

**IDAHO  
ATTORNEY  
GENERAL'S  
ANNUAL REPORT**

**OPINIONS**

**SELECTED INFORMAL  
GUIDELINES**

AND

**CERTIFICATES OF REVIEW**

FOR THE YEAR

**2001**

**Alan G. Lance**  
Attorney General

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2001 Idaho Att’y Gen. Ann. Rpt. 05

Similarly, the Informal Guideline of June 7, 2001  
is found at:

2001 Idaho Att’y Gen. Ann. Rpt. 61

The Certificate of Review of July 5, 2001  
is found at:

2001 Idaho Att’y Gen. Ann. Rpt. 81

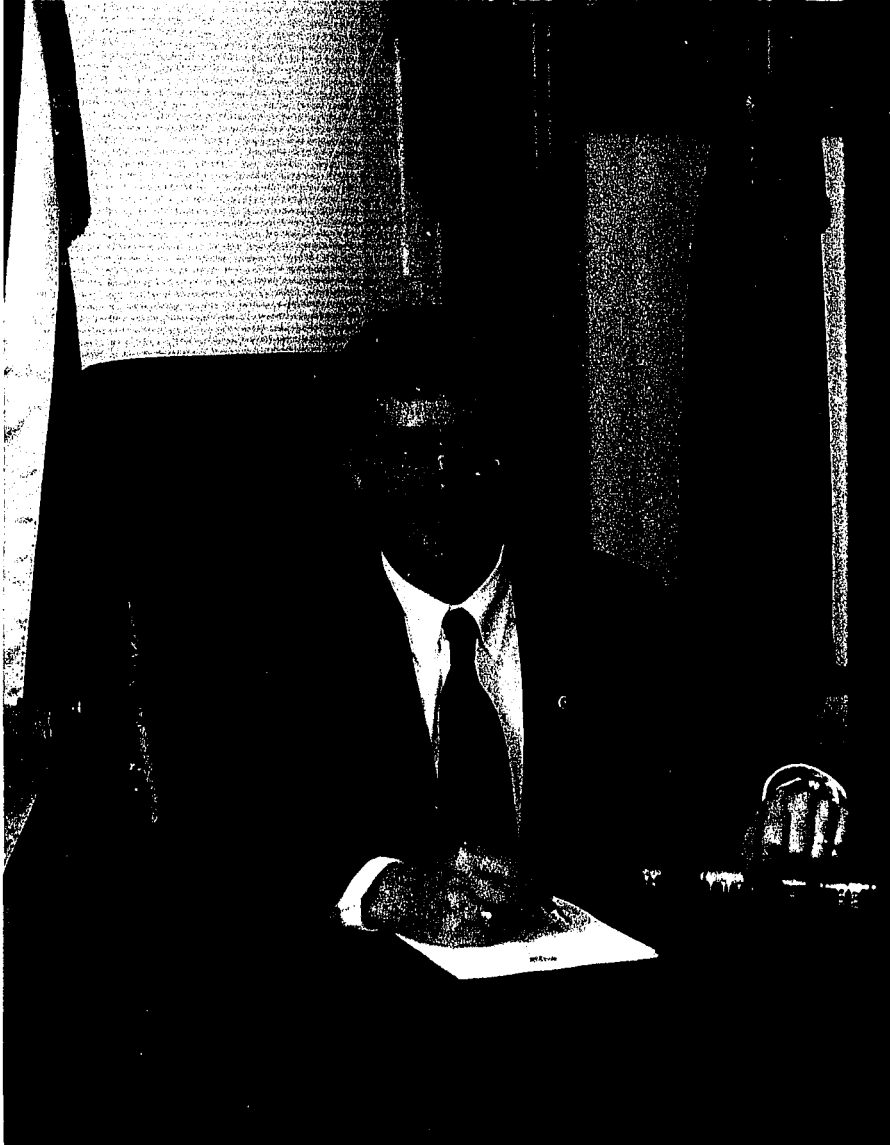
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## ATTORNEYS GENERAL OF IDAHO

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 to you the 2001 Annual Report of the Attorney General. This volume contains the legal opinions, guidelines and certificates of review issued during 2001 by my office at the request of the state elected officials and other state entities we represent.

The legal opinions in this manual represent only a small fraction of the work performed by the 198 dedicated and loyal public servants employed in my office - the largest law firm in the state.

The year 2001 began with the introduction of the "Attorney General's No Call List." I proposed this new law during the 2000 session of the Idaho Legislature. It was passed unanimously. The Idaho No Call Law allows Idahoans to voluntarily choose to place their residential telephone numbers on a list that is purchased by telemarketers. Telemarketers are not allowed to place calls to those numbers. By all reports, the new law is working very well, giving Idahoans some peace and quiet. We have had to pursue some enforcement actions against telemarketers who repeatedly violate the law and ignore our warning letters, but overall most telemarketers seem to be complying with the law without much difficulty. By the end of 2001, more than 33,000 households had signed up for the Attorney General's No Call List. I commend the employees in my Consumer Protection Unit, who have done a wonderful job of implementing the Idaho No Call Law.

This past year also included the once-in-a-decade event known as "reapportionment." The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution embodies the "one-person, one-vote" requirement, meaning that our congressional and legislative districts must be close to equal in terms of population. Therefore, every ten years, following the official census, all fifty states reapportion congressional and legislative districts to comply with the Equal Protection Clause.

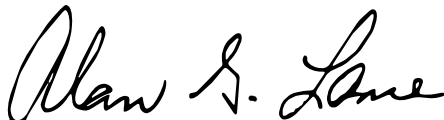
My office provided written legal advice to the commission for reapportionment, the body charged with developing the new districts. In addition to advising the commission on their legal questions, my office also provided the commission with Attorney General Opinion 1991-4, issued for the previous redistricting, which advised that legislative districts should not be adopted unless the overall population deviation falls below 10%. Ultimately, the commission adopted a legislative plan with an overall population deviation above 10%, and the Idaho Supreme Court struck it down and ordered the commission to start over again. I hope that the commission will complete its work in time for the people of the State of Idaho to vote in the 2002 primary and general elections.

There were a variety of other very important issues resolved in 2001. The Natural Resources Division in my office won a significant ruling from the Idaho Supreme Court in the Snake River Basin Adjudication. The ruling involved federal claims for Idaho water for the Deer Flat Wildlife Refuge. The Idaho Supreme Court denied the federal claims, upholding the principle that Idaho's water belongs to Idaho's people. To date, of the more than 3,700 federal reserved water rights claims submitted by federal agencies, all but eight have been disallowed.

My cross-divisional team of attorneys in the roadless case obtained a preliminary injunction against the United States Forest Service's "roadless rule." A federal judge found that the roadless rule was a conclusive violation of the National Environmental Policy Act (NEPA) and enjoined all aspects of it from being implemented. The ruling obtained by my office had nationwide impact, and it reaffirmed the public's right under NEPA to participate in major federal actions affecting the environment.

After the horrific events of September 11<sup>th</sup>, my office went to work studying Idaho's criminal and civil laws to ascertain whether any changes should be made to deal with the new world of terrorism inside America's borders. We have worked closely with the Governor and legislative leadership in formulating a state response to the many new issues and uncertainties that Idahoans face in this new world. These issues will carry over into 2002.

I have enjoyed my seven years as your Attorney General, and I am looking forward to my eighth year in 2002. It is a pleasure and honor to serve you, the citizens of Idaho, and the elected officials you send to represent your interests in the Legislature and other statewide executive branch offices.

A handwritten signature in black ink, reading "Alan G. Lance". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

ALAN G. LANCE  
Attorney General

**NOTE:**

*On a more personal level, and as I enter the final year of my second term as your Attorney General, I would like to commend the efforts of my front office staff. The skills of Janet Carter (my executive assistant), Sandra Rich (administrative secretary/receptionist), Thorpe Orton (deputy chief of staff), and my Chief of Staff, Lawrence Wasden, have kept the State of Idaho's largest law office running smoothly and consistently. They carry out my legal policy priorities by coordinating and managing the eight divisions within the office. Their hard work and dedication has played a major role in all aspects of my duties as your Attorney General.*



# ANNUAL REPORT OF THE ATTORNEY GENERAL

## OFFICE OF THE ATTORNEY GENERAL ALAN G. LANCE ATTORNEY GENERAL

### 2001 STAFF ROSTER

#### ADMINISTRATION

Lawrence Wasden  
Chief of Staff

Thorpe Orton  
Deputy Chief of Staff

Janet Carter  
Executive Assistant

Sandra Rich  
Administrative  
Secretary/Receptionist

#### DIVISION CHIEFS

Tara Orr, Administration & Budget  
David High, Civil Litigation  
Terry Coffin, Contracts & Administrative Law  
Michael Henderson, Criminal Law

Jeanne Goodenough, Human Services  
William vonTagen, Intergovernmental & Fiscal Law  
Clive Strong, Natural Resources

#### DEPUTY ATTORNEYS GENERAL

Willard Abbott  
Lawrence Allen  
Stephanie Altig  
LaMont Anderson  
James Baird  
David Barber  
Michelle Bartlett  
Garrick Baxter  
Mary Jo Belg  
Nancy Bishop  
Craig Bledsoe  
Jo-Ann Bowen  
Carol Brassey  
Dallas Burkhalter  
Cheri Bush  
Stephen Bywater  
James Carlson  
Jody Carpenter  
Corey Cartwright  
Ron Christian  
Christopher Clark  
Doug Conde

Kimberly Coster  
Christy Cunningham  
Timothy Davis  
Brett DeLange  
Keith Donahue  
Thomas Donovan  
Margaret Dougherty  
Darrell Early  
Patrick Fanning  
Mary Feeney  
Lori Fleming  
Curt Fransen  
Sherman Furey III  
Roger Gabel  
Michael Gilmore  
Stephen Goddard  
Brad Goodsell  
Joanna Guilfof  
Susan Hamlin-Nygard  
John Hammond  
Harriet Hensley  
John Homan

Donald Howell  
Ron Howen  
Karen Hudelson  
J. Scott James  
Blair Jaynes  
Kenneth Jorgensen  
Lorna Jorgensen  
Paul Kime  
John Kormanik  
C. Nicholas Krema  
Lisa Kronberg  
T. Paul Krueger II  
Michael Larsen  
David Lloyd  
William Loomis  
Kay Manweller  
Rene Martin  
Candice McHugh  
Matthew McKeown  
Tim McNeese  
Cheryl Meade  
Mark Mimura

Clinton Miner  
Robert Naftz  
Kent Nelson  
Brian Nicholas  
Lisa Nordstrom  
Kirsten Ocker  
Carl Olsson  
Edith Pacillo  
Paul Panther  
Steve Parry  
Eric Pfof  
Patti Powell  
Victor Ramirez  
Phillip Rassier  
Whitaker Riggs  
Donald Robertson  
Kenneth Robins  
Kevin Satterlee  
Steve Schuster  
Sandra Shaw  
Michael Sheeley  
Jason Siems

Clay Smith  
Theodore Spangler  
Nicholas Spencer  
Marcy Spilker  
Myrna Stahman  
Dan Steckel  
Steve Strack  
Ken Stringfield  
Weldon Stutzman  
J. Ron Sutcliffe  
Evelyn Thomas  
Timothy Thomas  
Geoffrey Thorpe  
Melissa Vandenberg  
Bridget Vaughan  
Karl Vogt  
Kirsten Wallace  
Julie Weaver  
Peggy White  
Timothy Wilson  
Scott Woodbury  
Charles Zalesky

#### INVESTIGATORS

Michael Dillon, Chief

Jackie Ailor

Scott Birch

Bill Buie

Gary Deulen

#### PARALEGALS

Kathie Brack  
Suzie Cooley  
Janice Crawford  
Paula Gradwohl

Becky Harvey  
Vicki Kelly  
Marlene Klein  
Linda Mirelez

Dora Morley  
Vicky Music  
Bernice Myles  
Lori Peel

Brett Phillips  
Jean Rosenthal  
Thomas Tharp  
Robert Wheeler

#### NON-LEGAL PERSONNEL

Rachel Balcerzak  
Prudence Barnes  
Kriss Bivens  
Patricia Boehm  
Karen Bolian  
Wanda Brock  
Marnie Burt  
Lorraine Byerly  
Camille Cameron

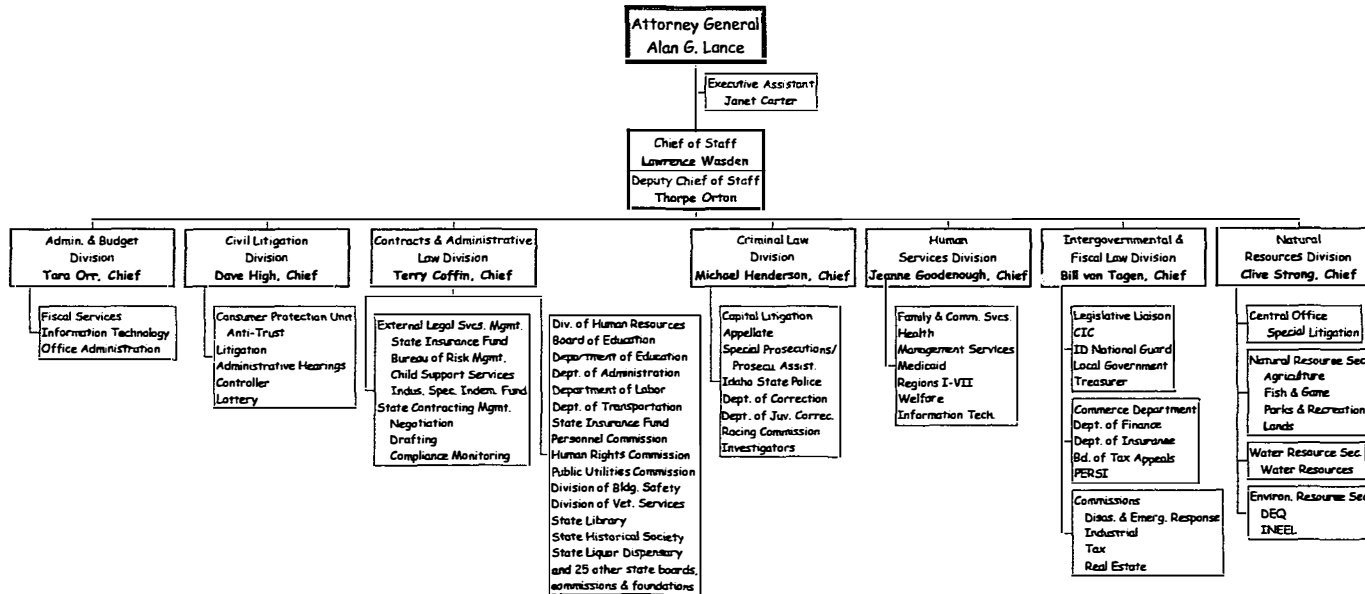
Robert Cooper  
Suzanne Crockett  
Rachel Everett  
Marilyn Freeman  
Colleen Funk  
Bethany Garner  
Rhonda Goade  
Leslie Gottsch  
Luanna Hibdon

Trudy Jackson  
Kelly Jennings  
Eric Jensen  
Cecil Jones  
Courtney Jurnigan  
Gerry Karpavich  
JoAnn Lanham  
Katie Madden  
Patty McNeill

Ronda Mein  
Ruth Miller  
Lynn Mize  
Rebecca Moss  
Barbara Mundell  
Roseann Newman  
Frances Nix  
Sharon Noice  
Aimee Price

Greg Rast  
Micki Schlapia  
Stella Slack  
Jodie Stoddard  
Debbie Stufflebeam  
Tamara Swanson  
Olga Valdivia  
Melissa Ward

Office of the Idaho Attorney General  
Organizational Chart - 2001



**OFFICIAL OPINIONS  
OF  
THE ATTORNEY GENERAL  
FOR 2001**

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



**ATTORNEY GENERAL OPINION NO. 01-1**

To: James Spalding  
Director, Idaho Department of Correction  
1299 N. Orchard, Suite 110  
P.O. Box 83720  
Boise, ID 83720-0018

Per Request for Attorney General's Opinion

You have requested an Attorney General's Opinion concerning the kinds of sales that Correctional Industries is permitted to make. This opinion addresses the question you have presented.

**QUESTION PRESENTED**

May Correctional Industries sell a prison-made product to a retail or wholesale establishment within the state that:

(1) is not engaged in the business of selling or servicing the same kind of product that it purchases from Correctional Industries; or

(2) does not intend to resell the prison-made product?

**CONCLUSION**

Correctional Industries may sell its products to retail or wholesale establishments within the state only where it is intended that the products will eventually be offered for resale to the general public. Therefore, Correctional Industries products may not be sold to retail or wholesale establishments that: (1) are not in the business of selling such products, or (2) do not intend to sell the Correctional Industries products.

**ANALYSIS**

The operations of Correctional Industries are controlled by the Correctional Industries Act, Idaho Code §§ 20-401, *et seq.* The controlling statutes here are Idaho Code §§ 20-413 and 20-414, which are as follows:

**20-413. Goods and services for government, non-profit organizations, and public use.—Contracts.—**The board is hereby authorized and empowered to cause the inmates in the state prison to be employed in the rendering of such services and in the production and manufacture of such articles, materials, and supplies as are now or may hereafter be needed by any public institution or agency of the state or any political subdivision thereof, including but not limited to counties, districts, municipalities, schools, nonprofit organizations, and other public use. The board may cause the inmates to be employed in rendering such services or producing and manufacturing such articles, materials, and supplies as are now or may hereafter be needed for use by the federal government for any department, agency or corporation thereof. The board may contract to sell products manufactured by correctional industries to retail or wholesale establishments within the state. The board or its designated agent may enter into contracts for the purposes of this article.

The board may contract with other state and federal penal institutions and with out-of-state governmental entities for the production, manufacture, exchange, sale, or purchase of goods, wares and merchandise manufactured or produced wholly or in part by inmates of the Idaho state penitentiary or of any state or federal penal institution.

**20-414. Disposition of products.—**All articles, materials, and supplies, produced or manufactured under the provisions of this act, shall be solely and exclusively for public or nonprofit organization use and no article, material, or supplies, produced or manufactured under the provisions of this chapter shall ever be sold, supplied, furnished, and exchanged, or given away for any private use or profit, except as allowed by the preceding section. However, by-products and surpluses of agricultural and animal husbandry enterprises may be sold to private persons, at private sale, under rules prescribed by the board of correction.

(Emphasis added.)

Thus, with the exception of the agricultural and husbandry by-products and surpluses referred to in Idaho Code § 20-414, Correctional Industries products may be supplied to government agencies and non-profit organizations, and may also be sold to “retail or wholesale establishments within the state.” All other distribution of such products is prohibited.

The answer to the question presented depends upon the meaning of “retail or wholesale establishments” in the context of these statutes. In construing legislative acts, we must ascertain, from a reading of the entire act, the purpose and intent of the legislature. George W. Watkins Family v. Messenger, 118 Idaho 537, 539, 797 P.2d 1385 (1990). The plain meaning of a statute will prevail unless clearly expressed legislative intent is contrary or unless plain meaning leads to absurd results. Corder v. Idaho Farmway, Inc., 133 Idaho 353, 358, 986 P.2d 1019 (Ct. App. 1999). We should aim to give statutes a sensible construction that will effectuate the legislative intent and, if possible, avoid an absurd conclusion. Hartman v. Meier, 39 Idaho 261, 266, 227 P. 25 (1924); Smith v. Smith, 131 Idaho 800, 802, 964 P.2d. 667 (Ct. App. 1998). Where a statute is ambiguous, the legislative intent should be ascertained by examining factors such as the statute’s language, the reasonableness of a proposed interpretation, and the policy underlying the statute. Struhs v. Protection Technologies, Inc., 133 Idaho 715, 718, 992 P.2d 164 (1999).

Applying these principles to the statutory language in question here leads to the conclusion that Correctional Industries products may be sold to retail or wholesale establishments only where it is intended that the products will be resold by those establishments. A super-literal reading of the language of Idaho Code § 20-413 might lead to the conclusion that a Correctional Industries product may be sold to a retail or wholesale establishment for any purpose whatever, even if that establishment is the ultimate consumer of the product. This, however, would appear to be an absurd result that is entirely inconsistent with the purpose of the relevant statutes. One of the purposes of Idaho Code §§ 20-413 and 20-414 is to limit the transfers or sales of Correctional Industries products. There is no apparent reason for allowing only retail and wholesale establishments, as opposed to all other private businesses or individuals, to purchase such items directly from Correctional Industries for their own use. On the other hand, it would be reasonable and consistent with the purpose of the statutes to allow retail and wholesale estab-

lishments to purchase Correctional Industries products for the purpose of resale. This would allow at least a portion of the private sector to share in the profits from the ultimate sale of such products to the general public.

This interpretation of the statute is supported by the legislative history. The statutes in question were originally enacted in 1974 as part of the Correctional Industries Act. 1974 Idaho Sess. Laws 1096, 1100-01. As then adopted, Idaho Code § 20-413 provided in part, “The [correctional industries] commission may contract to sell products manufactured by correctional industries to retail establishments within the state for resale to the general public.” (Emphasis added.) 1974 Idaho Sess. Laws 1100. Thus, it was clear that the original legislative intent was to allow the sale of Correctional Industries products only where the products would be resold to the general public.

In 1978, the legislature adopted Senate Bill No. 1405, which added the words “or wholesale” following the word “retail,” and which struck the words “for resale to the general public.” The Statement of Purpose accompanying the bill was as follows:

The purpose of this act is to amend Section 20-413 to allow the Correctional Industries Commission to contract with wholesalers within the state for the sale of products manufactured by Correctional Industries. Present law allows the Commission to contract only with retailers.

The testimony offered in committee in support of the bill was to the same effect. For instance, the minutes of the hearing on the bill before the House State Affairs Committee state:

Don Erickson [of the Department of Correction] spoke to the committee on this bill and said the purpose of this act is to amend Section 20-413 to allow the Correctional Industries Commission to contract with wholesalers within the state for the sale of products manufactured by Correctional Industries. He said present law allows the Commission to contract only with retailers. He further stated benefits would be attained by allowing the Correctional



Industries Commission to deal with wholesalers as well as retailers.

Minutes of House State Affairs Committee, March 4, 1978; *see also*, Minutes of Senate State Affairs Committee, January 19, 1978; Minutes of Senate Commerce and Labor Committee, February 1, 1978.

Since the only purpose underlying Senate Bill 1405 was to allow for the sale of Correctional Industries products to wholesalers, it follows that the language “for resale to the general public” was dropped simply to allow those wholesalers to resell the products to retailers. Nothing in the legislative history suggests that the deleted language was dropped in order to permit retail and wholesale establishments to apply the products to their own use. Therefore, it must be concluded that the legislative intent remained to allow the sale of Correctional Industries products to private businesses only for ultimate resale to the general public.

Applying this conclusion to the specific question you have asked, it is our opinion that Correctional Industries products may not be sold to businesses that are not engaged in the wholesale or retail selling of such products, or that do not intend to resell the products.

### **AUTHORITIES CONSIDERED**

**1. Idaho Code:**

Idaho Code §§ 20-401, et seq.  
Idaho Code § 20-413.  
Idaho Code § 20-414.

**2. Idaho Session Laws:**

1974 Idaho Sess. Laws 1096.  
1974 Idaho Sess. Laws 1100.  
1974 Idaho Session Laws 1101.

**3. Idaho Cases:**

Corder v. Idaho Farmway, Inc., 133 Idaho 353, 986 P.2d 1019 (Ct. App. 1999).

George W. Watkins Family v. Messenger, 118 Idaho 537, 797 P.2d 1385 (1990).

Hartman v. Meier, 39 Idaho 261, 227 P. 25 (1924).

Smith v. Smith, 131 Idaho 800, 964 P.2d. 667 (Ct. App. 1998).

Struhs v. Protection Technologies, Inc., 133 Idaho 715, 992 P.2d 164 (1999).

**4. Other Authorities:**

Minutes of House State Affairs Committee, March 4, 1978.

Minutes of Senate State Affairs Committee, January 19, 1978.

Minutes of Senate Commerce and Labor Committee, February 1, 1978.

Dated this 12th day of January, 2001.

ALAN G. LANCE  
Attorney General

**Analysis by:**

Michael A. Henderson  
Deputy Attorney General  
Chief, Criminal Law Division

**ATTORNEY GENERAL OPINION NO. 01-2**

To: Winston A. Wiggins  
Director  
Idaho Department of Lands  
**STATEHOUSE MAIL**

Per Request for Attorney General's Opinion

**QUESTION PRESENTED**

Are all lands acquired or owned by the State of Idaho ("State") subject to the provisions of art. 9, sec. 8 of the Idaho Constitution, or do the provisions apply only to endowment lands?

**CONCLUSION**

Article 9, sec. 8 of the Idaho Constitution applies to lands granted to the State by the federal government upon admission to the Union (endowment lands) and lands acquired by the State from the federal government after 1982. Other lands acquired or owned by the State of Idaho are not subject to the provisions of art. 9, sec. 8.

**ANALYSIS****A. Introduction**

In 1982, art. 9, sec. 8 of the Idaho Constitution was amended to prohibit the sale of "state lands" for less than the appraised price, to limit the sale of "state lands" to no more than one hundred sections in any one year, and to prohibit the sale of more than three hundred and twenty acres of "state lands" to any one individual, company or corporation. Prior to the 1982 amendment, the above prohibitions and limitations applied only to "school lands." The question is whether the term "state lands" encompasses *all* lands owned or acquired by the State of Idaho. It should be noted at the outset that no Idaho appellate court has considered the meaning of the term "state lands" as used in art. 9, sec. 8. If presented with this question, an appellate court could, based on the identical evidence set forth below, reach a different conclusion than that contained herein.

## **B. Constitutional Framework**

The State of Idaho owns and manages several million acres of land granted to the State for the purpose of financing public institutions (“trust” or “endowment” lands). By far, the majority of trust lands were granted to the state for the purpose of providing financing for public schools. The original grant occurred in the Organic Act of the Territory of Idaho (Organic Act), which granted to the Idaho Territory sections sixteen and thirty-six of each township for the support of public schools. Act of March 3, 1863, § 14, 12 Stat. 808, 814. The Organic Act referred to these lands as “school lands.” The grant of school lands was confirmed in the Idaho Admission Act (Admission Act). Act of July 3, 1890, § 4, 26 Stat. 215, 215. In addition to school lands, the Admission Act granted lands to the State for the purposes of financing public buildings and universities. Act of July 3, 1890, §§ 6, 8, 26 Stat. 215, 216. The Admission Act also granted lands to the State to finance a scientific school, state normal schools, an insane asylum, a penitentiary, and “other state, charitable, education, penal and reformatory institutions.” *Id.*, § 11, 26 Stat. 215, 217.

The drafters of the Idaho Constitution created the State Board of Land Commissioners (“land board”), Idaho Const. art. 9, sec. 7, and charged it with the duty “to provide for the location, protection, sale or rental of all lands . . . granted to the state by the general government . . .” I.W. Hart, Proceedings and Debates of the Constitutional Convention of Idaho, 2071 (1912) (hereinafter “Proceedings and Debates”). Concurrently, the legislature was charged with the duty to “provide by law that the general grants of land made by congress to the state shall be judiciously located and carefully preserved and held in trust, subject to disposal at public auction, for the use and benefit of the respective objects for which said grants of land were made.” *Id.* at 2072. The transcript of the constitutional convention clearly shows that the general terms of sec. 8 were intended to apply to all state trust lands, not just school lands. The first draft of sec. 8 provided that the land board would have management responsibilities for “all the school lands heretofore, or which may hereafter be granted to the state by the general government.” *Id.* at 830 (emphasis added). The limitation of the section to school lands was based on the fact that at the time of the convention in 1889, the only trust lands held by the Territory of Idaho were school lands; the grant of lands for other purposes did not occur until the 1890 Admission Act. The grant of additional lands

at statehood was anticipated, however, and several delegates objected to the limitation of sec. 8 to “school lands.” *Id.* at 837, 845. Thus, the convention adopted a resolution amending sec. 8 to apply to all lands granted to the State from the federal government. *Id.* at 847.

Article 9, sec. 8, also established certain provisos limiting the land board’s authority to dispose of lands. Section 8 provided that no “school lands” could be sold for less than ten (\$10) dollars an acre, and put a limitation upon the number of sections of school lands that could be sold in any one year or to any one individual, company or corporation. The limitation of these provisos to school lands was intentional. *Id.* at 845-47. In the words of one delegate, the “board may go to work and sell the university lands, and sell the agricultural lands, without any restrictions.” *Id.* at 845-46.<sup>1</sup>

The term “state lands” also appeared in the original version of sec. 8. The section provided that the legislature shall provide for the sale of timber “on all state lands.” The context of the sentence, however, made it clear that the term “state lands” referred only to lands granted to the State by the federal government, since proceeds from timber sales were to be faithfully applied “in accordance with the terms of said grants.” *Id.* at 2072. Notably, the sentence, as originally drafted, applied only to timber sales on “public school lands.” *Id.* at 848. It was later amended to read “state lands” for the stated purpose of providing “conformity” with the previous parts of sec. 8. *Id.* at 1450.

In 1982, art. 9, sec. 8, was amended in the following manner:

It shall be the duty of the state board of land commissioners to provide for the location, protection, sale or rental of all the lands heretofore, or which may hereafter be granted to or acquired by the state by or from the general government, under such regulations as may be prescribed by law, and in such manner as will secure the maximum ~~possible amount therefor~~ long term financial return to the institution to which granted or to the state if not specifically granted; provided, that no ~~school~~ state lands shall be sold for less than ~~ten dollars per acre~~ the appraised price. \* \* \* The legislature shall, at the earliest practicable period, provide by law that the gen-

eral grants of land made by congress to the state shall be judiciously located and carefully preserved and held in trust, subject to disposal at public auction for the use and benefit of the respective object for which said grants of land were made, and the legislature shall provide for the sale of said lands from time to time and for the sale of timber on all state lands and for the faithful application of the proceeds thereof in accordance with the terms of said grants:: provided, that not to exceed one hundred sections of ~~school~~ state land shall be sold in any one year, and to be sold in subdivisions of not to exceed three hundred and twenty acres of land to any one individual, company or corporation. The legislature shall have power to authorize the state board of land commissioners to exchange granted or acquired lands of the state on an equal value basis for other lands under agreement with the United States, local units of government, corporations, companies, individuals, or combinations thereof.<sup>2</sup>

The 1982 amendment broadened the terms of art. 9, sec. 8, so that it would apply not only to lands granted to the state by the federal government, but also to all lands “acquired” from the federal government. It also altered the restrictions on the sale of lands so that they applied to “state lands” rather than “school lands.”<sup>3</sup> In addition, the 1982 amendment expanded the entities with which the State could exchange lands and required that the exchange be on an equal value basis.

### **C. Internal Construction**

The question presented is whether the term “state lands” in the 1982 amendment encompasses *all* lands owned by the State or merely those granted by or acquired from the federal government. Rules of statutory construction apply to constitutional provisions generally, including constitutional amendments. Sweeney v. Otter, 119 Idaho 135, 138, 804 P.2d 308, 311 (1990); Westerberg v. Andrus, 114 Idaho 401, 403, n.2, 757 P.2d 664, 666, n.2 (1969). Interpretation of the term “state lands” thus turns on traditional rules of statutory construction.

### 1. Plain Meaning

The examination of the question presented must begin with the literal wording of art. 9, sec. 8. Ada County Assessor v. Roman Catholic Diocese of Boise, 123 Idaho 425, 428, 849 P.2d 98, 101 (1993). It is well settled that in construing the constitution words are to be given their ordinary meaning. State ex rel. Wright v. Gossett, 62 Idaho 521, 529, 113 P.2d 415, 417-18 (1941). The threshold question in the analysis of any constitutional provision is whether the meaning of the constitutional language in question is clear and plain or is ambiguous and uncertain. Armstrong v. County of San Mateo, 194 Cal. Rptr. 294, 301 (Cal. Ct. App. 1983). See also Caminetti v. United States, 242 U.S. 470, 485 (1917).

The term “state lands” is not defined in art. 9, sec. 8, nor is it self-defining. The term “state lands,” by its nature, is so general it could potentially refer to a number of categories of land. In addition to the phrase in question, the amendment contains numerous descriptors of the lands it addresses. Accordingly, the term “state lands” as utilized in the amendment is ambiguous and its meaning must be derived by placing it in the context of the more specific descriptors of land found in art. 9, sec. 8.

### 2. Textual Analysis

An analysis of the amendment as a whole is necessary to determine whether the meaning of the term can be deciphered from the context of art. 9, sec. 8. This is known as “whole act interpretation,” and requires that the entire amendment be read together because no part of it is superior to any other. 2A Norman J. Singer, Sutherland Statutes and Statutory Construction, § 47:02 (6<sup>th</sup> ed. 2000) (“Sutherland”).

Article 9, sec. 8, as amended, consists of three general provisions. The first general provision establishes the duties of the land board to manage lands “granted to or acquired by the state by or from the general government,” and provides the manner in which such lands will be managed (to secure the maximum long-term financial gain). The first general provision is followed by the proviso that no “state lands” shall be sold for less than the appraised price.

The second general provision requires the legislature to “provide by law that the general grants of land made by congress to the state shall be judiciously located and carefully preserved and held in trust, subject to disposal at public auction for the use and benefit of the respective object for which said grants of land were made . . . .” It also requires the legislature to “provide for the sale of said lands from time to time and for the sale of timber on all state lands and for the faithful application of the proceeds thereof in accordance with the terms of said grants . . . .” The legislature’s authority to provide for the sale of “general grants of land made by congress to the state” is limited by the proviso that no more than one hundred sections of “state lands” shall be sold in any one year and no more than three hundred twenty acres be sold to any one individual, company or corporation.

The third general provision grants the legislature the power to authorize the exchange of “granted or acquired” lands with a number of specified entities on an equal value basis. The most natural reading of the term “granted or acquired” is to read it to refer to the same granted or acquired lands addressed in the initial provisions of the section, namely, lands granted by, or acquired from, the federal government.

In short, the general provisions are self-defining and limited to lands granted or acquired from the federal government. The term “state lands” appears only in the provisos to the general provisions. Provisos “serve the purpose of restricting the operative effect of statutory language to less than what its scope of operation would be otherwise.” 2A Sutherland, § 47:08 (6<sup>th</sup> ed. 2000). Accordingly, the term “state land” in each proviso must be read in conformance with the operative language of the general provision that it follows.

In the first general provision, the operative language applies to lands “granted to or acquired by the state by or from the general government.” Thus, the term “state land” in the proviso necessarily refers to those same lands. In the second general provision, the operative language applies to the sale of “general grants of land made by congress to the state.” Thus, the term “state lands” in the proviso limiting the amount of land that may be sold in any one year or to any one individual, company or corporation necessarily applies *only* to lands granted from Congress to the State. These lands are a smaller subset of those “granted to or acquired by” the state by or from the



federal government. This limitation is consistent with the interpretation of the first proviso. Accordingly, a court could look to the context within which the term “state lands” is used in the amendment and conclude that the term means only lands granted to or acquired from the federal government.

#### **D. Legislative Considerations**

As demonstrated above, the term “state lands” can be defined to mean lands granted by or acquired from the federal government solely by analyzing the context of its use in the amendment and by using rules of statutory construction concerning provisos. Typically, a court’s inquiry into the meaning of a constitutional term would be at an end after reaching such a conclusion. As stated above, however, no Idaho appellate court has yet considered this issue. Therefore, in an abundance of caution, this analysis looks both to the circumstances surrounding the proposed constitutional amendment as well as to the legislature’s subsequent interpretation of the term “state lands” in analysis of the meaning of the term in the 1982 amendment.

##### **1. Surrounding Circumstances**

The legislature’s impetus for proposing the 1982 amendment to art. 9, sec. 8, must be considered because “[i]n construing constitutional amendments, consideration should be given to the circumstances leading to their adoption and the purpose sought to be accomplished.” School District of Seward Educ. Ass’n v. School District of Seward in the County of Seward, 199 N.W.2d 752, 755 (Neb. 1972), *quoting* Engelmeyer v. Murphy, 142 N.W.2d 342 (Neb. 1966). *See* Girard v. Diefendorf, 54 Idaho 467, 475, 34 P.2d 48, 50 (1934) (“A constitutional amendment should be interpreted in the light of the conditions under which it was framed, the ends which it was designed to accomplish, the benefits which it was expected to confer and the evils which it was hoped to remedy.”). Mazzone v. Attorney General, 736 N.E.2d 358, 368 (Mass. 2000). A review of the motivation of the legislature supports the conclusion that the term “state lands” as used in art. 9, sec. 8 of the Idaho Constitution refers only to those lands granted by or acquired from the federal government.

The legislative history of the 1982 amendment to art. 9, sec. 8, demonstrates that the 1982 amendments were focused on the management of

federal lands that the State then considered acquiring from the federal government, and in this context the Idaho Legislature established a Public Lands Committee. S. Con. Res. 144, 45<sup>th</sup> Leg. (1980). The committee was assigned the task of “gathering accurate information to assist the Idaho Legislature in properly addressing the issue of the management and control of the unappropriated public lands in the state of Idaho.” *Id.* Indeed, the committee confined its work to the consideration of the acquisition of the “unappropriated public lands.” Minutes of the Leg. Council Comm. on the Public Lands (“Comm. Minutes”), August 25, 1980, at 136.<sup>4</sup>

The 1982 amendment came about, in part, because of the committee’s work and was based, in part, on the committee’s report to the legislature. Given the legislature’s understanding of the purpose of the 1982 amendment to art. 9, sec. 8, the term “state lands” would be interpreted by an Idaho appellate court to encompass only those lands granted to or acquired by the federal government.

## 2. Statutory Framework

In addition to its motivation in proposing the 1982 amendment, the legislature’s interpretation of the term “state lands” must be considered. A fundamental rule of construction of any legal document is that the main object of the interpretation is to ascertain the intent of the parties who made the instrument and to give that intent the fullest effect possible consistent with the related body of law. Armstrong, 194 Cal. Rptr. at 306. When interpreting constitutional language, Idaho courts have looked to the understanding the legislature had of the terms contained in a constitutional amendment. Girard, 54 Idaho at 475, 34 P.2d at 50.

At the time art. 9, sec. 8, was drafted and ratified, there was a host of specific provisions in the Idaho Code relative to the disposition of lands owned or occupied by state agencies. For example, state agencies and the land board were granted the power, codified in Idaho Code §§ 58-331 through 58-335, to dispose of surplus real property. These management and sale criteria are separate and distinct from those contained in art. 9, sec. 8. This body of statutory law was first codified in 1951 and, thus, existed at the time of the amendment. *See* 1951 Idaho Sess. Laws §§ 1 through 4 at 452. Pursuant to these statutes, the land board was authorized to relinquish control and custody

of surplus property to any state agency it determined could best use the property, or, more importantly, the land board could sell the property “to the highest and best bidder upon terms and conditions to be determined by the board.” Nothing in the material provided to the voters indicated the 1982 amendment would overturn this body of statutory law.

Furthermore, a plethora of other statutes existed at the time of the 1982 amendment granting various state agencies the power to acquire and dispose of real property. For example, since 1965, pursuant to Idaho Code § 42-1734, the State Water Resource Board has had the authority to “acquire, purchase, lease, or exchange land.” *See* 1965 Idaho Sess. Laws, ch. 320, § 4 at 907. In 1970, pursuant to Idaho Code § 33-107, the State Board of Education was granted the power to “acquire, hold and dispose of title to or interest in real property.” *See* 1970 Idaho Sess. Laws, ch. 79, § 1 at 199. In 1974, both the Idaho Department of Health and Welfare—Idaho Code § 39-106—and the Idaho State Building Authority—Idaho Code § 67-6409—were granted the power to acquire and dispose of real property. *See* 1974 Idaho Sess. Laws, ch. 23, § 50 at 669 (health and welfare); 1974 Idaho Sess. Laws, ch. 111, § 9 at 1268 (building authority). Yet another statute in existence at the time of the 1982 amendment distinguished endowment lands from other real property owned by state agencies. Idaho Code § 21-142(14) gave the Idaho Transportation Board the power to sell, exchange, or otherwise dispose of, for aeronautical purposes, any real or personal property, “not placed under the jurisdiction of the state land board.” It must be assumed that the legislature was fully aware of the existence of these laws at the time it proposed the 1982 amendment to Idaho Const. art. 9, sec. 8.

Given the wealth of statutory law in place at the time of the 1982 amendment, it is reasonable to conclude that the legislature did not intend for the amendment to render void the above-referenced statutes. If the legislature had intended to render these statutes void, there would have been some evidence of such an intent in the legislative history of the amendment. A court would not likely imply such intent on the part of the legislature based on the available evidence.

Furthermore, the term “state lands” contained in art. 9, sec. 8, must be viewed in light of the statutes enacted by the legislature *following the ratification* of the 1982 amendment. Where a constitutional provision “may well

have either of two meanings, it is a fundamental rule of constitutional construction that, if the Legislature by statute has adopted one, its action in this respect is well nigh, if not completely controlling.” Armstrong, 194 Cal. Rptr. at 310. A court will “give much, though not conclusive, weight to legislative interpretation, and although the legislature’s interpretation of the constitution is not binding on . . . [a court, it] would be loathe to interpret the constitution otherwise.” Geringer v. Bebout, 10 P.3d 514, 522 (Wyo. 2000).

In 1985, while recodifying the laws pertaining to highways, bridges and ferries, the legislature expressly granted the Idaho Transportation Board the power to purchase and sell, exchange or otherwise dispose of “any real property, other than public lands which by the constitution and laws of the state of Idaho are placed under the jurisdiction of the state land board.” See 1985 Idaho Sess. Laws, ch. 253, § 2 at 601. This express reservation by the legislature makes it abundantly clear it did not interpret the term “state lands” as used in art. 9, sec. 8, to apply to *all* lands owned by the state.

Thereafter, in 1986, the legislature enacted Idaho Code § 58-335A permitting the Idaho Transportation Department to promulgate rules governing the sale of its surplus real property with a value of less than a certain amount. See 1986 Idaho Sess. Laws, ch. 129, § 1 at 336. Furthermore, in 1989, the legislature created the “park land trust” within the Idaho Department of Parks and Recreation (“IDPR”), and granted IDPR the power to acquire, exchange and sell property in the land trust. See 1989 Idaho Sess. Laws, ch. 386, §§ 2, 3 at 962-63.

Based on its enactment of the aforementioned statutes, the legislature did not interpret the 1982 amendment to art. 9, sec. 8, as affecting *all* state lands, otherwise its 1986 and 1989 acts would have been patently unconstitutional. However, construing the term “state lands” contained in the 1982 amendment to art. 9, sec. 8, to mean only those lands “granted to or acquired by the state from the general government,” the legislature’s acts do not offend the language of the constitutional provision.

Lending support to the conclusion that the term “state lands” refers only to lands acquired from or granted by the federal government is the fact that the legislature has the authority to review rules promulgated by the various state agencies. See Idaho Code § 67-5223 (requiring any rules promul-

gated by state agencies to be submitted to the legislature for review), and Idaho Code § 67-5291 (the legislature has the power to reject administrative rules if they violate the intent of the statute under which they are made). In 1997, the Idaho Department of Transportation enacted rules governing the disposal of its surplus property. IDAPA 39.03.45. The legislature did not revoke these rules and, thus, must not have interpreted the term “state lands” as used in Idaho Const. art. 9, sec. 8, as applying to *all* lands owned by the State of Idaho.

### **E. Intent of the Voters**

Although the meaning of the term “state lands” can be derived from the context of art. 9, sec. 8, it is worthwhile to examine the intent of the voters ratifying the constitutional amendment to ensure that they had a similar understanding of the amendment.<sup>5</sup> The people, not the legislature, amend the Idaho Constitution. Idaho Const. art. 20, sec. 1; Idaho Mut. Benefit Ass’n v. Robison, 65 Idaho 793, 799, 154 P.2d 156, 159 (1944). When interpreting a constitutional amendment, the intent of the voters adopting it must be given effect. Hibernia Bank v. California Bd. of Equalization, 166 Cal. App. 3d 393, 401 (Cal. Ct. App. 1985); Tivolino Teller House, Inc. v. Fagan, 926 P.2d 1208, 1211 (Colo. 1996); De Mere v. Missouri State Highway and Transp. Comm’n, 876 S.W.2d 652, 655 (Mo. Ct. App. 1994). The California Supreme Court, in interpreting a constitutional amendment, has stated, “the intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act.” State Bd. of Equalization v. Board of Supervisors of the County of San Diego, 164 Cal. Rptr. 739, 744 (Cal. Ct. App. 1980), *quoting* Bakkenson v. Superior Court, 241 P. 874, 877 (Cal. 1925). Accordingly, if voter intent regarding the meaning of the term “state lands” can be gleaned from an analysis of the materials provided them, that intent will govern, even over the letter of the amendment.

Explanations about a proposed constitutional amendment, made available to the public before referendum elections, are relevant legislative history for construing a measure after its enactment. Sutherland, § 48:19. The materials provided to the voters prior to their ratification of the 1982 amendment to art. 9, sec. 8, Section 2 of H.J.R. No. 18, required the following question be submitted to the voters:

Shall Section 8, Article IX, of the Constitution of the State of Idaho be amended to require that endowment lands be managed to secure the maximum long term financial return for the institution to which granted; to provide the acquired lands be managed to secure the maximum long term financial return to the state; to prohibit the sale of state lands for less than the appraised price; and to authorize the exchange of state lands on an equal value basis?

1982 Idaho Sess. Laws, H.J.R. No. 18, § 2 at 936. Pursuant to Idaho Code § 67-913, and as required by § 4 of H.J.R. No. 18, the Secretary of State caused to be published the statement of meaning and purpose, the presentation of major arguments submitted by the legislative council, and the text of the proposed amendment. Accordingly, these materials will be reviewed in an attempt to discern what meaning voters ascribed to the term “state lands.”

The Statement of Meaning and Purpose declared:

The purpose of this proposed amendment to Section 8, Article IX, of the Constitution of the State of Idaho is to require the State Board of Land Commissioners to manage endowment lands and other lands acquired by the State of Idaho from the United States government for the maximum long term financial return, to prohibit the sale of state lands for less than the appraised price of those lands, and to authorize the exchange of state lands for other lands on an equal value basis with private and governmental entities.

In addition, the legislative council issued a statement regarding the Effect of Adoption of the amendment, which stated:

If this amendment is adopted, the constitutional standard for managing endowment and other lands granted to or acquired by the State of Idaho from the federal government will change. At present, endowment lands are managed to “secure the maximum possible amount therefor.” This amendment will change that standard and require management to secure the “maximum long term financial return.”

This amendment will also add a constitutional standard for sales and exchanges of state lands.

Neither the Statement of Meaning and Purpose nor the statement regarding the Effect of Adoption defines the term “state lands.” A natural reading of both of these statements, however, leads us to conclude that the term “state lands” concerned only those lands previously referred-to—endowment lands or other lands granted to or acquired by the State from the federal government. However, voter intent is far from clear based on these two statements and, therefore, there is some question whether these statements would be sufficient for a court to conclude voters intended the term “state lands” to encompass all lands owned by the State.

In addition to the above-referenced materials, the voters were provided the following Statements FOR Proposed Amendment:

1. This amendment will formally spell out in the State Constitution a management practice that the State Board of Land Commissioners uses in managing the State’s *endowment lands*. The State Board of Land Commissioners manages the *endowment lands* to receive the maximum long-term financial return instead of the short-term benefit.

2. The maximum long-term financial return to the State of Idaho from the management of *state-owned lands* could be significantly different than the maximum possible amount received from the lands. Requiring that the State Board of Land Commissioners manage lands to receive the maximum amount of return over a period of years will promote efficient, cost-effective far-sighted management practices, and allow the State of Idaho to realize the maximum financial return possible from the sale or rental of *state lands*.

3. By providing that *state lands* shall not be sold for less than the appraised price, the State of Idaho will avoid subsidizing individuals or institutions by selling lands

for less than the appraised price when the sale of particular lands generates little interest or few bidders.

4. The provision allowing exchanges of *state lands* on an equal value basis for lands owned by entities other than the State of Idaho will allow the State Board of Land Commissioners to exchange lands so that blocks of land could be put together for wildlife management, parks, recreation areas or resource development areas which otherwise might not occur. Lands received through these exchanges must be equal in value to the lands given up.

(Emphasis added.)

In the first two statements, the proponents of the amendment appear to have used the term “state lands” virtually interchangeably with the term “endowment lands.” Statement 1 refers to the management of “endowment lands” for maximum long-term financial return. Immediately thereafter, Statement 2 details why it is more prudent to manage “state-owned lands” in such a fashion. Furthermore, in Statements 3 and 4, the proponents continue to refer to “state lands.” Insofar as Statement 3—sale of “state lands”—is concerned, the text of the amendment identified the restriction on sales as concerning lands granted by the federal government. Statement 4 addressed exchanges of “state lands;” the text of the amendment refers to exchanges of “granted or acquired lands.” A comparison of the language in the Statements FOR the Proposed Amendment and the text of the amendment suggests voters intended the term “state lands” to mean lands granted by or acquired from the federal government.

Finally, the following Statements AGAINST the Proposed Amendment were provided to the voters:

1. This proposed amendment is unnecessary as the State Board of Land Commissioners now administers the State’s *endowment lands* in a manner that will secure the maximum long-term financial return to the institution for which they are granted. It is provided by statute that the State Board of Land Commissioners shall not sell *state lands*



under bid for less than the minimum price set by the board. This has traditionally been for at least the appraised price. It is statutorily provided that the State Board of Land Commissioners may exchange *state lands* on an equal basis with private and governmental entities.

2. While it is not the intent of the amendment, wording in this amendment may preclude the State of Idaho from acquiring land from the federal government and devoting it to a purpose that would not secure the maximum long-term financial return to the State. This could prevent the State of Idaho from acquiring land from the federal government and converting that land into a state park or a fish and game preserve if that use does not secure the maximum long-term financial return to the State of Idaho.

3. This amendment substitutes the phrase “maximum long-term financial return” for a phrase that has been interpreted by the courts. This substitution may eliminate nearly a century of case law regarding the State’s *endowment lands*. Also, the phrase “maximum long-term financial return” is highly ambiguous.

4. While not the intent of the amendment, the wording of this proposed amendment could possibly endanger certain existing state parks and wildlife refuges which had been granted to the State of Idaho by the United States government. Lands containing certain state parks and wildlife refuges were granted to the State of Idaho by the United States specifically for use as parks or wildlife refuges. If a court were to find that the use of these lands as state parks or wildlife refuges is not securing the maximum long-term financial return to the State and hence in violation of the State Constitution, title to the lands could revert to the United States Government.

(Emphasis added.)

It is clear from the Statements AGAINST the Proposed Amendment that the opponents were focused only on lands granted to or acquired from the federal government. There is no hint that the opponents thought the amendment applied to lands acquired from other entities.

The opponents of the amendment appear to have used the terms “endowment lands” and “state lands” interchangeably. In Statement 1, for instance, they argue that the amendment is not necessary because the land board already administered “endowment lands” in a manner that would secure the maximum long-term financial return. In support of this argument, those in opposition pointed to the land board’s statutory duty not to sell “state lands” for less than the set price, which, they asserted, was traditionally the appraised price. In further support for their argument, the opponents pointed to the land board’s statutory authority to exchange “state lands” with other private and governmental entities. Based on the language utilized in this statement, it is not possible to determine whether voters attached some significance to the use of the term “state lands,” as opposed to “endowment lands” in the amendment.

Statement 3 argues against the adoption of the amendment because the phrase “maximum long-term financial return” was “highly ambiguous,” and changing the land board’s express management standard would do away with “nearly a century of case law” in which Idaho courts had interpreted art. 9, sec. 8. Statements 2 and 4 both begin with the caveat “[w]hile not the intent of the amendment.” Therefore, voters were cautioned the amendment might have unintended consequences when subjected to court interpretation. It is difficult to fathom how any of these three statements, either separately or in combination, could assist a court in determining the intent of the voters with regard to the meaning of the term “state lands” contained in the amendment.

Analysis of the materials before the voters prior to their ratification of the 1982 amendment leads to the conclusion that the intent of the voters vis-à-vis the meaning they assigned to the term “state lands” cannot readily be discerned. Importantly, however, as noted in section IV.B. above, *none of the materials* before the voters indicated the amendment would overturn the significant statutory authority then possessed by state agencies to purchase

and sell land. If such a result had been intended by the voters, a court would require some form of concrete evidence to that end. Accordingly, it is reasonable to conclude that voters did not intend for the 1982 amendment to art. 9, sec. 8, to have such an effect.

## CONCLUSION

Prior to the 1982 amendments, this Office opined that art. 9, sec. 8, applied only to the original grants of land outlined in the Idaho Admission Bill and any lands received from the federal government in exchange or in lieu of the originally granted lands. *See* 1982 Idaho Att’y Gen. Ann. Rpt. 52. A 1984 Attorney General Guideline stated, in passing, that “[o]ne of the effects of the 1982 amendments is to make applicable to all state lands some of the restrictions which originally applied only to school lands.” 1984 Idaho Att’y Gen. Ann. Rpt. 129, 130. For the reasons discussed above, it is the opinion of this office that the phrase “state lands,” now found in art. 9, sec. 8 of the Idaho Constitution, merely extended the section’s prohibitions to any unreserved, unappropriated lands that might be acquired by the State from the federal government in the future. This conclusion is supported by the context in which the term is used within the amendment itself, the legislature’s motivation in proposing the amendment, and the legislature’s post-hoc interpretation of the term. Finally, statutory authority existed for various state agencies to acquire and dispose of lands owned by the State prior to the 1982 amendment, and voters were not informed that the amendment would do away with those laws. Viewing the evidence as a whole, a reviewing court is likely to conclude that the prohibitions of art. 9, sec. 8, on the disposition of “state land” do not apply to other categories of land owned by the State of Idaho or in the name of any of its agencies. To the extent that the 1984 Attorney General Guideline is inconsistent with this Opinion, that Guideline is hereby withdrawn.

## AUTHORITIES CONSIDERED

### 1. Idaho Constitution:

Article 9, § 7.

Article 9, § 8.

Article 20, § 1.

**2. Statutes and Rules:**

Act of March 3, 1863, Organic Act of the Territory Of Idaho, 12 Stat. 808.

Act of July 3, 1890, Idaho Admission Bill, 26 Stat. 215.

IDAPA 39.03.45.

Idaho Code § 21-142(14).

Idaho Code § 33-107.

Idaho Code § 39-106.

Idaho Code § 42-1734.

Idaho Code § 58-331.

Idaho Code § 58-332.

Idaho Code § 58-333.

Idaho Code § 58-334.

Idaho Code § 58-335.

Idaho Code § 58-335A.

Idaho Code § 67-913.

Idaho Code § 67-5223.

Idaho Code § 67-5291.

Idaho Code § 67-6409.

**3. Legislative Materials:**

1951 Idaho Sess. Laws 452.

1965 Idaho Sess. Laws 907.

1970 Idaho Sess. Laws 199.

1974 Idaho Sess. Laws 669.

1974 Idaho Sess. Laws 1268.

1982 Idaho Sess. Laws 936 (House Joint Resolution 18).

1985 Idaho Sess. Laws 601.

1986 Idaho Sess. Laws 336.

1989 Idaho Sess. Laws 962.

Minutes of the Leg. Council Comm. On the Public Lands, August 25, 1980, and October 27, 1980.

S. Con. Res. 144, 45<sup>th</sup> Leg. (1980).

Secretary of State's Abstract of Votes Cast at the General Election, November 2, 1982.

Legislative Council's Statement of Effect of Adoption of H.J.R. No. 18, pub. by Secretary of State (1982).

Legislative Council's Statement of Meaning and Purpose of H.J.R. No. 18, pub. by Secretary of State (1982).

Legislative Council's Statements AGAINST the Proposed Amendment, pub. by Secretary of State (1982).

Legislative Council's Statements FOR Proposed Amendment, pub. by Secretary of State (1982).

**4. Idaho Cases:**

Ada County Assessor v. Roman Catholic Diocese of Boise, 123 Idaho 425, 849 P.2d 98 (1993).

American Exp. Travel Related Services Co., Inc. v. Tax Com'n, 128 Idaho 902, 920 P.2d 921 (1996).

City of Sun Valley v. Sun Valley Co., 123 Idaho 665, 851 P.2d 961 (1993)., 54 Idaho 467, 34 P.2d 48 (1934).

Idaho Mut. Benefit Ass'n v. Robison, 65 Idaho 793, 154 P.2d 156 (1944).

Local 1494 of the Int'l Ass'n of Firefighters v. City of Coeur d'Alene, 99 Idaho 630, 586 P.2d 1346 (1978).

State ex rel. Wright v. Gossett, 62 Idaho 521, 113 P.2d 415 (1941).

Sweeney v. Otter, 119 Idaho 135, 804 P.2d 308 (1990).

Westerberg v. Andrus, 114 Idaho 401, 757 P.2d 664 (1969).

**5. Federal Cases:**

Caminetti v. United States, 242 U.S. 470 (1917).

**6. Other Cases:**

Armstrong v. County of San Mateo, 194 Cal. Rptr. 294 (Cal. Ct. App. 1983).

Bakkenson v. Superior Court, 241 P. 874 (Cal. 1925).

De Mere v. Missouri State Highway and Transp. Comm'n, 876 S.W.2d 652 (Mo. Ct. App. 1994).

Engelmeyer v. Murphy, 142 N.W.2d 342 (Neb. 1966).

Geringer v. Bebout, 10 P.3d 514 (Wyo. 2000).

Hibernia Bank v. California Bd. of Equalization, 166 Cal. App. 3d 393 (Cal. Ct. App. 1985).

Mazzone v. Attorney General, 736 N.E.2d 358 (Mass. 2000).

School District of Seward Educ. Ass'n v. School District of Seward in the County of Seward, 199 N.W.2d 752 (Neb. 1972).

State Bd. of Equalization v. Board of Supervisors of the County of San Diego, 164 Cal. Rptr. 739 (Cal. Ct. App. 1980).

Tivolino Teller House, Inc. v. Fagan, 926 P.2d 1208 (Colo. 1996).

## **7. Other Authorities:**

1982 Idaho Att'y Gen. Ann. Rpt. 52.

1984 Idaho Att'y Gen. Ann. Rpt. 129.

2A Norman J. Singer, *Sutherland Statutes and Statutory Construction*, (6<sup>th</sup> ed. 2000).

I.W. Hart, *Proceedings and Debates of the Constitutional Convention of Idaho* (1912).

Dated this 9th day of July, 2001.

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<sup>1</sup>The delegate's statement that the land board could sell lands other than school lands "without restrictions" was not correct, since the section, by its terms, requires all state lands to be sold at public auction. *Proceedings and Debates* at 847.

<sup>2</sup>Section 8 now reads as follows:

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

ed; provided, that no state lands shall be sold for less than the appraised price. No law shall ever be passed by the legislature granting any privileges to persons who may have settled upon any such public lands, subsequent to the survey thereof by the general government, by which the amount to be derived by the sale, or other disposition of such lands, shall be diminished, directly or indirectly. The legislature shall, at the earliest practicable period, provide by law that the general grants of land made by congress to the state shall be judiciously located and carefully preserved and held in trust, subject to sale at public auction for the use and benefit of the respective object for which said grants of land were made, and the legislature shall provide for the sale of said lands from time to time and for the sale of timber on all state lands and for the faithful application of the proceeds thereof in accordance with the terms of said grants; provided, that not to exceed one hundred sections of state lands shall be sold in any one year, and to be sold in subdivisions of not to exceed three hundred twenty acres of land to any one individual, company or corporation. The legislature shall have power to authorize the state board of land commissioners to exchange granted or acquired lands of the state on an equal value basis for other lands under agreement with the United States, local units of government, corporations, companies, individuals, or combinations thereof.

<sup>3</sup>Other amendments were made to art. 9, sec. 8, in 1916, 1935, 1941 and in 1951. The amendments, *inter alia*, increased the amount of school lands that could be sold, changed the amount per acre for which they could be sold, and empowered the legislature to exchange granted lands for other lands under agreement with the federal government. Those amendments are not relevant to the current opinion.

<sup>4</sup>Courts often rely on committee reports to determine legislative intent. Sutherland, § 48:10; see, e.g., American Exp. Travel Related Services Co., Inc. v. Tax Comm'n, 128 Idaho 902, 904, 920 P.2d 921, 923 (1996); City of Sun Valley v. Sun Valley Co., 123 Idaho 665, 668, 851 P.2d 961, 964 (1993). Idaho, like many states, does not keep a verbatim record of most committee hearings. Thus, courts are generally hesitant to resort to statements reportedly made by committee members to determine legislative intent. Sutherland, § 48:10. The Idaho Supreme Court has, however, relied upon the testimony of the proponent of a proposed bill in construing a statute. Local 1494 of the Int'l Ass'n of Firefighters v. City of Coeur d'Alene, 99 Idaho 630, 641, 586 P.2d 1346, 1357 (1978).

<sup>5</sup>According to the Secretary of State's Abstract Of Votes Cast At The General Election, November 2, 1982, 177,188 Idahoans, or 64.1%, voted in favor of the constitutional amendment.

**ATTORNEY GENERAL OPINION NO. 01-3**

To: Patrick A. Takasugi  
Director  
Idaho State Department of Agriculture  
**VIA HAND DELIVERY**

Per Request for Attorney General's Opinion

**QUESTION PRESENTED**

You asked for guidance as to the procedure the Director of the Idaho State Department of Agriculture ("Director") should follow in making the "determination" that there are no other viable agricultural alternatives to crop burning, as required by Idaho Code § 22-4803(1). As part of your request, you asked whether the Director can "simply issue a determination based on [his or her] experience and intimate acquaintance with Idaho agriculture, and [his or her] review of published literature." Finally, you have asked whether there is any "statutory or other guidance regarding the need to maintain records of the facts relied upon in making the determination."

**CONCLUSION**

The determination required by Idaho Code § 22-4803(1) will likely be subject to deferential judicial review using an "arbitrary and capricious" standard under the Idaho Administrative Procedure Act, Idaho Code §§ 67-5201 through 67-5292. In order to withstand such a judicial review, the determination must be based on documentary evidence, including letters, memoranda, published literature, and various other reports; a reviewing court would be unable to review the Director's "intimate acquaintance with Idaho agriculture" and, thus, could not determine that the Director had formed a sufficient basis for the determination. Failure to develop a sufficient record will likely result in a reversal of the Director's determination. The materials utilized by the Director in making the determination must be retained so that in the event the determination is challenged, the reviewing court has a record to review.



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## ANALYSIS

Your question concerns the interaction between title 22, chapter 48, of the Idaho Code, concerning Smoke Management and Crop Residue Disposal, and title 67, chapter 52, Idaho Code, the Idaho Administrative Procedure Act (APA). Idaho Code § 22-4803 states, in relevant part:

(1) The open burning of crop residue grown in agricultural fields shall be an allowable form of open burning when the provisions of this chapter, and any rules promulgated pursuant thereto, and the environmental protection and health act, and any rules promulgated pursuant thereto, are met, *and when no other agricultural viable alternatives to burning are available, as determined by the director . . .*

(Emphasis added.) Accordingly, Idaho Code § 22-4803(1) imposes a duty on the Director of the ISDA to make a determination. An agency's performance of, or failure to perform, any duty placed on it by law is subject to judicial review under the APA. *See* Idaho Code § 67-5270. Therefore, the Director's determination, made pursuant to Idaho Code § 22-4803(1), is reviewable pursuant to the APA.

There are three types of actions performed by an agency which are reviewable under the APA: (1) issuance of orders following a contested case; (2) promulgation of rules; and (3) other duties which are imposed on the agency pursuant to law. The determination required by Idaho Code § 22-4803(1) constitutes neither an order nor a rule.<sup>1</sup> Accordingly, the Director need not adhere to the APA requirements governing either contested cases or rule promulgation. Agencies, however, do many things in addition to promulgating rules and issuing orders. *See* Michael S. Gilmore & Dale D. Goble, The Idaho Administrative Procedure Act: A Primer For The Practitioner, 30 Idaho L. Rev. 273, 288 (1993) (hereinafter "APA Primer"). The determination required by Idaho Code § 22-4803 is one of these additional duties.

Idaho Code § 22-4803(1) does not restrict, in any manner, the information that may be considered by the Director in reaching his or her determination. However, pursuant to Idaho Code § 67-5275(1)(c), the "agency record" of an action that constitutes neither a rule nor an order consists of

“any agency documents expressing the agency action” (emphasis added). Presumably, such a record would include “letters, memoranda, and other pre-decisional and all decision documents.” APA Primer at 354.

The APA sets forth the standard of judicial review of agency decisions. Fuller v. Department of Educ. Div. of Vocational Rehab., 117 Idaho 126, 127, 785 P.2d 690, 691 (1990). The Director’s determination, a factual one, will be governed by the “arbitrary, capricious, or an abuse of discretion” standard of review set forth in Idaho Code § 67-5279(2). An agency decision is arbitrary, capricious or an abuse of discretion if it was not based on those factors that the legislature thought relevant, ignored an important aspect of the problem, provided an explanation that ran counter to the evidence before the agency, or involved a clear error of judgment. See Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983); APA Primer at 365.

In order to survive review under the “arbitrary and capricious” standard, the Director should consider the advantages and disadvantages—important aspects upon which the determination will be based—of any alternatives in order to determine whether such are agriculturally “viable.” So long as the Director’s determination is supported by substantial evidence, it is likely to withstand judicial review. Accordingly, the Director, in reaching the determination required by Idaho Code § 22-4803(1), should gather all available information on crop burning and its alternatives, carefully review that information, and reach an informed decision which is supported by the evidence.

Your question specifically asks whether the Director may rely on his or her experience and intimate acquaintance with Idaho agriculture in making the determination required by Idaho Code § 22-4803(1). The Director may rely on such information so long as it is in a form capable of judicial review, such as an affidavit wherein the Director sets forth that information. However, such an affidavit alone may not be sufficient to enable the Director’s determination to withstand judicial review. Additionally, the affidavit must exist at the time the determination is made, and not be created later. The presence of an adequate record before the decision-maker *at the time his or her decision is made* is critical. The Idaho Supreme Court has looked unfavorably upon findings which are created after a decision has been made and entered because such “are not the ‘findings’ contemplated” by Idaho Supreme Court decisions. Curr v. Curr, 124 Idaho 686, 691, 864 P.2d 132, 137 (1993).

Finally, you have also asked whether there is any “statutory or other guidance regarding the need to maintain records of the facts relied upon in making the determination.” Pursuant to Idaho Code § 67-5250(2):

Unless otherwise prohibited by any provision of law, each agency shall index by subject all agency guidance documents. The index and the guidance documents shall be available for public inspection and copying at cost in the main office and each regional or district office of the agency. As used in this section, “agency guidance” means all written documents, other than rules, orders, and pre-decisional material, that are intended to guide agency actions affecting the rights or interests of persons outside the agency. “Agency guidance” shall include *memoranda, manuals, policy statements, interpretations of law or rules, and other material that are of general applicability, whether prepared by the agency alone or jointly with other persons*. The indexing of a guidance document does not give that document the force and effect of law or other precedential authority.

(Emphasis added.) Any documents that satisfy the aforementioned definition of “agency guidance” and are relied upon by the Director must be indexed. More importantly, however, as stated above, the Director’s determination could be subjected to judicial review. Such a review will be based on the record before the Director at the time of the determination. Accordingly, it is necessary for the Director to maintain the records upon which his or her determination was based.

### **AUTHORITIES CONSIDERED**

#### **1. Statutes and Rules:**

Idaho Code § 22-4803.

Idaho Code § 22-4803(1).

Idaho Administrative Procedure Act, Idaho Code §§ 67-5201 through 67-5292.

Idaho Code § 67-5201(12).

Idaho Code § 67-5201(19).  
Idaho Code § 67-5250(2).  
Idaho Code § 67-5270.  
Idaho Code § 67-5275(1)(c).  
Idaho Code § 67-5279(2).

**2. Idaho Cases:**

Curr v. Curr, 124 Idaho 686, 864 P.2d 132 (1993).

Fuller v. Department of Educ. Div. of Vocational Rehab., 117 Idaho 126, 785 P.2d 690 (1990).

**3. Federal Cases:**

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983).

**4. Other Authorities:**

Michael S. Gilmore & Dale D. Goble, The Idaho Administrative Procedure Act: A Primer For The Practitioner, 30 Idaho L. Rev. 273 (1993).

Dated this 3rd day of August, 2001.

ALAN G. LANCE  
Attorney General

**Analysis by:**

John R. Kormanik  
Deputy Attorney General  
Natural Resources Division

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<sup>1</sup> An "order" is "an agency action of particular applicability that determines the legal rights, duties, privileges, immunities, or other legal interests of one (1) or more specific persons." Idaho Code § 67-5201(12). A "rule" on the other hand is an agency statement of general applicability promulgated in compliance with the requirements of the APA, which implements, interprets, or prescribes a law or policy, or the procedure or practice requirements of an agency. Idaho Code § 67-5201(19).

**ATTORNEY GENERAL OPINION NO. 01-4**

To: Winston A. Wiggins, Director  
Idaho Department of Lands  
**STATEHOUSE MAIL**

Per Request for Attorney General's Opinion

**QUESTIONS PRESENTED**

You ask the following questions:

- A. For which endowments may the State Board of Land Commissioners ("Land Board") utilize the land bank fund created by Idaho Code § 58-133;
- B. Is use of the land bank fund mandatory; and
- C. What "expenses" of property sale/acquisition, if any, can be paid for out of the proceeds from the sale of endowment lands that are invested in the land bank fund?

**CONCLUSIONS**

A. Pursuant to various provisions of the Idaho Code, the Land Board may deposit into the land bank fund proceeds from the sale of lands belonging to the penitentiary endowment; public school endowment; university endowment; scientific school endowment; agricultural college endowment; normal school endowment; mental hospital endowment; and charitable institutions endowment. The proceeds from the sale of lands belonging to the capitol permanent endowment, however, may not be placed into the land bank fund.

B. Based on the plain language of Idaho Code § 58-133, which states, "[t]he proceeds from the sale of state endowment land *may* be deposited into a fund which shall be known as the 'land bank fund'" (emphasis added), the Land Board retains discretion in deciding whether to deposit proceeds from the sale of various parcels of endowment lands into the land bank

fund. In the event the Land Board chooses not to deposit the proceeds from the sale of eligible endowment lands into the land bank fund, Idaho Code § 57-716 requires those proceeds to be placed in the appropriate permanent endowment fund.

C. The trusts created by the grants of endowment lands by the federal government are governed by basic trust principles. One such principle is that reasonable costs incurred in selling and acquiring trust property may be deducted from the principal of the trust. Accordingly, prior to their deposit into the land bank fund, proceeds from the sale of endowment property may be used to pay for reasonable and necessary costs incidental to the sale. Likewise, proceeds deposited in the land bank fund may be used to pay reasonable and necessary costs incidental to the acquisition or purchase of new endowment property.

## ANALYSIS

### A. Introduction

There are nine permanent endowments in Idaho—penitentiary; public school; university; scientific school; agricultural college; normal school; mental hospital; charitable institutions; and capitol building. Each endowment originated from various grants of lands to the state from the federal government upon Idaho’s admission to the Union. *See Idaho Admission Act, Act of July 3, 1890, §§ 4, 6, 8 and 11, 26 Stat. 215, 215-17.* Pursuant to Idaho Const. art. 9, §§ 7 and 8, and Idaho Code §§ 58-101 and 58-104, the State Board of Land Commissioners is charged with the management of these endowment lands.

In the past, the Land Board did not have authority to use the proceeds from the sale of endowment lands to purchase “new” endowment land. Prior to its amendment in 1998, for example, the Idaho Admission Act provided that the proceeds from the sale of school endowment land “constitute[d] a permanent school fund, the interest on which only shall be expended . . .” Act of July 3, 1890, § 5, 26 Stat. 215 (amended 1998 Pub. L. No. 105-296). Accordingly, if the Land Board desired to acquire a new, more valuable, parcel of land for an endowment, it was required to perform complicated land exchanges.

In 1998, the Idaho Legislature enacted comprehensive endowment reform. See 1998 Idaho Sess. Laws 825. This reform ultimately entailed a change to the Idaho Admission Act, changes to portions of the Idaho Constitution, and the amendment or creation of a myriad of statutes. One of the purposes of the endowment reform was to eliminate the necessity of complicated “land swaps” by permitting the Land Board to purchase new endowment land with the proceeds from the sale of previously owned endowment land. Minutes of the Endowment Fund Inv. Reform Comm., July 10, 1997, at 17. The endowment reform required congressional action, and, thus, the effective date of the endowment reform legislation was July 1, 2000, following Congress’s amendment of the Idaho Admission Act.

## **B. Use of the Land Bank Fund**

The question of which endowments may utilize the land bank process is an issue of statutory interpretation. The rules governing interpretation of a statute have recently been reiterated by the Idaho Supreme Court:

Where statutory language is unambiguous, the clearly expressed intent of the legislature must be given effect and there is no occasion for a court to consider the rules of statutory construction. Where . . . there is an ambiguity in the statute, the Court should construe the statute to give effect to the legislative intent. The interpretation should begin with an examination of the literal words of the statute, and this language should be given its plain, obvious, and rational meaning.

In re Williamson v. City of McCall, 135 Idaho 452, 455, 19 P.3d 766, 769 (2001) (citations omitted).

Idaho Code § 58-133(2), enacted in 1998 and effective in 2000, addresses the acquisition, sale, lease, exchange or donation of public lands, and creates a land bank fund. It states, in relevant part:

The proceeds from the sale of state endowment land may be deposited into a fund which shall be known as the “land bank fund,” which is hereby created in the state treasury for the purpose of temporarily holding proceeds from land sales

pending the purchase of other land for the benefit of the beneficiaries of the endowment. A record shall be maintained showing separately from each of the respective endowments the moneys received from the sale of endowment lands. Moneys from the sale of lands which are a part of an endowment land grant shall be used only to purchase land for the same endowment.

Idaho Code § 58-133(2). Money not deposited into the land bank fund for the purpose of purchasing other lands must, upon the sale of state endowment lands, be deposited into the appropriate permanent endowment fund. Idaho Code § 57-716.

As part of the endowment reform in 1998, statutes governing the management of state endowments were also enacted. The following statutes were enacted creating permanent endowment funds: Idaho Code § 20-102 (penitentiary endowment); Idaho Code § 33-902 (public school endowment); Idaho Code § 33-2909 (university endowment); Idaho Code § 33-2911 (scientific school endowment); Idaho Code § 33-2913 (agricultural college endowment); Idaho Code § 33-3301 (normal school endowment); Idaho Code § 66-1101 (mental hospital endowment); Idaho Code § 66-1103 (charitable institutions endowment).<sup>1</sup> *See generally* 1998 Idaho Sess. Laws 825. Each of these statutes has specific language allowing the proceeds from the sale of a parcel of endowment land to be placed into the land bank fund. For example, Idaho Code § 20-102 (penitentiary endowment) states, in relevant part:

Proceeds from the sale of penitentiary endowment lands may first be deposited into the land bank fund established in section 58-133, Idaho Code, to be used to acquire other lands within the state for the benefit of the beneficiaries of the penitentiary endowment. If the land sale proceeds are not used to acquire other lands in accordance with section 58-133, Idaho Code, the land sale proceeds shall be deposited into the penitentiary permanent endowment fund along with any earnings on the proceeds.

Idaho Code § 20-102(2). Seven other permanent endowment funds contain similar language expressly permitting proceeds from the sale of endowment



lands to be placed into the land bank fund. See Idaho Code § 33-902(2) (proceeds from the sale of public school endowment land “may be deposited into the land bank fund”); Idaho Code § 33-2909(2) (same for the proceeds from the sale of university endowment land); Idaho Code § 33-2911(2) (same for the proceeds from the sale of scientific school endowment land); Idaho Code § 33-2913(2) (same for the proceeds from the sale of agricultural college endowment land); Idaho Code § 33-3301(2) (same for the proceeds from the sale of normal school endowment land); Idaho Code § 66-1101(2) (same for the proceeds from the sale of mental hospital endowment land); Idaho Code § 66-1103(2) (same for the proceeds from the sale of charitable institutions endowment land).

Accordingly, based both on the plain language of Idaho Code § 58-133, as well as the statutory language establishing each of the respective “permanent endowment” funds, the Land Board may deposit, in the land bank fund, proceeds from the sale of endowment lands of the following endowments: (1) penitentiary; (2) public school; (3) university; (4) scientific school; (5) agricultural college; (6) normal school; (7) mental hospital; and (8) charitable institutions. The remaining endowment, the capitol endowment fund, must be addressed separately because of the unique circumstances surrounding its creation.

The federal government, in the Idaho Admission Act, granted the state 50 sections—approximately 32,000 acres—of the unappropriated public lands “for the purpose of erecting public buildings at the capital . . . for legislative, executive, and judicial purposes . . .” Act of July 3, 1890, § 6, 26 Stat. 215, 216. In 1998, the legislature created two competing and inconsistent statutes that addressed this endowment.

As part of the “endowment reform package” the legislature enacted Idaho Code §§ 67-5779 through 67-5781, addressing the “the public buildings” endowment. 1998 Idaho Sess. Laws 848-50. Idaho Code § 67-5779 established a “public buildings permanent endowment fund,” and, as with all of the other permanent endowment fund statutes, expressly permitted the deposit of proceeds from the sale of public building endowment lands into the land bank fund. 1998 Idaho Sess. Laws 848-49. The corpus of this permanent endowment fund was to be the “[p]roceeds of the sale of lands granted to the state of Idaho by the United States government in the Idaho Admission

Bill, 26 Stat. L. 215, ch. 656, known as public buildings endowment lands, and lands granted in lieu thereof.” 1998 Idaho Sess. Laws 849. Also in 1998, the legislature enacted Idaho Code §§ 67-1601 through 67-1612, concerning the “Capitol Building And Grounds.” 1998 Idaho Sess. Laws 1007-11. Idaho Code § 67-1610 created the “capitol permanent endowment fund,” which consists, in part, of “the proceeds of the sale of lands granted to the state of Idaho for the purpose of facilitating the construction, repair, furnishing and improvement of public buildings at its capitol by an Act of Congress . . . entitled ‘An Act to Provide for the Admission of the State of Idaho into the Union . . . .’” Thus, there were two endowments with the same corpus. In 2000, recognizing that the statutes creating the “public buildings permanent endowment fund” and the “capitol permanent endowment fund” contained “similar and conflicting provisions,” the legislature repealed the statutes establishing the “public building endowment.” 2000 Idaho Sess. Laws 644. Accordingly, only the remaining statute, Idaho Code § 67-1610, must be analyzed in order to determine whether proceeds from the sale of lands governed by the “capitol permanent endowment fund” may be placed in the land bank fund.

Unlike the above-mentioned eight other permanent endowment statutes, Idaho Code § 67-1610, which created the capitol permanent endowment fund, does not expressly authorize proceeds from the sale of capitol endowment lands to be deposited into the land bank fund. Idaho Code § 67-1610 states:

There is hereby created a permanent fund within the state treasury to be known as the capitol permanent endowment fund, consisting of, from this point forward: (a) the proceeds of the sale of lands granted to the state of Idaho for the purpose of facilitating the construction, repair, furnishing and improvement of public buildings at its capitol by an Act of Congress (26 Stat. L. 214, ch. 656 (1890) (as amended)) entitled “An Act to Provide for the Admission of the State of Idaho into the Union,” comprising thirty-two thousand (32,000) acres, or any portion thereof, or mineral therein; (b) all unappropriated and unencumbered moneys in the public building fund shown on the state controller’s chart of accounts as Fund No. 0481-09; (c) retained earnings to compensate for the effects of inflation; and (d) legislative appro-

priations. The fund shall be managed by the endowment fund investment board in accordance with chapter 5, title 68, Idaho Code. All realized earnings shall be credited to the capitol endowment income fund creation [sic] in section 67-1611, Idaho Code.

As stated above, Idaho Code § 67-1610 was enacted in the same legislative session as the statutes for the eight other permanent endowments. Statutes passed at the same session and having to do with the same subject matter are to be considered *in pari materia* (of the same matter or subject) and construed together as though parts of one act. State v. Casselman, 69 Idaho 237, 244, 205 P.2d 1131, 1134 (1949). Courts construe statutes that are *in pari materia* together as one system to effect legislative intent. Shay v. Cesler, 132 Idaho 585, 588, 977 P.2d 199, 202 (1999). Accordingly, although Idaho Code § 67-1610 was not part of the above-referenced “endowment reform act,” 1998 Idaho Sess. Laws 825, it is *in pari materia* with that act, and it must be construed as though it is part of the endowment reform act in order to determine the legislature’s intent.

“[W]here a statute, with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject is significant to show that a different intention existed.” Sutherland Statutory Construction § 51.02 (5th ed. 1992). Reading all the endowment statutes together, the legislature’s failure to specifically provide for utilization of the land bank in Idaho Code § 67-1610 can only be interpreted as purposeful and is an indication the legislature did not intend the proceeds from the sale of capitol permanent endowment land to be deposited into the land bank.

Additionally, when a statute designates the things to which it refers, a court will typically infer that all omissions should be understood as exclusions. Sutherland Statutory Construction § 47.23 (5th ed. 1992) (describing the doctrine of *expressio unius est exclusio alterius*). Idaho Code § 67-1610 specifically designates the components which make up the capitol permanent endowment. The statute makes no mention of the land bank process with respect to the capitol endowment fund. Finally, it is well established that a specific statute controls over a more general one when there is any conflict between the two or when the general statute is vague or ambiguous. Tuttle v.

Wayment Farms, Inc., 131 Idaho 105, 108, 952 P.2d 1241, 1244 (1998). “Where two statutes appear to apply to the same case, the specific should control over the general.” V-1 Oil Co. v. Idaho Transp. Dept., 131 Idaho 482, 483, 959 P.2d 463, 464 (1998). Here, although the general statutes—Idaho Code §§ 57-716 and 58-133—apparently permit *all* endowments to utilize the land bank, the more specific statute concerning the capitol permanent endowment—Idaho Code § 67-1610—does not. Accordingly, when compared with the language of the other endowment statutes, Idaho Code § 67-1610 does not permit the deposit of proceeds from the sale of the lands comprising the capitol permanent endowment into the land bank.

**C. The Land Board is not Required to Deposit the Proceeds From the Sale of Endowment Lands in the Land Bank**

In 2000, Idaho Code § 58-133 became effective. It states in relevant part: “The proceeds from the sale of state endowment land *may* be deposited into a fund which shall be known as the ‘land bank fund’ . . . .” (Emphasis added.)

Ordinarily, in construing a statute, the language of a statute is to be given its plain, obvious and rational meaning. In re Williamson, 135 Idaho at 455, 19 P.3d at 769; Thomas v. Worthington, 132 Idaho 825, 829, 979 P.2d 1183, 1187 (1999). The Idaho Supreme Court has interpreted the word “may” to mean or express the right to exercise discretion. Rife v. Long, 127 Idaho 841, 848, 908 P.2d 143, 150 (1995). When used in a statute, the word “may” is permissive rather than imperative or mandatory. *Id.* Accordingly, a court would interpret the plain language of Idaho Code § 58-133 as permitting the Land Board to exercise its discretion to choose whether to utilize the land bank fund.

Furthermore, Idaho Code § 57-716 provides for the disposition of proceeds from the sale of endowment lands *not* placed into the land bank. Pursuant to Idaho Code § 57-716, proceeds from the sale of state endowment lands, “if not deposited into the land bank fund established in section 58-133, Idaho Code, and used to purchase other lands, shall be deposited into the appropriate permanent endowment funds.” Thus, the legislature specifically recognized that the Land Board has the discretion to choose whether to deposit proceeds from the sale of endowment lands in the land bank.

The plain language of Idaho Code § 58-133, as well as the express language of Idaho Code § 57-716, grant the Land Board discretion in choosing to use the land bank. Therefore, that portion of Idaho Code § 58-133 which permits the deposit of proceeds from the sale of endowment land into the land bank is not mandatory; the Land Board has the discretion on a case-by-case basis to determine whether it is appropriate to place any eligible funds into the account.

**D. Depending on Whether “Transaction Costs” Are Associated With the Sale or Purchase of Endowment Property, Such Costs May Be Paid From Either the Proceeds of the Sale of Endowment Land or the Land Bank Fund, Respectively**

You asked whether the funds constituting the land bank fund may be used to pay for costs associated with property sale and/or acquisition, *i.e.*, appraisals, Level 1 environmental site assessments, timber cruises, and realtor commissions, as well as architecture, engineering and closing costs. Because of the express language contained in Idaho Code § 58-133, it is necessary to address the costs associated with sale of property separately from those associated with the acquisition of property.

Initially, it must be noted that trustees are required to obtain independent appraisals of trust assets before selling or acquiring them. National Parks and Conservation Assoc. v. Board of State Lands, 898 P.2d 909, 922 (Utah 1993). Because a seller or purchaser “has the opportunity to shop for favorable appraisals,” if the Land Board were to rely on an appraisal submitted by the seller or purchaser, the trust would be “subject to sharp dealing on the part” of that individual or entity. *Id.* Accordingly, pursuant to basic trust law, the Land Board, as trustee, must contract for its own appraisal. *Id.* In addition to its own appraisal, to the extent any of the costs you inquire about are subject to the same potential for sharp dealing, the Land Board must obtain the necessary inspections. These basic trust law principles provide the foundation for the answer to your question.

**1. Purchase Costs Are Payable Out of the Land-Bank Fund**

Following the 1998 endowment reform, there are three separate trusts for each endowment except the capitol permanent endowment. One trust con-

sists of the funds that constitute the land bank fund. A second trust consists of the permanent endowment fund created for each endowment. The third trust is made up of the lands that comprise each of the endowments. Your question concerns the land bank trust.

Trust *res* is the property of which the trust consists. Black's Law Dictionary 1054 (Abridged 6<sup>th</sup> ed. 1991). Upon the sale of a parcel of endowment land, the *res* is transformed—from the land itself, to the proceeds from the sale of the land. If such proceeds are placed into the land bank fund they can earn interest. By statute, both the proceeds and the interest that accumulates on the proceeds deposited in the land bank fund are deposited into the permanent endowment fund of the respective endowment if not used to acquire new lands for the endowment. Idaho Code § 58-133.<sup>2</sup>

The specific question regarding the use of endowment *res*—in the form of the proceeds from the sale of endowment land or interest thereon—to pay the costs associated with the acquisition of endowment property has not been addressed by any court of this state. The Idaho Supreme Court has, however, in another context, noted that the principles of basic trust law apply to the state's administration of the endowment trusts. See Moon v. State Bd. of Land Comm'rs, 111 Idaho 389, 393, 724 P.2d 125, 129 (1986) (finding a statute concerning public school endowment constitutional because it was “in accord with the principles of basic trust law”). The committee responsible for drafting the 1998 comprehensive endowment reform was advised that management of the endowment trusts must be in accordance with private trust principles. Minutes of the Endowment Fund Inv. Reform Comm., July 10, 1997, at 19. Furthermore, the Joint Memorial transmitted by Idaho to the United States Congress, requesting amendment of the Idaho Admission Act to permit proceeds from the sale of public school endowment lands to be placed into the land bank fund, stated that the restrictions then placed on the endowment were “inconsistent with modern concepts of prudent investment,” and stated that the restrictions should be modified “to reflect modern business practices.” 1998 Idaho Sess. Laws 1372.

Idaho Code § 58-133 permits the Land Board to utilize the proceeds from the sale of endowment land for the “*purchase* of other land for the benefit of the beneficiaries of the endowment.” (Emphasis added.) Under basic trust law, “the cost of effecting . . . acquisitions of any part of the [trust] prin-

principal, are payable out of principal.” Restatement (Second) of Trusts §233, cmt. f (1959). *See also In re Estate of Campbell*, 382 P.2d 920, 966 (Haw. 1963), *quoting* the Restatement (Second) of Trusts; Bogert, *The Law Of Trusts and Trustees* § 803, at 151 (1981) (court decisions and statutes generally require payment of the costs of buying trust investments from trust principal). Accordingly, Idaho Code § 58-133 is consistent with basic trust principles. Appraisals, Level 1 environmental site assessments, timber cruises, realtor commissions, as well as architecture, engineering and closing costs can be considered costs effecting the acquisition of trust principal (real property).

The Moon court also noted that, absent an express prohibition, “expenses incurred in maintaining and protecting the trust *res* are reasonable deductions.” *Id.* Idaho Code § 58-133 does not contain an express prohibition forbidding the use of the moneys therein from being used to pay the costs associated with property acquisition. Furthermore, nothing in Idaho Const. art. 9, § 4—concerning the public school permanent endowment fund—nor any of the statutes creating the seven other applicable permanent endowment funds expressly prohibits the use of the funds deposited in the land bank from being utilized to pay the transaction costs associated with the purchase of trust property.

Additionally, the language of a statute is to be given its plain, obvious and rational meaning. In re Williamson, 135 Idaho at 455, 19 P.3d at 769; Thomas, 132 Idaho at 829, 979 P.2d at 1187. If statutory language is clear and unambiguous, a court need only apply the statute without engaging in statutory construction. As set forth above, Idaho Code § 58-133 states: “Moneys from the sale of lands which are a part of an endowment land grant shall be used only to purchase land for the same endowment.” In order to “purchase land for the same endowment,” the costs associated with such a purchase must be paid. Accordingly, the costs associated with purchasing lands with proceeds deposited in the land bank fund may be paid out of that fund.

However, in view of the fact that no Idaho court has yet to consider this issue, it must be noted that a review of the legislative history reveals that the specific question of whether land bank funds could be used to pay the costs associated with property acquisition was not discussed. Moreover, an

argument may be made that because Idaho Code § 57-723A permits the legislature to appropriate the funds from each endowment's earnings reserve fund "to pay for administrative costs incurred managing the assets of the endowments including, but not limited to, real property and monetary assets," the deduction of the costs of property acquisition from the trust *res* is improper. However, given the language of Moon, 111 Idaho at 393, 724 P.2d at 129, regarding the applicability of basic trust law to the state's endowment trusts, such arguments are likely to fail.

It is the opinion of this office that the costs associated with the acquisition of endowment property may be paid for out of the trust *res* contained in the land bank. The payments of such costs are in agreement with basic trust principles and are necessary costs associated with property purchase. Without the payment of such costs, the Land Board could not ensure that beneficiaries of the subject trust receive the maximum possible benefit when new endowment lands are acquired.

2.      Sale Costs Are Payable From the Proceeds of the Sale of Endowment Land

The costs associated with the sale of endowment property must be addressed separately because Idaho Code § 58-133, by its express terms, addresses only the "*purchase* of other land for the benefit of the beneficiaries of the endowment." (Emphasis added.) Accordingly, the costs of disposing endowment land may not be deducted from the land bank fund. Because the statutes establishing the land bank fund do not govern the payment of costs associated with the sale of endowment land, this section is applicable to the sale of land constituting all nine endowments, including the capitol permanent endowment.

As stated above, basic trust principles apply to the Land Board's management of each endowment. See Moon, 111 Idaho at 393, 724 P.2d at 129. Pursuant to basic trust law, "the cost of effecting sales . . . of any part of the [trust] principal, are payable out of principal." Restatement (Second) of Trusts §233, cmt. f (1959). See also In re Estate of Campbell, 382 P.2d at 966, quoting the Restatement (Second) of Trusts; Bogert, The Law Of Trusts and Trustees § 803, at 151 (1981) (court decisions and statutes generally require payment of the costs of selling trust investments from trust principal).



Furthermore, the Idaho Uniform Principal and Income Act, Idaho Code §§ 68-10-101 through 68-10-605 requires a trustee to pay “disbursements made to prepare property for sale” from principal. Idaho Code § 68-10-502(2).

According to basic trust principles, and like the costs of acquiring trust property, reasonable and ordinary costs associated with the sale of endowment property are payable out of the proceeds from the sale of those lands. However, those costs must be deducted from the proceeds from the sale of endowment land before those proceeds are deposited in the land bank fund.

### CONCLUSION

The Land Board may deposit the proceeds from the sale of the following eight endowments into the land bank fund created by Idaho Code § 58-133: (1) penitentiary; (2) public school; (3) university; (4) scientific school; (5) agricultural college; (6) normal school; (7) mental hospital; and (8) charitable institutions. The statutes relating to eight endowments specifically permit the proceeds from the sale of endowment lands to be placed in the land bank. The capitol building permanent endowment, however, contains no such express permission. Idaho Code § 67-1610. This omission by the legislature can only be interpreted as purposeful. Thus, proceeds from the sale of the lands granted to the state by § 6 of the Idaho Admission Act, Act of July 3, 1890, 26 Stat. 215, 216, may not utilize the land bank process.

Idaho Code § 58-133 states that the Land Board “may” deposit proceeds from the sale of endowment land into the land bank. The term “may” has been interpreted by the Idaho courts as permissive. Additionally, Idaho Code § 57-716 expressly directs that proceeds from the sale of endowment land not placed into the land bank “shall be deposited into the appropriate permanent endowment funds.” Accordingly, the Land Board is not required to utilize the land bank process, but may place the proceeds from the sale of endowment land directly into the appropriate permanent endowment fund.

Finally, basic trust principles apply to the management of state endowment funds. One such basic trust principle is that the cost of effecting sales or acquisitions of any part of trust principal are payable out of that prin-

cipal. Accordingly, although there may be arguments to the contrary, payment of reasonable and ordinary costs associated with the disposal of endowment real property—such as appraisal, Level 1 environmental site assessments, timber cruises, realtor commissions, as well as architecture, engineering and closing costs—may be paid for out of the trust principal prior to its deposit into the land bank fund. Likewise, moneys deposited in the land bank fund, which expressly permits the funds therein to be used for the “purchase” of new endowment land, may be used to pay the costs set forth above associated with the purchase of trust property.

### **AUTHORITIES CONSIDERED**

#### **1. Idaho Constitution:**

Article 9.

Article 9, § 7.

Article 9, § 8.

#### **2. Idaho Code:**

Idaho Code § 20-102.

Idaho Code § 33-902.

Idaho Code § 33-902A.

Idaho Code § 33-903.

Idaho Code § 33-2909.

Idaho Code § 33-2911.

Idaho Code § 33-2913.

Idaho Code § 33-3301.

Idaho Code § 57-716.

Idaho Code § 57-723A.

Idaho Code § 58-101.

Idaho Code § 58-104.

Idaho Code § 58-133.

Idaho Code § 66-1101.

Idaho Code § 66-1103.

Idaho Code §§ 67-1601 through 67-1612.

Idaho Code §§ 67-5779 through 67-5781.

Idaho Code §§ 68-10-101 through 68-10-605.

**3. Idaho Session Laws:**

1998 Idaho Sess. Laws 825.  
 1998 Idaho Sess. Laws 848-50.  
 1998 Idaho Sess. Laws 1007-11.  
 1998 Idaho Sess. Laws 1372.  
 2000 Idaho Sess. Laws 644.

**4. Cases:**

In re Estate of Campbell, 382 P.2d 920 (Haw. 1963).

In re Williamson v. City of McCall, 135 Idaho 452, 19 P.3d 766 (2001).

Moon v. State Bd. of Land Comm'rs, 111 Idaho 389, 724 P.2d 125 (1986).

National Parks and Conservation Assoc. v. Board of State Lands, 898 P.2d 909 (Utah 1993).

Rife v. Long, 127 Idaho 841, 908 P.2d 143 (1995).

Shay v. Cesler, 132 Idaho 585, 977 P.2d 199 (1999).

State v. Casselman, 69 Idaho 237, 205 P.2d 1131 (1949).

Thomas v. Worthington, 132 Idaho 825, 979 P.2d 1183 (1999).

Tuttle v. Wayment Farms, Inc., 131 Idaho 105, 952 P.2d 1241 (1998).

V-1 Oil Co. v. Idaho Transp. Dept., 131 Idaho 482, 959 P.2d 463 (1998).

**5. Other Authorities:**

Black's Law Dictionary 1054 (abridged 6<sup>th</sup> ed. 1991).  
 Bogert, The Law of Trusts and Trustees § 803 (1981).

Idaho Admission Act, Act of July 3, 1890, 26 Stat. 215.  
Minutes of the Endowment Fund Inv. Reform Comm., July 10, 1997.  
Restatement (Second) of Trusts § 233, cmt. f (1959).  
Sutherland Statutory Construction § 47.23 (5<sup>th</sup> ed. 1992).  
Sutherland Statutory Construction § 51.02 (5<sup>th</sup> ed. 1992).

Dated this 18th day of December, 2001.

ALAN G. LANCE  
Attorney General

**Analysis by:**

John R. Kormanik  
Deputy Attorney General  
Natural Resources Division

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<sup>1</sup>Statutes creating a "permanent building endowment" were also enacted. However, as will be set forth more fully below, those statutes were repealed and are no longer in effect.

<sup>2</sup>The interest that accumulates in the land bank fund becomes part of the trust *res* because it is deposited into the appropriate permanent endowment fund. Idaho Code § 58-133. This differs significantly from the earnings on the endowment funds themselves, which do not constitute part of the trust *res*; they become part of the appropriate earnings reserve fund which can be distributed to the beneficiaries. *See, e.g.*, Idaho Code §§ 33-902A and 33-903.

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**ATTORNEY GENERAL'S  
SELECTED  
INFORMAL GUIDELINES  
FOR THE YEAR 2001**

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



## INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

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June 7, 2001

Richard H. Schultz, Administrator  
Division of Health  
Department of Health and Welfare  
**STATEHOUSE MAIL**

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

### **QUESTION PRESENTED**

Whether the State has the authority pursuant to current rules to regulate swimming pools operated by hotels, motels, homeowners' associations, and the like.

### **CONCLUSION**

Rules drafted by the health districts implement the statutory requirement to enforce "minimum standards of health, safety and sanitation for all public swimming pools in the state." Idaho Code § 56-1003(3)(d). Hotels and motels are probably "public pools" subject to inspection and regulation, while the definitions of "public" and "private" pools need to be clarified.

### **ANALYSIS**

The Director of the Idaho Department of Health and Welfare has the authority to promulgate rules establishing health, safety and sanitation standards for all public swimming pools in Idaho. Idaho Code § 56-1003(3)(d). "Public swimming pool" is defined in § 56-1001:

(6) "Public swimming pool" means an artificial structure, and its appurtenances, which contains water more than two (2) feet deep which is used or intended to be used for swimming or recreational bathing, and which is for the use of any segment of the public pursuant to a general invitation but not an invitation to a specific occasion or occasions.

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The definition of public swimming pools and the authority to regulate them have not been amended since first coming into statute in 1972. 1972 Sess. Laws Ch. 347, § 5, p. 1017. In recent years, the Department of Health and Welfare has delegated to the seven health districts the responsibility to perform licensing and inspection functions pursuant to Department rules. IDAPA 16.02.14.040. The current rules were drafted by the health districts and properly promulgated by the Department.

The statutory definition of “public swimming pool” is in obvious need of further clarification in order to determine what entities are covered, which is done through rulemaking. Prior to rule changes in April of 2000, the rules governing public swimming pools made a distinction between Type A and Type B pools. IDAPA 16.01.07.004.10. Type A pools were municipal, community, public school, commercial and “institutional” pools, such as those maintained by scouting organizations. Type B pools were defined as “semipublic,” and included athletic club, country club, swimming club, hotel, motel, apartment, multiple housing unit and condominium pools. These definitions were in place from 1982 until 2000. The only exception to the regulatory scheme was for a residential swimming pool, which was defined in 1977 as:

13. Residential Swimming Pool. Any swimming pool, located on private property under the control of the property or homeowner, the use of which is limited to bathing by members of his family or guests. The design, construction and operation of such pools are not subject to the provisions of these Rules.

IDAPA 16.01.07.004.13.

Thus, it is apparent that for a substantial period of time, hotel, motel, apartment and condominium pools were subject to the rules. The question is whether the recent rule changes clearly change that long-standing regulatory scheme, which has been subject to annual legislative review. Idaho Code § 67-5291.

In the 2000 rules changes, the “pool rules” were rewritten and located in a different chapter of rules as a result of the creation of the Idaho

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Department of Environmental Quality, in whose chapter they had previously resided. The substantive changes important to this analysis are that the distinction between the “municipal” (Type A) and “semipublic” (Type B) pools was eliminated, as was the definition of “residential swimming pool.” The definition of “public swimming pool” remains the same as the statute. IDAPA 16.02.14.010.14 and .16. However, there is a new definition of “private pool”:

15. Private Pool. Any pool constructed in connection with or appurtenant to single family dwellings or condominiums used solely by the persons maintaining their residence within such dwellings and the guests of such persons.

IDAPA 16.02.14.010.15.

Private and special-use pools are specifically excluded from coverage of the rules’ requirements. IDAPA 16.02.14.006.

Comparing the old and new rules, it is apparent that there was at least one significant change in coverage, which was that condominium pools were regulated before as Type B or semipublic pools, and are now specifically identified as private pools. Ownership of the property is no longer the operative concept in the definition, but the living arrangement as single family dwellings or condominiums.

The meaning of “single family dwelling” seems self-evident. In the case of a pool maintained by a homeowners’ association, it is appurtenant to single family dwellings if that is the composition of the development, and would therefore be excluded from the regulatory scheme. Even this seemingly simple concept is problematic, however, since a duplex with a pool would not be excluded from coverage, though there is no appreciable distinction between that and stand-alone housing. The use of the phrase “single family dwelling” to define private pools is therefore somewhat arbitrary.

Assuming the health districts used “condominium” as defined in Idaho Code, the rule also refers to a living arrangement whereby the housing unit is owned separately and all owners have undivided interests in common areas. Idaho Code § 55-101B; § 55-1501, *et seq.* It does not matter whether

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the units are being purchased, or rented from the actual owner. Idaho Code § 55-1516. In that they consist of joint and separate property interests, condominiums are analogous to homeowners' associations.

However, there is no indication in the rule that the health districts intended to use the term "condominium" in its strict legal definition; in daily life, many types of living arrangements are referred to as "condos," including vacation time shares. In addition, there are vacation destinations in Idaho comprised of true condominium ownership of suites with kitchens, where people do not actually reside on a permanent basis. Therefore, resorts consisting of condominium units could be excluded from inspection and licensing while resort hotels of equal size would not, based on the definition of "private pool." Since the scope of authority is ambiguous and potentially arbitrary, neither the regulators nor the pool owners are afforded certainty about their obligations.

Apartment complexes are not single family or technically condominium living arrangements, yet may also have common areas and pools. It is not apparent that there is any meaningful public policy distinction between apartments and condominiums such that one is excluded from the rule, when both are multi-family units. In addition, there may be difficulties in determining when to enforce the pool rules in a development that may start out with rented townhouses and transition over time to a true condominium form of ownership, or that consists of a mixture of single family and townhouse or apartment units. Since it is not clear to the pool owners being regulated or to the enforcers of the rules whether they are covered in these scenarios, a court may find the private pool rule void for vagueness as to apartments and other multifamily arrangements.

Motels and hotels cannot fit into the definition of single family or condominium dwellings, even with the ambiguities described, and so cannot be excluded from coverage as private pools under the pool rules. Considering the analysis from another perspective, the statutory definition of "public swimming pool" is probably broad enough to cover hotels and motels. A swimming pool at a hotel or motel is intended for the use of "any segment of the public pursuant to a general invitation," which in this case is the segment of the public that pays for the use of the pool as part of the room rental. Hotels and motels do make a general invitation to the public to stay at their



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facilities and subsequently use the pools. In the case of resort hotels and motels, use of the pool is one of several amenities that make the resort a desirable destination, which the public is paying to enjoy. In this regard, they are like municipal and commercial pools that all would agree are public in nature, and for which one pays a fee to swim.

However, the new definition of “private pool” and elimination of the listing of public pools has introduced a level of ambiguity as to which entities are subject to enforcement. In addition, though it appears that hotels and motels are included as public pools, the rules are probably not enforceable as to apartments, townhouses and mixed density developments. The rule drafters are encouraged to clarify the rules after making policy decisions about what entities should be covered. They may wish to consider simply listing those entities that are regarded as “public,” or making the distinction made by California’s Public Health Department, which defines private pools as those maintained by an individual for the use of family and friends, but which also includes as public pools a list “including, but not limited to” all commercial pools, community pools, pools at hotels, motels, resorts, and so forth. Cal. Admin. Code, title 17, § 7775.

### CONCLUSION

Since the statutory definition of “public swimming pool” does not provide a very clear line between “public” and “private,” the rules drafted by the health districts must interpret the definition and make clear what entities are subject to the appropriate health, safety and sanitation requirements. While reasonable minds might differ, it is more likely than not that a court would determine that hotels and motels are subject to these rules, taking into account the statutory definition of “public pool,” their long-standing coverage, the commercial nature of the use of the pools (unlike a homeowners’ association pool that is not open to the public), and the new definition of “private pool” that does not include them.

It should be understood that an Attorney General’s guideline is not a directive but is an objective review of what statutes and rules authorize, as well as the best prediction available of how a reviewing court is likely to view that authority. It appears that the changes to the rules in 2000 have created an

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ambiguity that make enforcement problematic, and that an amendment of statute or rule should be considered.

Very truly yours,

Jeanne T. Goodenough  
Deputy Attorney General  
Chief, Human Services Division

## INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

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July 6, 2001

Tom Stuart, Co-Chair  
Idaho Commission for Reapportionment  
2301 Hillway Drive  
Boise, ID 83702

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

Dear Mr. Stuart:

You have asked this office to provide you with legal advice regarding three questions at issue before the Commission for Reapportionment (the "Commission"). As you set them forth, those questions are:

1. The question is whether the commission has discretion to apportion the House of Representatives by the use of sub-districts whereby the Seats A and B of what would otherwise be a two-seat multi-member district are not to be elected at large from each of the thirty to thirty-five districts, but rather would be elected individually from sub-districts comprising half the population of the legislative district.
2. The question is whether each legislative district in the state must be apportioned with a two-seat multi-member district, or whether the commission has discretion to apportion the House of Representatives with single-member districts as was done in Idaho prior to the 1960's or with a mix of two-seat multi-member districts and one-seat single-member districts containing half of the population as the multi-member districts.
3. The question is whether the federal Voting Rights Act prohibits the use of two-seat multi-member districts in situations where a racial or ethnic minority would not constitute the majority in the two-seat multi-member district, but would constitute the majority of a one-seat, single-member sub-district made up of half the population of the district.

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Questions “1” and “2” will first be addressed under Idaho’s constitutional and statutory law. The questions will then be analyzed under the applicable federal laws.

The first issue being considered by the Commission is whether it may apportion the House of Representatives by dividing districts into sub-districts, whereby rather than electing two representatives at large district-wide, half of the district elects one representative and the other half elects a second representative. The creation of sub-districts is not specifically addressed in the Idaho Constitution or applicable statutory law. Reference is only made to legislative “districts.” The language of article 3, section 2 of the Idaho Constitution appears to preclude the election of the House of Representatives in such a fashion. Article 3, section 2, subsection (1), provides, “The senators and representatives shall be chosen by the electors of the respective counties or districts into which the state may, from time to time, be divided by law.” This language strongly suggests that each legislative position is to be filled by a district-wide vote and that *all* of the electors within the respective district are to participate in the selection of all senators and representatives.

The second question posed by the Commission is whether it may reduce the number of members in the House of Representatives so that only a single representative is elected in each district, or, alternatively, if it may devise a redistricting plan under which some districts are two-seat multi-member districts and others with half the population of the multi-member districts elect only a single representative. Article 3, section 2, subsection (1) of the Idaho Constitution provides that, “the senate shall consist of not less than thirty nor more than thirty-five members. The legislature may fix the number of members of the house of representatives at not more than two times as many representatives as there are senators.” Article 3, section 4 of the Idaho Constitution sets the number of districts from which the legislature is to be drawn at not less than thirty nor more than thirty-five. Those are the identical numerical limitations imposed upon the size of the senate.

While the Idaho Constitution permits the membership of the House of Representatives to range to any number no greater than seventy under the current scheme, it also directs that the legislature is to set the number of members in the House of Representatives. The legislature has set that number at seventy, two per legislative district, the maximum allowed under the constitutional framework. Idaho Code § 67-202. Additionally, the Idaho

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Constitution directs the legislature to enact laws providing standards to govern the Commission. Idaho Const. art. 3, § 2(3). In 1996, the legislature adopted Idaho Code § 72-1506, entitled, “Criteria governing plans.” That statute directs the Commission that districts are to be “substantially equal in population.” Idaho Code § 72-1506(3).

The state’s constitutional and statutory scheme presently envisions one senator and two representatives to be elected in each of the state’s thirty-five legislative districts. The constitution would not preclude the formation of a house of representatives smaller than seventy members. However, without disregarding the legislature’s directive that there are to be two representatives per district, the Commission could not return to single-member districts as existed more than forty years ago.

The possibility of creating a mix of two-seat multi-member districts with one-seat single-member districts would also conflict with the legislative directive found in Idaho Code § 67-202. Further, a redistricting plan of this nature would also appear to be at odds with Idaho Code § 72-1506, in that the districts adopted under such a plan would not be substantially equal in population.

It should also be noted that any redistricting plan adopted by the Commission is subject to federal law in addition to state law. On the federal level, challenges to state redistricting plans generally arise under the Equal Protection Clause of the Fourteenth Amendment or the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973. The Commission is directed to the Office of the Attorney General’s “Commission for Reapportionment Guidelines” issued June 5, 2001, and the Attorney General’s Opinion No. 91-4 contained therein for a more thorough analysis of the basic requirements to comply with the applicable federal constitutional and statutory laws.

“[A]s a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis.” Reynolds v. Sims, 377 U.S. 533, 568, 84 S. Ct. 1362, 1385, 12 L. Ed. 2d 506 (1964). The Fourteenth Amendment requires that legislative redistricting be done in a fashion which will give substantially equal weight to each vote.

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“Congress enacted Sec. 2 of the Voting Rights Act of 1965 . . . to help effectuate the Fifteenth Amendment’s guarantee that no citizen’s right to vote shall ‘be denied or abridged...on account of race, color, or previous condition of servitude.’ U.S. Const., Amdt. 15.” Voinovich v. Quilter, 507 U.S. 146, 152, 113 S. Ct. 1149, 1154-55, 122 L. Ed. 2d 500 (1993). “Section 2 thus prohibits any practice or procedure that, ‘interact[ing] with social and historical conditions,’ impairs the ability of a protected class to elect its candidate of choice on an equal basis with other voters.” 507 U.S. at 153, 113 S. Ct. at 1155, *quoting* Thornburg v. Gingles, 478 U.S. 30, 47, 106 S. Ct. 2752, 2764, 92 L. Ed. 2d 25 (1986).

The Commission must strive to comply with both state and federal law when undertaking the task of redistricting. In the event state and federal law conflict, the Supremacy Clause, U.S. Const., art. VI, cl. 2, directs that the Commission must comply with federal constitutional and statutory requirements even if the only way to do so would be to invalidate the state constitution and/or statutes. However, in order for federal law to displace the state law, there must be no means of complying with both. “[I]n order for the Fourteenth Amendment to displace the Idaho constitutional provision, there must be no possibility of compliance with both.” Hellar v. Cenarrusa, 104 Idaho 858, 860, 664 P.2d 765, 767 (1983).i Except in those instances where Congress has preempted an area of law altogether, state law is nullified by the existence of federal law pertaining to the same subject matter only to the extent that there is an actual conflict with the federal law. Hillsborough County, Florida v. Automated Medical Laboratories, Inc., 471 U.S. 707, 713, 105 S. Ct. 2371, 2375, 85 L. Ed. 2d 714 (1985).

The final question posed by the Commission is whether the Voting Rights Act prohibits the use of two-seat multi-member districts in situations where a racial or ethnic majority would not constitute the majority under such a districting plan, but would constitute the majority in a one-seat, single-member sub-district made up of half of the district. There can be no definitive answer to the Commission’s question pertaining to the Voting Rights Act, other than to state that the Act does not *per se* prohibit multi-member districts in instances where a protected class could constitute the majority of a single-member sub-district. Additionally, proof of only the showing set forth in the final question would fall short of stating a claim or establishing a violation of the Voting Rights Act.

## INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

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The body of case law developed under the Voting Rights Act reflects that challenges to redistricting schemes under the Act require an intensive analysis of the facts of each individual case.

Section 2 of the Voting Rights Act, as amended, provides:

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973.

The United States Supreme Court's decision in Thornburg, *supra*, is regarded as the leading case in addressing challenges to legislative redistricting plans under Section 2 of the Voting Rights Act subsequent to its amendment in 1982. Thornburg and its progeny hold multi-member districts and at-large elections schemes are not per se violative of minority voters' rights. 478 U.S. at 45, 106 S. Ct. at 2764.

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Section 2 contains no *per se* prohibitions against particular types of districts: It says nothing about majority-minority districts, districts dominated by certain political parties, or even districts based entirely on partisan political concerns. Instead, § 2 focuses exclusively on the consequences of apportionment. Only if the apportionment scheme has the *effect* of denying a protected class the equal opportunity to elect its candidate of choice does it violate § 2; where such an effect has not been demonstrated, § 2 simply does not speak to the matter.

Voinovich, 507 U.S. at 155, 113 S. Ct. at 1156.

To prove a violation of the Voting Rights Act, plaintiffs must show the state's apportionment scheme operates to minimize or cancel out the voting strength of the protected class. Voinovich, 507 U.S. at 147, 113 S. Ct. at 1151-52. Three threshold conditions must be met by plaintiffs:

[F]irst, the minority group "is sufficiently large and geographically compact to constitute a majority in a single member district"; second, the minority group is "politically cohesive"; and third, the majority "votes sufficiently as a bloc to enable it . . . to defeat the minority's preferred candidate."

Abrams v. Johnson, 521 U.S. 74, 91, 117 S. Ct. 1925, 1936 138 L. Ed. 2d 285(1997), *quoting* Thornburg, 478 U.S. at 50-51, 106 S. Ct. at 2766-67.

The Court in Thornburg reasoned that a minority group must be able to make an initial showing that it is large enough and compact enough to constitute a majority in a single-member district because, "[u]nless minority voters possess the *potential* to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice." Thornburg, 478 U.S. at 51, n.17, 106 S. Ct. at 2767, n.17. Once the potential to elect a minority candidate is established, the plaintiffs still bear the burden of showing that the minority group and the majority group vote in blocs for different candidates. Bloc voting by the minority shows the group's cohesiveness and supports a claim that the group could elect its preferred candidate in a single-member minority-majority district. Likewise, it must be shown that the majority group votes as a bloc in order to



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demonstrate that the minority's candidate generally could not prevail on election day.

If plaintiffs are able to meet the three threshold requirements, it must then be shown that "under a totality of the circumstances," the minority group's ability to equally participate in the electoral process has been diluted by the districting scheme:

As both amended § 2 and its legislative history make clear, in evaluating a statutory claim of vote dilution through districting, the trial court is to consider the "totality of the circumstances" and to determine, based "upon a searching practical evaluation of the 'past and present reality,'" whether the political process is equally open to minority voters. "This determination is peculiarly dependent upon the facts of each case," and requires "an intensely local appraisal of the design and impact" of the contested electoral mechanisms.

Thornburg, 478 U.S. at 79, 106 S. Ct. at 2781 (citations omitted).

The question to be asked when determining whether a particular practice or procedure impairs the statute is whether "as a result of the challenged practice or structure plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice." *Id.*, 478 U.S. at 44, 106 S. Ct. at 2763 (citations omitted). Citing to the Senate Report, the Thornburg Court found the determination is to be made based on the assessment of various objective factors. Those cited factors were: the history of voting-related discrimination within the state or political subdivision, the extent to which voting is racially polarized, the extent to which voting practices or procedures tend to enhance the opportunity for discrimination against the minority group, the exclusion of members of the minority group from candidate slating processes, the extent to which the effects of past discrimination hinder the group's ability to effectively participate in the political process, the use of racial appeals in political campaigns, and the extent to which members of the minority group have been elected to public office in the jurisdiction. *Id.*, 478 U.S. at 36-37, 106 S. Ct. at 2759.

As noted, the determination of the existence of a Voting Rights Act violation is particularly fact intensive. Absent specific information regarding

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demographics and past electoral practices in a specific legislative district, any suggestion that the Act would require changes in the state's redistricting scheme would be purely speculative. Even if a Voting Rights Act violation existed, the remedy would not necessarily be single-member districting. A less drastic change to the state plan could possibly be identified to cure the defect and yet continue to follow the state constitutional and statutory scheme.

The Commission has neither the function nor the information before it to engage in the kind of extensive fact-finding and legal analysis that courts engage in to determine violations of the Voting Rights Act. Moreover, the Commission does not have before it adverse parties that the courts generally rely on to make an informed decision. Therefore, we recommend the Commission not create sub-districts since it is not in a position to assume the Idaho Constitution is invalid.

Very truly yours,

Thorpe P. Orton  
Deputy Chief of Staff

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<sup>1</sup>*Cf. Davis v. Chiles*, 139 F.3d 1414 (11<sup>th</sup> Cir. 1998). In this case involving a Voting Rights Act challenge to two at-large judicial districts in the state of Florida, the Eleventh Circuit Court of Appeals observed the plaintiff's interest in a proposed remedy of modified sub-districting was outweighed by the state's interest in maintaining its existing judicial model established in its constitution. "[W]e read the first threshold fact of *Gingles* to require that there must be a remedy *within the confines of the state's judicial model* that does not undermine the administration of justice." *Id.*, 1421, quoting *Nipper v. Smith*, 39 F.3d 1494, 1531 (11<sup>th</sup> Cir.1994). While it is not precedential authority, *Davis* may be instructive to the Commission in analyzing a potential Voting Rights Act violation in light of Idaho's constitutional and statutory legislative districting scheme.

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**ATTORNEY GENERAL'S  
CERTIFICATES OF REVIEW  
FOR THE YEAR 2001**

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





## CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

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July 5, 2001

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

Re: Certificate of Review  
Proposed Initiative Regarding Testing of Candidates for  
Public Office

Dear Mr. Cenarrusa:

An initiative petition was filed with your office on June 21, 2001, that would require candidates for public office in Idaho to take a test when the candidate submits his or her declaration to be a candidate for any public office. In addition, the proposed initiative anticipates that the results of the test will be made available to electors via publication in the media and all publicly funded voter information. Pursuant to Idaho Code § 34-1809, this office has reviewed the proposed initiative 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 proposed initiative, 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 TITLES**

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

## MATTERS OF SUBSTANTIVE IMPORT

There are a number of procedural and substantive flaws that could make this proposed initiative vulnerable to a legal challenge. The entirety of the proposed initiative reads as follows:

In addition to other pertinent requirements for candidates registering to seek election to an Idaho public office, said candidate must take the high school exiting standards test for the school district in which they reside at the time of their registration. The results (test scores) will be released to the local media for publication and voter information no later than fourteen (14) days prior to the election. The test results will be published in any informational guide released to the public to inform voters about the candidates and their qualifications. By requiring all candidates running for political office to complete the exiting standards test the public will be better informed concerning the qualifications of all political candidates.

In its current form, the proposed initiative does not offer any guidance concerning how its substantive provisions should be codified. The qualifications for various public offices are spread throughout the Idaho Code. This office recommends that the initiative's sponsors either amend each of the provisions governing qualifications for public office specifically or enact the proposed initiative as a stand alone code section within title 34, Idaho Code.

In addition to the procedural problem identified above, the proposed initiative presents a number of substantive problems. First and foremost, the proposed initiative would require candidates for any public office in Idaho to "take the high school exiting standards test for the school district in which they reside at the time of their registration." Implicit in this new requirement is the assumption that every school district in Idaho has adopted a high school exiting standards test. This assumption is incorrect. Based on information provided by the Idaho Department of Education, it is this office's understanding that most school districts in Idaho do not administer a "high school exiting standards test." There are some administrative rules that will go into effect in the future which would establish proficiency standards for certain

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subjects. However, even these new rules would not require school districts to administer a single “high school exiting standards test.” If the school district in which a particular prospective candidate for public office resides does not administer high school exiting standards tests, it would be impossible for a prospective candidate to comply with the requirement created by the proposed initiative. The fact that it will be impossible to comply with the proposed initiative in most cases will render it very vulnerable to a court challenge.

The next potential problem created by the proposed initiative is whether additional qualifications can be created for state wide elected officials and state legislators via the Idaho Code. There is currently some uncertainty in Idaho concerning whether constitutional officers, such as state wide elected officials and legislators, can have additional qualifications imposed on their office other than those which are specifically enumerated in the Idaho Constitution. It is likely that the pending litigation surrounding the 1994 “term limits” initiative may resolve some of the uncertainty surrounding the ability to add additional qualifications via state law. In the meantime, it is important for the sponsors of the proposed initiative to understand that the additional qualifications the proposed initiative would impose may not apply to candidates either for statewide office or for the state legislature.

Next, the proposed initiative anticipates that the results of the tests taken by prospective candidates “will be released to the local media for publication and voter information no later than fourteen (14) days prior to the election.” This proposed language somehow suggests that the media may be required to publish the results of the test scores that would be required by the proposed initiative. Naturally, the First Amendment to the United States Constitution and Art. 1, § 9, of the Idaho Constitution prohibit the state from compelling a private business, such as a newspaper, to publish government sponsored speech. It is important for the sponsors of the proposed initiative to bear in mind that “local media” may decline to publish or publicize the test scores that would be generated by the proposed initiative.

Finally, the proposed initiative does not recognize that the statutes governing the election process for many local taxing districts exempt some taxing districts from holding elections when a candidate is running for public office without opposition. For example, Idaho Code § 31-1410(3) allows

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unopposed candidates for fire district commissioner to take office without standing for election. The current language of the proposed initiative suggests that a candidate who is running unopposed for a local public office would be required to take the high school exiting standards test despite the fact that the candidate may never stand for election if the candidate faces no opposition. Under these circumstances, there does not appear to be any utility in requiring an unopposed candidate to take a test when the candidate will not stand for election.

In conclusion, the proposed initiative will have to be substantially revised in order to address the legal flaws identified above. In its current form, the proposed initiative will likely 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 Mr. Lyndon Harriman, by deposit in the U.S. Mail of a copy of this certificate of review.

Sincerely,

Matthew J. McKeown  
Deputy Attorney General  
Intergovernmental & Fiscal Law  
Division

## CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

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July 12, 2001

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

Re: Certificate of Review  
Proposed Initiative Regarding Tribal Video Machine Gaming

Dear Mr. Cenarrusa:

An initiative petition was filed with your office on June 13, 2001, that would add two new sections to chapter 4, title 67, Idaho Code. Pursuant to Idaho Code § 34-1809, this office has reviewed the proposed initiative 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 proposed initiative, 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 TITLES**

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

### **MATTERS OF SUBSTANTIVE IMPORT**

The proposed initiative would create a new provision titled "Authorized Tribal Video Gaming Machines" as Idaho Code § 67-429B. This section would authorize the use of video gaming devices on Indian lands with

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certain limited restrictions. The initiative would also create a new provision titled “Amendment of State-Tribal Gaming Compacts” as Idaho Code § 67-429C. This section would provide for an automatic “ratification” process for changes to state-tribal gaming compacts consistent with the provisions of Idaho Code § 67-429B.

### **A. Title and “Findings and Purpose”**

Before turning to the substantive issues noted above we will review the title and “Findings and Purpose” section of the proposed initiative. Idaho Code § 34-1809 states that “the ballot title shall not be intentionally an argument or likely to create prejudice either for or against the measure.” The title provided by petitioners is “Indian Gaming and Self-Reliance Act.” As the act deals only with the definition of tribal video gaming machines and the process for amending state-tribal compacts, the inclusion of the term “self-reliance” could reasonably be construed as argumentative and may subject the title to attack.

In like manner, under section 2, “Findings and Purpose,” in subsection (3) the statement that the tribes in Idaho have proceeded in good faith will raise some question as to the stance the state has consistently taken as to the illegality of the gaming currently conducted on tribal lands.

While a proposed bill may include a statement of purpose and findings that are subject to dispute, to do so in an initiative creates legal risk. The long title will need to describe such disputed findings. However, as noted above, the title must not be argumentative. Therefore, to place disputed factual findings with a corresponding title in an initiative creates the potential that the form of initiative will be challenged as violative of Idaho Code § 34-1809.

### **B. Section 3—Addition of Idaho Code § 67-429B**

The language of the new section to be designated as Idaho Code § 67-429B(1) includes certain provisions that will likely be problematic.

First, that subsection states that “a tribal video gaming machine *plays only lottery games.*” When read in connection with the later findings that

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these devices are neither slot machines nor electronic or electromechanical imitations of any form of casino gambling, such a definition could affect what constitutes a lottery in Idaho. If this definition of lottery was adopted and was found to be constitutional, any of the activities available to the tribes as defined by these sections would be available to the Idaho State Lottery. More likely, as discussed below, tribal video gaming machines would be construed as slot machines or imitations or simulations of forms of casino gambling.

We note that this subsection does state that the machines shall not be activated by a handle or lever. This distinction has lost much of its practical significance as the slot machine and casino industry currently uses machines with handles and machines without handles.

Another part of this subsection states that a tribal video gaming machine (TVGM) “does not dispense coins or currency.” This language is sufficiently broad to allow for the machines to dispense tokens or chips. Again, it is our understanding that the slot industry began using tokens in slot machines that cost one dollar or more to play when the silver dollar went out of circulation.

The proposed language in Idaho Code § 67-429(B)(1)(E) also requires that the proposed gaming machines or proposed TVGM’s select “randomly, by computer, numbers or symbols to determine the game results.” Once again, it is an almost universal slot machine industry standard to employ computer-generated random numbers. In the recent state district court case of MBS Investments v. Lance, Case No. CV-OC-99-04815-D, Judge Kathryn A. Sticklen, of the Fourth Judicial District in and for the County of Ada, issued a Memorandum Decision and Order dated May 11, 2001. In that decision Judge Sticklen provided an extensive outline of the history and law surrounding the definition and prohibitions of slot machines. Ultimately, in her evaluation, she provided a synopsis of that law in a working definition of what constitutes a slot machine in the State of Idaho. Judge Sticklen stated:

This Court determines that the commonly accepted meaning of the term “slot machine” is that of a mechanical or electronic gambling device by which a patron may risk money or a token to play a game of chance for gain of a prize or money. Specifically, a slot machine pays off by the matching of spin-

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ning reels. Additionally, Idaho Code § 18-3910 places a prohibition on “any slot machine of any sort.” Therefore, any mechanical or electronic device by which a patron may risk money or a token to play a game of chance for gain of a prize or money falls within the statute.

Memorandum Decision and Order, p. 17 (emphasis added). Plaintiffs in that case have sought reconsideration of that decision.

The foregoing characteristics of “authorized tribal video gaming machines” indicate that they would likely be construed to be either slot machines or imitations of casino gambling within the meaning of Idaho’s Constitution. Given the parameters provided by the provisions of the proposed statutory changes found in the initiative, and in light of Idaho’s blanket restriction on the use or possession of slot machines, it is unlikely that attempts to distinguish tribal video gaming machines from slot machines or imitations thereof under Idaho law will succeed.

### **C. Proposed Idaho Code § 67-429(C)**

The initiative, as proposed, also provides for the addition of a new section designated as Idaho Code § 67-429(C). In that provision, the initiative outlines a process whereby the state-tribal gaming compacts currently in existence may be amended in order to take advantage of the provisions proposed in the earlier portions of the initiative. While there may be some procedural concerns, as outlined below, we note that, pursuant to the Indian Gaming Regulatory Act, 25 U.S.C. § 2710(d)(1), state-tribal gaming compacts may allow any tribe within the borders of the State of Idaho to conduct any gaming if the state “permits such gaming for any purpose by any person, organization or entity.” In the Shoshone-Bannock/State Tribal Gaming Compact, the Shoshone-Bannock Tribes are allowed to conduct any and all gaming allowed by the state to any other tribe within the state. Accordingly, should this initiative pass and be found constitutional, the Shoshone-Bannock Tribes, and potentially other tribes, may not be required to proceed with the provisions outlined in the proposed section 67-429(C), and would not be bound by the limitations found therein.



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Also, section 67-429(C)(1)(b) requires that future negotiations be conducted “in good faith” between the state and tribe. Section 67-429 (C)(1)(b) also provides that the negotiations between the state and tribe regarding the number of machines allowed after 10 years shall be conducted under “a prudent business standard.” This phrase is not defined and could easily be interpreted to mean if it were a reasonable business decision to add machines, the state would have to agree to allow them. If the intent of the initiative is to have limited gaming, this provision should be reconsidered or the phrase should be defined.

We recommend that “Indian lands” be defined. Proposed Idaho Code § 67-429(C)(1)(b) provides that the tribes “agree not to conduct Indian gaming outside of Indian lands.” Without a more specific definition of what constitutes “Indians lands,” disputes could arise over the intended meaning. “Indian lands” is a defined term in the Indian Gaming Regulatory Act. If that definition is the intended meaning, a statement to that effect in the initiative could avoid future disagreements over its meaning.

Section 5 of the initiative provides for what would be considered an emergency clause. In an attempt to expedite the effectiveness of the initiative, that provision states: “Notwithstanding any other provisions of Idaho law, this Act shall be in full force and effect immediately upon passage. No further action by the executive or legislative branches of the State government are required to implement the provisions of this Act.” The language of that provision does not take into consideration normal canvassing and certification requirements.

Section 6, which has been labeled “severability,” states, “it is the intent of the voters that, to the extent any term or provision is declared illegal, void, or unenforceable, the legislature take all available steps to enact such term or provision in a legal, valid, and enforceable manner, whether through a statute or a proposed constitutional amendment.” To the extent that this language is an attempt to require a future legislature to pass further laws or constitutional amendments in order to assure the effectiveness of this initiative, any such attempts will be ineffective since an initiative has only the same legal effect as a statute, and a future legislature cannot be restricted in its actions. *See, e.g., Luker v. Curtis*, 64 Idaho 703, 136 P.2d 978 (1943); *Westerberg v. Andrus*, 114 Idaho 401, 757 P.2d 978 (1988).

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Article 3, section 20 of the Idaho Constitution prohibits all forms of gambling, except the types of gambling specifically enumerated in subsections 1(a) through 1(c). Article 3, section 20, subsection 2, specifically prohibits “any form of casino gambling including, but not limited to, blackjack, craps, roulette, poker, baccarat, Keno and slot machines.” This prohibition includes “any electronic or electromechanical imitation or simulation of any form of casino gambling.”

The proposed initiative seeks to authorize on Indian lands a method of casino gambling that in our opinion would be prohibited elsewhere in the state by article 3, section 20 of the Idaho Constitution. Legislation that is passed via citizen initiative has the same force and effect as legislation passed by the legislature. *See, e.g., Westerberg v. Andrus*, 114 Idaho 401, 757 P.2d 664 (1988). Consequently, the initiative would almost certainly be challenged on grounds it would authorize gambling that directly conflicts with a constitutional requirement. *See, e.g., Simpson v. Cenarrusa*, 130 Idaho 609, 944 P.2d 1372 (1997) (prohibiting the secretary of state from implementing certain ballot legend requirements promulgated via citizen initiative because those requirements violated constitutional provisions).

In our opinion, the argument that such a gaming statute or initiative is permissible cannot be premised upon an assumption that such gaming is permitted by the Idaho Constitution. Rather, the argument that such a law is valid must be based upon the following legal assumptions:

1. The Idaho Constitution does not apply on Indian reservations except as provided by federal law, and no federal law requires the Idaho Constitution to apply on Indian reservations.
2. Federal law is not offended by a state statute authorizing forms of gaming on Indian reservations that would not be allowed elsewhere in the state.
3. The legislature, or the people through an initiative, may allow an activity on Indian reservations that would be contrary to the Idaho Constitution if allowed elsewhere in the state.

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We are not aware of any court decisions that answer all of these questions. Therefore, the proponents of the initiative should anticipate a court challenge if the initiative passes.

I HEREBY CERTIFY that the enclosed measure has been reviewed for form, style and matters of substantive import and that the recommendations set forth above have been communicated to petitioners Coeur d'Alene Tribe and Nez Perce Tribe, by deposit in the U.S. Mail of a copy of this certificate of review.

Sincerely,

ALAN G. LANCE  
Attorney General

**Analysis by:**

William A. vonTagen  
Deputy Attorney General

## CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

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August 23, 2001

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

Re: Certificate of Review  
Initiative Concerning State Term Limits

Dear Mr. Cenarrusa:

An initiative petition was filed with your office on August 3, 2001, called the "Idaho State Term Limits Act of 2002" (proposed initiative).

Idaho Code § 34-1809 provides in relevant part:

REVIEW OF INITIATIVE AND REFERENDUM BY ATTORNEY GENERAL . . . the attorney general . . . shall, within twenty (20) working days from receipt thereof, review the proposal for matters of substantive import and shall recommend to the petitioner such revision or alteration of the measure as may be deemed necessary and appropriate. The recommendations of the attorney general shall be advisory only and the petitioner may accept or reject them in whole or in part. The attorney general shall issue a certificate of review to the secretary of state certifying that he has reviewed the measure for form and style . . . .

Pursuant to this duty, this office has reviewed the proposed initiative and prepared the following advisory comments.

This office offers no opinion with regard to the policy issues addressed by the proposed initiative. 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 proposed initiative, 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

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recommendations are “advisory only,” and the petitioners are free to “accept or reject them in whole or in part.”

### **BALLOT TITLES**

Following the filing of the proposed initiative and pursuant to Idaho Code § 34-1809, this 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 this office prepares the titles, if petitioners would like to propose language with these standards in mind, we would recommend that they do so and their proposed language will be considered.

### **MATTERS OF SUBSTANTIVE IMPORT**

The proposed initiative would make a number of changes to Idaho Code § 34-907. Idaho Code § 34-907 contains the ballot access restrictions for statewide elected officials and state legislators that were adopted by voter initiative in 1994. None of these changes set forth in the proposed initiative raises any significant statutory or constitutional concern beyond those raised by existing law.

#### **1. Addition of the Term “Special”**

Currently, Idaho Code § 34-907(1) states that the ballot access restrictions apply for all multi-term incumbents planning to appear on the “primary or general election ballot.” The proposed initiative would include ballots prepared for “special” elections in the list of ballots covered by the ballot access restrictions in Idaho Code § 34-907(1).

#### **2. Repeal of Ballot Access Restrictions for Congressional Candidates**

Currently, Idaho Code §§ 34-907(1)(a) and (b) set out ballot access restrictions for multi-term congressional incumbents. Ballot access restrictions for congressional candidates were held to be unconstitutional in U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995). The initiative would remove the unconstitutional language from Idaho Code § 34-907.

**3. Restriction on Switching from House to Senate and Vice Versa in Consecutive Elections**

Idaho Code § 34-907(1)(d) prohibits an individual from appearing on the ballot as a candidate for either the Idaho State Senate (Senate) or House of Representatives (House) when that individual has served as “a state legislator, representing any district within the state, including all House seats within the same district, during eight (8) or more of the previous fifteen (15) years.” However, the initial language in Idaho Code § 34-907(1) limits this restriction to service in the “same office.” Therefore, under the current version of Idaho Code § 34-907, a person who is prohibited from appearing on the ballot as a candidate for the State Senate, for example, could appear on the ballot as a candidate for the House of Representatives. The same would be true for a multi-term member of the House appearing on the ballot as a candidate for State Senate.

The initiative would narrow the ability of a multi-term incumbent in one house to appear on the ballot as a candidate for a position in the other house. A state legislator could not appear on the ballot as a candidate for the State Senate or the State House of Representatives once he or she has served as a “member of the state legislature during twelve (12) or more of the previous fifteen (15) years.”

**4. Repeal of Ballot Access Restrictions for County Officials**

Currently, Idaho Code §§ 34-907(1)(e) and (f) contain ballot access restrictions for multi-term incumbent candidates for county commission and other county elected positions. The initiative would repeal these restrictions.

**5. Change of Effect Date for Terms Counted Toward Ballot Access Restrictions**

Section 5 of the 1994 initiative enacting the current version of Idaho Code § 34-907 stated that the effective date of the initiative was January 1, 1995. It also stated that, “[s]ervice prior to January 1, 1995 shall not be counted for purpose of” calculating when the ballot access restrictions go into effect. Legislative terms begin on December 1 following the general election. Idaho Code § 34-907. Therefore, the term that resulted from the 1994 gener-

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al election does not count toward the ballot access restriction calculations for state legislators only.

Section 3 of the proposed initiative would change the date from which terms are calculated to determine when ballot access restrictions begin. The initiative includes all “terms of office [that] began or begin at any time after December 1, 1994” in the calculation of terms leading toward ballot access restrictions. It is not clear what the drafters intend by this change. It does not cover the state legislative terms that were the subject of the 1994 general election because those terms began on December 1, 1994, not after December 1, 1994. The drafters should clarify what they hope to accomplish with the language in section 3 that differs from the existing effective date of Idaho Code § 34-907.

### **6. Other Matters for Consideration**

In a memorandum decision dated August 23, 2000, the District Court for the Sixth Judicial District invalidated Idaho Code §§ 34-907(1)(e) and (f), which imposed term limits on county elected positions. Rudeen v. Cenarrusa, Memorandum Decision and Order, Case No. CV00-00012 (6<sup>th</sup> Dist., Power County, August 23, 2000). The rationale adopted by the district court in Rudeen included the following rulings: (1) the right of suffrage is a fundamental right set forth in the Idaho Constitution; and (2) the right of suffrage includes the right to vote, access to the ballot to run for public office, and to hold public office. The court also relied upon the “equal footing” line of authority, traced back to the Idaho Supreme Court’s decision in Luker v. Curtis, 64 Idaho 703, 136 P.2d 978 (1943). The equal footing doctrine holds that legislation passed through the initiative process is “on an equal footing with legislation enacted by the state and must comply with the same constitutional requirements as legislation enacted by the Idaho legislature.” Westerberg v. Andrus, 114 Idaho 401, 405, 757 P.2d 664, 668 (1988). In other words, if the legislature would be constitutionally prohibited from passing a law, then the voters would also be prohibited from passing the same law through the initiative process.

In the Westerberg case, the Idaho Supreme Court struck down a lottery law passed by the voters through the initiative process, explaining that the legislature was constitutionally prohibited from establishing lotteries.

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Therefore, the court reasoned, a lottery could only be established by amending the Idaho Constitution. *See id.* (“[W]e conclude that [the Idaho Constitution] prohibits the establishment of a lottery through any legislative process, including the initiative.”) Indeed, the voters of Idaho subsequently passed a constitutional amendment establishing a state lottery.

Similar to the Idaho Supreme Court in Westerberg, the district court in Rudeen ruled that because the right of suffrage is a fundamental right under the Idaho Constitution, the term limits initiative is unconstitutional. The district court further advised that, “[t]he term limits issue in Idaho ought to be determined permanently and definitely (if at all) by political debate and election on a constitutional amendment.” Memorandum Decision at 37 (emphasis added).

The rationale applied by the district court in Rudeen resulted in a decision which invalidated term limits on county elected officials. Yet, the term limits law applies to county and state elected officials, including legislators and executive branch officials. The incomplete nature of the ruling is entirely due to the coincidental status of the named plaintiffs in the lawsuit—of the twenty-two (22) named plaintiffs, none of them were state elected officials. However, if the legal validity of the district court’s rationale is accepted, it would seem that the decision would apply equally to any statutorily imposed term limit restrictions on any elected official in Idaho.

The Rudeen decision is currently on appeal to the Idaho Supreme Court. For the reasons set forth above, the court’s decision may have direct application to this proposed initiative.

Sincerely,

ALAN G. LANCE  
Attorney General

### Analysis by:

Wm. A. von Tagen  
Deputy Attorney General



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