IDAHO ATTORNEY GENERAL'S ANNUAL REPORT

SELECTED INFORMAL GUIDELINES

AND

CERTIFICATES OF REVIEW

FOR THE YEAR

2004

Lawrence G. Wasden
Attorney General

Printed by The Caxton Printers, Ltd.
Caldwell, Idaho

This volume should be cited as:

2004 Idaho Att'y Gen. Ann. Rpt.

Thus, the Informal Guideline of February 24, 2004 is found at:

2004 Idaho Att'y Gen. Ann. Rpt. 5

The Certificate of Review of January 15, 2004 is found at:

2004 Idaho Att'y Gen. Ann. Rpt. 35

CONTENTS

Roster of Attorneys General of Idaho v

Introduction vii

Roster of Staff of the Attorney General 1

Organizational Chart of the Office of the Attorney General 2

Selected Informal Guidelines—2004 5

Topic Index to Informal Guidelines 31

Table of Statutes Cited 32

Certificates of Review—2004 35

Topic Index to Certificates of Review 51

Table of Statutes Cited 51

Five-Year Topic Index and Tables of Citation

Official Opinions 2000-2004 55

Five-Year Topic Index and Tables of Citation

Selected Informal Guidelines 2000-2004 .63

Five-Year Topic Index and Tables of Citation

Certificates of Review 2000-2004 75

ATTORNEYS GENERAL OF IDAHO

GEORGE H. ROBERTS 1891-1892
GEORGE M. PARSONS 1893-1896
ROBERT McFARLAND 1897-1898
S. H. HAYS 1899-1900
FRANK MARTIN 1901-1902
JOHN A. BAGLEY 1904-1904
JOHN GUHEEN 1905-1908
D. C. McDOUGALL 1909-1912
JOSEPH H. PETERSON 1913-1916
T. A. WALTERS 1917-1918
ROY L. BLACK 1919-1922
A. H. CONNER 1923-1926
FRANK L. STEPHAN 1927-1928
W. D. GILLIS 1929-1930
FRED J. BABCOCK 1931-1932
BERT H. MILLER 1933-1936
J. W. TAYLOR 1937-1940
BERT H. MILLER 1941-1944
FRANK LANGLEY 1945-1946
ROBERT AILSHIE (Deceased November 16) 1947
ROBERT E. SMYLIE (Appointed November 24) 1947-1954
GRAYDON W. SMITH 1955-1958
FRANK L. BENSON 1959-1962
ALLEN B. SHEPARD 1963-1968
ROBERT M. ROBSON 1969
W. ANTHONY PARK 1970-1974
WAYNE L. KIDWELL 1975-1978
DAVID H. LEROY 1979-1982
JIM JONES 1983-1990
LARRY ECHOHAWK 1991-1994
ALAN G. LANCE 1995-2002
LAWRENCE G. WASDEN 2003-

Lawrence G. Wasden
Attorney General

INTRODUCTION

Dear Fellow Idahoan:

The year 2004 was a watershed year for the Office of Attorney General. Indeed, Idaho's water took center stage with tremendous progress in the now 17-year-long Snake River Basin Adjudication.

Historic settlements resolved federal claims of Idaho's water within the Wild and Scenic Rivers Act and the Hells Canyon National Recreation Area. The Wild and Scenic Rivers Act litigation threatened water rights in many of Idaho's rivers including: the Main Salmon, Middle Fork Salmon, Rapid, Selway, Lochsa and Middle Fork of the Clearwater. Through good faith negotiations with the United States, Idaho was able to protect her sovereignty and ensure that all existing water rights, as of the date of the agreement, were preserved. These settlements also ensure that additional water will be available for future development in the Salmon and Clearwater Basins.

In the Hells Canyon National Recreation Area, the parties reached a settlement that protects stream flows and lake levels in quantities sufficient to preserve these resources for this and future generations. This agreement enabled the State of Idaho to effectively balance the public interest in these resources, while ensuring the availability of water for both existing and future private uses.

Late in the year, the State of Idaho successfully concluded five years of negotiations regarding claims by the Nez Perce Tribe to virtually all of the unappropriated water in the Snake River. These negotiations challenged a range of resources within my office. The resulting historic agreement (subsequently approved by the Congress, Idaho's legislature and the Nez Perce Tribe) resolved the long-standing threat these claims posed to Idaho's sovereignty over her water and lifted a major cloud from the state's economic future.

The year also brought an end to the Boise City public official misconduct prosecutions undertaken by my office at the request of the Ada County Prosecuting Attorney. The former mayor and two high-ranking city employees served jail sentences resulting from their guilty pleas on several counts of criminal misconduct.

Unfortunately, cases involving allegations of public official misconduct continue to arise elsewhere in our state. The various county prosecutors continue to seek assistance in these matters from my office. Although there is no joy in pursuing such cases, I remain committed to firm and fair prosecution of those who violate Idaho's criminal laws, regardless of their status, and we are vigorously pursuing those cases that have been referred to my office for action.

The University Place matter took another turn during the year. Regrettably, my office had no choice but to withdraw from the criminal investigation when it became apparent that we could not both represent our statutory clients and conduct a criminal investigation. A conflict of interest also removed the United States Attorney for the District of Idaho from the federal investigation. At the time of this writing, the United States Attorney for the District of Oregon and the Latah County Prosecuting Attorney are leading the criminal investigation. My office remains active in civil matters involving University Place. We are focused on recovering money that was improperly withdrawn from trust accounts, thus depriving the University and its students of the benefits intended by those who donated to these trust accounts.

2004 was also a year of increasing workload in the Office of Attorney General:

- In the Criminal Law Division, the Appellate Unit represented the state in a record 743 criminal appeals; the Capital Litigation Unit represented the state in 20 death penalty cases and 110 non-capital federal habeas cases; and the Special Prosecutions Unit prosecuted 90 criminal cases at the request of 20 county prosecuting attorneys.
- The Human Services Division recovered a record $4.4 million from estate recovery for Medicaid and more than $100,000 from service providers as a result of Medicaid fraud.
- The Civil Litigation Division successfully defended a challenge to the sales and cigarette tax laws, as well as a challenge to the Legislature's constitutional powers to determine its own rules of proceeding. The Consumer Protection Unit recovered and distributed to Idaho businesses and consumers a record $5.7 million, while responding to a record 4,079 consumer complaints.

- The Contracts and Administrative Law Division helped the Department of Correction with a multi-state joint powers agreement, saving the state millions of dollars. The Division also assisted the Department of Commerce and Labor in enhancing the department's ability to recover unemployment insurance overpayments resulting from fraud.
- In the Intergovernmental and Fiscal Law Division, deputy attorneys general at the Department of Finance won decisions resulting in more than $2.2 million in fines and penalties, while deputies at the Industrial Commission collected more than $449,000. The Division responded to 175 formal requests from legislators for assistance or legal opinions.

As a member of the Idaho Board of Land Commissioners, I worked with the other members to ensure the maximum long-term return to the endowment beneficiaries. My office continues to assist the Department of Lands with the implementation of the Tamarack Resort lease. Tamarack Resort is developing a world-class destination resort, infusing economic benefits in the Cascade area and providing enhanced revenue for the endowed beneficiaries. We are also assisting the Department of Lands with developing a long-term plan for addressing challenges, under the Endangered Species Act, to state timber harvest in the Priest Lake state forest. We believe that, through wise stewardship, it is possible to continue harvest on state lands, while meeting federal requirements under the Endangered Species Act.

I am extremely proud of the quality of work performed by the dedicated professionals who work in the Office of Attorney General. Even this brief summary makes it clear that the citizens of Idaho receive the very best representation available when it comes to legal services.

Sincerely,

LAWRENCE G. WASDEN
Attorney General

OFFICE OF THE ATTORNEY GENERAL
LAWRENCE G. WASDEN
ATTORNEY GENERAL
2004
STAFF ROSTER

ADMINISTRATION

Sherman F. Furey III Chief Deputy	Thorpe Orton Assistant Chief Deputy	Janet Carter Executive Assistant	DeLayne Deck Secretary/Receptionist

DIVISION CHIEFS

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

DEPUTY ATTORNEYS GENERAL

Willard Abbott	Jeremy Chou	Harriet Hensley	Michael McPeek	Sandra Shaw
Lawrence Allen	Kay Christensen	Jane Hochberg	Kathleen McRoberts	Jason Siems
Stephanie Altig	Christopher Clark	John Homan	Cheryl Meade	Clay Smith
LaMont Anderson	Doug Conde	Donald Howell	Melissa Moody	Theodore Spangler
James Baird	Rebekah Cude	J. Scott James	Kent Nelson	Nicholas Spencer
Kimberly Bailey	Timothy Davis	Blair Jaynes	Brian Nicholas	Marcy Spilker
David Barber	Brett DeLange	Joseph Jones	Lisa Nordstrom	Myrna Stahman
Garrick Baxter	Thomas Donovan	Kenneth Jorgensen	Brian Oakey	Dan Steckel
Mary Jo Beig	Darrell Early	Loma Jorgensen	Carl Olsson	John Stosich
Brian Benjamin	Stephanie Ebright	Brian Kane	Paul Panther	Steve Strack
Nancy Bishop	Patrick Fanning	Emily Kane	Steve Parry	Ken Stringfield
Craig Bledsoe	Mary Feeny	Brent King	James Price	Weldon Stutzman
Chris Bromley	Lori Fleming	C. Nicholas Krema	Phillip Rassier	J. Ron Sutcliffe
Ralph Blount	Curt Fransen	Lisa Kronberg	Whitaker Riggs	Evelyn Thomas
Jo-Ann Bowen	Roger Gabel	Mark Kubinski	Donald Robertson	Timothy Thomas
Carol Brassey	Michael Gilmore	Deena Layne	Kenneth Robins	Melissa Vandenberg
Dallas Burkhalter	Brad Goodsell	Jerold Lee	Jay Rosenthal	Karl Vogt
Cheri Bush	Jennifer Grunke	William Loomis	Kristina Schindele	Julie Weaver
Stephen Bywater	Joanna Guilfoy	Jessica Lorello	Jeffrey Schrader	Peggy White
James Carlson	Stephanie Guyon	Rene Martin	Steve Schuster	Anne Baker Wilde
Jody Carpenter	Susan Hamlin-Nygard	Candice McHugh	Robert Schwarz	Scott Woodbury
Corey Cartwright		Tim McNeese		Charles Zalesky

INVESTIGATORS

Michael Dillon, Chief	Scott Birch	Gary Deulen	Jim Kouril

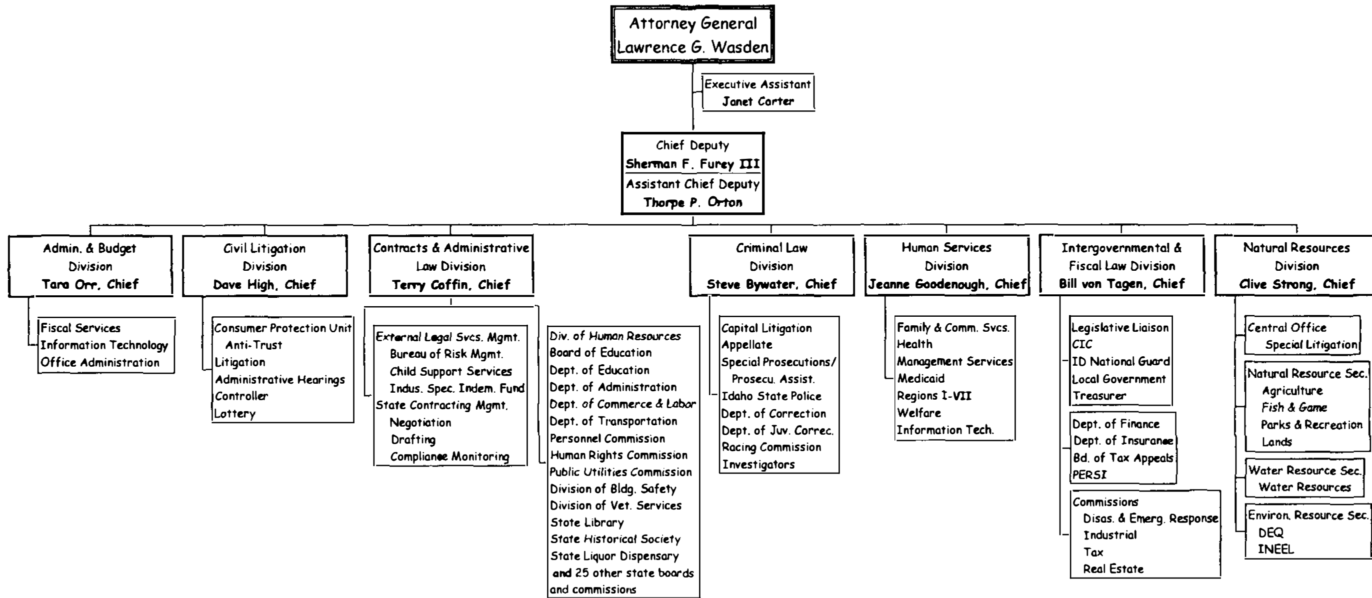
PARALEGALS

Kathie Brack	Vicki Kelly	Bernice Myles	Thomas Tharp
Lorraine Byerly	Marlene Klein	Lori Peel	Robert Wheiler
Suzie Cooley	Michelle MacKenzie	Jean Rosenthal	Paula Wilson
Becky Harvey	Vicky Music	Tammy Swanson	

NON-LEGAL PERSONNEL

Karen Adair	Marilyn Freeman	Gerry Karpavich	Barbara Mundell	Micki Schlapia
Deon Ayala	Colleen Funk	Beth Kittelmann	Rosean Newman	Stella Slack
Kriss Bivens Cloyd	Rhonda Goade	JoAnn Lanham	Frances Nix	Aimee Stephenson
Patricia Boehm	Leslie Gottsch	Sheryl Spidell Leonard	Sharon Noice	Jodie Stoddard
Karen Bolian	Janene Hocking	Patty McNeill	Angel O'Brien	Sara Stringfield
Wanda Brock	Trudy Jackson	Ronda Mein	Rosie Panter	Tamara Swanson
Robert Cooper	Eric Jensen	Patricia Miller	Greg Rast	Olga Valdivia
Deborah Forgy	Cecil Jones	Lynn Mize	James Reiff	Melissa Ward

Office of the Idaho Attorney General
Organizational Chart - 2004



ATTORNEY GENERAL'S SELECTED INFORMAL GUIDELINES FOR THE YEAR 2004

LAWRENCE G. WASDEN
ATTORNEY GENERAL
STATE OF IDAHO

February 24, 2004

The Honorable Laird Noh
Capitol Building
P.O. Box 83720
Boise, ID 83720-0081

The Honorable Bert Stevenson
Capitol Building
P.O. Box 83720
Boise, ID 83720-0081

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

Dear Senator Noh and Representative Stevenson:

This letter is in response to the questions presented in your February 3, 2004, inquiry regarding the revisions proposed by House Bill (H.B.) 636, which would amend the definition of "consumptive use" under Idaho Code § 42-202B and preclude the Director of the Department of Water Resources from considering actual or historic consumptive use in taking action upon an application to change any element of a water right under Idaho Code § 42-222.

QUESTIONS PRESENTED

1. Does the Prior Appropriation Doctrine, adopted by Article XV, Section 3, of the Idaho Constitution, implemented through statutes by the Legislature, and endorsed by the Idaho courts, require that an approved change in nature of use of a water right be limited to the actual or historic volume of consumptive use previously made under the right in order to avoid injury to other water rights?

2. If not, what recourse, if any, do the holders of other affected water rights have to ensure that injury to their water rights does not occur as a result of such transfers?

CONCLUSION

Our reading of the prior appropriation doctrine, as implemented by Idaho and most other prior appropriation states, requires that an approved change in nature of use of a water right be limited to the actual or historic volume of consumptive use previously made under the right in order to avoid injury to other water rights. The current provisions of Idaho Code §§ 42-202B and 42-222 are in accord with the statutes and laws of other prior appropriation states.[1] If H.B. 636 were enacted as proposed, the Director would be precluded from considering historical consumptive use "as a factor in determining whether a proposed change would constitute an enlargement in use of the original water right." An affected water right holder would still be entitled to challenge the proposed transfer of an existing right on the grounds that the change would result in injury, is inconsistent with the State's policy on the conservation of water, or is not in the local public interest. However, enactment of H.B. 636 would seriously limit the ability of an affected water right holder to successfully protect his or her water right from any injury caused by an increase in consumptive use authorized by the transfer or change in use of another water right.

ANALYSIS

A. Doctrine of Historical Consumptive Use in Idaho

The only reported Idaho case that applies Idaho Code §§ 42-202B and -222 is Barron v. Idaho Department of Water Resources, 135 Idaho 414, 18 P.3d 219 (2001).[2] Barron applied to the Idaho Department of Water Resources ("Department") to transfer a water right. During the preliminary stages, the local watermaster recommended that the Department deny the transfer on the basis that, if granted, injury to downstream appropriators might occur. Following the watermaster's recommendation, the Department requested that Barron provide additional information that the transfer would not injure other users. Concluding that the additional information was insufficient to establish that downstream appropriators would not be injured if the transfer were approved, the Department denied the request. Barron subsequently sought judicial review of the Department's decision, which was affirmed by the district court.

On appeal from the district court, the Idaho Supreme Court concluded Barron had not met his burden of demonstrating no injury would occur if the transfer were granted. *Id.* at 418, 18 P.3d at 223. In applying Idaho Code §§ 42-202B and 42-222, the Idaho Supreme Court ruled, "Idaho law prohibits any transfer from resulting in an enlargement of the water right above its historical beneficial use." *Id.* at 420, 18 P.3d at 225. The court further found that Barron had failed to supply sufficient information for the Department to establish the historical consumptive use under the water right proposed for transfer. *Id.* at 419, 18 P.3d at 224. Therefore, the court affirmed the Department's denial of Barron's transfer application.

B. Doctrine of Historical Consumptive Use in Other Prior Appropriation States

Because the Idaho courts have not discussed the theoretical basis behind the application of the doctrine of historical consumptive use in a transfer proceeding, it is appropriate to examine the reasoning from courts in other prior appropriation states. Before examining the opinions of other prior appropriation states, however, the precise nature of a water right must be discussed.

According to the doctrine of prior appropriation, water is a public resource to which individuals are allotted a right to use. *See, e.g.*, Idaho Code § 42-101. While water rights are considered real property, Idaho Code § 55-101(1), water rights are unique because they are "usufructuary."[3] As a usufructuary right, water rights do not stand on their own. Instead, water rights "are the complement of, or one of the appurtenances of, the land or other thing to which, through necessity, said water is being applied . . . ." Idaho Code § 42-101.

Because a water right is a usufructuary right, a water right is quantified by the amount of water an individual can beneficially use. To be a beneficial use, "the end use for the water must be generally recognized and socially acceptable use . . . ." Water and Water Rights § 12-24 (Robert E. Beck ed., 2001). Therefore, even if an individual possess a right to divert a certain quantity of water, that individual's entitlement is limited by the amount of water he or she can apply to a beneficial purpose. *See* Wells A. Hutchins, Idaho Law of Water Rights, 5 Idaho Law Review 1, 38 (1968)

("The [Idaho] supreme court also has held that the appropriator is held to the quantity of water he is able to divert and apply to a beneficial use . . . ."). Limiting an individual's ability to use water only for beneficial uses maximizes water resources; helps prevent waste, and injury to other users. *Id.* at 2-3.

Consistent with the theory that water is a public resource that should be managed for the greater good, and that beneficial use is the measure of a water right, "[a] water holder *can only transfer the amount that he has historically put to beneficial use.* Beneficial use is the measure and limit of the transferable right whether the right is a permit or non-permit based right." A. Dan Tarlock, Law of Water Rights and Resources § 5:139 (2003) (emphasis added). Therefore, under the doctrine of prior appropriation, the amount of water available to transfer cannot be quantified without an examination of the past use of that right.

While both the Arizona[4] and Colorado[5] supreme courts have expressly stated that the amount of water available to transfer under the doctrine of prior appropriation is limited to historical consumptive use, the most thorough analysis behind the application of historical consumptive use appears to have been undertaken by the Washington and Wyoming supreme courts. According to the Washington Supreme Court:

> Washington's [transfer] statute *is consistent with the principle of Western water law* that the diversion point of a water right put to beneficial use may be granted unless that change causes harm to other water rights. Both upstream and downstream water right holders can object to a change in the point of diversion or the place of use, which could affect natural and return flows and, thus, adversely affect their rights. A. Dan Tarlock, *Law of Water Rights and Resources* § 5.17[3][a], at 5-92.1 to .3 (1996); *see, e.g., Haberman v. Sander*, 166 Wash. 453, 7 P.2d 563 (1932); *Farmers Highline Canal & Reservoir Co. v. City of Golden,* 129 Colo. 575, 272 P.2d 629 (1954). The statute also presumes that a change in point of diversion may be made only where water has been put to a beneficial use. This is also consistent with established water law principles. *A transferred right or a change*

> *in point of diversion may be granted only to the extent the water right has historically been put to beneficial use. E.g., May v. United States,* 756 P.2d 362, 370-71 (Colo. 1988); *City of Westminster v. Church*, 167 Colo. 1, 445 P.2d 52, 57 (1968); *Orr v. Arapahoe Water & Sanitation Dist.*, 753 P.2d 1217, 1224 (Colo. 1988); *Basin Elec. Power Co-op. v. State Bd. of Control*, 578 P.2d 557, 563 (Wyo. 1978); *see also* Tarlock, § 5.17[5], at 5-93. "[B]eneficial use determines the measure of a water right. The owner of a water right is entitled to the amount of water necessary for the purpose to which it has been put, provided that purpose constitutes a beneficial use." *Dep't of Ecology v. Grimes*, 121 Wash.2d 459, 468, 852 P.2d 1044 (1993).

Okanogan Wilderness League, Inc. v. Town of Twisp, 947 P.2d 732, 737 (Wash. 1997) (emphasis added).

In Wyoming, the state supreme court engaged in an extended discussion of the policy behind limiting the amount of water available in a transfer proceeding to the amount historically used for a beneficial purpose. Basin Elec. Power Co-Op v. State Board of Control, 578 P.2d 557 (Wyo. 1978). There, the court stated:

> While this court has for many years recognized that one of the fundamental principles applicable to any transfer of water rights for change in use is the avoidance of injury (Johnston v. Little Horse Creek Irrigation Co., supra), *equally fundamental is the principle which holds that an appropriator obtains a transferable water right only to the extent that he has put his appropriation to a beneficial use.* Our statutes provide:
>
> > " . . . Beneficial use shall be the basis, the measure and the limit of the right to use water at all times, not exceeding the statutory limit . . . ." (Emphasis supplied) Section 41-3-101, W.S .1977 (Section 41-2, W.S.1957).

We have previously said that the water right of an appropriator is limited to beneficial use, even though a larger amount has been adjudicated. Quinn v. John Whitaker Ranch Co., 54 Wyo. 367, 92 P.2d 568, 570-571, and Budd v. Bishop, Wyo., 543 P.2d 368, 373. *The decreed amount of water may be prima facie evidence of an appropriator's entitlement (Quinn, supra), but such evidence may be rebutted by showing actual historic beneficial use. Beneficial use is not a concept which is considered only at the time an appropriation is obtained. The concept represents a continuing obligation which must be satisfied in order for the appropriation to remain viable.* The state's abandonment statutes, ss 41-3-401 and 41-3-402, W.S.1977 (ss 41-47.1 and 41-47.2, W.S.1957, 1975 Cum. Supp.), are recognition of this requirement. See also, Budd v. Bishop, supra. This principle announced in Johnston, supra, at 79 P. 24, continues to be the law to this day. We said in Johnston:

> "As an appropriator of water obtains by his appropriation that only of which he makes a beneficial use, it necessarily follows that he cannot sell surplus water which he does not need, while retaining his original appropriation; . . ." (Emphasis supplied)

As we have heretofore observed, the Johnston decision indicates that if the seller-appropriator or the buyer were shown to have committed waste or that they intend the commission of waste the court would interfere.

. . . .

The key to understanding the application of beneficial-use concepts to a change-of-use proceeding is a recognition that the issues of nonuse and misuse are inextricably interwoven with the issues of change of use and change in the place of use. This is true even without the formal initiation of abandonment proceedings under the statutes. If an appropriator, either by misuse or failure to use, has effectively abandoned either all or part of his water right through noncompliance

> with the beneficial-use requirements imposed by law, he could not effect a change of use or place of use for that amount of his appropriation which had been abandoned.
>
> . . . .
>
> Prior to the enactment of s 41-3-104, supra, the laws of Wyoming did not clearly recognize the role played by the concept of beneficial use in the context of a change-of-use proceeding. Emphasis was placed, in cases where such changes were allowed, on the avoidance of injury to other appropriators. Commentators and those involved in water administration, however, came to realize the great disparity between the actual practices of water users and adjudicated water rights.

Id. at 564-566 (emphasis added).

C. Codification of Historical Consumptive Use in the Prior Appropriation States

While the appellate courts in many of the prior appropriation states have seemingly not engaged in a thorough theoretical analysis of the doctrine of historical consumptive use, every prior appropriation state—with the exception of Alaska—has codified statutes that limit water transfers.[6] Of those states, Colorado, Oregon, Washington, and Wyoming appear to have statutes that are the most similar to the current version of Idaho Code §§ 42-202B and -222. Even in the states that have not expressly defined the theory of consumptive use—California, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, South Dakota, and Texas—legislation prevents the reallocation of water if it will injure any vested water right holder.

Presently, Utah appears to be the only prior appropriation state with a statute similar to the proposed revisions to Idaho Code §§ 42-202B and -222. The Utah transfer statute provides that "[a] change may not be made if it impairs any vested right without just compensation." Utah Code § 73-3-3(2)(b). However, another subsection of the same statute also provides that "[t]he state engineer may not reject applications for either permanent or tem-

porary changes for the sole reason that the change would impair the vested rights of others." Utah Code § 73-3-3(7)(a).

While Utah Code § 73-3-3(7)(a) clearly states that injury may not be the sole reason for denying a request to reallocate water, the Utah Supreme Court has found the opposite. In Piute Reservoir & Irrigation Co. v. West Panguitch Irrigation & Reservoir Co., 367 P.2d 855 (Utah 1962),[7] the state supreme court was presented with an application for change of use that, if approved, would have allegedly injured a downstream appropriator. Concluding that the evidence presented supported a finding of injury, the court denied the application: "if vested rights will be impaired by such change or application to appropriate, such application should not be approved." *Id.* at 858. Therefore, the Utah Supreme Court appears to have limited the application of Utah Code § 73-3-3 in a manner consistent with the doctrine of prior appropriation in the other western states.

D. Recourse Available to Holders of Affected Water Rights

Even if Idaho Code §§ 42-202B and -222(1) are amended as proposed in H.B. 636, affected water right holders would still be able to object to the proposed transfer or change of a valid water right on grounds of injury, enlargement of the original right, inconsistency with the conservation of water resources, or violation of the local public interest. Idaho Code § 42-222(1). However, if Idaho Code § 42-222(1) is changed as proposed, and only the "authorized" as opposed to the "actual or historic" consumptive use volume can be considered by the Director in a transfer proceeding, it may be difficult for the holder of an affected water right to protect his or her right from injury caused by an increase in consumptive use under a transferred water right.

Under the prior appropriation doctrine, water authorized to be diverted and beneficially used under a permit, license, or decree but not required to accomplish the beneficial use being made must remain part of the public water resource available to meet the needs of other water right holders. Thus, if a water right holder has not been required to use the maximum amount of water authorized under the right in order to accomplish the beneficial use made, the remaining water has likely been left in the stream or other public source and appropriated by other users. Depending on the duration of this

practice, other appropriators may have come to rely upon the unused water to meet their needs.

In the event that a water right holder seeks to transfer or change his or her water right, other appropriators could be injured if the amount of water available for transfer or change is the entire permitted, licensed, or decreed right—more than the amount beneficially used. As Idaho law currently stands, the Director could limit the transfer or change based on the historic use of the water right, determining that a transfer of the full amount of water authorized to be used under the right would injure other appropriators or constitute an enlargement of the beneficially used right. Without the ability to look at historical use, it may be difficult for the Director to deny or condition a transfer or change on the basis of injury or enlargement.

Sincerely,

Clive J. Strong
Deputy Attorney General
Chief, Natural Resources Division

---

[1] The prior appropriation states are: Alaska, Arizona, California, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, Washington, and Wyoming.

[2] The Idaho Supreme Court historically has not allowed transfer applications based on injury to downstream junior appropriators. In Washington State Sugar Co. v. Goodrich, 27 Idaho 26, 41, 147 P. 1073, 1078 (1915), a sawmill owner sought to transfer his water right to upstream irrigators. Concluding that change in the nature of use from non-consumptive to consumptive, and change in place of use to an upstream location, would injure downstream junior appropriators, the court denied the transfer. "As against the change sought by petitioners, the junior appropriators had a vested right in the continuance of the conditions that existed on the stream at and subsequent to the time they made their appropriations, unless the change can be made without injury to such right." 27 Idaho at 41, 147 P. at 1078.

[3] [T]he right of property in water is usufructuary, and consists not so much of the fluid itself as the advantage of its use. . . . [R]unning water, so long as it continues to flow in its natural course, is not, and cannot be made, the subject of private ownership. A right may be acquired to its use which will be regarded and protected as property, but it has been distinctly declared in several cases that this right carries with it no specific property of the water itself." Samuel C. Wiel, Water Rights in the Western States § 18 (1911).

[4] In a groundwater reallocation proceeding involving the city of Tucson, the Arizona Supreme Court stated that the amount of water subject to reallocation was limited to the *"annual historical maximum use* upon the lands so acquired." Jarvis v. State Land Dep't, 550 P.2d 227, 228 (Ariz. 1976) (emphasis added).

[5] The amount of consumable water available for transfer depends upon *the historic beneficial consumptive use* of the appropriation for its decreed purpose at its place of use." Santa Fe Trail Ranches Property Owners Ass'n v. Simpson, 990 P.2d 46, 59 (Colo. 1999) (emphasis added).

[6] See Appendix attached.

[7] Utah Code § 73-3-3 was codified in 1919, but has been amended numerous times since its enactment. The current language in Part (7)(a) has been in existence since at least 1947. *See* Moyle v. Salt Lake City, 176 P.2d 882 (Utah 1947). Therefore, Part 7(a) predates the Utah Supreme Court's 1962 decision in Piute.

APPENDIX

The following is a survey of laws currently in effect in the prior appropriation states that govern water reallocation.

1. Alaska

Alaska does not statutorily regulate water transfers; however, Alaska common law recognizes that a transfer can be denied on the basis of injury. Water and Water Rights § 14-44, n.200 (Robert E. Beck ed., 2001).

2. Arizona

Arizona Revised Statute § 45-172 states that the amount of water available for reallocation shall not "exceed the vested rights existing at the time of such severance and transfer, and the director shall by order so define and limit the amount of water to be diverted or used annually subsequent to such transfer."

3. California

California Water Code § 1702 establishes that a reallocation of water may not occur if the change will "operate to the injury of any legal user of the water involved."

4. Colorado

Colorado Revised Statute § 37-92-305 states:

> (3) A change of water right or plan for augmentation, including water exchange project, shall be approved if such change or plan will not injuriously affect the owner of or persons entitled to use water under a vested water right or a decreed conditional water right. In cases in which a statement of opposition has been filed, the applicant shall provide to the referee or to the water judge, as the case may be, a proposed ruling or decree to prevent such injurious effect in advance of any hearing on the merits of the application, and

notice of such proposed ruling or decree shall be provided to all parties who have entered the proceedings. If it is determined that the proposed change or plan as presented in the application and the proposed ruling or decree would cause such injurious effect, the referee or the water judge, as the case may be, shall afford the applicant or any person opposed to the application an opportunity to propose terms or conditions which would prevent such injurious effect.

(4) Terms and conditions to prevent injury as specified in subsection (3) of this section may include:

(a) A limitation on the use of the water which is subject to the change, taking into consideration the historic use and the flexibility required by annual climatic differences;

(b) The relinquishment of part of the decree for which the change is sought or the relinquishment of other decrees owned by the applicant which are used by the applicant in conjunction with the decree for which the change has been requested, if necessary to prevent an enlargement upon the historic use or diminution of return flow to the detriment of other appropriators;

(c) A time limitation on the diversion of water for which the change is sought in terms of months per year;

(d) Such other conditions as may be necessary to protect the vested rights of others.

5. Kansas

Kansas Statute § 82a-1502 states that in a water reallocation proceeding, "the hearing officer shall consider all matters pertaining thereto, including specifically, (1) Any current beneficial use being made of the water proposed to be diverted . . . (3) . . . other impacts of approving or denying the transfer of the water."

6. Montana

According to Montana Code § 85-2-402:

(2) . . . the department shall approve a change in appropriation right if the appropriator proves by a preponderance of evidence that the following criteria are met:

(a) The proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued under part 3.

7. Nebraska

Nebraska Revised Statute § 46-294 states:

(1) The Director of Natural Resources shall approve an application filed pursuant to section 46-290 if:
(a) The requested change of location is within the same river basin, will not adversely affect any other water appropriator, and will not significantly adversely affect any riparian water user who files an objection in writing prior to the hearing;
(b) The requested change will use water from the same source of supply as the current use;
(c) The change of location will not diminish the supply of water otherwise available;
(d) The water will be applied to a use in the same preference category as the current use, as provided in section 46-204 [domestic, agricultural, or manufacturing]; and
(e) The requested change is in the public interest.

8. Nevada

According to Nevada Revised Statute § 533.370:

> 1. Except as otherwise provided in this section and NRS 533.345, 533.371, 533.372 and 533.503, the State Engineer shall approve an application submitted in proper form which contemplates the application of water to beneficial use if:
>
> (a) The application is accompanied by the prescribed fees;
>
> (b) The proposed use or change, if within an irrigation district, does not adversely affect the cost of water for other holders of water rights in the district or lessen the efficiency of the district in its delivery or use of water; and
>
> (c) The applicant provides proof satisfactory to the State Engineer of:
>
> (1) His intention in good faith to construct any work necessary to apply the water to the intended beneficial use with reasonable diligence; and
>
> (2) His financial ability and reasonable expectation actually to construct the work and apply the water to the intended beneficial use with reasonable diligence.

Nevada Revised Statute § 533.371 states that a reallocation of water may not occur if "[t]he proposed use conflicts with existing rights; or [t]he proposed use threatens to prove detrimental to the public interest."

9. New Mexico

New Mexico Statute § 72-5-23 states:

> All water used in this state for irrigation purposes, except as otherwise provided in this article, shall be considered appurtenant to the land upon which it is used, and the right to use it upon the land shall never be severed from the land without the consent of the owner of the land, but, by and with the consent of the owner of the land, all or any part of

the right may be severed from the land, simultaneously transferred and become appurtenant to other land, or may be transferred for other purposes, without losing priority of right theretofore established, if such changes can be made without detriment to existing water rights and are not contrary to conservation of water within the state and not detrimental to the public welfare of the state, on the approval of an application of the owner by the state engineer. Publication of notice of application, opportunity for the filing of objections or protests and a hearing on the application shall be provided as required by Sections 72-5-4 and 72-5-5 NMSA 1978.

10. North Dakota

According to North Dakota Century Code § 61-04-15.2, "[t]he state engineer may approve the proposed change if the state engineer determines that the proposed change will not adversely affect the rights of other appropriators."

11. Oklahoma

Oklahoma Statute § 82-105.23 states: "Any appropriator of water including but not limited to one who uses water for irrigation, may use the same for other than the purposes for which it was appropriated, or may change the place of diversion, storage or use, in the manner and under the conditions priscribed for the transfer of the right to use water for irrigation purposes in Section 105.22 of this title." Oklahoma Statute § 82-105.22 states that a change in use may occur "if such change can be made without detriment to existing rights."

12. Oregon

According to Oregon Revised Statute § 540.520:

(2) The application required under subsection (1) of this section shall include:

(a) The name of the owner;

(b) The previous use of the water;

(c) A description of the premises upon which the water is used;

(d) A description of the premises upon which it is proposed to use the water;

(e) The use which is proposed to be made of the water;

(f) The reasons for making the proposed change; and

(g) Evidence that the water has been used over the past five years according to the terms and conditions of the owner's water right certificate or that the water right is not subject to forfeiture under ORS 540.610.

13. South Dakota

South Dakota Codified Laws § 46-5-34.1 states that a reallocation of a water right will not be granted "unless the transfer can be made without detriment to existing rights having a priority date before July 1, 1978, or to individual domestic users." Emphasis added. South Dakota Codified Laws § 46-5-34.1 further limits reallocation by stating that "[n]o land which has had an irrigation right transferred from it pursuant to this section, may qualify for another irrigation right from any water source."

14. Texas

According to Texas Water Code § 11.134(b):

The commission shall grant the application only if:

(1) the application conforms to the requirements prescribed by this chapter and is accompanied by the prescribed fee;

(2) unappropriated water is available in the source of supply;

(3) the proposed appropriation:

(A) is intended for a beneficial use;

(B) does not impair existing water rights or vested riparian rights;

(C) is not detrimental to the public welfare;

(D) considers the assessments performed under Sections 11.147(d) and (e) and Sections 11.150, 11.151, and 11.152; and

(E) addresses a water supply need in a manner that is consistent with the state water plan and the relevant approved regional water plan for any area in which the proposed appropriation is located, unless the commission determines that conditions warrant waiver of this requirement; and

(4) the applicant has provided evidence that reasonable diligence will be used to avoid waste and achieve water conservation as defined by Subdivision (8)(B), Section 11.002.

15. Utah

Utah Code § 73-3-3 states in relevant part:

> (2)(a) Any person entitled to the use of water may make permanent or temporary changes in the:
>
> (i) point of diversion;
>
> (ii) place of use; or
>
> (iii) purpose of use for which the water was originally appropriated.
>
> (b) A change may not be made if it impairs any vested right without just compensation.
>
> . . . .
>
> (4)(a) A change may not be made unless the change application is approved by the state engineer.
>
> . . . .
>
> (5)(a) The state engineer shall follow the same procedures, and the rights and duties of the applicants with respect to applications for permanent changes of point of diversion, place of use, or purpose of use shall be the same, as provided in this title for applications to appropriate water.
>
> . . . .
>
> (7)(a) The state engineer may not reject applications for either permanent or temporary changes for the sole

reason that the change would impair the vested rights of others.

16. Washington

Revised Code of Washington § 90.03.380 states:

> (1) The right to the use of water which has been applied to a beneficial use in the state shall be and remain appurtenant to the land or place upon which the same is used: PROVIDED, HOWEVER, That the right may be transferred to another or to others and become appurtenant to any other land or place of use without loss of priority of right theretofore established if such change can be made without detriment or injury to existing rights. The point of diversion of water for beneficial use or the purpose of use may be changed, if such change can be made without detriment or injury to existing rights. A change in the place of use, point of diversion, and/or purpose of use of a water right to enable irrigation of additional acreage or the addition of new uses may be permitted if such change results in no increase in the annual consumptive quantity of water used under the water right. For purposes of this section, "annual consumptive quantity" means the estimated or actual annual amount of water diverted pursuant to the water right, reduced by the estimated annual amount of return flows, averaged over the two years of greatest use within the most recent five-year period of continuous beneficial use of the water right.

17. Wyoming

According to Wyoming Statute § 41-3-104(a):

> When an owner of a water right wishes to change a water right from its present use to another use, or from the place of use under the existing right to a new place of use, he shall file a petition requesting permission to make such a change. The petition shall set forth all pertinent facts about

the existing use and the proposed change in use, or, where a change in place of use is requested, all pertinent information about the existing place of use and the proposed place of use. The board may require that an advertised public hearing or hearings be held at the petitioner's expense. The petitioner shall provide a transcript of the public hearing to the board. The change in use, or change in place of use, may be allowed, provided that the quantity of water transferred by the granting of the petition shall not exceed the amount of water historically diverted under the existing use, nor exceed the historic rate of diversion under the existing use, nor increase the historic amount consumptively used under the existing use, nor decrease the historic amount of return flow, nor in any manner injure other existing lawful appropriators. The board of control shall consider all facts it believes pertinent to the transfer which may include the following:

(i) The economic loss to the community and the state if the use from which the right is transferred is discontinued;

(ii) The extent to which such economic loss will be offset by the new use;

(iii) Whether other sources of water are available for the new use.

December 20, 2004

Lt. Robert Clements
Bureau Manager
Alcohol Beverage Control
Idaho State Police
P.O. Box 700
Meridian, ID 83680-0700

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

Dear Lt. Clements:

This guideline is in response to your recent inquiry regarding the application of Idaho Code §§ 23-943 and 23-945—the requirement that a "place" (basically, a bar room) restrict access to persons over 21 years of age and to post the restriction clearly at the entrance to the "place"—to an establishment that is licensed as a restaurant and also contains a "place." Particularly whether the "blanket exception" to the presence and posting requirements for restaurants, provided for in Idaho Code § 23-944(1) and referred to in a 1993 Guideline of the Attorney General, applies also to a place that is part of the same premises as a restaurant. Or, as it was succinctly put, are minors restricted from being present in a "place," even if the "place" is within a restaurant?

QUESTION PRESENTED

If a restaurant that serves alcohol has a separate room in which the alcohol is kept and mixed, such as a cocktail lounge or tavern, are underage persons prohibited from entering that room, and should the room be posted as restricting entry or loitering by persons under 21 years of age?

CONCLUSION

Yes.

ANALYSIS

Idaho law prohibits persons under 21 years of age from being in, or loitering about, bars, cocktail lounges and taprooms. The effective provisions are found in the alcohol code at Idaho Code §§ 23-941 to 23-946. These provisions call bar rooms a "place" and prohibit persons under 21 years of age from being in the "place," further requiring the "place" to be posted to prevent entry of persons under 21 years of age.[1] These restrictions further the public policy underlying that portion of the alcohol code dealing with minors, found in Idaho Code § 23-941:

> It is hereby declared that the intent of this act is to *restrict persons* under the ages herein specified *from entering, remaining in or loitering in or about certain places*, as herein defined, which are operated and commonly known as taverns, barrooms, taprooms and cocktail lounges *and which do not come within the definition of restaurant* as herein contained and are not otherwise expressly exempted from the restrictions herein contained.

(Emphasis added.) Thus, the clear intent of the legislature is to restrict access by persons under 21 years of age to "places," but not to "restaurants."

The legislature effected its intent by prohibiting those under 21 years of age from being present in a "place," pursuant to Idaho Code § 23-943, while enacting an exception, in Idaho Code § 23-944(1), allowing persons under 21 years of age to enter or be present:

> (1) *upon the premises of any restaurant, as herein defined, or in any railroad observation or club car or any airplane of a commercial airline, notwithstanding that such premises may also be licensed for the sale of liquor by the drink or for the sale of beer for consumption on the premises or that alcohol beverages, or beer, or both, are prepared, mixed, dispensed and serve and consumed therein.*

(Emphasis added.) As noted by the 1993 Guideline, this creates a "blanket exception" to the access restrictions and posting requirement for any "restau-

rant." However, by its plain language, this exception does not apply to anything except "the premises of any restaurant." Whether a person under 21 years of age is denied access, and whether posting is required pursuant to Idaho Code § 23-945, therefore turns on the definitions of "place," "premise" and "restaurant."

Idaho Code § 23-902(13) defines "premises":

> "Premises" means the building and contiguous property owned, or leased or used under a government permit by a licensee as part of the business establishment in the business of sale of liquor by the drink at retail, which property is improved to include decks, docks, boardwalks, lawns, gardens, golf courses, ski resorts, courtyards, patios, poolside areas or similar improved appurtenances in which the sale of liquor by the drink at retail is authorized under the provisions of law.

"Premises" comprise the whole of the property owned, leased or used by a business, which business is licensed to sell alcohol by the drink at retail.

Idaho Code § 23-942 defines "place" and "restaurant":

> (b) "Place," as used in this act, means *any room of any premises* licensed for the sale of liquor by the drink at retail wherein there is a bar and liquor, bar supplies and equipment are kept and where beverages containing alcoholic liquor are prepared or mixed and served for consumption therein, and *any room of any premises* licensed for the sale of beer for consumption on the premises wherein there is a bar and beer, bar supplies and equipment are kept and where beer is drawn and poured for consumption therein.
>
> (c) "Restaurant," as used in this act, means any restaurant, café, hotel dining room, coffee shop, cafeteria, railroad dining car or other *eating establishment having kitchen and cooking facilities for the preparation of food and where hot meals are regularly served to the public.*

(Emphasis added.) By the plain language of these definitions, a "place" is a *room*, a discrete part of a premises licensed for the sale of alcohol by the drink at retail. Similarly, a "restaurant" is construed, in the context of this statute, as a discrete part of a premises—hence the examples of "hotel dining room, coffee shop, cafeteria, [and] railroad dining car."

It is troublesome that Idaho Code § 23-944(1) employs the word "premises"; however, the context of its usage—*"upon the premises of any restaurant"*—suggests the more common, non-statutory definition of "premises." The statute could certainly be clearer in this respect.

However, construing these statutes together, according to the rules of statutory construction, the "blanket exception" provided for "restaurants" in Idaho Code § 23-944(1) is limited to "restaurants" and <u>not</u> to any "place"—whether that "place" is a <u>room</u> within the architectural confines of the restaurant itself, a <u>room</u> adjacent to the restaurant as part of an overall premises licensed to sell alcohol by the drink at retail, or totally unattached.

The key analysis is whether the location concerned is a "place"—any <u>room</u> of any premises that serves and stores alcohol that cannot also be defined as a restaurant itself—or is simply an area serving alcohol that is part and parcel of a restaurant. If the location concerned is a "place," access must be restricted and the entrance to the area must be posted. If the location concerned is simply an area of a restaurant that also serves alcohol, persons under 21 years of age are permitted to be present and no posting is required.

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

Sincerely,

Stephen A. Bywater
Deputy Attorney General
Chief, Criminal Division

[1] Idaho Code § 23-943 prohibits persons under 21 years of age from entering, or remaining in, or loitering in or about any prohibited "place":

> No person under the age of twenty-one (21) years shall enter, remain in or loiter in or about *any place, as herein defined*, licensed for the sale of liquor by the drink at retail, or sale of beer for consumption on the premises . . . .

(Emphasis added.) Further, Idaho Code § 23-945 requires:

> Every licensee herein referred to shall keep a sign conspicuously posted over or near each entrance to any *place* from which persons under twenty-one (21) years are herein restricted giving public notice of such fact . . . .

(Emphasis added.)

Topic Index

and

Tables of Citation

SELECTED INFORMAL GUIDELINES

2004

2004 INFORMAL GUIDELINES INDEX

TOPIC	**DATE**	**PAGE**
ALCOHOLIC BEVERAGES		
Persons under 21 years of age are prohibited from entering separate room in restaurant where alcohol is kept and mixed, such as cocktail lounge or tavern, and room must be posted as restricting entry or loitering by persons under 21 years of age	12/20/04	24
WATER RESOURCES		
Prior appropriation doctrine requires that approved change in nature of use of water right be limited to actual or historic volume of consumptive use previously made under the right in order to avoid injury to other water rights	2/24/04	5

IDAHO CONSTITUTION CITATIONS

ARTICLE & SECTION	DATE	PAGE
ARTICLE XV		
§ 3	2/24/04	5

IDAHO CODE CITATIONS

SECTION	DATE	PAGE
23-902(13)	12/20/04	24
23-941	12/20/04	24
23-942	12/20/04	24
23-943	12/20/04	24
23-944(1)	12/20/04	24
23-945	12/20/04	24
23-946	12/20/04	24
42-101	2/24/04	5
42-202B	2/24/04	5
42-222	2/24/04	5
42-222(1)	2/24/04	5
55-101(1)	2/24/04	5

ATTORNEY GENERAL'S CERTIFICATES OF REVIEW FOR THE YEAR 2004

LAWRENCE G. WASDEN
ATTORNEY GENERAL
STATE OF IDAHO

January 15, 2004

The Honorable Ben Ysursa
Secretary of State
HAND DELIVERED

Re: Certificate of Review
Initiative to Amend Idaho State Video Lottery Terminal Law

Dear Secretary of State Ysursa:

An initiative petition was filed with your office on December 16, 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

1. Initiated Legislation is Equal to Legislative Enactments

The Idaho Constitution art. III, § 1, 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 leg-

islation 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 construing a law for both definitional and constitutional purposes, courts see no essential difference between measures enacted by initiative and referendum and those created through the usual legislative process. Neither is superior to the other, and are treated as equal in regard to their force, effect, and limitations. Thus, *"laws created by initiative or approved by referendum . . . must yield to the superior authority of the state or federal constitution . . .* in any case of conflict." 2 Singer, Sutherland Statutory Construction § 36.05 (4th ed. 1986) (emphasis added). *See also*, 42 Am. Jur. 2d Initiative and Referendum § 6 (1969); 82 C.J.S. Statutes § 118 (1953); Annot., Applicability of Constitutional Requirements as to Legislation or Constitutional Amendments, to Statutes or Constitutional Amendments Under Provision Conferring Initiative or Referendum Powers, 62 A.L.R. 1349 (1929).

2. Exempting Certain Counties from Constitutional Prohibitions on Gambling is Unconstitutional

The Constitution of the State of Idaho prohibits the passing of local or special laws on a host of topics, including crimes and misdemeanors:

> The legislature shall not pass local or special laws in any of the following enumerated cases, that is to say: . . . For the punishments of crimes and misdemeanors.

Idaho Const. art. III, § 19 (emphasis added). A law "is not special when it treats all persons in similar situations alike," and it is not local "when it applies equally to all areas of the state." Sun Valley Co. v. City of Sun Valley, 109 Idaho 424, 429, 708 P.2d 147, 152 (1985). "A special law applies only to . . . a special locality," as opposed to all similarly situated localities. Bd. of County Comm'rs of Lemhi County v. Swensen, 80 Idaho 198, 201, 327 P.2d 361, 362 (1958) (*quoting* Ada County v. Wright, 60 Idaho 394, 403, 92 P.2d 134, 138 (1939)).

Although the court's formulation of this test over the years may have, at times, resembled that employed in the analysis under the equal protection

clauses of the U.S. and Idaho Constitutions, Hanson v. De Coursey, 66 Idaho 631, 637, 166 P.2d 261, 263 (1946), the test for a local or special law remains a different analysis; the equal protection clause of the U.S. Constitution and Idaho Const. art. III, § 19, were adopted to serve distinctly different identifiable purposes.

While it might be constitutional in the sense of equal protection for our legislature to single out persons or corporations for preferred treatment, such would nevertheless be regarded as in conflict with art. III, § 19; Jones v. State Bd. of Med., 97 Idaho 859, 877, 555 P.2d 399, 417 (1976). The test for determining whether a law is local or special is whether the classification is arbitrary, capricious, or unreasonable. Sun Valley Co., 109 Idaho at 429, 708 P.2d at 152; Kirkland v. Blaine County Med. Ctr., 134 Idaho 464, 469, 4 P.3d 1115, 1120 (2000); Jones v. Power County, 27 Idaho 656, 665, 150 P. 35, 37 (1915).

The initiative defines what constitutes an "eligible facility," as follows:

> (7) "Eligible facility" means a facility operated by a person licensed by the Idaho State Racing Commission to conduct live horse race meetings for not less than three of the last five years prior to 2004 in a county having a population of less than 100,000 in the 2000 US Census, where the facility is located in the county in which the licensed live horse race meetings have been conducted.

The Idaho State Video Lottery Terminal Law Initiative Petition, 2. Based upon this office's research, there are eight (8) counties with horse racing facilities. But, only seven (7) counties appear eligible, because Ada County has a population in excess of 100,000. This law appears to further violate the prohibition against local legislation because it limits who can become eligible. According to the above cited definition, only those racing facilities which have conducted races in "three of the last five years prior to 2004" are eligible to conduct video lottery gaming. This makes it impossible for any other county to legally engage in the conduct that would be made legal in only seven counties, while still illegal in the balance of Idaho's 44 counties. As outlined above, a law, which makes legal in some places that which

is illegal in other places would likely be construed by a court of competent jurisdiction as a local law and prohibited by the Idaho Constitution.

3. Gambling is Expressly Prohibited in Idaho

Article III, § 20 of the Idaho Constitution states:

> **SECTION 20. GAMBLING PROHIBITED.** (1) Gambling is contrary to public policy and is strictly prohibited except for the following:
>
> a. A state lottery which is authorized by the state if conducted in conformity with enabling legislation; and
>
> b. Pari-mutuel betting if conducted in conformity with enabling legislation; and
>
> c. Bingo and raffle games that are operated by qualified charitable organizations in the pursuit of charitable purposes if conducted in conformity with enabling legislation.
>
> (2) No activities permitted by subsection (1) shall employ any form of casino gambling including, but not limited to, blackjack, craps, roulette, poker, bacarrat, keno and slot machines, or employ any electronic or electromechanical imitation or simulation of any form of casino gambling.
>
> (3) The legislature shall provide by law penalties for violations of this section.
>
> (4) Notwithstanding the foregoing, the following are not gambling and are not prohibited by this section:
>
> a. Merchant promotional contests and drawings conducted incidentally to bona fide nongaming business

operations, if prizes are awarded without consideration being charged to participants; and

b. Games that award only additional play.

Additionally, the Idaho Legislature enacted Idaho Code § 18-3801, which provides:

> **18-3801. Gambling defined.**—"Gambling" means risking any money, credit, deposit or other thing of value for gain contingent in whole or in part upon lot, chance, the operation of a gambling device or the happening or outcome of an event, including a sporting event, the operation of casino gambling including, but not limited to, blackjack, craps, roulette, poker, bacarrat [baccarat] or keno, but does not include:
>
> (1) Bona fide contests of skill, speed, strength or endurance in which awards are made only to entrants or the owners of entrants; or
>
> (2) Bona fide business transactions which are valid under the law of contracts; or
>
> (3) Games that award only additional play; or
>
> (4) Merchant promotional contests and drawings conducted incidentally to bona fide nongaming business operations, if prizes are awarded without consideration being charged to participants; or
>
> (5) Other acts or transactions now or hereafter expressly authorized by law.

According to the Idaho Constitution, all forms of permissible gambling including, the Idaho Lottery and pari-mutuel betting are expressly prohibited from engaging in certain specified forms of gambling. The lottery is expressly prohibited from engaging in any gambling that takes on the follow-

ing forms: blackjack, craps, roulette, poker, bacarrat, keno and slot machines, or employ any electronic or electromechanical imitation or simulation of any form of casino gambling.

"Video lottery terminals" are simply another name for illegal "slot machines." If one were to call a game of 7-Card Stud "Go Fish," it would not make the game legal. The same analysis applies here.

Within the initiative petition, "Video Lottery Terminal" is defined as:

> (17) "Video Lottery Terminal" means a lottery machine, which is not activated by a handle or a lever, does not dispense coins, currency, tokens, or chips and performs only the following functions:
>
> (a) Accepts currency, cash, coins, tokens, chips, vouchers, coupons, electronic cards or any other representative of value to qualify a player to participate in one or more games;
>
> (b) Dispenses, at the player's request, a cash out ticket or electronic card that has printed physically or electronically, upon it the game identifier and the player's credit balance;
>
> (c) Shows on a video screen or other electronic display, rather than on a paper ticket, the results of each game played;
>
> (d) Shows on a video screen or other electronic display, in an area separate from the game results, the player's credit balance;
>
> (e) Selects randomly, by a central computer, numbers or symbols to determine game results without use of any skill or judgment by the player; and

(f) Maintains the integrity of the operations of the terminal.

The Idaho State Video Lottery Terminal Law Initiative Petition, 3. Clearly this provision has been written to "technically" avoid classification as a slot machine. But this effort fails in many respects. Most importantly, the Idaho Supreme Court recently held that regardless of the technological changes made to a slot machine, it is still considered a slot machine and prohibited by both the Idaho Constitution and the Idaho Code. MDS Investments v. State of Idaho, 138 Idaho 456, 65 P.3d 197 (Idaho 2003).

Idaho Code § 18-3801 applies to slot machines "of any sort or kind whatsoever." Slot machine technology is constantly evolving, which explains why the legislature intended the prohibition to apply to slot machines of "any sort or kind whatsoever." Additionally, the Idaho Constitution prohibits "any electronic or electromechanic imitation or simulation of any form of casino gambling." Idaho Const. art. III, § 20 (2) (emphasis added). Generally, exclusively mechanical slot machines have been replaced by electrical or computer controlled machines, which determine the outcome based upon a "Random Number Generator." As referred to in the initiative, the distinctions made regarding the absence of "levers or handles," or that the outcome is selected "randomly by central computer," do not operate to make the device described any less of a slot machine. If anything, it simply reflects the current trend in slot machine technology. Equally unconvincing is the distinction, which states that instead of money, the machine: "[d]ispenses, at the player's request, a cash-out ticket or electronic card that has printed physically or electronically, upon it the game identifier and the player's credit balance." Currently, many casinos are incorporating "ticket in, ticket out" technology. Tech-nological changes such as these are simply cosmetic.

Slot machines are defined by the Idaho Supreme Court as follows:

> A slot machine is a gambling device which, upon payment by a player of required consideration in any form, may be played or operated, and which, upon being played or operated, may, solely by chance, deliver or entitle the player to receive something of value, with the outcome being shown

> by spinning reels or by a video or other representation of reels.

MDS Investments, 138 Idaho at 462, 65 P.3d at 203. As outlined within the initiative, the player pays to play, and then the machine, "selects randomly, by a central computer, numbers or symbols to determine game results without use of any skill or judgment by the player" at which point, the player will either win additional credits or lose the credits played. Based upon the way that this initiative is crafted, it is likely that a reviewing court would find that the machines described are slot machines and expressly prohibited by the Idaho Constitution.

4. Tribal Gaming Statutes Cannot Permit State-Sanctioned Illegal Slot Machines

An anticipated argument is that the Tribal Gaming Compacts and recently passed initiative permits the installation of "video lottery terminals." This is an incorrect assumption. Tribal gaming is regulated by a complex set of interrelated federal statutes, state statutes, tribal law, and tribal state compacts. A legal analysis of tribal gaming is far beyond the scope of this certificate of review. Distinct provisions of the law govern tribal gaming pursuant to a Compact and the prohibition on state operated slot machines.

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 Brent Baldwin 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

April 1, 2004

The Honorable Ben Ysursa
Secretary of State
HAND DELIVERED

Re: Certificate of Review
Initiative for Defense of Marriage Amendment

Dear Secretary of State Ysursa:

An initiative petition was filed with your office on March 12, 2004. 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 proposed law:

> Until the Congress of the United States of America shall have proposed an amendment to the United States Constitution that only (a) defines marriage as between a man

> and a woman or (b) ensures to each state the right to decide for itself the definition of marriage for all its residents, then, the Legislature of each session of this State shall, prior to the passage of any new legislation by the Legislature, call for the convening of a United States Constitutional Convention. Such call shall be for a Convention with the same authority and rules as the original founding Convention and shall be valid for a period of seven years once made. The Legislature shall take all such additional acts as necessary, including the appointment of representatives, to call, attend and fully participate in such a Convention. Such representatives shall meet at a place designated by the sponsors of this law no later than May 14 of each year, and shall as one of their first items of business determine whether there is adequate participation so that a Convention has authority to proceed. When, in consequence of such a Convention, any Constitutional amendment adopted shall either (a) define marriage as only between a man and a woman or (b) ensure to each state the right to decide for itself the definition of marriage for all its residents, then the Legislature of this State shall thereafter have no further obligation to issue a new call for election.

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.

It should also be noted that this proposal does not appear to be as much of a law as it is a mandate that the legislature act. 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). This initiative seeks to enact a law, which will mandate that the legislature call for a constitutional convention prior to passage of any legislation. In essence, this statute attempts to limit the constitutional authority of the legislature, as outlined within article III, § 1 of the Idaho Constitution. A reviewing court would likely conclude that this limitation appears impermissible, because the legislature is granted plenary authority over the setting of its rules of order and procedure by the Idaho Constitution. Idaho Constitution art. III, §§ 9-10. In short, an initiative

cannot restrict the actions of future legislatures absent a constitutional mandate.

As this initiative seeks to compel the legislature to issue a call for a national constitutional convention, there is no reason to discuss the policy reasons for the convention call.

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 Vivian T. Wayment 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

July 22, 2004

The Honorable Ben Ysursa
Idaho 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 Mr. Secretary:

An initiative petition was filed with your office on July 9, 2004. 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.

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 David D. Whaley 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

Topic Index

and

Tables of Citation

CERTIFICATES OF REVIEW

2004

2004 SELECTED CERTIFICATES OF REVIEW INDEX

CERTIFICATE TITLE/DESCRIPTION	DATE	PAGE
Initiative to Amend Idaho State Video Lottery Terminal Law	1/15/04	35
Initiative for Defense of Marriage Amendment	4/1/04	43
Proposed Initiative to Repeal the Right to Work Law	7/22/04	46

IDAHO CONSTITUTION CITATIONS

ARTICLE & SECTION	DATE	PAGE
ARTICLE III		
§ 1	1/15/04	35
§ 1	4/1/04	43
§ 1	7/22/04	46
§ 9	4/1/04	43
§ 10	4/1/04	43
§ 19	1/15/04	35
§ 20	1/15/04	35

IDAHO CODE CITATIONS

SECTION	DATE	PAGE
18-3801	1/15/04	35
34-1809	1/15/04	35
34-1809	4/1/04	43
34-1809	7/22/04	46
44-2001, et seq.	7/22/04	46

FIVE-YEAR

Topic Index

and

Tables of Citation

OFFICIAL OPINIONS

2000-2004

TOPIC	OPINION	PAGE
AGRICULTURE		
Determination by director that there are no viable agricultural alternatives to crop burning must be based on documentary evidence to create a record that can be reviewed by a court under the Administrative Procedure Act	01-3	32
CORRECTIONAL INDUSTRIES		
Correctional Industries products may not be sold to retail or wholesale establishments that (1) are not in business of selling such products or (2) do not intend to sell Correctional Industries products	01-1	5
INSURANCE		
Court would likely find I.C. 41-2819, which requires insurance holding companies to obtain solicitation permit from director of Dept. of Insurance prior to soliciting Idaho investors for exempt private offering of federally covered securities pursuant to Rule 506 of Regulation D promulgated under Securities Act of 1933, to be preempted by National Securities Markets Improvement Act of 1996	02-2	22
LAND BOARD		
Land Board may deposit into land bank fund proceeds from sale of lands belonging to the following endowments: penitentiary, public school, university, scientific school, agricultural college, normal school, mental hospital, and charitable institutions; but not from capitol permanent endowment *(Note: Opinion 02-1 supersedes Opinion 01-4 to the extent Opinion 01-4 conflicts with Opinion 02-1)*	01-4 and 02-1	37 and 5

TOPIC	OPINION	PAGE
Land Board retains discretion in deciding whether to deposit proceeds from sale of parcels of endowment lands into land bank fund; if not placed in land bank fund, must be placed in appropriate permanent endowment fund *(Note: Opinion 02-1 supersedes Opinion 01-4 to the extent Opinion 01-4 conflicts with Opinion 02-1*)	01-4 and 02-1	37 and 5
Proceeds from sale of endowment property may be used to pay for reasonable and necessary costs incidental to sale or acquisition of property prior to deposit into land bank fund *(Note: See also Opinion 02-1)*	01-4	37
LANDS		
Idaho Constitution art. 9, § 8, applies to endowment lands and to lands acquired by state after 1982, but does not apply to other lands acquired or owned by state	01-2	11
Proceeds deposited into land bank fund may be used to pay reasonable and necessary costs incidental to acquisition or purchase of new endowment property, and Department of Lands precluded from deducting any costs from purchase moneys received in exchange for endowment lands	02-1	5
TAXES		
Analysis of Idaho's tiered premium tax statutes under the U.S. and Idaho Constitutions	00-1	5

UNITED STATES CONSTITUTION CITATIONS

ARTICLE & SECTION	OPINION	PAGE
ARTICLE I		
§ 8	00-1	5
Fourteenth Amendment, § 1	00-1	5

IDAHO CONSTITUTION CITATIONS

ARTICLE & SECTION	OPINION	PAGE
ARTICLE I		
§ 2	00-1	5
ARTICLE VII		
§ 5	00-1	5
ARTICLE IX		
§ 7	01-2	11
§ 7	01-4	37
§ 7	02-1	5
§ 8	01-2	11
§ 8	01-4	37
§ 8	02-1	5
ARTICLE XX		
§ 1	01-2	11

UNITED STATES CODE CITATIONS

SECTION	OPINION	PAGE
15 U.S.C. § 77r	02-2	22
15 U.S.C. § 1012	02-2	22

IDAHO CODE CITATIONS

SECTION	OPINION	PAGE
20-102	01-4	37
20-102	02-1	5
20-401, *et seq.*	01-1	5
20-413	01-1	5
20-414	01-1	5
21-142(14)	01-2	11
22-4803	01-3	32
22-4803(1)	01-3	32
33-107	01-2	11
33-902	01-4	37
33-902	02-1	5
33-902A	01-4	37
33-902A	02-1	5
33-903	01-4	37
33-903	02-1	5
33-2909	01-4	37
33-2909	02-1	5
33-2911	01-4	37
33-2911	02-1	5
33-2913	01-4	37
33-2913	02-1	5
33-3301	01-4	37
33-3301	02-1	5
39-106	01-2	11
41-340	00-1	5
41-402	00-1	5
41-403	00-1	5
41-2819	02-2	22
42-1734	01-2	11
57-716	01-4	37
57-716	02-1	5
57-723A	01-4	37
57-723A	02-1	5
58-101	01-4	37

SECTION	OPINION	PAGE
58-101	02-1	5
58-104	01-4	37
58-104	02-1	5
58-116	02-1	5
58-128	02-1	5
58-133	01-4	37
58-133	02-1	5
58-331	01-2	11
58-332	01-2	11
58-333	01-2	11
58-334	01-2	11
58-335	01-2	11
58-335A	01-2	11
58-361	02-1	5
66-1101	01-4	37
66-1101	02-1	5
66-1103	01-4	37
66-1103	02-1	5
67-913	01-2	11
67-1601 through 67-1612	01-4	37
67-1601 through 67-1612	02-1	5
67-5201, *et seq.*	01-3	32
67-5201(12)	01-3	32
67-5201(19)	01-3	32
67-5223	01-2	11
67-5250(2)	01-3	32
67-5270	01-3	32
67-5275(1)(c)	01-3	32
67-5279(2)	01-3	32
67-5291	01-2	11
67-5779 through 67-5781	01-4	37
67-5779 through 67-5781	02-1	5
67-6409	01-2	11
68-10-101 through 68-10-605	01-4	37
68-10-101 through 68-10-605	02-1	5

FIVE-YEAR

Topic Index

and

Tables of Citation

SELECTED INFORMAL GUIDELINES

2000-2004

TOPIC	DATE	PAGE
AGRICULTURE		
When permit to sell milk for human consumption is temporarily revoked, Dept. of Agriculture may enter into consent agreement with dairyman for donation of forfeited proceeds to charitable organization chosen by dept.	2/16/00	39
ALCOHOLIC BEVERAGES		
Persons under 21 years of age are prohibited from entering separate room in restaurant where alcohol is kept and mixed, such as cocktail lounge or tavern, and room must be posted as restricting entry or loitering by persons under 21 years of age	12/20/04	24
EDUCATION		
Legislature may not limit spending authority for income from university land endowments by not appropriating that money to colleges and universities; all income from university endowment funds derived from federal land grants is perpetually appropriated by such grants regardless of statutory or constitutional beneficiary	3/15/00	45
Court likely to uphold district policy authorizing or mandating moment of silence at beginning of school day if properly drafted and adopted for appropriate purpose	1/7/02	37
Universities and colleges are not prohibited from charging differential matriculation fees under art. 9, sec. 10, Idaho Const., provided that fees collected are used only for maintenance and operation of physical plant, institutional support or student services	1/17/02	48

TOPIC	DATE	PAGE
Program to charge differential matriculation fees may not survive rational basis review under equal protection analysis if program is method to allow institution to be reimbursed for increased costs of instruction; if program has legitimate purpose such as accounting for increased cost for items that may be reimbursed by matriculation fees, it is likely to pass rational basis review	1/17/02	48
Board of Education does not have legal authority to grant initial petition for charter school status	6/23/03	11
Board of Education does not have legal power or authority to create mechanism for funding public schools that is contrary to legislative funding mechanism established by legislature	11/18/03	22
ELECTED OFFICIALS		
Individual serving simultaneously as county commissioner and city councilperson or county commissioner and planning and zoning commission member may have conflict of loyalty and should vacate one office	8/23/03	18
ELECTIONS		
Court likely to hold member of commission for reapportionment not precluded from running for lieutenant governor	4/30/02	55
Secretary of State has authority to determine qualifications of candidates	4/30/02	55

TOPIC	DATE	PAGE
HEALTH AND WELFARE		
Pools at hotels and motels are probably "public pools" subject to state inspection and regulation, but definitions of "public" and "private" pools need to be clarified	6/7/01	61
LEGISLATURE		
Idaho Constitution addresses only legislative "districts" and Commission for Reapportionment may not apportion House of Representatives by use of "sub-districts"	7/6/01	67
Idaho Constitution does not preclude formation of a House of Representatives smaller than 70 members by Commission for Reapportionment, but single-member districts or mix of two-seat multi-member districts with one-seat single-member districts conflict with Idaho Code	7/6/01	67
Federal Voting Rights Act does not *per se* prohibit multi-member districts in instances where protected class could constitute majority of a single-member sub-district; however, extensive fact-finding and legal analysis required to determine violation of Voting Rights Act is not function of Commission for Reapportionment	7/6/01	67
PUBLIC EMPLOYEES		
Existing public employment is not jeopardized by sub-sequent election of employee's relative to public office, and employee is frozen in current job assignment but may be eligible for non-meritorious pay increases	12/30/02	69

TOPIC	DATE	PAGE
TAX APPEALS		
Rule allowing accountants or other non-attorneys to argue points of law, prepare legal briefs, or call and examine witnesses before Board of Tax Appeals would likely be struck down by court	7/31/02	61
WATER RESOURCES		
Legislature may amend definition of "local public interest" without Water Resources Board first amending Public Interest Policy 1B of the *State Water Plan*	3/20/03	5
Holder of junior priority water right for domestic purposes may exercise delivery preference over holders of more senior water rights for other purposes when there is insufficient water to satisfy all users, and junior domestic right holder must pay just compensation to holder of non-domestic water right from whom water is taken	11/25/03	41
Prior appropriation doctrine requires that approved change in nature of use of water right be limited to actual or historic volume of consumptive use previously made under the right in order to avoid injury to other water rights	2/24/04	5

UNITED STATES CONSTITUTION CITATIONS

ARTICLE & SECTION	DATE	PAGE
ARTICLE VI		
§ 2	7/6/01	67
First Amendment	1/7/02	37
Fourteenth Amendment	7/6/01	67

IDAHO CONSTITUTION CITATIONS

ARTICLE & SECTION	DATE	PAGE
ARTICLE I		
§ 2	1/17/02	48
§ 4	1/7/02	37
§ 14	11/25/03	41
ARTICLE II		
§ 1	3/20/03	5
§ 1	11/18/03	22
ARTICLE III		
§ 1	3/20/03	5
§ 2	7/6/01	67
§ 2(1)	4/30/02	55
§ 2(6)	4/30/02	55
§ 4	7/6/01	67
§ 9	4/30/02	55
§ 10	4/30/02	55
ARTICLE IV		
§ 1	4/30/02	55
§ 2	4/30/02	55
§ 13	4/30/02	55

ARTICLE & SECTION	DATE	PAGE
ARTICLE VII		
§ 13	11/18/03	22
ARTICLE IX		
§ 1	11/18/03	22
§ 2	6/23/03	11
§ 2	11/18/03	22
§ 3	3/15/00	45
§ 4	3/15/00	45
§ 8	3/15/00	45
§ 9	6/23/03	11
§ 10	3/15/00	45
§ 10	1/17/02	48
§ 11	3/15/00	45
ARTICLE XV		
§ 3	3/20/03	5
§ 3	11/25/03	41
§ 3	2/24/04	5
§ 7	3/20/03	5

UNITED STATES CODE CITATIONS

ARTICLE & SECTION	DATE	PAGE
42 U.S.C. § 1973	7/6/01	67

IDAHO CODE CITATIONS

ARTICLE & SECTION	DATE	PAGE
3-401	7/31/02	61
3-420	7/31/02	61
18-316	8/28/03	18
18-1359	12/30/02	69

ARTICLE & SECTION	DATE	PAGE
23-902(13)	12/20/04	24
23-941	12/20/04	24
23-942	12/20/04	24
23-943	12/20/04	24
23-944(1)	12/20/04	24
23-945	12/20/04	24
23-946	12/20/04	24
31-855	8/28/03	18
33-101	6/23/03	11
33-101	11/18/03	22
33-107	6/23/03	11
33-107	11/18/03	22
33-116	6/23/03	11
33-1002	11/18/03	22
33-1003	11/18/03	22
33-1004A	11/18/03	22
33-1009	11/18/03	22
33-1612	6/23/03	11
33-3302	3/15/00	45
33-3304	3/15/00	45
33-3717	1/17/02	48
33-5201	6/23/03	11
33-5203	6/23/03	11
33-5205	6/23/03	11
33-5206	6/23/03	11
33-5207	6/23/03	11
33-5207	11/18/03	22
33-5208	11/18/03	22
33-5209	6/23/03	11
33-5210	6/23/03	11
33-5210	11/18/03	22
34-904	4/30/02	55
34-1404	4/30/02	55
34-2101(2)	4/30/02	55
34-2104	4/30/02	55
34-2122	4/30/02	55

ARTICLE & SECTION	DATE	PAGE
34-2123	4/30/02	55
34-2124	4/30/02	55
34-2128	4/30/02	55
34-2129	4/30/02	55
37-401	2/16/00	39
37-403	2/16/00	39
37-408	2/16/00	39
42-101	3/20/03	5
42-101	2/24/04	5
42-103	11/25/03	41
42-202B	3/20/03	5
42-202B	2/24/04	5
42-203	3/20/03	5
42-203A	3/20/03	5
42-222	3/20/03	5
42-222	2/24/04	5
42-222(1)	2/24/04	5
42-604	11/25/03	41
42-1734	3/20/03	5
42-1734A	3/20/03	5
42-1736	3/20/03	5
55-101(1)	2/24/04	5
55-101B	6/7/01	61
55-1501	6/7/01	61
55-1516	6/7/01	61
56-1001	6/7/01	61
56-1003(3)	6/7/01	61
63-3808	7/31/02	61
63-3809(1)	7/31/02	61
63-3810	7/31/02	61
63-3812	7/31/02	61
66-1106	3/15/00	45
67-202	7/6/01	67
67-1401(13)	12/30/02	69
67-3608	3/15/00	45
67-3609	3/15/00	45

ARTICLE & SECTION	DATE	PAGE
67-5201(11)	2/16/00	39
67-5240	2/16/00	39
67-5291	6/7/01	61
67-6506	8/28/03	18
72-1502	4/30/02	55
72-1506	7/6/01	67
73-116	8/28/03	18

FIVE-YEAR

Topic Index

and

Tables of Citation

CERTIFICATES OF REVIEW
2000-2004

CERTIFICATE TITLE/DESCRIPTION	DATE	PAGE
Annexation of adjacent unincorporated property	3/22/00	69
Initiative Concerning State Term Limits	8/23/01	92
Initiative Concerning State Term Limits	2/28/02	89
Initiative for Defense of Marriage Amendment	4/1/04	43
Initiative Regarding Judicial Accountability Initiative Law	2/11/02	81
Initiative Regarding Testing of Candidates for Public Office	7/5/01	81
Initiative Regarding the Idaho Judicial Accountability Act of 2004	1/30/03	57
Initiative Regarding the Idaho Judicial Accountability Act of 2004	6/4/03	76
Initiative Regarding the Resort County Sales Tax	3/11/03	73
Initiative Regarding Tribal Video Machine Gaming ..	7/12/01	85
Initiative to Amend Idaho State Video Lottery Terminal Law	1/15/04	35
Initiative to Amend Idaho's School Funding	7/22/03	82
Initiative to Amend Title 36 that Governs the Idaho Fish and Game Commission	2/28/03	65
Initiative to Amend Title 36-102 that Governs the Idaho Fish and Game Commission	2/21/02	86
Initiative to Create a Sales Tax Exemption for Food ..	3/5/03	69
Initiative to Repeal the Right to Work Law	7/10/03	80

CERTIFICATE TITLE/DESCRIPTION	DATE	PAGE
Initiative to Repeal the Right to Work Law	7/22/04	46
Referendum on Repeal of Term Limits Law	3/11/02	93

UNITED STATES CONSTITUTION CITATIONS

ARTICLE & SECTION	DATE	PAGE
ARTICLE I		
§ 9	1/30/03	57
First Amendment	7/5/01	81
Fifth Amendment	1/30/03	57
Sixth Amendment	1/30/03	57

IDAHO CONSTITUTION CITATIONS

ARTICLE & SECTION	DATE	PAGE
ARTICLE I		
§ 9	7/5/01	81
ARTICLE II		
§ 1	2/11/02	81
§ 1	1/30/03	57
§ 1	2/28/03	65
§ 1	6/4/03	76
ARTICLE III		
§ 1	2/11/02	81
§ 1	2/21/02	86
§ 1	1/30/03	57
§ 1	2/28/03	65
§ 1	3/5/03	69
§ 1	7/10/03	80
§ 1	7/22/03	82

ARTICLE & SECTION	DATE	PAGE
§ 1	1/15/04	35
§ 1	4/1/04	43
§ 1	7/22/04	46
§ 9	4/1/04	43
§ 10	4/1/04	43
§ 15	2/28/03	65
§ 15	7/22/03	82
§ 19	3/11/03	73
§ 19	1/15/04	35
§ 20	7/12/01	85
§ 20	1/15/04	35
ARTICLE IV		
§ 10	2/28/03	65
§ 11	2/28/03	65
ARTICLE V		
§ 2	2/11/02	81
§ 2	1/30/03	57
§ 13	2/11/02	81
§ 13	1/30/03	57
§ 20	2/11/02	81
§ 20	1/30/03	57
ARTICLE VII		
§ 11	2/28/03	65
§ 11	7/22/03	82
§ 13	2/28/03	65
§ 13	7/22/03	82
ARTICLE IX		
§ 1	7/22/03	82

UNITED STATES CODE CITATIONS

ARTICLE & SECTION	DATE	PAGE
12 U.S.C. §§ 1701 *et seq.*	3/5/03	69
12 U.S.C. §§ 1701 *et seq.*	7/22/03	82
25 U.S.C. § 2710(d)(1)	7/12/01	85

IDAHO CODE CITATIONS

ARTICLE & SECTION	DATE	PAGE
18-109	1/30/03	57
18-3801	1/15/04	35
18-3910	7/12/01	85
31-1410(3)	7/5/01	81
34-1809	1/30/03	57
34-1809	2/28/03	65
34-1809	3/5/03	69
34-1809	3/11/03	73
34-1809	6/4/03	76
34-1809	7/10/03	80
34-1809	7/22/03	82
34-1809	1/15/04	35
34-1809	4/1/04	43
34-1809	7/22/04	46
34-907	8/23/01	92
34-907	2/28/02	89
34-907	3/11/02	93
36-101	2/28/03	65
36-102	2/21/02	86
36-102(b)	2/28/03	65
36-102(d)	2/28/03	65
36-107(d)	2/28/03	65
44-2001, *et seq.*	7/10/03	80
44-2001, *et seq.*	7/22/04	46
44-2012	7/10/03	80
50-222	3/22/00	69

ARTICLE & SECTION	DATE	PAGE
50-478	3/11/02	93
50-1043 through 50-1049	3/11/03	73
63-3601, *et seq.*	3/5/03	69