

**IDAHO
ATTORNEY
GENERAL'S
ANNUAL REPORT**

OPINIONS

**SELECTED INFORMAL
GUIDELINES**

AND

CERTIFICATES OF REVIEW

FOR THE YEAR

2002

Alan G. Lance
Attorney General

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2002 Idaho Att’y Gen. Ann. Rpt. 05

Similarly, the Informal Guideline of January 7, 2002
is found at:
2002 Idaho Att’y Gen. Ann. Rpt. 37

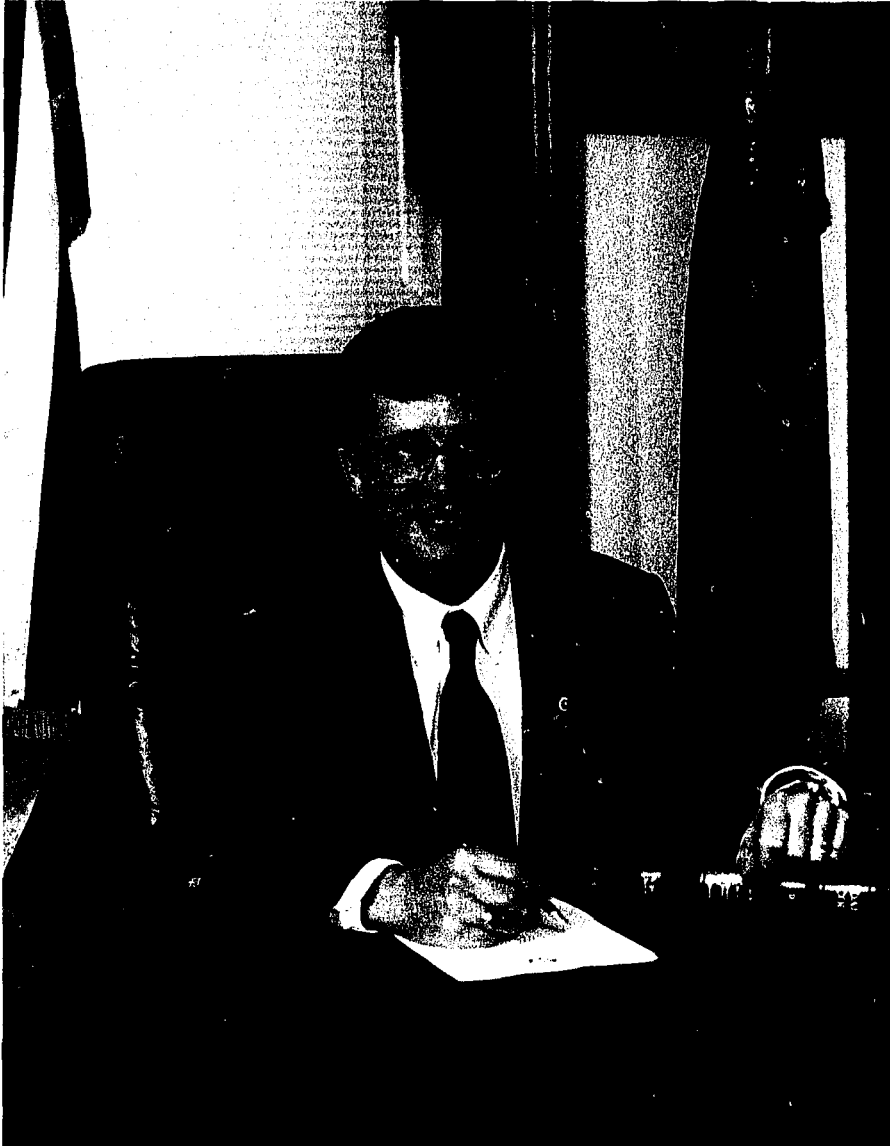
The Certificate of Review of February 11, 2002
is found at:
2002 Idaho Att’y Gen. Ann. Rpt. 81

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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	1995-2002



Alan G. Lance
Attorney General

INTRODUCTION

Dear Fellow Idahoans:

I am pleased to present this volume of the Attorney General's Opinions and Annual Report, which contains the official opinions, selected guidelines, and certificates of review issued during calendar year 2002. An official opinion represents the definitive, final opinion of the Attorney General on a legal issue posed by a client. Guidelines contain legal analysis and advice on legal issues brought to my office's attention by our clients. Certificates of review are issued pursuant to Idaho Code § 34-1809, which requires the Attorney General to conduct a legal review of initiative and referendum measures. Please remember that attorneys can only offer *opinions* on legal questions – only judges have the power to issue final, binding decisions on questions of law.

This annual report is published pursuant to Idaho Code § 67-1401(6), which provides that the Attorney General's "opinions shall be compiled annually and made available for public inspection." This publication represents only a fraction of the numerous duties and activities of the Office of the Attorney General (OAG). One of my predecessors, in delivering his annual report to Governor James H. Brady, explained as follows:

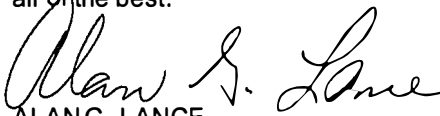
Necessarily, a great portion of the work of the office cannot be reported by reason of the nature of the work itself. Cases tried, board meetings attended, abstracts passed upon and farm loans made, opinions rendered to State Officers and County Attorneys and to the Legislature represent but a very small portion of the work of the office. A great bulk of the time of the office is taken to rendering opinions to individuals, to school districts, to municipal corporations and to irrigation districts concerning matters of more or less public moment, in which case the Attorney General's office, by right of custom, has been made the clearing house for the settlement of moot questions.

Report of the Attorney General of the State of Idaho, the Honorable D.C. McDougall, December 1, 1910.

The point underlying Attorney General McDougall's words retains its truth today, albeit with some different and additional duties and clients, and a much bigger population to serve. The OAG provides legal representation to the 105 legislators, state elected officials, the executive departments of state government, and numerous small boards and commissions. We also work closely with local officials on criminal and civil matters. The duties and demands do not lessen over time, and the current budget issues facing the state do not dissuade our clients from seeking legal advice and representation. The OAG is stretched thin, particularly with current attorney staffing levels below that of 1994, but we have been able to meet the fundamental requirements of the Idaho Constitution relating to the duties of the Attorney General.

The Attorney General is one of seven constitutional officers. Idaho Const. art. III, § 1. Accordingly, he is endowed with responsibilities that are constitutional in nature. The Idaho Constitution explicitly makes the Attorney General a member of the State Board of Examiners and the State Board of Land Commissioners. Idaho Const. art. IV, § 18; art. IX, § 7. The Idaho Supreme Court has also explained that the laws of the Idaho Territory, which predate the Idaho Constitution, represent inherent constitutional powers and duties for the constitutional officers. *Williams v. State Legislature of Idaho*, 111 Idaho 156, 722 P.2d 465 (1986); *Wright v. Callahan*, 61 Idaho 167, 99 P.2d 961 (1940). With respect to the Attorney General, Section 250 of the Revised Statutes of the Idaho Territory of 1887 assigned twelve duties to the Attorney General. The 1887 law has been reproduced on the following page. To the extent those duties have not been altered in the Idaho Constitution, they represent the primary responsibilities that the Attorney General is elected to carry out on behalf of the people of the State of Idaho.

This is the eighth and final annual report that I bring to you. It has been a privilege for me to serve the people of the State of Idaho for two terms as their Attorney General. Idaho has had fourteen Attorneys General serve for two terms. The first ten of them served two two-year terms of office. Two former Attorneys General served portions of two four-year terms: (1) Robert E. Smylie was appointed to serve a vacancy caused by the death of Robert Ailshie, serving from November 24, 1947 to January 3, 1955 (2,597 days); and (2) Allan Shepard was appointed by Governor Don Samuelson to the Idaho Supreme Court, having been elected twice and serving from January 7, 1963 to January 6, 1969 (2,191 days). Attorney General Jim Jones, who served from January 5, 1983 to January 7, 1991 (2,924 days), and I, who served from January 2, 1995 to January 6, 2003 (2,926 days), are the only two Attorneys General who were elected twice and served two full four-year terms. To paraphrase my good friend and former Attorney General Jim Jones in his final annual report, I wish all of the dedicated staff in the Office of the Attorney General and my successor, Lawrence Wasden, all of the best.


ALAN G. LANCE
Attorney General

CHAPTER 1X.
ATTORNEY GENERAL.

SECTION
250. General Duties.
251. Salary.

SECTION
252. Official Bond.

SECTION 250. It is the duty of the Attorney General:

General duties.
13 aob., 31.

1. To attend the Supreme Court and prosecute or defend all causes to which the Territory or any officer thereof, in his official capacity, is a party; and all causes to which any county may be a party, unless the interest of the county is adverse to the Territory or some officer thereof acting in his official capacity:

2. After judgment in any of the causes referred to in the preceding sub-division, to direct the issuing of such process as may be necessary to carry the same into execution:

3. To account for and pay over to the proper officer all moneys which may come into his possession belonging to the Territory or to any county:

4. To keep a docket of all causes in which he is required to appear, which must during business hours be open to the inspection of the public, and must show the county, district, and Court in which the causes have been instituted and tried, and whether they are civil or criminal; if civil, the nature of the demand, the stage of the proceedings, and, when prosecuted to judgment, a memorandum of the judgment; of any process issued thereon, and whether satisfied or not, and if not satisfied, the return of the Sheriff; and if criminal, the nature of the crime, the mode of prosecution, the stage of the proceedings, and, when prosecuted to sentence, a memorandum of the sentence and of the execution

ANNUAL REPORT OF THE ATTORNEY GENERAL

Tit. I. Ch. IX.

ATTORNEY GENERAL.

§§ 251-252

thereof, if the same has been executed, and if not executed, of the reasons of the delay or prevention.

5. To exercise supervisory powers over District Attorneys in all matters pertaining to the duties of their offices, and from time to time require of them reports as to the condition of public business intrusted to their charge.

6. To give his opinion in writing, without fee, to the Legislature or either House thereof, and to the Governor, the Territorial Secretary, Controller, Treasurer, the Trustees or commissioners of Territorial Institutions, when required, upon any question of law relating to their respective offices.

7. When required by the public service, to repair to any county in the Territory and assist the District Attorney thereof in the discharge of his duties.

8. To bid upon and purchase, when necessary, in the name of the Territory, and under the direction of the Controller, any property offered for sale under execution issued upon judgments in favor of or for the use of the Territory, and to enter satisfaction in whole or in part of such judgments as the consideration for such purchases.

9. Whenever the property of a judgment debtor in any judgment mentioned in the preceding sub-division has been sold under a prior judgment, or is subject to any judgment, lien, or incumbrance taking precedence of the judgment in favor of the Territory, under the direction of the Controller to redeem such property from such prior judgment, lien, or incumbrance; and all sums of money necessary for such redemption must, upon the order of the Controller, be paid out of any money appropriated for such purposes.

10. When in his opinion it may be necessary for the collection or enforcement of any judgment herein before mentioned, to institute and prosecute, in behalf of the Territory, such suits or other proceedings as he may find necessary to set aside and annul all conveyances fraudulently made by such judgment debtors, the cost necessary to the prosecution must, when allowed by the Controller, be paid out of any appropriations for the prosecution of delinquents.

11. To discharge the other duties prescribed by law.

12. To report to the Governor, at the time required by this Code, the condition of the affairs of his department, and to accompany the same with a copy of his docket and of the reports received by him from District Attorneys.

SEC. 251. The annual salary of the Attorney General is two thousand dollars.

SEC. 252. The Attorney General must execute an official bond in the sum of five thousand dollars.

Salary,
13 ses., 32.
Bond,

ANNUAL REPORT OF THE ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL ALAN G. LANCE ATTORNEY GENERAL

2002 STAFF ROSTER

ADMINISTRATION

Lawrence Wasden Chief of Staff	Thorpe Orton Deputy Chief of Staff	Janet Carter Executive Assistant	Sandra Rich Administrative Secretary/Receptionist
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DIVISION CHIEFS

Tara Orr, Administration & Budget	Jeanne Goodenough, Human Services
David High, Civil Litigation	William vonTagen, Intergovernmental & Fiscal Law
Terry Coffin, Contracts & Administrative Law	Clive Strong, Natural Resources
Michael Henderson, Criminal Law	

DEPUTY ATTORNEYS GENERAL

Willard Abbott	Christopher Clark	Jane Hochberg	Tim McNeese	Clay Smith
Lawrence Allen	Doug Conde	John Homan	Cheryl Meade	Theodore Spangler
Stephanie Altig	Kimberly Coster	Donald Howell	Clinton Miner	Nicholas Spencer
LaMont Anderson	Timothy Davis	Karen Hudelson	Robert Naftz	Marcy Spilker
James Baird	Brett DeLange	J. Scott James	Kent Nelson	Myrna Stanham
David Barber	Keith Donahue	Blair Jaynes	Brian Nicholas	Paul Stark
Michelle Bartlett	Thomas Donovan	Kenneth Jorgensen	Lisa Nordstrom	Dan Steckel
Garrick Baxter	Margaret Dougherty	Loma Jorgensen	Kirsten Ocker	Steve Strack
Mary Jo Belg	Darrell Early	Brian Kane	Carl Olsson	Ken Stringfield
Brian Benjamin	Patrick Fanning	Paul Kime	Edith Pacilio	Weldon Stutzman
Nancy Bishop	Mary Feeney	John Kormanik	Paul Panther	J. Ron Sutcliffe
Kimberly Blas	Lori Fleming	C. Nicholas Krema	Steve Parry	Evelyn Thomas
Craig Bledsoe	Curt Fransen	Lisa Kronberg	Eric Pfost	Timothy Thomas
Jo-Ann Bowen	Sherman Furey III	T. Paul Krueger II	Patli Powell	Geoffrey Thorpe
Carol Brassey	Roger Gabel	Michael Larsen	Victor Ramirez	Melissa Vandenberg
Dallas Burkhalter	Michael Gilmore	Michael C. Larsen	Phillip Rassler	Bridget Vaughan
Cheri Bush	Stephen Goddard	David Lloyd	Whitaker Riggs	Karl Vogt
Stephen Bywater	Brad Goodsell	William Loomis	Donald Robertson	Julie Weaver
James Carlson	Joanna Gullfo	Kay Manweller	Kenneth Robins	Peggy White
Jody Carpenter	Susan Hamlin-Nygard	Rene Martin	Steve Schuster	Timothy Wilson
Corey Cartwright	John Hammond, Jr.	Candice McHugh	Sandra Shaw	Scott Woodbury
Ron Christian	Harriet Hensley		Jason Siems	Charles Zalesky

INVESTIGATORS

Michael Dillon, Chief	Scott Birch	Bill Bule	Gary Deulen
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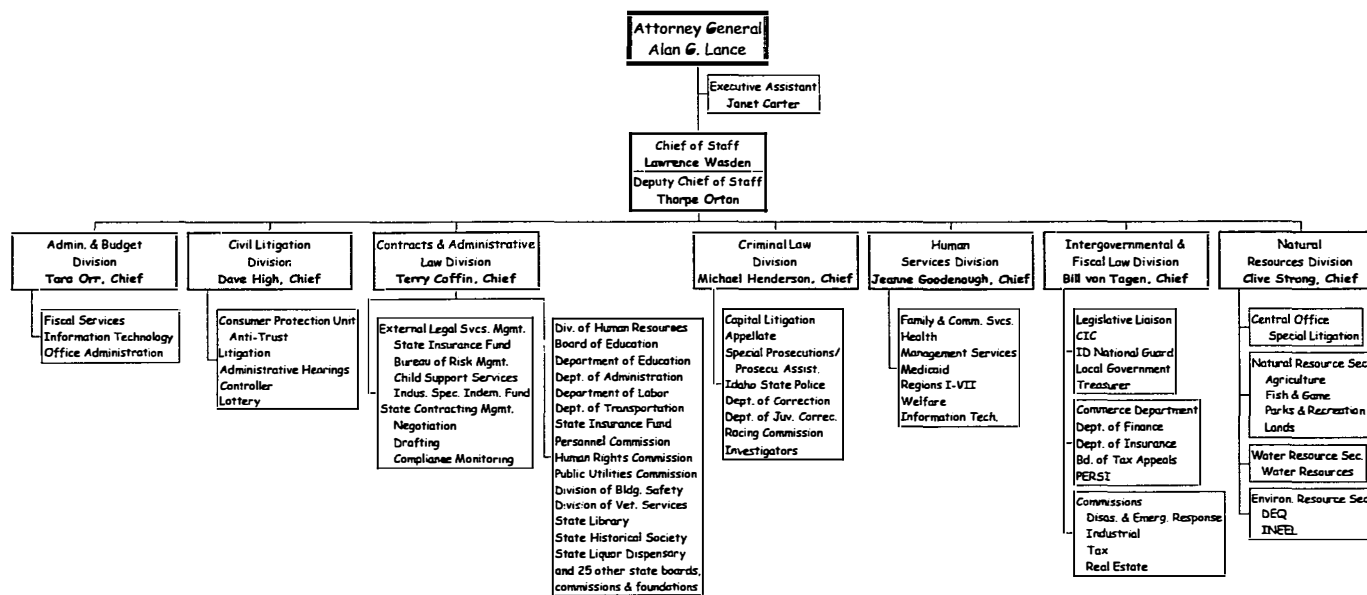
PARALEGALS

Kathie Brack	Vicki Kelly	Bernice Myles	Thomas Tharp
Suzie Cooley	Marlene Klein	Lori Peel	Robert Wheeler
Paula Gradwohl	Dora Morley	Brett Phillips	Melody Whigham
Becky Harvey	Vicky Music	Jean Rosenthal	

NON-LEGAL PERSONNEL

Rachel Balcerzak	Robert Cooper	Monica Hofhine	Ronda Mein	Greg Rast
Tara Bakes	Suzanne Crockett	Trudy Jackson	Lynn Mize	James Reiff
Prudence Barnes	Marilyn Freeman	Eric Jensen	Kathryn Mooney	Micki Schlapla
Kriss Blvens	Colleen Funk	Cecil Jones	Barbara Mundell	Stella Slack
Patricia Boehm	Bethany Garner	Gerry Karpavich	Rosean Newman	Jodie Stoddard
Karen Bolian	Rhonda Goade	JoAnn Lanham	Frances Nix	Debbie Stufflebeam
Wanda Brock	Leslie Gottsch	Katie Madden	Sharon Noice	Tamara Swanson
Marnie Burt	Luanna Hibdon	Patty McNeill	Rosie Panter	Olga Valdivia
Lorraine Byerly	Janene Hocking		Aimee Price	Melissa Ward

Office of the Idaho Attorney General
Organizational Chart - 2002



**OFFICIAL OPINIONS
OF
THE ATTORNEY GENERAL
FOR 2002**

ALAN G. LANCE
ATTORNEY GENERAL
STATE OF IDAHO

ATTORNEY GENERAL OPINION NO. 02-1

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

Per Request for Attorney General's Opinion

INTRODUCTION

In 2001, the Idaho Department of Lands ("Department") requested a formal opinion from this office regarding aspects of the newly created land bank fund. On December 18, 2001, this office issued Attorney General Opinion No. 01-4. Section D.2. of that Opinion conflicts with three provisions of the Idaho Code. Accordingly, to the extent Attorney General Opinion No. 01-4 conflicts with this Opinion, it is hereby superseded.

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 acquiring trust property may be deducted from the principal of the trust. Accordingly, 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. Although these same basic trust principles apply to payment of the costs associated with the sale of trust property, Idaho Code § 58-316 requires “[a]ll purchase moneys arising from the sale of state land” be paid by the Department to the state treasurer. Thus the Department is specifically precluded from deducting any costs whatsoever from the purchase moneys received in exchange for endowment lands.

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).¹ *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 appropriations. 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 statute³ 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 into the land bank fund.

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. “Transaction Costs” Associated With the Purchase of Endowment Property May Be Paid From the Land Bank Fund, Those Costs Associated With the Sale of Endowment Property May Not Be Deducted From the Proceeds Of Sale

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, as well as other provisions of the Idaho Code, 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 consists 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 6th 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 § 58-133.²

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 man-

agement 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] 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 affecting 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. Costs Associated With the Sale of Endowment Land May Not Be Deducted From the Proceeds, But Instead Must Be Paid For in Another Manner³

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.) The statutes establishing the land bank fund do not govern the payment of costs associated with the sale of endowment land and, thus, this section is applicable to the sale of land constituting all nine endowments, including the capitol permanent endowment.

No fewer than three specific provisions of the Idaho Code address this issue.

Idaho Code § 58-116 states:

The gross amount of money received by the department, from whatever source, belonging to or for the use of the state, shall be paid into the state treasury, without delay, without any deduction on account of salaries, fees, costs, charges, expenses or claim of any description whatever and shall be credited to such fund or funds as are now or may hereafter be designated by law for the deposit thereof. No money belonging to, or for the use of, the state shall be expended or applied by the department except in consequence of an appropriation made by law and upon the warrant of the state controller.

The term “gross” means, among other things, “before or without diminution or deduction.” BLACK’S LAW DICTIONARY 485 (abridged 6th ed. 1991). Although there may be some question regarding when money is “received” by the department following the sale of endowment land, other portions of Idaho Code § 58-116 clearly prohibit the payment of costs associated with the sale of such lands directly from the proceeds received by the Department. Section 58-116 requires that all of the money received by the Department be deposited with the treasury, “without any deductions on account of . . . fees, costs, charges or expenses.” Additionally, the final clause of section 58-116 requires the use of money belonging to the state be made “upon the warrant of the state controller.”

Idaho Code § 58-128 governs the Land Board’s duty to deposit money received by it and requires that money to be deposited “daily” with the state treasurer. Finally, Idaho Code § 58-316 states, in relevant part:

All purchase moneys arising from the sale of state land shall without delay be paid by the director of the department of lands to the treasurer who shall receipt for the same, and the same shall be credited by the treasurer to the land bank fund to which the land sold belonged.

(Emphasis added.) “Purchase money” is defined as: “The actual money paid in cash or check initially for the property while the balance may be secured by a mortgage and not calling for periodic payments.” BLACK’S LAW DICTIONARY 861 (abridged 6th ed. 1991). It is apparent from the plain language of Idaho Code § 58-316 that *all* of the money paid to the state for endowment land (or any other state land) must be deposited with the state treasurer. Accordingly, deduction of the costs associated with the sale of endowment property from the money paid to the state for that property is prohibited.

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 acquisitions of any part of trust principal are payable out of that principal. Accordingly, although there may be arguments to the contrary, 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 reasonable and ordinary costs associated with the acquisition of endowment real property—such as appraisal, Level 1 environmental site assessments, timber cruises, realtor commissions, as well as architecture, engineering and closing costs. Although basic trust principles likewise apply to the costs associated with the sale of trust lands, Idaho Code § 58-316 requires that “[a]ll purchase moneys arising from the sale of state land” be paid to the state treasurer “without delay.” Accordingly, costs associated with the sale of endowment lands may not be deducted from the purchase moneys received by the Department.

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 § 58-116.
Idaho Code § 58-128.
Idaho Code § 58-133.
Idaho Code § 58-361.
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 485 (abridged 6th ed. 1991).

BLACK'S LAW DICTIONARY 861 (abridged 6th ed. 1991).
 BLACK'S LAW DICTIONARY 1054 (abridged 6th 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 (5th ed. 1992).
 SUTHERLAND STATUTORY CONSTRUCTION § 51.02 (5th ed. 1992).

DATED this 5th day of June, 2002.

ALAN G. LANCE
 Attorney General

Analysis by:

John R. Kormanik
 Deputy Attorney General
 Natural Resources Division

¹ 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.

² 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.

³ This section of the Opinion supersedes and withdraws that expressed in Section D.2 of Att'y Gen. Op. No. 01-4.

ATTORNEY GENERAL OPINION 02-2

To: The Honorable Stan Hawkins
P. O. Box 367
Ucon, ID 83454

The Honorable David Callister
7011 Holiday Drive
Boise, ID 83709

Per Request for Attorney General's Opinion

QUESTION PRESENTED

You inquire whether the National Securities Markets Improvement Act of 1996 ("NSMIA") (Public Law No. 104-290, 110 Stat. 3416, codified in part at 15 U.S.C. § 77r) preempts Idaho Code § 41-2819 under the circumstances relevant to your inquiry and set forth below. Idaho Code § 41-2819 requires an insurance holding company to obtain a solicitation permit from the director of the Department of Insurance prior to soliciting in Idaho for the sale of its securities, even for an exempt private offering of its federally covered securities pursuant to Rule 506 of Regulation D promulgated under the Securities Act of 1933.

CONCLUSION

Insofar as Idaho Code § 41-2819 requires that an insurance holding company obtain a solicitation permit from the director prior to soliciting Idaho investors for an exempt private offering of its federally covered securities pursuant to Rule 506 of Regulation D promulgated under the Securities Act of 1933, it appears to be preempted by NSMIA.

ANALYSIS

Idaho Code § 41-2819 explicitly applies to insurers and insurance holding corporations, as well as others similarly situated. The statute prohibits such an entity from soliciting or receiving funds in Idaho in exchange

for its securities until the company has been granted a solicitation permit. Idaho Code § 41-2819(1). Subsection (2) of Idaho Code § 41-2819 provides:

The director shall issue such a permit unless he finds:

(a) That the funds proposed to be secured are inadequate or excessive in amount for the purposes intended, or

(b) That the proposed securities or the manner of their distribution are inequitable, or

(c) That the offering or issuance of the securities would be unfair to existing or prospective holders of securities of the same insurer, corporation, syndicate, organization, or entity.

The NSMIA provides exemptions from the applicability of certain state laws. Section 18(a) of the Act (15 U.S.C. § 77r(a)) provides in part:

Except as otherwise provided in this section, no law . . . of any State . . .

(1) requiring, or with respect to, registration or qualification of securities, or registration or qualification of securities transactions, shall directly or indirectly apply to a security that—

(A) is a covered security; or

(B) will be a covered security upon completion of the transaction;

. . .

(3) shall directly or indirectly prohibit, limit, or impose conditions based on the merits of such offering or issue, upon the offer or sale of any security described in paragraph (1).

Securities offered pursuant to Rule 506 of Regulation D promulgated under the Securities Act of 1933 qualify as covered securities under 15 U.S.C. § 77r(b)(4)(D).

Read in its most broad sense, the prerequisite of a solicitation permit in Idaho Code § 41-2819(1) might be construed as a law “requiring or with respect to” the registration or qualification of securities as set forth in section 18(a)(1) of the NSMIA. Even if such a broad reading stretches the language too far, the solicitation permit requirement for subsequent financing contained in Idaho Code § 41-2819(1) falls within the scope of NSMIA section 18(a)(3) by placing limits on the offering of securities.

The McCarran-Ferguson Act enacted by Congress in 1945 reserves to the states the regulation and taxation of insurance and provides, in essence, an anti-preemption provision. 15 U.S.C. § 1012. The McCarran-Ferguson Act provides, in part:

No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, . . . unless such Act specifically relates to the business of insurance . . .

The Supreme Court has stated that the above quoted “first clause” of 15 U.S.C. § 1012(b) “was intended to further Congress’ primary objective of granting the States broad regulatory authority over the business of insurance.” United States Department of Treasury v. Fabe, 508 U.S. 491, 505, 113 S. Ct. 2202, 2210, 124 L. Ed. 2d 449 (1993). As set forth in Fabe, the McCarran-Ferguson Act overturned the normal rules of preemption, which provide simply that inconsistent state laws are preempted by federal laws.

It seems clear that section 18(a)(1) or (3) of the NSMIA would be construed to invalidate, impair, or supersede Idaho Code § 41-2819. Thus, under the McCarran-Ferguson Act, preemption may occur: (1) if NSMIA specifically relates to the business of insurance, or (2) even if it does not, if Idaho Code § 41-2819 was not enacted “for the purpose of regulating the business of insurance.”

While there are references in the NSMIA and other securities acts indicating that the NSMIA applies to variable annuities, hybrid products containing attributes of securities and insurance products,¹ the NSMIA itself does not seem “specifically related to the business of insurance” as opposed to securities regulation. See Barnett Bank of Marion County, N.A. v. Nelson, 517 U.S. 25, 116 S. Ct. 1103, 134 L. Ed. 2d 237 (1996) (federal statute that permitted certain national banks to sell insurance in small towns specifically referred to insurance). Recognizing direct conflict between the NSMIA exemption provisions concerning applicability of state law to covered securities and Idaho Code § 41-2819 and despite that the NSMIA does not appear to be specifically related to the business of insurance on its face, Idaho Code § 41-2819 may still be preempted under the McCarran-Ferguson analysis if it is not a law enacted “for the purpose of regulating the business of insurance”.

In Securities and Exchange Commission v. National Securities, Inc., 393 U.S. 453, 462, 89 S. Ct. 564, 569, 21 L. Ed. 2d 668 (1969), the United States Supreme Court ruled that the Arizona law that required the Arizona Director of Insurance “to find that the proposed merger would not ‘substantially reduce the security of and service to be rendered to policyholders’” before he approved the proposed merger clearly related to the business of insurance. The Court in National Securities, Inc., held that the McCarran-Ferguson Act did not bar a federal remedy that affected a matter that was subject to state insurance regulation. In this case, the Securities and Exchange Commission (SEC) sought remedies based on allegedly fraudulent conduct on behalf of the proponents of the merger. The Supreme Court determined there was no conflict between the statutes and that allowing the SEC to pursue remedies under federal law did not effectively “invalidate, impair, or supersede” the Arizona statute. However, there is some discussion in National Securities, Inc., indicating laws that regulate the relationship between a stockholder and the company in which stock is owned are not insurance regulation but rather securities regulation. *Id.*, 393 U.S. at 460, 89 S. Ct. at 569.

The Supreme Court has identified three criteria relevant to whether activity constitutes the business of insurance for purposes of McCarran-Ferguson Act preemption. They are: “*first*, whether the practice has the effect of transferring or spreading a policyholder’s risk; *second*, whether the practice is an integral part of the policy relationship between the insurer and the

insured; and *third*, whether the practice is limited to entities within the insurance industry.” Union Labor Life Insurance Co. v. Pireno, 458 U.S. 119, 129, 102 S. Ct. 3002, 3008, 73 L. Ed. 2d 647 (1982). Most recently, the United States Supreme Court indicated that the three McCarran-Ferguson criteria are “guideposts,” all of which need not be met to withstand preemption. See Rush Prudential HMO, Inc. v. Moran, 122 S. Ct. 2151 (June 20, 2002).

The majority in Fabe indicated its belief that not only does the writing of an insurance contract fall within the scope of the business of insurance, but so does the actual performance of an insurance contract. The Court in Fabe found that the portion of the Ohio liquidation priority statute affecting policyholder interests and the administrative expenses in the liquidation of an insurer was enacted for the purpose of regulating the business of insurance. But to the extent the statute is designed to advance the interests of other creditors, the statute was not enacted for the purpose of regulating the business of insurance. Fabe, 508 U.S. 508, 113 S. Ct. 2212.

Facially, Idaho Code § 41-2819 does not satisfy the first two McCarran-Ferguson criteria. The third criterion may be satisfied because the statute is limited to insurers or insurance holding companies. But, potential or actual investors may or may not be policyholders. The three bases of denial pursuant to Idaho Code § 41-2819(2) appear to be directed more toward the protection of existing or prospective shareholders, not policyholders, of the company. Moreover, Idaho Code § 41-2819(5) provides, “This section is supplemental to other laws of this State applicable to the sale of securities”. This provision tends to undermine arguments that Idaho Code § 41-2819 should not be applied because other Idaho securities laws might apply to protect potential Idaho investors by their own terms, because Idaho Code § 41-2819 is expressly supplemental, or in addition, to other Idaho securities laws. Subsection (5) provides additional insight, however, into the Idaho Legislature’s purpose in enacting Idaho Code § 41-2819. The law creates, in essence, additional securities protection for existing and potential investors where the securities to be sold are those of an insurance company or insurance holding company. While the legislature’s desire to provide a second layer of oversight to protect existing or potential investors appears in the insurance code and is thus unique to Idaho’s regulation of the business of insurance, Idaho Code § 41-2819 does not truly relate to a practice that “is limited to entities within the insurance industry.”

Recent case law also indicates that the Ninth Circuit Court of Appeals would likely view the NSMIA as preempting Idaho Code § 41-2819 under the circumstances presented. *See, e.g. Patenaude v. Equitable Life Assurance Society of the United States*, 290 F.3d 1020, 1028, n.8 (even if the California Insurance Code, as opposed to the California Business and Professional Code, had an express statute that was in conflict with a companion federal securities act of NSMIA, the state law would likely be preempted).

One could argue that there is a general insurance business purpose supporting Idaho Code § 41-2819, such as advancing general oversight of financial solvency of insurance holding companies, and therefore ultimately insurers, which is thus related to the performance of insurance contracts. Realistically, a federal court would conclude that Idaho Code § 41-2819, requiring an insurance holding corporation to obtain a solicitation permit prior to soliciting or receiving funds in Idaho in exchange for its securities, falls outside the scope of legislation enacted for the purpose of regulating the business of insurance. Therefore, insofar as Idaho Code § 41-2819 requires an insurance holding company to obtain a solicitation permit for subsequent financing prior to soliciting investors for federally covered securities under a Rule 506 of Regulation D offering, a court of competent jurisdiction would likely find it is preempted by NSMIA.

AUTHORITIES CONSIDERED

1. Idaho Code:

Idaho Code § 41-2819.

2. Federal Statutes:

15 U.S.C. § 77r.

15 U.S.C. § 1012.

National Securities Markets Improvement Act of 1996 (Public Law No. 104-290, 110 Stat. 3416).

3. Cases:

Barnett Bank of Marion County, N.A. v. Nelson, 517 U.S. 25, 116 S. Ct. 1103, 134 L. Ed. 2d 237 (1996).

Patenaude v. Equitable Life Assurance Society of the United States, 290 F.3d 1020 (9th Cir. 2002).

Rush Prudential HMO, Inc. v. Moran, 122 S. Ct. 2151 (June 20, 2002).

Securities and Exchange Commission v. National Securities, Inc., 393 U.S. 453, 462, 89 S. Ct. 564, 21 L. Ed. 2d 668 (1969).

Union Labor Life Insurance Co. v. Pireno, 458 U.S. 119, 129, 102 S. Ct. 3002, 3008, 73 L. Ed. 2d 647 (1982).

United States Department of Treasury v. Fabe, 508 U.S. 491, 113 S. Ct. 2202, 124 L. Ed. 2d 449 (1993).

DATED this 28th day of June, 2002.

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¹ See, e.g., Patenaude v. Equitable Life Assurance Society of the United States, 290 F.3d 1020, 1025-26 (9th Cir. 2002).

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68-10-101 through 68-10-605	02-1	5

**ATTORNEY GENERAL'S
SELECTED
INFORMAL GUIDELINES
FOR THE YEAR 2002**

ALAN G. LANCE
ATTORNEY GENERAL
STATE OF IDAHO

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

January 7, 2002

Senator Dean Cameron
Idaho State Senate
STATEHOUSE MAIL

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

Dear Senator Cameron:

Thank you for your recent letter inquiring whether there are any legal or constitutional impediments that would prohibit the Minidoka County School District from adopting a policy requiring a mandatory moment of silence at the commencement of the school day. In your letter, you enclosed a copy of a proposed policy of the Minidoka County School District. The school district is aware that the adoption of a policy mandating a moment of silence would be controversial.

FACTS

Many states have adopted statutes mandating a moment of silence at the beginning of each school day. In addition, even in those states that do not have legislation mandating a moment of silence, school districts have adopted policies such as the one being considered by the Minidoka County School District.

The proposed policy, which you have provided to me, states:

Joint School District No. 331, Minidoka, Jerome, Lincoln and Cassia Counties, intends to create, and does hereby create a two minute moment of silence at the beginning of each school day. It is further the intent and policy of this District to comply fully with Santa Fe v. Doe, 530 U.S. 290, 120 S. Ct. 2266 (2000), therefore, the District shall not establish, require, instigate, or endorse prayer or other religious expression by students. Likewise, the district shall maintain its viewpoint neutrality and not suppress, forbid,

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interfere with, discourage or disparage voluntary religious expression.

Nothing in this policy abrogates the District's right to prohibit and/or punish obscene speech, which is not protected by the first amendment (Ginsberg v. New York, 390 U.S. 629, 635 (1968)), the use of vulgar terms and offensive lewd and indecent speech (Bethel School District v. Fraser, 478 U.S. 675, 683, 685 (1986)), and students' actions that materially and substantially disrupt the work and discipline of the school, or substantially disrupt or materially interfere with school activities (Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 513, 514 (1968)).

(Verbatim.)

In addition, as part of this policy, the district has adopted guidelines that provide:

1. The moment of silence shall be for two minutes at the beginning of each day and shall be supervised by the classroom teacher or other appropriate school personnel.
2. The classroom teachers and all other school personnel shall maintain viewpoint neutrality and shall not suppress, forbid, interfere with, discourage or disparage voluntary religious expression. Furthermore, teachers and all other school personnel shall not establish, require, instigate, or endorse prayer or other religious expression by students.
3. When initiating the moment of silence, classroom teachers and all other school personnel shall only refer to it as a "two-minute moment of silence."
4. Students shall remain quiet for the two-minute moment of silence.

SHORT CONCLUSION

Given the controversial nature of a “moment of silence” and its association with religious meditation or prayer, it is likely that if the district should adopt the proposed policy, or one substantially similar, the policy will be challenged in court. The more difficult question is the outcome of any court challenge.

If a moment of silence is adopted for an appropriate purpose and if the policy is properly drafted, it is more likely than not that a court will uphold a district policy authorizing or mandating a moment of silence at the beginning of each school day. The ultimate outcome will depend on the precise wording of the policy but, more importantly, the facts and statements surrounding the adoption of the moment of silence policy and, in particular, the apparent purpose for the adoption of the policy. If a court determines that the policy was adopted to foster religion or to introduce prayer into a public school classroom then the policy would be struck down. If, on the other hand, the court is convinced that the policy was adopted to instill a proper sense of decorum at the beginning of the school day and to assist students in focusing their thoughts and reflecting on the tasks before them and if the court is persuaded that the policy neither encourages children to pray nor discourages those who are inclined to pray from doing so, then the court would most likely uphold the policy.

Because of the close scrutiny any policy adoption will receive by a reviewing court, I suggest that any policy adopted by the district be simple and concise in nature. The district may simply wish to model its policy after the statute in Virginia, which has been reviewed by the Fourth Circuit Court of Appeals and which simply mandates:

The school board of each school district shall establish the daily observance of one minute of silence in the classroom of the division. During such period of silence, the teacher responsible for each classroom shall take care that all pupils remain seated and silent and make no distracting display to the end that each pupil may, in the exercise of his or her individual choice, meditate, pray, or engage in any other

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silent activity which does not interfere with, distract, or impede other pupils in the like exercise of individual choice.

Virginia Code Ann. § 22.1-203. Perhaps a better approach than that followed by Virginia would simply be to mandate a moment of silence, not to exceed two (2) minutes, for silent meditation. In the guidelines implementing the policy, it could then be explained to teachers that the time for meditation could be used for silent reflection, thought or prayer and teachers would be cautioned to neither encourage nor discourage religious activity.

It is also advisable for the school board to adopt specific findings explaining their rationale for adopting the policy. If the district's rationale is to foster or encourage religion, then the policy should not be adopted. If, however, the school board members wish to consider a moment of silence as an instrument to give greater solemnity and purpose to the school day and because it helps students in the transition from home or playground to school and enables students to pause, settle down and to compose themselves and focus on the day ahead in order to make for a better and more productive school day, then that should be reflected in the district's findings.

ANALYSIS

The First Amendment to the U.S. Constitution provides in relevant part:

Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof

The First Amendment is made applicable to the states through the Fourteenth Amendment to the U.S. Constitution. Similarly, article 1, § 4, of the Idaho Constitution guarantees religious liberty, providing:

Guaranty of religious liberty.—The exercise and enjoyment of religious faith and worship shall forever be guaranteed; and no person shall be denied any civil or political right, privilege, or capacity on account of his religious opinions; but the liberty of conscience hereby secured shall not be construed to dispense with oaths or affirmations, or

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excuse acts of licentiousness or justify polygamous or other pernicious practices, inconsistent with morality or the peace or safety of the state; nor to permit any person, organization, or association to directly or indirectly aid or abet, counsel or advise any person to commit the crime of bigamy or polygamy, or any other crime. No person shall be required to attend or support any ministry or place of worship, religious sect or denomination, or pay tithes against his consent; nor shall any preference be given by law to any religious denomination or mode of worship. Bigamy and polygamy are forever prohibited in the state, and the legislature shall provide by law for the punishment of such crimes.

At least one Idaho case has held that article 1, § 4 of the Idaho Constitution “is an even greater guardian of religious liberty” than its federal counterpart. Osteraas v. Osteraas, 124 Idaho 350, 859 P.2d 948 (1993). This point is important to consider because I have been unable to find Idaho court cases dealing with the issue of a moment of silence in the public schools. The analysis contained herein is based solely upon an analysis of federal court cases decided under the federal Constitution. While it is likely that article 1, § 4, will cause a court to deal with this issue in a manner that is consistent with federal precedent, it is possible that an Idaho court, interpreting the actions of the school board, and applying the Idaho Constitution, could come to a result inconsistent with the federal cases discussed.

The school district could adopt a policy that would be constitutionally valid authorizing a moment of silence if the moment of silence neither advocates nor discourages prayer. The adoption of such a policy would no doubt be scrutinized and the ultimate issue of the constitutionality of such a policy would hinge not only upon the precise wording adopted, but also the facts and circumstances surrounding its adoption. As Justice O’Conner noted in her concurring opinion in Wallace v. Jaffree, 472 U.S. 38, 105 S. Ct. 2479 (1985):

The relevant issue is whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of prayer in public schools. A moment of silence law that is

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clearly drafted and implemented so as to permit prayer, meditation, and reflection within the prescribed period, without endorsing one alternative over another should pass this test.

472 U.S. 76, 105 S. Ct. 2500 (1985) (citations omitted). As Justice O'Connor notes:

The crucial question is whether the state has conveyed or attempted to convey the message that children should use the moment of silence for prayer. This question cannot be answered in the abstract, but instead requires courts to examine the history, language, and administration of a particular statute to determine whether it operates as an endorsement of religion.

Id. at 73-74. Because the facts, circumstances and the intent of those adopting moment of silence laws are so closely scrutinized, many of these cases turn more on fact than on the precise language adopted.

At issue in Santa Fe Independent School District v. Doe, 530 U.S. 290, 120 S. Ct. 2266 (2000), was whether the Santa Fe School District's policy, permitting student-led and student-initiated prayer at football games, violated the Establishment Clause of the U.S. Constitution. The policy of the district provided that each spring, under the advice and direction of each high school principal, the student council would conduct an election whereby the student body would elect, by secret ballot, whether to have a message from a student to be delivered at a pre-game ceremony which would serve to solemnize the sporting event and to promote good sportsmanship and student safety. If the student body elected to have such a message, then a student would be selected from a list of student volunteers to deliver the statement or invocation. The same student would give an invocation before each home football game. These messages always consisted of a student-led prayer which was delivered over the loudspeaker system, owned and controlled by the high school.

The Supreme Court ruled that the invocation consisted of a state sponsorship of the dominant religion that existed in that school district. The district argued that the invocation just happened to be a prayer and that, in

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fact, the policy was adopted to serve a secular purpose, and that the solemnization of a football game served to promote sportsmanship. The opinion noted that it is the duty of the courts to distinguish a sham secular purpose from a sincere one. The consistent practice of offering prayers before a football game amounted to a state sponsorship or endorsement of religion. The policy was struck down.

It is interesting to note, however, that although the policy was struck down, the Court noted in its opinion:

Thus, nothing in the Constitution as interpreted by this court prohibits any public school student from voluntarily praying at any time before, during, or after the school day. But the religious liberty protected by the Constitution is abridged when the state affirmatively sponsors the particular religious practice of prayer.

530 U.S. at 313, 120 S. Ct. at 2281.

The Fourth Circuit Court of Appeals took up the issue of a moment of silence in Brown v. Gilmore, 258 F.3d 265 (4th Cir.), cert. denied, 122 S. Ct. 465 (2001). The issue before the court was the validity of the Virginia law mandating a minute of silence at the beginning of each school day during which each student could exercise the choice of meditating, praying or engaging in any other silent activity that does not disrupt the activities of other students. The court in Gilmore was deciding the validity of Virginia Code Ann. § 22.1-203. The specific provision in the statute provides:

Each pupil may, in the exercise of his/her individual choice, meditate, pray or engage in any other silent activity which does not interfere with, distract, or impede other pupils in the like exercise of individual choice.

The court found that the statute provided a neutral medium during which the student may, without the knowledge of other students, engage in religious or non-religious activity. *Id.* at 265. The Fourth Circuit upheld the statute, stating:

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The minute of silence established in Virginia by Section 22.1-203 for each public school classroom is designed to provide each student at the beginning of each day an opportunity to think, to meditate, to quiet emotions, to clear the mind, to focus on the day, to relax, to doze, or to pray—in short, to provide the student with a minute of silence to do with what the student chooses. And just as this short period of quiet serves the religious interests of those students who wish to pray silently, it serves a secular interest of those who do not wish to do so. Because the state imposes no substantive requirement during the silence, it is not religiously coercive. Neither the teacher nor any student will know how any other student uses the time because it is, fortunately, inherent in the human constitution that what transpires in the mind cannot be known by others.

The statute's use of the word "pray" in listing an unlimited range of mental activities that are authorized during the minute of silence, cannot by itself be a ground for finding the statute unconstitutional. Indeed, to require a ban on the use of religiously related terms would manifest hostility to religion that is plainly inconsistent with the religious liberties secured by the Constitution.

Id. at 281-82.

As indicated by the citation, the Supreme Court declined to review the Virginia case. It was the finding of the Fourth Circuit that at least one purpose of the statute was secular even though the statute addressed religion. The Fourth Circuit held that by providing a moment of silence the state was making no endorsement of religion and the court appeared to be persuaded, at least in part, by the legislative history which indicated that the moment of silence would assist in establishing a sense of calm and stability in the public schools by offering students a peaceful minute each day to reflect upon their studies, to collect their thoughts and to generally prepare themselves for the task before them.

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In Wallace v. Jaffree, 472 U.S. 38, 105 S. Ct. 2499 (1985), the Supreme Court struck down an Alabama statute which was, in many respects, similar to the Virginia statute reviewed by the Fourth Circuit in Gilmore. The Wallace case is distinguishable both in the particular statute being reviewed and, more importantly, in the legislative history of the Alabama statute. The Alabama statute had several parts. Part of it mandated a moment of silence, but another portion authorized teachers to lead willing students in vocal prayer. Regarding the purpose for which the legislation was adopted, the Supreme Court noted statements of the bill's sponsor found in the legislative record that the purpose of the legislation was to return voluntary prayer to the public schools and that it was the sponsor's intent to provide children with the opportunity to share in the spiritual heritage of both the state and the nation. In a trial before the district court, the Senator also testified unequivocally that this was his sole purpose in sponsoring the legislation. The evidence in the case also showed that a number of teachers led their students in prayer each day before class.

The Court defined the issue in Wallace as:

The narrow question for decision is whether Section 16-1-20.1, which authorizes a period of silence for "meditation or voluntary prayer," is a law respecting the establishment of religion within the meaning of the first amendment.

472 U.S. at 41-42, 105 S. Ct. at 2482.

The State of Alabama failed to produce any evidence in the case of a secular purpose for the statute. The plaintiffs, on the other hand, produced a legislative history as well as testimony from the bill's sponsor that the sole purpose of the bill was to further religion. It appears that, based on this, the U.S. Supreme Court struck down the Alabama statute.

Justice O'Connor concurred in the Court's opinion, but in her concurring opinion she indicated that a statute mandating a moment of silence was not an affront to religious liberty:

Scholars and at least one member of this court have recognized the distinction and suggested that a moment of

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silence in public schools would be constitutional. As a general matter, I agree. It is difficult to discern a serious threat to religious liberty from a room of silent, thoughtful school children.

472 U.S. at 72-73, 105 S. Ct. at 2498 (citations omitted).

In determining the validity of a moment of silence law a reviewing court will undoubtedly apply a three-part test first articulated in Lemon v. Kurtzman, 403 U.S. 602, 91 S. Ct. 2105 (1975). In order to pass this three-part test it must be found: (1) that the statute in question must have a secular legislative purpose; (2) that the principal effect of the statute must be one which neither advances nor inhibits religion, and finally; (3) the statute not excessively entangle government with religion.

In Doe v. Madison School District, 7 F. Supp. 2d 1110 (D. Idaho 1997), the federal district court applied the Lemon test to a policy of the Madison School District, which authorized the top four students from the high school graduating class to make an address at the graduation. The graduation policy authorized the invited students to give an appropriate, uncensored presentation that could include an address, a poem, a reading, a song, a musical presentation, a prayer or any other pronouncement. The policy indicated that the school administration would not censor any presentation, but advised participants to use appropriate language for the audience and occasion. The plaintiffs in the case sued because the policy mentioned, as one option, a prayer. It was the contention of the plaintiffs that the qualification to make an address “according to class standing” was not specific enough to preclude school officials from choosing students who are known members of the LDS church and who would be likely to give a prayer at the ceremony.

Despite plaintiffs’ concerns, their challenge to the Madison County policy was rejected. The court found that the policy did not run afoul of the Lemon test and noted that the neutrality of the policy furthered the secular purpose of the district to allow chosen students to solemnize an important ceremony in the manner of their own choice.

Adopting a moment of silence policy, which would require a moment of silence not to exceed one to two minutes at the beginning of each school

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day, could come under greater scrutiny than a policy such as the one adopted by Madison County schools because of the greater frequency of a daily moment of silence. There is some indication that this greater frequency could cause a court to scrutinize both the purpose and the effect of the policy as well as the way in which the policy is administered.

CONCLUSION

A carefully drafted policy which is adopted for a neutral and non-religious purpose and which does not have the effect of furthering or deterring religious beliefs would probably pass constitutional muster. How such a policy is administered could affect a court's ultimate determination on its constitutionality. If a district is pursuing such a policy in order to further religion, then a policy should not be adopted. If it is adopted for religious purposes it will most likely be struck down. During the moment of silence the teachers should not be engaged in furthering or hindering religious practices.

Finally, as was noted at the beginning of this guideline, it should be cautioned that there are no Idaho court cases applying the Idaho Constitution to a moment of silence. On this particular issue, the Idaho Constitution will probably be read in a manner that is consistent with federal case authority. However, there is at least some indication that an Idaho court could construe the Idaho Constitution as being a greater guarantor of religious liberties. How this role of being a greater guarantor would affect the ultimate outcome of a case cannot be said with certainty.

Sincerely,

WILLIAM A. VON TAGEN, Division
Chief
Intergovernmental & Fiscal Law
Division

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

January 17, 2002

Gary Stivers, Executive Director
Idaho State Board of Education
650 W. State Street
Boise, ID 83702

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

Dear Mr. Stivers:

This guideline is provided in response to the State Board of Education's ("Board") request for guidance regarding the legality of instituting a differential fees program ("Program") at Idaho's universities and colleges. The Program, as described in your letter, would enable an institution to charge a group of students a higher matriculation fee, as defined in Idaho Code § 33-3717(1)(b), than other students based upon academic major or emphasis. This guideline will analyze the Program under art. 9, sec. 10 of the Idaho Constitution, Idaho Code § 33-3717, the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, and art. 1, sec. 2 of the Idaho Constitution.

The question of the legality of the Program arises as a result of the University of Idaho's ("University") recent proposal to the Board to institute such a Program for students in its Integrated Business Curriculum ("IBC"). The IBC makes up the junior level common curriculum for all students in the University's College of Business and Economics. *See* University of Idaho's Differential Fees Proposal, Board's agenda materials, p. 12 of the Instruction, Research, and Student Affairs agenda dated November 14-15, 2001, attached hereto as Exhibit A. According to the University, the unique resources for the IBC include a five-person faculty team, a limited section enrollment cap of 60 students per IBC section, considerable faculty time as mentors for student teams, coordination of material, and providing cross-functional perspectives on the businesses presented in the IBC. The University contends, "The resource demands for this unique approach to undergraduate business education are unusually high when compared to traditional pedagogy in other business curricula." *Id.* at p. 17. The University asserts that the "combination of

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empirical support, outside evaluation, and personal testimonials support the University's position that the IBC is indeed a unique program that differentiates the University's undergraduate business program." *Id.* at p. 16. It is unclear whether either the activities of the IBC students or the IBC in general do in fact result in increased costs to the University in terms of maintenance and operation of the physical plant, student services or institutional support more than any other major or emphasis at the University.

While the only differential matriculation fees proposal currently before the Board is the proposal from the University regarding the IBC, if the Board determines that the Program is appropriate, other institutions may also seek to institute a differential matriculation fees structure for their different departments. Thus, the legality of a differential matriculation fees structure in general must be analyzed.

Our conclusion is that the Program would not violate art. 9, sec. 10 of the Idaho Constitution or Idaho Code § 33-3717. However, the Program may not pass rational basis scrutiny under the Fourteenth Amendment to the United States Constitution or art. 1, sec. 2 of the Idaho Constitution if the purpose of the classification is only to reimburse the institution for increased cost of instruction.

ANALYSIS

A. Definition of "Tuition"

Art. 9, sec. 10 of the Idaho Constitution, incorporating the 1889 Territorial Act creating the University, prevents the imposition of a fee to any resident student attending the University. *See Dreps v. Bd. of Regents of the Univ. of Idaho*, 65 Idaho 88, 95, 139 P.2d 467, 470 (1943). The University, however, is entitled to charge resident students tuition for studies in a "professional department" and for "extra studies." *Id.* at p. 468, n.1. Similarly, Idaho Code prohibits charging a fee for tuition to full-time, regularly enrolled resident students in any degree-granting program at Idaho's state colleges or universities (hereinafter collectively referred to as "institutions"). Idaho Code § 33-3717(1), adopted in 1970, also provides an exception for tuition charged for studies in a professional college, school or department, or for "extra studies," as well as for part-time enrollment. Thus, under Idaho law,

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tuition may only be charged to non-resident students, students in a professional department, students involved in extra studies, or part-time students.¹

Tuition is defined in Idaho Code § 33-3717(1)(a) as:

[T]he cost of instruction at the colleges and universities. The cost of instruction shall not include those costs associated with said colleges and universities, such as maintenance and operation of physical plant, student services and institutional support, which are complementary to, but not a part of the instructional program.

In accordance with the statutory definition, the Board's Governing Policies and Procedures Manual ("Board Policies") defines "tuition" as follows:

Tuition is defined as the fee charged for the cost of instruction at the colleges and universities. The cost of instruction shall not include those costs associated with said colleges and universities, such as maintenance and operation of physical plant, student services, and institutional support, which are complementary to, but not part of the instructional program. Tuition may be charged only to nonresident, full-time and part-time students enrolled in any degree-granting program and to vocational students enrolled in pre-employment, preparatory programs.

Board Policy § V.R.1.a. (1).

B. Definition of "Matriculation Fees"

Idaho law allows the institutions to charge "matriculation fees" to their resident students. Matriculation fees are defined as:

[T]he fee charged to students for educational costs excluding the cost of instruction. The state board of education and board of regents for the University of Idaho may prescribe matriculation fees for resident students.

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Idaho Code § 33-3717(1)(b). In accordance with this definition and the statutory definition of “tuition,” the Board defines matriculation fees in policy as follows:

Matriculation fee is defined as the fee charged for maintenance and operation of physical plant, student services, and institutional support for full-time students enrolled in academic credit courses and vocational pre-employment, preparatory programs.

Board Policy § V.R.1.a.(2). Thus, while tuition is prohibited for resident students, the institutions can charge matriculation fees, as they are the fees charged for certain educational costs that are not costs of instruction.

We have been informed that Idaho’s institutions currently charge their students for only a fraction of the actual costs of maintenance and operation of physical plant, student services, and institutional support. The remainder of the actual costs for these items is paid out of the institutions’ “general accounts,” consisting of state-generated appropriated funds. The general accounts are currently used not only to help supplement the matriculation fees for the actual costs of these items, but also for other costs involved in running the institutions, including the cost of instruction. The institutions are allowed, subject to Board approval, to increase their matriculation fees to pay for these specified costs. *See generally* Idaho Code § 33-3717(1)(b); Board Policy § V.R.4.a. If the matriculation fees were increased, the institutions would need lesser funds from their general accounts to pay for the actual costs incurred for maintenance and operation of their physical plants, student services, and institutional support. Therefore, by increasing the matriculation fees, the institutions indirectly benefit their general accounts that support the costs of instruction.

C. The Legality of Differential Matriculation Fees Under Art. 9, Sec. 10 of the Idaho Constitution and Idaho Code § 33-3717

The amount of matriculation fees charged by the institutions is within the discretion of the Board. Idaho Code § 33-3717(1)(b). As long as the matriculation fees are used for maintenance and operation of physical plant, student services, and institutional support, such fees are legal under section

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33-3717(1)(b). *See generally* Letter from Steven Berenter, Deputy Attorney General, to Mr. Milton Small, Executive Director, Idaho State Board of Education, dated September 2, 1980 (regarding the imposition of student fees for institutional maintenance), attached hereto as Exhibit B; Attorney General Guideline from Kenneth Mallea, Deputy Attorney General, to Representative Joseph Walker, dated February 4, 1980 (regarding which costs of operating and maintaining Idaho's universities and colleges are properly associated with tuition) 1980 Idaho Att'y Gen. Ann. Rpt. 205, attached hereto as Exhibit C. There is nothing in Idaho Code § 33-3717 or art. 9, sec. 10 of the Idaho Constitution that explicitly requires each student to pay an equal amount of fees. However, if certain students are subject to increased matriculation fees without a related increased expense on behalf of the institution for the costs that may be reimbursed by matriculation fees, there may be significant equal protection concerns.

D. The Legality of Differential Matriculation Fees Under the Equal Protection Clause of the United States Constitution and the Idaho Constitution

Implementing the Program at Idaho's institutions may present equal protection concerns. "The principle underlying the equal protection clauses of both the Idaho and United States Constitutions is that all persons in like circumstances should receive the same benefits and burdens of the law." Bon Appetit Gourmet Foods, Inc. v. State, Dep't of Employment, 117 Idaho 1002, 1003, 793 P.2d 675, 676 (1989); State v. Breed, 111 Idaho 497, 500, 725 P.2d 202, 205 (1986). By its very nature, the Program divides students into different categories according to academic department and associated matriculation fees. Therefore, the Program is subject to an equal protection analysis.

Idaho courts have set forth a three-step equal protection analysis for consideration under the Fourteenth Amendment to the United States Constitution and art. 1, sec. 2 of the Idaho Constitution. *See Sanchez v. City of Caldwell*, 135 Idaho 465, 467, 20 P.3d 1, 3 (2001). First, we must identify the classification under attack. *Id.* Second, we must determine the standard under which the classification should be tested: strict scrutiny, means-focus/intermediate, or rational basis. *Id.* Finally, we must determine whether the appropriate standard has been satisfied. *Id.*

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Applying this three-step analysis to the present matter, the classification at issue is University students in the IBC.² Because this case does not involve suspect classes or fundamental rights, strict scrutiny does not apply to this equal protection analysis.³ State v. Mowrey, 134 Idaho 751, 754, 9 P.3d 1217, 1220 (2000). Intermediate scrutiny under the Fourteenth Amendment to the United States Constitution is not appropriate because the proposal for differential fees is not based on gender or illegitimacy. *Id.* In addition, Idaho's means-focus scrutiny is also not applicable in this matter. The Program does not distinguish the IBC students on an odious basis, or on any basis that is calculated to "excite animosity or ill will." See State v. Hart, 135 Idaho 827, 830, 25 P.3d 850, 853 (2001).

Rational basis scrutiny applies to all other challenges not appropriately analyzed under the strict scrutiny or intermediate/means-focus scrutiny. See Mowrey, 134 Idaho at 754, 9 P.3d at 1220. Applying the rational basis scrutiny to the Program reveals genuine legal concerns. Under both the United States Constitution and the Idaho Constitution, a classification will pass rational basis review "if it is rationally related to a legitimate government purpose" and, as stated in Meisner v. Potlatch Corporation, "if there is any conceivable state of facts to support it." Mowrey, 134 Idaho at 755, 9 P.3d at 1221; Meisner v. Potlatch Corp., 131 Idaho 258, 262, 954 P.2d 676, 680, *cert. denied*, 525 U.S. 818, 119 S. Ct. 56, 142 L. Ed. 2d 44 (1998). When applying the rational basis analysis, courts "do not judge the wisdom or fairness of the challenged legislation." *Id.* See also Sanchez, 135 Idaho at 467, 20 P.3d at 3.

Using the IBC as an example, the Program may fail rational basis scrutiny if the purpose of the classification is only to indirectly charge for increased instructional costs. Instructional costs are "tuition," prohibited by art. 9, sec. 10 of the Idaho Constitution and Idaho Code § 33-3717(1). While the institutions are able, subject to Board approval, to increase the amount of matriculation fees currently charged to their students "across the board" to pay for certain specified costs, the University must be able to demonstrate a rational relationship between the classification of students in the IBC and a legitimate purpose. Assuming this is the only purpose for the Program, there is, arguably, no legitimate government purpose to this classification.

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Assuming the University can demonstrate that the classification has a legitimate government purpose, such as the IBC accounting for a higher level of costs that may be reimbursed by matriculation fees, this conclusion may be different. In other words, if the IBC generates an increased cost for maintenance and operation of physical plant, institutional support or student services, and the differential fees collected are used to pay for these increased costs, a Program based on these actual increased non-instructional costs may pass a rational basis review.

CONCLUSION

In summary, the institutions are not prohibited from charging differential matriculation fees under art. 9, sec. 10 of the Idaho Constitution or Idaho Code § 33-3717, provided that the fees collected are used only for maintenance and operation of physical plant, institutional support or student services. An equal protection analysis, however, leads to the conclusion that the Program may not survive a rational basis review if it is merely a method to allow an institution to be reimbursed for increased costs of instruction. If the classification of the IBC students in the Program has a legitimate purpose, such as accounting for an increased cost for items that may be reimbursed by matriculation fees, it is likely to pass a rational basis review.

Very truly yours,

Terry E. Coffin
Division Chief
Contracts & Administrative Law
Division

¹ The IBC is not a "professional department" as defined by the Board. Board Policy § V.R.1.6.(4).

² For purposes of this specific analysis, we are reviewing the IBC only. However, this analysis is also applicable to any other Program based on a specific academic department or major.

³ The Idaho Supreme Court has determined that "education is not a fundamental right because it is not a right directly guaranteed by the Idaho Constitution." Idaho Schools for Equal Education Opportunity v. Evans, 123 Idaho 573, 582, 850 P.2d 724, 733 (1993). Education is also not a fundamental right guaranteed by the United States Constitution. See San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 93 S. Ct. 1278, 36 L. Ed. 2d 16 (1973).

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

April 30, 2002

The Honorable Pete T. Cenarrusa
Secretary of State
HAND DELIVERED

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

Dear Mr. Cenarrusa:

This guideline is in response to your recent inquiry regarding the eligibility of L. Karl Shurtliff to run for lieutenant governor. Your inquiry is threefold:

1. Do article III, section 2(6) of the Idaho Constitution and Idaho Code § 72-1502(3) preclude a member of the commission for reapportionment from running for the office of lieutenant governor?
2. If a member of the commission for reapportionment is precluded from running for the office of lieutenant governor, what jurisdiction or authority does the secretary of state have to declare a candidate for lieutenant governor ineligible and remove the candidate from the ballot?
3. Are the election contest provisions of Idaho Code §§ 34-2101(2) and 34-2104 the exclusive methods of challenging the election of an executive department officer?

Question 1: A court would most likely hold that a member of the commission for reapportionment is not precluded from running for lieutenant governor.

The Idaho Constitution sets forth the following prohibition, which applies to members of the commission for reapportionment ("commission"):

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A member of the commission shall be precluded from serving in either house of the legislature for five years following such member's service on the commission.

Idaho Const. art. III, § 2(6). This prohibition is echoed in the Idaho Commission for Reapportionment Act. Idaho Code § 72-1502. Therefore, it would not be permissible under Idaho's laws for a member of the commission to become lieutenant governor within five years of service on the commission if the lieutenant governor serves in either house of the legislature.

Article IV of the Idaho Constitution sets forth the executive department of the State of Idaho. Article IV, § 1, identifies the lieutenant governor as a member of the executive department. Article IV also sets forth a variety of other provisions relating to the executive branch offices, including the requirement that the lieutenant governor is elected by the qualified electors of the state. Idaho Const. art. IV, § 2.

Article III of the Idaho Constitution sets forth the legislative department of the State of Idaho.¹ The membership of the legislature is set forth as follows:

Following the decennial census of 1990 and in each legislature thereafter, 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. 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.

Idaho Const. art. III, § 2(1). Notably, no mention of the lieutenant governor is made within the entirety of article III of the Idaho Constitution.

It is evident that the lieutenant governor is not a senator or a representative; the lieutenant governor is not a member of the legislative branch of government. The lieutenant governor is elected by the qualified electors of the state, not by the electors in a legislative district. There are a variety of

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other provisions (qualifications, terms) in article IV that distinguish the lieutenant governor from a state legislator.

The sole provision associating the lieutenant governor with the legislature is set forth in article IV, § 13 of the Idaho Constitution:

The lieutenant governor shall be president of the senate, but shall vote only when the senate is equally divided. In case of the absence or disqualification of the lieutenant governor from any cause which applies to the governor, or when he shall hold the office of governor, then the president pro tempore of the senate shall perform the duties of the lieutenant governor until the vacancy is filled or the disability removed.

Idaho Const. art. IV, § 13.

This provision, read together with article III, §§ 9-10 of the Idaho Constitution has been construed by the Idaho Supreme Court to simply provide a mechanism for the efficient operation of the senate in the event of deadlock. Sweeney v. Otter, 119 Idaho 135, 804 P.2d 308 (1990). In Sweeney, the Idaho Supreme Court, quoting Joseph Story in Story on the Constitution, (1873), observed that there is nothing novel about a presiding officer who “is not a constituent member of the body over which he is to preside.” Sweeney, 119 Idaho at 141, 804 P.2d at 314. The court noted further, “[t]he source of the American governmental concept of a non-legislative person presiding over the Senate and having a casting vote originates with the New York Constitution drafted in 1777.” *Id.*, citing N.Y. Const. of 1777, art. XX (emphasis added).

“The general rules of statutory construction apply to constitutional provisions as well as statutes.” Rudeen v. Cenarrusa, 136 Idaho 560, 567, 38 P.3d 598, 605 (2001), citing Sweeney, *supra*. The law must be followed as written when the language is clear. *Id.*, citing Westerberg v. Andrus, 114 Idaho 401, 403, 757 P.2d 664, 666 (1988). When the law is not clear, i.e., ambiguous, then a court will apply rules of construction to give effect to what was intended by the legislature, and, in so doing, may consult the provision’s legislative history. City of Sun Valley v. Sun Valley Co., 123 Idaho 665, 667, 851 P.2d 961, 963 (1993).

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In this case, it appears likely that a court would rule that the constitutional prohibition on “serving in either house of the legislature” is clear on its face. In other words, a member of the commission cannot be a state representative or senator for five years after service on the commission. Furthermore, it is also likely that a court would not rule that the lieutenant governor, a statewide elected officeholder in the executive branch of government, falls within the reach of this prohibition.

Even if it is argued that the constitutional prohibition is ambiguous,² the legislative history of the constitutional prohibition supports the clear intent discussed above. During the legislative debates over Senate Joint Resolution 105 (1993), the minutes for the House State Affairs Committee reflect the following testimony by Senator Evan Frasure:

As a true citizens committee those individuals could not run for the legislature for five years after serving on this committee, so they would have no personal vested interest.

Hearing Minutes, State Affairs Committee, Idaho House of Representatives, March 17, 1993.

This statement is consistent with and reinforces the intent discussed above. In other words, future legislators should have no direct influence, *i.e.*, debate and a vote, on the borders/constituents of their prospective legislative districts. The lieutenant governor does not fit within this intent—he or she is an executive branch official selected by all of the qualified electors of the State of Idaho, not from a legislative district drawn by the commission.

Question 2: The secretary of state has authority to determine the qualifications of candidates.

Idaho Code § 34-1404 provides in pertinent part:

The election official shall verify the qualifications of the nominees, and shall not later than seven (7) days after the close of filing, certify the nominees and any special questions placed by action of the governing board of the political subdivision. . . . For all other elections, the nomination shall be

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filed not later than 5:00 p.m. on the sixth Friday preceding the election for which the nomination is made. The election official shall verify the qualifications of the nominee, and shall not more than seven (7) days following the filing, certify the nominees and any special questions, placed by action of the governing board of the political subdivisions, to be placed on the ballot of the political subdivision.

(Emphasis added.)

Under this statute, the secretary of state verifies the qualifications of the nominee and thereafter certifies that a candidate for lieutenant governor is qualified. In the event that a candidate is not qualified for the office sought, then his or her name would not be certified and, accordingly, not placed on the ballot. See Idaho Code § 34-904 (“All candidates who have filed their declarations of candidacy and are subsequently certified shall be listed” on the primary ballot). A candidate who seeks to challenge a decision against certification may seek to do so in an extraordinary proceeding.

I note that, upon certification, the only apparent recourse a complainant may have is to file an action in the district court for Ada County. See Idaho Code §§ 34-2122 and 34-2123 (election contests in primary elections and Ada County venue for statewide executive offices). The timelines for election contest proceedings are very short, and an appeal of the district court’s determination is assigned priority in the Idaho Supreme Court. See Idaho Code § 34-2124 (the candidate challenging a primary election must file an affidavit with the appropriate court within five (5) days of completion of the canvass); Idaho Code § 34-2128 (a court opinion is due no more than ten (10) days after the hearing); Idaho Code § 34-2129 (an appeal must be filed within ten (10) days of judgment, and the Idaho Supreme Court must issue a decision within ten (10) days after receipt of the appeal).

I also note that a procedure for contesting the qualifications of a candidate prior to the conduct of a primary election is not set forth in the Idaho Code. It is possible, however, that a court may review a candidate’s qualifications in an extraordinary proceeding.

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Question 3: Election contests are governed by Idaho Code §§ 34-2101 through 31-2130.

If a candidate is elected to an executive office for which he is not qualified, Idaho Code §§ 34-2101(2) and 34-2104 embody the exclusive method for contesting the election. Idaho Code § 34-2104 provides:

The legislature, in joint meeting, shall hear and determine cases of contested election for all officers of the executive department. The meeting of the two (2) houses to decide upon such elections shall be held in the house of representatives and the speaker of the house shall preside.

Aside from the provisions mentioned above regarding contest of a primary election, this is the sole course of action provided in the Idaho Code to contest the election of an executive officer.

I hope that you find this guideline helpful. As always, if you have any questions, or would like to discuss this more fully, please contact me.

Sincerely,

William A. von Tagen, Division
Chief
Intergovernmental & Fiscal Law
Division

¹ The third branch of government, the judicial department, is set forth in article V of the Idaho Constitution.

² Certainly, there may be other ways to express intent—e.g., “a member of the Commission may not serve as a state senator or state representative for five years following service on the Commission.” However, this office believes it is most likely a court would rule the prohibition clear on its face.

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July 31, 2002

Susan Renfro, Clerk
Board of Tax Appeals
STATEHOUSE MAIL

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

Dear Ms. Renfro:

BACKGROUND AND ISSUES PRESENTED

The Board of Tax Appeals (Board) asks whether non-attorneys may represent taxpayers who have appeals before the Board. In at least one case, objections were raised by an individual attorney who objected to a county being represented by a deputy assessor, who was not an attorney, rather than a deputy prosecuting attorney. In other instances, questions have been raised about individual “tax agents” from out of state appearing before the Board of Tax Appeals to represent groups of property owners who are appealing their property valuation. It has been the Board’s position that non-attorneys are authorized to represent parties by virtue of the Board of Tax Appeals Rule 30, which provides:

APPEARANCE AND PRACTICE BEFORE THE BOARD:

The right to appear and practice before the Board shall be limited to the following classes of persons: (4-5-00)

01. Natural Persons. Parties who are natural persons representing themselves; (4-5-00)
02. Authorized Persons. Duly authorized directors, officers or designated full-time salaried employees of corporations representing the corporation of which they are, respectively, directors, officers or employees; (4-5-00)

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03. Authorized Representatives. Duly authorized partners, joint venturers, designated full-time salaried employees, or trustees representing their respective partnerships, joint ventures or trusts; (4-5-00)

04. Authorized Attorneys. Attorneys duly authorized, who are qualified and entitled to practice in the courts of the state of Idaho; (4-5-00)

05. Officers or Employees. Public officer or designated employees when representing the agency of which they are an officer or employee; (7-1-93)

06. Board Approved Power Of Attorney. A party may designate a representative in writing through a Board approved power of attorney; (4-5-00)

07. Intervention. Parties entitled to intervene under Section 085. (4-5-00)

Board of Tax Appeals Rule 030.

Of particular concern is Rule 30.06, which allows a party to designate, in writing, a representative to represent him before the Board. There is no requirement in the rule that this representative be an attorney licensed to practice law in the State of Idaho. In fact, Rule 30.04 read together with Rule 30.06 implies that non-attorneys are authorized to represent taxpayers before the Board including presentation of evidence, examination of witnesses and arguing points of law.

Presently, taxpayers might be represented by an attorney, an accountant, by a relative or friend or anyone of the taxpayers' choosing. In addition, a partnership or joint venture might be represented by one or more of the partners or joint ventures and a corporation might be represented by an officer, director or employee of the corporation. As noted above, counties have appeared through the county's assessor.

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The Board's rule on representation of practice has developed over time, partly through recognition of the fact that there is not enough tax money at issue in many cases to justify the hiring of an attorney to represent the taxpayer.

NATURE OF BOARD PROCEEDINGS

Parties appearing before the Board are given an opportunity to present witnesses, to cross-examine witnesses, and to argue the application of the facts of a particular case to the tax statutes in question. Under Idaho Code § 63-3808, the Board and each member has the power to issue subpoenas requiring the attendance of witnesses and to require the production of documentary evidence to the same extent as a court of law. Idaho Code § 63-3809(1) states that a hearing on the case will be conducted and a recommended decision will be rendered by the hearing officer or by one Board member. Idaho Code § 63-3810 allows for rehearing and Idaho Code § 63-3812 provides for an appeal from the Board to the courts.

In Idaho State Bar Assoc. v. Idaho Public Utilities Comm., 102 Idaho 672, 637 P.2d 1168 (1981), the Idaho Supreme Court ruled that proceedings before the Idaho Public Utilities Commission (PUC) are quasi-judicial in nature. The court would undoubtedly rule that proceedings before the Board are likewise quasi judicial.

ANALYSIS

Idaho Code § 3-401 states that the practice of law is a privilege granted by the state and not a right of the individual. This section goes on to say that "the public shall be properly protected against the unprofessional, improper and unauthorized practice of law. . . ." To this end, Idaho Code § 3-420 provides misdemeanor criminal penalties for the unauthorized practice of law.

Just what constitutes the unauthorized practice of law, particularly in tax disputes, is not entirely clear. The area of tax is a field where the professions of law and accounting overlap. In addition, officers of a corporation or the corporation's directors or the partners in a partnership have often appeared

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before tribunals to state the case for the entity involved. According to one law review article:

The lack of a clear standard has made it difficult to enforce the unauthorized practice of law rules. The problem is particularly apparent in the field of accounting where “the legal phases and accounting phases are so interrelated, interdependent and overlapping that they are difficult to distinguish.”

Bringing Down the Bar: Accountants Challenge Meaning of Unauthorized Practice, Susan B. Schwab, 21 Cardozo L. Rev. 1425, 1430.

The Idaho Supreme Court addressed what constitutes the practice of law in In re Matthews, 58 Idaho 772, 79 P.2d 535 (1938). There, the court stated:

The practice of law as generally understood is the doing or performing services in a court of justice, in any matter depending therein, throughout its various stages, and in conformity with the adopted rules of procedure. But in a larger sense, it includes legal advice and counsel, and the preparation of instruments and contracts by which legal rights are secured, although such matter may or may not be depending in a court.

. . . .

Where the rendering of such services involves the use of legal knowledge or skill, or where legal advice is required and is availed of or rendered in connection with such transactions, this is sufficient to characterize the services as practicing law.

58 Idaho at 776-77 (citations omitted).

The Idaho Supreme Court, in a series of cases in the late 1970s and early 1980s, made it clear that representing individuals in front of adminis-

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trative tribunals constitutes the practice of law and therefore is generally limited to attorneys. In White v. Idaho Forest Industries, 98 Idaho 784, 572 P.2d 887 (1977), the Idaho Supreme Court noted that the Gibbens Company represented the defendant, Idaho Forest Industries, before the Idaho Industrial Commission (Industrial Commission). The court noted that the Gibbens Company had prepared and signed pleadings, introduced evidence, examined and cross-examined witnesses and in general advised and prosecuted the case for Idaho Forest Industries. The court stated: "the functions engaged in by the Gibbens Company may well be within the exclusive province of licensed attorneys," and added, "the fact that the practice here is before an administrative rather than a judicial body does not make it any less authorized." 98 Idaho at 788, 572 P.2d at 891.

Similarly, in Weston v. Gritman Memorial Hospital, 99 Idaho 717, 587 P.2d 1252 (1978), the court noted that Steve Mallard, the Director of the Idaho Hospital Association, introduced evidence, examined and cross-examined witnesses, interposed objections and in general acted as an attorney in the hearing that was held before the Industrial Commission. In the opinion, the court directed that the officials at the Idaho State Bar conduct an investigation "as may be warranted."

The third case considered by the Idaho Supreme Court bears directly on the issue now being raised by the Board of Tax Appeals. At issue in Idaho State Bar Assoc. v. Idaho Public Utilities Comm., 102 Idaho 672, 637 P.2d 1168 (1981), was a rule issued by the PUC regarding the representation of parties appearing before it. The rule, PUC Rule 4.3 stated:

Appearances and representation of parties shall be made as follows: (a) a party who is a natural person shall be entitled to represent himself or herself or be represented by an attorney. (b) Non-profit organizations are entitled to be represented by an officer, other duly authorized representative or by an attorney. (c) Utility and motor carriers with present or anticipated annual gross income less than \$100,000 are entitled to be represented by a partner, officer, duly authorized representative, or by an attorney. (d) All other parties shall appear and be represented by an attorney

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duly admitted to practice land in good standing in the State of Idaho.

102 Idaho at 673, 637 P.2d at 1169 (emphasis added).

The rule proposed by the PUC authorizing representation is narrower than the Board's Rule 30. For example, the proposed PUC rule stated that a natural person may only be represented by an attorney. The only exceptions were for non-profit corporations and utilities and motor carriers who could be represented by "other duly authorized representative[s]." Board Rule 30.06 states that "a party may designate a representative in writing through a Board approved power of attorney." This would authorize any party with a case before the Board to designate anyone as a representative for purposes of filing an appeal, drafting legal briefs, drafting motions, presenting evidence, calling witnesses, entering objections to the proceedings, or arguing points of law. Thus, the court's ruling in Idaho State Bar Assoc. v. Idaho Public Utilities Comm. is particularly relevant.

Regarding the PUC's rule, the Idaho Supreme Court held:

The Bar specifically notes that rule 4.3(b) and (c) apparently authorize the practice of law by lay persons.

Inasmuch as Rule 4.3(b) and (c) profess to empower third persons unconnected with the entity and acting in a representative capacity in proceedings before the Commission to engage in activities constituting the practice of law, the Commission in adopting these subsections has infringed upon the inherent and singularly judicial power granted by the constitution to this court to define and regulate the practice of law.

. . . .

Yet consistent with the recognition that proceedings before the Commission are quasi-judicial, and often involve matters more administrative than judicial in nature, some relaxation of the traditional rule against the practice of

law by lay persons is appropriate. Accordingly, this court has no objection to Rule 4.3(b) and (c) to the extent they allow representation of a sole proprietorship by the owner, or representation of a partnership by the partners or representation of a corporation or non-profit organization by the officers of those entities. However, to the extent Rule 4.3 (b) and (c) authorize representation of an entity by third persons unconnected with the entity, the objection of the Bar is well founded. It is well settled that in proceedings before regulatory bodies such as the Commission, that third persons unconnected with the entity and acting in a representative capacity in such proceedings would necessarily be engaging in activities commonly associated with the practice of law.

102 Idaho at 676, 637 P.2d at 1172 (citations omitted).

The court went on to hold:

Thus, it is the decision of this court that the Commission is without authority to adopt those portions of Rule 4.3(b) and (c) which permit representation of a utility, motor carrier or non-profit organization by a non-attorney unconnected with the entity.

102 Idaho at 677, 637 P.2d at 1173.

Assuming that the Idaho Supreme Court would follow its precedent in Idaho State Bar Assoc. v. Idaho Public Utilities Comm. and apply it when reviewing the Board's Rule 30, it would undoubtedly find Board Rule 30.06 invalid and a violation of Idaho statutes, of court rules and in violation of the separation of powers provisions of the Idaho Constitution.

While a court might be convinced to allow a CPA to play a limited role in explaining a taxpayer's case to the Board, it is unlikely that our court would ever rule that a tax agent, neighbor, cousin or friend could be authorized to routinely represent a taxpayer's interests before the Board. Furthermore, based on precedent, the accountants' role would be limited to explaining the rationale used in preparing tax returns and in claiming certain

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deductions or exemptions. Based on precedent, I doubt the court would allow a rule to stand which allows accountants or other non-attorneys to argue points of law, to prepare legal briefs or call and examine witnesses.

RECOMMENDATIONS

I recommend that the Board carefully review Rule 30 and consider striking Rule 30.06. Failure to do so could put the Board in the position of being the defendant in a legal action brought by the Idaho State Bar or brought by an opposing party in a contested case. After repealing Rule 30.06, the Board might wish to approach the Idaho State Bar, the Idaho Supreme Court and perhaps the legislature and seek specific authorization to allow licensed professionals, such as accountants to have some limited role in representing taxpayers in proceedings before the Board.

Sincerely,

William A. von Tagen, Division
Chief
Intergovernmental & Fiscal Law
Division

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

December 30, 2002

The Honorable Pete T. Cenarrusa
Secretary of State
HAND DELIVERED

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

Dear Mr. Cenarrusa:

This guideline is in response to your recent inquiry asking: "Is the current employment of a state employee jeopardized by the subsequent election of the employee's spouse to an office which supervises the employee?" Consistent with the longstanding position of this office, it does not appear that a current employee must be terminated because of the spouse's election.

1. There is no Appointment or Vote for Appointment of a Previously Employed Employee of the Secretary of State's Office Upon Succession of Office

Idaho Code § 18-1359 states the following:

(1) No public servant shall:

....

(e) Appoint or vote for the appointment of any person related to him by blood or marriage within the second degree, to any clerkship, office, position, employment or duty, when the salary, wages, pay or compensation of such appointee is to be paid out of public funds or fees of office.

Provided an employee is already working within the office, then there can be no appointment or vote for appointment of the employee by the elected official. The situation regarding the appointment of employees is expressly considered within the Idaho Code. For example, according to Idaho Code § 67-1401(13), the Attorney General is expressly empowered to appoint

deputies and staff. No similar authority is expressly granted to the Secretary of State.

The interpretation of these provisions indicates that an employee within the Secretary of State's office is not hired or re-hired with a transition in office by the elected official. The employee spouse is not being appointed to a position of employment by the elected official. Rather, the spouse is merely continuing in a position she already holds. The prohibition found in Idaho Code § 18-1359 does not apply unless the elected official attempts to promote or appoint the employee spouse to a new position.

2. Current Employment is not Jeopardized by the Subsequent Election of a Spouse

As you are aware, within the last legislative session, the legislature passed S1422 to amend Idaho Code § 18-1359, permitting an employee of a governmental entity to retain his or her position when the spouse is elected as a local government official. Although the amendment appears directed at local government, it reflects a statutory endorsement of this office's broader opinion as reflected within the *Idaho Ethics In Government Manual* and specifically discussed in the nepotism section in Question No. 5:

Question No. 5: Is the current employment of a public employee jeopardized by the subsequent election of a relative to a public office which has supervisory authority over that employee?

Answer: Idaho Code § 18-1359 sets forth the nepotism policy of the state of Idaho. The Attorney General's Office has taken the position that *existing* public employment will not be jeopardized by the *subsequent* election of a relative of that employee to public office.

Election of an employee's spouse to a supervisory public office should not result in the termination of the current employee.

Although not addressed within this question, an ancillary issue necessarily arising from this question regards promotion and pay increases for

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the current employee following election of the spouse. The Idaho Ethics In Government Manual also addresses this issue.

According to the answer to Question No. 6, the employee will be frozen in his or her current job assignment but may be eligible to receive non-meritorious pay increases. In other words, if everyone in the office is receiving a 2% pay increase, then the employee of the spouse may also be entitled to receive a 2% pay increase. No promotion, advancement, or bonus is authorized.

I hope that you find this guideline helpful. If you have any questions regarding this guidance or any related issue, please contact me.

Sincerely,

Brian P. Kane
Deputy Attorney General
Intergovernmental & Fiscal Law
Division

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**ATTORNEY GENERAL'S
CERTIFICATES OF REVIEW
FOR THE YEAR 2002**

ALAN G. LANCE
ATTORNEY GENERAL
STATE OF IDAHO

CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

February 11, 2002

The Honorable Pete T. Cenarrusa
Secretary of State
HAND DELIVERED

Re: Certificate of Review
Initiative Regarding Judicial Accountability Initiative Law
(J.A.I.L.)

Dear Mr. Cenarrusa:

An initiative petition was filed with your office on January 15, 2002. Pursuant to Idaho Code § 34-1809, this office has reviewed the petition and has prepared the following advisory comments. It must be stressed that, given the strict statutory time frame in which this office must respond and the complexity of the legal issues raised in this petition, this office's review can only isolate areas of concern and cannot provide in-depth analysis of each issue that may present problems. Further, under the review statute, the Attorney General's recommendations are "advisory only," and the petitioners are free to "accept or reject them in whole or in part."

BALLOT TITLE

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

MATTERS OF SUBSTANTIVE IMPORT

A. Introduction

Entitled "The IDAHO Judicial Accountability Initiative Law (J.A.I.L.)," petitioners have presented a petition that seeks to substantially

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alter the judicial system of Idaho. Specifically, petitioners seek to alter and implement the following:

1. Judicial Immunity will be eliminated.
2. A Special Grand Jury related solely to the conduct of judges on the bench.
3. Procedures for the removal of judges.
4. Additional provisions related to the implementation of the Grand Jury.

Each of these measures would most likely be struck down by a reviewing court as unconstitutional and a violation of the separation of powers doctrine.

The separation of powers doctrine recognizes that each branch of the government is intended to operate in its own sphere of authority subject only to those checks and balances expressly granted within the Idaho Constitution. Absent a constitutional amendment, this measure will most likely be struck down. For additional consideration and review, an overview of the principal provisions of the Idaho Constitution related to this issue is provided below.

B. Separation of Powers Defined

Idaho Constitution article 2, § 1, defines the departments of government and states the policy of separation of powers. Specifically, article 2, § 1, states:

Departments of government.—The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial; and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any powers properly belonging to either of the others, except as in this constitution expressly directed or permitted.

The initiative is considered a legislative power. *See* Idaho Constitution, art. 3, § 1. As a legislative power, the initiative cannot regulate the powers of the

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courts nor act as an oversight mechanism. All judicial power is vested within the courts.

It is quite clear that the Idaho Constitution expressly states that each branch of government is permitted to exercise those powers granted to it without encroachment from the other branches of government. As can be read from the last sentence of article 2, § 1—no department may exercise the power of another department unless it is expressly permitted within the Idaho Constitution. J.A.I.L., as enacted through the initiative process, would unconstitutionally encroach on the powers of the judicial branch because the statute would operate as an impermissible exercise of judicial power by the legislature without an express constitutional grant of power.

The separation of judicial power from executive power and the legislative power was not merely a matter of convenience. The three branches of government are coordinate and yet each, within the administration of its own affairs, is supreme. The granting of judicial power to the courts carries with it, as a necessary incident, the right to make that power effective in the *administration* of justice under the constitution. See R. E. W. Const. Co. v. District Court of Third Judicial Dist., 88 Idaho 426, 435-36, 400 P.2d 390, 396 (1965). Rules of practice and procedure are, fundamentally, matters within the judicial power and subject to the control of the courts in the administration of justice. The courts accept legislative *co-operation* in rendering the judiciary more effective. They deny the right of legislative *dominance* in matters of this kind. Dowling, *The Inherent Power of the Judiciary*, Vol. XXI, American Bar Association Journal, page 635.

The J.A.I.L. initiative seeks to create an additional body with power to remove judges, review the decisions made by judges, and in certain instances, indict a judge for a crime.¹ Essentially, this petition creates a legislative oversight mechanism for the courts. Creation of this body through statute is an impermissible exercise of judicial power by a legislative body.

Article 5 of the Idaho Constitution defines the powers of the judicial branch of government. Specifically, article 5, § 2, states:

Judicial Power—Where vested.—The judicial power of the state shall be vested in a court for the trial of

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impeachments, a Supreme Court, district courts, and such other courts inferior to the Supreme Court as established by the legislature. The courts shall constitute a unified and integrated judicial system for administration and supervision by the Supreme Court. The jurisdiction of such inferior courts shall be as prescribed by the legislature. Until provided by law, no changes shall be made in the jurisdiction or in the manner of the selection of judges of existing inferior courts.

Reading this section in its entirety, the legislature is empowered to establish certain courts, however, once established those courts are subject to the administration and supervision of the Idaho Supreme Court. The J.A.I.L. initiative usurps the administrative and supervisory power of the Idaho Supreme Court by replacing it as the highest authority on the conduct of judges within the judicial system. This is in direct conflict with the above quoted constitutional provision.

The above provision of the constitution is a restriction upon the power of the legislature to limit the jurisdiction conferred by the constitution on the judicial department of the state. While the legislature may provide a proper system of appeals, and regulate by law, when necessary, the methods of proceeding in the exercise of the powers of all the courts below the Supreme Court, in doing so it has no power to prescribe a jurisdiction for the district courts of the state which is less broad than contained in section 20, art. 5, of the constitution. See Fox v. Flynn, 27 Idaho 580, 150 P. 44, 46.

The power of the legislature is specifically limited in other areas as well. As can be seen in Idaho Constitution, article 5, § 13:

Power of legislature respecting courts.—The legislature shall have no power to deprive the judicial department of any power or jurisdiction, which rightly pertains to it as a coordinate department of the government; but the legislature shall provide a proper system of appeals, and regulate by law, when necessary, the methods of proceeding in the exercise of their powers of all the courts below the Supreme Court, so far as the same may be done without conflict with this constitution, provided, however, that the legislature can provide

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mandatory minimum sentences for any crimes, and any sentence imposed shall be not less than the mandatory minimum sentence so provided. Any mandatory minimum sentence so imposed shall not be reduced.

This section operates as another limitation on the power of the legislature or the initiative as an exercise of legislative power to control the courts. The J.A.I.L. initiative seeks to directly invade the province of the judicial system through the legislative process.

CONCLUSION

In the interests of timeliness and brevity this review deals only with the separation of powers issue. Other issues, that are highly problematic, include the fiscal impact of this measure if implemented, the creation of original appellate jurisdiction within the U.S. Supreme Court, the regulation of federal judges, and a myriad of other constitutional flaws. Nearly every provision of this initiative contains elements that are in direct conflict with the well settled principles of state and federal constitutional law.

I HEREBY CERTIFY that the enclosed measure has been reviewed for form, style and matters of substantive import and that the recommendations set forth above have been communicated to petitioner Rose Johnson by deposit in the U.S. Mail of a copy of this certificate of review.

Sincerely,

ALAN G. LANCE
Attorney General

Analysis by:

Brian P. Kane
Deputy Attorney General

¹ According to the petition, a special jury would be convened to try the judge as well as sentence the judge through a procedure in which, upon a finding of guilt—each juror would recommend a sentence that would then be averaged with other jurors' sentences. The average sentence would then be the judge's sentence.

CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

February 21, 2002

The Honorable Pete T. Cenarrusa
Secretary of State
HAND DELIVERED

Re: Certificate of Review
Initiative to Amend Idaho Code § 36-102

Dear Mr. Cenarrusa:

An initiative petition was filed with your office on January 31, 2002. Pursuant to Idaho Code § 34-1809, this office has reviewed the petition and has prepared the following advisory comments. It must be stressed that, given the strict statutory time frame in which this office must respond and the complexity of the legal issues raised in this petition, this office's review can only isolate areas of concern and cannot provide in-depth analysis of each issue that may present problems. Further, under the review statute, the Attorney General's recommendations are "advisory only," and the petitioners are free to "accept or reject them in whole or in part."

BALLOT TITLE

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

MATTERS OF SUBSTANTIVE IMPORT

Entitled "Initiative to Amend Title 36-102 That Governs the Idaho Fish And Game Commission," petitioners apparently seek to amend Idaho Code § 36-102. The amendments to Idaho Code § 36-102 are outlined as follows:

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1. Reduce the number of members of the Idaho Fish and Game Commission from seven (7) members to five (5);
2. Eliminate the service of members to be at the pleasure of the Governor;
3. Eliminate the restriction on party (political) affiliation;
4. Create a Citizen Wildlife Advisory Council (CWAC), from which Commission members would be nominated;
5. Reduce the number of regions from seven (7) to five (5);
6. Amend the geographical boundaries of the regions in order to accomplish the above-referenced reduction;
7. Increase the length of the term from four (4) to six (6) years;
8. Provide for staggered terms.

The Idaho Fish and Game Commission is created pursuant to statute. Idaho Code § 36-101. Offices of legislative creation can be modified, controlled, or abolished by the legislature. *See Smylie v. Williams*, 81 Idaho 335, 341 P.2d 451 (1959). The initiative is recognized by the Idaho Constitution as a legislative power; therefore, these changes may be made through an initiative. Idaho Constitution article 3, § 1; *Smylie*. As a result, this measure does not appear to present any legal issues at this time.

CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

CONCLUSION

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 Kermit W. Andrus by deposit in the U.S. Mail of a copy of this certificate of review.

Sincerely,

ALAN G. LANCE
Attorney General

Analysis by:

Brian P. Kane
Deputy Attorney General

CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

February 28, 2002

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 February 12, 2002, called the "Idaho State Term Limits Act of 2002" (proposed initiative).

Idaho Code § 34-1809 provides in relevant part:

Review of initiative and referendum measures 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 create a new code provision entitled Idaho Code § 34-907. The proposed Idaho Code § 34-907 contains ballot access restrictions for statewide elected officials and state legislators.

1. The Initiative

This initiative is similar to former Idaho Code § 34-907, which was upheld by the Idaho Supreme Court on December 13, 2001, and then repealed by the Idaho Legislature on February 6, 2002. Former Idaho Code § 34-907, was also passed pursuant to an initiative. As indicated previously, former Idaho Code § 34-907, which is nearly identical to the proposed Idaho Code § 34-907 was upheld as constitutionally permissible in Rudeen v. Cenarrusa, — Idaho —, 38 P.3d 598 (2001). This initiative also appears to be constitutionally permissible because it imposes the same ballot access restrictions that were previously upheld as constitutionally permissible in Rudeen.

The primary change in the current initiative is that it omits the limitation on ballot access for local government elected officials at the county and municipal levels. As previously stated, ballot access restrictions imposed upon statewide elected officials and state legislators are constitutionally permissible. As a result, this initiative does not appear to raise any substantive legal or constitutional issues.

2. A Note on the Effective Date for Terms Counted Toward Ballot Access Restrictions

Section 3 of the 2002 initiative states that the effective date of the initiative is December 1, 1994. It also states that “[s]ervice prior to December 1, 1994 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 general election will count toward the ballot access restriction calculations for state legislators only.

Section 3 of the proposed initiative establishes the date from which terms are calculated to determine when ballot access restrictions begin. The initiative includes all “terms of office [that] began on or after December 1, 1994” in the calculation of terms leading toward ballot access restrictions. It will cover the state legislative terms that were the subject of the 1994 general election because those terms began on December 1, 1994. This initiative, if passed, would take effect pursuant to its enacting clause, “one day after passage. . . .”

This provision will not operate retrospectively. This provision will have no effect on officeholders lawfully on the ballot for the 2002 primary or general election and subsequently elected. Those officeholders, lawfully elected prior to passage of this initiative, will serve their term, but may be prohibited from being listed as a candidate in a future election. This provision will prohibit affected officeholders from having their names listed on the ballot in certain elections held after passage of this initiative.

CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

CONCLUSION

I HEREBY CERTIFY that the enclosed measure has been reviewed for form, style and matters of substantive import and that the recommendations set forth above have been communicated to petitioner Peter C. Erbland by deposit in the U.S. Mail of a copy of this certificate of review.

Sincerely,

ALAN G. LANCE
Attorney General

Analysis by:

Brian P. Kane
Deputy Attorney General

CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

March 11, 2002

The Honorable Pete T. Cenarrusa
Secretary of State
HAND DELIVERED

Re: Certificate of Review
Referendum on Repeal of Term Limits Law

Dear Mr. Cenarrusa:

A referendum petition was filed with your office on February 26, 2002, seeking a referendum on the legislature's enactment of H425, which repeals Idaho Code §§ 34-907, 50-478 and 33-443.

Idaho Code § 34-1809 provides in relevant part:

Review of initiative and referendum measures 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 referendum. It must be stressed that 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."

CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

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 referendum would repeal H425 enacted by the 2002 legislature over the veto of the governor. H425 repealed the term limits initiative passed by voters in 1994. It repealed sections 34-907, 50-478 and 33-443 of the Idaho Code. Repeal of the enactment would reinstate term limits as set forth in those statutes.

The Idaho Supreme Court reviewed term limits in Rudeen v. Cenarrusa, — Idaho —, 38 P.3d 598 (2001). Because the Idaho Supreme Court upheld term limits, it appears that this referendum is constitutionally permissible, with the exception that reenacting subsections (1)(a) and (b) of § 34-907 would not impose term limits on members of the U.S. Senate or U.S. House of Representatives. It has been held by the U.S. Supreme Court that the states are without power to impose term limits on members of Congress. See U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 115 S. Ct. 1842, 131 L. Ed. 2d 881 (1995).

The referendum would impose limitations on ballot access for state elected executive officers, state legislators and state elected officials at the county, municipal and school board levels. As indicated above, these limitations have been upheld by the Idaho Supreme Court.

Should H425 be rejected by the voters in a referendum, it will have no effect on officeholders lawfully elected prior to the referendum. Those officials will serve their term, but would be prohibited from being listed as candidates in future elections.

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A necessary note to this Certificate of Review are the provisions of Idaho Code § 34-1811, which provides for the procedure when conflicting measures are approved. The Office of the Attorney General has reviewed two other measures related to term limits prior to the instant referendum. Neither is identical to the other, nor are they identical to the instant referendum; therefore, they must be treated as conflicting measures.

According to Idaho Code § 34-1811: "If two (2) or more conflicting laws shall be approved by the people at the same election, the law receiving the greatest number of affirmative votes shall be paramount in all particulars as to which there is a conflict, even though such law may not have received the greatest majority of affirmative votes." Therefore, if all submitted measures pass, then the measure receiving the greatest number of affirmative votes shall be the one enacted. This would appear to apply equally to the instant referendum insofar as the effects of the repeal of H425 would conflict with the other term limits initiatives.

CONCLUSION

I HEREBY CERTIFY that the enclosed measure has been reviewed for form, style and matters of substantive import and that a copy has been provided to petitioner Dennis Mansfield, 8500 Stynbrook, Boise, ID 83704.

Sincerely,

ALAN G. LANCE
Attorney General

Analysis by:

William A. vonTagen
Deputy Attorney General

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