

**IDAHO  
ATTORNEY  
GENERAL'S  
ANNUAL REPORT**

**OPINIONS**

**SELECTED INFORMAL  
GUIDELINES**

**AND**

**CERTIFICATES OF REVIEW**

**FOR THE YEAR**  
**1995**

**Alan G. Lance**  
Attorney General

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This volume should be cited as:  
1995 Idaho Att’y Gen. Ann. Rpt.

Thus, the Official Opinion 95-01 is found at:  
1995 Idaho Att’y Gen. Ann. Rpt. 5

Similarly, the Informal Guideline of January 26, 1995,  
is found at:  
1995 Idaho Att’y Gen. Ann. Rpt. 65

The Certificate of Review of July 14, 1995  
is found at:  
1995 Idaho Att’y Gen. Ann. Rpt. 169

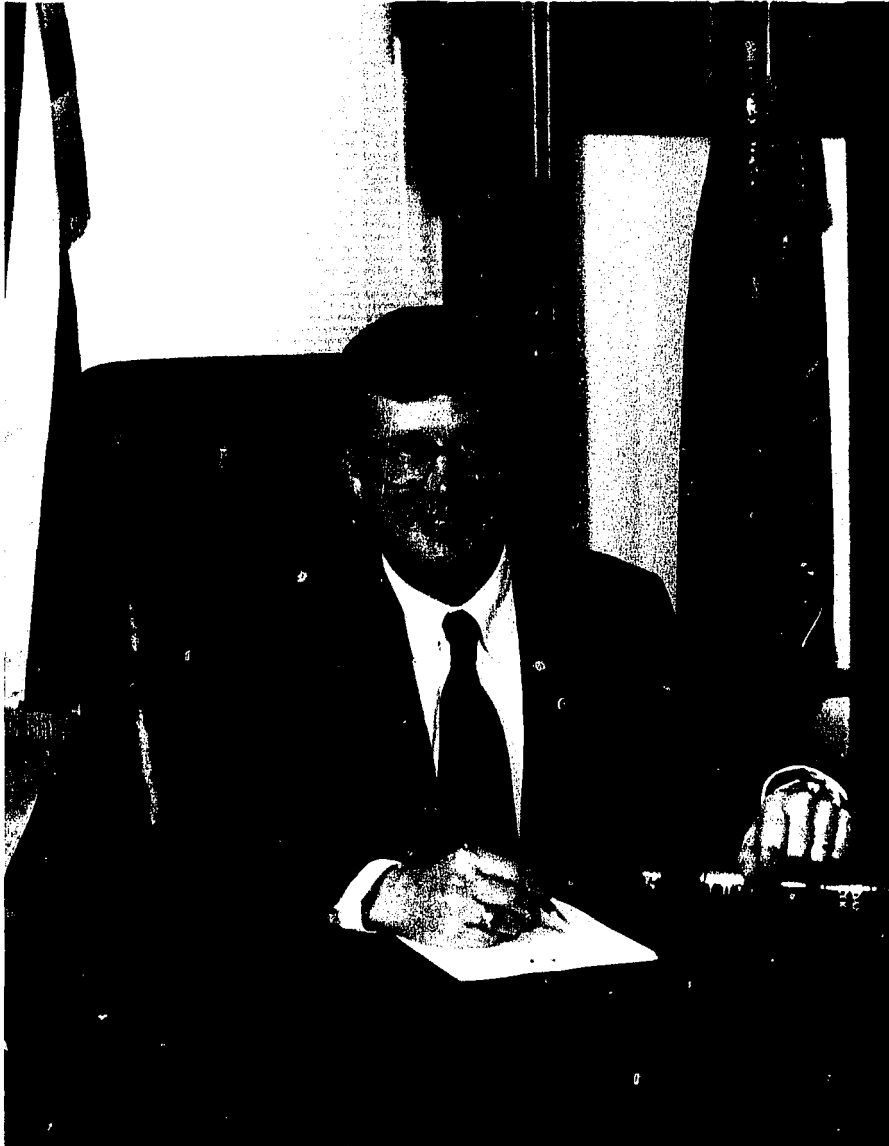
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## ATTORNEYS GENERAL OF IDAHO

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	1904-1904
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
ALLEN B. 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	1991-1994
ALAN G. LANCE	1995-



**Alan G. Lance**  
Attorney General

## INTRODUCTION

Dear Fellow Idahoan:

It is with great pride that I present my administration's first volume of Idaho Attorney General Opinions, as well as selected Informal Guidelines and Certificates of Review. The contents of this volume represent the work product of our dedicated attorneys, paralegals and support staff. Their diligence and professionalism are truly worthy of recognition.

The year 1995 was eventful for the Office of the Idaho Attorney General. The legislature, by an overwhelming margin, enacted legislation consolidating the disparate legal resources of the State of Idaho under the auspices of the Attorney General. That bill, Senate Bill 1217, was signed into law by Governor Phil Batt on March 15, 1995. Idaho has now joined the majority of states which enjoy the efficiencies and economies of a consolidated Attorney General's office. This legislation also, for the first time, authorized the Attorney General to monitor the performance of private attorneys who provide legal services to the State of Idaho in order to ensure that the interests of the public are well served at a reasonable cost.

On the litigation front, in addition to defending suits brought against the state, and enforcing the laws and regulations of the agencies of state government. Deputy Attorneys General have been actively involved in protecting Idaho's natural resources, as well as ensuring that entities responsible for causing environmental damage are tasked with responsibility for remediating that damage.

For the first time, this Annual Report contains selected Certificates of Review completed by this office as required by the recently amended **Idaho Code** section 34-1809. The legal analysis demonstrated in these Certificates provides a review of the status of the law concerning a number of topics that may be of interest to Idahoans.

I am honored to serve as your Attorney General during these exciting times and am proud to present you with this Annual Report.

Sincerely,

A handwritten signature in black ink, appearing to read "Alan G. Lance", written in a cursive style.

ALAN G. LANCE  
Attorney General





# ANNUAL REPORT OF THE ATTORNEY GENERAL

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## OFFICE OF THE ATTORNEY GENERAL

1995 Staff Roster

### ADMINISTRATIVE

Alan G. Lance—Attorney General

David Hennessey—Chief of Staff

Lawrence Wasden—Deputy Chief of Staff

Christopher D. Rich—Administration & Budget, Director

Chad J. Cook—Constituent Information

Lois Hurless—Office Administrator

Jan McMann—Executive Assistant

Tara Orr—Business Manager

Bob Henry—Computer Network Coordinator

Eric Cawley—Constituent Information, Director

Sandra Rich—Administrative Secretary/Receptionist

### DIVISION CHIEFS

Jeanne Goodenough—Human Services

John J. McMahon—Contracts & Administrative Law

David G. High—Civil Litigation

Clive J. Strong—Natural Resources

J. Scott James—Criminal Law

William von Tegen—Intergovernmental & Fiscal Law

### DEPUTY ATTORNEYS GENERAL

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Stephanie Maulin-Altig  
LaMont Anderson  
Brent Asay  
James Baird  
Stephanie Balzarini  
David Barber  
Kevin Beaton  
Mary Jo Beig  
Richard Bergesen  
Craig Blewace  
Carol Brasseur  
Ron Bruce  
Bernadette Buemgen  
Dallas Burkhalter  
David Butler  
Corey Cartwright  
Doug Conde  
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Katherine Crawford  
Brett DeLange  
Catherine Derden  
Patrick Fanning  
Mary Feeny  
Curt Fransen  
Nora Fuentes

Roger Gabel  
Robert Gates  
Michael Gilmore  
Leslie Goddard  
Stephen Goddard  
Fred Goodenough  
Brad Goodsell  
Tom Gratton  
David Haenel  
Susan Hamlin  
Michael Henderson  
John Homan  
Matt Howard  
Donald Howell  
Margaret Hughes  
Mary Hughes  
Cheri Jacobus  
Michael Jones  
Rinda Just  
Paul Kime  
Brent King  
C. Nicholas Krema  
Janice Krueger  
Lynne Krogh  
Lisa Kronberg  
Michael Larsen

Margaret Lawless  
David Lee  
Chris Lockwood  
Lori Mann  
Kay Manweiler  
Reve Martin  
Nancy Matthews  
Bridget McGonigal  
Nicole McKay  
Matthew McKeown  
John McKinney  
Tim McNeese  
Holly Mercer  
Mia Murphy  
Kirby Nelson  
Jane Newby  
Brian Nicholas  
Carl Olsson  
Thorpe Orton  
George Parham  
Steve Parry  
Eric Pfost  
Shad Priest  
Brad Purdy  
Phillip Raszler  
Marilyn Scanlan

Steven Scanlin  
Steve Schuster  
Phoebe Smith  
Michael Sheeley  
Theodore Spangler  
Nicholas Spencer  
Marcy Spilker  
Myrna Stalunan  
Dan Steckel  
Steve Strack  
Ken Stringfield  
Jay Sturgell  
Weldon Stutzman  
Evelyn Thomas  
Lynn Thomas  
Kathleen Trever  
Thane Twigg  
Thomas Watkins  
Doug Wenf  
Will Whelan  
Peggy White  
Lenard Wittlake  
Scott Woodbury  
Charles Zalesky

### PARALEGALS

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Ralph Blount  
Kathie Brack

Dora Morley  
Bernice Myles  
Lori Peel

Jean Rosenthal  
Paula Saul  
Teresa Teevan

Suzanne Ventura  
Karen Wright

### CRIMINAL INVESTIGATION

Russell Reneau—Chief Investigator  
Randy Everett

Jackie Atkins

Scott Birch

Richard LeGall

### NON-LEGAL PERSONNEL

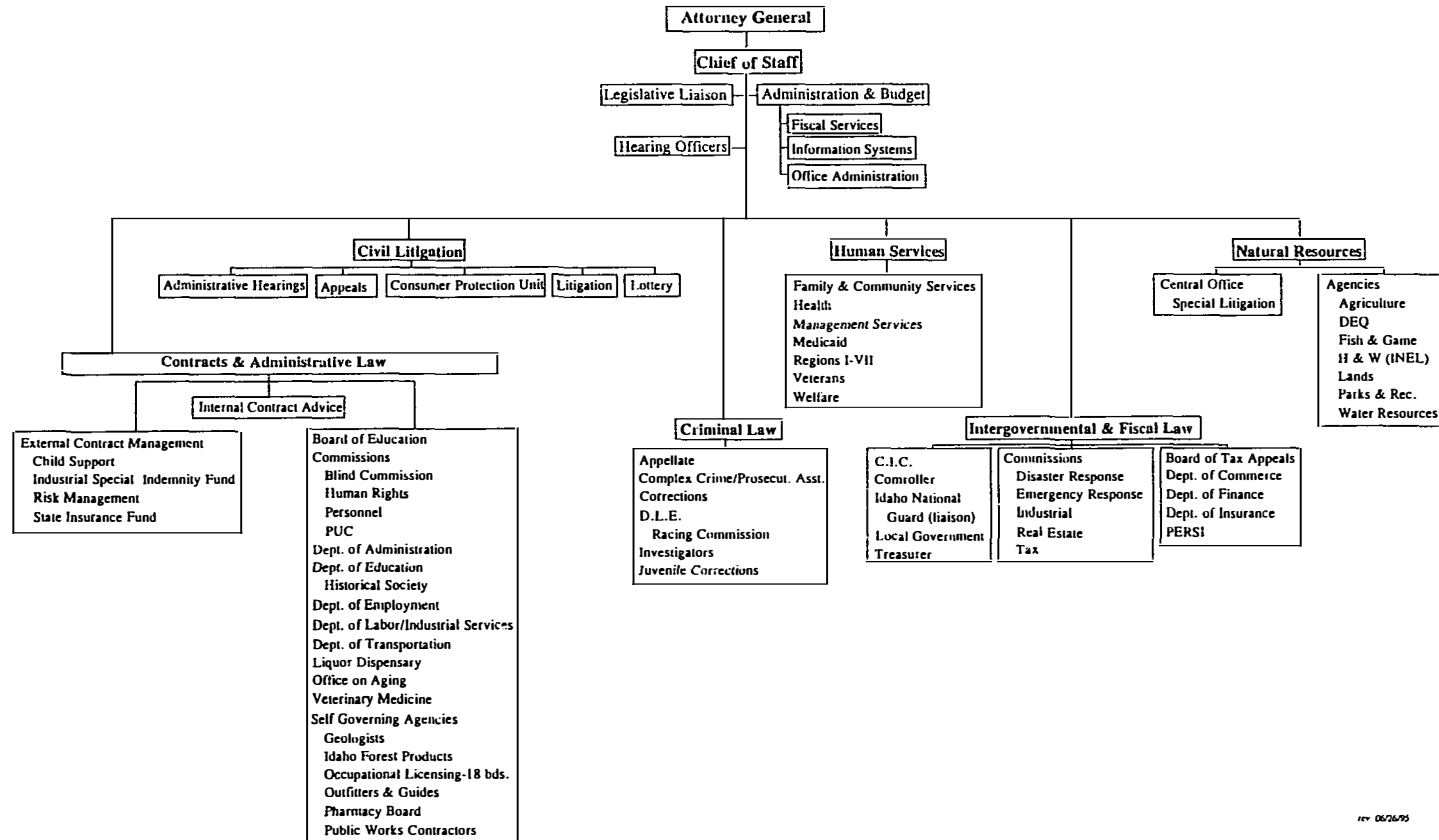
Cathy Akin  
Prudence Barnes  
Kris Bivens  
Patricia Boehm  
Karen Bolian  
Carrie Clark  
Kinun Cole  
Kendall Colvin

Sheila Crawford  
Ellen Darnell  
Jeanne Dillion  
Marilyn Freeman  
Doug Graves  
Yvonne Jurado  
Ann Lang  
Jo Ann Latham

Pamela Marteness  
Elizabeth Maxwell  
Pat McCoy  
Dawn McGahn  
Patty McNeill  
Ronda Mein  
Victoria Mundy  
Sharon Noice

Kevin Peterson  
Erica Scarrow  
Sharon Schul  
Debra Stufflebeam  
Lynae Van Horn

# ORGANIZATION CHART - Office of the Attorney General



**OFFICIAL OPINIONS  
OF  
THE ATTORNEY GENERAL  
FOR 1995**

**ALAN G. LANCE**  
ATTORNEY GENERAL  
STATE OF IDAHO



## ATTORNEY GENERAL OPINION NO. 95-01

To: The Honorable Jim D. Kempton  
Idaho House of Representatives  
**HAND DELIVERED**

Per Request for Attorney General's Opinion

### QUESTION PRESENTED

May a city council, pursuant to Idaho Code § 67-6526(a)(1) acting unilaterally and without parallel action by the board of county commissioners, pass an ordinance, the terms of which are enforceable upon land within the area of impact and outside of the city limits?

### CONCLUSION

Only the board of county commissioners may exercise legislative powers in the unincorporated areas of the county. An ordinance enacted by a city pursuant to Idaho Code § 67-6526(a)(1) is not effective in the unincorporated area of impact until the county, by ordinance, adopts the terms of the city ordinance.

### ANALYSIS

#### Statutory Authority

Chapter 65, title 67, Idaho Code, covers areas of impact and provides for the adoption of a planning zoning ordinance to cover an area of impact. The chapter provides that the ordinance governing the area of city impact must be adopted by the governing board of each county and of each city. The ordinance is to be based upon mutual agreement.

Pursuant to the statutory scheme found in chapter 65, title 67, Idaho Code, a governing board is a city council or a board of county commissioners. In Idaho Code § 67-6504, it is provided that the governing board may exercise all of the powers required and authorized by chapter 65 of title 67.

Pursuant to Idaho Code § 67-6505, the board of county commissioners and a city council are authorized to establish joint planning and zoning commissions governing an area of impact. The code section provides, in relevant part:

[T]he board of county commissioners of a county, together with the council of one or more cities within a county. . .are empowered to cooperate in the establishment of a joint planning, zoning, or planning and zoning commission, hereinafter referred to as a joint commission. . .a joint commission is further authorized and empowered to perform any of the duties for any local members governing board when the duties have been authorized by that member government.

The authority of this joint commission is limited, however, by the language found in Idaho Code § 67-6504 “excluding the authority to adopt ordinances.” A joint planning and zoning commission may not exercise the legislative function of either of the member governing boards which created it.

The language of Idaho Code § 67-6526(a) is somewhat ambiguous and has been read by some municipalities as authorizing cities to act unilaterally and without the consent of counties in creating areas of impact. The language of that subsection (a) provides:

**Areas of city impact—Negotiation procedure.**—(a) The governing board of each county and each city therein shall, prior to October 1, 1994, adopt by ordinance following the notice and hearing procedures provided in section 67-6509, Idaho Code, a map identifying an area of city impact within the unincorporated area of the county. By mutual agreement, this date may be extended to November 1, 1994. A separate ordinance providing for application of plans and ordinances for the area of city impact shall be adopted no later than January 1, 1995. This separate ordinance shall provide for one of the following:

- (1) Application of the city plan and ordinances adopted under this chapter to the area of city impact; or

(2) Application of the county plan and ordinances adopted under this chapter to the area of city impact; or

(3) Application of any mutually agreed upon plan and ordinances adopted under this chapter to the area of city impact.

Areas of city impact, together with plan and ordinance requirements, may cross county boundaries by agreement of the city and county concerned if the city is within three (3) miles of the adjoining county.

In reading this subsection in conjunction with all of chapter 65 and, in particular, sections 67-6504, 67-6505 and the remainder of 67-6526, it is clear that the ordinance governing the area of impact must be adopted by both the city council and the board of county commissioners. Section 67-6526(a)(1) merely states that a plan drafted by a city may be applied to the area of impact. The application of the city's plan to the area of impact only occurs when ordinances adopting such plan are enacted by the city council and the board of county commissioners.

### **Constitutional Limitations on Power**

Statutes are to be construed as being consistent with constitutional limitations on power. Reading Idaho Code § 67-6526(a)(1) as giving cities the power to act unilaterally in adopting ordinances governing unincorporated areas of impact would render it unconstitutional as violating art. 12, sec. 2 of the Idaho Constitution.

Art. 12, sec. 2 of the Idaho Constitution provides:

2. Local Police Regulations Authorized.—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.

(Emphasis added.)

The power of cities and counties to enact or amend ordinances only exists within the limits of the city or county. For a city, this means within the city's incorporated limits and for a county, this means the unincorporated area lying outside a city. The issue presented by art. 12, sec. 2, has been described by the Idaho Supreme Court as an issue not of conflicts but of power. In Clyde Hess Distributing Co. v. Bonneville County, 69 Idaho 505, 210 P.2d 798 (1949), the court held:

It also appears to be conceded that county regulations passed under such constitutional grant of power, cannot be enforced in a municipality in a field reserved to municipalities under the constitution, whether such field has been occupied by municipal ordinance or not. Therefore, the fact that it does not appear that the regulation in question is in conflict with any existing ordinance of a municipality is not important. The question is one of power and not one of conflict.

*Id.* at 511, 210 P.2d at 804 (emphasis added; citations omitted). The court went on to note that because this is a question of power and constitutional provision, it makes no difference whether or not the legislature, by statute, authorizes a county or a city to undertake the thing it is doing:

The legislature can pass a general law effective upon all, but it cannot restrict the constitutional right of a municipality to make police regulations not in conflict or inconsistent with such general law. An attempt by the legislature to grant authority to a county to make police regulations effective within a municipality would be an infringement of such constitutional right of a municipality.

*Id.* at 512, 210 P.2d at 805.

In Hobbs v. Abrams, 104 Idaho 205, 657 P.2d 1073 (1983), the court reconfirmed its earlier ruling in Hess. In addition, the court went on to set forth the restrictions which apply to an exercise of power by a county or municipality under art. 12, sec. 2 of the Idaho Constitution:



This Court has stated that there are three general restrictions that apply to ordinances enacted under the authority conferred by this constitutional provision: “(1) the ordinance or regulation must be confined to the limits of the governmental body enacting the same, (2) it must not be in conflict with other general laws of the state, and (3) it must not be an unreasonable or arbitrary enactment.”

104 Idaho at 207, 657 P.2d at 1075 (citation omitted).

Art. 12, sec. 2, was applied to the issuance of a building permit by a county upon land which was subsequently annexed by the City of Boise in Boise City v. Blaser, 98 Idaho 789, 572 P.2d 892 (1977). In that case, the builders obtained a building permit for multi-unit housing which was to be constructed outside the city limits. Construction was delayed due to inclement weather and when Blaser attempted to resume construction, the land had been annexed by Boise City. The construction project was ultimately allowed to proceed but on grounds of estoppel. In the course of its opinion, the court discussed art. 12, sec. 2, and the effect it has upon the validity of county building permits issued on land within an incorporated city. Regarding the effectiveness of a county building permit within the city limits, the court stated:

Generally speaking, to give effect to a county permit within city limits would be to violate the separate sovereignty provisions of Idaho Const. art. 12, § 2, and the careful avoidance of any county/city jurisdictional conflict or overlap which is safeguarded therein.

*Id.* at 791, 572 P.2d at 895.

Under the statutory scheme found in chapter 65, title 67, Idaho Code, the governing board for an unincorporated area, including the area of impact, is the board of county commissioners. The legislative power possessed by the board of county commissioners may only be exercised by the board. Likewise, the legislative power of a city council is limited to the city's corporate limits. Any reading granting a city the power to enact land use ordinances affecting unincorporated areas is inconsistent with chapter 65 of title

67. The exercise of legislative power beyond the corporate limit is also a clear violation of art. 12, sec. 2 of the Idaho Constitution.

### **AUTHORITIES CONSIDERED**

**1. Idaho Constitution:**

Art. 12, sec. 2.

**2. Idaho Code:**

§ 67-6504.

§ 67-6505.

§ 67-6509.

§ 67-6526(a).

§ 67-6526(a)(1).

§ 67-6526(d).

**3. Idaho Cases:**

Boise City v. Blaser, 98 Idaho 789, 572 P.2d 892 (1977).

Clyde Hess Distributing Co. v. Bonneville County, 69 Idaho 505, 210 P.2d 798 (1949).

Hobbs v. Abrams, 104 Idaho 205, 657 P.2d 1073 (1983).

DATED this 9th day of March, 1995.

ALAN G. LANCE  
Attorney General

**Analysis by:**

WILLIAM A. VON TAGEN  
Deputy Attorney General  
Director, Governmental and Public Affairs

**ATTORNEY GENERAL OPINION NO. 95-02**

TO: R. Michael Southcombe, Chairman  
Idaho State Tax Commission  
**STATEHOUSE MAIL**

Per Request for Attorney General's Opinion

Dear Mr. Southcombe:

**QUESTION PRESENTED**

Does passage of Pub. L. No. 104-7, the Self-Employed Health Insurance Act, which was signed into law by President Clinton on April 11, 1995, apply retroactively to the benefit of Idaho taxpayers on their Idaho income taxes for 1994?

**SHORT ANSWER**

No. The provisions of the Self-Employed Health Insurance Act apply retroactively for 1994 federal tax returns, but not for 1994 Idaho tax returns. Unless the Idaho Legislature acts affirmatively to incorporate this recent change in federal tax law retroactively into Idaho law, self-employed Idaho taxpayers cannot avail themselves of this tax deduction on their Idaho tax returns for the 1994 tax year.

**A. Background**

The "Self-Employed Health Insurance Act" (Pub. L. No. 104-7) amends section 162 of the Internal Revenue Code to reinstate as a deductible business expense certain health care costs incurred by self-employed individuals (sole proprietors and members of partnerships). Prior to December 31, 1993, self-employed individuals could deduct twenty-five percent of the amount paid for health insurance for the individual and the individual's spouse and dependents. This deduction expired on December 31, 1993, and has not been a deduction available for computing federal taxable income for tax years beginning on and after January 1, 1994. Pub. L. No. 104-7 reinstates this deduction retroactively to January 1, 1994, and increases the amount of the deduction from twenty-five to thirty percent for tax years

beginning on and after January 1, 1995. President Clinton signed the bill into law on April 11, 1995.

To take advantage of this deduction, federal taxpayers who have already filed 1994 returns will be required to file amendments to their 1994 federal income tax returns.

**B. Application of Pub. L. No. 104-7 to the State of Idaho**

The Idaho Income Tax Act (chapter 30, title 63, Idaho Code) defines “taxable income” by incorporating the definitions found in the Internal Revenue Code, subject to certain modifications. Idaho Code § 63-3022 provides in pertinent part:

The term “taxable income” means “taxable income” as defined in section 63 of the Internal Revenue Code, adjusted as provided in this chapter. . . .

Idaho Code § 63-3004, as most recently amended by 1995 Idaho Session Laws, chapter 79, § 1 (H.B. 117) defines the term “Internal Revenue Code” as follows:

(a) The term “Internal Revenue Code” means the Internal Revenue Code of 1986 of the United States, as amended, and in effect on the first day of January, 1995.

(b) Provisions of the Internal Revenue Code amended, deleted, or added prior to the effective date of the latest amendment to this section shall be applicable for Idaho income tax purposes on the effective date provided for such amendments, deletions, or additions, including retroactive provisions.

The Internal Revenue Code “as amended, and in effect on the first day of January, 1995” did not permit a deduction for health care costs incurred by self-employed individuals. Subsection (b) of Idaho Code § 63-3004 recognizes, for Idaho income tax purposes, retroactive effective dates of amendments to the Internal Revenue Code, but only if the amendment to the Internal Revenue Code is “prior to the effective date of the latest amendment

to this section.” The latest amendment to Idaho Code § 63-3004 was by H.B. 117 of the 1995 Idaho Legislature. That bill, now 1995 Idaho Session Laws, chapter 79, § 1, was signed into law by Governor Batt on March 10, 1995. Its effective date was January 1, 1995. Both dates are before President Clinton’s signature of Pub. L. No. 104-7 on April 11, 1995. Thus, the deduction for health care costs incurred by self-employed individuals in 1994 is not a deduction available for the computation of Idaho taxes under present Idaho law.

### C. Delegations of Authority

Your request letter also asks about possible constitutional implications of adoption of Pub. L. No. 104-7 through H.B. 117. Since H.B. 117 does not effect an adoption of Pub. L. No. 104-7, issues about possible improper delegations of legislative authority do not arise. It is appropriate to note, however, that part of the reason for annually updating Idaho Code § 63-3004 is to avoid any possibility of an apparent adoption of federal law changes that significantly affect state tax policy without legislative approval.

The Idaho Supreme Court has in the past struck down statutes that provide for similar legislative delegations to Congress. *See Idaho Savings and Loan Association v. Roden*, 82 Idaho 128, 350 P.2d 255 (1960). In that case, the Idaho Supreme Court considered legislative provisions which required Idaho savings and loan associations to insure their accounts with the Federal Savings and Loan Insurance Corporation in the State of Idaho. However, to obtain such insurance, savings and loan associations were required by federal law to abide by and conform with the National Housing Act and any amendments thereto, and the rules and regulations of the Federal Home Loan Bank Board. Finding the legislation to be an unconstitutional delegation of legislative power, the court said:

The legal axiom that all legislative power is vested in the Legislature of the State of Idaho has been set forth in *State v. Nelson*, 36 Idaho 713, 213 P. 358 (1923). The legislature cannot delegate its authority to another government or agency in violation of our Constitution. *State v. Nelson*, *supra*; *State v. Heitz*, 72 Idaho 107, 238 P.2d 439 (1951).

... Thus, it is demonstrated that the unconstitutional provisions delegating to the Congress and the Home Loan Bank Board the legislative power and function to make future laws and regulations governing appellant's business and its right to remain in business, are not severable from the provisions requiring appellant to obtain insurance of accounts by the Federal Savings and Loan Insurance Corporation. The provisions requiring such insurance are therefore unconstitutional and void.

82 Idaho at 134-35.

The rule which has developed in Idaho regarding delegation to other public bodies is that delegation is permissible where the legislature establishes the standard or defines the limits by which rulemaking or fact finding may be judged. However, it is impermissible for the legislature to delegate to another public body the power to set the standard itself. The rule has also been analyzed as a distinction between the delegation of legislative functions and executive functions. *See, e.g., Kerner v. Johnson*, 99 Idaho 433, 583 P.2d 360 (1978); *State v. Kellogg*, 98 Idaho 541, 568 P.2d 514 (1977); *Board of County Commissioners v. Idaho Health Facilities Authority*, 96 Idaho 498, 531 P.2d 588 (1975); *Boise Redevelopment Agency v. Yick Kong Corp.*, 94 Idaho 876, 499 P.2d 575 (1951).

For this reason, the Idaho Legislature may adopt existing provisions of the Internal Revenue Code as a part of the Idaho Income Tax Act, but it cannot adopt, as Idaho law, unknown and unknowable future federal provisions.

Finally, it is important to note that in certain circumstances it is possible for the Idaho Legislature to validly make retroactive changes to tax statutes. A fuller analysis of retroactivity of tax legislation is found in Attorney General Opinion 91-2. *See* 1991 Idaho Att'y Gen. Ann. Rpt. 21.

### **AUTHORITIES CONSIDERED**

#### **1. Idaho Code and Session Laws:**

Idaho Code § 63-3004.

1995 Idaho Session Laws, chapter 79, § 1.

**2. Idaho Cases:**

Board of County Commissioners v. Idaho Health Facilities Authority, 96 Idaho 498, 531 P.2d 588 (1975).

Boise Redevelopment Agency v. Yick Kong Corp., 94 Idaho 876, 499 P.2d 575 (1951).

Idaho Savings & Loan Association v. Roden, 82 Idaho 128, 350 P.2d 255 (1960).

State v. Heitz, 72 Idaho 107, 238 P.2d 439 (1951).

State v. Kellogg, 98 Idaho 541, 568 P.2d 514 (1977).

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

**3. Other Authorities:**

Attorney General Opinion No. 91-2, 1991 Idaho Att'y Gen. Ann. Rpt. 21.

The Self-Employed Health Insurance Act (Pub. L. No. 104-7).

DATED this 20th day of April, 1995.

ALAN G. LANCE  
Attorney General

**Analysis by:**

TED SPANGLER  
Deputy Attorney General  
Idaho Tax Commission

**ATTORNEY GENERAL OPINION NO. 95-03**

To: R. Michael Southcombe, Chairman  
Idaho State Tax Commission  
**STATEHOUSE MAIL**

Per Request for Attorney General's Opinion

**QUESTIONS PRESENTED**

1. What is the current status of Idaho Code § 63-923?
2. How is the new law, House Bill 156, to be implemented given the status of Idaho Code § 63-923?

**CONCLUSION**

1. Through legislative oversight, the provisions of Idaho Code § 63-923 are not modified by any other statute. Idaho Code § 63-923 is, however, incapable of implementation and likely to be struck down if presented to a court.
2. Idaho Code § 63-923 imposes no impediment to the full implementation of House Bill 156.

**BACKGROUND**

On November 7, 1978, the electorate of the State of Idaho adopted Initiative Petition No. I. The chief provision of this initiative was to limit the maximum amount of ad valorem tax on any property subject to assessment and taxation within the State of Idaho to one percent (1%) of the actual market value of such property. The initiative also purported to limit increase in market values to a maximum of two percent (2%) for any given year.

The legislature immediately amended the provisions of Initiative Petition No. I. In 1979, House Bills 166, 280, 306, and 308 were introduced to either amend Initiative Petition No. I or to ameliorate its effects on certain taxing districts. Aside from actually amending the language of Initiative Petition No. I, codified as Idaho Code § 63-923, the principal thrust of the leg-



islature's concern with the initiative petition was embodied in a new statute, Idaho Code § 63-2220. This new section was an attempt to place a cap on ad valorem taxes by limiting the budget requests of taxing districts. The one percent (1%) limitation codified in Idaho Code § 63-923 was not, however, referred to in Idaho Code § 63-2220. The code, therefore, reflected two (2) distinct strategies for controlling ad valorem taxes—a cap on taxes of one percent (1%) of assessed value and a limitation on budgets funded by the property tax.

In 1980, the legislature amended Idaho Code § 63-923 to make Idaho Code § 63-2220 the exclusive state strategy for limiting ad valorem taxes. The legislature did this by inserting the words “Except as provided in Section 63-2220, Idaho Code . . .” at the very beginning of Idaho Code § 63-923. The effect of this language was to nullify the impact of Idaho Code § 63-923, although Idaho Code § 63-2220, itself, contained a one percent (1%) limitation. This one percent (1%) limitation was removed from Idaho Code § 63-2220 in 1981, thus eliminating entirely the one percent (1%) strategy for limiting ad valorem taxes.

The state changed its approach to limiting ad valorem taxes in 1990. House Bill 366 repealed the budget limitation strategy codified in Idaho Code § 63-2220 and substituted what became known as Truth in Taxation. This was codified in Idaho Code §§ 63-2224 through 63-2226. These sections sought to limit ad valorem taxes by maximizing public comment whenever a taxing district requested an amount of ad valorem tax revenues which would cause the tax rate to increase from the rate in effect during the previous year. The critical language which, in 1980, had been inserted into Idaho Code § 63-923, “Except as provided in Section 63-2220, Idaho Code . . .” was amended to read, “Except as provided in Section 63-2224, Idaho Code . . . .” The approach, however, was still to nullify the effect of the one percent (1%) limitation contained in section 63-923, Idaho Code, while simultaneously attempting to control ad valorem taxes using a strategy other than the one percent (1%) limitation.

In 1995, the strategy for controlling ad valorem taxes changed again. The approach, introduced in House Bill 156, is two-fold. First, there was a shift in some of the funding for public schools from the property tax to general fund revenues. Second, a variant of the budget limitation strategy originally codified in Idaho Code § 63-2220 was reimposed. In adopting this

revised approach to limiting ad valorem taxes, the legislature repealed Truth in Taxation (Idaho Code §§ 63-2224 through 63-2226), but did not amend the one percent (1%) limitation of Idaho Code § 63-923. This failure to amend means that, on its face, Idaho Code § 63-923 now requires the implementation of the one percent (1%) limitation as well as the new approach set forth in section 63-2220A.

### ANALYSIS

#### Question 1:

From 1981 through 1994, Idaho Code § 63-923, the one percent (1%) limitation on ad valorem taxes, was effectively nullified. The one percent (1%) limitation was effective, “Except as provided in” either section 63-2220 or section 63-2224, Idaho Code. Each of those provisions permitted imposition of tax in excess of one percent (1%) of market value while attempting to limit ad valorem taxes using approaches different than the one percent (1%) limitation of section 63-923.

Effective January 1, 1995, Idaho Code § 63-2224 was repealed. On its face, therefore, the one percent (1%) limitation of Idaho Code § 63-923 is no longer limited by reference to other statutes. Nevertheless, it is unlikely that Idaho courts will enforce the one percent (1%) limitation. It was not the intent of the legislature to terminate the statutory nullification of Idaho Code § 63-923. Even if it were, the statutory scheme set forth in Idaho Code § 63-923 cannot be implemented.

#### **THE LEGISLATURE DID NOT INTEND TO ELIMINATE ITS PREVIOUS STATUTORY NULLIFICATION OF IDAHO CODE § 63-923**

There are several compelling reasons to support the view that the Idaho Legislature did not intend to eliminate the statutory nullification of Idaho Code § 63-923. First, it was clearly the legislature’s purpose for fourteen (14) years to restrain the one percent (1%) limitation while attempting to curb ad valorem taxes through other means. Second, the current language of Idaho Code § 63-923 provides that it is limited in its effect by a statutory provision which has been repealed. This leads to the inescapable conclusion that the legislature’s failure to amend Idaho Code § 63-923 was an oversight rather than a policy determination. Third, supporting the hypothesis that the

failure to limit Idaho Code § 63-923 was unintentional is the fact that the fiscal impact statement attached to House Bill 156 grossly underestimates the fiscal impact unless one assumes that the legislature had no intention of reviving the one percent (1%) limitation.<sup>1</sup> Fourth, the minutes of the House Revenue and Taxation Committee, wherein House Bill 156 was debated extensively, are devoid of any reference to Idaho Code § 63-923. Fifth, while Idaho Code §§ 63-923 and 63-2220A are not in conflict, in practice it will be difficult to reconcile the application of the sections. Sixth, the one percent (1%) limitation cannot be implemented given Idaho's ad valorem tax structure.

**IDAHO CODE §§ 63-923 AND 63-2220A ARE NOT IN CONFLICT,  
BUT ARE DIFFICULT TO RECONCILE IN PRACTICE**

There are a number of ways to affect the level of taxes imposed on property. Limits can be placed on the taxing district's budget request. This will result, other things being equal, in a lower levy. Another approach is to place limits on the amount of the levy. In fact, at various places in the Idaho Code, maximum levies are provided for various taxing districts and funds. Idaho Code § 63-2220A adopts the strategy of limiting taxing district budget requests in order to place a limit on the amount of ad valorem taxes a taxing district can impose.

Idaho Code § 63-923 adopts a different limitation mechanism entirely. Rather than limit budget requests or levy amounts, Idaho Code § 63-923 attempts to restrain ad valorem taxes by placing a limit of one percent (1%) of the assessed valuation as the total tax levy that can be imposed on any given piece of property. Theoretically, then, there is no conflict between the approaches codified in sections 63-923 and 63-2220A. Theoretically, each section imposes a ceiling on ad valorem taxes. Whichever section imposes the lower ceiling on property in a given tax district will impose the tight constraint on ad valorem taxation within that district. As discussed in the following section the difficulty lies not with the theory, but with the practical application of the one percent (1%) limitation to Idaho's ad valorem tax structure.

## OVERVIEW OF IDAHO'S AD VALOREM TAX STRUCTURE

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 tax districts.

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

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 Tax Commission. Idaho Code § 63-915. The 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 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 the district's tax.

### **HOW IDAHO CODE § 63-923 AFFECTS THE LEVY, COLLECTION AND APPORTIONMENT OF TAXES**

Idaho Code § 63-923 inserts a one percent (1%) limitation on the amount of tax that can be imposed on any real property.

The section does not limit the budgets certified by the taxing districts, or the levies set by boards of county commissioners. 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 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 implementation of Idaho Code § 63-923 has its impact. The Tax Commission will be unable to approve any levies which, in combination, cause taxes to exceed one percent (1%) of the actual market value of any property.

#### **A. Recourse to the Courts**

Two possible solutions present themselves. First, the Tax Commission could handle the matter as it presently does "according to law." The law mandates the 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."

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. Finally, 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 Idaho Code § 63-923 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. Recourse to the courts is ultimately futile as a means of implementing Idaho Code § 63-923.

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, 297 (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 by Idaho Code § 63-923.

## **B. Counties as Ultimate Tax Authorities**

The second solution is to assume that Idaho Code § 63-923 impliedly grants to counties the power to collect and apportion taxes to the various taxing districts within and between 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 (1%) 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 Idaho Code § 63-923, then each board will become the ultimate tax authority in its county. Faced with the problem of scaling taxes down to one percent (1%), the board would have several options. It could either 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.<sup>2</sup>

There is no express grant of authority to the 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 ultimate taxing authorities and virtually destroy all the other independent taxing districts that now answer to the local electorate.

It follows, from the above discussion, that Idaho Code § 63-923 cannot be implemented as written. It is our opinion that a reviewing court faced with the options of striking down this section or upholding it 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). Idaho Code § 63-923 fits these criteria. There is no possible means to implement it “according to law.” Consequently, a reviewing court would strike it down.

### **THE CONSTITUTIONAL REQUIREMENT OF UNIFORM LEVIES**

This opinion has already concluded that Idaho Code § 63-923 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 (1%) 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 the question of how Idaho Code § 63-923 can 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 authority levying the tax . . . .”

Reading Idaho Code § 63-923 together with art. 7, sec. 5 of the Idaho Constitution yields the following possible apportionment mechanism.<sup>3</sup> 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 (1%) of the actual market value of the property. If so, the commission-



ers might then decide to reduce the levies proportionately to an amount that no longer exceeds one percent (1%) 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. 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 (1%) limitation of each district) are:

<b>Hypothetical County</b>			
<u>District</u>	<u>Budget</u>	<u>Tax Base</u>	<u>Levy</u>
County	\$2,000,000	\$1,000,000,000	0.30%
School District 1	\$750,000	\$250,000,000	0.30%
School District 2	\$937,500	\$312,500,000	0.30%*
Fire District	\$1,000,000	\$420,000,000	0.24%
City A	\$1,500,000	\$300,000,000	0.50%
City B	\$750,000	\$187,500,000	0.40%

\*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:

<u>District</u>	<u>Example 1</u>	<u>Example 2</u>	<u>Example 3</u>
County	0.30%	0.30%	0.30%
School District 1		0.30%	0.30%
School District 2	0.30%		
Fire District	0.24%		
City A	0.50%		
City B	0.40%		
<u>Total Levies:</u>	<u>1.34%</u>	<u>0.60%</u>	<u>1.00%</u>

The taxes levied on the property in Example 1 exceed the one percent (1%) limitation. To reduce the taxes on this property to one percent (1%), the levies imposed on it must be reduced to .7462686<sup>4</sup> of the levy first computed. The adjustment is:

<u>District</u>	<u>Levy</u>	<u>Adjustment</u>	<u>Adjusted Levy</u>
County	0.30%	0.7462686	0.224%
School District 1			
School District 2	0.30%	0.7462686	0.224%
Fire District	0.24%	0.7462686	0.179%
City A	0.50%	0.7462686	0.373%
City B			.40%
<u>Total Levies:</u>	<u>1.34%</u>	<u>0.7462686</u>	<u>1.00%</u>

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 and 3 can no longer be taxed at 0.30% by the county, when the property in Example 1 is only taxed at 0.224%. Thus, the lower county levy applies to all property in the county, even though some of that property is not taxed above one percent (1%). As a result, the adjusted tax rates on all three properties in the hypothetical county become:

<u>District</u>	<u>Example 1</u>	<u>Example 2</u>	<u>Example 3</u>
County	0.224%	0.224%	0.224%
School District 1		0.30%	0.30%
School District 2	0.224%		
Fire District	0.179%		
City A	0.373%		
City B			0.40%
Total Levies:	1.00%	0.524%	0.924%

Several things should be noted in this final step of the hypothetical. First, the adjustment required by Idaho Code § 63-923 is not simply to reduce tax levies to one percent (1%) 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 levy is the one that must first be brought down to the one percent (1%) 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 0.30% 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 0.30% tax levy, whereas School District 2 has a 0.2240% tax levy. That children in the latter district experience a 25% cut in school 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 0.373% 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.<sup>5</sup>

In short, the combined requirements of a one percent (1%) 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 2:**

Since Idaho Code § 63-923 cannot be implemented, it has no effect on the implementation of those statutes affected by House Bill 156.

**AUTHORITIES CONSIDERED**

**1. Idaho Constitution:**

Art 2, § 1.

Art. 7, § 5.

Art. 9, § 5.

**2. Idaho Code:**

§ 31-601.

§ 31-602.

§ 31-1605.

§ 63-621 through 63-626.

§ 63-901.

§ 63-915.

§ 63-917.

§ 63-918.

§ 63-923.

§ 63-1003.

§ 63-1103.

§ 63-1103(6).

§ 63-2220.

§ 63-2220A.

§ 63-2224 through 63-2226.

**3. Idaho Cases:**

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

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

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

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

**4. Other Cases:**

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

DATED this --10th day of August, 1995.

ALAN G. LANCE  
Attorney General

**Analysis by:**

CARL E. OLSSON  
Deputy Attorney General

<sup>1</sup> The fiscal impact statement associated with House Bill 156 estimates the impact on the General Fund for fiscal year 1996 to be \$40 million. The impact on the General Fund in fiscal years 1997 and 1998 is estimated at \$44 million and \$47.5 million, respectively. According to the best estimates of the Tax Commission, however, these figures are understated by at least \$200 million per year in additional lost revenues to local governments if one assumes implementation of Idaho Code § 63-923.

<sup>2</sup> As noted above, an across-the-board proportionate reduction is only one possible scenario. The one percent (1%) limitation does not mandate this outcome. If counties are truly empowered to "apportion" taxes and bring them down to one percent (1%) of market value, then they are free to cut taxes in any way they see fit.

<sup>3</sup> 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 ultimate tax authority for its own county; it cannot have authority beyond its borders to set taxes in adjacent counties. The one percent (1%) limitation has no solution to this problem of apportioning taxes among multi-county taxing districts.

<sup>4</sup> The adjustment is by one percent (1%) divided by the total levy. In this case,  $0.0100 / 0.0134 = 0.742686$ .

<sup>5</sup> 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 (1%) limitation would create an incentive to protect against this anticipated scale-down by submitting inflated budget requests.

**ATTORNEY GENERAL OPINION NO. 95-04**

To: Honorable Gaylen L. Box  
Magistrate Judge  
Sixth Judicial District  
P.O. Box 4887  
Pocatello, ID 83201

Per Request for Attorney General's Opinion

**QUESTIONS PRESENTED**

1. What is necessary to confer lawful authority on tribal law enforcement officers to arrest tribal members on tribal arrest warrants outside the reservation?
2. What is necessary for state law enforcement agencies to arrest under the authority of tribal court warrants?

**CONCLUSION**

1. State statutory authority to recognize tribal warrants, together with deputization of tribal law enforcement officials, would be required for tribal officers to arrest tribal members on tribal warrants beyond the external boundaries of the reservation.
2. State statutory authority, together with an agreement with the affected tribe, would be sufficient to grant state law enforcement officers authority to effect an arrest based on a tribal court warrant.

**ANALYSIS****Overview:**

Indian tribes are sovereign nations which exist within the external boundaries of the states of the United States at the pleasure of the United States Congress. See Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832), and its progeny. The control of Congress over the Indian tribes is plenary. Cherokee Nation v. Georgia, 30 U.S. 1 (1831); Johnson v. McIntosh, 21 U.S.

543 (1823). Generally, by act of Congress and historical interpretation, Indian tribes have jurisdiction over their own members and non-member Indians within the external boundaries of their reservation. This jurisdiction is limited by withdrawals of jurisdiction by Congress in acts such as the Major Crimes Act (18 U.S.C. § 1152) and Public Law 280. At present, Indian tribes have jurisdiction over their members in criminal matters that would amount only to misdemeanors or infractions under state law.

Indian reservations exist within the external boundaries of the states. Therefore, except where limited by congressional act or necessarily intrinsic tribal authority, state law enforcement officers may exercise enforcement jurisdiction within the external boundaries of Indian reservations.<sup>1</sup> *See, e.g., State ex rel. Old Elk v. District Court*, 552 P.2d 1394 (Mont. 1976), *appeal dismissed* 429 U.S. 1030 (1976) (state law enforcement officers had authority to arrest Indian tribal member on reservation where tribe had no extradition ordinance controlling such arrest); *Davis v. Mueller*, 643 F.2d 521 (8th Cir. 1980), *cert. denied* 454 U.S. 892, 102 S. Ct. 387, 70 L. Ed. 2d 206 (court did not lose jurisdiction over Indian tribal member who was arrested on the reservation in violation of tribal extradition ordinance, however, if challenge had been brought prior to removal of the member from the reservation, court would have honored the tribal ordinance). The converse is not true. Indian tribes have no authority or jurisdiction beyond their external boundaries.<sup>2</sup> Therefore, a grant of state law authority is required to permit the recognition of Indian tribal court warrants outside the boundaries of Indian reservations.

#### **Question No. 1:**

As a general rule, a warrant for arrest issued in one jurisdiction has no force or authority in a foreign jurisdiction. *Street v. Cherba*, 662 F.2d 1037, 1039 (4th Cir. 1981); *State v. Bradley*, 106 Idaho 358, 360, 679 P.2d 635, 637 (1983), *cert. denied*, 464 U.S. 1041 (1984); *Holbird v. State of Oklahoma*, 650 P.2d 66, 70 (Okla. Crim. App. 1982). For this reason, states have executed interstate compacts for detaining and extraditing persons charged in other states. *See* Idaho Code § 19-4514 and related provisions. States enact provisions permitting officers of foreign states to continue fresh pursuit into the home state. *See* Idaho Code § 19-701; *see also* Idaho Code § 19-701A (granting authority to Idaho police officers to pursue offenders into other political subdivisions of the state). No such compacts or agreements



have been entered into between the State of Idaho and Indian tribes residing within the state.

Only one case was discovered which suggests otherwise. In the case of Schauer v. Burleigh County, 1987 WL 90271 (D.C. N. Dak. 1987), the Turtle Mountain Tribal Court issued an arrest warrant for the plaintiff charging she abducted her minor children without the consent of their legal guardian. The charge was the equivalent of a state court misdemeanor. No challenge to the validity of the warrant was made. The warrant was given to the Burleigh County Sheriff's Office which, after substantial discussion, effected the arrest, off the reservation, and took the plaintiff to the county jail where she posted \$150 bond two hours later. There was no formal compact, statute or agreement which provided for execution of tribal warrants by state officers. The plaintiff subsequently brought an action under 42 U.S.C. § 1983 in federal court alleging her arrest by county officials off the reservation was in violation of her constitutional rights. The county moved for summary judgment which was granted by the court.

The court saw the issue as two-fold: first, whether execution of the warrant violated state law and, second, whether execution of the warrant violated the plaintiff's civil rights. On the first issue, the court cited cases finding arrests by state officers within Indian reservations to be valid and analogized to those cases to find that the arrest by state officers based on a tribal warrant would not violate North Dakota law.

The court then turned to the question of whether the arrest violated the plaintiff's constitutional rights. The court first found that the Fourth Amendment does not prohibit an arrest for a non-felony, not committed in the officer's presence, based on probable cause, even though such arrests may not be in accord with state law. The court then noted that the officers who arrested the plaintiff had probable cause to make the arrest because of their knowledge of the tribal court warrant. Therefore, the court found, the arrest of the plaintiff did not violate her civil rights.

Importantly, the question before the court was limited to whether the plaintiff's civil rights had been violated. Had the matter arisen on a petition for *habeas corpus*, or on appeal of a criminal conviction, or even on a motion to suppress evidence discovered in the course of the plaintiff's arrest, the matter could have been decided differently.

Unfortunately, the first part of the court's decision does not withstand scrutiny. Because states and Indian tribes are not equivalent sovereigns, the fact that state officers may have authority to arrest on the reservation for off-reservation crimes does not mean that tribal officials may arrest off the reservation for on-reservation crimes. There is simply no basis to extend tribal authority to execute arrest warrants beyond the external boundaries of the reservation.<sup>3</sup>

**Question No. 2:**

The best solution to the problem, as it now exists, is legislation which grants state officers authority to detain persons named in tribal court arrest warrants and deliver them to the custody of tribal officers. For example, the state of Maine has enacted a simple provision that permits state courts to take cognizance of tribal warrants:

Judges of District Courts shall have all authority and powers now granted by law to judges of municipal courts, provided that no Judge of the District Court may sit as the trial judge in any case arising from a complaint to such judge and warrant of arrest resulting therefrom, unless by consent of the defendant.

When a complaint charging a person with the commission of an offense, or a duly authenticated arrest warrant issued by the Tribal Court of the Passamaquoddy Tribe or the Penobscot Nation, is presented to any Judge of the District Court, to a justice of the peace or to any other officer of the District Court authorized to issue process, the judge, justice of the peace or other officer shall issue a warrant in the name of the District Court for the arrest of such person, in that form and under the circumstances that the Supreme Judicial Court by rule provides. The justice of the peace or other officer does not have authority to preside at any trial, and may not appear as counsel in any criminal case in which that officer has heard the complaint. A clerk of the District Court may accept a guilty plea upon payment of fines as set by the judge.

15 M.R.S.A. § 706 (1994) (emphasis added). South Dakota, on the other hand, has enacted a comprehensive statute governing “Extradition of fugitive Indians.” *See* Title 23, Chapter 24B, South Dakota Codified Laws. Either of these approaches would be effective to grant state officers authority to recognize Indian tribal warrants.

Alternatively, legislation now in place may be sufficient to support a compact between the affected state jurisdictions and Indian tribes to recognize tribal warrants. Idaho Code § 67-4002 provides as follows:

Any public agency as defined in section 67-2327, Idaho Code, or the state of Idaho or any of its political subdivisions may enter into agreements with the Indian tribes enumerated in section 67-4001, Idaho Code, for transfer of real and personal property and for joint concurrent exercise of powers provided such agreement is in substantial compliance with the provisions of sections 67-2327 through 67-2333, Idaho Code. No power, privilege or other authority shall be exercised under the authority of this chapter where otherwise prohibited by the constitution of the state of Idaho or the constitution or laws of the United States government. Additionally, the provisions of this chapter shall not be deemed to amend, modify, or repeal the provisions of chapter 51, title 67, Idaho Code (public law 280).

Idaho Code § 67-4002 (emphasis added). This section would permit any compact which would not violate the constitution or other specific laws of the state or federal government. Presumably, therefore, this section would permit an agreement for affected jurisdictions to detain persons subject to tribal court arrest warrants, at the request of the tribe, and deliver them to tribal officers. The procedures for such exercise of power could be specified by the agreement.

There are some unanswered questions in using Idaho Code § 67-4002 to support such an agreement. For example, Idaho law does not permit an arrest for a misdemeanor not committed in the presence of the arresting officer. Idaho Code § 19-603. Idaho Code § 67-4003 provides, in part, as follows:

Nothing in this chapter shall be interpreted to grant to any . . . Indian tribe . . . the power to increase . . . governmental power of . . . the state of Idaho . . . .

Idaho Code § 67-4003. Would a tribe's grant of authority to state officers to arrest for misdemeanor tribal offenses based on a tribal court warrant be in excess of this limitation, or merely the grant to state officers of the same authority already exercised by tribal officers on the reservation? Such questions are not subject to easy answers. To avoid such ambiguities, new legislation with statewide application is probably the best solution.

### **AUTHORITIES CONSIDERED**

#### **1. Idaho Code:**

Idaho Code § 19-4514.  
Idaho Code § 19-603.  
Idaho Code § 19-701.  
Idaho Code § 19-701A.  
Idaho Code § 67-4002.  
Idaho Code § 67-4003.

#### **2. U.S. Supreme Court Cases:**

Cherokee Nation v. Georgia, 30 U.S. 1 (1831).

De Coteau v. District Court, 420 U.S. 425, 95 S. Ct. 1082, 43 L. Ed. 2d 300 (1975).

Johnson v. McIntosh, 21 U.S. 543 (1823).

Williams v. Lee, 358 U.S. 217, 79 S. Ct. 269, 3 L. Ed. 2d 251 (1959).

Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

#### **3. Idaho Cases:**

State v. Bradley, 106 Idaho 358, 679 P.2d 635 (1983), *cert. denied* 464 U.S. 1041 (1984).

**4. Federal Cases:**

Davis v. Mueller, 643 F.2d 521 (8th Cir. 1980), *cert. denied* 454 U.S. 892, 102 S. Ct. 387, 70 L. Ed. 2d 206.

Schauer v. Burleigh County, 1987 WL 90271 (D.C. N. Dak. 1987).

Settler v. Lamcer, 507 F.2d 231 (9th Cir. 1974).

Street v. Cherba, 662 F.2d 1037 (4th Cir. 1981).

**5. Other Cases:**

Holbird v. State of Oklahoma, 650 P.2d 66, 70 (Okla. Crim. App. 1982).

State ex rel. Old Elk v. District Court, 552 P.2d 1394 (Mont. 1976), *appeal dismissed* 429 U.S. 1030 (1976).

**6. Other Authorities:**

15 M.R.S.A. § 706 (1994).

Arizona Attorney General Opinion I88-131, 1988 Ariz. Op. Atty. Gen. 177, 1988 WL 249704 (December 30, 1988).

Title 23, Chapter 24B, South Dakota Codified Laws.

Wisconsin Attorney General Opinion 10-81, 70 Wis. Op. Atty. Gen. 36, 1981 WL 157222 (March 11, 1981).

DATED this 13th day of October, 1995.

ALAN G. LANCE  
Attorney General

**Analysis by:**

W. COREY CARTWRIGHT  
Deputy Attorney General

<sup>1</sup> Territoriality is not a basis for exclusive Indian jurisdiction. Rather, the question is whether state action infringes on the right of tribal Indians to make their own laws and be governed by them. De Coteau v. District Court, 420 U.S. 425, 444-46, 95 S. Ct. 1082, 1092-94, 43 L. Ed. 2d 300 (1975); Williams v. Lee, 358 U.S. 217, 220, 79 S. Ct. 269, 270-71, 3 L. Ed. 2d 251 (1959).

<sup>2</sup> A very limited exception to this rule is recognized in the case of Settler v. Lameer, 507 F.2d 231 (9th Cir. 1974). In Settler a Yakima Tribe member was arrested at an off-reservation tribal fishing site for violation of tribal fishing ordinances and brought a habeas corpus proceeding in federal court. The court found that the 1855 treaty creating the Yakima Reservation reserved to the tribe the right to fish "at all usual and accustomed places." Since the tribe had the right to regulate members' exercise of tribal fishing rights, it had authority to arrest tribal members at "usual and accustomed" fishing sites. The court noted the narrowness of its holding:

Our holding that the Yakima Indian Nation may enforce its fishing regulations by making arrests and seizures off the reservation is a very narrow one. Off-reservation enforcement is limited strictly to violations of tribal fishing regulations. The arrest and seizure of fishing gear must be made at "usual and accustomed places" of fishing, and only when violations are committed in the presence of the arresting officer. Tribal officers patrolling off-reservation sites are subject to all reasonable regulations that may be imposed by the State of Washington for the orderly conduct of inspections, arrests and seizures.

Settler, 507 F.2d at 240 (emphasis added). This exception, of course, provides no authority for service of tribal arrest warrants away from the Fort Hall Indian Reservation.

<sup>3</sup> At least two other states' attorneys general agree with this conclusion. See Arizona Attorney General Opinion I88-131, 1988 Ariz. Op. Atty. Gen. 177, 1988 WL 249704 (December 30, 1988); Wisconsin Attorney General Opinion 10-81, 70 Wis. Op. Atty. Gen. 36, 1981 WL 157222 (March 11, 1981).

**NOTE**

No opinion numbered "95-05" was prepared or issued by  
the Office of the Attorney General

**ATTORNEY GENERAL OPINION NO. 95-06**

To: Linda L. Caballero, Director  
Department of Health and Welfare  
P.O. Box 83720  
Boise, ID 83720-0036

Per Request for Attorney General's Opinion

**QUESTION PRESENTED**

You have asked whether a public record exemption under Idaho Code § 9-340 constitutes valid grounds to refuse compliance with an administrative subpoena issued by the Department of Health and Welfare pursuant to Idaho Code § 56-227C.

**CONCLUSION**

No. The Department of Health and Welfare's statutory subpoena power is not limited by the Public Records Act.

**BACKGROUND**

You indicated in your letter dated September 19, 1995, that, pursuant to Idaho Code § 56-227C, the Department of Health and Welfare issued a subpoena to the Idaho State Board of Nursing seeking records related to the board's investigation and possible action against a licensee who provides personal care services under the Medicaid program. You further pointed out that the department is authorized by law to take independent action against Medicaid providers who engage in abusive conduct. The Board of Nursing refused to provide the information on the grounds that the information sought was exempt from disclosure under Idaho Code §§ 9-340(14), (15) and (26) of the Idaho Public Records Act. Specifically, you have asked whether an

exemption by the Idaho Public Records Act constitutes “reasonable cause or legal excuse” for failing to comply with the department’s subpoena.

### ANALYSIS

The Idaho Public Records Act, Idaho Code §§ 9-337 et seq., provides that “every person has a right to examine and take a copy of any public record of this state, and there is a presumption that all public records in Idaho are open . . . except as otherwise provided by statute.” Idaho Code § 9-338(1). Idaho Code § 9-340 sets forth those records that are exempt from disclosure to the general public. For the purposes of this analysis, it is assumed that the records subpoenaed by the department are exempt from disclosure to the general public pursuant to exemptions set forth in Idaho Code § 9-340.

As noted above, the Idaho Public Records Act governs access to records by the general public. Specifically, it governs those records that “every person has a right to examine (and copy).” (Emphasis added.) By its terms, the act does not purport to govern the rights that specific persons or agencies may have to examine records pursuant to separate statutory authority. In this case, the department seeks to compel production of records pursuant to the statutory subpoena power granted to the department by Idaho Code § 56-227C, not the Public Records Act. As such, the exemptions by the Idaho Public Records Act are simply inapplicable. Moreover, the Idaho Public Records Act specifically provides at Idaho Code § 9-343(3) that the availability of records for administrative and judicial adjudicatory proceedings shall not be limited by the Idaho Public Records Act:

Nothing contained in this act shall limit the availability of documents and records for discovery in the normal course of judicial or administrative adjudicatory proceedings, subject to the law and rules of evidence and of discovery governing such proceedings.

Thus, the Idaho Public Records Act expressly recognizes that the laws and rules of evidence and of discovery governing administrative proceedings dictate what evidence may be obtained for those proceedings. The Idaho Public Records Act does not itself govern the issue. We must look to the department’s administrative subpoena power to determine the scope of the department’s power.



The department is authorized to issue administrative subpoenas pursuant to Idaho Code § 56-227C. That statute provides the department with broad subpoena powers provided the subpoena is issued “for the purposes contemplated by this act (the public assistance law).” These powers include the power to “compel the production of pertinent books, payrolls, accounts, papers, records, documents and testimony.” Idaho Code § 56-227C also provides for judicial enforcement of the department’s subpoenas. It provides in pertinent part:

[I]f the judge shall determine that such person has refused, without reasonable cause or legal excuse, to be examined or to answer a legal or pertinent question, or to produce a book or paper which he has ordered to bring or produce, he may forthwith punish the offender as for contempt of court.

(Emphasis added.)

The above quoted enforcement provision recognizes that the department’s subpoena power is limited. The court may refuse to enforce the subpoena based upon “reasonable cause or legal excuse.” This phrase is not defined.

However, “reasonable cause” appears to relate to factual circumstances sufficient to avoid a contempt citation, and “legal excuse” appears to relate to legal reasons that the subpoena cannot be enforced. For example, a failure to find certain records after a good faith effort to find them may constitute “reasonable cause” to avoid a contempt citation. In contrast, a “legal excuse” implies some constitutional or statutory right not to produce the information requested.

While there is no case law construing Idaho Code § 56-227C, in our opinion a valid “legal excuse” for failure to comply with an administrative subpoena should be construed to mean a legal reason recognized with respect to administrative proceedings in Idaho. In this regard, the Idaho Administrative Procedure Act provides in pertinent part at 67-5251:

(1) The presiding officer may exclude evidence that is irrelevant, unduly repetitious, or excludable on constitutional or statutory grounds, or on the basis of any eviden-

tiary privilege provided by statute or recognized in the courts of this state.

If administrative subpoena powers are harmonized with the Administrative Procedure Act, a “legal excuse” for failure to honor an administrative subpoena could include a constitutional provision or statute that would protect the information from disclosure to the agency. Moreover, evidentiary privileges recognized by statute or court rules would provide a “legal excuse” for failure to comply with an administrative subpoena.

In sum, refusal to provide records or documents on the grounds that such records or documents are exempt from disclosure pursuant to the Idaho Public Records Act does not constitute reasonable cause or legal excuse for failing to comply with the department’s administrative subpoena. As indicated in Idaho Code § 9-343(3), the Idaho Public Records Act does not limit the availability of information requested pursuant to an administrative adjudicatory proceeding. The laws of evidence and discovery governing administrative subpoenas dictate what constitutes “reasonable cause or legal excuse” from complying with an administrative subpoena. This phrase should be harmonized with Idaho Code § 67-5251 which governs evidence issues in administrative hearings. A document’s lack of availability under the Public Records Act is not a valid basis to refuse to honor a subpoena.

## CONCLUSION

Public records that are exempt from public disclosure are nevertheless subject to disclosure in a judicial or administrative proceeding if they are subject to disclosure under the laws or rules of evidence and of discovery governing those proceedings.

## AUTHORITIES CONSIDERED

### 1. Idaho Code:

- § 9-337.
- § 9-338(1).
- § 9-340.
- § 9-340(14).
- § 9-340(15).

§ 9-340(26).

§ 9-343(3).

§ 56-227C.

**2. Other Authorities:**

I.R.E. 501.

DATED this 26th day of October 1995.

ALAN G. LANCE  
Attorney General

**Analysis by:**  
NICOLE S. MCKAY  
Deputy Attorney General

**ATTORNEY GENERAL OPINION NO. 95-07**

To: Honorable Tom Dorr  
Idaho House of Representatives  
160 Hughes Lane  
Post Falls, ID 83854

Honorable Gordon F. Crow  
Idaho State Senate  
10202 Hillview Drive  
Hayden Lake, ID 83835

Per request for Attorney General's Opinion from Representative Dorr dated September 14, 1995, and Senator Crow dated September 14, 1995, and as expanded by request of Senator Crow dated October 4, 1995.

**QUESTIONS PRESENTED**

1. May the State of Idaho "loan" state employees to the United Way for a period of approximately eight (8) weeks to assist the United Way in its annual fundraising campaign?
2. What are the limitations on loaning and/or sharing State of Idaho employees or facilities to or with private charitable foundations?

**CONCLUSION**

1. Loaning public employees to the United Way for eight (8) weeks while continuing to pay their salaries and benefits from state funds violates the "public purpose doctrine."
2. State of Idaho employees or facilities may not be shared with or loaned to private charitable foundations unless such action serves a public purpose and is directly related to a function of government. Moreover, such arrangements will be most likely to withstand a judicial challenge if the foundation involved exists for the benefit of the state agency and performs activities which the state agency can conduct. Additionally, there should be state control, whether con-

tractual or otherwise, to ensure that the activities of the charitable foundation continue to meet the public purpose requirement.

## ANALYSIS

### 1. State Participation in the United Way “Loaned Executive” Program

The United Way conducts a “loaned executive” program. Corporations and other entities “loan” upper-level executives to the United Way for approximately eight weeks to assist with its annual fundraising campaign. The executives are given administrative leave with pay. The State of Idaho has participated in this program and has, each year, loaned, on a full-time basis, two or three public employees to the United Way. As with employees from the private sector, these public employees continue to receive their salaries and benefits during their eight-week leave.

You have requested an opinion regarding the legality of this practice. It is the opinion of this office that this practice raises serious questions concerning the use of public funds for what is essentially a private purpose.

The Idaho Constitution requires that public funds only be expended for public purposes. This so-called “public purpose” doctrine is not explicitly stated in the constitution, but the Idaho Supreme Court has inferred it from a number of constitutional provisions, including Art. 8, sec. 2. While this section of the constitution is expressly directed at prohibiting the state from loaning “credit” to any “individual, association, municipality or corporation,” the Idaho Supreme Court has held that this section also impliedly prohibits the state from engaging in or funding activities that “do not have primarily a public, rather than a private purpose.” In Board of County Commissioners v. Idaho Health Facilities Authority, 96 Idaho 498, 531 P.2d 588 (1975), the Idaho Supreme Court, in reviewing and ultimately upholding the use of state funds to better improve health care facilities, discussed this principle:

[T]his restriction must be inherent throughout state government and must be a fundamental limitation upon the power of state government under the Idaho Constitution, even though not expressly stated in it. Thus, no entity created by the state can engage in activities that do not have primarily a

public, rather than a private purpose, nor can it finance or aid any such activity. Article 8, § 2, Idaho Constitution.

96 Idaho at 502, 531 P.2d at 592 (citation omitted).

There are several justifications for this inferred constitutional principle. First, it prevents the public's money from passing into the control of private associations or parties. Fluharty v. Board of County Comr's of Nez Perce County, 29 Idaho 203, 158 P. 320 (1916). Likewise, it prevents the state or one of its subdivisions from aiding or promoting a particular commercial or industrial enterprise to the detriment of others in the field, Village of Moyie Springs v. Aurora Mfg. Co., 82 Idaho 337, 353 P.2d 767 (1960), or conferring favored status on any private enterprise or individual in the application of public funds, Boise Redevelopment Agency v. Yick Kong Corp., 94 Idaho 876, 499 P.2d 575 (1972). Finally, and perhaps most importantly, this limitation on government power precludes state action which principally aims to aid private schemes. Idaho Water Resource Board v. Kramer, 97 Idaho 535, 548 P.2d 35 (1976).

What constitutes a valid "public purpose" can be complicated. The Idaho Supreme Court has stated that a "public purpose is an activity that serves to benefit the community as a whole and which is directly related to the function of government." Idaho Water Resource Board v. Kramer, 97 Idaho at 559, 548 P.2d at 59. Importantly, if a proposed appropriation or expenditure meets the "public purpose" test, it is immaterial that, incidentally, private ends may also be advanced. Nelson v. Marshall, 94 Idaho 726, 497 P.2d 47 (1972); Boise Redevelopment Agency v. Yick Kong Corp., 94 Idaho 876, 499 P.2d 575 (1972); Engelking v. Investment Board, 93 Idaho 217, 458 P.2d 213 (1969). Thus, even a direct loan of state funds to private associations or individuals will be upheld if it primarily furthers a broad public purpose such as development of the state's water resources. Nelson v. Marshall, 94 Idaho at 731-32, 497 P.2d at 52-53. Conversely, however, if the primary object is to promote some private end, the expenditure is illegal even though it may incidentally also serve some public purpose. Village of Moyie Springs v. Aurora Mfg. Co., 82 Idaho 337, 353 P.2d 767 (1960); State v. Idaho Power Co., 81 Idaho 487, 346 P.2d 596 (1959).

In applying the "public purpose" requirement to the question before us, we first note that the payment by the State of Idaho of wages and benefits

to state employees while they work for the United Way constitutes an expenditure of state funds and property. Consequently, the above principles are relevant. See, e.g., Iowa Attorney General Opinion No. 94-1-6 (1994) (solicitation of charitable contributions by uniformed firefighters constitutes the use of public property, e.g., city time, uniforms, vehicles and equipment); Texas Attorney General Opinion No. MW-89 (1979) (professional organizations' utilization of "release time" of public school personnel constitutes a benefit financed from public funds).

The next question is whether the loaning of these employees is primarily for a public or a private purpose. Our research has revealed little precedent that is directly on point. However, Oregon Attorney General Opinion No. 7997 addressed a similar question. The question presented to the Oregon Attorney General was whether it was "an illegal expenditure of public funds for state employees to work during office hours for the United Fund [United Way] campaign." The Oregon Attorney General concluded that incidental activities reasonably necessary to implement the charitable payroll deduction program were valid.<sup>1</sup> However, the Attorney General went on to suggest that anything beyond this was contrary to what the legislature had statutorily authorized in its charitable contribution payroll deduction program. In reaching this conclusion, the Oregon Attorney General also suggested that such work, even if it were authorized by the legislature, might constitute promoting a private charity at state expense:

However, we point out that the legislature did not authorize state employees to work for a private charitable organization while drawing a state salary. Whether or not it could have done so consistent with the public purpose doctrine, it did not purport to try.

....

Although, as noted, the legislature authorized the deduction, it did not also purport to authorize state officers and employees to do "private" charitable work at state expense. It did by necessary implication authorize the activities reasonably necessary or incidental to effectuate the fringe benefit of the United Way deduction. But for the agency or its employees to spend substantially more time

than necessary to accomplish this objective, would be to go beyond the legislative purpose and to promote a private charity rather than to administer a statutorily authorized deduction.

41 Or. Op. Atty. Gen. 347 (1981) (emphasis added; citation omitted).

In Texas Attorney General Opinion No. MW-89, the Texas Attorney General reviewed a policy of allowing teachers to work for professional organizations while continuing to receive their district salaries. Although this situation is not factually identical to our own, it is sufficiently similar that the Texas Attorney General's opinion is relevant. The Texas Attorney General concluded that the policy of permitting teachers to work for professional organizations while being paid salaries by the school district constituted "an unconditional grant of public funds to a private organization" and was "therefore unconstitutional." Tex. Atty. Gen. Op. No. MW-89 (1979). *But see*, Slawson v. Alabama Forestry Commission, 631 So. 2d 953 (Ala. 1994) (holding that providing state personnel to a private non-profit organization whose goals did not conflict with the State Forestry Commission's goals served a public purpose).

Turning to the current situation, allowing two or three top-level state employees to work for a private organization for approximately six to eight weeks each while being paid by the state is a significant state expenditure of funds. The policy of permitting these employees to take administrative leave with pay, as allowed under Idaho Personnel Commission rules, authorizes the transfer of a valuable benefit to the United Way. While the activities of these executives would be centered upon coordination of charitable contributions by fellow state employees, the private benefit to the United Way significantly outweighs the incidental public benefits. As stated in Village of Moyie Springs:

It does not matter what such undertakings may be called or how worthwhile they may appear to be at the passing moment. The financing of private enterprises by means of public funds is entirely foreign to a proper concept of our constitutional system.



82 Idaho at 347 (quoting State v. Town of North Miami, Fla., 59 So. 2d 779 (Fla. 1952)).

It is the opinion of this office that allowing state personnel to work full time for the United Way to assist in its fundraising while also receiving wages and benefits from the state violates the public purpose doctrine.<sup>2</sup> The lack of legislative authorization buttresses this conclusion. While the United Way serves the public good by helping with public relief which might otherwise fall on the government itself, this purpose is not sufficient. As stated above, if the primary object is to promote some private end, the expenditure is illegal even though it may incidentally also serve some public purpose. Village of Moyie Springs v. Aurora Mfg. Co., 82 Idaho 337, 353 P.2d 767 (1960); State v. Idaho Power Co., 81 Idaho 487, 346 P.2d 596 (1959). Added to this is the concern that favored status not be given to a private enterprise or individual in the application of public funds at the expense of other organizations. Village of Moyie Springs; Boise Redevelopment Agency v. Yick Kong Corp., 94 Idaho 876, 499 P.2d 575 (1972). Allowing state employees to work for the United Way at state expense gives the United Way favored status and preferential treatment. In short, allowing state employees to work for the United Way for several weeks under the “loaned executive” program while receiving wages and benefits by the State of Idaho is an expenditure of public funds which does not satisfy the “public purpose” doctrine.

## **2. Limitations on the State Sharing Facilities or Employees With Charitable Organizations**

The next question is of a more general nature. You also ask, “What are the limitations on loaning and/or sharing State of Idaho employees or facilities to or with private charitable organizations or foundations?”

This is a question of first impression in Idaho. Our courts have never reviewed a legal challenge to the state sharing facilities or personnel with a charitable foundation.<sup>3</sup> Likewise, case law from other jurisdictions is sparse. However, we will discuss what authority exists and, for your guidance, attempt to draw from that authority principles or limitations that would make a facility- or personnel-sharing arrangement most likely to withstand a judicial challenge.

Idaho has some state agencies that are closely associated with private charitable foundations. In some instances, a foundation is allowed to occupy space with a state agency and agency employees may staff the foundation.<sup>4</sup> Clearly, sharing public facilities rent-free or allowing state employees to work for a charitable foundation is an expenditure of state funds. Consequently, it is the opinion of this office that the public purpose doctrine discussed in the foregoing section applies. To reiterate the public purpose test, an activity constitutes a valid public purpose if it serves as a benefit to the community and, at the same time, is directly related to the function of government. Idaho Water Resource Board v. Kramer, 97 Idaho 535, 548 P.2d 35 (1976). Therefore, to be legally permissible, the loaning or sharing of state employees or facilities must both benefit the community and be directly related to the function of government.

There is authority concluding that these arrangements can meet the public purpose requirement. The clearest example involves private foundations and universities. Universities throughout the nation are associated with private charitable foundations which are, in essence, simply fundraising arms for the universities. In Idaho, for example, all three of our universities are associated with foundations that raise money, through private donations, for use by a particular university. The sole purpose of these private foundations is to support the educational institution by soliciting public financial support and managing and investing such moneys. Often the universities allow the foundation to share university facilities, and university employees may staff the foundation.

Two attorney general opinions have concluded that these arrangements satisfy the public purpose doctrine. For example, a Texas Attorney General Opinion reasoned that as Texas statutory law, like Idaho statutory law, permits the universities and the State Board of Education to accept and administer gifts, donations and endowments for the benefit of the universities, “[a] university will have to devote some of its resources to administering grants it accepts, in particular the services of personnel.” Tex. Atty. Gen. Op. No. MW-373 (1981). Because universities would be required to hire personnel and devote their resources to such activities in the absence of foundations, fulfilling these educational functions for the universities was deemed permissible. As the Texas Attorney General Opinion went on to note, “public education is an essential governmental function. . . . The assistance provided by

the foundation to the university helps it accomplish a public purpose entrusted to it.” *Id.*

A Utah Attorney General reached a similar conclusion. The Utah Attorney General was asked by the Utah State Auditor to explain the relationship between public universities and charitable foundations. In explaining these alignments, the Utah Attorney General stated:

If a foundation is controlled by an institution of higher education it is certainly permissible for the institution to assist with the expenses of the foundation inasmuch as the foundation is really an arm of the institution and has been organized and operates solely for the purpose of benefiting the college or university, provided that the services are rendered on a fee for service basis. A reasonable arrangement would be to have the foundation pay for services rendered in terms of mailing, office space, etc., but allow the foundation a credit against these charges for contributions made to the college or university during the period services are provided to the foundation.

Ut. Atty. Gen. Informal Op. No. 78-183 (1978). The Utah Attorney General concluded that sharing arrangements between foundations and universities were permissible, although he also seemed to suggest that some form of consideration, if only in the form of contributions to the university, was essential.

The advantage to the state and the public from these sharing arrangements was explained by the Texas Attorney General in Opinion No. MW-373. Members of the university had easy access to the foundation office for coordination purposes. The administrators could work with the foundation to coordinate foundation activities with those of the state agency. “Their convenience will be served if the foundation is easily available for consultations. If the foundation also provides administrative services, these can be utilized easiest [sic] on the [premises].” Tex. Atty. Gen. Op. No. MW-373 (1981). Moreover, allowing the foundation to share facilities and personnel enhanced the cost effectiveness of operating the foundation. Because the foundation activities benefited the public university, the costs saved to the foundation necessarily went to the benefit of the university, and therefore to the public. In addition, the service the foundation provided was quite significant in mon-

etary terms. Thus, as with the Utah scenario, there was some consideration flowing to the state from the arrangement.

Importantly, along with these public benefits, in both situations, there was also a significant amount of state control exercised over the sharing arrangement. The foundations were organized so that their functions were directly related to that of the public university with which they were associated. The purpose of the foundations was to support the universities with which they were aligned, and they engaged in activities that the universities were also authorized to conduct. Moreover, the details of the arrangements, including the purpose of the foundation and the terms and conditions of providing to it state premises and personnel, were memorialized in writing. And, there was sufficient state control to ensure that the public purpose, in fact, continued to be served. *Id.*

The sharing arrangements between foundations and universities appear to involve the existence of a private entity whose sole purpose is to support the public entity it serves. However, the Alabama Supreme Court, in Slawson v. Alabama Forestry Commission, 631 So. 2d 953, 955 (Ala. 1994), upheld the Alabama Forestry Commission's use of its resources, personnel and equipment to support a private non-profit organization that did not exist solely to support the Alabama Forestry Commission. The private entity's stated goal was to protect landowners by "confronting environmental and political extremism," including federal environmental laws. The Alabama Supreme Court, nevertheless, upheld the commission's contributions of state resources and state personnel, stating that it would defer to the Forestry Commission's determination that the private organization's goals complemented and did not conflict with the goals of the commission. According to the Alabama Supreme Court, the commission's determination was sufficient to satisfy the public purpose doctrine. *Id.* at 957. However, the Alabama Supreme Court defined "public purpose" more broadly than have Idaho courts. The Alabama Supreme Court simply stated, "a public purpose has for its objective the promotion of public health, safety, morals, security, prosperity, contentment, and the general welfare of the community." *Id.* at 956. Unlike Idaho courts, the Alabama Supreme Court did not hold that the expenditure must be "directly related to the function of government" to satisfy the "public purpose" doctrine.

Reading the Utah and Texas Attorney General opinions in conjunction with the Alabama Supreme Court opinion, it is clear that there is some variation in terms of how the public purpose doctrine is applied when a state provides resources or personnel to a private organization. The Alabama Supreme Court appeared to take a significantly looser approach than did either the Texas or the Utah Attorneys General and to defer significantly to the executive agency's decision. Because of this variation and the limited number of cases available to review, it is difficult to state with absolute certainty what the limitations on facility and personnel sharing are. Nevertheless, this office's advice is that if the sharing arrangements are structured closely to the arrangements between universities and private foundations, they will be likely to withstand a judicial challenge. In this regard, this office offers the following suggestions. The most important point to remember is that when the state shares either public facilities or state personnel with a private charitable foundation, that arrangement must benefit the community, and it must be directly related to the function of government. Moreover, it would be desirable that the foundation's sole or principal purpose is to support the state agency, and the foundation only engages in activities which the state agency is specifically authorized to conduct. Finally, any sharing arrangement affecting personnel or other state resources should be memorialized in writing, and the state should retain some control over the foundation to ensure that the public purpose justifying the sharing arrangement continues to be served.<sup>5</sup>

Legal problems may develop if the foundation strays from the purpose for which it is organized. If the foundation is not organized solely for the benefit of a state agency, and the state agency is contributing personnel and facilities to it, this arrangement is more likely to be challenged. Moreover, if the foundation is using state facilities and personnel for activities in which the state agency would not be authorized to engage, abuses can occur, and, in the long run, the public may not be benefited as a whole. There is even a risk that the "expenditures" of state money and resources would become primarily an action in support of a private as opposed to a public purpose and would be unconstitutional. In such an instance, at a minimum the foundation must be removed from the state premises and required to use its own resources and personnel.

Again, the question you have asked concerning facility and personnel sharing, while very important, is a general one, and, consequently, this office

is only able to provide you with general guidance. Obviously, each particular arrangement, if questioned, would have to be reviewed carefully on its own and the facts unique to that situation evaluated. Nevertheless, those arrangements most likely to be upheld, if challenged, are arrangements in which the foundation's sole purpose is to benefit the state agency, the foundation only engages in activities the agency is authorized to conduct, and the state retains sufficient control, contractual or otherwise, to ensure that the public purpose justifying the sharing arrangement continues to be served. Finally, this office notes that if the legislature is concerned with these sharing arrangements, it may statutorily limit how they are structured.

### **CONCLUSION**

In conclusion, the State of Idaho's participation in the United Way's "loaned executive" program violates the public purpose doctrine because that activity primarily benefits a private enterprise rather than serving a public purpose. Under certain circumstances, however, state agencies or institutions can share facilities and personnel with private charitable organizations or foundations. However, the sharing arrangement must accomplish a public purpose and must be directly related to the function of government. Moreover, for these arrangements to be most likely to withstand a judicial challenge, this office offers the following suggestions. Specifically, the foundation involved should exist for the benefit of the state agency and perform activities which the state agency is authorized to conduct. In addition, there should be sufficient state control, whether contractual or otherwise, to ensure that the activities of the charitable foundation continue to meet the public purpose requirement.

### **AUTHORITIES CONSIDERED**

**1. Idaho Constitution:**

Art. 8, sec. 2.

**2. Idaho Statutes:**

Idaho Code § 67-2502

**3. Idaho Cases:**

Bevis v. Wright, 31 Idaho 676, 175 P. 815 (1918).

Board of County Commissioners v. Idaho Health Facilities Authority, 96 Idaho 498, 531 P.2d 588 (1975).

Boise Redevelopment Agency v. Yick Kong Corp., 94 Idaho 876, 499 P.2d 575 (1972).

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

Fluharty v. Board of County Com'rs of Nez Perce County, 29 Idaho 203, 158 P. 320 (1916).

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

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

Slawson v. Alabama Forestry Commission, 631 So. 2d 953 (Ala. 1994).

State v. Idaho Power Co., 81 Idaho 487, 346 P.2d 596 (1959).

Village of Moyie Springs v. Aurora Mfg. Co., 82 Idaho 337, 353 P.2d 767 (1960).

**4. Other Authorities:**

Iowa Attorney General Opinion No. 94-1-6 (1994).

41 Or. Op. Atty. Gen. 347 (1981).

Tex. Atty. Gen. Op. No. MW-89 (1979).

Tex. Atty. Gen. Op. No. MW-373 (1981).

Ut. Atty. Gen. Informal Op. No. 78-183 (1978).

DATED this 1st day of November, 1995.

ALAN G. LANCE  
Attorney General

**Analysis by:**

WILLIAM VON TAGEN  
THOMAS F. GRATTON  
Deputy Attorneys General  
Intergovernmental and Fiscal Law Division

<sup>1</sup> Most states and the federal government have charitable payroll deduction programs. Employees contribute to a designated charity, and this contribution is deducted from their paychecks.

<sup>2</sup> In the current situation, there has been no legislative determination that the activities are for a “public purpose.” Such a legislative finding or declaration, when it is made, while not determinative, is given considerable deference by courts in deciding whether an expenditure is for a public purpose. Bevis v. Wright, 31 Idaho 676, 175 P. 815 (1918); Village of Moyie Springs v. Aurora Mfg. Co., 82 Idaho 337, 353 P.2d 767 (1960). Consequently, this office distinguishes the current analysis from any analysis that might take place should the legislature expressly authorize the loaning of public employees, in certain circumstances, to private organizations and provide a legislative declaration of how this activity serves a public purpose.

<sup>3</sup> In this opinion, we will use the term “foundation” to include “organizations.”

<sup>4</sup> It is these more permanent, on-going types of arrangements which will be the focus of this section of our opinion. This opinion will not focus on state government allowing private groups to use facilities on an irregular basis for meetings, etc.

<sup>5</sup> Before entering into such facility- and personnel-sharing arrangement, state agencies are required to obtain written approval of the governor. Idaho Code § 67-2502.



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**ATTORNEY GENERAL'S  
SELECTED  
INFORMAL GUIDELINES  
FOR THE YEAR 1995**

**ALAN G. LANCE**  
ATTORNEY GENERAL  
STATE OF IDAHO





## INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

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January 26, 1995

Dwight M. Bower, Director  
Idaho Transportation Department  
**STATEHOUSE MAIL**

### **THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE**

Re: Constitutionality of Bluebird License Plate Program

Dear Mr. Bower:

During the process of transition to the new administration in the Attorney General's Office, we came across a letter in which you had requested an opinion from this Office concerning the constitutionality of Idaho Code § 49-417(2). I apologize for the delay in responding.

Your opinion request was triggered by an inquiry from a legislator during the 1994 legislative session. The legislator asked whether the Idaho wildlife special license plate program, authorized by Idaho Code § 49-417(2), violates art. 7, section 17 of the Idaho Constitution. We conclude that, while the program would probably pass constitutional muster, there is some risk of challenge, and we recommend that the statute be clarified.

The Idaho wildlife special license plate program took effect on July 1, 1993. Citizens who wish to purchase and display the Idaho wildlife special plates (known popularly as the "bluebird" license plates) pay the basic registration fee, the special license program fee, and an additional \$10.00 which is deposited into a special account at the Department of Fish and Game. Proceeds from this \$10.00 contribution are dedicated to nongame management and protection.

Financing for the program is established as follows:

In addition to the regular operating fee, the applicant shall be charged a fee of thirty-five dollars (\$35.00) for the initial issuance of the plates, and twenty-five dollars (\$25.00) upon each succeeding annual registration. Twenty-five dol-

## INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

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lars (\$25.00) of the initial fee and fifteen dollars (\$15.00) of the renewal fee shall be deposited in the state highway account and shall be used to fund the cost of administration of this special license plate program. Ten dollars (\$10.00) of each initial fee and ten dollars (\$10.00) of each renewal fee shall be deposited by the state treasurer in the fish and game set-aside account pursuant to section 36-111, Idaho Code, for use in the nongame management and protection program.

Idaho Code § 49-417(2).

The question is whether this \$10.00 set-aside from each initial and renewal fee violates the provisions of Idaho Constitution, art. 7, section 17, which states:

On and after July 1, 1941 the proceeds . . . from any tax or fee for the registration of motor vehicles, in excess of the necessary costs of collection and administration and any refund or credits authorized by law, shall be used exclusively for the construction, repair, maintenance and traffic supervision of the public highways of this state and the payment of the interest and principal of obligations incurred for said purposes; and no part of such revenues shall, by transfer of funds or otherwise, be diverted to any other purposes whatsoever.

(Emphasis added.) Thus, if the \$10.00 set-aside for bluebird license plates is found to be “the proceeds . . . from any tax or fee for the registration of motor vehicles,” it must be used exclusively for highway construction purposes and cannot be diverted for any other purpose whatsoever.

The Idaho Supreme Court has made it clear that the Idaho Legislature cannot divert monies earmarked for the highway fund for any purpose, no matter how worthwhile. In State ex rel. Moon v. Jonasson, 78 Idaho 205, 296 P.2d 755 (1956), the court held unconstitutional an appropriation of \$50,000.00 from the highway fund for the purpose of advertising the highways in the State of Idaho. The court stated:

Where specific funds or revenue are dedicated to a particular purpose the same cannot be used for any other pur-

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pose, and any Act of the Legislature attempting to provide otherwise is unconstitutional.

78 Idaho at 210, 296 P.2d at 760.

The court used equally strong language to defend the highway fund in Williams v. Swensen, 93 Idaho 542, 467 P.2d 1 (1970). That case involved a county complaint against what would today be called an “unfunded mandate.” The legislature had imposed on counties the obligation of licensing motor vehicles, but had not provided funds to do so. Ada County withheld reasonable administrative costs before turning over the proceeds to the state. The Idaho Supreme Court, in issuing a writ of mandate requiring the county to turn over the funds, stated:

The plain meaning of Art. 7 § 17 of the Constitution is that all moneys collected from the enumerated sources must be used for the designated purpose and may not be diverted therefrom. The only exception to that mandate is that the legislature may authorize the funds to also be used for refunds or credits or to defray costs of collection and administration.

93 Idaho at 544, 467 P.2d at 3 (citing Moon v. Jonasson). Since one of the “enumerated sources” of money dedicated to the highway fund is “the proceeds . . . of any tax or fee for the registration of motor vehicles,” we are again faced with the question whether the \$10.00 bluebird license plate set-aside is such a “fee.”

The basic rule of statutory construction is that where the statute is not ambiguous, the language will be given its plain, ordinary meaning. Sherwood v. Carter, 119 Idaho 246, 805 P.2d 452 (1991). On the other hand, when a statute admits of two readings, the court will look at the entire statutory scheme to arrive at legislative intent, Leliefeld v. Johnson, 104 Idaho 357, 659 P.2d 111 (1983), and, in particular, will ascertain the legislative intent by tracing the history of the statute. Mix v. Gem Investors, Inc., 103 Idaho 355, 647 P.2d 811 (1982).

The unexplained reference to a “fee” in Idaho Code § 49-417(2) is not sufficiently unambiguous that reasonable minds cannot differ over its

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interpretation. We therefore turn for guidance to the legislative history and the location of this statute within the context of chapter 4, title 49 of the Idaho Code.

At the outset, it is clear the Idaho Legislature did not intend that the \$10.00 bluebird license plate surcharge would be a “fee for the registration of motor vehicles.” In 1992, when this program was begun, the legislature enacted House Bill 695, which overhauled the entire structure of special license plate offerings. The intent was “to Make the Motor Vehicle Program 100% Self Supporting in Administrative Costs.” *See* H.B. 695, Statement of Purpose.

The result is a two-tiered system of special license plate programs. All automobile owners pay an annual basic registration fee to operate their vehicles, which fee currently varies from \$16.08 to \$36.48 depending on the age of the vehicle. Special plate programs in the first tier are for certain honorees, *e.g.*, disabled veterans, Purple Heart medalists, prisoners of war, Pearl Harbor survivors. These programs are exempt from additional charges and pay only the basic registration fee and a \$3.00 license plate fee.

A second tier of special plate programs is for personal license plates of various types. Participants in these programs pay the basic registration fee and, in addition, pay a \$25.00 **program fee** for issuance of the plates and an annual \$15.00 **program fee** for renewal. These programs, as identified in the fiscal impact statement appended to H.B. 695, include “legislative, old timer, street rod, year of manufacture, radio amateur, national guard, and classic license plates.” According to the sponsors, this “change will allow ITD to recover the cost of administering the special plate program.”

Importantly for purposes of this opinion, this two-tiered system of charges in H.B. 695 was made applicable to all new special license plate programs as well:

The fees contained in this subsection shall be applicable to all new special plate programs. The initial program fee and the annual program fee shall be deposited in the state highway account and shall be used to fund the cost of administration of special license plate programs which are provided to the

## INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

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public as a personal alternative to the standard license plate requirements.

Idaho Code § 49-402(9).

The Idaho wildlife special plate program, H.B. 698, was enacted into law on April 8, 1992, as was H.B. 695, creating the two-tiered system of special plate charges outlined above. We must assume that the legislature fully understood the impact of the one law upon the other since the two were adopted the same day.

The Idaho wildlife special plate program requires participants to pay the basic registration fee and an additional “fee of thirty-five dollars (\$35.00) for the initial issuance of the plates, and twenty-five dollars (\$25.00) upon each succeeding annual registration.” Idaho Code § 49-417. Clearly, participants are paying the initial program fees of \$25.00 and the renewal program fees of \$15.00, plus a \$10.00 surcharge. The surcharge is in the nature of a contribution to nongame management and protection programs of the Idaho Department of Fish and Game.

This was certainly the understanding of those who sponsored the legislation. Wayne Melquist, State Non-Game Manager of the Department of Fish and Game, explained that the purpose of the program was to offset “the decline in tax return checkoff contributions” that the department had been experiencing. See Minutes of Senate Resources and Environment Committee, p. 3, March 20, 1992.

Representative John Gannon, the bill’s sponsor, testified before the Senate Transportation Committee on March 26, 1992 that H.B. 698:

[P]rovides for a special Idaho wildlife motor vehicle license plate, and that a portion of the fee for such a plate [would] be used in nongame management and protection. He explained it was hoped that 10,000 plates would be sold and \$100,000 earned, the funds to go for various nongame activities.

We conclude that the \$10.00 surcharge for the bluebird license plate program is not part of “the fees contained in this subsection”—i.e., \$25.00 issuance and \$15.00 renewal fees mandated by Idaho Code § 49-402(8)<sup>1</sup> to

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support the administration of special license programs that involve personal license plates. Nor is it part of the basic registration fee for motor vehicles set forth in Idaho Code § 49-402(1). We believe a reviewing court would probably conclude that the surcharge forms no part of “the proceeds . . . from any tax or fee for the registration of motor vehicles” and thus does not violate the prohibition of art. 7, sec. 17 of the Idaho Constitution, prohibiting the transfer or diversion of such fees away from highway projects. Such a conclusion would give full effect to the basic mandate that when a statute admits of two possible constructions, one of which will uphold its validity and the other of which will render it unconstitutional, a court must adopt that construction which is consistent with the constitution. State v. Groseclose, 67 Idaho 71, 75, 171 P.2d 863, 867 (1946).

However, we must emphasize that because the language of Idaho Code § 49-417 setting up the Idaho wildlife special plate program is ambiguous, a court could conclude the \$10.00 contribution is, in fact, a fee and hold the statute unconstitutional. For this reason, we strongly suggest that the legislature clarify this matter so that the program will not be subject to attack at a future date. Expressly designating the \$10.00 as a contribution in the statute, instead of referring to it as part of the “fee,” would go a long way in allaying concerns.

If you have any questions, please do not hesitate to contact me.

Sincerely,

JOHN J. MCMAHON  
Acting Chief  
Business Regulation Division

<sup>1</sup> Note that the statutes enumerating the special license fee programs all cross reference Idaho Code § 49-402(9). However, the legislative directive governing program fees is now codified as Idaho Code § 49-402(8). The error arose in 1993 when Idaho Code § 49-402 was amended and one section was deleted. The cross references were not brought into conformity.

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January 27, 1995

The Honorable J.L. "Jerry" Thorne  
Idaho State Senate  
**STATEHOUSE MAIL**

**THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE  
ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE**

Dear Senator Thorne:

You have requested our office to review Idaho Code § 49-434A, which provides for the seizure and detention of motor vehicles owned by non-residents for which the proper registration and operating fees have not been paid. The statute was enacted by the 1994 Idaho Legislature but, according to your letter, has not yet been put in effect by the Idaho Transportation Department because the department has concluded it is not a "law enforcement agency" and thus is not empowered to carry out the new law.

Your question is whether the Idaho Transportation Department (ITD), Port of Entry Unit, qualifies as a "law enforcement agency" under Idaho Code § 49-434A, which reads:

Any motor vehicle or combination of vehicles owned by a nonresident and operated in Idaho for which the proper registration and operating fees in Idaho have not been paid under the provisions of sections 49-432, 49-433, 49-434(5) or 49-435, Idaho Code, shall, upon discovery, be subject to the following penalties:

Seizure and detention for up to seventy-two (72) hours by any law enforcement agency of the vehicle and its entire cargo if the cargo does not consist of perishable food products or livestock;

(1) Release from detention shall be accomplished only by presentation of proper evidence that the applicable fees have been paid; or

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(2) Off-loading of any cargo onto a properly licensed and registered vehicle.

(Emphasis added.)

The term “law enforcement agency” is not defined in this section of the Idaho Code, but is defined elsewhere. For example, the Terrorist Control Act, Idaho Code § 18-8102(3), defines “law enforcement agency” as:

a governmental unit of one or more persons employed full time or part time by the state or federal government, or a political subdivision thereof, for the purpose of preventing and detecting crime and enforcing laws or local ordinances and the employees of which are authorized to make arrests for crimes while acting within the scope of their authority.

Essentially the same definition is used in identifying agencies that can access criminal identification records, Idaho Code § 19-4812(b), and that enforce the Uniform Controlled Substances Act, Idaho Code § 37-2701(q).

Thus, the employees of a law enforcement agency are empowered to enforce the laws and to make arrests. Employees of the ITD may issue citations for misdemeanors and infractions. Idaho Code § 40-510. But there is no provision in the Idaho Code that authorizes them to make arrests. Nor can they carry or use a firearm. Idaho Code § 49-510(5).

Other definitions of a “law enforcement agency” simply enumerate particular agencies with law enforcement powers. For example, the Missing Child Report Act defines “law enforcement agency” as:

any law enforcement agency of the state or any political subdivision of the state, including the Idaho department of law enforcement and any municipal or county sheriff department.

Idaho Code § 18-4508(1). Similarly, for purposes of the Idaho Public Records Act, a “law enforcement agency” means:



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the office of the attorney general, the office of the state controller, the department of law enforcement, the office of any prosecuting attorney, sheriff or municipal police department.

Idaho Code § 9-335(2). Clearly, the ITD does not qualify as a law enforcement agency under such definitions.

As a practical matter, the Idaho Legislature has limited the authority of the Port of Entry Unit of the ITD to issuing citations for certain nonmoving traffic infractions and misdemeanor violations. Idaho Code § 40-510. Authorized employees of the ITD do not receive peace officer training, which training is a prerequisite to serving as a “peace officer” for any “police or law enforcement agency . . . whose duties include and primarily consist of the prevention and detection of crime and the enforcement of penal, traffic or highway laws of this state or any political subdivision.” Idaho Code §§ 19-5101(d) and 19-5109(d).

In short, ITD employees have not received appropriate peace officer training, are forbidden to carry or use a firearm and lack express or implied authority to make an arrest. Thus, they are not “peace officers” or members of a “law enforcement agency” and do not have authority to seize and detain commercial motor vehicles. If the Idaho Legislature intends to confer such authority on ITD employees, an express delegation of authority should be made and the employees should be required to undergo appropriate training as peace officers.<sup>1</sup>

Sincerely,

ALAN G. LANCE  
Attorney General

<sup>1</sup> You have not asked and we have not addressed concerns that have been raised elsewhere regarding allegations of discriminatory enforcement arising from the fact that the law applies only to motor vehicles owned by nonresidents.

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February 7, 1995

Honorable Fred Tilman  
Idaho House of Representatives

**HAND DELIVERED**

### **THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE**

Re: Legal Analysis of Potential Church/State  
Constitutional Issues Associated With an Idaho Income Tax  
Credit for Tuition Payments for Private Schools for Children  
in K-12

Dear Representative Tilman:

### **QUESTION PRESENTED**

Your inquiry to the Office of the Attorney General posed the following question: Would there be potential church/state constitutional issues associated with an income tax credit for tuition payments to private schools for children ages K-12?

### **CONCLUSION**

I conclude that there are potential constitutional issues associated with income tax credits for tuition payments to private schools for children attending K-12. I have analyzed the constitutional questions under both the state and federal constitutions. I conclude that the issues are too close to call under the United States Constitution and that tuition tax credits for private schools are probably unconstitutional under the Idaho Constitution.

### **ANALYSIS**

#### **1. Analysis Under the First Amendment to the United States Constitution**

This is a question that has been presented to the Attorney General's Office on previous occasions. On February 15, 1985, Deputy Attorney

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General Patrick J. Kole advised Representative J.F. Chadband that there were two lines of thought on the question. Kole also included an analysis prepared by Idaho Education Association attorney Byron Johnson the previous year, on March 15, 1984. Johnson's analysis concluded that tax credits for tuition payments to parochial schools would be unconstitutional under the First Amendment to the United States Constitution and under art. 9, sec. 5 of the Idaho Constitution. With regard to the First Amendment, Johnson opined:

In Mueller v. Allen, [463 U.S. 388,] 103 S. Ct. 3062, [77 L. Ed. 2d 721] (1983), the Supreme Court held as constitutional a statute similar to HB 698, but providing for an income tax deduction instead of an income tax credit. As indicated in my letter of March 12, 1984, the amount of the credit does not depend on the tax rate of the individual taxpayer. Because the credit provides a benefit to the taxpayer regardless of the tax rate, it appears more similar to the system of reimbursing parents that was struck down by the Supreme Court in Committee for Public Education v. Nyquist, [413 U.S. 756,] 93 S. Ct. 2955, [37 L. Ed. 2d 948] (1973), than it does to the deduction in Mueller.

The distinction between tax credits, tax exclusions, and tax deductions for educational expenditures was succinctly pointed out by the court in Koysdar v. Wolman, 353 F. Supp. 744 (S.D. Ohio, E.D. 1972), which was affirmed by the United States Supreme Court in Grit v. Wolman, 413 U.S. 901 (1973). In this case the district court stated:

[T]ax credits are more direct than income tax exclusions or deductions. When a state grants a total exemption, . . . exempted institutions are no longer taxable entities and do not appear on the tax roles of the state. In that situation there is no longer any tax relationship between the exempted entity and the state; consequently, far less danger exists, if the exempted institution is a religious one, that abrasive contacts, arising out of tax liability will occur along religious lines. Slightly more direct than exemptions are tax deductions and exclusions which tend to be inverse to income and go to reduce the base upon which a percentage tax is levied.

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A tax credit, to the contrary, is a dollar for dollar forgiveness against the net payable tax as finally computed, after all exclusions and deductions have been taken. A credit, therefore, while perhaps less intensive than direct grants, tends to involve the state more directly in assisting the benefited enterprise than do either exemptions or deductions. 353 F. Supp. at 763-4.

The court held that the statute providing tax credits to parents who incurred educational expenses was unconstitutional under the First Amendment. I reach the same conclusion about HB 698.

Mr. Johnson (now Justice Johnson) made an important point concerning the distinction between tax credits and tax deductions in the federal cases. I will begin my analysis with a review of the precedents he discusses and move on to several others. In Committee for Public Education v. Nyquist, 413 U.S. 756, 93 S. Ct. 2955, 37 L. Ed. 2d 948 (1973), the United States Supreme Court struck down five sections of a New York statute that provided for direct payment to private schools, partial tuition tax credits for lower income taxpayers for private school tuition, and reductions in taxable income of up to \$1,000 for middle-income taxpayers who pay at least \$50 per year in private school tuition. *Id.* at 773-94, 93 S. Ct. at 2966-76. On the issue of tuition grants through tax credits, the Court observed: “[T]hese grants could not, consistently with the Establishment Clause, be given directly to sectarian schools.” *Id.* at 780, 93 S. Ct. at 2969. Because the tuition grants made no attempt to segregate sectarian and non-sectarian functions (e.g., religious instruction vs. transportation of students), the effect was to aid sectarian schools contrary to the First Amendment. *Id.* at 783, 93 S. Ct. at 2970-71. Moreover, the tax benefits for middle-income taxpayers were struck down, in part, because they bore no relationship to actual expenditures, as would a true deduction. *Id.* at 790, 93 S. Ct. 2974.

The case of Koysdar v. Wolman, 353 F. Supp. 744 (D.C. Ohio 1972), *affirmed sub nom.* Grit v. Wolman, 413 U.S. 910, 93 S. Ct. 3062, 37 L. Ed. 2d 1201 (1973), which Johnson also cited in his letter, was likewise a case dealing with tax credits. There the statute gave a tuition tax credit against the sum of the taxpayer’s income, excise, sales and property tax obligations, *i.e.*, it restored from the treasury unsegregated general revenues already collected and was held unconstitutional as direct state aid to religion.

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Nyquist was probably the high water mark of restrictive interpretation of the Establishment Clause in the area of assistance to students or the families of students attending private schools. In Mueller v. Allen, 463 U.S. 388, 103 S. Ct. 3062, 77 L. Ed. 2d 721 (1983), the United States Supreme Court probably began an erosion of Nyquist when it upheld Minnesota's state income tax deductions available to parents for their tuition and transportation expenses, be their children in public or private school. *Id.* at 390, n.1, 103 S. Ct. at 3064, n.1. Mueller characterized Nyquist as a case in which "we held invalid a New York statute providing public funds for the maintenance and repair of the physical facilities of private schools and granting thinly disguised 'tax benefits,' actually amounting to tuition grants, to the parents of children attending private schools." *Id.* at 394, 103 S. Ct. at 3066. Mueller elaborated that Nyquist struck down outright grants to low-income parents because they did not take the form of ordinary tax benefits and noted that the tax reductions struck down were unrelated to the amount of money actually spent by any parent on tuition, but were calculated on the basis of a formula contained in the statute. In contrast, Minnesota's deduction was a genuine tax deduction based upon actual (although capped) expenditures. *Id.* at 396, n.6, 103 S. Ct. at 3068, n.6.

Mueller also noted that one reason why the Nyquist scheme was struck down was that tuition grants were provided only to parents with children in non-public schools. In contrast, the Minnesota deduction was available for tuition and transportation expenses for students in both public and private schools. *Id.* at 398, 103 S. Ct. at 3068. Moreover, the Minnesota scheme at issue in Mueller channeled all assistance that it might provide to parochial schools through individual parents; it was not part of a larger scheme that was intertwined with direct aid to private schools. *Id.* at 399, 103 S. Ct. at 3069.

A stand-alone tuition tax credit available only to parents for tuition payments to private schools does not exactly fit in either the Mueller or Nyquist facts, but I believe it is closer to Nyquist than to Mueller. It was distinctions between the statutory schemes at issue in Nyquist and Mueller—*e.g.*, the unavailability of the credit to public schools parents, the difference between a true tax deduction based upon actual expenditures as opposed to tax benefits arbitrarily figured under a formula without relationship to actual expenditures—that persuaded Deputy Attorney General Margaret Hughes that a pure private school tuition tax credit was unconstitutional in her guide-

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line of February 7, 1992, to Representative Myron Jones. 1992 Idaho Att’y Gen. Ann. Rpt. 54.

As Hughes noted, it is difficult to reconcile Mueller and Nyquist and the later case of Witters v. Washington Department of Services for the Blind, 474 U.S. 481, 106 S. Ct. 748, 88 L. Ed. 2d 846 (1986), which held that a blind student could use state vocational rehabilitation assistance to attend a religious college, focusing in part upon the religious neutrality of providing rehabilitation assistance for education of the blind. Further, since Hughes prepared her analysis, the Court has decided Zobrest v. Catalina Foothills School District, 509 U.S. 1, 113 S. Ct. 2462, 2467, 112 L. Ed. 2d 1 (1993), which held that the provision of a sign language interpreter at public expense for a deaf student attending a parochial school did not offend the Establishment Clause because the function of providing sign language translation for deaf students is part of a religiously neutral general social program.

I think there has been a softening of the First Amendment Establishment Clause jurisprudence regarding the constitutionality of state provided benefits that taxpayers and students may decide to use in either secular or religious schools. The current trend of the United States Supreme Court might allow a private school tuition tax credit to pass constitutional muster, but the Supreme Court would have to overrule Nyquist or distinguish it on very narrow grounds.

### **2. Analysis Under the Idaho Constitution**

The issue to be analyzed is whether tax credits for private school tuition would be unconstitutional under art. 9, sec. 5 of the Idaho Constitution. I have parsed that section below as follows:

§ 5. Sectarian appropriations prohibited.—Neither the legislature nor any county, city, town, township, school district, or other public corporation,

[1] shall ever make any appropriation, or pay from any public fund or moneys whatever,

[a] anything in aid of any church or sectarian or religious society, or

## INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

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[b] for any sectarian or religious purpose, or

[c] to help support or sustain any school, academy, seminary, college, university or other literary or scientific institution, controlled by any church, sectarian or religious denomination whatsoever;

[2] nor shall any grant or donation of land, money or other personal property ever be made by the state, or any such public corporation,

[a] to any church or

[b] for any sectarian or religious purpose;

[3] provided, however, that a health facilities authority, as specifically authorized and empowered by law, may finance or refinance any private, not for profit, health facilities owned or operated by any church or sectarian religious society, through loans, leases, or other transactions.<sup>1</sup>

There is a small body of case law under art. 9, sec. 5 of the Idaho Constitution. It does not address the precise questions that you have presented on tuition tax credits. In Epeldi v. Engelking, 94 Idaho 390, 48 P.2d 860 (1971), the court considered state officers' refusal to allocate appropriated funds to local school districts to allow nonpublic school students to ride school districts' buses and the officers' defense that the statute providing for transportation of nonpublic school children was unconstitutional under art. 9, sec. 5. The court struck the statute down under art. 9, sec. 5 of the Idaho Constitution:

It is clear under Everson v. Board of Education, [330 U.S. 1, 67 S. Ct. 504, 91 L. Ed. 711 (1947)], that furnishing public funds to parents of students attending parochial schools to aid the students in attendance at those schools is not prohibited by the First Amendment of the United States Constitution. Board of Education v. Allen, [392 U.S. 236, 88 S. Ct. 1923, 20 L. Ed. 2d 1060 (1968)], holds that the furnishing of secular textbooks by school authorities for use by students in

parochial schools, likewise is not contrary to the First Amendment.

However, unlike the provisions of the Federal Constitution, the Idaho Constitution contains provisions specifically focusing on private schools controlled by sectarian, religious authorities. In considering the provisions of Idaho Const. art. 9, § 5, set out above, one cannot help but first be impressed by the restrictive language contained therein.

This section in explicit terms prohibits any appropriation by the legislature or others (county, city, etc.) or payment from any public fund, *anything in aid* of any church or to help support or sustain any sectarian school, etc. . . . [I]t is our conclusion that the framers of our constitution intended to more positively enunciate the separation between church and state than did the framers of the United States Constitution. . . .

The Idaho Const. art. 9, § 5, requires this court to focus its attention on the legislation involved to determine whether it is in “aid of any church” and whether it is “to help support or sustain” any church affiliated school. The requirements of this constitutional provision thus eliminate as a test for determination of the constitutionality of the statute, both the “child benefit” theory discussed in Everson v. Board, *supra*, and the standard of Board of Education v. Allen, *supra*, i.e., whether the legislation has a “secular legislative purpose and a primary effect that neither advances nor inhibits religion.” In this context, while we recognize that even though this legislation does assist the students to attend parochial schools, it also aids those schools by bringing to them those very students for whom the parochial schools were established. Thus, it is our conclusion that this legislation, the effect of which would be to aid the school, is prohibited under the provisions of Idaho Const. art. 9, § 5.

94 Idaho at 395, 488 P.2d at 865.



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In Board of County Commissioners of Twin Falls County v. Idaho Health Facilities Authority, 96 Idaho 498, 531 P.2d 588 (1974), the court considered a statute that would allow the Idaho Health Facilities Authority (IHFA), an authority established by the state, to use its funds to refinance the outstanding debt of hospitals operated by churches or sectarian or religious societies. The court found this provision unconstitutional under art. 9, sec. 5, for the following reasons:

The appropriation of public funds to public hospitals operated by religious sects does not violate the First Amendment to the Constitution of the United States, Bradfield v. Roberts, 175 U.S. 291, 20 S. Ct. 121, 44 L. Ed. 168 (1899). But this does not mean that such commitment of funds is not violative of the Idaho Constitution. The Idaho Constitution places a much greater restriction upon the power of state government to aid activities undertaken by religious sects than does the First Amendment to the Constitution of the United States. Epeldi v. Engelking, 94 Idaho 390, 488 P.2d 860 (1971).

. . . The moneys which the Idaho Health Facilities Authority was to give to the hospitals involved comes from the sale of that Authority's bonds, and thus the moneys are "public" since their source is the proceeds of the sale of a bond of a "public body politic and corporate." State v. Musgrave, [84 Idaho 77, 370 P.2d 778 (1962)]. Further, the refinancing of existing debt or the lending of money for reconstruction and equipping of a building consists of giving "aid" to the building's owner. Therefore, the agreements between the hospitals and the Authority support and commit public moneys to the hospitals, and if those hospitals are owned and/or operated by "any church or sectarian or religious society," the Constitution of the State of Idaho has been violated. Epeldi v. Engelking, *supra*.

96 Idaho at 509, 531 P.2d at 597.

Based upon Epeldi, Hughes opined to Representative Jones that tuition tax credits were unconstitutional because they ultimately aid the

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schools. Mr. Johnson reached the same conclusion, but his analysis of art. 9, sec. 5 of the Idaho Constitution was not specifically grounded in the case law:

As stated in my letter of March 12, 1984, the effect of HB 667 would be to help support or sustain educational institutions controlled by churches, sectarian or religious denominations by allowing a taxpayer who makes payments to such an institution for tuition, textbooks and transportation to receive a credit from the state. This amounts to an indirect payment of public funds in aid of such an institution. Despite the fact that HB 698 removes the possibility of a payment to the taxpayer where the credit exceeds the amount of the tax liability of the taxpayer, the tax credit continues to be an indirect payment of public funds. The distinction between tax credits and tax exemptions, as set forth above, is not a meaningless distinction. A tax credit amounts to an indirect appropriation of tax monies, rather than merely a system of determining the taxable income of a taxpayer. Therefore, it is my opinion that HB 698 is unconstitutional under Article IX, Section 5 of the Idaho Constitution.

A tuition tax credit is not an appropriation for transportation of students to a parochial school, which was found unconstitutional in *Epeldi*, nor a direct loan of public funds to a religiously controlled hospital, which was found unconstitutional in *IHFA*. Nevertheless, under precedent of the Idaho Supreme Court, a tax credit can be unconstitutional if it is for an unconstitutional purpose or has an unconstitutional effect.

In *Village of Moyie Springs, Idaho v. Aurora Mfg. Co.*, 82 Idaho 337, 353 P.2d 767 (1960), the court considered a statute authorizing municipalities to issue bonds for acquisition of manufacturing, industrial or commercial enterprises and held it to be violative of the constitutional prohibition against any municipality lending its credit in aid of a corporation, notwithstanding that the bonds were revenue bonds and there would be an incidental or indirect benefit to the public. The court stated:

We are mindful that under art. 7, § 5 [of the Idaho Constitution], the legislature has plenary power to grant such exemptions [from taxation] “as shall seem necessary and

just.” An exemption which arbitrarily prefers one private enterprise operating by means of facilities provided by a municipality, over another engaged, or desiring to engage, in the same business in the same locality, is neither necessary nor just. In this instance the exemption is intended to be granted by the legislature for an unconstitutional purpose, and for that reason also is not “necessary and just.”

82 Idaho at 349-50, 353 P.2d at 775. Thus, there is a practice in Idaho of analyzing the purpose of tax exemptions and striking them down if the court determines that they have an unconstitutional purpose. There is also a practice of striking down direct aid to school children if it has the effect of aiding sectarian institutions. As the court said in *Epeldi*:

In this context, while we recognize that even though this legislation does assist the students to attend parochial schools, it also aids those schools by bringing to them those very students for whom the parochial schools were established. Thus, it is our conclusion that this legislation, the effect of which would be to aid the school, is prohibited under the provisions of Idaho Const. art. 9, § 5.

94 Idaho at 395, 488 P.2d at 865.

*Epeldi* and *IHFA* are not precisely on point on the issue of tuition tax credits. *Epeldi* dealt with an appropriation of funds to deliver children to the parochial school door and *IHFA* with public funds used for direct loans to hospitals run by religious organizations. *Epeldi* and *IHFA* did not deal with the subtler issue of whether tuition tax credits are a “pay[ment] from any public fund or moneys . . . to help support or sustain any school, academy, seminary, college, university . . . controlled by any church, sectarian or religious denomination” or “a grant or donation of . . . money . . . to any church or for any sectarian or religious purpose.” But, there is case law from Oregon suggesting that tax credits are grants from the state. In *Keller v. Dept. of Revenue*, 12 Or. Tax 381, 1993 WL 55294, the court characterized a tax credit as an exemption from liability from a tax already determined and admittedly valid and thus concluded tax credits were essentially grants by the state. Cf. *Keyes v. Chambers*, 307 P.2d 498, 501 (Ore. 1957), upon which *Keller* is based.

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Under a literal parsing of art 9, sec. 5, a tuition tax credit is not an “appropriation or pay|ment| from any public fund”; but it is most likely a “grant or donation of . . . money” to which art. 9, sec. 5, would apply. Thus, I opine that the Idaho Supreme Court would conclude that art. 9, sec. 5, directly prohibits tuition tax credits to private schools.

Moreover, based on cases like Moyie Springs and Epeldi, it is my opinion that the Idaho Supreme Court would go beyond the analysis of whether tax credits are payments of public moneys or grants and whether parents (rather than religious schools) receive the direct benefits of tuition tax credits; it would likely look to determine whether there is an unconstitutional purpose or effect to benefit religious education in the tax credits. An argument focusing narrowly on the words of art. 9, sec. 5, would have some chance of passing constitutional muster if the court were to accept the underlying premises that this provision should be parsed as a statute and that tax credits are not grants of money or other personal property (forgiveness of taxes). That little likelihood of prevailing if the court’s analysis looked to broad underlying constitutional analyses of purpose and effect. In my opinion, the Idaho Supreme Court is more likely to follow the latter path and hold tuition tax credits for private schools to be unconstitutional.

Sincerely yours,

MICHAEL S. GILMORE  
Deputy Attorney General

<sup>1</sup> I note from the materials that you provided to me that the first two subdivisions of this section of the Idaho Constitution are somewhat more restrictive than article 10, § 6 of the Montana Constitution with regard to their provisions regarding aid or assistance to sectarian schools. That section of the Montana Constitution has not been construed in reported decisions, but its predecessor section under Montana’s 1889 Constitution has. State ex rel. Chambers v. School District No. 10 of the County of Deer Lodge, 472 P.2d 1013 (Mont. 1970) (school board cannot constitutionally levy for employment of teachers in parochial school). While an analysis prepared for the Montana Legislature addresses the constitutionality of providing tuition tax credits to children privately educated, I hesitate to follow that path. Idaho’s scanty jurisprudence on this subject is not comprehensive, but it seems better developed than Montana’s and as well developed as any of its sister states in the West, as the following survey of leading opinions under various state constitutions’ education articles and similar sections prohibiting sectarian aid show:

Alaska: Sheldon Jackson College v. State, 599 P.2d 127 (Alaska 1979) (tuition grants to student to attend private schools reflecting differences between public and private school tuition are unconstitutional—no cases on tuition tax credits).

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California: Board of Trustees of Leland Stanford Junior University v. Cory, 79 Cal. App. 3d 661, 145 Cal. Rprt. 136 (1978) (tuition grant to student to attend private medical school is constitutional, but direct payment to private school is not—no cases on tuition tax credits).

Colorado: Americans United for Separation of Church and State Fund, Inc. v. State, 648 P.2d 1072 (Colo. 1982) (higher education grants to students who attend public or private universities are not unconstitutional, but statute forbade grants to students to attend pervasively sectarian institutions, so constitutionality of aid to pervasively sectarian institutions was not at issue—no cases on tuition tax credits).

Nevada: State ex rel. Nevada Orphan Asylum v. Hallock, 16 Nev. 373 (1882) (appropriation of \$X per orphan per year for orphans in sectarian orphanage is unconstitutional—no cases on tuition tax credits).

Utah: Gobler v. Utah State Teachers' Retirement Board, 192 P.2d 580 (Utah 1948) (state cannot constitutionally credit teacher's retirement account for time teacher spent teaching in parochial school—no cases on tuition tax credits).

Washington: Weiss v. Bruno, 509 P.2d 973 (Wash. 1973) (statute providing financial assistance for needy or disadvantaged students attending public or private schools was unconstitutional unless sectarian schools receive no benefits from grants—no cases on tuition tax credits).

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February 16, 1995

Mr. Stanley F. Hamilton, Director  
Idaho Department of Lands  
**STATEHOUSE MAIL**

### **THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE**

Dear Director Hamilton:

#### **QUESTION PRESENTED**

You have asked the Attorney General's Office to provide legal guidance regarding the 1987 sale of two adjacent 320-acre parcels of state land to two wholly-owned subsidiaries of Idaho Power Company for use as a pump-storage generating plant consistent with art. 9, sec. 8 of the Idaho Constitution.

Our answer is that the 1987 sale of two adjacent 320-acre parcels of state land to two wholly-owned subsidiaries of Idaho Power for use as a pump-storage generating plant raises a constitutional question, but there is insufficient information to reach a conclusion.

#### **DISCUSSION**

Article 9, sec. 8 of the Idaho Constitution reads in relevant part:

provided, that not to exceed one hundred sections of state land shall be sold in any one year, and to be sold in subdivisions of not to exceed three hundred and twenty acres of land to any one individual, company or corporation.<sup>1</sup>

(Emphasis added.) The question is whether this provision was violated by two 1987 sales of adjacent 320-acre parcels of state land to Idaho Utilities Products Company and Idaho Energy Resources, both wholly-owned subsidiaries of Idaho Power Company. The two parcels were to be used in combination for a 640-acre pump-storage generating plant.

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There are two basic lines of inquiry that may be pursued in order to determine the constitutionality of the sales. First, are the wholly-owned subsidiaries distinct legal entities, such that they each satisfy the “one individual, company or corporation” criteria of the Idaho Constitution? Art. 9, sec. 8, Idaho Constitution. Second, even if they are separate legal entities, did the subsidiaries act together or with their common parent corporation to evade the 320-acre constitutional limitation? *See O’Bryant v. City of Idaho Falls*, 78 Idaho 313, 303 P.2d 672 (1956); *Webster-Soule Farm v. Woodmansee*, 36 Idaho 520, 211 P. 1090 (1920).

Subsidiary corporations, even those wholly owned, are generally considered to be distinct legal entities in Idaho. See, e.g., Idaho Code §§ 30-1-1 et seq.; *Ross v. Coleman*, 114 Idaho 817, 761 P.2d 1169 (1988); *Baker v. Kulczyk*, 112 Idaho 417, 732 P.2d 386 (Ct. App. 1987). The answer to whether the sister corporations in this case are distinct legal entities for purposes of art. 9, sec. 8 then depends on the relationship, in fact, between the wholly owned subsidiaries and between the subsidiaries and their parent corporation, Idaho Power Company.

It has been suggested in a prior opinion of the Idaho Attorney General’s Office that the “mere instrumentality” and alter ego concepts, which are used by courts to determine corporate liability, may be used to analyze the relationship between affiliated corporations for purposes of art. 9, sec. 8. Attorney General Opinion 75-56 (9/25/74). Relevant factors may include: (1) whether the subsidiary lacks substantial business contacts other than with the parent or sister subsidiary; (2) whether the subsidiary operates solely with capital furnished by the parent or sister subsidiary; (3) whether the subsidiary has officers and directors in common with the parent or sister subsidiary; (4) whether the subsidiary has an accounting and payroll system in common with the parent or sister subsidiary; and (5) whether there is commingling of funds between the subsidiary and the parent or sister subsidiary. *Id.* Other factors may also be helpful in the analysis. See, e.g., *Baker v. Kulczyk*, 112 Idaho 417, 732 P.2d 386 (Ct. App. 1987).

In this case, insufficient information has been provided in the request for guidance to arrive at any conclusion as to whether or not the two wholly owned subsidiaries of Idaho Power are distinct legal entities.

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Assuming the two wholly owned subsidiaries are separate entities, the second line of inquiry is whether the two sister corporations have acted together or with their common parent to evade the 320-acre limitation. The Idaho Supreme Court has interpreted art. 9, sec. 8 as prohibiting the purchase of more than 320 acres of state land by two or more individuals acting together to evade the constitutional limitation. Webster-Soule Farm v. Woodmansee, 36 Idaho 520, 211 P. 1090 (1920). In Woodmansee the court stated, with respect to the 320-acre constitutional limitation:

If the original purchase were made by the purchaser in good faith and for himself, there would be nothing unlawful in the subsequent sale of his interest to one who had already purchased by another transaction the acreage mentioned in the constitutional provision. On the other hand, if the original purchase were made by a nominal purchaser not on his own behalf, but in the interest of another person, there being an agreement between them to evade the constitutional limitation, then such a transaction would be invalid.

36 Idaho at 524.

This is consistent with the intent of the framers of the Idaho Constitution. The framers specifically sought to prohibit the purchase of more than 320 acres by groups or associations of individuals acting in concert. See Idaho Constitutional Convention, Proceedings and Debates, vol. I, at 841 (1889). The framers believed that an acreage limitation was necessary so that “monied syndicates” and “monied men’s cattle ranches” would not be able to lock up large parcels of land and prevent population growth and settlement. See Remarks of Mr. Ainslie, Idaho Constitutional Convention, Proceedings and Debates, vol. I, at 840 (1889).

It follows that art. 9, sec. 8 would be violated if Idaho Power’s two wholly owned subsidiaries, in fact, acted on behalf of Idaho Power as nominal purchasers in an attempt to evade the constitutional limitation. Additionally, art. 9, sec. 8 would be violated if the two wholly owned subsidiaries were created by Idaho Power for the sole purpose of avoiding the acreage limitation. O’Bryant v. City of Idaho Falls, 78 Idaho 313, 303 P.2d 672 (1956). The Idaho Supreme Court has held “[t]hat which the constitution directly prohibits may not be done by indirection through a plan or instru-



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mentality attempting to evade the constitutional prohibition.” 78 Idaho at 325, 303 P.2d at 678. Further factual investigation is necessary to definitively determine the intent of the purchasers.

Finally, any sale of state land made in violation of article 9, sec. 8 is ultra vires and void. See Newton v. State Board of Land Commissioners, 37 Idaho 58, 219 P. 1052 (1923); Webster-Soule Farm v. Woodmansee, 36 Idaho 520, 211 P. 1090 (1920).

Sincerely,

STEPHANIE A. BALZARINI  
Deputy Attorney General  
Idaho Department of Lands

<sup>1</sup> Originally, the Idaho Constitution limited purchases to 160 acres of school land. In a 1951 amendment, the acreage limitation was increased to 320 acres, and in 1982, the phrase “school lands” was amended to read “state lands.”

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March 31, 1995

Honorable Pete Cenarrusa  
Secretary of State  
**STATEHOUSE MAIL**

### **THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE**

Dear Mr. Cenarrusa:

#### **QUESTION PRESENTED**

Pursuant to Idaho Code § 59-704, the Secretary of State has requested an opinion as to whether the fact that he is a livestock producer and runs sheep on private and federal lands, some of which, being adjacent to state land, presents a conflict of interest to his reviewing state land leases and voting on appeals of actions by the Department of Lands as a State Land Board member.

The fact that Mr. Cenarrusa is a livestock producer and runs sheep on land adjacent to state land presents no conflict of interest under Idaho's Ethics in Government Act found at chapter 7 of title 59 of the Idaho Code.

At statehood, the federal government granted sections 16 and 36 of each township to the State of Idaho for the support of common schools. These lands are referred to as school lands in art. 9, sec. 4 of the Idaho Constitution and are held in trust by the state for the support of Idaho's common or public schools. The state public school fund consists of income derived from the school lands through sales, leases, sale of timber or minerals, and other activities. The interest earned from the public school fund is appropriated annually to support the ongoing operation of Idaho's public schools.

The distribution of state endowment lands creates an interesting "crazy quilt pattern" across the state. In some instances, endowment lands are surrounded by federal land, and in other areas they adjoin private land. This situation makes it extremely difficult for the Idaho Department of Lands to manage isolated state parcels. In recent years, there has been considerable

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effort to consolidate state holdings through land exchanges with the federal government or with private landowners.

Much of the state land, like much of the land in Idaho, is unfenced. This is because, in many instances, the cost of fencing exceeds the value of the land. Animals roam at large on the open range and may graze upon private land, state land or federal lands. In addition, animals from one herd may forage on state leases or federal allotments in common with animals from other herds.

The Secretary of State, Pete Cenarrusa, does not hold any state land leases and has not held any state leases since taking office in 1967. Mr. Cenarrusa was a stockholder of the East Side Blaine County Livestock Grazing Association in 1969 when the Association was issued a state grazing lease. The association leased the land until it was dissolved in 1987.

The Secretary of State has remained in the livestock business and is a principal of the Biskay Land and Livestock Company. Biskay owns private grazing land and also holds federal grazing permits. At present, Biskay holds grazing permits within two federal allotments. These allotments are the Iron Mine Allotment and the Wild Horse Allotment.

The Iron Mine Allotment adjoins private land owned by Biskay. The Wild Horse Allotment does not adjoin any land owned by Mr. Cenarrusa or Biskay. Both federal allotments include within their boundaries parcels of school land. Within the Iron Mine Allotment are several parcels of school land presently leased to Schindler Brothers of California, Grazing Lease No. G-7190-1. The lands leased by Schindler Brothers were first leased to them in 1991. Rental is based upon the number of AUMs<sup>1</sup> that it is estimated the land can sustain. Schindler Brothers pay the cattle AUM rate. The Wild Horse Allotment is a common use sheep allotment with several operators holding federal grazing permits; it contains nine sections of unleased state land.

The state land within the Iron Mine Allotment and that within the Wild Horse Allotment are unfenced. While there does not appear to be any intent to graze animals upon this land, it is acknowledged that animals belonging to Biskay as well as animals from other herds may from time to

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time inadvertently graze upon state lands. The state parcels are not taken into account by the federal government in determining the carrying capacity of the federal allotments adjoining the land. In other words, Biskay may not graze any more animals on the federal land than that land is able to sustain.

The state land leases within the two allotments are administered by the Idaho Department of Lands. “The Land Board has never been required to take any action with respect to the specific parcels of land in question. Consequently, the Secretary of State has never had to cast a vote regarding these lands. State leases are normally issued administratively by the Department without involvement by the Land Board other than the signatures of the Governor and the Secretary of State.”

### ANALYSIS

The term conflict of interest has a very specific meaning under Idaho law. Conflict of interest is defined in Idaho Code § 59-703(4):

“Conflict of interest” means any official action or any decision or recommendation by a person acting in a capacity as a public official, the effect of which would be to the private pecuniary benefit of the person or a member of the person’s household, or a business with which the person or a member of the person’s household is associated, unless the pecuniary benefit arises out of the following . . . .

The statute then goes on to discuss exceptions to the definition of conflict of interest. One of these exceptions has relevance to this case. Subsection (b) of subsection (4) states:

Any action in the person’s official capacity which would affect to the same degree a class consisting of an industry or occupation group in which the person, or a member of the person’s household or business with which the person is associated, is a member or is engaged.

Idaho Code § 59-704 sets forth the actions required to be taken by a public official in cases in which a conflict of interest arises. That code section provides in relevant part:

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A public official shall not take any official action or make a formal decision or formal recommendation concerning any matter where he has a conflict of interest and has failed to disclose such conflict as provided in this section. Disclosure of a conflict does not affect an elected public official's authority to be counted for purposes of determining a quorum and to debate and to vote on the matter, unless the public official requests to be excused from debate and voting at his or her discretion. In order to determine whether a conflict of interest exists relative to any matter within the scope of the official functions of a public official, a public official may seek legal advice from the attorney representing that governmental entity or from the attorney general or from independent counsel. If the legal advice is that no real or potential conflict of interest exists, the public official may proceed and shall not be subject to the prohibitions of this chapter. If the legal advice is that a real or potential conflict may exist, the public official:

. . . .

If he is an elected state public official, he shall prepare a written statement describing the matter required to be acted upon and the nature of the potential conflict, and shall file such statement with the secretary of state prior to acting on the matter. A public official may seek legal advice from the attorney representing that agency or from the attorney general or from independent counsel. The elected public official may then act on the advice of the agency's attorney, the attorney general or independent counsel.

(Emphasis added.)

In the first instance it does not appear that the Secretary of State has a conflict of interest as defined by Idaho Code § 59-703. The Secretary of State does not hold any state land leases and, in voting to establish state grazing rates or on an appeal of a state lease auction or on conflict bids, he is not providing any pecuniary benefit to himself or to his family. In addition, the land leases within the Iron Mine Allotment and within the Wild Horse

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Allotment have been administered and dealt with solely by the Idaho Department of Lands. Questions involving these two leases have never come before the State Land Board, and the Secretary of State has not been called upon to vote for or against a lease award made by the Department of Lands.

The fact that the Secretary of State is a livestock producer does not create a conflict of interest with respect to his position on the Land Board. Even if Idaho Code § 59-703(4) could be read as defining a conflict of interest in this case, subsection (b) of subsection (4) creates an exception. The Secretary of State is not affected by the establishment of rates for state land leases or the appeal of lease auctions or ruling on conflict bids any more than anyone else in the livestock industry. His interest is simply too remote to be considered a conflict of interest under Idaho law.

If questions involving state land leases within the Iron Mine Allotment or within the Wild Horse Allotment ever come before the Land Board, the Secretary of State may wish to consider this as a potential conflict of interest and deal with it pursuant to the provisions set forth in Idaho Code § 59-704. That code section only requires the disclosure of the conflict of interest and specifically provides that once the conflict is disclosed that the public official with the potential conflict of interest is not disqualified from voting on the matter. Disclosure is being recommended only because it appears to be the most prudent course of action and the one best in keeping with the spirit of the Idaho Ethics in Government Act.

I hope this information is of assistance to you. This letter does not constitute a ruling or official opinion of the Attorney General's Office. It is intended merely to explain the question set forth in your letter of February 22, 1995, and the conclusions set forth in this letter are based on the facts outlined in your letter of February 22, 1995. Obviously, any change in those facts or additional facts could result in a different analysis.

Yours very truly,

WILLIAM A. VON TAGEN  
Director, Governmental and  
Public Affairs

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<sup>1</sup> An “AUM” or “animal unit month” is defined by the Land Board’s Grazing Rules as the “[f]orage necessary to feed a cow or cow with calf under six (6) months of age for one month. Five head of sheep, or five ewes with lambs are appraised as one (1) AUM and one horse is appraised as one and one-half (1-1/2) AUM.” IDAPA 20.03.14.010.02.

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June 30, 1995

David D. Duthie, Deputy Director  
Department of Labor & Industrial Services  
**STATEHOUSE MAIL**

### **THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE**

Re: Opinion Regarding H.B. 100 (Idaho Code § 44-2206)

Dear Mr. Duthie:

You have requested an Attorney General's opinion regarding issues you identify as having been raised by the enactment of H.B. No. 100 (codified at Idaho Code § 44-2206). This bill was passed by the 1995 Idaho Legislature and takes effect July 1, 1995. H.B. 100, as amended, states:

**INSTALLATION OF ELECTRICAL SERVICE  
EQUIPMENT.** Electrical service equipment shall be permitted to be installed in or on a manufactured home, provided that all of the following conditions are met: (1) the service equipment must be completely installed by either the manufacturer of the structure or an Idaho licensed electrical contractor

....

Idaho Code § 44-2206(1) (emphasis added).

The amendments to H.B. 100 raise the following questions:

1. Does H.B. 100 conflict with the National Electrical Code (1993 edition) regarding the onsite installation of electrical service equipment in or on a manufactured home? If so, which standard takes precedence?
2. Does the portion of H.B. 100 that authorizes an electrical contractor to undertake onsite installation of electrical service equipment in or on a manufactured home conflict



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with the scope of authority otherwise afforded electrical contractors in the State of Idaho?

3. Does the Department of Labor and Industrial Services have the authority to inspect onsite installations of electrical service equipment in or on a manufactured home if such installations are undertaken in accordance with the terms of H.B. 100?

The National Electrical Code (NEC) has been adopted by rule as the prevailing authority in the State of Idaho. IDAPA 07.01.06011. The NEC would therefore govern the installation of electrical service on a manufactured home in the absence of H.B. 100.

### ANALYSIS

#### **1. H.B. 100 Conflicts With, and Takes Precedence Over, the National Electrical Code Regarding the Onsite Installation of Electrical Service Equipment for Manufactured Homes**

On its face, H.B. 100 presents a direct conflict with the National Electrical Code (NEC) with respect to the installation of onsite electrical service equipment for manufactured homes. H.B. 100 authorizes the installation of an electrical service directly “in or on” a manufactured home at the onsite location. By contrast, the NEC, Article 550-23(q) states:

(a) **Service Equipment.** The mobile home service equipment shall be located adjacent to the mobile home and not mounted in or on the mobile home.

(Emphasis added.) Article 550-2 of the NEC defines a “mobile home” to include manufactured homes.

In short, H.B. 100 authorizes the installation of an electrical service directly upon a manufactured home at the onsite location. The relevant provisions of the NEC, which constitutes the sole adopted standard for electrical installations in Idaho, precludes the onsite installation of an electrical service upon a manufactured home. Therefore, a direct conflict exists between the two standards.

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When a conflict exists between two standards having the force and effect of law, the principles of statutory construction dictate that the later in time prevail. Union Pacific Railroad Co. v. Board of Tax Appeals, 103 Idaho 808, 654 P.2d 901 (1982). Thus, H.B. 100 takes precedence over the parallel provisions of the NEC. It follows that, in Idaho, electrical service equipment may be installed in or on a manufactured home, despite the provision of the National Electrical Code that such electrical service equipment must be located adjacent to the manufactured home and not mounted in or on it.

### **2. H.B. 100 may be Harmonized With the Other Provisions of the Idaho Code Governing Installation of Electrical Service Equipment, and an Electrical Contractor may Install Electrical Service Equipment Upon a Manufactured Home so Long as Said Contractor is Properly Qualified or Supervised**

H.B. 100 authorizes an “Idaho licensed electrical contractor” to install electrical service equipment in or on a manufactured home. You ask whether this provision of Idaho Code § 44-2206 conflicts with Idaho Code § 54-1010(1), which states:

On and after July 1, 1961, any electrical contractor who works as a journeyman electrician, as herein defined, shall be required to have a journeyman electrician’s license issued under the provisions of this act. All installations of electrical wiring, equipment or apparatus made by an electrical contractor shall be done by or under the direct supervision of a licensed journeyman electrician.

Thus, at first blush, it appears that H.B. 100 in title 44 of the Idaho Code authorizes an electrical contractor to undertake actual physical installations of electrical service equipment in or on manufactured homes, whereas title 54 of the Idaho Code appears to restrict such installations to journeymen electricians.

It is a basic principle of statutory construction that when two statutes deal with the same subject matter, they must be construed harmoniously and consistently if at all possible. State v. Maland, 124 Idaho 537, 540, 861 P.2d 107, 110 (Ct. App. 1993); State v. Paul, 118 Idaho 717, 719, 800 P.2d 113, 115 (Ct. App. 1990). In the absence of repeal or amendment, new provisions

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enacted by the legislature are presumed to accord with the legislative policy embodied in prior statutes relating to the same subject matter. Cox v. Mueller, 125 Idaho 734, 736, 874 P.2d 545, 547 (1994).

We do not read H.B. 100 as extending the scope of permissible conduct by an electrical contractor. Rather, H.B. 100 should be read as harmonizing with chapter 10, title 54, which comprehensively regulates the conduct of electrical contractors and other professionals who work in this area.

In general, chapter 10, title 54 provides that an electrical contractor is the person or business entity which carries on the business (bidding, contracting, designing, etc.) of electrical installations. Idaho Code § 54-1003A(1). Only a journeyman electrician or a properly supervised apprentice electrician is statutorily authorized to personally perform the actual physical installation of electrical wiring or equipment. Idaho Code § 54-1003A(2) and (3). All actual electrical installation by an electrical contractor must be done by a journeyman electrician or a properly supervised apprentice electrician. Idaho Code § 54-1010(1).

Thus, read in the context of the entire Idaho Code, H.B. 100 provides that a licensed electrical contractor can install electrical service equipment upon a manufactured home if the electrical contractor (1) is also licensed as a journeyman electrician, (2) is undertaking the installation through the service of a journeyman electrician, or (3) is undertaking the installation through the service of an apprentice electrician working under the direct supervision of a journeyman electrician.

This reading is bolstered by H.B. 100 itself which states that the installation of electrical service equipment in or on a manufactured home is permitted:

provided that all of the following conditions are met: . . . (2)  
The installation of the service equipment must otherwise  
comply with article 230 of the national electrical code, 1993  
edition, . . .

Article 230-1 of the NEC covers service conductors and equipment for control and protection of services and their installation requirements. Article 230 details the standards for such electrical service components as drop conduc-

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tors underground/lateral conductors, entrance conductors, disconnects, and overcurrent protection. Importantly, the statutory qualifications for an “electrical contractor” contained in title 54 of the Idaho Code do not include a prerequisite of any actual electrical installation experience. Idaho Code § 54-1007(1). Thus, the technical knowledge required to comply with article 230 of the NEC is beyond the scope of the statutory definition of an electrical contractor. We therefore conclude that the Idaho Legislature could not have intended that electrical contractors can personally undertake the physical installation of electrical service equipment set forth in H.B. 100. We cannot attribute to the Legislature an intent to authorize conduct so adverse to the public health and safety.

### **3. The Department of Labor and Industrial Services can Inspect the Electrical Service Equipment Installation Authorized by H.B. 100**

The Department of Labor and Industrial Services is authorized to inspect any electrical installation in the State of Idaho coming under the provisions of chapter 10, title 54, Idaho Code. Idaho Code § 54-1004. Chapter 10, title 54, Idaho Code, addresses itself to all electrical installations in the State of Idaho which are addressed and controlled by the standards of the National Electrical Code. Idaho Code § 54-1001. The installation of electrical service equipment for manufactured homes is a matter coming within the scope of the NEC. Therefore, the Department’s electrical inspectors are statutorily authorized to inspect any such electrical installations.

I hope this adequately addresses your questions. If you have any additional questions with respect to this matter, please feel free to contact me.

Sincerely,

JOHN J. MCMAHON  
Chief, Administrative  
& Contract Law Division

## INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

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August 9, 1995

J.D. Williams, State Controller  
Office of the State Controller  
**STATEHOUSE MAIL**

### **THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE**

Re: Copyrighting the Idaho Administrative Rules

Dear Mr. Williams:

You have asked us two questions regarding Idaho's administrative rules. First, you ask what legal remedies exist for the Rules Coordinator to control the reprinting and distribution of Idaho's administrative rules. You also inquire whether the Rules Coordinator can legally restrict public access, through, for example, the use of fees, to internal documents prior to their official publication, such as draft documents or internal documents containing customer mailing lists, categorized subscriber lists, Rules Division marketing/strategy papers or other related documents.

#### **A. Idaho Administrative Rules and Copyright Law**

Your first question, whether legal remedies exist for the Rules Coordinator to control the reprinting and distribution of Idaho's administrative rules, essentially raises an issue of copyright law. Namely, does the Rules Coordinator have a copyright in the Idaho Administrative Rules that can be legally protected. The simple answer to this question is "no."

I understand that the Division of Statewide Administrative Rules has taken the position that because it is self-supporting and because, under Idaho Code § 67-5205(2), it has the authority to sell copies of the rules to the public, it has a legally protected copyright interest in the rules. However, it is well settled that the law, whether in the form of opinions, statutes, or rules, cannot be copyrighted. The law belongs in the public domain and is, therefore, uncopyrightable.

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The rule that the law is in the public domain and not copyrightable was first enunciated by the United States Supreme Court in Wheaton v. Peters, 33 U.S. (8 Pet.) 591, 8 L. Ed. 1055 (1834). In that case, the Supreme Court rejected an action for infringement of a copyright on Wheaton's volumes of Supreme Court Opinions, observing:

[T]he Court is unanimously of [the] opinion, that no reporter has or can have any copyright in the written opinions delivered by this court; and that the judges thereof cannot confer on any reporter any such right.

33 U.S. at 668. Fifty years later, in Banks v. Manchester, 128 U.S. 244, 9 S. Ct. 36, 32 L. Ed. 425 (1888), the Supreme Court held invalid an Ohio law which authorized the official reporter for the Ohio Supreme Court to obtain, in his own name, a copyright on the opinions of the Ohio Supreme Court, stating:

The whole work done by the judges constitutes the authentic exposition and interpretation of the law, which, binding every citizen, is free for publication to all . . . .

128 U.S. at 253.

The principle that the law belongs to the public and cannot be copyrighted does not only apply to judicial opinions. It also applies to legislatively enacted statutes, *see* State of Georgia v. The Harrison Co., 548 F. Supp. 110 (N.D. Ga. 1982), and administratively promulgated rules. *See* Building Officials and Code Adm. v. Code Technology, Inc., 628 F.2d 730 (1st Cir. 1980). Moreover, this doctrine applies even in those situations where a state legislature itself has attempted to copyright the law or to confer that copyright on another entity. *See* Banks and Harrison Company. Simply put, no one person or entity can claim ownership of the law or obtain a legally protectable copyright interest in it.

This is not to say that publishers who compile cases or statutes cannot obtain a copyright in whatever creative aspect of the compilation they themselves have contributed. For example, West Publishing Co. has a copyright in its own headnotes to its reporters. Moreover, in an extremely controversial and widely criticized opinion, the Eighth Circuit Court of Appeals also

held West Publishing Co. could copyright its pagination. See West Pub. Co. v. Mead Data Cent., Inc., 799 F.2d 1219 (8th Cir. 1986). However, West Publishing Co. has no copyright in the text of the opinions. Also, in order for a publisher's contribution to be copyrightable, it must involve some "minimal degree of creativity." In Feist Publication v. Rural Telephone Service Co., 499 U.S. 340, 111 S. Ct. 1282, 113 L. Ed. 2d 358 (1991), for example, the Supreme Court held that the arrangement of names and numbers in the white pages of a telephone book was not copyrightable as simply listing the names in alphabetical order was not even remotely creative. Likewise, in State of Georgia v. The Harrison Company, 548 F. Supp. 110 (N.D. Ga. 1982), the court not only held that the Georgia Statutes were uncopyrightable, but also that there was no valid copyright to title, chapter and article headings that amounted to mere "labels." The court reasoned that brief descriptive language, such as "Torts," "Mental Health" and "Domestic Relations" used only to designate or describe something did not merit a copyright. *Id.* at 115.

Applying this precedent to your situation, it is clear that the text to Idaho's administrative rules may not be copyrighted and that no legal remedy exists for preventing others from copying and distributing that text. Beyond the text of the rules themselves, the Office of Administrative Rules would have to ask what it has uniquely contributed to its publication of the rules and whether this contribution involved any degree of creativity. If the rule sequence has already been established in advance, it is unlikely you can obtain a copyright to the numbering of the rules. Likewise, even if the Rules Coordinator and not the agency provides the titles or headings, these may be viewed as mere descriptive labels and uncopyrightable. However, if you have provided any indexes, annotations, notes or comments, these portions of the publication probably are copyrightable. As to those portions of your publication that are copyrightable, you can protect them by seeking an injunction against their republication and distribution by a third party.

## **B. Draft Rules and the Public Records Law**

Your second question concerns public records law. You have asked whether the Coordinator can legally restrict public access, through the use of fees, to internal documents prior to their official publication, such as "draft documents" or "internal documents containing customer mailing lists, categorized subscriber lists, Rules Division marketing/strategy papers or other related documents." I am not familiar with all of the internal documents in

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your possession, so I am unable offer an opinion concerning whether each one constitutes a public record and, if it does, whether it nevertheless fits into one of the exemptions to disclosure found at Idaho Code § 9-340. Because your primary concern appears to be drafts of administrative rules, I will address that issue. If you have questions regarding other internal documents beyond draft rules, please do not hesitate to send those documents to me to review whether they must be disclosed under the public records law. I would note, however, that Idaho Code § 9-348 contains strict prohibitions against distributing mailing or telephone lists. Regarding draft administrative rules I will first address whether they must be disclosed if a public record request is made and then address whether you can charge a fee beyond the copying cost.

### 1. Disclosure

Draft administrative rules in your possession must be disclosed if a public record request is made. The intention of the legislature in enacting the Idaho public records law was that all records maintained by state and local government entities must be available for public access and copying:

Every person has the right to examine and take a copy of any public record of this state and there is a presumption that all public records in Idaho are open at all reasonable times for inspection except as otherwise expressly provided by statute.

Idaho Code § 9-338(1). Public records are, in turn, broadly defined by the public records law which states:

“Public Record” includes, but is not limited to, any writing containing information relating to the conduct or administration of the public’s business prepared, owned, used or retained by any state or local agency regardless of physical form or characteristics.

Idaho Code § 9-337(10). Draft rules would appear to fall within this definition of a public record and be subject to disclosure unless they were covered by an exemption.

Idaho Code § 9-340 contains the exemptions from disclosure. Unlike draft legislation, there is no express exemption for draft rules found in this



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code section. However, Idaho Code § 9-340 does state that in addition to the specific exemptions listed, a document need not be disclosed if it is exempt under any other “federal or state law.” A number of states with similar language in their public records laws have concluded that the principle of separation of powers and the common law executive privilege exempt from disclosure certain draft documents in the executive branch. See Doe v. Alaska, 721 P.2d 617 (Alaska 1986), Guy v. Judicial Nominating Commission, 659 A.2d 777 (Del. 1995); Killington, Ltd. v. Lash, 572 A.2d 1368 (Vt. 1990). The basis for this implied “deliberative process” exemption is that the executive branch cannot function without some “opportunity for private exchange . . .” and critical debate in the formulation of policy. Lash, 572 A.2d at 1374. Consequently, federal and state courts have been “nearly unanimous in supporting the existence of some species of executive privilege.” *Id.* at 1372. Most public records laws, including the Federal Freedom of Information Act, expressly protect this privilege. Where it is not expressly protected, courts have nevertheless acknowledged the privilege and its basis in separation of powers principles and have construed their public records laws as implicitly containing it. See Lash.

While the Idaho Supreme Court has not reviewed an executive privilege issue, it seems clear that the privilege, even if it were read into the list of disclosure exemptions, would not apply under these circumstances. Draft rules that have been sent to the Rules Coordinator are essentially formal proposals. The reason they are sent to the Coordinator is for publication to third parties in the Administrative Bulletin. The inter-agency deliberative process and formulation of policy is, to a large extent, complete by the time the Rules Coordinator receives draft rules for publication. In my opinion an executive privilege, which is designed to protect a confidential deliberative process, would not apply to rules that have already been distributed to another agency for the purpose of publication.

### 2. The Fee Charged

Given that the draft rules in the Rules Coordinator’s possession probably must be disclosed if a request is made, the next issue is whether you can restrict access to the rules by charging a fee beyond the copying cost. The public records law provides strict measures for determining the costs that may be charged when a request for a public record is made. Idaho Code § 9-338(8) provides in pertinent part:

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A public agency or public official may establish a copying fee schedule. The fee may not exceed the actual cost to the agency for copying the record if another fee is not otherwise provided by law. The actual cost shall not include any administrative or labor costs resulting from locating and providing a copy of the public record.

The policy behind this provision is that examination and copying of public records is part of the public business, already funded by taxpayers. Therefore, fees for copying may not exceed the "actual cost" to the agency, and a public agency is expected to absorb the labor and administrative costs.

A question may arise as to whether the phrase unless "otherwise provided by law" could include an additional fee beyond the actual cost of copying if the additional fee was set by a rule promulgated by the Rules Coordinator. Idaho Code § 67-5205(2) grants the Coordinator the authority to set prices for the administrative code, permanent supplements, the bulletin, reprints and bound volumes, pamphlet rules and statements of policy. Moreover, these prices can be set "without reference to the restrictions placed upon and fixed for the sale of other publications of the state." Could the Coordinator use the authority granted in this section to charge a fee beyond the actual cost of copying if a request for a specific draft rule was made? In my opinion, he could not.

While Idaho Code § 67-5205(2) gives the Coordinator the authority to set prices for the Coordinator's compilations of rules, draft rules and policy statements, if a member of the public seeks to copy just one draft rule, in my opinion, it would run counter to the purpose of the public records law to require that individual to purchase an entire compilation of rules and pay the extra fee for this compilation. Charging exorbitant copying fees or requiring the purchase of compilations of draft rules when only one draft rule was requested would discourage requests for public records and contradict the government openness that is the basis of the public records law. Idaho Code § 67-5205(2) should not be used as a means to avoid the strict requirements of the public records law. If a member of the public desires to purchase the administrative code or a monthly bulletin or pamphlet rules, then the Coordinator can charge whatever price he has set for those items. But, if a member of the public seeks only to examine and copy one draft rule, only the actual cost of copying should be charged.

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I hope this letter answers your questions. If you have any further concerns, please feel free to contact me.

Sincerely,

MARGARET HUGHES  
Deputy Attorney General  
Civil Litigation Division

## INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

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August 24, 1995

The Honorable Donna Jones  
Idaho State Representative, District 9  
1911 First Avenue South  
Payette, ID 83661

### **THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE**

Dear Representative Jones:

Your letter of August 14, 1995, requests an opinion of the Attorney General on the following question:

Can the Governor's Housing Committee use the interest income generated from the investment of funds in the Governor's Residence Account to pay the Governor a housing allowance, or is additional legislation required to authorize the investment and payment of a housing allowance to the Governor?

We conclude that, under the current law, funds in the Governor's Residence Account cannot be used to pay the Governor a housing allowance and that new legislation would be required to accomplish this goal.

### **I.**

#### **HISTORY OF LEGISLATION**

In order to determine the answer to the issues presented, a review of the statutes involved and the overall legislative history will be required.

In 1977, the Idaho Legislature enacted House Bill 275. 1977 Idaho Sess. Laws 903. The statement of purpose read as follows:

The purpose of this bill is to provide for disposition of the current executive residence upon the completion of a new residence and to provide for acceptance of gifts and

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endowments for the executive residence. The bill also creates an advisory committee to advise on the construction and furnishing of the executive residence.

(Emphasis added.)

The bill provided for the creation of a dedicated fund called the Governor's Residence Account. This account was to consist of money from gifts, grants or endowments "for the purpose of decorating, equipping, completing and/or furnishing the Governor's residence and/or landscaping the grounds surrounding such residence." 1977 Idaho Sess. Laws at 903. The money in the account was to be "perpetually appropriated and set apart for the purposes for which the moneys are received . . ." *Id.* at 903. Further, spending from such account could only be authorized by the Permanent Building Fund Advisory Council and the Division of Public Works.

In 1989, the legislature again addressed the issue of the Governor's Residence Account in Senate Bill 1148. 1989 Idaho Sess. Laws 898. In this bill, the legislature authorized and directed the State Land Board to act as custodian for the Governor's mansion. The Department of Lands was to dispose of the existing property by sale, and any moneys realized from the sale were to be deposited in the Governor's Residence Account. The bill created an agency asset fund in the State Treasury designated as the Governor's Residence Account. As in the 1977 act, the moneys in such account were perpetually appropriated for the purposes designated in the act. Further, any unused money from the 1988 Governor's Office budget was also transferred into the Governor's Residence Account.

The 1989 act contains identical language to the 1977 act as to the purposes of the legislation but goes on to add the new purposes of site acquisition, planning and construction of a Governor's residence. Section 3(b) of the act reads, in part, as follows:

The Division of Public Works is authorized to . . . use all gifts and donations . . . for use in the Governor's residence.

In addition to the stated purposes in the legislation, the minutes of the House State Affairs Committee on March 20, 1989, regarding Senate Bill 1148 state:

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An account will be created (Governor's Residence Account) in the State Treasury to deposit money from the sale of the property and all other gifts and donations received toward the project of a new residence.

(Emphasis added; parenthetical language in original.)

In 1990, the Idaho Legislature adopted Senate Bill 1647. 1990 Idaho Sess. Laws 917. This act appropriated \$778,800 from the Permanent Building Fund into the Governor's Residence Account.

In 1993, the Idaho Legislature adopted House Bill 442. 1993 Idaho Sess. Laws 1400. Section 8 of this act appropriated \$150,000 from the Governor's Residence Account for the purposes of "planning and designing an Executive Residence." In addition, the Executive Residence Committee was charged with the duty of reviewing the current site and investigating if any other site or structure would suffice as a Governor's residence. The committee was also to recommend appropriate designs for the new executive residence.

As you are aware, most recently in 1995, the Idaho Legislature adopted Senate Bill 1234. 1995 Idaho Sess. Laws 1281. This bill provided that the Governor's Residence Account be set over to the Department of Administration and be "set apart for the purposes of acquisition and maintenance of a Governor's residence . . . ." (Emphasis added.) Further, "the department shall use moneys in the account for any purpose related to the acquisition or construction or maintenance of a Governor's residence." (Emphasis added.)

The statement of purpose attached to Senate Bill 1234 contained the following language: ". . . appropriate money to the Governor's Resident Account for expenditure as directed by the committee for the purpose of acquiring and maintaining a Governor's residence." (Emphasis added.)

With the above legislative history in mind, we turn to the issue of statutory construction.

## II.

### ANALYSIS

#### A. Does the Current Statute Provide for the Payment of a Housing Allowance?

The first question is whether the current law, as contained in Senate Bill 1234, permits the investing of moneys in the Governor's Residence Account and using the interest income from such investments to pay a Governor's housing allowance.

If a statute is not ambiguous, the language will be given its plain and ordinary meaning. Sherwood v. Carter, 119 Idaho 246, 805 P.2d 452 (1991); George W. Watkins Family v. Messenger, 117 Idaho 588, 790 P.2d 369 (Ct. App. 1989). Further, the courts must give force and effect to the legislature's intent and purpose, Sherwood, 119 Idaho 246; Sweitzer v. Dean, 118 Idaho 568, 798 P.2d 27 (1990).

A plain reading of the language of Senate Bill 1234 states that the purposes for which the Governor's Residence Account funds may be expended are for the "acquisition and maintenance of a Governor's residence" and for purposes "related to the acquisition or construction or maintenance of a Governor's residence." This reading is augmented by the statement of purpose which contains language identical to that contained in the body of the legislation. Based on this unambiguous language, the plain and ordinary meaning of the law is that the money in the Governor's Residence Account is to be used to acquire, construct and maintain a Governor's residence.

A review of the legislative committee minutes regarding Senate Bill 1234 also supports the conclusion that moneys in the Governor's Residence Account are to be used for the purposes listed above. On February 27, 1995, the Senate State Affairs Committee discussed whether to send RS04958, which eventually became Senate Bill 1234, to print. The committee minutes read as follows:

This legislation will authorize a committee consisting of five appointed members to appropriate money to the Governor's resident account for expenditure for the purposes of acquir-

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ing and maintaining a Governor's residence. Moneys used will come from a dedicated fund for purchase of Governor's residence.

(Emphasis added.)

Further, on March 6, 1995, the Senate State Affairs Committee discussed Senate Bill 1234 and sent the bill to the floor of the Senate with a do pass recommendation. Senator Twiggs, the sponsor of the bill, explained to the committee that the process was not one to "be used 'building a mansion' or even spending the entire \$1M in the fund but rather one to buy a residence appropriate to house our future governors." (Emphasis added.) On March 15, 1995, the House of Representatives State Affairs Committee considered Senate Bill 1234 and once again it is noted in the committee records that the purposes of the legislation are for "acquiring and maintaining a governor's residence."

The doctrine of *expressio unius est exclusio alterius* (the expression of one is the exclusion of all others) applies to Senate Bill 1234. Local 494, etc. v. City of Coeur d'Alene, 99 Idaho 630, 586 P.2d 1346 (1978). Where the legislature has expressly stated the purposes of the money in the Governor's Residence Account, all other purposes for the money are excluded.

Thus, the sole authorized purposes for the use of the money in the Governor's Residence Account are acquisition, construction and maintenance of a Governor's residence. As such, it would not be lawful to simply invest the funds and pay a housing allowance directly to the Governor. Therefore, additional legislation would be required to authorize such investment and payment.

### **B. Does the Prior Law Provide for a Different Result?**

Since the current law as enacted by Senate Bill 1234 was an augmentation of the prior pieces of legislation described above, we also address the result that would follow under the prior legislation.

In the 1977 legislation, the Permanent Building Fund Advisory Council and Division of Public Works were to authorize the expenditure of



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the funds for the “purpose of decorating, equipping, completing and/or furnishing the Governor’s residence and/or landscaping the grounds surrounding such residence.” The statement of purpose for the bill states that the current executive residence is to be disposed of “upon completion of a new residence” and that the Advisory Committee is to advise on “the construction and furnishing of the executive residence.” Further, the fact that the Permanent Building Fund Advisory Council and the Division of Public Works were the designated bodies to authorize the spending points to the intent that the project was for a permanent structure.

In the 1989 legislation, the language is the same and only adds to the stated purposes to include site acquisition, planning and construction of a Governor’s residence.

The 1990 and 1993 appropriation bills are not very expressive of their stated purposes. However, the 1993 legislation states that the \$150,000 is for the purpose of “planning and designing an executive residence.” Section 8 of that legislation states that the “funds may be expended . . . for professional services of an architect, engineer or consultant as may be required by the Executive Residence Committee.”

A summation of all of the prior legislation once again leads to the conclusion that the Governor’s Residence Account is to be used for the site acquisition, planning, construction, decorating, equipping, completing, furnishing, landscaping, planning and designing of an executive residence. Nowhere in the legislative history is there any authority to invest the funds and use the income therefrom to pay a housing allowance.

### **C. The Legislature Could Provide a Housing Allowance**

The legislature has the authority to provide a housing allowance or expenditure for the Governor outside of the Governor’s Residence Account. In the absence of such legislation, it cannot be implied elsewhere.

In 1995, with Senate Bill 1090, 1995 Idaho Sess. Laws 56, the legislature attempted to appropriate a housing allowance for the Governor. The fiscal note for Senate Bill 1090 stated, in part, “Governor’s Residence: increase the General Fund by \$12,000 to provide living expenses for the Governor.” Further, the legislation, beginning at line 24, provided money for the Governor’s residence in his operating expenditures. The amount was

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eventually amended to \$22,000, and the bill passed both houses of the Idaho Legislature. However, on February 23, 1995, Governor Batt line-item vetoed line 24 of the legislation, striking the \$22,000 living allowance from the Governor's Office budget. The legislature did not override the veto.

This bill illustrates that the legislature can specifically provide for a housing allowance for the Governor if it chooses to do so. Since the legislature has chosen to express that the Governor's Residence Account is for purposes other than a housing allowance, then the housing allowance should not be read into the purposes of the Governor's Residence Account. Once again, the doctrine of *expressio unius est exclusio alterius* (the expression of one is the exclusion of all others), Local 494, etc. v. City of Coeur d'Alene, 99 Idaho 630, 586 P.2d 1346 (1978), applies equally to Senate Bill 1234 as it does to Senate Bill 1090. Since Senate Bill 1234 expressed the purposes of acquiring, maintaining and constructing the Governor's residence, it excludes the purpose of providing a housing allowance. Since Senate Bill 1090 expressed the purpose of providing a Governor's housing allowance, the 1995 legislature clearly understood that separate legislation was necessary in order to accomplish this result.

### III.

#### CONCLUSION

Based on the above analysis, the moneys appropriated to the Governor's Residence Account cannot be invested and the proceeds used to pay a living allowance to the Governor. Absent additional legislation, the funds must be used for the acquiring, construction and maintenance of a residence for the Governor. This reading of the current law is consistent with the legislative history and prior legislative enactments on the same subject. The legislature could, if it so chose, provide a living allowance for the Governor either by appropriating funds from the Governor's Residence Account for this purpose or by direct appropriation.

I hope this adequately addresses your inquiry. If you desire further information or assistance, please contact me.

Very truly yours,

KEVIN D. SATTERLEE  
Deputy Attorney General

## INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

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September 8, 1995

Honorable Ruby Stone  
Idaho House of Representatives  
6604 Holiday Drive  
Boise, ID 83709

Honorable Ralph Wheeler  
Idaho State Senate  
659 Gifford Avenue  
American Falls, ID 83211

### **THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE**

Re: City/County Consolidation

Dear Representative Stone and Senator Wheeler:

You have requested that the Office of the Attorney General render an opinion on whether city/county consolidation can be an optional form of county government under any proposed legislation. For the reasons set forth herein, it is the opinion of this office that city/county consolidation cannot be added as an optional form of county government in legislation absent other constitutional and statutory changes.

An analysis of the issue of city/county consolidation requires review of: (1) art. 12, sec. 2 of the Idaho Constitution and supporting case law; (2) art. 18, sec. 12, H.J.R. 17 and the Legislative Council's Statement of the Meaning and Purpose, the effect of adoption, and the statements for and against H.J.R. 17; and (3) other states' constitutional provisions.

Art. 18, sec. 12, which contains the optional forms of county government constitutional provision, states:

#### **§ 12. Optional forms of county government. -**

The legislature by general law may provide for optional forms of county government for counties, which shall be the exclusive optional forms of county government. No option-

al form of county government shall be operative in any county until has been submitted to and approved by a majority of the electors voting thereon in the county affected at a general or special election as provided by law. The electorate at said election shall be allowed to vote on whether they shall retain their present form of county government or adopt any of the optional forms of county government. In the event an optional form shall be adopted, the question whether to return to the original form or any other optional forms, may be placed at subsequent elections, but not more frequently than each four years. When an optional form of county government has been adopted, the provisions of this section supersede sections 5, 6, and 10 of this article and sections 16 and 18 of article V.

No mention is made in art. 18, sec. 12 of the city/county consolidation. Obviously, it does not specifically mention any optional form, but the lack of specificity with regard to city/county consolidation is relevant when other provisions of the Idaho Constitution, as well as constitutional provisions of other states are considered.

Art. 12, sec. 2 of the Idaho Constitution appears to preclude city/county consolidation. That section states, “[a]ny 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.” (Emphasis added.) In interpreting this provision, the Idaho Supreme Court set forth clear standards as to the bounds of power of cities and counties outside their respective boundaries. In Clyde Hess Distributing Co. v. Bonneville County, 69 Idaho 505, 210 P.2d 798 (1949), the court stated:

[I]n the exercise of the powers granted by such constitutional provision [art. 12, sec. 2], a county cannot make police regulations effective within a municipality.

[C]ounty regulations passed under such constitutional grant of power, cannot be enforced in a municipality in a field reserved to municipalities under the constitution, whether such field has been occupied by municipal ordinance

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or not. Therefore, the fact that it does not appear that the regulation in question is in conflict with any existing ordinance of a municipality, is not important. The question is one of power and not one of conflict.

69 Idaho at 510-11, 210 P.2d at 713-14 (citations omitted).

Significantly, the court held that the legislature is without power to allow such county regulations to be enforced within a municipality's limits as argued by Bonneville County and the State of Idaho as amicus curiae in Clyde Hess:

The position of appellants and Amicus Curiae overlooks the fact that a municipality, under the constitutional provision in question, has authority to make police regulations not in conflict with general laws, coequal with the authority of the legislature to pass general police laws. The legislature can pass a general law effective upon all, but it cannot restrict the constitutional right of a municipality to make police regulations not in conflict or inconsistent with such general law. An attempt by the legislature to grant authority to a county to make police regulations effective within a municipality would be an infringement of such constitutional right of a municipality. A police regulation made by a county is not a general law for a municipality within the meaning of the constitution.

69 Idaho at 512, 210 P.2d at 715 (emphasis added; citations omitted).

The Clyde Hess decision leaves little doubt that a county cannot make and enforce laws within a municipality and vice versa. Moreover, any attempt by the legislature to allow such ordinances violates art. 12, sec. 2 of the Idaho Constitution. When a city and county are consolidated in the sense of one government governing both entities, the boundaries and limits of the city and county are still in effect. The only difference is the government. Because the two entities remain intact, one government is regulating the county and the city. Such an arrangement violates art. 12, sec. 2. A government for the county is making and enforcing laws within the city limits, and

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the government for the city is making and enforcing laws within the county's unincorporated areas.

This conclusion also finds support in the language of H.J.R. 17 and the Legislative Council's Statement of Meaning and Purpose, which are the only relevant "legislation" and "interpretation" to date that bears on the issue of whether city/county consolidation can be one of the options under any proposed enabling legislation. H.J.R. No. 17 states:

Shall Article XVIII, of the Constitution of the State of Idaho be amended by the addition of a New Section 12, Article XVIII, to allow the Legislature to provide for optional forms of county government, and to allow the electors of any county to retain their present form of county government or select an optional form of county government by majority vote of that county's electors voting thereon?

The Legislative Council's Statement of Meaning and Purpose to H.J.R. No. 17 states:

The purpose of the proposed amendment to Article XVIII of the Constitution of the State of Idaho, is to allow the Legislature to provide optional forms of county government which could be adopted by a majority vote of the electors of the county voting on the question. Currently, the form of county government, consisting of a three member board of county commissioners, and an elected sheriff, county assessor, clerk of the district court, county coroner, county treasurer and prosecuting attorney, is specified in the Constitution. No county may deviate from this mandated form. With the adoption of this amendment, the Legislature could provide alternative forms. The electors of a county could choose to adopt any of the alternatives. If an alternative form were adopted, the electors could later choose to return to the original form.

### **Effect of Adoption**

The effect of adopting this amendment would be to allow electors of a county a choice among optional forms of county government authorized by the Legislature. No change in the form of county government could be made unless adopted by the electors of the county. The existing form of county government would be available as one option, while other options might eliminate some elected officers, make some officers appointed, or consolidate some offices.

Clearly, neither H.J.R. No. 17 nor the Legislative Council's Statement of Meaning and Purpose mention cities or optional forms which might include changes to city government. This suggests that enabling legislation dealing with optional forms of county government should be limited to dealing exclusively with counties, and city/county consolidation should be separate constitutional and statutory matters.

A study of constitutional provisions from other states also support the conclusion that city/county consolidation cannot be added as an optional form of county government at the present time. Both California and Washington have provisions almost identical to art. 12, sec. 2 of the Idaho Constitution. Art. 11, sec. 7 (formerly sec. 11) of the California Constitution states, "[a] county or city may make and enforce within its limits all local police, sanitary, and other ordinances and regulations not in conflict with general laws."

Similarly, art. 11, sec. 11 of the Washington Constitution states, "[a]ny county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws." Significantly, both Washington and California have constitutional provisions specifically allowing some sort of city/county consolidation. *See* art. 11, sec. 6 (and former art. 11, sec. 7), California Constitution; art. 11, sec. 16, Washington Constitution. Therefore, those states have specific constitutional provisions which allow city/county consolidation and which supersede the police powers provision.

Further, the Montana Constitution, which is a model that has been examined by the committee, specifically allows city/county consolidation. Montana's optional forms of government constitutional provision applies to

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all “local government units” as opposed to counties or cities. Article 11, sec. 3 states:

(1) The legislature shall provide methods for governing local government units and procedures for incorporating, classifying, merging, consolidating, and dissolving such units, and altering their boundaries. The legislature shall provide such optional or alternative forms of government that each unit or combination of units may adopt, amend, or abandon an optional or alternative form by a majority of those voting on the question.

(Emphasis added.)

It is significant that Washington, California and Montana (as well as many other states) contain specific constitutional provisions governing city/county consolidation. This is a recognition that allowing such a consolidation is a change so fundamental to the structure of the traditional county and city form of government that it should be included in the constitution.

For the reasons set forth above, city/county consolidation cannot become an “option” which can be inserted into the draft legislation which is presently being considered. However, a city and county are not prohibited by the Idaho Constitution from achieving “consolidation” by the city’s disincorporating. Disincorporation procedures are already spelled out in title 50, Idaho Code. However, city/county consolidation cannot occur where the city maintains its incorporated status.

I hope this opinion is of assistance to you. If you have any questions, please feel free to contact me.

Very truly yours,

THOMAS F. GRATTON  
Deputy Attorney General  
Intergovernmental & Fiscal Law  
Division



## INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

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September 8, 1995

Jesse Berain, Director  
Idaho Commission on Aging  
**STATEHOUSE MAIL**

### **THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE**

Re: Disclosure of Adult Protection Records

Dear Mr. Berain:

Your memorandum of August 15, 1995, requests an opinion of the Attorney General on the following question:

Does the Department of Health and Welfare (hereinafter "Department") have the right to access the records of the Idaho Commission on Aging (hereinafter "Commission") regarding the names of alleged perpetrators of adult abuse contained in the investigative files of Adult Protective Services?

We conclude that, under the current law, the Department has a right to access all of the Adult Protective Services records of the Commission.

### **BACKGROUND**

The Idaho Adult Abuse, Neglect and Exploitation Act (hereinafter the "Act") is codified as Idaho Code § 39-5301 *et seq.* The Department administered the program (sometimes referred to as "Adult Protective Services") under statutory authority until July 1, 1995. On that date, a Memorandum of Understanding (hereinafter "MOU") between the Department and the Commission became effective. In the MOU, the Commission agreed to assume all responsibility for the Adult Protective Services as contained in the Act. The question that is the center of this opinion arose after the Department requested access to the Commission's Adult Protective Services files after the effective date of the MOU.

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We conclude that the Act statutorily grants certain powers and mandates certain duties to the Department, which powers and duties entitle the Department to custody of, and access to, the files of the Commission with regard to Adult Protective Services.

### ANALYSIS

#### A. State Law Grants the Department Access

The answer to the central question requires that we construe Idaho Code § 39-5304(6), which states:

Upon completion of an investigation, the department shall prepare a written report of the investigation. The name of the person making the original report or any person mentioned in the report shall not be disclosed unless those persons specifically request such disclosure or unless the disclosure is made pursuant to a request to law enforcement for an emergency access, a court order or a hearing.

(Emphasis added.) The “department” is defined in Idaho Code § 39-5302(3) as the “Idaho department of health and welfare.”

Idaho Code §§ 39-5304(5) and 39-5307 give the Department a basis for access to the Commission’s investigative files.

First, under Idaho Code § 39-5304(5), the Department is statutorily charged with carrying out the duties enumerated in the Act. Although the Department and the Commission have entered into the MOU through which the Commission is exercising many of the duties required by the Act, the Department is still the only state entity required by statute to administer the Act.

Further, Idaho Code § 39-5307 provides that “any person, department, agency or commission authorized to carry out the duties enumerated in this chapter shall have access to all relevant records . . .” (Emphasis added.)

Illustrations of the Department’s duties and authority are found throughout the Act. For example, under Idaho Code § 39-5303, the care givers

for the vulnerable adults are required to report suspected abuses to the Department. Also, Idaho Code § 39-5304(2) provides that if allegations of abuse indicate an emergency exists, “the department must initiate an investigation immediately . . . .” (Emphasis added.) Idaho Code § 39-5304 further provides for the process for conducting and completing investigations and states that the Department has the duty and power to do so. Under Idaho Code § 39-5305, upon receiving information that abuse, neglect or exploitation has occurred, “the department shall cause such investigation to be made in accordance with the provisions of this chapter as is appropriate.” (Emphasis added.) Under Idaho Code § 39-5306(1), “the department has the responsibility to assist the adult in obtaining available services.” (Emphasis added.) Under Idaho Code § 39-5310, if the abuse, neglect or exploitation has caused an injury or risen to the level of possible criminal activity, “the department shall immediately notify the appropriate law enforcement agency . . . .” (Emphasis added.)

In summary, all of the directives required by the Act give authority to the Department to carry out the terms of the Act. Therefore, under Idaho Code § 39-5307, the Department is the primary entity with possession of and access to all relevant records.

### **B. The MOU Requires Access by the Department**

Idaho Code § 39-5304(5) further gives the Department access to the records through the application of Idaho Code § 39-5308 and the MOU between the Department and the Commission. Under Idaho Code § 39-5308, the Department has the right to request the assistance of any other state department, agency or commission to further the duties set forth in the Act. In accordance with this provision, the Department and the Commission entered into the MOU through which the Commission has been performing the duties required in the Act. Although the Commission is currently performing all of the duties, it is doing so in cooperation with the Department. Therefore, any of the Commission’s files kept pursuant to Idaho Code § 39-5304(5) are actually files of the Department. The Department must have access to its own records, even if the files are currently in the possession of the Commission.

Moreover, the MOU addresses the issue of the Department’s access to the records. Section C of the Agreement is entitled “Idaho Code § 39-5307:

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Access to Records.” Subparagraph 3 of this section states that “[t]he Department, the Commission, and the AAA [Area Agencies on Aging] will have access to necessary records. A system will be developed and local protocols will be established to enable Departmental review of necessary information.” (Bracketed language added.) Therefore, under the express terms of the MOU, the Department is entitled to access to all “necessary records.” In determining what constitutes a necessary record, the analysis set forth above regarding the Department’s statutory authority provides the answer. The Department is entitled to access to all records of the Commission with regard to Adult Protective Services.

### **C. Federal law Requires the Department to Have Access to the Files**

Finally, federal law applicable to the Act likewise requires disclosure to the Department. Under 42 U.S.C. § 3058i(b), the state agency in charge of the prevention of elder abuse, neglect and exploitation is required to investigate and report on allegations of elder abuse and, under 42 U.S.C. § 3058i(e), is required to keep all information gathered in the course of its investigations confidential. The agency that is statutorily mandated to carry out these duties in Idaho is the Department of Health and Welfare.

Thus, the Department must be allowed access to the records under 42 U.S.C. § 3058i(b) and (e) because it is charged with the duties enumerated under the Act.

## **CONCLUSION**

The Commission must disclose its Adult Protective Services files, and any other files kept pursuant to the Act, to the Department. The Department is currently charged with the statutory duties of enforcing the Act and the express provisions of the Act require that the Department be the primary custodian of the records. Further, the Commission, through the MOU, is acting in conjunction with the Department, and the MOU entitles the Department to have access to the necessary records. Finally, the federal statute requires the Department’s access to the files due to its state statutory duties. In summary, the Commission must allow the Department access to all of the Commission’s records and files regarding Adult Protective Services. We do not address the outcome of this question under any amendments to the Act that may be placed before the 1996 Idaho Legislature.

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I hope this adequately addresses your inquiry. If you desire further information or assistance, please do not hesitate to contact me.

Very truly yours,

KEVIN D. SATTERLEE  
Deputy Attorney General  
Contracts & Administrative Law  
Division

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September 19, 1995

Honorable Ruby Stone  
Idaho House of Representatives  
6604 Holiday Drive  
Boise, ID 83709

Honorable Ralph Wheeler  
Idaho State Senate  
659 Gifford Avenue  
American Falls, ID 83211

### **THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE**

Re: Home Rule/Charter Form of County Government

Dear Representative Stone and Senator Wheeler:

You have requested that the Office of the Attorney General render an opinion on whether home rule or charter form ("home rule") of county government is prohibited by the Idaho Constitution. For the reasons set forth herein, it is the opinion of this office that allowing a limited form of home rule as an optional form of county government would not contravene the Idaho Constitution.

The traditional definition of the source of the powers of counties has been "Dillon's rule." This rule states that a county possesses only those powers which are expressly granted or those which can be necessarily or fairly implied to the powers expressly granted. On the other hand, home rule allows counties the right of self-government in local affairs. An excellent discussion of home rule powers of cities in Idaho, which is also somewhat applicable to counties, is found in Moore, Powers and Authorities of Idaho Cities: Home Rule or Legislative Control, 14 Id. L. Rev. 143 (1976). In his law review article, Moore compares and contrasts the various forms of home rule:

There are two types of home rule. Under "constitutional" home rule, the guarantees of local home rule proceed directly from the state constitution. These guarantees are theoretic-

cally immune from incursions by the state legislature. Only the people, by amending the constitution, can deprive a city of its home rule powers. Under “legislative” home rule, a city’s home rule powers proceed from state legislative enactments or legislatively authorized home rule charters. Legislatively granted powers are not considered vested, and may be changed by the legislature at will.

Under some “home rule” grants, cities are permitted to exercise all powers and authorities within the area of local or municipal concern, so long as the exercise of these powers does not conflict with state law. Under this type of home rule grant, the exercise of power: (1) must be within the scope of local or municipal (as opposed to purely statewide) concern; and (2) must not be in conflict with state law. As we shall see later, a “conflict” may arise not only where the state has expressly prohibited cities from acting in a particular area, but also: (a) where the state has directed that cities exercise powers granted to them in a certain manner, and a city seeks to perform in a different manner; or (b) where the state has expressly or impliedly pre-empted the field, to the exclusion of municipalities.

In contrast, under “true” home rule systems, if a subject is within an area of purely local concern, the legislature *cannot* legislate in that area and thereby pre-empt the city. State-wide enactments dealing with local concerns do not apply to true home rule cities.

*Id.* at 148-49.

Art. 12, sec. 2 of the Idaho Constitution already gives counties some self-governing powers in the area of governmental (police) as opposed to proprietary powers.<sup>1</sup> Art. 12, sec. 2, states, “[a]ny 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.” (Emphasis added.) This grant of power is similar to the type of home rule grant of power discussed above, which is not the “true” form of home rule.

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Although somewhat ambiguously, Idaho courts have generally reaffirmed counties' constitutional status in the exercise of police power. In State v. Clark, 88 Idaho 365, 399 P.2d 955 (1965), the court held that art. 12, sec. 2, directly conferred authority upon counties to enact subdivision control ordinances in the presence of enabling legislation enacted by the legislature. In Moore, *supra*, the author concludes:

It is clear, then, that Idaho cities [counties] have a direct grant of the police power from the people under art. 12, sec. 2, of the Idaho Constitution, and are not dependent upon the state legislature for a grant of express authority while acting under the police power. However, the grant of police powers is not unlimited. If a city enactment conflicts with other constitutional guarantees or with state law, it will be held invalid. Further, the grant of police powers under art. 12, sec. 2, is not a grant of any taxing or other fiscal power, nor does it include a grant of any private or proprietary powers.

*Id.* at 155.

Thus, art. 12, sec. 2, already provides a source of self-governing powers as it relates to governmental (police) powers. Because any further home rule powers given to counties in Idaho would be "legislative" home rule powers, those powers could not exceed those given in art. 12, sec. 2. In other words, counties would have to continue to comply with art. 12, sec. 2, and its "conflict" limitations in the exercise of governmental powers. Although not included in art. 12, sec. 2, the home rule provision as it relates to proprietary powers should probably be drafted with the same limitations in place as found in art. 12, sec. 2, for equal application purposes. In reviewing the draft legislation prepared by the Idaho Association of Counties, this is precisely what has been drafted. The draft legislation states, "[t]he grant of powers under this act is intended to be as broad as consistent with the construction of the Constitution of the State of Idaho and the statutes relating to local government." (Emphasis added.) This wording appears to be in conformity with this opinion.

Home rule powers also allow the county to organize itself as it wishes, subject, of course, to the overriding requirement that the governing body be democratically elected, i.e., a republican form of government. Because art.



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18, sec. 12 of the Idaho Constitution overrides the other constitutional provisions relating to county organization, there is no constitutional prohibition against counties organizing their government in any form.

In conclusion, there is no constitutional prohibition to legislatively allowing counties to enact a home rule or charter form of government if, at least with respect to governmental powers, the grant of self-governing powers does not exceed the limitations imposed in art. 12, sec. 2 of the Idaho Constitution. No other constitutional provisions would prohibit the legislature from allowing counties home rule powers.

I hope this analysis is of assistance to you. If you have any questions, please feel free to contact me.

Very truly yours,

THOMAS F. GRATTON  
Deputy Attorney General  
Intergovernmental & Fiscal Law  
Division

<sup>1</sup> As stated in Moore, *supra*, "police power may be defined as the power, inherent in the state, to make laws to restrict and regulate, within the bounds of reasonableness and constitutional rights, the conduct and business of individuals for the protection and promotion of the public health, safety, property, morals, and welfare." *Id.* at 145.

Proprietary powers, in some cases, have been "defined as a voluntary or discretionary function of government, as opposed to a governmental function which is required or commanded by law. In other cases, a city is said to act in its proprietary capacity where it undertakes some benefit for itself or its own citizens which could be and sometime is performed by private business." *Id.* at 146.

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October 3, 1995

Mr. Philip A. Brown  
Gooding County Prosecuting Attorney  
624 Main Street  
P. O. Box 86  
Gooding, ID 83330-0086

### **THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE**

Re: Term Limits for Planning and Zoning Commissioners

Dear Mr. Brown:

You have requested an opinion from the Office of the Attorney General regarding whether the amendments to Idaho Code § 67-6504(a) which established term limits for planning and zoning commissioners apply retroactively. For the reasons set forth below, it is the opinion of this office that the term limits set forth in Idaho Code § 67-6504(a) apply only prospectively.

In the 1995 Session of the Idaho Legislature, H.B. 212a was enacted which amended Idaho Code § 67-6504(a). The statute now sets forth that “[n]o person shall serve more than two (2) full consecutive terms.” The statute does not address the question whether past terms prior to the effective date of the statute (July 1, 1995) must be taken into account. In other words, the question becomes whether a planning and zoning commissioner, who has already served two consecutive terms, can now hold any further office on the commission.

The Idaho Supreme Court has held on numerous occasions that unless the terms of a statute show a clear legislative intent that it should be applied retroactively, a statute should have a prospective operation only. Marmon v. Marmon, 121 Idaho 480, 825 P.2d 1136 (1992); Gailey v. Jerome County, 113 Idaho 430, 745 P.2d 1051 (1987); Edwards v. Walker, 95 Idaho 289, 507 P.2d 486 (1973); Application of Forde L. Johnson Oil Co., 84 Idaho 288, 372 P.2d 135 (1962). An application of this doctrine to the instant question requires a conclusion that prior terms of a commissioner should not be

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considered. A purely prospective application of the statute would enable commissioners to come in with a fresh slate of terms after the effective date of the amendments to Idaho Code § 67-6504(a). Such a conclusion is a logical extension of the term “prospective.” This is supported by the fact that term limits legislation passed in Idaho and other states regarding elected officials is seen to be “retroactive” if prior terms are considered. J. Richard Brown, *Coming to Terms with Congress: A Defense of Congressional Term Limits*, 22 Cap. U. L. Rev. 1095 (1993). A similar construction should be given to the statute in question.

Moreover, this term limit legislation was enacted shortly after the term limit initiative regarding elected officials was passed by the voters of Idaho in 1994. That initiative expressly stated that service prior to January 1, 1995, would not be counted. It is within this context that the term limits legislation for planning and zoning commissioners was enacted. It would not be fair for planning and zoning commissioners to be treated differently in this regard, and we do not think it was the intent of the legislature to bring about such a disparate treatment. While planning and zoning commissioners are not elected officials, their role is still extremely important to city and county government. Therefore, prior terms of planning and zoning commissioners should not be considered, and they can now serve two (2) additional terms.

I hope this guideline is of assistance to Gooding County. If you have any questions, please feel free to contact me.

Very truly yours,

THOMAS F. GRATTON  
Deputy Attorney General  
Intergovernmental & Fiscal Law  
Division

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October 4, 1995

Mr. Alan H. Winkle  
Executive Director, PERSI  
P. O. Box 83720  
Boise, ID 83720-0078

### **THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE**

Re: Fiduciary Liability Insurance

Dear Alan:

You have inquired whether PERSI board members and employees are covered by the Idaho Tort Claims Act for claims arising from a breach of fiduciary duty.

The Idaho Tort Claims Act ("ITCA") provides coverage to state boards and their employees. Idaho Code §§ 6-902(1) and 6-902(4). PERSI is a state board organized as part of the Governor's Office. Idaho Code § 59-1304. By definition, PERSI board members and employees are covered by the ITCA.

Allegations of a breach of fiduciary duty raise the question whether the claim arises from contract or is a tort. The Idaho Supreme Court in the case of Podolan v. Idaho Legal Aid Services, Inc., 123 Idaho 937, 854 P.2d 280 (Ct. App. 1993), held that the breach of fiduciary duty is a tort. The court said a fiduciary relationship exists between two parties "when one is under a duty to act or give advice for the benefit of another upon a matter within the scope of the relation." 123 Idaho at 946, 854 P.2d at 289. The fiduciary duties and relationship of the PERSI board exist by virtue of the statutory duty established by Idaho Code §§ 59-1301, et seq.

Claims for breach of fiduciary duty have arisen recently against the Oregon Public Employees Retirement Board (OPERB). The issues presented in the case of Hanggi v. Hartford Insurance Company, 132 Or. 601, 889 P.2d 365 (Or. Ct. App. 1995), parallel the concerns you have regarding the PERSI board members. In Hanggi, beneficiaries of the Oregon Public

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Employees Retirement Fund brought four separate derivative actions against the state, OPERB and insurers based on alleged losses suffered by the fund. The beneficiaries alleged that state employees participated in imprudent investments of the fund moneys or failed to police fund investments adequately and failed to pursue claims against “public employee dishonesty” insurers. The Oregon Court of Appeals found that the claims against the state and the Oregon Employees Retirement Board for breach of fiduciary duty were torts falling within the purview of the Oregon Tort Claims Act. Thus, the claims were required to comply with the notice requirements of the Oregon Tort Claims Act and were dismissed for failure to do so.

Another recent case addresses similar issues relating to allegations of a breach of fiduciary duties and the application of the immunities provided by the tort claims act. In Masters v. San Bernardino City Employees Retirement Association, 37 Cal. Rptr. 2d 860 (Cal. Ct. App. 1995), a former county hospital employee sued the county employees retirement association, the association administrator, board members and the medical advisor for alleged wrongful conduct in denying and failing to promptly award a disability retirement pension. The suit sought relief under a number of legal theories including breach of fiduciary duty, promissory fraud, negligent misrepresentation, and violation of federal due process rights under 42 U.S.C. § 1983. The California Court of Appeals, in discussing the provisions of California law equivalent to the ITCA, found that the individual board members had discretionary immunity for their adjudicatory decisions on the applicant’s application for disability retirement. The court held that public employees had immunity for policymaking or planning decisions, but not for operational decisions. Thus, if there was some error in processing the application there may not be qualified immunity. (The court did not review at length the substantive due process and 42 U.S.C. § 1983 claims because the court found that, under the facts, the plaintiff did not state a cause of action.)

The ITCA affords similar protection to PERSI board members and employees as the Oregon Tort Claims Act does for the Oregon Public Employees Retirement Fund and as the California act does for governmental entities and employees. The ITCA limits the liability of governmental entities and its employees to the maximum of \$500,000 (Idaho Code § 6-926), prohibits the imposition of punitive damages (Idaho Code § 6-918), and protects the public entity from the imposition of attorney fees (Idaho Code § 6-918A). The ITCA protection afforded PERSI, its board and employees makes

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it unnecessary to have additional insurance coverage or to self-insure against claims arising from a breach of fiduciary duty.

The ITCA also provides various immunities to the public entity and its employees against imposition of money damage claims. The immunity that would apply most frequently to claims of breach of fiduciary duty by PERSI Board members and employees is the “discretionary function” immunity found at Idaho Code § 6-904(1). The discretionary function exception applies to government decisions entailing planning or policy formulation. Sterling v. Bloom, 111 Idaho 211, 723 P.2d 755 (1986).

The test for determining the applicability of the discretionary function immunity looks at the nature of the conduct. Routine matters not requiring evaluation of broad policy factors will likely be “operational” and not necessarily afforded immunity. Decisions involving the consideration of the financial, political, economic, and social effects of a particular plan are likely “discretionary” and will be afforded immunity. Lawton v. City of Pocatello, 126 Idaho 454, 886 P.2d 330 (1994); Ransom v. City of Garden City, 113 Idaho 202, 743 P.2d 70 (1987). The PERSI board’s acts and decisions will usually be planning and policy formulation which are discretionary functions. The implementation of board policy by PERSI’s employees may be considered an operational act and not subject to the immunity.

In other words, the PERSI board and its employees will be accorded discretionary immunity for making a prudent investment decisions, even though an investment may subsequently become worthless. For example, the PERSI Board may authorize investment in certain real estate which otherwise satisfies the statutory and fiduciary duties for a prudent investment. Subsequently, the real estate investment substantially declines in value due to a general market decline. The board will be protected by the “discretionary immunity” exemption for claims resulting from this loss. If the decline in substantial value was caused by a cloud on the title which could have been prevented had the board or its employees conducted a title search or purchased a title insurance policy, then there may be liability. The investment decision is still afforded the “discretionary function” immunity, but the negligence in failing to exercise due care in the “operation stage,” i.e., not conducting a title search or obtaining title insurance, may result in liability. The state would defend the employee or board member and would pay any judgment entered against them pursuant to Idaho Code § 6-903; the amount of

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damages assessed, if any, would be limited to \$500,000 pursuant to Idaho Code § 6-926.

Suits brought against board members or employees arising from the course and scope of employment will be handled by the Bureau of Risk Management and the Office of Attorney General pursuant to the provisions of Idaho Code §§ 6-903 and 67-1401, *et seq.*

Acts of fiduciaries who are not employees, such as consultants or investment advisors, are not covered by the ITCA. Thus, a contract for services should require the contractor to carry for the benefit of PERSI, its board and employees, insurance covering the contractor's fiduciary acts or omissions.

Certain types of claims may arise which are outside the coverage of the ITCA. Typically these claims arise from an alleged violation of an individual's constitutional rights. Most frequently these constitutional torts are brought as a 42 U.S.C. § 1983 claims. Section 1983 claims permit actions only against "persons" who deprive others of any rights, privileges or immunities secured by the Constitution and laws. 42 U.S.C. § 1983. Qualified and official immunities exist for section 1983 claims, usually through the defense that the state and its officials are not "persons" within the meaning of section 1983. Will v. Michigan Department of State Police, 491 U.S. 58, 109 S. Ct. 2304 (1989), and Arnzen v. Department of Law Enforcement, 123 Idaho 899, 854 P.2d 242 (1993). Through this defense, public entities or officials will be dismissed from the action in their official capacity. However, individuals may still be parties to the suit in their individual capacities. The state, under the provisions of Idaho Code § 6-903, will defend the individuals when they are acting within the course and scope of employment.

The state, of course, has no duty to defend public officials or employees for criminal wrongdoing or intentional torts, such as assaults or batteries. Other circumstances may arise where the state has no duty to defend or indemnify public officials. These circumstances would be highly unusual, and typically the public official's conduct would be clearly outside the course and scope of employment or beyond a reasonable exercise of their official authority. The state will defend and indemnify individuals acting within the course and scope of their employment and acting without malice or criminal intent pursuant to Idaho Code §§ 6-901, *et seq.*, 59-1305, and 59-1308(11).

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A final question addresses judgments that exceed the \$500,000 limit or that are imposed individually against a board member or employee in his or her individual capacity. If such a judgment falls under the ITCA, then the judgment is reduced to \$500,000 pursuant to Idaho Code § 6-926. If the judgment falls outside the ITCA—*e.g.*, a constitutional rights violation—then the PERSI board members and employees are held harmless pursuant to Idaho Code §§ 59-1305 and 59-1308(11). The payment of the judgment would have to come not from the trust assets of PERSI but, rather, through a new appropriation. The Idaho Tort Claims Act provides that the claim or judgment is to be paid from the next appropriation of the state instrumentality whose tortious conduct gives rise to the claim. Idaho Code § 6-922. The Idaho Constitution requires certification from the Board of Examiners before payment could be authorized. Idaho Constitution, article 4, section 18.

If you desire further information or assistance, please do not hesitate to contact me.

Very truly yours,

MICHAEL R. JONES  
Deputy Attorney General  
Contracts and Administrative Law  
Division



## INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

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October 5, 1995

John R. Hill, Director  
Idaho State Historical Society  
1109 Main Street, Suite 250  
Boise, ID 83702

### **THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE**

Re: Membership Lists as Public Records

Dear Director Hill:

This guideline addresses a question raised by the Board of Trustees of the Idaho State Historical Society regarding its membership lists. At its meeting on July 21, 1995, the board received a letter from Royal Cruise Lines requesting use of the Historical Society's mailing list for a cruise scheduled in October. The board voted to oppose divulging the membership list until the Attorney General's Office could be consulted. You requested written direction on how to handle such requests in the future.

I conclude that the membership lists of the Historical Society are public records but are specifically excluded from disclosure by statute.

### **ANALYSIS**

Under Idaho Code § 9-337(10), a public record is defined as:

[A]ny writing containing information relating to the conduct or administration of the public's business prepared, owned, used or retained by any state or local agency regardless of physical form or characteristics.

A "state agency" is defined under Idaho Code § 9-337(11) as "every state officer, department, division, bureau, commission and board or any committee of a state agency including those in the legislative or judicial branch . . . ." The Idaho State Historical Society is clearly a state agency. Any writing relating

## INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

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to the conduct or administration of the public's business maintained by the Historical Society is, therefore, a public record.

Idaho Code § 9-338(1) states the general rule of access to public records:

[E]very person has a right to examine and take a copy of any public record of this state and there is a presumption that all public records in Idaho are open at all reasonable times for inspection except as otherwise expressly provided by statute.

Idaho Code § 9-337(7) defines "person" as "any natural person, corporation, partnership, firm, association, joint venture, state or local agency or any other recognized legal entity." Royal Cruise Lines is undoubtedly a person under the public records statutes, and thus has the right to examine and copy all public records of the Historical Society.

In addition to the statutory analysis above, there is an Idaho Supreme Court case which discusses the release of membership lists as public records. In Dalton v. Idaho Dairy Products Commission, 107 Idaho 6, 684 P.2d 983 (1984), the Idaho Supreme Court considered a case where the plaintiff sought the membership lists of the Idaho Dairy Products Commission to aid in "a direct mail advertising campaign . . . ." 107 Idaho at 8, 684 P.2d at 985. It was undisputed that the plaintiff was requesting the list to conduct a for-profit operation. The court stated that the "intent by the legislature to create a very broad scope of government records and information accessible to the public . . ." was clear. 107 Idaho at 11, 684 P.2d at 990. The court held that membership lists fell within the purview of public records and that unless there was an express statute exempting the records from disclosure, they were open to inspection. Further, the court stated that if the legislature wished for such records to be exempt from disclosure, it could pass a statute accordingly.

The Idaho Legislature has enacted such a statute. Idaho Code § 9-348 provides that, in order to protect the privacy of persons who deal with public agencies, no agency may "distribute or sell for use as a mailing list or a telephone number list, any list of persons without first securing permission of those on the list." The statute further prohibits the outside use of any list of persons prepared by an agency without permission. Therefore, Idaho Code § 9-348(1) specifically excludes membership lists from disclosure as public records.

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It should be noted that the statute “does not prevent an individual from compiling a mailing list or a telephone number list by examination or copying of public records, original documents or applications which are otherwise open to public inspection.” Idaho Code § 9-348(2). Therefore, if the Historical Society is obtaining its lists by taking names from documents contained in its files, those documents, unless otherwise exempted, remain subject to disclosure.

You also inquired what to do when a list is requested. If a person requests a membership list, the Historical Society should simply deny the request based on Idaho Code § 9-348(1). The Historical Society is not required to, and should not, compile the otherwise disclosable raw data and give it to the requesting party. This statute puts the burden of compiling such a list on the individual who wants it.

### CONCLUSION

The membership lists of the Idaho Historical Society are not subject to disclosure under the Idaho public records laws. While the data used to compile the lists is subject to disclosure, if not otherwise exempted, the Historical Society has no duty to provide such information to a person requesting a membership list. The Historical Society may simply deny such request based on Idaho Code § 9-348(2).

I hope this adequately addresses your inquiry. If you have any further questions regarding this, please do not hesitate to contact me.

Very truly yours,

KEVIN D. SATTERLEE  
Deputy Attorney General  
Contracts and Administrative Law  
Division

## INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

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October 13, 1995

Jim Monroe, Acting Administrator  
Commission for the Blind  
and Visually Impaired  
STATEHOUSE MAIL

### **THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE**

Re: Hiring Preference for Blind Administrator of the  
Commission

Dear Mr. Monroe:

In your memorandum of September 11, 1995, you requested an opinion of the Attorney General regarding the constitutionality of Idaho Code § 67-5409. This section states that “preference shall be given to equally qualified blind persons in filling the position of administrator of the Commission.” Your question as stated in the memorandum was “whether this statement reflects reverse discrimination, and if the code requires modification.”

We conclude that the preference set forth in Idaho Code § 67-5409 is constitutionally permissible, does not constitute “reverse discrimination,” and does not require modification.

### **I.**

### **ANALYSIS**

“States have wide discretion in framing employee qualifications . . .” Personnel Administrator of Massachusetts v. Fenney, 442 U.S. 256, 273, 99 S. Ct. 2282, 2293, 60 L. Ed. 2d. 870 (1979). However, any state law that overtly or covertly prefers one class of persons over another in public employment requires a particular level of justification to withstand a constitutional challenge under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. *Id.*

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### A. Level of Scrutiny

The first issue is the level of scrutiny required to withstand the constitutional challenge.

In Clark v. Jeter, 486 U.S. 456, 108 S. Ct. 1910, 100 L. Ed. 2d (1988), the United States Supreme Court summarized the standards applied to state laws challenged under the Fourteenth Amendment as follows:

In considering whether state legislation violates the Equal Protection Clause of the Fourteenth Amendment, we apply different levels of scrutiny to different types of classifications. At a minimum, a statutory classification must be rationally related to a legitimate governmental purpose. Classifications based on race or national origin, and classifications affecting fundamental rights are given the most exacting scrutiny. Between these extremes of rational basis review and strict scrutiny lies a level of intermediate scrutiny, which generally has been applied to discriminatory classifications based on sex or illegitimacy.

486 U.S. at 460, 108 S. Ct. at 1914 (citations omitted).

Since discrimination based on blindness does not fall within a suspect classification (such as race or national origin) and does not impinge on a fundamental right (such as the right to vote, freedom of speech or religion, or the rights to life, liberty or property) the level of justification applied is not “strict scrutiny.” Further, since the discrimination is gender neutral, “intermediate scrutiny” does not apply. Thus, the constitutionality of the discrimination is determined by rational basis review.

### B. Rational Basis Review

In order to pass constitutional scrutiny, the statute in question must be rationally related to a legitimate government purpose. Hodel v. Indiana, 452 U.S. 314, 101 S. Ct. 2376, 69 L. Ed. 2d 40 (1981). While the Hodel case dealt with the issue of mining regulation, the statement of the United States Supreme Court regarding the review of social and economic legislation applies to the current situation. The Court stated that:

Social and economic legislation . . . that does not employ suspect classifications or impinge on fundamental rights must be upheld against equal protection attack when the legislative means are rationally related to a legitimate governmental purpose. Moreover, such legislation carries with it a presumption of rationality that can only be overcome by a clear showing of arbitrariness and irrationality. . . . [S]ocial and economic legislation is valid unless “the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that [a court] can only conclude that the legislature’s actions were irrational.” This is a heavy burden . . . .

Hodel, 452 U.S. at 331, 332, 101 S. Ct. at 2387 (citations omitted; emphasis added).

#### **I. The Purpose of the Hiring Preference is Legitimate**

The purposes set forth for the preference are legitimate purposes for which the government can act and regulate.

Idaho Code § 67-5401 *et seq.* create the Commission for the Blind and Visually Impaired. The purposes of the Commission are:

(1) to relieve blind persons from the distress of poverty; (2) to encourage and assist blind persons in their efforts to become socially and economically independent and to render themselves more self supporting; and (3) to enlarge the opportunities of blind persons to obtain education, vocational training and employment.

Idaho Code § 67-5401. The apparent purpose for the hiring preference is found in Idaho Code § 67-5409 which provides that the administrator “shall be experienced in work for the blind . . . .” Thus, the purpose for the hiring preference is to insure that the administrator has knowledge of working with the blind and of the needs and interests of the blind and visually impaired. Coupling this specific purpose with the stated purposes of the Commission, the purpose of the hiring preference is to ensure that the administrator is experienced in working with issues such as relieving blind persons from the dis-

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tress of poverty, encouraging social and economic independence and enlarging opportunities for the blind and visually impaired.

When taken as a whole, there is no doubt that the purpose of the preference provision is legitimate. The advancement and welfare of the blind is a legitimate government purpose and has even been mandated with requirements such as the Americans with Disabilities Act and the Randolph-Sheppard Act. Since we have concluded that the preference is based on a legitimate government purpose, the next question is whether the preference is rationally related to that purpose.

### **2. The Preference is Rationally Related to the Purposes**

In furtherance of the above purposes, Idaho Code § 67-5409 requires that, when hiring an administrator for the Commission, preference shall be given to an equally qualified blind person.

In order to be rationally related to a legitimate government purpose, the classification must not be arbitrary and must bear some nexus or connection to the stated purpose. In this case, preferring an equally qualified blind applicant bears a substantial nexus to the purpose of ensuring that the administrator is experienced with, and educated as to, the conditions and concerns of the blind and visually impaired. There is no valid argument that a preference for a blind administrator is arbitrary or is not reasonable to further such purposes.

## **II.**

### **CONCLUSION**

The hiring preference for an equally qualified blind administrator is rationally related to the legitimate purpose of ensuring that the administrator is experienced in working with the blind and visually impaired. Therefore, the preference provision is constitutional under the Equal Protection Clause of the Fourteenth Amendment. Since the preference is constitutionally permissible, Idaho Code § 67-5409 does not constitute “reverse discrimination” and does not require modification.

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I hope this has adequately answered your inquiry. If you have any further questions regarding this or any other matter, please do not hesitate to contact me.

Very truly yours,

KEVIN D. SATTERLEE  
Deputy Attorney General  
Contracts & Administrative Law  
Division



## INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

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October 13, 1995

Ms. Suzanne Balderston  
State Insurance Fund  
**STATEHOUSE MAIL**

### **THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE**

Re: Status of Northwest Power Planning Council Employees

Dear Ms. Balderston:

This letter is in response to your request of July 27, 1995, regarding the status of Idaho's members and employees of the Northwest Power Planning Council for workers' compensation purposes.

We conclude that the Idaho members and employees are officers and employees of the State of Idaho for purposes of workers' compensation coverage.

### **I.**

### **BACKGROUND**

The Pacific Northwest Electric Power and Conservation Planning Council (commonly known as the "Northwest Power Planning Council" and hereinafter referred to as the "Council") was created by Congress pursuant to the Pacific Northwest Electric Power Planning and Conservation Act. Public Law 96-501. The act empowered the Bonneville Power Administration (BPA) to create the Council with a membership composed of two persons from each of the states of Idaho, Montana, Oregon and Washington. One practical effect of the act was congressional approval for the future creation of the Council as an interstate compact. Since congressional approval was given in advance, the remaining action required to create the compact was the assent of each of the four included states. Idaho manifested its assent by enacting Idaho Code § 61-1201 *et seq.*

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From its inception in 1981 until June 30, 1995, the Idaho members and employees of the Council have been paid through the State of Idaho Auditor's Office, despite the fact that the entire funding for the Council was derived through the BPA. The BPA paid federal funds to the State Auditor who in turn paid the salaries and expenses of the Idaho Council members and employees. As of July 1, 1995, the funds for the salaries and expenses of the Idaho members and employees were no longer channeled through the State of Idaho and are currently paid directly by the Council.

### II.

#### ANALYSIS

##### A. Idaho Attorney General Opinion No. 81-3

In 1981, the President Pro Tem of the Idaho State Senate presented two questions to the Attorney General of the State of Idaho referencing the Council and Idaho's membership therein. A copy of Attorney General Opinion No. 81-3 is attached hereto. The two questions presented were as follows:

1. In addition to congressional statute, is state legislative action required to authorize the creation of and appointment to the office of Idaho Council Member for the Pacific Northwest Electric Power and Conservation Planning Council?

2. With or without the state legislative action by what legally proper process may appointments to the Council be made?

1981 Idaho Att'y Gen. Ann. Rpt. 59.

The opinion concluded that "the Council's members are state, not federal officers" and that "we believe that [Congress] conceptually envisioned that the members would serve as officers of the respective states they represent." *Id.* at 63. In reaching this conclusion, the opinion relied on the fact that the members and employees of the Council cannot be officers or employees of the federal government by specific provisions of the act. *Id.* at 62, 63. The legislative history of the act also noted that Congress envisioned

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the members and employees representing the individual states and that the Council was not a federal agency. *Id.*

The opinion concluded that the federal government cannot create a State of Idaho public office and, therefore, the Idaho Legislature needed to create the office of Idaho Council Member. Once a public office is created under Idaho law, the persons placed in such office are state officers. Also, unless otherwise specified in the enabling legislation, the Idaho statutes regarding appointment to public office apply to the positions. *Id.* at 64-65.

Therefore, since the date of their initial appointments in 1981, the Idaho members and employees of the Council have been considered state officers and employees. Since coverage for workers' compensation is included as part of employment with the state, or holding a public office of the state, there is no question that the officers and employees were covered under the state's workers' compensation program as of that date.

### **B. Idaho Code § 61-1201 et seq. Does not Change the Analysis**

Following the issuance of Attorney General Opinion No. 81-3, the Idaho Legislature adopted Idaho Code § 61-1207 *et seq.* which took effect on April 8, 1981. The effect of this legislation bolsters the analysis above that the Idaho members and employees of the Council are state officers and employees.

Idaho Code § 61-1201 provides that "the State of Idaho agrees to participate in the formation of the [Council]." Idaho Code § 61-1202 creates "in the Office of the Governor, a state office to be known and designated as [Council] Member . . . ." (Emphasis added.) The governor appoints the two members from Idaho with the advice and consent of the senate. Pursuant to Idaho Code § 61-1203, the two members serve at the pleasure of the governor. Under Idaho Code § 61-1205, the physical office of the Council members must be located in the City of Boise and the Department of Administration is required to furnish office space to the Council members at the same rates charged to state agencies. Pursuant to Idaho Code § 61-1206, the Idaho Council members must report annually to the governor and the legislature and, under Idaho Code § 61-1207, the legislature may express its intent and concerns regarding activities of the Idaho Council members by concurrent resolution.

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Reviewing the above statutes shows that the Idaho Council member is a state office. Therefore, the persons holding such office, and their employees, are state officers and employees.

As of April 8, 1981, the effective date of the statutory creation of the Idaho Council members, the members and employees were state officers and employees for the purpose of workers' compensation coverage.

### **C. The Change in Payment Method as of July 1, 1995, Does not Change the Analysis**

Pursuant to Idaho Code § 61-1204, the annual salary of each Council member is set by the governor. Further, all expenses of the Council members incurred while conducting business of the Council must be reimbursed. However, this section states that “[s]alary and expense monies shall be paid from federal appropriations as provided for [in the act].”

Thus, it was contemplated by the Idaho Legislature that, although the governor could set the salaries of the Council members, all salary and expense monies were to be paid by federal funds. In practice, the salaries and expenses were an item in BPA's annual budget. That money was transferred from BPA to the State of Idaho and paid as the salaries and expenses for the Idaho Council members and employees. The recent change, effective July 1, 1995, to a direct payment from the Council to the Idaho members and employees does not change the analysis.

The change in the manner and method of payment is simply an accounting and bookkeeping change and does not reflect a change in the status of the Idaho Council members or employees. Idaho Code § 61-1204 has always contemplated that the funds for the Idaho Council members would be provided by the federal government. The statute does not require any method by which the salaries or expenses shall be paid. Therefore, it was proper, prior to July 1, 1995, to pay the salaries and expenses by channeling the funds through the State of Idaho. However, it is equally proper to pay the salaries and expenses directly from the Council. The method of payment has no effect on the status of the members and employees as officers or employees of the State of Idaho.

**III.**

**CONCLUSION**

The Idaho members and employees of the Northwest Power Planning Council are state officers and employees for the purpose of workers' compensation coverage. Attorney General Opinion No. 81-3 concluded that the Idaho members were state officers. The enabling legislation contemplates the same result. The change in the method of payment for salaries and expenses does not alter the analysis as such method of payment was contemplated in the enabling legislation. Therefore, the Idaho members and their employees are state officers and employees for workers' compensation coverage purposes.

I hope this adequately addresses your inquiry. If you have any further questions regarding this, please do not hesitate to contact me.

Very truly yours,

KEVIN D. SATTERLEE  
Deputy Attorney General  
Contracts & Administrative Law  
Division

## INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

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October 20, 1995

Honorable Milt Erhart  
State Representative, District 14  
Idaho House of Representatives  
**STATEHOUSE MAIL**

### **THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE**

Re: Eligibility for Medical Assistance

Dear Representative Erhart:

Your request of October 6, 1995, has been forwarded to me, concerning eligibility of individuals who may have received funds from a community fundraising effort to offset expenses of a catastrophic illness or accident.

You have asked two explicit questions: (1) Would fundraising and acceptance of contributions directly by or on behalf of the victim of a catastrophic event be considered income for AABD or Medicaid eligibility? (2) Would a trust such as the example provided be sufficient to exclude the funds for purposes of determining eligibility?

As always in this area, much will depend on the facts of the particular situation. An individual could have a catastrophic health situation due to an accident from which he or she could be expected to recover in a relatively short time. Such a person would not meet the definition of "disabled" for AABD or SSI. 42 U.S.C. § 1382c(a)(3).

Funds paid directly to the victim would be considered income; for funds paid on behalf of the victim but not held in his name, not available to the individual and not the victim's money, there would be no problem with eligibility.

As to the second question, the sample trust you provided purports to be a special needs trust, which is a type of trust that is exempt from consideration for eligibility so long as disbursements comply with 42 U.S.C. §§

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1917(c) and (d), asset transfers and trusts. Section VI is a problem since the remaining funds at the time the trust is terminated are not applied to Medicaid expenditures. See 42 U.S.C. § 1396p(d)(4). For a trust that qualifies as exempt, payments made from the trust for clothing, food or shelter are income for eligibility purposes.

As you can see from this response, the requirements of federal law relating to trusts and eligibility are the source of the state's rules. This letter cannot even begin to address the complexities of these types of situations, and individuals facing them should consult with knowledgeable legal counsel.

Very truly yours,

JEANNE T. GOODENOUGH  
Deputy Attorney General  
Chief, Human Services Division

## INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

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October 23, 1995

Honorable Ruby Stone  
Idaho House of Representatives  
6604 Holiday Drive  
Boise, ID 83709

Honorable Ralph Wheeler  
Idaho State Senate  
659 Gifford Avenue  
American Falls, ID 83211

### **THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE**

Re: Optional Forms of County Government

Dear Representative Stone and Senator Wheeler:

You have requested that the Office of the Attorney General render an opinion on whether the legislature can provide that only one optional form of government at a time appear on the ballot, and whether counties can consolidate offices such as prosecutor or sheriff. For the reasons set forth below, it is the opinion of this office that the legislature can limit the number of optional forms which can appear on a ballot in a given election, and can allow counties to consolidate offices.

The draft legislation regarding optional forms of county government provides that an optional form may be proposed by resolution of the board of county commissioners or a petition of the voters meeting the requisite signature requirement. The draft legislation further requires that the question of adopting an optional form or retaining the existing form of county government must be submitted at a general election. Your question is:

May the legislature provide that only one optional form of government shall appear at a time on the ballot? And, if so, are there any legal limitations on the manner in which a determination is made as to which optional form will appear on the ballot if more than one petition or resolution propos-



ing an optional form is eligible to appear on the ballot in the general election?

The constitutional provision allowing optional forms of county government does not prohibit the legislature from limiting the number of optional forms on the ballot. Art. 18, sec. 12 provides:

§ 12. Optional forms of county government. - The legislature by general law may provide for optional forms of county government for counties, which shall be the exclusive optional forms of county government. No optional form of county government shall be operative in any county until it has been submitted to and approved by a majority of the electors voting thereon in the county affected at a general or special election as provided by law. The electorate at said election shall be allowed to vote on whether they shall retain their present form of county government or adopt any of the optional forms of county government. In the event an optional form shall be adopted, the question whether to return to the original form or any other optional forms, may be placed at subsequent elections, but not more frequently than each four years. When an optional form of county government has been adopted, the provisions of this section supersede sections 5, 6, and 10 of this article and sections 16 and 18 of article V.

This provision simply mandates that any of the optional forms prescribed by the legislature and placed on the ballot run against the current form. Because there is no prohibition against limiting the number of optional forms which may appear on a ballot at any one time, the legislature is free to enact such a limitation.

How to limit the number of optional forms is clearly a legislative prerogative. It is hard to speculate on all of the various ways that the legislature could limit the number of optional forms on the ballot. Thus, this opinion necessarily speaks in generalities. However, there really are no legal restrictions on how the legislature could limit the amount of optional form(s) which will appear on the ballot. Obviously, the limitation can't be completely arbitrary in the sense that it is not reasonably related to the goals sought to be

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accomplished and it must be neutrally applied. Outside of these general restrictions, the legislature should be free to enact a limitation on the amount of optional forms which will appear on the ballot against the current form without legal ramifications: whether the limitation is a first-in-time restriction or holding a primary election between the competing optional forms.

Next, the draft legislation also provides for consolidation of offices between counties. Your question is:

What, if any, jurisdictional or other legal problems arise if the elected offices of sheriff or prosecuting attorney are consolidated between one or more counties, with one elected person to serve as sheriff or prosecuting attorney for each of those counties? Are there particular problems that attach to the positions of prosecuting attorney or sheriff which do not apply when other elective offices are consolidated between counties?

Art. 18, sec. 12, provides: “[w]hen an optional form of county government has been adopted, the provisions of this section supersede sections 5, 6, and 10 of this article and sections 16 and 18 of article V.” Sections 5, 6 and 10 of art. 18 relate to: (1) the requirement of a commission form of government, (2) creation and duties of county row officers (not including prosecutor), and (3) election requirements of county commissioners. Sections 16 and 18 of article 5 set forth the qualifications and terms of office of the county clerk and prosecutor, respectively. All of these sections are superseded if an optional form of county government is adopted. Because these constitutional provisions which require each county to elect such officers, and that such officers be residents of those counties, are superseded, the impediment to consolidating county offices is removed. The remaining requirements that county officers must be electors of the county they are serving are statutory, and can be modified by the legislature in enacting legislation providing for optional forms of county government.

In essence, the two or more counties would constitute a “district” or “region” for which a prosecutor or sheriff or other county elected row officer would serve. The prosecutor would have to be an elector of that “district” or “region.” This is a basic concept, that the elected official be a resident and qualified elector of the geographical region which elects him or her. Of

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course, this all presumes that two or more counties have voted to combine these offices. It cannot be done unilaterally by one county. Two or more counties must go through the process of voting in favor of an optional form of county government. Moreover, the individual who receives the most votes will win, and it would not matter that County A casts a majority of its votes for Candidate A, and County B casts a majority of its votes for Candidate B. As long as Candidate A receives the most total votes out of all of the combined counties, he or she wins.

There are no particular legal problems that attach to the positions of prosecuting attorney or sheriff for each of those counties. However, there may be a practical problem if the two counties who consolidate the office of prosecuting attorney are engaged in litigation or other activities with each other. The prosecuting attorney is the representative of the county and legal advisor to the governing body of the county. If the two counties are involved in litigation the prosecutor would be in a conflict situation. However, this is not a major problem, since both counties have the ability to hire outside private counsel if such a situation occurs.

Consolidation of county offices should not apply to the governing body. As discussed in our earlier opinion regarding city/county consolidation, regulations passed pursuant to the police power provision of art. 12, sec. 2, can only be made and enforced within the respective boundaries of the individual counties and cities. A consolidated governing body would face the same constitutional problems as a consolidated city/county. Thus, the consolidation of county offices provision should exclude consolidation of the governing body.

I hope this opinion is of assistance to you. If you have any question, please feel free to contact me.

Very truly yours,

THOMAS F. GRATTON  
Deputy Attorney General  
Intergovernmental & Fiscal Law  
Division



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**ATTORNEY GENERAL'S  
CERTIFICATES OF REVIEW  
FOR THE YEAR 1995**

**ALAN G. LANCE**  
ATTORNEY GENERAL  
STATE OF IDAHO





## CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

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July 14, 1995

The Honorable Pete T. Cenarrusa  
Secretary of State  
**HAND DELIVERED**

Re: Certificate of Review;  
Initiative Entitled "The Teachers Right to Work Act"

Dear Mr. Cenarrusa:

An initiative petition was filed with your office on June 26, 1995. Pursuant to Idaho Code § 34-1809, this office has reviewed the petition and has prepared the following advisory comments. It must be stressed that, given the strict statutory timeframe in which this office must respond and the complexity of the legal issues raised in this petition, our review can only isolate areas of concern and cannot provide in-depth analysis of each issue that may present problems. Further, under the review statute, the Attorney General's recommendations are "advisory only," and the petitioners are free to "accept or reject them in whole or in part."

### **BALLOT TITLE**

Following the filing of the proposed initiative, our office will prepare short and long ballot titles. The ballot titles should impartially and straightforwardly state the purpose of the measure without being argumentative and without creating prejudice for or against the measure. While our office prepares the titles, if petitioners would like to propose language with these standards in mind, we would recommend that they do so and their proposed language will be considered.

### **MATTERS OF SUBSTANTIVE IMPORT**

The substantive provision of the proposed initiative is brief and straightforward. The initiative would change Idaho Code § 33-1271 by substituting the word "may" for "shall" as indicated below.<sup>1</sup>

**33-1271. School districts—Professional employees—Negotiation agreements.**—The board of trustees of

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each school district, including specially chartered districts, or the designated representative(s) of such district, is hereby empowered to and ~~shall~~ may upon its own initiative or upon the request of a local education organization representing professional employees, enter into a negotiation agreement with the local education organization or the designated representative(s) of such organization and negotiate with such party in good faith on those matters specified in any such negotiation agreement between the local board of trustees and the local education organization. A request for negotiations may be initiated by either party to such negotiation agreement. Accurate records or minutes of the proceedings shall be kept, and shall be available for public inspection at the offices of the board of education during normal business hours. Joint ratification of all final offers of settlement shall be made in open meetings.

Importantly, there is no constitutional or statutory prohibition against the amendment of § 33-1271 as contemplated by the initiative. However, for practical purposes, such an amendment would leave the negotiating process between school districts and professional employees unclear, and may not fulfill the stated intent of the initiative drafters to allow teachers in Idaho “to have a negotiating agency of their choice represent their interests.”

The Attorney General’s statutory duty to review proposed initiatives includes the obligation to “recommend to the petitioner such revision or alteration of the measure as may be deemed necessary and appropriate.” Idaho Code § 34-1809. As stated above, because of other statutes, the single word change in Idaho Code § 33-1271 from “shall” to “may” may not accomplish the “legislative intent” of the proposed change, i.e. that through the amendment, “teachers in Idaho will be allowed to have a negotiating agency of their choice represent their interests.”

Idaho Code § 33-1273 states that the local education organization “shall be the exclusive representative for all professional employees in that district for purposes of negotiations.” “Local education organization” is defined to mean:

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any local district organization duly chosen and selected by a majority of the professional employees as their representative organization for negotiations under this act.

Idaho Code § 33-1272(2).

It is clear that the initiative would make negotiations with a local education organization optional. However, if such negotiations were to occur, the local education organization approved by a majority of the professional employees would still be the representative of such employees, because of the language of § 33-1273. Under the initiative, teachers would not be allowed to have a negotiating agency of their choice represent their interests as contemplated. Rather, the school district would have the option to negotiate with a local education organization, but if such negotiations occurred, only one representative of such professional employees would be allowed to engage in such negotiations.

If the school district chose not to negotiate with such a group, the procedure would be unclear. On its face, it would appear that the school district could negotiate with each individual professional employee. However, § 33-1273 states that the local education association is the “exclusive” representative of professional employees of the school district for purposes of negotiation. Such language suggests that any negotiations would have to occur through such a group, rather than on the individual level, regardless of whether the school district was required by law to negotiate with them. In other words, if the language in Idaho Code § 33-1273 remains intact, the school district would still be forced to negotiate with a local education organization by de facto operation of law.

In conclusion, in order for the initiative to accomplish the stated intent, we would recommend that Idaho Code § 33-1273 or the definition of “local education organization” found in Idaho Code § 33-1272, or both, also be amended to more specifically provide that more than one group can represent the interests of professional employees. This recommendation is made solely for the purpose of assisting the petitioner as required by Idaho Code § 34-1809, and is not meant to reflect a position either in favor or against the proposed initiative by the Office of the Attorney General.

I HEREBY CERTIFY that the enclosed measure has been reviewed for form, style and matters of substantive import and that the recommenda-

## CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

ations set forth above have been communicated to petitioner John Slack by deposit in the U.S. Mail of a copy of this certificate of review.

Sincerely,

ALAN G. LANCE  
Attorney General

<sup>1</sup> An identical change to Idaho Code § 33-1271 was introduced in the Senate as S.B. 1025 during the last legislative session by Senator Rod Beck, but was killed in the Senate Education Committee.

## CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

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July 19, 1995

The Honorable Pete T. Cenarrusa  
Secretary of State

**HAND DELIVERED**

Re: Certificate of Review  
Initiative Entitled "Protection From Late Term Abortion  
Act"\*

Dear Mr. Cenarrusa:

An initiative petition entitled "Protection From Late Term Abortion Act" was filed with your office on June 26, 1995. Pursuant to Idaho Code § 34-1809, this office has reviewed the petition and has prepared the following advisory comments. Under the review statute, the Attorney General's recommendations are "advisory only," and the petitioners are free to "accept or reject them in whole or in part."

### **BALLOT TITLE**

Following the filing of the proposed initiative, our office will prepare a short and long ballot title. The ballot title should impartially and straightforwardly state the purpose of the measure without being argumentative and without creating prejudice for or against the measure. If petitioners would like to propose language with these standards in mind, we would recommend that they do so. Their proposed language will be considered, but our office is responsible for preparing the title.

### **MATTERS OF SUBSTANTIVE IMPORT**

Section 18-616 of the proposed initiative would amend title 18, chapter 6 of the criminal code, the "Abortion and Contraceptives" chapter, and prohibit abortions beyond the "first thirteen weeks of prenatal development," except those necessary "to save the life of the child's mother." The proposed

\* Following the issuance of this Certificate of Review, the petitioners resubmitted a revised initiative. Pursuant to Idaho Code § 34-1809, the Attorney General issued long and short ballot titles. These ballot titles were challenged and were modified as a result of Buchin v. Lance, No. 22395, 1995 WL 757770 (Idaho Dec. 22, 1995).

initiative goes on in section 18-617 to detail some of the specific abortion methods prohibited, although this list of proscribed methods does not purport to be exhaustive:

Section 18-617. PROCEDURES COMMONLY PRACTICED TO CAUSE WILLFUL DEATH PROHIBITED FOR PRENATAL CHILDREN OVER THE AGE OF 13 WEEKS. The people find that procedures used in later term abortions cause suffering and pain in the unborn which is inhumane. The prohibition provided by this Chapter shall apply to the following procedures only after 13 weeks of gestation, including but not limited to the following abortion procedures: (a) dismemberment of the prenatal child's body, or (b) chemically burning or poisoning the prenatal child, or (c) the partial delivery of a prenatal child for the purpose of removing, by incision through the skull, followed by suction, the child's brain from his or her skull, otherwise known as brain suction abortion (dilation and extraction).

The initiative further provides that an attending physician must determine whether "the life of a child falls within or beyond his or her first thirteen weeks of prenatal development." Section 18-619 then states that a woman "upon whom any abortion is performed" is not guilty of violating the act and, under section 18-620, she or the "father" may seek "money damages" from the "medical abortion provider." Such damages are "for all injuries, psychological and physical, occasioned by a violation of [the] section" as well as "statutory damages equal to three times the cost of the abortion." Damages are available "even if [a] party consented to the performance of an abortion." In short then, under this proposed initiative, all second and third trimester abortions are legally prohibited unless carrying the unborn child to term would endanger the mother's life, and if a second or third trimester abortion is performed, money damages may be sought from the doctor by the parents of the aborted fetus. This proposed initiative, by legally prohibiting previability abortions that take place beyond the thirteenth week of prenatal development, violates the Federal Constitution as construed by the United States Supreme Court in Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992).

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Abortion is one of the most divisive issues this country has faced. To those who are “pro-choice,” what is at stake is “the right of an individual, married or single to be free from unwarranted government intrusion into matters so fundamentally affecting a person as the decision to bear or beget a child.” Eisenstadt v. Baird, 405 U.S. 438, 453, 92 S. Ct. 1029, 1038, 31 L. Ed. 2d 349 (1972). For those who are “pro-life,” the balance is different and the “government intrusion” warranted. For them, legalizing abortion is simply authorizing adults, with the approval of the law, to take the lives of children not yet born and thus incapable of defending themselves.

Layered on top of this conflict is the additional question of which is the proper branch of government to resolve the issue—the judiciary or the legislature. Those in favor of a judicial resolution argue that a “woman’s right to reproductive choice” is a “fundamental liberty” that cannot “be left to the whims of an election.” Casey, 112 S. Ct. at 2854 (Blackmun, J., concurring). Therefore, it is the responsibility of the courts to protect that right. But, this view is not universally shared, and the judiciary’s willingness to enter into the abortion fray has also been criticized as exalting the role of the judiciary over the democratic process and prolonging the abortion controversy:

[B]y foreclosing all democratic outlet for the deep passions this issue arouses, by banishing the issue from the political forum that gives all participants, even the losers, the satisfaction of a fair hearing and an honest fight, by continuing the imposition of a rigid national rule instead of allowing for regional differences, the Court merely prolongs and intensifies the anguish.

We should get out of this area, where we have no right to be, and where we do neither ourselves nor the country any good by remaining.

Casey, 112 S. Ct. at 2885 (Scalia, J., dissenting).

The United States Supreme Court first took on the abortion issue in Roe v. Wade, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 143 (1973). In that opinion, the Court held that a woman has a fundamental right to terminate a pregnancy and established what has been characterized as a “trimester approach” to govern the regulation of abortion. Almost no regulation was

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permitted during the first trimester of pregnancy. Regulation designed to protect the woman's health, but not to further the state's interest in potential life, were permitted during the second trimester. Finally, during the third trimester, when the fetus was viable, certain abortion prohibitions were permitted so long as they did not jeopardize the life or health of the mother. Roe, 410 U.S. at 163-66.

Roe was followed by widespread criticism, and by 1990, there was some expectation that it would be overruled. Subsequent Supreme Court opinions seemed to erode Roe's basic holding and, in particular, when the decision in Webster v. Reproductive Health Services, 492 U.S. 490, 109 S. Ct. 3040, 106 L. Ed. 2d 410 (1989), was issued, there no longer appeared to be five justices on the Court who supported the Roe decision. Thus, when the Court granted *certiorari* in Planned Parenthood of Southeastern Pennsylvania v. Casey, Roe's days appeared to be numbered.

Such was not the case. Justices O'Connor and Kennedy changed their positions from Webster, and the Court, in a five-to-four ruling, reaffirmed a woman's constitutional right to have an abortion before the fetus reaches viability. There were, however, some modifications to the Roe decision. The Court rejected Roe's trimester construct, reasoning that its "rigid prohibition on all previability regulation aimed at the protection of fetal life . . . undervalue[d] the State's interest in potential life. . . ." Casey, 112 S. Ct. at 2818. The Court instead adopted a new "undue burden" test. Under this test, a state may regulate abortion to further its interest in potential life or to foster the health of the mother so long as the "purpose or effect" of the regulation is not to place "a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." *Id.* (citation omitted). Once the fetus is viable, the state may proscribe abortion "except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." *Id.* at 2821. Obviously, there are many who disagree with the Casey decision. But, unless it is overruled, it remains the law and must be followed.

The proposed initiative prohibits abortions beyond the thirteenth week of prenatal development. In so doing, it is proscribing some previability abortions. Viability constitutes the point at which "there is a realistic possibility of maintaining and nourishing a life outside the womb . . . ." Casey, 112 S. Ct. at 2817. Survival as early as 21 weeks gestational age is possible,



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and the Supreme Court has upheld a statute which “create[d] what [was] essentially a presumption of viability at 20 weeks.” Webster, 109 S. Ct. at 3055. However, viability does not reach back to the thirteenth week of pregnancy, and this proposed initiative, by prohibiting abortions beyond the thirteenth week of prenatal development, brings within its ban some previability abortions. An outright ban on previability abortions clearly violates Casey’s mandate that the state not place a “substantial obstacle” in the path of a woman seeking an abortion “before the fetus” attains viability. See Sojourner T. v. Edwards, 974 F.2d 27 (5th Cir. 1992) (Louisiana statute prohibiting previability abortions is unconstitutional under Casey); Jane L. v. Bangerter, 809 F. Supp. 865 (D. Utah 1992) (Utah statute, insofar as it banned previability abortions before 21 weeks gestational age, held unconstitutional under Casey). Consequently, the proposed initiative, as applied to previability abortions, appears unconstitutional.<sup>1</sup>

The next question is whether the proposed initiative’s prohibition could apply to abortions performed when the fetus is viable. As noted, under Casey, a state may proscribe abortion once the unborn child is viable “except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.” Casey, 112 S. Ct. at 2821. The proposed initiative provides an exception to its prohibition to “save the life of the child’s mother.” It does not provide any exception where the mother’s health is endangered. Because the mother’s health is not taken into account, the proposed initiative may also be too restrictive even as to abortions performed on a viable fetus.

I HEREBY CERTIFY that the enclosed measure has been reviewed for form, style and matters of substantive import and that the recommendations set forth above have been communicated to petitioners John and Teri Slack by deposit in the U.S. Mail of a copy of this certificate of review.

Yours very truly,

ALAN G. LANCE  
Attorney General

**Analysis by:**  
MARGARET R. HUGHES  
Deputy Attorney General  
Civil Litigation Division

## CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

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<sup>1</sup>The Ohio House and Senate recently approved a bill prohibiting one abortion procedure—the dilation and extraction procedure. The proposed initiative, here, appears to ban all abortion procedures after the thirteenth week of prenatal development. Since this office is not now reviewing an initiative prohibiting only one particular abortion procedure, this office offers no opinion as to the constitutionality of such a prohibition. However, the proponents of this proposed initiative may want to be aware that there is case law, issued prior to Casey, indicating that particular abortion procedures cannot be prohibited if the risk to the woman's health is thereby increased. See, e.g., Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 96 S. Ct. 2831, 49 L. Ed. 2d 788 (1976).

## CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

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July 21, 1995

Honorable Pete T. Cenarrusa  
Secretary of State

**HAND DELIVERED**

Re: Certificate of Review;  
Initiative Entitled "Family and Child Protection Act"

Dear Mr. Cenarrusa:

An initiative petition entitled "Family and Child Protection Act" was filed with your office on June 26, 1995. Pursuant to Idaho Code § 34-1809, this office has reviewed the petition and has prepared the following advisory comments. Given the timeframe in which this office must respond and the complexity of the legal issues raised in this petition, our review can only identify areas of concern. Further, under the review statute, the Attorney General's recommendations are "advisory only," and the petitioner is free to "accept or reject them in whole or in part."

### **BALLOT TITLE**

Following the filing of the proposed initiative, our office will prepare a short and long ballot title. The ballot title should impartially and straightforwardly state the purpose of the measure without being argumentative and without creating prejudice for or against the measure. If petitioner would like to propose language with these standards in mind, we would recommend that he do so. His proposed language will be considered, but our office is responsible for preparing the title.

### **MATTERS OF SUBSTANTIVE IMPORT**

This review of the proposed initiative will be the third time this office has examined these or similar issues. On March 18, 1993, this office issued a certificate of review examining the original version of Proposition 1, the initiative that was narrowly defeated in November of 1994. On November 3, 1993, this office reviewed a revised version of Proposition 1, issuing a more comprehensive opinion. Since the defeat of Proposition 1 at the polls, this new initiative has been filed with the Secretary of State's Office. Some of the

language has been revised, and the current proposed initiative is not identical to Proposition 1. Moreover, since the November 3, 1993, opinion, there have been developments in the case law on a number of the issues involved that need to be analyzed. Against this background, this office will review the four sections of the current proposed initiative which are most likely to be subject to a constitutional challenge if the proposed initiative is placed on the ballot and passed. Those four sections are: (1) the minority status provision; (2) the public funding provision; (3) the public school provision; and (4) the library provision. This office will first, however, address the introductory language contained in the initiative.

**I.**

**INTRODUCTORY LANGUAGE**

The title to the proposed section 67-8002 states: "By voting 'yes' on this [i]nitiative . . . ." This is unusual language to be codified. Similar problems exist with the proposed section 67-8003. The language, if added to the Idaho Code, will create confusion and does little to inform the reader about the content of the proposed code section. We would recommend that this sentence be deleted in its entirety.

**II.**

**SECTION 67-8002(a)  
MINORITY STATUS**

Section 67-8002(a) contains the "minority" status provision. It provides:

A government agency, board, commission, council, department, district, institution, or elected or appointed officer of the state of Idaho, or of any political subdivision thereof:

(a) Shall not declare any individual or group, solely on the basis of homosexual behavior, to constitute an officially sanctioned or recognized "minority", or otherwise

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grant to such individual(s) any special, exclusive, or preferential status, treatment, or classification under law.

This section is similar to the “special rights” provision of Proposition 1. It denies special or preferential rights to individuals based on homosexual behavior. But it also, by precluding legal “classifications” based on homosexual behavior, arguably bars any anti-discrimination laws that might be implemented not to confer “special” rights, but rather to protect homosexuals from unequal treatment and discrimination. It may be the case that the proponents of the “Family and Child Protection Act” do not intend to officially, throughout the state, ban laws prohibiting discrimination based on homosexual behavior. However, because the proposed initiative is drafted so broadly, such anti-discrimination laws are probably within its scope. If this was not the intent of the initiative’s proponents, they should clarify section 67-8002(a) by expressly stating that the section’s restrictions are not intended to ban laws prohibiting discrimination based on homosexual behavior. If, however, such a ban on anti-discrimination laws is intended by this section, the next question becomes whether this ban is constitutional.

A variety of courts have addressed this issue, and the precedent is currently mixed. Two courts, the Colorado Supreme Court and the Fourth District Court of Appeals in California, have found similar prohibitions to anti-discrimination laws to be unconstitutional. *See Evans v. Romer*, 854 P.2d 1270 (Colo. 1993); *Citizens for Responsible Behavior v. Superior Court*, 2 Cal. Rptr. 2d 648 (Ct. App. 4th Dist. 1991). These courts grounded their holdings essentially on two theories. The first theory is that an official ban on anti-discrimination laws protecting homosexuals makes the state a partner to private discrimination against homosexuals and, in so doing, violates the Equal Protection Clause of the United States Constitution. *See Citizens for Responsible Behavior*, 2 Cal. Rptr. 2d at 658. The second theory is that prohibiting anti-discrimination laws at all levels of government that affect one identifiable group, homosexuals, while allowing all other identifiable groups to seek similar anti-discrimination protection from these same government entities, unconstitutionally denies homosexuals equal access to the political process. *See Evans v. Romer*, 854 P.2d at 1285.

Until this spring, these were the primary cases addressing this issue. However, in May 1995 the Sixth Circuit Court of Appeals addressed a similar issue in *Equality Foundation of Greater Cincinnati, Inc. v. City of*

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Cincinnati, 54 F.3d 261 (6th Cir. 1995), and concluded that a city charter amendment that rescinded a human rights ordinance protecting homosexuals from discrimination and banning such legal protection in the future was not unconstitutional. The court did not expressly address the state partnership in private discrimination theory. It did, however, unequivocally reject the equal access to the political process argument.

The United States Supreme Court, at the urging of the states of Colorado, Idaho, Virginia and Alabama, has recently agreed to review the Colorado Supreme Court's decision in Evans v. Romer and that appeal is now pending. The United States Supreme Court has, as part of its charter, the final authority to interpret the Federal Constitution. The Court's decision in the Evans case will likely settle the ongoing controversy concerning whether legal bans on anti-discrimination laws that would protect homosexuals, such as that contained in section 67-8002(a), violate an individual's constitutional rights.

There are strong sentiments on both sides of this issue. In light of the fact that a case involving issues like those involved in this initiative is now pending before the United States Supreme Court, it would be premature for this office to opine whether the language proposed in section 67-8002(a) violates the Federal Constitution. The only advice this office can offer is to defer the petition until the Supreme Court decides the Evans case. The United States Supreme Court has the ultimate responsibility of interpreting the Federal Constitution, and the prudent approach is to wait for the Court's decision.<sup>1</sup>

### III.

#### **SECTION 67-8002(c) PUBLIC FUNDING**

The next substantive section of the initiative that may pose constitutional problems is section 67-8002(c), the public funding provision. This section provides:

A government agency, board, commission, council, department, district, institution, or elected or appointed offi-

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cer of the state of Idaho, or of any political subdivision thereof:

(c) Shall not expend tax dollars or any other public funds to promote, advocate, endorse, or encourage homosexual behavior.

This section prohibits tax dollars or public funds from being spent to “promote, advocate, endorse, or encourage” homosexual behavior. It is not clear whether this proposed initiative is intended to bring within its scope the expenditure of public funds in a manner that might indirectly, as well as directly, encourage homosexual behavior. Also not clear is what is included within the clause “promote, advocate, endorse, or encourage homosexual behavior.” Does a film such as *Philadelphia*, which portrays a homosexual relationship in a positive light, promote homosexual behavior and would this section preclude a state university from showing that film in a public facility or renting it with university funds? Is the proposed initiative aimed at something narrower than that scenario? If so, the proponents of the initiative should clarify their intent. In matters involving the First Amendment, which this section clearly implicates, it is critical that laws be narrowly tailored and certain in their terms. An open-ended statute which impacts speech and expression is a prescription for problems under the First Amendment. As written, this section could arguably reach public funding of the arts and humanities, public university funds and the ideas that may be expressed in university classrooms or on university campuses and other publicly funded open forums where a diversity of opinions are expressed.

The United States Supreme Court has issued a number of opinions addressing the expenditure of public funds to subsidize speech and the restrictions that may be placed on that speech. Most recently, in Rosenberger v. Rector and Visitors of the University of Virginia, No. 94-329, 1995 WL 382046 (S. Ct. June 29, 1995), the Court went to extraordinary lengths to harmonize its prior precedent and to explain when a state may or may not place viewpoint restrictions on expression subsidized by public monies.

In Rosenberger, the University of Virginia, a state instrumentality, authorized payments from its Student Activities Fund to outside contractors for the printing costs of a variety of publications issued by student groups. The university, however, withheld authorization for payments to a printer on

behalf of Wide Awake Productions, solely because its student newspaper, “Wide Awake: A Christian Perspective at the University of Virginia,” primarily promoted a religious viewpoint on current issues. The Supreme Court held that this viewpoint-based denial of public funds violated the free speech protections contained in the First Amendment of the United States Constitution. In reaching this decision, the Court explained when viewpoint-based restrictions may be placed on the expenditure of public funds:

We recognized that when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes. When the government disburses private funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee. It does not follow, however, and we did not suggest . . . that viewpoint-based restrictions are proper when the University does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers.

1995 WL 382046, at \*10 (citations omitted).

In other words, while the government may place restrictions on the speech of a private entity that has been hired to convey a government message, the government may not expend money to encourage a diversity of views and then set up viewpoint-based restrictions on funding of those views. The Court went on to explain that while the government is “not required to subsidize the exercise of fundamental rights,” it cannot “discriminate invidiously in its subsidies in such a way as to ‘ai[m] at the suppression of dangerous ideas.’” *Id.* (citation omitted).

The Court in Rosenberger invoked a public forum analogy. It explained that public forums can be more “metaphysical” than “spatial or geographic,” but that the same First Amendment principles apply. *Id.* at \*8. Government subsidies of private expression can create a public forum, even a limited one, and the government, having created this forum, must respect its legitimate boundaries. The state may confine a forum of its own creation to the “limited and legitimate purpose for which it was created” and reserve it for “the discussion of certain topics.” *Id.* at \*7. However, it may not “exclude



speech where its distinction is not reasonable in light of the purpose served by the forum” or where the exclusion is based upon “viewpoint.” *Id.*

Thus, in determining whether the State is acting to preserve the limits of the forum it has created so that the exclusion of speech is legitimate, we have observed a distinction between, on the one hand, content discrimination, which may be permissible if it preserves the purposes of the limited forum, and, on the other hand, viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum’s limitations.

*Id.* By way of example, if the state created a limited forum for the discussion of family issues, it could exclude a group that wanted to use that forum to discuss motorcycles, but it could not constitutionally exclude a group that wanted to discuss family issues from a Christian perspective. See Lamb’s Chapel v. Center Moriches Union Free School Dist., 508 US —, 113 S. Ct. 2141, 124 L. Ed. 2d 352 (1993).

Having rejected the university’s argument that public forum principles should not be applied to public funding cases, the Supreme Court also rejected the university’s position that it should have the discretion to allocate scarce resources as it chose, holding that “the government cannot justify viewpoint discrimination among private speakers on the economic fact of scarcity.” Rosenberger, 1995 WL 382046, at \*10. Comparing the situation to Lamb’s Chapel, an open forum case involving physical facilities, the Court noted that, “had the meeting rooms in Lamb’s Chapel been scarce, had the demand been greater than the supply, our decision would have been no different.” *Id.* at \*11. The Court reasoned that while it is “incumbent on the State” to “ration or allocate the scarce resources on some acceptable neutral principle,” scarcity does not “give the State the right to exercise viewpoint discrimination that is otherwise impermissible.” *Id.*

In sum, the government has no obligation to create open or limited open forums either through funding mechanisms or providing facilities or space. However, once it chooses to do so, it may not discriminate against certain viewpoints that are otherwise legitimately within the boundaries of those forums simply because it finds those viewpoints offensive. The First

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Amendment prohibits this type of viewpoint-based discrimination where public funding of private expression is involved.

Idaho has created any number of open and limited open forums in which it encourages, through public funding, “a diversity of views from private speakers.” These range from funding of the arts and humanities to funding for social science research and educational symposiums. Likewise, our state universities, which receive substantial public funds, are traditionally viewed as areas where academic freedom and “creative inquiry” can flourish. Indeed, in this latter context, the Supreme Court has recently noted that “the quality and creative power of student intellectual life to this day remains a vital measure of a school’s influence and attainment,” and a regulation that casts “disapproval on particular viewpoints” risks the “suppression of free speech and creative inquiry in one of the vital centers for the nation’s intellectual life, its college and university campuses.” Rosenberger, 1995 WL 382046, at \*11.

The proponents of this initiative clearly find certain viewpoints about homosexual behavior patently offensive. However offensive they may find those views, they cannot seek to silence them through an official public funding restriction that cuts into open or limited open forums created by the state and denies funds based on whether the proponents of this initiative agree with the ideas expressed. Under Rosenberger, this is a violation of First Amendment principles. Again, as noted, section 67-8002(c) of the proposed initiative is not drafted with absolute precision, and it is possible its drafters did not intend it to reach this far. If such is the case, the drafters should clarify their intent. Otherwise, absent a narrowing construction by a court, this section would face a serious constitutional challenge.

### IV.

#### **SECTION 67-8002(d) PUBLIC SCHOOLS**

Section 67-8002(d) of the proposed initiative contains the public school provision. It provides:

A government agency, board, commission, council, department, district, institution, or elected or appointed offi-

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cer of the state of Idaho, or of any political subdivision thereof:

(d) Shall not authorize, approve, or allow the promotion, advocacy, endorsement, or encouragement of homosexual behavior in any officially sanctioned public school class, course, curriculum, activity, program, or event, and shall require that any discussion of such behavior therein occur only on an age-appropriate basis as defined by the local school board.

This section bans speech in “any officially sanctioned public school class, course, curriculum, activity, program, or event” that expresses approval of or advocates, endorses or encourages homosexual behavior. The section also requires that any discussion of such behavior will occur “only on an age-appropriate basis” as defined by the local school board. If this section is placed on the ballot and passes, the challenge that will be made to it will be based, again, on free speech.

At the outset, this office notes that the scope of this section is also not entirely clear. It covers school-sponsored speech in officially sanctioned public school classes, courses and curriculums. But, by also referring to officially sanctioned public school “activit[ies]” and “event[s],” this section could bring within its reach some non-school-sponsored speech, such as statements made at school board meetings or faculty meetings. Such speech would not necessarily be perceived as school-sponsored and, consequently, as explained below, different First Amendment principles would be applied to it. Again, the drafters of this proposed initiative may only be seeking to restrict school-sponsored speech and not other types of expression, such as views expressed by one adult to another at a school board meeting. If such is the case, the drafters should redraft this section so that it is clear that it is only school-sponsored speech that is impacted.

### **A. School-Sponsored Speech**

Schoolchildren and their instructors, even through the high school level, do not enjoy the same degree of First Amendment protections as the general public. When it comes to speech that could reasonably be perceived as being sponsored by the school, recent opinions from the United States

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Supreme Court have upheld restrictions on such speech. These recent opinions indicate that, although teachers and students in secondary schools retain some First Amendment protections, teachers' and students' speech which is curriculum-related and appears to carry the school's endorsement—such as statements made by a teacher in a classroom, articles in a student newspaper prepared by a journalism class and statements made by students during school assemblies or school theater productions—may be restricted if the restrictions are both reasonable and further “legitimate pedagogical concerns.” Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260, 108 S. Ct. 562, 98 L. Ed. 2d 592 (1988).

Kuhlmeier is the leading Supreme Court case in this area. In Kuhlmeier, the school principal had banned from a school newspaper an article concerning divorce and an article addressing teen pregnancy. The principal's decision rested on two grounds: first, one article was inaccurate and second, the school newspaper was available to all students, even freshmen, some of whom the principal deemed too immature to read the articles. The principal's decision was upheld by the Supreme Court.

The Court first determined that the newspaper was not a public forum, but instead part of the school's journalism curriculum. It then rejected the First Amendment challenge stating:

[E]ducators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.

484 U.S. at 273 (footnote omitted). The Court then described “legitimate pedagogical concerns” expansively:

In addition, a school must be able to take into account the emotional maturity of the intended audience. . . . A school must also retain the authority to refuse to sponsor student speech that might reasonably be perceived to advocate drug or alcohol use, irresponsible sex, or conduct otherwise inconsistent with “the shared values of a civilized social order . . .”

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or to associate the school with any position other than neutrality on matters of political controversy . . . .

Id. at 272 (citation omitted).

There is clearly no constitutional problem with section 67-8002(d)'s requirement that any discussion of homosexuality within public schools be "age-appropriate." On the other hand, it does not necessarily further a "legitimate pedagogical concern" if a school opens up a political topic for discussion and then bans a viewpoint with which the state disagrees. As the Supreme Court noted in Kuhlmeier, 484 U.S. at 272, a school must "retain the authority to refuse . . . to associate the school with any position other than neutrality on matters of political controversy." Likewise, in Bethel School District No. 403 v. Fraser, 478 U.S. 675, 106 S. Ct. 3159, 92 L. Ed. 2d 549 (1986), while the Court held a school had acted within its permissible authority in imposing sanctions upon a student in response to a speech he delivered at a school assembly in which he used elaborate and explicit sexual metaphors, the Court also emphasized that the penalties imposed and upheld "were unrelated to any political viewpoint." 478 U.S. at 685. Although the state, the school board and educators have broad discretion to establish and control school curriculum and school-sponsored speech, at some point this discretion can be abused. A court is unlikely to be sympathetic towards restrictions that, rather than furthering legitimate pedagogical concerns, are simply efforts to suppress political viewpoints with which the state disagrees.

Clearly, the balance here is difficult. The proponents of this proposed initiative can make a strong argument that Kuhlmeier and Fraser allow the state to require that the shared values of the community be taught in the public schools and, since homosexual sodomy, like heterosexual sodomy, is illegal in Idaho, see Idaho Code § 18-6605, the state is acting within its discretion when it prohibits speech that approves of or encourages homosexual behavior. Similarly, the proponents of this initiative can point to Kuhlmeier's holding that a school can refuse to sponsor speech advocating "irresponsible sex" and, again, argue that, given the criminal code's prohibition against sodomy, the speech restrictions contained in section 67-8002(d) are constitutional. The initiative's proponents can further argue that the state can no doubt prohibit teachers in classrooms from encouraging violations of the Idaho Code, including Idaho Code § 18-6605, the sodomy statute.

The counterposition is that, rather than furthering a legitimate pedagogical concern, the proponents of this proposed initiative are instead using the public schools to promote their own political agenda and silence political viewpoints on homosexual issues with which they disagree. In this regard, it is significant that section 67-8002(d) does not specifically refer to the sodomy statute and the behavior therein proscribed, but instead prohibits speech that “endorse[s]” or “approve[s]” of “homosexual behavior,” generally. This could prohibit a classroom discussion of both sides of certain current political issues such as homosexuals in the military or the pros and cons of this initiative itself. A teacher’s concern might be that a frank discussion of both sides of these issues could be perceived as “endors[ing]” or expressing “approv[al]” of “homosexual behavior.”

There is a legitimate question regarding the constitutionality of the proposed initiative’s public school section. Given the stated purpose of this initiative, prohibiting government promotion of the “so-called ‘homosexual rights’ agenda” and the potentially broad reach of the public school section, a reviewing court could reasonably conclude that the restrictions are not an effort to further “legitimate pedagogical concerns,” but are instead an attempt to dictate a political position in the public classrooms throughout the state. This question may be a close one. However, since this initiative, if placed on the ballot and passed, will likely be challenged, its drafters may want to consider narrowing the scope of the public school section so that it restricts only school-sponsored speech that directly advocates violations of Idaho Code § 18-6605, the sodomy statute.

#### **B. Non-School-Sponsored Speech**

As noted, the proposed initiative’s restrictions extend not specifically to “school-sponsored” speech, but to speech at any “officially sanctioned public school . . . activity . . . [or] event” that endorses homosexual behavior. This phrase could be read as being broader than actual school-sponsored expression. It could encompass, for example, statements made by teachers at school board meetings and faculty meetings. Every statement made at such meetings is not reasonably perceived as bearing the “imprimatur of the school” and, consequently, being non-school-sponsored, the state’s leeway in restricting it is much narrower.

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The government's authority to limit school-sponsored speech to further legitimate pedagogical concerns does not extend to speech that is not sponsored by the school. Public school employees do not lose their First Amendment rights merely because they work for the state. *See Pickering v. Board of Education of Township High School District 205*, 391 U.S. 563, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968) (teacher cannot be fired for letter to editor of local newspaper criticizing school board); *City of Madison v. Wis. Emp. Rel. Com'm*, 429 U.S. 167, 97 S. Ct. 421, 50 L. Ed. 2d 376 (1976) (non-union teacher cannot be prohibited from speaking on negotiation issue at open school board meeting); *National Gay Task Force v. Board of Education of the City of Oklahoma*, 729 F.2d 1270 (10th Cir. 1984), *aff'd* 470 U.S. 903, 105 S. Ct. 1858, 84 L. Ed. 2d 776 (1985) (teacher cannot be punished for publicly advocating the repeal of an anti-sodomy law). To the extent that the proposed initiative encompasses speech that is not school-sponsored, such speech cannot constitutionally be restricted in this manner. Discussion and opinion on homosexual issues that do not bear the imprimatur of the state cannot be censored by the state. It may be that the drafters of this section did not intend to restrict speech that is not sponsored by a school. If so, they can clarify their intent by adding language that states that section 67-8002(d) applies only to school-sponsored expression. If, however, their goal is to restrict all expression on this topic, at any school activity or event, regardless of whether the expression is reasonably perceived to be sponsored by the school, First Amendment considerations would, in all probability, prevail.

### V.

#### **SECTION 67-8002(f) PUBLIC LIBRARIES**

Finally, we turn to section 67-8002(f), the public library provision. This provision states:

A government agency, board, commission, council, department, district, institution, or elected or appointed officer of the state of Idaho, or of any political subdivision thereof:

(f) Shall not, in a public library, except with the direct supervision or consent of a parent or legal guardian,

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make available to a minor child any publication which promotes, advocates, endorses, or encourages homosexual behavior, or which attempts to persuade minor children that homosexual behavior is a positive, normal, healthy, or socially acceptable activity or lifestyle.

This provision limits a minor's access, in public libraries, to publications that endorse or encourage homosexual behavior or express the viewpoint that a homosexual "lifestyle" can be "positive, normal, healthy, or socially acceptable." Minors are not, under the section, denied all access to such materials. Rather, their access is impeded by the requirement that they either be supervised by a parent or legal guardian when viewing such materials or, at least, obtain parental consent. This section of the initiative probably violates the First Amendment under both the overbreadth and vagueness doctrines.

Turning first to the overbreadth doctrine, a statute restricting free expression is unconstitutionally overbroad if it reaches protected speech. In this regard, a few points need to be made at the outset. Free speech includes not only expression of ideas, but also access to information and ideas. Moreover, although the First Amendment rights of minors are not co-extensive with those of adults, they are substantial. For example, in Board of Education v. Pico, 457 U.S. 853, 102 S. Ct. 2799, 73 L. Ed. 2d 435 (1982), the Supreme Court held unconstitutional a school board's decision to remove from school libraries books that contained ideas the board found offensive. In reaching its decision, the Court emphasized that minors have First Amendment rights to receive information and ideas and to "remain free to inquire, to study and to evaluate, to gain new maturity and understanding." 457 U.S. at 868 (citation and footnote omitted).

This is not to say that minors have a right to all information. To the contrary, material that is obscene is afforded no First Amendment protection and, in Ginsberg v. New York, 390 U.S. 629, 88 S. Ct. 1274, 20 L. Ed. 2d (1968), the Supreme Court held that states may constitutionally employ a variable obscenity standard which restricts the rights of minors to obtain sexually related materials that are not obscene as to adults, but are obscene as to minors. For example, a number of courts have upheld display statutes that restrict the display of materials that are obscene as to minors. See American Booksellers v. Webb, 919 F.2d 1493 (11th Cir. 1990); Davis-Kidd



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Booksellers, Inc. v. McWherter, 866 S.W.2d 520 (Tenn. 1993). The display statutes, however, were directed at obscene material, narrowly tailored and not applied to materials containing serious literary, artistic, political or scientific value for a reasonable 17-year-old minor. *Id.* Likewise, restrictions on speech that were not directed at obscenity, even under the variable standard applied to minors, have been struck down. See Erznoznik v. City of Jacksonville, 422 U.S. 205, 95 S. Ct. 2268, 45 L. Ed. 2d 125 (1975) (ordinance forbidding display in drive-in theaters of films containing nudity invalidated as all nudity cannot be deemed obscene even as to minors); Rushia v. Town of Ashburnham, 582 F. Supp. 900 (D. Mass. 1983) (town bylaw unconstitutional because it was not limited to materials obscene as to minors); Allied Artists Pictures Corp. v. Alford, 410 F. Supp. 1348 (W.D. Tenn. 1976) (ordinance overbroad because it prohibited exposing juveniles to films containing language that was not obscene as to juveniles).

Section (f) of the proposed initiative is not necessarily aimed at material obscene as to minors. Granted, the publications it addresses will involve issues related to sex and homosexuality, but not every discussion of those issues will be obscene or even erotic. The public library restriction is not so much directed at material that is somehow, under a variable obscenity standard, age-inappropriate, but rather at material that contains ideas the proponents of this initiative find offensive. It is precisely this type of restriction of the free exercise of First Amendment rights that the Constitution forbids.

In conjunction with the issue of overbreadth, the question arises as to whether this section can be narrowly construed, avoiding an overbreadth problem. The United States Supreme Court has stated that courts are required to construe challenged statutes narrowly, and that if a statute is “readily susceptible” to a narrowing construction that would make it constitutional, it will be upheld. Erznoznik v. City of Jacksonville, 422 U.S. 205, 95 S. Ct. 2268, 45 L. Ed. 2d 125 (1975). The key to this principle is that the statute “must be ‘readily susceptible’ to limitation” and a court “will not rewrite a state law to conform it to constitutional requirements.” American Booksellers v. Webb, 919 F.2d 1493, 1500 (11th Cir. 1990).

Since obscenity does not appear to be the concern of this section, but rather it is the expression of a particular viewpoint on homosexual issues that is targeted, a court may well have difficulty limiting this section to obscene speech that both expresses approval of a homosexual lifestyle and that also

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lacks serious artistic, literary, political or scientific value. A court would more likely conclude that the section is not “readily susceptible” to a limiting construction that does not involve essentially rewriting the provision.

The public library provision faces an additional problem under the vagueness doctrine. In the First Amendment context, laws restricting expression must not be so vague or so loose as to leave those who apply them too much discretion. Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676, 88 S. Ct. 1298, 20 L. Ed. 2d 225 (1968). As the Supreme Court has noted:

Vague standards, unless narrowed by interpretation, encourage erratic administration whether the censor be administrative or judicial; ‘individual impressions become the yardstick of action, and result in regulation in accordance with the beliefs of the censor rather than regulation by law.’

390 U.S. at 685 (citations omitted). Added to this is the risk that erratic standards cause expression not intended to be within the scope of the legal restriction to be impermissibly “chilled.” Thus, in Interstate Circuit, Inc., the Supreme Court held unconstitutionally vague an ordinance providing for the classification of films as suitable or unsuitable for young persons, concluding the ordinance lacked sufficient precision and standards.

The public library section raises vagueness concerns. Preliminarily, it is unclear from its terms who is to determine what publications endorse homosexual behavior. Does each librarian make the determination or will an administrative body be the decision maker? In either case, which or whose standards are to be used? Does a psychology textbook that states that homosexuality is no longer considered a psychological disorder thereby “endorse” homosexual behavior or seek to “persuade” minors who may read such a text that homosexuality can be an acceptable lifestyle? This section lacks the standards and precision that would allow it to withstand a constitutional attack based upon vagueness.

The proposed initiative does not deny all access by minors to the materials addressed by this section, but instead requires parental supervision or consent. However, precedent suggests this will not cure the First Amendment problems. Interstate Circuit, Inc., for example, involved a classification system in which minors apparently could view films classified as

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“unsuitable for youth” so long as a parent accompanied them. The ordinance was nevertheless struck down.

More importantly, minors’ access to the materials involved here is burdened, not, as noted, because the materials are age-inappropriate or obscene under a variable obscenity standard, but rather because the proponents of this initiative find offensive the ideas contained within those materials. If library material is vulgar, obscene or otherwise age-inappropriate for minors, with proper standards and tailoring, the state may enact laws that restrict or even prohibit minors’ access to those materials. What the state may not do is establish unique burdens barring minors’ access to library materials solely because the state disagrees with a viewpoint contained therein. This type of viewpoint-based censorship has been determined to be unconstitutional.

### VI.

### CONCLUSION

In conclusion, important constitutional issues raised by the “minority status” provision are now pending before the United States Supreme Court, and these issues should be resolved in the near future. The First Amendment questions implicated by the public funding, public school and public library provisions are substantial. The public funding and public library provisions are particularly vulnerable to attack. To increase the likelihood that these provisions would be able to withstand a constitutional attack on First Amendment grounds, the drafters may wish to modify the language of this proposed initiative to address the concerns discussed in this opinion.

I HEREBY CERTIFY that the enclosed measure has been reviewed for form, style and matters of substantive import and that the recommendations set forth above have been communicated to petitioner Kelly Walton by deposit in the U.S. Mail and by telefax a copy of this certificate of review.

Yours very truly,

ALAN G. LANCE  
Attorney General

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**Analysis by:**

MARGARET R. HUGHES

Deputy Attorney General

Civil Litigation Division

<sup>1</sup>The Idaho Constitution could be construed differently from the United States Constitution. There is, however, currently no direct precedent under the Idaho Constitution indicating how the Idaho Supreme Court would rule on these issues or if the Idaho Supreme Court would choose to vary its analysis from that of the United States Supreme Court.

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July 24, 1995

The Honorable Pete T. Cenarrusa  
Secretary of State  
**HAND DELIVERED**

Re: Certificate of Review;  
Initiative Entitled "Non-Public Education Enhancement Act"

Dear Mr. Cenarrusa:

An initiative petition was filed with your office on June 26, 1995. Pursuant to Idaho Code § 34-1809, this office has reviewed the petition and has prepared the following advisory comments. It must be stressed that, given the strict statutory time frame in which this office must respond and the complexity of the legal issues raised in this petition, our review can only isolate areas of concern and cannot provide in-depth analysis of each issue. Further, under the review statute, the Attorney General's recommendations are advisory only, and the petitioner is free to accept or reject them in whole or in part.

### **BALLOT TITLE**

When the initiative is filed, our office will prepare a short ballot title and a long ballot title. The ballot titles should impartially and straightforwardly state the purpose of the measure without being argumentative and without creating prejudice for or against the measure. While our office prepares the titles, petitioner may submit proposed language in keeping with the standards for ballot titles. If petitioner submits such language, it will be considered by the Attorney General's staff as it drafts the ballot titles.

### **MATTERS OF SUBSTANTIVE IMPORT**

The proposed initiative provides a \$500 state income tax credit to parents of compulsory-education-aged children who do not attend public school. The stated purpose for the initiative is "to encourage non-public education growth and to alleviate the pressure and expense of overcrowded schools." The initiative proposal would allow parents of non-public school

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students between the ages of 7 and 16 to claim the credit for any tax year in which the student did not attend an Idaho public school.

The Attorney General has previously addressed the questions of private school tuition tax credits and voucher systems. The proposals that prompted those opinions fundamentally differed from this initiative proposal which is a tax credit for non-use of public schools. The issue of taxpayer support of private schools still remains and therefore it will be addressed.

Although this initiative is distinguishable from previous efforts to support private schools, similar constitutional concerns remain. If enacted into law, this proposal will probably encourage some parents to remove their children from public school and enroll their children in private parochial schools. Whenever it appears that tax dollars are being used to support a religious institution, the proposal must be analyzed under the Constitutions of both the United States and Idaho.

### ANALYSIS UNDER THE U.S. CONSTITUTION

The United States Supreme Court, in Committee for Public Education v. Nyquist, 413 U.S. 756, 93 S. Ct. 2955, 37 L. Ed. 2d 948 (1973), declared certain tax benefits to religious schools unconstitutional. In that case, taxpayers challenged a New York statute which, among other things, granted benefits to parents of non-public school students. The Court struck down the scheme, citing the Establishment Clause limitations that require a state to neither advance nor inhibit religion.

Ten years later, in the case of Mueller v. Allen, 463 U.S. 388, 103 S. Ct. 3062, 77 L. Ed. 2d 721 (1983), the Supreme Court held that a Minnesota law providing a tax deduction for tuition, school books, and school transportation expenses for both public and private school students was constitutional. In comparing the Minnesota law to the New York statute struck down in Nyquist, the Court drew several distinctions. First, the tax deduction for tuition expenses was only one of many deductions available to Minnesota taxpayers. The invalid statute in Nyquist was criticized by the Court as “granting thinly disguised ‘tax benefits,’ actually amounting to tuition grants, to the parents of children attending private schools.” Mueller, 103 S. Ct. at 3066. The initiative proposal at hand would provide a tax credit to parents of Idaho’s non-public school students. Such a credit differs from both the tax

## CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

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deduction allowed in Mueller and the outright grant struck down in Nyquist. However, the Mueller Court expressed its preference for a tax scheme based on a tax deduction rather than a tax credit.

The Mueller Court spoke approvingly of the availability of the tax deduction to all parents of school-aged children. The Nyquist benefits were available only to parents of non-public school children. The present initiative limits its benefits to parents of children who do not attend public school, distinguishing it from the plan approved by the Court in Mueller. It is, however, broader in its scope than the New York plan invalidated in Nyquist, since, for example, the benefits under Idaho's proposed initiative would be available to parents of home-schooled children.

The Court also favored the Minnesota tax plan because it channeled any assistance to parochial schools through individual parents, whereas in Nyquist, at least some of the tax benefits were transmitted directly to parochial schools. The proposed initiative provides a benefit directly to parents, similar to the Minnesota plan. The Court expressed the importance of this distinction, saying, "Where, as here, aid to parochial schools is available only as a result of decisions of individual parents no 'imprimatur of State approval' can be deemed to have been conferred on any particular religion, or on religion generally." Mueller, 103 S. Ct. at 3069, citing Widmar v. Vincent, 454 U.S. 263, 102 S. Ct. 269, 70 L. Ed. 2d 440 (1981). The Court went on to say, "The historic purposes of the [Establishment] clause simply do not encompass the sort of attenuated financial benefit, ultimately controlled by the private choices of individual parents, that eventually flows to parochial schools from the neutrally available tax benefit at issue in this case." Mueller, 103 S. Ct. at 3069.

The constitutionality of the proposed initiative under the First Amendment is a debatable issue. However, the proposed initiative's grant of the tax credit to parents of all non-public school students—home-schooled, private non-sectarian, and private parochial—coupled with the absence of a direct financial benefit to parochial schools, makes it probable this proposal will be upheld under the U.S. Constitution.

### ANALYSIS UNDER THE IDAHO CONSTITUTION

The Idaho Constitution, art. 9, § 5, states in part:

## CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

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Neither the legislature nor any county, city, town, township, school district, or other public corporation, shall ever make any appropriation, or pay from any public fund or moneys whatever, anything in aid of any church or sectarian or religious society, or for any sectarian or religious purpose, or to help support or sustain any school, academy seminary, college, university, or other literary or scientific institution, controlled by any church, sectarian or religious denomination whatsoever; nor shall any grant or donation of land, money or other personal property ever be made by the state, or any such public corporation, to any church or for any sectarian or religious purpose . . . .

In interpreting this article, the Idaho Supreme Court has held that Idaho's constitution more positively enunciates the separation between church and state than does the Constitution of the United States. Epeldi v. Engelking, 94 Idaho 390, 488 P.2d 860 (1971). In Epeldi, the court decided a case involving a statute that mandated school districts to provide transportation to students attending private schools within the district's boundaries. This was found to be a benefit to the private schools. The Supreme Court found the statute in violation of art. 9, § 5 of the Idaho Constitution. The court reasoned that, since some of the private schools benefiting from the law were religious or church-affiliated schools, the provision of transportation for their students was a government appropriation in aid of a sectarian institution and, thus, unconstitutional.

The Epeldi court established a simple test, drawn from the constitution itself, to determine the validity of the statute. The court said:

The Idaho Constitution Article 9, section 5, requires this court to focus its attention on the legislation involved to determine whether it is in "aid of any church" and whether it is "to help support or sustain" any church affiliated school.

94 Idaho at 395, 488 P.2d at 493.

The Attorney General has recently provided an opinion on the constitutionality of tuition tax credits or vouchers. In a guideline issued to a state representative on February 7, 1995, the Office of the Attorney General opined



## CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

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that a tax credit for private school tuition is, like the bus service in Epeldi, an unconstitutional appropriation in aid of a sectarian institution. In arriving at that opinion, the Attorney General analyzed the tuition tax credit plan under the Idaho Constitution and determined that the credit was most likely a “grant or donation of . . . money” to a church-affiliated school, which is specifically prohibited by art. 9, § 5 of the Idaho Constitution. 1995 Idaho Att’y Gen. Ann. Rpt. —, —.

The initiative proposal under review here differs from a tax credit for private school tuition, which, following the Attorney General’s previous analysis, violates the Idaho Constitution. It is also clearly distinguishable from the private school transportation statute which was struck down in Epeldi. In those cases, the state aid to the private school was more direct than the aid proposed by this initiative. If this initiative were approved, it is theoretically possible (albeit unlikely) that no benefit whatsoever will accrue to church affiliated schools. In Epeldi, the Supreme Court determined that transportation was a benefit to the private school. In the case of a tuition tax credit, only those parents who pay tuition may claim it. A tax credit for non-use of public schools does not necessarily benefit parochial schools in the same way as the more direct tuition tax credit or free bus transportation.

Presently, Idaho Code § 63-3029A offers an income tax credit for charitable contributions to Idaho’s public or private non-profit institutions of elementary, secondary or higher education. Presuming Idaho Code § 63-3029A is constitutional, it follows that this proposed initiative is likewise constitutional. It can be logically argued that there is little to distinguish between the benefits received by private schools under Idaho Code § 63-3029A and those under the proposed initiative.

The constitutionality of this proposed initiative under the Idaho Constitution is also a debatable question. However, given that any benefit to parochial schools is remote, it follows that the proposed credit may well pass constitutional muster. The benefit under the proposed scheme flows to parents who choose not to educate their children within Idaho’s public school system and not to the parochial schools. Neither the purpose nor the effect of the proposed initiative appear to violate Idaho’s proscription regarding aid to religious or sectarian schools.

## ISSUES RELATING TO IDAHO'S INCOME TAX STATUTES

There are at least five tax-related issues which should be addressed by the drafters of this initiative:

### **A. Differential Treatment of Taxpayers**

The initiative requires a student for whom the tax credit is received be a resident of Idaho for 270 days of the taxable year. If a parent from another state moves into Idaho during the summer and begins home schooling, that parent will be ineligible for the tax credit. This residency distinction between taxpayers identical in all other respects may violate the Commerce Clause of the U.S. Constitution. The drafters may wish to draft language that would allow a partial or pro rata tax credit for part-year Idaho residents.

### **B. Definition of "Qualified Dependent"**

The proposed initiative incorporates the definition of "qualified dependent" from Internal Revenue Code § 151(c)(3). That section of the Code does not define qualified dependents, but refers to children who may be claimed as dependents. The drafters of this initiative should clarify the definition of "qualified dependent." The initiative should also clearly state that only the taxpayer who is entitled to claim the dependent exemption for the child may claim the tax credit for nonuse of public schools.

### **C. Pupils Transferred to Neighboring States**

Idaho Code § 33-1403 allows border school districts to transfer students to schools in neighboring states. The cost of tuition for such a student is paid by the State of Idaho and the school district involved. This initiative, as it is currently drafted, would permit the parent of such a student to claim the tax credit even though the child has been educated in a public school at the state's expense. The drafters should remedy this apparent inconsistency.

### **D. Statutory Interpretation**

The proposed initiative provides the tax credit for parents of students who do not attend an Idaho public school. If a student attends a public school,

## CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

even for part of a school year or on a limited dual enrollment basis, then his or her parent will be precluded from claiming the credit.

### **E. Effective Date**

The initiative will be presented to the voters in November 1996, which is after the deadline date for printing of state tax forms. Since the Tax Commission will not know whether the initiative has passed or failed, the tax form must include some explanatory language and a conditional tax credit. This problem may be alleviated by changing the effective date of the initiative from January 1, 1996, to January 1, 1997.

## **CONCLUSION**

It is difficult to forecast where the United States Supreme Court will draw the line between actions that constitute impermissible "aid" to religious institutions and those which are permissible benefits to individual taxpayers. The Idaho Supreme Court also has not clearly ruled on this question. The constitutionality of statutory provisions involving questions of income tax relief which might be construed as having the effect of aiding religious educational institutions is an extremely difficult issue. However, it appears the proposed initiative may well pass constitutional muster. The petitioner is advised to consider making the suggested statutory revisions in order to make the proposed initiative compatible with Idaho's statutory tax scheme.

I HEREBY CERTIFY that the enclosed measure has been reviewed for form, style, and matters of substantive import and that the conclusions set forth above have been communicated to the petitioner, John Slack, by deposit in the U.S. Mail of a copy of this certificate of review.

Sincerely,

ALAN G. LANCE  
Attorney General

**Analysis by:**  
KIRBY D. NELSON  
Deputy Attorney General

## CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

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July 28, 1995

The Honorable Pete T. Cenarrusa  
Secretary of State  
**HAND DELIVERED**

Re: Certificate of Review;  
Initiative Regarding Minimum Wage

Dear Mr. Cenarrusa:

An initiative petition was filed with your office on July 7, 1995. Pursuant to Idaho Code § 34-1809, this office has reviewed the petition and has prepared the following advisory comments. It must be stressed that, given the strict statutory timeframe in which this office must respond and the complexity of the legal issues raised in this petition, our review can only isolate areas of concern and cannot provide in-depth analysis of each issue that may present problems. Further, under the review statute, the Attorney General's recommendations are "advisory only," and the petitioners are free to "accept or reject them in whole or in part."

### **BALLOT TITLE**

Following the filing of the proposed initiative, our office will prepare short and long ballot titles. The ballot titles should impartially and succinctly state the purpose of the measure without being argumentative and without creating prejudice for or against the measure. While our office prepares the titles, if petitioners would like to propose language with these standards in mind, we would recommend that they do so and their proposed language will be considered.

### **MATTERS OF SUBSTANTIVE IMPORT**

Idaho Code §§ 44-1501, *et seq.*, is the Idaho Minimum Wage Law ("IMWL"). This law regulates minimum wage and sets standards for hours worked similar to the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201, *et seq.* The FLSA applies to employees of federal, state and local governments, employees engaged in or producing goods for interstate commerce, and employees in certain other enterprises. It does not apply to private

## CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

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employers who are not engaged in interstate commerce and who have annual gross sales of less than \$500,000.

The initiative would make essentially four (4) changes in the Idaho Minimum Wage Law. The initiative would raise the minimum hourly wage by fifty cents each year for four consecutive years, until the minimum wage would be six dollars and twenty-five cents (\$6.25) per hour commencing on July 1, 2000. Presently, the IMWL states that employers subject to the IMWL must pay a minimum wage of four dollars and twenty-five cents (\$4.25) per hour.

In addition, the IMWL presently permits tips to be included in determining whether wages of employees receiving tips comply with the law. For example, if a tipped employee is paid at a rate of three dollars and twenty-five cents (\$3.25) per hour, the amount of tips actually received up to a maximum of one dollar and six cents (\$1.06) (*i.e.*, twenty-five percent of the applicable minimum wage of \$4.25), can be added to the existing hourly wage for purposes of compliance with the IMWL. The proposed initiative would repeal this provision.

The initiative would also delete from the law the exemptions relating to overtime pay. Presently, the IMWL has the same exemptions or exceptions for overtime/maximum work week requirements as provided under the FLSA, which are expressly incorporated in the IMWL. Thus, the IMWL overtime provisions would not apply to the classes of employees exempted under 29 U.S.C. § 213; nor does it apply to the classes of employers found at 29 U.S.C. § 203. For example, the IMWL overtime provisions currently do not apply to taxicab drivers who are exempted under 29 U.S.C. § 213(b)(17). The initiative would repeal such exemptions and require that all employers who fall within the purview of the Idaho Minimum Wage Law pay overtime for employment in excess of forty (40) hours per workweek.

Last, the initiative would repeal certain exemptions in Idaho Code § 44-1504, which contains a list of employees who are excepted from all of the provisions of the IMWL. The initiative would repeal the exemptions for: (1) agricultural labor; (2) domestic service; (3) outside salesmen; and (4) minors under the age of sixteen working part-time (unless engaged in odd jobs not exceeding a total of four (4) hours per day with any one (1) employer).

## CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

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Upon review, it is the opinion of this office that there is no constitutional or statutory impediment to the petitioner's proposed changes to the Idaho Minimum Wage Law. Moreover, the FLSA has a specific savings clause which allows states to enact more generous minimum wage laws. 29 U.S.C. § 218 provides in relevant part:

(a) No provision of this chapter or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter or a maximum workweek lower than the maximum workweek established under this chapter.

Thus, Idaho may enact a more generous minimum wage and maximum workweek law which would not be preempted by the FLSA. Pacific Merchant Shipping Ass'n v. Aubry, 918 F.2d 1409, *cert. denied* 112 S. Ct. 2956, 119 L. Ed. 2d 578 (9th Cir. 1990); Baxter v. M.J.B. Investors, 876 P.2d 331 (Ore. Ct. App. 1994); and Berry v. KRTV Communications, Inc., 865 P.2d 1104 (Mont. 1993). The proposed initiative does not contravene state or federal statutory or constitutional law.

I HEREBY CERTIFY that the enclosed measure has been reviewed for form, style and matters of substantive import and that the recommendations set forth above have been communicated to petitioner Randy Ambuehl by deposit in the U.S. Mail of a copy of this certificate of review.

Sincerely,

ALAN G. LANCE  
Attorney General

**Analysis by:**  
THOMAS F. GRATTON  
Deputy Attorney General  
Intergovernmental and Fiscal Law

## CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

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October 13, 1995

The Honorable Pete T. Cenarrusa  
Secretary of State

**HAND DELIVERED**

Re: Certificate of Review;  
Sales Tax Initiative—Sales Tax Rate

Dear Mr. Cenarrusa:

An initiative petition was filed with your office on September 13, 1995. Pursuant to Idaho Code § 34 1809, this office has reviewed the petition and has prepared the following advisory comments. It must be stressed that, given the strict statutory time frame in which this office must respond and the complexity of the legal issues raised in this petition, our review can only isolate areas of concern and cannot provide in-depth analysis of each issue. Further, under the review statute, the Attorney General's recommendations are advisory only and the petitioner is free to accept or reject them in whole or in part.

### **BALLOT TITLE**

When the initiative is filed, our office will prepare a short ballot title and a long ballot title. The ballot title should impartially and straightforwardly state the purpose of the measure without being argumentative and without creating prejudice for or against the measure. While our office prepares the titles, petitioner may submit proposed language in keeping with the standards for ballot titles. If petitioner submits such language, it will be considered by the Attorney General staff as it drafts the ballot titles.

### **MATTERS OF SUBSTANTIVE IMPORT**

The proposed initiative provides for an amendment to Idaho Code § 63-3619 to reduce the sales tax rate from 5% to 3%. The initiative does not propose to make any change to the rate of the complementary use tax, which raises a question of whether it can survive a Commerce Clause challenge. In addition, by failing to address the use tax petitioners appear to have failed to accomplish at least part of their apparent purpose. Also, to the extent there

are Commerce Clause violations, there are NAFTA and GATT violations. The analysis below relating to the Commerce Clause applies equally to NAFTA and GATT.

### **ANALYSIS UNDER THE CONSTITUTION**

The proposed initiative amends Idaho Code § 63-3619 to reduce the tax rate for all transactions subject to sales tax within the State of Idaho. However, the proposed initiative has not addressed the use tax rate of 5% which is controlled by Idaho Code § 63-3621. Because the initiative does not propose to amend the use tax, if it is adopted Idaho will be a jurisdiction with two varying tax rates, a 3% rate on all items subject to sales tax, and a 5% rate on all items subject to use tax. Idaho Code § 63-3621(c) provides “the provisions of this section [the use tax section] shall not apply when a retailer pays sales tax on the transaction and collects reimbursement for such tax from the customer.” Thus, a 3% rate will apply to those transactions subject to Idaho sales tax under Idaho Code § 63-3619, a 5% rate will apply to those transactions subject to use tax under Idaho Code § 63-3621.

The net effect of the resulting statutory scheme is to discriminate against out-of-state sellers. In the typical situation, the sales tax applies when the sale is made by an in-state seller, and the use tax applies when the sale is made by an out-of-state seller to an Idaho resident and the goods are shipped to Idaho. Thus, the local retailer would collect a 3% tax, while the out-of-state retailer would collect a 5% tax or the purchaser would remit a 5% use tax. The United States Constitution prohibits discrimination against interstate commerce. U.S. Const. Art. I, § 8, cl. 3; Associated Industries of Missouri v. Lohman, — U.S. —, 114 S. Ct. 1815, 128 L. Ed. 2d 639 (1994). In Lohman, the Court ruled Missouri’s use tax scheme violated the Commerce Clause. Missouri had a 4.225% sales tax on the sale of all goods within the state and a statewide use tax of 4.225% on goods brought into the state after being purchased elsewhere. In addition, the state allowed local governments to impose a local sales tax. Many of these jurisdictions had imposed local sales taxes ranging from .05% to 3.5%. To compensate for the higher sales tax the Missouri Legislature enacted an additional use tax of 1.5%. This additional use tax was challenged as being an impermissible burden on interstate commerce.



The Supreme Court held that to be constitutional a use tax must be a compensatory tax designed to make interstate commerce bear a burden already born by intrastate commerce. The Court stated that the end result under the compensatory tax theory is that “when the account is made up, a stranger from afar is subject to no greater burden . . . than the dweller within the gates. The one pays upon one activity or incident, and the other upon another, but the sum is the same when the reckoning is closed.” Lohman, — U.S. at —, 114 S. Ct. at 1821, *citing* Henneford v. Silus Mason Company, 300 U.S. 577, 584, 57 S. Ct. 524, 527, 81 L. Ed. 814 (1937). The Court held Missouri’s use tax scheme ran afoul of the basic requirement of a compensatory tax because the burdens imposed on interstate and intrastate commerce are not equal:

Where the use tax exceeds the sales tax, the discrepancy imposes a discriminatory burden on interstate commerce. Out-of-state goods brought into such a jurisdiction are subjected to a higher levy than are goods locally. The resulting disparity is incompatible with [prior rules adopted by the Court].

*Id.*

Quite simply, sellers of out-of-state goods are discriminated against when they have to collect a higher tax than in-state sellers. If enacted, the initiative would result in a 3% tax on in-state sales and a 5% tax rate on purchases of goods from outside the state. Thus, the taxes are not compensatory and thus run afoul of the Commerce Clause. The petitioners of the proposed initiative can remedy the constitutional defect by simply amending Idaho Code § 63-3621 to lower the use tax rate to 3%.

### **ISSUES RELATING TO IDAHO’S SALES TAX STATUTES**

On two prior occasions, 1984 and 1987, the Idaho Legislature has amended the rate of the sales and use taxes. In 1984, the Idaho Legislature raised the rate from 3% to 4%. See 1984 Sess. Laws, ch. 287. In 1987, the Idaho Legislature raised the sales and use tax from 4% to 5%. See 1987 Sess. Laws, ch. 31. In both instances, the legislature amended both Idaho Code § 63-3619 and § 63-3621 to make the sales and use tax complementary. If the petitioners would amend the initiative to make the sales and use tax rates con-

## CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

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sistent, the proposed initiative would comport with past legislative practice and accomplish the apparent purpose of the petitioners.

### EFFECTIVE DATE

The petitioners have not proposed an effective date for the initiative. If the initiative passes, it will become law once the governor proclaims the initiative as approved by a majority of the voters. See Idaho Code § 34-1813. This allows no time to implement the necessary administrative mechanics for both retailers and the Idaho Tax Commission. Retailers will need time to program computers to recognize the new law, and the Tax Commission will need time to draft rules and prepare forms. If the effective date is in the middle of a reporting period, retailers' preparation of sales tax returns for that period will be extremely difficult. Experience indicates it is better to have the effective date at the beginning of a calendar quarter.

### CONCLUSION

The petitioners of the proposed initiative need to keep the sales and use taxes consistent. Otherwise, the initiative could face serious constitutional problems as a violation of the United States Commerce Clause as well as a violation of both NAFTA and GATT.

I hereby certify that the enclosed measure has been reviewed for form, style and matters of substantive import and that the conclusion set forth above has been communicated to the petitioner, Mary J. Charbonough, by deposit in the U.S. Mail of a copy of this certificate of review.

Yours very truly,

ALAN G. LANCE  
ATTORNEY GENERAL

**Analysis by:**  
BRIAN G. NICHOLAS  
Deputy Attorney General  
Civil Litigation Division

## CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

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October 13, 1995

The Honorable Pete T. Cenarrusa  
Secretary of State  
**HAND DELIVERED**

Re: Certificate of Review;  
Sales Tax Initiative—Exemption for Food, Water and  
Clothing

Dear Mr. Cenarrusa:

An initiative petition was filed with your office on September 13, 1995. Pursuant to Idaho Code § 34-1809, this office has reviewed the petition and has prepared the following advisory comments. It must be stressed that, given the strict statutory time frame in which this office must respond and the complexity of the legal issues raised in this petition, our review can only isolate areas of concern and cannot provide in-depth analysis of each issue. Further, under the review statute, the Attorney General's recommendations are advisory only and the petitioner is free to accept or reject them in whole or in part.

### **BALLOT TITLE**

When the initiative is filed, our office will prepare a short ballot title and a long ballot title. The ballot title should impartially and straightforwardly state the purpose of the measure without being argumentative and without creating prejudice for or against the measure. While our office prepares the titles, petitioner may submit proposed language in keeping with the standards for ballot titles. If petitioner submits such language, it will be considered by the Attorney General staff as it drafts the ballot titles.

### **MATTERS OF SUBSTANTIVE IMPORT**

The proposed initiative provides for an amendment to Idaho Code § 63-3619 to exempt from sales tax the purchase of water, food and clothing. "These three (3) items are necessities of life, for everyone, therefore, this tax should be exempt from the current Idaho Tax Revenue . . . ." There is no constitutional provision prohibiting the exemption of water, food and clothing

from Idaho sales and use taxes; however, this initiative only exempts food, water and clothing sales and not use tax. By failing to address use tax, the petitioners risk creating an inconsistency in Idaho law and have failed, at least in part, to accomplish their stated purpose.

### **ISSUES RELATING TO THE IDAHO SALES TAX**

The initiative proposes to amend the sales tax statute instead of creating an exemption statute. Most of the exemption statutes from the Idaho Sales and Use Tax Act are codified at Idaho Code § 63-3622 and, specifically, Idaho Code §§ 63-3622A through 63-3622KK. Idaho Code § 63-3619 imposes a tax on retail sales. The petitioners should strongly consider a change to the initiative to provide for the creation of a new exemption statute (a new Idaho Code § 63-3622LL) instead of amending Idaho Code § 63-3619.

If the initiative is not changed, the petitioners will not completely accomplish their objective of exempting food, water and clothing from the Idaho sales and use tax. The initiative as drafted exempts the purchase of food, water and clothing from sales tax, but does not exempt food, water and clothing from the use tax. Idaho Code § 63-3621 provides in relevant part:

An excise tax is hereby imposed on the storage, use, or other consumption in this state of tangible personal property acquired on or after July 1, 1995, for storage, use, or other consumption in this state at the rate of five per cent (5%) of the value of the property, and a recent sales price shall be presumptive evidence of the value of the property.

The statute further provides that every person storing, using or otherwise consuming, in this state, tangible personal property, is liable for the tax and that liability is not extinguished until the tax has been paid to this state. The statute further provides:

Every retailer engaged in business in this state and making sales of tangible personal property for the storage, use, or other consumption in this state, not exempted under section 63-3622, Idaho Code, shall, at the time of making the sales or, if storage, use or other consumption of the tangible personal property is not then taxable hereunder, at the time the

storage, use or other consumption becomes taxable, collect the tax from the purchaser and give to the purchaser a receipt therefor in the manner and form prescribed by the state tax commission.

Because Idaho Code § 63-3621 does not refer to any exemptions contained in Idaho Code § 63-3619, but, instead, only refers to the exemptions contained in Idaho Code § 63-3622, the use tax would still be due on food, water and clothing. This failure to exempt food, water and clothing from the use tax defeats the very purpose of the petitioners. Idaho Code § 63-3621 further requires the retailer to collect the use tax from the purchaser. Thus, despite the language of the initiative the retailer will collect a 5% tax from the purchaser. As noted above, the petitioners should add an exemption statute to Idaho Code § 63-3622, instead of amending Idaho Code § 63-3619. Alternatively, the petitioners may wish to amend Idaho Code § 63-3621 to exempt food, water and clothing from use tax. This alternative, though it would achieve an exemption, is more cumbersome than simply creating a new exemption statute.

## **DEFINITIONAL PROVISIONS TO THE INITIATIVE**

### **1. Definition of Food**

The proposed initiative does not define the term “food.” Many states which exempt food have some specific definition for food, such as a reference to the federal statute defining food for purposes of food stamps. As drafted, the term would exempt sales of the most expensive restaurant food as well as basic groceries. Further, the initiative is unclear as to whether the petitioners intended to exempt the sale of beverages commonly sold with food such as soda pop, juice, milk, coffee and tea.

### **2. Definition of Clothing**

Like the term “food,” “clothing” is not defined. It is not clear whether the petitioners intended to exempt as “clothing” specialized sporting equipment such as uniforms, helmets, batting gloves, knee pads, lifejackets and other similar items. In addition, the term clothing would exempt the sale of items regardless of price and would include everything from tee shirts to mink coats.

**3. Definition of Water**

Water, when delivered to consumers at the place of consumption by means of pipes, wires, mains or similar systems, is exempted from the sales and use tax. See Idaho Code § 63-3622F. It appears the petitioners intend to include water delivered to consumers for consumption. However, the term “water” is not clearly defined. The petitioners’ intent may be to exempt bottled water and other beverages made from water such as tea, coffee or juices which contain a substantial quantity of water. The petitioners may wish to reconsider the definition of water.

**ISSUES RELATING TO IDAHO’S INCOME TAX ACT**

Idaho Code § 63-3024A provides for fifteen dollars (\$15.00) credit for allowable personal exemptions claimed on the state income tax return. Though not specifically defined as such, it is commonly understood the credit was created as an offset for sales taxes paid on food. The proposed initiative, by creating a sales tax exemption, may, to such extent, duplicate the income tax credit. If duplication of the income tax credit is not intended, the petitioners may wish to include a provision repealing Idaho Code § 63-3024A.

**EFFECTIVE DATE**

The petitioners have not proposed an effective date for the initiative. If the initiative passes, it will become law once the governor proclaims the initiative as approved by a majority of the voters. *See* Idaho Code § 34-1813. This allows no time to implement the necessary administrative mechanics for both retailers and the Idaho Tax Commission. Retailers will need time to program computers to recognize the new law, and the Idaho Tax Commission will need time to draft rules and prepare forms. If the effective date is in the middle of a reporting period, retailers’ preparation of sales tax returns for that period will be greatly complicated. Experience indicates it is better to have the effective date at the beginning of a calendar quarter.

**CONCLUSION**

The initiative does not accomplish what the petitioners intended. In order to accomplish the obvious purpose, the initiative needs to be redrafted

## CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

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and resubmitted as a new exemption to the Idaho sales and use tax. Alternatively, the petitioners could propose an initiative modifying the use tax statute as well as the sales tax statute.

In addition, the definitions of food, water and clothing should be clarified. The petitioners are advised to consider making those statutory revisions in order to make the proposed initiative compatible with the Idaho sales and use tax scheme.

I hereby certify that the enclosed measure has been reviewed for form, style and matters of substantive import and that the conclusion set forth above has been communicated to the petitioner, Mary J. Charbonough, by deposit in the U.S. Mail of a copy of this certificate of review.

Yours very truly,

ALAN G. LANCE  
ATTORNEY GENERAL

**Analysis by:**  
BRIAN G. NICHOLAS  
Deputy Attorney General  
Civil Litigation Division

## CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

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October 13, 1995

Honorable Pete T. Cenarrusa  
Secretary of State  
**HAND DELIVERED**

Re: Certificate of Review;  
Initiative Entitled "Definition of Life"

Dear Mr. Cenarrusa:

An initiative petition entitled "Definition of Life" was filed with your office on September 18, 1995. Pursuant to Idaho Code § 34-1809, this office has reviewed the petition and has prepared the following advisory comments. Under the review statute, the Attorney General's recommendations are "advisory only," and the petitioners are free to "accept or reject them in whole or in part."

### **BALLOT TITLE**

Following the filing of the proposed initiative, our office will prepare a short and long ballot title. The ballot title should impartially and straightforwardly state the purpose of the measure without being argumentative and without creating prejudice for or against the measure. If petitioners would like to propose language with these standards in mind, we would recommend that they do so. Their proposed language will be considered, but our office is responsible for preparing the title.

### **MATTERS OF SUBSTANTIVE IMPORT**

The proposed initiative would amend title 18, chapter 6 of the criminal code, the "Abortion and Contraceptives" chapter, and prohibit the taking of any life. "Life" is defined in section 18-616 of the proposed initiative as consisting of "either brain stem activity, or [a] heart beat in a human being." Thus, the effect of this proposed initiative is to criminalize abortion where there is either brain stem activity or a detectable heartbeat in the fetus. Not only would such an abortion be criminalized by this proposed initiative, the mandatory punishment for such an abortion would be the death penalty. In this regard, section 18-619 of the proposed initiative provides for a penalty of



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capital punishment. It further states that a violation of the proposed initiative's terms can only be prosecuted by a court as "premeditated murder" and may not be "plea bargained to any other charge." Finally, the proposed initiative provides, in section 18-616, that its definition of life is "for the purpose of protection by the State of Idaho under the Constitution of the United States, and the Constitution of the State of Idaho."

The proposed initiative violates the United States Constitution. The United States Supreme Court held in Roe v. Wade, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 143 (1973), that a woman has a fundamental right to terminate a pregnancy. The Court established what has been characterized as a "trimester approach" to govern the regulation of abortion. Almost no governmental regulation impeding a woman's access to an abortion was permitted during the first trimester of a pregnancy. Governmental regulation designed to protect the woman's health, but not to further the state's interest in potential life, was permitted during the second trimester. Finally, during the third trimester, when the fetus was viable, certain abortion prohibitions were permitted so long as they did not jeopardize the life or health of the woman. Roe, 410 U.S. at 163-66.

In Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992), the United States Supreme Court reaffirmed the essential holding of Roe. There were some modifications to the Roe decision. The Court rejected Roe's trimester construct, reasoning that its "rigid prohibition on all previability regulation aimed at the protection of fetal life . . . undervalue[d] the State's interest in potential life . . . ." Casey, 112 S. Ct. at 2818. The Court instead adopted a new "undue burden" test. Under this test, a state may regulate abortion to further its interest in potential life or to foster the health of the mother so long as the "purpose or effect" of the regulation is not to place "a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." *Id.* (Citation omitted.) Once the fetus is viable, the state may proscribe abortion "except where it is necessary, in appropriate medical judgment, for the preservation of the life or the health of the mother." *Id.* at 2821.

The proposed initiative prohibits an abortion if brain stem activity or a heartbeat is detectable in the fetus. This restriction clearly prohibits some previability abortions. Viability is the point at which "there is a realistic possibility of maintaining and nourishing a life outside the womb . . . ." Casey,

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112 S. Ct. at 2817. Survival as early as 21 weeks gestational age is possible. However, viability does not reach back to when brain stem activity or a heart-beat is initially detectable. For example, a heartbeat can occur as early as the 32nd day of fetal development. This proposed initiative, by bringing within its ban previability abortions, violates Casey's mandate that the state not place a "substantial obstacle" in the path of a woman seeking an abortion before the fetus attains viability.

The proposed initiative defines life "for the purpose of protection by the State of Idaho under the Constitution of the United States, and the Constitution of the State of Idaho . . . ." If it is the intent of the proponents of this proposed initiative to either amend or modify the federal or state constitutions, this goal cannot be accomplished through Idaho's initiative process. The federal Constitution can only be amended at a national level. *See* U.S. Const. art. V. It cannot be amended or modified by the people of Idaho acting alone. Likewise, the state constitution cannot be amended through the initiative process. Initiated legislation is on equal footing with legislation enacted by the state, and it does not carry the legal weight of a constitutional provision. Luker v. Curtis, 64 Idaho 703, 136 P.2d 978 (1943). The procedure for amending the state constitution is set forth in article 20, section 1 of the Idaho Constitution, which does not include the option of amending by initiative. Consequently, to the extent that this proposed initiative purports to impact either the federal or state constitutions, such language has no legal effect. Any law passed by the initiative process is still subject to constitutional review, and there is no reason to suspect that the legal test set forth in Casey will be modified.

If you have any further questions, please do not hesitate to contact me.

I HEREBY CERTIFY that the enclosed measure has been reviewed for form, style and matters of substantive import and that the recommendations set forth above have been communicated to petitioner, Liberty of Conscience, by deposit in the U.S. Mail and by telefax of a copy of this certificate of review.

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Yours very truly,

ALAN G. LANCE  
ATTORNEY GENERAL

**Analysis by:**  
MARGARET R. HUGHES  
Deputy Attorney General  
Civil Litigation Division

## CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

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October 13, 1995

Honorable Pete T. Cenarrusa  
Secretary of State  
**HAND DELIVERED**

Re: Certificate of Review;  
Initiative Regarding Volunteer Militia Organizations

Dear Mr. Cenarrusa:

An initiative petition was filed with your office on September 18, 1995. Pursuant to Idaho Code § 34-1809, this office has reviewed the petition and has prepared the following advisory comments. It must be stressed that, given the strict statutory time frame in which this office must respond, and the complexity of the legal issues raised in this petition, our review can only isolate areas of concern and cannot provide an in-depth analysis of each issue that may present problems. Further, under the review statute, the Attorney General's recommendations are "advisory only," and the petitioners are free to "accept or reject them in whole or in part."

### **BALLOT TITLE**

Following the filing of the proposed initiative, our office will prepare short and long ballot titles. The ballot titles should impartially and succinctly state the purpose of the measure without being argumentative and without creating prejudice for or against the measure. While our office prepares the titles, if petitioners would like to propose language with these standards in mind, we would recommend that they do so and their proposed language will be considered.

### **MATTERS OF SUBSTANTIVE IMPORT**

The proposed initiative concerns the relationship and inclusion of volunteer organizations into the militia of the State of Idaho. The proposed initiative is based upon art. 14, sec. 2, Idaho Constitution, which states:

The legislature shall provide by law for the enrollment, equipment and discipline of the militia, to conform as nearly

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as practicable to the regulations for the government of the armies of the United States, and pass such laws to promote volunteer organizations as may afford them effectual encouragement.

The proposed initiative would repeal existing Idaho Code § 46-102 and add a new section which states:

46-102. State Militia. The militia of the state of Idaho shall consist of all able bodied citizens who have attained the age of eighteen (18) who are citizens of the United States, and a resident of the State of Idaho.

1. Volunteer Organizations in Article XIV, Section 2 of the state Constitution shall be deemed to be any organization which shall register with the County Commission of the county in which they reside, and with the Adjutant General's office of the State of Idaho, and the office of the Governor; and which organization shall adhere to the organizational structure and code of conduct as the "regulations for the . . . armies of the United States."

2. Proof of Enrollment shall be defined to mean that the volunteer organization shall provide a list of men so enrolled when called out for service in the State Militia by the Governor.

3. Effectual Encouragement mentioned in Article XIV, Section 2, shall be defined to mean that the State Legislature shall not pass any law which would inhibit any such volunteer organization from registering, enrolling citizens, training, or conducting any other activities normal to such volunteer organization or militia.

4. No discrimination may be made as to the size or composition of such volunteer organizations, or to its leaders, except when called to service by the Governor he shall approve the officers elected by such organization, or he may refuse to call the organization into the service of the state.

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5. The Organized Militia referred to in Section 103, hereafter, shall be defined to mean the volunteer organizations as provided above, and such units comprised and ordered in to service by the governor in Section 106, which units shall co-exist with such volunteer organizations as provided above.

The Idaho Constitution, aside from art. 14, sec. 2, has several provisions which are relevant to the creation and regulation of the state militia. Art. 4, sec. 4, states:

§ 4. Governor is commander of militia.—The governor shall be commander-in-chief of the military forces of the state, except when they shall be called into actual service of the United States. He shall have power to call out the militia to execute the laws, to suppress insurrection, or to repel invasion.

Article 14, secs. 1 & 3, are also relevant to the present inquiry.

§ 1. Persons subject to military duty.—All able-bodied male persons, residents of this state, between the ages of eighteen and forty-five years, shall be enrolled in the militia, and perform such military duty as may be required by law; but no person having conscientious scruples against bearing arms, shall be compelled to perform such duty in time of peace. Every person claiming such exemption from service, shall, in lieu thereof, pay in the school fund of the county of which he may be a resident, an equivalent in money, the amount and manner of payment to be fixed by law.

§ 3. Selection and commission of officers. - All militia officers shall be commissioned by the governor, the manner of their selection to be provided by law, and may hold their commissions for such period of time as the legislature may provide.

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Presently, Idaho Code § 46-103 divides the militia (as defined in art. 14, sec. 1, and the current Idaho Code § 46-102) into three (3) classes, to wit:

The national guard, the organized militia, and the unorganized militia. The national guard shall consist of enlisted personnel between the ages of seventeen (17) and sixty-four (64), organized and equipped and armed as provided in the national defense act, and of commissioned officers between the ages of eighteen (18) and sixty-four (64) years, who shall be appointed and commissioned by the governor as commander-in-chief, in conformity with the provisions of the national defense act, the rules and regulations promulgated thereunder, and as authorized by the provisions of this act. The organized militia shall include any portion of the unorganized militia called into service by the governor, and not federally recognized. The unorganized militia shall include all of the militia of the state of Idaho not included in the national guard or the organized militia.

As set out above, the proposed initiative establishes a new Idaho Code § 46-102. The proposed initiative sets forth in the first section who comprises the state militia. However, the definition does not quite comport with art. 14, sec. 1, which sets out an exception from service based upon conscientious objection. The definition proposed by the initiative does not contain this exemption. While a court would read that exemption into the new definition, it would be better to specifically include the conscientious objection exemption.

Next, the proposed initiative seeks to define the term “volunteer organization” set out in art. 14, sec. 2. Under the initiative such organizations must register with the county, governor, and adjutant general, and adhere to the organizational structure and code of conduct as set out in the regulations for the armies of the United States. In general, there is no constitutional problem with providing for the registration and organization of volunteer organizations which may be included in the militia. Nevada has a constitutional provision similar to art. 14, sec. 2 of the Idaho Constitution. The Nevada provision states, “[t]he legislature shall provide by law for organizing and disciplining the Militia of this State, for the effectual encouragement of Volunteer Corps and the safe keeping of the public arms.” Art. 12, sec. 1, Nevada

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Constitution. Nevada provides that such volunteer organizations are part of the Nevada militia, along with the national guard and the national guard reserve, which is essentially the unorganized militia in Idaho. Nev. Rev. Stat. Ann. § 412.026. Such volunteer organizations are licensed by the Governor in Nevada. Nev. Rev. Stat. Ann. § 412.126. Thus, the general concept of having volunteer militia organizations which are registered with a governmental entity under art. 14, sec. 2, or similar provision, is in accordance with Idaho's Constitution.

However, there are a number of constitutional problems with the proposed initiative. First, the proposed initiative attempts to define "effectual encouragement" as set forth in art. 14, sec. 2, to mean "that the state Legislature shall not pass any law which would inhibit any such volunteer organization from registering, enrolling citizens, training, or conducting any other activities normal to such volunteer organization or militia." As referred to in this subsection of the proposed initiative and subsection 5, the initiative defines "organized militia" to include volunteer organizations. Art. 14, sec. 2, states that the "legislature shall provide by law for the enrollment, equipment and discipline of the militia . . . ." Because these volunteer organizations are part of the militia under the initiative, they are subject to any laws passed by the legislature for the enrollment, equipment and discipline of the militia. To the extent that the proposed initiative seeks to prohibit the legislature from passing such laws under the auspices of defining "effectual encouragement," it is unconstitutional.

Second, subsection 4 of the proposed initiative requires that "no discrimination may be made as to the size or composition of such volunteer organizations, or to its leaders, except when called to service by the governor he shall approve the officers elected by such organization, or he may refuse to call the organization into the service of the state." Essentially, this provision mandates that these volunteer organizations have autonomy over their structure, organization and the selection of their leaders. If the governor seeks to call such volunteer organization into service, he must approve the officers elected or refuse to call the organization into service of the state. This provision is clearly unconstitutional. As stated above, these volunteer organizations are part of the "organized militia" as defined in the proposed initiative. Thus, they must adhere to all of the constitutional provisions relating to the militia. Art. 14, sec. 3, states that "[a]ll militia officers shall be commissioned by the governor, the manner of their selection to be provided by law, and may



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hold their commissions for such period of time as the legislature may provide.” Thus, it is the governor who has the authority to commission the officers of the militia, including these volunteer organizations. Further, it is the legislature which provides the manner of their selection and the period of time they may hold their commissions.

In addition, art. 14, sec. 2, already authorizes the legislature to provide by law for the enrollment, equipment and discipline of the militia. All laws passed by the legislature under this authority must be adhered to by the volunteer organizations. Under this authority, the legislature certainly can pass laws which set forth how members are enrolled in the volunteer organizations, and their organizational structure, including the size and composition. By prohibiting “any discrimination” as to the size and composition of the volunteer organizations, the proposed initiative is really prohibiting the enactment of any law which might regulate such activity. This is clearly unconstitutional.

Under the proposed initiative, volunteer organizations would be able to organize and train as a military unit, yet not be subject to any governmental control until called into service by the governor. However, once the volunteer organizations are defined as part of the “organized militia” they are immediately subject to laws passed by the legislature. Moreover, art. 4, sec. 4 of the Idaho Constitution provides that the “governor shall be commander-in-chief of the military forces of the state, except when they shall be called into actual service of the United States. He shall have power to call out the militia to execute the laws, to suppress insurrection, or to repel invasion.” As commander-in-chief, the governor has the ability to provide such rules and regulations as may be thought necessary to govern the militia. It was not the intent of the framers of the Idaho Constitution to have militia organizations organizing and training without any oversight by the governor and legislature. This intent is clearly stated in art. 14, secs. 2 and 3, which includes oversight by both the governor and the legislature. *See Westerberg v. Andrus*, 114 Idaho 401, 757 P.2d 664 (1988) (legislative acts and legislation by initiative are on equal footing and both are subject to same constitutional limitations).

It should be noted that the legislature, in title 46, Idaho Code, has already passed a set of laws governing the militia. For example, Idaho Code § 46-111 states that the adjutant general is the commanding general of the military forces of the state. This includes the militia. Moreover, Idaho Code §

46-112 requires the adjutant general to be “the custodian of all military records and property of the national guard and organized militia.” Idaho Code § 46-112(2) (emphasis added). As these volunteer organizations are defined as part of the organized militia under subsection 5 of the proposed initiative, the adjutant general would be the custodian of all property which is used for training and other activities. Further, Idaho Code § 46-112(9) states that it is the duty of the adjutant general to supervise the training of the national guard and the organized militia. Thus, the adjutant general is required to ensure that these volunteer organizations, as part of the organized militia, receive the proper training. Therefore, he has the implied authority to dictate what that training will entail. All of these statutes were passed under the authority given to the legislature under art. 14, sec. 2 of the Idaho Constitution. The initiative does not expressly address or repeal these sections, so presumably they would still be valid. *See Coeur d’Alene Indus. Park Property Owners Ass’n, Inc. v. City of Coeur d’Alene*, 108 Idaho 843, 702 P.2d 881 (Ct. App. 1985) (repeals or amendments of statutes by implication are disfavored in the law); *Greenwade v. Idaho State Tax Com’n*, 119 Idaho 501, 808 P.2d 420 (Ct. App. 1991) (only if new legislation is irreconcilable with and repugnant to preexisting statute may repeal of preexisting statute be implied). Even if the initiative would impliedly repeal the above sections, the legislature would still be free to enact these same laws under art. 14, sec. 2, Idaho Constitution. The proposed initiative could not tie the hands of future legislatures to enact laws they are constitutionally empowered to enact. *Wagner v. Secretary of State*, 663 A.2d 564 (Maine 1995); and *People’s Advocate, Inc. v. Superior Court*, 226 Cal. Rptr 640 (Ct. App. 1986).

Outside these constitutional problems, there are a few miscellaneous items which deserve some discussion. First, although not stated in the initiative, members of the organized militia could not also be members of the national guard. Idaho Code § 46-103 provides that the unorganized militia includes all of the militia not included in the national guard and organized militia. It follows that members of the organized militia cannot include members of the national guard. Because the proposed initiative defines volunteer organizations as part of the organized militia, members of the national guard could not be members of such volunteer organizations.

Second, the proposed initiative sets out a registration requirement for volunteer militia organizations. However, a registration function is already provided for in Idaho Code § 46-104, which states:

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46-104. Enrollment of persons liable to service—  
Duty of county assessor—Penalty.—Whenever the governor  
deems it necessary he may order a registration under such  
regulations as he may prescribe, to be made by the assessors  
of the various counties of this state, of all persons resident in  
their respective counties and liable to serve in the militia.  
Such registration shall be on blanks furnished by the adjutant  
general, and shall state the name, residence, age and occupa-  
tion of the person registered and their military service.

If any assessor willfully refuses or neglects to per-  
form any duty which may be required of him by the governor  
under the authority of this act, he shall be deemed guilty of a  
misdemeanor and, on conviction thereof, he shall be fined in  
a sum of not less than \$300 nor more than \$800.

If the registration provided for in the proposed initiative is intended  
to repeal or amend this registration function, it should be clearly stated. In  
addition, the proposed initiative attempts to define certain terms. Because  
Idaho Code § 46-101 is already set out as a definition section, it may be bet-  
ter organizationally to include definitions within that section rather than Idaho  
Code § 46-102.

In conclusion, as presently worded, the proposed initiative is uncon-  
stitutional. Under the proposed initiative, volunteer organizations would be  
able to organize and train without any oversight or interference from govern-  
mental authorities. However, the Idaho Constitution requires control of the  
state militia by the governor and through laws passed by the legislature.

I HEREBY CERTIFY that the enclosed measure has been reviewed  
for form, style and matters of substantive import and that the recommenda-  
tions set forth above have been communicated to petitioner Chuck Dalton by  
deposit in the U.S. Mail of a copy of this certificate of review.

Sincerely,

ALAN G. LANCE  
ATTORNEY GENERAL

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**Analysis by:**

THOMAS F. GRATTON

Deputy Attorney General

Intergovernmental and Fiscal Law Division

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