IDAHO ATTORNEY GENERAL'S ANNUAL REPORT

OPINIONS

SELECTED INFORMAL GUIDELINES

AND

CERTIFICATES OF REVIEW

FOR THE YEAR

2006

Lawrence G. Wasden
Attorney General

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Lawrence G. Wasden
Attorney General

INTRODUCTION

Dear Fellow Idahoan:

Thank you for your interest in the annual report from the Office of the Attorney General. The year 2006 brought about my re-election to office, and I am thankful for the continuing support of the citizens of Idaho.

In 2006, the Idaho Supreme Court issued an opinion in the School Funding lawsuit. The decision represented a defensible result for the Legislature, because, although the Court found the current school funding system inadequate, it respected the Legislature's constitutional authority, leaving the solution to the Legislature. In response to the Court's decision, the Legislature took steps to address the Court's decision.

The State's longest running case—the Jeff D. case, ongoing for the past 26 years—will also be coming to a close. Deputies from my Human Services Division collaborated with deputies from my Civil Litigation and Criminal Law Divisions to effectively posture and try the Jeff D. case. The U.S. District Court issued its decision, and the State should be able to comply with the requirements of the decision within 120 days, as ordered by the Court. Again, this represented a significant outcome for the State of Idaho.

This Office was also required to defend the Legislature's Article 3 rulemaking authority in the Idaho Press Club case. The Idaho Supreme Court agreed with my Office's legal analysis that the Legislature has the authority, under the Idaho Constitution, to determine its own rules of procedure.

Unfortunately, this Office continues to be asked to investigate and prosecute cases of public corruption around the state involving the misuse of public funds, abuses of position and power, and falsifying documents. We have been successful in these prosecutions, and have worked very hard to insure Idaho's citizens have a government in which they can place their trust.

Our Consumer Protection Unit recovered $1.4 million for Idaho consumers and taxpayers. This Unit also collected $260,000 in civil penalties, fees, and costs, which was deposited into the Consumer Protection account and legislatively appropriated for consumer protection and educational activities. Surplus funds were then transferred to the General Fund. At the end of last year, our Office transferred $151,758 to the General Fund. Since FY 2000, we have transferred $3.9 million to the General Fund.

I am very proud of this Office's ProtecTeens Internet safety program, which we presented in 2005. I hope you have had the opportunity to view the program with your family. This year, my Office improved this program by creating

two important manuals for parents: *The Internet Lingo Dictionary* and *A Parent's Guide to Social Networking Sites.* These manuals help parents more fully understand what their children are doing on-line, how they are communicating on-line, and how better to supervise their children's on-line activity from a more informed perspective. Each manual is available on our website, and will be included in the 2007 version of the ProtecTeens compact disk. To date, we have distributed over 90,000 copies of this program to parents and students throughout the State of Idaho.

One of my Office's busiest times of year is during the Legislative Session. The past year was no different. My Intergovernmental and Fiscal Law Division handled 280 requests from legislators, generally providing them a written opinion within 48 hours. We also identified potential problem areas in existing law and provided recommendations for needed changes in the law regarding the misuse of public funds and end-of-life issues.

The Office of the Attorney General has again enjoyed an extremely busy, but productive, year. Select opinions of statewide significance are contained in this volume. I encourage you to visit the Office's website at http://www.ag.idaho.gov where you will find details about the Office, as well as all of our publications, including the Public Records Law Manual, the Open Meeting Law Manual, the Ethics in Government Manual, and the Internet Safety program.

On behalf of all the attorneys and staff in this Office, we not only appreciate the opportunity to represent the State of Idaho, but we are also prepared to meet the future legal challenges that confront the State of Idaho. Thank you for your ongoing support of the efforts of this Office.

LAWRENCE G. WASDEN
Attorney General

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ATTORNEY GENERAL
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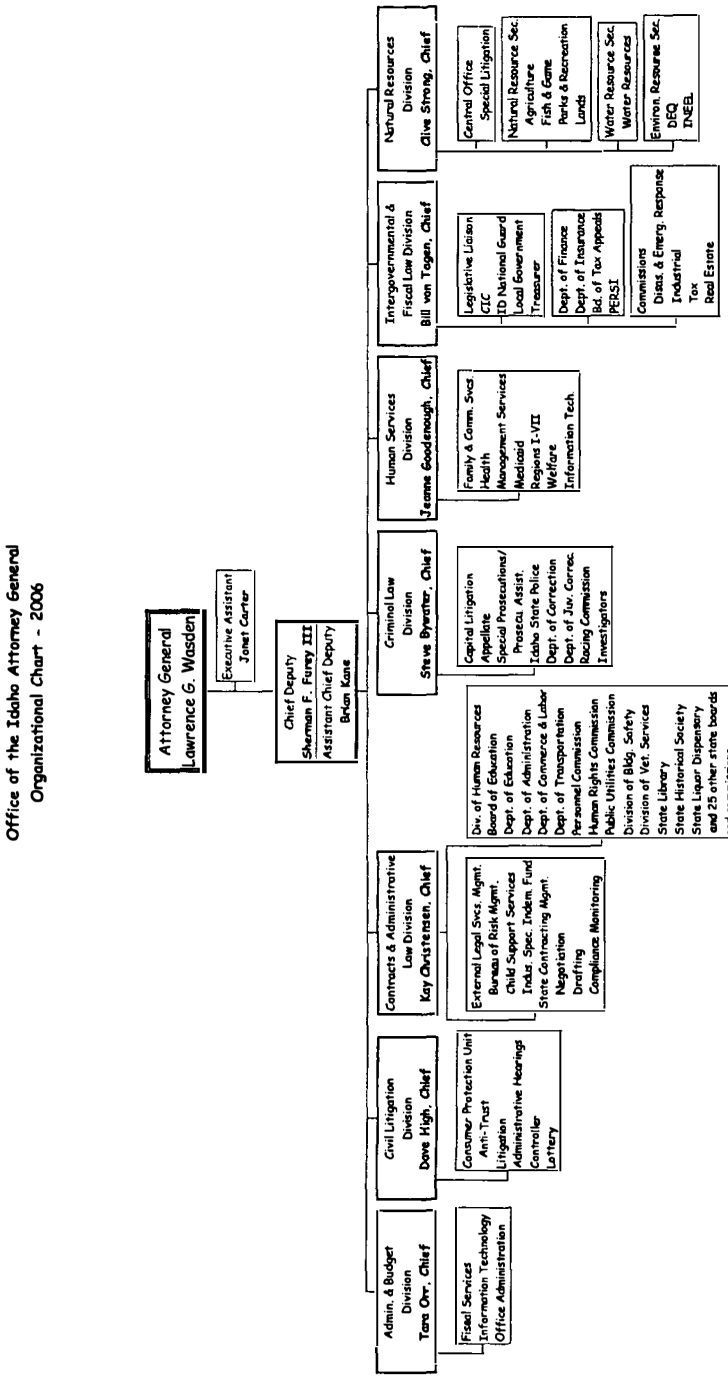
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Dept. of Administration
Dept. of Commerce & Labor
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Personnel Commission
Human Rights Commission
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Division of Bldg. Safety
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State Historical Society
State Liquor Dispensary
and 25 other state boards and commissions
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OFFICIAL OPINIONS
OF
THE ATTORNEY GENERAL
FOR THE YEAR 2006

LAWRENCE G. WASDEN
ATTORNEY GENERAL
STATE OF IDAHO

ATTORNEY GENERAL OPINION NO. 06-1

Hand Delivered

Honorable Lawerence Denney
Majority Leader
Idaho House of Representatives
STATEHOUSE

Per Request for Attorney General's Opinion
Regarding Proposed Amendment to the Idaho Constitution

Dear Representative Denney:

The Idaho Legislature is considering a proposed amendment to the Idaho Constitution concerning marriage. You have written that the proposed amendment is to ensure the State of Idaho's policy provides for and protects the traditional institution of marriage, and you have requested the Attorney General's opinion regarding several questions.

This opinion responds to your questions concerning the constitutionality of marriage laws and the potential impact of a constitutional marriage amendment on certain rights and benefits under current Idaho law. This opinion is not intended to address the particular language of the proposed marriage amendment currently under consideration.

QUESTIONS PRESENTED

For purposes of this opinion, your questions are summarized as follows:

1. Without a defense of marriage amendment, is it possible for the Idaho Supreme Court to recognize a marriage solemnized in another state that is not between a man and a woman?
2. Will a defense of marriage amendment directly conflict with any provisions of the United States Constitution?
3. Will a defense of marriage amendment inhibit the ability of any individuals to conduct business of any nature via contract or interfere with powers of attorney?

4. Will a defense of marriage amendment interfere with the right of a person to leave property by a will to anyone of his or her choosing?
5. Will a defense of marriage amendment interfere with: (a) the rights of unmarried persons to cohabitate; (b) the rights of extended family members to help raise minor members of their family; (c) the rules regarding the making of medical care decisions by unmarried persons; or (d) the ability of unmarried persons to visit each other if one is hospitalized?

CONCLUSIONS

1. Idaho Code §§ 32-201 and 32-209 limit marriage under Idaho law to a marriage between a man and a woman. Without a marriage amendment, a couple who seeks to solemnize their relationship in Idaho could bring a lawsuit alleging that Idaho's marriage statutes violate the due process and equal protection clauses of the Idaho Constitution. Idaho Const. art. I, §§ 1-2. A couple that seeks recognition in Idaho of a relationship solemnized in another state could further claim that full faith and credit is due the relationship under the United States Constitution. U.S. Const. art. IV, § 1. Although the Idaho Supreme Court would probably reject these challenges under current law, a marriage amendment would bar a challenge under the Idaho Constitution and would strengthen Idaho's current statement of public policy rejecting same-sex marriages formed in other states.

2. Ultimately, the United States Supreme Court will face and probably uphold marriage laws that limit marriage to a man and a woman as constitutional under the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution, but there are no guarantees given wide discrepancies in the current case law. U.S. Const. amend. XIV. In Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971), appeal dismissed Baker v. Nelson, 409 U.S. 810, 93 S. Ct. 37, 34 L. Ed. 2d 65 (1972), the Supreme Court summarily dismissed on appeal, without discussion, a federal constitutional challenge to a marriage statute that limited marriage to a man and a woman. Some courts have held that Baker v. Nelson is determinative of a federal constitutional challenge, but other courts have questioned or ignored its precedential value. Numerous federal and state courts have addressed the constitutionality of marriage laws and reached

opposite decisions on similar facts and arguments. A marriage law that not only defines marriage as between a man and a woman but also prohibits recognition of other domestic relationships faces additional federal constitutional hurdles.

3. A marriage amendment need not be drafted to inhibit the ability of individuals to conduct business via contract or powers of attorney. Contracts with third parties outside of a same-sex relationship should not be invalidated by a marriage amendment. A same-sex couple's contract with each other would more likely be upheld on contract principles than rejected as an unenforceable legal union akin to marriage. Powers of attorney are generally not dependent upon marriage and, therefore, should not be invalidated by a marriage amendment.

4. A marriage amendment need not be drafted to interfere with the right of a person to leave property by a will to anyone of his or her choosing. Because the right to leave property by a will is not dependent upon marital status, the right to leave property by a will should not be invalidated by a marriage amendment.

5. A marriage amendment need not be drafted to impair the decisions of unmarried persons to cohabitate, or the rights of extended family members to raise minor members of that extended family. A marriage amendment should not invalidate current statutes governing medical care decisions or hospital visitation rules. A marriage amendment that not only defines marriage as between a man and a woman but also prohibits recognition of other domestic relationships carries a higher risk of affecting relationships outside of traditional marriage.

BACKGROUND

In 1967, in Loving v. Commonwealth of Virginia, the United States Supreme Court established marriage as a fundamental right protected by the Fourteenth Amendment of the United States Constitution. 388 U.S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967). In Loving, the United States Supreme Court held that Virginia's miscegenation statutes which outlawed interracial marriages violated both the substantive due process and equal protection clauses of the Fourteenth Amendment. 388 U.S. at 12, 87 S. Ct. at 1824.

"The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men." *Id.*

Traditionally, the courts have refused to recognize any right of same-sex couples to marriage. In 1971, in Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971), *appeal dismissed* Baker v. Nelson, 409 U.S. 810, 93 S. Ct. 37, 34 L. Ed. 2d 65 (1972), a same-sex couple who were denied a marriage license claimed that they had a fundamental right to marry and that restricting marriage to couples of the opposite sex violated equal protection principles. On appeal, the Minnesota Supreme Court held that same-sex couples do not have a fundamental right to marry under the United States Constitution. 191 N.W. 2d at 186. The court reasoned: "The institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis." *Id.* The court also rejected the couple's equal protection claim, holding that prohibiting same-sex marriage was not invidious discrimination. *Id.* at 187.

Several early cases are in accord with Baker v. Nelson. *See,* Adams v. Howerton, 486 F. Supp. 1119, 1124-25 (C.D. Cal. 1980) (upholding prohibition of same-sex marriage under Colorado law and federal immigration law); Singer v. Hara, 522 P.2d 1187, 1197 (Wash. Ct. App. 1974), *rev. denied,* 84 Wash. 2d 1008 (1974) (upholding prohibition of same-sex marriage under Washington and federal law); Jones v. Hallahan, 501 S.W.2d 588, 588-89 (Ky. Ct. App. 1973) (citing Baker v. Nelson, finding no constitutional protection for right of marriage between persons of the same sex); Anonymous v. Anonymous, 325 N.Y.S.2d 499, 500 (N.Y. Sup. Ct. 1971) ("Marriage is and always has been a contract between a man and a woman.").

In 1993, however, the Hawaii Supreme Court made a stark departure from the traditional rule and held that prohibiting same-sex marriages violated the equal protection provisions of the Hawaii Constitution. Baehr v. Lewin, 852 P.2d 44, 67 (Haw. 1993), *superseded by constitutional amendment,* Smelt v. County of Orange, 374 F. Supp. 2d 861, 875 (C.D. Cal. 2005).

Congress responded to Baehr by proposing the Defense of Marriage Act ("DOMA") which was enacted in 1996. 1 U.S.C. § 7 (1996); 28 U.S.C. § 1738C (1996). DOMA defines marriage for purposes of federal law as limited to opposite-sex couples:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.

1 U.S.C. § 7. DOMA also allows states to refuse recognition of same-sex marriages recognized in other states:

No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.

28 U.S.C. § 1738C.

Many states followed suit and enacted defense of marriage statutes. Idaho already limited marriage to a man and a woman. See 1993 Idaho Att'y Gen. Ann. Rpt. 119, 132 ("The State of Idaho does not legally recognize either homosexual marriages or homosexual domestic partnerships."). However, Idaho modified its marriage laws to bar recognition of same-sex marriages formed in other jurisdictions. Idaho Code § 32-201(1) states:

Marriage is a personal relation arising out of a civil contract between a man and a woman, to which the consent of parties capable of making it is necessary. Consent alone will not constitute marriage; it must be followed by a license and solemnization as authorized and provided by law. Marriage created by a mutual assumption of marital rights, duties or obligations shall not be recognized as a lawful marriage.

Idaho Code § 32-209 states:

All marriages contracted without this state, which would be valid by the laws of the state or country in which the same were contracted, are valid in this state, unless they violate the public policy of this state. Marriages that violate the public policy of this state include, but are not limited to, same-sex

marriages, and marriages entered into under the laws of another state or country with the intent to evade the prohibitions of the marriage laws of this state.

Despite DOMA, over the past decade a growing number of state courts have followed Baehr and struck down marriage statutes that limit marriage to a man and a woman under their state constitutions. *See, e.g.*, Baker v. State of Vermont, 744 A.2d 864, 886 (Vt. 1999) (exclusion of same-sex couples from benefits and protections of marriage violated Vermont Constitution); Goodridge v. Dept. of Public Health, 798 N.E.2d 941, 969 (Mass. 2003) (limitation of marriage to persons of opposite sex violated equal protection principles under the Massachusetts Constitution).

In response, several states have passed defense of marriage amendments to their state constitutions.[1] Some marriage amendments only define marriage as between a man and a woman. Other marriage amendments define marriage as between a man and a woman and also prohibit legal recognition of other domestic relationships, such as same-sex marriages, domestic partnerships and civil unions. The broader the scope of the amendment, the more likely a constitutional challenge will be brought.

ANALYSIS

I.

EFFECTS OF THE PASSAGE OF A MARRIAGE AMENDMENT UPON SAME-SEX UNIONS ENTERED INTO IN OTHER STATES

You have asked whether, without a marriage amendment to the Idaho Constitution, the Idaho Supreme Court could recognize a marriage solemnized in another state that is not between a man and a woman. Your question actually poses two inquiries. First, without a marriage amendment, could the Idaho Supreme Court conclude that the prohibition of same-sex marriage under Idaho Code §§ 32-201 and 32-209 violates the Idaho Constitution? Second, even though same-sex marriages are not recognized under the Idaho Code, could the Idaho Supreme Court be required to recognize a same-sex marriage formed in another state?

It is unlikely that the Idaho Supreme Court would adopt marriage policies contrary to those articulated in Idaho Code §§ 32-201 and 32-209.

However, as discussed below, a marriage amendment would preclude a state constitutional challenge and would reinforce Idaho's public policy against recognizing same-sex marriages solemnized in other states.

A. Without a Marriage Amendment, Whether a State Constitutional Challenge Could be Brought Against Idaho's Marriage Statutes

Without a marriage amendment, a challenge could be brought that prohibiting same-sex marriage under Idaho Code §§ 32-201 and 32-209 violates the due process and equal protection clauses of the Idaho Constitution. Idaho Const. art. I, §§ 1-2. A state constitutional challenge might be brought by a same-sex couple who wishes to solemnize a marriage or other domestic union (*e.g.*, a domestic partnership or civil union) in Idaho, or by a same-sex couple who asks Idaho to recognize a marriage or other domestic union solemnized in another state. Other courts have faced similar challenges.

A growing number of cases have struck down marriage statutes as unconstitutional. In 1993, in Baehr v. Lewin, same-sex couples who were denied marriage licenses claimed that Hawaii's marriage statute violated the Hawaii Constitution's equal protection provisions. 852 P.2d at 64. The Hawaii Supreme Court agreed and held that limiting marriage to opposite-sex couples discriminated against same-sex couples on the basis of sex. *Id.* The court concluded that the discrimination was unlawful because the marriage statute was not narrowly drawn to support a compelling state interest. *Id.* at 67. The court reasoned that the equal protection provisions of the Hawaii Constitution were more "elaborate" than the equal protection provisions of the Fourteenth Amendment of the United States Constitution. *Id.* at 64.

In 1999, in Baker v. State of Vermont, the Vermont Supreme Court upheld the right of same-sex couples under the Vermont Constitution to receive the common benefits and protections that flow from marriage. The court reasoned that the Common Benefits Clause of the Vermont Constitution requires that the same benefits and protections afforded to married opposite-sex couples be afforded to same-sex couples. 744 A.2d at 887. The court did *not* hold that the same-sex couples had any right to a marriage license, but rather only to the common benefits and protections that flow from marriage under Vermont law. *Id.* at 878. The court distinguished its analysis from a federal constitutional analysis, holding that interpreting the Vermont

Constitution must reflect an "inclusionary principle" rather than track a federal constitutional analysis. *Id.*

In 2003, in Goodridge v. Dept. of Public Health, the Massachusetts Supreme Court held that same-sex couples in Massachusetts are entitled to marry, on the grounds that prohibiting same-sex marriage does not satisfy substantive due process or equal protection requirements under the Massachusetts Constitution. 798 N.E.2d at 961. The court reasoned, "[t]he Massachusetts Constitution is, if anything, more protective of individual liberty and equality than the Federal Constitution; it may demand broader protection for fundamental rights; and it is less tolerant of government intrusion into the protected spheres of private life." *Id.* at 948-49. The court's holding was challenged unsuccessfully in the federal courts, in Largess v. Supreme Judicial Court for the State of Massachusetts, 317 F. Supp. 2d 77 (D. Mass.), *aff'd,* 373 F.3d 219 (1st Cir.), *cert. denied*, 543 U.S. 1002, 125 S. Ct. 618, 160 L. Ed. 2d 461 (2004), which rejected an attempt by state legislators to enjoin enforcement of Goodridge on the grounds of judicial overreaching.

In 2004 and 2005, additional courts rejected state marriage statutes. Among them are two cases pending on appeal before the Washington Supreme Court. *See,* Castle v. State of Washington, No. 04-2-00614-4, 2004 WL 1985215, at **16-17 (Wash. Super. Sept. 7, 2004) (unpublished decision) (holding that DOMA violates the privileges or immunities clause of the Washington Constitution); Andersen v. King County, No. 04-2-04964-4, 2004 WL 1738447, at *11 (Wash. Super. Aug. 4, 2004) (unpublished decision) (holding that Washington's marriage statutes, which prohibit same-sex marriages, violate the privileges or immunities clause and due process clause of the Washington Constitution). The Washington Supreme Court held oral argument in March 2005 and a decision is pending. Six more cases are pending on appeal in a consolidated action before the California Court of Appeals. *See,* Judicial Council Coordination Proceeding (Marriage Cases), No. 4365, 2005 WL 583129 (Cal. Super. Ct. March 14, 2005) (unpublished decision) (holding limitation of marriage to opposite-sex couples under California's marriage statute is unconstitutional under California Constitution). *See also,* Deane v. Conaway, No. 24-C-04-005390, 2006 WL 148145 (Md. Cir. Ct. Jan. 20, 2006) (striking down Maryland's prohibition of same-sex marriages, under the equal protection and due process provisions of the Maryland Constitution).

However, other courts have upheld marriage statutes. Several federal courts have upheld DOMA as compatible with the United States Constitution. *See,* In re Kandu, 315 B.R. 123, 148 (Bankr. W.D. Wash. 2004) (upholding DOMA and concluding that a lesbian couple who married in Canada could not jointly file a Chapter 7 bankruptcy); Smelt v. County of Orange, 374 F. Supp. 2d at 880 (upholding DOMA, finding no due process or equal protection violations); Wilson v. Ake, 354 F. Supp. 2d 1298, 1309 (M.D. Fla. 2005) (holding that DOMA does not violate Full Faith and Credit Clause or the due process or equal protection protections of the United States Constitution); *see also,* Morrison v. Sadler, 821 N.E.2d 15, 35 (Ind. Ct. App. 2005) (upholding DOMA).

Also, several state courts have upheld state marriage statutes as compatible with state constitutions, holding that marriage is properly limited to opposite-sex couples. *See,* Li v. State of Oregon, 110 P.3d 91, 102 (Or. 2005) (upholding prohibition of same-sex marriages under Oregon law); Hernandez v. Robles, 805 N.Y.S.2d 354, 377 (N.Y. App. Div. 2005) (holding denial of same-sex marriage does not violate due process or equal protection provisions of New York Constitution); Standhardt v. Superior Court of Arizona, 77 P.3d 451, 464 (Ariz. Ct. App. 2004) (holding denial of same-sex marriage does not violate any fundamental due process or equal protection right under Arizona or United States Constitutions); Dean v. District of Columbia, 653 A.2d 307, 333 (D.C. Ct. App. 1995) (holding same-sex marriage is not a fundamental right protected by due process).

Given this wide split in the case law, there is no majority rule to guide the Idaho Supreme Court if a state constitutional challenge to Idaho's marriage statutes is brought. However, the court should consider federal cases upholding DOMA. *See,* In re Kandu, 315 B.R. at 148; Smelt v. County of Orange, 374 F. Supp. 2d at 880; Wilson v. Ake, 354 F. Supp. 2d at 1309. The Idaho Constitution is "separate and in many respects independent" from the United States Constitution, but Idaho courts can interpret the Idaho Constitution by considering federal court rulings interpreting the United States Constitution. Rudeen v. Cenarrusa, 136 Idaho 560, 568, 38 P.3d 598, 606 (2001), citing Thompson v. Engelking, 96 Idaho 793, 818, 537 P.2d 635, 660 (1975). "The majority of Idaho cases . . . state that the equal protection guarantees of the federal and Idaho Constitutions are substantially equivalent." *Id.* An Idaho court "is free to interpret its constitution as more protective than the United States Constitution." Garcia v. State Tax Commission,

136 Idaho 610, 615, 38 P.3d 1266, 1271 (2002), citing State v. Thompson, 114 Idaho 746, 748, 760 P.2d 1162, 1164 (1988). However, "independent analysis under the Idaho Constitution does not mean that [the Idaho Supreme] Court will reach a different result from that reached by the U.S. Supreme Court under a similar constitutional provision." Garcia, 136 Idaho at 614, 38 P.3d at 1270.

The court could very well disregard case law from Hawaii, Vermont and Massachusetts that struck down state marriage statutes on the basis that the state constitutional provisions at issue were more protective than their federal constitutional counterparts. *See*, Baehr v. Lewin, 852 P.2d at 572 (holding the equal protection provisions of the Hawaii Constitution were more "elaborate" than the equal protection provisions of the Fourteenth Amendment); Baker v. State of Vermont, 744 A.2d at 878 (holding that interpretation of the Common Benefits Clause of the Vermont Constitution must reflect an "inclusionary principle" rather than track a federal constitutional analysis); Goodridge v. Dept. of Public Health, 798 N.E.2d at 948-49 ("The Massachusetts Constitution is, if anything, more protective of individual liberty and equality than the Federal Constitution; it may demand broader protection for fundamental rights; and it is less tolerant of government intrusion into the protected spheres of private life").

Thus, Idaho's marriage statutes are probably less vulnerable than the statutes challenged in Vermont, Hawaii and Massachusetts. However, a marriage amendment would articulate Idaho's marriage policy at a constitutional level and preclude a state constitutional challenge.

B. Without a Marriage Amendment, Whether the Idaho Supreme Court Would Be Required to Recognize Same-Sex Marriages Formed in Other States

You have asked whether, without a marriage amendment, the Idaho Supreme Court could be required to recognize a same-sex marriage formed in another state. The answer is most likely "no."

The Full Faith and Credit Clause of the United States Constitution generally requires that full faith and credit be given to the public acts, records and judicial proceedings of sister states, as follows:

> Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.

U.S. Const. art. IV, § 1. *See also* 28 U.S.C. § 1738; 28 U.S.C. § 1739 (implementing statutes governing attestation for recognition of, respectively, acts of legislature and records and judicial proceedings of courts, and nonjudicial records or books of public offices). Pursuant to the Full Faith and Credit Clause, a valid judgment entered into in a sister state with jurisdiction is entitled to full faith and credit in Idaho. *See*, Mitchell v. Pincock, 99 Idaho 56, 58, 577 P.2d 343, 345 (1978) (upholding rights of birth mother in adoption dispute that was adjudicated in California, under Full Faith and Credit Clause).

The Full Faith and Credit Clause does not, however, create a license for a single state to create national policy regarding marriage. Wilson v. Ake, 354 F. Supp. 2d at 1309, citing Nevada v. Hall, 440 U.S. 410, 423-24, 99 S. Ct. 1182, 1189, 1190, 59 L. Ed. 2d 416 (1979). Idaho retains some attributes of sovereignty to enact its own laws and, in effect, define its own public policy. *See*, Pacific Emp. Ins. Co. v. Indus. Accident Comm. 306 U.S. 493, 501, 59 S. Ct. 629, 632 (1939); Brotherhood of Locomotive Firemen & Enginemen v. Chicago, Rock Island & Pacific RR Co., 393 U.S. 129, 142, 89 S. Ct. 323, 330, 21 L. Ed. 2d 289 (1968) ("policy decisions are for the state legislature") (citation omitted). "[T]he Full Faith and Credit Clause does not require a State to apply another State's law in violation of its own legitimate public policy." Nevada v. Hall, 440 U.S. at 422, 99 S. Ct. at 1189.

Several courts have held that the Full Faith and Credit Clause does not require one state to recognize a same-sex marriage formed in another state. *See* Wilson v. Ake, 354 F. Supp. 2d at 1309 (upholding Florida's right to reject a same-sex couple's marriage entered into in Massachusetts); Burns v. Burns, 560 S.E.2d 47, 49 (Ga. Ct. App. 2002) (in child custody matter, holding that Full Faith and Credit Clause did not require Georgia to recognize a civil union formed in Vermont); Hennefeld v. Township of Montclair, 22 N.J. Tax 166 (2005) (in matter regarding disabled veteran's property tax exemption, holding that Full Faith and Credit Clause did not require New Jersey to recognize civil union formed in Vermont); Langan v. St. Vincent's

Hospital of New York, 802 N.Y.S.2d 476 (N.Y. App. Div. 2005); (holding that Full Faith and Credit Clause did not require New York to allow a wrongful death action brought on behalf of the decedent's same-sex partner); Raum v. Restaurant Assoc., 675 N.Y.S.2d 343, 370 (N.Y. App. Div. 1998) (same); Rosengarten v. Downes, 802 A.2d. 170, 172, 174-75 (Conn. Ct. App. 2002) (rejecting demand that Connecticut provide a forum to dissolve a same-sex civil union formed in Vermont); *see also,* In re Kandu, 315 B.R. at 134 (rejecting claim for comity regarding same-sex marriage formed in Canada).

Also, Congress adopted DOMA pursuant to its powers under the Full Faith and Credit Clause to determine the effect of a marriage entered into in one state on other states. Wilson v. Ake, 354 F. Supp. 2d at 1303; *see* U.S. Const. art. IV, § 1 ("And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof."). DOMA expressly protects a state's right to reject same-sex marriages formed in other states. 28 U.S.C. § 1738C.

Idaho's public policy to limit marriage to a man and a woman and prohibit recognition of same-sex marriages and other domestic relationships is articulated in Idaho Code §§ 32-201 and 32-209. The Full Faith and Credit Clause and DOMA do not require an Idaho court to recognize domestic relationships that are contrary to this stated public policy.

However, although the public policy exception to the Full Faith and Credit Clause and DOMA *allow* an Idaho court to reject an out-of-state same-sex marriage or other domestic relationship, neither *mandate* that an Idaho court reject such a marriage or relationship. Thus, as discussed above, without a marriage amendment an Idaho court could consider a state constitutional challenge to Idaho Code §§ 32-201 and 32-209. (*See* Sec. I.A, *supra.*) Additionally, Idaho Code §§ 32-201 and 32-209 are limited to "marriages" and do not expressly prohibit civil unions, domestic partnerships or other marriage equivalents. Thus, under current Idaho law a court could recognize such a relationship formed in another state, as compatible with Idaho's marriage statutes. *See* Idaho Code §§ 32-201, 32-209 (addressing "marriage"). Adopting a marriage amendment would more clearly articulate Idaho's public policies concerning marriage, as well as bar a state constitutional challenge to Idaho Code §§ 32-201 and 32-209.

II.
POTENTIAL FEDERAL CONSTITUTIONAL CHALLENGES TO A MARRIAGE AMENDMENT

You have asked whether a defense of marriage amendment will directly conflict with any provisions of the United States Constitution. The United States Supreme Court will ultimately face and decide the constitutionality of marriage amendments. At that time, the Court will probably uphold their constitutionality, but there are no guarantees.

A. Baker v. Nelson May Preclude a Federal Constitutional Challenge

Baker v. Nelson, which upheld the prohibition of same-sex marriage, could preclude a federal constitutional challenge to Idaho's proposed amendment. Baker v. Nelson, 191 N.W.2d at 186-87, *appeal dismissed,* Baker v. Nelson, 409 U.S. 810, 93 S. Ct. 37, 34 L. Ed. 2d 65. After the Minnesota Supreme Court rejected the plaintiffs' claim that same-sex marriages should be recognized, the plaintiffs sought review of the court's decision by invoking the mandatory appellate jurisdiction of the United States Supreme Court (since repealed). Baker v. Nelson, 409 U.S. 810, 93 S. Ct. 37, 34 L. Ed. 2d 65. The Supreme Court summarily decided the case, without a full opinion on the merits, dismissing the appeal "for want of a substantial federal question." *Id.*

A dismissal for want of a substantial federal question is a decision on the merits that is binding on lower courts, except when doctrinal developments indicate otherwise. Smelt v. County of Orange, 374 F. Supp. 2d at 872, citing Hicks v. Miranda, 422 U.S. 332, 344-45, 95 S. Ct. 2281, 45 L. Ed. 2d 223 (1975). The scope of this rule is narrow; the decision is dispositive only of "the specific challenges presented in the statement of jurisdiction." Smelt, 374 F. Supp. 2d at 872, citing Mandel v. Bradley, 432 U.S. 173, 176, 97 S. Ct. 2238, 53 L. Ed. 2d 199 (1977) (per curium). The rationale is to prevent "lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by the dismissal, but it does not affirm the reasoning or the opinion of the lower court whose judgment is appealed." Smelt, 374 F. Supp. 2d at 872, citing Mandel, and Washington v. Confederated Bands & Tribes, 439 U.S. 463, 476, n.20, 99 S. Ct. 740, 58 L. Ed. 2d 740 (1979).

The statement of jurisdiction in Baker v. Nelson presented the specific question of whether a "county clerk's refusal to authorize a same-sex marriage deprived plaintiffs of their liberty to marry and of their property without due process of law under the Fourteenth Amendment, their rights under the Equal Protection Clause of the Fourteenth Amendment, or their right to privacy under the Ninth and Fourteenth Amendments." Smelt, 374 F. Supp. 2d at 872, citing Baker v. Nelson, Jurisdictional Statement, No. 71-1027 (Oct. Term 1972).

Several courts have recognized Baker v. Nelson as binding precedent and, on that basis, have dismissed federal constitutional challenges to defense of marriage laws. In Wilson v. Ake, the court held, "The Supreme Court has not explicitly or implicitly overturned its holding in Baker or provided the lower courts, including this Court, with any reason to believe that the holding is invalid today." 354 F. Supp. 2d at 1305. *See also*, Morrison v. Sadler, 821 N.E.2d at 20 (finding no grounds for a Fourteenth Amendment challenge in light of Baker v. Nelson); Adams v. Howerton, 486 F. Supp. at 1124 (holding that Baker v. Nelson precluded claim to same-sex marriage).

Thus, a federal constitutional challenge to an Idaho marriage amendment could be dismissed under Baker v. Nelson for want of a substantial federal question. However, some courts have rejected Baker v. Nelson as binding precedent and other cases have ignored the decision. *See*, Smelt v. County of Orange, 374 F. Supp. 2d at 874 (holding Baker v. Nelson was not binding precedent); In re Kandu, 315 B.R. at 138 (same). Because a court addressing an Idaho marriage amendment might reject Baker v. Nelson as binding precedent, the potential federal constitutional challenges are discussed below.

B. Potential Challenges Under the Fourteenth Amendment

Courts addressing marriage laws under the Due Process and Equal Protection Clauses of the Fourteenth Amendment generally answer three legal questions: (1) whether same-sex couples have a fundamental right to marry; (2) for purposes of equal protection, whether homosexuals are a suspect or quasi-suspect classification or whether marriage laws discriminate on the basis of sex, which is a suspect or quasi-suspect classification; and (3) depending on how a court answers the first two questions, whether the marriage law should be reviewed under the rational basis test or heightened scrutiny.

1. Whether There Is a Fundamental Right to Same-Sex Marriage

The Due Process Clause "protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition.'" Wilson v. Ake, 354 F. Supp. 2d at 1305, quoting Washington v. Glucksberg, 521 U.S. 702, 721, 117 S. Ct. 2258, 2268, 138 L. Ed 2d 772 (1997). Fundamental rights are those liberties that are "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." Glucksberg, 521 U.S. at 721, 117 S. Ct. at 2268. "The Supreme Court has cautioned courts to 'exercise the utmost care' in conferring fundamental-right status on a newly asserted interest." In re Kandu, 315 B.R. at 140, citing Glucksberg, 521 U.S. at 720, 117 S. Ct. at 2268.

The United States Supreme Court has never held that same-sex couples have a fundamental right of marriage. Three years ago in Lawrence v. Texas, 539 U.S. 558, 575, 123 S. Ct. 2472, 2482, 156 L. Ed. 2d 508 (2003), the Court reversed longstanding precedent and held unconstitutional a Texas statute outlawing sodomy between two persons of the same sex. *Id.* (reversing Bowers v. Hardwick, 478 U.S. 186, 106 S. Ct. 2841, 92 L. Ed. 2d 140 (1986), holding that the continuance of Bowers as precedent would "demean[] the lives of homosexual persons"). However, Lawrence declined to address the validity of same-sex marriage, concluding that the case did "not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter." 539 U.S. at 578, 123 S. Ct. at 2484.

Most lower courts have found that same-sex couples do not have a fundamental right of marriage. *See,* Wilson v. Ake, 354 F. Supp. 2d at 1307 (no fundamental right to marry person of same sex); In re Kandu, 315 B.R. at 139-40 (same); Smelt v. County of Orange, 374 F. Supp. 2d at 879 ("the fundamental due process right to marry does not include a fundamental right to same-sex marriage"); Hernandez v. Robles, 805 N.Y.S.2d at 362 ("we reject plaintiffs' argument in support of a fundamental right"); Dean v. District of Columbia, 653 A.2d at 333 (quoting Moore v. City of East Cleveland, 431 U.S. 494, 503, 97 S. Ct. 1932, 52 L. Ed. 2d 531 (1977): "[W]e cannot say that same-sex marriage 'is deeply rooted in this Nation's history and tradition'"); Standhardt v. Superior Court of Arizona, 77 P.3d at 457 (rejecting claim by same-sex couple of fundamental right to marry). On the weight of the case

law, there is most likely no fundamental right to same-sex marriage which would require heightened scrutiny of marriage laws.

2. Whether a Marriage Amendment Would Discriminate Against a Suspect or Quasi-Suspect Class

Most likely, marriage laws that reject same-sex marriages and related domestic relationships would not be found to discriminate on the basis of a suspect or quasi-suspect class.

The United States Supreme Court and the Ninth Circuit Court of Appeals have not recognized homosexuals as a suspect or quasi-suspect class for equal protection purposes. In Romer v. Evans, the United States Supreme Court applied a rational basis review to a constitutional amendment that discriminated against homosexuals. 517 U.S. 620, 631-32, 116 S. Ct. 1620, 1626-27, 134 L. Ed. 2d 855 (1996). In High Tech Gays v. Def. Indus. Sec. Clearance Office, the Ninth Circuit Court of Appeals held that homosexuality is not a suspect or quasi-suspect classification. 895 F.2d 563, 573-74 (9th Cir. 1990). In Smelt v. County of Orange, the court held that homosexuals are not a suspect or quasi-suspect class for purposes of evaluating whether DOMA violates equal protection principles. 374 F. Supp. 2d at 875, citing Romer, 517 U.S. at 631-32, 116 S. Ct. at 1626-27 and High Tech Gays, 895 F.2d at 573-74. In re Kandu reached the same conclusion, holding that homosexuals are not a suspect or quasi-suspect class. In re Kandu, 315 B.R. at 143-44, citing Lawrence v. Texas, 539 U.S. at 579-81, 123 S. Ct. 2472 (O'Connor, J., concurring) and High Tech Gays, 895 F.2d at 574. *But see,* Castle v. State of Washington, 2004 WL 1985215, at *13 (holding homosexuality is a suspect class for equal protection purposes; case pending appeal before the Washington Supreme Court). Thus, homosexuals are most likely not a suspect or quasi-suspect class.

Whether marriage laws discriminate on the basis of sex is less certain, but they probably do not. Several cases have held that defense of marriage laws do not discriminate on the basis of sex. *See,* Smelt, 374 F. Supp. 2d at 877 (holding DOMA does not discriminate on the basis of sex); In re Kandu, 315 B.R. at 143 ("There is no evidence from the voluminous legislative history or otherwise, that DOMA's purpose is to discriminate against men or women as a class."); Singer v. Hara, 522 P.2d at 1192-93 (holding that prohibiting same-sex marriages is not discrimination on the basis of sex). The

rationale is that marriage laws do not make any distinctions on the basis of sex. Men and women are treated the same; neither men nor women receive the benefits of marriage in same-sex relationships. *Id.* at 1196 ("Appellants were not denied a marriage license because of their sex; rather they were denied a marriage license because of the nature of marriage itself.").

Other courts have reached a contrary result, holding that marriage laws discriminate on the basis of sex. *See, e.g.,* Baehr v. Lewin, 852 P.2d at 63-64 (rejecting argument that there was no sex discrimination on the grounds that marriage statute prohibited both men and women in same-sex relationships from marrying). *See also,* Loving v. Virginia, 388 U.S. at 9, 12, 87 S. Ct. at 1822-23 (rejecting claim that a law which punishes members of different races equally for entering into interracial marriages does not discriminate on the basis of race).

Thus, although the law is uncertain, several courts evaluating marriage amendments have refused to find the suspect classification of sex at issue. These cases are probably more closely aligned with Romer v. Evans, which applied a rational basis review to a constitutional amendment that discriminated against homosexuals. 517 U.S. at 631-32, 116 S. Ct. at 1626-27.

3. Whether a Marriage Amendment Would Satisfy Rational Basis Review

Because most courts refuse to find a fundamental right to same-sex marriage or discrimination on the basis of a suspect classification, courts typically evaluate the constitutionality of defense of marriage laws under rational basis scrutiny. It is under the rational basis test, however, where the wide breadth of judicial disagreement concerning defense of marriage laws is most evident. Courts have reached dramatically different conclusions when considering substantially similar state interests and arguments.

The rational basis test is stated as follows: "Where . . . a law does not make a quasi-suspect or suspect classification (the equal protection issue) and does not burden a fundamental right (the due process issue), it will be upheld if it is rationally related to a legitimate government interest." Smelt v. County of Orange, 374 F. Supp. 2d at 879 (citing Romer v. Evans, 517 U.S. at 631, 116 S. Ct. 1620). The burden is on the plaintiff challenging the defense of marriage law to negate "every conceivable basis" for support of the law.

Smelt, 374 F. Supp. 2d at 880, citing Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 364, 93 S. Ct. 1001, 35 L. Ed. 2d 351 (1973).

The plaintiff's burden is heavy and difficult to satisfy. "Courts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends. . . . A statutory classification fails rational-basis review only when it 'rests on grounds wholly irrelevant to the achievement of the State's objective.'" In re Kandu, 315 B.R. at 144, quoting Heller v. Doe, 509 U.S. 312, 321, 324, 113 S. Ct. 2637, 125 L. Ed. 2d 257 (1993). The rational basis scrutiny "is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." *Id.* (citation omitted). However, "[m]oral disapproval of a group cannot be a legitimate governmental interest under the Equal Protection Clause because legal classifications must not be 'drawn for the purpose of disadvantaging the group burdened by the law.'" Lawrence v. Texas, 539 U.S. at 583, 123 S. Ct. at 2486 (O'Connor, J., concurring), quoting Romer v. Evans, 517 U.S. at 633, 116 S. Ct. at 1620.

Many courts have applied the rational basis test and held that marriage laws are rationally related to a legitimate government interest. In Smelt v. County of Orange, the court found DOMA to be rationally related to the government's interest of encouraging the optimal union for procreation and for rearing children by both biological parents, and to communicate to citizens that opposite-sex relationships have special significance. 374 at F. Supp. at 880. In re Kandu held that DOMA is rationally related to the government's legitimate interest in promoting marriage to encourage stable relationships and facilitate the rearing of children by both biological parents. 315 B.R. at 146.

In Adams v. Howerton, the court upheld a marriage law under heightened strict scrutiny based upon a similar rationale: "In traditional equal protection terminology, it seems beyond dispute that the state has a compelling interest in encouraging and fostering procreation of the race and providing status and stability to the environment in which children are raised." 486 F. Supp. at 1124. See also, Standhardt v. Superior Court, 77 P.3d at 464 (upholding marriage statute under rational basis test); Singer v. Hara, 522 P. 2d at 1191-92 (same).

However, other courts have held that denying same-sex couples the status or benefits of marriage does not satisfy a rational basis review. In Goodridge v. Dept of Public Health, the Massachusetts Supreme Court rejected the state's assertion that prohibiting same-sex couples from marrying promoted a favorable setting for procreation, promoted an optimal setting for child rearing in a two-parent family with one parent of each sex, and preserved scarce state and private financial resources. 798 N.E. 2d at 961-68. The court found there was no evidence that "forbidding marriage to people of the same sex will increase the number of couples choosing to enter into opposite-sex marriages in order to have and raise children." *Id.* at 963.

In Baker v. State of Vermont, the Vermont Supreme Court held that the laudable government goal of promoting the commitment of married couples to ensure the security of their children provided no reasonable basis for denying the benefits of marriage to same-sex couples. 744 A.2d at 884. The court reasoned that many opposite-sex couples marry for reasons unrelated to procreation and, therefore, there was no logical connection to the stated governmental purpose. *Id.* at 881. *See also,* Deane v. Conaway, No. 24-C-04-005390, 2006 WL 148145 (Md. Cir. Ct. Jan. 20, 2006) (unpublished decision, p. 15) ("This Court, like others, can find no rational connection between the prevention of same-sex marriages and an increase or decrease in the number of heterosexual marriages or of children born to those unions."). Under a heightened strict scrutiny standard, similar state arguments have been closely examined and rejected. *See,* Baehr v. Miike, No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996), *on remand from* Baehr v. Lewin, 852 P.2d 44 (Haw. 1993) (finding under heightened scrutiny standard that there was no causal link between allowing same-sex marriage and adverse effects on children).

The enforceability of marriage laws is a highly disputed area of law, which will remain so until the United States Supreme Court resolves the issue. Thus, states that adopt marriage amendments should anticipate and be prepared to defend legal challenges.

C. A Marriage Amendment That Precludes Recognition of Other Domestic Relationships Could Face Additional Constitutional Challenges

A marriage amendment that both defines marriage and also bars recognition of domestic relationships outside of marriage furthermore could be challenged under the recent case of Citizens for Equal Protection, Inc. v. Bruning, 368 F. Supp. 2d 980 (D. Neb. 2005). In Citizens for Equal Protection, a federal district court struck down Nebraska's constitutional marriage amendment, which bans recognition of same-sex civil unions, domestic partnerships, and other similar relationships. *Id.* at 989.

At issue in Citizens for Equal Protection was Nebraska's marriage amendment, which provides:

> Only marriage between a man and a woman shall be valid or recognized in Nebraska. The uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same-sex relationship shall not be valid or recognized in Nebraska.

Neb. Const. art. I, § 29 (2000). The court held that the Nebraska amendment's broad scope violated the First and Fourteenth Amendments of the United States Constitution by imposing "significant burdens on both the expressive and intimate associational rights of the plaintiffs' members and creat[ing] a significant barrier to the plaintiffs' right to petition or to participate in the political process." Citizens for Equal Protection, 368 F. Supp. 2d at 995. The court also held that the amendment was an illegal bill of attainder because it singled out gays and lesbians for legislative punishment by limiting their access to lobby for benefits and protections. *Id.* at 1008. In reaching these conclusions, the court reasoned that the scope of the amendment was too broad: "The amendment goes far beyond merely defining marriage as between a man and a woman." *Id.* at 995.

In support of these holdings, the court cited Romer v. Evans, 517 U.S. 620, 116 S. Ct. 1620, 134 L. Ed. 2d 855 (1996). In Romer v. Evans, the United States Supreme Court struck down, under a rational basis review, an amendment to Colorado's constitution that precluded all state and local government action designed to protect the status of persons based on their "homosexual, lesbian or bisexual orientation, conduct, practices or relationships." 517 U.S. at 620, 116 S. Ct. at 1622. The Court held that the Colorado amendment violated the equal protection clause of the Fourteenth Amendment by singling out homosexuals and imposing barriers that made it

more difficult for them to seek aid from the government. 517 U.S. at 633, 116 S. Ct. at 1628.

Citizens for Equal Protection is on appeal to the Eighth Circuit Court of Appeals and may not be upheld; oral argument is scheduled for later this month. (Case No. 05-2604). However, the case is notable for its criticism of a marriage amendment with a broad scope.

Under Romer, a constitutional amendment may not single out homosexuals and impose barriers that make it more difficult for them to seek aid from the government. Attorney General Opinion No. 93-11, dated November 3, 1993, reached a similar conclusion. 1993 Idaho Att'y Gen. Ann. Rpt. 119. In that opinion, former Idaho Attorney General Larry EchoHawk evaluated a proposed initiative to articulate state policies concerning homosexuals. The Attorney General opined that the initiative's proposal to preclude any grant of minority status to persons engaging in homosexual activities barred the homosexual community from obtaining anti-discrimination laws and thus violated equal protection principles, by "denying homosexuals equal access to the political process." *Id.* at 132. However, the Attorney General also recognized that "[t]he State of Idaho does not legally recognize either homosexual marriages or homosexual domestic partnerships." *Id.*

Romer and Attorney General Opinion No. 93-11 should not invalidate marriage amendments that simply limit marriage to a marriage between a man and a woman. In re Kandu rejected a challenge under Romer, distinguishing Romer and holding that DOMA is "not so exceptional and unduly broad as to render the . . . reasons for its enactment 'inexplicable by anything but animus' towards same sex couples." In re Kandu, 315 B.R. at 147-48. *See also*, Standhardt v. Superior Court of Arizona, 77 P.3d at 465 (rejecting a Romer analogy, holding that a marriage statute was not enacted to make same-sex couples unequal).

The inapplicability of Romer and Opinion No. 93-11 becomes less clear, however, regarding a marriage amendment that furthermore bans any legal recognition of all non-marital domestic relationships. However, Romer addressed a constitutional amendment that precluded all legislative, executive or judicial action at any level of state or local government designed to protect the status of homosexuals. Romer, 517 U.S. at 620, 116 S. Ct. at 1622. Citizens for Equal Protection likely stretches Romer too far by applying the principles of Romer to the limited context of marriage laws.

III.
UNDER PRINCIPLES OF CONSTITUTIONAL CONSTRUCTION, COURTS ARE UNLIKELY TO RULE THAT A MARRIAGE AMENDMENT GOVERNS RELATIONSHIPS THAT ARE UNLIKE MARRIAGE

Several of your questions focus on the effect of a constitutional amendment on current rights and benefits of domestic relationships outside of marriage. An amendment should not cancel current rights and obligations that are not dependent upon the status of marriage.[2] However, an amendment that not only defines marriage but also bars recognition of other domestic relationships carries a greater risk of claims of interference with such relationships. Terms in marriage amendments adopted by other states, such as "domestic union," "legal union," "identical or substantially similar to marriage" or "approximate " to marriage, may require judicial interpretation to determine their effect on other domestic relationships. *See, e.g.,* Ky. Const. § 233A (2004); La. Const. art. XII, § 15 (2004); N.D. Const. art. XI, § 28 (2004); Ohio Const. art. XV, § 11 (2004).

General principles of statutory construction apply to the construction of the Idaho Constitution. State v. Blaine County, 139 Idaho 348, 350, 79 P.3d 707, 709 (2003); Keenan v. Price, 68 Idaho 423, 437, 195 P.2d 662, 670 (1948). Where the language is plain and unambiguous, an Idaho court must give effect to the provision as written without engaging in statutory construction. State v. Knott, 132 Idaho 476, 478, 974 P.2d 1105, 1107 (1999). Where, however, the language of a constitutional provision or statute is not plain and unambiguous, a court must ascertain the legislative intent and give effect to that intent. *Id.* at 478, 974 P.2d at 1107. "All statutes must be liberally construed with a view to accomplishing their aims and purposes, and attaining substantial justice, and courts are not limited to the mere letter of the law, but may look behind the letter to determine its purpose and effect, the object being to determine what the legislature intended, and to give effect to that intent." Keenan, 68 Idaho at 438, 195 P.2d at 670. "To ascertain the intent of the legislature, not only must the literal words of the statute be examined, but also the context of those words, the public policy behind the statute and its legislative history." State v. Rhode, 133 Idaho 459, 462, 988 P.2d 685, 688 (1999).

Thus, if an Idaho court concludes that the language of a marriage amendment is not plain and unambiguous, the court should consider the context of the amendment, the public policy behind the amendment and its legislative history. The context should include references to marriage within the text of the amendment and current limits on marriage articulated in Idaho Code §§ 32-201 and 32-209. Consideration of public policy behind the amendment should include any statement of purpose for the proposed amendment as well as the public debate on this topic. The legislative history also will be relevant. These guidelines should discourage an Idaho court from upholding a marriage amendment's unintended consequence to relationships that are dissimilar to marriage. With these principles in mind, answers to your questions are provided below.

A. Contract Rights and Powers of Attorney

The language of a marriage amendment need not interfere with individuals conducting business via contract or executing enforceable powers of attorney. Both the United States Constitution and the Idaho Constitution prohibit the enactment of laws that impair the obligations of contracts. U.S. Const. art. I, § 10; Idaho Const. art. I, § 16. Therefore, a marriage amendment should not be interpreted to automatically impair all existing contract rights. See, Steward v. Nelson, 54 Idaho 437, 32 P.2d 843, 846-47 (1934). Additionally, contracts with third parties outside of a domestic relationship should not be affected. For example, employers and employees should continue to be allowed to contract for the provision of, for example, health care benefits or leave benefits to be provided to same-sex couples where one of the individuals works for the employer.

Same-sex couples would likely continue to enter into enforceable contracts that document their obligations to each other. One partner might later allege that a contract between a same-sex couple is an unenforceable legal union or legal relationship under a marriage amendment. However, under the statutory construction principles discussed above, this challenge should fail. The determinative issue in a same-sex couple's contract dispute should be the enforceability of the contract rather than the status of their domestic relationship. A remark in the amendment or its statement of purpose that the marriage amendment is not intended to interfere with contracts would support this conclusion.

Idaho Code §§ 15-5-501, *et seq.*, governs durable powers of attorney under Idaho law. Idaho Code § 39-4510 governs durable powers of attorney for health care. Neither statutory scheme makes a distinction between married and unmarried persons. There "is no presumption of agency between husband and wife in dealing with each other's property resulting from the mere fact of the marital relationship." 41 C.J.S. Husband and Wife § 58. "An agency relationship between husband and wife will not be established merely by virtue of their marriage." Zukowski v. Dunton, 650 F.2d 30, 34 (4th Cir. 1981). Thus, because marital status does not control powers of attorney, a marriage amendment should not interfere with powers of attorney under Idaho law. To avoid potential challenges, the amendment's statement of purpose and the legislative history can make clear that the amendment is not intended to interfere with powers of attorney.

B. The Disposition of Property Upon Death

A marriage amendment should not interfere with the right of a person to leave property by a will to anyone of his or her choosing. The Uniform Probate Code, at title 15 of the Idaho Code, governs wills. Because the right to dispose of property by will is not dependent upon marriage, a marriage amendment will most likely not affect that right. A statement of purpose that the amendment is not intended to interfere with the right of a person to provide for the disposition of their property at death will support this result.

The Uniform Probate Code gives some preferences based upon marriage and divorce that will not be available to unmarried couples. For example, Idaho Code § 15-2-301 favors a surviving spouse who marries a testator after the execution of his or her will but is omitted from the will. Idaho Code § 15-2-508 provides that if a testator divorces after executing a will, the divorce revokes the will's disposition of property to the former spouse. These statutes are compatible with a constitutional marriage amendment and thus should not be affected by adoption of an amendment.

C. Other Relationships

You have also asked about the potential for interference with other relationships, such as existing rights of unmarried persons to cohabitate, existing rights of extended family members to help raise minor members of that extended family, rules regarding the making of medical care decisions by

unmarried persons, and whether it would be more difficult for unmarried persons to visit each other if one is hospitalized. A marriage amendment probably would not be interpreted to cancel the rights and benefits of these relationships. However, the broader the net that a marriage amendment casts over domestic relationships outside of marriage, the more uncertain the amendment's effect will be on the types of relationships you have described.

I. Unmarried Couples and Cohabitation

An unmarried couple's decision to cohabitate should not be impaired. Interpreting a marriage amendment to prohibit any and all cohabitation would be a slippery slope towards prohibiting ordinary roommate arrangements. This interpretation would stretch too far the context and public policy of the amendment. *But see,* Citizens for Equal Protection, Inc. v. Bruning, 368 F. Supp. 2d at 995-96 (holding that breadth of Nebraska's marriage amendment threatened relationships such as "roommates, co-tenants, foster parents, and related people who share living arrangements, expenses, custody of children, or ownership of property").

A related question is whether a marriage amendment would invalidate Idaho's domestic violence statute as applied to unmarried couples who cohabitate. Idaho Code § 18-918(2) makes it a felony for one household member to inflict a traumatic injury upon another household member. A household member includes a "spouse, former spouse, or a person who has a child in common regardless of whether they have been married or a person with whom a person is cohabiting, whether or not they have married or have held themselves out to be husband or wife." Idaho Code § 18-918(1)(a). In State v. Hart, the court held that Idaho's domestic violence laws apply even where a domestic relationship no longer exists. 135 Idaho 827, 830, 25 P.3d 850, 853 (2001).

In the unpublished case of State v. Burk, a criminal defendant asserted that Ohio's domestic violence statute as applied to unmarried couples who cohabitate was unconstitutional under Ohio's marriage amendment. No. 86162, 2005 WL 3475812, at *1 (Ohio Ct. App. Dec. 20, 2005) (unpublished decision). Ohio's marriage amendment bars recognition of any legal status for "relationships or unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage." *Id.*, citing Ohio Const. art. XV, § 11. The trial court held that Ohio's domestic violence statute was

invalid because it "confers a legal status upon cohabiting, unmarried individuals that approximates 'the design, qualities, significance or effect of marriage' simply because a 'family or household member' includes a person 'living as a spouse.'" *Id.* at *2. However, the appellate court reversed the decision, holding instead that Ohio's domestic violence statute properly protects household relationships outside of marriage, including persons living as spouses, parents, children and blood relatives of the offender. *Id.* at *4. The court reasoned, "[w]hile 'cohabitation' defines a relationship between people, that status is factual not legal. 'Cohabitant' is therefore not a legal status, let alone a legal status that 'intends to approximate the design, qualities, significance or effect of marriage'" within the meaning of Ohio's marriage amendment. *Id.* (citation omitted).

Burk is an unpublished decision that is not binding on an Ohio court, much less an Idaho court, facing the same issue. However, the reasoning in Burk is persuasive. The public health and welfare is not advanced by limiting the right to be free from family violence to those relationships connected by marriage and excluding unmarried couples from such protection. Idaho's domestic violence laws, which recognize domestic relationships outside of marriage, should not be invalidated by a marriage amendment.

2. Extended Families

Your question as to whether a marriage amendment would interfere with existing rights of extended family members to help raise minor children of the extended family is more difficult. Terms such as "legal union" or "domestic union" in marriage amendments arguably apply to grandparent-grandchild, uncle-nephew, sibling or other familial relationships. However, a legal challenge arising out of such terms should be defeated based upon the context, public policy and legislative history of a marriage amendment.

Various sections of the Idaho Code address parental and other child custody relationships. Title 32 of the Idaho Code governs child custody issues arising out of marriage and divorce. See, Idaho Code §§ 32-1001, *et seq.* (Parent-Child Relations); Idaho Code §§ 32-11-101, *et seq.* (Uniform Child Custody Jurisdiction and Enforcement Act). Title 16 of the Idaho Code governs juvenile proceedings. *See,* Idaho Code §§ 16-1501, *et seq.* (Adoptions); Idaho Code §§ 16-1601, *et seq.* (Child Protective Act). It is

unlikely that a marriage amendment would be construed to invalidate these statutes or the familial relationships sanctioned by them.

Also, Idaho courts will not invalidate a parent-child relationship solely because one parent is in a same-sex relationship. The recent case of McGriff v. McGriff addressed a divorced father's shared custody of his children after the father moved in with another man. 140 Idaho 642, 644, 99 P.3d 111, 113 (2004). The Idaho Supreme Court held that parental custody can not be determined solely based upon a parent's sexual orientation. The court reasoned, "only when the parent's sexual orientation is shown to cause harm to the child, such that the child's best interests are not served, should sexual orientation be a factor in determining custody." *Id.* at 648, 99 P.3d at 117. The court held that custody was properly transferred to the mother based on conduct in the record, such as inappropriate conduct by the father's partner toward the children's mother and the father's failure to cooperate in communicating his lifestyle to the children. *Id.* at 648-52, 99 P.3d at 117-21.[3]

Thus, a marriage amendment should be generally compatible with the current Idaho laws discussed above governing parental, child custody and familial statuses.

3. Medical Decisions and Hospital Visitation

Your concerns about medical care decisions and hospital visitation are common in the public debate about marriage laws. The adoption of a marriage amendment to the Idaho Constitution should not interfere with current rights regarding these issues.

The making of health care decisions for a loved one implicates federal and state law. The privacy regulations under the federal Health Insurance and Portability Accountability Act ("HIPAA"), at 45 C.F.R. § 164.510, allow a health care provider to disclose certain protected health care information about a patient to a family member, relative or other "close friend," where the patient is unable to consent or object to the disclosure. 45 C.F.R. § 164.510. A state constitutional marriage amendment would not interfere with this federal right to obtain protected health information.

Idaho Code § 39-4503 establishes the order of persons who may give consent to health care treatment for minors and other persons who are inca-

pable of deciding for themselves. The order gives priority, in part, first to a legal guardian, then to a person named in a Living Will and Durable Power of Attorney for Health Care, then to a spouse, then to a parent, then to another relative who is responsible to act under the circumstances and then to any other competent individual who is responsible for the health care of the patient. Idaho Code § 39-4503. A marriage amendment should not mandate a change in this order. Unmarried couples can execute Living Wills and Durable Powers of Attorney for Health Care to protect their rights to make health care decisions.

Some states have enacted statutes to recognize rights to hospital visitation. *See e.g.*, HRS § 323-2; LSA-R.S. 40:2005 (Louisiana statute providing that adult patient may designate individuals who will be denied access to hospital visitation); 22 M.R.S.A. § 1711-D (Maine statute providing that a hospital patient may designate persons to be considered immediate family members for purposes of visitation). However, Idaho has no comparable statutory scheme governing hospital visitation. Thus, a marriage amendment should not interfere with current rules in Idaho regarding hospital visitation.

IV.
CONCLUSION

If Idaho adopts a marriage amendment to the Idaho Constitution, Idaho will join a growing number of states that are taking similar action.

Importantly, the scope of an adopted marriage amendment must accurately reflect the legislature's intended state policy regarding marriage. Enforcement issues for a marriage amendment that only defines marriage as between a man and a woman are limited to whether prohibiting same-sex marriage is constitutional. However, an amendment that only defines marriage will not prohibit courts, future legislatures or the state's political subdivisions from recognizing domestic partnerships, civil unions or other relationships that approximate marriage. Accordingly, a narrow amendment is insufficient to articulate a public policy that seeks not only to define marriage as between a man and a woman but also to prohibit recognition of other relationships such as same-sex marriages, civil unions and domestic partnerships. The trade-off is that marriage laws that prohibit recognition of relationships outside of marriage contain an inherent degree of ambiguity as to scope and therefore pose a greater risk of a successful legal challenge.

When the United States Supreme Court ultimately addresses marriage laws under the United States Constitution, the Court will probably defer to state rights to govern marriage and uphold the traditional view that a marriage is between a man and a woman. However, given the unsettled state of the law, there is no guarantee that a proposed marriage amendment to the Idaho Constitution would comply with all requirements of the United States Constitution.

AUTHORITIES CONSIDERED

1. United States Constitution:

Art. I, § 10.
Art. IV, § 1.
First Amendment.
Fourteenth Amendment.

2. Idaho Constitution:

Art. I, § 1.
Art. I, § 2.
Art. I, § 16.

3. United States Code:

1 U.S.C. § 7.
28 U.S.C. § 1738.
28 U.S.C. § 1738C.
28 U.S.C. § 1739.

4. Idaho Code:

§ 15-2-301.
§ 15-2-508.
§ 15-5-501.
§ 16-1501.
§ 16-1601.
§ 18-918(1)(a).
§ 18-918(2).

§ 32-11-101.
§ 32-201.
§ 32-201(1).
§ 32-209.
§ 32-1001.
§ 39-4503.
§ 39-4510.

5. U.S. Supreme Court Cases:

Baker v. Nelson, 409 U.S. 810, 93 S. Ct. 37, 34 L. Ed. 2d 65 (1972).

Bowers v. Hardwick, 478 U.S. 186, 106 S. Ct. 2841, 92 L. Ed. 2d 140 (1986).

Brotherhood of Locomotive Firemen & Enginemen v. Chicago, Rock Island & Pacific RR Co., 393 U.S. 129, 89 S. Ct. 323, 21 L. Ed. 2d 289 (1968).

Heller v. Doe, 509 U.S. 312, 113 S. Ct. 2637, 125 L. Ed. 2d 257 (1993).

Hicks v. Miranda, 422 U.S. 332, 95 S. Ct. 2281, 45 L. Ed. 2d 223 (1975).

Lawrence v. Texas, 539 U.S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003).

Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 93 S. Ct. 1001, 35 L. Ed. 2d 351 (1973).

Loving v. Commonwealth of Virginia, 388 U.S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967).

Mandel v. Bradley, 432 U.S. 173, 97 S. Ct. 2238, 53 L. Ed. 2d 199 (1977).

Moore v. City of East Cleveland, 431 U.S. 494, 97 S. Ct. 1932, 52 L. Ed. 2d 531 (1977).

Nevada v. Hall, 440 U.S. 410, 99 S. Ct. 1182, 59 L. Ed. 2d 416 (1979).

Pacific Emp. Ins. Co. v. Indus. Accident Comm. 306 U.S. 493, 59 S. Ct. 629, 83 L. Ed. 940 (1939).

Romer v. Evans, 517 U.S. 620, 116 S. Ct. 1620, 134 L. Ed. 2d 855 (1996).

Washington v. Confederated Bands & Tribes, 439 U.S. 463, 99 S. Ct. 740, 58 L. Ed. 2d 740 (1979).

Washington v. Glucksberg, 521 U.S. 702, 117 S. Ct. 2258, 138 L. Ed 2d 772 (1997).

6. Idaho Cases:

Garcia v. State Tax Commission, 136 Idaho 610, 38 P.3d 1266 (2002).

Keenan v. Price, 68 Idaho 423, 195 P.2d 662 (1948)

McGriff v. McGriff, 140 Idaho 642, 99 P.3d 111 (2004).

McMahon v. Auger, 83 Idaho 27, 357 P.2d 374 (1960).

Mitchell v. Pincock, 99 Idaho 56, 577 P.2d 343 (1978).

Rudeen v. Cenarrusa, 136 Idaho 560, 38 P.3d 598 (2001).

State v. Blaine County, 139 Idaho 348, 79 P.3d 707 (2003).

State v. Hart, 135 Idaho 827, 25 P.3d 850 (2001).

State v. Knott, 132 Idaho 476, 974 P.2d 1105 (1999).

State v. Rhode, 133 Idaho 459, 988 P.2d 685 (1999).

State v. Thompson, 114 Idaho 746, 760 P.2d 1162 (1988).

Steward v. Nelson, 54 Idaho 437, 32 P.2d 843 (1934).

Thompson v. Engelking, 96 Idaho 793, 537 P.2d 635 (1975).

7. Other Cases:

Adams v. Howerton, 486 F. Supp. 1119 (C.D. Cal. 1980).

Andersen v. King County, No. 04-2-04964-4, 2004 WL 1738447 (Wash. Super. Aug. 4, 2004).

Anonymous v. Anonymous, 325 N.Y.S.2d 499 (N.Y. Sup. Ct. 1971).

Baehr v. Lewin, 852 P.2d 44 (Haw. 1993).

Baehr v. Miike, No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996).

Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971).

Baker v. State of Vermont, 744 A.2d 864 (Vt. 1999).

Burns v. Burns, 560 S.E.2d 47 (Ga. Ct. App. 2002).

Castle v. State of Washington, No. 04-2-00614-4, 2004 WL 1985215 (Wash. Super. Sept. 7, 2004).

Citizens for Equal Protection, Inc. v. Bruning, 368 F. Supp. 2d 980 (D. Neb. 2005).

Dean v. District of Columbia, 653 A.2d 307 (D.C. Ct. App. 1995).

Deane v. Conaway, No. 24-C-04-005390, 2006 WL 148145 (Md. Cir. Ct. Jan. 20, 2006).

Goodridge v. Dept. of Public Health, 798 N.E.2d 941 (Mass. 2003).

Hennefeld v. Township of Montclair, 22 N.J. Tax 166 (2005).

Hernandez v. Robles, 805 N.Y.S.2d 354 (N.Y. App. Div. 2005).

High Tech Gays v. Def. Indus. Sec. Clearance Office, 895 F.2d 563 (9th Cir. 1990).

In re Kandu, 315 B.R. 123 (Bankr. W.D. Wash. 2004).

Jones v. Hallahan, 501 S.W.2d 588 (Ky. Ct. App. 1973).

Judicial Council Coordination Proceeding (Marriage Cases), No. 4365, 2005 WL 583129 (Cal. Super. Ct. March 14, 2005) (unpublished decision).

Langan v. St. Vincent's Hospital of New York, 802 N.Y.S.2d 476 (N.Y. App. Div. 2005).

Largess v. Supreme Judicial Court for the State of Massachusetts, 317 F. Supp. 2d 77 (D. Mass.), aff'd, 373 F.3d 219 (1st Cir.), cert. denied, 542 U.S. 1002, 125 S. Ct. 618, 160 L. Ed. 2d 461 (2004).

Li v. State of Oregon, 110 P.3d 91 (Or. 2005).

Morrison v. Sadler, 821 N.E.2d 15 (Ind. Ct. App. 2005).

Raum v. Restaurant Assoc., 675 N.Y.S.2d 343 (N.Y. App. Div. 1998).

Rosengarten v. Downes, 802 A.2d 170 (Conn. Ct. App. 2002).

Singer v. Hara, 522 P.2d 1187 (Wash. Ct. App. 1974), rev. denied, 84 Wash. 2d 1008 (1974).

Smelt v. County of Orange, 374 F. Supp. 2d 861 (C.D. Cal. 2005).

Standhardt v. Superior Court of Arizona, 77 P.3d 451 (Ariz. Ct. App. 2004).

State v. Burk, No. 86162, 2005 WL 3475812 (Ohio Ct. App. Dec. 20, 2005).

Wilson v. Ake, 354 F. Supp. 2d 1298 (M.D. Fla. 2005).

Zukowski v. Dunton, 650 F.2d 30 (4th Cir. 1981).

8. Other Constitutions:

Ala. Const. art. I, § 25 (1999).
Ark. Const. amend. 83 (2004).
Ga. Const. art. I, § 4 I (2004).
Ky. Const. § 233A (2004).
La. Const. art. XII, § 15 (2004).
Mich. Const. art. I, § 25 (2004).

Miss. Const. art. XIV, § 263A (2004).
Mo. Const. art. I, § 33 (2004).
Mont. Const. art. XIII, § 7 (2004).
Neb. Const. art. I, § 29 (2000).
Nev. Const. art. I, § 21 (2002).
N.D. Const. art. XI, § 28 (2004).
Ohio Const. art. XV, § 11 (2004).
Okla. Const. art. II, § 35 (2004).
Or. Const. art. XV, § 5a (2004).
Tex. Const. art. I, § 32 (2005).
Utah Const. art. I, § 29 (2005).

9. Other Authorities:

22 M.R.S.A. § 1711-D.
41 C.J.S. Husband and Wife § 58.
45 C.F.R. § 164.510.
1993 Idaho Att'y Gen. Ann. Rpt. 119.
HRS § 323-2.
LSA-R.S. 40:2005.

DATED this 8th day of February, 2006.

LAWRENCE G. WASDEN
Attorney General

Analysis by:

EMILY A. MAC MASTER
Deputy Attorney General

[1] See, e.g., Ala. Const. art. I, § 25 (1999); Ark. Const. amend. 83 (2004); Ga. Const. art. I, § 4 I (2004); Ky. Const. § 233A (2004); La. Const. art. XII, § 15 (2004); Mich. Const. art. I, § 25 (2004); Miss. Const. art. XIV, § 263A (2004); Mo. Const. art. I, § 33 (2004); Mont. Const. art. XIII, § 7 (2004); Nev. Const. art. I, § 21 (2002); N.D. Const. art. XI, § 28 (2004); Ohio Const. art. XV, § 11 (2004); Okla. Const. art. II, § 35 (2004); Or. Const. art. XV, § 5a (2004); Tex. Const. art. I, § 32 (2005); Utah Const. art. I, § 29 (2005).

[2] "The benefits accessible only by way of a marriage license are enormous, touching nearly every aspect of life and death." Goodrich v. Department of Health, 798 N.E.2d at 955. Goodrich identified a list of numerous rights arising out of marriage under Massachusetts law, including, for example, joint income tax filing, rights to inherit property from a spouse without a will, certain health care, pension and veteran benefits for spouses, presumptions of parentage of children born to a married couple, evidentiary protections for private marital conversations, bereavement and medical leave to care for family members, a preference for family members to make medical decisions about an incompetent or disabled spouse, and predictable rules of child custody, visitation, support and removal out of state upon a divorce. *Id.* at 955-56. *See also,* Baehr v. Lewin, 852 P.2d at 59 (listing the more "salient" of a "multiplicity of rights and benefits that are contingent upon [marital] status," including, for example, community property rights, rights regarding the disposition of property upon a spouse's death, awards of child custody and support payments in divorce proceedings, post-divorce rights regarding support and property division, evidentiary benefits for the spousal privilege and confidential marital communications, exemptions of real property from attachment or execution and the right to bring a wrongful death action upon a spouse's death).

[3] Idaho case law recognizes familial relationships outside of marriage between a man and a woman in a variety of circumstances. For purposes of determining gratuitous services to family members (for which no wages are due), Idaho law defines a family relationship as "a collective body of persons who form one household under one head and one domestic government, and who have reciprocal, natural and moral duties to support and care for one another." McMahon v. Auger, 83 Idaho 27, 39, 357 P.2d 374, 381 (1960). As discussed above, Idaho's domestic violence laws protect household members, even where a domestic relationship no longer exists. State v. Hart, 135 Idaho at 830, 25 P.3d at 853.

[NOTE: This Opinion is Superceded by Opinion No. 06-2A]

ATTORNEY GENERAL OPINION 06-2

Hand Delivered

Honorable Bruce Newcomb
Speaker of the House
Idaho House of Representatives
STATEHOUSE

Per Request for Attorney General's Opinion
Regarding Swan Falls Agreement and Idaho Code §§ 42-234(2) and 42-4201A(2)

Dear Speaker Newcomb:

This opinion responds to the questions in your letter dated February 27, 2006, regarding the effect of Idaho Code §§ 42-234(2) and 42-4201A(2) on the use of natural flow to recharge the Eastern Snake Plain Aquifer. In order to respond to your questions, it is first necessary to review the Swan Falls Agreement and to then consider the effect, if any, of Idaho Code §§ 42-234(2) and 42-4201A(2) on the Swan Falls Agreement. The questions presented are set forth below.

QUESTIONS PRESENTED

1. Is aquifer recharge a use to which Idaho Power Company subordinated its hydropower water rights under the Swan Falls Agreement?

2. If Idaho Power Company subordinated its water rights to recharge under the Swan Falls Agreement, do the provisions in Idaho Code §§ 42-234(2) and 42-4201A(2) change the Swan Falls Agreement and create any vested rights or priorities in Idaho Power Company?

CONCLUSIONS

1. Under the Swan Falls Agreement, Idaho Power Company subordinated its hydropower water rights in excess of the agreed-upon min-

imum flows to all "subsequent beneficial upstream uses upon approval of such uses by the State in accordance with State law,"[1] regardless of the type or kind of beneficial use. Thus, the hydropower rights referenced in the Swan Falls Agreement are subordinated to aquifer recharge in accordance with state law.

2. Idaho Code §§ 42-234(2) and 42-4201A(2) does not create any vested rights or priorities in Idaho Power Company because the State, as trustee, holds legal title to the water placed in trust and, in accordance with the Swan Falls Agreement, the State has the right to determine how the trust water will be used. Idaho Code §§ 42-234(2) and 42-4201A(2) create only an incidental statutory benefit in favor of Idaho Power that the State is free to modify or rescind at any time.

ANALYSIS

I.

THE SWAN FALLS AGREEMENT DOES NOT LIMIT THE TYPES OF BENEFICIAL USES FOR WHICH THE TRUST WATERS MAY BE ALLOCATED

You have asked whether aquifer recharge is a use to which Idaho Power Company ("Idaho Power") subordinated its water rights under the Swan Falls Agreement. This question raises the issue of whether the Swan Falls Agreement limits the subordination of Idaho Power's water rights to any particular types or kinds of beneficial uses, and therefore categorically excludes other uses for purposes of subordination. These issues present a question of the interpretation of the Swan Falls Agreement.

The objective in interpreting a contract such as the Swan Falls Agreement is to give effect to the parties' intentions, which should be ascertained from the language of the contract, if possible. Tolley v. THI Co., 140 Idaho 253, 260, 92 P.3d 503, 510 (2004). The contract must be viewed as a whole and in its entirety. Clear Lakes Trout Co., Inc. v. Clear Springs Foods, Inc., 141 Idaho 117, 120, 106 P.3d 443, 446 (2005). If its terms are clear and unambiguous, their meaning and legal effect are questions of law controlled by the plain meaning of the words. *Id.* If the contractual language is ambigu-

ous, the parties' intent may be determined from the facts and circumstances surrounding the formation of the contract. *Id.* Contractual language is ambiguous if it is reasonably susceptible to conflicting interpretations. Maroun v. Wyreless Systems, Inc., 141 Idaho 604, 614, 114 P.3d 974, 984 (2005).

As discussed below, the plain terms of the Swan Falls Agreement compel the conclusion that Idaho Power subordinated its hydropower water rights to all future beneficial uses, including but not limited to aquifer recharge. Testimony given by Idaho Power's legal counsel in Idaho legislative hearings confirm the plain terms of the Swan Falls Agreement.

A. The Terms of the Swan Falls Agreement

1. Overview of the Swan Falls Agreement

The Swan Falls Agreement had its origin in litigation over whether Idaho Power's water rights for its hydropower generation facilities on the Snake River had been subordinated to beneficial upstream uses. The Idaho Supreme Court held that Idaho Power had expressly subordinated its water rights at its Hells Canyon dams but not at the Swan Falls dam. Idaho Power Co. v. Dept. of Water Resources, 104 Idaho 575, 586, 661 P.2d 741, 752 (1983). The court also held, however, that the mere lack of an express subordination provision in the Swan Falls water rights licenses did not mean that the water rights were unsubordinated, and remanded the case for consideration of the extent to which Idaho Power may have subordinated or otherwise lost its Swan Falls water rights under a variety of theories advanced by the State and other parties to the case. *Id.* at 583, 590, 661 P.2d at 749, 756. [2]

The parties resolved this litigation by agreeing that a portion of Idaho Power's hydropower water rights would be held in trust by the State of Idaho and that hydropower use of the trust water would be subordinated to subsequent beneficial upstream uses approved by the State in accordance with state law. This solution was a compromise between the State's desire to have immediate and complete subordination of Idaho Power's hydropower water rights and Idaho Power's desire to retain full ownership and use of its hydropower water rights until a new beneficial upstream use of the water was approved by the Idaho Department of Water Resources. It is against this

backdrop that the subordination provision of the Swan Falls Agreement must be construed.

2. The Subordination Provision

The parties to the Swan Falls Agreement viewed it as providing "a plan best adapted to develop, conserve, and utilize the water resources of the region in the public interest." Agreement at 5,¶ 11. This was to be achieved largely through the subordination provision of the Agreement. Miles v. Idaho Power Co., 116 Idaho 635, 637, 778 P.2d 757, 759 (1989) ("[t]he purpose of the [Swan Falls] agreement concerning subordination was to make more water available for future appropriators and to assist in the expansion of other beneficial uses of the water in the Snake River").

The subordination provision established certain minimum flows[3] and provided that water accruing to Idaho Power's hydropower water rights above these minimum flows would be held in trust by the State of Idaho for "subsequent beneficial upstream uses":

> The Company is also entitled to use the flow of the Snake River at its facilities to the extent of its actual beneficial use but not to exceed those amounts stated in State Water License Numbers [recitation of the applicable water right license numbers], but such rights in excess of the [minimum flow] amounts stated in 7(A) shall be subordinate to subsequent beneficial upstream uses upon approval of such uses by the State in accordance with State law unless the depletion violates or will violate paragraph 7(A). Company retains its right to contest any appropriation of water in accordance with State law. Company further retains the right to compel State to take reasonable steps to insure the average daily flows established by this Agreement at the Murphy U.S.G.S. gauging station. . . . This paragraph shall constitute a subordination condition.

Agreement at 3,¶7(B) (emphasis added).

The subordination language is straightforward. The Agreement expressly provides for subordination to "subsequent" beneficial upstream

uses "upon approval of such uses by the State." These terms explicitly require subordination to beneficial uses approved after the execution of the Agreement. In the absence of any textual limitation to the contrary, the most natural reading of this language is that it includes not only new diversions for established types of beneficial uses, but also diversions for new types of beneficial uses recognized and approved in accordance with State law. It is a given that State law is not static and changes over time, and this is particularly true with respect to what uses of water constitute "beneficial uses." *See* Dept. of Parks v. Idaho Dept. of Water Administration, 96 Idaho 440, 447-48, 530 P.2d 924, 931-32 (1974) ("With the exception of the uses implicitly declared to be beneficial by Article 15, § 3, there is always a possibility that other uses beneficial in one era will not be in another and vice versa.") (Bakes, J., concurring specially).

Thus, under the plain terms of the Swan Falls Agreement, if a proposal to appropriate water for aquifer recharge is approved by the State as a beneficial use in accordance with state law, the hydropower water rights held in trust are subordinated to such use.

B. The Legislative History of the Statutes Implementing the Agreement

While the Agreement is unambiguous, it is worth noting that the history of the legislation the parties proposed to implement the Swan Falls Agreement also shows that subordination was not intended to be limited to any particular type or category of beneficial use.[4] The testimony of Idaho Power's legal counsel in committee hearings on Senate Bill 1008, the centerpiece of the proposed Swan Falls legislation, demonstrates particularly well that Idaho Power understood the Agreement included all types of beneficial uses subsequently recognized by state law. He testified before the Senate Resources & Environment Committee that "[t]he Company feels it is critical hydropower be recognized as an element in consideration of new water uses that affect the river above Murphy. It is important that the statute and the contract do not prohibit development." Minutes of the Idaho Senate Resources and Environment Comm., Jan. 18, 1985, 48th Sess. (Idaho 1985) ("Minutes of Jan. 18, 1985") at 2 (testimony of Tom Nelson) (emphasis added).

Similarly, at a subsequent hearing, Idaho Power's counsel stated that "[a]nything above the minimum flow the state is free to do as it likes," and

that "[o]f course one of the big questions is what will future uses be of the remaining water." Minutes of the Idaho Senate Resources and Environment Comm., Feb. 1, 1985, 48th Sess. (Idaho 1985) ("Minutes of Feb. 1, 1985") at 7, 9 (Nelson testimony). These statements reveal that the parties intended to provide for subordination of the trust water to all future beneficial uses approved in accordance with state law.

The statements of Idaho Power's counsel take on even more significance in light of the fact that the future use of trust water for aquifer recharge was an obvious possibility at the time of the Agreement. Statutes authorizing aquifer recharge, albeit on a limited basis, were first enacted in 1978, some six years prior to the Swan Falls Agreement. *See* Idaho Code §§ 42-4201 *et seq.* Indeed, the 1978 aquifer recharge statutes invoked the same "multiple use water policy of this state" that the parties explicitly recognized in 1984. 1978 Idaho Session Laws, ch. 293, § 1; Idaho Code § 42-4201(1) (emphasis added); *see also* Agreement at Exhibit 1, pp. 3-4 ("the promotion of full economic and multiple use development of the water resources of the State of Idaho") (emphasis added).[5] Further, aquifer recharge had been recognized as a "beneficial use" in other states for several years. *See* McTaggart v. Montana Power Co., 602 P.2d 992, 996 (Mont. 1979); Oahe Conservancy Subdistrict v. Janklow, 308 N.W.2d 559, 564 (S.D. 1981). In this context, the absence of any evidence that the parties intended to exclude subordination to aquifer recharge must be understood as meaning that the parties were aware that aquifer recharge would potentially trigger subordination under the Agreement in the future.

II.

IDAHO CODE §§ 42-234(2) AND 42-4201A(2) DO NOT CREATE ANY VESTED RIGHTS OR PRIORITIES IN IDAHO POWER COMPANY

Idaho Code § 42-234 declares that the appropriation and underground storage of unappropriated water for purposes of ground water recharge is a beneficial use, and authorizes the Department of Water Resources to issue permits to appropriate for such uses. The statute also provides that such rights are secondary to prior perfected rights, including those that might otherwise be subordinated by the Swan Falls Agreement:

> The rights acquired pursuant to any permit and license obtained as herein authorized shall be secondary to all prior perfected water rights, including those water rights for power purposes that may otherwise be subordinated by contract entered into by the governor and Idaho power company on October 25, 1984, and ratified by the legislature pursuant to section 42- 203B, Idaho Code.

Idaho Code § 42-234(2). [6]

Idaho Code § 42-4201A(2) is identical in relevant part. By their terms, these statutes make a licensed right to beneficially use water for underground storage or aquifer recharge secondary to the hydropower water rights held in trust by the State of Idaho under the Swan Falls Agreement. Thus, the question is whether the statutes give rise to any vested rights in Idaho Power Company that permanently trump the subordination provision of the Swan Falls Agreement. Under the plain language of the Agreement and the relevant legislative history, the answer to this question is clearly "No," for two reasons: (1) the State holds legal title to the subordinated portion of the hydropower water rights in trust for the people of the State of Idaho and Idaho Power, and (2) as part of the Swan Falls Agreement, Idaho Power bargained away any right to assert a vested right in the trust water.

The Agreement and the implementing legislation resolved the Swan Falls litigation principally by transferring legal title to a portion of Idaho Power's hydropower water rights to the State, which holds the rights in trust for the benefit of the people of the State of Idaho and Idaho Power. Agreement at 8, ¶ 13(A)(vii); *id.* at Exhibit 7B; Idaho Code § 42-203B. Hydropower use of the trust water is subordinated to subsequent beneficial upstream uses approved by the State in accordance with state law. *Id.*

A Statement of Legislative Intent for Senate Bill 1008, the centerpiece of the legislation proposed and enacted to implement the Swan Falls Agreement, was prepared and read into the Senate Journal and describes the trust as follows:

> [T]his trust arrangement results in the State of Idaho possessing legal title to all water rights previously claimed by Idaho Power Company above the agreed minimum stream

> flows and Idaho Power Company holds equitable title to those water rights subject to the trust. The Idaho Department of Water Resources is the entity which makes the determination of whether water is to be reallocated from the trust under the criteria of Section 42-203C and in compliance with the State Water Plan. The Company's rights may be asserted by the state, as trustee, and by Idaho Power Company, as beneficiary of the trust, and as the user of the water right. Idaho Power Company is not the sole beneficiary of the trust, however. Future appropriators, as persons on whose behalf the trust waters are held, may seek to appropriate the trust waters in conformance with State law. The State acts as trustee in their behalf as well. At such time as a future appropriator is granted a water right in the trust waters, Idaho Power Company's rights in such appropriated water become subordinated.

Statement of Legislative Intent S 1008 ("Statement of Legislative Intent"), JOURNAL OF THE STATE SENATE, 48th Sess. (Idaho 1985) at 58-61, 60; *see also* Minutes of Jan. 18, 1985 and Minutes of Feb. 1, 1985 (testimony by Idaho Power's legal counsel describing the trust arrangement).

Thus, the State, as trustee, holds legal title to the hydropower water rights referenced in the Swan Falls Agreement to the extent they exceed the agreed-upon minimum flows, and has the authority to manage the trust water for the benefit of the people of the State of Idaho and Idaho Power. Under the Agreement and the implementing legislation, Idaho Power surrendered its legal title and control of the water rights above the minimum flows. Idaho Power retained only an equitable interest in the use of the trust water until such time as the State approved a subsequent beneficial upstream use in accordance with state law. Thus, as trustee, the State has exclusive authority to determine how the trust water will be allocated.

This understanding is supported by the express language of the Swan Falls Agreement, which provides that other than the legislative program that implemented the Agreement, legislation enacted after the effective date of the Agreement has no effect on it:

> This Agreement is contingent upon certain enactments of law by the State and action by the Idaho Water Resource Board. Thus, within this Agreement, reference is made to state law in defining respective rights and obligations of the parties. Therefore, upon implementation of the conditions contained in paragraph 13, any subsequent final order by a court of competent jurisdiction, **legislative enactment** or administrative ruling shall not affect the validity of this Agreement.

Agreement at 8, ¶ 17 ("Subsequent Changes in Law") (emphases added). In other words, the parties expressly agreed that legislation passed after the Agreement became effective would not void the Agreement or change the parties' rights and obligations as established by the Agreement. Part of the contractual agreement was Idaho Power's acceptance of beneficial upstream uses upon approval of such uses by the State in accordance with state law.

The language in Idaho Code §§ 42-234(2) and 42-4201A(2) regarding the Swan Falls Agreement was enacted some ten years after the Agreement was signed. *See* Idaho Session Laws 1994, ch. 274, § 1, p. 851; id. ch. 433, § 1, p. 1397. These statutes reflect a policy decision at the time to treat aquifer recharge as a secondary use. But, as noted above, the state as trustee is free to change the policies regarding the use of the water held in trust.[7]

This interpretation accords with the parties' intent as revealed by the legislative history of SB 1008. In testimony before the Senate Resource and Environment Committee, Idaho Power's attorney left no doubt that the Agreement ultimately controls subordination, and that statutorily increasing the amount of water actually available to Idaho Power merely creates an incidental benefit that the State is free to modify or rescind at any time:

> Senator Crapo: With regard to the portion of the contract that says that subsequent legislative changes don't impinge on the contract. Would you clarify, what subsequent legislative changes would do to the status of [the] Idaho Power water right with regard to changes in minimum flow?

Tom Nelson: As the contract and the statute work together, the state could obviously increase the minimum flow at Murphy anytime they wanted. The Company would have no rights involved in that decision. If the state wanted to reduce that minimum flow below the seasonal 3900 and 5600 it certainly is at liberty to do that. However, the contractual recognition of the Company's water rights at that level would remain at those levels and therefore the Company's rights would not follow the minimum flow down in that instance. The contract would still define it as the seasonal 3900 and 5600.

. . . .

Senator Peavey: What would be the flip side of Senator Tominaga's scenario in case the state wanted to raise the minimum flow? How would that work and would there be any problems?

Tom Nelson: In a situation where the state raised the minimum flow, the Company's subordinated rights would remain at 3900 and 5600. However, that increase would then make the company the beneficiary of that increase [*sic*] flow and I as read both what we have as those minimum flows operate, the company would be a beneficiary of the higher flow and entitled to protect it or to try and make the state enforce it if it raised the flow but at the same time didn't put mechanisms in place to really make it work.

Senator Peavey: When you say "to protect the new higher minimum flow," you aren't saying then that the state couldn't after it had done that, relower that to 3900, that would be at the state's option, would it not?

Tom Nelson: You are right. Anything above the minimum flow the state is free to do as it likes.

Minutes of Feb. 1, 1985, at 3, 7. [8]

In the February 11, 1985, hearing, Senator Little asked Idaho Power's legal counsel that if "two years from now we don't like [all these bills fulfilling the Agreement] and parts are repealed, will that affect the agreement made between the power company and the state." Minutes of the Idaho Senate Resources and Environment Comm., Feb. 11, 1985, 48th Sess. (Idaho 1985) at I. Idaho Power's counsel replied:

> [T]here is a provision in the agreement that says the agreement remains binding even in the face of changes in the law. If the legislature wants to undo this whole thing next year, that is its prerogative. The only thing the legislature does not have power to do, would be to change the contractual recognition of the company's water rights at Murphy gage [*sic*].

Id. (Nelson testimony).

Legal counsel for the Office of the Attorney General testified during the same hearing in regard to the general trust concept that "the ultimate control over those trusts does rest with the Legislature. They created those trusts and of course they can alter them or take whatever steps are necessary." *Id.* at 12 (testimony of Pat Kole). Idaho Power's attorney then testified with regard to hydropower water rights placed in trust under Idaho Code § 42-203B that "[i]f you were subordinated you would have no right to compensation and it is solely the Director's discretion as this is written to implement the constitutional provision." *Id.* at 13 (Nelson testimony).

These exchanges demonstrate that the parties intended the Agreement to control the parties' rights and obligations with respect to subordination of the trust water, regardless of subsequent changes in State law. *See also* Statement of Legislative Intent at 59 ("While the State may later change the minimum flows, the recognition of the nature of the company's rights will not change"); Minutes of Jan. 18, 1985 at 18-19 (written testimony of Attorney General Jim Jones at 5-6) ("If the public interest criteria is not, after trial and error, precisely what the legislature desires, the standards can be changed without affecting this agreement, state legal ownership of the water rights involved and the trust arrangement established.").

It was understood that subsequent changes in state law would not reduce or enhance the State's authority over the trust water or the rights established by the Agreement. Just as the State cannot reduce Idaho Power's rights under the Agreement with regard to the unsubordinated portion of the hydropower water rights, Idaho Power is simply an incidental beneficiary of any State law governing the trust water. This aspect of the Agreement is crucial, because the overarching intent was to put control of the reallocation of the trust water in the State's hands, and to provide the State with the flexibility necessary to promote full economic and multiple use development of the water resources of the Snake River system. *See also* Minutes of Jan. 18, 1985, at 18-19 (Jones testimony at 5-6); Agreement at Exhibit 1.

It is thus evident that any subsequent changes in statutory language such as the relevant portions of Idaho Code §§ 42-234(2) and 42-4201A(2) do not trump the Swan Falls Agreement for purposes of subordination or give rise to a right of compensation regarding use of the trust water. These statutes may have worked to Idaho Power's benefit but the legislature has the authority to change this policy at any time.

Nothing in the legislative history of Idaho Code §§ 42-234(2) and 42-4201A(2) can be viewed as requiring a different conclusion. The only reference to the Swan Falls hydropower rights in the legislative history of the recharge statutes is a single statement by a representative of the Idaho Water Users Association that the language regarding privately owned electrical generating companies was "to protect and verify the agreement on Swan Falls." Minutes of the Senate Resources & Environment Comm., March 9, 1994, at 1 (testimony of Sherl Chapman). This statement is essentially meaningless for purposes of interpreting the Swan Falls Agreement, because, as the statement recognizes, the Agreement speaks for itself, and by its terms is fully integrated and sets forth all of the parties' understandings. Agreement at 9, ¶ 19. Further, the statement was made by a non-party ten years after the Agreement was executed, and cannot be viewed as probative or reliable for purposes of determining the intent of the parties at the time they executed the Agreement. *See* Pinehaven Planning Bd. v. Brooks, 138 Idaho 826, 829, 70 P.3d 664, 667 (2003) ("the Court must determine the intent of the parties at the time the instrument was drafted").

III.

CONCLUSION

The plain terms of the Swan Falls Agreement, as well as the facts and circumstances surrounding the Agreement, conclusively demonstrate the parties' intent that the hydropower water rights held in trust by the State would be subordinated to all beneficial upstream uses approved in accordance with State law, including aquifer recharge. The Agreement and implementing legislation also demonstrate that the provisions in Idaho Code §§ 42-234(2) and 42-4201A(2) regarding the Swan Falls Agreement only created an incidental benefit in favor of Idaho Power, and did not give rise to any vested rights or priorities.

AUTHORITIES CONSIDERED

1. Idaho Code:

§ 42-203B.
§ 42-203C.
§ 42-234.
§ 42-4201.
§ 42-4201A.

2. Idaho Session Laws:

1994, chapter 274, § 1.
1994, chapter 433, § 1.
1978, chapter 293, § 1.

3. Idaho Cases:

Clear Lakes Trout Co., Inc. v. Clear Springs Foods, Inc., 141 Idaho 117, 106 P.3d 443 (2005).

Dept. of Parks v. Idaho Dept. of Water Administration, 96 Idaho 440, 530 P.2d 924 (1974).

Idaho Power Co. v. Dept. of Water Resources, 104 Idaho 575, 661 P.2d 741 (1983).

Maroun v. Wyreless Systems, Inc., 141 Idaho 604, 114 P.3d 974 (2005).

Miles v. Idaho Power Co., 116 Idaho 635, 778 P.2d 757 (1989).

Pinehaven Planning Bd. v. Brooks, 138 Idaho 826, 70 P.3d 664 (2003).

Tolley v. THI Co., 140 Idaho 253, 92 P.3d 503 (2004).

4. **Other Cases:**

McTaggart v. Montana Power Co., 602 P.2d 992 (Mont. 1979).

Oahe Conservancy Subdistrict v. Janklow, 308 N.W.2d 559 (S.D. 1981).

5. **Other Authorities:**

"Agreement" (Oct. 25, 1984) (the "Swan Falls Agreement").

JOURNAL OF THE STATE SENATE, 48th Session (Idaho 1985).

Minutes of the Idaho Senate Resources and Environment Committee, 52nd Session (1994).

Minutes of the Idaho Senate Resources and Environment Committee, 48th Session (1985).

DATED this 9th day of March, 2006.

LAWRENCE G. WASDEN
Attorney General

Analysis by:

CLIVE J. STRONG
MICHAEL ORR
Deputy Attorneys General

[1] "Agreement" executed by the Governor, the Attorney General and the Chief Executive Officer of Idaho Power Company on October 25, 1984, for purposes of resolving the litigation regarding Idaho Power Company's water rights at Swan Falls dam (the "Swan Falls Agreement") at 4, ¶ 7(B).

[2] These theories included abandonment, forfeiture, adverse possession, equitable estoppel, and customary preference. *Id.*

[3] The agreed-upon minimums are average daily flows of 3,900 c.f.s. from April 1 to October 31, and 5,900 c.f.s. from November 1 to March 31, as measured at the U.S.G.S. Gauging Station below Swan Falls Dam and above Murphy, Idaho (the "Murphy Gauge"). Swan Falls Agreement at 3, ¶ 7(A).

The Swan Falls Agreement contains three express subordination provisions. Agreement at 3-4, ¶¶ 7(B)-(D). Two of these subordinated Idaho Power's water rights to certain junior uses that actually existed or were in the process of being perfected as of the date of the Agreement and are not directly relevant to the question presented. *Id.* at 4, ¶ (C)-(D).

[4] *See* Agreement at 2-3, ¶ 6; id. at 8, ¶ 13(A)(vii) (agreeing to propose and support a legislative program implementing the Agreement and conditioning effectiveness of the subordination provision on the enactment of corresponding subordination legislation); *id.* at Exhibits 1-8 (the proposed legislation). The proposed subordination legislation was enacted substantially as proposed and is codified at Idaho Code §§ 42-203B and 42-203C.

[5] Presently codified at Idaho Code § 42-203C.

[6] The language of Idaho Code §§ 42-234(2) and 42-4201A(2) is an express acknowledgement that the subordination provision would apply to aquifer recharge in the absence of the 1994 change to the statutes making recharge use secondary to hydropower use under the Swan Falls Agreement.

[7] Once a subsequent beneficial upstream use becomes a vested right, the water subject to that right is no longer part of the trust water.

[8] Likewise, when discussing the reservation of 150 cubic feet per second of the trust water for domestic, commercial and industrial uses before the Senate Resources and Environment Committee, Idaho Power's attorney testified, "it is essentially a reservation of that much water for those purposes and subject always to change by the Water Board as it finds out if it is too high or too low." Minutes of Jan. 18, 1985, at 5 (Nelson testimony).

ATTORNEY GENERAL OPINION 06-2A[1]

Hand Delivered

Honorable Bruce Newcomb
Speaker of the House
Idaho House of Representatives
STATEHOUSE

Per Request for Attorney General's Opinion
Regarding Swan Falls Agreement and Idaho Code §§ 42-234(2) and 42-4201A(2)

Dear Speaker Newcomb:

This opinion responds to the questions in your letter dated February 27, 2006, regarding the effect of Idaho Code §§ 42-234(2) and 42-4201A(2) on the use of natural flow to recharge the Eastern Snake Plain Aquifer. In order to respond to your questions, it is first necessary to review the Swan Falls Agreement and to then consider the effect, if any, of Idaho Code §§ 42-234(2) and 42-4201A(2) on the Swan Falls Agreement. The questions presented are set forth below.

QUESTIONS PRESENTED

1. Is aquifer recharge a use to which Idaho Power Company subordinated its hydropower water rights under the Swan Falls Agreement?

2. If Idaho Power Company subordinated its water rights to recharge under the Swan Falls Agreement, do the provisions in Idaho Code §§ 42-234(2) and 42-4201A(2) change the Swan Falls Agreement and create any vested rights or priorities in Idaho Power Company?

CONCLUSIONS

1. Under the Swan Falls Agreement, Idaho Power Company subordinated its hydropower water rights in excess of the agreed-upon minimum flows to all "subsequent beneficial upstream uses upon

approval of such uses by the State in accordance with State law,"[2] regardless of the type or kind of beneficial use. Thus, the hydropower rights referenced in the Swan Falls Agreement are subordinated to aquifer recharge in accordance with state law.

2. Idaho Code §§ 42-234(2) and 42-4201A(2) do not create any vested rights or priorities in Idaho Power Company because the State, as trustee, holds legal title to the water placed in trust and, in accordance with the Swan Falls Agreement, the State has the right to determine how the trust water will be used. Idaho Code §§ 42-234(2) and 42-4201A(2) create only an incidental statutory benefit in favor of Idaho Power that the State is free to modify or rescind at any time.

ANALYSIS

I.

THE SWAN FALLS AGREEMENT DOES NOT LIMIT THE TYPES OF BENEFICIAL USES FOR WHICH THE TRUST WATERS MAY BE ALLOCATED

You have asked whether aquifer recharge is a use to which Idaho Power Company ("Idaho Power") subordinated its water rights under the Swan Falls Agreement. This question raises the issue of whether the Swan Falls Agreement limits the subordination of Idaho Power's water rights to any particular types or kinds of beneficial uses, and therefore categorically excludes other uses for purposes of subordination. These issues present a question of the interpretation of the Swan Falls Agreement.

The objective in interpreting a contract such as the Swan Falls Agreement is to give effect to the parties' intentions, which should be ascertained from the language of the contract, if possible. Tolley v. THI Co., 140 Idaho 253, 260, 92 P.3d 503, 510 (2004). The contract must be viewed as a whole and in its entirety. Clear Lakes Trout Co., Inc. v. Clear Springs Foods, Inc., 141 Idaho 117, 120, 106 P.3d 443, 446 (2005). If its terms are clear and unambiguous, their meaning and legal effect are questions of law controlled by the plain meaning of the words. *Id.* If the contractual language is ambiguous, the parties' intent may be determined from the facts and circumstances

surrounding the formation of the contract. *Id.* Contractual language is ambiguous if it is reasonably susceptible to conflicting interpretations. Maroun v. Wyreless Systems, Inc., 141 Idaho 604, 614, 114 P.3d 974, 984 (2005).

As discussed below, the plain terms of the Swan Falls Agreement compel the conclusion that Idaho Power subordinated its hydropower water rights to all future beneficial uses, including but not limited to aquifer recharge. Testimony given by Idaho Power's legal counsel in Idaho legislative hearings confirms the plain terms of the Swan Falls Agreement.

A. The Terms of the Swan Falls Agreement

1. Overview of the Swan Falls Agreement

The Swan Falls Agreement had its origin in litigation over whether Idaho Power's water rights for its hydropower generation facilities on the Snake River had been subordinated to beneficial upstream uses. The Idaho Supreme Court held that Idaho Power had expressly subordinated its water rights at its Hells Canyon dams but not at the Swan Falls dam. Idaho Power Co. v. Dept. of Water Resources, 104 Idaho 575, 586, 661 P.2d 741, 752 (1983). The court also held, however, that the mere lack of an express subordination provision in the Swan Falls water rights licenses did not mean that the water rights were unsubordinated, and remanded the case for consideration of the extent to which Idaho Power may have subordinated or otherwise lost its Swan Falls water rights under a variety of theories advanced by the State and other parties to the case. *Id.* at 583, 590, 661 P.2d at 749, 756.[3]

The parties resolved this litigation by agreeing that a portion of Idaho Power's hydropower water rights would be held in trust by the State of Idaho and that hydropower use of the trust water would be subordinated to subsequent beneficial upstream uses approved by the State in accordance with state law. This solution was a compromise between the State's desire to have immediate and complete subordination of Idaho Power's hydropower water rights and Idaho Power's desire to retain full ownership and use of its hydropower water rights until a new beneficial upstream use of the water was approved by the Idaho Department of Water Resources. It is against this backdrop that the subordination provision of the Swan Falls Agreement must be construed.

2. The Subordination Provision

The parties to the Swan Falls Agreement viewed it as providing "a plan best adapted to develop, conserve, and utilize the water resources of the region in the public interest." Agreement at 5, ¶ 11. This was to be achieved largely through the subordination provision of the Agreement. Miles v. Idaho Power Co., 116 Idaho 635, 637, 778 P.2d 757, 759 (1989) ("The purpose of the [Swan Falls] agreement concerning subordination was to make available more water for future appropriators and to assist in the expansion of other beneficial uses of the water in the Snake River").

The Swan Falls Agreement established certain minimum flows [4] and provided that water accruing to Idaho Power's hydropower water rights above these minimum flows would be held in trust by the State of Idaho for "subsequent beneficial upstream uses":

> The Company is also entitled to use the flow of the Snake River at its facilities to the extent of its actual beneficial use but not to exceed those amounts stated in State Water License Numbers [recitation of the applicable water right license numbers], but such rights in excess of the [minimum flow] amounts stated in 7(A) shall be subordinate to subsequent beneficial upstream uses upon approval of such uses by the State in accordance with State law unless the depletion violates or will violate paragraph 7(A). Company retains its right to contest any appropriation of water in accordance with State law. Company further retains the right to compel State to take reasonable steps to insure the average daily flows established by this Agreement at the Murphy U.S.G.S. gauging station. . . . This paragraph shall constitute a subordination condition.

Agreement at 3-4,¶ 7(B) (emphasis added); *see also id.* at 1 ¶ 4 ("water rights held in trust by the State"); *id.* at Exhibit 7B (similar).

The subordination language is straightforward. The Agreement expressly provides for subordination to "subsequent" beneficial upstream uses "upon approval of such uses by the State." These terms explicitly require subordination to beneficial uses approved after the execution of the

Agreement. In the absence of any textual limitation to the contrary, the most natural reading of this language is that it includes not only new diversions for established types of beneficial uses, but also diversions for new types of beneficial uses recognized and approved in accordance with state law. It is a given that state law is not static and changes over time, and this is particularly true with respect to what uses of water constitute "beneficial uses." *See* Dept. of Parks v. Idaho Dept. of Water Administration, 96 Idaho 440, 447-48, 530 P.2d 924, 931-32 (1974) ("With the exception of the uses implicitly declared to be beneficial by Article 15, § 3, there is always a possibility that other uses beneficial in one era will not be in another and vice versa.") (Bakes, J., concurring specially).

Thus, under the plain terms of the Swan Falls Agreement, if a proposal to appropriate water for aquifer recharge is approved by the State as a beneficial use in accordance with state law, the hydropower water rights held in trust are subordinated to such use.

B. The Legislative History of the Statutes Implementing the Agreement

While the Agreement is unambiguous, it is worth noting that the history of the legislation the parties proposed to implement the Swan Falls Agreement also shows that subordination was not intended to be limited to any particular type or category of beneficial use.[5] The testimony of Idaho Power's legal counsel in committee hearings on Senate Bill 1008, the centerpiece of the proposed Swan Falls legislation, demonstrates particularly well that Idaho Power understood the Agreement included all types of beneficial uses subsequently recognized by state law. He testified before the Senate Resources and Environment Committee that "[t]he Company feels it is critical hydropower be recognized as an element in consideration of new water uses that affect the river above Murphy. It is important that the statute and the contract do not prohibit development." Minutes of the Idaho Senate Resources and Environment Comm., Jan. 18, 1985, 48th Leg., 1st Reg. Sess. (Idaho 1985) ("Minutes of Jan. 18, 1985") at 2 (testimony of Tom Nelson) (emphasis added).

Similarly, at a subsequent hearing, Idaho Power's counsel stated that "[a]nything above the minimum flow the state is free to do as it likes," and that "[o]f course one of the big questions is what will future uses be of the

remaining water." Minutes of the Idaho Senate Resources and Environment Comm., Feb. 1, 1985, 48th Leg., 1st Reg. Sess. (Idaho 1985) ("Minutes of Feb. 1, 1985") at 7, 9 (Nelson testimony). These statements reveal that the parties intended to provide for subordination of the trust water to all future beneficial uses approved in accordance with state law.

The statements of Idaho Power's counsel take on even more significance in light of the fact that the future use of trust water for aquifer recharge was an obvious possibility at the time of the Agreement. Statutes authorizing aquifer recharge, albeit on a limited basis, were first enacted in 1978, some six years prior to the Swan Falls Agreement. *See* Idaho Code §§ 42-4201, *et seq.* Indeed, the 1978 aquifer recharge statutes invoked the same "multiple use water policy of this state" that the parties explicitly recognized in 1984. 1978 Idaho Sess. Laws 725 (codified at Idaho Code § 42-4201(1)) (emphasis added); *see also* Agreement at Exhibit 1, p. 4 ("the promotion of full economic and multiple use development of the water resources of the State of Idaho") (emphasis added).[6] Further, aquifer recharge had been recognized as a "beneficial use" in other states for several years. *See* McTaggart v. Montana Power Co., 602 P.2d 992, 996 (Mont. 1979); Oahe Conservancy Subdistrict v. Janklow, 308 N.W.2d 559, 564, n.5 (S.D. 1981). In this context, the absence of any evidence that the parties intended to exclude subordination to aquifer recharge must be understood as meaning that the parties were aware that aquifer recharge would potentially trigger subordination under the Agreement in the future.

II.

IDAHO CODE §§ 42-234(2) AND 42-4201A(2) DO NOT CREATE ANY VESTED RIGHTS OR PRIORITIES IN IDAHO POWER COMPANY

Idaho Code § 42-234 declares that the appropriation and underground storage of unappropriated water for purposes of ground water recharge is a beneficial use, and authorizes the Department of Water Resources to issue permits to appropriate for such uses. The statute also provides that such rights are secondary to prior perfected rights, including those that might otherwise be subordinated by the Swan Falls Agreement:

> The rights acquired pursuant to any permit and license obtained as herein authorized shall be secondary to all prior perfected water rights, including those water rights for power purposes that may otherwise be subordinated by contract entered into by the governor and Idaho power company on October 25, 1984, and ratified by the legislature pursuant to section 42-203B, Idaho Code.

Idaho Code § 42-234(2).[7]

Idaho Code § 42-4201A(2) is identical in relevant part. By their terms, these statutes make a licensed right to beneficially use water for underground storage or aquifer recharge secondary to the hydropower water rights held in trust by the State of Idaho under the Swan Falls Agreement. Thus, the question is whether the statutes give rise to any vested rights in Idaho Power Company that permanently trump the subordination provisions of the Swan Falls Agreement. Under the plain language of the Agreement and the relevant legislative history, the answer to this question is clearly "No," for two reasons: (1) the State holds legal title to the subordinated portion of the hydropower water rights in trust for the people of the State of Idaho and Idaho Power, and (2) as part of the Swan Falls Agreement, Idaho Power bargained away any right to assert a vested right in the trust water.

The Agreement and the implementing legislation resolved the Swan Falls litigation principally by transferring legal title to a portion of Idaho Power's hydropower water rights to the State, which holds the rights in trust for the benefit of the people of the State of Idaho and Idaho Power. Agreement at 8, ¶ 13(A)(vii); *id.* at Exhibit 7B; Idaho Code § 42-203B. Hydropower use of the trust water is subordinated to subsequent beneficial upstream uses approved by the State in accordance with state law. *Id.*[8]

A Statement of Legislative Intent for Senate Bill 1008, the centerpiece of the legislation proposed and enacted to implement the Swan Falls Agreement, was prepared and read into the Senate Journal and describes the trust as follows:

> [T]his trust arrangement results in the State of Idaho possessing legal title to all water rights previously claimed by Idaho Power Company above the agreed minimum stream

> flows and Idaho Power Company holds equitable title to those water rights subject to the trust. The Idaho Department of Water Resources is the entity which makes the determination of whether water is to be reallocated from the trust under the criteria of Section 42-203C and in compliance with the State Water Plan. The Company's rights may be asserted by the state, as trustee, and by Idaho Power Company, as beneficiary of the trust and as the user of the water right. Idaho Power Company is not the sole beneficiary of the trust, however. Future appropriators, as persons on whose behalf the trust waters are held, may seek to appropriate the trust waters in conformance with State law. The State acts as trustee in their behalf as well. At such time as a future appropriator is granted a water right in the trust waters, Idaho Power Company's rights in such appropriated water become subordinated.

Statement of Legislative Intent S 1008 ("Statement of Legislative Intent"), JOURNAL OF THE STATE SENATE, 48th Leg., 1st Reg. Sess. (Idaho 1985) at 58-61, 60; *see also* Minutes of Jan. 18, 1985, at 3, and Minutes of Feb. 1, 1985, at 4-5 (testimony by Idaho Power's legal counsel describing the trust arrangement).

Thus, the State, as trustee, holds legal title to the hydropower water rights referenced in the Swan Falls Agreement to the extent they exceed the agreed-upon minimum flows and has the authority to manage the trust water for the benefit of the people of the State of Idaho and Idaho Power. Under the Agreement and the implementing legislation, Idaho Power surrendered its legal title and control of the water rights above the minimum flows. Idaho Power retained only an equitable interest in the use of the trust water until such time as the State approved a subsequent beneficial upstream use in accordance with state law. Thus, as trustee, the State has exclusive authority to determine how the trust water will be allocated.

This understanding is supported by the express language of the Swan Falls Agreement, which provides that other than the legislative program that implemented the Agreement, legislation enacted after the effective date of the Agreement has no effect on it:

> This Agreement is contingent upon certain enactments of law by the State and action by the Idaho Water Resource Board. Thus, within this Agreement, reference is made to state law in defining respective rights and obligations of the parties. Therefore, upon implementation of the conditions contained in paragraph 13, any subsequent final order by a court of competent jurisdiction, **legislative enactment** or administrative ruling shall not affect the validity of this Agreement.

Agreement at 8, ¶ 17 ("Subsequent Changes in Law") (emphases added). In other words, the parties expressly agreed that legislation passed after the Agreement became effective would not void the Agreement or change the parties' rights and obligations as established by the Agreement. Part of the contractual agreement was Idaho Power's acceptance of beneficial upstream uses upon approval of such uses by the State in accordance with state law.

The language in Idaho Code §§ 42-234(2) and 42-4201A(2) regarding the Swan Falls Agreement was enacted some ten years after the Agreement was signed. *See* 1994 Idaho Sess. Laws 851, 1397. These statutes reflect a policy decision at the time to treat aquifer recharge as a secondary use. But, as noted above, the state as trustee is free to change the policies regarding the use of the water held in trust.[9]

This interpretation accords with the parties' intent as revealed by the legislative history of SB 1008. In testimony before the Senate Resource and Environment Committee, Idaho Power's attorney left no doubt that the Agreement ultimately controls subordination, and that statutorily increasing the amount of water actually available to Idaho Power merely creates an incidental benefit that the State is free to modify or rescind at any time:

> Senator Crapo: With regard to the portion of the contract that says that subsequent legislative changes don't impinge on the contract. Would you clarify, what subsequent legislative changes would do to the status of [the] Idaho Power water right with regard to changes in minimum flow?

Tom Nelson: As the contract and the statute work together, the state could obviously increase the minimum flow at Murphy anytime they wanted. The Company would have no rights involved in that decision. If the state wanted to reduce that minimum flow below the seasonal 3900 and 5600 it certainly is at liberty to do that. However, the contractual recognition of the Company's water rights at that level would remain at those levels and therefore the Companys [*sic*] rights would not follow the minimum flow down in that instance. The contract would still define it as the seasonal 3900 and 5600.

. . . .

Senator Peavey: What would be the flip side of Senator Tominaga's scenario in case the state wanted to raise the minimum flow? How would that work and would there be any problems?

Tom Nelson: In a situation where the state raised the minimum flow, the Company's subordinated rights would remain at 3900 and 5600. However, that increase would then make the company the beneficiary of that increase [*sic*] flow and I as read both what we have as those minimum flows operate, the company would be a beneficiary of the higher flow and entitled to protect it or to try and make the state enforce it if it raised the flow but at the same time didn't put mechanisms in place to really make it work.

Senator Peavey: When you say "to protect the new higher minimum flow," you aren't saying then that the state couldn't after it had done that, relower that to 3900, that would be the state's option, would it not?

Tom Nelson: You are right. Anything above the minimum flow the state is free to do as it likes.

Minutes of Feb. 1, 1985, at 3, 7.[10]

In the February 11, 1985, hearing, Representative Little asked Idaho Power's legal counsel that if "two years from now we don't like [all these bills fulfilling the Agreement] and parts are repealed, will that affect the agreement made between the power company and the state." Minutes of the Idaho House Resources and Conservation Comm., Feb. 11, 1985, 48th Leg., 1st Reg. Sess. (Idaho 1985) at 1. Idaho Power's counsel replied:

> [T]here is a provision in the agreement that says the agreement remains binding even in the face of changes in law. If the legislature wants to undo this whole thing next year, that is its prerogative. The only thing the legislature does not have power to do, would be to change the contractual recognition of the company's water rights at Murphy gage [*sic*].

Id. (Nelson testimony).

Legal counsel for the Office of the Attorney General testified during the same hearing in regard to the general trust concept that "the ultimate control over those trusts does rest with the Legislature. They created those trusts and of course they can alter them or take whatever steps are necessary." Minutes of Jan. 18, 1985, at 12 (testimony of Pat Kole). Idaho Power's attorney then testified with regard to hydropower water rights placed in trust under Idaho Code § 42-203B that "[i]f you were subordinated you would have no right to compensation and it is solely the Director's discretion as this is written to implement that constitutional provision." *Id.* at 13 (Nelson testimony).

These exchanges demonstrate that the parties intended the Agreement to control the parties' rights and obligations with respect to subordination of the trust water, regardless of subsequent changes in state law. *See also* Statement of Legislative Intent at 59 ("While the State may later change the minimum flows, the recognition of the nature of the company's rights will not change"); Minutes of Jan. 18, 1985 at 18-19 (written testimony of Attorney General Jim Jones at 5-6) ("If the public interest criteria is not, after trial and error, precisely what the legislature desires, the standards can be changed without affecting this agreement, state legal ownership of the water rights involved and the trust arrangement established.").

It was understood that subsequent changes in state law would not reduce or enhance the State's authority over the trust water or the rights established by the Agreement. Just as the State cannot reduce Idaho Power's rights under the Agreement with regard to the unsubordinated portion of the hydropower water rights, Idaho Power is simply an incidental beneficiary of any state law governing the trust water. This aspect of the Agreement is crucial, because the overarching intent was to put control of the reallocation of the trust water in the State's hands and to provide the State with the flexibility necessary to promote full economic and multiple use development of the water resources of the Snake River system. *See also* Minutes of Jan. 18, 1985, at 18-19 (Jones testimony at 5-6); Agreement at Exhibit 1.

It is thus evident that any subsequent changes in statutory language such as the relevant portions of Idaho Code §§ 42-234(2) and 42-4201A(2) do not trump the Swan Falls Agreement for purposes of subordination or give rise to a right of compensation regarding use of the trust water. These statutes may have worked to Idaho Power's benefit but the legislature has the authority to change this policy at any time.

Nothing in the legislative history of Idaho Code §§ 42-234(2) and 42-4201A(2) can be viewed as requiring a different conclusion. The only reference to the Swan Falls hydropower rights in the legislative history of the recharge statutes is a single statement by a representative of the Idaho Water Users Association that the language regarding privately owned electrical generating companies was "to protect and verify the agreement on Swan Falls." Minutes of the Idaho Senate Resources and Environment Comm., March 11, 1994, 52d Leg., 2d Reg. Sess. (Idaho 1994) at 1 (testimony of Sherl Chapman). This statement is essentially meaningless for purposes of interpreting the Swan Falls Agreement because, as the statement recognizes, the Agreement speaks for itself and by its terms is fully integrated and sets forth all of the parties' understandings. Agreement at 9, ¶ 19. Further, the statement was made by a non-party ten years after the Agreement was executed and cannot be viewed as probative or reliable for purposes of determining the intent of the parties at the time they executed the Agreement. *See* Pinehaven Planning Bd. v. Brooks, 138 Idaho 826, 829, 70 P.3d 664, 667 (2003) ("the Court must determine the intent of the parties at the time the instrument was drafted").

III.

CONCLUSION

The plain terms of the Swan Falls Agreement, as well as the facts and circumstances surrounding the Agreement, conclusively demonstrate the parties' intent that the hydropower water rights held in trust by the State would be subordinated to all beneficial upstream uses approved in accordance with state law, including aquifer recharge. The Agreement and implementing legislation also demonstrate that the provisions in Idaho Code §§ 42-234(2) and 42-4201A(2) regarding the Swan Falls Agreement only created an incidental benefit in favor of Idaho Power, and did not give rise to any vested rights or priorities.

AUTHORITIES CONSIDERED

1. Idaho Code:

§ 42-203B.
§ 42-203C.
§ 42-234.
§ 42-4201.
§ 42-4201A.

2. Idaho Session Laws:

1994 Idaho Sess. Laws 851, 1397.
1978 Idaho Sess. Laws 725.

3. Idaho Cases:

Clear Lakes Trout Co., Inc. v. Clear Springs Foods, Inc., 141 Idaho 117, 106 P.3d 443 (2005).

Dept. of Parks v. Idaho Dept. of Water Administration, 96 Idaho 440, 530 P.2d 924 (1974).

Idaho Power Co. v. Dept. of Water Resources, 104 Idaho 575, 661 P.2d 741 (1983).
Maroun v. Wyreless Systems, Inc., 141 Idaho 604, 114 P.3d 974 (2005).

Miles v. Idaho Power Co., 116 Idaho 635, 778 P.2d 757 (1989).

Pinehaven Planning Bd. v. Brooks, 138 Idaho 826, 70 P.3d 664 (2003).

Tolley v. THI Co., 140 Idaho 253, 92 P.3d 503 (2004).

4. **Other Cases:**

McTaggart v. Montana Power Co., 602 P.2d 992 (Mont. 1979).

Oahe Conservancy Subdistrict v. Janklow, 308 N.W.2d 559 (S.D. 1981).

5. **Other Authorities:**

"Agreement" (Oct. 25, 1984) (the "Swan Falls Agreement").

JOURNAL OF THE STATE SENATE, 48th Legislature, 1st Regular Session (Idaho 1985).

Minutes of the Idaho House Resources and Conservation Committee, 48th Legislature, 1st Regular Session (1985).
Minutes of the Idaho Senate Resources and Environment Committee, 52d Legislature, 2d Regular Session (1994).

Minutes of the Idaho Senate Resources and Environment Committee, 48th Legislature, 1st Regular Session (1985).

DATED this 12th day of February, 2007, effective March 9, 2006.

LAWRENCE G. WASDEN
Attorney General

Analysis by:

CLIVE J. STRONG
MICHAEL ORR
Deputy Attorneys General

[1] This opinion supersedes Attorney General Opinion No. 06-2 and corrects several scriveners' errors therein. This opinion also adds two supporting citations to the primary citation following the indented block quote on page 4 and footnote no. 8 regarding the minimum flow at Milner dam.

[2] "Agreement" executed by the Governor, the Attorney General and the Chief Executive Officer of Idaho Power Company on October 25, 1984, for purposes of resolving the litigation regarding Idaho Power Company's water rights at Swan Falls dam (the "Swan Falls Agreement") at 4, ¶ 7(B).

[3] These theories included abandonment, forfeiture, adverse possession, equitable estoppel, and customary preference. *Id.*

[4] The agreed-upon minimums are average daily flows of 3,900 c.f.s. from April 1 to October 31, and 5,600 c.f.s. from November 1 to March 31, as measured at the U.S.G.S. gauging station below Swan Falls Dam and above Murphy, Idaho (the "Murphy Gauge"). Swan Falls Agreement at 3, ¶ 7(A).

The Swan Falls Agreement contains three express subordination provisions. Agreement at 3-4, ¶¶ 7(B)-(D). Two of these subordinated Idaho Power's water rights to certain junior uses that actually existed or were in the process of being perfected as of the date of the Agreement and are not directly relevant to the question presented. Id. at 4, ¶¶ 7(C)-(D).

[5] *See* Agreement at 2-3, ¶ 6; id. at 8, ¶ 13(A)(vii) (agreeing to propose and support a legislative program implementing the Agreement and conditioning effectiveness of the subordination provision on the enactment of corresponding subordination legislation); *id.* at Exhibits 1-8 (the proposed legislation). The proposed subordination legislation was enacted substantially as proposed and is codified at Idaho Code §§ 42-203B and 42-203C.

[6] Presently codified at Idaho Code § 42-203C.

[7] The language of Idaho Code §§ 42-234(2) and 42-4201A(2) is an express acknowledgement that the subordination provision would apply to aquifer recharge in the absence of the 1994 change to the statutes making recharge use secondary to hydropower use under the Swan Falls Agreement.

[8] Further, because the Swan Falls Agreement retained the minimum daily flow of zero c.f.s. at the Milner gauging station, Agreement at Exhibit 6, surface and ground waters tributary to the Snake River above Milner dam are not subject to hydropower water rights below Milner dam. *See also* Idaho Code § 42-203B(2).

[9] Once a subsequent beneficial upstream use becomes a vested right, the water subject to that right is no longer part of the trust water.

[10] Likewise, when discussing the reservation of 150 cubic feet per second of the trust water for domestic, commercial and industrial uses before the Senate Resources and Environment Committee, Idaho Power's attorney testified, "it is essentially a reservation of that much water for those purposes and subject always to change by the Water Board as it finds out if it is too high or too low." Minutes of Jan. 18, 1985, at 5 (Nelson testimony).

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ATTORNEY GENERAL'S SELECTED INFORMAL GUIDELINES FOR THE YEAR 2006

LAWRENCE G. WASDEN
ATTORNEY GENERAL
STATE OF IDAHO

March 3, 2006

The Honorable Bruce Newcomb
Speaker of the House
State Capitol Building
P.O. Box 83720
Boise, ID 83720-0038

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

Dear Speaker Newcomb:

This letter is in response to your request for a response from the Office of Attorney General to the analysis of House Bill (H.B.) 721 conveyed to you by Roy L. Eiguren of the Givens Pursley law firm with his letter of February 28, 2006 (Givens Pursley Analysis) [attached]. H.B. 721 proposes to amend Idaho Code § 42-108 to provide for legislative approval of certain water right transfers that are to be used "in conjunction with the coal fired generation of electricity other than integrated gasification combined cycle technology where coal is not burned but oxidized as a power source . . . ." The Givens Pursley Analysis of H.B. 721 suggests that enactment of H.B. 721 in its present form likely would violate the Equal Protection Clauses of the Idaho and Federal Constitutions.

QUESTION PRESENTED

Does the Equal Protection Clause bar the State from regulating water right transfers as contemplated in House Bill 721?

CONCLUSION

Our reading of House Bill 721 and its Statement of Purpose leads us to conclude that the amendment proposed to Idaho Code § 42-108 by the bill is rationally related to the State's duty to protect its water resources and likely would withstand a court challenge alleging violation of the Equal Protection Clause of the Idaho Constitution.

ANALYSIS

Article I, § 2 of the Idaho Constitution states in part: "Government is instituted for their [the people's] equal protection and benefit. . . ." Amendment XIV, § 1 of the United States Constitution states that no state shall deny "to any person within its jurisdiction the equal protection of the laws."

"It is generally presumed that legislative acts are constitutional, that the state legislature has acted within its constitutional powers, and any doubt concerning interpretation of a statute is to be resolved in favor of that which will render the statute constitutional." Meisner v. Potlatch Corp., 131 Idaho 258, 261, 954 P.2d 676, 679 (1998). If, however, persons in like circumstances are not receiving the same benefits and burdens under the law, the legislation may violate the Equal Protection Clause. Olsen v. J.A. Freeman Co., 117 Idaho 706, 791 P.2d 1285 (1990). Where the government is alleged to have violated the Equal Protection Clause, Idaho courts employ a three-step analysis: (1) identification of the classification under attack; (2) the standard under which the classification will be reviewed; and (3) determination of whether the standard has been satisfied. State v. Hart, 135 Idaho 827, 830, 25 P.2d 850, 853 (2001). For analyses made under the Idaho Constitution, the strict scrutiny standard applies to "fundamental rights" or "suspect classes[,]" Bradbury v. Idaho Judicial Council, 136 Idaho 63, 68, 28 P.3d 1006, 1011 (2001); the means-focus scrutiny standard applies "where the discriminatory character of a challenged statutory classification is apparent on its face and where there is also a patent indication of lack of relationship between the classification and the declared purpose of the statute," State v. Mowry, 134 Idaho 751, 754-55, 9 P.3d 1217, 1220-21 (2000); and, finally, the rational basis scrutiny standard applies to all other challenges, Hart, 135 Idaho at 830, 25 P.2d at 853.

In this case, the classification under attack is the State's regulation of water right transfers that are to be used "in conjunction with the coal-fired generation of electricity other than integrated gasification combined cycle technology where coal is not burned but oxidized as a power source . . . ." H.B. 721. According to H.B. 721's statement of purpose, "This bill ensures that the legislature will have an opportunity to evaluate the effect of such coal-fired generation on the water resources of the State of Idaho." The Givens Pursley Analysis states, however, that "H.R. 721 singles out a partic-

ular type of coal-fired power generation technology for special treatment under Idaho water law, despite the fact that this technology consumes no more water than other technologies. It therefore raises serious constitutional issues." Givens Pursley Analysis at page 1.

Despite argument to the contrary, it is unlikely that the strict scrutiny standard of review would apply to the classification in H.B. 721. *See* Givens Pursley Analysis at page 2, footnote 1. "Strict scrutiny requires the state to prove a compelling need for the goal of the challenged statute and that there is no less discriminatory method available to achieve that goal. Low level review, conversely, places the burden on the challenging party to prove that the state's goal is not legitimate and that the challenged law is not rationally related to the legitimate government purpose and if there is any conceivable state of facts which will support it." Rudeen v. Cenarrusa, 136 Idaho 560, 569, 38 P.3d 598, 607 (2001) (internal citation omitted).

While the Givens Pursley Analysis is correct that Article XV, § 3 of the Idaho Constitution states that the right to appropriate water to a beneficial use shall never be denied, the use of water is subject to regulation and control by the State. Article XV, § 3 specifically provides that, "the state may regulate and limit the use [of water] for power purposes." Because the State is empowered to regulate the use of water, it is unlikely that a reviewing court would apply a strict scrutiny standard of review to legislation that does not involve a fundamental right or suspect class. Furthermore, no reported decisions in the State of Idaho have applied a strict scrutiny standard of review to the State's regulation of water rights.

The Givens Pursley Analysis also argues that it is possible that a reviewing court would apply the means-focus scrutiny standard of review to the classification in H.B. 721. *See* Givens Pursley Analysis at page 2, footnote 1. Means-focus scrutiny applies "where the discriminatory character of a challenged statutory classification is apparent on its face and where there is also a patent indication of lack of relationship between the classification and the declared purpose of the statute." State v. Mowry, 134 Idaho at 754-55, 9 P.3d at 1220-21. Before the means-focus test will be used, the classification must be "obviously invidiously discriminatory" and must distinguish between groups either "odiously or on some other basis calculated to excite animosity or ill will." Coghlan v. Beta Theta Pi Fraternity, 133 Idaho 388, 396, 987 P.2d 300, 308 (1999). "Under this intermediate standard of judicial scrutiny, the

right to equal protection of laws is not violated if the classification 'substantially furthers some specifically identifiable legislative end.'" Miles v. Idaho Power Co., 116 Idaho 635, 645, 778 P.2d 757, 767 (1989), *citing* Jones v. State Bd. of Medicine, 97 Idaho 859, 867, 555 P.2d 399, 407 (1976).

House Bill 721 classifies power plants that use coal differently than power plants that do not. House Bill 721 further refines that classification by treating traditional coal-fired power plants differently from coal-fired power plants that use "integrated gasification combined cycle technology where coal is not burned but oxidized as a power source. . . ." Therefore, on its face, H.B. 721 distinguishes between types of coal-fired power plants. In order to violate the Equal Protection Clause, however, the classification must "clearly bear[] no relationship to the statute's declared purpose." Aeschliman v. State, 132 Idaho, 397, 401, 973 P.2d 749, 752 (Ct. App. 1999).

House Bill 721's statement of purpose states that it is necessary to treat traditional coal-fired power plants differently from coal-fired power plants that use "integrated gasification combine cycle technology" to "ensure[] that the legislature will have an opportunity to evaluate the effect of such coal-fired generation on the water resources of the State of Idaho." As evidenced by testimony and academic study, legislative evaluation of traditional coal-fired power plants is necessary because those types of plants, as opposed to coal-fired plants that use "integrated gasification combined cycle technology[,]" threaten the State's water resources by producing increased emissions.

On August 8, 2005, the Idaho Legislature's Energy, Environment and Technology Interim Committee (Committee) met to discuss, among other topics, the development of a "clean coal project at the Old FMC site in Power County." Energy, Environment and Technology Interim Committee, Minutes, pages 13-18 (August 8, 2005). It was explained to the Committee that oxidizing coal in a pressurized chamber, instead of burning it, results in

> a synthetic gas that allows the company to clean the gas prior to emission. They can strip out the sulfur, capture mercury in a carbon bed, capture part of the carbon dioxide (C_O2) prior to combustion . . . . The key component of this is the sulfur and C_O2 capture. Emissions are captured prior to combustion.

Capturing emissions out of the stack is much more challenging. The reason this new technology has not been used in the past is because of cost. It is currently about 20% higher than a traditional polarized coal plant. With the energy bill incentives, it will be close to the same cost. Mr. Raman said this is a technology breakthrough. There have not been a lot of vendors in the past willing to provide a total package facility although the process is commercially proven.

Senator Werk asked about the term "clean coal" and removing emissions. Mr. Raman said coal is still a fossil fuel. He explained that there are still stack emissions from this process but that these emissions are similar to what a natural gas facility would emit. Senator Werk asked about other impacts that result from this process. Mr. Raman said "clean coal" means cleaner coal or a cleaner fossil fuel. There are C_o2 emissions, Nitrogen Oxides (N_oX) emissions, trace Sulfur very similar to a natural gas plant. This is different compared to a traditional coal plant in that the volume of S_o2, mercury, C_o2, and N_oX emissions are much lower from the stack.

. . . .

Representative Smylie said that there are several proposals in Idaho for coal-fired plants. He said he was aware that the Sempra plant that is proposed in Jerome County will use pulverized coal and will be similar in size [to the proposed project at the old FMC site in Power County].

Id. at 14-15, 17.

In an article published in the Environmental Law Review, it is noted that clean coal power plants reduce emissions of pollutants:

Because pollutants are removed from a highly concentrated steam prior to combustion, I[ntegrated] G[asification] C[ombined] C[ycle] is the lowest emitting among all coal production processes as to N[ational] A[mbient] A[ir] Q[uality] S[tandard] pollutants. For the same reason, IGCC used in conjunction with available control technologies also provides vastly superior performance and dramatically lower cost in removing mercury and other toxic metals as compared to pulverized coal boilers. The IGCC technology is also substantially more thermally efficient--by 10% or more, according to the U.S. Department of Energy (DOE)--than other available technologies. This

thermal advantage reduces total emissions of all pollutants, including CO_2, by a corresponding amount. . . . Finally, IGCC is unique among available technologies in its ability to economically capture the CO_2 emissions from coal combustion, making the CO_2 available for storage rather than being vented to the atmosphere as a greenhouse gas.

Gregory B. Foote, *Considering Alternatives: The Case for Limiting CO_2 Emissions from New Power Plants Through New Source Review,* 34 Environmental Law Review 10642, 10660 (July 2004).

Therefore, even though H.B. 721 differentiates between types of coal fired power plants, the differentiation "substantially furthers[,]" Idaho Power, 116 Idaho at 645, 778 P.2d 767, the bill's stated purpose of allowing legislative review of certain water right transfers that involve traditional coal fired power plants in an effort to "evaluate the effect of such coal-fired generation on the water resources of the State of Idaho."

While it is likely that H.B. 721 would survive even a means-focused scrutiny standard of review, it is most likely that a reviewing court would apply the less rigorous rational basis standard of review because the classification is not "obviously invidiously discriminatory" and does not distinguish between groups either "odiously or on some other basis calculated to excite animosity or ill will." Coghlan, 133 Idaho at 396, 987 P.2d at 308. "Under the 'rational basis' test, equal protection is offended only if the classifications 'are based solely on reasons *totally unrelated to the pursuit* of the State's goals and only if no ground can be conceived to justify them.'" City of Lewiston v. Knieriem, 107 Idaho 80, 85, 685, P.2d 821, 826 (1984) (emphasis added).

The decision to treat traditional coal fired power plants differently from coal fired power plants that use "integrated gasification combined cycle technology" is based on the legislation's stated purpose to "ensure[] that the legislature will have an opportunity to evaluate the effect of such coal-fired generation on the water resources of the State of Idaho." The legislation is therefore consistent with the State's obligation to protect health, safety, and welfare of its citizens. "Under the broad authority of the police power, a state legislature may enact laws concerning the health, safety, and welfare of the people so long as the regulations are not arbitrary or unreasonable." State v. Wilder, 138 Idaho 644, 646, 67 P.3d 839, 841 (Ct. App. 2003). Because the

bill is rationally related to the State's duty to protect its water resources, it likely would withstand a court challenge alleging violation of the Equal Protection Clause of the Idaho Constitution.

Sincerely,

PHILLIP J. RASSIER
Deputy Attorney General
Natural Resources Division

"[T]he differences between the standard applied under Idaho's equal protection clause and the federal clause are negligible; accordingly, we will not undertake a separate analysis. . . ." Rudeen v. Cenarrusa, 136 Idaho 560, 569, 38 P.3d 598, 607 (2001).

ATTACHMENT

February 28, 2006

Honorable Bert Stevenson
Idaho House of Representatives
Idaho State Legislature
State Capitol Building
P.O. Box 83720
Boise Idaho 83720-0038

Dear Representative Stevenson:

Enclosed is a copy of the legal analysis prepared by our firm's water attorneys on HB721. We would be pleased to respond to any questions you may have regarding this analysis.

With best regards,
Roy L. Eiguren

Enclosure
cc: Resource Committee, Attention: Mona Spaulding (w/encl.)
Representative Bruce Newcomb (w/encl.)

Representative Sharon Block (w/encl.)
Deputy Attorney General Clive Strong (w/encl.)

H.R. 721 Violates The Equal Protection Clause of The Idaho and Federal Constitutions

The Fourteenth Amendment of the Constitution bars states from enacting legislation that denies any person the equal protection of the laws. U.S. Const., Amend XIV § 1. Similar protection is embodied in Idaho's constitution. Idaho Const., art. I, § 2. These equal protection provisions apply to corporations as well as to natural persons. *In re Case*, 20 Idaho 128, 132-33, 116 P. 1037, 1038 (1911).

In essence, the equal protection provisions prohibit the government from singling out certain individuals or classes of persons for special treatment. While some classification is inherent in all legislation, the Equal Protection Clause prohibits laws that are in reality "a subterfuge to shield one class or unduly burden another." 16B Am. Jur. 2d., Constitutional Law § 808 (1998). Thus, where legislation classifies persons without any rational basis, treating some better than others, it is unconstitutional.

H.R. 721 singles out a particular type of coal-fired power generation technology for special treatment under Idaho water law, despite the fact that this technology consumes no more water than other technologies. It therefore raises serious constitutional issues.

Of course, some legislative classifications are appropriate. For instance, the Idaho Supreme Court upheld a statute providing special treatment of irrigation systems covering over 25,000 acres, noting that the classification was legitimate because it did not bear on the nature of the corporation, but instead "its classification relates solely to size." *Big Wood Canal Co. v. Chapman*, 45 Idaho 380, 403, 263 P. 45, 53 (1927). It is another matter, however, where the legislation singles out a particular corporate entity whose impact on the water resource is no greater than any other industry.

A good example of an unconstitutional differentiation is found in *Crom v. Frahm*, 33 Idaho 314, 193 P. 1013. In that case, the Idaho Supreme Court struck down a law that singled out Carey Act irrigation companies, allowing them to modify their boards more easily than other Idaho corporations. The Court declared that such special treatment of one type of water user "is not founded on a difference either natural, or intrinsic, or reasonable." 33 Idaho at 319, 123 P. at 1014.

To survive scrutiny, the classification based on the type of entity must be reasonably related to the articulated legislative purpose. By way of example, it is reasonable and proper to implement different maximum fee schedules for opthamalogists and optometrists. *Posner v. Rockefeller*, 31 A.D.2d 352 (N.Y. 1969). In such a case, the purpose of the legislation (to implement Medicare requirements) is rationally related to the distinction drawn between doctors and non-doctors. The situation would be entirely different if instead the Legislature declared that opthamalogists may freely appropriate water while optometrists must secure legislative approval. Plainly, such a classification would be unrelated to their respective ability to put water to beneficial use without injury. Consequently, such a law would violate the Equal Protection Clause.

In sum, the Equal Protection Clause "does not preclude the states from enacting legislation that draws distinctions between different categories of people, but it does prohibit them from according different treatment to persons who have been placed by statute into different classes on the basis of criteria wholly unrelated to the purpose of the legislation." 16B Am. Jur. 2d., Constitutional Law § 793 (1998).

Our Supreme Court has summed up the law concisely: "The discrimination must rest upon some reasonable ground of difference between the persons or things included and those excluded, having regard to the purpose of the legislation, and, within the sphere of its operation, the statute must affect all persons similarly situated." *Big Wood Canal Co. v. Chapman, 45* Idaho 380, 403-04, 263 P. 45, 53 (1927).

H.B. No. 721 violates this constitutional principle. The bill's legislative purpose states that it is intended to provide an opportunity for the Legislature to "evaluate the effects of such coal-fired generation on the water resources of the State of Idaho." Yet there is no plausible basis for the

Legislature to determine that the diversion of a relatively modest quantity of water (2 cfs or more) for this particular coal-fired power technology has any different impact on the water resource than would similar modestly-sized diversions by other industrial users. Under existing law, Sempra, just like any other water user, will be required to provide 100 percent mitigation its water use. The simple fact is that water consumed to extinction by Sempra is no different from water consumed to extinction by a microchip manufacturer, a dairy, or any other industrial user.

Indeed, the legislation's blatant discriminatory intent is evident on its face in its exclusion of coal gasification plants from the special scrutiny, despite the fact that the coal gasification technology will consume as much or more water as the technology employed by Sempra's project. The legislation is a transparent effort to single out a particular water user for additional burdens that have nothing whatsoever to do with protection the water resource. Consequently, it is unconstitutional.

It bears emphasis that the discussion above is based on application of the most deferential test, the so-called "rational basis" test, which applies where no suspect classification or fundamental rights are involved. H.B. 721, however, would likely be scrutinized under either the intermediate "means-focus" test or even the "strict scrutiny" test. Accordingly, H.B. 721 is at even greater risk. [1]

[1] The strict scrutiny test may well apply, because the legislation limits a "fundamental right" under Idaho's Constitution, namely the right to appropriate water to beneficial use. Although this right is not found in the U.S. Constitution and therefore does not implicate the federal Equal Protection Clause, the Idaho Supreme Court could recognize the right to transfer a water right as a fundamental right under Idaho's Constitution, and therefore protected by the Equal Protection Clause of the Idaho Constitution. If the strict scrutiny test applies, H.B. 721 would be struck down unless shown to be "narrowly tailored to serve a compelling governmental interest." *State v. Breed,* 111 Idaho 497, 500, 725 P.2d 202, 205 (Idaho App. 1986). The bill's sweeping prohibition on water transfers cannot meet this test.

Even if this were not the case, the Court might appropriately declare the legislation subject to intermediate "means-focus" review on the basis that "especially important" (though not "fundamental") interests are at stake. *State v. Breed,* 111 Idaho 497, 500, 725 P.2d 202, 205 (Idaho App. 1986). Under either test, the State's ability to defend the legislation is further diminished. Even if these tests were not applied, however, H.B. 721 cannot survive scrutiny under the more lenient "rational basis" test. As the U.S. Supreme Court has said, this standard is "not a toothless one" and requires the classification to rationally advance a reasonable and identifiable government objective." *Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 438-42 (1982) (striking down requirement for differing appeal bonds for differing appellants).

April 10, 2006

Mr. David B. Rogers
Attorney at Law
720 College Avenue
St. Maries, ID 83861

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

QUESTION PRESENTED

The following responds to your request on behalf of the City of Plummer for assistance with regard to the following annexation question: If the Coeur d'Alene Reservation (the "Reservation") is still in existence, does the City of Plummer (the "City"), which is surrounded by the Reservation, have the authority to annex adjacent properties as requested by the property owners? Your request notes that substantial controversy exists over the Reservation's existence but, as the question states, seeks a response assuming such existence.

CONCLUSION

As discussed more fully below, I conclude that the City has annexation authority under the circumstances presented in the question.

ANALYSIS

A. Introduction

Annexation by cities of land outside their corporate limits is controlled by Idaho Code § 50-222. That provision provides for annexation in three situations. Each has its own procedural requirements. My understanding is that the first of these categories is involved here—*i.e.*, all adjacent landowners have consented to the annexation. *See* Idaho Code § 50-222(3)(a). Compliance with § 50-222's requirements is assumed.

Idaho statutes do not except land within Indian reservations from the annexation process. Consequently, any exclusion from annexation must arise as a matter of federal statute or common law based preemption. No federal statute effects such an exclusion, and relevant decisional authority counsels against preemption.

B. Relevant Decisional Authority

The most recent decision concerning the authority of state political subdivisions to annex within Indian country is Shakopee Mdewakanton Sioux Community v. City of Prior Lake, 771 F.2d 1153 (8th Cir. 1985). There, the Eighth Circuit Court of Appeals rejected a city's contention that reservation residents were not part of its jurisdiction and therefore ineligible to vote in municipal elections or receive city services. The city predicated its position on a council resolution that deemed certain reservation lands—which had been previously annexed—outside reconfigured municipal election precincts. *Id.* at 1155. "That a tribal government exercises sovereign powers on a reservation and that reservation lands are held in trust by the United States[,]" the court reasoned, "does not prevent the reservation from constituting a portion of a state and a political subdivision of a state." *Id.* at 1156.

The Shakopee decision relied heavily upon Howard v. Commissioners of Louisville Sinking Fund, 344 U.S. 624 (1953), where the United States Supreme Court had held, in rejecting a challenge to a municipality's annexation of federally owned land, that "[a] state may conform its municipal structures to its own plan, so long as the state does not interfere with the exercise of jurisdiction within the federal area by the United States." *Id.* at 626-27. The Supreme Court further stated that "[a] change of municipal boundaries did not interfere in the least with the jurisdiction of the United States within the area or with its use or disposition of the property." *Id.* at 627; *see also* Agua Caliente Band of Mission Indians' Tribal Council v. City of Palm Springs, 347 F. Supp. 42, 45 (C.D. Cal. 1972) (relying on, *inter alia,* Howard for the proposition that "the federal ownership of the Indian land in question did not bar the inclusion of the land within the City of Palm Springs upon its incorporation in 1938"). [1] The Court then examined whether the complainants, who were federal employees aggrieved by the imposition of a city income tax, enjoyed protection from the tax by operation of the Buck Act, 4 U.S.C. §§ 105-110; *i.e.*, the real issue was not the annexation but whether,

given the City's action in that regard, the employees enjoyed some independent immunity from the involved tax.

Any preemption issues related to the City's exercise of its annexation authority here will arise from substantive obligations imposed on landowners by virtue of being incorporated within a state political subdivision. Those issues can and do arise without regard to the reason for the incorporation. A tribal member who purchases land within the City's original boundaries from a nonmember might argue, for example, that the newly acquired property is not subject to city zoning regulations. This member's legal rights and obligations as to such regulations would not differ from those of a member who owns land recently annexed into the City.

I recognize that the New Mexico Supreme Court reached a contrary result in Your Food Stores, Inc. v. Village of Espanola, 361 P.2d 950 (N.M. 1961). It held that a municipality's annexation authority was preempted by operation of (1) Article XXI, section 2 of the state constitution disclaiming "all right and title . . . to all lands lying within said boundaries owned or held by any Indian or Indian tribes the right or title to which shall have been acquired through or from the United States or any prior sovereign" (361 P.2d at 953); (2) Public Law No. 83-280, 67 Stat. 588 (1953) (codified as amended in relevant part at 18 U.S.C. § 1162 and 28 U.S.C. § 1360) ("Public Law 280"), which the court construed as reflecting Congress' consent for a State "to assume jurisdiction over the Indians within its boundaries" but to "prohibit[] the State from exercising such jurisdiction until the State should amend its Constitution or statute, as the case may be, removing any legal impediments to such assumption of jurisdiction" (361 P.2d at 954); and (3) its conclusion that the exercise of annexation authority would interfere impermissibly with tribal self-government under Williams v. Lee, 358 U.S. 217 (1958) (361 P.2d at 957).

Each ground for the Your Food Stores holding has been undermined significantly by later decisional authority. *First,* the Supreme Court strongly suggested in Arizona v. San Carlos Apache Tribe, 463 U.S. 545 (1983), that state constitution "disclaimer" provisions do not affect ordinary Indian law preemption principles. *Id.* at 563 ("Our many recent decisions recognizing crucial limits on the power of the States to regulate Indian affairs have rarely either invoked reservations of jurisdiction contained in statehood enabling

acts by anything more than a passing mention or distinguished between disclaimer States and nondisclaimer States.") *Second*, Public Law 280 has no relevance to determining the scope of the City's annexation authority, as binding precedent has since established. E.g., Bryan v. Itasca County, 426 U.S. 373, 385 (1976) ("The primary intent of [the civil component of Public Law 280] was to grant jurisdiction over private civil litigation involving reservation Indians in state court.") *Third*, the Supreme Court has adopted an interest-balancing test to be used as an ordinary matter in determining whether federal law preempts state civil regulatory authority in Indian country (Bracker v. White Mountain Apache Tribe, 448 U.S. 136, 144-45 (1980)), and not the categorical approach deemed required by the New Mexico court. *See* Your Food Stores, 361 P.2d at 957 (exercise of annexation authority "would affect the authority of the tribal council over reservation affairs and, hence, would infringe on the right of the Indians to govern themselves"). The exercise of annexation authority, again, merely alters municipal boundaries. Whether preemption exists as to the subsequent application of municipal law should be resolved on a case-by-case basis in accordance with the Bracker interest-balancing test. Finally, I note that the New Mexico court gave no consideration to Howard.

C. Conclusion

The City of Plummer's annexation authority is not compromised by the assumed reservation status of the adjacent lands. Whether the full breadth of its regulatory authority applies to landowners or activities within the annexed territory is a question that falls outside the scope of your request for assistance. That question must be answered by reference to ordinary Indian law preemption principles under the particular facts and will be answered no differently for those landowners or activities than for other landowners or activities within the City's territory.

Sincerely,

CLAY R. SMITH
Deputy Attorney General
Natural Resources Division

[1] The district court's judgment in Agua Caliente was subsequently vacated on appeal and remanded (*see* Capitan Grande Band of Mission Indians v. Helix Irr. Dist., 514 F.2d 465, 468 n.3 (9th Cir. 1975)), but no reason exists to believe that its analysis concerning the authority of California to authorize political subdivisions to annex land held by the United States for its own or a tribe's benefit was erroneous. *Cf.* Cabazon Band of Mission Indians v. City of Indio, 694 F.2d 634, 637-38 (9th Cir. 1982) (invalidating annexation of reservation lands where city failed to satisfy federal-consent condition precedent imposed under *state* law).

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ATTORNEY GENERAL'S CERTIFICATES OF REVIEW FOR THE YEAR 2006

LAWRENCE G. WASDEN
ATTORNEY GENERAL
STATE OF IDAHO

January 5, 2006

The Honorable Ben Ysursa
Idaho Secretary of State
HAND DELIVERED

Re: Certificate of Review
Proposed Initiative to Increase Sales and Use Taxes and Apply Revenues to Public Education

Dear Secretary of State Ysursa:

We reviewed the initiative petition filed with your office on December 5, 2005. As required by Idaho Code § 34-1809, we offer the following advisory comments. Due to the limited time within which we must respond and the complexity of the legal issues raised in this petition, our review can address only general issues or areas of concern. We cannot provide in-depth analysis of each issue that may present problems. Further, the review statute provides that the Attorney General's recommendations are "advisory only." The petitioners are free to "accept or reject them in whole or in part." Our review addresses only matters that may affect the initiative's legality. We offer no opinion about the policy issues raised by this proposed initiative.

BALLOT TITLE

Following the filing of the proposed initiative, we will prepare short and long ballot titles. The titles should impartially and succinctly state the purpose of the measure without being argumentative and without creating prejudice for or against the measure. If petitioners wish to propose language with these standards in mind, we recommend that they do so. We will consider their proposed language in our preparation of the titles.

MATTERS OF SUBSTANTIVE IMPORT

Summary of the proposal:

We understand the proposed initiative intends the following results:

1. Two separate sections of the initiative set the rate of tax of sales and use tax imposed by the Idaho Sales Tax Act at six percent (6%) beginning on July 1, 2007.[1]

2. The additional revenue raised is to be placed into an "Idaho Public Schools Investment Fund" that would be created by the initiative.[2]

3. It directs that the revenue placed in the Idaho Public Schools Investment Fund be used for specified purposes related to public schools.[3]

4. Local school districts are required to make annual accountability reports about the use of the revenue and make the reports "easily available to the general public."[4]

5. It expresses several responsibilities and limitations on the Idaho Legislature.

   - The operative language raising the sales tax rate requires that the increase rate be "maintained" at the six percent rate.[6] This seems to be an attempt to limit the ability of the legislature to reduce (or increase) the rate after the time the initiative becomes effective.[6]

   - It charges the legislature to develop "an alternative state-based revenue stream" in the event the legislature increases the sales and use tax rate before the effective date of the initiative.[7]

   - It requires that funds raised by the initiative "shall be utilized for funding public education at the K-12 level."[8]

   - It directs the legislature to enact prescribed minimum appropriations for "K-12 public school support" and limits the ability of the legislature in future years to reduce the "general account appropriation for K-12 public school support."[9]

   - It specifically directs the actions of the "2007 Idaho Legislature, in establishing the general account appropriation for K-12 public school support for fiscal year 2008."[10]

- It directs that the Idaho Legislature place on the general election ballot in 2020 a ballot question relating to the reauthorization of the act.[11]

Comments:

The Attorney General's Office is required to "review the proposal for matters of substantive import and shall recommend to the petitioner such revision or alteration of the measure as may be deemed necessary and appropriate."[12] We have reviewed the initiative and offer the following recommendations.

General Comments:

The language needs more specificity in its financial controls and accountability. We understand the language to require the annual "general account appropriation" for public schools to include funds from several sources,[13] including the proposed Idaho Local Public Schools Investment Fund, which shall then be "distributed to local public schools as provided in chapter 10, title 11, Idaho Code."[14] There are several conflicts and ambiguities in this process that need clarification. First, the funds from the Idaho Local Public Schools Investment Fund will be subject to limitations that may not apply to other funds in the annual public schools appropriations. Simply lumping the funding sources together may result in losing the ability to account for the earmarked funds, thereby making the required annual accountability reports[15] problematic at best.

The initiative could be improved by using more consistent language to describe the schools or districts to which the additional revenue to be raised is to be distributed. For example, proposed Idaho Code § 33-912 provides that "local school districts" shall spend the revenue to help improve "local schools" which includes providing support of "all public schools." Proposed Idaho Code § 33-914 provides the additional revenues are to be included within the appropriation for "K-12 public schools." These inconsistent terms lead to potential confusion over "local schools" vs. "public schools"[16] as well as potential confusion over the participation of charter schools in the proposed additional funding. All charter schools are public schools.[17] Some charter schools have been authorized by school districts,[18] and some charter schools have been authorized or otherwise fall under the jurisdiction of the

Public Charter School Commission.[19] All public charter schools are operated by nonprofit entities and function independently of the governing board of the entity that chartered them.[20] However, the chartering entities remain responsible to see that their authorized public charter schools operate within the bounds of the approved charter[21] and applicable law.[22] Consequently, the proposed legislation needs to clarify the participation of charter schools in the proposed funding mechanism and the level of participation of the chartering entities and of the directors of the nonprofit entities that operate the charter schools with respect to reporting obligations and the like.

Specific Comments:

Item 1. It is unclear why the operative language "[t]he sales and use taxes imposed upon each sale or purchase subject to taxation under the Idaho Sales Tax Act, Chapter 36, Title 63, Idaho Code shall be returned to and maintained at the six percent (6%) rate in effect on June 30, 2007" is reiterated in proposed Idaho Code §§ 33-910 and 33-916. Only the latter follows the language with the phrase "effective July 1, 2007." Rules of statutory construction require that all language in a statute be given some effect.[23] Thus, the unnecessary repetition raises possible interpretations that are not consistent with the petitioner's apparent intent. We recommend modifying the language to remove the repetition.

Item 2. As written, the requirement that the revenues received as a result of the rate change be placed in the specified fund requires that any expenditure from the fund be by future appropriation by the legislature.[24] We do not understand the language that the funds "shall be utilized" for public education to constitute an appropriation. If it is the petitioner's intent to effect an appropriation, this language should be modified accordingly.[25]

The initiative requires that the "portion of the increased revenues, after refunds, derived from" the increased rate "shall be placed in the 'Idaho Local Public Schools Investment Fund.'"[26] This language takes no account of Idaho Code §§ 63-3203 or 63-3709. These reduce distributions for tax anticipation notes and certain multi-state tax collections.

Item 3. The initiative limits the purposes for which the funds raised by the increase in sales and use tax rates may be used. However, these limitations are expressed differently in different parts of the initiative. Proposed

Idaho Code § 33-911 says the new revenue must be used for "funding public education at the K-12 level." Proposed Idaho Code § 33-912(a) says it must be used on "any" of nine designated purposes. Proposed Idaho Code § 33-912(b) says 90% must be used for "classroom instruction and support." These limitations may not be consistent. We recommend a single provision setting out the petitioner's intent in regard to the use of the funds. That provision would be improved by a definition of "classroom instruction and support."

The proposed initiative charges the legislature[27] with developing an "alternative state-based revenue stream" in the event the legislature increases the sales and use tax rates before the effective date of the initiative. The alternative must hold "funding for all other existing public services harmless."[28] No standard by which the legislature or a court could determine if this requirement has been met is expressed. There is a similar problem with the requirement that the annual general account appropriation "augment, rather than replace K-12 public school support . . . ."[29]

The proposed initiative requires that the "annual general account appropriation for K-12 public school support" include "an annual inflationary factor, based on a percentage change in the consumer price index for all urban consumers."[30] Greater specificity about how to make this calculation would remove doubt about which potential calculation is correct.[31]

The same section requires that the "annual general account appropriation for K-12 public school support" include "federal funds."[32] The reference to federal funds is problematic because their allocation, distribution, and use is governed by federal and not state law.

Item 4. Our only recommendations regarding the requirements in proposed Idaho Code § 33-913 for local accountability reports on use of revenues relate to the ambiguity of the term "local school district" discussed above under general comments.

Item 5. The multiple provisions expressing limitations and duties for the legislature are problematic. Efforts to direct or limit actions by future sessions of the legislature are of no legal effect. The initiative process in Idaho is limited to proposing and adopting changes in statutory law.[33] Initiative legislation is on equal footing with the legislation enacted by the Idaho legisla-

ture.[34] Like any other statute, a statute enacted by initiative may be repealed or amended by the legislature.[35] This power to make, repeal, or amend existing law is constitutionally based.[36] A statute may not usurp a constitutionally granted power.[37] It follows that future legislatures are not effectively constrained by these provisions.

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 the petitioner, Idaho Education Association, c/o Jim Shackelford, P.O. Box 2638, Boise, Idaho 83701, by deposit in the U.S. Mail of a copy of this certificate of review.

Sincerely,

LAWRENCE G. WASDEN
Attorney General

Analysis by:

THEODORE V. SPANGLER, JR.
Deputy Attorney General

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[1] Proposed Idaho Code §§ 33-910 and 33-916.

[2] Proposed Idaho Code § 33-911.

[3] Proposed Idaho Code §§ 33-911 and 33-912. The former section provides the funds "shall be utilized for funding public education at the K-12 level." The latter limits the use of the funds to nine specified purposes and further provides that local school districts must use at least 90 percent of the revenue for "classroom instruction and support."

[4] Proposed Idaho Code § 33-913.

[5] See footnote 1.

[6] Ordinarily a tax rate, once set by law, remains in place until such time as it is changed by an amendment or repeal of the statute setting the rate. Thus, the "and maintained" language is either an attempt to direct future legislative action or it is unnecessary surplus. The rules of statutory construction advise against construing the statute to include surplus language. Eby v. Newcombe, 116 Idaho 838 (1989); Magnuson v. Idaho State Tax Commission, 97 Idaho 917 (1976).

[7] Proposed Idaho Code § 33-910.

[8] Proposed Idaho Code § 39-911.

[9] Proposed Idaho Code § 33-914.

[10] Proposed Idaho Code § 33-916(b).

[11] Proposed Idaho Code § 33-917.

[12] Idaho Code § 34-1809.

[13] Proposed Idaho Code § 33-914.

[14] Proposed Idaho Code § 33-915.

[15] Required by proposed Idaho Code § 33-913.

[16] The terms "local school districts" and "local schools" imply a distinction between districts and schools that are "local" and those that are not. Unless a distinction is intended (in which case the distinguished class requires a definition), the word "local" is surplus and should be stricken.

[17] Idaho Code § 33-5203(1) provides that "[p]ublic charter schools shall be part of the state's program of public education."

[18] Idaho Code § 33-5203(3).

[19] Idaho Code §§ 33-5203(5) and 33-5207(6)

[20] Idaho Code § 33-5204(1).

[21] Idaho Code § 33-5209.

[22] Idaho Code § 33-5210(2).

[23] Potlatch Corp. v. U.S., 134 Idaho 912 (2000); Peterson v. Franklin County, 130 Idaho 176 (1997).

[24] Art. VII, § 13, Idaho Constitution, "No money shall be drawn from the treasury, but in pursuance of appropriation made by law."

[25] See Idaho Code § 33-1513 for an example of funds "continuously appropriated," in this instance for pupil transportation.

[26] Proposed Idaho Code § 33-911.

[27] See Item 5 below for a discussion of the effectiveness of such a charge.

[2] Proposed Idaho Code § 33-910.

[29] Proposed Idaho Code § 33-914.

[30] Proposed Idaho Code § 33-914(e).

[31] An example of such language can be found in Idaho Code § 63-3024.

[32] Proposed Idaho Code § 33-914(b).

[33] See chapter 18, title 34, Idaho Code.

[34] Westerberg v. Andrus, 114 Idaho 401 (1988); Simpson v. Cenarrusa, 130 Idaho 609 (1997).

[35] Luker v. Curtis, 64 Idaho 703 (1943); Gibbons v. Cenarrusa, 140 Idaho 316 (2002).

[36] Article III, § 1, Idaho Constitution.

[37] Williams v. State Legislature of Idaho, 111 Idaho 156 (1986).

January 13, 2006

The Honorable Ben Ysursa
Idaho Secretary of State
HAND DELIVERED

Re: Certificate of Review
Proposed Initiative to Amend Idaho Code §§ 67-2342 and 67-2347 Relating to the Open Meeting Law

Dear Secretary of State Ysursa:

An initiative petition was filed with your office on December 19, 2005. 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 timeframe 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 that may affect the legality of the initiative. This office offers no opinion with regard to the policy issues raised by this proposed initiative.

BALLOT TITLES

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 ballot titles, if petitioners wish to propose language with these standards in mind, we recommend that they do so. Their proposed language will be considered in our preparation of the ballot titles.

MATTERS OF SUBSTANTIVE IMPORT

The proposed initiative seeks to amend two code sections of the Idaho Open Meeting Law: Idaho Code §§ 67-2342 and 67-2347. With

respect to the proposed change to Idaho Code § 67-2342, the initiative petition states, in relevant part:

> Add to the definition—Any committee, commission; etc. that operates under any public agency, whether it receives funding from said agency or not is subject to the open meeting law.

This language would be better put into a legislative format. In other words, the petitioners might wish to consider restating Idaho Code § 67-2342(1) and showing precisely how the initiative would change that subsection. If any language is to be removed from that subsection, it should be shown as stricken, and added language should be shown as underscored.

As an alternative to amending Idaho Code § 67-2342, the petitioners should amend Idaho Code § 67-2341(4) or Idaho Code § 67-2341(5). The changes the petitioners are proposing better fit in the context of Idaho Code § 67-2341.

Notwithstanding the above concerns, the petitioners might wish to consider additional language to make the definition they intend more precise. For instance, a more precise description than "[a]ny committee, commission; etc." should be considered to provide some level of clarity and notice to those entities that are covered by the proposed initiative, should the initiative become law. The lack of this clarity could affect the ability to enforce the proposed code section, as members of such "committee, commission; etc" might argue that they did not have notice that they were covered by the law.

The proposed changes to Idaho Code § 67-2347(1) should, likewise, be put into a legislative format in which the petitioners set forth that subsection in its entirety and show which words are being deleted and which words are being added by the proposed initiative. By following such practice, the petitioners will ensure that the initiative petition that is being signed and the initiative that is being voted upon will be the law placed into the Idaho Code, should this initiative make it onto the ballot and be passed into law. Failure to do so means that, should the initiative pass, codifiers, or perhaps the legislature, may be called upon to put the language of the proposed initiative into a legislative or code format.

The petitioners propose changes to Idaho Code § 67-2347(1). This code section does not appear to be the code section the petitioners meant to cite. The "fine" provision of Idaho Code § 67-2347 is found in subsection 2, not in subsection 1. Therefore, the amendment to Idaho law should be an amendment to Idaho Code § 67-2347(2) and not to Idaho Code § 67-2347(1).

There is a more significant potential problem with the changes proposed to Idaho Code § 67-2347, and that has to do with the nature of the penalty proposed. At present, Idaho Code § 67-2347(2) provides for a monetary civil fine of not more than $150 on any member of a governing body who participates in a meeting in violation of the Open Meeting Law. Subsequent violations are penalized in an amount not to exceed $300.

Petitioners, through this initiative, are seeking to increase the amount of the penalty. Under the proposed initiative petition, the penalty would be a minimum of $500 for the first violation and $1,000 for any subsequent violation. There is no maximum fine or penalty. These penalties would be against the individual members of the governing body. The potential exists that these provisions might cause a court to construe the penalty provisions of this act to be criminal in nature rather than civil. Enforcement might then be governed by the criminal law, and members of governing bodies accused of violating the provisions of the Open Meeting Law might be entitled to all of the protection afforded them under the state and federal constitutions and rules of criminal procedure. Since the present statute does not state that Open Meeting Law violations are criminal in nature, and since the initiative does not include a maximum penalty, a court potentially could even strike down the very penalty provisions the petitioners are proposing.

The petitioners may wish to review Idaho Code § 34-1801A and use it to draft their petition so that it is substantially in the form prescribed by law. This statute prescribes the form that an initiative petition must substantially follow. The form contains a warning that it is a felony for anyone to knowingly sign the petition more than once or just once if the signor is not a qualified elector. There is a section titled "INITIATIVE PETITION" that includes a demand from the petitioners that their proposed law be submitted to voters at a regular general election and a certification of petitioners' status as qualified electors. Petitioners have not included these items in their petition.

CERTIFICATION

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 the petitioner via a copy of this certificate of review, deposited in the U.S. Mail, to L. Roger Falen, 516 N. Laurel, Genesee, Idaho 83832.

Sincerely,

LAWRENCE G. WASDEN
Attorney General

Analysis by:

WILLIAM A. VON TAGEN
Deputy Attorney General

March 3, 2006

The Honorable Ben Ysursa
Idaho Secretary of State
HAND DELIVERED

Re: Certificate of Review
Proposed Initiative Relating to the Removal of Wolves from Idaho

Dear Secretary of State Ysursa:

An initiative petition was filed with your office on February 9, 2006. 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 following 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, this office will prepare short and long ballot titles. The ballot titles must 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, they are encouraged to do so. Any proposed language will be considered carefully.

MATTERS OF SUBSTANTIVE IMPORT

I. ESA Background

Before discussing the text of the proposed initiative and the substantive issues attendant to its provisions, a brief summary of the status of the gray wolf (*Canus lupus*) under the Endangered Species Act (ESA), 16 U.S.C. §§ 1531-1544, within Idaho helps place the proposal in legal context. The gray wolf is listed currently as endangered under the ESA in the contiguous 48 states except Minnesota, where it is listed as threatened. 43 Fed. Reg. 9607 (1978); *see also,* Defenders of Wildlife v. Secretary, 354 F. Supp. 2d 1156 (D. Or. 2005) (invalidating rule, 68 Fed. Reg. 15,804 (2003), reclassifying entire species to threatened status). In 1994, however, the Secretary of the Department of the Interior, through the United States Fish and Wildlife Service (FWS), exercised his authority under ESA section 10(j), 16 U.S.C. § 1539(j), to establish a "nonessential experimental population" (NEP) in portions of three states—Idaho, Montana and Wyoming—by the reintroduction of gray wolves imported from Canada. 59 Fed. Reg. 60,252 (1994).[1] The principal NEP locus in Idaho is referred to commonly as the central Idaho area and is bounded on the north by Interstate Highway 90, on the east by Interstate Highway 15, and on the west and south by the state line. Another portion of the state east of Interstate Highway 15 is located in the "Greater Yellowstone" NEP area that also encompasses portions of Montana and Wyoming.

The FWS introduced 35 wolves from Canada into the central Idaho area during 1995 and 1996. 70 Fed. Reg. 1286, 1287 (2006). Over the intervening period, the wolf population has increased significantly in the region and is estimated now by IDFG at 500-600 animals in 61 packs with 36 verified breeding pairs. IDFG, Idaho Wolf Management, available at http://fishandgame.idaho.gov/cms/wildlife/wolves (last visited February 14, 2006); *see also,* 71 Fed. Reg. 6634, 6636 (2005) (FWS estimate of 422 animals and 27 breeding pairs as of 2004). The Idaho population and those populations in the two other NEP areas have exceeded since 2002 the recovery goal set by FWS of at least 30 breeding pairs distributed among the areas—*i.e.,* at least ten pairs per state—over a consecutive three-year period. 70 Fed. Reg. at 1288.

Aside from satisfying this recovery metric, the 1994 experimental population rule also included as a condition for delisting the existence of adequate state "protective legal mechanisms" to maintain the wolf populations in the three states after loss of ESA protection. In response to that requirement, the 2002 Idaho Legislature approved by concurrent resolution the Idaho Wolf

Conservation and Management Plan (Wolf Plan). Although the Wolf Plan reiterated the state's formal position that all wolves should be removed from Idaho by the federal government, it also recognized the need "to use every available option to mitigate the severe impacts on the residents of the State of Idaho" from the wolves' presence and thus provided that "the state will seek delisting and manage wolves at recovery levels that will ensure viable, self-sustaining populations." Idaho Wolf Management and Conservation Plan 4 (2002). The FWS approved the Idaho Wolf Plan in 2004. Montana also has an approved plan, but Wyoming does not. 71 Fed. Reg. at 6652-55; *see also,* Wyoming v. USDOI, 360 F. Supp. 2d 1214 (D. Wyo. 2005) (rejecting challenge to FWS refusal to approve Wyoming wolf management plan).

In January 2005, the Department of the Interior (the "Department") issued a revised section 10(j) rule for the NEP populations that, in part, loosened "take" restrictions and authorized transfer of regulatory responsibility to Idaho, Montana and Wyoming conditioned upon federal approval of the particular state's wolf management plan and entry into a memorandum of agreement (MOA). 70 Fed. Reg. 1286, 1299-80 (2005). The requisite MOA between Idaho and the Department was executed in January 2006. The revised section 10(j) rule therefore applies to the central Idaho NEP region.

Finally, FWS published an advanced notice of proposed rulemaking in February 2006, announcing its intention to delist wolves in the Northern Rocky Mountain area, which includes the entirety of the three states and portions of Oregon, Washington and Utah. 71 Fed. Reg. at 6639 (Fig. 2). Delisting is conditioned upon Wyoming's adoption of a wolf management plan consistent with FWS requirements. *Id.* at 6658 ("on the basis of the best scientific and commercial information available, we believe that the gray wolf in the NRM DPS would no longer qualify for protection under the ESA, if Wyoming modified its State wolf law and State wolf management plan in a manner that the Service would approve as an adequate regulatory mechanism").

II. The Proposed Initiative

The proposal is captioned "An Initiative Relating to the Removal of Wolves From Idaho" and, in addition to prefatory "Whereas" clauses, contains nine sections. Sections 1 through 3 amend, respectively, Idaho Code §§ 36-103, 36-201 and 36-712(a). Sections 4 and 5 repeal, respectively, Idaho

Code §§ 36-714(2) and 36-715. Section 6 substantially revises through amendment chapter 24 of title 36. Sections 7 and 8 repeal, respectively, Idaho Code §§ 67-818 and 67-819, while section 9 rescinds the concurrent resolution approving the Wolf Plan. Our review indicates that (1) the proposal's caption is potentially misleading and (2) there are significant constitutional questions raised by the initiative under article III, sections 16 and 18. This office also recommends the inclusion of underscoring and strikeouts to indicate new and repealed language that are not required as a matter of law but may be helpful to the public in determining whether to support the initiative.

A. The Petition's Caption

The caption suggests that the initiative, if adopted, will "remove" wolves from Idaho. As discussed above, however, rescission of the Wolf Plan will place Idaho in the same position as Wyoming now occupies and not only will preclude delisting but also will reinstate the 1994 section 10(j) rule with its more stringent "take" limitations. Neither of those outcomes will effect removal of reintroduced or any other wolves from this state. Rescission of the Wolf Plan instead will result in greater federal control over the species in Idaho. In this regard, it must be emphasized that, by virtue of actions taken pursuant to section 10(j), wolves exist here and that, insofar as they are listed as threatened or endangered under the ESA, are not subject to a "take"—a term which includes any form of harassment or capture. *See* 16 U.S.C. § 1532(19) ("[t]he term 'take' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct"). Wolves, in short, cannot be "removed" from Idaho by actions taken pursuant to state law. Absent a change in federal statute or implementing regulations, the wolf populations will remain, with the only questions being which governmental entity is responsible for their management and what regulatory measures will be employed to ensure their continued recovery. *See, e.g.,* 70 Fed. Reg. at 1289 ("[b]ecause the [wolf] population inhabits parts of Montana, Idaho, and Wyoming, all three States must have adequate regulatory mechanisms to reasonably ensure their share of the population will remain recovered before the Service can propose it be delisted").

The caption is additionally confusing to the extent that it suggests the petition is limited to wolf removal. As discussed below, the initiative also would abolish the Office of Species Conservation (OSC).

This office offers no view on how those questions should be answered as a policy matter. The initiative sponsors nonetheless may wish to consider rephrasing the caption.

B. Unity of Subject

It is settled that the "power of legislation, reclaimed by the people through the medium of [article III, section 1], did not give any more force or effect to initiative legislation than to legislative acts but placed them on an equal footing." Luker v. Curtis, 64 Idaho 703, 706, 36 P.2d 978, 979 (1943); *accord* State v. Finch, 79 Idaho 275, 280, 315 P.2d 529, 530 (1957). Consequently, the constitutionality of voter-approved initiatives is determined "by the same standards as . . . if the legislature had enacted it." Simpson v. Cenarrusa, 130 Idaho 609, 611, 944 P.2d 1372, 1374 (1997).

Article III, section 16 of the Idaho Constitution contains one of those "standards" and provides in part that "[e]very act shall embrace but one subject and matters properly connected therewith." The Idaho Supreme Court has held that "if the provisions of an act all relate directly or indirectly to the same subject, having a natural connection therewith, and are not foreign to the subject expressed in the title, they may be united in one act." Boise City v. Baxter, 41 Idaho 368, 376, 238 P. 1029, 1032 (1925); *accord* Cole v. Fruitland Canning Ass'n, 64 Idaho 505, 511, 134 P.2d 603, 605 (1945). Inherent in this requirement is the need for the statute to "disclose, either by express declaration or by clear intendment, or at least portend the common object in order that it may be determined whether all parts are congruous and mutually supporting, and reasonably designed to accomplish the common aim." AFL v. Langley, 66 Idaho 763, 768, 168 P.2d 831, 833 (1946).

Here, the proposed initiative's subject matter is wolf removal. This purpose is disclosed perhaps most plainly in the initiative's caption and its "Whereas" clauses that focus exclusively on the reintroduction of wolves by the FWS, the negative effect of such action, and need for wolf recovery efforts to be terminated. Sections 1 through 5 of the initiative respond specifically to the removal issue insofar as they (1) direct the Idaho Department of Fish and Game (IDFG) to remove reintroduced wolves "at such time and to the extent allowed by law" from Idaho and treat all other wolves as "unprotected predatory wildlife[;]" (2) add wolves generally to the list of unprotect-

ed wildlife; (3) make a technical change to a provision that requires reporting wolves born or held in captivity; (4) repeal exceptions from the obligation to compensate for damage done by wolves escaping from captivity; and (5) repeal a provision related to the duties of OSC and IDFG with respect to the transition of wolf management from federal to state control. Section 9 rescinds legislative approval of the Wolf Plan. Sections 6 through 8, however, address issues related generally to species conservation by substantially amending chapter 24 of title 36 and repealing statutes creating OSC and specifying its authority.

A quite substantial issue exists over whether the proposed initiative violates the unity of subject mandate in article III, section 16. The OSC's responsibilities extend to all matters of species conservation, and not simply conservation activities related to wolves. Twenty-three species of mammals, birds, fish, invertebrates and plants listed under the ESA exist in Idaho, and during fiscal year 2005 OSC received $17.67 million in funds for its conservation-related activities, with only $2.4 million-—or 13.6 percent—for wolf matters. During 2005, for example, the agency petitioned FWS to delist the Idaho springsnail; provided data to FWS to support delisting bull trout in Idaho; developed candidate conservation plans for slickspot peppergrass and sage grouse; assisted in completion of the Clearwater-Salmon forestry agreement; and administered Pacific Coastal Salmon Recovery Funds through project solicitation, review and funding; and prepared to take a lead role in administering the Northwest Power and Conservation Council's 2006-09 Fish and Wildlife Mitigation Program in this state. The provisions related to OSC's elimination could well be determined in a judicial challenge to be unrelated to whether wolves should be removed from Idaho. Moreover, a voter's support of wolf removal entails consideration of factors quite arguably distinct from those that inform a decision concerning whether an agency generally responsible for species conservation matters should be abolished. *Cf.* Keenan v. Price, 68 Idaho 423, 451, 195 P.2d 662, 679 (1948) ("if the thing or things proposed can be divided into questions distinct and independent so that any one of them can be adopted without in any way being controlled, modified, or qualified by the other, then there are as many [constitutional] amendments [requiring separate ballot measures] as there are distinct and independent questions or subjects") (emphasis and some parenthetical marks deleted). This office recommends that the proposed initiative's sponsors con-

sider either deleting Sections 6 through 8 or pursuing the wolf-removal and OSC-elimination issues through separate petitions.

C. Full Text of Sections Amended

Article III, section 18 prohibits any act for being "revised or amended by mere reference to its title, but the section as amended shall be set forth and published at full length." *See* Golconda Lead Mines v. Neill, 82 Idaho 96, 99-101, 350 P.2d 221, 222-23 (1960). We therefore recommend that the full text of Idaho Code §§ 36-103, 36-201, 36-712 and title 36, chapter 24, be reproduced in the proposed initiative, with amendments indicated appropriately by underscoring for additions and strikeouts for deletions. These underscoring and strikeouts, while not required constitutionally, may facilitate informed decision-making with respect to whether to sign the petition.

D. Miscellaneous

The sponsor's attorney has suggested a change to the proposed initiative as filed: The word "and" should replace the second "to" in the sixth "Whereas" clause. This review has been conducted with that modification considered. He suggested two other modifications, but they had been made in the proposed petition as filed and thus were considered.

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 Ron Gillett by deposit in the U.S. Mail of a copy of this certificate of review.

Sincerely,

LAWRENCE G. WASDEN
Attorney General

Analysis by:

CLAY R. SMITH
Deputy Attorney General

[1] Section 10(j) was added to the ESA in 1982. It authorizes the Secretary to establish NEPs that expand the range of listed species, thereby promoting recovery objectives, but to do so pursuant to rules designed to "'mitigate industry's fears [that] experimental populations would halt development projects, and, with the clarification of the legal responsibilities incumbent with experimental populations, actually encourage private parties to host such populations on their lands.'" Wyoming Farm Bureau Fed'n v. Babbitt, 199 F.3d 1224, 1232 (10th Cir. 2000) (quoting H.R. Rep. No. 97-567, at 8 (1982)); *see also,* McKittrick v. United States, 142 F.3d 1170, 1174 (9th Cir. 1998) ("[E]ach experimental population has its own set of special rules so that the Secretary has more managerial discretion. . . . This flexibility allows the Secretary to better conserve and recover endangered species").

March 9, 2006

The Honorable Ben Ysursa
Idaho Secretary of State
HAND DELIVERED

Re: Certificate of Review
Proposed Initiative Relating to the Removal of Wolves from Idaho

Dear Secretary of State Ysursa:

A proposed initiative petition was filed with your office on March 7, 2006. Pursuant to Idaho Code § 34-1809, this office has reviewed the proposal 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 proposed initiative, 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 following 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 that may affect the legality of the proposed 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, this office will prepare short and long ballot titles. The ballot titles must 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, they are encouraged to do so. Any proposed language will be considered carefully.

MATTERS OF SUBSTANTIVE IMPORT

I. The Proposed Initiative

The proposal is captioned "An Initiative Relating to Idaho Policy and Law Regarding the Removal of Wolves From Idaho." It effectively supersedes a proposed initiative that was filed with your office on February 9, 2006, and was the subject of a Certificate of Review dated March 3, 2006. The petition's sponsors adopted some, but not all, of the recommendations in the earlier certificate. The newly filed petition contains eight sections. Sections 1 through 3 amend, respectively, Idaho Code §§ 36-103(a), 36-201, and 36-712(a). Sections 4 and 5 repeal, respectively, Idaho Code §§ 36-714(2) and 36-715. Sections 6 and 7 add two sections to the Idaho Code. Section 8 rescinds a concurrent legislative resolution amending and approving the Idaho Wolf Conservation and Management Plan.

II. Unity of Subject

The Certificate of Review directed to the prior wolf initiative expressed concern over the compliance with article III, section 16. The current petition addressed that concern by limiting its scope of matters directly related to wolf management. A single subject therefore is involved.

III. Full Text of Sections Amended

Article III, section 18, prohibits any act for being "revised or amended by mere reference to its title, but the section as amended shall be set forth and published at full length." *See* Golconda Lead Mines v. Neill, 82 Idaho 96, 99-101, 350 P.2d 221, 222-23 (1960). The Certificate of Review directed to the earlier petition recommended that the full text of, *inter alia*, Idaho Code §§ 36-103 and 36-712 be reproduced in the initiative, with amendments indicated appropriately by underscoring for additions and strikeouts for deletions. The underscoring and strikeouts, while not required constitutionally, were suggested to facilitate informed decision-making with respect to whether to sign the petition. The present petition again includes only those subsections of §§ 36-103 and 36-712 proposed to be amended. We construe the term "section" in article III, section 18, literally and thus repeat the recommenda-

tion that the full text of the latter two sections be set out in full. Finally, because the amendments in Sections 6 and 7 of the proposed initiative add new sections and do not modify existing ones, article III, section 18's full text requirement is inapplicable.

CONCLUSION

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

Sincerely,

LAWRENCE G. WASDEN
Attorney General

Analysis by:

CLAY R. SMITH
Deputy Attorney General

March 28, 2006

The Honorable Ben Ysursa
Idaho Secretary of State
HAND DELIVERED

Re: Certificate of Review
Proposed Initiative Relating to Eminent Domain
and Regulatory Takings

Dear Secretary of State Ysursa:

An initiative petition was submitted to your office on February 28, 2006. 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 following 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 that 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, this office will prepare short and long ballot titles. The ballot titles must 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, they are encouraged to do so. Any proposed language will be considered carefully.

MATTERS OF SUBSTANTIVE IMPORT

The submitted initiative seeks to amend Idaho Code §§ 7-701, 7-701A, 67-8002, and 67-8003. Chapter 7 of title 7 of Idaho Code addresses eminent domain. Chapter 80 of title 67 addresses regulatory takings.

A. Amendments Should Be Printed in Full

Article III, section 18 of the Idaho Constitution prohibits any act from being "revised or amended by mere reference to its title, but the section as amended shall be set forth and published at full length." *See* Golconda Lead Mines v. Neill, 82 Idaho 96, 99-101, 350 P.2d 221, 222-23 (1960). We therefore recommend that the full text of Idaho Code §§ 7-701, 7-701A, 67-8002, and 67-8003 be reproduced in the proposed initiative, with amendments indicated appropriately by underscoring for additions and strikeouts for deletions. These underscoring and strikeouts, while not required constitutionally, may facilitate informed decision-making with respect to whether to sign the petition. After consultation with the petitioner, a draft containing the underlining was provided to this office. It is recommended that the underlined draft be used for circulation and collection of signatures in order to facilitate informed decision-making.

B. Unity of Subject

Article III, section 16 of the Idaho Constitution provides in part that "[e]very act shall embrace but one subject and matters properly connected therewith." The Idaho Supreme Court has held that "if the provisions of an act all relate directly or indirectly to the same subject, having a natural connection therewith, and are not foreign to the subject expressed in the title, they may be united in one act." Boise City v. Baxter, 41 Idaho 368, 376, 238 P. 1029, 1032 (1925); *accord*, Cole v. Fruitland Canning Ass'n, 64 Idaho 505, 511, 134 P.2d 603, 605 (1945). Inherent in this requirement is the need for the statute to "disclose, either by express declaration or by clear intendment, or at least portend the common object in order that it may be determined whether all parts are congruous and mutually supporting, and reasonably designed to accomplish the common aim." AFL v. Langley, 66 Idaho 763, 768, 168 P.2d 831, 833 (1946).

A question may be raised as to whether eminent domain and regulatory takings are rationally related to one another. Article 1, section 14 of the Idaho Constitution provides that private property may be taken for a public use. This section of the Idaho Constitution is self-executing, leaving to the legislature only the task of providing the procedure for implementation. Blackwell Lumber Co. v. Empire Mill Co., 28 Idaho 556, 568, 155 P. 680, 684 (1916). Idaho Code § 7-704 requires that any taking for a public use be necessary. Regulatory takings are defined by Idaho Code § 67-8002(4), which "means a regulatory or administrative action resulting in deprivation of private property that is the subject of such action, whether such deprivation is total or partial, permanent or temporary, in violation of the state or federal constitution." These topics could arguably be connected to one another by classifying both as takings of property—eminent domain is a complete taking, while regulatory takings are a partial taking of property.

A court could find that these issues are either directly or indirectly connected to one another. This office cannot predict, with certainty, whether a court would permit these topics to be linked in a challenge or whether this presents a constitutional technicality.

C. Initiated Legislation and Bicameral Legislation Share "Equal Footing"

It is settled that the "power of legislation, reclaimed by the people through the medium of [article III, section 1], did not give any more force or effect to initiative legislation than to legislative acts but placed them on an equal footing." Luker v. Curtis, 64 Idaho 703, 706, 36 P.2d 978, 979 (1943); *accord*, State v. Finch, 79 Idaho 275, 280, 315 P.2d 529, 530 (1957). Consequently, the constitutionality of a voter-approved initiative is determined "by the same standards as . . . if the legislature had enacted it." Simpson v. Cenarrusa, 130 Idaho 609, 611, 944 P.2d 1372, 1374 (1997).

D. The Initiative May Require Reconciliation With Laws Taking Effect July 1, 2006

The initiative as proposed makes amendments to Idaho statutes. Since statutes can be amended by initiative, this initiative appears to address topics well within the province of the initiative power. Other than the constitutional issues presented above, there are a couple of minor points to consider with the proposed initiative:

1. H555 Creates a New Section

Recently, House Bill 555 ("H555") was signed into law, creating a new Idaho Code § 7-701A, which will go into effect on July 1, 2006. The proposed initiative also creates a new Idaho Code § 7-701A. These provisions will have to be reconciled in some way, likely by the Idaho Code Commission. Additionally, the initiative appears to have used some of the same language as that used in H555 in its proposed Idaho Code § 7-701(12). If this initiative is enacted, these provisions will also likely need to be reconciled with one another, keeping in mind that the statute enacted later in time generally controls.

2. Confusion May Result

Within the proposed Idaho Code § 67-8003(6)(c), the initiative proposes to exempt land use law regulations that were enacted prior to the effective date of the law from its application. This could create confusion because no parameters defining what is meant by "enacted prior to the effective date" have been set forth. For example, if a land use law is amended, does the entire law become applicable or just the amendment? Would this result in a measuring by the court of the substantiveness of the amendment for applicability of this section? This has a strong likelihood of resulting in a significant amount of litigation to fully define the boundaries of this proposed statute. Although this is a policy question for the voters, it has significant legal ramifications that warrant its mention.

I HEREBY CERTIFY that the enclosed measure has been reviewed for form, style, and matters of substantive import and that the recommenda-

tions set forth above have been communicated to petitioner Laird Maxwell 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

November 16, 2006

The Honorable Ben Ysursa
Idaho Secretary of State
HAND DELIVERED

Re: Certificate of Review
Proposed Initiative Relating to Wolf Regulation in Idaho

Dear Secretary of State Ysursa:

An initiative petition was filed with your office on November 6, 2006. Pursuant to Idaho Code § 34-1809, this office has reviewed the petition and prepared the following advisory comments. Given the strict statutory timeframe in which this office must respond and the complexity of the legal issues raised in this petition, the 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 one recommendation below is "advisory only." The petitioner is free to "accept or reject [it] in whole or in part." The opinions expressed in this review are only those that 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 measure within the 15 working-day period specified in Idaho Code § 34-1809, this office will prepare short and long ballot titles. The ballot titles must 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, they are encouraged to do so. Any proposed language will be considered carefully.

MATTERS OF SUBSTANTIVE IMPORT

I. The Proposed Initiative

The proposal is captioned "An Initiative Relating to Wolf Regulation in Idaho" and is the third such proposal filed with your office during 2006. It

is substantively identical to an initiative that was the subject of a certificate of review dated March 9, 2006. Insufficient signatures were gathered to qualify that initiative for the November 7, 2006, ballot. This initiative, if requisite qualified signatures are gathered, will be included on the ballot for the November 4, 2008, general election. The relevant federal statutory and regulatory background was summarized in my certificate of review dated March 3, 2006, which was directed to the initial wolf regulation petition filed on February 9, 2006, and will not be repeated.

The present petition contains nine sections. Sections 1 through 3 amend, respectively, Idaho Code §§ 36-103(a), 36-201 and 36-712(a). Sections 4 and 5 repeal, respectively, Idaho Code §§ 36-714(2) and 36-715. Section 6 amends certain definitions in Idaho Code § 36-2401 to exclude wolves, while Section 7 adds a new provision making chapter 36, title 24 inapplicable to wolves. Section 8 adds a new section to chapter 67, title 8 excluding wolves from the "jurisdiction" of the Office of Species Conservation. Section 9 rescinds a concurrent legislative resolution amending and approving the Idaho Wolf Conservation and Management Plan.

II. Unity of Subject

All substantive aspects of the proposed initiative relate to the regulation of wolves in Idaho. A single subject is involved.

III. Full Text of Sections Amended

Article III, section 18 prohibits any act for being "revised or amended by mere reference to its title, but the section as amended shall be set forth and published at full length." *See* Golconda Lead Mines v. Neill, 82 Idaho 96, 99-101, 350 P.2d 221, 222-23 (1960). The proposed initiative complies with this requirement. A typographical error, however, appears in Section 3 which improperly quotes the section being amended as "36-712(a)" and not "36-712." This typographical error should be addressed in the measure, if any, submitted to your office following issuance of this certificate of review.

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 Ron Gillett by deposit in the U.S. Mail of a copy of this certificate of review.

Sincerely,

LAWRENCE G. WASDEN
Attorney General

Analysis by:

CLAY R. SMITH
Deputy Attorney General

Topic Index

and

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