

**IDAHO
ATTORNEY
GENERAL'S
ANNUAL REPORT**

**SELECTED INFORMAL
GUIDELINES**

AND

CERTIFICATES OF REVIEW

FOR THE YEAR

2003

Lawrence G. Wasden
Attorney General

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2003 Idaho Att'y Gen. Ann. Rpt. 57

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ATTORNEYS GENERAL OF IDAHO

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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
LAWRENCE G. WASDEN	2003-



Lawrence G. Wasden
Attorney General

INTRODUCTION

Dear Fellow Idahoan:

The year 2003 was perhaps one of the busiest and most controversial years ever for the Office of the Attorney General. The year saw my office play a lead role in two very significant legal matters – the Boise City prosecutions and the University Place investigation. As this introduction is being written in early 2004, the Boise City prosecutions have reached conclusion, but the impact will be felt for years to come as citizens and government officials seek to restore and maintain trust and confidence in government. The University Place investigation continues, and we may not see it finally resolved for some time. These two major, historic events evoke the famous line penned by Charles Dickens in his classic novel A Tale of Two Cities (1859): "It was the best of times, it was the worst of times...."

The Boise City prosecutions were originally brought to the Office of the Attorney General by the Ada County Prosecuting Attorney, who declared a conflict of interest and asked my office to assume investigatory and prosecutorial authority. The investigation lasted several months, culminating in grand jury indictments against three former Boise City officials. The former Director of Human Resources for the City of Boise pled guilty to misuse of public funds, a felony. The former Chief of Staff for the Mayor pled guilty to four felonies – presenting a fraudulent voucher, two counts of misuse of public funds and electronic eavesdropping. The former Mayor pled guilty to two felonies – presenting a fraudulent voucher and misuse of public money. The team of investigators and prosecutors in my Criminal Law Division who worked on this case for over one year deserves a big "thank you" for successfully bringing to conclusion one of the sorriest chapters in Idaho's history.

The University Place investigation began in the spring, when the State Board of Education sought the appointment of a special deputy attorney general to investigate issues surrounding a series of real estate and financial transactions aimed at the construction of a satellite campus for the University of Idaho in downtown Boise. I appointed the special deputy attorney general, who worked for several months before releasing a 443-page report for the Board's review. The report explained the details of the complex project and identified a number of issues raising potential legal concerns.

In December of 2003, my office was asked by the Ada County Prosecuting Attorney to conduct a criminal review of the matter. At present, my office, the Latah County Prosecuting Attorney and the United States Attorney are reviewing the matter to determine whether any criminal conduct occurred. I also have a team of civil attorneys looking at other potential legal issues. A number of attorneys in my office, particularly in the Contracts & Administrative Law Division,

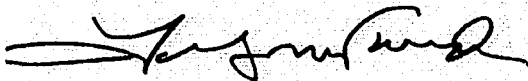
have spent tremendous amounts of time on this matter. It will take several more months before we know all of the facts and resolve this matter.

Meanwhile, the other work of the Office of the Attorney General went forward:

- In the Criminal Law Division, we handled 716 criminal appeals last year, an increase of 242 from 1997. We handled 72 non-capital federal *habeas* cases, several of which are still pending. We continue to handle 21 death penalty cases. We also prosecuted 76 cases at the request of local prosecutors.
- We recovered over 4.1 million dollars in estate recovery in Medicaid, and we stepped in to take on growth in child support cases, saving the Department of Health & Welfare an estimated \$230,500 in contract attorney fees.
- The Consumer Protection Unit recovered over 1.5 million dollars in consumer restitution and \$566,486.03 in civil penalties, fees and costs. The tobacco settlement brought in \$26,735,589.51.
- We issued 169 formal, written legal opinions to legislators and handled approximately 80 informal opinions.
- The Natural Resources Division continues to defend Idaho's water in the massive Snake River Basin Adjudication. The year 2004 promises to be a busy year in this area, with the Nez Perce federal reserved water right claims reaching a critical stage.

It has certainly been a year of stretched resources and weighty legal matters. We may not see a year like 2003 again for a long, long time. However, my view is that the Office of the Attorney General must always be prepared for controversy and demands of the nature we saw in 2003. Whether or not criminal prosecutions or civil lawsuits result from real or perceived scandal, the people of the State of Idaho must know the whole story and be able to have confidence in their public servants. When scandal crosses into the area of law, the Attorney General can perform a valuable service in the search for truth and justice.

Sincerely,



LAWRENCE G. WASDEN
Attorney General

ANNUAL REPORT OF THE ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL LAWRENCE G. WASDEN ATTORNEY GENERAL

2003 STAFF ROSTER

ADMINISTRATION

Sherman F. Furey III Chief Deputy	Thorpe Orton Assistant Chief Deputy	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

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Lawrence Allen	Corey Cartwright	Jane Hochberg	Cheryl Meade	Theodore Spangler
Stephanie Altig	Christopher Clark	John Homan	Clinton Miner	Nicholas Spencer
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Nancy Bishop	Lori Fleming	Brent King	Eric Post	Timothy Thomas
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Ralph Blount	Roger Gabel	C. Nicholas Krema	Phillip Rassler	Melissa Vandenberg
Jo-Ann Bowen	Michael Gilmore	Lisa Kronberg	Whitaker Riggs	Bridget Vaughan
Carol Brassay	Brad Goodsell	Michael Larsen	Donald Robertson	Karl Vogt
Dallas Burkhalter	Joanna Guilfooy	Jerold Lee	Kenneth Robins	Julie Weaver
Cheri Bush	Stephanie Guyon	William Loomis	Steve Schuster	Peggy White
Stephen Bywater	Susan Hamlin-Nygard	Kay Manweiler	Sandra Shaw	Scott Woodbury
James Carlson	John Hammond, Jr.	Rene Martin	Jason Siems	Charles Zalesky
		Candice McHugh		

INVESTIGATORS

Michael Dillon, Chief	Scott Birch	Bill Buie	Gary Deulen
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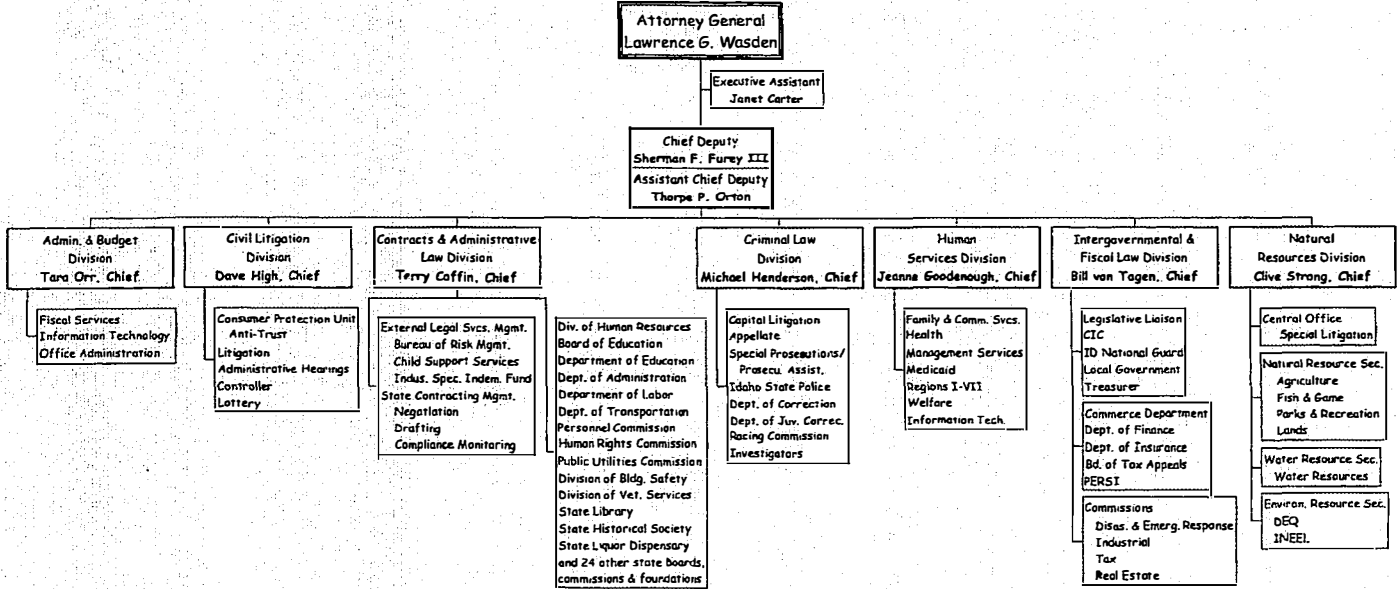
PARALEGALS

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

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Lorraine Byerly	Janene Hocking		Greg Rast	Melissa Ward

Office of the Idaho Attorney General
Organizational Chart - 2003



**ATTORNEY GENERAL'S
SELECTED
INFORMAL GUIDELINES
FOR THE YEAR 2003**

LAWRENCE G. WASDEN
ATTORNEY GENERAL
STATE OF IDAHO

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

March 20, 2003

The Honorable Laird Noh
Idaho State Senate
STATEHOUSE MAIL

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

Dear Senator Noh:

This letter is in response to your March 4, 2003, inquiry regarding House Bill No. 284 ("HB 284"). In that inquiry you ask the following question:

QUESTION PRESENTED

May the legislature modify the application of the local public interest as expressed in HB 284 without those modifications first being changed in the State Water Plan, under procedures spelled out for such modification by the legislature?

CONCLUSION

Upon reviewing the provisions of article XV, § 7 of the Idaho Constitution and the statutes establishing the Idaho Water Resource Board in accordance with article XV, § 7, we conclude that the legislature may amend the statutory definition of the "local public interest" without the Idaho Water Resource Board first amending Public Interest Policy 1B of the *State Water Plan*. We further conclude that the change in the definition of the "local public interest" proposed under HB 284 is not inconsistent with current Policy 1B of the *State Water Plan*, which provides: "It is the policy of Idaho that water be managed with due regard for the public interest as established by state law."

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ANALYSIS

The Idaho Water Resource Board ("IWRB") initially adopted *The State Water Plan—Part Two* on December 29, 1976. The IWRB adopted the *State Water Plan* pursuant to its then existing constitutional and statutory authorities. Art. XV, § 7, Idaho Const. (1965 Sess. Laws 22), and Idaho Code § 42-1734 (1974 Sess. Laws 533). Article XV, section 7 of the Idaho Constitution was amended in 1984 to read as it now appears:

SECTION 7. STATE WATER RESOURCE AGENCY. There shall be constituted a Water Resource Agency, composed as the Legislature may now or hereafter prescribe, which shall have power to construct and operate water projects; to issue bonds, without state obligation, to be repaid from revenues of projects; to generate and wholesale hydroelectric power at the site of production; to appropriate public waters as trustee for Agency projects; to acquire, transfer and encumber title to real property for water projects and to have control and administrative authority over state lands required for water projects; all under such laws as may be prescribed by the Legislature. Additionally, the State Water Resource Agency shall have power to formulate and implement a state water plan for optimum development of water resources in the public interest. The Legislature of the State of Idaho shall have the authority to amend or reject the state water plan in a manner provided by law. Thereafter any change in the state water plan shall be submitted to the Legislature of the State of Idaho upon the first day of a regular session following the change and the change shall become effective unless amended or rejected by law within sixty days of its submission to the Legislature.

Art. XV, § 7, Idaho Const. (amended text as proposed by S.J.R. No. 117, 1984 Sess. Laws 689, and ratified at the Nov. 6, 1984 general election).

As the state water resource agency referred to in art. XV, § 7 of the Idaho Constitution, the IWRB is authorized to "formulate and implement a state water plan for the optimum development of water resources in the pub-

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lic interest.” Following its amendment in 1984, article XV, § 7, now provides that “[t]he Legislature . . . shall have the authority to amend or reject the state water plan in a manner provided by law. Thereafter any change . . . shall be submitted to the Legislature . . . and the change shall become effective unless amended or rejected by law within sixty days of its submission to the Legislature.”¹

In formulating the 1976 *State Water Plan—Part Two*, the IWRB adopted 37 policies as the basis for future water resource development, conservation and preservation in the state. Policy No. 1 entitled “Public Interest” provided as follows:

Applications for future water permits shall not be approved if they are in conflict with the State Water Plan adopted by the Idaho Water Resource Board in the public interest. Section 42-203, Idaho Code, should be amended to provide the following: (1) protection for all existing water rights. Nothing in this plan shall adversely affect water rights established and vested under the Constitution and laws of Idaho; (2) all new water uses, both consumptive and non-consumptive such as irrigation, municipal, industrial, power, mining, fish and wildlife, recreation, aquatic life, and water quality will be judged to have equal desirability as beneficial uses subject to Article XV, Section 3, of the state Constitution; (3) if conflicts occur between meeting new water uses, the approval or denial of the application shall consider the public interest including an evaluation of the beneficial and adverse economic, environmental and social impacts as identified in the State Water Plan as adopted by the Idaho Water Resource Board.

The Idaho State Water Plan—Part Two, Idaho Water Resource Board, Dec. 29, 1976, page 91.

In 1978, the legislature implemented a modified version of the public interest provision proposed by Policy 1 of the *State Water Plan*. Rather than making a water right application subject to the public interest as determined under the State Water Plan, the legislature chose to define the public interest by statute. The legislature amended Idaho Code § 42-203 to require

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that the “local public interest” be considered for each new application to appropriate water, “where the local public interest is defined as the affairs of the people in the area directly affected by the proposed use.” 1978 Sess. Laws 767. The statutory definition of the “local public interest” has remained unchanged since 1978 and is now codified as I.C. § 42-203A(5)(e). In 1981, the legislature amended Idaho Code § 42-222 to make the local public interest criterion applicable to water right transfer applications. 1981 Sess. Laws 253.

The current version of the *State Water Plan*, adopted by the IWRB in December 1996 contains the following “public interest” policy identified as Policy 1B:

It is the policy of Idaho that water be managed with due regard for the public interest as established by state law.

The IWRB’s Comment following Policy 1B states:

The constitution and statutes of the State of Idaho declare all the waters of the state, when flowing in their natural channels, including ground waters, and the waters of all natural springs and lakes within the boundaries of the state, to be public waters [Idaho Code § 42-101]. Water allocation and management decisions must consider the public interest as established by state law. The State Water Plan is an expression of the public interest.

Idaho State Water Plan, Idaho Water Resource Board, Dec. 1996, p. 5. The IWRB adopted Policy 1B pursuant to its authority under art. XV, § 7, Idaho Const., and the provisions of Idaho Code § 42-1734A(1), which provides in pertinent part as follows:

The board shall, subject to legislative approval, progressively formulate, adopt and implement a comprehensive state water plan for conservation, development, management and optimum use of all unappropriated water resources and waterways of this state in the public interest.

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Pursuant to the provisions of art. XV, § 7, Idaho Const., the legislature approved Policy 1B of the *State Water Plan*, as adopted by the IWRB, through the enactment of law. 1997 Sess. Laws 67. The IWRB has not made any subsequent change to the public interest policy of the *State Water Plan* since 1996.

The question now presented is whether the legislature may modify the definition of the “local public interest” in the manner expressed in HB 284 without those changes first being made in the *State Water Plan*, under the procedures spelled out for such modification by the legislature.

HB 284 would change the statutory definition of the “local public interest” from “the affairs of the people in the area directly affected by the proposed use,” now existing under Idaho Code § 42-203A(5)(e), to “the interests that the people in the area directly affected by a proposed water use have in the effects of such use on the public water resource.” This revised definition of the “local public interest” would appear as an added definition in Idaho Code § 42-202B to be applied wherever the defined term is used within title 42, Idaho Code. In addition, HB 284 would add language at several locations in title 42, Idaho Code, prohibiting the approval of a proposed water project that would “adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates.”

The change in the definition of the “local public interest” as proposed under HB 284 is not inconsistent with Policy 1B of the current *State Water Plan*. Policy 1B reads: “It is the policy of Idaho that water be managed with due regard for the public interest as established by state law.” There is no provision in either art. XV, § 7, Idaho Const., or in the statutes establishing and governing the IWRB, that would require the IWRB to first amend the *State Water Plan* before the legislature modifies the existing statutory definition of the “local public interest.” Idaho Constitution, art. II, § 1, and art. III, § 1, place in the legislature the power to make law. Mead v. Arnell, 117 Idaho 660, 664, 791 P.2d 410, 414 (1990). Nothing in art. XV, § 7 of the Idaho Constitution suggests an intent to limit the legislature’s authority to make law with respect to matters that may be addressed in the *State Water Plan*.

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Sincerely,

Phillip J. Rassier
Deputy Attorney General
Natural Resources Division

¹ The 1984 amendment to art. XV, § 7, Idaho Const., was in response to the decision of the Idaho Supreme Court in Idaho Power Company v. State, 104 Idaho 570, 661 P.2d 736 (1983), declaring unconstitutional the provisions of Idaho Code § 42-1736 because the statute purported to authorize the legislature to perform functions constitutionally assigned to the Idaho Water Resource Board. The court further held that to the extent art. XV, § 7, authorizes the legislature to take action upon the *State Water Plan* it must do so by enactment of law and not by means of a concurrent resolution.

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June 23, 2003

Mr. Gary Stivers
Executive Director
Idaho State Board of Education
P.O. Box 83720
Boise, ID 83720-0037

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

Re: State Board of Education as a Chartering Entity

Dear Mr. Stivers:

QUESTION PRESENTED

Whether the State Board of Education ("Board") has legal authority to grant an initial petition for charter school status under the Public Charter Schools Act of 1998 ("Act").

CONCLUSION

The State Board of Education does not have legal authority to grant an initial Petition for Charter School status under the Act.

ANALYSIS

Your letter of June 11, 2003, seeking legal guidance refers to article IX, section 9 of the Idaho Constitution and Evans v. Andrus, 124 Idaho 6, 855 P.2d 467 (1993), in support of the proposition that the Board has broad authority over all state educational institutions and the public school system of Idaho and, therefore, has the authority to grant an initial petition for a charter school. Article IX, section 9, refers to compulsory school attendance. This opinion assumes you meant article IX, section 2, which creates the Board. The Evans case does not support any conclusion as to the Board's authority to perform specific acts pursuant to its general supervisory authority and is inapplicable to the issue and my conclusion herein. The court in

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Evans simply recites article IX, section 2 of the Idaho Constitution in reaching its conclusion that House Bill 345 (1993), which would have divided the Board into three smaller boards, was unconstitutional because article IX, section 2, contemplates a single board of education.

In relevant part, article IX, section 2, provides:

The general supervision of the state educational institutions and public school system of the state of Idaho, shall be vested in a state board of education, the membership, powers and duties of which shall be prescribed by law.

(Emphasis added.) It is the “powers and duties . . . which shall be prescribed by law” that are relevant to your inquiry rather than the number of boards of education this section allows.

The Idaho Legislature has prescribed several powers and duties of the Board. Idaho Code § 33-101 states that “for the general supervision, governance and control of the public school systems, including public community colleges, a state board of education is created.” Idaho Code § 33-107 describes the general powers and duties of the Board as including the power to “(1) perform all duties prescribed for it by the school laws of the state” and “(3) have general supervision, through its executive departments and offices, of all entities of public education supported in whole or in part by state funds.” Idaho Code § 33-116 provides that “all school districts in Idaho, including specially chartered school districts, shall be under the supervision and control of the state board.” The legislature has also placed limitations on the Board’s authority with regard to thoroughness and uniformity in the public school system. Idaho Code § 33-1612 provides that, “Authority to govern the school district, vested in the board of trustees of the school district, not delegated to the state board, is reserved to the board of trustees.”

Charter schools, as part of Idaho’s public education system, are, in certain circumstances, subject to supervision by the Board. Idaho Code § 33-5210(1) provides that, “All public charter schools are under the general supervision of the state board of education.” The legislature has also placed limitations on the authority of the Board such as that “[e]ach charter school is otherwise exempt from rules governing school districts which have been prom-

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ulgated by the state board of education or by the superintendent of public instruction,” with certain specific exceptions as enumerated in Idaho Code § 33-5210(3). It does not limit the Board’s authority to generally supervise charter schools. The legislature has clearly vested authority in the Board to decide an appeal from a denial of a charter school petition by a district board of trustees pursuant to Idaho Code § 33-5207.

However, the Public Charter Schools Act of 1998, Idaho Code §§ 33-5201, *et seq.*, taken as a whole, does not contemplate the Board acting as an initial chartering entity. Idaho Code § 33-5205(1) provides that a petition to establish a new or a conversion charter school shall be submitted to the board of trustees of a school district. It does not authorize any other entity to review or approve the initial petition. Idaho Code §§ 33-5205(2) and (3) provide for only a school district board of trustees granting a charter for the operation of a charter school. Idaho Code § 33-5206(5) describes the process for submitting notice of the local board of trustees’ approval to the Board to assist the Board in implementing the limitations on the number of charter school approvals pursuant to Idaho Code § 33-5203(2).

The only statutory mention of Board review and approval of charter school petitions relates to the appeal process under Idaho Code § 33-5207(5)(b). *See also* Idaho Code § 33-5209(3), which reads: “A decision to revoke, not to renew, or not to approve a revision of a charter may be appealed directly to the state board of education. The state board shall essentially follow the procedure as provided in section 33-5207, Idaho Code.” Where the legislature has specifically mandated that initial petitions for the establishment of charter schools are to be reviewed by the board of trustees of the school district, and where the Board has only been granted the authority to approve or renew a charter in the context of an appeal of a school district denial, the Board has no authority to consider or grant initial petitions for a charter to operate a school.

When a legislative enactment is unambiguous and its meaning and intent is clear on its face, as is the Act on the question at issue here, the enactment must be given the clearly mandated effect and there is no need or occasion for the use of legislative history as an aid in construing the meaning of the enactment. Sherwood v. Carter, 119 Idaho 246, 805 P.2d 452 (1991); Sweeney v. Otter, 119 Idaho 135, 804 P.2d 308 (1990). Nevertheless, a

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review of the legislative history of the Act serves only to bolster our conclusion.

In 1997, an interim legislative committee on charter schools drafted proposed legislation for charter schools and held several public hearings across the state. On a number of occasions, including at its July 24, 1997, meeting, the interim committee considered the question of which government entities should be authorized to grant charters. On that date the committee decided against multiple charter-granting entities, choosing instead to draft proposed statutory language that would authorize local boards of trustees and the Idaho Superintendent of Public Instruction to grant initial charter petitions, with the Board being the entity to which charter denials were to be appealed. At its October 27-29, 1997, meeting, the interim committee modified its proposed language by deleting the superintendent of public instruction's authority to grant a charter. Instead, all initial applications would go to the local school districts' boards of trustees.

On January 27, 1998, the interim committee's proposed legislation was introduced in the House Education Committee by Representative Fred Tilman. The minutes reflect Representative Tilman's description of the charter school application approval process as follows:

[A]n application for a charter school must be approved by the local school district's Board of Trustees. This last change means that these schools will not be state charter schools approved by the State Superintendent. However, if an application is denied by a local school district's Board of Trustees, the proposed charter school may appeal to the State Board of Education.

On February 10, 1998, Rep. Tilman again described the proposed Act (then House Bill 517) to the House Education Committee. The minutes of the Committee meeting reflect his statements as follows:

The bill states the process to be followed to start a charter school making sure the request must go before the local school district's Board of Trustees for approval. The bill also allows for an appeals process to the State Board of

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Education should the request be denied by the local school district. He pointed out that the approval of the Superintendent of Public Instruction is no longer required.

House Bill 517 was introduced in the Senate Education Committee on February 20, 1998, where various committee members each described portions of the bill. The minutes reflect that Senator Dunklin explained that:

Section 33-5207 outlines who can grant a charter and how the decision might be appealed. The petition for a charter begins with the local school board. However, there is an appeal process. . . . If it is still denied, they can go to the State Board of Education and the State Board can override the local school board. The State Board then assumes the responsibility as the chartering entity.

The changes made to the proposed legislation from the time it was drafted and debated by the interim legislative committee to the final version presented to the legislature, and the comments legislators made through the process, show clearly that the legislature did not intend to grant any state-level entity the authority to approve an initial petition for a charter school. Had the legislature intended to vest the authority to approve initial petitions for charter schools with the Board, it could have done so in 1998 and every year since then in which it has addressed proposed amendments to the Act.

Your letter indicates that the Board plans to "initiate policy to make it a chartering entity for Public Charter Schools in Idaho." In light of the foregoing, such a policy would likely be found by a court to be outside the statutory authority of the Board.

The applicable general rule of law is:

The validity of a rule or regulation depends upon whether the administrative agency was empowered to adopt the particular rule, that is, whether the rule was within the agency's statutory authority. It must be within the matter covered by the enabling statute, and comply with the underlying legislative intent. Regulations made by an agency that

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exceed its statutory authority are invalid or void. An agency may not go beyond declared statutory policy.

2 Am. Jur. 2d Administrative Law § 225 (footnotes omitted), citing Curtis v. Canyon Highway Dist. No. 4, 122 Idaho 73, 831 P.2d 541 (1992), for the proposition that a rule must be adopted pursuant to statutory authority to be valid.

The concept applies whether the Board attempts to acquire the chartering authority through rulemaking or policymaking.

The Idaho Court of Appeals, in the case of Roberts v. Transportation Department, 121 Idaho 727, 827 P.2d 1178 (1991), summed up the Idaho law generally applicable to the extent of and limits on the Board's or other administrative agencies' authority in carrying out statutory functions. The court held that an agency "cannot validly subvert the legislation by promulgating contrary rules." See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). See also Fahn v. Cowlitz County, 93 Wash. 2d 368, 610 P.2d 857 (1980) ("An administrative agency is limited to the power and authority granted it by the legislature"); Roeder Holdings, L.L.C. v. Board of Equalization of Ada County, 136 Idaho 809, 41 P.3d 237 (2001) ("A regulation that is not within the expression of the statute, however, is in excess of the authority of the agency to promulgate that regulation and must fail") (quoting Levin v. Idaho State Board of Medicine, 133 Idaho 413, 987 P.2d 1028 (1999)). In light of the clearly expressed legislative intent of the Act, the Board does not have the authority, through policy or administrative rule, to act as the initial authorizing body for charter schools.

Based upon the foregoing, I conclude that the Idaho Legislature did not intend the Board to have the authority to approve initial petitions for charter schools. It is clear from the language of the Act itself that the Board has no statutory authority to consider or grant initial charter school petitions. The Board's primary role under the Act is that of an appellate body, authorized to hear appeals of denials of initial charter school petitions by local school district boards of trustees. Additionally, the legislative history reveals no ambiguities on this point.

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It should be understood that an Attorney General's Legal Guideline is not a directive but is an objective review of what statutes authorize, as well as the best prediction available of how a reviewing court is likely to view that authority.

Very truly yours,

Terry E. Coffin
Division Chief
Contracts & Administrative Law
Division

¹Note that the SBE's authority over charter schools is limited to "general supervision" in Idaho Code § 33-5210, in contrast to the "supervision and control" the SBE exercises over school districts pursuant to Idaho Code § 33-116. See also I.C. § 33-101 which grants broad legislative authority to the Board "for the general supervision, governance and control" of all state educational institutions and the public school system.

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

August 28, 2003

John A. Swayne
Prosecuting Attorney
Clearwater County
P.O. Box 2627
Orofino, ID 83544-2627

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

This letter is in response to your recent inquiry regarding potential incompatibility of office issues within Clearwater County. Specifically, you ask the following questions:

May an individual simultaneously serve as county commissioner and as:

- (a) City Councilperson; or
- (b) Planning and Zoning Commission Member?

The answers to these questions are examined in detail below.

A. City Councilperson and County Commissioner

At the outset of this review, it is essential to note that Idaho has not adopted a rule that prohibits *per se* the holding of both city council and county commissioner positions. Therefore, the appropriate inquiry will focus on the common law doctrine of incompatible offices.¹

There is also present a question of incompatibility of office. The common law doctrine applies if there is a potential conflict between the two offices such that one individual could not give absolute allegiance to both offices. Incompatibility is most often found where one office supervises the other or when the interests of the two offices are antagonistic to each other. 3 *McQuillin on Municipal Corporations*, §§ 12.66 *et seq.*

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Public policy demands that an officeholder discharge his duties with undivided loyalty. In order to insure undivided loyalty, the doctrine of incompatible offices requires vacation of offices wherein it is impossible for an officeholder to discharge his duties with undivided loyalty. Applicability of this doctrine in no way turns upon the integrity of the officeholder. The analysis of incompatible offices turns instead on factors such as: due to multiplicity of the business in them they cannot be executed with due care; or when offices are subordinate to one another; or where offices are contrary and antagonistic to one another. 3 *McQuillin on Municipal Corporations*. § 12.67; *see also*, Oakland County Prosecutor v. Scott, 603 N.W.2d 111 (Mich. 1999).

The offices of city councilman and county commissioner clearly fall within the doctrine due to both the multiplicity of business, and the fact that cities and counties often find themselves in potentially contrary or antagonistic positions. Any time a shared officeholder found himself in this position, there would be a question as to where his “undivided loyalty” lay. This office cannot recommend the assumption or retention by an officeholder of both a city councilman’s and county commissioner’s position based upon the common law doctrine of incompatibility of offices.

It is worthy of note that, for a county commissioner, neglect of duty is broadly defined, and could be interpreted to apply to a circumstance wherein a shared officeholder was unable to achieve undivided loyalty. For your convenience and review, Idaho Code § 31-855 is set forth fully below:

31-855. Neglect of duty by commissioners.— Any commissioner who neglects or refuses, without just cause therefore, to perform any duty imposed on him, or who willfully violates any law provided for his government as such officer, or fraudulently or corruptly performs any duty imposed on him, or willfully, fraudulently or corruptly attempts to perform an act, as commissioner, unauthorized by law, shall be prosecuted as provided in section 18-316, Idaho Code.³

For the foregoing reasons, this office recommends that a dual officeholder select one office which he would prefer to hold and resign from the other.

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B. County Commissioner and Planning & Zoning Commission Member

The Local Planning Act contains a conflict of interest provision:

A member or employee of a governing board, commission, or joint commission shall not participate in any proceeding or action when the member or employee or his employer, business partner, business associate, or any person related to him by affinity or consanguinity within the second degree has an economic interest in the procedure or action.

Idaho Code § 67-6506.

A county commissioner is an agent of the county he represents, therefore, this section would probably prevent him/her from participating in any county zoning decisions that may affect the county's economic interests. However, there is no provision requiring the council member to resign his/her position.

Also present is the same issue addressed above regarding incompatibility of office. The commissioners pass ordinances, adopt budgets and oversee county departments. Also among their duties is to oversee all county officers, departments, appoint boards and commissions. They further oversee the county budget and provide for the maintenance of roads and bridges, solid waste disposal, juvenile court services, ambulance services and building inspections. In short, they supervise the tasks involved with managing county business.

The board sits as a quasi-judicial body to hear various matters including planning and zoning requests, property valuation protests and requests for cancellation of taxes and indigent issues.

In the area of zoning, the interests of the county and the city may frequently be at odds, and it is not uncommon for cities and counties to sue one another over zoning disputes. Under such circumstances, one person could not fill both offices without a conflict of loyalty. If two offices are incompatible, one office should be vacated. It is this office's recommendation that one office be vacated to eliminate the incompatibility problem.

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I hope that you find this letter helpful. If you would like to discuss this or any other matter more fully, please contact me.

Sincerely,

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

¹ The common law inquiry is appropriate because Idaho has adopted the common law "in all cases not provided for in these compiled laws. . . ." Idaho Code § 73-116.

² It should be noted that Idaho Code § 18-316 has been repealed. It would appear that the relevant code section is Idaho Code § 18-315, which provides for punishment of omission of public duty as a misdemeanor.

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November 18, 2003

Honorable Gary J. Schroeder, Chairman
Senate Education Committee
1289 Highland
Moscow, ID 83843

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

Dear Senator Schroeder:

This Attorney General's Legal Guideline is issued in response to your September 15, 2003, letter to the Office of the Attorney General in which you asked the following questions:

QUESTIONS PRESENTED

1. Does the State Board of Education's order that the State Department of Education base funding on "average district per-pupil budgeted expenditure of the previous year for multi-district public charters and non-resident students" and "deduct the funds for public charter schools from the allocation to the resident districts and send them directly to the public charter school where the students are enrolled" prevail over the budgeting and appropriations authority of the legislature?
2. Is the State Board of Education's order to base funding on "average per-pupil budgeted expenditure of the previous year for multi-district public charters and non-resident students" and "deduct the funds for public charter schools from the allocation to the resident districts and send them directly to the public charter school where the students are enrolled" contrary to the FY 2003 session laws and existing laws governing the funding formula for school districts and charter schools?

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CONCLUSIONS

1. No, only the Idaho Legislature has plenary power and authority to appropriate funds in support of the public school system in this state, and to prescribe the means and manner in which such funds are apportioned to the local school districts and public charter schools. The powers and duties of the State Board of Education (hereinafter "Board") are established by the Legislature by statute, and are limited to the general supervision of the state's public education system. The Legislature has not granted power to the Board to establish a public school funding mechanism, or authority to modify a school funding plan already legislatively established. Therefore, the Board does not have the legal power or authority to create a mechanism for funding public schools that is contrary to the legislative funding mechanism established by the Legislature. Any such action would encroach upon the appropriation power of the Legislature, in violation of the constitutional doctrine of separation of powers.

2. Yes, the resolution adopted by the Board relating to the funding of certain public charter schools prescribes a means and manner of apportioning funds to such schools that is materially contrary to the funding mechanism established by the Legislature.

INTRODUCTION

The Legislature adopted the Public Charter Schools Act of 1998, providing for the creation of charter schools that are intended to operate independently from the existing school district structure, but within the existing public school system. See title 33, chapter 52, Idaho Code. In doing so, the Legislature also established a plan for apportioning state funds to charter schools by providing that such schools are to be funded in accordance with the legislative funding mechanism applicable to all traditional public schools, with a few minor modifications attributable to certain special considerations relating only to charter schools. Idaho Code § 33-5208. (This general funding mechanism is discussed in greater detail below.)

The Board adopted the following resolution relating to the funding of certain specified charter schools at its August 14 and 15, 2003, meeting:

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That, beginning with the 2003-04 school years, the allocation of both state and federal funds be administered so that funding follows students. Funding will be based on average district per-pupil budgeted expenditure of the previous year for multi-district public charters and non-resident students. Funds come from the district of student's residence. The State Department of Education will deduct the funds for public charter schools from the allocation to the resident districts and send them directly to the public charter school where the students are enrolled. Public charters may receive additional funding for special needs students if the State and Federal requirements for such funds are fulfilled. This action is intended to be carried out to the extent it is not inconsistent with federal law or our federal consent decree.

The Board also prepared *Guidance Memorandum 03-01*, which describes the Board's proposed procedure for implementing this funding mechanism, as it relates to such charter schools. A copy of *Guidance Memorandum 03-01* is attached hereto as **Exhibit "A."**

Your questions relate to the legal authority of the Board to promulgate the resolution set forth above, and also to whether the Board's directive for funding certain public charter schools, as described in the resolution, contravenes state law.

ANALYSIS

1. The Respective Powers, Duties, and Authority of the Legislature and the Board

Art. IX, sec. 1 of the Idaho Constitution states that "it shall be the duty of the legislature of Idaho, to establish and maintain a general, uniform and thorough system of public, free common schools."

Art. IX, sec. 2 of the Idaho Constitution provides that "[t]he general supervision of the state educational institutions and public school system of the state of Idaho, shall be vested in a state board of education, the member-

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ship, powers and duties of which shall be prescribed by law.” (Emphasis added.)

The foregoing provisions delineate and define the relationship between the Board, an “executive department” pursuant to Idaho Code § 33-101,¹ and the Legislature— vesting “general supervision” of the state educational system in the Board, but specifically calling on the Legislature to “establish and maintain” the public school system, and also mandating that the Legislature determine the “powers and duties” of the Board.

Pursuant to its constitutional charge, the Legislature enacted title 33, chapter 1, Idaho Code, which sets out the authority of the Board with respect to the Board’s general supervision of the public education system in this state. Idaho Code § 33-101 provides that “[f]or the general supervision, governance and control of . . . the public school systems, . . . a state board of education is created.” Idaho Code § 33-107 grants specific powers and duties to the Board in support of its duty to supervise the state public school system.² Additionally, in Idaho Code § 33-5210, the Legislature declared that charter schools are under the “general supervision” of the Board.

This distinction between the power and authority of the Idaho Legislature *vis-à-vis* the power and authority of the Board, as it relates to the Idaho education system, has been recognized by the Idaho Supreme Court, which specifically acknowledged the plenary authority of the Legislature with respect to Idaho’s public schools. See Andrus v. Hill, 73 Idaho 196, 200, 249 P.2d 205, 207 (1952) (“there is involved no question of the plenary power of the legislature to provide for, regulate, control and alter the public schools of the state, within the definition provided by the constitutional provision imposing that duty on the legislature.”) See also Electors of Big Butte v. State Board of Education, 78 Idaho 602, 612, 308 P.2d 225, 231 (1957) (“the constitution vests the legislature with plenary power as well as a specific mandate to provide for the education of the children of the state, Art. 9, § 1, and the board of education with general supervision of the public school system, Art. 9, § 2”)

Pursuant to its plenary power, the Legislature may define and limit the powers and duties of the Board through legislation, as it has done in Idaho Code § 33-107 and Idaho Code § 33-5210, discussed above. The Idaho Code contains no grant of power to the Board to establish a funding mechanism for

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public schools; nor does it provide authority to the Board to modify a school funding plan already legislatively imposed. The Idaho Code contains no delegation by the Legislature of its power and authority to establish a legislative funding mechanism to the Board. Based on the foregoing, it is our view that the Legislature retains its plenary power and authority in the areas of education, including its plenary power and authority to decide the elements of the mechanism through which the state funds the constitutionally required system of public free common schools.

2. Separation of Powers Doctrine

Any attempt by a department of government to encroach upon the powers granted to another department of government implicates the constitutional separation of powers doctrine. The Idaho Constitution has a three-department system of government, modeled on the United States Constitution, with similar provisions defining the three departments of government—legislative, executive, and judicial.³ However, the Idaho Constitution differs from the United States Constitution in that art. II, sec. 1 of the Idaho Constitution explicitly mandates that a department shall not exercise any powers properly belonging to one of the other departments:

The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial; and no person or collection or 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.

Art. VII, sec. 13 of the Idaho Constitution grants the power of appropriation to the Legislature, and provides that “[n]o money shall be drawn from the treasury, but in pursuance of appropriations made by law.” In furtherance of its appropriations authority, the Idaho Legislature must authorize the executive department to draw money from the Treasury. *Id.*

The Idaho Supreme Court, in Blaine County Inv. Co. v. Gallett, 35 Idaho 102, 204 P. 1066 (1922), held that it is the Legislature that determines the parameters of appropriations, stating:

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An appropriation in this state is authority of the Legislature given at the proper time and in legal form to the proper officers to apply a specified sum from a designated fund out of the treasury for a specified object or demand against the state.

Id. at 106, 204 P. at 1067.

As discussed above, the Board is an “executive department” of state government pursuant to Idaho Code § 33-101. Consequently, it is prohibited from exercising a power that has been granted to another department—namely, the Legislature’s appropriation power. The Board is bound by the specific mandates contained in the Legislature’s appropriation bills, as well as the specific directions of the Legislature, as set out in statute, relating to the funding of public schools. To assert otherwise would be contrary to the fundamental doctrine of separation of powers. To act otherwise would be beyond the constitutional and statutory authority of the Board.

3. Idaho’s Legislatively Established Funding Mechanism—the “Foundation Program”

Each year, the Idaho Legislature appropriates funds in support of the public school system of this state. The primary legislative funding mechanism is a comprehensive and complex system known as the “*Foundation Program*,” codified at title 33, chapter 10, Idaho Code. In addition, specific appropriation bills may contain funding and distribution requirements.⁴

Under the Foundation Program, state aid to public schools is allocated through a system designed to support a variety of special programs and services provided by the local public school districts and schools in this state. Some of these programs are described in the addendum, attached hereto as Exhibit “B.” Generally, the allocation of state funds to the public schools is determined in accordance with a support unit formula (calculated in accordance with the schedules contained in Idaho Code § 33-1002(6)) that is based on the “average daily attendance” (hereinafter “ADA”) of students in each district and, separately, in each charter school. Idaho Code § 33-1002. In addition to ADA, the legislative funding mechanism also takes into account a variety of other circumstances in allocating funds to the public schools, including the unique characteristics of the various school districts and indi-

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vidual schools, as well as other special considerations, such as local tax contributions, property tax replacement based on the market values of real property in the various school districts, and the “economies of scale” that exist throughout the state, such as the increased costs associated with operating smaller, rural, or isolated schools and districts.

The *Foundation Program* is based on the principle that “funding follows students.” State aid is distributed to the public schools in a series of installments based largely on reported ADA. Idaho Code § 33-1009. The payments made in August, October, and November are advance payments for the current year, but are based on payments from the public school income fund for the preceding school year; the payments relating to the preceding school year are based largely on ADA. Idaho Code § 33-1009(2). Payments in February and May use the state distribution factor (Idaho Code § 33-1002(7)), and are largely a function of ADA reported through the first Friday in November. Idaho Code § 33-1009(3). The July payment takes into account ADA reported using the 28 best weeks of the school year, ending not later than June 30 of the current year. Idaho Code § 33-1009(3)(a). The allocation of state funds to Idaho’s public schools is primarily determined on a school district-by-school district basis. However, the *Foundation Program* was modified by the Legislature in 1998 to provide apportionments also to individual charter schools.

Just as is the case with traditional public schools, charter schools receive the majority of their funding based on “attendance figures,” or ADA. Idaho Code § 33-5208. The allocation of state funds to charter schools is based on the same support unit formula (calculated in accordance with the schedules contained in Idaho Code § 33-1002(6)) applicable to all other public schools.⁵ Idaho Code § 33-5208(1). However, specific modifications to the calculations are permitted to offset special considerations applicable only to charter schools, such as lack of taxing authority, as well as to assist charter schools with initial start-up costs. Idaho Code § 33-5208(1)-(5). State aid is distributed to charter schools in accordance with Idaho Code § 33-1009, in the same manner as it is distributed to all other public school districts in the state. Idaho Code § 33-5208(5). In summary, the Legislature has established that state aid to charter schools shall be allocated in accordance with the *Foundation Program*.

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4. The Board's Resolution

Applying the foregoing constitutional and statutory analysis relating to school funding (and the Legislature's appropriation power) to the Board's resolution presents some difficulties, because the language of the resolution is vague, internally inconsistent, and uses terms not defined either in the resolution or in the Idaho Code.⁶ Nonetheless, it does appear that the Board's intent in adopting the resolution, based on the general language used in the resolution, and when read in context with *Guidance Memorandum 03-01*, attached hereto as **Exhibit "A,"** was to describe a particular funding mechanism, at least for some charter schools (which we shall hereinafter refer to, collectively, as "multi-district" charter schools), and the following analysis presumes this to be the case.

If the Board's resolution purports to create either a new funding mechanism or to modify the legislative funding mechanism for public charter schools contained in Idaho Code § 33-5208, then such action would encroach upon the appropriation power of the Legislature and would be an unconstitutional violation of the separation of powers doctrine. The Board's adoption of the resolution would result in the modification, whether intentional or not, of the legislative funding mechanism as it relates to "multi-district" charter schools.⁷

Pursuant to the resolution, "multi-district" charter schools would no longer receive state funding based on reported ADA and the unique characteristics of such schools, as is required under Idaho Code § 33-5208, and through statutory and special distributions as outlined in the Legislature's appropriation bills.⁸ Instead, it appears that the Board's resolution would result in "multi-district" charter schools receiving state funding in a manner different than legislatively established. As we understand the procedure for implementing the resolution, when a new student begins attending a "multi-district" charter school, state funds are to be redirected from the school district in which that student resides (but not the school district where that student necessarily attended) to the "multi-district" charter school, in the amount of the "average district per-pupil budgeted expenditure" during that current school year for a student in that district. This is a method of funding charter schools not authorized by the Legislature.

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The Board's resolution presents other significant issues. For example, it purportedly requires a transfer of funds to "multi-district" charter schools in an amount of the "average district per-pupil budgeted expenditure." This would mean that the state funds that would "follow the child" would be based on the funding formula as applied to another district. Under the Board's resolution, for example, "multi-district" charter schools would receive funding for programs provided by the school district in which the student resides, but which the "multi-district" charter school may not provide; an education and experience index for instructional and administrative staff employed by the school district in which the student resides, but not necessarily reflective of the "multi-district" charter school's staff; transportation costs incurred by the district in which the student resides, but not incurred by the "multi-district" charter school (because it may not transport students in buses to school each day); statutory and special distributions in legislative appropriation bills based on ADA of the school district in which the student resides, but not the ADA of the "multi-district" charter school where the student attends; property tax replacement attributable to the district in which the student resides, even though charter schools have no taxing authority; as well as numerous other components related to the school district in which the student resides, but not at all related to the "multi-district" charter school.

Several factors unique to each of Idaho's public schools have large impacts on funding. For example, the employment of highly educated and experienced instructors and administrators results in greater funding. Idaho Code § 33-1004A. Student population demographics also affect state funding. For example, with regard to the calculation of support units, students in kindergarten are funded at a lower rate than those in grades 1-3; students in grades 1-3 are funded at a lower rate than students in grades 4-6; and students in grades 4-6 are funded at a lower rate than secondary students, alternative school students, and exceptional students. Idaho Code § 33-1002. Additionally, there are numerous other provisions contained in title 33, chapter 10, Idaho Code, under which the number of students served in each of these various categories, or ADA, greatly affects funding as well. Accordingly, any computation of "dollars per student" is necessarily unique to a particular school district or charter school.

Considering these factors, it is clear that the Board's funding mechanism would benefit "multi-district" charter schools that are successful in

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attracting students from small, rural school districts, because such districts generally receive a relatively high rate of state funding, when calculated as “dollars per student” (in comparison to “dollars per student” spent in more urban districts). As a result, such “multi-district” charter schools would receive disproportionately higher funding on a per-student basis, when compared to all other charter schools and school districts in the state. In sum, the Board’s resolution prescribes a means and manner of apportioning funds to “multi-district” public charter schools that is materially contrary to Idaho Code § 33-5208.

5. Legislative History Relating to the Funding of Public Charter Schools

The Legislature has previously considered whether charter schools should be funded through a transfer of funds from each child’s former district to the charter school, as the Board’s resolution purports to require. This charter school funding proposition was considered by the Charter School Interim Committee beginning in July 1997. Proposed legislation at that time initially considered a funding provision that would have provided as follows:

33-5207. DISTRICT CHARTER SCHOOL FINANCIAL SUPPORT. The board of trustees of the school district may make the following apportionments from the educational support program moneys distributed to that school district to each district charter school of the district for each fiscal year:

(1) An amount for each student in a district charter school calculated by dividing the total district educational support units for the current fiscal year by the total number of students in the district using the fall enrollment figures. The total district educational education support funds include, before any subtractions or disbursements, all the moneys received by the district.

However, at its July 24, 1997, meeting, the Charter School Interim Committee rejected this method of funding for charter schools. The minutes of that meeting reflect that:

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Representative Tilman asked Ms. Kahler how we can draft legislation that will make dollars follow the students as equitably as possible and in a way that will not upset the current funding formula. Ms. Kahler responded that she would treat charter schools almost exactly the same as the school districts are treated now, other than she would not give them any special provisions such as those for remote schools.

Representative Tilman moved, seconded by Representative Gagner, that we fund charter schools under the statewide average funding formula allocation as described by Ms. Kahler. Ms. Kahler was asked to work with Ms. Ingram to ensure proper language. The legislation is to be drafted in such a way that it cannot be financially advantageous for a school district to impose charter status on one of its schools or the entire district, i.e., no school shall be allowed to receive more than the formula generates.

(Emphasis added.)

In response, the Charter School Interim Committee revised again the funding provision, as it related to charter schools, before presenting the legislation to the House Education Committee. The relevant charter school funding provision of House Bill No. 517, as presented, read as follows:

33-5208. CHARTER SCHOOL FINANCIAL SUPPORT. From the state educational support program the state department of education shall make the following apportionment to each charter school for each fiscal year based on attendance figures submitted in a manner and time as required by the department of education:

(1) Per student support. Computation of support units for each charter school shall be calculated according to the schedules in section 33-1002.6., Idaho Code. Funding from the state educational support program shall be equal to the total distribution factor, plus the salary-based apportionment provided in chapter 10, title 33, Idaho Code.

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It is noteworthy that the statement of purpose relating to H.B. No. 517 provided that in the proposed legislative method of funding for charter schools “[t]he state dollars follow the student moving from one school to another the same way the dollars follow a student moving from one school district to another school within the state of Idaho.” Given this expressed intent, it is clear that the Legislature determined that the method of funding charter schools was to be in accordance with the legislative funding mechanism applicable to all other traditional public schools: the funding mechanism called for under the *Foundation Program*.

SUMMARY

The Board may not lawfully create its own mechanism for funding public charter schools because the Idaho Legislature has not granted such power and authority to the Board. The resolution adopted by the Board provides for a means and manner of apportioning funds to public charter schools that is materially contrary to the legislative funding mechanism as described in the *Foundation Program*. Such action encroaches upon the appropriation power of the Legislature and amounts to an unconstitutional violation of the doctrine of separation of powers.

This Attorney General’s Legal Guideline is not a directive but is an objective review analysis of applicable statutes, as well as our best prediction of how a court of law is likely to view those statutes.

Very truly yours,

William A. von Tagen
Deputy Attorney General

¹ Idaho Code § 33-101 provides that “. . . [f]or purposes of section 20, article IV, of the constitution of the state of Idaho, the state board of education and all of its offices, agencies, divisions and departments shall be an executive department of state government.”

² Idaho Code § 33-107 provides:

The state board shall have power to

(1) perform all duties prescribed for it by the school laws of the state;

(2) acquire, hold and dispose of title, rights and interests in real and personal prop-

erty;

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(3) have general supervision, through its executive departments and offices, of all entities of public education supported in whole or in part by state funds;

(4) delegate to its executive secretary, to its executive officer, or to such other administrators as the board may appoint, such powers as said officers require to carry out the policies, orders and directives of the board;

(5) through its executive departments and offices;

(a) enforce the school laws of the state,

(b) study the educational conditions and needs of the state and recommend to the legislature needed changes in existing laws or additional legislation;

(6) in addition to the powers conferred by chapter 24, title 33, Idaho Code;

(a) maintain a register of courses and programs offered anywhere in the state of Idaho by postsecondary institutions which are (1) located outside the state of Idaho and are offering courses or programs for academic credit or otherwise; or (2) located within the state of Idaho but not accredited by a regional or national accrediting agency recognized by the board and are offering courses for academic credit. The acceptance of academic or nonacademic credit, at public postsecondary institutions in Idaho, is the prerogative of the state board of education; provided however, credit transferred into Idaho public postsecondary institutions from nonaccredited postsecondary institutions can be accepted only upon positive review and recommendation by the individual postsecondary institutions and with the approval of the state board of education. A nonaccredited postsecondary institution is one which is not accredited by a regional accrediting agency recognized by the state board or the United States department of education,

(b) require compliance by institutions which desire to offer courses or programs in Idaho with the standards and procedures established in chapter 24, title 33, Idaho Code, or those standards, procedures and criteria set by the board,

(c) violation of the provisions of this act will be referred to the attorney general for appropriate action, including, but not limited to, injunctive relief.

(7) prescribe the courses and programs of study to be offered at the public institutions of higher education, after consultation with the presidents of the affected institutions;

(8) approve new courses and programs of study to be offered at community colleges organized pursuant to chapter 21, title 33, Idaho Code, when the courses or programs of study are academic in nature and the credits derived therefrom are intended to be transferable to other state institutions of higher education for credit toward a baccalaureate degree, and when the courses or programs of study have been authorized by the board of trustees of the community college.

(Emphasis added.)

³ The following provisions for separation of powers under the Idaho Constitution are modeled on the United States Constitution:

“Legislative power. — . . . The legislative power of the state shall be vested in a senate and house of representatives.” Idaho Const., Art. III, § 1. **“Supreme executive power vested in governor.** — The supreme executive power of the state is vested in the governor. . . .” *Id.*, Art. IV, § 5. **“Judicial power — Where vested.** — The judicial power of the state shall be vested in a court for the trial of impeachments, a supreme court, district court, and such other courts inferior to the Supreme Court as established by the legislature.” *Id.*, Art. V, § 2.

⁴ In 2003, for example, the Legislature appropriated funds to the public school system in House Bill No. 456, H.B. No. 463, Senate Bill No. 1196, S.B. No. 1197, and S.B. No. 1198.

⁵ The computation of support units for each charter school is calculated as if it were a “separate school.” as that term is used in Idaho Code § 33-1003.

⁶ The first sentence of the resolution appears to apply to all schools and all funds such that “both state and federal funds be administered so that funding follows students.” The second sentence addresses funding for “multi-district public charters” and non-resident students. The term multi-district public charter is not defined in the resolution and appears nowhere in the Idaho Code. In addition, it is unclear whether the reference to “non-resident students” applies only to the undefined “multi-district public charters” or to all non-resident students being educated in Idaho. The fourth sentence calls for a deduction by the State Department of Education of funds for public charter schools from the allocation for the resident

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districts. Use of the term “public charter schools” in the fourth sentence would appear to be broader than just the previously referenced “multi-district charter schools.”

Generally there is confusion within the resolution as to whether: a) it applies to all school funding as the initial sentence indicates; b) whether it applies a different mechanism only to the undefined multi-district charter schools and to non-resident students; c) whether the foregoing reference to non-resident students applies only to non-resident students of charter schools or of multi-district charter schools or to all non-resident students across the board; and d) whether there is yet another disbursement mechanism for all charter schools as set out in the fourth sentence.

The confusion is not particularly resolved in any fashion by *Guidance Memorandum 03-01*, attached hereto as **Exhibit “A.”** It talks about “students participating in the approved multi-district or statewide, individualized computer education or distance learning program (collectively “virtual program”). The balance of the memorandum focuses on “participating students” which appears to relate back to the defined term “virtual program.” However the definition of “virtual program” applies to “approved” multi-district charter schools (a revisiting, with slight addition, to the undefined term used in the resolution) as well as newly described (and equally undefined) “statewide, individualized computer education or distance learning program.”

⁷As described earlier, the Board’s resolution relates to “multi-district” public charters, which is problematic because that term is not used, mentioned, or referenced in either the Idaho Public Charter Schools Act of 1998, title 33, chapter 52, Idaho Code, nor in any of the provisions of the *Foundation Program*. Accordingly, there is no evidence that the Legislature has ever authorized the creation of “multi-district” charter schools, nor are there any currently in existence—there are only charter schools, with specific areas of charter as established under title 33, chapter 52, Idaho Code. The fact that certain charter schools have students who reside in areas outside of the geographic district that granted the charter, does not create “multi-district” charter schools—any more than some students attending a public school while residing outside the geographic district would create a “multi-district” public school. The attempt to create such a distinction for charter schools creates yet another division within the Board’s proposed funding mechanism which is not recognized in the funding mechanism established by the Legislature.

⁸Statutory and special distributions are typically based on the school or district’s ADA. For example, Section 5 of H.B. 1198 (2003) appropriates funds to districts with “a base amount of \$1,500 and a prorated amount based on the prior year’s average daily attendance.”

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EXHIBIT "A"

GUIDANCE MEMORANDUM

03-01

Allocation of State and Federal Funds for Multi-District Public Charter Schools

Approved by the State Board of Education
August 14, 2003

On August 14, 2003, the State Board of Education, under authority from Article IX, Section 2 of the Idaho Constitution and Title 33 of the Idaho Code, issued the following directive.

That, beginning with the 2003-04 school years, the allocation of both state and federal funds be administered so that funding follows students. Funding will be based on average district per-pupil budgeted expenditure of the previous year for multi-district public charters and non-resident students. Funds come from the district of student's residence. The State Department of Education will deduct the funds for public charter schools from the allocation to the resident districts and send them directly to the public charter school where the students are enrolled. Public charters may receive additional funding for special needs students if the State and Federal requirements for such funds are fulfilled. This action is intended to be carried out to the extent it is not inconsistent with federal law or our federal consent decree.

The Board also noted the following points in support of their directive:

- Idaho Code 33-5210(1) states that all public charter schools are under the general supervision of the state board.
- Idaho Code 33-105 states that "the state board shall have the power to make rules for its own governance and the governance of its executive departments and offices..."
- Idaho Code 33-1009 provides that the state board is responsible for "Payments of the state general accounts... and payments of monies other than the state general account appropriation that accrue to the public school income fund..."
- Current Idaho Code directing the funding of public schools is based on legislative intent that educational funding should follow the child. In this way equity and fairness can best be maintained for institutions delivering education to Idaho's children particularly in light of districts' open enrollment policies and delivery of education by non-traditional means.

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Suggested Procedure to Enact Idaho State Board of Education Guidance Memorandum

1. School will identify the students participating in the approved multi-district or statewide, individualized computer education or distance learning program, including but not necessarily limited to an internet charter school program (collectively, "virtual program").
2. For each participating student, the school will determine the resident/home school district of each student participating in the virtual program.
 - a. Determine the student's home school.
 - b. Determine the student's grade level.

If a participating student was not in attendance at their resident/home school district during the previous school year, due either to home or private schooling status, the student's age (e.g., entering Kindergarten for the first time) or new physical residence (i.e., moved from another location), a determination of the student's home school and grade level shall be made utilizing the student's current physical residence.

3. For each participating student, the SDE will determine the amount of state and federal funding support that the resident/home school district received for each participating student in the preceding school year, or would have received if they fall into any of the categories listed in number two above.
4. The SDE shall deduct from the resident/home school district's funding an amount equal to that which they received the preceding school year for each of the students participating in the virtual program.
5. The SDE will directly provide to the approved virtual program the funding identified in paragraph 4, above. For multi-district or state-wide internet based charter schools, such funds shall not flow through any chartering entity or chartering school district but shall be paid directly to the charter school program.
6. If a participating student is a special population student, such as a Title I or Special Education Student, the approved virtual program shall directly receive the allocated federal funding for the participating child, regardless of the geographical boundaries of the approved virtual program, and so long as the participating approved virtual program fulfills all the state and federal requirements of any other school or school district within the state of Idaho.
7. The total funding following each participating student will be adjusted, as with any school district, through attendance percentages, utilizing a 24/7 calendar with an allowance for carry-over of accumulated educational attendance hours. However, the total funded hours will be set corresponding to maximum educational attendance hours per year, as determined by the state, for each grade level category as follows:
 - a. 450 hours Kindergarten

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- | | |
|--------------|-------------|
| b. 810 hours | Grades 1-3 |
| c. 900 hours | Grades 4-8 |
| d. 990 hours | Grades 9-12 |

For example, if a program has a 97.5% attendance for their participating student population, the program would receive 97.5% of the funding allocation possible under the parameters as set forth above.

8. Advance payments to approved virtual programs shall be based upon an estimated enrollment and estimations of funding allocations utilizing the parameters as set forth above and dispersed by the SDE to the virtual program on the same schedule as they are for other public schools and districts in the state of Idaho.
9. Regular payments to approved virtual programs shall be made by the SDE on the same schedule as they are for other public schools and districts in the state of Idaho.

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EXHIBIT "B"

FOUNDATION PROGRAM

Education Support Program

Includes the state appropriation for general education purposes, including the moneys available in public school income fund as well as miscellaneous revenues. These funds are allocated in accordance with Idaho Code § 33-1002.

State Support of Special Programs

The legislature provides funding to local public school districts to support a variety of special programs provided by such school districts, including the following:

- Pupil tuition-equivalency allowance (Idaho Code § 33-1002B).
- Transportation support program (Idaho Code § 33-1006).
- Feasibility studies allowance (Idaho Code § 33-1007A).
- Border district allowance (Idaho Code § 33-1403).
- Exceptional child approved contract allowance (Idaho Code § 33-2004).
- Expectant and delivered mothers allowance (Idaho Code § 33-2006).
- Unemployment insurance benefit payments (Idaho Code § 72-1349A).
- Public school technology program (Idaho Code § 33-1002.2.i).
- Support provisions that provide a safe environment conducive to student learning and to maintain classroom discipline (Idaho Code § 33-1002.2.j).
- Idaho student information management system (Idaho Code § 33-120A).
- Any additional amounts as required by statute to effect administrative adjustments (Idaho Code § 33-1002.2.l).

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Miscellaneous Funding Appropriated for Specific Purposes

In addition, the legislature appropriates funds for specifically enumerated purposes, such as the following:

- Summer school/alternative school programs (Idaho Code § 33-1002C).
- Property tax replacement (Idaho Code § 33-1002D).
- Appropriations for professional-technical schools (Idaho Code § 33-1002G).

Salary-Based Apportionment

Each school district also is entitled to salary-based apportionment funding, which is calculated based upon a complex formula composed of four components: (i) “support units;” (ii) a “staff allowance ratio;” (iii) a “base salary;” and (iv) the “average administrative and instructional experience and education index.” The funding formula for salary-based apportionment is described at Idaho Code § 33-1004E.

Categorical Funding

In addition to the recurring funding programs described above, the legislature also appropriates funds to support a variety of special programs and purposes on a non-recurring basis. During past years, such funding programs have included appropriations in support of the following:

- Technology grants
- Achievement standards implementation funding
- Safe and drug free schools program
- Idaho reading initiative
- Limited English proficiency funding
- Funds for teacher supplies
- Least restrictive environment/teacher training
- Gifted and talented training
- Teacher support program

Other Miscellaneous Funding

An additional source of public school district funding in the state is derived from lottery dividends and interest (Idaho Code § 33-905).

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November 25, 2003

The Honorable Clint Stennett
P.O. Box 475
Ketchum, Idaho 83340

The Honorable Wendy Jaquet
P.O. Box 783
Ketchum, Idaho 83340

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

Dear Senator Stennett and Representative Jaquet:

This letter is in response to the questions presented in your October 29, 2003, inquiry regarding the State of Idaho's domestic use preference.

QUESTIONS PRESENTED

1. Would you please clarify for the city the intent of the drafters of our Constitution in establishing that the appropriation of water for domestic use takes priority over any other use or right.
2. How does one (in this case, the City of Gooding) protect and preserve its right to the use of its water for domestic purposes?

CONCLUSION

Article XV, section 3 of the Idaho Constitution authorizes the holder of a junior priority water right for domestic purposes to exercise a delivery preference over the holders of more senior water rights for other purposes when there is insufficient water to satisfy all users. In exercising this preference, however, the junior domestic right holder must pay just compensation to the holder of any non-domestic water right from whom water is taken in order to comply with the provisions of article I, section 14 of the Idaho

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Constitution, which requires compensation for the taking of private property for public and private use.

The City of Gooding has at least two options it may pursue to preserve its rights to the use of water for domestic purposes in times of shortage without resorting to an exercise of the domestic preference under article XV, section 3. The City may seek coverage under an approved mitigation plan designed to mitigate the effects of the City's junior priority water withdrawals on senior right rights, or it may purchase more senior water rights in the area.

ANALYSIS

A. Article XV, Section 3 of the Idaho Constitution

On July 3, 1890, Congress approved the Idaho Constitution, including article XV, section 3. With the exception of a 1928 amendment that allows the state to regulate waters for "power purposes," article XV, section 3, has remained unchanged since 1890.¹ Article XV, section 3 of the Idaho Constitution presently reads as follows:

§ 3. Water of natural stream—Right to appropriate—State's regulatory power—Priorities. The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied, except that the state may regulate and limit the use thereof for power purposes. Priority of appropriations shall give the better right as between those using the water; *but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall (subject to such limitations as may be prescribed by law) have the preference over those claiming for any other purpose;* and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes. And in any organized mining district those using the water for mining purposes or milling purposes connected with mining, shall have preference over those using the same for manufacturing or agricultural purposes. *But the usage by such subsequent appropriators shall be subject to such provisions of law regulating the taking of private property for public and private use, as referred to in section 14 of article 1 of this Constitution.*

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(Emphasis added.)

B. Idaho Case Law Interpreting Article XV, Section 3

In 1911, the Idaho Supreme Court examined the meaning of the domestic preference in article XV, section 3 of the Idaho Constitution in Montpelier Milling Co. v. City of Montpelier, 19 Idaho 212, 113 P. 741 (1911). The Montpelier Milling Company owned a flourmill that diverted waters from Montpelier creek. The mill had been diverting waters from the creek for beneficial use since 1891. In April 1908, at a point two miles above the Milling Company's point of diversion, the City of Montpelier began diverting waters from the creek for domestic use. In the winter months that followed, the City's diversion of water for domestic use resulted in a deprivation of the Milling Company's non-domestic prior appropriation right.

The Milling Company sought to enjoin the City from diverting water from the creek. After the Milling Company's injunction was denied, it appealed the judgment to the Idaho Supreme Court. On appeal, the City argued that even though the Milling Company's water right was first in time, "it was the intention of the framers of the Constitution [in article XV, section 3] to make an appropriation of water for domestic uses a right superior to an appropriation made for manufacturing uses, without reference to the time or priority of such appropriations." *Id.* at 218, 113 P.2d at 743. The court rejected the City of Montpelier's interpretation.

We do not think that the language thus used in the Constitution was ever intended to have this effect, for it is clearly and explicitly provided in said section that the right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses shall never be denied; that priority of appropriation shall give the better right as between those using the water. This clearly declares that the appropriation of water to a beneficial use is a constitutional right, and that the first in time is the first in right, without reference to the use, but recognizes the right of appropriations for domestic purposes as superior to appropriations for other purposes, when the waters of any natural stream are not sufficient for the service of all those desiring the same. This

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section clearly recognizes that the right to use water for a beneficial purpose is a property right, subject to such provisions of law regulating the taking of private property for public and private use as referred to in section 14, art. 1, of the Constitution.

It clearly was the intention of the framers of the Constitution to provide that water previously appropriated for manufacturing purposes may be taken and appropriated for domestic use, upon due and fair compensation therefor. It certainly could not have been the intention of the framers of the Constitution to provide that water appropriated for manufacturing purposes could thereafter arbitrarily and without compensation be appropriated for domestic purposes.

....

It is clear, therefore, that under the provisions of the above-quoted section of the Constitution, a municipality cannot take water for domestic purposes which has been previously appropriated for other beneficial uses without fully compensating the owner, and in this case it appearing that the respondent appropriated waters of Montpelier creek and applied the same to a beneficial use in 1891, the appellant had no right to interfere with such appropriation, to the injury of the respondent, without full compensation.

Id. at 219-21, 113 P. at 743-44 (emphasis added).

The Idaho Supreme Court found its interpretation of article XV, section 3, consistent with an interpretation reached by the Colorado Supreme Court that examined a similar provision in the Colorado Constitution:

In the case of *Town of Sterling v. Pawnee Extension Ditch Co.*, 42 Colo. 421, 94 Pac. 339, 15 L.R.A. (N.S.) 238, the Supreme Court of Colorado construed section 6, art. 16, of the Constitution of that state, which is very similar to section 3, art. 15, of the Constitution of this state, and said:

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“Section 6, art. 16, Const., states that those using water for domestic purposes shall have the preference over those claiming for other purposes, but this provision does not entitle one desiring to use water for domestic purposes, as intended by the defendant town of Sterling, to take it from another who has previously appropriated it for some other purpose, without just compensation. Rights to the use of water for a beneficial purpose, whatever the use may be, are property in the full sense of that term, and are protected by section 15, art. 12, Const., which says that ‘private property shall not be taken or damaged for public or private use without just compensation.’ That a city or town cannot take water for domestic purposes which has been previously appropriated for some other beneficial purpose, without fully compensating the owner, is so clear that further discussion seems almost unnecessary. Any other conclusion would violate the most fundamental principles of justice, and result in destroying most valuable rights. It would violate that right protected by our Constitution, that property shall not be taken from the owner either for the benefit of the public or for private use without compensation to the owner.”

Montpelier, 19 Idaho at 219-20, 113 P. at 743-44.

C. Applying Article XV, Section 3

Article XV, section 3, is not intended to function as an exception to the prior appropriation doctrine. See Basinger, 30 Idaho 289, 164 P. 522; Montpelier, 19 Idaho 212, 113 P. 741. Article XV, section 3, is limited in its application and may only be invoked over non-domestic users “when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same” The phrase “waters of any natural stream” has been construed for related purposes to include surface water as well as ground water. See Idaho Code §§ 42-103; Silkey v. Tiegs, 51 Idaho 344, 5 P.2d 1049 (1931).

Once a domestic user has exercised its rights under article XV, section 3, the user must pay just compensation to the non-domestic user as pro-

vided for in the last sentence of article XV, section 3. Just compensation for the water taken is necessary to comply with article I, section 14, which provides: "Private property may be taken for public use, but not until a just compensation, to be ascertained in the manner prescribed by law, shall be paid therefor."

D. How can the City of Gooding Protect and Preserve its Right to the Use of its Water for Domestic Purposes?

Your letter indicates that the City of Gooding is concerned about the potential curtailment of its rights to divert water for domestic use under an anticipated order from the Idaho Department of Water Resources. The concern is assumed to arise from the Director of the Department of Water Resources' Order issued on February 19, 2002, creating Water District No. 130, pursuant to the provisions of Idaho Code § 42-604. On January 8, 2003, the Director issued a further order extending the boundaries of Water District No. 130 to include an area encompassing the City of Gooding. The Director created Water District No. 130 to provide for the administration of water rights, pursuant to the provisions of chapter 6, title 42, Idaho Code, for the protection of prior surface and ground water rights. Among the duties to be performed by the watermaster for Water District No. 130 is the duty to: "Curtail out-of-priority diversions determined by the Director to be causing injury to senior priority water rights that are not covered by a stipulated agreement or a mitigation plan approved by the Director."

As the holder of water rights within Water District No. 130, the City is subject to water delivery calls made by the holders of senior priority surface or ground water rights diverted from the same source or an interconnected water source. The principal means available to the City to protect against such a delivery call is to participate in a mitigation plan approved by the Director of the Department of Water Resources that adequately mitigates for the effects of the City's diversions upon the source of water relied upon by the holders of the senior priority water rights making the delivery call.

As a domestic user, the City may exercise its rights under article XV, section 3, when there is insufficient water to service all users. While the City cannot take water from other domestic users pursuant to the preference in article XV, section 3, the City could take water from non-domestic users, pro-

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vided the City pays just compensation to any non-domestic user for the value of the water taken. To avoid taking water from non-domestic users in times of shortage, and being forced to pay just compensation, the City could purchase more senior water rights in the area.

Sincerely,

Phillip J. Rassier
Deputy Attorney General
Natural Resources Division

¹ In 1928, the legislature proposed an amendment to article XV, section 3: "The right to divert and appropriate the unappropriated waters of any natural stream to beneficial use shall never be denied, *except that the State may regulate and limit the use thereof for power purposes.*" S.L. 1927, p. 591, H.J.R. No. 13 (emphasis in original). The italicized amendment was subsequently approved by voters in the November 1928 general election. *Id.*

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ATTORNEY GENERAL'S CERTIFICATES OF REVIEW FOR THE YEAR 2003

LAWRENCE G. WASDEN
ATTORNEY GENERAL
STATE OF IDAHO

CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

January 30, 2003

The Honorable Ben Ysursa
Secretary of State
HAND DELIVERED

Re: Certificate of Review
Initiative Regarding the Idaho Judicial Accountability Act of
2004 (IJAA)

Dear Secretary of State Ysursa:

An initiative petition was filed with your office on January 2, 2003. 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, 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 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

1. Introduction

Entitled "The Idaho Judicial Accountability Act of 2004" ("IJAA"), petitioners have presented a petition that seeks to substantially alter the judi-

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

1. The Elimination of Judicial Immunity.
2. A Special Grand Jury ("SGJ") established to review any decision made in any court.
3. Procedures for the removal of judges.
4. Abolishment of the Judicial Council.
5. Additional provisions related to the implementation of the Grand Jury.

Most of the provisions of this measure would 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.

2. Separation of Powers

Article II, § 1 of the Idaho Constitution defines the departments of government and states the policy of separation of powers. Specifically, article II, § 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 a legislative power. Idaho Const. art. III, § 1. As a legislative power, the initiative cannot regulate the powers of the courts, or act as an

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oversight mechanism. Moreover, an initiative proposes a law that is statutory in nature—laws passed by initiative are on an equal footing with laws passed by the legislature. Gibbons v. Cenarrusa, No. 28408, 2002 WL 834149 (Idaho May 3, 2002); Luker v. Curtis, 64 Idaho 703, 136 P.2d 978 (1943). Laws of this kind cannot alter constitutional provisions including those which define and empower the courts. Johnson v. Diefendorf, 56 Idaho 620, 57 P.2d 1068 (1936). 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 art. II, § 1—no department may exercise the power of another department unless it is expressly permitted within the Idaho Constitution. The IJAA, as enacted through the initiative process, would unconstitutionally encroach on the powers of the judicial branch because the statute would operate as an impermissible intrusion into judicial power through the use of a legislative power (the initiative), without an express constitutional grant of such power.

The separation of powers among judicial, executive and legislative 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 *cooperation* 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, at 635.

The IJAA 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. Essentially, this petition creates an impermissible legislative oversight mechanism for the courts. Creation of

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this body through statute is an impermissible exercise of judicial power by a legislative body.

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

Judicial Power—Where vested.—The judicial power of the state shall be vested in a court for the trial of 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 IJAA initiative usurps this constitutional, 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 Idaho 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 Idaho Const. art. V, § 20. See Fox v. Flynn, 27 Idaho 580, 150 P. 44, 46 (1915).

The power of the legislature is specifically limited in other areas as well. As can be seen in Idaho Const. art. V, § 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 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 IJAA initiative seeks to directly invade the province of the judicial system through the legislative process.

3. The Initiative Violates Art. I, § 9 of United States Constitution

The United States Constitution states: “No bill of attainder or *ex post facto* law shall be passed.” U.S. Const. art. I, § 9. To fall within the *ex post facto* prohibition, a law must be retrospective—that is, it must apply to events occurring before its enactment—and it must disadvantage the offender affected by it, by altering the definition of criminal conduct or increasing the punishment for the crime. Lynce v. Mathis, 519 U.S. 433, 117 S. Ct. 891, 896, 137 L. Ed. 2d 63 (1997).

The IJAA clearly violates this provision because it states: “In a six-month period, which shall begin to run immediately upon the initial seating of the SGJ, a complainant may file a complaint for judicial misconduct which occurred prior to enactment of this Act.” IJAA p. 7, § 2540 (emphasis added). Clearly, the above provision would apply to events occurring before the enactment of IJAA, and disadvantages the “offender” by making an otherwise legal act at the time of the conduct, illegal after the fact. A reviewing court would most likely find this provision unconstitutional as an *ex post facto* law.

4. The Initiative Violates Both the Due Process Clause and the Rights of the Accused

Pursuant to the Fifth and Sixth Amendments of the United States Constitution, citizens accused of crimes, criminal conduct, or conduct that creates punitive sanctions, are afforded basic rights related to the accusations. Paramount within these rights is the right to Due Process as contained within the Fifth Amendment. According to Idaho Code § 18-109, a “crime” is defined as:

[A]n act committed or omitted in violation of a law forbidding or commanding it, and to which is annexed upon conviction, either of the following punishments:

1. Death
2. Imprisonment
3. Fine
4. Removal from Office; or
5. Disqualification to hold and enjoy any office of honor, trust or profit in this state.

Idaho Code § 18-109.

According to the IJAA, possible penalties for improper judicial conduct within the ambiguously broad definition of judicial misconduct include forfeiture of pay, forfeiture of retirement benefits, and removal from office. IJAA, *supra*. Since the IJAA is, in essence, proposing crimes and criminal procedures to be utilized within judicial misconduct cases, those charged with misconduct must be afforded the rights guaranteed them by the United States Constitution.

A citizen charged under the IJAA is presumed guilty. “All complaint allegations *shall be liberally construed in the favor of the complainant . . .*” IJAA, § 2535. This runs directly counter to the United States’ system of justice, whereby the accused are presumed innocent. This merely highlights one instance of many wherein the rights of those charged are not protected by the IJAA. For example, the IJAA unconstitutionally limits the rights of the accused to trials by jury, unconstitutionally limits peremptory challenges to

jurors, unconstitutionally creates juror qualifications that violate the Fourteenth Amendment, and violates the prohibition against double jeopardy.

5. Remedial Suggestions for Initiative Language and Organization

Incongruities within the language of the IJAA should be addressed. For example, the primary theme of the IJAA initiative is the elimination of judicial immunity for “judicial officers” as defined within the initiative, but the provisions of the initiative create a broad immunity protection for members of the “Special Grand Jury.” This inconsistency cannot be reconciled on its face by any of the provisions of the initiative.

The IJAA purports to create a vehicle by which judicial conduct will be overseen by a legislatively created “Special Grand Jury,” but, in reality, the initiative seems to create a vehicle by which the “Special Grand Jury” will substitute its judgment for the conduct of the courts of Idaho. The actual jurisdiction of the “Special Grand Jury” is nebulous as well. According to the initiative, a judge may issue a ruling which is the subject matter of a complaint. An appeal of the district court’s judgment may be taken, and the complaint lodged with the “Special Grand Jury.” What happens if the “Special Grand Jury” makes a determination of wrongdoing, and the appellate court affirms the decision of the district court? This occurrence cannot be reconciled.

Finally, the initiative grants the “Special Grand Jury” virtually limitless powers related to *habeas corpus*, indictments, grants of temporary immunity, and criminal proceedings against judges. On their face, many of these provisions are offensive to the rights of due process guaranteed by both the United States Constitution and the Idaho Constitution.

CONCLUSION

In the interest of timeliness and brevity, this review highlights only the most constitutionally offensive issues. Other issues that are highly problematic include the fiscal impact of this measure if implemented, the creation of varying degrees of original jurisdiction with the “Special Grand Jury,” the confusing regulation of both attorneys and judges, and a myriad of other constitutional flaws. Nearly every provision of this initiative contains elements

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in direct conflict with well-settled principles of state and federal constitutional law. A reviewing court would most likely find the IJAA, in its entirety, to be unconstitutional.

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,

LAWRENCE G. WASDEN
Attorney General

Analysis by:

Brian P. Kane
Deputy Attorney General

CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

February 28, 2003

The Honorable Ben Ysursa
Secretary of State
HAND DELIVERED

Re: Certificate of Review
Initiative to Amend Idaho Code §§ 36-102(c); 36-102(d); and
36-107(b)

Dear Mr. Ysursa:

An initiative petition was filed with your office on February 3, 2003. 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 that Governs the Idaho Fish And Game Commission" (the "initiative"), petitioners apparently seek to amend Idaho Code §§ 36-102(b); 36-102(d); and 36-107(d). The proposed amendments are outlined and reviewed below:

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A. Proposed Amendments to Idaho Code § 36-102(b):

1. Creation of a Citizens Wildlife Advisory Council (CWAC) for each of the seven regions;
2. Eliminate the service of Commissioners to be at the pleasure of the Governor, Commissioners may only be removed for cause;
3. Eliminate the restriction on party (political) affiliation;
4. Create a Citizen Wildlife Advisory Council (CWAC), from which Commission members would be nominated.

B. Proposed Amendments to Idaho Code § 36-102(d):

1. Numbering the regions instead of geographical region descriptions;
2. Amend the geographical boundaries of two regions by realigning the counties in each region;
3. Increase the length of the term from four (4) to six (6) years;
4. 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. *Id.*; Idaho Const. art. III, § 1. As a result, the proposed amendments to Idaho Code §§ 36-102(b) and 36-102(d) do not appear to violate any provisions of the state or federal constitutions.

C. The Proposed Amendment to Idaho Code § 36-107(b) Appears to Violate the Idaho Constitution

The proposed initiative seeks to amend Idaho Code § 36-107(b) as follows:

The commission shall govern the financial policies of the department and shall fix the budget for the operation and maintenance of its work for each fiscal year and this budget

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can not [*sic*] be amended by the Idaho state legislature without the approval of five (5) commissioners. Said budget shall not be exceeded by the director.

Initiative, p. 2.

The prohibition of budgetary amendments by the legislature without a supermajority of commissioners' approval, within this provision, violates several provisions of the Idaho Constitution. This provision appears to violate art. II, § 1, related to the separation of powers based upon its application to the legislature and the executive branches. But more importantly, a specific process is outlined within the Idaho Constitution for the passage of bills; the proposed amendment seeks to alter this process by statute. It is axiomatic that the Idaho Constitution cannot be amended by statute without specific constitutional authorization. Absent such authorization, this alteration is unconstitutional.

Specifically, passage of bills is governed by art. III of the Idaho Constitution. Article III, § 15, outlines the manner of passing bills. As provided for within the proposed initiative, the legislature must seek the approval of the Idaho Fish and Game Commission prior to amending fish and game's budget recommendation. The proposed initiative seeks to insert the fish and game commission into the process by requiring their approval on certain legislative activities. A limitation such as this must be expressly provided for within the Idaho Constitution. This is not contemplated anywhere within the Idaho Constitution.

Coordinately, the proposed initiative could be interpreted to create a fish and game "veto" of legislative action related to fish and game's budgets. This is also unconstitutional. The veto power is expressly limited to the governor in the Idaho Constitution by art. IV, §§ 10 and 11. There is no provision granting any other entity within the State of Idaho the power to veto a bill passed by the legislature.

Finally, art. VII of the Idaho Constitution outlines the system of finance and revenue for the State of Idaho. The legislature is granted plenary authority over this system by the Idaho Constitution. Specifically, art. VII, § 11, mandates that the appropriations of the legislature cannot exceed the

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revenue (balanced-budget requirement). The proposed initiative contains no mechanism to ensure that this provision of the Idaho Constitution would not be violated, and clearly infringes upon the legislature's power to balance the budget under art. VII, § 11.

Article VII, § 13 of the Idaho Constitution requires that money expended from the treasury must be done by appropriations made according to law. As previously outlined within this review, the Idaho Constitution outlines a specific process for the passage of bills. Case law has defined an appropriation as the authority, from the legislature, given in legal form to the proper officers, to pay from the public moneys, a specific sum. McConnel v. Gallet, 51 Idaho 386, 6 P.2d 143 (1931); Jackson v. Gallet, 39 Idaho 382, 228 P. 1068 (1924); Herrick v. Gallet, 35 Idaho 13, 204 P. 477 (1922). The proposed initiative's improper infringement into the legislative authority to set appropriations violates this provision of the Idaho Constitution.

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 Jerry Conley by deposit in the U.S. Mail of a copy of this certificate of review.

Sincerely,

LAWRENCE G. WASDEN
Attorney General

Analysis by:

Brian P. Kane
Deputy Attorney General

CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

March 5, 2003

The Honorable Ben Ysursa
Secretary of State
HAND DELIVERED

Re: Certificate of Review
Proposed Initiative to Create a Sales Tax Exemption for Food

Dear Mr. Ysursa:

An initiative petition was filed with your office on February 12, 2003. Pursuant to Idaho Code § 34-1809, this office has reviewed the petition and 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." The petitioners are free to "accept or reject them in whole or in part." The opinions expressed in this review are only those which may affect the legality of the initiative. This office offers no opinion with regard to the policy issues addressed or the potential revenue impact to the state budget.

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 standard in mind, we would recommend that they do so and their proposed language will be considered.

MATTERS OF SUBSTANTIVE IMPORT

Petitioners seek to create a new section in the exemptions to the Sales Tax Act, Idaho Code §§ 63-3601, *et seq.* The purpose of the proposed initia-

tive is to exempt “food products” from the sales and use tax. The definition of “food products” is not spelled out in the proposed statute, but instead is identified as “those items that can be purchased by food stamps issued by the Department of Agriculture of the United States of America” and a “list of such items can be found in C.F.R. 271.2, as it presently reads, or as it may be amended to read in the future.” There are several problems with this reference to the federal regulation which may constitute an unconstitutional delegation of state legislative power to another government.

A. A Function of the Legislature Cannot Be Delegated to Another Entity

Article III, § 1 of the Idaho Constitution vests the legislative power of the state in the senate and house of representatives, and in the people through the initiative process. This legislative power cannot be delegated to any other governmental authority. State v. Nelson, 36 Idaho 713, 213 P. 358 (1923). In Idaho Savings & Loan Ass’n v. Roden, 82 Idaho 128, 350 P.2d 225 (1960), the legislature enacted a statute which, as a condition precedent of doing business, required all local savings and loans to comply with the regulations adopted by certain federal agencies, and abide and conform with any amendment to Title 4 of the National Housing Act (12 U.S.C.A. §§ 1701, et seq.) which may become effective after the Idaho statute. The court struck down the Idaho statute, holding it was an unconstitutional delegation of authority contrary to art. III, § 1. The court held that all legislative power is vested in the legislature of the State of Idaho, and the legislature cannot delegate its authority to another government or agency in violation of the Idaho Constitution. Idaho Savings and Loan v. Roden, 82 Idaho at 134, 350 P.2d 228-29.

The same rationale applies to legislation enacted by the initiative process. Laws passed by initiative are on equal footing with legislation enacted by the legislature, and the two must comply with the same constitutional requirements. Westerberg v. Andrus, 114 Idaho 401, 757 P.2d 664 (1984). In short, an initiative cannot delegate a legislative function to another governmental entity.

Here, the proposed initiative refers to the definition of food as contained in the Code of Federal Regulations, as it may be amended from time to

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time. It appears that by using this definition, the drafters of the initiative may be delegating the legislative function to another governmental body in violation of art. III, § 1. A court of competent jurisdiction could find all or part of the exemption initiative, if enacted, to be unconstitutional.

One remedy the drafters should consider is to list the specific items from the Code of Federal Register as it exists in its present state, or to develop a different definition of food and specify that in the proposed statute. One possible source for a uniform definition of “food and food products” is contained in the proposed multistate “Streamlined Sales and Use Tax Agreement.” For your reference, a copy of the agreement may be found on the web page of the National Conference of State Legislatures (www.ncsl.org).

B. The Definition of “Food Products” is Confusing

Notwithstanding the above concern, the reference to the Code of Federal Regulations is flawed for several other reasons. First, the correct citation should be 7 C.F.R. § 271.2 (2003). As it now reads, the initiative refers to “C.F.R. 271, Section 271.2.”

Second, there is no definition of “food products” in the referenced federal regulation. There is a definition of “eligible foods” which includes, among other things, “any food or food product intended for human consumption except alcoholic beverages, tobacco, and hot foods and hot food products prepared for immediate consumption.” 7 C.F.R. § 271.2. Thus, the reference to “food products” should, at a minimum, be changed to “eligible foods.”

The definition of eligible foods in C.F.R. excludes hot foods prepared for immediate consumption. The proposed initiative statute excludes food products when furnished, prepared, or served for consumption at or near the location where the food products are sold. Thus, in some respects, the exclusions overlap and may result in some confusion. For example, since most restaurant food is excluded in the C.F.R. definition, is the statute attempting to exclude other food or is it simply repetitive? The solution to this problem is dependent upon the definition of food that the drafters adopt.

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 Ronald D. Rankin by deposit in the U.S. Mail of a copy of this certificate of review.

Sincerely,

LAWRENCE G. WASDEN
Attorney General

Analysis by:

Brian Nicholas
Deputy Attorney General

CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

March 11, 2003

The Honorable Ben Ysursa
Secretary of State
HAND DELIVERED

Re: Certificate of Review
Initiative Regarding the Resort County Sales Tax

Dear Mr. Ysursa:

An initiative petition was filed with your office on February 12, 2003. Pursuant to Idaho Code § 34-1809, this office has reviewed the petition and has prepared the following advisory comments. I stress that, given the strict statutory time frame in which this office must respond, and the complexity of the issues raised in this petition, this review can only isolate areas of concern and cannot provide an in-depth analysis of each issue that may present problems. Further, under the review statute, the Attorney General's recommendations are "advisory only," and the petitioners are free to "accept or reject them in whole or in part."

BALLOT TITLE

Following the filing of the proposed initiative, 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 recommend they do so and their proposed language will be considered.

MATTERS OF SUBSTANTIVE IMPORT

Entitled the "Resort County Sales Tax," the petition seeks to permit resort counties to impose a countywide sales tax, of which a portion of the revenue will be used for local property tax relief. This petition is an attempt to reinstate a local option county sales tax similar to one the Idaho Supreme Court struck down in 2002. In Concerned Citizens of Kootenai County v.

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Kootenai County, 137 Idaho 496 (2002), the court held unconstitutional the entirety of the Resort County Act (the “Act”), which generally provided that voters in resort counties could approve a local sales or use tax to accommodate the influx of tourists. The statute was held unconstitutional because the definition of “resort county” in the Act was drawn in such a way as to apply only to Kootenai County. This made the Act a local and special law in violation of art. III, § 19 of the Idaho Constitution. The petition’s major features are outlined as follows:

1. The definition of “resort county” is modeled on language found in the City Property Tax Alternatives Act of 1978, codified in §§ 50-1043 through 50-1049, Idaho Code. This Act permits certain resort cities to impose a local sales tax. A resort county must have a population in excess of 17,000 and “derive a major portion of its economic well-being from businesses catering to recreational needs and meeting needs of people traveling to that destination county for an extended period of time.” This definition appears to be sufficiently inclusive to avoid the flaw of being a local or special law. Blaine County, for example, meets the population requirement and, presumably, the other requirements as well.
2. The petition provides that county commissioners may implement a county sales and use tax if it is approved by 60% of county voters.
3. The petition establishes a county property tax relief fund into which must be placed a minimum of 50% of any revenue received from the county sales or use tax. The money in this fund is to be distributed to the county and cities in the county. Money not placed in the property tax relief fund shall be distributed to cities in the resort county in the manner approved by county voters. If a city in the resort county already has a city sales tax implemented pursuant to statute, it is not entitled to share in revenue received pursuant to the county sales or use tax. The county sales or use tax will not operate in any city that has a city sales tax.

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4. The petition establishes certain requirements for the ordinance to be submitted to county voters. These requirements are largely modeled on the provisions of § 50-1047, Idaho Code.

This measure does not appear to present any legal issues.

CONCLUSION

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

Sincerely,

LAWRENCE G. WASDEN
Attorney General

Analysis by:

Carl E. Olsson
Deputy Attorney General

CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

June 4, 2003

The Honorable Ben Ysursa
Secretary of State
HAND DELIVERED

Re: Certificate of Review
Initiative Regarding the Idaho Judicial Accountability Act of
2004 (IJAA)

Dear Secretary of State Ysursa:

An initiative petition was filed with your office on May 7, 2003. 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, 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 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

1. Introduction

Entitled “The Idaho Judicial Accountability Act of 2004” (“IJAA”), petitioners have presented a petition that seeks to substantially alter the judicial branch and system of Idaho. Specifically, petitioners seek to alter and implement the following:

1. The Elimination of Judicial Immunity.
2. A Special Grand Jury (“SGJ”) established to review any decision made in any court.
3. Procedures for the removal of judges.
4. Abolishment of the Judicial Council.
5. Additional provisions related to the implementation of the Grand Jury.

Most of the provisions of this measure would likely be struck down by a reviewing court as unconstitutional and a violation of the separation of powers doctrine. Each of these provisions were reviewed within the Certificate of Review issued on January 30, 2003. This office notes that the initiative submitted on May 7, 2003, and the initiative submitted on January 3, 2003, are substantially similar in form, verbiage, and potential effect. In the interest of brevity, the January 30, 2003, Certificate of Review is adopted and incorporated into this certificate of review in its entirety and attached hereto for your convenience.

Although substantively the same, the newest iteration of this initiative may be more constitutionally offensive than previous versions, as outlined below.

2. Departments of Government

Article II, § 1 of the Idaho Constitution defines the departments of government and states the policy of separation of powers. Specifically, art. II, § 1, states:

CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

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 most recent version of the Idaho Judicial Accountability Act of 2004 changes the name of the judicial accountability entity from that of a “Special Grand Jury” to the “Idaho Judicial Accountability Commission.” This “commission” is created as an entity independent of the legislative, executive, or judicial branches of government; in essence, a fourth branch of government. This is patently unconstitutional. The branches of government are clearly delineated within art. II, § 1 of the Idaho Constitution. Any new branch of government must be outlined within art. II, § 1 of the Idaho Constitution. A change of this magnitude must be made through a constitutional amendment. A reviewing court would most likely find that the Idaho Judicial Accountability Act of 2004 is unconstitutional for this reason.

3. A Note About Word Choice

Consistent with this office’s statutory duty to review proposed initiatives for matters of style and substantive import, this office makes the following observation related to style within the proposed Idaho Judicial Accountability Act of 2004. The use of the term/abbreviation “A.D.” is superfluous.

Also, unnecessary words are used to describe the United States Constitution and the Bill of Rights. For example, the U.S. Constitution is described as “the 1789 Constitution for the United States of America including the 1791 Bill of Rights.” These descriptive words are meaningless. The United States is governed by the Constitution as the supreme law of the land, which includes the Bill of Rights. M’Culloch v. State of Maryland, 17 U.S. 316, 360 (1819). Finally, the Declaration of Independence is referenced, but it must be noted that the Declaration of Independence has no force or effect of law.

CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

CONCLUSION

As noted within the January 30, 2003, Certificate of Review and the current certificate of review, the Idaho Judicial Accountability Act of 2004 contains constitutional infirmities, contradictions, and confusing terminology. It is beyond the scope of this review to definitively point out each and every transgression, but review of the January 30, 2003, Certificate of Review, which is adopted and incorporated herein, and this certificate of review reflect that upon review by a court of competent jurisdiction, the Idaho Judicial Accountability Act of 2004 will likely be found unconstitutional.

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,

LAWRENCE G. WASDEN
Attorney General

Analysis by:

Brian P. Kane
Deputy Attorney General

CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

July 10, 2003

The Honorable Ben Ysursa
Secretary of State
HAND DELIVERED

Re: Certificate of Review/Proposed Initiative to
Repeal the Right to Work Law (Idaho Code §§ 44-2001 to
44-2012)

Dear Secretary of State Ysursa:

An initiative petition was filed with your office on May 22, 2003. Pursuant to Idaho Code § 34-1809, this office has reviewed the petition and 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." The petitioners are free to "accept or reject them in whole or in part." The opinions expressed in this review are only those which may affect the legality of the initiative. This office offers no opinion with regard to the policy issues raised by this proposed initiative.

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.

CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

MATTERS OF SUBSTANTIVE IMPORT

Petitioner has submitted a proposed initiative seeking to repeal Idaho Code §§ 44-2001 to 44-2012, commonly known as Idaho's "Right to Work" law. As a series of legislative enactments, these code sections are subject to repeal by the initiative power reserved to the people by the Idaho Constitution. Idaho Const. art. III, § 1.

Article III, § 1 of the Idaho Constitution vests the legislative power of the state in the Senate and House of Representatives, and in the people through the initiative process. Laws passed by initiative are on equal footing with legislation enacted by the legislature, and the two must comply with the same constitutional requirements. Westerberg v. Andrus, 114 Idaho 401, 757 P.2d 664 (1984). As both the proposed initiative and the law it seeks to repeal are interpreted to be on "equal footing," this proposed initiative does not appear to raise any significant legal issues.

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 Barbara A. Harris by deposit in the U.S. Mail of a copy of this certificate of review.

Sincerely,

LAWRENCE G. WASDEN
Attorney General

Analysis by:

Brian P. Kane
Deputy Attorney General

CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

July 22, 2003

The Honorable Ben Ysursa
Secretary of State
HAND DELIVERED

Re: Certificate of Review
Initiative to Amend Idaho's School Funding

Dear Secretary of State Ysursa:

An initiative petition was filed with your office on June 26, 2003. 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

Petitioners have submitted the following:

We, the undersigned citizens and qualified electors of the State of Idaho, respectfully demand that the following proposed law, to-wit:

CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

All public school districts in Idaho shall receive funding at a per pupil level greater than that of the lowest five percent (5%) of the public school districts in the entire United States.

shall be submitted to the qualified electors of the State of Idaho, for their approval or rejection at the regular general election to be held on the 2nd day of November, A.D., 2004 .

...

Although this is a proposal for a new law, it does not contain a title, a chapter or any other indication of where within the code it should be placed. This is problematic for organizational reasons within the Idaho Code.

I. The Proposed Initiative Appears Contrary to the Idaho Constitution

The requirement that the legislature fund all school districts within Idaho “at a per pupil level greater than that of the lowest five percent (5%) of the public school districts in the entire United States” appears to be legally ineffective. The creation, destruction, expansion or contraction of school districts is a legislative function. Idaho Constitution, art. IX, § 1; art. III, § 1. The legislature has plenary power in such matters. In re Common School Dists. Nos. 18 and 21, 52 Idaho 363, 15 P.2d 732 (1932). Article VII of the Idaho Constitution outlines the system of finance and revenue for the State of Idaho. To be effective, any mandates upon the legislature must have a constitutional base.

Article VII, § 11 of the Idaho Constitution mandates a balanced budget. Specifically, passage of bills is governed by art. III of the Idaho Constitution. Article III, § 15, outlines the manner of passing bills. As provided for within the proposed initiative, the legislature would be restricted to funding on a per pupil basis at a minimum level set by external measure. The proposed initiative seeks to eliminate the legislature’s constitutional authority related to the setting of budgets for the state. A limitation such as this must be expressly provided for within the Idaho Constitution.

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Article VII, § 13 of the Idaho Constitution requires that money expended from the treasury must be done by appropriations made according to law. The Idaho Constitution outlines a specific process for the passage of bills. Case law has defined an appropriation as the authority, from the legislature, given in legal form to the proper officers, to pay from the public moneys, a specific sum. McConnel v. Gallet, 51 Idaho 386, 6 P.2d 143 (1931); Jackson v. Gallet, 39 Idaho 382, 228 P. 1068 (1924); Herrick v. Gallet, 35 Idaho 13, 204 P. 477 (1922). The proposed initiative's improper infringement into the legislative authority to set appropriations, if effective, violates this provision of the Idaho Constitution.

II. Legislative Functions Cannot Be Delegated Elsewhere

Article III, § 1 of the Idaho Constitution vests the legislative power of the state in the senate and house of representatives, and in the people through the initiative process. This legislative power cannot be delegated to any other governmental authority. State v. Nelson, 36 Idaho 713, 213 P. 358 (1923). In Idaho Savings & Loan Ass'n v. Roden, 82 Idaho 128, 350 P.2d 225 (1960), the legislature enacted a statute which, as a condition precedent of doing business, required all local savings and loans to comply with the regulations adopted by certain federal agencies, and abide by and conform with any amendment to Title 4 of the National Housing Act (12 U.S.C.A. §§ 1701, *et seq.*) which may become effective after the Idaho statute. The court struck down the Idaho statute holding it was an unconstitutional delegation of authority contrary to art. III, § 1. The court held that all legislative power is vested in the legislature of the State of Idaho, and the legislature cannot delegate its authority to another government or agency in violation of the Idaho Constitution. 82 Idaho at 134, 350 P.2d at 228-30.

The same rationale applies to legislation enacted by the initiative process. Laws passed by initiative are on equal footing with legislation enacted by the legislature, and the two must comply with the same constitutional requirements. Westerberg v. Andrus, 114 Idaho 401, 757 P.2d 664 (1984). In short, an initiative cannot delegate a legislative function to another governmental entity, nor can it restrict the actions of future legislatures absent a constitutional mandate.

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Here, the proposed initiative mandates funding at a “per pupil level greater than that of the lowest five percent (5%) of the public school districts in the entire United States.” It appears that by using this definition, the drafters of the initiative may be delegating the legislative function to another governmental body or some unnamed group in violation of art. III, § 1. No showing is made clarifying the standards of measurement, who will compile these results, how they will be tested for accuracy or any other specific data for creating this funding mechanism. The idea of allowing local school districts in other states to drive budget policy in Idaho is anathema to basic concepts of state sovereignty embodied in the Idaho Constitution and the Tenth Amendment to the U.S. Constitution. Absent more precise language, this proposed initiative represents little more than an overly broad policy statement, not a law. A court of competent jurisdiction would find all or part of the initiative, if enacted, to be either unconstitutional or unenforceable.

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

Sincerely,

LAWRENCE G. WASDEN
Attorney General

Analysis by:

Brian P. Kane
Deputy Attorney General

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