

**IDAHO
ATTORNEY
GENERAL'S
ANNUAL REPORT**

OPINIONS

**SELECTED INFORMAL
GUIDELINES**

AND

CERTIFICATES OF REVIEW

FOR THE YEAR

1997

Alan G. Lance
Attorney General

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This volume should be cited as:

1997 Idaho Att'y Gen. Ann. Rpt.

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1997 Idaho Att'y Gen. Ann. Rpt. 5

Similarly, the Informal Guideline of January 7, 1997
is found at:

1997 Idaho Att'y Gen. Ann. Rpt. 31

The Certificate of Review of March 11, 1997
is found at:

1997 Idaho Att'y Gen. Ann. Rpt. 95

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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

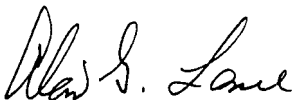
Dear Fellow Idahoans:

I am pleased to present the Idaho Attorney General's Annual Report for 1997. The contents of this volume are representative of the professional legal work performed by my staff on a daily basis. I thank the employees of this office for their dedication and loyalty to the State of Idaho. I also thank our clients -- statewide elected officials, legislators, and state departments and agencies -- and the hundreds of local officials and citizens who call upon this office for legal assistance. It was another great year!

From an administrative standpoint, I am able to report another successful year of balancing the state's legal needs with the fiscal responsibility expected by all Idahoans. Similar to 1995 and 1996, the overall budget did not go up. We continued to cut spending on hiring outside lawyers, saving Idaho taxpayers 1.6 million dollars since 1995. We have also been able to cut the net total of legal positions in state government. These numbers would not be possible without employees who are always willing to do whatever it takes to get the job done.

From a legal standpoint, 1997 is filled with many good examples of how the six legal divisions in this office represent the State. The Civil Litigation Division and the Intergovernmental and Fiscal Law Division worked together to obtain a court ruling requiring the United States Forest Service to end its policy of secrecy and release public information to Idaho's county officials. The Intergovernmental and Fiscal Law Division continues to assist local governmental entities and legislators with their legal questions -- over 300 questions from local officials and 167 formal legislative inquiries were handled in 1997. In a lawsuit that attracted national attention, the Human Services Division filed suit against the United States Department of Veterans Affairs (VA). As a result, the VA agreed to provide Idaho veterans with guaranteed medical benefits and compensate Idaho veterans' homes for all moneys wrongfully withheld. The Natural Resources Division continued its legal management of the State's interests in the Snake River Basin Adjudication (SRBA), including numerous appearances in the state's SRBA court and appellate courts, and winning rulings dismissing water rights claims filed by the federal government. The SRBA is one of the largest and most complex adjudications in American history, involving a total of 185,000 claims. The Criminal Law Division continues to fight crime. Through 1997, prosecutions in this office are up 45%, investigations are up 49%, criminal appeals are up 50%, and briefs filed in the appellate courts are up 60%. Crime overall continued to fall in Idaho during 1997. All together, these six divisions handle approximately 5,000 pending cases and projects at any given time.

New challenges are ahead, but I can guarantee that this office will fully meet its legal and ethical obligations to provide professional and zealous legal representation for the State of Idaho.



ALAN G. LANCE
Attorney General

ANNUAL REPORT OF THE ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL – 1997 STAFF ROSTER

ALAN G. LANCE

Attorney General

ADMINISTRATIVE

David Hennessey
Chief of Staff
Tara Orr
Business Manager
Don Larson
Computer Systems Manager

Lawrence Warden
Deputy Chief of Staff
Lois Hurless
Office Administrator
Sandra Rich
Administrative
Secretary/Receptionist

Janet Carter
Executive Assistant
Robert Cooper
Director, Constituent Information
Kris Bivens
Constituent Information Specialist

DIVISION CHIEFS

David High, Civil Litigation
Jeanne Goodenough, Human Services
Jack McMahon, Contracts & Administrative Law
Michael Henderson, Criminal Law

Christopher Rich, Administration & Budget
Clive Strong, Natural Resources
William vonTagen, Intergovernmental & Fiscal Law

DEPUTY ATTORNEYS GENERAL

Peter Ampe	Dennis Charney	John Homan	John McKinney	Marcy Spilker
Peter Anderson	Doug Conde	Charles Honsinger	Tim McNeese	Myrna Stahman
Joseph Ammirati	Cherie Copsey	Matt Howard	Scott Muir	Dan Steckel
Willard Abbott	Kimberly Coster	Donald Howell	Mia Murphy	Kathryn Sticklen
Stephanie Altig	Ronaldo Coulter	Margaret Hughes	Kirby Nelson	Steve Strack
LaMont Anderson	Brett DeLange	Mary Hughes	Brian Nicholas	Ken Stringfield
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Stephanie Balzarini	Mary Feeny	Rinda Just	Thorpe Orton	Lynn Thomas
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Craig Bledsoe	Leslie Goddard	Janice Kroeger	Eric Pfost	Thomas Watkins
Carol Brassey	Stephen Goddard	Lisa Kronberg	Shad Priest	Will Whelan
Ron Bruce	Fred Goodenough	David Lee	Brad Purdy	Peggy White
Bernadette Buentgen	Brad Goodsell	Kay Manweiler	Phillip Rassier	Scott Woodbury
Dallas Burkhalter	Tom Gratton	Rene Martin	Kenneth Robins	Mary York
David Butler	Joanna Guilfooy	Nancy Matthews	Kevin Satterlee	Charles Zalesky
Timothy Callanan	Susan Hamlin	Michael McDonagh	Steve Schuster	
James Carlson	Andrew Helmlinger	Nicole McKay	Theodore Spangler	
Corey Cartwright	Harriet Hensley	Matthew McKeown	Nicholas Spencer	

INVESTIGATORS

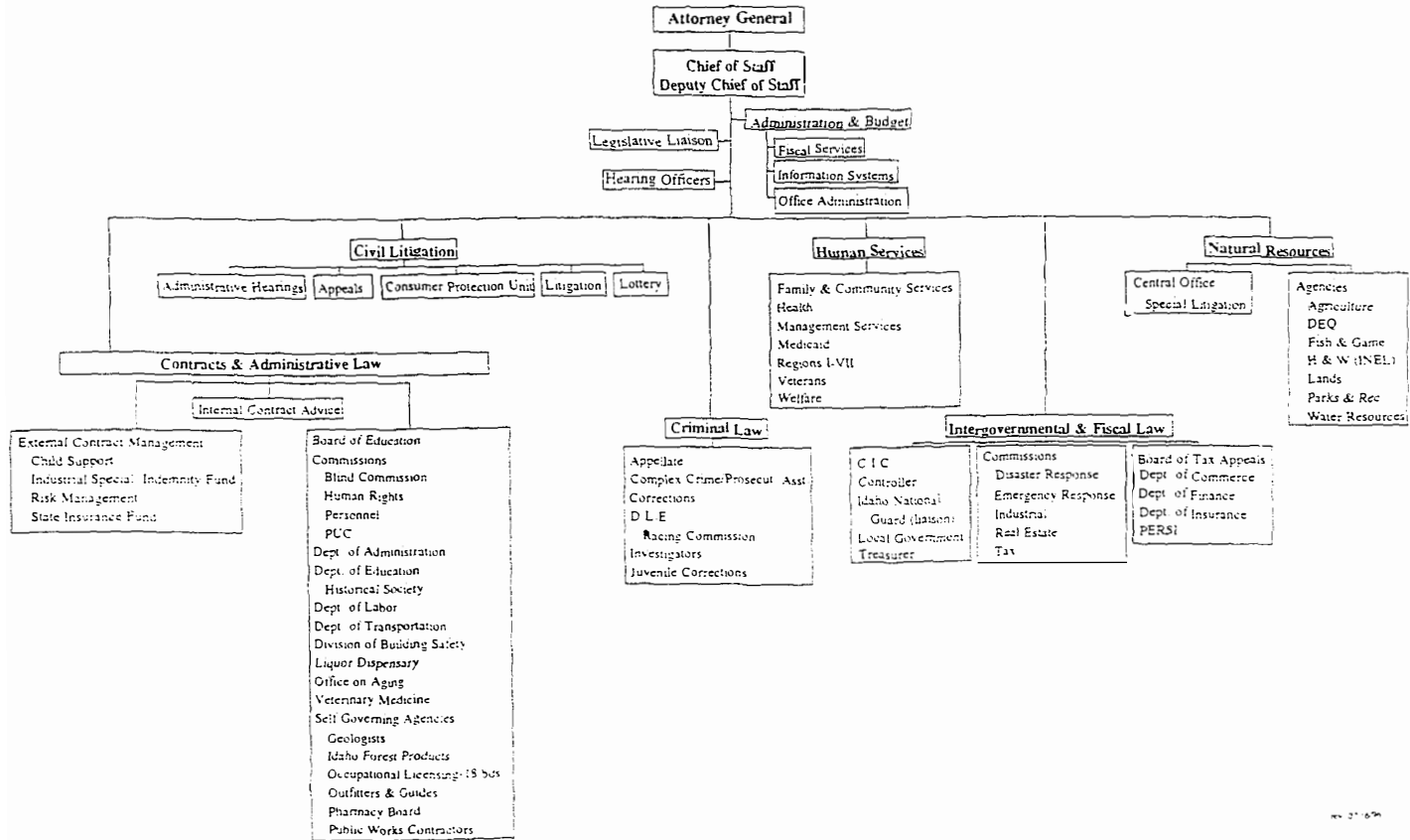
Russ Reneau, Chief Jackie Ailor Scott Birch Richard LeGall

PARALEGALS

Cheryl Brass Becky Harvey Marlene Klein Bernice Myles Jean Rosenthal Robert Wheeler Diann Whittier
Kathie Brack Vicki Kelly Dora Morley Lori Peel Paula Saul Suzanne Ventura

NON-LEGAL PERSONNEL

Prudence Barnes	Sharon DeWitt	Ann Lang	Sharon Noice	Lynae Van Horn
Patricia Boehm	Jeanne Dillion	Jo Ann Lanham	Dawn Peckham	Luanna Vowels
Karen Bolian	Marilyn Freeman	Pat McCoy	Ellen Pierce	Melissa Ward
Alex Carder	Rebecca Fuller	Patty McNeill	Debbie Ross	Kelli Wilson
Michelle Christian	Colleen Funk	Ronda Mein	Sandi Simmons	Linda Whipple
Linda Clark	Leslie Gottsch	Victoria Mundy	Debra Stufflebeam	
Sheila Crawford	Dean Heyl	Renda Newman	Luke tenDoeschate	



**OFFICIAL OPINIONS
OF
THE ATTORNEY GENERAL
FOR 1997**

ALAN G. LANCE
ATTORNEY GENERAL
STATE OF IDAHO

ATTORNEY GENERAL OPINION NO. 97-1

TO: Robert I. Meline, Executive Director
Lava Hot Springs Foundation
P.O. Box 669
Lava Hot Springs, ID 83246

Per Request for Attorney General's Opinion

QUESTIONS PRESENTED

1. Does the Lava Hot Springs Foundation (the "Foundation"), under the terms of title 67, chapter 44, Idaho Code, have authority to control the use of hot springs and hot waters located on lands under the control of the Foundation?
2. If the Foundation has the authority to control the use of hot springs and hot waters on lands under the control of the Foundation, is such control exclusive, or is the use of such waters subject to the provisions of title 42, Idaho Code?
3. If the Foundation has authority to control the use of hot springs and hot waters on lands under the control of the Foundation, does such authority extend to authorizing the use of such hot springs and hot waters by private parties on private lands in exchange for an easement across such lands for a pipeline used for the discharge of the Foundation's waste water, or would such a use have to be licensed by the Idaho Department of Water Resources?

CONCLUSION

1. Yes, the Foundation maintains authority to manage and control the use of all hot waters lawfully appropriated under state law that rise and flow on the Foundation's lands.
2. The rights to the use of all hot waters that rise and flow at Lava Hot Springs are water rights that have been appropriated under state law and are subject to regulation by the Idaho Department of Water

Resources (the “Department”) under the provisions of title 42 of the Idaho Code.

3. The Foundation has the authority under title 67, chapter 44, Idaho Code, to enter into agreements involving easements with private parties to discharge the Foundation’s waste water. However, the Foundation may not authorize the use of any portion of its water in a manner that is inconsistent with its state water right. Other parties seeking to use the Foundation’s waste water for new uses or on lands other than the authorized place of use must file for a permit from the Idaho Department of Water Resources.

BACKGROUND

Lava Hot Springs was acquired from the United States under an act of Congress in 1902 which conveyed certain lands to the State of Idaho for public use subject to state regulation. The act reads as follows:

Chapter 1076.—An Act to grant certain lands to the State of Idaho. Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled, That lots seven and eight in section twenty-one, the northwest quarter of the southwest quarter, and lots nine and ten in section twenty-two, all in township nine south, range thirty-eight east, base meridian, in the State of Idaho, are hereby ceded, granted, relinquished, and conveyed unto said State of Idaho for public use under such regulations as said State may prescribe. 32 Stat. 330 (1902).

Seventeen years later, in 1919, the State of Idaho passed Senate Bill 9 vesting in the Department of Welfare the responsibility to manage the lands and property at Lava Hot Springs. 1919 Idaho Sess. Laws 108. The Lava Hot Springs Foundation was created in 1935, and the statutes were amended to make the Foundation responsible for the management and control of the lands and property at Lava Hot Springs. 1935 Idaho Sess. Laws 16. The Foundation, operating as an agency within the Department of Parks and Recreation, continues to manage the lands at Lava Hot Springs today.

ANALYSIS

A. Introduction

The threshold issue raised by the questions presented is whether the unique language in title 67, chapter 44, Idaho Code, creates a special type of water right for the benefit of the Foundation that is different from all other state water rights acquired under the appropriation process. An underlying legal issue is whether it is possible in this state for another type of state water right to exist other than one acquired by appropriation under Idaho law.

Idaho Code § 67-4401 provides: “All rights to the operation, management and control, and to the maintenance and improvement of the lands and property belonging to the state of Idaho situated within and near the city of Lava Hot Springs, in Bannock County, state of Idaho, hereinafter more particularly described is vested in the Lava Hot Springs Foundation which shall be an agency within the department of parks and recreation”

Idaho Code § 67-4403 describes the lands and property placed under the jurisdiction and control of the Foundation. Idaho Code § 67-4403 provides:

Description of property: The property hereinbefore referred to, and herewith placed under the jurisdiction and control of the said foundation, is described as follows: The northwest quarter (1/4) of the southwest quarter (1/4), and lots nine (9) and ten (10) in section twenty-two (22), and lots seven (7) and eight (8) in section twenty-one (21) in township nine (9), south, range thirty-eight (38) east of the Boise meridian, together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in any wise appertaining, and the hot springs and hot waters arising and flowing thereon, in Bannock County, state of Idaho.

Upon further analysis of Idaho’s Constitution and related water statutes, the language in Idaho Code § 67-4403 placing jurisdiction and con-

trol of the hot springs and hot waters under the direction of the Foundation is intended to refer to only those waters lawfully appropriated under state law.

B. The Right to Use Water at Lava Hot Springs is Sanctioned Under Water Rights Acquired by Appropriation

All rights to water under state law in Idaho are acquired by appropriation. Article 15, § 3 of the Idaho Constitution provides: “The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied, except that the state may regulate and limit the use for power purposes” Idaho Code § 42-101 provides: “All the waters of the state, when flowing in their natural channels, including the waters of all natural springs and lakes within the boundaries of the state are declared to be the property of the state, whose duty it shall be to supervise their appropriation and allotment to those diverting the same therefrom for any beneficial purpose” Idaho Code § 42-103, prior to the 1971 amendments, provided: “The right to the use of the waters of rivers, streams, lakes, springs, and of subterranean waters, may be acquired by appropriation.” Idaho Code § 42-104 provides: “The appropriation must be for some useful or beneficial purpose, and when the appropriator or his successor in interest ceases to use it for such purpose, the right ceases.” Idaho Code § 42-106 provides: “As between appropriators, the first in time is the first in right.”

The consistent thread in Idaho’s Constitution and water statutes is that the right to use water must be acquired by appropriation. The Idaho Supreme Court has long held that the method to acquire water in Idaho is by appropriation and that the state may regulate the means of appropriating water within the state. *Speer v. Stephenson*, 16 Idaho 707, 102 P. 365 (1909).

Unquestionably, the law of prior appropriation is specified as the method to establish the right to use water in Idaho. Absent a clear statutory expression by the legislature to create an exception to the appropriation statutes, all rights to the use of water in Idaho must be acquired by appropriation. The language in Idaho Code §§ 67-4401 and 67-4403 is not a clear expression that the legislature intended to create an exception from the appropriation process for the waters at Lava Hot Springs. The most reasonable interpretation of this language is that the Foundation’s jurisdiction and control over waters at Lava Hot Springs refers to those waters that have already been appropriated or that will be appropriated in the future. The legislature

has had several opportunities over the years to pass laws regarding the use of water by the state acting through the governor or a state board for a special purpose. In every instance there is a clear expression in the statutes that the water for the special purpose should be appropriated in trust for the people of the State of Idaho.¹ Additionally, Idaho Code § 42-1503 requires that an application to appropriate water be filed by the Idaho Water Resource Board before a minimum stream flow can be established under Idaho law.

Other statutory authority as well as past actions on the part of the Foundation and the Department indicate that the use of the water at Lava Hot Springs was based upon appropriative water rights developed under state law. Perhaps most instructive on the nature of the Foundation's water rights is the language contained in Idaho Code §§ 58-703 and 58-704, passed in 1931, which addressed cessions to the United States for the construction of a national veterans' sanatorium or hospital at Lava Hot Springs. Idaho Code § 58-703 provides: "The state board of land commissioners, acting for and on behalf of the state of Idaho, is hereby authorized, empowered and directed to cede, grant, relinquish and convey to the government of the United States, . . . such portion of the hot mineral and cold water and water rights appurtenant to said lands as may be necessary and convenient [for the operation of a national veterans' sanatorium or hospital]." The description of the lands provided in section 58-704 again refers to waters and water rights appurtenant thereto. The use of the terms "water rights" and "appurtenant" in sections 58-703 and 58-704 is a strong indicator that the Foundation merely controlled the use of the water under a traditional state water right that is appurtenant to lands at Lava Hot Springs.

The grant from the United States in 1902 provided that title to Lava Hot Springs was to be held by the State of Idaho under such regulations as the state may prescribe. In 1919, the Idaho Legislature passed laws directing the department of welfare to manage and control the hot springs and hot waters at Lava Hot Springs. It appears that the Department of Welfare was directed to manage and control the hot springs and the same hot waters that had been used for many years at Lava Hot Springs prior to the passage of the 1919 Act. In fact, the Foundation recognized this earlier use and claimed a 3 cfs. year-round water right with a 1902 priority when it filed a Claim to a Water Right with the Idaho Department of Water Resources in 1980. The Foundation filed applications for additional water rights as its needs increased over the years

and the Department has processed the applications and issued two water right licenses authorizing the use of additional waters at Lava Hot Springs.

C. The Water at Lava Hot Springs is Subject to State Regulation Under Title 42 and Must Be Applied in a Manner Consistent With the Underlying Water Right

Idaho Code § 67-4401 places a duty on the Foundation to manage and control the hot springs and hot waters arising from lands at Lava Hot Springs. The most reasonable interpretation of this statute is that jurisdiction and control is limited to those waters appropriated under state law. The Foundation's water rights acquired under the appropriation process are the same type of water rights held by other water users in the state and are subject to regulation under title 42 of the Idaho Code.

Finally, under Idaho Code § 67-4402, the Foundation is authorized to exercise such powers as are incidental or conducive to the attainment of the purposes of the Foundation. The authority granted to the Foundation in Idaho Code § 67-4402 appears sufficient to allow the Foundation to enter into agreements pertaining to easements, provided the purpose of the agreement is incidental or conducive to the attainment of the purposes of the Foundation. An agreement which pertains to an easement to discharge waste water from lands managed by the Foundation appears to fall within the grant of authority under Idaho Code § 67-4402. However, as with all appropriators of water, the Foundation must use its water in a manner that is consistent with its underlying water rights. The Foundation's water rights are appurtenant to the lands described in Idaho Code § 67-4403 and should not be applied to other lands. If an adjacent property owner desires to make beneficial use of the Foundation's waste water, that person needs to file an application for permit to appropriate water with the Idaho Department of Water Resources. The Foundation does not have the ability to enter into contracts authorizing the use of its waste water on lands not authorized under the water right.

AUTHORITIES CONSIDERED

1. Federal Statutes:

32 Stat. 330 (1902).

2. Idaho Constitution:

Art. 15, § 3.

3. Idaho Code:

§ 42-101.
 § 42-103.
 § 42-104.
 § 42-106.
 § 42-1503.
 § 58-703.
 § 58-704.
 § 67-4301.
 § 67-4304.
 § 67-4307.
 § 67-4308.
 § 67-4309.
 § 67-4310.
 § 67-4311.
 § 67-4401.
 § 67-4402.
 § 67-4403.

4. Idaho Cases:

Speer v. Stephenson, 16 Idaho 707, 102 P. 365 (1909).

5. Other Authorities:

1919 Idaho Sess. Laws 108.
 1935 Idaho Sess. Laws 16.

DATED this 9th day of January, 1997.

ALAN G. LANCE
Attorney General

Analysis by:

JOHN W. HOMAN
Deputy Attorney General
Natural Resources Division

¹ See Idaho Code § 67-4301, appropriation of waters at Big Payette Lake; Idaho Code § 67-4304, appropriation of waters at Priest, Pend d'Oreille and Coeur d'Alene Lakes; Idaho Code § 67-4307, appropriation of waters at Malad Canyon; Idaho Code § 67-4308, appropriation of waters at Niagra Springs; Idaho Code § 67-4309, appropriation of waters at Big Springs; Idaho Code § 67-4310, appropriation of waters at Box Canyon; Idaho Code § 67-4311, Appropriation of waters at Thousand Springs.

ATTORNEY GENERAL OPINION NO. 97-2

TO: The Honorable Dave Bivens
Idaho House of Representatives
2354 Star Lane
Meridian, ID 83642

The Honorable Jim D. Kempton
Idaho House of Representatives
HC 36, Box 28
Albion, ID 83311

Per Request for Attorney General's Opinion

QUESTIONS PRESENTED

1. May the Idaho Legislature grant an income tax credit to a parent or legal guardian who complies with the state's compulsory education law by means other than the public school system?
2. If parents comply with the state's compulsory education law by enrolling their children in private sectarian schools, does the granting of a tax credit to the parents violate article 9, section 5 of the Idaho Constitution or First Amendment of the U.S. Constitution?

CONCLUSION

1. There appear to be no state or federal constitutional impediments which would prohibit the legislature from granting a tax credit to a parent or guardian who complies with the state's compulsory education law by means other than the public school system and without using public school resources. Whether the requirements of the state's compulsory education law are met by enrolling the child in a private non-sectarian school, a private sectarian school or through home schooling does not affect this conclusion.

2. Current U.S. Supreme Court interpretations of the First Amendment to the U.S. Constitution make it likely that a tax credit for nonuse of public schools would be deemed constitutional.
3. While the lack of case law makes it more difficult to predict how a court would rule on the constitutionality of such a proposal under article 9, section 5 of the Idaho Constitution, it is probable that the contemplated tax credit would be upheld.

ANALYSIS

This question was raised after the 1997 Idaho Legislature considered HB 342, which would have granted a \$500 tax credit to parents or guardians of school-aged children who did not enroll those children in a public school, yet were in compliance with Idaho's compulsory education law. HB 342 is similar to a 1995 initiative proposal for which the Office of the Attorney General provided a Certificate of Review.

As a matter of definition, the income tax credit provided by HB 342 should not be confused with a "school voucher" or a "tuition tax credit." A school voucher program provides government funds, in the form of a voucher, to parents who may then use that voucher to purchase education services for their children in any qualified public or private school. Under a voucher system, the government, in effect, provides direct payment to the private school for all or part of the child's tuition. Similarly, a tuition tax credit is granted only to those parents who pay tuition at a private or other school and is usually limited to the amount of tuition actually paid by the parent. The tuition tax credit differs from the voucher in that the credit goes to the individual to offset, in whole or in part, the payment of tuition. Courts differ on whether a tax credit is a transfer of government funds to the individual. HB 342, unlike the tuition tax credit concept, allows the full amount of the contemplated tax credit to each qualifying parent, as long as the child for whom the credit is claimed is not enrolled in a publicly supported school. It is not dependent upon the payment of tuition.

As a practical matter, there are only three educational settings in which a child could enroll which would qualify the parent to be eligible for the HB 342 tax credit: a private non-sectarian school, a private religious or

sectarian school, or a home school. Because of the church-state concerns surrounding the First Amendment to the U.S. Constitution and the prohibition against sectarian appropriations found in article 9, section 5 of the Idaho Constitution, the analysis of HB 342 under both constitutions must be differentiated by the type of school in which the eligible student is educated.

I.

PRIVATE NON-SECTARIAN AND HOME SCHOOLS

The United States Constitution guarantees the right of parents to educate their children in non-public schools. Indeed, the Supreme Court recognized the duty, as well as the right, of parents to educate their children. In Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510, 45 S. Ct. 571 (1925), the Court invalidated an Oregon statute which required virtually all school-age children to attend a public school. In striking down the statute, the Court said:

The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.

45 S. Ct. at 573.

The Idaho Constitution similarly recognizes the right and responsibility of parents to educate their children. In the case of Electors of Big Butte Area v. State Board of Education, 78 Idaho 602, 308 P. 2d 225 (1957), the Idaho Supreme Court said,

It must be conceded that under our constitution parents have a right to participate in the supervision and control of the education of their children. True, the constitution vests the legislature with plenary power as well as a specific mandate to provide for the education of the children of the state, article 9, section 1, and the board of education with general

supervision of the public school system, article 9, section 2, but it cannot seriously be urged that in clothing the legislature and the board with such powers the people transferred to them the rights accorded to parenthood before the constitution was adopted. By article 1, section 21, such rights were retained by the people.

78 Idaho at 612.

The court went on to conclude, “In the American concept, there is no greater right to the supervision of the education of the child than that of the parent. In no other hands could it be safer.” *Id.* at 613.

For those parents who choose to educate their children in a non-sectarian private school or in a home school, the tax credit provided by HB 342 is simply a legislative recognition of the “high duty” enunciated in *Pierce*, and the right of the parent to educate his children recognized in *Electors v. State Board*. The legislature has broad authority to determine the provisions of tax law and may, under the constitutions of the United States and the State of Idaho, extend tax benefits to individuals who exercise their right to educate their children in a manner consistent with legislative policy.

Because the right to educate one’s children is superior to any right of the state, there can be no question about the constitutionality of HB 342 as it applies to students in non-sectarian private schools and home schools. The issue of tax credits granted to parents whose children use sectarian or religiously oriented private schools requires further analysis. Arguments against the credit would center on allegations that it violates the Establishment Clause of the First Amendment to the U.S. Constitution and article 9, section 5 of the Idaho Constitution.

II.

SECTARIAN SCHOOLS

If enacted into law, HB 342 will undoubtedly grant tax credits to parents who send their children to private parochial or sectarian schools. A legal challenge to the law would most likely claim that this connection between the

state and religious schools is a violation of both the federal and state constitutions.

A. 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.

The New York statute struck down by Nyquist contained three provisions, all of which were determined by the Court to violate the First Amendment. The statute provided for direct grants of state funds to private parochial schools for the purposes of “maintenance and repair” of school facilities owned and operated by the religious organization controlling the school. It also provided tuition reimbursement to low income taxpayers, and a tax deduction for tuition paid by parents who did not qualify as low income.

Ten years after Nyquist, 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 tax credit proposal at hand would provide a tax credit to parents of Idaho’s non-public school students in much the same way that the Minnesota statute authorized an income tax deduction. In contrast, the New York statute targeted private school tuition payers as the beneficiaries of the statute, and went so far as to determine the specific dollar amount of tax relief

each tuition deduction was worth. No such pre-determination is involved in the Idaho tax credit proposal.

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 who had actually paid tuition to a private school. HB 342 is not squarely analogous to the plan approved by the Supreme Court in Mueller because its benefits may be claimed only by parents of children who do not attend public school. It is, however, broader in its scope than the New York plan invalidated in Nyquist, since a parent may claim its benefits without regard to tuition payments. For example, the benefits under HB 342 would be available to parents of home-schooled children, whereas, under the statute struck down in Nyquist, only parents with a tuition receipt could claim the tax deduction.

The Court also favored the Minnesota tax plan because it channeled any assistance to parochial schools through individual parents, whereas under the statute struck down in Nyquist, at least some of the tax benefits were transmitted directly to parochial schools, and the remainder were tuition grants specifically targeted at parents who had paid tuition to a private school. HB 342 provides a benefit directly to parents, in a manner 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, S. Ct. at 3069.

As noted, the tax credit granted by HB 342 is not identical to the tax deduction approved by the Court in Mueller v. Allen, nor to the tax benefit plan struck down in Nyquist. However, inasmuch as the stated purpose of the bill is to reduce the financial burden on public schools and the tax credit will be available to any and all parents who do not avail themselves of public school services, the proposed credit is more like the one analyzed in Mueller.

The neutral basis on which the tax credit is awarded is clear, and although there will be an incidental benefit to religious schools, that benefit, like the one in Mueller, is remote and under the control of parents. Therefore, one is led to the conclusion that HB 342 will likely withstand a challenge under the U.S. Constitution.

B. Analysis Under the Idaho Constitution

The Idaho Constitution, article 9, section 5, provides in relevant part:

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, including parochial schools. Accordingly, the Idaho Supreme Court found the statute in violation of article 9, section 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 IX, 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 issued an opinion on the constitutionality of tuition tax credits or vouchers in a guideline dated February 7, 1995. In that guideline, the Office of the Attorney General opined 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 a “grant or donation of . . . money” to a church-affiliated school, which is specifically prohibited by article 9, section 5 of the Idaho Constitution. 1995 Idaho Att’y Gen. Ann. Rpt. 74.

The proposed legislation under review here differs from a tax credit for private school tuition which, following the Attorney General’s previous analysis, may violate 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 was found to be a transfer of a state benefit to a religious school, or a tax credit which was conditioned upon payment of money by the taxpayer to a private religious school. Under the proposal found in HB 342, there is no requirement that the taxpayer pay any money to a private or church affiliated school before being able to claim the credit. The benefit flows to the taxpayer/parent, not to the school. HB 342 provides a benefit to parents for the stated purpose of relieving the burden on the state’s public school system.

In Epeldi, the Idaho 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 to private schools may claim it. A tax credit for non-use of public schools does not directly benefit parochial schools.

While the constitutionality of HB 342 remains somewhat unclear, it is the opinion of this office that the proposed credit is probably constitutional inasmuch as any benefit to parochial schools is remote at best. The benefit under the proposed scheme flows to parents who choose not to educate their children within Idaho's public school system, not to the parochial schools. The granting of the credit is not conditioned on any payment by the taxpayer to a religious school. Neither the purpose nor the effect of the proposed initiative appears to violate Idaho's proscription regarding aid to religious or sectarian schools.

The Epeldi court emphasized the constitutional prohibition against "anything in aid" of a religious school. The test articulated in Epeldi could be broadly construed to forbid any government action that even remotely benefits religion. Such an interpretation would invalidate, among other things, section 63-3029A, Idaho Code, which provides a limited tax credit for donations made to Idaho private schools, including religious schools. By extending the logic of the Epeldi rule to its fullest reach, Idaho cities could not legally provide police and fire protection to churches and private schools--clearly an absurd result and one which would probably run afoul of the free exercise clause in the First Amendment to the U.S. Constitution.

Rather than focusing on any attenuated benefit to religion, the U.S. Constitution requires that no public fund or moneys be paid for anything in aid of any church or church-related school. Therefore, in order to be declared unconstitutional, the payment must first come out of a public fund and, second, it must be paid to a church or other religious enterprise. The tax credit in question arguably does not come out of any public fund and it certainly does not go to the aid of a church or another religiously controlled institution. The tax credit will only be available to parents, some of whom admittedly send their children to religious schools, but some of whom also school their children at home or in a non-sectarian private school. HB 342 meets the constitutional requirement that no appropriation be made to sectarian institutions. The tax credit provided by the bill may only be claimed by parents, and may be claimed without regard to the type of school their children attend.

As noted, 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. The credit is granted for contri-

butions to sectarian schools. The benefit to private schools is far more direct under Idaho Code § 63-3029A, inasmuch as the granting of the credit is conditioned on the taxpayer giving money or something of value to the educational institution. In addition to Idaho Code § 63-3029A, Idaho tax statutes have long provided for a deduction for contributions to churches and other religious institutions, including schools. This deduction, against income, is not limited by dollar amount. Both the credit under Idaho Code § 63-3029A as well as the unlimited deduction under Idaho Code § 63-3022(l)(2) provide for more direct and substantial benefits to churches, religious institutions and schools than does the proposed tax credit for non-use of public schools. The long-standing and unquestioned acceptance of the credit found in Idaho Code § 63-3029A and the deduction found in Idaho Code § 63-3022(l)(2) lends support to the conclusion that the proposed credit is likewise constitutional.

Given the foregoing analysis, it is clear that there can be no question of the constitutionality of HB 342 as it applies to students in home schools and private non-sectarian schools. Given the clear intent of the bill to reduce the financial burden on public schools, it is virtually inconceivable that a court could uphold the tax credit for parents who educate their children in a home school or a non-sectarian private school, while invalidating the tax credit for parents who send their children to a parochial school. In fact, such a distinction is probably violative of the U.S. Constitution's First Amendment guarantee of the free exercise of religion.

While the constitutionality of HB 342 with respect to granting credits to parents whose children attend religious schools remains yet to be resolved by the Idaho courts, it is probable that the bill would be upheld as constitutional. The credit is not dependent upon payment of money to a sectarian school, and any benefits to parochial schools are tenuous at best.

CONCLUSION

For the foregoing reasons, I conclude that HB 342 will likely be held to be constitutional under both the state and federal constitutions.

AUTHORITIES CONSIDERED

1. Idaho Code:

§ 63-3022(1)(2).
§ 63-3029A.

2. Cases:

Committee for Public Education v. Nyquist, 413 U.S. 756, 93 S. Ct. 2955, 37 L. Ed. 2d 948 (1973).

Electors of Big Butte Area v. State Board of Education, 78 Idaho 602, 308 P. 2d 225 (1957).

Epeldi v. Engelking, 94 Idaho 390, 488 P.2d 860 (1971).

Mueller v. Allen, 463 U.S. 388, 103 S. Ct. 3062, 77 L. Ed. 2d 721 (1983).

Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510, 45 S. Ct. 571 (1925).

3. Other Authorities:

U.S. Const. amend. I.
Idaho Const. art. 9, § 5.

DATED this 22nd day of August, 1997.

ALAN G. LANCE
Attorney General

Analysis by:

KIRBY NELSON
Deputy Attorney General
State Board of Education

WILLIAM A. VON TAGEN

Deputy Attorney General

Chief, Intergovernmental and Fiscal Law Division

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**ATTORNEY GENERAL'S
SELECTED
INFORMAL GUIDELINES
FOR THE YEAR 1997**

ALAN G. LANCE
ATTORNEY GENERAL
STATE OF IDAHO

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

January 7, 1997

The Honorable David Callister
Idaho House of Representatives
7011 Holiday Dr.
Boise, ID 83709

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

Re: Interpretation of Idaho Code § 34-907

Dear Representative Callister:

Thank you for requesting the opinion of the Office of the Attorney General. You have submitted a number of questions relating to Idaho Code § 34-907, which was passed by the voters in 1994. Each of your questions is set out below in bold and followed by an answer.

1. When does the 8-year term limit for state house or state senate members begin?

Although Idaho Code § 34-907, the term limits initiative, went into full force and effect on November 23, 1994, section 5 of the initiative made it applicable only to service for terms of office which began on or after January 1, 1995. Section 5 of the initiative specifically provides that service for terms commencing prior to January 1, 1995, shall not be counted.

According to article 3, section 3 of the Idaho Constitution, senators and representatives are elected for a "term of two years, from and after the first day of December next following the general election." For senators and representatives elected on November 8, 1994, their term of office began on December 1, 1994. According to the plain terms and apparent intent of section 5 of the Term Limits Initiative, service for the term beginning December 1, 1994, is not to be counted. The first term to be counted against senators and representatives is the one beginning December 1, 1996.

2. Does the 8-year limit apply to services rendered in the “legislature” or does its application treat the office of representative and the office of senator individually? In other words, does this law allow a candidate’s name to be on the ballot for the state house of representatives if that candidate has just served eight consecutive years in the state senate?

Idaho Code § 34-907(1)(d) prohibits the name of a person from appearing on the ballot as a candidate for either house of the state legislature when that person has already served in the same office “during eight (8) or more of the previous fifteen (15) years.” The preliminary language of section 34-907(1) states that this prohibition applies to candidates for a state legislative office who “have previously held if they have served, will serve or but for resignation would have served, in that same office” for the allotted time (emphasis added). By their terms, the state house of representatives and the state senate are not the “same office.” Therefore, Idaho Code § 34-907 probably would not prohibit a person’s name from appearing on the ballot as a candidate for the state house if that person had just served for eight years in the state senate.

3a. If a house member were elected successively from separate districts, would the 8-year term limit apply to the member’s entire service collectively or would the 8-year limit apply separately from each district?

The office that the individual in your hypothetical question holds is that of state representative. The 8-year time limit found in section 34-907(1)(d) specifically applies to state legislators “representing any district within the state, including house seats within the same district.” Therefore, a house member that already served eight years probably could not appear on the ballot as a candidate for the house in a different legislative district.

3b. If the 8-year limit is just applicable to service in the same district only, then in the case of a legislative district being altered by reapportionment, what criteria would be used to determine if the altered district was the same district for the purpose of applying the term limit?

The 8-year limit contained in section 34-907(1)(d) applies to an individual who has held the office of state senator for eight years or more. Likewise, a state representative who has held office for four terms may not be

included on the primary or general election ballot for the office of state representative. The potential reapportionment of a particular legislative district probably would have no effect on the application of Idaho Code § 34-907(1)(d) to a candidate running for a fifth consecutive term in the same office.

4a. After an office holder has served the full term of office as described under this section, and then chooses to run in the primary election by write-in for the same office and is selected as party nominee by receiving the appropriate number of ballots, does Idaho law prevent the candidate's name from being printed on the general election ballot for that office?

While the answer to this question is not clear, it appears that the successful write-in candidate could not have his name placed on the general election ballot. Idaho Code § 34-907(1)(d) prohibits the name of a person from appearing on the ballot as a candidate for either house of the state legislature when that person has already served in the same office “during eight (8) or more of the previous fifteen (15) years.” This prohibition probably includes successful primary write-in candidates. If the hypothetical scenario you pose actually occurred, it is uncertain who would appear on the general election ballot for the successful write-in candidate's party. This is an area that the legislature may wish to clarify.

4b. Are there conflicting provisions of Idaho Code on this matter?

Idaho Code § 34-906 states that the general election ballot must contain “the complete ticket of each political party.” Each “political party ticket shall include that party's nominee for each particular office.” In the hypothetical posed in question 4a, it would be impossible to comply with the requirements of Idaho Code § 34-906 while also honoring the limitations of Idaho Code § 34-907(1)(d).

4c. Which provisions prevail?

There are two general rules of statutory construction that govern the outcome of this question. First, when there is an irreconcilable inconsistency between two statutes, the most recent statute governs. *See, e.g., State v.*

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Betterton, 127 Idaho 562, 903 P.2d 151 (1995). In this case, Idaho Code § 34-906 was last amended in 1977, while Idaho Code § 34-907 was enacted in 1994. Second, a specific statute will control over a more general statute. *See, e.g., City of Sandpoint v. Sandpoint Indep. Highway Dist.*, 126 Idaho 145, 879 P.2d 1078 (1994). Section 34-906 governs the content of ballots in a general way, while section 34-907 specifically limits ballot access for certain incumbents. Both of these rules of statutory interpretation suggest that section 34-907 will probably prevail over section 34-906.

I hope this letter is of help to you. If you have any additional questions or comments, please feel free to call upon me.

Sincerely,

MATTHEW J. MCKEOWN
Deputy Attorney General
Intergovernmental and Fiscal Law Division

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

January 20, 1997

Superintendent Anne C. Fox
Superintendent of Public Instruction
Department of Education
STATEHOUSE MAIL

Honorable William T. Sali
House of Representatives
STATEHOUSE MAIL

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

Dear Superintendent Fox and Representative Sali:

Per request for opinion from Representative Sali dated December 13, 1996, and Superintendent of Public Instruction, Anne C. Fox, Ph.D., dated December 13, 1996.

QUESTIONS PRESENTED

1. What is the definition of "public funds" under Idaho Law?
2. Are mandated student fees such as those imposed upon students attending Idaho state supported colleges and universities public funds?
3. What are the restrictions on the use of public funds to advocate for or against a candidate or ballot issue?
4. Does the First Amendment to the United States Constitution restrict the manner in which public funds may be spent, or impose any special obligations upon governmental entities which spend public funds to advocate in favor or against an election issue? Would an analysis under the First Amendment distinguish between tax generated public funds and non-tax generated public funds such as mandated student fees?

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5. If a public entity spends funds in support or in opposition to an election issue, is it required to file a report or to otherwise comply with the Idaho Sunshine Law?
6. What remedies are available against public entities, officers, or employees which spend or who authorize spending of public funds in favor or against election or ballot issues? Please consider all remedies, civil, criminal and injunctive relief.
7. What is the potential liability on the part of a public officer or employee who uses or who authorizes the use of public funds to advocate for or against a candidate or ballot issue?

CONCLUSION

1. Public funds are defined as “moneys belonging to government, or any department of it, in hands of a public official.” Black’s Law Dictionary (6th ed. 1990).
2. Student activity and other mandated fees are considered public funds.
3. Public funds should not be expended to support or oppose candidates or election issues. However, in the case of mandated student fees, the expenditure of funds in support of certain political activities is not strictly prohibited, provided that safeguards are built in for students who oppose the stance being taken by student government or by any organization funded by student government.
4. If public resources or public funds are used in any way related to a ballot issue, there must be equal access to the funds or resources on the part of both opponents and proponents of a ballot measure.
5. The Idaho Sunshine Law does not apply to expenditures by public entities on ballot issues.
6. Idaho law does not provide specific remedies against public entities, officers, or employees who violate the prohibition against expenditure of public funds in support of or in opposition to a ballot measure.

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There is no Idaho case law on this point. Criminal statutes may apply, but more likely any remedy would be civil in nature.

7. Just as remedies are unclear under Idaho law, the liability of public officials who authorize the expenditure of public funds is likewise unclear. Public officers who authorize such expenditures conceivably could be subject to criminal liability. Civil liability making the public officer personally responsible for the expenditure or injunctive relief against the public officer is also possible.

ANALYSIS

Factual Background

During the 1996 election campaign, school districts and other public entities spent public funds in opposition to the most recent version of the one percent initiative. Public moneys were used to print campaign flyers, political tracts, fact sheets, position papers and notices to patrons of school districts. Other state entities also made expenditures of funds in open opposition to the one percent initiative as well as against the bear baiting initiative. In addition, it has been alleged that the student governments at Idaho's universities authorized the expenditure of moneys in opposition to the one percent initiative. In prior elections, it has been alleged that student governments authorized expenditure of funds in opposition to other ballot measures. Annually, legislators and other public officials receive complaints of expenditures by school districts and municipalities to campaign for passage of bonds.

It is a common practice in Idaho and in other states for school boards, boards of county commissioners, city councils, individual legislators, the governor, the attorney general, and other public officers to take stands for or against various initiatives. Actions taken in support or opposition to ballot initiatives might include the passage of resolutions, statements of position, speeches or participation in debates. It appears well settled that this latter type of activity does not violate the public purpose doctrine or any rules regulating the expenditure of public funds. However, this opinion will examine the status of existing law concerning the expenditure of public funds to actively campaign for or against ballot measures or the expenditure of public

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funds to purchase advertising space, to produce television or radio ads or to print tracts which argue for or against a particular ballot measure.

Public Funds Doctrine

a. Prior Analysis of Public Funds and Public Purpose Doctrine by the Office of Attorney General

Questions relating to the expenditure of public funds for or against ballot issues have come up repeatedly for at least the past 20 years. In 1975, the Office of Attorney General issued Attorney General Opinion 6-75 concerning the expenditure of public funds on a bond election for an auditorium district. The opinion concluded that a taxing district may utilize public funds to advertise a bond election provided the funds used equally present the pro and con positions of the ballot question. Further, funds are not to be used for promotional advertising urging voters to pass the bond. Expenditures for informational advertising are permissible so long as that information is limited to information about the election, such as the location of polling places, the hours that polling places would be open, the bond authorization being sought and information regarding the cost of the bond to property owners.

In 1995, the Office of Attorney General issued Opinion 95-07 regarding the practice of Idaho state government agencies loaning state employees to the United Way for the United Way's annual fund raising campaign. That opinion concluded that the loaning of employees violated the Public Purpose Doctrine and, further, that Idaho employees or facilities may not be shared or loaned to private charitable foundations unless the action serves a public purpose and is directly related to a function of government. Between these two opinions, a number of informal letters have been issued by the Attorney General's Office concerning public expenditures in support of school bonds, municipal bonds, and expenditures in opposition to ballot initiatives. All of these opinions have concluded that the expenditure of public money in opposition or in favor of a ballot measure violates the Public Purpose Doctrine and is an improper expenditure of public funds.

b. Basis of the Public Purpose Doctrine as it Relates to the Expenditure of Public Funds

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Governments have available to them powers not available to private individuals or corporations. Governments at all levels have the ability to raise money through taxation. All citizens are subject to taxation whether or not they agree with the purposes to which the government intends to put the money. Generally, citizens may not challenge in court these expenditures so long as the government spends the money for a public purpose related to the function of government.

The First Amendment to the United States Constitution provides some basis for restricting public expenditures on ballot campaigns. One court has noted:

An interpretation of the pertinent language of the Campaign Reform Act as a grant of express authority for a partisan use of public funds in an election of this type would violate the First Amendment to United States Constitution, made applicable to the states by the due process clause of the Fourteenth Amendment. It is the duty of this Court to protect the political freedom of the people of Colorado. The freedom of speech and the right of the people to petition the government for a redress of grievances, are fundamental components of guaranteed liberty in the United States.

Mountain States Legal Foundation v. Denver School District, 459 F. Supp. 357, 360 (1978) (citations omitted).

Most courts have avoided an analysis under the First Amendment, with the exception of those courts addressing the issue of the expenditure of mandatory student fees.

The prohibition on the use of public funds in political campaigns is primarily based upon the public funds doctrine. This doctrine prohibits the expenditure of public moneys for purposes unrelated to the function of government. As noted by the New York Supreme Court in Stern v. Kramarsky, 375 N.Y.S. 2d 235 (1975):

Public funds are trust funds, and as such are sacred and are to be used only for the operation of government. For

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government agencies to attempt to influence public opinion on such matters inhibits the democratic process through the misuse of government funds and prestige. Improper expenditure of funds, whether directly through promotional and advertising activities or indirectly through the use of government employees or facilities cannot be countenanced.

Id. at 239.

The prohibition on using public funds on political campaigns recognizes the vast amount of money available as well as the power and prestige of the state. Unchecked, governments or incumbents could use the resources available to them to control the outcome of elections.

The principles behind the Public Purpose Doctrine are as old as the Republic. A fundamental premise of American government is the principle that the people control the government. The government should never be allowed to control the people. Structural safeguards designed to protect the people from an overreaching government have long been part of American democracy. Among these safeguards is that public monies should only be used for public purposes. Indeed, Thomas Jefferson wrote:

To compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors is sinful and tyrannical.

Boyd, Papers of Thomas Jefferson, 545-47 (1950).

c. Definition of Public Funds

There are two Idaho statutes which define public moneys. Idaho Code § 57-105 defines public moneys:

“Public moneys” are all moneys coming into the hands of any treasurer of a depositing unit, and in the case of any county shall also include all moneys coming into the hands of its tax collector or public administrator.

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Similarly, Idaho Code § 18-5703 defines public moneys:

The phrase “public moneys” as used in the two preceding sections includes all bonds and evidences of indebtedness, and all moneys belonging to any state, or any city, county, town or district therein, and all moneys, bonds and evidences of indebtedness received or held by state, county, district, city or town officers in their official capacity.

The definition used in these Idaho statutes is in accord with the general understanding of the terms “public funds” and “public moneys.” The generally accepted definition of public funds is:

Moneys belonging to government, or any department of it, in hands of public official.

Black’s Law Dictionary (6th ed. 1990).

d. Mandated Student Fees

Idaho state universities and colleges are not specifically authorized by the constitution or by statute to collect student activity fees. However, it has been generally accepted that such fees are generally authorized by the constitutional provision granting “general supervision of the state educational institutions” to the State Board of Education (Board). Idaho Constitution, art. 9, section 2. The Board’s governing policies and procedures identify activity fees as “local fees” which are deposited into local institutional accounts and are to be expended for the purposes for which they are collected. The activity fee funds are not deposited into the state treasury, but are instead administered on campus by university officials. The governing policies and procedures of the Board define activity fee:

Activity fee is defined as the fee charged for such activities as intercollegiate athletics, student health center, student union operations, the associated student body, financial aid, intramural and recreation, and other activities which directly benefit and involve students. The activity fee shall not be charged for educational costs or major capital

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improvement or building projects. Each institution shall develop a detailed definition and allocation proposal for each activity for internal management purposes.

State Board of Education Governing Policies and Procedures, Section V, Subsection R, Page V-42.

Clearly, public funds are not limited to those funds derived from taxes. In Denver Area Labor Federation v. Buckley, 924 P.2d 524 (Colo. 1996), the Colorado Supreme Court held that money in the funds administered by the Colorado worker's compensation fund constituted public moneys. The court then concluded that money in the fund could not be used to urge voters to vote for or against a ballot measure.

Although student activity fees are not state funds inasmuch as they are not controlled directly by the state treasurer, they appear to fit the definition of public funds. The use of such fees for political causes has restrictions as will be discussed more fully below.

e. Expenditure of Tax Generated Public Funds in Favor of or Against Ballot Issues

The question here is whether public entities may use money raised by taxes to influence the outcome of an election. Most courts that have addressed this issue have found the use of public funds to support or oppose a ballot issue improper, either on grounds that such use was not legislatively authorized (*ultra vires*), Mines v. Del Valle, 257 P.2d 530 (1927); Citizens to Protect Public Funds v. Board of Education of Parsippany—Troy Hills Tp., 98 A.2d 673 (N. J. 1953); Porter v. Tiffany, 502 P.2d 1385 (Or. Ct. App. 1972); Stanson v. Mott, 551 P.2d 1 (Cal. 1976); Palm Beach County Hospital v. Hudspeth, 540 So.2d 147 (Fla. Ct. App. 1989); and Smith v. Dorsey, 599 So.2d 529 (Miss. 1992), or on broader constitutional grounds, Mountain States Legal Foundation v. Denver School District No. 1, 459 F.2d 357 (D. Colo. 1978); Schultz v. State of New York, 654 N.E.2d 1226 (N.Y. 1995).

In Citizens to Protect Public Funds, *supra*, Justice (now former United States Supreme Court Justice) Brennan, writing for the New Jersey Supreme Court, determined that a school board had implied powers to use

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public funds to give voters some information about a school bond issue. However, the court held:

That a fair presentation of the facts will necessarily include all consequences, good and bad, of the proposal, not only the anticipated improvement in educational opportunities, but also the increased tax rate and such other less desirable consequences may be foreseen. . . .

The public funds entrusted to the Board belong equally to the proponents and opponents of the proposition, and the use of the funds to finance not the presentation of facts merely, but also arguments to persuade the voters that only one side has merit, gives the dissenters just cause for complaint. The expenditure is then not within the implied power and is not lawful in the absence of express authority from the Legislature.

Id. at 677.

Public expenditures in other elections are even more limited. There are strong policy reasons for precluding public expenditures in elections for office or initiative or referendum elections.

In Idaho, the right of the initiative is recognized in the state constitution at article 3, section 1. That section states in relevant part:

The people reserve to themselves the power to propose laws, and enact the same at polls independent of the Legislature. This power is known as the initiative, and legal voters may, under such conditions and in such manner as may be provided by acts of the Legislature, initiate any desired legislation and cause the same to be submitted to the vote of the people at a general election for their approval or rejection.

Some courts reviewing expenditures by public entities in initiative elections have specifically cited the constitutional recognition of the right of the initiative. In Mountain States Legal Foundation v. Denver School District

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No. 1, *supra*, the court, early in its opinion, hinted at the significance of the initiatives, stating:

That proposal was placed on the ballot by a voter's petition in the exercise of the power of the initiative, expressly reserved to the people in Article V, Section 1 of the Constitution of Colorado.

Id. at 358. The court then went on to condemn the practice of spending by public entities for or against ballot initiatives:

A use of the power of publicly owned resources to propagandize against a proposal made and supported by a significant number of those who are being taxed to pay for such resources is an abridgment of those fundamental freedoms. Specifically, where the proposal in question—placed before voters in the exercise of the initiative power—seeks fundamentally to alter the authority of representative government, opposition to the proposal which is financed by publicly collected funds has the effect of shifting the ultimate source of power away from the people. Do not the people themselves, as the grantors of the power of government, have the right to freely petition for what they believe is an improvement in the exercise of that power? Publicly financed opposition to the exercise of that right contravenes the meaning of both the First Amendment to the United States Constitution and Article V, Section 1 of the Constitution of Colorado.

Id. at 360, 361. The practice of using tax generated public funds to oppose a citizen initiative was likewise found to be an unlawful practice in Campbell v. Arapahoe County School District No. 6, 90 F.R.D. 189 (D. Colorado 1981).

Article 1, section 2 of Idaho's Constitution states: "[a]ll political power is inherent in the people." The initiative was established as a means of exercising this power. Idaho Constitution article 3, section 1. Because of the central importance of the initiative process in protecting the political power

vested in the people, interference with the right of initiative by the use of government resources in opposition should be regarded with suspicion.

The use of public funds to support or oppose a statewide initiative could be considered a violation of the provision of the Idaho Constitution prohibiting the use of public funds for a private benefit. In Schulz v. State of New York, *supra*, the court considered whether public funds used in support of a local referendum violated a New York constitutional provision similar to Idaho's constitutional provisions prohibiting the granting or loaning of the state's money or credit to private individuals. The New York court recited the history of New York's provision, which is substantially the same as Idaho's. Both prohibitions arose out of a fear of government subsidization of the railroad industry. The New York court held:

We think it is unassailable that the use of public funds out of a state agency's appropriation to pay for the production and distribution of campaign materials for a political party or a political candidate or partisan cause in any election would fall squarely within the prohibition of Article VII, Section 8, Subsection 1 of the Constitution. Manifestly, using public moneys for those purposes would constitute a subsidization of a non-governmental entity—a political party, candidate or political cause advanced by some non-governmental group. Contrastingly, a governmental agency does not violate Article VII, Section 8, Subsection 1, merely by using taxpayers' funds for the valid governmental purpose of encouraging the public to participate in a democratic process by voting in an election. Nor would that constitutional provision prevent the use of public funds to inform and educate the public in a reasonably neutral fashion on the issues in an election so that voters will more knowledgeably exercise their franchise.

Id. at 1230. In Schulz, the plaintiffs were challenging a local board of education's use of public funds for the preparation and distribution of promotional materials advocating an affirmative vote on a bond proposition scheduled for public referendum.

f. First Amendment Implications

You have raised the issue of whether the First Amendment to the United States Constitution imposes restrictions on the use of public funds to advocate in favor or in opposition to ballot measures. The First Amendment as a potential source of restriction on such use as is noted in Mountain States Legal Foundation v. Denver School District No. 1, *supra*. However, most courts appear to have avoided First Amendment issues. They have construed these cases as issues of government power to expend funds on ballot issues rather than examining the issue of whether the expenditure is an infringement upon a citizen's First Amendment rights. Some courts have noted that the right of free speech involves also the right not to speak and that necessarily involves the right not to have one's money spent in support of an issue with which one disagrees. Most often, the First Amendment issue is not reached because these cases do not involve First Amendment questions, but, rather, involve issues of the power or authority of government to legally spend money to influence the outcome of elections.

In Anderson v. City of Boston, 380 N.E.2d 628 (Mass. 1978), the court noted:

We are offered little assistance from prior decisions. Although for more than 50 years the due process clause of the fourteenth amendment has protected the liberty of speech from invasion by state action, there has been no judicial consideration of the impact of the rights of freedom of speech on the right of state or local governments to use public funds to advocate a position on a question being submitted to voters.

Id. at 635 (citations omitted).

In State v. Kramarsky, 375 N.Y.S.2d 235 (N.Y. Sup. Ct. 1975). The plaintiffs were challenging expenditures by the New York Human Rights Commission in support of a constitutional amendment to be submitted to the voters. The court held that the issue to be examined was not free speech, but, rather, the power and authority of government to use public funds in a political campaign:

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Thus the issue raised by the instant application is not one concerning freedom of speech or association, but whether it is a proper function of a state agency to actively support a proposed amendment to the state constitution which is about to be presented to the electorate in a statewide referendum.

Id. at 237. It must be noted that the issue in the New York case was not the free speech rights of those challenging the expenditure, but, rather, the First Amendment rights of the Human Rights Commission and its director to use state funds to campaign against the constitutional amendment.

In Campbell v. Arapahoe County School District No. 6, 90 F.R.D. 189 (1981), the court was urged by the defendants to interpret Colorado's Campaign Reform Act in such a way as to permit expenditures of public monies in favor of ballot issues. Regarding this argument, the court stated that such an interpretation might violate the First Amendment:

Reading Section 1-45-116 in the manner urged by the defendants would also infringe upon those individual freedoms which are protected by the First Amendment to the United States Constitution, applicable to the States under the Fourteenth Amendment.

Id. at 194.

One place where the courts have applied First Amendment principles to the area of public funds is the expenditure of mandatory student fees. In light of the First Amendment, courts have considered a number of cases involving the use of mandatory fees to fund controversial or objectionable activities. Smith v. Board of Regents, 844 P.2d 500 (Cal. 1993), dealt with the expenditure of mandated student fees. The Smith court held:

To summarize, *Keller* and *Abood* teach that the state may compel a person to support an organization if there is a sufficiently compelling reason to do so, and that the organization's use of mandatory contributions must be germane to the purpose that justified the requirement of support.

Id. at 508.

Perhaps the most recent of these cases is Southworth v. Grebe, et al. (Eastern District Wis. 96-C-0292-S) (slip opinion). In that case, three students at the University of Wisconsin - Madison sued the university's board of regents claiming that the student activity fees were used to support student organizations engaged in political or ideological activities. At least part of the objection of the students was that their beliefs were very different from the activities they were being compelled to support. The district court granted summary judgment to the plaintiffs primarily because their First Amendment right to free speech had been violated.

In analyzing the case, the court identified First Amendment concerns, framing the issue:

In this case, plaintiffs contend that the use of mandatory segregated fees to subsidize student organizations that are engaged in political and ideological activities violates their First Amendment rights not to be compelled to speak and associate. Defendants argue that the mandatory segregation fee does not compel speech on behalf of plaintiffs, but rather funds the expression of different views at the University of Wisconsin. To the extent that the segregated fee infringes plaintiff's First Amendment rights, defendants claim that such infringement is justified by the university's compelling interest in providing opportunities for free and wide ranging discussion of competing viewpoints. Accordingly, the parties' arguments in this case require the court to strike a balance between two very significant competing interests: the plaintiffs' constitutional right not to be compelled to financially subsidize political or ideological activities, balanced against the board of regents authority to promote the university's educational mission by providing opportunities for the free expression of diverse viewpoints on difficult and challenging issues.

Slip op. at 11. Since the issue involved fundamental rights, strict scrutiny was applied:

Because the imposition of mandatory fees implicates both freedom of speech and freedom of association, the court must consider plaintiffs' claims using a strict scrutiny analysis. Strict scrutiny provides that a state may infringe upon one's First Amendment rights to freedom of speech or freedom of association if it serves a compelling state interest, unrelated to suppression of ideas, and cannot be achieved through less restrictive means. *Chicago Teacher's Union, Local No. 1 AFT, AFL-CIO v. Hudson*, 475 U.S. 292, 303 Note 5 (1986).

Id. The court in Southworth held that distribution of mandatory student fees to subsidize political or ideological student organizations might be permissible, but any program providing for distribution of such funds must be carefully tailored:

Accordingly, just as the *Smith* court found that the students at U.C. Berkley were forced to support groups whose primary function was to promote political and ideological activities, plaintiffs are being compelled to subsidize student organizations at UW-Madison whose educational benefits to the UW-Madison are incidental to some student organizations' political and ideological activities. This court need not determine if each and every of the eighteen groups that plaintiff specifically challenged offer educational benefits that justify the infringement of plaintiffs' speech and associational rights. As long as more than a de minimus number of student organizations are using their funding from the segregated fee to engage in primarily political and ideological activity, defendant's infringement of plaintiffs' First Amendment rights cannot be legally justified. . . .

. . . The university's compelling interest in promoting the free exchange of ideas by subsidizing the political and ideological student organizations does not justify such infringement because the university hasn't carefully tailored the implementation of its interest so as to avoid the unnecessary infringement of the First Amendment Rights of

those students who disagree with the political and ideological messages being advocated by certain student organizations. This is not to say that these political and ideological student organizations cannot be funded by segregated fees of those students who do not object. These political and ideological student organizations contribute in a limited manner to the education function of state universities and can be funded by mandatory student fees such as the segregated fee, however, the university must provide some sort of opt out provision or refund system for those students who object to subsidizing political and ideological student organizations with which they disagree. Because the parties have agreed to fashion their own remedy in the event violation of plaintiffs' constitutional rights exists, this court will not address at this time that which it believes may be the appropriate remedy.

Slip op. at 8, 9.

The court recognized some legitimate university interest in funding activities or organizations which are political or ideological. However, it appears that the court also had in mind a remedy which would provide a refund to students of that portion of their student fee which would otherwise go to subsidizing such an activity. The court felt that given the unique circumstances of the university community such a balance was necessary to provide for the free flow and exchange of ideas.

It appears that a university may support student organizations through mandatory student fees because the free exchange of ideas is germane to the university's mission. However, safeguards must be built in to any such system. Such safeguards might include provisions for refunding money to students who disagree with political or ideological activities which do not directly relate to the university's primary mission.

g. Applicability of Sunshine Law to Governmental Entities

Whether or not the state's Sunshine Law, Idaho Code § § 67-6601 through 6628, applies to state agencies is primarily a matter of statutory interpretation. The Sunshine Law's definition of "person" includes "an individ-

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ual, corporation, association, firm, partnership, committee, political party, club, or other organization or group of persons.” Idaho Code § 67-6602(1). In addition, public agencies generally do not receive contributions, one of the triggering elements to be considered a “political committee.” Since public agencies do not fall within the definitions of the Sunshine Law, they are not subject to its provisions.

The primary purpose of the state’s Sunshine Law is one of disclosure. Both the Public Records Act and the Open Meeting Law apply to state agencies. These laws probably provide the appropriate disclosure as well as assuring that the public entities’ business is conducted in a public forum.

Construing the state’s Sunshine Law in such a fashion as to apply it to governmental entities might imply that the governmental entities have the right to make political contributions. In other words, state agencies and branches of government need not be subject to the state’s Sunshine Law unless it is felt that they possess the power or should be granted the power to make political contributions or to attempt to influence the outcome of elections.

The lack of mention of governmental entities in a state Sunshine Law was cited by the Massachusetts court in Anderson v. City of Boston, *supra*, in support of the proposition that the state agencies lacked the authority to spend funds in opposition to a state referendum. The Massachusetts’ Sunshine Law is found in the General Laws of Massachusetts, Chapter 55. In relying upon the Massachusetts Sunshine Law in support of its conclusion, the court held:

We interpret G.L.c. 55 as intended to reach all political fund raising and expenditures within the commonwealth. The absence of any reference to municipal corporations is significant, not as an indication that municipal action to influence election results was intended to be exempt from regulation, but rather as an indication that the Legislature did not even contemplate such municipal action could occur. We notice judicially that traditionally municipalities have not appropriated funds to influence election results. If the Legislature had expected municipalities would engage in such activities or intended that they could, G.L.c. 55 would

have regulated those activities as well. We thus construe G.L.c. 55 as preempting any right which a municipality might otherwise have to appropriate funds for the purpose of influencing the result on a referendum question to be submitted to the people at a state election.

Id. at 634.

h. Remedies/Penalties

The absence of Idaho case law in this area makes it difficult to determine what is the most appropriate remedy to be pursued in cases where governmental entities or officers misuse public funds to influence the outcome of elections. At the outset, it appears that civil remedies are probably the most appropriate. The appropriateness of a particular remedy will depend upon the facts of each case.

The primary criminal provision that could apply to a public agency or officer is Idaho Code § 18-5701—Misuse of Public Money by Officers, which provides:

Each officer of this state, or of any county, city, town, or district of this state, and every person charged with the receipt, safekeeping, transfer or disbursement of public moneys, who . . . [w]ithout authority of law, appropriates the same or any portion thereof to his own use, or to the use of another . . . [i]s punishable by imprisonment in the state prison for not less than one (1) no more than ten (10) years, and is disqualified from holding any office in this state.

The severe penalties imposed by this code section are a strong deterrent. As a criminal statute, it is to be enforced by a county prosecutor. An aggrieved citizen cannot pursue enforcement on his own and therefore must rely upon government to remedy the shortcomings of government. More importantly, however, the annotations to § 18-5701 concern more traditional embezzlement and theft situations. There are no reported cases where this statute has been used to pursue a public agency or officer for spending money to influence the outcome of an election.

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The Administrative Procedure Act (APA) may also provide remedies to citizens who object to the action of a public agency which is subject to the APA. This remedy would be pursued through the judicial review provisions of the APA. Under Idaho Code § 67-5273(3), an aggrieved party may file a petition for judicial review of a “final agency action other than a rule or order . . . within twenty-eight (28) days of the agency action, . . .” Not all public entities are subject to the APA. The APA does not cover the actions of local government entities.

A third remedy would be for an aggrieved citizen to seek injunctive relief against the public entity. The standards for either granting or denying a preliminary injunction are set out in Idaho Rule of Civil Procedure 65(e). Injunctive relief is prospective in nature and may not provide satisfaction in cases where the action complained of has been completed. In addition, in Harris v. Cassia County, 106 Idaho 513, 681 P.2d 988 (1984), the Idaho Supreme Court held that a preliminary injunction is granted only in extreme cases where the right is very clear and it appears that irreparable injury will flow from its refusal.

A board or public official who authorizes the expenditure of public funds which is later found to be illegal might be personally liable for the money spent. In other words, the board or officer who authorizes spending to advocate for or against a ballot issue might be called upon to refund to the public agency the amount of the expenditure.

As noted above, there are numerous cases around the United States where citizens have filed suit against public entities when those entities have spent money to attempt to influence the outcome of an election. Few of these cases have discussed standing. This seems remarkable given the reluctance of courts to grant standing to individual taxpayers who feel aggrieved by government action. Those cases which have addressed standing have done so in only a cursory fashion. The court in *Stern v. Kramarsky*, *supra*, simply ruled that the plaintiff had standing to bring the action and did not provide any further explanation:

Moreover, as a taxpayer and as president of an organization campaigning against the Human Rights

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Amendment, the plaintiff Annette Stern has requisite standing to maintain this action.

Id. at 240 (citations omitted). The New York court did not discuss the particularized injury of the plaintiff, although perhaps it is noteworthy that the court specifically mentioned that the plaintiff was president of an organization campaigning against the human rights amendment. Members of organizations who are sponsoring ballot measures which are opposed by governmental entities might have the particularized injury required to maintain standing.

Injunctive relief was seen as an appropriate remedy in Anderson v. City of Boston, *supra*. However, Chief Justice Hennessey writing for the Massachusetts Supreme Court, hinted that relief beyond injunction might be appropriate:

We come finally to the relief to which the plaintiffs are entitled. They seek an injunction against the city and its employees from taking certain action for the purpose or effect of influencing the outcome of the vote on the classification amendment.

The order which was entered on July 19, 1978 (see note 5 above), dealt with the expenditure of funds. Such an order is appropriate in an action brought under G.L.c. 40, Section 53 where a municipality is about to raise or expend money for purposes not authorized by law.

That order enjoins the city from using any funds specifically appropriated to be used to influence a vote on the classification amendment. Of course, the city has no authority to use other appropriated funds, including services of any employees paid from funds appropriated for other purposes, for the purpose of influencing that vote. In our discretion, however, we decline to issue an order concerning municipal funds of any greater breadth than that already entered. We anticipate that the city will adhere to the requirements of the law which are stated in this opinion. No claim has been made concerning the recovery of funds already expended.

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Normally, G.L.c. 40, Section 53, “does not authorize the undoing of completed transactions.” We decline to express any view concerning whatever obligation there may be to restore, or to seek to recover, these amounts which were paid not only after this action was commenced, but also after the defendants had knowledge of the action. . . .

Our Order made no explicit reference to the use of city facilities, equipment, and supplies to advocate adoption of the classification amendment. The city intends to use office space and telephones for this purpose and to make them available to volunteers. It also intends to provide printed materials for distribution to the voters. From what we have said, it is apparent that the city’s use of telephones and printed materials provided by public funds, and its use of facilities paid for by public funds, would be improper, at least unless each side were given equal representation and access.

Id. at 640-41.

In Independent School District No. 5 v. Collins, 15 Idaho 535, 98 P.2d 857 (1908), two taxpayers brought legal action against a school board trustee to recover from the trustee the money paid to his business pursuant to a contract which was said to violate provisions of Idaho law. The district had paid the bill to the trustee’s business and the school board refused the demands of the plaintiffs to seek restitution from the defendant trustee. Regarding the remedy the Idaho Supreme Court held:

If money is illegally paid on such void contract, the district may recover it back and in case the district refuses to do so, any taxpayer of the district may, for and on behalf of the district, maintain an action for the recovery of the money so illegally paid.

15 Idaho at 541.

It is not clear whether Idaho courts would so easily find that taxpayers have standing to bring these actions today.

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In the area of student fees, it appears from the Southworth case that students who may disagree with the use of student funds for political or ideological purposes must be given the opportunity of receiving a refund on that portion of their mandated student fees which went to support the political or ideological activity. This result, rather than a strict prohibition on expenditures, appears to be a recognition that universities are to foster the free flow of information as well as to encourage public debate.

CONCLUSIONS

Public agencies may not spend money to influence the outcome of elections. While public funds may be spent to encourage voter participation or to represent fairly both sides of an issue, funds may not be spent simply to support or to defeat a particular ballot issue. Government may sponsor candidate debates, debates on ballot issues and, in the case of bond elections, certain basic information such as the amount of the bond sought, what it is to be used for and its effect upon property owners.

Certainly, elected officials may state their position on issues of the day, as well as their opinion on ballot measures. School boards may pass resolutions indicating their position on a ballot measure, but the expenditure of public funds to defeat a measure or to support a measure is prohibited.

The courts have used strong language in condemning the practice of spending public funds to influence the outcome of elections. The Massachusetts court in Anderson v. City of Boston, *supra*, stated:

Fairness and the appearance of fairness are assured by a prohibition against using public tax revenues to advocate a position which certain taxpayers oppose. The commonwealth's interest in fairness and in the appearance of fairness is particularly significant in the face of the defendant's argument that no limit may be imposed on the city's expenditure of tax revenue for vigorous advocacy on a referendum question. On this view, the commonwealth is apparently powerless against political entities of its own creation.

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Assuming that the commonwealth has no right to restrict such advocacy where there is no opposition from any affected citizen, the commonwealth has a compelling interest in restricting such advocacy where the affected citizenry are not in unanimity. The commonwealth has an interest in assuring that a dissenting minority of taxpayers is not compelled to finance the expression on an election issue of views with which they disagree. Unlike the shareholders of a private corporation, real estate taxpayers such as plaintiffs cannot avoid the financial consequences of the city's appropriation of funds.

380 N.E. 2d at 639 (citations omitted).

Similarly, the court in Mountain States Legal Foundation v. Denver School District No. 1, *supra*, stated:

Indeed, every court which has addressed the issue to date has found the use of public funds for partisan campaign purposes improper either on the ground that such use was not explicitly authorized or on the broader ground that such expenditures are never appropriate. As in the instant case, the majority of these decisions related to expenditures in connection with bond elections.

Underlying this uniform judicial reluctance to sanction the use of public funds for election campaigns rests an implicit recognition that such expenditures raise potentially serious constitutional questions. A fundamental precept of this nation's democratic electoral process is that the government may not "take sides" in election contests, or bestow an unfair advantage on one of several competing factions. A principal danger feared by our country's founders lay in the possibility that the holders of government authority would use official power improperly to perpetuate themselves or their allies in office. The selective use of public funds in election campaigns, of course, raises a spectre of just such an improper distortion of the democratic electoral process.

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459 F. Supp. at 360 (citations omitted). Perhaps the strongest language used in condemning expenditures of public funds to influence the outcome of elections came from the New York Supreme Court in Stern v. Kramarsky, *supra*. In that case, after ruling that the New York Human Rights Commission could not spend money to advocate in favor of passage of a human rights amendment, the court went on to conclude:

The spectacle of state agencies campaigning for or against propositions or proposed constitutional amendments to be voted on by the public, albeit perhaps well motivated, can only demean the democratic process. As a state agency supported by public funds, they cannot advocate their favorite position on any issue or for any candidates, as such. So long as they are an arm of the state government, they must maintain a position of neutrality and impartiality.

It would be establishing a dangerous and untenable precedent to permit the government or any agency thereof, to use public funds to disseminate propaganda in favor of or against any issue or candidate. This may be done by totalitarian, dictatorial, or autocratic governments, but cannot be tolerated, directly or indirectly, in these democratic United States of America. This is true even if the position advocated is believed to be in the best interest of our country.

Id. at 239.

There is nothing contained in the Idaho Statutes or in Idaho case law to indicate that an Idaho court would reach a different conclusion.

Very truly yours,

WILLIAM A. VON TAGEN
Deputy Attorney General
Director, Intergovernmental and
Fiscal Law Division

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April 30, 1997

Mr. Don Heikkila, Chairman
Idaho Soil Conservation Commission
P. O. Box 83720
Boise, ID 83720-0083

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

Dear Mr. Heikkila:

Your request for guidance on the question of your Commission's relationship with the Idaho Department of Agriculture has been forwarded to me for response. In 1984, the Department of Lands sought and received guidance on the statutory relationship between the Department of Lands and the Soil Conservation Commission ("Commission"). In 1997, the legislature enacted S.B. 1241 (1997 Idaho Sess. Laws, ch. 180), which severed the relationship between the Department of Lands and the Commission, and placed the Commission in a similar relationship with the Department of Agriculture ("Department"). In light of the recent statutory changes, the Commission has requested that this office review and update the 1984 guidance.

QUESTIONS

1. What is the nature of the relationship between the Soil Conservation Commission and the Department of Agriculture?
2. What is the nature of the relationship between the Soil Conservation Commission and the director of the Department of Agriculture?
3. What is the nature of the relationship between the administrator of the Soil Conservation Commission, and the director of the Department of Agriculture?
4. What is the nature of the relationship between the Soil Conservation Commission and the administrator of the Soil Conservation Commission?

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5. Does the Commission staff report to the Commission administrator and Commission or to the Department of Agriculture director?

ANSWERS

The legislative changes enacted by the 1997 legislature through S.B. 1241 did little to clarify the ambiguities identified in the 1984 guidance letter and, in fact, raise additional questions about the nature of the relationships which you identified in your questions.

1. The relationship between the Soil Conservation Commission and the Department of Agriculture is cooperative in nature.
2. The relationship between the Soil Conservation Commission and the director of the Department of Agriculture (director) is cooperative in nature.
3. Beyond the director's power of appointment, the statute provides no guidance regarding the relationship between the administrator of the Commission (administrator) and the director. The legislature has left it to the parties to forge a functioning organizational structure.
4. The statute provides no guidance regarding the relationship between the Commission and the administrator, leaving it to the respective parties to create a workable organizational structure.
5. The reporting relationships among the Commission staff, the Commission, and the administrator are internal Commission matters. Since the Commission retains the power to hire staff, it is within the Commission's power to establish the lines of authority and reporting relationships of staff.

ANALYSIS

1. Background

The soil conservation district law was enacted in 1957 (1957 Idaho Sess. Laws, ch. 218, p. 476, codified as Idaho Code § 22-2714 et seq.). The act created the Soil Conservation Commission as an agency of the State of

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Idaho and provided for the creation of soil conservation districts. The three-member Commission was granted the authority to employ an administrator and staff to carry out its statutory functions.

In 1967, the Commission was increased from three to five members and the requirements for appointment of Commissioners were revised (1967 Idaho Sess. Laws, ch. 28, p. 48).

The next substantive change to the soil conservation district law occurred in 1974. The 1974 legislature reorganized state government by consolidating agencies and functions to reduce the number of state agencies to 20 (1974 Idaho Sess. Laws, ch. 17, p. 308). At that time, the Soil Conservation Commission was placed within the Department of Lands. The 1974 legislation did little, however, to impact the independence of the Soil Conservation Commission. As discussed in the 1984 legal guidance memorandum, the Department of Lands exercised no direct control or authority over the Commission, its administrator, or its staff. The nature of the relationship between the Department of Lands and the Commission was solely cooperative.

2. 1997 Legislation

No other substantive changes were made to the soil conservation district law until the 1997 changes, which precipitated this request for guidance. The 1997 legislation included several changes of note. First, it added language to the legislative determination and declaration of policy (Idaho Code § 22-2716(D)) emphasizing that the responsibilities of the Commission included providing “support and service to soil conservation districts in the wise use and enhancement of soil, water and related resources.”

Second, the legislation removed the Commission from within the Department of Lands and placed it within the Department of Agriculture. According to the statement of legislative intent, the relocation from the Department of Lands to the Department of Agriculture was “designed to maximize technical staff expertise, increase efficiency, enhance productivity, and reduce duplication of efforts.”

Third, the legislation provided for a change in the manner of appointment of the administrator of the Commission. Formerly, the appointment of

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an administrator was a function within the sole discretion of the Commission. The 1997 legislation gave to the director of the Department of Agriculture the authority to "appoint the administrator of the Soil Conservation Commission from persons recommended by the Soil Conservation Commission." The Commission retains the authority to employ such other staff as it deems necessary.

3. Discussion of Questions

Question 1 concerns the relationship between the Commission and the Department of Agriculture. The 1997 legislation made no changes in the language governing the relationship between the Commission and the Department when it moved the Commission from the Department of Lands to the Department of Agriculture. There is nothing in the legislative history which suggests that the association between the Commission and the Department be anything other than cooperative in nature. Neither the Commission nor the director of the Department has any direct authority over the other.

Question 2 concerns the relationship between the Commission and the director of the Department of Agriculture. While the 1997 legislation does not explicitly change the cooperative nature of the relationship between the Commission and the director, the legislation does cause a shift in the relative relationship of the two entities. As a practical matter, the 1997 legislation effects a division of power between the Commission and the director without specifically delineating what powers are distributed or to whom they are granted. This occurs as a result of the change in the manner of appointment of the administrator of the Commission, discussed elsewhere in this memorandum.

Both the senate and house committee minutes note that S.B. 1241 was a compromise bill drafted in response to strong objections to an original bill (S.B. 1147). As proposed, S.B. 1147 included provisions which would have resulted in major changes to the soil conservation district laws, substantially impacting the independence of the Commission. The fact that a compromise bill, which retains the Commission's control over its staff and requires that the Commission and the director act jointly in appointing an administrator was enacted, supports the conclusion that the relationship between the Commission and the director be cooperative. If either entity acts

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without regard to the other's concerns, the likelihood of an impasse looms large. Thus, it appears that cooperation is not merely a suggestion, but a necessity.

Questions 3 and 4 concern the relationship between the administrator and the director and the relationship between the administrator and the Commission. Clearly, the 1997 legislation altered these relationships when it transferred the Commission's authority to appoint an administrator to the director of the Department. This change affects the relationship between the administrator and the director, the Commission and its administrator, and as mentioned previously, the relationship between the Commission and the director. A careful review of the legislation, together with legislative history, provides no guidance as to the precise nature of these relationships. Rather, the legislative history suggests that the legislature intentionally left these issues to be resolved by the parties.

a. The Administrator of the Commission and the Director of the Department

The legislative changes transfer the authority to appoint the Commission's administrator from the Commission itself to the director of the Department. This change does not give the director of the Department complete autonomy in the appointment of the administrator, however. The director must appoint the administrator "from persons recommended by the Soil Conservation Commission." This language creates a division of power between the Commission and the director. The ambiguity that this creates was pointed out during the committee hearings on Senate Bill 1241. A number of individuals expressed concerns regarding the chain of command and inquired about organizational structure and reporting relationships (Minutes of the House Agricultural Affairs Committee, March 10, 1997). Commissioner Robert Griffel responded to these concerns by stating that the Commission still needs "to work out concerns such as have been expressed today. All of these things can be worked out, but it takes time." *Id.* The legislature could have resolved this uncertainty by specifying the relationship between the director and the administrator, but it chose not to, leaving the matter to be resolved by the parties themselves.

b. The Commission and the Administrator of the Commission

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The responsibilities of the administrator were not enumerated in the prior statute, nor are they discussed in the 1997 legislation. Now, the director, rather than the Commission, has the authority to appoint the administrator, but nothing in the 1997 legislation suggests that the responsibilities of the administrator have changed. As discussed with regard to the relationship between the administrator and the director, above, this ambiguity is not inadvertent. The legislature has left it up to the parties to create an organizational structure which is functional and allows the respective parties to perform their statutory obligations cooperatively.

Question 5 asks whether the Commission staff reports to the Commission and administrator or to the director. Following the 1997 statutory changes, the Commission retained the authority to “employ such technical experts and such other agents and employees, permanent and temporary, as it may require, and shall determine their qualifications, duties and compensation.” (Idaho Code § 22-2718.) Reporting relationships among the staff, administrator and Commission remain an internal matter to be resolved by the Commission.

CONCLUSION

The 1997 changes to the soil conservation district law result in a slight shift in the balance of power between the Soil Conservation Commission and the agency with which it is associated. The Commission, however, remains an independent entity in a cooperative endeavor with the Department of Agriculture. The legislature left to the Commission and the director of the Department of Agriculture the responsibility to further define this relationship.

The Commission or the director may seek further clarification of this relationship by agreement, executive order, or further legislative action. If this office can be of assistance in any of these venues, please feel free to contact us.

Sincerely,

RINDA JUST
Deputy Attorney General
Natural Resources Division

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

May 15, 1997

Mr. David Young
Canyon County Prosecuting Attorney
1115 Albany Street
Caldwell, ID 83605

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

Dear Mr. Young:

I am writing in response to your letter of April 4, 1997, requesting guidance as to whether a presentence report must be disclosed to a prosecuting attorney, and the manner of such disclosure. Specifically, you have asked: (1) whether the department of correction must disclose the complete contents of the presentence report to the prosecuting attorney prior to the sentencing hearing; (2) whether such disclosure requires providing a copy of the report to the prosecuting attorney prior to the sentencing hearing; and (3) whether there are any conditions the prosecuting attorney must meet before receiving a copy of the report.

The answer to your first question is that the complete contents of the report must be disclosed to the prosecuting attorney. Idaho Criminal Rule 32(g) states in part, "Full disclosure of the contents of the presentence report shall be made to the defendant, defendant's counsel, and the prosecuting attorney prior to any hearing on the sentence except as hereinafter provided." None of the language that follows indicates any permissible limitation on disclosure of the contents to the prosecuting attorney.

It is not clear, however, that this disclosure is the responsibility of the department of correction. Rather, the disclosure appears to be the responsibility of the court. Under I.C.R. 32, the court has the discretion to order a presentence report. The general tenor of Rule 32 appears to leave the presentence investigation and report process within the control of the trial court. Further, I.C.R. 33.1(a), pertaining to presentence reports in capital cases, states in part, "After receiving the presentence investigation report, and delivering a copy thereof to the defendant or defendant's counsel and to the pros-

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ecuting attorney, the court shall . . . hold a sentencing hearing” Although this statement applies only to capital cases, it reflects an intention to give the trial court responsibility for disclosure of presentence reports. The trial court would therefore have responsibility for seeing to it that the contents of the report are disclosed, and would have control over the manner of disclosure.

With regard to your second question, there is an explicit requirement in cases where the death penalty is authorized that a copy of the presentence report be delivered to the defendant or defendant’s counsel and the prosecuting attorney. I.A.R. 33.1(a). There is no such explicit requirement in other cases, and so the manner of disclosing the contents of the report in such cases would be within the control of the trial court. Providing a copy of the report to the prosecuting attorney is the usual practice and the most efficient method of such disclosure. For instance, the victim of a crime has a right to read the presentence report prior to the sentencing hearing. Idaho Constitution, article I, section 22(9); Idaho Code § 19-5306(h). The prosecuting attorney is often in the best position to ensure that the victim is afforded this right, but he or she can do so only if provided with a copy of the presentence report.

Your third question is whether there are any conditions the prosecuting attorney must meet before receiving a copy of the presentence report. There are, of course, requirements of confidentiality contained in I.C.R. 32, and the prosecuting attorney must be prepared to comply with those. We are not aware of any other conditions that are applicable. In the absence of information as to the type of conditions that you have in mind, we cannot provide further guidance.

Please contact me if you have any additional questions or if we can be of further help.

Sincerely,

MICHAEL A. HENDERSON
Deputy Attorney General
Chief, Criminal Law Division

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

June 4, 1997

Mr. Doug Werth
Blaine County Prosecuting Attorney
Box 756
Hailey, ID 83333

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

Dear Doug:

This letter is in response to your inquiry concerning the implications of the full faith and credit provisions of 18 U.S.C. § 2265. Subsection (a) of that statute provides:

Any protection order issued that is consistent with subsection (b) of this section by the court of one State or Indian tribe (the issuing state or Indian tribe) shall be accorded full faith and credit by the court of another State or Indian tribe (the enforcing State or Indian tribe) and enforced as if it were the order of the enforcing State or tribe.

Subsection (b) of the statute requires that the protection order to be enforced has been issued by a court having jurisdiction over the parties and matter, and that reasonable notice and opportunity to be heard have been given to the person against whom the order is issued.

The difficulties in applying this statute become apparent when we look at the language of Idaho Code § 39-6312, which is part of our Domestic Violence Crime Prevention Act:

(1) Whenever a protection order is granted under this chapter and the respondent or person to be restrained had notice of the order, a violation of the provisions of the order or of a provision excluding the person from a residence shall be a misdemeanor

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(2) A peace officer may arrest without a warrant and take into custody a person whom the peace officer has probable cause to believe has violated an order issued under this chapter, if the person restrained had notice of the order.

Idaho Code § 19-603(6) also allows for arrest without a warrant for violations of Idaho Code § 39-6312, based upon probable cause, even where the offense did not occur in the presence of the officer.

Your questions concern the interaction between these federal and state statutes. First, may a person be convicted under Idaho Code § 39-6312 where the protection order violated was issued by another state, despite that statute's reference to protection orders "granted under this chapter"? Second, do the powers of arrest arising from § 39-6312 apply to violations of protection orders issued by other states? And, third, what is the extent of Idaho's full faith and credit obligation under 18 U.S.C. § 2265?

We have concluded that: (1) A person probably cannot be convicted for a violation of Idaho Code § 39-6312 where the underlying order was issued by another state. (By "another state," I refer to Indian tribes and "states," as defined in 18 U.S.C. § 2266, other than Idaho.) (2) The arrest powers emanating from § 39-6312 do not apply to violations of orders issued in another state, although other sources of arrest power may be available in such situations. (3) Under the full faith and credit provision of 18 U.S.C. § 2265, a protection order issued by another state must be enforced in the same manner as any other civil order issued by an Idaho court. In particular, violations of such an order may be punished as a contempt. Further, the order of another state may form a basis for the issuance of a protection order under chapter 63 of title 39, which would in turn trigger the penalty and arrest provisions of § 39-6312.

A definitive answer to the first question is difficult in view of the absence of relevant legislative history reflecting congressional intent and the scarcity of case law since the adoption of 18 U.S.C. § 2265 in 1994. A search has failed to yield anything indicating whether Congress intended that state statutes making it a crime to violate one state's protection orders must also be applied to protection orders of other states. No cases have been found in which a state has attempted to apply a statute like Idaho Code § 39-6312 to a violation of an out-of-state protection order. *But see, People v. Hadley*, —

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N.Y.S.2d —, 1997 WL 225140 (N.Y. Crim. Ct. April 7, 1997) (holding that protection order issued in New Jersey could form basis for prosecution for criminal contempt in New York, where acts violating protection order took place in New York; citing 18 U.S.C. § 2265); Eileen W. v. Mario A., 644 N.Y.S.2d 452, 456 (N.Y. Family Ct. 1996) (noting, without elaboration, that New York protection order would be enforceable in New Jersey under 18 U.S.C. § 2265).

It might be argued that the language of 18 U.S.C. § 2265 requires Idaho to apply all of its enforcement provisions for protection orders, including those set out in Idaho Code § 39-6312, to out-of-state protection orders. On the other hand, courts have recognized the power of the states to define and punish criminal offenses:

The States are no less sovereign with respect to each other than they are with respect to the Federal Government. Their powers to undertake criminal prosecutions derive from separate and independent sources of power and authority originally belonging to them before admission to the Union and preserved to them by the Tenth Amendment. . . . Thus, “[e]ach has the power, inherent in any sovereign, independently to determine what shall be an offense against its authority and to punish such offenses, and in doing so each ‘is exercising its own sovereignty, not that of the other.’”

Heath v. Alabama, 474 U.S. 82, 89-90, 106 S. Ct. 433, 88 L. Ed. 2d 387 (1985) (citations omitted).

In addition, the full faith and credit clause of article IV, section 1 “[h]istorically . . . has been applied in the context of civil disputes. . . . [W]hether the clause applies to criminal matters ‘is not at all clear’” Gillis v. State, 633 A.2d 888 (Md. 1993), *cert. denied*, 511 U.S. 1039, 114 S. Ct. 1558, 128 L. Ed. 2d 205 (1994); *see generally*, Nelson v. George, 399 U.S. 224, 90 S. Ct. 1963, 26 L. Ed. 2d 578 (1970); Huntington v. Attrill, 146 U.S. 657, 13 S. Ct. 224, 36 L. Ed. 1123 (1892). In view of these considerations, it is doubtful whether Congress has the power to essentially rewrite a state criminal statute such as Idaho Code § 39-6312 to make it apply to a situation where it otherwise would not. Still more doubtful is whether Congress intended such a result in adopting 18 U.S.C. § 2265, particularly in the

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absence of explicit language within the statute or legislative history reflecting such an intent.

Further, a defendant charged with a criminal violation of Idaho Code § 39-6312 predicated upon violation of an out-of-state protection order could well argue that the statute failed to give him notice that he could be so charged. Such a defendant might even concede that Idaho *should* extend the protection of that statute to cases such as his, in view of the language of 18 U.S.C. § 2265, but that the state had simply failed to do so.

It therefore appears likely that our courts would refuse to allow a conviction under Idaho Code § 39-6312 for violation of a protection order issued by another state.

The second question is whether the laws of arrest under Idaho Code § 19-603(6) would apply to violations of protection orders issued by other states. Since there would probably be no criminal violation of Idaho Code § 39-6312 in these situations, an arrest based on a violation of that statute would not be possible. Some commentators have stated that officers should arrest in these situations based upon an out-of-state protection order. See Lutz and Bonomolo, How New York Should Implement the Federal Full Faith and Credit Guarantee for Out-of-State Orders of Protection, 16 Pace L. Rev. 9 (1995); Paziotopoulos, Violence Against Women Act: Federal Relief for State Prosecutors, 30 Prosecutor 20 (1996). They do not state, however, for what offense the arrest would be made, nor do they weigh the sorts of problems presented by statutes such as Idaho Code § 39-6312.

Of course, even in these situations, an arrest without a warrant for an offense occurring out of the presence of the officer will often be possible under Idaho Code § 19-603(6). That statute permits such arrests not only for violations of Idaho Code § 39-6312, but for assault, battery, domestic assault or battery and stalking. Further, officers could assist the victim in making a citizen's arrest for an offense that was not committed in the officers' presence. See Idaho Code § 19-606 (person making arrest may summon others to aid in arrest); Moxie v. State, 662 P.2d 990 (Alaska Ct. App. 1983); People v. Johnson, 76 Cal. Rptr. 201 (Cal. Ct. App. 1969); People v. Sjosten, 68 Cal. Rptr. 832 (Cal. 1968) (officers acted properly in assisting citizen with arrest).

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Further, the Violence Against Women Act created federal felony offenses for crossing a state line with intent to injure, harass or intimidate a spouse or intimate partner, and intentionally committing a crime of violence or causing injury to such person, 18 U.S.C. § 2261, and crossing a state line with intent to violate a protection order and subsequently engaging in such conduct, 18 U.S.C. § 2262. State officers may arrest for federal offenses. Idaho Code § 19-603 (authorizing officers to arrest for felony based upon reasonable cause; not restricting such arrests to state felonies); *Marsh v. United States*, 29 F.2d 172 (2d Cir.), appeal dismissed, 277 U.S. 611, 48 S. Ct. 563, 72 L. Ed. 1015 (1928), cert. denied, 279 U.S. 849, 49 S. Ct. 346, 73 L. Ed. 992 (1929) (opinion by L. Hand, J., holding that state officer was authorized to arrest for federal offense); *Department of Public Safety v. Berg*, 674 A.2d 513 (Md. 1996) (discussing *Marsh* and later cases reaching same result). This will often provide an additional basis for arrest and subsequent prosecution by federal authorities.

With regard to your final question—the extent of Idaho’s full faith and credit obligation under the federal statute—the out-of-state order should be regarded as an order of an Idaho court, and violation of the order may therefore result in contempt proceedings under Idaho Code § 7-601(3). An example of a case approving a criminal contempt prosecution based upon an out-of-state protection order is *People v. Hadley*, — N.Y.S.2d —, 1997 WL 225140 (N.Y. Crim. Ct. April 7, 1997), cited previously. Further, the out-of-state order could assist in obtaining an Idaho protection order.

As you suggest, this area may be appropriate for legislation. Statutes allowing arrests and prosecutions for the violation of out-of-state protection orders, and providing officers with immunity for such arrests, should be considered. See Klein, Full Faith and Credit: Interstate Enforcement of Protection Orders Under The Violence Against Women Act of 1994, 29 Family L.Q. 253, 260-62 (1995) (discussing Oregon statutes). (I am enclosing a copy of this article.) This is something that we should discuss further.

Please contact me if I can be of further assistance.

Sincerely,

MICHAEL A. HENDERSON
Deputy Attorney General
Chief, Criminal Law Division

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

July 8, 1997

Honorable Gary J. Schroeder
Idaho State Senate
STATEHOUSE MAIL

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

Re: State Licensing Requirements for Electrical Installations

Dear Senator Schroeder:

The following is in response to your request for legal guidance on the licensing requirements for electrical installations.

QUESTION PRESENTED

Do local governments have authority to preempt state licensing requirements by imposing stricter public safety rules?

CONCLUSION

No. As provided by Idaho Code § 54-1002(3), the licensure of electrical contractors and journeyman electricians is within the exclusive jurisdiction of the state. Consequently, local jurisdictions cannot require additional licensure. To contend that the additional language in Idaho Code § 54-1002(3) that “[n]othing in this chapter shall restrict a city or county from imposing stricter public safety rules” was intended to repeal by implication the state’s licensing authority is an unreasonable construction of the statute.

ANALYSIS

Article 12, section 2 of the Idaho Constitution provides that local ordinances may not conflict with state statutes:

Local police regulations authorized.—

Any county or incorporated city or town may make and

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enforce, within its limits, all such local police, sanitary and other regulations as are not in conflict with its charter or with general laws.

When it comes to regulating who must be licensed to make electrical installations in the State of Idaho, the statutory provisions of Idaho Code § 54-1002 leave no doubt that the legislature intended to retain exclusive statewide jurisdiction. Section 54-1002(3) provides:

Licensure of the electrical contractors and journeyman electricians shall be within the exclusive jurisdiction of the state pursuant to this chapter and no local jurisdiction shall have the authority to require additional licensure or to issue licenses to persons licensed under this chapter which are inconsistent with the provisions of this chapter or rules promulgated by the division of building safety. The state shall investigate all local infractions and state violations of this chapter and prosecute the same. The local jurisdictions will assist the state by requesting investigations within their jurisdictions. Nothing in this chapter shall restrict a city or county from imposing stricter public safety rules, notwithstanding any provision of Idaho Code.

In fact, the entire purpose of title 54, chapter 10, is to establish uniform statewide regulations regarding licensing. For example, Idaho Code § 54-1003A defines a journeyman electrician as “any person who personally performs or supervises the actual physical work of installing electrical wiring or equipment to convey electrical current, or apparatus to be operated by such current.” (Emphasis added.) Idaho Code § 54-1002(2) makes it “unlawful for any person to act as a journeyman electrician in this state until such person shall have received a license as a journeyman electrician.” (Emphasis added.) Idaho Code § 54-1006 authorizes the Idaho Electrical Board to promulgate rules for the “examination and licensing of journeyman electricians.” Idaho Code §§ 54-1005, -1007 and -1009 give authority to a state agency, the Division of Building Safety, to issue revoke or suspend licenses. And, Idaho Code § 54-1016 creates a specific exemption from the licensing requirement for “persons making electrical installations on their own property.”

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It is an unreasonable interpretation of the statute to contend that the last sentence of Idaho Code § 54-1002, which allows local jurisdictions to impose stricter public safety rules, was intended by the legislature to repeal by implication not only the state's licensing authority, but also the specific licensing exemption given to property owners in Idaho Code § 54-1016. According to general principles of statutory construction, the implied repeal of inconsistent laws is not favored and will not be indulged if there is any other reasonable construction. State v. Martinez, 43 Idaho 180, 250 P. 239 (1926). Statutes, although in apparent conflict, are construed to be in harmony if reasonably possible. Cox v. Mueller, 125 Idaho 734, 874 P.2d 545 (1994). Only that part of an existing statute actually in conflict with a subsequent statute is repealed by implication. State v. Davidson, 78 Idaho 553, 309 P.2d 211 (1957). A specific statute will control over a more general statute, especially when the more general statute is vague or ambiguous. Tomich v. City of Pocatello, 127 Idaho 394, 901 P.2d 501 (1995).

While it may be true that the term "public safety" is not defined by Idaho Code § 54-1002, a reasonable construction of this statute, especially in light of the overall purpose and intent of title 54, chapter 10, would be that it was not intended to include licensing regulations. This means that while local jurisdictions could adopt stricter "public safety" requirements affecting the manner and method of electrical installations, those local requirements could not interfere with the state's exclusive authority to regulate who must be licensed to perform electrical work in the State of Idaho.

Sincerely,

CRAIG G. BLEDSOE
Deputy Attorney General

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

August 28, 1997

Ms. Leah K. Castagne
Deputy City Attorney
City of Moscow
P.O. Box 9203
Moscow, ID 83843-1703

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

Re: Family Law License Suspensions

Dear Ms. Castagne:

This letter is in response to your inquiry concerning the proper charge when a person drives while his or her license is suspended under the provisions of the Family Law License Suspension Statute. You asked whether the proper charge is driving without a license, in violation of Idaho Code § 49-301, or driving without privileges, in violation of Idaho Code § 18-8001.

Our research has failed to yield a definitive answer to this question, and it will no doubt ultimately be resolved by the courts. It appears, however, that the sounder course may be to charge these offenses as driving without a license under Idaho Code § 49-301.

The Family Law License Suspension statute, passed in 1996, provides for the suspension of a wide variety of state-issued licenses as a means of effective enforcement of child support orders. Idaho Code §§ 7-1401, *et seq.* Under this new statute, either the court or the department of health and welfare can order the suspension of a license for (1) nonpayment of child support; (2) failure to obey a subpoena in a paternity or child support proceeding; or (3) failure to comply with a court order for visitation. Idaho Code § 7-1403.

The new law does not discriminate among the types of licenses that may be suspended, and includes, within the definition of "license," professional, recreational, and driver's licenses. Idaho Code § 7-1402(5).

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Relevant here, the statute contains a “penalties” provision which states, “[a] person who continues to engage in the activity after an order of suspension has become final shall be subject to the same penalties as any person engaging in the activity without a license.” Idaho Code § 7-1415 (emphasis added).

The emphasized language is significant in the case of the suspension of a driver’s license. It gives rise to the question whether a person “engaging in the activity [in this case, operating a motor vehicle] without a license” may be charged with the crime of driving without privileges (DWP), or the less serious crime of driving without a valid license. It seems clear that, but for the language in the Family Law License Suspension penalty section, a person driving while suspended, regardless of the reason for the suspension, would be subject to prosecution for DWP. However, because the statute provides that the penalty will be the same as for “engaging in the activity without a license,” there is a strong argument that the legislature intended that the penalty be limited to that imposed for driving without a valid license, in violation of Idaho Code § 49-301.

Ordinarily, a person who drives while his privileges are suspended is subject to prosecution for the crime of DWP, in violation of Idaho Code § 18-8001(1). That statute makes it a crime for anyone to drive with knowledge “that his driver’s license, driver’s privileges or permit to drive is revoked, disqualified or suspended” The penalty for first time DWP includes a two-day mandatory jail term; a fine up to \$500; and a mandatory six-month suspension of driving privileges. Idaho Code § 18-8001(3). The penalties are enhanced for additional violations within five years; a third offense is a felony, carrying a mandatory thirty-day jail sentence. Idaho Code § 18-8001(4), (5).

By comparison, I.C. § 49-301 prohibits a person from driving “unless the person has a valid Idaho license.” A violation of that statute carries the general misdemeanor penalty; up to six months’ jail, and a fine up to \$300. Idaho Code §§ 18-113, 49-236. The further suspension of driving privileges is not an authorized penalty for this offense.

Two principles of statutory construction must be considered. The first is the “rule of lenity.” That rule holds that criminal statutes must be

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strictly construed in favor of the accused. State v. Barnes, 124 Idaho 379, 380, 859 P.2d 1387, 1388 (1993); State v. Mills, 128 Idaho 426, 429, 913 P.2d 1196, 1199 (Ct. App. 1996).

The other rule of construction has been stated as follows: "It is incumbent upon the court to interpret the statute in a manner that will not nullify it, and it is not to be presumed that the legislature performed an idle act of enacting a superfluous statute." State v. Coleman, 128 Idaho 446, 449, 915 P.2d 28, 31 (Ct. App. 1996). "In construing a statute, the court may examine the language used, the reasonableness of proposed interpretations and the policy behind the statute." Umphrey v. Sprinkel, 106 Idaho 700, 682 P.2d 1247 (1983). These rules, and particularly the rule of lenity, may weigh in favor of imposing punishment for only the less serious crime of driving without a license.

Research into the legislative history of the Family Law License Suspension statute has not been particularly helpful. That research reveals that the law was passed in the form introduced, with only slight amendments from the original senate bill, which are not relevant here. The discussion in the committees centered on whether the legislation was needed, what the procedure would be for suspending licenses, and whether the suspension law would be supported by the public in general. There is no report that driver's licenses, in particular, were ever discussed.

We have also asked other prosecutors whether they have confronted this problem and which charge they would use in such cases. The prosecutors consulted did not recall prosecuting anyone for driving after a license was suspended under the Family Law License Suspension statute. The Boise City Attorney's Office indicated that they would probably charge the offense as a DWP, leaving the "penalties" aspect for the judge to deal with at sentencing. A deputy prosecutor for Ada County who deals with traffic cases seemed to disagree, stating that, given the language in the Family Law License Suspension statute's penalty provision, his office would likely charge the offense as driving while invalid, under Idaho Code § 49-301.

The stated purpose of the Family Law License Suspension statute is to coerce compliance with the court's orders for child support, visitation of minors, and compliance with subpoenas in paternity and child support cases.

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Idaho Code § 7-1401. Thus, there is an argument that harsher penalties will result in greater compliance. Further, under the statute's provisions, it is clear that the transportation department is required to "suspend" the license, as opposed to merely invalidating it. Thus, a person driving with privileges in this status is driving while those privileges are suspended. These arguments would weigh in favor of a charge of DWP.

However, the stronger argument seems to be that the plain meaning of Idaho Code § 7-1415 requires that, if a person drives after being suspended pursuant to the Family Law License Suspension statute, the penalty is limited to that for driving without a valid license, in violation of Idaho Code § 49-301, and that the driver is not subject to the harsher penalties for DWP under Idaho Code § 18-8001.

I hope that this information will be of some assistance. If we hear of any cases raising this issue, we will be sure to contact you. Please contact us if we can be of any further help.

Sincerely,

MICHAEL A. HENDERSON
Deputy Attorney General
Chief, Criminal Law Division

Researched by:

Kimberly A. Coster

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

September 4, 1997

Mr. Dan C. Grober
Attorney at Law
P.O. Box 325
Homedale, ID 83628

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

Dear Mr. Grober:

This letter is in response to your letter of July 28, 1997, requesting our opinion with regard to a refusal by the sheriff's office to take custody of a prisoner arrested by a city police officer on an outstanding warrant. You have given a concise yet detailed account of the incident that gave rise to this inquiry. To summarize that account, a person told a Homedale police officer that he believed there was a misdemeanor warrant for his arrest. The officer confirmed the existence of the warrant and "began arrest and booking procedures"—which, I take it, means that he actually arrested the person on the warrant. While transporting the arrestee from Homedale to the county jail in Murphy, the officer radioed the jail with the information that the arrestee was extremely intoxicated. Personnel at the jail informed the officer that they would not accept the arrestee because of his intoxication and "prior experience with the subject wherein he became suicidal while incarcerated." During the arrest and transport on this occasion, the arrestee had not been combative, nor had he threatened suicide. The sheriff's office advised the officer to release the prisoner and tell him to make a court appearance on the following day. The officer ultimately released the prisoner to family members.

You have posed the following questions:

1. Under what circumstances, if any, can a sheriff refuse to receive a subject arrested by a police officer within the county?
2. If an arresting officer observes nothing to suggest the subject is suicidal at the time of arrest, does the arresting officer have a duty to do anything other than take the subject to the county jail?

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3. If a sheriff refuses to take custody of a subject arrested by a police officer, what should the arresting officer do?

4. If a sheriff refuses to take custody, who bears liability for the subject's conduct if he is released by the arresting officer?

In summary, the answers are:

1. We are not aware of any circumstances in which a sheriff can refuse to receive a subject lawfully arrested by a city police officer within the county. Certainly, the intoxication of the person arrested and the fear that he might do himself harm while incarcerated, thereby subjecting the county to liability, does not constitute an adequate cause for refusing to take custody.

2. An arresting officer may have an obligation to seek medical assistance for the person arrested if it appears that it is needed and should inform the jailers of the subject's condition. Otherwise, he has no obligation other than to follow normal booking procedures and deliver the person arrested to the county jail.

3. There is no clear guidance as to what an arresting officer should do if the sheriff refuses to take custody of the prisoner. Whichever option is selected by the officer should be consistent with the protection of the prisoner and other persons who might be harmed by the prisoner.

4. There is no definitive answer to the question of liability, which ultimately would be determined by a jury. However, there is some reason to be concerned about liability on the part of the arresting officer or sheriff for injury resulting from the release of the prisoner.

In answer to your first question, a sheriff has a legal obligation to accept lawfully arrested prisoners. I am including with this letter a copy of Idaho Attorney General Opinion 84-4. 1984 Idaho Attorney General Ann. Rpt. 35. This opinion concerned a refusal by a sheriff to take custody of prisoners in a somewhat different context. The question there was whether a sheriff could refuse to take custody of city prisoners until the city had paid its past due bills for the incarceration of its prisoners. The opinion states that a city should be responsible for the costs of incarcerating persons who are

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charged with violating city ordinances, and the county may seek reimbursement for such costs, while the county bears the cost of incarcerating those who are charged with violations of state law. But as the opinion goes on to state, a sheriff cannot refuse to take custody of lawfully arrested prisoners. The opinion cites Idaho Code § 20-612, which states, in part: "The sheriff must receive all persons committed to jail by competent authority." (In 1992, this sentence was amended by the addition of the language, "except mentally ill persons not charged with a crime and juveniles." 1992 Idaho Sess. Laws 427-28. This amendment does not change the significance of the statute in this situation.) The opinion also cites Idaho Code § 18-701, which states:

Every sheriff, coroner, keeper of a jail, constable, or other peace officer, who wilfully refuses to receive or arrest any person charged with criminal offense, is punishable by fine not exceeding \$5,000, and imprisonment in the county jail not exceeding one (1) year.

Thus, a failure by the sheriff or other officer to receive a lawfully arrested prisoner could result in criminal prosecution. The view expressed in the 1984 opinion is fully applicable to the present situation. In particular, we have found no Idaho law that would allow a sheriff to use a prisoner's intoxication or threats to do harm to himself as a reason for not accepting custody. Authority has been found from another jurisdiction expressly stating that intoxication is not a justification for a sheriff's refusal to accept custody of a prisoner. *See Harford County v. University of Maryland Medical System Corp.*, 569 A.2d 649, 652 (Md. 1990); 58 Maryland Op. Atty. Gen. 647 (1973). Such a refusal to accept custody would also appear to be contrary to state policy with regard to the protection of intoxicated persons. Idaho Code § 39-307A(b) provides for the taking into protective custody of intoxicated persons:

A person who appears to be incapacitated by alcohol or drugs shall be taken into protective custody by a law enforcement officer and forthwith brought to an approved treatment facility for emergency treatment. If no approved treatment facility is readily available he may be taken to a city or county jail where he may be held until he can be transported to an approved treatment facility, but in no event

shall such confinement extend more than twenty-four (24) hours. A law enforcement officer, in detaining the person and in taking him to an approved treatment facility, is taking him into protective custody and shall make every reasonable effort to protect his health and safety. In taking the person into protective custody, the detaining officer may take reasonable steps to protect himself. A taking into protective custody under this section is not an arrest. No entry or other record shall be made to indicate that the person has been arrested or charged with a crime.

Under this statute, police officers are charged with the authority to protect intoxicated persons from doing themselves harm. In cases where no approved treatment facility is available, the sheriff may have the responsibility of detaining the intoxicated person and protecting his health and safety. In view of this provision, it would be anomalous if a sheriff could shirk his responsibility to take custody of arrestees because of their intoxication or because they represented a threat of harm to themselves.

It follows from the sheriff's duty to take custody of arrestees that the arresting officer is not under an obligation to do anything other than follow normal booking procedures and deliver the prisoner to the sheriff's custody. The officer should, of course, inform the jailers of any medical problems or special needs of the person arrested.

There is no clear solution to the problem of what an officer should do if the sheriff or his deputies refuse to take custody of the prisoner. (Arresting the jailers for a violation of Idaho Code § 18-701 comes to mind, but would hardly constitute a practical solution.) The best course, if possible, would probably be to contact the city attorney or county prosecuting attorney for advice. Such an approach might lead to an amicable working out of any differences on the basis of sound legal advice. The officer could also attempt—probably with the assistance of the city attorney or county prosecuting attorney—to bring the prisoner before the magistrate. The magistrate could then make a decision as to whether the prisoner should be released or detained, determine who should take custody of the prisoner, and issue an appropriate order. Idaho Criminal Rule 5; Idaho Misdemeanor Criminal Rule 6.1. If neither of these approaches is viable, and if no city jail is available, the officer

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should take whatever steps necessary to insure the safety of the prisoner and others.

Finally, there is no definitive answer to the question of liability, which would generally be determined by a jury. However, I would refer you to two Idaho cases, Ransom v. City of Garden City, 113 Idaho 202, 743 P.2d 70 (1987), and Olguin v. City of Burley, 119 Idaho 721, 810 P.2d 255 (1991). In Ransom, officers arrested a driver for driving under the influence. An officer gave the keys to the driver's car to a passenger, whom the officer had determined was also under the influence, and told him not to drive. The passenger drove the car, collided head-on with the plaintiffs' vehicle, and caused injury. The supreme court reversed the district court's order of summary judgment in favor of the city. The court held that the officer's entrusting of the keys of the vehicle to the passenger was "operational" and did not fall within the discretionary function exception of Idaho Code § 6-904(1). Therefore, the city would be held liable if the officer acted without ordinary care. 113 Idaho at 203-06.

In Olguin, a man named Webster drove himself to a hospital for treatment of a nose injury received in a fight. The doctor who treated him concluded that Webster was too intoxicated to drive and summoned the police. The officers spoke with Webster and advised him not to drive; they also gave him the keys to his vehicle. The officers then left. Webster later drove away and collided with another car. The court held that the officers were not liable for the resulting injuries. They did not have the power to control Webster's vehicle, nor did they have a duty to execute a warrantless arrest of Webster for DUI. 119 Idaho at 722-25.

In this case, the officer did in fact arrest the subject pursuant to a warrant. Unlike the officers in Olguin, he had a duty to make the arrest under the outstanding warrant. Idaho Code §§ 18-701, 19-507. Similarly, the sheriff had a duty to take custody of the prisoner, as discussed previously. Maintaining custody of the prisoner in these circumstances could be viewed as an "operational" function, rather than a discretionary one. If this view is taken, there is a possibility of liability if the arresting officer, sheriff or jailers are found to have performed without ordinary care in releasing the prisoner.

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Again, we must emphasize, this is not a definitive opinion on the question of liability. But there is reason for concern that a failure to comply with the applicable statutes could result in liability.

I hope that this discussion will be of some assistance. Please contact us if we can be of any further help.

Sincerely,

MICHAEL A. HENDERSON
Deputy Attorney General
Chief, Criminal Law Division

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and

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**ATTORNEY GENERAL'S
CERTIFICATES OF REVIEW
FOR THE YEAR 1997**

ALAN G. LANCE
ATTORNEY GENERAL
STATE OF IDAHO

CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

March 11, 1997

Honorable Pete T. Cenarrusa
Secretary of State
STATEHOUSE MAIL

Re: Certificate of Review—Initiative to Limit ad Valorem
Taxation on Real Property to One Percent of Assessed Value

Dear Mr. Cenarrusa:

An initiative petition that would limit ad valorem taxation on real property to one percent of assessed value was filed with your office on February 11, 1997. Idaho Code § 34-1809 requires the Office of the Attorney General to review the proposed initiative for matters of substantive import. Because of the strict statutory timeframe established by Idaho Code § 34-1809, this office can highlight areas of concern, but is unable to provide in-depth analysis of each issue that may present problems. This office prepared a comprehensive opinion, reviewing a similar version of the one percent initiative on May 16, 1996 (to be published as Attorney General Opinion 96-3). Pursuant to Idaho Code § 34-1809, the recommendations contained in this certificate are “advisory only” and “the petitioner may accept or reject them in whole or in part.”

Once the petitioner has filed the proposed initiative, this office will prepare a short and long ballot title. According to Idaho Code § 34-1809, the ballot titles must “give a true and impartial statement of the purpose of the measure,” must not contain any argument and should not “create prejudice either for or against the measure.”

MATTERS OF SUBSTANTIVE IMPORT

The latest version of the one percent initiative is similar to previous versions. A number of specific changes have been made in response to criticism of the prior initiative proposal. However, the overall structure and intent of the one percent initiative remains unchanged.

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A. Statement of Intent

Among other things, the statement of intent for the initiative states that it will “provide uniform state funding for public schools.” It further states that the initiative will “guarantee essential public health and safety service.” The operative language of the initiative, however, does not set out a mechanism to ensure uniform state funding for public schools. Likewise, the initiative does nothing to guarantee essential public health and safety service.

The statement of intent also purports to replace the existing language of Idaho Code § 63-923 with the language in the initiative. As an initial matter, the operative language of the initiative does not specifically repeal Idaho Code § 63-923. In addition, because the tax code has been recodified, Idaho Code § 63-923 no longer exists. The language that used to be contained in Idaho Code § 63-923 is now located in Idaho Code § 63-1313. The operative language of the initiative should specifically repeal Idaho Code § 63-1313. All other references to Idaho Code § 63-923 should be changed to Idaho Code § 63-1313.

B. Section 1.1

The analysis of a prior version of section 1.1 concluded that it is “not self-executing. If the Initiative passes, the implementation requires that the legislature extensively revise [the initiative’s] text, the existing property tax laws, or both.” Atty. Gen. Op. 96-3 at 14. The last sentence of section 1.1 has been changed as follows:

The maximum amount of tax on property subject to assessment and taxation within the state of Idaho shall not exceed one percent (1%) of the assessed value of such property, after all statutory exemptions applying to such property have been applied. The one percent (1%) shall be collected by the counties and apportioned to the taxing districts within the counties, using a formula to be developed by the legislature’s enabling legislation for this act.

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(new language underlined). While the new language acknowledges that additional legislation is necessary to implement the one percent initiative, that language is left to future legislatures to develop. As this office has pointed out previously, legislation such as the one percent initiative cannot bind the actions of future legislatures. There is no guarantee that the legislature will promulgate enabling legislation for the one percent initiative. Simply put, the new language does not alter this office's conclusion that the initiative cannot be implemented in its present form.

C. Section 1.2

This office has previously concluded that section 1.2 limits increases in the entire annual budget of cities, counties and taxing districts even if the budget increase is the result of a grant or other source of funding. Atty. Gen. Op. 96-3 at 16. The final sentence of section 1.2 has been changed to clarify that "grants on new construction and/or annexation are exempt" from the one percent limit. It is uncertain what is meant by "grants on new construction and/or annexation." What is clear, however, is that while the previous language of section 1.2 permitted an exception to the budget limitation for any money generated by new construction or annexation, now only taxes, fees or grants generated by new construction or annexation are exempt from the budget limitation.

D. Section 2

In order to be implemented, section 2 would have to provide a system of centralizing the budgetary authority of every local taxing district into one unit. This would require a reorganization of Idaho's ad valorem tax system as well as the structure of local governments throughout the state. Once again, since the initiative provides no mechanism to overcome these problems, it is incapable of implementation as it is currently written.

E. Sections 4 and 5

Sections 4 and 5 forbid the legislature from repealing or reducing existing exemptions to property taxes. Sections 4 and 5 also require the legislature to fund all public school education exclusively from general fund or other state and federal resources.

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As this office has explained on a number of occasions, these sections will not bind the legislature in any legal sense. The only limitations placed on the power of the legislature to enact legislation are those contained in the United States and Idaho Constitutions. One legislature has no authority to limit or restrict the power of subsequent legislatures. *See, e.g., Johnson v. Deifendorf*, 56 Idaho 620, 636, 57 P.2d 1068 (1936) (“[a] legislative session is not competent to deprive future sessions of powers conferred on them, or reserved to them, by the constitution”). The same limit applies to legislation by citizen initiative. *Luker v. Curtis*, 64 Idaho 703, 136 P.2d 978 (1943). The only way to bind the legislature as is intended by sections 4 and 5 would be to amend the Idaho Constitution.

This office previously concluded that “the courts would not construe section 5.1 of the Initiative to apply to community colleges.” Atty. Gen. Op. 96-3 at 11. New language has been added to section 5.1 to clarify that community colleges are included in the requirement to fund all public education with revenue from the “general fund and other state and federal revenue sources.”

F. Section 6

Section 6 purports to repeal Idaho Code § 63-923 [now Idaho Code § 63-1313] and “any laws in conflict with” the initiative. This office has previously concluded that this section renders the initiative incapable of implementation:

It is the law in Idaho that a statute providing for repeal of all inconsistent laws is effective to accomplish such repeal. *State v. Davidson*, 78 Idaho 553, 309 P.2d 211 (1957). This doctrine is known as “repeal by implication.” It is not favored and will not be indulged if there is any other reasonable construction. *State v. Martinez*, 43 Idaho 180, 250 P. 239 (1926). Statutes, although in apparent conflict, are construed to be in harmony if reasonably possible. *Cox v. Mueller*, 125 Idaho 734, 874 P.2d 545 (1994). Only that part of an existing statute actually in conflict with a subsequent statute is repealed by implication. *State v. Davidson*, 78 Idaho 553, 309 P.2d 211 (1957) (holding that enactment of negligent homicide statute repealed the earlier voluntary manslaughter statute to the extent the earlier statute included homicide resulting from the improper operation of motor vehicles).

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The conflict section of the Initiative does not expressly repeal existing Idaho Code § 63-923 [now Idaho Code § 63-1313]. The language of the preamble leaves no doubt it is the drafters' intent that existing Idaho Code § 63-923 [now Idaho Code § 63-1313] be repealed and replaced by the language of the Initiative, but the Initiative does not expressly accomplish this purpose. Since the Initiative does not expressly repeal existing Idaho Code § 63-923 [now Idaho Code § 63-1313], only those portions of the existing statute in irreconcilable conflict with the Initiative will be repealed by implication. The legislature, of course, could expressly repeal the existing section, thereby solving this problem.

....

In a greater sense, however, the Initiative may be read as conflicting with the principles of the entire property tax code. It is the opinion of this office that this Initiative, like its predecessor as reviewed in Attorney General Opinion 91-9, is unimplementable. It is unimplementable because it is in conflict with the basic principles of Idaho's property tax structure. Given a choice between effectively repealing Idaho's property tax code or holding that an initiative which ostensibly attempts only to modify a portion of that code cannot be implemented, a court is most apt to find the Initiative unimplementable.

The repeal provision in the Initiative may affect statutes other than the property tax code. Chapter 17, title 50, for example, permits local improvement districts to issue bonds which are then repaid by collecting "special assessments" levied against the property lying within the local improvement district. (See, e.g., Idaho Code § 50-1721A for use of the phrase "special assessment.") Bonds issued by local improvement districts are not [a]ffected by the provisions of art. 8, sec. 3 of the Idaho Constitution. *Byrns v. City of Moscow*, 21 Idaho 398, 121 P. 1034 (1912). Section 1.4 of the Initiative prohibits "special assessments" to repay indebtedness not approved pursuant to "art. 8, sec. 3 of the Idaho Constitution relating to bonds." Art. 8, sec. 3, requires that bonds for indebtedness be approved by a two-thirds vote of those persons living in the taxing district, unless the indebtedness is for "ordinary and necessary" expenses. It is likely, then, that bonds of local improvement districts issued after January 1, 1997 [the effective date of the previous initiative], the effective date of the Initiative, will have to be

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approved by a two-thirds vote when neither the local improvement district code nor the Idaho Constitution require such a vote now. The legislature, of course, may address this problem by amending affected statutes, the Initiative, or both.

Atty. Gen. Op. 96-3 at 16-18.

CONCLUSION

This is the second time within a year the Office of the Attorney General has reviewed the one percent initiative. In August, 1996, this office concluded that the initiative could not be implemented as it was drafted. While a number of specific changes have been made, the overall structure and intent of the initiative remains the same. Therefore, this office concludes, once again, that the most recent version of the one percent initiative cannot be implemented in its current form.

I hereby certify that the enclosed measure has been reviewed for form, style and matters of substantive import and that the recommendations set forth have been communicated to Ronald D. Rankin by sending him a copy of this certificate via U.S. Mail.

Sincerely,

MATTHEW J. MCKEOWN
Deputy Attorney General
Intergovernmental and Fiscal Law Division

CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

July 1, 1997

The Honorable Pete T. Cenarrusa
Secretary of State
HAND DELIVERED

Re: Certificate of Review
Initiative Regarding Radioactive Material

Dear Mr. Cenarrusa:

An initiative petition was filed with your office on June 6, 1997, concerning the handling of plutonium. 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 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 recommend that they do so and their proposed language will be considered.

MATTERS OF SUBSTANTIVE IMPORT

Enforcement Problems

As it is currently written, the proposed initiative contains a number of format problems that will make the initiative very difficult to either codify or implement. Without extensive revision, a court will probably rule that the

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proposed initiative is unenforceable and does not constitute valid law. As it is presently written, the proposed initiative does not so much propose a law as it does express the wishes of the sponsors.

The proposed initiative does not state where in the Idaho Code it will be contained upon codification. Generally, an initiative will either create a new section in the Idaho Code or amend or repeal an existing provision in the Idaho Code. The proposed initiative should be re-written to specifically explain where in the Idaho Code it should be included upon codification.

Next, the proposed initiative is not divided into separate sections, despite the fact that it proposes to mandate a number of different things. This office has identified at least four different substantive requirements that would be created by the proposed initiative. The proposed initiative should be re-written in separate sections for greater ease of reference and implementation.

Lastly, much of the text of the proposed initiative does not consist of operative language requiring specific action or conduct. Instead, the text explains the intentions of the petitioners and the purpose of the legislation. Typically, a bill originating in the legislature will separate such explanatory material into a separate section dedicated to “legislative findings” or “statement of purpose.” This separation helps the public, and the courts, interpret the actual operative language without mistaking the explanatory language for operative language. The proposed initiative should be re-written to separate the explanatory language from the operative language.

Substantive Problems

There are a number of substantive problems with the proposed legislation. The fundamental problem that the entire proposed initiative suffers from is a lack of clarity. Basic elements of legislation, such as designating the entity or individual responsible for certain tasks, are not included in the proposed initiative. Indeed, it is difficult to determine with precision what duties the undesignated entity or individual is charged to perform. Without substantial revision, it will be impossible to develop accurate short and long ballot titles for the proposed initiative. Certainly, it will be impossible to either implement or enforce the proposed initiative if it is approved in its current

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form. This office has isolated several particular areas of concern as noted below.

1. Ban on Entering Plutonium-Related Agreements

The proposed initiative states that “no state employee, including the governor, is allowed to sign or agree to anything that allows the reburial of this plutonium in Idaho.” This requirement appears to refer to a number of matters that are not specifically incorporated into the proposed initiative. For example, the proposed initiative refers to the “reburial” of plutonium, not the burial of plutonium. Therefore, if the initiative is intended to regulate the burial of plutonium, it will not accomplish that goal. On the other hand, if the proposed initiative is oriented only towards “reburial” of plutonium, this office recommends that the petitioners develop some specific findings that will help the public understand the distinction between “burial” and “reburial” of plutonium. Likewise, the proposed initiative refers to “this plutonium” without specifying what plutonium is subject to regulation.

Another problem that may stem from the proposed ban on entering into any plutonium-related agreement is that states only have regulatory authority over plutonium when those states have first entered into a management agreement with the United States Nuclear Regulatory Commission (NRC) for the management of “special nuclear materials,” pursuant to 42 U.S.C. § 2021(b)(4). Currently, there is no agreement in place between the State of Idaho and the NRC. Therefore, a reviewing court is likely to rule that the proposed initiative is preempted to the extent it attempts to address “reburial” of plutonium in a manner that differs from the NRC’s program. *See Boundary Backpackers v. Boundary County*, 128 Idaho 371, 913 P.2d 1141 (1996) (state and local laws that specifically conflict with federal laws are invalid).

2. Written Accident Analysis

The proposed initiative next purports to require “written accident analysis” for every air quality permit issued by the state. Implicit in this requirement is that only those air quality permits related to plutonium would necessitate “written accident analysis.” If the drafter’s intention is to limit the

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new analysis to plutonium-related air quality permits, that intention should be explicitly incorporated into the proposed initiative.

The “written accident analysis” anticipated by the proposed initiative requires an unidentified state entity to “calculate the doses of radiation they inflict on Idahoans.” The proposed initiative does not designate a state agency to carry out this requirement. Also, it is not clear whether the word “they” refers to air quality permits or other potential releases of plutonium. Since this phrase is a pivotal piece of operative language, it should clearly identify both what action is required and the entity required to perform the action.

The proposed initiative identifies a number of specific scenarios that must be incorporated into the “written accident analysis.” The analysis must consider the effects of radiation doses to pregnant women and their babies, worst weather and geological conditions (particularly earthquakes). This analysis must be conducted to consider the “lifetime of project and the lifetime of nuclear waste created.” The unidentified entity that would perform this proposed analysis is not given any criteria that would guide its procedures and findings. It is unclear from the proposed language whether the analyzing entity is evaluating the effects of air quality permits, other “projects” or nuclear waste itself. Without greater detail, it will be very difficult for a state agency to implement this provision. It will also be virtually impossible for a reviewing court to assess a state agency’s compliance during the judicial review process.

3. Construction With Other Laws

The proposed initiative contains a sentence describing how it should be interpreted with other existing laws. The last paragraph states that “[a]ll state laws and regulations will be corrected to comply with the spirit and letter of this initiative and no federal laws will be broken.” As it is written, this provision will be very difficult to implement.

The last paragraph proposes to change all state laws so they will “comply with the spirit and letter of this initiative.” This office assumes that the drafter’s goal is to ensure that when the proposed initiative’s requirements conflict with another statute, the provisions contained in the proposed initia-

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tive will govern. When the legislature intends for a bill to control against other potentially conflicting legislation, the bill will frequently begin with the phrase, “notwithstanding any other provision of law,” or a similar phrase. The use of this standard statutory language will eliminate the need for a court to engage in the difficult, and uncertain, task of determining both the “spirit and letter” of the proposed initiative.

The last clause of the final paragraph states that “no federal laws will be broken.” As a matter of federal supremacy, federal law will control over state law when the two are in direct conflict. *See, e.g., Boundary Backpackers v. Boundary County*, 128 Idaho 371, 913 P.2d 1141 (1996). This is particularly true in cases involving the management of plutonium where, absent a specific agreement, federal jurisdiction is exclusive. Therefore, a reviewing court probably would not interpret the proposed initiative as violating federal law. A court will most likely view the phrase, “no federal laws will be broken,” as a rule of statutory interpretation clarifying that the proposed initiative should be interpreted in a manner that is consistent with existing federal law. However, if the provision purporting to prohibit the state from entering into an agreement allowing the “reburial” of plutonium cannot be reconciled with federal law, a reviewing court will not re-write the provision simply because another section of the proposed initiative states that “no federal laws will be broken.” Instead, a court will most likely ignore the prohibition contained in the proposed initiative in favor of federal law.

CONCLUSION

The proposed initiative’s apparent intent is to direct some entity of state government to take some specified action when a decision involving plutonium is before that state agency. However, there is no language in the proposed initiative that specifies exactly what must be done or which agency is expected to do it. When these substantive problems are combined with the enforcement flaws identified above, this office must conclude that the proposed initiative cannot be implemented as it is currently written. Indeed, without substantial revision of the proposed initiative, this office will be unable to develop accurate long and short ballot titles, as is required by Idaho Code § 34-1804.

CERTIFICATES OF REVIEW 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 recommendations set forth above have been communicated to petitioner Peter Rickards by mailing him a copy of this certificate of review.

Sincerely,

ALAN G. LANCE
Attorney General

Analysis by:
MATTHEW J. MCKEOWN
Deputy Attorney General

CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

July 7, 1997

The Honorable Pete T. Cenarrusa
Secretary of State
HAND DELIVERED

Re: Certificate of Review
Initiative Regarding Incremental Property Tax Relief

Dear Mr. Cenarrusa:

A proposed initiative petition was filed with your office on June 12, 1997. 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 recommend that they do so and their proposed language will be considered.

MATTERS OF SUBSTANTIVE IMPORT

The proposed initiative has two sections that this certificate must address separately.

Section I would adopt a new Idaho Code § 33-801B. It would phase out the property tax levy for maintenance and operation of schools (the "School M & O Levy") over a period of three years.

CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

By way of background, public schools in Idaho receive funding from a variety of sources. The two of interest to understanding the proposed initiative are the property tax levy for maintenance and operation of schools authorized by Idaho Code § 33-802(2) and the monies from the state general fund appropriated annually by the legislature. Idaho Code § 33-802(2) currently authorizes school districts to levy up to three-tenths of one percent (0.3%) of the market value for assessment purposes of the taxable property within the district. The annual public schools' appropriation of money from the state general fund is distributed to local school districts through the educational support program set out in Idaho Code § 33-1002. The largest source of revenue to the state general fund is money raised pursuant to the Idaho Income Tax Act and the Idaho Sales Tax Act.

Section 1 of the proposed initiative would require that the maximum School M & O Levy be two-tenths of one percent (0.2%) in 1999, one-tenth of one percent (0.1%) in 2000, and zero after that year. It also contains a non-binding preference that the legislature "should" provide funding for the maintenance and operation of public schools from state sales tax revenues. Thus, although the proposed initiative, if enacted, would require reduction and eventual repeal of the School M & O Levy, it does not guarantee that the revenues lost to the districts would be replaced. Replacement would be dependent upon the legislature's ability and willingness to divert or increase (or both) general fund revenues to public schools.

We suggest adding in proposed Idaho Code § 33-801B a reference to Idaho Code § 33-802(2), the section that sets the maximum School M & O Levy. This will insure that the proposed initiative could not be construed as applying to any other levy, such as the supplemental maintenance and operation levy authorized in Idaho Code § 33-802(4). Such a reference will make clear precisely what proposed Idaho Code § 33-801B is to effect.

We note that the proposed initiative cannot affect charter school districts. Amendments to the districts' individual charters must accomplish any mandated change affecting those districts. *See Bagley v. Gilbert*, 63 Idaho 494, 122 P.2d 227 (1942); *Howard v. Independent School Dist. No. 1*, 17 Idaho 537, 106 P. 692 (1910).

CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

We also note that the proposal to eliminate the School M & O Levy may have an undetermined effect on the theoretical underpinning of the state's education support program set forth in Idaho Code § 33-1002. This program is also known as the school funding formula. In creating the school funding formula, the legislature recognized that a school district with high aggregate property values tends to be able to spend more money per student than a district with a lower property tax base. The school funding formula is designed to equalize the disparity in funding per student that otherwise might exist between districts. If the funds raised by the School M & O Levy are replaced with nonproperty tax funds, then, depending upon how the nonproperty tax funds are distributed to the districts, the rationale for the current school funding formula may no longer be valid. Because the proposed initiative does not mandate replacement funding, let alone discuss how it is to be distributed, predicting the effect on the rationale for the school funding formula is not possible.

Section 2 contains only a nonbinding recommendation. If adopted, Section 2 of the proposed initiative would have no legal effect. Its only effect is political, not legal. The political effect is that the voters adopting the proposed initiative may be presumed to have asked the legislature to consider adopting certain provisions of a specific legislative proposal, i.e., sections 2 through 9 of draft legislation identified as RS07175. This could be no more than a presumption, because it would be impossible to determine from election returns if the majority voting for the proposed initiative would have voted for section 2 alone or whether the coupling of section 2 with the operative provisions of section 1 resulted in its passage. In either case, section 2 creates no legally enforceable rights or duties. It is most unlikely that any party could prevail in a legal action alleging violation of section 2 of the proposed initiative.

CONCLUSION

Because the proposed initiative, if adopted, would not enact the provisions of RS07175, we have not undertaken an analysis of the substantive import of that draft legislation.

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

tions set forth above have been communicated to petitioner Laird Maxwell by mailing him a copy of this certificate of review.

Sincerely,

ALAN G. LANCE
Attorney General

Analysis by:
TED SPANGLER
CARL OLSSON
Deputy Attorneys General

CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

July 7, 1997

The Honorable Pete T. Cenarrusa
Secretary of State
HAND DELIVERED

RE: Certificate of Review; Initiative Regarding
State, County, Municipal and School District Term Limits
Pledges

Dear Mr. Cenarrusa:

An initiative petition was filed with your office on June 26, 1997, concerning term limits pledges for state, county, municipal and school district offices. 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 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 recommend that they do so and their proposed language will be considered.

MATTERS OF SUBSTANTIVE IMPORT

The proposed initiative would authorize candidates for state, county, municipal and school district office to sign the following pledge:

CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

I hereby declare that during my term of office, if elected, I will adhere to the 1994 Term Limits Act, as passed by the voters of Idaho.

Candidates for those offices are also authorized to submit the signed pledge along with their declaration of candidacy or nomination paper. Once the candidate has signed and submitted the pledge, the following legend is required to appear on the official ballots: "Pledges to adhere to the 1994 Term Limits Act, as passed by the voters of Idaho." Apparently, candidates who decline to sign the pledge would have their names appear on the ballot with no legend.

Section 1

Section 1 of the proposed initiative states that the law, upon passage, should be referred to as the "State, County, Municipal and School District Term Limits Pledge Act of 1998."

Section 2

Section 2 of the proposed initiative would create Idaho Code § 34-907C, which contains the pledge procedure for candidates for state and county office.

Section 3

Section 3 of the proposed initiative would create Idaho Code § 50-478A, which contains the identical pledge procedure for candidates for municipal office.

Section 4

Section 4 of the proposed initiative would create Idaho Code § 33-443A, which contains the identical pledge procedure for school district trustee candidates.

CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

Section 5

Section 5 of the proposed initiative states that the pledge procedure can be initiated by any candidate who files for candidacy "on or after one day after" passage of the initiative by the voters.

Section 6

Section 6 of the proposed initiative contains a severability clause.

The proposed initiative raises two distinct substantive issues. First, the necessity for the act is not apparent. State, county, municipal and school district officials are already subject to the ballot access restrictions enacted by the voters in 1994. Only the portion of the 1994 initiative mandating term limits for congressional offices has been struck down by reviewing courts. Therefore, the proposed initiative does nothing more than permit candidates to pledge their intention to comply with a state law that is already compulsory. Candidates who opt not to sign the pledge would be subject to the same ballot access restrictions as those who choose to sign the pledge. The fact that the legend, "Pledges to adhere to the 1994 Term Limits Act, as passed by the voters of Idaho," would appear after some candidates' names on the ballot and would not appear after others' would only serve to confuse the voters since the 1994 Term Limits Act applies equally to all candidates.

Second, whether ballot legends of any kind are permissible in Idaho is still an open question. In Simpson v. Cenarrusa, Supreme Court No. 23526 (argued May 7, 1997), one of the arguments presented by the petitioners was that ballot legends are an unconstitutional infringement on the right to vote. The Idaho Supreme Court is likely to rule on that question in the near future. If the Idaho Supreme Court rules in favor of the petitioners on the issue of ballot legends, the proposed initiative will probably be invalidated by a reviewing court.

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 Beau Parent by deposit in the U.S. Mail of a copy of this certificate of review.

CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

Sincerely,

ALAN G. LANCE
Attorney General

Analysis by:
MATTHEW J. MCKEOWN
Deputy Attorney General

CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

July 7, 1997

The Honorable Pete T. Cenarrusa
Secretary of State
HAND DELIVERED

RE: Certificate of Review
Initiative Regarding State Term Limits and Lobbying Reform

Dear Mr. Cenarrusa:

A proposed initiative petition was filed with your office on June 26, 1997. 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 recommend that they do so and their proposed language will be considered.

MATTERS OF SUBSTANTIVE IMPORT

The proposed initiative purports to make two changes to Idaho law. First, the proposed initiative would give counties, municipalities and school districts the option to eliminate term limits via local citizen initiative. In addition, the proposed initiative would place certain restrictions on lobbying activities by former Idaho legislators and legislative employees.

CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

Section 1

Section one of the proposed initiative states that, upon passage, the statute should be referred to as "The State Term Limits and Lobbying Reform Act of 1998."

Section 2

Section two of the proposed initiative would add two new sub-sections to Idaho Code § 34-907. Currently, Idaho Code §§ 34-907(1)(a)-(d) contain the ballot access, or "term limit," restrictions for statewide elected officials, Idaho legislators and county officials. A new section would state that, "[t]he people shall have the right through the county initiative process provided in Idaho Code § 31-717 to eliminate the term limits created herein for county commissioners or any other county elected officials."

A second new section would create the following restriction:

Any person who currently serves or subsequent to the enactment of this act serves as a member of the Idaho House of Representatives or Senate or is employed by the Idaho legislature shall not, for compensation, lobby, solicit, or represent any organization, business, government, or state recognized legal entity before any member, employee or representative of the Idaho state government until the number of years served in or employed by the Idaho legislature have intervened.

This section also would establish a maximum penalty of either a \$10,000 fine or a two year prison sentence, or both, for an intentional or willful violation of the new lobbying limitation. As it is currently written, section two contains two potential constitutional problems that will probably prevent implementation of the proposed initiative.

Article 3, § 16 of the Idaho Constitution states:

Every act shall embrace but one subject and matters properly connected therewith, which subject shall be

CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

expressed in the title; but if any subject shall be embraced in an act which is not expressed in the title, such act shall be void only as to so much thereof as shall not be embraced in the title.

The Idaho Supreme Court has provided the following guidance in applying article 3, § 16:

To comply with Article 3, Section 16, the statute must disclose, either by express declaration or by clear intendment, or at least portend the common object in order that it may be determined whether all parts are congruous and mutually supporting, and reasonably designed to accomplish the common aim.

Amer. Fed. of Labor v. Langley, 66 Idaho 763, 768, 168 P.2d 831 (1946).

An initial question that must be addressed is whether article 3, § 16, applies to initiative legislation as to legislation adopted by the legislature. In Luker v. Curtis, 64 Idaho 703, 706, 136 P.2d 978 (1943), the Idaho Supreme Court compared the power of initiative to the power of legislation:

This power of legislation, reclaimed by the people through the medium of the amendment to the constitution, did not give any more force or effect to initiative legislation than to legislative acts but placed them on equal footing. The power to thus legislate is derived from the same source and, when exercised through one method of legislation, it is asserted, is just as binding and efficient as if accomplished by the other method; that the legislative will and result is as validly consummated the one way as the other.

(Emphasis added.) The supreme court reiterated its adherence to the “equal footing” rule for initiative and legislative acts in Westerberg v. Andrus, 114 Idaho 401, 404, 757 P.2d 664 (1988). It is this office’s opinion that the supreme court’s “equal footing” rule most likely means that article 3, § 16’s “single subject” rule applies to initiative legislation in the same manner, and to the same extent, that it applies to laws enacted by the legislature.

CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

Section 2 of the proposed initiative attempts to enact legislation concerning two distinct subjects: county term limits and restrictions on lobbying. To avoid violating article 3, § 16, these two subjects must be “considered as falling within the same subject matter” or be “necessary as ends and means to the attainment of each other.” State v. Banks, 37 Idaho 27, 31, 215 P. 468 (1923). The Banks court determined that the sale of general fund treasury notes and the sale of refunding bonds are separate subjects that cannot be included in one piece of legislation. *Id.* In another case, the Idaho Supreme Court has determined that a salary increase for a state employee contained in an appropriations bill violates article 3, § 16. Hailey v. Huston, 25 Idaho 165, 136 P. 212 (1913).

County term limits and lobbying restrictions are no more closely related than the topics at issue in Banks and Hailey. Certainly, they are not “necessary as ends and means to the attainment of each other.” Based on the Idaho Supreme Court’s precedent, this office concludes that a reviewing court is likely to rule that the entire proposed initiative is void. *See Banks*, 37 Idaho at 32 (“where [article 3, § 16, is violated] the act is absolutely void”).

Assuming, for the purposes of complete review, that the proposed initiative survives an article 3, § 16, challenge, the proposed lobbying restriction may also violate the freedom of association protected by the First Amendment to the United States Constitution and article 1, §§ 9 and 10 of the Idaho Constitution.

Statutes restricting former state elected officials, and other state employees, from doing business with the state are referred to as “revolving door” statutes. *See, e.g., In Re Advisory from the Governor*, 633 A.2d 664, 667 (R.I. 1993). A number of states have considered First Amendment challenges to “revolving door” statutes.

The Ohio Court of Appeals considered the following “revolving door” restriction in State v. Nipps:

No public official or employee shall represent a client or act in a representative capacity for any person before the public agency by which he is or within the preceding twelve months was employed or on which he serves or with-

CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

in the preceding twelve months had served on any matter with which the person is or was directly concerned and in which he personally participated during his employment or service by a substantial and material exercise of administrative discretion.

419 N.E.2d 1128, 1131 (Ohio 1979). The Ohio court ruled that the challenged statute did not violate the First Amendment because:

The statute in question is not a blanket prohibition on all representation by defendant before his former employer, but only in those matters in which he, as an official or employee of the state, was directly concerned and in which he personally participated by a substantial and material exercise of administrative discretion.

Nipps, 419 N.E.2d at 1132. The court also determined that:

The state has a substantial and compelling interest to restrict unethical practices of its employees and public officials not only for the internal integrity of the administration of government, but also for the purpose of maintaining public confidence in state and local government.

Id.

The lobbying restriction in the proposed initiative is not limited to matters in which former officials and employees either were directly concerned or personally participated. In addition, the prohibition is not limited to one year. Finally, the proposed initiative does not contain any findings that would help a reviewing court understand why a more narrowly tailored proposal, such as the Ohio statute, would not adequately address the interests of the petitioners. Because the proposed initiative's lobbying restriction is so broad, and since there are no findings to guide a reviewing court, a reviewing court might rule that the lobbying restriction violates the First Amendment to the United States Constitution, article 1, §§ 9 and 10 of the Idaho Constitution, or both.

CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

Section 3

Section 3 of the proposed initiative adds the local initiative term limit option to the provision establishing municipal term limits, Idaho Code § 50-478.

Section 4

Section 4 of the proposed initiative probably intends to add the local initiative option to the provision establishing school district term limits. However, that addition is omitted from the version of the proposed initiative submitted to this office.

Section 5

Section 5 establishes the effective date of the proposed initiative.

Section 6

Section 6 contains a severability clause. However, as explained above, the Idaho Supreme Court has ruled that statutes violating article 3, § 16, are “absolutely void.” Therefore, the severability clause may not save the remainder of the statute.

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 Donna Weaver by deposit in the U.S. Mail of a copy of this certificate of review.

Sincerely,

ALAN G. LANCE
Attorney General

Analysis by:
MATTHEW J. MCKEOWN
Deputy Attorney General

CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

July 8, 1997

The Honorable Pete T. Cenarrusa
Secretary of State
HAND DELIVERED

Re: Certificate of Review
Initiative Regarding Congressional Term Limits Pledges

Dear Mr. Cenarrusa:

A proposed initiative petition was filed with your office on June 26, 1997. 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 recommend that they do so and their proposed language will be considered.

MATTERS OF SUBSTANTIVE IMPORT

The proposed initiative authorizes candidates for either the United States House of Representatives or the United States Senate to sign a "term limits pledge." Section 2 of the proposed initiative contains the following pledge form language:

CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

I voluntarily pledge not to serve in the United States [House of Representatives for more than three (3) terms] [Senate more than two (2) terms] after the effective date of this provision. I understand that informing the voters that I have taken this pledge is important to voters. I therefore authorize, instruct and ask the Secretary of State to notify the voters of this action by placing the applicable ballot information, "Signed **TERM LIMITS** pledge to serve no more than [three (3) terms] [two (2) terms]" or "Broke **TERM LIMITS** pledge" next to my name on every election ballot and in all state sponsored voter education material in which my name appears as a candidate for the office to which the pledge refers.

Once the candidate signs the pledge, sections three and four of the proposed initiative require the Idaho Secretary of State to place the applicable term limits legend next to candidates' names in every election ballot and in all state-sponsored voter education material.

The constitutionality of ballot legends of any kind is still an open question in Idaho. In Simpson v. Cenarrusa, Supreme Court No. 23526 (argued May 7, 1997) (challenge to the 1996 term limits legend initiative), one of the arguments presented by the petitioners was that ballot legends are an unconstitutional infringement on the right to vote. The Idaho Supreme Court is likely to rule on that question in the near future. If the Idaho Supreme Court rules in favor of the Simpson petitioners on the issue of ballot legends, the provisions authorizing the congressional term limits pledges will probably be invalidated by a reviewing court.

Section Five

Section five of the proposed initiative requires the secretary of state, or other designated election officials, to "post in a conspicuous place in every polling location a copy of the Term Limits Pledge." Currently, Idaho Code § 18-2318(1)(b) prohibits any person from "circulating cards or handbills of any kind" within one hundred feet of a polling place. In addition, Idaho Code § 18-2323 prohibits the placing of placards in voting booths that are "intended or likely to call the attention of the voter to any candidate, or to urge the

CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

voter to vote for any particular candidate.” Since section five of the proposed initiative has the potential to conflict with Idaho Code §§ 18-2318 and 18-2323, it should be revised to specify that section five takes precedence over other potential conflicting statutes.

Section Six

Section six of the proposed initiative states that, “service in office for more than one-half of a term shall be deemed service for a term.” In U.S. Term Limits v. Bryant, — U.S. —, 115 S. Ct. 1842 (1995), the United States Supreme Court ruled that states may not impose qualifications for offices of the United States Representative or United States Senator in addition to those set forth by the Constitution. Therefore, a reviewing court will probably refuse to implement section six if it is deemed to conflict with the United States Constitution.

Section Seven

Section seven states that the “state recognized proponents and sponsors of this initiative have standing to defend this initiative against any challenge in any court.” Idaho Code § 67-1401 states that the Idaho Attorney General, or his designee, is responsible for defending state laws against challenges in court. If it is the intention of the sponsor to relieve the Office of the Attorney General from the obligation of defending the proposed initiative in court, then that intention should be specifically incorporated into section seven. Even without section 7, the Idaho Rules of Civil Procedure probably give the initiative sponsors the ability to intervene as a defendant in any action challenging the proposed initiative.

Section Eight

Section eight of the proposed initiative authorizes the secretary of state to promulgate rules in order to implement the proposed initiative.

Section Nine

Section nine of the proposed initiative contains a severability clause.

CERTIFICATES OF REVIEW 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 recommendations set forth above have been communicated to petitioner Donna Weaver by deposit in the U.S. Mail of a copy of this certificate of review.

Sincerely,

ALAN G. LANCE
Attorney General

Analysis by:
MATTHEW J. MCKEOWN
Deputy Attorney General

CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

July 9, 1997

The Honorable Pete T. Cenarrusa
Secretary of State
HAND DELIVERED

Re: Certificate of Review
Initiative Regarding Process Governing Initiatives

Dear Mr. Cenarrusa:

An initiative petition was filed with your office on June 24, 1997, concerning the process for enacting an initiative under Idaho law. 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 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 recommend that they do so and their proposed language will be considered.

MATTERS OF SUBSTANTIVE IMPORT

During the 1997 legislative session, the legislature passed House Bill 265. As amended, House Bill 265 established certain procedures for the gathering of signatures for the purpose of placing an initiative on the ballot. House Bill 265 was signed into law by Governor Batt on March 20, 1997. If

CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

it is successful, the proposed initiative would repeal the majority of the changes to Idaho's initiative law contained in House Bill 265.

Section 1

Section 1 of the proposed initiative would repeal House Bill 265's redesignation of Idaho Code § 34-1801 as Idaho Code § 34-1801A.

Section 2

Section 2 of the proposed initiative would repeal the statement of legislative intent and legislative purpose, codified as Idaho Code § 34-1801, contained in House Bill 265.

Section 3

Section 3 of the proposed initiative would repeal all of the new time limits for gathering signatures that House Bill 265 adds to Idaho Code § 34-1802.

Section 4

Section 4 of the proposed initiative would repeal House Bill 265's new provisions governing the removal of signatures from an initiative petition (codified as Idaho Code § 34-1803B).

Section 5

Section 5 of the proposed initiative would amend Idaho Code § 34-1805, the geographical proportionality requirement for signature collection created by House Bill 265. Under section 5, Idaho Code § 34-1805 would retain the reduction of required signatures, six percent of the qualified electors at the time of the last general election, originally contained in House Bill 265, but would drop the requirement that a proportional number of signatures be gathered in twenty-two counties.

CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

Section 6

Section 6 of the proposed initiative would repeal the judicial review provisions added to Idaho Code § 34-1809 by House Bill 265.

Section 7

Section 7 of the proposed initiative would repeal the new requirements for initiative petition signature gatherers established by House Bill 265 (codified as Idaho Code § 34-1814A).

Section 8

Section 8 of the proposed initiative would repeal certain disclosure requirements placed on initiative petition signature gatherers by House Bill 265 (codified as Idaho Code § 34-1815).

Section 9

Section 9 of the proposed initiative designates January 1, 1999, as the effective date for the changes it makes to title 34, chapter 18, Idaho Code.

Section 10

Section 10 contains a severability clause.

The only significant legal issue raised by the proposed initiative is whether art. 3, sec. 1 of the Idaho Constitution allows the electorate to alter the process for enacting an initiative through the initiative process. In Luker v. Curtis, 64 Idaho 703, 706, 136 P.2d 978 (1943), the Idaho Supreme Court compared the power of initiative to the power of legislation:

This power of legislation, reclaimed by the people through the medium of the amendment to the constitution, did not give any more force or effect to initiative legislation than to legislative acts but placed them on equal footing. The power to thus legislate is derived from the same source and, when exercised through one method of legislation, it is

CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

asserted, is just as binding and efficient as if accomplished by the other method; that the legislative will and result is as validly consummated the one way as the other.

(Emphasis added.) The supreme court reiterated its adherence to the “equal footing” rule for initiative and legislative acts in Westerberg v. Andrus, 114 Idaho 401, 404, 757 P.2d 664 (1988). It is the opinion of this office that the supreme court’s “equal footing” rule would most likely be judicially interpreted to permit the electorate to amend the process for enacting an initiative in the same manner, and to the same extent, that the legislature is permitted to do so.

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 Dennis Mansfield by deposit in the U.S. Mail of a copy of this certificate of review.

Sincerely,

ALAN G. LANCE
Attorney General

Analysis by:
MATTHEW J. MCKEOWN
Deputy Attorney General

CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

July 16, 1997

The Honorable Pete T. Cenarrusa
Secretary of State
HAND DELIVERED

Re: Certificate of Review
Initiative Regarding Teachers' Freedom to Negotiate

Dear Mr. Cenarrusa:

An initiative petition was filed with your office on June 30, 1997. 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 recommend that they do so and their proposed language will be considered.

MATTERS OF SUBSTANTIVE IMPORT

This office previously prepared a certificate of review for an identical initiative proposal on July 14, 1995. See 1995 Idaho Att'y Gen. Ann. Rpt. 169. Neither the law nor the circumstances surrounding the proposed initiative have changed appreciably since the issuance of this office's previous certificate.

CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

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:

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

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Idaho Code § 33-1273 provides 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:

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) (emphasis added).

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.

CONCLUSION

In conclusion, in order for the initiative to accomplish the stated intent, we would recommend that Idaho Code § 33-1273 or the definition of

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“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 of 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 recommendations set forth above have been communicated to petitioner Laird Maxwell by mailing him a copy of this certificate of review.

Sincerely,

ALAN G. LANCE
Attorney General

Analysis by:
MATTHEW J. MCKEOWN
Deputy Attorney General

CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

July 22, 1997

The Honorable Pete T. Cenarrusa
Secretary of State

HAND DELIVERED

Re: Certificate of Review
Initiative Regarding Regulation of Black Bear Hunting

Dear Mr. Cenarrusa:

A proposed initiative petition was filed with your office on June 30, 1997. 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 recommend that they do so and their proposed language will be considered.

MATTERS OF SUBSTANTIVE IMPORT

The proposed initiative is very similar to an initiative (Proposition Two) that was defeated by the voters in the November 5, 1996, general election.

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Section 1(1)

Section 1(1) of the proposed initiative prohibits the use of bait to take a bear at any time during the calendar year. This proposal is identical to the prohibition on the use of bait that was contained in Proposition Two. The term “take” is defined by Idaho Code § 36-202(h) to mean “hunt, pursue, catch, capture, shoot, fish, seine, trap, kill, or possess or any attempt to so do.” The definition of “take” is intended to be all inclusive.

However, the term “hunting” has a separate definition which specifically excludes “stalking, attracting, searching for, or lying in wait for any wildlife” by an unarmed person to watch or photograph wildlife. Idaho Code § 36-202(i). With the exception to the term “hunting” and the inclusion of “hunt” in the definition of “take,” there is a potential for unarmed hound hunters to stalk and search for bears to watch or photograph. The terms “stalking” and “searching for” are not defined. However, Idaho Code § 36-1101(b)(6) prohibits the use of dogs to pursue, track, or harass any big game animal except as allowed by commission rule. Therefore, unarmed hound hunters with cameras could not pursue or track bears if the proposed initiative were adopted. The sponsors may want to draft additional initiative language to address this potential “loophole.”

Section 1(2)

Section 1(2) of the proposed initiative would prohibit the use of dogs to take a black bear from May 1 through August 31. This proposal is a change from Proposition Two’s attempt to prohibit the use of dogs during the entire calendar year. There are 23 spring seasons which would be changed by the dog use prohibition. In addition, the proposed initiative would prohibit the current black bear dog training seasons under IDAPA 13.01.08588 (which already prohibits the killing of any bear). There are twenty distinct dog training seasons. All are within the prohibited dates of May 1 to August 31. Based on the Declaration of Intent, it is not clear that the sponsors intend to prohibit black bear dog training seasons that would not result in the killing of any bears. The sponsors should clarify whether it is the intent of the proposed initiative to eliminate these dog training seasons.

Section 1(3)

CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

Section 1(3) of the proposed initiative identifies the persons who are exempted from the proposed law. While employees of the Idaho Department of Fish and Game are exempted, agents are not. In actual practice, when the Department of Fish and Game is required to capture or kill a bear, it usually seeks the assistance of a private hound hunter. That is because the Department of Fish and Game does not keep hunting hounds. The use of hunting hounds is the most efficient way to track and either capture or eliminate problem bears. Section 1(3) should be redrafted to include agents of the Idaho Department of Fish and Game.

Section 1(4)

Section 1(4) of the proposed initiative defines the term “bait.”

Section 1(5)

Section 1(5) of the proposed initiative contains a penalty provision. The penalties proposed in the initiative are far more severe than the current fish and game code for similar offenses. In addition, the penalty provision would not be included in chapter 14 of title 36, Idaho Code, with all other fish and game violations. Over the past six years, the Department of Fish and Game has attempted to centralize all penalty provisions in chapter 14 of title 36, Idaho Code. If the proposed initiative is approved by the voters, the sponsors should rewrite section 1(5) so it is codified in chapter 14 of title 36, Idaho Code.

Section 1(6)

Section 1(6) of the proposed initiative contains a severability clause.

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 Lynn Fritchman 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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