradling, 576 S.W.2d 282 (Mo. 1978).

Old West Realty v. Idaho State Tax Commission, 110 Idaho 546, 715 P.2d 1318 (1986).

Scandrett v. Shoshone County, 63 Idaho 46, 116 P.2d 225 (1941).

Shell Oil Company v. Director Of Revenue, 732 S.W.2d 178 (Mo. 1987).

State Board of Equalization v. Jackson Hole Ski Corporation, 737 P.2d 350 (Wy, 1987) Modified 745 P.2d 58 (Wy, 1987).

Sun Valley Co. v. City of Sun Valley, 109 Idaho 424, 708 P.2d 147 (1985).

DATED this 29th day of April, 1991.

LARRY ECHOHAWK
Attorney General
State of Idaho

Analysis by:

THEODORE V. SPANGLER, JR.
Deputy Attorney General

¹ We understand your reference to "tax code" to mean the city of Sun Valley's ordinance imposing a local sales tax under Idaho Code §§ 50-1043 through 50-1049.

² The fact that we express these necessary assumptions is not intended to imply that we believe there is any reason to question the accuracy of either.

³ The ordinance also defines the terms "in this city" and "in the city" to mean "Within the exterior limits of the City of Sun Valley, Blaine County, Idaho." See § 3-1-2.

ATTORNEY GENERAL OPINION NO. 91-7

TO: Bruce Balderston, CPA
Legislative Auditor
Statehouse
Boise, Idaho 83720-1000

Per Request for Attorney General's Opinion

QUESTIONS PRESENTED:

1. Define: (a) the nature of Water District 1, (b) its term of existence, and (c) the existence of officers capable of transacting business for the district.
2. Does Water District 1 have responsibility and control over all water bank funds and, if so, are these funds subject to the same requirements imposed on other district funds?
3. Does the Committee of Nine, which is the advisory committee for Water District 1, have any control over the use and distribution of any retained water bank funds?
4. Does the watermaster for Water District 1 have authority to invest regular water district funds or water bank funds in common stocks, corporate bonds, mutual funds and other types of equity securities?

CONCLUSIONS:

1. (a) Water District 1 is an instrumentality of the state established by a predecessor of the Director of the Department of Water Resources, pursuant to Idaho Code § 42-604, for the purpose of assisting the department in carrying out its responsibility to distribute the public waters of the state in accordance with the rights of prior appropriation.
- (b) The term of existence of Water District 1 as an administrative and geographic unit is continuous from its date of creation until dissolved by order of the director. Water District 1 is active year-round.
- (c) The current officers of Water District 1 are the chairman and secretary whose primary duties are (1) presiding over the annual meeting of the district, (2) transmitting a certified copy of the budget to the Idaho Department of Water Resources (IDWR) and the county auditor in some circumstances, and (3) preparing, maintaining and transmitting the minutes of the meeting to the IDWR. The daily business activities of the

district are transacted by a watermaster elected by the water users and appointed by the director. The watermaster of Water District 1 presently serves as treasurer.

Idaho law provides four alternative methods for the collection and disbursement of water district funds: (1) the county auditor and treasurer may collect and disburse the assessments; (2) the county auditor and treasurer may collect the assessments, and the water district treasurer may hold and disburse the water district funds; (3) the watermaster may collect the assessments, and the county treasurer may hold and disburse the assessments; (4) the watermaster may collect the funds, and the water district treasurer may hold and disburse the assessments. Idaho law does not permit the watermaster to act as treasurer for a water district. Thus, Water District 1's present practice of allowing the watermaster to also serve as treasurer is not permissible.

2. Water District 1 has responsibility and control over water bank funds associated with the operation of the Upper Snake Rental Pool. The funds are of two types, monies held for the benefit of persons leasing water into the rental pool, and monies assessed by the district as an administrative charge on water rented from the Upper Snake Rental Pool. New rules provide that the district must assess a 10% surcharge which is transferred to the IDWR as reimbursement for its costs. The district retains the remainder of any assessment. Water bank funds must be handled in the same manner as other district funds, but must be maintained in a separate bank account. Water bank funds retained by the district can only be used to pay for the district expenses, improvements and projects authorized by Idaho Code § 42-613A and must not be paid to water users or used to reduce assessments to water users.

3. Idaho Code § 42-1765 does not vest in the local committee of a water district, here the Committee of Nine, any responsibilities regarding the collection, investment, or disbursement of water bank funds. The water district retains authority over water bank funds.

4. The watermaster of Water District 1 should not have custody of the funds of Water District 1. Assuming Water District 1 has elected to follow Idaho Code § 42-619, a district treasurer should be elected to have custody of Water District 1 funds and to make disbursements from these funds. The district treasurer is prohibited by the provisions of the Public Depository Law, chapter 1, title 57, Idaho Code, from investing any district funds in common stocks, corporate bonds, mutual funds and other types of equity securities.

INTRODUCTION

Water District 1 includes all of the area of the state served by water from the Snake River from the Wyoming border to the Milner diversion dam near Twin Falls. The

issues you seek guidance on arose in the course of your performance of an audit of Water District 1 requested by state legislators for fiscal years 1988, 1989 and 1990. The issues raised involve the proper handling of funds generated (1) by the assessment of water users to pay for watermaster services, and (2) by an administrative rental pool charge on each acre foot of stored water rented from the Upper Snake Rental Pool.

ANALYSIS:

Question No. 1

The first question asks us to define the nature of Water District 1, its term of existence and the existence of officers capable of transacting business for the district. Your letter states that you are informed by the watermaster that Water District 1 and its officers are active only one day per year at the annual meeting in March, except for the watermaster who also serves as the treasurer for the district.

The existence and operation of state water districts, such as Water District 1, are governed by the provisions of chapter 6, title 42, Idaho Code, first enacted in 1903. Act of March 11, 1903, 1903 Idaho Sess. Laws 223. State water districts are instrumentalities of the state that exist for the purpose of assisting the IDWR in carrying out its duty under Idaho Code § 42-604 to provide for the distribution of the public waters of the state in accordance with rights of prior appropriation.¹ Idaho Code § 42-602 imposes upon the IDWR a duty to exercise immediate direction and control over the distribution of water from all of the streams to the canals and ditches diverting therefrom. The doctrine of prior appropriation provides that, as between appropriators, "the first in time is first in right." Idaho Code § 42-106.

Idaho Code § 42-604 directs the IDWR to create water districts for each public stream and its tributaries, or other independent source of water supply within the state. The statutory requirement applies only to streams or other water supplies for which the relative dates of priority of appropriation have been determined by court decree. There are currently 108 state water districts in Idaho, of which 84 are active in 1991. Once established, a district remains in existence as an administrative and geographic unit until dissolved by a subsequent order of the director. Depending upon the water distribution needs of the water users, a water district may be active year-round or only during the irrigation season. According to IDWR records, Water District 1 has been active year-round since 1919.

After a water district is established by the IDWR, Idaho Code § 42-605(1) provides that the district shall hold an annual meeting for the purpose of conducting its business. Unless otherwise set by the district, the time for the annual meeting is the first Monday in March of each year. The affected water users consist of all persons owning or having the

use of decreed, licensed or permitted water rights in the waters of the stream or water supply comprising the district.

Idaho Code § 42-605(4) requires the water users at the annual meeting to choose a chairman and secretary. The primary duties of the chairman and secretary are to preside over the meeting, to send a certified copy of the approved budget to the county auditor² and IDWR, to keep the minutes of the annual meeting and to forward a certified copy of the minutes to the IDWR. Idaho Code §§ 42-605 and 42-613.

Idaho Code § 42-605(3) also requires the water users to elect a watermaster at the annual meeting. The watermaster must subscribe an oath to faithfully perform the duties of the office. The primary duties of a watermaster are to make reports about the distribution of water to the IDWR, to deliver the water in accordance with the prior rights, and to prepare the annual budget for the water district. Idaho Code §§ 42-606, 42-607 and 42-615. Although a watermaster generally serves only during an irrigation season, Idaho Code § 42-608 authorizes the water users to employ a watermaster throughout the year. Water district records on file with the IDWR indicate that the watermaster for Water District 1 has served on a year-round basis since 1919.

The Idaho Supreme Court has held that a watermaster is a public administrative officer who holds office until a successor is elected or appointed and qualified. *Big Wood Canal Co. v. Chapman*, 45 Idaho 380, 263 P.45 (1927). A watermaster does not serve as an agent of the water users, but is a ministerial officer. *Bailey v. Idaho Irrigation Co.*, 39 Idaho 354, 227 P.1055 (1924).

The last part of your first question asks us to define the officers capable of transacting business for Water District 1. We take your question to mean all the ordinary types of transactions of an operating water district, such as disbursements for expenses and payment of salaries.

Idaho Code § 42-613, previously codified as Idaho Code § 41-513, states the general procedure for adoption of a water district budget, collection of the monies and payment of the expenses. The basic procedure is for the secretary of the water district to prepare a certified copy of the annual budget approved at the annual meeting and to send the certified copy to the county auditor.³ The county auditor then prepares an assessment roll and delivers it to the county treasurer who collects the assessments and deposits the funds collected into a special account. The county treasurer pays the expenses of the water district, including the salary of the watermaster and assistant watermasters, in accordance with the procedures for payment of bills by the county.⁴ The basic concept is for the water district to use existing county officers as its fiscal agents.⁵

In 1947, the Idaho Legislature enacted an optional procedure for the collection of the

district budget for water districts whose area includes land in more than four counties. Act of January 31, 1947, ch. 11, 1947 Idaho Sess. Laws 11, now codified at Idaho Code § 42-618. In 1969, this alternative procedure became available to all water districts with the enactment of the Act of March 27, 1969, ch. 305, 1969 Idaho Sess. Laws 913.

The relevant language of Idaho Code § 42-618 is as follows:

In water districts the water users, instead of following the provisions of sections 42-612, 42-613, 42-614, 42-615, 42-616, and 42-617, may, at any annual meeting, authorize the watermaster to collect his compensation and that of his assistants, and other expenses of delivering the water of said district to the users thereof, directly from the water users, canal companies, and irrigation district. When so authorized the watermaster shall collect such compensation and expenses directly from the water users. (Emphasis added.)

Idaho Code § 42-618 is ambiguous when read in the context of the balance of the chapter. First, this section could be interpreted to mean that the watermaster, if so authorized under Idaho Code § 42-618, has the authority to collect, hold and disburse the assessments collected from water users. This position interprets the phrase “instead of following the provisions of Idaho Code sections 42-612, 42-613, 42-614, 42-615, 42-616, and 42-617” in Idaho Code § 42-618 as an expression of legislative intent to eliminate completely the application of those enumerated sections to water districts that elect to comply with the alternative procedure provided by Idaho Code § 42-618. This position also interprets Idaho Code § 42-618 as authority for the watermaster to collect the monies from the water users directly, to hold the funds, and to disburse the funds, including disbursement to his assistants and to himself. The argument is that, if the watermaster receives his compensation from someone other than himself, the watermaster is not receiving his compensation “directly.” This is the current administrative interpretation of the statute by Water District 1 and represents a possible interpretation of an anomalous statute.

Second, as you suggest in your letter, this section may be interpreted as only authorizing the watermaster to collect the assessments of the water district; the county treasurer would still retain the authority to hold and disburse the water district funds in accordance with the general procedures for payment of bills by the county. Since Idaho Code § 42-613 distinguished between collection of assessments and disbursements of district funds, an amendment that only addresses collection could be interpreted as only changing the law regarding collection of assessments. This interpretation of Idaho Code § 42-618 is supported by the plain meaning of that section.

Since Idaho Code § 42-618 is ambiguous, we may review extrinsic evidence, such as existing administrative interpretation of statutes, to determine the legislative intent for

enactment of that provision. While a long-standing administrative interpretation of a statute is entitled to great weight and will be followed unless there are cogent reasons for holding otherwise, *Kopp v. State*, 100 Idaho 160, 595 P.2d 309 (1979), we must also consider the consequences of this interpretation. *State ex rel. Evans v. Click*, 102 Idaho 443, 447-448, 631 P.2d 614, 618-619 (1981). If the first interpretation, which is the one made by Water District 1, were correct, then Water District 1 would not have to comply with the provisions of the enumerated sections regarding deposit of monies with the county treasurer. The logic of this interpretation would also mean, however, that Water District 1 would not be required to adopt an annual budget as provided in Idaho Code § 42-612;⁶ that the adoption of the budget would not cause the amount allocated to each ditch, canal company, irrigation district or other water user to become a debt thereof as provided in Idaho Code § 42-612; and that Water District 1 would not have specific authority to impose a minimum annual charge per water user.

We conclude that the legislature did not intend to strip a water district of the powers stated in Idaho Code §§ 42-612, 42-613, 42-614, 42-615, 42-616, and 42-617 simply because a district elects to use the alternative collection procedures of Idaho Code § 42-618. Indeed, this conclusion is bolstered by the fact that Water District 1 has generally complied with the procedures set forth in these enumerated sections, except for the collection procedures of those sections, and that the county treasurer continues to collect the assessments in the counties of Madison, Teton and Fremont for Water District 1. This inconsistent administrative practice undermines the argument that there is a long-standing administrative interpretation of Idaho Code § 42-618.

The first interpretation, which concludes that Idaho Code § 42-618 authorizes the collection, holding and disbursement of assessments by the watermaster, would also be in conflict with Idaho Code § 42-611, which was not repealed until 1989. See Act of April 4, 1989, ch. 286, 1989 Idaho Sess. Laws 710. Idaho Code § 42-611 required the watermaster and his assistants to present a bill for their services to the board of county commissioners. The board then orders a warrant to be issued to the watermaster and assistants. The first interpretation ignores the requirements of Idaho Code § 42-611 and would allow the watermaster to disburse the funds to himself, in contravention of this section.⁷ The election of a water district to proceed under Idaho Code § 42-618 does not excuse compliance with Idaho Code § 42-611 because Idaho Code § 42-618 did not make reference to Idaho Code § 42-611.⁸

Idaho Code § 42-618 merely replaced the procedures for collection of monies stated in the enumerated sections with the alternative collection procedures provided by Idaho Code § 42-618. The enumerated sections otherwise remained in effect. Thus, if a water district only elects to proceed under Idaho Code § 42-618, the county treasurer retains the authority to hold and disburse the funds of the water district and not the watermaster.

This interpretation also preserves the division of responsibility that exists under the older and newer statutes between the watermaster and the designated treasurer. In 1989, the legislature enacted Idaho Code § 42-619, an alternative procedure for the holding and disbursement of water district funds. In water districts for which the county commissioners elect to discontinue the county treasurer's duty to hold and disburse district funds, the water users are required to elect or appoint a treasurer. The statute imposes upon the district treasurer a duty to keep a complete, accurate and permanent record of all funds received by and disbursed for and on behalf of the district. The treasurer is required to deposit all funds of the district in a designated depository approved at the annual meeting, and must comply with the Public Depository Law, chapter 1, title 57, Idaho Code. The statute also authorizes any water district to elect or appoint a treasurer to exercise the duties provided for in Idaho Code § 42-619 even if the county commissioners have not determined to stop providing the bill paying service for the district. Idaho Code § 42-619(3) and (10).

Under the original disbursement procedure, the county treasurer held and disbursed the funds of the water district. Idaho Code § 42-613. Similarly, under the more recent amendments in 1989, the treasurer of the water district holds and disburses the funds. Idaho Code § 42-619. The county auditor and treasurer collect the water district assessments unless the water district elects to use the alternative procedures of Idaho Code § 42-618; in that case, the watermaster collects the assessments.

Based upon the foregoing review of the applicable statutes, we conclude that the water districts have four options regarding the collection and disbursement of water district funds: (1) the county auditor and treasurer may collect and disburse the assessments as provided in Idaho Code § 42-613; (2) the county auditor and treasurer may collect the assessments in accordance with the provisions of Idaho Code §§ 42-601 through 42-617, and the water district treasurer may hold and disburse the water district funds in accordance with Idaho Code § 42-619; (3) the watermaster may collect the assessments as provided in Idaho Code § 42-618, and the county treasurer may hold and disburse the assessments as provided in Idaho Code § 42-618; or (4) the watermaster may collect the assessments as provided in Idaho Code § 42-618, and the water district treasurer may hold and disburse the assessments as provided in Idaho Code § 42-619.

Although Water District 1 has apparently elected to proceed in accordance with the alternative procedures of Idaho Code §§ 42-618 and 42-619 described above, we are aware of no formal action adopting these procedures. Further, we note that Water District 1 has not implemented the provisions of Idaho Code § 42-619. For example, the local procedures for Water District 1 do not provide for a water district treasurer. Rather, the management of the monies received is vested in the watermaster with authority to disburse and invest funds. See Rule 4.3 of Water District 1 Rental Pool Procedures, approved by the Committee of Nine on May 29, 1991, and the Idaho Water

Resource Board on May 31, 1991. Since the treasurer's duties necessarily involve oversight of the expenditures of the watermaster, if the watermaster also acts as the treasurer, he holds an office incompatible with his office as watermaster.⁹

We recognize that our conclusions differ from current and past practices of Water District 1 and that a very real problem is how to proceed during the remainder of the present water year in light of this opinion. The next annual meeting of Water District 1 will occur in March, 1992. We recommend against continuing with the present arrangements until the next annual meeting because of the problems we have identified. Instead, the officers of Water District 1 or the director should arrange for the election or appointment of a treasurer.

Question No. 2

Your second question asks whether Water District 1 has responsibility and control over all water supply bank funds and, if so, whether these funds are subject to the same requirements imposed on other water district funds? The records of the IDWR show that Water District 1 has operated a "rental pool" to facilitate the rental of storage water in the Upper Snake River Basin since the early 1930's. In 1979, the Legislature provided a statutory basis for the rental pool operation by enacting Idaho Code §§ 42-1761 to 42-1766.

These code provisions¹⁰ created the water supply bank to be operated by the Idaho Water Resource Board. The legislature directed the board to adopt rules and regulations governing the management, control, delivery and use and distribution of water to and from the water supply bank. Idaho Code § 42-1762.

Idaho Code § 42-1765 authorizes the board to appoint local committees to facilitate the rental of stored water. The statute provides that a local committee shall have the authority to market stored water between consenting owners and consenting renters under rules and regulations adopted by the board. The board adopted rules and regulations implementing its water supply bank authority in October, 1980. IDAPA 37.D, *Water Supply Bank Rules and Regulations* (1980). The board adopted amendments to the *Water Supply Bank Rules and Regulations* on March 22, 1991. Pursuant to Idaho Code § 67-5204 the amended rules went into effect twenty days after being filed with the IDWR.

Rule 6 of the board's current rules governs the appointment of local committees to facilitate the rental of stored water. The rule requires the local committee to adopt procedures governing the rental of stored water in a manner consistent with the board's rules. The procedures must include provisions determining the price for water placed into the bank, the price of water rented out of the bank, and a provision determining the

amount of the administrative rental pool charge to be paid to the local committee by persons renting water from the bank. IDAPA 37.D.6.1.2,3 and 4.¹¹

By resolution, the Board renewed the appointment of the Committee of Nine as the local committee for Water District 1 for a five-year term on May 24, 1988. Previous board rules did not address how the local committee is to manage the moneys generated by collection of the administrative rental pool charge. Rule 6,1,11 of the newly amended rules requires that local committee procedures provide for the “[m]anagement of rental pool funds as public funds pursuant to the Public Depository Law, chapter 1, Title 57, Idaho Code.”

The legislature in 1986 amended Idaho Code § 42-1765 to restrict how funds generated from the administrative charge may be used. The amendment provides that, “[a]ny proceeds retained by a district shall be used exclusively for public purposes as set forth in section 42-613A, Idaho Code.” Idaho Code § 42-613A provides as follows:

42-613A. Proceeds from the lease of stored water -- District retention -- Control and use. Each water district created pursuant to section 42-604, Idaho Code, shall be authorized to retain in a special account the proceeds from the rental of storage water leased under the provisions of section 42-1765, Idaho Code. The account shall not be used to reduce assessments to water users nor shall it be paid to water users in any event. Notwithstanding the supervisory responsibilities of the department of water resources over the activity of water districts, the account shall be under the exclusive control of the water district within which the leased water is stored. All proceeds from the lease of stored water which are retained by any district under this section shall be used solely for one or more of the following public purposes:

- (1) Expenses of the district.
- (2) Improvements to the district's facilities, including a reasonable reserve for future improvements.
- (3) Educational projects designed to increase public awareness in the area of water distribution, water rights and water conservation.
- (4) Other public projects designed to assist in the adjudication, conservation or more efficient distribution of water.

Idaho Code § 42-613A authorizes a water district to maintain a special account to retain the proceeds generated from its rental pool operation. The statute emphasizes that the account shall be “under the exclusive control of the water district.” The legislature

could not have been more specific in its intent. The clearly expressed intent of the legislature must be given effect. *Ottesen on Behalf of Edwards v. Board of Comm'rs of Madison County*, 107 Idaho 1099, 695 P.2d 1238 (1985). We interpret the language of the statute to require that the funds generated by the district's operation of a rental pool must be maintained by the water district in the same manner as other water district funds are maintained, but that use of the funds is limited as provided in the statute.

The statute requires that funds in the special account "shall not be used to reduce assessments to water users nor . . . paid to water users in any event." This requirement places a clear duty upon the water district to ensure that the rental pool funds are not intermingled with the normal operating funds of the district. All funds from the rental of water, other than the administrative charge, are held in trust to be paid to the owners of the water placed into the rental pool. Based upon the specific wording of the statute we conclude that Water District 1 does have responsibility and control over all water bank funds.

Question No. 3

The third question asks whether the Committee of Nine has any control over the use and distribution of retained water bank funds? As previously discussed, the Committee of Nine is the advisory committee for Water District 1.¹² The Committee of Nine is the entity approved by the Idaho Water Resource Board to serve as the local committee under Idaho Code § 42-1765.

Idaho Code § 42-1765 describes the role of the local committees in administration of the water bank. Idaho Code § 42-1765 states:

The water resource board may appoint local committees to facilitate the rental of stored water. The committee shall have the authority to market stored water between consenting owners and consenting renters under rules and regulations adopted by the board. . . .

In exercising its authority under this section, the local rental committee shall determine, in advance, at the annual meeting of water users each year, that portion of the proceeds for the year from the lease of stored water to be paid to consenting contract holders of the storage water rights as reimbursement for their costs and *that portion to be retained by the district* in which the committee is located. Any proceeds retained by a district shall be used exclusively for public purposes as set forth in section 42-613A, Idaho Code. (Emphasis added.)

Idaho Code § 42-1765 does not vest in the local committee of a water district, here

the Committee of Nine, any responsibilities regarding the collection, investment, or disbursement of water bank funds. The statute specifically requires the water district to retain authority over the funds and to administer the funds in accordance with Idaho Code § 42-613A.

Question No. 4

The fourth question asks whether the watermaster for Water District 1 is allowed to invest water assessment funds or water bank funds in common stocks, corporate bonds, mutual funds and other types of equity securities? It is apparent that since a water district is defined as an instrumentality of the state by Idaho Code § 42-604, the officers of such districts are subject to the general provisions of law governing the management of funds which come into their possession. This last question involves two issues: [1] What is the role of the watermaster in the management of the funds? [2] What are the authorized types of investments for these funds?

As explained earlier, Water District 1 has elected to proceed under the alternate procedures of Idaho Code § 42-619, which provides for a water district treasurer. The district treasurer has authority to "keep a complete, accurate and permanent record of all moneys received by and disbursed for and on behalf of the district." Idaho Code § 42-619(3). Since the district treasurer has an oversight authority regarding expenditures of the watermaster, that office is incompatible with the office of watermaster. One person cannot hold both positions. *Supra*, at note 9. Therefore, the watermaster has no authority to invest the funds of Water District 1.

Idaho Code § 42-619 requires that the water district treasurer comply with the provisions of the Public Depository Law, chapter 1, title 57, Idaho Code. The act is designed to safeguard and protect the public moneys of all governmental entities having the power to levy taxes or assessments. The investment of public funds must be made in accordance with the act even though interest so earned is less than what might be earned by more speculative investments. *Oversmith v. Highway Dist. No. 2*, 37 Idaho 752, 218 P.361 (1923). Statutes governing the general powers of governmental entities must be construed *in pari materia* with the provisions of the Public Depository Law. *See Id.*

Idaho Code § 57-105 defines "[p]ublic moneys' . . . [as] all moneys coming into the hands of any treasurer of a depositing unit" Therefore, the monies received by Water District 1 as water user assessments or as payments into the water bank are "public monies under the provisions of the Public Depository Law." The district treasurer for Water District 1 must deposit in a designated depository all public monies of \$1,000 or more on hand. *See Idaho Code § 57-127 (Supp. 1990)*. A designated depository in which public moneys may be authorized for deposit includes "any national bank, state bank, trust company, federal savings and loan association, state

savings and loan association, federal credit union or state credit union, located in the state” Idaho Code § 57-110 (Supp. 1990). In most instances, the designated depository must be within the boundaries of the depositing unit. See Idaho Code §§ 57-128 and 57-130 (Supp. 1990). The statute contains an exception providing that upon appropriate approval the treasurer may invest surplus or idle funds of the depositing unit in investments permitted by Idaho Code § 67-1210. Section 67-1210 lists the types of investment vehicles authorized for use by the state treasurer in investing idle moneys in the state treasury. The list includes numerous types of obligation type securities issued by federal, state and local governmental entities and public corporations. The list does not, however, include common stocks, corporate bonds, mutual funds or other types of equity securities.

Consequently, Water District 1 is not authorized to invest any district funds, whether generated from water user assessments or water bank activities, in equity securities such as common stocks, corporate bonds or mutual funds.

AUTHORITIES CONSIDERED:

1. *Idaho Statutes*

Act of March 11, 1903, 1903 Idaho Sess. Laws 223.

Act of February 19, 1927, ch. 39, 1927 Idaho Sess. Laws 51.

Act of January 31, 1947, ch. 11, 1947 Idaho Sess. Laws 11.

Act of March 27, 1969, ch. 305, 1969 Idaho Sess. Laws 913.

Act of April, 4, 1989, ch. 286, 1989 Idaho Sess. Laws 710.

Idaho Code § 42-106.

Idaho Code §§ 42-601 through 619.

Idaho Code § 42-1752.

Idaho Code § 42-1760.

Idaho Code §§ 42-1761 through 42-1766.

Idaho Code § 57-105.

Idaho Code § 57-110 (Supp. 1990).

Idaho Code § 57-127 (Supp. 1990).

Idaho Code § 57-128 (Supp. 1990).

Idaho Code § 57-130 (Supp. 1990).

Idaho Code § 67-1210.

Idaho Code § 67-5204.

Idaho Code § 73-116.

Chapter 1, title 57, Idaho Code.

2. *Idaho Cases*

Bailey v. Idaho Irrigation Co., 39 Idaho 354, 227 P. 1055(1924).

Big Wood Canal Co. v. Chapman, 45 Idaho 380, 263 P. 45(1927).

Kopp v. State, 100 Idaho 160, 595 P.2d 309 (1979).

Ottesen on Behalf of Edwards v. Board of Comm'rs of Madison County, 107 Idaho 1099, 695 P.2d 1238 (1985).

Oversmith v. Highway Dist. No. 2, 37 Idaho 752, 218 P.361 (1923).

State ex rel. Evans v. Click, 102 Idaho 443, 631 P.2d 614,(1981).

3. *Cases from other Jurisdictions*

People ex rel. Chapman v. Rapsey, 16 Cal.2d 636, 107 P.2d388 (1940).

Township of Belleville v. Fornarotto, 228 N.J. Super. 412,549 A.2d 1267 (1988).

4. *Other Authorities*

IDAPA 37.D *Water Supply Bank Rules and Regulations*.

Rule 4.3 of Water District 1 Rental Pool Procedures.

63A Am.Jur.2d *Public Officers and Employees* § 65 (1984).

1919 *Annual Report For Water District No. 36.*

DATED this 5th day of August, 1991.

LARRY ECHOHAWK
Attorney General
State of Idaho

Analysis By:

David J. Barber
Deputy Attorney General
Natural Resources Division

Phillip J. Rassier
Deputy Attorney General
Idaho Department of Water Resources

¹ The public waters distributed by Water District 1 provide water for approximately 1.3 million acres of irrigated farm land in the Snake River Plain. Water District 1 is the largest water district in Idaho and is sometimes cited as the largest district of its kind in the country. Records for diversions from the area that became Water District 1 and on file with the IDWR commence in 1912.

² This duty to send the approved budget to the county auditor does not apply to those water districts that elect to proceed under some alternative procedures in Idaho Code §§ 42-618 and 42-619.

³ The requirement for an annual budget began in 1927, See Act of February 19, 1927, ch. 39, 1927 Idaho Sess. Laws 51.

⁴ Idaho Code § 42-611, repealed in 1989, specifically required the presentment of the bill for watermaster services at a regular meeting of the board of county commissioners.

⁵ The distribution of water on an organized basis began with the Act of March 11, 1903, 1903 Idaho Sess. Laws 223. We are not concerned with the initial collection and disbursement procedures of that act, however, because Water District 1 did not come into existence until 1919.

⁶ Of course, a water district would not be prohibited from adopting an annual budget.

⁷ The above legal interpretation of these sections by Water District 1 differs from the actual practice. An agreement between the IDWR and the Committee of Nine regarding watermaster services became effective on March 4, 1979. The practice under this agreement, as we understand it, is for the watermaster of Water District 1 to transmit the monies he collects from the water users to the IDWR. The IDWR then issues checks for the salaries of the watermaster and his assistant. Accordingly, the watermaster has not been issuing the check for his own salary. Finally, the present practice of the IDWR issuing the salary checks to the watermaster further undermines the argument in favor of the interpretation that the watermaster must receive his compensation "directly" without any intervening actors.

⁸ We note that the last sentence of Idaho Code § 42-613 is in many respects duplicative of Idaho Code § 42-611. That last sentence of Idaho Code § 42-613 requires payment of the watermaster and his assistants “in the same manner as bills against the county are paid.” Idaho Code § 42-611 provides a specific procedure for presentment to the board of county commissioners and for payment of the watermaster and his assistants. Idaho Code § 42-618 is somewhat anomalous because it lists Idaho Code § 42-613 but does not list Idaho Code § 42-611, even though all of Idaho Code § 42-611 and a portion of Idaho Code § 42-613 concern the same subject – payment of the watermaster and his assistants. The rationale for drafting Idaho Code § 42-618 in this manner is unknown. The existence of this duplication, however, does not change our conclusion.

⁹ We are not aware of an Idaho Supreme Court decision that specifically adopts the common law doctrine of incompatibility of office as a part of our law, although other states have developed considerable case law on this doctrine. See *People ex rel. Chapman v. Rapsey*, 16 Cal.2d 636, 107 P.2d 388 (1940); *Township of Belleville v. Fornarotto*, 228 N.J. Super. 412, 549 A.2d 1267 (1988); 63A Am.Jur.2d *Public Officers and Employees* §65 at 717-718 (1984). If the question were presented to the Idaho Supreme Court, we believe the court would apply the doctrine to the present situation for two reasons: First, it is a part of the common law, and the Idaho legislature adopted the common law as the rule of decision in the courts of this state when not “repugnant to, or inconsistent with, the constitution or laws of the United States” Idaho Code § 73-116. Second, the Idaho Supreme Court would have the same policy concern that resulted in the creation of this common law doctrine in other states. These other states have generally applied the doctrine to prevent one person from holding an office that has a fiscal accounting function with respect to another office which is held by the same person. The obvious purpose of this prohibition is to protect the public monies, and the prohibition reduces the risk of improper use of public funds. Here, one person holds the offices of watermaster and of treasurer for Water District 1. Since the office of treasurer has a fiscal accounting function over the watermaster, the present administration of Water District 1 presents the precise situation that resulted in the initial creation of this common law doctrine.

¹⁰ Idaho Code §§ 42-1761 through 42-1766.

¹¹ IDAPA 37.D.6.2 requires the local committee procedures to require a 10% surcharge for credit to the revolving development account and the water management account established by Idaho Code §§ 42-1752 & 42-1760. Therefore, the total price for water rented from the water bank is the sum of (1) the price paid to the lessor of the water, (2) the 10% surcharge paid to the IDWR, (3) the amount retained by the local committee.

¹² The Committee of Nine is elected annually by the water users at the annual Water District 1 meeting. The Committee of Nine functions as an executive body representing the interests of the water users throughout the year. The makeup of the committee is structured so as to provide representation for both stored and natural flow water users throughout the several reaches of the approximately 300 mile stretch of the Snake River from the Wyoming border to Milner Dam. The initial establishment of the Committee of Nine in the spring of 1919 grew out of the need to provide organizational continuity to the complex task of distributing storage and natural flow water rights over the great distance encompassed by the district and to provide for the systematic collection of hydrographic information on the river. See 1919 *Annual Report For Water District No. 36*. The commissioner of reclamation at the time, W. G. Swendsen, approved of the establishment of the Committee of Nine. He also approved of the recommendation of the committee that the district thereafter be operated on a year-round basis.

ATTORNEY GENERAL OPINION NO. 91-8

TO: Olivia Craven West
Executive Director
Commission for Pardons and Parole
1075 Park Blvd.
STATEHOUSE MAIL

Per Request for Attorney General's Opinion

QUESTION PRESENTED:

May a person be "eligible" for parole on a certain date (the first day of the indeterminate portion of the sentence), while at the same time not being capable of being released on parole because the board did not have the power to "consider" him for parole prior to the same date?

CONCLUSION:

The Commission for Pardons and Parole may schedule an initial parole hearing prior to the expiration of an inmate's determinate sentence so that the inmate may be paroled on the date he becomes eligible for parole.

ANALYSIS:

The relevant statute, Idaho Code § 19-2513, the Unified Sentencing Act, reads, in pertinent part:

During the minimum term of confinement, the offender shall not be eligible for parole or discharge or credit or reduction of sentence for good conduct except for meritorious service. The offender may be considered for parole or discharge at any time during the indeterminate period of the sentence.

Statutes must be liberally construed with a view toward accomplishing their aims and purposes and attaining substantial justice. Courts are not usually limited to the mere letter of the law, but may look behind the letter to determine the purpose and effect of the law, the object being to determine what the legislature intended and to give effect to that intent. *Kennan v. Price*, 68 Idaho 423, 195 P.2d 662 (1948); *Chinchurreta v. Evergreen Management, Inc.*, 117 Idaho 588, 790 P.2d 369 (Ct. App. 1989), *rev. denied* 1989. Given this principle, it is my opinion that the legislature did not intend to make a person eligible for parole while at the same time denying that person parole status by denying the Commission for Pardons and Parole the opportunity to examine

the person prior to the expiration of his determinate sentence. Not only would such an interpretation be in conflict with the very concept of being "parole eligible," it would have the undesirable effect of tacking on an additional month or two to the date of the fixed portion of the sentence. This clearly is not in keeping with the notion of a fixed minimum sentence and the policy of avoiding overcrowding in the penitentiary.

Therefore, it is my opinion that the Commission may examine a prisoner by scheduling an initial parole hearing prior to the expiration of the determinate sentence, so that the person may indeed be paroled when he becomes eligible for parole.

AUTHORITIES CONSIDERED:

1. Statutes

Idaho Code § 19-2513.

2. Cases

Chinchurreta v. Evergreen Management, Inc., 117 Idaho 588, 790 P.2d 369 (Ct. App. 1989), *rev. denied* 1989.

Kennan v. Price, 68 Idaho 423, 195 P.2d 662 (1948).

DATED this 20th day of September, 1991.

LARRY ECHOHAWK
Attorney General
State of Idaho

Analysis by:

MICHAEL KANE
Deputy Attorney General

ATTORNEY GENERAL OPINION NO. 91-9

TO: The Honorable Michael Simpson
House of Representatives
786 Hoff Drive
Blackfoot, Idaho 83221

Per Request for Attorney General's Opinion

QUESTIONS PRESENTED

You have requested the Attorney General's legal opinion on the following questions raised by the One Percent Initiative:

1. Section 2 of the One Percent Initiative requires "a two-thirds vote of the qualified electors" in order to impose special taxes in excess of the one percent cap. Does this mean two-thirds of the electors voting, or two-thirds of all the qualified electors?
2. Section 2 of the One Percent Initiative creates a process for approving "special taxes" in excess of the one percent cap. What taxes would be covered by this process?
3. Section 1 of the One Percent Initiative states that the one percent "shall be collected by the counties and apportioned according to law to the taxing districts within the counties." How would this apportionment of taxes be done "according to law"?
4. Article 7, section 5 of the Idaho Constitution requires that all taxes "be uniform upon the same class of subjects within the territorial limits of the authority levying the tax . . ." How would the one percent property tax initiative be implemented in light of this constitutional provision?
5. Does the One Percent Initiative -- with its cap on property taxes and its requirement of approval for additional taxes by two-thirds of all qualified electors -- conflict with art. 8, sect. 3 of the Idaho Constitution, which allows creation of bonded indebtedness with consent of two-thirds of the qualified electors voting in the election? or with any other specialized taxing requirements of local government?
6. Article 7, section 6 of the Idaho Constitution prevents the Idaho legislature from imposing taxes on behalf of cities and counties, but allows the legislature, by statute, to invest such power to assess and collect taxes in local governmental entities. Does the One Percent Initiative comport with this basic structure of ad valorem taxation in Idaho?

7. Assuming that the One Percent Initiative fails to comport with the taxing structure created by the Idaho Constitution, should the initiative be removed from the ballot?

CONCLUSIONS

1. As written, the One Percent Initiative would require a super-majority of two-thirds of the qualified electors in any given district considering a "special tax." This voting standard for imposing special taxes in excess of the one percent cap will be impossible to implement because there is no means to determine the number of qualified electors in an area.

2. The term "special taxes" has no obvious meaning as used in the initiative. It would require a court decision in order to determine the meaning of this phrase.

3. The requirement in section 1 of the One Percent Initiative that taxes "shall be collected by the counties and apportioned according to law to the taxing districts within the counties" is inoperable because, under existing law, counties have no authority to adjust taxes imposed by taxing districts within their counties.

4. Idaho Constitution, art. 7, § 5, requires tax levies of taxing districts to be uniform within the boundaries of the districts. Therefore, the adjustment required by the One Percent Initiative is not simply to reduce levies to one percent of market value. The constitution also requires that the resulting levies be uniform. The inevitable result is that property taxes in each taxing district will bear no rational relation to the need of that district or the wishes of the taxpayers of that district.

5. The Initiative's requirement that "special taxes" be approved by two-thirds of the qualified electors would, taken literally, conflict with Idaho's Constitution, which allows creation of bonded indebtedness by a two-thirds vote of the qualified electors voting in the election. It would undermine the ability of government to function in times of emergency. It would conflict with special levies to fund such unpredictable but legally-required items as tort claim judgments and catastrophic medical indigency bills. It could also jeopardize the contract rights of bondholders who have purchased tax increment bonds under Idaho's Economic Development Act. Finally, it would introduce such a note of uncertainty as to threaten the ability of local governments to issue bonds at reasonable interest rates.

6. Art. 7, § 6, of the Idaho Constitution gives local communities the power to impose upon themselves for their needs such property tax burdens as they themselves determine through their governing officials. Statutory limits may be placed upon this local authority provided the limits are uniform as to each type of local government. The One Percent Initiative would deny this constitutional principle of local self-determination

and would force discrimination in local taxing authority. This the initiative cannot do. Consequently, to impose a one percent limitation would require dismantling the system of property taxation under which we have operated since statehood.

7. An initiative, however badly drafted or facially unconstitutional, may be placed on the ballot for consideration by the voters.

BACKGROUND

On March 25, 1991, supporters of the One Percent Initiative submitted their proposed initiative to Secretary of State Pete Cenarrusa. The proposed initiative was transmitted to this office, as required by Idaho Code § 34-1809. Under this statute, it is the duty of the Attorney General to review a proposed initiative for matters of substantive import and to “recommend to the petitioner such revision and alteration of the measure as may be deemed necessary and appropriate.” The Attorney General’s recommendations, it must be stressed, remain “advisory only” and the petitioners are free to “accept or reject them in whole or in part.”

The Attorney General issued his Certificate of Review of the proposed initiative on April 5, 1991, concluding that “most of the substantive provisions of the initiative would be found to be unconstitutional if passed.” The drafters of the initiative, as is their right, eliminated some of the original sections of the initiative and kept others. They did not replace the sections that were eliminated or address the issues that the original initiative had addressed in those sections. They chose not to clarify the conflicts that were identified by this office in the remaining sections. They also chose not to request further review by this office of their final work product.

On September 24, 1991, in response to an opinion request from Tom Boyd, Speaker of the House, this office issued an opinion which concluded that the proposed One Percent Initiative would have no impact upon either the homeowner’s exemption found at Idaho Code § 63-105DD, or the exemption for speculative value of agricultural land found at Idaho Code § 63-105CC.

We now address the questions raised in your opinion request of September 26, 1991.

ANALYSIS

QUESTION 1.

The Two-Thirds Super-Majority.

Your first two questions address section 2 of the One Percent Initiative, which states:

Cities, Counties, and taxing districts, by a two-thirds vote of qualified electors of such districts, may impose special taxes in excess of the one percent (1%), on such cities, counties and taxing districts.

Initially, you ask the meaning of the requirement that special taxes be approved “by a two-thirds vote of the qualified electors of such districts.” The sponsors of the initiative have stated that this language is to be applied literally. It is their intent that all “special taxes” will require approval of *two thirds of those qualified to vote* at the election, not just *two thirds of those actually voting*. This raises the question how such a requirement would be carried out under Idaho law.

One problem with this super-majority requirement stems from the fact that it is impossible to identify the number of qualified electors in a given district on a particular date. Many special taxing districts -- such as hospital districts, irrigation districts, fire protection districts and recreation districts -- base voter qualification upon residency within the district and do not require voter registration. In order to vote in these taxing districts, electors need only sign an oath form affirming their residency. The elector's oath need not be signed until just before the elector enters the polling booth. For example, Idaho Code § 42-3202 establishes voter qualification for water and sewer district elections:

A “qualified elector” of a district, within the meaning of and entitled to vote under this act, unless otherwise specifically provided herein, is a person qualified to vote at general elections in this state, and who has been a bona fide resident of the district for at least thirty (30) days prior to any election in the district. *No registration shall be required at any election held pursuant to this act, but each voter shall be required to execute an oath of election attesting his qualification.* (Emphasis added.)

Under this electoral system, it is impossible to determine the number of “qualified electors” in the district. The number of qualified electors is constantly in flux and the required number of votes needed for approving a “special tax” changes every time someone moves into or out of the district.

The two-thirds super-majority voting requirement is likewise impossible to follow in districts that do have voter registration, such as counties, cities and school districts. No precise figures of qualified electors are available in these districts either. If a registered voter moves from a county and the county clerk is not aware of the change, the voter's registration at his or her former address will remain on the county rolls for up to four years. Idaho Code § 34-435. Thus, voter registration does not provide exact numbers of “qualified electors” within a county at any given time and cannot be relied upon to establish voter approval thresholds for “special tax” elections.

We therefore conclude, based on the practical problems facing the two-thirds super-majority voting requirement, that this provision of the One Percent Initiative cannot be enforced as written. The courts must either strike section 2 of the initiative in its entirety as inoperable (thus leaving no means for the public to exempt levies from the initiative) or interpret and apply section 2 in a manner at odds with its literal wording and the announced intent of its sponsors.

Regardless of the approach taken by the courts, in our opinion the courts would not allow the two-thirds super-majority provision to stand as written. Requiring the approval of two-thirds of all qualified electors -- whether they vote or not -- turns every non-vote into a "No" vote. It systematically frustrates those who do exercise the franchise and even takes away from those who choose to abstain the right not to have their votes counted.

This requirement of the One Percent Initiative violates the basic principle of participatory democracy guaranteed to every Idahoan by art. 6, § 1, of the Idaho Constitution ("All elections by the people must be by ballot.") A reviewing court would not allow such a requirement to stand.

QUESTION 2.

The "Special Taxes" Exempt From the One Percent Limitation.

Your second question asks us to construe the meaning of those "special taxes" that section 2 of the initiative permits in excess of the one percent limit if approved by a two-thirds vote of the qualified electors.¹

We note next that the choice of the term "special taxes" is ambiguous. The term is used sporadically throughout the Idaho Constitution and the Idaho Code, but has no consistent usage that would identify a particular tax in relation to section 2 of the initiative.

In the context of ad valorem taxes, the phrase appears more than 40 times. In its ad valorem use, a "special tax" is one that generates revenue for a special fund or purpose, rather than being a *general* revenue producing tax. Art. 7, sec.15, of the Idaho Constitution, for example, speaks of levying "a special tax . . . for the creation of a special fund for the redemption of . . . warrants." A special tax is used to provide revenue for the district court fund. Idaho Code § 31-867. A special tax is used to defray the costs of equipping and maintaining fire protection districts. Idaho Code §§ 31-1420 and 31-1421. There are special taxes to support ambulance services, Idaho Code §§ 31-3901 and 31-3908; for the payment of highway bonds, Idaho Code §§ 40-808 through 40-813; for armories, Idaho Code § 46-722; for the construction of service

memorials, Idaho Code § 65-104; and for the maintenance of those memorials, Idaho Code § 65-103. There are numerous other examples.

We must assume that the drafters of the One Percent Initiative did not intend that the “special taxes” enumerated in the Idaho Constitution and the Idaho Code were the ones that would be exempt from the one percent limitation if approved by the two-thirds super-majority. Traditionally, for example, the “special taxes” levied to support the district court fund, or to maintain fire and ambulance equipment, do not require special voter approval at all. Other “special taxes” require approval by a simple majority of the voters. Still others require a two-thirds vote. It does not seem likely that the drafters of the One Percent Initiative intended to single out just these taxes and subject them to the two-thirds super-majority voting requirement while leaving all other taxes unscathed. Nor can we assume that they intended to obliterate the carefully distinguished voting requirements that have evolved for different types of taxes over the last one hundred years.

It is possible the drafters of the initiative intended that the two-thirds super-majority would be needed to approve those specific taxes that push the tax levy over one percent. However, this likewise makes no sense. It is impossible to identify which particular tax is responsible for pushing the levy over one percent.

There is nothing in the initiative when construed as a whole that sheds any light upon the term “special taxes” found in section 2 of the initiative. The term is incapable of any legal application as written.

QUESTION 3.

Apportionment of Taxes “According to Law.”

Subsection 1 of section 1 of the One Percent Initiative states:

The maximum amount of all ad valorem tax on property subject to assessment and taxation within the state of Idaho shall not exceed one percent (1%) of the actual market value of such property. The one percent (1%) shall be collected by the counties and apportioned according to law to the taxing districts within the counties.

Your question asks precisely how counties will collect and apportion taxes “according to law” if the initiative passes and becomes law. To address this question, we first review how the tax collection system works according to existing law. We then analyze the way the system would work if subject to a one percent limitation.

The Existing Property Tax Collection System

Although each city, county or other authorized taxing district levies a discrete tax, the districts do not actually “set levies.” Instead, each district develops a budget that determines the amount of revenue from property taxes the district will need during its next fiscal year. See Idaho Code §§ 63-621 through 63-626. This dollar amount is then “certified” by each taxing district to the board of county commissioners in which the district exists. Idaho Code § 63-624. If the district is a multi-county district (if its boundaries overlap county boundaries), the total amount of revenue required from property taxes is apportioned between the counties, based on the percentage of the taxing district’s taxable value located in each county. Idaho Code § 63-624.

On the second Monday of each September:

The board of county commissioners shall make a tax levy as a percent of market value for assessment purposes of all taxable property in the taxing district, which when applied to the tax rolls, will meet the budget requirements certified by the taxing district:

Idaho Code § 63-624. See also, §§ 63-901 and 31-1605.

The board’s clerk must prepare four copies of the record of all levies set by the board of county commissioners and deliver one copy to the State Tax Commission. Idaho Code § 63-915. The State Tax Commission must “carefully examine” this report to determine if any county has:

Fixed a levy for any purpose or purposes not authorized by law or in excess of the maximums provided by law for any purpose or purposes

Idaho Code § 63-917. If the State Tax Commission finds an unauthorized or excessive levy, it must report the levy to the prosecuting attorney (in the case of levies other than those imposed by the county) or to the Attorney General (in the case of county levies) who must bring suit to have such levy set aside as unlawful. Idaho Code § 63-917.

When the levies are approved, the auditor delivers the tax rolls with the tax computations to the county treasurer. Idaho Code § 63-1003. The treasurer prepares tax notices which must be mailed to taxpayers by the fourth Monday of November. Idaho Code § 63-1103. The notice must separately state the exact amount of tax due for each taxing district levying on the property to which the notice relates. Idaho Code § 63-1103(6).

All taxes collected by the treasurer are deposited into the county treasury and then

“apportioned” from the county treasury to each taxing district. Idaho Code § 63-918. Because the amount of tax due for each taxing district is displayed on each tax bill, the amount to be apportioned to each taxing district is simply the amount collected which is designated as that district’s tax.

How the One Percent Initiative Would Affect the Levy, Collection and Apportionment of Taxes

The One Percent Initiative repeals existing Idaho Code § 63-923, which is the vestige of the 1978 version of the One Percent Initiative. It does not repeal, amend or modify any other existing statute. Instead, it attempts to insert a one percent limitation on the amount of tax that can be imposed on any real property.

The One Percent Initiative does not limit the budgets certified by the taxing districts, or the levies set by boards of county commissioners, both according to law. The duties of the county auditor and the board of county commissioners remain the same. The levies set by the county will still be reported to the State Tax Commission and reviewed by that body to determine if any county has fixed a levy that is “in excess of the maximums provided by law.”

It is at this point in the system that the one percent limitation has its impact. The State Tax Commission will be unable to approve any levies which, in combination, cause taxes to exceed one percent of the actual market value of any property.

a) Recourse to the Courts.

Two possible solutions present themselves. First, the State Tax Commission could handle the matter as it presently does “according to law.” As outlined earlier, the law now on the books, Idaho Code § 63-917, mandates the State Tax Commission to report all excessive levies to county prosecutors or to the Attorney General. The prosecutor or the Attorney General must then “immediately bring suit . . . to set aside such levy as being illegal.”

This solution leads to both practical and legal problems. As a practical matter, the courts are not equipped to handle the massive influx of lawsuits that would result. Furthermore, taxing districts with multi-county boundaries could have their lawsuits brought in more than one county, thus giving rise to questions of jurisdiction or to inconsistent verdicts in different courts on the same issue. A final practical problem is presented by the inexorable deadlines of the annual property tax levy and collection process. As outlined above, these lawsuits would have to be filed and resolved between the date the levy is set (the second Monday of September) and the date the tax notices are mailed (the fourth Monday of November). The Idaho courts could not possibly handle these lawsuits in an eleven-week period.

Even if Idaho district courts could process these property tax lawsuits in eleven weeks, the legal problem created by the One Percent Initiative still would not be solved. The district courts are presently empowered only to “set aside” property tax levies found to be “illegal.” They cannot themselves impose the levies once the illegal levies are set aside.² Thus, recourse to the courts is ultimately futile as a means of implementing the One Percent Initiative according to present law.

If the drafters of the One Percent Initiative intended that Idaho district courts be empowered to impose corrected tax levies on cities, counties, school districts and all other taxing districts, then an even more fundamental legal problem arises.

This implementation procedure would effectively impose on the judicial branch of government the duties of administering the ad valorem tax system of the state, which duties are both ministerial and at the same time profoundly policy-laden. Such an imposition of ministerial and policy-making duties lies beyond the functions provided for the judicial branch of government in article 5 of the Idaho Constitution and would violate the separation of powers principle of art. 2, sec. 1, of the Idaho Constitution. It is one thing for the courts to review the legality of administrative actions already taken. It is quite another thing to impose those duties on the courts themselves. *Miller v. Miller*, 113 Idaho 415, 418, 745 P.2d 294 (1987). It is our opinion that the Idaho judiciary would properly decline to assume the duties of tax apportionment that would be imposed on it under this reading of the One Percent Initiative.

b) The Counties as Tax Czars.

The second and only other solution would be to assume that the One Percent Initiative itself impliedly grants to counties the power to collect and apportion taxes to the various taxing districts within and between counties. That power would derive from the initiative language stating that the “one percent shall be collected by the counties and apportioned according to law to the taxing districts within the counties.”

Such an implied grant of power or authority is authorized whenever such power is found to be necessary, usual and proper to carry out express authority. *Bailey v. Ness*, 109 Idaho 495, 708 P.2d 900 (1985). Implied powers of boards of county commissioners are also recognized by statute:

Every county is a body politic and corporate, and as such has the powers specified in this title or in other statutes, *and such powers as are necessarily implied from those expressed.*

Idaho Code § 31-601 (emphasis added).

The county's powers are exercised by its board of county commissioners. Idaho Code § 31-602. The Idaho Supreme Court has validated exercise of implied powers by local governments. *Alpert v. Boise Water Corp.*, 118 Idaho 136, 795 P.2d 298, (1990). However, if there is a "fair, reasonable, substantial doubt" about whether a power exists, the doubt is resolved against its existence. *City of Grangeville v. Haskin*, 116 Idaho 535, 777 P.2d 1208 (1989).

Such a solution to the problem of apportioning taxes under the one percent limit would work only if the board of county commissioners is given ultimate taxing authority over all other taxing districts in the county. At present, each county contains several independent taxing districts: the counties themselves, cities, school districts, highway districts, fire districts, irrigation districts and so forth. Each district has its own statutory authority to impose taxes up to a certain mill levy limit. The combined total of mill levies exceeds one percent of market value on properties in many areas of the state.

A board of county commissioners presently has no statutory authority to adjust the levies of these other independent taxing districts. If such authority is impliedly granted by the One Percent Initiative, then each board will become the tax czar in its county. Faced with the problem of scaling taxes down to one percent, the board would have several options. It could scale down taxes in equal proportion across all taxing districts. Or, it could eliminate entirely the tax levy in some districts in order to maintain tax revenue for other districts that are perceived as providing more essential services. Such a solution would centralize all taxing authority in the board of county commissioners and effectively eliminate statutory budget authority of all other independent taxing districts.³

The basic problem here is that the drafters of the proposed One Percent Initiative frame a standard that is, at bottom, only a slogan: "taxation within the State of Idaho shall not exceed one percent (1%) of the actual market value of such property." However, they fail to provide any entity with authority to adjust tax levies to meet this standard. They also fail to provide any procedural mechanism to carry out their proposal.

We conclude that neither the existing statutes nor any provision of the One Percent Initiative expressly grants authority to the State Tax Commission to adjust levies and apportion taxes. Neither the Idaho Constitution nor the Idaho Code would permit imposition of such a duty on the courts. Finally, any attempt to centralize such authority in the boards of county commissioners would make the boards into local taxing czars and virtually destroy all the other independent taxing districts that now answer to the local electorate.

It follows that the One Percent Initiative cannot be implemented as written. It is our opinion that a reviewing court faced with the options of striking down the One Percent

Initiative or upholding the initiative by creating from whole cloth a new tax apportionment system for the State of Idaho would choose the former option.

Courts are driven to the extreme measure of striking down a statute only when “it is so unclear or confused as to be wholly beyond reason, or inoperable, . . .” *Gord v. Salt Lake City*, 434 P.2d 449, 451 (Utah 1967). The One Percent Initiative fits these criteria. There is no possible means to implement it “according to law.” Consequently, a reviewing court would strike it down.

QUESTION 4.

The Constitutional Requirement of Uniform Levies.

This opinion has already concluded that the One Percent Initiative cannot be implemented because it fails to provide a mechanism whereby counties, or any other governmental entity, can collect taxes and then apportion them subject to the one percent limit. Assuming, however, for the sake of argument, that counties were authorized to perform this task, it would then be necessary to inquire as to the standard they would use in making the apportionment.

We turn, therefore, to your question as to how the One Percent Initiative would be implemented in light of the uniformity requirements of art. 7, sec. 5, of the Idaho Constitution. That provision requires that each taxing district levy must be “uniform upon the same class of subjects within the territorial limits of the authority levying the tax. . . .”

Reading the One Percent Initiative in conjunction with art. 7, sec. 5 of the Idaho Constitution yields the following possible apportionment mechanism.⁴ The board of county commissioners would first have to determine whether the cumulative levies on any property subject to ad valorem tax exceed one percent of the actual market value of the property. If so, the commissioners might then decide to reduce the levies proportionately to an amount that no longer exceeds one percent of actual market value. These reduced levies must then be uniformly applied to all property subject to tax within the geographical boundaries of each taxing district whose levy applies to the property.

A simplified hypothetical example may help clarify how the levies, once set, could be adjusted by a board of county commissioners under the One Percent Initiative. For this hypothetical example, assume a single county has two school districts. The hypothetical county also contains two cities and a fire district which serves one city (“City A”) and part (but not all) of the county. The ad valorem budget, tax base and levy (unadjusted for the One Percent Initiative) of each district are:

HYPOTHETICAL COUNTY

District	Budget	Tax Base	Levy
County	\$2,000,000	\$1,000,000,000	.20%
School District 1	\$1,000,000	\$ 250,000,000	.40%
School District 2	\$1,250,000	\$ 312,500,000	.40%*
Fire District	\$1,000,000	\$ 420,000,000	.24%*
City A	\$1,500,000	\$ 300,000,000	.50%
City B	\$ 750,000	\$ 187,500,000	.40%

*Maximum statutory levy

Now, compare the taxes imposed on properties located in three different parts of the county. Example 1 is property located in City A and is subject to taxes by that city, the fire district, School District 2 and the county. Example 2 is rural property located in School District 1 and the county. Example 3 is property located in City B, School District 1 and the county. Each is subject to the following levies:

	Example 1	Example 2	Example 3
County	0.20%	0.20%	0.20%
School District 1		0.40%	0.40%
School District 2	0.40%		
Fire District	0.24%		
City A	0.50%		
City B			0.40%
Total Levies:	1.34%	0.60%	1.00%

The taxes levied on the property in the first example exceed the limitation of the One Percent Initiative. To reduce the taxes on this property to 1%, the levies imposed on it must be reduced to .7462686⁵ of the levy first computed. The adjustment is:

	Levy	Adjustment	Adjusted Levy
County	0.20%	0.7462686	0.15%
School District 1			
School District 2	0.40%	0.7462686	0.30%
Fire District	0.24%	0.7462686	0.18%
City A	0.50%	0.7462686	0.37%
City B			
Total Levies:	1.34%	0.7462686	1.00%

Art. 7, sec. 5, mandates that these reduced levies apply uniformly to all property within a taxing district's boundaries. The property in Examples 2 & 3 can no longer be taxed at 0.20% by the county, when the property in Example 1 is only taxed at 0.15%. Thus, the lower county levy applies to all property in the county, even though some of that property is not taxed above 1%. As a result, the adjusted tax rates on all three properties in the hypothetical county become:

	Example 1	Example 2	Example 3
County	0.15%	0.15%	0.15%
School District 1		0.40%	0.40%
School District 2	0.30%		
Fire District	0.18%		
City A	0.37%		
City B			0.40%
Total Levies:	1.00%	0.55%	0.95%

Several things should be noted in this final step of the hypothetical. First, the adjustment required by the One Percent Initiative is not simply to reduce tax levies to one percent of market value. A second step, mandated by art. 7, sec. 5 of the Idaho Constitution, requires that the resulting levies be uniform. As a practical matter, this means that the property in the county with the highest mill levy is the one that must first be brought down to the one percent level. All other properties are then proportionately reduced. This means that some properties upon which tax levies did not originally exceed one percent will enjoy levies that are reduced yet lower.

Second, School District 1 and School District 2 each began with a 0.40% mill levy -- presumably the amount that local school boards, parents and taxpayers felt was the amount necessary to provide a comparable education for the children in these two school districts. After the adjustment, however, School District 1 still has a 0.40% tax levy, whereas School District 2 has a 0.30% tax levy. The children in the latter district experience a 25% cut in school funding, without any rational basis for the cut. Such an irrational disparity in funding might well be found to violate the requirement in art. 9, sec. 5, of the Idaho Constitution that all Idaho students be provided a "uniform" and "thorough" education.

Third, it should be noted that City A had a 0.50% tax levy before the adjustment and City B had a 0.40% tax levy. After the adjustment, City A finds itself with a 0.37% tax levy, whereas City B still has a 0.40% levy. Those who live in City A have no voice whatsoever in this 26% tax cut, or in the corresponding loss of services the cut will mandate. The cut is triggered solely by events in other taxing districts.⁶

In short, the combined requirements of a one percent property tax limitation and the uniform levy requirements of art. 7, sec. 5, of the Idaho Constitution create the inevitable result that property taxes in each taxing district will bear no rational relation to the needs of that district or to the wishes of the taxpayers of that district.

QUESTION 5.

Your next question inquires as to the impact of the One Percent Initiative -- with its one percent cap on property taxes, and its requirement that two-thirds of all qualified electors approve all special taxes -- on bonded indebtedness or other special taxing situations.

We have identified four such taxing situations that deserve separate analysis: 1) bonded indebtedness provision of art. 8, sec. 3, of the Idaho Constitution; 2) tax increment financing bonds created pursuant to the Local Economic Development Act; 3) registered warrants; and 4) special levies.

(1) Initiative's impact on constitutionally approved debt.

It is difficult to reconcile the language of the initiative with Idaho Constitution art. 8, sec. 3, which provides in pertinent part:

No county, city, board of education or school district, or other subdivision of the state, shall incur any indebtedness, or liability, in any manner, or for any purpose, exceeding in that year, the income and revenue provided for it for such year, without the assent of *two-thirds (2/3) of the qualified electors thereof voting* at an election to be held for that purpose (Emphasis added.)

The One Percent Initiative excludes from the one percent limitation “any indebtedness approved by the voters *prior* to the time this section becomes effective.” (Emphasis added.) Thus, by its specific terms, the One Percent Initiative does not grant an exemption for indebtedness approved *after* the date the initiative would become effective. However, as noted previously in this opinion, the initiative does allow “special taxes” to be exempt from the initiative if approved by two-thirds of the “qualified electors” of a district. This is a higher standard than two-thirds of those voting, which is the constitutional standard for approval of most bonds. If the initiative’s higher standard were found to be constitutional, a bond could be approved by the constitutionally required two-thirds of voters still be subject to the one percent limitation. The one percent limitation would require cuts in levies whenever the total of all levies exceeded one percent.

Consequently, if constitutionally approved bonds are not given a tax levy priority over other levies, bondholders would not be assured of repayment of their bonds making such bonds unmarketable. Given the confusion created by the One Percent Initiative, bond counsel would almost certainly refuse to give an opinion that the bonds are legally required to be paid according to their terms. This would effectively undermine the provisions of Idaho Constitution art. 8, sec. 3 providing for bonded indebtedness.

2) Tax Increment Financing Under the Local Economic Development Act.

Chapter 29, title 50, of the Idaho Code, the Local Economic Development Act, gives certain municipalities the authority to issue bonds. These bonds are repaid using a device commonly known as tax increment financing. These bonds are not voter approved; hence, they are not covered by the initiative’s exception for existing indebtedness.

Six tax increment financing areas now operate in Idaho pursuant to the Local Economic Development Act. The One Percent Initiative will have a serious impact on their ability to repay bonds. Those familiar with each of the areas indicate their area would be unable to meet debt service if the initiative passes.

Under the tax increment financing law, a municipality first creates an urban renewal agency which exercises authority over a given geographical area of a city. Idaho Code §§ 50-2005 through -2007, 50-2903 and -2904. The agency then issues bonds, the proceeds of which are used for urban renewal projects within the agency's geographic area. Idaho Code § 50-2909. The bonds issued are a limited obligation of the agency, not the municipality. Idaho Code § 50-2910. Bonds are repaid solely from a special fund established for the purpose. Idaho Code § 50-2909. The income stream used to replenish the special fund is generated by dedicating property taxes above a certain base level to the fund. Idaho Code § 50-2908. The rationale is that the investment of the redevelopment agency in its geographic area encourages further development, thus raising tax revenues within the entire area. The tax upon the difference between the assessed value at the time the bonds were issued and subsequent years is applied to repayment of the bonds. Idaho Code §§ 50-2903(4) and 50-2908.

The One Percent Initiative would change the repayment structure set up by the Local Economic Development Act by lowering tax rates with corresponding reductions in the revenue available to repay bondholders. This raises the question whether the One Percent Initiative would violate Article I, § 10, of the United States Constitution. That section specifically forbids any state to "pass any . . . law impairing the obligation of their contracts."

Bondholders of tax increment financing bonds would likely challenge the initiative on grounds it impairs the obligation of contracts under the principles laid down by the United States Supreme Court in *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977), and *Energy Reserves Group v. Kansas Power and Light*, 459 U.S. 400 (1982).

On the other hand, we note that the California Supreme Court, in *Amador Valley Joint Union High School District v. State Board of Equalization*, 22 Cal. 3d 208, 583 P.2d 1281 (1978), upheld that state's one percent law, Proposition 13, against a challenge that it unconstitutionally impaired contractual obligations. The *Amador* court found that although there was a possibility of default on bonds, the default was not "inevitable" and new revenues might be found from other sources, such as legislative enactments, to prevent default. *Amador* seems to require actual default rather than merely "substantial impairment" as discussed in *United States Trust Co.*, *supra*, and *Energy Reserves Group*, *supra*. Thus, if the Idaho Supreme Court were to find a substantial impairment but adopt the reasoning of the California Supreme Court in *Amador*, it would not find that the initiative impaired the obligation of contracts, at least until actual default became inevitable. Rather, it would wait to see if other revenue became available such as through new legislation. This would leave open the possibility of future legislation to authorize some additional tax to repay existing bondholders.

As to future tax increment financing, the One Percent Initiative would create

uncertainty as to future tax revenues and thus, the ability to repay the bonds. The practical effect would be the reduction or elimination of tax increment financing since investors would presumably be reluctant to buy bonds which might not be repaid.

3) Registered Warrants.

The One Percent Initiative would also cause problems to counties during times of emergency. Currently, counties are authorized to pay bills that arise during major emergencies by a system of registered warrants. Idaho Code § 31-1608 gives examples of the types of emergency that may be dealt with in this manner:

[A]ny emergency caused by fire, flood, explosion, storm, epidemic, riot or insurrection, or for the immediate preservation of order or of public health or for the restoration to a condition of usefulness of public property, the usefulness of which has been destroyed by accident, or for the relief of a stricken community overtaken by a calamity, or the settlement of approved claims for personal injuries or property damages, exclusive of claims arising from the operation of any public utility owned by the county, or to meet mandatory expenditures required by law, or the investigation and/or prosecution of crime, punishable by death or life imprisonment, when the board has reason to believe such crime has been committed in its county

The statute next outlines the procedure the county commissioners must use to pay for emergency expenditures that were not anticipated or funded in their budget:

[T]he board of county commissioners may, upon the adoption, by the unanimous vote of the commissioners, of a resolution stating the facts constituting the emergency and entering the same upon their minutes, make the expenditures necessary to investigate, provide for and meet such an emergency.

Finally, the statute sets forth the precise funding tool of registered warrants:

If at any time there shall be insufficient moneys on hand in the treasury to pay any of such warrants, then such warrants shall be registered, bear interest, and be called in the manner provided by law for other county warrants.

Thus, the statute provides a mechanism by which counties can finance expenditures in time of emergency. The One Percent Initiative would dramatically impact this process. The initiative provides no exemption for levies to repay registered warrants. In other words, levies to repay registered warrants could suffer the same fate as levies to support cities, schools and other local governments. However, if levies to repay registered warrants are cut, payments to those persons who financed the emergency by taking

registered warrants will also be affected. If this were permitted, the ability to finance expenditures in time of emergency would be undermined. The provisions of the current law are workable only because those who finance emergency expenditures know they will be repaid. Without that assurance, it is doubtful that counties would be able to finance their expenditures in times of emergency.

It is possible that the constitution and statutes could be read to give registered warrants a priority over other levies to guarantee repayment of persons financing emergency expenses. However, this too creates a problem in times of emergency. For example, in times of a major emergency such as the Teton Dam disaster, emergency expenditures themselves may exceed the one percent limit. If warrants to pay for the emergency are given priority, then no other taxing district could levy at all because the amount needed to redeem registered warrants would consume the entire one percent property tax allowed by the initiative. A levy by any other district, including the county for its normal operating purposes, would not be permitted since it would be a levy above one percent. Thus, even if registered warrants are given a priority over the levies of other districts, the initiative will create its own emergency by shutting down the functions of all other governments in the county. Even normal county functions would be shut down other than those funded as emergency expenses.

Whether registered warrants would be given a priority under the One Percent Initiative is unclear under current law. Idaho Constitution art. 7, sec. 5 provides for a levy of up to one percent to repay registered warrants. Thus, arguably, levies for registered warrants should be given priority over other levies since they are of constitutional stature. However, the Idaho Supreme Court has held that Idaho Constitution art. 7, sec. 15 is not self-executing. That is to say, the court found that the power of the board of county commissioners to levy taxes under this article was derived solely from statute and not from the constitutional provision. *Oregon Shortline Railroad Company v. Gooding County*, 33 Idaho 452, 454, 196 P. 196 (1921). The case was decided in 1921 and it is possible that the court would change its view today. However, assuming the court would continue to interpret the section as not being self-executing, levy authority would be defined by the statutes and the One Percent Initiative does not provide any priority for the levy to repay registered warrants.

Thus, the initiative will create substantial problems in times of emergency since levies to pay registered warrants are not excluded from the one percent limitation. If they are not given a priority over other levies, investors will have no guarantee of repayment. Without an ability to fund emergency expenses, counties would be unable to adequately protect the public in times of emergency. If levies to repay registered warrants are given a priority over other levies, then a county could respond to an emergency. However, to do so would reduce or eliminate funding of other governmental functions. Following a major disaster, the effect would be to shut down most local governments.

4) Other Levy Problems.

Certain levies are exempt from the levy limitations of current law, but are not exempt from the proposed 1% initiative. Examples include school plant facilities reserve fund levies previously approved by voters (Idaho Code § 33-804), levies to pay tort claims (Idaho Code §§ 6-927 and 6-928), levies to pay extraordinary city expenses in times of emergency (Idaho Code §50-1006), levies to pay catastrophic medical expenses (Idaho Code § 31-3503), and county expenses for noxious weed control (Idaho Code § 22-2482).

Since these expenses are given no exemption or priority of payment under the initiative, the initiative would provide no assurance of their payment. As an example, the school plant facility reserve fund provides a pay-as-you-go program for funding public school buildings, as opposed to borrowing to buy school buildings. Money is saved until sufficient to buy buildings. It requires a two-thirds vote of those voting to be authorized. School plant facilities reserve funds previously authorized by voters are not exempt from the 1% initiative. Thus, funding of these existing school building programs would be jeopardized by the initiative.

Extraordinary city expenses incurred in times of emergency are likewise given no priority under the initiative. This would cause the same kind of problems previously discussed that counties would face in times of emergency. Similarly, the initiative would undermine the financial ability of counties to address catastrophic medical problems or to eradicate noxious weeds threatening the agricultural base in their counties since these expenses are not exempt from the initiative. By not exempting tort claims, a major tort claim could take a substantial portion of the 1% authorization reducing the amount available for support of other governmental functions.

QUESTION 6.**Conflict With Idaho's System of Ad Valorem Taxation.**

The final substantive question in your opinion request asks whether the One Percent Initiative comports with the basic structure of ad valorem taxation in Idaho as set forth in art. 7, sec. 6, of the Idaho Constitution. That provision states:

The legislature shall not impose taxes for the purpose of any county, city, town or other municipal corporation, but may by law invest in the corporate authorities thereof, respectively, the power to assess and collect taxes for all purposes of such corporation.

This section contemplates local control of the level of property taxes within the limits of uniform laws established by the legislature. During Idaho's Constitutional Convention, Mr. Ainslie explained the provision as follows:

Now, under the revenue law the state may exact a levy of so much for state purposes; and authorize the county to levy a tax, not exceeding so much more; and then the county commissioners of each county levy their own rate. In one county it may be more than it is in another. If the state makes a levy itself, if the legislature makes a levy, the rate of taxation in each county in the territory would be exactly the same; but *they authorize the different counties to levy a rate of taxation between so much, not to exceed so much, and they can go under that any amount they please.* In some counties they might make a higher levy than another.

Constitutional Convention Proceedings, Vol. II, p.1659. (Emphasis added.)

Thus, the drafters of our constitution understood that the legislature would set upper limits for taxes by cities, counties or other taxing districts. However, districts would be given the authority to make their own determination as to the levy within the limit set by the legislature.

In contrast, the One Percent Initiative does not limit taxation based upon upper limits judged adequate by the legislature and applied uniformly to cities, counties or other districts with similar responsibilities. Rather, as discussed in detail in response to Question 4, it makes taxing authority dependent upon the budgets and levies of other unrelated taxing districts.

The intent of art. 7, sec. 4, was also discussed by the Idaho Supreme Court in *State v. Nelson*, 36 Idaho 713, 719, 213 P. 358 (1923):

Manifestly, the reason for placing this limitation upon the legislative power to tax is to give local communities, organized as municipal corporations, the power to impose upon themselves for their needs only such burdens in the way of taxation *as they themselves determine through their governing officials.*

(Emphasis added.) See also *Fenton v. Board of County Commissioners*, 20 Idaho 392, 119 P. 41 (1911); *Hamilton v. Village of McCall*, 90 Idaho 253, 409 P.2d 393 (1965).

The concept of the One Percent Initiative negates this fundamental concept of local self-determination in taxation within legislatively determined limits. Local governments will not be able to impose burdens "as they themselves determine through their governing officials." Rather, the level of authorized taxation will depend upon budgets and levies of unrelated local governments.

Just as the One Percent Initiative negates the fundamental concept of local self-determination in taxation, so too does it negate the fundamental concept of services provided to the citizenry within uniform limits applicable to similar units of government. For example, Idaho Constitution, art. 9, § 1, requires the legislature:

to establish and maintain a general, uniform and thorough system of public, free common schools.

As long as the system of schools relies in part upon property taxes, it is difficult to see how the system can be “uniform” within the meaning of the constitution where local taxing authority of school districts of the same type is made non-uniform based upon levies of other unrelated taxing districts. (See examples set out in response to Question 4.)

Likewise, Idaho Constitution, art. 3, § 19, provides in pertinent part:

The legislature shall not pass local or special laws in any of the following enumerated cases, that is to say:

...

For the assessment and collection of taxes.

This provision does not require identical treatment under tax laws. The legislature may adopt various classifications for taxation provided the classifications are not arbitrary, capricious or unreasonable. As the Idaho Supreme Court held in the tax case of *Sun Valley Co. v. City of Sun Valley*, 109 Idaho 424, 429, 708 P.2d 147 (1985):

Art. 3, § 19 of the Idaho Constitution prohibits the legislature from enacting local or special laws in matters of taxation. This Court has held that a law “is not special when it treats all persons in similar situations alike,” *Twin Falls Clinic and Hospital Bldg. v. Hamill*, 103 Idaho 19, 26, 644 P.2d 341, 388 (1982), nor is it local “when it applies equally to all areas of the state.” *School Dist. No. 25 v. State Tax Commission*, 101 Idaho 283, 291, 612 P.2d 126, 134 (1980). *The test of whether a classification is local or special is whether the classification is arbitrary, capricious or unreasonable. Washington Court v. Paradis*, 38 Idaho 364, 369, 222 P. 775, 369 (1923).

Thus, laws for the assessment and collection of taxes will be found to be unconstitutional if the classification resulting in disparate treatment is arbitrary, capricious or unreasonable. It is unlikely that a reviewing court would find that a one percent limitation, which destroys that uniformity, would be consistent with the constitution.

The court would not be able to find a reasonable basis to support discrimination among counties, schools and cities where the discrimination is wholly unrelated to the needs or activities of those local governments and results from the budgets and levies of other unrelated taxing districts.

Thus, the one percent taxation concept is contrary to the system of local taxation and self-determination contemplated by the Idaho Constitution. It would discriminate against local governments and the communities they serve on a basis wholly unrelated to their needs or desires. Idaho's system of property taxation was not designed to allow one political subdivision to dominate or eliminate the financial wherewithal of another, especially without the input of all persons impacted. Contrary to the intent of the framers of the Idaho Constitution, the One Percent Initiative would force this result.

In conclusion, the concept of the One Percent Initiative is contrary to the system of property taxation created by our constitution. The One Percent Initiative cannot be implemented without dismantling the system of local property taxation under which Idaho has functioned for the last century. Dismantling the system is legally possible. It is conceivable, for example, that certain functions currently under local control could be shifted to the state. It is also conceivable that all local governmental units might be given alternative taxing authority such as income tax authority.

The critical point is that the language of the One Percent Initiative is aimed only at limiting property taxation. However, it cannot be implemented without dismantling the property tax system in effect since statehood. The public will vote upon the initiative. It is entitled to know that the initiative would dismantle and not merely limit our property tax system.

QUESTION 7.

The Right to Place the Initiative on the Ballot.

Your final question is whether the One Percent Initiative may be put on the ballot for the 1992 election despite the fact that it is so fatally flawed that it would not stand up under a court challenge. This precise question was addressed by the Idaho Supreme Court in the case of *Associated Taxpayers of Idaho v. Cenarrusa*, 111 Idaho 502, 725 P.2d 526 (1986). The court held:

In brief, our Constitution guarantees our people the right to *propose* legislation through the initiative process. That right is not circumscribed or limited to "good" legislation or "constitutional" legislation. The voters may or may not *enact* the proposed legislation. If enacted it may be repealed by the next representative legislative session. . . .

111 Idaho at 505 (emphasis in original).

Thus, it is clear that Idaho voters have a right to vote on any proposed initiative, regardless of whether it is so poorly drafted as to be fatally flawed or even unconstitutional.

AUTHORITIES CONSIDERED:

1. *United States Constitution:*

Article I, § 10.

2. *Idaho Constitution:*

Art. 2, § 1.

Art. 3, § 19.

Art. 6, § 1.

Art. 7, § 4.

Art. 7, § 5.

Art. 7, § 6.

Art. 8, § 3.

Art. 9, § 5.

3. *Idaho Statutes:*

Idaho Code chapter 29, title 50.

Idaho Code § 6-927.

Idaho Code § 6-928.

Idaho Code § 22-2482.

Idaho Code § 31-601.

Idaho Code § 31-602.

Idaho Code § 31-867.

Idaho Code § 31-1420.

Idaho Code § 31-1421.

Idaho Code § 31-1608.

Idaho Code § 31-3503.

Idaho Code § 31-3901.

Idaho Code § 31-3908.

Idaho Code § 33-804.

Idaho Code § 34-435.

Idaho Code § 34-1809.

Idaho Code § 40-808.

Idaho Code § 42-3202.

Idaho Code § 46-722.

Idaho Code § 50-1006.

Idaho Code § 50-2005.

Idaho Code § 50-2903(4).

Idaho Code § 50-2908.

Idaho Code § 50-2909.

Idaho Code § 50-2910.

Idaho Code § 63-105DD.

Idaho Code § 63-621.

Idaho Code § 63-624.

Idaho Code § 63-901.

Idaho Code § 63-915.

Idaho Code § 63-917.

Idaho Code § 63-918.

Idaho Code § 63-923.

Idaho Code § 63-1001.

Idaho Code § 63-1003.

Idaho Code § 63-1103.

Idaho Code § 65-103.

Idaho Code § 65-104.

4. *Idaho Cases:*

Alpert v. Boise Water Corp., 118 Idaho 136, 795 P.2d 298 (1990).

Associated Taxpayers of Idaho v. Cenarrusa, 111 Idaho 502, 725 P.2d 526 (1986).

Bailey v. Ness, 109 Idaho 495, 708 P.2d 900 (1985).

City of Grangeville v. Haskin, 116 Idaho 535, 777 P.2d 1208 (1989).

Fenton v. Board of County Commissioners, 20 Idaho 392, 119 P. 41 (1911).

Hamilton v. Village of McCall, 90 Idaho 253, 409 P.2d 393 (1965).

Miller v. Miller, 113 Idaho 415, 745 P.2d 294 (1987).

Oregon Shortline Railroad Company v. Gooding County, 33 Idaho 452, 196 P. 196 (1921).

School Dist. No. 25 v. State Tax Commission, 101 Idaho 283, 612 P.2d 126 (1980).

State v. Nelson, 36 Idaho 713, 213 P. 358 (1923).

Sun Valley Co. v. City of Sun Valley, 109 Idaho 424, 429, 708 P.2d 147 (1985).

Twin Falls Clinic and Hospital Bldg. v. Hamill, 103 Idaho 19, 644 P.2d 341 (1982).

Washington Court v. Paradis, 38 Idaho 364, 222 P. 775 (1923).

5. *Other Cases:*

Amador Valley Joint Union High School District v. State Board of Equalization, 22 Cal. 3d 208, 583 P.2d 1281 (1978).

Energy Reserves Group v. Kansas Power and Light, 459 U.S. 400 (1982).

Gord v. Salt Lake City, 434 P.2d 449 (Utah 1967).

United States Trust Co. v. New Jersey, 431 U.S. 1 (1977).

6. *Other Authorities:*

Constitutional Convention Proceedings, Vol. II, p.1659.

DATED this 25th day of November, 1991.

LARRY ECHOHAWK
Attorney General
State of Idaho

Analysis by:

David G. High
Deputy Attorney General
Chief, Civil Litigation Unit

¹ At the outset, we note a basic flaw in the wording of section 2 of the One Percent Initiative. Stripped to its essentials, this section states that, "Cities, Counties, and taxing districts, . . . may impose special taxes. . . on such cities, counties and taxing districts." This makes no sense. Cities, counties and taxing districts simply do not impose taxes, special or otherwise, on cities, counties and taxing districts. Any attempt to impose taxes on themselves would violate art. 7, § 4, of the Idaho Constitution, which provides that all public property is exempt from taxation.

² Nor is the State Tax Commission empowered under existing law or under the One Percent Initiative to adjust or correct the levies it has disapproved or that a district court has set aside.

³ The mechanism presented here is over-simplified. Even if counties were given all authority to apportion taxes within the county, a residual problem would exist for all multi-county districts. At best, a county can be the tax czar for its own county; it can have no authority beyond its borders to set taxes in adjacent counties. The One Percent Initiative has no solution to this problem of apportioning taxes among multi-county taxing districts.

⁴ As noted above, an across-the-board proportionate reduction is only one possible scenario. The One Percent Initiative does not mandate this outcome. If counties are truly empowered to “apportion” taxes and bring them down to one percent of market value, then they are free to cut taxes in any way they see fit.

⁵ The adjustment is by one percent divided by the total levy. In this case, $0.0100 \div 0.0134 = 0.7462686$.

⁶ It should take little imagination to visualize the extreme pressures that will be exerted on local public officials once it becomes known that the budgets they submit will inevitably be scaled down by unrelated budgeting decisions in other taxing districts. The One Percent Initiative would create an incentive to protect against this anticipated scale-down by submitting inflated budget requests.

ATTORNEY GENERAL OPINION NO. 91-10

TO: Mr. Gary Bermeosolo, Administrator
 Division of Veterans Services
 Department of Health and Welfare
 Idaho Veterans Home
 STATEHOUSE MAIL

Per Request for Attorney General's Opinion

QUESTION PRESENTED:

Are the durational residency requirements which Idaho Code §§ 65-203 and 66-901 place on Idaho veterans to determine eligibility for emergency relief assistance and admission to a state veterans' home constitutional?

CONCLUSION:

The durational residency requirements contained in Idaho Code §§ 65-203 and 66-901 are unconstitutional because they impinge on the fundamental right to migrate and because they deny newcomer resident veterans equal protection of the law.

ANALYSIS:

Idaho Code §65-203 defines "veteran" for the purposes of providing emergency relief and public assistance. It states:

65-203. "Veteran" defined. The word veteran as used in this chapter shall include any honorably discharged person *who was an actual resident of the state of Idaho for a period of at least three (3) months immediately before his or her entry into the armed forces of the United States, or who has been an actual resident of the state of Idaho for a period of at least three (3) years next preceding the date of his or her application for relief and who was regularly enlisted, drafted, inducted or commissioned and who served on active duty in the armed forces of the United States at some time during any period of war recognized by the United States department of veterans affairs for the purpose of awarding federal veterans benefits as may be defined in title 38, U.S. code, chapter 1, section 101(11); or, who, being a citizen and resident of the state of Idaho, at the time of his or her entry therein, or who has been an actual resident of the state of Idaho for at least three (3) consecutive years immediately preceding the date of his or her application for relief, served on active duty in the naval, military or air forces of any of the governments associated with the*

United States during said periods; provided, that no person shall be entitled to any benefits under this chapter (a) who being in the armed forces of the United States or of any of the governments associated with the United States during said periods, refused on conscientious, political, or other grounds, to be subject to military discipline or unqualified service; or (b) who being in such service was separated therefrom under circumstances amounting to dishonorable discharge or discharge without honor; provided, however, that nothing in this chapter contained shall prevent said Idaho veterans affairs commission from rendering every possible aid and assistance to any honorably discharged veteran, or his or her dependents, except grants of direct relief shall be confined to veterans and their dependents as defined herein. Any aid or assistance, which is determined by the commission to be duplicated in any manner by any other agency or organization authorized by the veterans administration, may not be rendered by said commission. (Emphasis added.)

Idaho Code §66-901 provides the eligibility requirements for admission to an Idaho state veterans' home. It states:

66-901. Establishment of homes. There shall be established in the department of health and welfare in this state homes for veterans which shall hereafter be known and designated as Idaho State Veterans Homes, which institutions shall be homes for honorably discharged male and female veterans who had actual service during any war or conflict officially engaged in by the government of the United States and for members of the state national guard disabled while in the line of duty who did not refuse military duty on account of conscientious objection; provided, that before a person is admitted to a home *he shall have been a bona fide resident of this state for not less than two (2) years prior to making application for admission thereto. But such residence shall not be required of any person who, at the time of his enlistment or induction into such service, was a bona fide resident of this state.* (Emphasis added.)

Together, these two statutes govern eligibility for emergency relief, public assistance and admission to medical and nursing home care in an Idaho state veterans' home. Under their terms, unless a veteran was an Idaho resident at the time of entry into the armed services, he is denied emergency relief and public assistance if he has not been an Idaho resident for three years, and he is denied admission to a veterans' home if he has not been an Idaho resident for two years. This is so even if he is a bona fide resident at the time he applies for the services at issue. By placing these durational residency requirements upon veterans, Idaho Code §§65-203 and 66-901 unconstitutionally burden the right to migrate and constitute a denial of equal protection of the laws.

The United States Supreme Court has repeatedly addressed state laws that, by classifying residents according to the time they establish residence, result in the unequal distribution of rights and benefits among otherwise qualified bona fide residents. See, e.g., *Attorney General of N.Y. v. Soto-Lopez*, 476 U.S. 898 (1986); *Zobel v. Williams*, 457 U.S. 55 (1982); *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974); and *Shapiro v. Thompson*, 394 U.S. 618 (1969). In analyzing these durational residency statutes, the Court has relied upon both the equal protection clause of the Fourteenth Amendment and the right to migrate. See *Soto-Lopez*, 476 U.S. at 901-904. However, as the Court has noted, regardless of the label it places upon its analysis -- right to migrate or equal protection -- the standard of review is the same. Because the right to migrate is fundamental, if a durational residency requirement burdens that right, the requirement will be strictly scrutinized and must be justified by a compelling state interest. *Id.* at 904, n. 4.

While the criteria used to determine whether the right to migrate has been burdened are not entirely clear, it appears the Supreme Court will find the right has been burdened if a durational residency requirement results in either a delay of “a very important” right or benefit or a permanent deprivation of a substantial right or benefit. *Id.* at 907-908. The Supreme Court has characterized important benefits and rights as those encompassing the “necessities of life.” Thus, in *Shapiro v. Thompson*, *supra*, durational residency requirements affecting welfare assistance were struck down. Likewise, in *Memorial Hospital v. Maricopa County*, *supra*, a one-year residency requirement affecting nonemergency hospitalization and medical care for the indigent was held unconstitutional. The Supreme Court has not defined a substantial right. However, the term appears to be broad, as both points on a civil service exam and dividends derived from a state’s natural resources have been held to fall within its scope. See *Soto-Lopez*, *supra*, and *Zobel v. Williams*, *supra*.

In our case, Idaho Code §§ 65-203 and 66-901 cause newcomer veteran residents up to three years’ delay in receiving emergency relief and public assistance and up to two years’ delay in gaining admission to an Idaho veterans’ home. The Supreme Court has already held that medical care and assistance to the financially needy are necessities of life and therefore important benefits. *Shapiro*, *supra*, and *Memorial Hospital*, *supra*. The benefits affected by Idaho Code §§ 65-203 and 66-901 are sufficiently akin to those at issue in *Shapiro* and *Memorial Hospital* that they, too, qualify as “important.” Therefore, Idaho Code §§ 65-203 and 66-901 should be strictly scrutinized to determine if they are constitutional.

In order to withstand this level of scrutiny, the statutes must be justified by a compelling state interest. *Soto-Lopez*, *supra*, at 904. It is unlikely this can be demonstrated. In *Shapiro* and *Memorial Hospital*, the Supreme Court rejected numerous arguments supporting durational residency requirements affecting welfare

assistance and medical care for the poor, including the fiscal integrity of state welfare programs, facilitating planning of a welfare budget, and the provision of an objective test of residency.

Added to this is the Court's analysis in *Soto-Lopez, supra*, where it addressed a durational residency requirement which permanently deprived newcomer New York veterans of a substantial right -- points on a civil service exam. There, the Court remarked that veterans serve the "nation as a whole" and that states benefit from the contributions of *all* service personnel. *Id.* at 911. The Court went on to reject every argument offered by New York to support the durational residency requirement and declared the requirement unconstitutional. *Id.* In short, it is our opinion that a court is unlikely to find that applying additional residency requirements to distinguish between different groups of bona fide resident veterans in allocating emergency relief, public assistance and veterans' home services furthers any compelling state interest.

SUMMARY:

The durational residency requirements contained in Idaho Code §§ 65-203 and 66-901 temporarily deny some bona fide resident veterans important benefits. In so doing, the statutes burden the fundamental right to migrate. Consequently, if challenged, they would be strictly scrutinized by a court and would only be found constitutional if they were justified by a compelling state interest. It is our opinion that these statutes could not be found to further a compelling state interest. Therefore, they violate the equal protection clause of the Fourteenth Amendment and unconstitutionally impinge on the fundamental right to migrate.

AUTHORITIES CONSIDERED:

1. *Constitutions*

United States Constitution, Fourteenth Amendment.

2. *Statutes*

Idaho Code § 65-203.

Idaho Code § 66-901.

3. *Cases*

Attorney General of New York v. Soto-Lopez, 476 U.S. 898 (1986).

Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974).

Shapiro v. Thompson, 394 U.S. 618 (1969).

Sosna v. Iowa, 419 U.S. 393 (1975).

Starns v. Malkerson, 401 U.S. 985 (1971).

Zobel v. Williams, 457 U.S. 55 (1982).

DATED this 19th day of December, 1991.

LARRY ECHOHAWK
Attorney General
State of Idaho

ANALYSIS BY:

Michael DeAngelo
Margaret R. Hughes
Deputy Attorneys General

¹ Worth noting is that the Court has upheld durational residency requirements affecting access to divorce courts and college tuition. See *Sosna v. Iowa*, 419 U.S. 393 (1975) (upholding a one-year residency condition for maintaining a divorce action); *Starns v. Malkerson*, 401 U.S. 985 (1971), *summarily aff'd* 326 F. Supp. 234 (Minn. 1970) (sustaining domicile requirement which incorporated one-year waiting period for resident tuition at state university).

Topic Index
and
Tables of Citations
OFFICIAL OPINIONS
1991

1991 OFFICIAL OPINIONS INDEX

TOPIC	DATE	PAGE
CITIES		
City of Sun Valley may require vendor of ski lift tickets and retailer of building materials to collect local option sales tax at time of sale to remit same to city	91-6	70
CORRECTIONS		
Commission for Pardons and Parole may schedule initial parole hearing prior to expiration of inmate's determinate sentence so inmate may be paroled on date he becomes eligible for parole	91-8	96
ELECTIONS		
Voting Rights Act and Fourteenth Amendment require that reapportionment plan provide substantially equal legislative representation and not discriminate against racial or language minorities	91-4	45
Idaho Constitution imposes requirements on creation of legislative districts	91-4	45
FETAL HEALTH		
State's compelling interest in protecting potential human life from fetal drug abuse will override woman's interest in personal privacy and permit some degree of state intervention	91-1	5
PARDONS AND PAROLE		
Commission for Pardons and Parole may schedule initial parole hearing prior to expiration of inmate's determinate sentence so inmate may be paroled on date he becomes eligible for parole	91-8	96
PUBLIC LANDS		
State Land Board may look to county land use restriction ordinances for advice and recommendation in determining future use and administration of lands within county but need not abide by those county ordinances	91-3	36

TOPIC	DATE	PAGE
REVENUE AND TAXATION		
H.B. 92, affecting computation of income taxes paid by nonresidents, may not withstand separation of powers challenge	91-2	21
H.B. 94, limiting production exemption for sales and use taxes, may not withstand separation of powers challenge	91-2	21
City of Sun Valley may require vendor of ski lift tickets and retailer of building materials to collect local option sales tax at time of sale to remit same to city	91-6	70
One Percent Initiative requirement of super-majority of two-thirds of qualified electors in any given district considering "special tax" is unenforceable as there is no means of determining number of qualified electors in a given district	91-9	98
An initiative, however badly drafted or facially unconstitutional, may be placed on ballot for consideration by voters	91-9	98
VETERANS		
Durational residency requirements for access to medical care for veterans are unconstitutional	91-10	125
WATER RESOURCES		
Changes to state water plan are not changes under art. 15, sec. 7, of Idaho Constitution	91-5	61
Legislature is free to enact specific law approving, amending or rejecting Comprehensive State Plan: Payette River Reaches	91-5	61
Water District 1 (Committee of Nine) is instrumentality of state charged with assisting Department of Water Resources' duty to provide for distribution of public waters	91-7	81

**1991 OFFICIAL OPINIONS
UNITED STATES CONSTITUTION CITATIONS**

ARTICLE & SECTION	OPINION	PAGE
First Amendment	91-1	5
Fourth Amendment	91-1	5
Fourteenth Amendment	91-4	45
Fourteenth Amendment	91-10	125
Fifteenth Amendment	91-4	45
ARTICLE I		
§ 2	91-4	45
§ 10	91-9	98
§ 10	91-2	21

**1991 OFFICIAL OPINIONS
IDAHO CONSTITUTION CITATIONS**

ARTICLE & SECTION	OPINION	PAGE
ARTICLE 1		
§ 16	91-2	21
ARTICLE 2		
§ 1	91-2	21
§ 1	91-9	98
ARTICLE 3		
§ 1	91-5	61
§ 2	91-4	45
§ 4	91-4	45
§ 5	91-4	45
§ 19	91-9	98
ARTICLE 6		
§ 1	91-9	98
ARTICLE 7		
§ 4	91-9	98
§ 5	91-9	98
§ 6	91-9	98

ARTICLE & SECTION	DATE	PAGE
ARTICLE 8		
§ 3	91-9	98
ARTICLE 9		
§ 5	91-9	98
§ 7	91-3	36
§ 8	91-3	36
§ 10	91-3	36
ARTICLE 11		
§ 12	91-2	21
ARTICLE 15		
§ 7	91-3	36
§ 7	91-5	61

1991 OFFICIAL OPINIONS UNITED STATES CODE CITATIONS

CODE	OPINION	PAGE
16 U.S.C. § 803 (1988)	91-5	61
42 U.S.C. § 1973 (1982)	91-4	45

1991 OFFICIAL OPINIONS IDAHO CODE CITATIONS

CODE	OPINION	PAGE
5-310	91-1	5
5-311	91-1	5
6-927	91-9	98
6-928	91-9	98
15-2-108	91-1	5

CODE	OPINION	PAGE
15-2-302	91-1	5
16-1601, <i>et seq.</i>	91-1	5
16-1602(e)	91-1	5
19-2513	91-8	96
22-2482	91-9	98
28-2-401	91-6	70
31-601	91-9	98
31-602	91-9	98
31-867	91-9	98
31-1420	91-9	98
31-1421	91-9	98
31-1608	91-9	98
31-3503	91-9	98
31-3901	91-9	98
31-3908	91-9	98
32-102	91-1	5
33-804	91-9	98
34-435	91-9	98
34-601	91-4	45
34-1809	91-9	98
40-808	91-9	98
41-513	91-7	81
41-619	91-7	81
42-106	91-7	81
42-601	91-7	81
42-602	91-7	81
42-604	91-7	81
42-605	91-7	81
42-605(1)	91-7	81
42-606	91-7	81
42-607	91-7	81
42-608	91-7	81
42-611	91-7	81
42-612	91-7	81
42-612, <i>et seq.</i>	91-7	81
42-613	91-7	81
42-613A	91-7	81
42-615	91-7	81
42-618	91-7	81
42-619	91-7	81

CODE	OPINION	PAGE
42-1734, <i>et seq.</i>	91-5	61
42-1752	91-7	81
42-1760	91-7	81
42-1761	91-7	81
42-1762	91-7	81
42-1765	91-7	81
42-3202	91-9	98
46-722	91-9	98
50-1006	91-9	98
50-1043	91-6	70
50-1044	91-6	70
50-1046	91-6	70
50-2005	91-9	98
Title 50, chapter 29	91-9	98
50-2903(4)	91-9	98
50-2908	91-9	98
50-2909	91-9	98
50-2910	91-9	98
Title 57, chapter 1	91-7	81
57-105	91-7	81
57-110 (Supp. 1990)	91-7	81
57-127 (Supp. 1990)	91-7	81
57-128 (Supp. 1990)	91-7	81
57-130 (Supp. 1990)	91-7	81
58-132	91-3	36
58-133	91-3	36
63-105DD	91-9	98
63-621	91-9	98
63-624	91-9	98
63-901	91-9	98
63-915	91-9	98
63-917	91-9	98
63-918	91-9	98
63-923	91-9	98
63-1981	91-9	98
63-1003	91-9	98
63-1103	91-9	98
63-3027A	91-2	21
Title 63, chapter 36	91-6	70
63-3601	91-6	70

CODE	OPINION	PAGE
63-3609	91-6	70
63-3612	91-6	70
63-3619	91-6	70
63-3621	91-6	70
63-3622D	91-2	21
65-103	91-9	98
65-104	91-9	98
65-203	91-10	125
66-901	91-10	125
67-1210	91-7	81
67-5204	91-7	81
67-6501	91-3	36
67-6508	91-3	36
67-6523	91-3	36
67-6524	91-3	36
67-6528	91-3	36
72-102(8)(c)	91-1	5
73-116	91-7	81

ATTORNEY GENERAL'S SELECTED INFORMAL GUIDELINES FOR THE YEAR 1991



Larry EchoHawk
Attorney General
State of Idaho

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

January 17, 1991

Robert L. Ford
Division of Financial Management
STATEHOUSE MAIL

**THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE
ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE**

Re: Racing Commission and Centennial Futurity Account Expenses

Dear Mr. Ford:

This is in response to your questions regarding procedures which might be followed to pay Racing Commission expenses and expenses of the Centennial Futurity Account. I understand that this last summer, the Racing Commission and the Centennial Futurity Account both faced expenses exceeding the revenues available. This fall, you worked with the Racing Commission to get the budget in balance for the fiscal year. This required various cuts in personnel and other expenses. Approximately \$40,000 of outstanding bills were paid by means of a transfer of funds from a law enforcement account. I understand these funds will be repaid to the Department of Law Enforcement account within the fiscal year. However, I understand there are also additional bills outstanding of approximately \$37,000, most of which are attributable to the Centennial Futurity Account.

You have asked if the Centennial Futurity Account bills which exceed the amount of revenue of the account are legal obligations of the state. You have also asked how the state might pay creditors now from an advance of funds, with the advance being repaid from racing revenues of the next fiscal year.

On several occasions, the Idaho Supreme Court has considered situations in which the state incurred obligations beyond funds available or beyond the amount of the appropriation available. For example, in the early case of *Winters v. State*, 5 Idaho 198, 47 P. 855 (1897), the court considered the state's obligation to pay expenses beyond the appropriation. The state had appropriated funds for a state wagon road. During construction, two portions of the road which had been completed were washed out by high waters. The state road commissioner requested the contractors to rebuild the portions destroyed. However, this resulted in a project cost exceeding the funds available. The court held that the legislature was authorized to make an appropriation sufficient to pay the contractors for the extra work and recommended that the legislature do so on the basis that the payment would be equitable and just.

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

In *Daniels v. State*, 15 Idaho 640, 98 P. 853 (1908), the Idaho Supreme Court considered a claim by the superintendent of the state capitol grounds. He was not paid a portion of his salary, presumably due to a lack of funds. The court held that since he had performed services for the state, the state, as a matter of right, ought to pay for such services. The court recommended that the legislature make an appropriation for the payment of his salary.

In *Moscow Hardware Company, Ltd. v. Regents of the University of Idaho*, 19 Idaho 420, 113 P. 731 (1911), the Idaho Supreme Court considered contract claims against the University of Idaho arising from construction of an agricultural building. The court held that as to contract claims for which there were duly appropriated funds to pay the claims, the district court had authority to hear the claim. However, to the extent the contract obligations exceeded the funds available, it was only proper to recommend the payment to the legislature.

The approach taken by the Idaho Supreme Court in these early cases reflects a respect for the appropriation process and a recognition of the state's need to budget and expend its funds in an orderly manner. However, the cases also reflect the policy of the state to pay its bills, once funds can be made available. The cases make it clear that the state has at least a moral obligation to pay its bills, even if payment must be delayed due to a lack of funds or appropriation.

As I understand it, the problem we face at the moment is that the Racing Commission does not have sufficient funds to both continue its scaled down operations this year and to pay outstanding bills. I understand that by continuing its scaled down operations next year, the Racing Commission could repay the bills next year. Idaho Code § 54-2514 should also be considered in relation to the question. That section is aimed at making the Racing Commission a self supporting agency and provides in pertinent part, "No salary, wages, expenses or compensation of any kind shall be paid by the State of Idaho for, or in connection with, the work of the Commission in carrying out the provisions of this act."

One possible solution would be an appropriation during this fiscal year to the Racing Commission and an appropriation from the Racing Commission next fiscal year. For example, the legislature could identify some fund which is anticipated to have a surplus at the end of this fiscal year. An appropriation could be made from that fund to the Racing Commission this fiscal year. Assuming the legislature desires to continue the policy of making the Racing Commission self supporting, the legislature could also make an appropriation from the Racing Commission next fiscal year, sufficient to repay the fund from which monies were received this year.

If this approach is used, the appropriation to the Racing Commission this fiscal year

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

should provide that it is exempt from the provisions of Idaho Code § 54-2514 to avoid a conflict with that section. In my opinion, such an approach would accomplish the goals of paying state creditors as soon as possible, respecting the appropriation process, and requiring the Racing Commission to be self supporting.

If you have any questions regarding this letter, please feel free to contact me.

Sincerely,

DAVID G. HIGH
Deputy Attorney General
Chief, Business Regulation and State Finance Division

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

February 5, 1991

Honorable Rex L. Furness
Idaho State Senate
STATEHOUSE MAIL

THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE

Dear Senator Furness:

You have requested the opinion of this office on the question of whether an individual or corporation can publish the Idaho Code statutes alone without the annotations.

This matter is governed by chapter 2, title 73, of the Idaho Code, which creates the Idaho Code Commission. The copyright provision of the Act states:

Copyright of all compilations shall be taken by and in the name of the publishing company which shall thereupon assign the same to the state of Idaho, and thereafter the same shall be owned by the state of Idaho. The commission is authorized and empowered to grant the use of the copyrights of the Idaho Code published pursuant to Session Laws of 1947, Chapter 224, and of all compilations authorized by this act, in connection with the performance of its said duties and obligations.

Thus, the ultimate decision-maker regarding use of the copyright for the Idaho Code is the Idaho Code Commission. The Commission, among other things, sets the price a publisher may charge in selling Code volumes. The Commission has a fiduciary duty to maximize the benefits of the copyright to the state. As such the Commission does, on occasion, allow use of the copyright for particularized purposes. Several volumes or portions of the Code are available in pamphlet or booklet form for groups interested in specific areas of the law, e.g., the Rules of Civil Procedure, the water laws, etc.

The director of the Idaho Code Commission is Mr. Max Sheils, Ellis, Brown & Sheils, 707 N. 8th St., P.O. Box 388, Boise, Id. 83701 (208-345-7832). He is the person to contact in order to explore proposals for new uses of the copyright of the Idaho Code.

Sincerely,

JOHN J. McMAHON
Chief Deputy

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

March 5, 1991

Kermit V. Kiebert
Director
Idaho Department of Transportation
STATEHOUSE MAIL

**THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE
ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE**

Re: Idaho's Grandfather Rights for Vehicle Weight Limitations

Dear Mr. Kiebert:

You have requested a legal guideline from this office concerning Idaho's grandfather rights under 23 U.S.C. 127. This section of federal law establishes vehicle weight limitations for interstate highways. These weight limitations must be observed by a state in order for it to qualify for its annual apportionment of federal highway funds.

As background, it should be noted that both the federal vehicle weight limitations and the state vehicle weight laws regulate a vehicle's weight by the load in pounds carried on any group of two or more consecutive axles. There are also restrictions on the weight for a single axle and a single wheel gross weight. With regard to the restriction on weights for a group of two or more consecutive axles, a five-axle vehicle could have up to ten different axle combinations which would be subject to the weight limitations. The further apart the first and last axle, the greater the weight that can be carried.

23 U.S.C. 127 provides for vehicle weight limitations on the interstate system. This statute provides that one axle can carry a maximum of 20,000 pounds or the axle weight limitation in effect in a state on July 1, 1956. A tandem axle may carry a maximum of 34,000 pounds or the weight limitation for tandem axle in effect in a state on January 4, 1975. Additionally, the gross weight of the vehicle combination cannot exceed 80,000 pounds or the maximum gross weight which could have been allowed by the state on July 1, 1956.

Idaho law provides for two sets of weight limitations for vehicle combinations. First, Idaho Code § 49-1001(1) codifies the federal weight limitations up to 80,000 pounds. Vehicle combinations can operate on the interstate system at weights in excess of 80,000 pounds with an overweight permit issued pursuant to Idaho Code § 49-1004. With an overweight permit, a vehicle combination can operate on an interstate highway at 105,500 pounds. This set of weight limitations allows the vehicle combination to carry 34,000 pounds on a set of two consecutive axles eight feet apart or less.

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

The second set of weight limitations is found at Idaho Code § 42-1001(2). This section allows special commodity haulers to operate vehicle combinations on the interstate system with a tandem axle weight of 37,800 pounds. The maximum gross weight for the vehicle combination under this section is 79,000 pounds.

Your inquiry is whether Idaho law allows a combination of vehicles to operate on an interstate highway with a set of consecutive axles at the 37,800 pound weight limit provided for in Idaho Code § 49-1001(2), and an overall weight of the vehicle combination in excess of 79,000 pounds, but in compliance with the weight limitations of § 49-1001(1). For the reasons stated herein, the answer is that this type of vehicle combination is not authorized by Idaho statute or department rule. Special commodity haulers that operate a vehicle combination with two consecutive axles at 37,800 pounds are limited to an overall gross weight of 79,000 pounds while operating on interstate highways in Idaho.

1. The Federal Requirements:

23 U.S.C. 127 (a) provides in part:

This section shall not be construed to deny apportionment to any State allowing the operation within such State of any vehicles or combinations thereof which the State determines could be lawfully operated within each State on July 1, 1956, except in the case of the overall gross weight of any group of two or more consecutive axles, on the date of enactment of the Federal-Aid Highway Amendments of 1974 [enacted Jan. 4, 1975].

Thus, in order to qualify for federal highway funds, Idaho must enforce either the federal weight limitations that were in effect January 4, 1975, or July 1, 1956.

23 U.S.C. 141 states in part:

Each State shall certify to the secretary before January 1, of each year that it is enforcing all State laws respecting maximum vehicle size and weights permitted on the Federal-aid primary system, the Federal-aid urban systems, and the Federal-aid secondary system, including the Interstate System in accordance with section 127 of this title [23 U.S.C. Sec. 127].

If the secretary determines that a state is not adequately enforcing all State laws respecting such maximum vehicle size and weights, notwithstanding such a certification, the Federal-aid highway funds apportioned to such State for such fiscal year shall be reduced by amounts equal to 10 per centum of the amount which would otherwise be apportioned to such State under section 104 of this title [23 U.S.C. Sec. 104].

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

If the secretary determines that a state is not enforcing the weight limitations contained in 23 U.S.C. 127, then he is required to reduce that state's allotment of federal highway funds by ten percent. A state then has one year to make the required corrections or permanently lose ten percent of its allotted federal highway funds.

2. The Chronology of Relevant Idaho Statutes:

The Idaho weight limitation statutes were codified in title 49, chapter 9, Idaho Code, until 1988 when the chapter of the code was redesignated as chapter 10 of title 49 of the code.

The weight limitations for vehicle combinations in Idaho on July 1, 1956, were all below the federal limitations. With the exception of the state's ability to issue overweight permits (see Section 3 of this guideline), Idaho has no grandfather rights for single axle weights or the overall gross weight of a vehicle.

The second relevant date for determining Idaho's grandfather rights is January 3, 1975. A state must enforce a 34,000 pound limitation on a set of tandem axles or the weight limit in effect in that state on January 3, 1975. 23 U.S.C. 127.

Chapter 184 of the 1975 Sessions Laws became effective on January 1, 1975. This chapter of the Session Laws amended then Idaho Code § 49-901 and provided for the appropriate weight limitations for vehicles traveling on state highways, including the interstate system. This is the statute that codifies Idaho's grandfather rights for gross weight of two or more consecutive axles (tandem axles).

Idaho Code § 49-901(c), as of January 1, 1975, stated in part:

The weight limitations set forth in subsections (a) and (b) hereof shall not apply to any vehicle, motor vehicle, trailer, and/or semi-trailer, or combination thereof, engaged in the transportation of logs, pulp wood, stull, poles or piling; nor to any such vehicle engaged in the transportation of ores, concentrates, sand and gravel, and aggregates thereof, in bulk; nor to any such vehicle engaged in the transportation of agricultural commodities including livestock, but no such vehicle shall be operated on the highways of this state where the total gross weight imposed on the highway by any one (1) axle exceeds 18,900 pounds, or where the total gross weight imposed on the highway by any one (1) wheel exceeds 9,450 pounds, or where the total gross weight imposed on the highway by any group of consecutive axles exceeds the weight set forth for the respective axle spacing in the following table:

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

Distance in Feet between First and Last Axles of any Group of Axles	Allowed Load in Pounds	
	Vehicles with Three or Four Axles	Vehicles with Five or More Axles
3	37,800	37,800
4	37,800	37,800
5	37,800	37,800
6	37,800	37,800
7	37,800	37,800
8	37,800	37,800

The maximum gross weight allowed under § 49-901(c) was 79,000 pounds.

In 1986 the Idaho Legislature again amended Idaho Code § 49-901. First, the federal weight limitations were modified to allow 34,000 pounds on a tandem axle. This modification was in accord with federal amendments to 23 U.S.C. 127, P.L. 97424, 96 stat. 2123.

The 1986 grandfather rights statute also provided:

(b) The weight limitations set forth in the table above shall not apply to any vehicle, or combination of vehicles when a greater allowed weight in pounds would be permitted such vehicles under the table provided in this subsection, *except that with regard to transportation on the United States federal interstate and defense highways of this state*, the following table of allowable weights shall apply only to vehicles engaged in the transportation of logs, pulp wood, stull, rough lumber, poles or piling; or to any such vehicle engaged in the transportation of ores, concentrates, sand and gravel and aggregates thereof, in bulk; or to any such vehicle engaged in the transportation of agricultural commodities, including livestock:

Distance in feet between the extremes of any group of 2 or more consecutive axles	Allowed Load in Pounds	
	Vehicles with Three or Four axles	Vehicles with Five or more axles
3	37,800	37,800
4	37,800	37,800
5	37,800	37,800
...		
47 and over		79,000

Idaho Code § 49-901(b) (emphasis added).

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

In 1988 this code section was again amended. It was redesignated as 49-1001(2). The only other modification was the removal of some redundant references in the weight tables.

In summary, the statutory scheme of allowing a vehicle to comply either with the federal vehicle weight limitations or with the state vehicle weight limitations that were in effect on January 1, 1975, has not been modified for vehicles operating on the interstate. With regard to interstate highways, special commodity haulers are limited to the 79,000 pound limitation and 37,800 pounds on two consecutive axles twelve feet or less apart.

3. *Overweight Permits*

In addition to the vehicle weight laws discussed above, the Idaho Transportation Board was authorized to issue permits for overweight loads.

Idaho Code § 49-905, which was in effect on January 1, 1975, states in pertinent part:

Upon application in writing to *the Idaho Transportation Board* or other proper authorities in charge of, or having jurisdiction over a public highway, such board or authorities *may in their discretion issue a special permit to the owner or operator of any vehicle allowing heavier or wider loads than permitted by law to be moved or carried over and on the public highways and bridges*, or allowing more than one (1) trailer to be drawn by a motor vehicle; and may also issue such special permit to increase the permissible weights per inch of width of tire and may also permit the use of corrugations on the periphery of the movable tracts of traction engines or tractors propelled not by wheels resting upon the ground but by flexible bands or chains. Such special permits shall be in writing and may limit the time of use and operation over the particular highways and bridges which may be traversed and may contain such special conditions and require such undertaking or other security as the said Idaho Transportation Board or other proper authority shall deem to be necessary to protect the public highways and bridges from injury, or provide indemnity for any injury to said public highways and bridges or to persons or property resulting from such operation. All such special permits shall be carried in the vehicles to which they refer and shall upon demand be opened to the inspection of any peace officer, any authorized agent of the Idaho Transportation Board or any officer or employee charged with the care or protection of the public highways. It shall be unlawful for any person to violate, or to cause or permit to be violated, the limitations or conditions of such special permits and any such violation shall be deemed for all purposes to be a violation of the provisions of this chapter. (Emphasis added.)

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

The only change in Idaho Code § 49-905 between July 1, 1956, and January 4, 1975, was a change in name from the Commissioner of Public Works to the Idaho Transportation Board. In 1988 Idaho Code § 49-905 was redesignated as § 49-1004. Some minor grammatical changes were made to this section of the code. The substance of the overweight permit statute was not modified.

It is the state's ability to issue overweight permits as of July 1, 1956, that allows vehicle combinations to operate on the interstate at a maximum gross weight of 105,500 pounds.

In *State ex rel. Dick Irvin, Inc. v. Anderson*, 525 P.2d 564 (Mont. 1974), the Montana Supreme Court reviewed the grandfather rights provision of 23 U.S.C. 127 as it relates to Montana's weight laws. After quoting 23 U.S.C. 127 at length, the Montana Supreme Court stated:

The foregoing section prescribes the limitations which must be observed by the states in order for them to qualify for their annual apportionment of federal funds for highway purposes. The section reveals the following criteria for determination of permitted sizes and weights on the interstate system:

a. The state laws in effect on July 1, 1956, must be examined for the purpose of determining whether the maximums prescribed in the federal code or the maximums prescribed by state law apply. If the state law permitted greater maximums as of July 1, 1956, these are controlling, otherwise, the federal maximum prevails.

b. *If the state law in effect on July 1, 1956, authorized variations from the maximums, by special permit or otherwise, such variations are also permitted by the federal statutes to be authorized over the interstate system.* Furthermore, a state statute passed after July 1, 1956, setting forth procedures or limitations with respect to such variations may also apply to the interstate system, if the state statutes in effect on July 1, 1956, were broad enough to allow such operations. This is made clear by the following provision of Title 23, Section 127, U.S.C.:

"This section shall not be construed to deny apportionment to any State allowing the operation within such State of any vehicles or combinations thereof that could be lawfully operated within such State on July 1, 1956."

It thus becomes necessary for us to examine the Montana laws in effect on July 1, 1956, to determine, first, the weight limitations having general applicability at that time, and second, *the extent to which variations from these weight limitations were authorized by special permit at that time.* (Emphasis added.)

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

525 P.2d at 567-568. The *Anderson* decision was decided prior to federal-aid highway amendments of 1974.

Applying the rationale of the court in *Anderson*, the Transportation Board has broad discretion in issuing overweight permits for vehicle combinations operating on interstate highways. Section 49-1004, Idaho Code, places no limitation on the Board's authority to issue overweight permits.

4. *Analysis:*

Your inquiry is whether Idaho Code § 49-1001(2) allows special commodity haulers the option of complying with Idaho Code § 49-1001(1) or § 49-1001(2). In other words, is it permissible for a combination of vehicles to have one set of two or more consecutive axles comply with the weight table in subsection (1) and another set of two or more consecutive axles comply with subsection (2) of the statute?

The first sentence of Idaho Code § 49-1001(2), which was added in 1986, states in part:

The weight limitations set forth in the table above shall not apply to any . . . combination of vehicles when a greater weight in pounds would be permitted such vehicles under the table provided in this subsection, except that with regard to transportation on the United States federal interstate and defense highways of this state the following table of allowable weights shall apply only to [special commodity haulers].

Under this statute, a combination of vehicles hauling special commodities can comply with either weight table on non-interstate highways. On interstate highways, however, a special commodity hauler is limited to the weight limits in Idaho Code § 49-1001(2).

The only change accomplished by the 1986 amendment was to allow special commodity haulers the right to use either weight table in the weighing of two or more consecutive axles *on non-interstate highways*. The term, "National System of Interstate and Defense Highways" means interstate highways. 23 U.S.C. 101(a) and 23 U.S.C. 103(e). 23 U.S.C. 127 is only concerned with Idaho's weight limitations on interstate highways.

With reference to Idaho's special commodity weight limitations on the interstate highways, it is our opinion that there has been no change from January 1, 1975, to the present. It is our opinion that Idaho's vehicle weight laws with respect to the United States federal interstate and defense highways are in compliance with 23 U.S.C. 127.

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

Additionally, it should be noted that the legislative intent of the law that went into effect on January 1, 1975, provides in part as follows:

It is also the finding of the legislature that the economy of the state of Idaho is largely dependent upon products of the forests, agriculture, livestock, mining and related products produced from the earth which must generally be transported by motor vehicles operating upon the highways within the state for reasons that water, rail and air transportation are available to only a few areas of the state of Idaho, and the above mentioned products are generally loaded at locations where weighing devices are not available, and fairness, justice and the public interest dictate that vehicles transporting the products mentioned in § 49-901(c), Idaho Code, be given a reasonable and adequate weight tolerance as is provided when transporting such products, and, in order that all parts of the state of Idaho have at their disposal adequate transportation facilities, it is necessary to utilize the interstate and national defense highways constructed under the Federal Aid Highway Act of 1956.

Part of Idaho's grandfather rights for vehicle weight limitations thus includes a reasonable and adequate weight tolerance for special commodity haulers operating on the interstate system.

Additionally, the law in effect on July 1, 1956, allowed the Commissioner of Public Works (now the Idaho Transportation Board) to issue overweight permits that would allow a vehicle or combination of vehicles to operate at a load in excess of the weight limits specified in Idaho Code § 49-1001.

Because we find that Idaho Code § 49-1001 complies with 23 U.S.C. 127, your other questions need not be addressed.

Sincerely,

JOHN J. MCMAHON
Chief Deputy Attorney General

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

March 5, 1991

Honorable Kenneth L. Robison
House of Representatives
STATEHOUSE MAIL

THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE
ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE

Re: Biennial Legislative Tour of Northern Idaho

Dear Representative Robison:

You have requested an opinion from this office regarding the legality of the biennial legislative tour of northern Idaho. This three day tour is sponsored by the North Idaho Chamber of Commerce and is provided without charge to every member of the Idaho legislature. The tour includes free air transportation, lodging, and meals. Your specific question is whether participation in the north Idaho tour would violate the Bribery and Corrupt Influence Act as amended in 1990. We conclude that it would not.

Idaho Code § 18-1356 regulates gifts to public servants. Subsection (4) relates to legislative officials:

No legislator or public servant employed by the legislature or by any committee or agency thereof shall solicit, accept or agree to accept any pecuniary benefit *in return for action on a bill, legislation, proceeding or official transaction* from any person known to be interested in a bill, *legislation, official transaction or proceeding, pending or contemplated before the legislature or any committee or agency thereof.* (Emphasis added.)

The underlined language in this section was added to the bribery statute by the Idaho legislature in 1990. In order for a gift to a legislator to be considered a violation of this section, there must now be a showing that the gift was made *in return for action on a bill or legislation*. As a statute with criminal penalties this provision must be strictly construed. *State v. Thompson*, 101 Idaho 430, 614 P.2d 970 (1980).

There have been no allegations, nor has it ever been suggested, that the efforts of the members of the North Idaho Chamber of Commerce are made in return for legislative action on their behalf. Therefore, the north Idaho tour in general does not violate Idaho Code § 18-1356(4).

Consideration must also be given to Idaho Code § 18-1359(1)(a). This section was added to the Bribery and Corrupt Influence Act in 1990 and provides:

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

(1) No public servant shall:

- (a) Without the specific authorization of the governmental entity for which he serves, use his official position or public funds or property to obtain a pecuniary benefit from sources other than lawful compensation as a public servant.

Undoubtedly, the tour is provided to the individual legislators because of their “official positions” and the monetary value of the tour is not a part of their “lawful compensation as public servants.” The issue then focuses upon whether the benefit provided to the legislators is a “pecuniary benefit” within the scope of Idaho Code § 18-1359(1)(a).

“Pecuniary benefit” is defined as follows by Idaho Code § 18-1351(7):

“Pecuniary benefit” is any benefit to a public official or member of his household in the form of money, property or commercial interests, the primary significance of which is economic gain.

It has been suggested that this section prohibits *all* benefits provided to a public servant except the actual compensation from the public body served. Taken to the extreme, this section might be read to prohibit a business or a charitable group from sponsoring coffee and donuts to public officers at public workshops and seminars. If this were the case, Idaho Code § 18-1359(1)(a) would envelop the entire chapter and lead to absurd results.

It is the opinion of this office that the legislature by enacting Idaho Code § 18-1359(1)(a) did not intend to prohibit and criminalize participation in activities such as the north Idaho tour. When construing Idaho Code § 18-1359(1)(a), attention must be given to the principle that a statute must be construed in light of its intent and purpose, *Jorstad v. City of Lewiston*, 93 Idaho 122, 456 P.2d 766 (1969), and that “a statute should be construed so that effect is given to all its provisions, so that no part thereof will be inoperative or superfluous, void or insignificant, and that one section will not destroy another.” *Norton v. Department of Employment*, 94 Idaho 924, 928, 500 P.2d 825 (1972). When travel, lodging and meals are incorporated into and combined with official activities, it is arguable that the public official is deriving a private pecuniary benefit from his official position. However, the combination of official business with conferences and social activities is a fact of modern life and it is the opinion of this office that the legislature did not intend to eliminate that reality.

The legislature’s stated intent in adding Idaho Code § 18-1359(1)(a) was to prohibit “use of government property for *private* gain.” (Emphasis added, House Bill 881, Statement of Purpose, 1990.)

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

This same legislative intent can readily be inferred from the context of the definition of “pecuniary benefit.” The definition focuses upon the public official “or member of his household” as the recipient of a benefit. In context, it seems clear that the pecuniary benefit must inure to the *private* benefit of the public officer.

This analysis is further confirmed by the title to Idaho Code § 18-1359 which identifies the conduct forbidden as: “Using public position for *personal* gain.” (Emphasis added.) In this instance the tour does not benefit the legislators’ private or personal interests. The legislators are acting in their official capacities and the public at large benefits from this educational opportunity as well as from the organizational business conducted by the legislators while on the tour.

The legislature addressed potential abuses in this regard by enacting the individual subsections of Idaho Code § 18-1356, which prohibit gifts to regulators, law enforcement officials, government officers concerned with contracts, judges and, in those instances specified, to legislators. To construe Idaho Code § 18-1359(1)(a) so broadly as to prohibit the private sponsorship of official activities would be unreasonable. The north Idaho tour is a legitimate function of the legislature. The expenses associated with the tour, if submitted on a voucher, could be financed by the state. As such, they are clearly not pecuniary benefits inuring to the legislators’ *personal* or *private* benefit. To the extent that such activities could lead to the abuse of an official’s public position, other sections of the Bribery and Corrupt Influence Act provide restrictions.

If I may be of any further assistance in this matter, please do not hesitate to contact me.

Yours very truly,

FRANCIS P. WALKER
Deputy Attorney General

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

March 15, 1991

Lydia Justice Edwards
Treasurer
State of Idaho
Statehouse
Boise, Idaho 83720

**THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE
ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE**

Re: Constitutionality of H.B. 234

Dear Ms. Edwards:

By letter dated March 13, 1991, you requested an opinion from this office regarding the constitutionality of HB 234. Pursuant to regulations promulgated by the Environmental Protection Agency petroleum retailers in Idaho must upgrade their underground fuel storage tanks. It is estimated that the average cost per petroleum retailer for this required fuel storage tank upgrading will be approximately \$40,000. (Statement of Purpose HB 234.) HB 234 proposes financial assistance for these retailers by reducing the interest rate charged by private lenders on loans for tank upgrade projects. This reduction in the interest rate will be accomplished through the establishment of an underground storage tank (UST) Upgrade Assistance Account. The purpose of this account is to repurchase loans made by private lenders and guaranteed through the United States Small Business Administration (SBA). The portion of the actual loan repurchased will not exceed the amount guaranteed by the SBA; thus, there is no risk of loss to the state. (Statement of Purpose HB 234.) In addition, in order to qualify for repurchase by the state the originating lender cannot charge more than 6% per annum on the original loan.

Your specific question is whether this proposed legislation would be contrary to Idaho Const. art. 8, § 2. For the reasons set forth below this office does not view the legislation as being contrary to the Idaho Constitution.

Art. 8, § 2, of the Idaho Constitution provides:

The credit of the state shall not, in any manner, be given, or loaned to, or in aid of any individual, association, municipality or corporation; nor shall the state directly or indirectly, become a stockholder in any association or corporation, provided, that the state itself may control and promote the development of the unused water power within this state.

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

This constitutional provision was construed by the Idaho Supreme Court in *Engelking v. Investment Board*, 93 Idaho 217, 458 P.2d 213 (1969). In that case the State Superintendent of Public Instruction challenged the constitutionality of a state statute permitting the investment of state permanent endowment funds in certain bonds, notes, convertible debt securities and common or preferred stock of private corporations. In construing art. 8, §2, of the Idaho Constitution the court stated:

[the loaning of credit clause of Idaho Const. art.8, § 2,] prohibits only loaning of the State's credit. Idaho Const. art. 8, § 2, does not prohibit the loaning of State funds. The word "credit" as used in this provision *implies the imposition of some new financial liability upon the State which in effect results in the creation of State debt for the benefit of private enterprises*. This was the evil intended to be remedied by Idaho Const. art. 8, § 2, and similar provisions in other state constitutions. Yet that particular evil is not presented by the investment of existing funds of the State, for no new State debts are created by such action.

The credit clause of Idaho Const. art. 8, § 2, is intended to preclude only State action which principally aims to aid various private schemes. As the parties have noted, the loaning of funds by the State is always presumably of some benefit to the recipient of the funds. *However, where such a benefit is merely an incidental consequence of efforts to effectuate a broad public purpose, then it cannot be said to violate the credit clause of Idaho Const. art.8, § 2.*

93 Idaho at 221, 222.

More factually on point to the present matter is *Nelson v. Marshall*, 94 Idaho 726, 497 P.2d 47 (1972). In that case the appellant filed a writ of prohibition to prevent the Idaho Water Resources Board from loaning state money to individual farmers for the development of irrigation wells pursuant to I.C. §§ 42-1754(b) & 42-1756(a). In holding that the loans did not violate art. 8, § 2, of the Idaho Constitution the Idaho Supreme Court reaffirmed its holding in *Engelking v. Investment Board*, *supra*. The court also noted the "broad public purpose" effectuated by such loans in the development of agricultural land.

Finally, in *Hansen v. Independent School District No. 1*, 61 Idaho 109, 98 P.2d 959 (1939), dealing with Idaho Const. art. 8, § 4, which is an analogous provision prohibiting political subdivisions of the state from lending credit, the court stated "it is essential that there be an imposition of *liability*, directly or indirectly, on the political body. Unless the credit or faith of respondent [public body] is obligated there is no constitutional inhibition." (Emphasis original.) 61 Idaho at 114.

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

In creating the underground storage tank upgrade assistance account HB 234 does not expose the state to liability for nonpayment of the loans. The Small Business Administration shoulders this entire risk and the state's credit is not extended in any sense.

Further, the loan repurchase enabling the reduction of interest rates charged does have a public purpose.

A public purpose is an activity that serves to benefit the community as a whole and which is directly related to the functions of government.

Idaho Water Resources Board v. Kramer, 97 Idaho 535, 559, 548 P.2d 35 (1976). The community clearly benefits from upgrading underground fuel storage tanks by reducing the potential for serious soil contamination. The benefit derived by the petroleum retailers is almost incidental in comparison to the benefit to the public in reducing pollution risks. The assistance being provided is certainly a function of government in the sense that the mandatory investment being required of the retailers is imposed pursuant to federal regulation. This legislation serves to promote compliance by the retailers with federal regulations as well as to promote the state's policy of reducing health risks associated with serious soil contamination.

If I may be of further assistance to you in this matter, please do not hesitate to call.

Yours very truly,

FRANCIS P. WALKER
Deputy Attorney General

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

April 5, 1991

William J. Douglas
Kootenai County Prosecuting Attorney
P.O. Box 9000
Coeur d'Alene, ID 83814-1971

Jeffrey A. Jones
Coeur d'Alene City Attorney
P.O. Box 489
Coeur d'Alene, ID 83814

THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE
ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE

Re: Sheriff's Requirement to Accept Prisoners

Dear Mr. Douglas and Mr. Jones:

You have asked for an opinion regarding whether a jailor may refuse to accept into the county jail a person who has been arrested by a police officer and who appears to be injured. Apparently, it has been the county's position that no arrestee is to be accepted if it appears that the person is injured, unless the arresting officer produces a document from a physician certifying his fitness for confinement. The authority for this position is found in § 15.04 of the Idaho Sheriffs' Association Jail Standards, which standards have been adopted as a Kootenai County ordinance. You have asked whether this section enables a jailor to require a police officer to transport an arrestee to a hospital. The issue apparently came to a head when a city officer tried to drop off an injured prisoner at the county jail, the jailor refused to take the individual, and the officer transported the prisoner to the hospital, where the prisoner escaped because no one was guarding him.

It is my understanding, from talking to both of you, that an underlying question is which agency must pay for the medical care of a person who is deemed to be too sick or injured to be housed in the jail. Apparently, the argument has been made that because the sheriff has no duty to accept prisoners who fit this category, the arresting agency must absorb the costs of medical treatment for the arrestee.

In 1984, the attorney general issued an opinion regarding the cost of housing prisoners in the county jail who have been arrested by city officers. In forming an opinion, the attorney general discussed the duty of the county sheriff to accept prisoners from city policemen and stated:

Idaho Code § 20-612 also makes it abundantly clear that the sheriff must accept all prisoners: "The sheriff must receive all persons committed to jail by competent authority." Despite the numerous code sections cited above showing that the sheriff has an affirmative duty to house prisoners arrested by other agencies, the dispute as to costs may lead some persons to quibble over the words "committed . . . by competent authority." The argument might be made that, all of the other code provisions notwithstanding, a sheriff has no duty to accept a prisoner from another agency until the prisoner has been *committed* by a court. Without lengthy exegesis, this position has no merit. It is true that the word "committed," while nowhere defined in the code, probably does have reference to the order of a court confining a prisoner. However, prisoners are not detained only on court order. Idaho law gives city police officers and state police officers authority to arrest criminals in the same manner as the sheriff. Idaho Code §§ 19-4804, 50-209. The process of confinement of criminal defendants is commenced in most cases by lawful arrest, which means "taking a person into custody in a case and in the manner authorized by law." Idaho Code §§ 19-601, 19-603. Moreover, in a probable cause arrest a person is charged before he is committed by any court process. It would be unreasonable for a peace officer to have the statutory authority to arrest and take into custody a law violator, but not have the authority to confine the person in jail until the person is committed by a court process, which may be from 24 to 72 hours after arrest. Idaho Criminal Rule 5(b), Idaho Code §§ 18-702, 19-615, 19-515. (Moreover, such an interpretation of Idaho Code § 20-612 would not only preclude cities and other agencies from housing prisoners in the county jail until committed by a magistrate, but it would also preclude the sheriff from housing his own prisoners there until committed by a judge! The absurdity of this logic is patent.) Police officers having the implied powers necessary in order to accomplish their lawful duties, also have the power to confine prisoners in the county jail to await first appearance without warrants or orders of confinement.

Where officers are entrusted with general powers to accomplish a given purpose, such powers include as well all incidental powers or those that may be deduced from the ends intended to be accomplished.

Cornell v. Harris, 60 Idaho 87, 93, 8 P.2d 498 (1939).

In *Lansdon v. Washington County*, 16 Idaho 618, 102 P. 344 (1909), the Idaho Supreme Court upheld a sheriff's exercise of implied powers in a case analogous to the question presented here. Having no secure facility for housing a seriously ill, female defendant, the sheriff of Washington County posted a guard outside of her hospital room. The issue was stated and answered as follows:

Can the sheriff, when the necessity arises, appoint guards and employ assistants to aid him in performing the duties of his office, and will the expenses incurred

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

thereby become a county charge? . . . Under such circumstances, in addition to the general authority expressly given by the statute to the sheriff, he is also by implication given such additional authority as is necessary to carry out and perform the duties imposed upon him by law. . . . In other words, the express authority given to the officer by statute carries with it by implication such additional authority as is necessary to efficiently execute the express authority given.

Lansdon, 16 Idaho at 623-24, 102 P. at 346.

That the sheriff is to receive prisoners before they are formally committed to jail by court order is clear from Idaho Code § 50-302A which gives a city the right to use its county's jail for "persons who are *charged* with" a law violation. This statute is silent as to any requirement that the charged person be received into jail on a court commitment.

Finally, and most significantly, giving Idaho Code § 20-612 the erroneous reading suggested above, would bring it into conflict with another statute, the command of which is unequivocal and the violation of which is punishable by imprisonment:

Every sheriff, coroner, keeper of a jail, constable or other peace officer, who wilfully refuses to receive or arrest any person charged with criminal offense is punishable by fine not exceeding Five thousand (\$5,000) and imprisonment in the county jail not exceeding one (1) year.

Idaho Code § 18-701.

In 1986, a sharply divided Idaho Supreme Court held that Idaho Code § 20-612 requires a sheriff to pay for all expenses, including medical bills, incurred in housing an arrestee, for any case involving a violation of state law. The court held that the county could not seek reimbursement from the city for those arrestees who were arrested by city police officers. *County of Bannock v. City of Pocatello*, 110 Idaho 292, 715 P.2d 962 (1986).

From these authorities, it can be seen that (1) a sheriff has an absolute duty to accept arrestees, and (2) a sheriff has the duty to pay the costs of caring for all arrestees, except for those held for violations of city ordinances.

The Idaho Jail Standards require that a jail provide basic medical care to all prisoners, and mandate that medical screening of incoming arrestees take place. Further, the jail is to have procedures in place to deal with emergencies, and must have the services of an on-call physician. However, the standards also contain the following provision:

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

Admission - 15.04

If any inmate shows signs of any illness or injury, or is incoherent, the inmate shall not be admitted to the facility until the arresting officer or committing officer has secured written documentation from facility medical personnel or a physician of examination, treatment, and fitness for confinement.

It is the opinion of this office that this section of the standards conflicts with Idaho law and cannot stand. Under art. 12, § 2 of the Idaho Constitution, county ordinances may not conflict with the general laws of the state. In such cases, the ordinance must always give way. *State v. Clark*, 88 Idaho 365, 399 P.2d 955 (1965). In this case (although it may not have been the intent of the drafters of the standards or the commissioners who promulgated the ordinance), the section clearly creates a loophole whereby a jailor may refuse to accept a prisoner based upon his subjective analysis of the state of the prisoner's health. This is contrary to state law regarding mandatory acceptance of prisoners.

For the same reasons, the jail standards cannot be used to circumvent a sheriff's duty to pay for the costs of medical care for a prisoner.

This is not to say that the jail standards as a whole are defective, or that the Kootenai County ordinance is entirely unconstitutional. Where an unconstitutional portion of an ordinance is not essential to the purpose and completeness of the ordinance as a whole, such portion will be treated by the courts as severable, thereby rendering the remainder constitutional. *Voyles v. City of Nampa*, 97 Idaho 597, 548 P.2d 1217 (1976).

It is of course in everyone's interest to ensure that an ill or injured arrestee is cared for immediately. Clearly, if a city officer has a person under arrest who is in immediate need of medical attention, an ambulance should be called or other actions must be taken to treat the person. Not only is this the humane course of action, it will guard the city against liability. However, the fact that such action is initiated by the city police officer will not relieve the sheriff from providing guards for the prisoner and from paying for the cost of medical care.

If, on the other hand, a city officer delivers such a prisoner to the door of the county jail, a jailor may not refuse to accept the person on the ground that the officer does not have a certification from a physician. Under such circumstances, the jailor must accept the prisoners and take whatever steps are appropriate to provide necessary medical treatment.

Yours very truly,

MICHAEL KANE
Deputy Attorney General
Chief, Criminal Law Division

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

April 5, 1991

J. D. Hancock
Rexburg City Attorney
12 N. Center St.
Rexburg, Idaho 83440

Dale P. Thompson
Madison County Prosecuting Attorney
130 E. Main St.
P.O. Box 70
Rexburg, Idaho 83440

THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE

Re: Apportionment of Fines and Forfeitures

Gentlemen:

You have requested an opinion from this office regarding the apportionment of fines and forfeitures pursuant to I.C. § 19-4705. I.C. § 19-4705 provides for the apportionment and distribution of all fines and forfeitures "collected pursuant to the judgment of any court of the state." For instance, I.C. § 19-4705(b) provides for the apportionment of fines and forfeitures remitted as a result of convictions for violations of fish and game laws. I.C. § 19-4705(c) provides for the apportionment of fines and forfeitures remitted for violations of state motor vehicle laws, state driving privilege laws, or state laws prohibiting driving while under the influence of alcohol, drugs or any other intoxicating substances. Where an arrest is made or citation issued by a city law enforcement officer the city receives ninety percent (90%) of the money collected. The apportionment of these funds pursuant to I.C. § 19-4705(c) is not in dispute.

The question involves the interpretation of I.C. § 19-4705(d) and § 19-4705(f). These subsections apportion fines and forfeitures for non-motor vehicles and non-fish and game law violations. These subsections provide:

(d) Fines and forfeitures remitted for violation of any state law not involving fish and games laws, or motor vehicle laws, or state driving privilege laws, or state laws prohibiting driving while under the influence of alcohol, drugs or any other intoxicating substances, shall be apportioned ten per cent (10%) to the state treasurer for deposit in the state general account and ninety per cent (90%) to the district court fund of the county in which the violation occurred.

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

....

(f) Fines and forfeitures remitted for violation of city ordinances shall be apportioned ten per cent (10%) to the state treasurer for deposit in the state general account and ninety per cent (90%) to the city whose ordinance was violated.

The City of Rexburg has incorporated by ordinance the state criminal code, title 18, Idaho Code. As such the city claims that pursuant to I.C. § 19-4705(f) the city is entitled to 90% of all fines and forfeitures remitted for all misdemeanor violations such as petty theft, disturbing the peace, assault and battery, etc. when charged by a city law enforcement officer as violations of the city's ordinances. Madison County asserts to the contrary that misdemeanor violations adopted from the state criminal code are properly classified as violations of state law and that 90% of the resulting fines and forfeitures must be remitted to the district court fund pursuant to I.C. § 19-4705(d).

The first question we must address is whether a city has the authority to enact prohibitory ordinances of the type listed above or whether the state has preempted a city's authority by enacting the criminal code. For the reasons set forth below, this office concludes that cities do have the authority to enact misdemeanor criminal ordinances and the state has not preempted this authority by enacting the state criminal code.

Idaho cities have a direct grant of police power under art.12, § 2, of the Idaho Constitution:

Any county or incorporated city or town may make and enforce, within its limits, all such local police, sanitary and other regulations as are not in conflict with its charter or with the general laws.

This grant of authority, however, is not unlimited and if a city ordinance conflicts with the general laws of the state, the ordinance is invalid. *In re Ridenbaugh*, 5 Idaho 371, 49 P. 12 (1897).

The Idaho Legislature has expressly accorded concurrent jurisdiction to municipalities in regard to misdemeanor criminal violations. I.C. § 50-302(1) provides:

Cities shall make all such ordinances, by-laws, rules, regulations and resolutions not inconsistent with the laws of the state of Idaho as may be expedient, in addition to the special powers in this act granted, to maintain the peace, good government and welfare of the corporation and its trade, commerce and industry. Cities may enforce all ordinances by fine or incarceration; provided, however, except as provided in subsection (2) of this

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

section, that the maximum punishment of any offense shall be by fine of not more than three hundred dollars (\$300) or by imprisonment not to exceed six (6) months, or by both such fine and imprisonment.

Further, the fact that the state has enacted similar prohibitory provisions does not divest municipalities from this authority to regulate local affairs. In *State v. Preston*, 4 Idaho 215, 30P.694 (1894), the defendant was convicted of violating the city of Pocatello's vagrancy ordinance. The defendant challenged the validity of the ordinance on the basis that the conduct was punishable under state law and the city had no authority to criminalize such conduct in light of the state law. The Idaho Supreme Court rejected the defendant's argument and held that the city had the authority to enact and enforce criminal ordinances notwithstanding existing state laws prohibiting the same conduct.

Similarly, in *State v. Quong*, 8 Idaho 191, 67 P. 491 (1902), the defendant was convicted of battery under a Boise city ordinance and challenged the validity of the ordinance as being contrary to state law. The Idaho Supreme Court rejected this argument and stated:

We cannot sanction this contention. The ordinance is not in conflict, but in harmony, with the general law. The authority of the city to enact police regulations, and to enforce them, where they do not contravene any general law of the state, is, under the provisions of our constitution, beyond question. The municipal government may not take from the citizen any constitutional right -- has no power to do so -- yet by the express provisions of section 2, article 12, the power to make and enforce sanitary and police regulations is expressly given to cities and towns. The object of the provision is apparent, its necessity urgent. *The burden of policing the different cities should not be thrown upon the state, nor upon the county in which the particular city in question may be situated. A prompt and efficient police service is absolutely necessary to a well-regulated and conducted city.*

8 Idaho at 194, 195 (emphasis added).

In *State v. Poynter*, 70 Idaho 438, 220 P.2d 386 (1950), the Idaho Supreme Court addressed the issue again and stated:

The state and a municipal corporation may have concurrent jurisdiction over the same subject matter and in which event the municipality may make regulations on the subject notwithstanding the existence of state regulations thereon, provided the regulations or laws are not in conflict.

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

The mere fact that the state has legislated on a subject does not necessarily deprive a city of the power to deal with the subject by ordinance.

A municipal corporation may exercise police power on the subjects connected with municipal concerns, which are also proper for state legislation. (Citations omitted.)

....

Whatever the rule may be elsewhere, it has long been the rule in Idaho that the fact that an ordinance covers the same offense as the state law does not make it inconsistent or in conflict therewith, or invalid for that reason.

70 Idaho at 441, 446. See also *State v. Musser*, 67 Idaho 214, 176 P.2d 99 (1946). Thus, it is beyond question that Idaho cities are empowered to enact similar or identical criminal ordinances to state law and share concurrent jurisdiction in the field.

Based upon the express grant of authority to regulate local affairs given to municipalities in art. 12, § 2, of the Idaho Constitution and by the Idaho Legislature in I.C. § 50-302, the city of Rexburg is empowered to enact ordinances prohibiting certain conduct and to prescribe penalties therefor. This authority is limited to misdemeanor offenses. The city cannot enact ordinances prescribing penalties for felonies as defined under state law. *State v. Poynter*, *supra*.

Madison County notes that the citations issued by the Rexburg city police generally reference the section of the Idaho Code violated without citing a specific Rexburg city ordinance. This office has found no authority that would prohibit a city from adopting the state criminal code and incorporating the provisions by reference. To the contrary, in *Town of Republic v. Brown*, 652 P.2d 955 (Wash. 1982), it was noted that the town of Republic, Washington, had adopted the state motor vehicle code by reference and the defendant was charged for violating a city ordinance as cited to the Revised Code of Washington. This reference to the Revised Code of Washington did not alter the nature of the ordinance or charged offense. The infraction was viewed as a violation of a city ordinance. From a practical standpoint no purpose would be served by requiring a city to renumber its ordinances.

We come, then, to the central question you have raised, namely, whether fines and forfeitures remitted for violations of city ordinances, which would otherwise be misdemeanors under the state criminal code, belong 90% to the city (as contended by the city of Rexburg) or 90% to the county's district court fund (as contended by Madison County). We conclude the fines and forfeitures must be apportioned to the city.

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

It has been suggested that the legislative intent in enacting I.C. § 19-4705 was to the contrary. The argument is that the distribution scheme in the subsections of the statute progressively addresses (b) fish and game violations; (c) motor vehicle violations; (d) other state law violations; (e) county ordinance violations; (f) city ordinance violations; and (g) all other violations. The distribution scheme thus seems calculated to descend from the higher to the lower units of government. Under this reading, it could be argued that the legislature did not intend to permit cities to evade the normal distribution scheme and receive a disproportionate share of funding for violations of state criminal laws by merely enacting identical criminal ordinances.

This argument is certainly a plausible interpretation of the legislature's intent. It suffers, however, from two weaknesses. First, the statute is clear and unambiguous and does not require constructive interpretation in an effort to discern legislative intent. See *Moon v. Investment Board*, 97 Idaho 595, 548 P.2d 861 (1976). Subsection (f) of I.C. § 19-4705 clearly states that “[f]ines and forfeitures remitted for violation of city ordinances shall be apportioned . . . ninety per cent (90%) to the city whose ordinance was violated.” The language is so clear it cannot be evaded.

Second, the history of this statute demonstrates that the language must be taken literally. Subsection (c) of the statute provides a complex distribution formula for violations of certain state motor vehicle laws. However, the statute was amended in 1971 to provide that 90% of such fines and forfeitures shall be apportioned to the city if the arrest on such violations is made by a city law enforcement official. We are informed by those familiar with the history of this amendment that this formula was added precisely because cities were, in fact, adopting the state motor vehicle code as a city ordinance and claiming the fines and forfeitures under the subsection (f) distribution language. It is apparent that history is now repeating itself, with cities adopting the state misdemeanor criminal code as a city ordinance. Once a city does so, it is entitled to the fines and forfeitures collected for violations of the new city ordinance under the clear language of subsection (f). This may not have been the result contemplated by the legislature in enacting I.C. § 19-4705, but it is for the legislature to correct the statute if it chooses to reverse the outcome mandated by the clear language of the statute.

Finally, we stress that this interpretation of I.C. § 19-4705(f) does not reach an absurd result from a policy point of view. Under I.C. § 50-302(A) the city must pay the costs of confinement of any person charged with or convicted of a violation of a city ordinance. The city must pay these charges regardless of whether the violator is confined in a city jail or a county jail. See *County of Bannock v. City of Pocatello*, 110 Idaho 292, 715 P.2d 962 (1986). Thus, there is logic to the conclusion that cities are entitled to their share of the fines and forfeitures for violations of city ordinances in order to defray the costs of jailing those who have violated such ordinances.

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

Yours very truly,

FRANCIS P. WALKER
Deputy Attorney General

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

April 30, 1991

Rick Laam
City Administrator
City of Orofino
217 1st St.
P.O. Box 312
Orofino, Idaho 83544

**THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE
ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE**

Re: Legal Ramifications of Serving as Legislator/City Mayor

Dear Mr. Laam:

You have requested an opinion from this office regarding legal consequences of a person concurrently serving in the Idaho Legislature and as the mayor of a municipality. For the reasons set forth below, this office can see no legal basis to prohibit an individual from holding these offices at the same time.

Unlike several other states, Idaho has no constitutional or statutory provisions prohibiting a state legislator from concurrently holding another public office. Arizona's Constitution, for example, provides:

No member of the Legislature, during the term for which he shall have been elected or appointed shall be eligible to hold any other office or be otherwise employed by the State of Arizona or, any county or incorporated city or town thereof. This prohibition shall not extend to the office of school trustee, nor to employment as a teacher or instructor in the public school system.

Art. 4, Pt. 2, § 5, Arizona Constitution. See also, art. VI, § 6, Utah Constitution; art. IV, § 13, California Constitution. The only statutory prohibitions against Idaho legislators holding separate public office is found at I.C. § 59-102. This section provides in part:

It shall be unlawful for any member of the legislature, during the term for which he was elected, to accept or receive, or for the governor, or other officials or board, to appoint such member of the legislature to, any office of trust, profit, honor or emolument, created by any law passed by the legislature of which he is a member.

This section clearly does not apply to the present matter.

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

Since there is no statutory prohibition in Idaho against an Idaho legislator holding a separate local public office, the focus then turns to whether these public positions are incompatible under the common law. The common law doctrine of incompatibility as it relates to one person holding two public offices is based upon the public policy that public service requires the discharge of official duties with undivided loyalty. Whether two separate public positions held by one individual are incompatible was addressed in *Reilly v. Ozzard*, 166 A.2d 360 (N.J. 1960). In *Reilly*, the New Jersey Supreme Court was called upon to determine whether a state legislator could also serve as a municipal attorney. In concluding that the dual office holding was permissible the court stated:

We come accordingly to the question whether the office of municipal attorney is incompatible with the office of senator. Incompatibility is usually understood to mean a conflict or inconsistency in the functions of an office. It is found where in the established governmental scheme one office is subordinate to another, or subject to its supervision or control, or the duties clash, inviting the incumbent to prefer one obligation to another. . . . There is no conflict between senator and township attorney in any of the conventional applications of the doctrine. The Legislature has no power in any judicial, executive or administrative sense to interfere with, supervise or review the performance of an incumbent in local office. Nor does it have the power to appoint to or to remove from local office.

166 A.2d at 367. See also *Haskins v. State ex rel. Harrington*, 516 P.2d 1171 (Wyo. 1973); 3 McQuillin, *Municipal Corporations*, §12.67 (3rd Ed.).

In the present matter the two positions are not incompatible. The office of city mayor is wholly independent from the state legislature and cannot in any sense be viewed as subordinate. Conversely, the duties of mayor, as described in ch. 6, title 50, of the Idaho Code, do not conflict or clash with the duties of a state legislator.

Finally, it has been suggested that holding dual office violates the distribution of powers clause of the Idaho Constitution, art. 2, § 1. This section provides:

The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial; and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any powers properly belonging to either of the others, except as in this constitution expressly directed or permitted.

The scope of this provision in relation to the separation of powers among the three branches of state government was previously analyzed in Attorney General Opinion No. 85-5. In relation to the separation of powers between state and local governments

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

(prohibiting a person from serving in an executive capacity on the local level and as a legislator in the state government), this office has been unable to find any authority indicating that the doctrine has any application.

The purpose for the separation of powers in government is to avoid the consolidation of sovereign power in one branch of government or person. As stated in 16Am. Jur. 2d, Constitutional Law, § 296:

The true meaning of the general doctrine of the separation of powers seems to be that the whole power of one department should not be exercised by the same hands which possess the whole power of either of the other departments, and that no one department ought to possess directly or indirectly an overruling influence over the others.

This threat is not present when one person functions in two distinct levels of government.

The fact that a state legislator is also a municipal executive officer does not in any sense impinge or intrude upon the authority of the state judicial or executive branches. Similarly, the fact that a city mayor is also a state legislator does not intrude upon the authority of the respective city council. Thus, holding dual public offices, one municipal and one state, does not violate art. 2, § 1, of the Idaho Constitution.

In conclusion, this office can find no statutory or common law prohibitions preventing a city mayor from serving in the Idaho Legislature. Should you have any further questions on this matter please contact me.

Yours very truly,

FRANCIS P. WALKER
Deputy Attorney General

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

May 20, 1991

The Honorable Lewis E. Pratt
Valley County Sheriff
Box 1078
Cascade, ID 83611

THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE

Re: City Police Officers Operating Outside of City Limits

Dear Sheriff Pratt:

You have asked for an opinion regarding whether or not a prosecuting attorney has the authority to authorize city police officers to investigate criminal activity outside of the city limits. You have further asked for an opinion as to whether the city officer acting at the behest of the prosecutor must be deputized as a deputy sheriff, and what power the city officer has regarding the making of arrests. You have also asked whether such a practice conflicts with Idaho Code § 31-2202, setting forth the duties of the county sheriff. Finally, you have requested an opinion concerning the issue of liability for misconduct on the part of the city officer who acts under the direction of the prosecutor.

These questions have arisen as a result of the Valley County Prosecuting Attorney's recent decision to utilize McCall city police officers in a criminal investigation outside the city limits, but within Valley County. The prosecutor has relied upon Idaho Code § 31-2227 for such a procedure. That section provides in pertinent part:

Irrespective of police powers vested by statute in state, precinct, county, and municipal officers, it is hereby declared to be the policy of the state of Idaho that the primary duty of enforcing all the penal provisions of any and all statutes of this state, in any court, is vested in the sheriff and prosecuting attorney of each of the several counties. When in the judgment of such county officers, they need assistance from precinct and municipal peace officers within the county, they are authorized and directed to call for such and such local officers shall render such assistance.

This statute was passed in 1951. No prior statute of a similar nature was found in Idaho law. Because no legislative history exists from that time period, it is impossible to discern the precise reason the statute was passed.

It is clear that the statute grants to a prosecutor the power to enlist the help of city

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

police officers whenever he or she feels it is necessary. When statutes are plain and unambiguous, they are to be accepted as found and are to be construed as they read. No construction of such statutes is necessary or even proper. *Roe v. Hopper*, 90 Idaho 22, 408 P.2d 161 (1965); *Koon v. Bottolfsen*, 68 Idaho 185, 191 P.2d 359 (1948). Therefore, it is the opinion of this author that the prosecuting attorney has the authority to request assistance in performing investigations under Idaho Code § 31-2227 without the approval, and even against the wishes, of the county sheriff. There is no requirement that a city officer must be deputized by the sheriff.

That a prosecuting attorney has the authority to investigate crime is beyond question. Clearly, the legislature intended to give prosecutors a dominant position in law enforcement. Such a position would be worthless without an investigative power. *State v. Winne*, 96 A.2d 63 (N.J. 1953); *McKittrick v. Wymore*, 132 S.W.2d 979 (Mo. 1939). Moreover, a prosecutor has an ethical duty to investigate each case in order to ensure that justice is done. ABA Standards for Criminal Justice, The Administration of Criminal Justice 88 (1974). Hence, if in a prosecutor's judgment he or she needs help in investigating a case, the legislature allows for the utilization of municipal police officers.

While it is the function of the sheriff to gather evidence leading to an arrest, it is the function of the prosecutor to obtain a conviction where appropriate. Investigative help toward the achievement of that goal is not in conflict with the powers and duties of the sheriff. In this light, it can be seen that Idaho Code § 31-2227 does not conflict with Idaho Code § 31-2202, which sets forth the duties of the county sheriff. A statute is to be interpreted in such a manner as to harmonize and reconcile it with other statutes. *Sampson v. Layton*, 86 Idaho 453, 387 P.2d 883 (1963).

However, the fact that a prosecutor has the legal ability to enlist city officers in an investigation does not end the analysis. The practical effects of such a practice should be considered, because once the city officers agree to act on behalf of the county prosecutor an agency relationship is created. *Thornton v. Budge*, 74 Idaho 103, 257 P.2d 238 (1953).

First, it should be recognized that the prosecuting attorney's investigative function is limited, by definition, to investigations. Such activities as service of arrest warrants, transportation of prisoners and service of search warrants are to be carried out by peace officers under Idaho law. Prosecutor's investigators do not fit the definition of peace officers under Idaho Code § 19-5101. Nor are they certified as peace officers by the POST Council. Municipal peace officers may not act as such outside of the city limits unless they are in fresh pursuit. Idaho Code § 50-209. Hence, it can be readily seen that a prosecutor may not usurp the duties of the sheriff by the utilization of § 31-2227. A prosecutor must be ever mindful against blurring the important distinction between peace officers and investigators.

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

Further, it is important to remember that a prosecutor only has complete immunity from malicious prosecution and civil rights actions for activities engaged in as a judicial officer. When a prosecutor engages in an investigation, he or she only has qualified immunity, based upon a good faith standard. *Imbler v. Pachtman*, 424 U.S. 409, 47 L.Ed.2d 128, 96 S.Ct. 984 (1976); *Maxfield v. Thomas*, 557 F.Supp. 1123 (D.C. Idaho 1983). Therefore, a prosecutor (and the county commissioners) must be prepared to bear the financial burden of any actions taken by the city police officers acting under the prosecutor's control.

Of course, any property damage or injury caused by the city officers will be held against the county as well. This is troubling, as the county will have no control over the training and discipline of city officers. Further, if city equipment is damaged, or a city police officer injured, the county will be responsible to the city and the officer.

Nor is the municipality relieved of responsibility for actions taken by city officers under the direction of the prosecutor. An agency relationship will still exist between the city and its employees, particularly when city uniforms, vehicles and equipment are used. Even if the officers were to act in plain clothes with county equipment on their own time, the city could still face a claim of negligent training of the officers.

In summary, a prosecuting attorney may enlist the help of city officers in the investigation of criminal activity outside of city limits. Although this statutory power is predicated upon "need," the statute leaves the decision as to when the need exists to the prosecutor. While it is certainly good practice to involve the sheriff in the decision making process, this is not required. The sheriff may not interfere with this decision on the ground that the city officers have not been deputized. The city officers may not go beyond investigative activities and act as if they were deputized peace officers.

Because of the various issues that may arise regarding liability, it is highly recommended that whenever possible the county commissioners and a representative of the city government be included in the decision as to whether to utilize § 31-2227.

Yours very truly,

MICHAEL KANE
Deputy Attorney General
Chief, Criminal Law Division

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

May 30, 1991

Carl B. Kerrick
Killen, Pittenger & Kerrick
200 E. Park St.
P.O. Box A.O.
McCall, ID 83638

THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE

Dear Mr. Kerrick:

You have requested an opinion from this office regarding I.C. § 31-1515. This statute prohibits a county commissioner from being personally interested in any contract made with the county. You are currently serving on the Valley County Board of Commissioners and practice law in McCall, Idaho. Your firm occasionally represents indigent criminal defendants. The resulting legal fees and costs are paid for by the county. This opportunity occurs when the two attorneys holding the county public defender contracts have conflicts of interest. The defense counsel appointment is made by the court on a rotating basis among the attorneys in the area who seek this business. According to your letter, the court establishes the hourly rate paid to the defense attorneys and reviews claims made by the attorneys for fees and costs. Ultimately, payment is made by Valley County from its indigency fund.

The question raised in your letter is whether you and/or members of your firm may do business with the county as public defenders. For the reasons set forth below, it is the opinion of this office that such business dealings by you or any member of your firm would be prohibited by I.C. § 31-1515.

Idaho Code § 31-1515 provides:

No member of the board must be interested, *directly or indirectly*, in any property purchased for the use of the county, *nor in any purchase or sale of property belonging to the county*, nor in any contract made by the board or other person on behalf of the county, for the erection of public buildings, the opening or improvement of roads, or the building of bridges, or for other purposes. (Emphasis added.)

Idaho case law dealing with this statute is scant and the cases that cite I.C. § 31-1515 are of little assistance. However, in construing other Idaho Code provisions prohibiting a public officer from contracting with the public body he serves, the Idaho Supreme Court has been strict in its interpretation.

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

For instance, I.C. § 59-201 provides:

Members of the legislature, state, county, city, district and precinct officers, must not be interested in any contract made by them in their official capacity, or by any body or board of which they are members.

In regard to this provision, the Idaho Supreme Court stated in *McRoberts v. Hoar*, 28 Idaho 163, 175, 152 P. 1046 (1915):

There is no more pernicious influence than that brought about by public officials entering into contracts between themselves by virtue of which contracts the emoluments of their offices are increased and the time and attention which the law demands that they shall give to the performance of the duties of their offices are given to the performance of the duties required of them under such contracts. Justice, morality and public policy unite in condemning such contracts, and no court will tolerate any suit for their enforcement. The fact that the acceptance of such employment was without fraud and prejudice to the interest of the taxpayers is immaterial. Even in the absence of statutory provisions, such a contract is void; as a public official cannot make a contract to regulate his official conduct by considerations of private benefit to himself.

....

It is the relation that the law condemns and not the results. It might be that in this particular case, public duty triumphed in the struggle with private interest, but such might not be the case again or with another officer; and the policy of the law is not to increase temptations or multiply opportunities for malfeasance in office.

In *Nampa Highway District No. 1 v. Graves*, 77 Idaho 381, 386, 293 P.2d 269 (1956), taxpayers challenged the payment to the highway commissioners for services performed pursuant to a contract between the highway district and the commissioners as private individuals. The Idaho Supreme Court stated:

The contract of employment in question interferes with the unbiased discharge of respondents' duties to the public as commissioners and places them in a dual position inconsistent with their duties as trustees for the public and all such contracts are invalid even if there be no specific statute prohibiting them. The law invalidating such a contract is based on public policy and the contention that there was no loss to the Highway District is no defense.

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

See also, art. 7, § 10, Idaho Constitution; 10A McQuillin, Municipal Corporations § 29.97 (3rd Ed.).

The language used in I.C. § 31-1515 is far more restrictive than I.C. § 59-201. Thus, in light of the strong opinions rendered in *McRoberts v. Hoar, supra*, and *Nampa Highway District No. 1 v. Graves, supra*, a literal approach to I.C. § 31-1515 is appropriate.

Although the court is largely responsible for administering the defense contracts for indigents, it is the responsibility of the county and county commissioners to provide the financial resources for public defenders. I.C. § 19-859. Further, I.C. § 19-860(b) states:

If a court before whom a person appears upon a formal charge assigns an attorney other than a public defender to represent a needy person, the appropriate district court, upon application, shall prescribe a reasonable rate of compensation for his services and shall determine the direct expenses necessary to representation for which he should be reimbursed. *The county shall pay the attorney the amounts so prescribed.* The attorney shall be compensated for his services with regard to the complexity of the issues, the time involved, and other relevant considerations. (Emphasis added.)

There can be no doubt that an attorney acting as a public defender is contracting with the county. The judiciary has no financial responsibility for indigent defendants and the court is clearly acting on behalf of the county when appointing a public defender pursuant to I.C. § 19-860(b). Therefore, no other conclusion can be reached but that a county commissioner cannot accept a contract to represent an indigent criminal defendant without violating I.C. § 31-1515. Further, a county commissioner would indirectly benefit from a member of his firm entering into similar contracts and such conduct would also be prohibited by I.C. § 31-1515.

Yours very truly,

FRANCIS P. WALKER
Deputy Attorney General

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

June 5, 1991

Lynn Nelson
Gooding County Prosecuting Attorney
Box 86
Gooding, ID 83330

THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE

Re: No Conflict Between PUC Carrier Regulations And Idaho Code

Dear Lynn:

The attorney general has asked me to respond to your letter of May 9, 1991, regarding an apparent conflict between sections of the Idaho Code. You have noted that Idaho Code § 49-905 makes it an infraction to drive without both headlights in operation. This has been the law since 1982. You have also pointed out that the Idaho Public Utilities Commission has made the same act, when performed by a carrier, a misdemeanor by the adoption of the motor carrier safety regulations of the Code of Federal Regulations, under the authority to make rules conferred upon the PUC by the legislature in Idaho Code § 61-807. Idaho Code § 61-814 makes it a misdemeanor to violate those rules. These statutes have been in effect since 1929.

In order to resolve this issue, it is helpful to begin by considering general rules of statutory construction. It is presumed that when the legislature enacts a statute it consults earlier statutes on the same subject matter. *State v. Long*, 91 Idaho 436, 423 P.2d 858 (1967). A cardinal principle of statutory construction is to ascertain legislative intent. *Messenger v. Burns*, 86 Idaho 26, 382 P.2d 412 (1963). Such intent may be inferred from policy or reasonableness. *Summers v. Dooley*, 94 Idaho 87, 481 P.2d 318 (1971). Statutes should be interpreted in such a way as to save them from nullification. *Bel v. Benewah County*, 60 Idaho 791, 97 P.2d 397 (1940).

In accordance with these policies, it is my interpretation that the statutes in question do not conflict. Rather, it appears that the legislature chose to regulate 18-wheelers more stringently than the family car. When headlight violations were reduced from misdemeanors to infractions in 1982, the legislature chose not to extend this largesse to carriers.

A similar issue was raised sixty years ago. *In re Public Utilities Commission*, 51 Idaho 56, 1 P.2d 627 (1931). In that case, two trucking companies challenged PUC regulations pertaining to length and width requirements of commercial trucks. The

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

claim was that the regulations conflicted with statutes regulating the maximum height and weight of “vehicles.” The court stated:

[R]egulating a common carrier business upon the highways is considered quite different from ordinary policing. It is derived from a a different source. The policing power deals with rights of the public in the road and is restricted to regulatory supervision differing from a commission’s supervision of a common carrier business which the state permits upon the road. In the supervision of such business it is held the power is plenary and may extend even to exclusion because the regulation of the business is the regulation of a privilege permitted and controlled by the state.

And, it is quite generally held that the business of a common carrier of freight or passengers permitted upon the highways is regulatory independently of any police power supervising the ordinary and usual rights of citizens in the highway, and independent of the ordinary laws establishing rules of the road governing ordinary rights in and upon the highway.

51 Idaho at 61-62.

In other words, regulation of carrier safety is independent of, and treated differently from, regulation of standard traffic safety. Hence, there can be no conflict between the PUC regulations and Idaho Code § 49-905.

Yet another way to regard the issue is to consider that the legislature and the PUC have created a different crime from that contemplated in § 49-905. While the statute covers all vehicles without regard to type or size, the regulation covers the driving without a headlight by a carrier as defined by the regulations. In order to prove a misdemeanor, a prosecutor would have to show not only that a person was driving with a light out, but also that the person meets the criteria in the regulations defining a carrier. If anything, § 49-905 could be considered an included offense within the offense created by the regulation.

For these reasons, it is my opinion that the PUC regulations do not conflict with the Idaho statutes, and violations of the regulations may be proceeded against independent of the provisions of title 49 of the Idaho Code.

Yours very truly,

MICHAEL KANE
Deputy Attorney General
Chief, Criminal Law Division

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

July 15, 1991

Mr. Hank Boomer
Prosecuting Attorney
Power County
Box 70
American Falls, ID 83211

THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE

Re: Voter qualifications, Rockland School District Bond Election (withheld judgments)

Dear Hank:

You have requested a legal opinion from the Attorney General's Office concerning the qualifications of Mr. J. Smith to vote in the Rockland School District bond election on July 17, 1991. Based upon the information supplied by your letter, it is our understanding that Mr. Smith pled guilty to the felony crime of burglary. Mr. Smith was granted a withheld judgment by the district court and is currently on probation for that particular crime. It is our understanding that Mr. Smith intends to vote in the upcoming Rockland School District bond election. Furthermore, prior to July 17, 1991, you do not anticipate Mr. Smith will be either discharged from his probation nor will his criminal case be dismissed.

The question you have presented is whether a person having pled guilty to a felony crime and thereafter granted a withheld judgment is considered "convicted of a felony" under the provisions of art. 6, § 3, of the Idaho Constitution and therefore prohibited from voting.

CONCLUSION

It is our opinion that a person that has been found guilty of a felony or has pled guilty to a felony, and had that plea accepted by the court, is considered to be "convicted of a felony" under art. 6, § 3, of the Idaho Constitution. The language "convicted of a felony" under art. 6, § 3, includes a person granted a withheld judgment, unless and until his or her civil rights have been restored.

ANALYSIS

In 1986 the Attorney General's Office issued a formal opinion related to the question you have presented. Attorney General Opinion No. 86-16. The question presented in

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

the 1986 opinion was slightly different, *i.e.*, whether a person granted a withheld judgment and placed on probation was a convicted felon under the Federal Gun Control Act of 1968. The 1986 Opinion analyzed the issue of whether a person is a “convicted” felon under Idaho law during the period of probation pursuant to a withheld judgment. The conclusion of the opinion was that once a person pleads guilty or is found guilty of a felony, that individual is a “de facto felon” and therefore a convicted felon under Idaho law, unless and until the case is dismissed by the court following the successful completion of probation.

The legal analysis in the 1986 Opinion is directly related to the question you have raised whether a person granted a withheld judgment and placed on probation is a convicted felon for the purpose of art. 6, §3, of the Idaho Constitution. The current language of art. 6, §3, states:

§3. Disqualification of certain persons. -- No person is permitted to vote, serve as a juror, or hold any civil office who is under guardianship, or who has, at any place, been convicted of a felony, and who has not been restored to the rights of citizenship, or who, at the time of such election, is confined in prison on conviction of a criminal offense.

For your information and review, I am attaching a copy of Attorney General Opinion 86-16. I will not reanalyze all of the cases and statutes set forth in that opinion.

The leading Idaho appellate case discussed in Attorney General Opinion 86-16 was *State v. Wagenius*, 99 Idaho 273, 581 P.2d 319 (1978). It contains the most detailed discussion of this issue by an Idaho appellate court. I was not able to locate any later Idaho appellate decisions that overturned or substantially modified the *Wagenius* holding, which stated that “a conviction occurs when a verdict or plea of guilty is accepted by the court.” *Id.* at 278. The *Wagenius* holding that a verdict or plea of guilty is a de facto conviction, even in the context of a withheld judgment, had been previously expressed by Judge Blaine Anderson in *United States v. Locke*, 49 F.Supp. 600 (D.C. Idaho 1976). Once again, my research could not locate any later federal court decision that overturned or substantially modified Judge Anderson’s ruling on this particular issue.

The only Idaho appellate decision to significantly revisit *Wagenius* was *State v. Brandt*, 110 Idaho 341, 715 P.2d 1011 (App. 1986). In *Brandt* the prosecutor charged the defendant as a persistent violator under Idaho Code § 19-2514. Idaho Code § 19-2514 applies to “any person *convicted* for the third time of the commission of a felony, . . .” (Emphasis added.) At the time of trial as a persistent violator, the defendant had not been sentenced and no judgment had been entered on the three prior felony “convictions,” so the issue facing the court was whether the defendant, by his plea

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

of guilty to the three prior felony offenses, had at least two prior felony convictions under Idaho's persistent violator statute. The Idaho Court of Appeals, by unanimous opinion, cited *Wagenius* with approval and specifically held that a felony conviction under the Idaho persistent violator statute "arises upon a determination of guilt, whether it be by a defendant's own admission or as a result of a jury verdict." *Id.* at 345. Therefore, the only Idaho appellate case to substantially discuss the *Wagenius* "de facto conviction" holding since the issuance of Attorney General Opinion 86-16 supports the legal conclusion that a "de facto conviction" exists based upon a verdict of guilty or plea of guilty accepted by the court to a felony crime, including a defendant granted a withheld judgment and placed on probation for a felony crime.

Although the Ninth Circuit in *United States v. Gomez*, 911 F.2d 219 (9th Cir. 1990), did limit the continued effectiveness of Attorney General Opinion 86-16 concerning restoration of the civil right of a felon to carry a firearm pursuant to Idaho Code § 18-310 (Imprisonment-- Effect on Civil Rights and Offices), it is important to note that it did not address the previous holdings of *Locke*, *Wagenius* or *Brandt* that a plea of guilty or a verdict of guilty is equivalent to a "de facto" felony conviction.

Two further legal arguments support the "de facto conviction" conclusion of Attorney General Opinion 86-16. First, Idaho Code § 19-2604 addresses the issue of the discharge of the defendant by the court. The language of subsection one clearly applies to a recipient of a withheld judgment. Idaho Code § 19-2604(1). The defendant must make application to the court and provide a satisfactory showing that he or she has complied with the terms and conditions of probation. If the court is so convinced and believes discharge of the defendant and/or dismissal of the case is compatible with the public interest, the court may terminate the sentence or set aside the guilty plea or the conviction of the defendant and finally dismiss the case and discharge the defendant. The final sentence of subsection one states: "The *final dismissal* of the case as herein provided shall have the effect of restoring the defendant to his civil rights." Idaho Code § 19-2604(1) (emphasis added). Where a statute is plain, clear and unambiguous, it speaks for itself and must be given the interpretation the language clearly implies. *Moon v. Investment Board*, 97 Idaho 595, 548 P.2d 861 (1976). *State v. Jonasson*, 78 Idaho 205, 299 P.2d 755 (1956). The plain meaning of the last sentence of subsection one of Idaho Code § 19-2604 is the defendant's civil rights are not to be restored until application by the defendant, court review of the defendant's performance on probation and consideration of the public's interest affected by the dismissal of the case. The language of subsection one of Idaho Code § 19-2604 does authorize the court to either terminate the sentence or set aside the guilty plea or the conviction. However, the final sentence of subsection one is specific and mandatory that it is the "final dismissal" of the case that restores the civil rights of the defendant. This interpretation of Idaho Code § 19-2604(1) is consistent with the *Locke*, *Wagenius* and *Brandt* decisions which recognize the existence of the defendant's "de facto conviction" upon a finding of guilt or

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

plea of guilty accepted by the court. The effect of the *Wagenius* “de facto conviction” to deprive the defendant of his civil rights is not removed until the court is satisfied that the defendant has complied with his or her probation and the court is satisfied that the discharge of the defendant and dismissal of the case is compatible with the public’s interest.

The second argument supporting the “de facto conviction” conclusion of *Locke, Wagenius, Brandt* and Attorney General Opinion 86-16, is the historical record surrounding the adoption of art. 6, §3, of the Idaho Constitution.

The language specifically relevant to your inquiry (“convicted of a felony”) remains substantially unchanged from the time of its adoption by the framers of the Idaho Constitution (the word “treason” and a comma were deleted after the word “of” and the letter “a” was inserted after the word “of” and before the word “felony”). Vol.2, Idaho Constitutional Convention Proceedings and Debate at 1028, 1150. The present concept of the withheld judgment was not adopted by the legislature until 1915. The 1915 statute limited withheld judgments by age (under 25 years of age) and by crime (not available for treason, murder, robbery, incest, bigamy, abortion, arson, perjury, embezzlement of public funds or rape, except statutory rape). The 1915 version authorized the court to discharge the defendant but did not specifically authorize dismissal of the case. The 1915 version of withheld judgments was amended and modified numerous times and the present language authorizing withheld judgments is found at Idaho Code § 19-2601.

Therefore, it is clear that the sentencing option of a withheld judgment did not exist until years after the Idaho Constitutional Convention had settled on the language to prohibit a convicted felon from voting, serving as a juror or holding any civil office *unless* that person had been restored to the rights of citizenship. It is also worth noting that there was substantial debate recorded in the Idaho Constitutional Convention proceedings concerning the right to suffrage by convicted felons. *Id.* at 918-38. A major focus during the debate over the right to suffrage by convicted felons was whether to include the language “and who has not been restored to the rights of citizenship, . . .” Idaho Const., art.6, sec.3. One view espoused was that convicted felons should never be restored to the right to vote. The contrary, and ultimately the prevailing position, was that if a felon had completed his sentence or was improperly convicted (not guilty), he or she ought to be able to vote if the board of pardons had either granted the felon a full pardon or by other action restored the felon’s rights of citizenship.

The essence of the argument for restoration of the right to vote was either to protect those not guilty but actually convicted or to forgive those who were guilty but had paid their debt to society. From the records of the proceedings and the debates of the delegates to the Idaho Constitutional Convention, it would appear that the members at

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

the convention shared the view later expressed in the *Brandt* decision that a felony conviction “arises upon a determination of guilt, whether it be by a defendant’s own admission or as a result of a jury verdict.” *Brandt* at 345. The belief of the members voting to adopt art. 6, § 3, — namely, that the restoration of the right to vote, to serve on a jury, or to hold public office should occur, if at all, after the individual had paid his or her debt to society -- is consistent with the language previously discussed in Idaho Code § 19-2604(1) stating that the *final dismissal* of the case has the effect of restoring the defendant’s civil rights.

Therefore, based upon Attorney General Opinion 86-16 and the further legal analysis provided herein, it remains the position of the Attorney General’s Office that an individual having been found guilty or having pled guilty to a felony and receiving a withheld judgment and serving a probationary term, is considered under Idaho law to have a “de facto conviction.” Therefore, such a person has not been restored to the rights of citizenship and does not enjoy his or her civil right to vote, serve as a juror or hold civil office, unless and until the defendant is restored to his or her civil rights pursuant to Idaho Code § 19-2604 or other applicable statute.

If we can be of further assistance in the matter, please contact our office.

Very truly yours,

Steve Tobiason
Deputy Attorney General
Chief, Legislative and Public Affairs Division

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

August 2, 1991

William L. Jarocki, Executive Director
Association of Idaho Cities
3314 Grace Street
Boise, ID 83703

THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE

Re: Application of the Idaho Human Rights Act to Cities

Dear Mr. Jarocki:

You have asked whether Idaho Code § 67-5901, as amended in 1991 by S.B. 1064, applies to cities. If the answer is “yes,” you have then asked if the definition of “discrimination” found in this section extends to situations where cities provide employee benefits, and how it applies.

The answer to your first question is “yes.” The Idaho Human Rights Act prohibits discrimination based upon race, sex, color, national origin, and religion in the areas of employment, public accommodations, educational services, and real estate transactions. In the area of employment, discrimination based upon age (over 40) and handicap are also prohibited.

The statutory definition of “employer” appears in Idaho Code § 67-5902(6). As of July 1, 1991, that definition is as follows:

“Employer” means a person, wherever situated, who hires five (5) or more employees for each working day in each of twenty (20) or more calendar weeks in the current or preceding calendar year whose services are to be partially or wholly performed in the state of Idaho, except for domestic servants hired to work in and about the person’s household. The term also means:

- (a) a person who as contractor or subcontractor is furnishing material or performing work for the state;
- (b) any agency of or *any governmental entity* within the state; and
- (c) any agent of such employer. (emphasis added.)

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

Cities are covered employers under § 67-5902(b) since they are “governmental entities within the state.”

Your question suggests that SB 1064, adjusted by the 1991 Legislature, affected the status of cities under the Human Rights Act. It did not. That amendment reduced from ten to five the number of employees which a private employer must have in order to be covered by the act. Both before and after July 1, 1991, governmental entities were considered to be “employers,” regardless of the number of employees.

It should also be noted that § 67-5902(5) defines a “person” to include any “governmental entity” as well. This means that not only do cities have a duty not to discriminate as employers, but they are also obliged not to discriminate in the giving of services under § 67-5905(5).

Your next question is whether the duty not to discriminate reaches the offering of employee benefits. Once again, the answer is “yes.”

Idaho Code § 67-5909(1) prohibits discrimination against a person based upon race, color, religion, sex, national origin, age or handicap, in all areas of the employment relationship including the terms, conditions or privileges of employment. The offering of employee benefits is clearly a term, condition or privilege of employment. Thus, benefits may not be offered on a basis that prefers one gender, race, etc. over another.

Your main concern appears to be whether cities are legally obligated to offer maternity benefits. The answer to that question requires reference to Title VII of the 1964 Civil Rights Act, 42 U.S.C. 2000e, which is the federal counterpart of the Idaho Human Rights Act, prohibiting discrimination in employment.

We are not aware of any law which requires an employer to offer health insurance to its employees. Title VII, however, does require an employer who chooses to offer health insurance to include maternity benefits. To refuse such coverage is a form of illegal sex discrimination. See *EEOC v. Wooster Brush Co.*, 727 F.2d 566 (6th Cir. 1984.) Title VII applies to employers, including cities, who have at least 15 employees.

Title VII has a definition of sex discrimination which makes it very clear that “sex discrimination” includes discrimination on the basis of pregnancy. 42 U.S.C. 2000e(k) reads as follows:

The terms “because of sex” or “on the basis of sex” include, but are not limited to, because of or on the basis of pregnancy, childbirth or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

section 703(h) of this title shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: Provided, that nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.

For Idaho employers who are too small for Title VII coverage, the Idaho Human Rights Act may still be applicable and clearly is applicable in the case of cities. To our knowledge, no court has yet ruled on the specific question of whether it is illegal sex discrimination under state law, as it is under federal law, to offer health insurance but refuse to offer maternity coverage.

State law does not have the same language quoted from Title VII above. In fact, it does not include a definition of sex discrimination at all. It does state, however, that one purpose of the Idaho Human Rights Act is to “provide for execution within the state of the policies embodied in the federal Civil Rights Act of 1964, as amended.” See Idaho Code § 67-5901(1). Also, our state courts have been guided by Title VII in interpreting other provisions of the Idaho Human Rights Act. See for example, *O’Dell and the Idaho Human Rights Commission v. John Basabe and J.R. Simplot Co.*, _____ Idaho _____, 810 P.2d 1082 (1991); *Hoppe v. McDonald*, 103 Idaho 33, 644 P.2d 355 (1982); and *Bowles v. Keating*, 100 Idaho 808, 606 P.2d 458 (1979).

It is likely that a court would rule that “sex discrimination” has the same meaning under state law as it has under federal law. If so, then any employer offering health insurance as a benefit of employment to its employees should include maternity coverage.

An alternative to purchasing such insurance is for the employer to self-insure for maternity coverage. This may be a viable option for employers with small workforces and known low risk for pregnancies. An employer who self insures would be liable for the costs which would have been paid by insurance if it had been purchased.

It is our understanding that the Idaho Human Rights Commission and the Department of Insurance are jointly developing more detailed interpretations of the law in order to help small employers comply. Both departments should be available to discuss options with you.

Sincerely,

LESLIE L. GODDARD
Deputy Attorney General

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

August 7, 1991

Marilyn T. Shuler, Director
Idaho Human Rights Commission
450 W. State Street
Boise, ID 83720

THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE

Re: Statutory Prohibitions Against the Issuance to
Non-Citizens of Licenses to Sell Liquor or Beer at Retail

Dear Ms. Shuler:

You have requested legal guidance on the question of whether two specific Idaho statutes, which prohibit issuance of licenses to non-citizens, violate the equal protection clause of either the U.S. Constitution or of article I, section 2, of the Constitution of the State of Idaho. The Attorney General does not generally rule on questions of the constitutionality of duly enacted state laws. That is normally a matter for the courts, and the Attorney General may be called upon to defend such laws against constitutional challenge. We are willing, however, to review the statutes in question and to outline the legal test to which they would be subjected, should a court challenge be made.

The two statutes in question are Idaho Code § 23-910(a), which governs licenses to sell liquor by the drink at retail, and § 23-1010(2)(d), which pertains to licenses for the sale of beer at retail. They read in pertinent part:

23-910. Persons not qualified to be licensed. - No license shall be issued to: a. An individual who is not a citizen of the United States . . . ; or to a partnership unless all members thereof are citizens of the United States . . . ; or to a corporation or association . . . unless the principal officers and the members of the governing board are citizens of the United States.

23-1010. License to sell beer at retail - Application procedure and form - showing of eligibility for license and disqualifications. - (1) Every person who shall apply for a state license to sell beer at retail shall . . . file written application for license with, the director. . . (2) The application shall affirmatively show: . . . (d) That the individual applicant, or each partner of a partnership applicant, is a citizen of the United States; or with respect to a corporation or association, . . . that the person who is or will be the manager of the corporation's or association's business of selling beer at retail is a citizen; . . .

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

Clearly, the statutes in question do preclude non-citizens from obtaining these licenses despite their compliance with all other licensing criteria.

The regulation and control of the sale of intoxicating liquors is vested in the Idaho Legislature through the twenty-first amendment to the U.S. Constitution and art. 3, sec. 26, of the Idaho Constitution. Licensing regulations for the retail sale of liquor “are enacted by the legislature for the protection, health, welfare and safety of the people of the state of Idaho and for the purpose of promoting and encouraging temperance in the use of alcoholic beverages within said state of Idaho.” Idaho Code § 23-901.

Regulatory authority is not unfettered however. In *State v. Cantrell*, 94 Idaho 653, 655-56, 496 P.2d 276, 278-279 (1972), the Idaho Supreme Court noted that although the regulation of retail liquor outlets was for a legitimate stated public purpose, the regulatory classifications of the licensing act must nevertheless reasonably relate to the accomplishment of that purpose. The court said:

Some discrimination is inherent in any legislative attempt to limit the number of retail outlets for liquor by the drink, and because any legislation is presumed to be constitutional [footnote omitted], a mere showing of discrimination has been held insufficient to defeat the regulatory scheme. [Footnote omitted.] Nevertheless, to comply with the equal protection requirement of the federal and state constitutions, the discriminatory classification must reflect a reasonably conceivable, legitimate public purpose [footnote omitted] and it must relate reasonably to that ascribed purpose. [Footnote omitted.]

Idaho law has long recognized equal protection limitations. In the 1963 case of *Weller v. Hopper*, 85 Idaho 386, 379 P.2d 792 (1963), the Idaho court said that Idaho Code § 23-910(d) violated both federal and state constitutions by setting up an “unreasonable, arbitrary and discriminatory classification.” It prevented a person who was convicted of a felony while holding a retail liquor license from obtaining a license, while one convicted of a felony who did not hold such a license could obtain a license within five years. This classification was subjected to a “reasonable basis” test and failed to meet that standard.

The classification which you question — between citizens and non-citizens — has been the subject of several federal lawsuits. While the courts have not always used identical terminology in making their analyses, it is clear that statutes which discriminate against aliens are subjected to greater scrutiny than the “reasonable basis” test used for distinctions among felons in *Weller*.

Federal case law is instructive for determining how an Idaho court would review the classification in question. In *Takahashi v. Fish & Game Commission*, 334 U.S. 410

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

(1948), for example, the Court ruled that a California statute barring issuance of fishing licenses to persons “ineligible to citizenship,” was unconstitutional. The Court stated at 420 that “the power of a state to apply its laws exclusively to its alien inhabitants as a class is confined within narrow limits.” *Id.* 334 U.S. at 420.

In *Graham v. Richardson*, 403 U.S. 365, 372 (1971), the Supreme Court concluded:

Classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny. Aliens as a class are a prime example of a discrete and insular minority [citation omitted] for whom such heightened judicial solicitude is appropriate.

The case of *In Re Griffiths*, 413 U.S. 717 (1972), posed a similar question. The appellant in that case was a resident alien who was denied permission to take the Connecticut bar examination solely because of a citizenship requirement imposed by a state court rule. The Supreme Court held that Connecticut’s exclusion of aliens from the practice of law violated the equal protection clause of the fourteenth amendment. In reaching that conclusion, the Court said:

The Court has consistently emphasized that a State which adopts a suspect classification “bears a heavy burden of justification,” *McLaughlin v. Florida*, 379 U.S. 184, 196 (1964), a burden which, though variously formulated, requires the State to meet certain standards of proof. In order to justify the use of a suspect classification, a State must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is “necessary . . . to the accomplishment” of its purpose or the safeguarding of its interest.

Resident aliens, like citizens, pay taxes, support the economy, serve in the Armed Forces, and contribute in myriad other ways to our society. It is appropriate that a State bear a heavy burden when it deprives them of employment opportunities.

Id. at 721-722.

It appears clear, therefore, that the two statutes you cite, by creating a suspect classification, would be subjected to close judicial scrutiny if challenged in court. The state would bear a heavy burden of justification for not allowing aliens to obtain licenses. The state would have to identify the interest being served by the exclusion; that purpose would have to be both constitutionally permissible and substantial; and the use of this classification would have to be necessary to the accomplishment of this purpose.

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

This office cannot predict what justifications could be offered in such a court challenge. We are aware of a case challenging a similar provision in Arizona in which the Arizona Supreme Court ruled that the statutory exclusion of aliens from obtaining liquor licenses constituted a denial of equal protection of the law under the federal and state constitutions. See *Arizona State Liquor Board of the Department of Liquor Licenses and Control v. Ali*, 550 P.2d 663 (1976). In the Ali case, the Arizona statute read in pertinent part:

Every spirituous liquor licensee, . . . shall be a citizen of the United States . . . If a partnership, each partner shall be a citizen of the United States. A.R.S. Sec. 4-202(A).

Mr. Ali was a permanent resident alien who met all the licensing requirements other than citizenship status. On that basis alone, he was denied a liquor license for the restaurant he owned. In order to prohibit aliens from obtaining liquor licenses, the Arizona court said that the classification “must not only reasonably relate to the purpose of the law, but the state has the burden of establishing that its use of the classification is necessary to the accomplishment of a legitimate state interest and that the law serves to promote a compelling state interest.” *Id.* 550 P.2d at 669.

The justifications offered by the State of Arizona were to assure that those people who sold liquor:

are sufficiently acquainted with our institutions and way of life to enable them to appreciate the relation of this particular business to our entire social fabric . . . This appreciation, in turn, is necessary in order to minimize the evils attending trafficking in intoxicating liquor. . . [the classification also] reflects legislative judgment that trafficking in intoxicating liquor by aliens presents a greater problem than such trafficking by citizens.

Id. The court did not find these arguments persuasive: “We are unable to comprehend, nor has it been demonstrated to us, why aliens cannot appreciate American institutions . . . It has not been shown that aliens cannot traffic in intoxicating liquors without falling prey to the inherent dangers and vices which have brought about legislation such as A.R.S. Sec. 4-202(A). Appellant has not presented us with any legitimate state purposes that could justify this kind of discrimination.” *Id.* at 670.

Finally, Arizona had argued that the statutory classification passed constitutional scrutiny as necessary to preserve for its citizens a limited state resource, namely, the liquor license. While acknowledging that a state is not required to dedicate its own resources to citizens and aliens alike, the court was not persuaded by this argument either. It was noted that any state legislation, even when aided by the twenty-first

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

amendment, must be shown to have a rational connection with a permissible state purpose. The reasons offered by the state to justify discrimination against aliens fell “far short of establishing either a legitimate or compelling state interest or a reasonable relation to the protection of the state’s interests or resources.” *Id.*

Based upon the cases cited above, we believe that a court challenge to these statutes would have a high likelihood of success. An Idaho court would consider non-citizens to be a suspect classification for equal protection analysis. The statutory prohibitions would be upheld only if the state were able to show that excluding aliens from obtaining licenses to sell liquor by the drink or beer at retail serves a legitimate and compelling state interest and that such exclusion is necessary for the accomplishment of that purpose. In our opinion, it is unlikely that the state would be able to make such a showing.

Sincerely,

LESLIE L. GODDARD
Deputy Attorney General

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

August 15, 1991

The Honorable Tom Boyd
Speaker of the House
Idaho House of Representatives
Room 309 - Statehouse
Boise, ID 83720

THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE
ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE

Re: Ethics Opinion Request/"Buy Idaho"

Dear Speaker Boyd:

Your letter of July 22, 1991, requested an ethics review from the Attorney General concerning promotional gifts provided to members of the Idaho Legislature by the marketing association known as "Buy Idaho." Specifically, your letter indicated that last year the "Buy Idaho" association provided Idaho legislators a complimentary shopping bag containing Idaho products intended to promote the variety and quality of merchandise produced in Idaho. Your letter stated that several legislators have raised the question whether the gift pack exceeds the monetary value that a legislator can receive for that type of promotion.

The statutory provisions relevant to legislative ethics are located primarily in two areas of the Idaho Code: The Ethics in Government Act, chapter 7, title 59, Idaho Code, and the Bribery and Corrupt Influence Act, Idaho Code, chapter 13A, title 18.

Turning to the Ethics in Government Act, a "conflict of interest" occurs when a legislative official takes official action or makes an official decision or recommendation, the effect being to the "private pecuniary benefit" of such person, the person's household or business. Idaho Code § 59-703(4). Based upon the facts in your letter, it is difficult to foresee any legislator having a conflict of interest, as defined by Idaho Code § 59-703(4), resulting from the acceptance of the "Buy Idaho" complimentary gift pack. By definition, conflict of interest requires some official action by the legislator, the effect of which action is to the private pecuniary benefit of that specific legislator. From the facts provided in your letter, there is no indication the receipt of the gift pack was the result of any official action, decision or recommendation taken or proposed by any legislator.

The Bribery and Corrupt Influence Act states no legislator "shall solicit, accept or agree to accept any pecuniary benefit *in return for action* on a bill, legislation, proceeding or official transaction, known to be interested in a bill, legislation, official

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

transaction or proceeding, pending or contemplated before the legislature or any committee or agency thereof.” (Emphasis added.) Idaho Code § 18-1356(4). The prohibition described in Idaho Code § 18-1356(4) does not apply to “trivial benefits not to exceed a value of fifty dollars (\$50.00) incidental to personal, professional or business contacts and involving no substantial risk of undermining official impartiality.” Idaho Code § 18-1356(5)(c). Based upon the facts of your letter, there was no violation of § 18-1356(4), since the gift pack was not given in exchange for specific action by a legislator on a particular bill, legislation or proceeding. Since there is no violation of § 18-1356(4), it is not necessary to consider the application of the “trivial benefits” (gifts under fifty dollars) exception under § 18-1356(5)(c).

Idaho Code § 18-1359 is the only other section of the Bribery and Corrupt Influence Act worthy of consideration on this issue. It states:

[N]o public servant shall:

...

(b) Solicit, accept or receive a pecuniary benefit as payment for services, advice, assistance or conduct customarily exercised in the course of his official duties. This prohibition shall not include trivial benefits not to exceed a value of fifty dollars (\$50.00) incidental to personal, professional or business contacts and involving no substantial risk of undermining official impartiality.

Idaho Code § 18-1359(1)(b).

There are no facts in your letter to suggest that the “Buy Idaho” gift pack was given to a legislator as payment for services, advice, assistance or conduct. Mere acceptance of the gift pack does not violate the provision of Idaho Code § 18-1359(1)(b).

Analysis of your request under the relevant sections of the Ethics in Government Act and the Bribery and Corrupt Influence Act leads to the conclusion that mere acceptance of the gift pack from “Buy Idaho” does not violate the standards enacted in either of the Idaho Code chapters.

Sincerely,

STEVE TOBIASON
Deputy Attorney General
Chief, Legislative and Public Affairs Division

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

September 24, 1991

The Honorable Tom Boyd
Speaker of the House
Route 1
P.O. Box 69
Genesee, Idaho 83832

THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE

Re: One Percent Initiative

Dear Speaker Boyd:

You have requested an opinion from this office regarding the proposed initiative that would limit ad valorem tax rates to one percent of market value for assessment purposes. Specifically, what effect would the initiative have upon the "homeowner exemption" provided in Idaho Code § 63-105DD? Similarly, what effect would the 1% initiative have upon the exemption for speculative value of agricultural land? Idaho Code § 63-105CC. For the reasons set forth below, it is the opinion of this office that the initiative would have no impact upon either the homeowner's exemption, Idaho Code § 63-105DD, or the exemption for speculative value of agricultural land, Idaho Code § 63-105CC.

Chapter 1, title 63, of the Idaho Code describes property subject to taxation in Idaho. Idaho Code §§ 63-105 through 63-105DD provide specific exemptions from taxation. Two exemptions of particular concern to landowners in Idaho are the residential improvement exemption or "homeowner's exemption" found at Idaho Code § 63-105DD and the speculative value of agricultural land exemption found at Idaho Code § 63-105CC.

Idaho Code § 63-105DD provides in part:

During the tax year 1983 and each year thereafter, the first fifty thousand dollars (\$50,000) of the market value for assessment purposes of residential improvements, or fifty percent (50%) of the market value for assessment purposes of residential improvements, whichever is the lesser, shall be exempt from ad valorem taxation.

Idaho Code § 63-105CC(a) provides that "the speculative portion of the value of land devoted to agriculture is exempt from taxation." This "speculative portion" exemption refers to:

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

that portion of the value of agricultural land which represents the excess over the actual use value of such land established by comparable sales data compared to value established by capitalization of economic rent or long term average crop rental at a capitalization rate which shall be the rate of interest charged by the Spokane federal land bank district averaged over the immediate past five (5) years plus a component for the local tax rate.

The one percent initiative, if passed, will not affect either of these exemptions. Paragraph 1 of § 1 of the initiative petition currently being circulated for signatures provides:

The maximum amount of all ad valorem tax on *property subject to assessment and taxation* within the State of Idaho shall not exceed one percent (1%) of the actual market value of such property.

(Emphasis added.) Thus, on its face, the one percent initiative places a limitation upon the amount of tax that may be levied against *taxable* property, i.e. "property subject to assessment and taxation." It has no application to property that is exempt from assessment and taxation. Thus, the one percent initiative, if passed, will not impact either the homeowner's exemption or the exemption for the speculative value of agricultural land.

This office is currently working on a formal opinion regarding several issues concerning the one percent initiative. Once our formal opinion has been finalized, we will send a copy of the opinion to your office. Thank you for your patience in this matter.

Yours very truly,

FRANCIS P. WALKER
Deputy Attorney General

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

October 16, 1991

Steven G. Wood
Wood & Shaw
155 South Second Avenue
Pocatello, ID 83201

**THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE
ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE**

Re: Idaho Code § 18-1502

Dear Mr. Wood:

By letter dated July 15, 1991, you requested an opinion from this office regarding Idaho Code § 18-1502(d). This provision authorizes a court to suspend for one year the driver's license of a minor who is found guilty of alcohol offenses unrelated to the operation of a motor vehicle. Your question is whether this office continues to adhere to our previous Attorney General Opinion that concluded that this statute was unconstitutional.

In 1983 the Idaho Legislature amended Idaho Code § 18-1502(c) to provide:

The department of transportation shall suspend the operator's license or permit to drive and any non-resident's driving privileges in the State of Idaho for sixty (60) days of any person under nineteen (19) years of age who is found guilty or convicted of violating the law pertaining to the use, possession, procurement, attempted procurement or dispensing of any beer, wine or any other alcoholic beverage

In 1984 this office issued Attorney General Opinion 84-5 stating that this provision was unconstitutional because, among other things, it failed to provide minimum safeguards of procedural due process. In particular, the statute did "not provide for notice or hearing before a license is suspended" by the department of transportation. 1984 Attorney General Opinion at 53.

Idaho Code § 18-1502(c) was amended by the Idaho Legislature in 1989 and 1990. Idaho Code § 18-1502(d) now provides:

Whenever a person pleads guilty or is found guilty of violating any law pertaining to the possession, use, procurement, attempted procurement or dispensing of any beer, wine, or other alcoholic beverage, and such person was

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

under eighteen (18) years of age at the time of such violation, then in addition to the penalty provided in subsection (b) of this section:

(1) The court shall suspend the person's driving privileges for a period of not more than one (1) year. The person may request restricted driving privileges during the period of suspension, which the court may allow, if the person shows by a preponderance of the evidence that driving privileges are necessary as deemed appropriate by the court.

Thus, the statute as amended provides for a hearing before the person authorized to suspend the license and also permits a hearing in order to obtain restricted driving privileges during the period of suspension. This amendment cures the procedural due process infirmity noted in Attorney General Opinion 84-5.

The 1984 opinion also indicated that the law as it then stood might suffer from substantive due process and equal protection deficiencies:

Because of the lack of a rational relationship between driving or driving privileges and the state's interests in prohibiting a minor's non-traffic possession, procurement, or use of an alcoholic beverage, Idaho Code § 18-1502(c) requiring suspension of driving privileges for teenagers convicted of liquor offenses is unconstitutional on equal protection grounds and probably on substantive due process grounds as well.

Nothing in the 1989 or 1990 amendments to this statute serves to cure what was identified as "the lack of a rational relation" between the penalty of denying driving privileges and the crime of possession, use, procurement, attempted procurement or dispensing of any beer, wine or other alcoholic beverage.

Subsequent to the issuance of Attorney General Opinion No. 84-5, however, the Court of Appeals of Oregon addressed the constitutionality of an Oregon statute similar to Idaho Code § 18-1502. *State v. Day*, 733 P.2d 937 (1987). In concluding that a rational relationship did exist between the penalty imposed and the state interest for imposing the penalty, the Oregon court stated:

The legislative history reveals that the law was intended to meet two goals: deterrence of drug and alcohol possession and use among young people and promotion of highway safety. Both goals are legitimate. The legislature considered the sanction appropriate to meet these goals because of the lack of other meaningful penalties for the group and the recognition that driving is a privilege young people do not want to lose.

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

733 P.2d at 938-39. Similarly, in *Commonwealth v. Strunk*, 582 A.2d 1326 (1990), the Superior Court of Pennsylvania construed a similar statute and concluded that the lack of other meaningful penalties against minors justified the sanction. A strongly worded dissent argued that the legislature had acted arbitrarily in suspending driving privileges as a penalty for underage possession of alcoholic beverages.

In sum, the conclusions reached in Attorney General Opinion 84-5 are superseded by those in this guideline. The procedural due process problems identified in 1984 have been cured by the 1989 and 1990 amendments to Idaho Code § 18-1502(c). The substantive due process and equal protection problems have not been addressed by subsequent legislatures, but similar statutes have been upheld by courts in Oregon and Pennsylvania against similar constitutional attacks. Unfortunately, neither court has persuasively articulated a rational relationship between the state's valid goal of enforcing statutes dealing with underage drinking and the chosen penalty of suspending driving privileges.

It is our conclusion, in light of these two decisions, that Idaho Code § 18-1502(c) is not clearly unconstitutional and that its penalties should be enforced unless and until they are successfully challenged.

Yours very truly,

JOHN J. McMAHON
Chief Deputy

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

October 23, 1991

Don L. Roberts
City Attorney
City of Lewiston
Post Office Box 617
Lewiston, Idaho 83501

THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE

Dear Mr. Roberts:

By letter dated September 30, 1991, you requested an opinion from this office regarding the legal consequences, if any, of a Lewiston City employee's spouse running for the Lewiston City Council. Lewiston's assistant city attorney, Earl McGeoghegan, is a classified city employee and has been employed by the City of Lewiston in this capacity for several years. Mr. McGeoghegan's wife, Shirley McGeoghegan, has filed a nominating petition and is a candidate seeking election to the Lewiston City Council. The election is scheduled for November 5, 1991. In light of Shirley McGeoghegan's candidacy, your question is whether Earl McGeoghegan could continue to serve as assistant city attorney if Shirley McGeoghegan is elected to the council. For the reasons set forth below, it is the opinion of this office that Mr. McGeoghegan could not continue to serve.

Idaho's Municipal Corporation law, title 50, Idaho Code, contains no provisions that would prohibit a city employee from being married to a member of that city's council. Idaho's anti-nepotism statute, Idaho Code § 18-1359(1)(e), does apply to city council members and the employment of close relatives. That provision would prohibit the appointment of a sitting council member's spouse to a position with the city. However, this office has taken the position that *existing* public employment should not be jeopardized by the *subsequent* election of a relative to public office. A copy of the legal guideline setting forth this position is enclosed. From the facts set forth in your letter and the previous analysis provided by this office, it appears that Idaho Code § 18-1359(1)(e) should not prohibit Earl McGeoghegan from retaining his position with the city.

The next section requiring discussion is Idaho Code § 59-201. That provision states:

The members of the legislature, state, county, city, district and precinct officers, must not be interested in any contract made by them in their official capacity, or by any body or board of which they are members.

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

Although this office has limited facts relevant to Mr. McGeoghegan's employment relationship with the City of Lewiston, it is apparent that this relationship is contractual. Idaho case law recognizes employment relationships as contractual in nature and in certain instances will afford contract remedies to aggrieved employees even though a written employment contract has not been executed. *Harkness v. City of Burley*, 110 Idaho 353, 715 P.2d 1283 (1986).

Whether Idaho Code § 59-201 extends to employment contracts is not in doubt. Idaho Code § 59-201 has been cited and utilized by the Idaho Supreme Court on several occasions in cases that nullified employment relationships between boards and their officers. *Nampa Highway District No. 1 v. Graves*, 77 Idaho 381, 293 P.2d 269 (1956); *McRoberts v. Hoar*, 28 Idaho 163, 152 P. 1046 (1915); *Nuckols v. Lyle*, 8 Idaho 589, 70 P. 401 (1902); *Ponting v. Isaman*, 7 Idaho 581, 65 P. 434 (1901). The more difficult question is whether a public official's spouse can have an employment contract with the board on which the public official serves. When analyzed under Idaho's community property law, the answer must be "no."

The basic rule of law in Idaho is that all property acquired after marriage is presumed to be community property. *Bolden v. Bolden*, 118 Idaho 84, 794 P.2d 1140 (1990); Idaho Code § 32-906. Income earned by the employment of either spouse during marriage is community property. *Suter v. Suter*, 97 Idaho 461, 546 P.2d 1169 (1976). Further, each spouse has a vested interest as equal partners in the community estate. *Peterson v. Peterson*, 35 Idaho 470, 207 P. 425 (1922); *Hansen v. Blevins*, 84 Idaho 49, 367 P.2d 758 (1962). Thus, under Idaho law, Shirley McGeoghegan has vested interest in one-half of the income earned by Earl McGeoghegan from the City of Lewiston. It follows that Shirley McGeoghegan has a pecuniary interest in Earl McGeoghegan's employment relationship with the city.

The only Idaho case to address this particular situation is *Nuckols v. Lyle, supra*. In *Nuckols*, the wife of a school board trustee entered into a contract to teach school with the district served by her husband. The contract was challenged by another member of the school board. In holding that the contract was void, the Idaho Supreme Court stated:

Touching the validity of said contract, only one question is necessary to be determined: Was the husband of Mrs. Young pecuniarily interested in the contract? We think he was. Under the laws of this state the earnings of the wife constitute a part of the community property. The husband has the control and management of the community property, and he may use it and is part owner in it, and hence is pecuniarily interested in it. The said contract was, by the terms of the said statute, null and void. We have other statutes prohibiting contracts of this kind. (See Rev. Stats. secs. 365-367.)

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

8 Idaho at 592. Although the court was relying primarily upon a statute expressly prohibiting school district trustees from being interested in school district contracts, the court made specific reference to R.S. § 365, a prior enactment of Idaho Code § 59-201, and indicated that the contract would be void under that provision as well.

Clark v. Utah Construction Company, 51 Idaho 587, 8 P.2d 454 (1932), is also relevant to the present matter. In *Clark*, the wife of an Owyhee County commissioner purchased a substantial amount of real property from the county. As the chairman of the board of county commissioners, the husband actually executed the deed conveying the property from the county to his wife. When challenged, the commissioner argued that the land was purchased with his wife's separate funds and, therefore, the land purchased was the separate property of his wife. The court rejected this argument and held that regardless of the nature of the property the commissioner was interested in the transaction:

The purport of the language used in these statutes is clear and unmistakable. A county commissioner is absolutely prohibited from being interested *directly or indirectly in any sale* of property belonging to the county. A violation of this statute by the officer is a felony. The general statutes merely reiterate the prohibition as to all officers. A sale of county property to the wife of one of the county commissioners contravenes the statutes above set forth, whether the purchase is paid with community funds or with the separate funds of the wife. The reason is obvious; in either event the commissioner is interested, within the purview of the law. Even if the purchase is made with separate funds, the law governing the marital relationship in this state imputes to the husband such an interest in the separate property of his wife, as to render the transaction obnoxious to the statute.

51 Idaho at 593 (emphasis in original).

Applying the above-stated law to the facts presented, it is clear that Shirley McGeoghegan, if elected to the Lewiston City Council, will have a pecuniary interest in Earl McGeoghegan's continued employment with the city. As a city council member, this interest would be prohibited by Idaho § 59-201. The fact that Mr. McGeoghegan is a classified employee and that the relationship existed prior to the election is of no real consequence. Earl McGeoghegan's employment contract and relationship with the City of Lewiston will undoubtedly be reviewed and renewed on a periodic basis. Shirley McGeoghegan's personal interest in this process cannot be reconciled with her official duties, particularly in establishing the annual city budget pursuant to Idaho Code § 50-1002. Furthermore, disclosure and non-participation in matters pertaining to Earl McGeoghegan's employment are not sufficient to overcome the prohibitions found in Idaho Code § 59-201. Ultimately, if Shirley McGeoghegan is elected and decides to

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

take a position on the Lewiston City Council, Earl McGeoghegan's employment with the City of Lewiston would have to be terminated.

This conclusion is buttressed by strong policy considerations set forth by the Idaho Supreme Court. In *McRoberts v. Hoar*, *supra*, the court stated:

An official's duty is to give to the public service the full benefit of a disinterested judgment and the utmost fidelity. Any agreement or understanding by which his judgment or duty conflicts with his private interest is corrupting in its tendency. . . . There is no more pernicious influence than that brought about by public officials entering into contracts between themselves by virtue of which contracts the emoluments of their offices are increased and the time and attention which the law demands that they shall give to the performance of the duties of their offices are given to the performance of the duties required of them under such contracts. Justice, morality and public policy unite in condemning such contracts and no court will tolerate any suit for their enforcement. The fact that the acceptance of such employment was without fraud and prejudice to the interest of the taxpayers is immaterial. Even in the absence of statutory provisions, such a contract is void; as a public official cannot make a contract to regulate his official conduct by consideration of private benefit to himself.

The court stated further:

It is the relation that the law condemns and not the results. It might be that in this particular case public duty triumphed in the struggle with private interest, but such might not be the case again or with another officer; and the policy of the law is not to increase temptations or multiply opportunities for malfeasance in office.

28 Idaho at 174-75. See also *Nampa Highway District No. 1 v. Graves*, *supra*.

The Idaho case law dealing with I.C. § 59-201 is absolute in enforcing the prohibition. There is simply no room for compromise or attempted justification. The case law is long-standing and the Idaho Legislature has found no reason to amend the statute.

The state of California has a nearly identical statute to I.C. § 59-201. Deering Codes, Government Code § 1090. The California legislature has enacted a number of exclusions from this contract prohibition. Among these exclusions, the California legislature specifically excluded existing employment contracts of public official spouses. Deering Codes, Government Code § 1091.5 provides:

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

(a) An officer or employee shall not be deemed to be interested in a contract if his or her interest is any of the following:

(6) That of a spouse of any officer or employee of a public agency in his or her spouse's employment or officeholding if his or her spouse's employment or officeholding has existed for at least one year prior to his or her election or appointment.

The Idaho Legislature could take similar action, but until such action is taken, Earl McGeoghegan cannot be employed by the City of Lewiston while his wife serves on the city council.

Very truly yours,

FRANCIS P. WALKER
Deputy Attorney General

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

October 29, 1991

Mr. George G. Hicks
Deputy City Attorney
City of Boise
150 N. Capitol Boulevard
P.O. Box 500
Boise, ID 83701-0500

THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF
THE ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE

Re: Delegation of Authority of City Council to Award Contracts

Dear Mr. Hicks:

You asked our office whether a city council may delegate authority to city employees to approve and award contracts to the lowest responsible bidder. The modern trend in case law is to permit delegation of city council functions such as contracting. However, some of the language of Idaho Code § 50-341 and legislative history indicate the legislature did not intend to permit delegation. Consequently, in our opinion, the safest course would be to seek legislative clarification. However, if the authority is delegated, it would be prudent to provide standards by which the lowest responsible bidder will be selected.

Under Idaho Code § 50-341 city contracts involving an expenditure of more than \$5,000 are awarded to the lowest responsible bidder. In the past, Boise City Council has generally accepted the recommendation of its staff in determining the identity of that bidder. The council would now like to delegate to subordinates the authority to approve and award such contracts.

Idaho has yet to specifically address the issue of when a city council may delegate authority. However, under case law from other jurisdictions, the general rule is that the same restrictions which apply to a state legislature's delegation of power also apply to a city council. C.S. Rhyne, *The Law of Local Government Operations*, § 4.10 (1980). Thus, a city council may not delegate its lawmaking authority. 56 Am. Jur. 2d, *Municipal Corporations*, § 196 (1971). Likewise, it may not leave the resolution of fundamental policy to others or fail to provide adequate direction for the implementation of that policy. *Carson Mobile Home Park Owners v. Carson*, 672 P.2d 1297 (Cal. 1983).

However, just as a legislature can empower an agency or official to ascertain the

existence of facts or conditions upon which a law becomes operative, *Kerner v. Johnson*, 99 Idaho 433, 583 P.2d 360 (1978), a city council may delegate authority to make a determination as to the existence of facts in order to enforce ordinances. *Carson, supra*. Similarly, a city council may delegate the authority to promulgate rules and regulations in order to enforce ordinances. 56 Am. Jur. 2d, *Municipal Corporations*, § 196 (1971). And, of course, ministerial and administrative functions not involving discretion may be delegated. *Id.*

Applying these rather broad principles to the delegation of the authority to contract, it appears that today this power may, under some circumstances, be conferred upon a subordinate. Traditionally, the power to contract was considered a discretionary function which could not be delegated away. See 63 C.J.S., *Municipal Corporations*, § 981. However, the present tendency is to allow delegation from the city council for various municipal officials, boards and departments to enter into contracts. *The Law of Local Government Operations*, § 27.2. It is felt that if delegation is precluded, city councils will become mired in the details of routine operations, when they should instead be concerned with setting basic priorities and policies. As our Idaho Supreme Court has noted, in the context of state legislative delegation, "The modern view is that broad delegation of legislative authority is proper and indeed necessary." *Sun Valley Company v. City of Sun Valley*, 109 Idaho 424, 428, 708 P.2d 147, 151 (1985). Thus, today, the authority to contract may, at times, be delegated by the city council. See, e.g., *Cleveland Police Patrolmen's Association v. City of Cleveland*, 492 N.E.2d 861 (Ohio App. 1985); *Subcontractors Trade Association v. Koch*, 477 N.Y.S.2d 120 (Ct. App. 1984); *Kayatt v. Dinkins*, 560 N.Y.S.2d 736 (Sup. 1990); 10 McQuillen, *Municipal Corporations*, § 29.15 (3rd ed. 1990).¹

There is, however, an exception to this rule. When the state legislature has evidenced its intent that one particular public body or official is to exercise specified discretionary power, that power is in the nature of a public trust and may not be exercised by others. For example, a statute which imposes a "duty" on a particular political body to, for instance, employ teachers, precludes delegation of this function. *Big Sandy School District No. 100-J v. Carroll*, 433 P.2d 325 (Colo. 1967). Similarly, a statute which provides "the city council shall fix the compensation of all appointive officers and employees," requires that the city council perform that duty. *Bagley v. City of Manhattan Beach*, 553 P.2d 1140 (Cal. 1976) (emphasis added). Thus, if the legislature intended to limit delegation, the power to contract may not be conferred on a subordinate or other political body.

Applying this law to the situation at hand, the first task is to determine whether the state legislature has expressed its intent that the city council has the sole duty to award contracts to the lowest responsible bidder. Idaho Code §§ 50-341(A) and (C) provide, in pertinent part:

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

The following provisions relative to competitive bidding apply to *all cities* . . .

. . .

When the expenditure contemplated exceeds five thousand dollars (\$5,000), . . . the expenditure shall be contracted for and let to the lowest responsible bidder. (Emphasis added.)

Thus, the function of awarding contracts is not expressly conferred upon the city council. However, other provisions indicate that it is the council which is required to perform this function. Under Idaho Code § 50-341(J) and (K), the task of rejecting all bids, choosing between identical bids and going to the open market is expressly given to the city council.² Because these functions are so closely linked to the responsibility of awarding a contract to the lowest responsible bidder, they indicate an intention on the part of the state legislature to confer solely on the city council the duty of awarding contracts.

Moreover, while the legislative history of Idaho Code § 50-341 does not directly address the council's authority to delegate contract decisions to its staff, the history does provide some insights. Most notable is the statement of purpose to Idaho Code § 50-341(L). Idaho Code § 50-341 provides that if an emergency is declared by the mayor or city manager, money "may be extended without compliance with this section." The 1981 Statement of Purpose for Idaho Code § 50-341(L) states that in an emergency, "a city or county can, in *that single instance* . . . make whatever purchases are required without complying with the state bid law." (Emphasis added.) This language underscores the importance the legislature attaches to compliance with precise bidding procedure.

Significant also is the statement of purpose to Idaho Code § 50-341(M). Section (M) was added in 1987 to authorize cities to purchase equipment at public auction. The statement of purpose provides in part:

This change would allow cities to take advantage of . . . savings . . . while still *requiring council control* over the dollar amount of the purchase. (Emphasis added.)

Here, council control over finances is both emphasized and treated as a requirement, again buttressing the position that the legislature intended city councils, and not their staff, to make bidding decisions. Thus, legislative history and the general language of Idaho Code § 50-341 indicate the authority to award bids should be exercised by the city council.

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

A reasonable policy argument can be made to allow delegation. As noted, delegation is the current trend, and it would free the city council to concentrate on other, more important tasks. Moreover, as noted, Idaho Code § 50-341 does not expressly place the duty of awarding bids on the council. Nevertheless, it is this office's opinion that, given the tenor of the statute and certain excerpts from the legislative history, the safer course would be not to delegate this authority, but to instead ask the state legislature to amend Idaho Code § 50-341 and ameliorate the problem.

If, upon weighing the risks, the city council still decides it is necessary to delegate the power to award bids, this delegation should not be without limit. As noted, the authority to contract was traditionally thought to be a discretionary function which the city council had to exercise itself. While today some exercise of judgment may be delegated, this should not be unbridled judgment, but should instead be circumscribed by reasonable legislative guidelines. O.M. Reynolds, Jr., *Local Government Law*, 170 (1982). For example, in *Koch, supra*, at 124, the New York Court of Appeals stated that the Mayor of New York City could not award construction contracts unless the city council "specifically delegate[d] that power to him and provide[d] adequate guidelines and standards for the implementation of that policy." Similarly, in *City of Cleveland, supra*, at 864-65, the Ohio Court of Appeals concluded the determination of salary schedules for patrol officers could be delegated as long as the city council established standards and principles to which the arbitration panel had to conform as well as a procedure whereby the panel's exercise of discretion could be reviewed. Thus, if the city council delegates its authority to award contracts, it should provide standards and guidelines so this authority is not exercised in an arbitrary or capricious manner.

Here, a subordinate awarding contracts is not merely determining the lowest bidder. Such would be a relatively simple task. Rather, the subordinate is determining the lowest *responsible* bidder. The city council should provide a specific policy and guidelines defining a reasonable bid and setting forth the factors which must be considered in choosing the lowest responsible bidder. By providing such guidance, the council will decrease the likelihood that contracts will be awarded in an arbitrary or discriminatory manner and increase the chance that its delegation will withstand judicial scrutiny.

In summary, the modern trend is to allow city councils to delegate their power to award contracts. However, such delegation requires a specific policy and guidelines defining a responsible bid and setting forth the factors which must be considered in choosing the lowest responsible bidder. By providing such guidance, the council will decrease the likelihood that contracts will be awarded in an arbitrary or discriminatory manner and increase the chance that its delegation will withstand judicial scrutiny. In summary, the modern trend is to allow city councils to delegate their power to award contracts. However, such delegation is not allowed if the state legislature has evidenced its intent

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

that the city council's authority be exercised by that body. While Idaho Code § 50-341 does not expressly impose the duty to award contracts upon the city council, this duty is quite likely so imposed by implication. That being so, this office does not recommend delegation. If, upon weighing this risk, the Boise City Council nevertheless decides to delegate its authority to award contracts, this office suggests that the delegation be accompanied with standards to guide the subordinates upon whom the authority is conferred.

Yours very truly,

MARGARET R. HUGHES
Deputy Attorney General

¹ Worth noting is that in the state legislative context, the Idaho Supreme Court has previously upheld the delegation of authority to an interim committee to approve a contract, so long as the legislature retained the final power to veto the committee's actions. *Idaho Water Resource Board v. Kramer*, 97 Idaho 535, 548 P.2d 35 (1976).

² Idaho Code § 50-341(J) and (K) state:

J. In its discretion, the city council may reject any bids presented and readvertise. If two (2) or more bids are the same and the lowest responsible bids, the city council may accept the one it chooses. If no bids are received, the council may make the expenditure without further compliance with this section.

K. After rejecting bids, the city council may, after finding it to be a fact, pass a resolution declaring that the thing sought to be accomplished by the expenditure can be performed more economically by day labor, or the materials or supplies furnished at a lower price in the open market. Upon adoption of the resolution, it may have the thing sought to be accomplished done in the manner stated without further compliance with this section.

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

November 4, 1991

The Honorable Ron Beitelspacher
Idaho State Senator
P.O. Box 415
Grangeville, ID 83530

THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE

Re: Balanced Budget Requirements

Dear Senator Beitelspacher:

This letter is in response to the inquiries contained in your letter of September 10, 1991, regarding the duty of the governor to present a balanced budget to the legislature, the duty of the legislature to approve a budget which is balanced with the revenue projections adopted by the legislature, and further requesting legal guidance on which revenue estimates should be used by the legislature. Our response requires an analysis of art. 7, sec. 11, of the Idaho Constitution. The pertinent portion of art. 7, sec. 11, states: “[n]o appropriation shall be made, nor any expenditures authorized by the legislature, whereby the expenditure of this state during any fiscal year shall exceed the total tax then provided for by law, and applicable to such appropriation or expenditure, unless the legislature making such appropriation shall provide for levying a sufficient tax, not exceeding the rates allowed in section nine of this article, to pay such appropriation or expenditure within such fiscal year.”

The Idaho Supreme Court, in interpreting the provisions of articles 7 and 8 of the constitution, found the intent of the framers to be explicit in providing that “appropriations for current expenses and the raising of revenues to meet those appropriations . . . [be] treated . . . as a cash transaction.” *Stein v. Morrison*, 9 Idaho 426, 451, 75 Pac. 246 (1904). Art. 7, sec. 11, thereby requires the state to maintain a balanced budget.

Pursuant to Idaho Code § 67-3506, the governor must transmit a budget document to the legislature not later than five days following the convening of the regular legislative session. There is no statutory requirement that the governor provide a balanced executive budget to the legislature. However, since the chief executive is also designated as the chief fiscal officer of the state, it would appear that a good faith obligation to provide a balanced budget to the legislature could be implied.

Art. 7, sec. 11, of the Idaho Constitution speaks specifically to the actions of the

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

legislature. Therefore, to comply with the requirements of this section, the legislature should make appropriations which balance with the revenue projection. In each legislative session, the legislature, by concurrent resolution, adopts a revenue projection. The legislature receives revenue projections from the department of financial management and the legislative budget office. There are no constitutional or statutory provisions which provide guidance in determining which projection should be adopted by the legislature. However, by adopting the projection, the legislature evidences its opinion as to the amount of revenues which will be available in the upcoming fiscal year. To meet the constitutional requirements of art. 7, sec. 11, the legislature should make appropriations which balance with the revenue projections adopted by concurrent resolution. If the legislature fails to carry out the constitutional mandate of art. 7, sec. 11, its right to determine and direct appropriations may be affected. Pursuant to Idaho Code §§ 67-3512 and 67-3512A, the governor and the board of examiners have authority to reduce appropriations to bring the budget into compliance with the constitutional requirements of art. 7, sec. 11.

Pursuant to Idaho Code § 67-3512A, if there is a failure or deficit in revenue which results in expenditures authorized by the legislature for the current fiscal year exceeding anticipated monies, the governor may by executive order temporarily reduce the allotments on file in the offices of the state auditor for any department, office or institution of the state. However, the governor is prohibited from making a reduction in allotments for elected officers in the executive department which would prohibit the discharge of their constitutional duties and, further, no reduction of allotments for the legislative and judicial departments may be made without the permission in writing of the head of such department.

Pursuant to Idaho Code § 67-3512, the board of examiners, upon an investigation or report of the administrator of the division of financial management, may also reduce appropriations made to any department, office or institution of the state. However, a hearing before the board of examiners must take place prior to a reduction being ordered unless the head of the department, office or institution affected files in writing a consent to the reduction. The board of examiners is also precluded from reducing appropriations which would result in an inability to discharge constitutional duties and is further precluded from reducing the appropriations from the legislative and judicial departments without the written consent of the head of such a department.

In summary, the legislature has a constitutional duty to balance its appropriations with the projected revenues adopted by concurrent resolution. If revenues fall short of the appropriations made by the legislature, the obligation to reduce appropriations to bring the state into compliance with the requirement of art. 7, sec. 11, of the Idaho Constitution fall to the board of examiners or the governor pursuant to the powers provided in Idaho Code §§ 67-3512 and 67-3512A.

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

I hope this response adequately addresses the concerns raised in your letter. If the attorney general's office can be of further assistance, please contact me.

Yours very truly,

TERRY B. ANDERSON
Deputy Attorney General
Chief, Business Regulation and State Finance Division

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

November 13, 1991

James W. Phillips
Roark, Donovan, Praggastis,
Rivers & Phillips
Post Office Box 2740
Hailey, Idaho 83333

THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE

Re: Conflict of Interest of Hospital Board Member

Dear Mr. Phillips:

By letter dated October 16, 1991, you requested an opinion from this office regarding the legal consequences of a county hospital board member having an interest in a contract made with the county hospital. According to your letter, a recently appointed member of the Blaine County Hospital Board is the spouse of a physician who has hospital privileges with the Blaine County Hospital. The physician leases office space from the county hospital and also has a contract with the county to provide emergency room services for the hospital. In light of this appointment, you have raised four questions. I will address each question in turn.

QUESTION NO. 1

Is a person appointed to a hospital board pursuant to I.C. § 31-3601, et seq., subject to the provisions of I.C. §§ 59-201 and 59-202?

A county hospital board member appointed pursuant to I.C. § 31-3603 would be an "officer" within the scope of chapter 2, title 59, Idaho Code. I.C. § 59-201 provides:

Members of the legislature, state, county, city, district, and precinct officers, must not be interested in any contract made by them in their official capacity, or by any body or board of which they are members.

Further, I.C. § 59-202 provides:

State, county, district, precinct and city officers must not be purchasers at any sale nor vendors at any purchase made by them in their official capacity.

Although the term "officer" is not defined in this chapter, the term "public official" is

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

defined in the Ethics in Government Act of 1990. Chapter 7, title 59, Idaho Code. Given the similarity in subject matter between chapters 2 and 7 of title 59, Idaho Code, the definition provides guidance. Idaho Code § 59-703(10) states:

‘Public official’ means any person holding public office in the following capacity:

(c) as an appointed public official meaning any person holding public office of a governmental entity by virtue of formal appointment as required by law;

A county hospital board member is formally appointed by the board of county commissioners pursuant to I.C. § 31-3603. The board member also has statutorily defined powers and duties delegated from the board of county commissioners. I.C. § 31-3607(a) provides in part:

The county hospital board shall be charged with the care, custody, upkeep, management and operation of all property belonging to the county and devoted to hospital purposes, and shall be responsible for all moneys received by it, including all revenue from hospital operation, all moneys received by tax levies for hospital operation, and all moneys received from whatever source, by contribution or otherwise, for hospital operation purposes.

I.C. § 31-3610 provides in part:

The county hospital board shall have power to formulate and adopt such rules and regulations for the conduct and operation of the hospital property as it may deem necessary or convenient for the efficient, economical and successful operation thereof, and which rules and regulations when approved by the board of county commissioners shall be in full force and effect. It shall be the duty of the county hospital board to formulate and adopt such changes, additions, modifications and rescissions of the rules and regulations as it may find or deem necessary or convenient for the efficient, economical and successful operation of the hospital property, which changes, additions, modifications and rescissions when approved by the board of county commissioners shall be in full force and effect.

Clearly, an official with these broad discretionary powers must be subject to the restrictions placed upon public officers in I.C. § 59-201.

California has a nearly identical statute to I.C. § 59-201. Deering Codes, Government Code, § 1090. The question as to who was a “public officer” in relation to this contract prohibition was raised in *City Council of the City of San Diego v. McKinley*, 145 Cal.

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

Rptr. 461, 80 Cal.App.3d 204 (Cal.App. 1978). The public position in question was an appointed member of the city's parks and recreation board. In determining that the board member was in fact a public officer within the scope of the statute, the court set forth the following criteria:

It is apparent now there are two requirements for a public office; first, a tenure of office which is not transient, occasional, or incidental but is of such nature that the office itself is an entity in which incumbents succeed one another and which does not cease to exist with the termination of incumbency and, second, the delegation to the officer of some portion of the sovereign functions of government either legislative, executive, or judicial (*Spreckels v. Graham*, 194 Cal. 516, 530, 228 P. 1040).

145 Cal. Rptr. at 464.

Applying this judicial criteria to county hospital board members, it is again evident that board members are public officers within the scope of chapter 2, title 59, Idaho Code. The creation and organization of a county hospital board is provided by statute and, once formed, it cannot be discontinued without voter approval. I.C. § 31-3605. Members of the board are appointed for a term of three years, and when vacancies occur on the board, the person appointed to fill the vacancy serves the remainder of the unexpired term. I.C. § 31-3604. Further, I.C. § 31-3606 requires that the board meet on a regular basis and adopt a meeting schedule by resolution. Service on a county hospital board is not "transient, occasional or incidental."

As previously noted, the powers and duties of a county hospital board are set forth in I.C. §§ 31-3607 and 31-3610. To a large degree, the board is autonomous from the board of county commissioners. While a county hospital board is not an independent political subdivision of the state, its delegated functions are highly discretionary and not merely ministerial. Thus, a county hospital board member must be considered an "officer" within the scope of I.C. § 59-201.

QUESTION NO. 2

Do the prohibitions contained in I.C. §§ 59-201 and 59-202 prohibit a county hospital board from entering into a contract or a lease with the spouse of one of the board members?

The prohibition set forth in I.C. § 59-201 also extends to the spouses of public officers. The basic rule of law in Idaho is that all property acquired after marriage is presumed to be community property. *Bolden v. Bolden*, 111 Idaho 84, 794 P.2d 1140 (1990); I.C. § 32-906. Income earned by either spouse during marriage is community

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

property, *Suter vs. Suter*, 97 Idaho 461, 546 P.2d 1169 (1976), and each spouse has a vested interest as equal partners in the community estate. *Peterson v. Peterson*, 35 Idaho 470, 207 P. 425 (1922); *Hansen v. Blevins*, 84 Idaho 49, 367 P.2d 758 (1962). This vested interest includes both the benefits and obligations from contracts entered into during marriage. *Stanger v. Stanger*, 98 Idaho 725, 571 P.2d 1126 (1976). Thus, under Idaho community property law, the county hospital board member has a vested interest in the contracts of her spouse as well as the income earned through these contracts with the county.

The Idaho Supreme Court has had the opportunity to address I.C. § 59-201 in relation to the spouse of a public officer. In *Nuckols v. Lyle*, 8 Idaho 589, 70 P. 401 (1902), the wife of a school board trustee entered into a contract to teach school with the district served by her husband. The contract was challenged by another member of the school board. In holding that the contract was void, the Idaho Supreme Court stated:

Touching the validity of said contract, only one question is necessary to be determined: Was the husband of Mrs. Young *pecuniarily interested* in the contract? We think he was. Under the laws of this state the earnings of the wife constitute a part of the community property. The husband has the control and management of the community property, and he may use it and is part owner in it, and hence is pecuniarily interested in it. The said contract was, by the terms of the said statute, null and void. We have other statutes prohibiting contracts of this kind. (See Rev. Stats. sec. 365-367.)

8 Idaho at 592. (Emphasis added) Although the court was relying primarily upon a statute expressly prohibiting school district trustees from being interested in school district contracts, the court made specific reference to R.S. § 365, a prior enactment of Idaho Code § 59-201, and indicated that the contract would be void under that provision as well. See also *Clark v. Utah Construction Company*, 51 Idaho 587, 8 P.2d 454 (1932).

The cases construing Idaho's community property law in relation to the contractual interest of public officers leave little room for doubt. A county hospital board member has a pecuniary interest in any contract made by his or her spouse with the hospital under the board's control.

QUESTION NO. 3

Do the prohibitions contained in I.C. § 59-201 void a contract entered into with the physician spouse of a subsequently appointed board member?

This issue has never been addressed by an Idaho appellate court. However, the clear

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

language in I.C. § 59-201, “. . . made by them in their official capacity,” indicates that the prohibition would not affect existing contracts.

This conclusion is limited to those contracts where the interests of the parties are well established and require no further negotiation or discretionary action by either party. Renegotiation of any provision in an existing contract or exercising any option within a contract would be viewed as “making” a contract within the scope of I.C. § 59-201 and would be prohibited. See *City of Imperial Beach v. Bailey*, 103 Cal.App. 3d 191, 162 Cal. Rptr. 663 (Cal.App. 1980).

Your letter identifies two prior contracts involving the county hospital board member's spouse as well as an on-going business relationship in practicing medicine in the hospital. You have characterized the privilege to practice medicine in the hospital as a “license.” This office lacks sufficient information to adequately analyze these existing contracts and hospital privileges in relation to I.C. § 59-201 and will defer to your judgment in advising your clients.

QUESTION NO. 4

If it appears that contract would be in violation of I.C. §§ 59-201 and 59-202, what legal alternatives exist to avoid the violation?

This office's research in this area indicates that there is no means to reconcile the public official's private contractual interests with his or her official duties. Disclosure and non-participation in matters pertaining to prohibited contracts is not sufficient to overcome the prohibitions found in I.C. § 59-201. Ultimately, if the board member faces a conflict prohibited by I.C. § 59-201, the contract cannot be made. If made in violation of I.C. § 59-201, the contract is voidable. I.C. § 59-203.

These conclusions are buttressed by strong policy considerations set forth by the Idaho Supreme Court. In *McRoberts v. Hoar*, 28 Idaho 163, 174-75, 152 P.1046 (1928), the court stated:

An official's duty is to give to the public service the full benefit of a disinterested judgment and the utmost fidelity. Any agreement or understanding by which his judgment or duty conflicts with his private interest is corrupting in its tendency. . . . There is no more pernicious influence than that brought about by public officials entering into contracts between themselves by virtue of which contracts the emoluments of their offices are increased and the time and attention which the law demands that they shall give to the performance of the duties of their offices are given to the performance of the duties required of them under such contracts. Justice, morality and public policy unite in

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

condemning such contracts and no court will tolerate any suit for their enforcement. The fact that the acceptance of such employment was without fraud and prejudice to the interest of the taxpayers is immaterial. Even in the absence of statutory provisions, such a contract is void; as a public official cannot make a contract to regulate his official conduct by consideration of private benefit to himself.

The court stated further:

It is the relation that the law condemns and not the results. It might be that in this particular case public duty triumphed in the struggle with private interest, but such might not be the case again or with another officer; and the policy of the law is not to increase temptations or multiply opportunities for malfeasance in office.

See also *Nampa Highway District No. 1 v. Graves*, 77 Idaho 381, 293 P.2d 269 (1956).

The Idaho case law dealing with I.C. § 59-201 is absolute in enforcing the prohibition. There is simply no room for compromise or attempted justification. The case law is long-standing and the Idaho Legislature has found no reason to amend the statute. In fact, in 1990 the Idaho Legislature added a criminal penalty to chapter 2, title 59, Idaho Code, making the violation of I.C. § 59-201 et seq. a misdemeanor punishable by a maximum fine of \$1,000.00 and/or one year incarceration in the county jail. I.C. § 59-208.

If I may be of further assistance to you in this matter, please do not hesitate to contact me.

Very truly yours,

FRANCIS P. WALKER
Deputy Attorney General

Topic Index
and
Tables of Citations
SELECTED INFORMAL GUIDELINES
1991

1991 SELECTED INFORMAL GUIDELINES INDEX

TOPIC	DATE	PAGE
CITIES		
Fines and forfeitures for violations of city ordinances, which would otherwise be misdemeanors under state criminal code, must be apportioned to city	04/05/91	165
Individual may hold offices of mayor and state legislator at same time	04/30/91	171
City police officer called upon to assist county prosecutor outside city limits need not be deputized by sheriff	05/20/91	174
City employee cannot be employed by city while spouse serves on city council	10/23/91	202
City council may delegate authority to approve and award contracts where legislature has not provided otherwise ...	10/29/91	207
COMMISSIONS AND BOARDS		
Horse Racing Commission must be self-supporting	01/17/91	143
Idaho Code Commission holds copyright for Idaho Code and has duty to maximize benefits to state	02/05/91	146
Idaho Human Rights Act prohibits cities from discrimination based upon race, sex, color, national origin or religion in employment and benefits	08/02/91	187
CORRECTIONS		
Person who pleads guilty and is granted withheld judgment and placed on probation is "de facto felon" under Idaho law	07/15/91	182
COUNTIES		
Sheriff is responsible for guarding prisoner and paying costs of medical care of injured or sick prisoner	04/05/91	161

TOPIC	DATE	PAGE
County prosecutor has authority to request assistance in performing investigations without approval of county sheriff	05/20/91	174
City police officer called upon to assist county prosecutor outside city limits need not be deputized by sheriff	05/20/91	174
County commissioners may not have interest in any contract made by commission in official capacity, or by any board of which they are members	05/30/91	177
County commissioner cannot accept a county contract to represent indigent criminal defendants	05/30/91	177
County hospital board member may not have interest in any contract made with county hospital	11/13/91	215
County hospital board member has pecuniary interest in any contract made by spouse with hospital under board's control	11/13/91	215
ELECTED OFFICIALS		
Individual may hold offices of mayor and state legislator at same time	04/30/91	171
Governor has good faith obligation to provide balanced budget to legislature	11/04/91	212
ENVIRONMENT		
Underground storage tank program does not violate credit clause of Idaho Constitution	03/15/91	158
ETHICS		
Participation by legislators in biennial legislative tour of northern Idaho does not violate Bribery and Corrupt Influence Act	03/05/91	155

TOPIC	DATE	PAGE
Acceptance of complimentary "Buy Idaho" gift pack did not violate either Bribery and Corrupt Influence Act or Ethics in Government Act	08/15/91	195
City employee cannot be employed by city while spouse serves on city council!	10/23/91	202
County hospital board member may not have interest in any contract made with county hospital	11/13/91	215
County hospital board member has pecuniary interest in any contract made by spouse with hospital under board's control	11/13/91	215
Any contract made in violation of Idaho Code 59-201 is voidable	11/13/91	215
HUMAN RIGHTS		
Idaho Human Rights Act prohibits cities from discrimination based upon race, sex, color, national origin or religion in employment and benefits	08/02/91	187
JUDICIAL		
Fines and forfeitures for violations of city ordinances, which would otherwise be misdemeanors under state criminal code, must be apportioned to city	04/05/91	165
LAW ENFORCEMENT		
Sheriff is responsible for guarding prisoner and paying costs of medical care of injured or sick prisoner	04/05/91	161
County prosecutor has authority to request assistance in performing investigations without approval of county sheriff	05/20/91	174
City police officer called upon to assist county prosecutor outside city limits need not be deputized by sheriff	05/20/91	174

TOPIC	DATE	PAGE
Person who pleads guilty and is granted withheld judgment and placed on probation is “de facto felon” under Idaho law	07/15/91	182
Statutory prohibitions excluding resident alien from obtaining license to sell liquor by the drink or beer at retail are unconstitutional	08/07/91	190
Statute suspending driving privileges for minors guilty of alcohol offenses unrelated to operation of motor vehicle is not clearly unconstitutional	10/16/91	199

LEGISLATURE

Participation by legislators in biennial legislative tour of northern Idaho does not violate Bribery and Corrupt Influence Act	03/05/91	155
Individual may hold offices of mayor and state legislator at same time	04/30/91	171
Acceptance of complimentary “Buy Idaho” gift pack did not violate either Bribery and Corrupt Influence Act or Ethics in Government Act	08/15/91	195
Legislature has constitutional duty to balance appropriations with projected revenues adopted by concurrent resolution	11/04/91	212

LIQUOR LAW

Statutory prohibitions excluding resident alien from obtaining license to sell liquor by the drink or beer at retail are unconstitutional	08/07/91	190
---	----------	-----

MOTOR VEHICLES

Misdemeanor offense of driving with a light out applies only to motor carriers and is not in conflict with infraction of driving with a light out which applies to standard traffic	06/05/91	180
---	----------	-----

TOPIC	DATE	PAGE
Statute suspending driving privileges for minors guilty of alcohol offenses unrelated to operation of motor vehicle is not clearly unconstitutional	10/16/91	199

REVENUE AND TAXATION

One percent initiative has no impact on homeowner's exemption or on exemption for speculative value of agricultural land	09/24/91	197
--	----------	-----

TRANSPORTATION

Idaho's weight limitation statutes and grandfather rights for vehicle weight limitations under 23 U.S.C. 127 include reasonable and adequate weight tolerances for special commodity haulers operating on interstate system	03/05/91	147
---	----------	-----

1991 INFORMAL GUIDELINES UNITED STATES CONSTITUTION CITATIONS

ARTICLE & SECTION	DATE	PAGE
First Amendment	08/07/91	190

1991 INFORMAL GUIDELINES IDAHO CONSTITUTION CITATIONS

ARTICLE & SECTION	DATE	PAGE
ARTICLE 1		
§ 2	08/07/91	190
ARTICLE 2		
§ 1	04/30/91	171

ARTICLE & SECTION	DATE	PAGE
ARTICLE 3		
§ 26	08/07/91	190
ARTICLE 6		
§ 3	07/15/91	182
ARTICLE 7		
§ 10	05/30/91	177
§ 11	11/04/91	212
ARTICLE 8		
§ 2	03/15/91	158
§ 4	03/15/91	158
ARTICLE 12		
§ 2	04/05/91	165

1991 INFORMAL GUIDELINES UNITED STATES CODE CITATIONS

CODE	DATE	PAGE
23 U.S.C. § 101(a)	03/05/91	147
23 U.S.C. § 103(e)	03/05/91	147
23 U.S.C. § 104	03/05/91	147
23 U.S.C. § 127	03/05/91	147
23 U.S.C. § 141	03/05/91	147
42 U.S.C. § 2000e	08/02/91	187

1991 INFORMAL GUIDELINES IDAHO CODE CITATIONS

CODE	DATE	PAGE
Title 18, chapter 13A	08/15/91	195
18-310	07/15/91	182
18-701	04/05/91	161
18-702	04/05/91	161
18-1351(7)	03/05/91	155
18-1356	03/05/91	155
18-1356(4)	03/05/91	155
18-1356(4)	08/15/91	195
18-1356(5)(c)	08/15/91	195
18-1359	08/15/91	195
18-1359(1)(a)	03/05/91	155
18-1359(1)(b)	08/15/91	195
18-1359(1)(e)	10/23/91	202
18-1502	10/16/91	199
18-1502(c)	10/16/91	199
18-1502(d)	10/16/91	199
19-515	04/05/91	161
19-601	04/05/91	161
19-603	04/05/91	161
19-615	04/05/91	161
19-859	05/30/91	177
19-860	05/30/91	177
19-860(b)	05/30/91	177
19-2514	07/15/91	182
19-2601	07/15/91	182
19-2604	07/15/91	182
19-2604(1)	07/15/91	182
19-4705 <i>et seq.</i>	04/05/91	165
19-4804	04/05/91	165
19-5101	05/20/91	174
20-612	04/05/91	165
23-901	08/07/91	190
23-910	08/07/91	190
23-910(a)	08/07/91	190
23-910(d)	08/07/91	190
23-1010	08/07/91	190
23-1010(2)(d)	08/07/91	190
31-1515	05/30/91	177
31-2202	05/20/91	174
31-2227	05/20/91	174

CODE	DATE	PAGE
31-3601, <i>et seq.</i>	11/13/91	215
32-906	10/23/91	202
42-1001(2)	03/05/91	147
42-1754(b)	03/15/91	158
42-1756(a)	03/15/91	158
Title 49, chapter 9	03/05/91	147
49-901	03/05/91	147
49-901(b)	03/05/91	147
49-901(c)	03/05/91	147
49-905	03/05/91	147
49-905	06/05/91	180
49-1001(1)	03/05/91	147
49-1001(2)	03/05/91	147
49-1004	03/05/91	147
50-209	04/05/91	161
50-209	05/20/91	174
50-302	04/05/91	165
50-302(1)	04/05/91	165
50-302A	04/05/91	165
50-341 <i>et seq.</i>	10/29/91	207
Title 50, chapter 6	04/30/91	171
50-1002	10/23/91	202
54-2514	01/17/91	143
59-102	04/30/91	171
Title 59, chapter 2	11/13/91	215
59-201	05/30/91	177
59-201	10/23/91	202
59-201	11/13/91	215
59-202	11/13/91	215
59-203	11/13/91	215
59-208	11/13/91	215
Title 59, chapter 7	08/15/91	195
Title 59, chapter 7	11/13/91	215
59-703(4)	08/15/91	195
59-703(10)	11/13/91	215
61-807	06/05/91	180
61-814	06/05/91	180
Title 63, chapter 1	09/24/91	197
63-105	09/24/91	197
63-105CC	09/24/91	197

CODE	DATE	PAGE
63-105DD	09/24/91	197
67-3506	11/04/91	212
67-3512	11/04/91	212
67-3512A	11/04/91	212
67-5901	08/02/91	187
67-5901(1)	08/02/91	187
67-5902(5)	08/02/91	187
67-5902(6)	08/02/91	187
67-5909(1)	08/02/91	187
Title 73, chapter 2	02/05/91	146