

**IDAHO
ATTORNEY
GENERAL'S
ANNUAL REPORT**

OPINIONS

**SELECTED INFORMAL
GUIDELINES**

CERTIFICATES OF REVIEW

AND

**SELECTED ADVISORY
LETTERS**

FOR THE YEAR

2007

Lawrence G. Wasden
Attorney General

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Similarly, the Informal Guideline of May 1, 2007
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2007 Idaho Att’y Gen. Ann. Rpt. 29

Similarly, the Certificate of Review of February 13, 2007
is found at:
2007 Idaho Att’y Gen. Ann. Rpt. 45

The Advisory Letter of January 24, 2007
is found at:
2007 Idaho Att’y Gen. Ann. Rpt. 59

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ATTORNEYS GENERAL OF IDAHO

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



Lawrence G. Wasden
Attorney General

INTRODUCTION

Dear Fellow Idahoan:

Thank you for your interest in the annual report for the Office of the Attorney General. The year 2007 was both challenging and successful, as the Office continued to represent the best legal interests of the State of Idaho.

The State's longest running case – the Jeff D. case, ongoing for the past 26 years – came 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 State proved that it complied with all but a handful of about 250 specific action items. Plaintiffs have appealed to the Ninth Circuit Court, but the State, for the first time in more than 25 years, can now administer the children's mental health system without federal court oversight.

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. The Special Prosecutions Unit handled 147 cases from 22 counties, at the request of county prosecutors or county commissioners. This represents an increase of almost 50% over prior years. These included 27 cases of violent crimes and 9 public corruption cases. We have been successful in these prosecutions, and have worked very hard to ensure Idaho's citizens have a government in which they can place their trust.

Our Consumer Protection Division recovered \$660,000 for Idaho consumers and taxpayers. This Division also collected \$1.7 million 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 more than \$1 million to the General Fund.

In order to protect children from the dangers on the Internet, my Office has distributed over 100,000 ProtecTeens CDs. Also, Idaho was one of 45 states that recently reached an agreement with MySpace to place significant limitations on its website to protect children from pornography and sex offenders. We have also received a grant from the United States Department of Justice to create an Idaho Internet Crimes Against Children Task Force.

Our Intergovernmental and Fiscal Law Division handled 268 requests from legislators during the Legislative Session, providing them a written opinion, generally within 48 hours. Certain of those legislative requests are included in this volume for your reference.

As in past years, I encourage you to visit the Office of the Attorney General's website at <http://www.ag.idaho.gov> where you will find details about us, along with copies of all of our publications.

Thank you for your support.

A handwritten signature in black ink, appearing to read 'L. Wasden', written in a cursive style.

LAWRENCE G. WASDEN
Attorney General

ANNUAL REPORT OF THE ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL LAWRENCE G. WASDEN ATTORNEY GENERAL 2007 STAFF ROSTER

ADMINISTRATION

Sherman F. Furey III Chief Deputy	Brian Kane Assistant Chief Deputy	Janet Carter Executive Assistant	DeLayne Deck Secretary/Receptionist
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DIVISION CHIEFS

Tara Orr, Administration & Budget	Stephen Bywater, Criminal Law
Steven Olsen, Civil Litigation	Jeanne Goodenough, Human Services
Brett DeLange, Consumer Protection	William vonTagen, Intergovernmental & Fiscal Law
S. Kay Christensen, Contracts & Administrative Law	Clive Strong, Natural Resources

DEPUTY ATTORNEYS GENERAL

Willard Abbott	Scot Campbell	Harriet Hensley	Joseph Mallet	Clay Smith
Lawrence Allen	James Carlson	Jane Hochberg	Kendal McDevitt	Theodore Spangler
Stephanie Altig	Corey Cartwright	John Homan	John McKinney	Nicholas Spencer
Stephanie Ammirati	Jeremy Chou	Krista Howard	Michael McPeck	Marcy Spilker
LaMont Anderson	Doug Conde	Donald Howell	Kathleen McRoberts	David Stanish
James Baird	Alan Conilogue	Blair Jaynes	Cheryl Meade	Dan Steckel
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Cheri Bush		Emily Mac Master		David Young

INVESTIGATORS

Michael Dillon, Chief	Scott Birch	Jim Kouril	Tawni Limesand	Scott Smith
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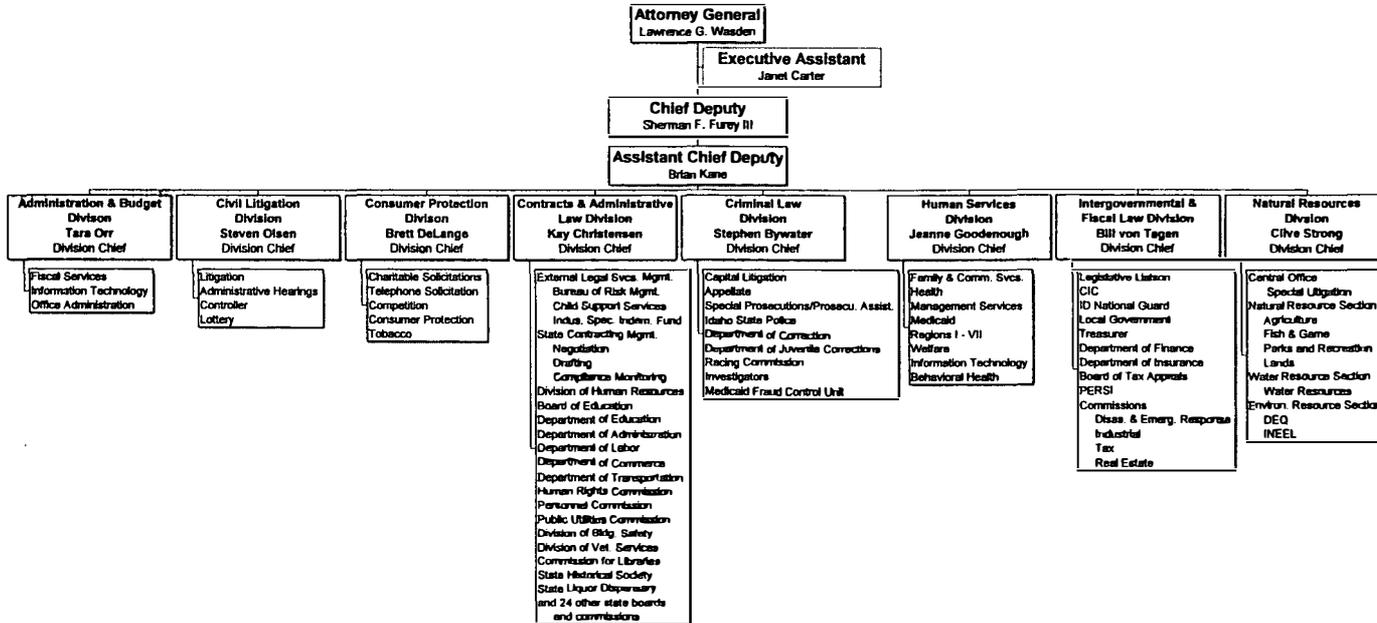
PARALEGALS

Rachel Balcerzak	Debbi Judd	Bernice Myles	Beccie Stange
Kathie Brack	Vicki Kelly	Lori Peel	Tammy Swanson
Suzu Cooley-Denney	Marlene Klein	Renea Ridgeway	Ray Williams
Becky Harvey	Sandra McCue	Jean Rosenthal	Paula Wilson

NON-LEGAL PERSONNEL

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Deon Ayala	Jodi Darling	Cecil Jones	Roseann Newman	Jodie Stoddard
Sherrie Bengtson	Deborah Forgy	Gerry Karpavich	Frances Nix	Lonny Tutko
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Malora Castle	Trudy Jackson	Lynn Mize	Dondalee Southern	

**Office of the Idaho Attorney General
Organizational Chart - 2007**



**OFFICIAL OPINIONS
OF
THE ATTORNEY GENERAL
FOR THE YEAR 2007**

**LAWRENCE G. WARDEN
ATTORNEY GENERAL
STATE OF IDAHO**

ATTORNEY GENERAL OPINION NO. 07-1

To: George Bacon, Director
Idaho Department of Lands
STATEHOUSE MAIL

Per Request for Attorney General's Opinion

INTRODUCTION

At the March 13, 2007, meeting of the State Board of Land Commissioners ("Board"), a formal Attorney General's opinion was requested regarding the legal basis for the Board's practice of requiring a 25-foot public easement in exchange for a disclaimer of the State's ownership of formerly submerged lands.

QUESTIONS PRESENTED

You ask the following questions:

1. What is the Board's role with respect to management of submerged lands?
2. What are the legal principles that establish the State's interest to lands adjacent to navigable streams?
3. What is the legal basis for the Board's long-standing practice of requiring the exchange of a 25-foot public use easement for the grant of a disclaimer of the State's interest to formerly submerged lands?
4. Does the exchange of a 25-foot public use easement for the grant of a disclaimer of the State's interest to formerly submerged lands constitute a taking of private property for a public purpose?

CONCLUSIONS

1. The State of Idaho received title to the submerged lands underlying navigable water bodies below the ordinary high water mark ("OHWM") under the Equal Footing Doctrine upon statehood.

Submerged lands are held in trust by the State for the benefit of the public. The Board was statutorily designated as the trustee of submerged lands within Idaho.

2. The legal principles of accretion, reliction and avulsion govern the ownership of submerged and formerly submerged lands below and adjacent to navigable waterways.
3. The legal basis for the Board's long-standing practice of requiring the exchange of a 25-foot public use easement for the grant of a disclaimer of the State's interest in formerly submerged lands is in the nature of the settlement of a private boundary dispute based upon competing proprietary claims.
4. The exchange of a 25-foot public use easement for the grant of a disclaimer of the State's interest in formerly submerged lands does not constitute a taking of private property for a public purpose without just compensation because the easement represents valuable consideration for the State's relinquishment of its claim to ownership of the parcel of land in dispute.

ANALYSIS

A. Under the Public Trust Doctrine, the Board Serves as a Trustee With a Fiduciary Responsibility to Assure Public Access to the Beds and Banks of Navigable Waterways

Under the Equal Footing Doctrine¹, the State obtained title to the beds and banks of navigable water bodies upon its admission into the Union in 1890. The power to direct, control and dispose of submerged lands is vested in the Board pursuant to Idaho Code § 58-104(9). The State's ownership and the Board's management responsibilities are not without limitation. In Kootenai Environmental Alliance v. Panhandle Yacht Club, 105 Idaho 622, 671 P.2d 1085 (1983) ("KEA"), the Idaho Supreme Court ruled that Idaho's submerged lands are subject to the common law Public Trust Doctrine. In KEA, the Idaho Supreme Court reviewed the common law history of the Public Trust Doctrine and its application in various other jurisdictions to synthesize the parameters of the Public Trust Doctrine to be applied in Idaho.

The Public Trust Doctrine requires that the State, through the Board, hold title to the beds and banks of navigable water bodies below the OHWM for the use and benefit of the public. 105 Idaho at 625, 671 P.2d at 1088. The beneficial uses reserved to the public historically included navigation, commerce and fishing. *Id.* More recently, courts have recognized a broader range of public uses including public recreational activities such as fishing, hunting and swimming. *Id.*² Courts have recognized that the public trust is dynamic and can expand with the development and recognition of new public uses. *Id.*

The core element of the State's public trust responsibility is that, as trustee on behalf of the public, the State may not abdicate its responsibility for submerged lands in favor of private parties. *Id.* Nor can the Board dispose of public trust lands unless explicitly authorized by the Legislature. Under the Lake Protection Act, title 58, chapter 13, Idaho Code, the Board is limited to approving encroachments or issuing leases on the submerged lands of navigable lakes consistent with the Public Trust Doctrine. However, such encroachments must be in aid of commerce, navigation and recreation and must not substantially impair the public interest in the remaining submerged lands and waters. 105 Idaho at 626, 671 P.2d at 1089.

From Massachusetts, Wisconsin and California, the Idaho Supreme Court fashioned the remaining factors for determining whether the alienation of state-owned submerged lands violates the Public Trust Doctrine. From Massachusetts jurisprudence, the Idaho Supreme Court chose the following requirement:

[P]ublic trust resources may only be alienated or impaired through open and visible actions, where the public is *in fact* informed of the proposed action and has substantial opportunity to respond to the proposed action before a final decision is made thereon.

105 Idaho at 628, 671 P.2d at 1091.

From Wisconsin jurisprudence, the Idaho Supreme Court established that the final determination whether an alienation or impairment of state-owned submerged lands violates the Public Trust Doctrine will be made by the judiciary. 105 Idaho at 629, 671 P.2d at 1092. In so doing, the court will

not supplant its judgment for that of the State, but will take a “close look” at the State’s action. *Id.* In determining whether the State’s action violates the public trust, the court will weigh the effect of the proposed project on the public trust resources impacted such as navigation, fishing, recreation or commerce. *Id.* The court will also look at the impact of the proposed project along with the cumulative impact of the existing impediments to full use of the public trust resource on the specific public trust resources impacted by the alienation or impairment. 105 Idaho at 629-30, 671 P.2d at 1092-93.

Examining California law, the Idaho Supreme Court determined that the allocation of public trust resources could be subject to future modification based on changed circumstances. The court determined that even where the State has appropriately allocated a public trust resource to a private use, a change in circumstances could change the validity of the allocation of that public trust resource. 105 Idaho at 631, 671 P.2d at 1094. Therefore, the grant of a private use to the State’s submerged lands remains subject to the Public Trust Doctrine. *Id.* The State’s alienation or impairment of the formerly submerged beds and banks must take into account the highly dynamic nature of the boundary lines along navigable rivers and the difficulty of drawing a firm boundary line. The following analysis sets forth the legal and factual complexities inherent in evaluating State ownership of the beds and banks of navigable waterways below the OHWM. These complexities add uncertainty to the Board’s exercise of its fiduciary responsibility as trustee of the public trust.

B. The Ownership of the State’s Public Trust Resources Cannot Easily Be Factually or Legally Ascertained

As previously noted, the State owns the beds and banks of presently or formerly submerged lands that were part of navigable waterways below the OHWM at the time the State was admitted into the Union. Idaho Forest Industries, Inc. v. Hayden Lake Watershed Improvement District, 112 Idaho 512, 733 P.2d 733 (1987) (“IFI”). The location of the OHWM was established by Idaho common law in Raide v. Dollar, 34 Idaho 682, 203 P. 469 (1921). In Dollar, the court determined that:

The high water mark of the river, not subject to tide, is the line which the river impresses on the soil

by covering it for sufficient periods to deprive it of vegetation and to destroy its value for agriculture.

34 Idaho at 689, 203 P. at 471. This standard was subsequently codified at Idaho Code § 58-104(9), which provides in pertinent part:

The term “natural or ordinary high water mark” as herein used shall be defined to be the line which the water impresses on the soil by covering it for sufficient periods to deprive the soil of its vegetation and destroy its value for agricultural purposes.

Thus, determining the State’s ownership is predicated upon the physical location of the line that water impresses on the soil by covering it for sufficient periods to deprive it of vegetation at the time of statehood. Because of man’s modification of river flows and intervening hydrologic events, establishment of the OHWM is highly complex and difficult.

Original government land surveys used meander lines as a surveying technique to determine the approximate acreage of upland lots abutting navigable rivers and lakes. The meander line in a government survey was used because it was virtually impossible to survey the actual OHWM along a river. Meander lines are an approximation of the OHWM along a navigable river. However, the meander line is not intended as either a boundary line or a determination of the OHWM. Smith v. Long, 76 Idaho 265, 281 P.2d 483 (1955).

An owner of riparian property may attempt to prove that the State does not own title to property because it is above the OHWM. In addition, a riparian owner may also attempt to prove that they have acquired ownership of formerly submerged lands under the theory of accretion. Accretion has been defined as the addition of riparian property by the gradual deposit, by water, of solid material causing to become dry land what was previously covered by water. Aldape v. Akins, 105 Idaho 254, 668 P.2d 130 (1983). The adjoining riparian owner acquires title to alluvial deposits between the water and the land bordering thereon. Nesbitt v. Wolfkiel, 100 Idaho 396, 398, 598 P.2d 1046, 1048 (1979). The law presumes a change in the submerged lands occurred as a result of accretion, but the presumption may be rebutted by evidence that the change that occurred was avulsive.³ *Id.*

Formerly submerged lands of the State may also be acquired by adverse possession. Rutledge v. State, 94 Idaho 121, 482 P.2d 515 (1971). However, in order for formerly submerged lands to be adversely possessed, the lands must have lost their value as a public trust resource. 94 Idaho at 123, 482 P.2d at 517. This can occur where the formerly submerged lands have dried up and been put to a public use over a long period of time. *Id.* In Rutledge, for example, the former bed of the river had been developed as a motel property. 94 Idaho at 121, 482 P.2d at 515.

There is a defense, however, to a claim of title to the formerly submerged lands under a claim of adverse possession. In IFI, Justice Huntley's concurrence⁴ cited with approval the principle that man-made alterations below the OHWM will not result in the loss of public trust resources. Justice Huntley noted that the Rutledge case only addressed adverse possession resulting from natural forces without the contribution of man-made alterations to the natural river system. 112 Idaho at 521, 733 P.2d at 742. In establishing the rationale for this precedent, Justice Huntley stated that if artificial modification of river systems could result in adverse possession: "the state would be left vulnerable to surreptitious drain and fill operations which would destroy important wetlands and rob Idahoans of the associated resources and values." *Id.* Relating this precedent to the public trust obligation, Justice Huntley noted that:

If we held otherwise, adverse claimants could accomplish by wrongful, unilateral action what the state itself could not accomplish by voluntary conveyance, namely the alienation of public trust land for purely private purposes.

Id.

C. The Board's Long-Standing Practice of Requiring the Exchange of a 25-Foot Public Use Right-of-Way for the Grant of a Disclaimer of the State's Interest to Formerly Submerged Lands is a Programmatic Means of Resolving Boundary Disputes Consistent With the Board's Fiduciary Duty to Protect Public Trust Lands

Given the complexity and expense of resolving disputes between the State and riparian owners, the Board often chooses to compromise disputes

relative to the State ownership of submerged land.⁵ The State's disclaimer process provides a legally defensible means of resolving disputed claims between the riparian owner and the Board. Claims to the State's formerly submerged lands constitute an expansion of the adjoining riparian owner's property, not a contraction of the riparian owner's claim to title. The State in its role as the trustee exercising its fiduciary responsibility to the citizens of the State of Idaho must ensure that the public trust asset is not compromised. Thus, the Board adopted the policy of requiring a 25-foot public right-of-way when disclaiming title to formerly submerged lands. The right-of-way preserves the public trust value while providing clear title to the adjoining landowner.

The Department's disclaimer policy is analogous to the resolution of a private boundary dispute by two contiguous real property owners. The Idaho Supreme Court has consistently recognized the validity of agreements between adjoining property owners to establish a disputed property line by agreement. In Downing v. Boehringer, 82 Idaho 52, 349 P.2d 306 (1960), the Idaho Supreme Court explained the doctrine of boundary agreement as follows:

[W]here the location of a true boundary line on the ground is unknown to either of the parties, and is uncertain or in dispute, [the] coterminous owners [of the parcels involved] may orally agree upon a boundary line. When such an agreement is executed and actual possession is taken under it, the parties and those claiming under them are bound thereby.

82 Idaho at 56, 349 P.2d at 308.

In boundary by agreement, the parties forego litigation in the form of a quiet title action or adverse possession action and compromise on the appropriate boundary. The compromise may involve the payment of compensation or a compromise dividing the disputed property line along an agreed allocated basis.

The same may be said of the Department's disclaimer process. A dispute exists as to the exact location of coterminous properties, with the riparian owner holding title to the landward parcel and the State holding title to the

waterward parcel. The owner of the riparian parcel seeks for various reasons to establish title to formerly submerged State lands.⁶ If the Department determines that the disclaimer sought is not of a significant importance, the disclaimer process goes forward. As compensation for the uncertainty in locating the precise demarcation between State-owned submerged lands and contiguous riparian land, the State receives compensation in the form of a 25-foot public use easement. If the riparian owner does not agree that the compensation sought by the Department is fair, the riparian owner is under no obligation to complete the disclaimer process.

The Board's long-standing practice of requiring the exchange of a 25-foot public use right-of-way for the grant of a disclaimer of the State's interest to formerly submerged lands is a legitimate compromise in settlement of a disputed property line between adjacent property owners. It is a voluntary agreement entered into between willing parties to resolve a disputed boundary line. It does not constitute a claim by the State against the riparian owner, nor does it represent the Department or the Board acting in its regulatory capacity. Rather, it represents the Board exercising its proprietary interest to State submerged lands.

D. The Exchange of a 25-Foot Public Use Right-of-Way for the Grant of a Disclaimer of the State's Interest to Formerly Submerged Lands Does not Constitute a Taking of Private Property for a Public Purpose

The Takings Clause of the Fifth Amendment provides: "Nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V. The aim of the clause is to prevent the government "from forcing some people alone to bear the public burdens which, in all fairness and justice, should be borne by the public as a whole." Armstrong v. United States, 364 U.S. 40, 49, 80 S. Ct. 1563, 1569, 4 L. Ed. 2d 1554 (1960).

A taking can occur directly through the exercise of the governmental power of eminent domain. *See, e.g., United States v. 564.54 Acres of Land*, 441 U.S. 506, 99 S. Ct. 1854, 60 L. Ed. 2d 435 (1979). A taking can also occur indirectly when the government acts in a manner which causes an inverse condemnation. First English Evangelical Lutheran Church of Glendale v. Los Angeles County, 482 U.S. 304, 107 S. Ct. 2378, 96 L. Ed. 2d 250 (1987). Inverse condemnation can occur in two manners. Inverse con-

demnation can occur through a direct physical invasion of a party's property known as a physical taking. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 102 S. Ct. 3164, 73 L. Ed. 2d 868 (1982). In addition, inverse condemnation can occur by virtue of the government's restriction on land use through its regulatory authority. Penn Central Transportation Company v. New York City, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978).

As previously noted, the Board's long-standing practice of requiring an exchange of a 25-foot public use easement for the granting of a disclaimer of the State's interest to formerly submerged lands is an exercise of the State's proprietary role as the owner of the State's public trust resource.⁷ Therefore, cases relating to takings based upon the State's regulatory authority are inapplicable.

Since these lands were formerly submerged lands, they remain impressed with the public trust. Actions to protect the public trust are not the imposition of state regulation over private parties. The State is giving up its interest to formerly submerged lands over which it could exert a claim. In doing so, the State retains the right of public access over a small portion of those formerly submerged lands thereby satisfying its fiduciary role to the public. The Board's policy requiring the exchange of a 25-foot public use easement in exchange for a disclaimer constitutes the settlement of the State's claim to title to formerly submerged lands. The riparian owner gains unencumbered title to the State's formerly submerged lands. The State satisfies its fiduciary responsibility under the public trust by providing public access but surrenders its legally cognizable defenses to the riparian owner's claim to title. A riparian owner that enters into a disclaimer agreement with the State has entered into a legally binding contractual agreement regarding the coterminous boundary of the riparian land and public trust land. This agreement is not a regulatory function and therefore cannot constitute a taking of private property for a public purpose.

CONCLUSION

The Board has a fiduciary responsibility under the Public Trust Doctrine to maintain public access to the submerged lands underlying navigable waterways. Private interests may attempt to claim formerly submerged lands. However, due to the complexity of the legal and factual prerequisites to a claim of title, the Board is justified in requiring compensation in the form

of a 25-foot public use right-of-way from the party claiming title. This compensation is a settlement of a disputed boundary and does not constitute the taking of private property for a public purpose. The Board is acting in a proprietary capacity in compromising a disputed claim to public trust resources.

AUTHORITIES CONSIDERED

1. United States Constitution:

Fifth Amendment.

2. United States Statute:

Idaho Admission Act, ch. 656, § 1, 26 Stat. 215 (1890).

3. Idaho Code:

§ 58-104(9).

§ 58-1301.

Title 58, chapter 13.

4. U.S. Supreme Court Cases:

Armstrong v. United States, 364 U.S. 40, 80 S. Ct. 1563, 4 L. Ed. 2d 1554 (1960).

First English Evangelical Lutheran Church of Glendale v. Los Angeles County, 482 U.S. 304, 107 S. Ct. 2378, 96 L. Ed. 2d 250 (1987).

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 102 S. Ct. 3164, 73 L. Ed. 2d 868 (1982).

Penn Central Transportation Company v. New York City, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978).

Shively v. Bowlby, 152 U.S. 1, 14 S. Ct. 548, 38 L. Ed. 331 (1894).

United States v. 564.54 Acres of Land, 441 U.S. 506, 99 S. Ct. 1854, 60 L. Ed. 2d 435 (1979).

5. Idaho Cases:

Aldape v. Akins, 105 Idaho 254, 668 P.2d 130 (1983).

Downing v. Boehringer, 82 Idaho 52, 349 P.2d 306 (1960).

Erickson v. State, 132 Idaho 208, 970 P.2d 1 (1998).

Heckman Ranches, Inc. v. State, 99 Idaho 793, 589 P.2d 540 (1979).

Idaho Forest Industries, Inc. v. Hayden Lake Watershed Improvement District, 112 Idaho 512, 733 P.2d 733 (1987).

Joplin v. Kitchens, 87 Idaho 530, 394 P.2d 313 (1964).

Kootenai Environmental Alliance v. Panhandle Yacht Club, 105 Idaho 622, 671 P.2d 1085 (1983).

Nesbitt v. Wolfkiel, 100 Idaho 396, 598 P.2d 1046 (1979).

Raide v. Dollar, 34 Idaho 682, 203 P. 469 (1921).

Rutledge v. State, 94 Idaho 121, 482 P.2d 515 (1971).

Smith v. Long, 76 Idaho 265, 281 P.2d 483 (1955).

State of Idaho v. U.S. Department of the Interior, No. 97-0426-BLW (D. Idaho 2002).

6. Other Cases:

Marine One, Inc. v. Manatee County, 898 F.2d 1490 (11th Cir. 1990).

DATED this 7th day of May, 2007.

LAWRENCE G. WASDEN
Attorney General

Analysis by:

C. NICHOLAS KREMA
Deputy Attorney General

¹ The Idaho Admission Act provides that Idaho was “admitted into the Union on an equal footing with the original states in all respects whatever.” Idaho Admission Act, ch. 656, § 1, 26 Stat. 215 (1890). The United States Supreme Court in Shively v. Bowlby, 152 U.S. 1, 14 S. Ct. 548, 38 L. Ed. 331 (1894), determined that one aspect of admission of a state on equal footing with the original states was the title to the beds of navigable waters below the OHWM.

² Idaho’s legislature recognized this broad scope of interests to be protected in the enactment of the Lake Protection Act, title 58, chapter 13, Idaho Code. Idaho Code § 58-1301 states in pertinent part that: “The legislature of the state of Idaho hereby declares that the public health, interest, safety and welfare requires that all encroachments upon, in or above the beds or waters of navigable lakes of the state be regulated in order that the protection of property, navigation, fish and wildlife habitat, aquatic life, recreation, aesthetic beauty and water quality be given due consideration and weighed against the navigational or economic necessity or justification for, or benefit to be derived from the proposed encroachment.”

³ Avulsion is the sudden and perceptible loss to land by the action of water or a sudden change in the bed or the course of a stream. Joplin v. Kitchens, 87 Idaho 530, 394 P.2d 313 (1964). If avulsion is the cause of the shift in the river’s bed, title remains as before the change of course. *Id.*

⁴ Justice Huntley’s concurring opinion was joined in by Justices Donaldson and Bistline. Therefore, the concurring opinion is binding precedent.

⁵ The Board does not always choose to compromise disputes regarding the ownership of claimed submerged lands. In those cases, the Board does not enter into the disclaimer process. Examples where the State has litigated its ownership of submerged lands include: Erickson v. State, 132 Idaho 208, 970 P.2d 1 (1998) (the State contested an allegation of the OHWM of Lake Coeur d’Alene below 2128’); Idaho Forest Industries, Inc. v. Hayden Lake Watershed Improvement District, 112 Idaho 512, 733 P.2d 733 (1987) (the State challenged the ownership of portions of Hayden Lake); State of Idaho v. U.S. Department of the Interior, No. 97-0426-BLW (D. Idaho 2002) (Deer Flat Refuge) (the State challenged the federal government’s ownership of federal reserve water rights); Heckman Ranches, Inc. v. State, 99 Idaho 793, 589 P.2d 540 (1979) (State challenged contention of the OHWM of the Salmon River). These cases constitute a significant commitment of State resources both in terms of cost and time. These cases also include only those which have been subject to substantial litigation. The Department administratively denies ownership of State-owned submerged lands which are not challenged through the courts.

⁶ Historically, parties seeking disclaimers have done so to clear title to facilitate lending or sale or to establish an ownership interest for purposes of subdivision.

⁷ Courts have recognized that takings cannot occur by the State’s exercise of its proprietary powers founded on the Public Trust Doctrine. See Marine One, Inc. v. Manatee County, 898 F.2d 1490 (11th Cir. 1990) (rescission of marine construction permits was exercise of the state’s proprietary interest in submerged lands and therefore not a taking of private property).

ATTORNEY GENERAL OPINION NO. 07-2

To: Mr. Ned C. Williamson
Hailey City Attorney
115 Second Avenue S.
Hailey, ID 83333

Per Request for Attorney General's Opinion

You have requested an Attorney General's opinion regarding three initiatives recently passed by Hailey voters concerning the possession and use of marijuana. This opinion addresses the question you have presented.

QUESTION PRESENTED

Are any of the provisions of the three "marijuana" initiatives recently passed by Hailey voters clearly illegal under Idaho law?

CONCLUSION

The major provisions of Initiative 1 (medical marijuana) and Initiative 2 (hemp) conflict with state law and are invalid. The major provision of Initiative 3 (law enforcement priorities) is administrative rather than legislative in nature and is likely not an allowable subject for an initiative and therefore invalid. The observations contained in this letter identify the *clearly* unlawful provisions of these initiatives and do not include all of their problematic consequences.

ANALYSIS**A. Summary of the Initiatives**

Initiative 1 is entitled "The Hailey Medical Marijuana Act." It allows persons described as "seriously ill citizens" to use up to 35 grams of marijuana for medicinal purposes upon the "recommendation" of a physician. It immunizes persons who possess and use marijuana and marijuana paraphernalia from arrest and prosecution and restricts the discretion of municipal law enforcement to enforce state drug laws. Additionally, it instructs city officers

to advocate, by official public declaration and through lobbyists, for changes to state law and establishes a Community Oversight Committee, whose membership includes a representative of the Liberty Lobby of Idaho.

Initiative 2 is entitled “The Hailey Industrial Hemp Act.” It declares that the growth and cultivation of industrial hemp is a positive and beneficial farming activity and that the legalization of such activity by the state and the federal government is favored. It contains provisions for advocacy and establishment of the Community Oversight Committee similar to Initiative 1.

Initiative 3 is entitled “The Hailey Lowest Police Priority Act.” It directs that Hailey law enforcement officers make enforcement of marijuana laws, where the drug is intended for adult personal use, the city’s lowest law enforcement priority, with some exceptions. It prohibits Hailey law enforcement officers from accepting or renewing formal deputizing or commissioning by federal law enforcement agencies if the deputizing or commissioning will include investigating, citing, arresting, or seizing property from adult marijuana users. As in Initiatives 1 and 2, it contains provisions for advocacy and establishment of the Community Oversight Committee.

B. Issues

1. Conflict With State Law

Cities are municipal corporations that are subdivisions of the State. “A municipal corporation possesses only such powers as the state confers upon it, subject to addition or diminution at its discretion.” State v. Frederic, 28 Idaho 709, 711, 155 P. 977, 979 (1916). Article XII, § 2 of the Idaho Constitution states that:

Any county or incorporated city or town may make and enforce, within its limits, all such local police, sanitary and other regulations as are *not in conflict with* its charter or with *the general laws*.

(Emphasis added.) A local regulation may conflict with a state law in two ways:

1. The local regulation may be in direct conflict by “expressly allowing what the state disallows, and vice versa.” Envirosafe Services of Idaho v. Owyhee County, 112 Idaho 687, 689, 735 P.2d 998, 1000 (1987); *see also* State v. Barsness, 102 Idaho 210, 628 P.2d 1044 (1981).
2. A conflict may be inferred where the state has intended to fully occupy or preempt a particular area of regulation to the exclusion of local governmental entities. *See* Envirosafe, 112 Idaho at 689, 735 P.2d at 1000. The doctrine of implied preemption typically applies “where, despite the lack of specific language preempting regulation by local governmental entities, the state has acted in the area in such a pervasive manner that it must be assumed that it intended to occupy the entire field of regulation.” *Id.*; *see, e.g.*, Caesar v. State, 101 Idaho 158, 610 P.2d 517 (1980) (state’s comprehensive safety regulations pertaining to state-owned buildings preempted application of the Boise City Building Code to Bronco Stadium).

Here, we need not examine the question of implied preemption, since conflict with state law is apparent. It is a criminal act to possess or use marijuana, hemp, or drug paraphernalia. Idaho Code §§ 37-2705, 37-2732 and 37-2734A. Therefore, the provisions of Initiatives 1 and 2, which immunize persons from prosecution for any of these acts, thus allowing what the state disallows, are in conflict with state law and outside of the constitutional powers of the City of Hailey to enact. *See* Davidson v. Wright, 143 Idaho 616, 151 P.3d 812 (2006), holding that the Sun Valley City Clerk could review an initiative for proper form but not for constitutionality. Chief Justice Schroeder wrote, in a special concurrence that “[i]f enough signatures are gathered to qualify the initiative for the ballot, and if the initiative then passes, *significant portions of it will clearly contravene state law and be invalid.*” 143 Idaho at 622, 151 P.3d at 818 (emphasis added). *See also* Gonzales v. Raich, 545 U.S. 1, 125 S. Ct. 2195, 162 L. Ed. 2d 1 (2005), wherein the United States Supreme Court held that the Supremacy Clause of the United States Constitution meant that California’s medical marijuana law (the Compassionate Use Act) could not limit federal law which, like Idaho, also prohibits the use of marijuana and hemp. U.S. Const. art. VI, cl. 2. Additionally, Idaho Code § 50-209 empowers the police of every city to “arrest all offenders against the law of the state” The provision of

Initiative 1 that restricts enforcement of state law by summons only is in direct conflict with this statute and therefore invalid. Further, Idaho Code § 50-208A requires city attorneys to prosecute state misdemeanors committed within the municipal limits. Consequently, the provision of Initiative 1 that directs the municipal prosecuting attorney to dismiss certain misdemeanor drug charges is also in direct conflict with state law and invalid.

2. Free Speech

The Idaho Constitution guarantees that “[e]very person may freely speak, write and publish on all subjects, being responsible for the abuse of that liberty.” Idaho Const. art. I, § 9. The right to free speech includes the right not to speak. In Simpson v. Cenarrusa, 130 Idaho 609, 944 P.2d 1372 (1997), the Idaho Supreme Court declared that a proposition that required candidates for elective office to take a stand on the issue of term limits was an unconstitutional infringement of free speech. Absent a flagrant abuse of the right, the government cannot control speech. *Id.* All three of Hailey’s initiatives instruct city officers to advocate for changes to state law to support the goals and implementation of each ordinance. Compelling this advocacy is clearly an infringement upon the free speech rights of city officers, rendering these provisions unconstitutional.

3. Legislation and Administration

In the case City of Boise City v. Keep the Commandments Coalition, 143 Idaho 254, 141 P.3d 1123 (2006), the Idaho Supreme Court stated that, while subjects of a legislative nature were allowable for local initiatives, subjects of an administrative nature were not. While it noted that there was “no bright line rule” to distinguish between legislative and administrative subjects, it did cite one of its prior opinions: Weldon v. Bonner County Tax Coalition, 124 Idaho 31, 855 P.2d 868 (1993). In Weldon, a coalition of citizens sought, through referendum and initiative, to reject a Bonner County budget decision and implement a new county budget process. The court held that the coalition did not seek to reject or propose a *law* (e.g., a measure passed by the Board of County Commissioners) but rather a *process*. *Id.* It stated that “[t]he county budgeting process, which results in an *ad valorem* levy, is not an ‘act’ or ‘measure,’ but instead it is merely the *result* of the statutory process set forth in the County Budget Law” 124 Idaho at 38, 855 P.2d at 875. Applying the precedent of Keep the Commandments and Weldon

to Initiative 3, it is likely that a court would find “enforcement priorities” a matter of administration rather than legislation and therefore not an allowable subject for an initiative.

AUTHORITIES CONSIDERED

1. United States Constitution:

Art. VI, cl. 2.

2. Idaho Constitution:

Art. I, § 9.

Art. XII, § 2.

3. Idaho Code:

§ 37-2705.

§ 37-2732.

§ 37-2734A.

§ 50-208A.

§ 50-209.

4. U.S. Supreme Court Cases:

Gonzales v. Raich, 545 U.S. 1, 125 S. Ct. 2195, 162 L. Ed. 2d 1 (2005).

5. Idaho Cases:

Caesar v. State, 101 Idaho 158, 610 P.2d 517 (1980).

City of Boise City v. Keep the Commandments Coalition, 143 Idaho 254, 141 P.3d 1123 (2006).

Davidson v. Wright, 143 Idaho 616, 151 P.3d 812 (2006).

Envirosafe Services of Idaho v. Owyhee County, 112 Idaho 687, 735 P.2d 998 (1987).

Simpson v. Cenarrusa, 130 Idaho 609, 944 P.2d 1372 (1997).

State v. Barsness, 102 Idaho 210, 628 P.2d 1044 (1981).

State v. Frederic, 28 Idaho 709, 155 P. 977 (1916).

Weldon v. Bonner County Tax Coalition, 124 Idaho 31, 855 P.2d 868 (1993).

DATED this 20th day December, 2007.

LAWRENCE G. WASDEN
Attorney General

Analysis by:

MITCHELL E. TORYANSKI
Deputy Attorney General

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**ATTORNEY GENERAL'S
SELECTED
INFORMAL GUIDELINES
FOR THE YEAR 2007**

**LAWRENCE G. WASDEN
ATTORNEY GENERAL
STATE OF IDAHO**

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

May 1, 2007

Via telefax to (208) 732-8822
and U.S. Mail

Mr. Fritz Wonderlich
Twin Falls City Attorney
WONDERLICH & WAKEFIELD
P.O. Box 1812
Twin Falls, ID 83308-1812

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

Re: Private Business's Operation of Tribal Video Gaming
Machines

Dear Mr. Wonderlich:

QUESTION PRESENTED

Your letter of April 12, 2007, asked for an Attorney General's opinion regarding unauthorized use of tribal video gaming machines. Your letter said:

I am the City Attorney for the City of Twin Falls. Our Police Department has discovered that a bar located in our city is operating tribal video gaming machines, as defined in Idaho Code § 67-429B(1)(a)-(f). These machines are obviously not being operated pursuant to a state-tribal gaming compact. I am unable to find a criminal penalty prescribed for unauthorized use of tribal video gaming machines.

Idaho Code § 18-3810 prohibits the possession or operation of slot machines in Idaho, and Idaho Code § 18-3802 prohibits gambling in Idaho, but 67-429B(2) provides that "Notwithstanding any other provision of Idaho law, a tribal video gaming machine as described in subsection (1) above is not a slot machine or an electronic or electromechanical imitation or simulation of any form of casino gambling."

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Please advise if there is a legal method of criminally prosecuting the unauthorized possession and operation of tribal video gaming machines. Thank you for your help in this matter.

CONCLUSION

There are no reported appellate cases on point in Idaho, but this office believes that you can prosecute this use of a tribal video gaming machine under the general statutes prohibiting gambling. There is no legal justification for treating these machines differently from any other gambling device operated by persons not authorized to operate them. Our analysis follows.

ANALYSIS

A. The Provisions of Idaho Law

The starting point is article III, § 20 of the Idaho Constitution, which sets forth the only kinds of gambling that can be legally conducted in Idaho and prohibits all others:

§ 20. Gambling prohibited.—(1) Gambling is contrary to public policy and is strictly prohibited except for the following:

- a. A state lottery which is authorized by the state if conducted in conformity with enabling legislation; and
- b. Pari-mutuel betting if conducted in conformity with enabling legislation; and
- c. Bingo and raffle games that are operated by qualified charitable organizations in the pursuit of charitable purposes if conducted in conformity with enabling legislation.

(2) No activities permitted by subsection (1) shall employ any form of casino gambling including, but not limited to, blackjack, craps, roulette, poker, bacarrat, keno and slot machines, or employ any electronic or electro-mechanical imitation or simulation of any form of casino gambling.

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(3) The legislature shall provide by law penalties for violations of this section.

(4) Notwithstanding the foregoing, the following are not gambling and are not prohibited by this section:

a. Merchant promotional contests and drawings conducted incidentally to bona fide nongaming business operations, if prizes are awarded without consideration being charged to participants; and

b. Games that award only additional play.

As you can see from article III, § 20, there are only three kinds of gambling allowed in Idaho:

- (1) a State lottery (*i.e.*, a lottery run by the State and not by private persons),
- (2) pari-mutuel betting as authorized by law, see the Idaho Racing Act, Idaho Code §§ 54-2501, *et seq.*, which authorizes pari-mutuel betting at licensed racetracks, and
- (3) bingo and raffle games operated by qualified charitable organizations in pursuit of charitable purposes.

Under article III, § 20, there are two distinct elements to a legal gambling operation: (a) the operation must be of a kind of the gambling allowed by the constitution (a lottery, pari-mutuel betting, or bingo and raffles) and (2) the operation must be conducted by persons allowed by the constitution to conduct the particular kind of gambling (the State for a lottery, a licensed racetrack for pari-mutuel betting, and charities pursuing charitable purposes for bingo or raffles).

The gambling described in your letter—a tribal video gaming machine operated by a bar in the City of Twin Falls—does not fit into any of the allowed categories of (1) a lottery run by the State, (2) pari-mutuel racing run by a licensed racetrack, or (3) bingo or raffles operated by charities for charitable purposes.

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The general Idaho criminal statutes that prohibit gambling therefore apply. In particular, Idaho Code §§ 18-3801 and 18-3802 apply. They provide:

18-3801. Gambling defined.—“Gambling” means risking any money, credit, deposit or other thing of value for gain contingent in whole or in part upon lot, chance, the operation of a gambling device or the happening or outcome of an event, including a sporting event, the operation of casino gambling including, but not limited to, blackjack, craps, roulette, poker, bacarrat [baccarat] or keno, but does not include:

- (1) Bona fide contests of skill, speed, strength or endurance in which awards are made only to entrants or the owners of entrants; or
- (2) Bona fide business transactions which are valid under the law of contracts; or
- (3) Games that award only additional play; or
- (4) Merchant promotional contests and drawings conducted incidentally to bona fide nongaming business operations, if prizes are awarded without consideration being charged to participants; or
- (5) Other acts or transactions now or hereafter expressly authorized by law.

18-3802. Gambling prohibited.—(1) A person is guilty of gambling if he:

- (a) Participates in gambling; or
 - (b) Knowingly permits any gambling to be played, conducted or dealt upon or in any real or personal property owned, rented, or under the control of the actor, whether in whole or in part.
- (2) Gambling is a misdemeanor.

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In construing § 18-3801, the Idaho Supreme Court said that gambling consists of risking money or any other thing of value contingent upon lot or chance:

In the instant case, the issue decided by the district court . . . was whether playing the [video] machines constituted gambling as defined by Idaho Code § 18-3801. That statute states, “ ‘Gambling’ means risking any money, credit, deposit or other thing of value for gain contingent in whole or in part upon lot, chance, the operation of a gambling device.” All that is required is the risking of “any money, credit, deposit or other thing of value.” The district court correctly held that risking credits worth 5¢ each fit within the statute.

MDS Investments, LLC v. State, 138 Idaho 456, 464, 65 P.3d 197, 205 (2003). Presumably, the tribal video gaming devices at issue risk money for a chance at more gain, so they are gambling.¹

In addition, depending upon how the particular tribal video gaming machine(s) at issue are mathematically configured for payouts to players, they may constitute a lottery or an electronic facsimile of a lottery, both of which are illegal under Idaho Code §§ 18-4901 through 18-4905,² which provide:

§ 18-4901. Lottery defined.—A lottery is any scheme for the disposal or distribution of property by chance among persons who have paid or promised to pay any valuable consideration for the chance of obtaining such property, or a portion of it, or for any share or interest in such property, upon any agreement, understanding or expectation that it is to be distributed or disposed of by lot or chance, whether called a lottery, raffle, or gift enterprise, or by whatever name the same may be known. . . .

§ 18-4902. Engaging in lottery.—Every person who contrives, prepares, sets up, proposes, or draws any lottery is guilty of a misdemeanor.

§ 18-4903. Traffic in lottery tickets.—Every person who sells, gives, or in any manner whatever furnishes or transfers to or for any other person any ticket, chance, share or interest, or any paper, certificate or instrument, purporting, or understood to be, or to represent any ticket, chance, share or interest in, or depending upon the event of any lottery, is guilty of a misdemeanor.

§ 18-4904. Assisting in lottery.—Every person who aids or assists, either by printing, writing, publishing, or otherwise, in setting up, managing or drawing any lottery, or in selling or disposing of any ticket, chance, or share therein, or in advertising an illegal lottery, is guilty of a misdemeanor.

§ 18-4905. Maintaining lottery office.—Every person who opens, sets up, or keeps by himself or any other person, any office or other place for the sale of, or for registering the number of any ticket in any lottery, or who, by printing, writing or otherwise, advertises or publishes the setting up, opening or using of any such office, is guilty of a misdemeanor.

....

§ 18-4907. Search, seizure, and confiscation.—All moneys and property offered for sale or distribution in violation of any of the provisions of this chapter are forfeited to the state.

....

§ 18-4908. Permitting premises to be used for lottery.—Every person who lets, or permits to be used, any building or vessel, or any portion thereof, knowing that it is to be used for setting up, managing or drawing any lottery, or for the purpose of selling or disposing of lottery tickets, is guilty of a misdemeanor.

A prosecution under these sections specific to lotteries, however, might involve complicated issues of fact concerning what is or is not a lottery, so the general gambling statutes would seem to be an easier source of authority for prosecution.

B. Federal Law Concerning Gambling on Indian Reservations

Article III, § 20, is not, however, the only pertinent law regarding gambling. Article III, § 20, is also subject to the overlay of federal law, particularly regarding federal reservations. Article XXI, § 19 of the Idaho Constitution recognizes the supremacy of federal jurisdiction over Indian lands:

§ 19. . . . Disclaimer of title to Indian lands.—

And the people of the state of Idaho do agree and declare that we forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indians or Indian tribes; and until the title thereto shall have been extinguished by the United States, the same shall be subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States; that the lands belonging to citizens of the United States, residing without the said state of Idaho, shall never be taxed at a higher rate than the lands belonging to the residents thereof.

Article XXI, § 19, explicitly recognizes that Congress retains jurisdiction over federal lands within Idaho and in particular over Indian reservations within Idaho. Congress's authority over Indians on Indian reservations comes in part from the Commerce Clause, Article I, § 8, cl. 3, which provides: "Congress shall have the Power . . . [¶] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Congress's authority over Indians on Indian reservations also comes in part from the Property Clause, Article IV, § 3, cl. 2, which provides: "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States" See United States v. State, 131 Idaho 468, 470, 959 P.2d 449, 451 (1998), quoting Cappaert v. United States, 426 U.S. 128, 138, 96 S. Ct.

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2062, 2069, 48 L. Ed. 2d 523 (1976) (the Property Clause also applies to Indian reservations).

Congress has exercised its authority under the Commerce Clause and/or under the Property Clause in the Indian Gaming Regulatory Act (IGRA), Public Law 100-497, 102 Stat. 4267 (1988), and in particular 25 U.S.C. § 2710(d)(1), which provides that Indian tribes may offer on Indian lands any so-called Class III game³ permitted to be offered under State law by any person, organization or entity once the Secretary of Interior has approved a Tribal-State Gaming Compact for the Class III games:

(d) Class III gaming activities; authorization; revocation; Tribal-State compact

(1) Class III gaming activities shall be lawful on Indian lands only if such activities are —

(A) authorized by an ordinance or resolution that —

(i) is adopted by the governing body of the Indian tribe having jurisdiction over such lands,

(ii) meets the requirements of subsection (b) of this section, and

(iii) is approved by the Chairman,

(B) located in a State that permits such gaming for any purpose by any person, organization, or entity, and

(C) conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is in effect.

Thus, although the Idaho Constitution restricts the operation of a lottery to the State of Idaho, the operation of pari-mutuel betting to licensed racetracks, and the operation of bingo and lotteries to charitable organizations, IGRA provides that any Idaho tribe may offer such games if it has compacted with the State to do so. Such gaming is, however, limited to the Indian

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lands over which a compacted tribe has jurisdiction—which in Idaho is currently limited to the Kootenai, Coeur d’Alene, Nez Perce and Fort Hall (Bannock-Shoshone) Reservations.

A compacted Idaho tribe’s right to operate a form of Class III gaming that can only be operated off-reservation by the State, by a licensed racetrack, or by a charitable organization does not give a non-tribal business operating on lands inside or outside an Indian reservation the authority to operate games that may lawfully be operated by a tribe on its own reservation. In other words, a tribe’s right under Idaho Code § 67-429C to amend its Tribal-State Gaming Compact to operate tribal video gaming machines as defined in § 67-429B on its own reservation does not extend a similar right to others to operate tribal video gaming machines off reservation. Off-reservation bars are not authorized to operate tribal video gaming machines.

C. Classification of Tribal Video Gaming Machines

Without inspecting the tribal video gaming machine(s) at issue, this office cannot state with certainty how the particular machine would be classified. One can safely assume that the tribal video gaming machines at issue would not be a pari-mutuel game offered by a licensed racetrack. That leaves only two other forms of gambling that may be legally operated off-reservation: lotteries and bingo/raffles games.

If the tribal video gaming device(s) at issue were lotteries or facsimiles of lotteries, off-reservation they can only be legally operated by the State of Idaho and not by a private bar. If the tribal video gaming device(s) at issue were bingo or raffles or facsimiles of bingo or raffles, off-reservation they can only be legally operated by qualified charitable organizations in the pursuit of charitable purposes and not by a privately owned bar. If the tribal video gaming machine(s) at issue were not lotteries, bingo or raffles or facsimiles of lotteries, bingo, or raffles, off-reservation they cannot legally be operated by anyone because State law only authorizes them for use by Indian tribes on Indian lands in accordance with the applicable Tribal-State Gaming Compact.

D. Conclusion

While it may be helpful to classify the tribal video gaming machine(s) at issue among the various categories of gambling to understand

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the law, it is not necessary to classify them among the various categories of gambling to bring a prosecution. That is because it is illegal for a privately owned bar in Twin Falls to operate a tribal video gaming machine, regardless of which category of gambling it would fall into. We believe that it should be possible for you to prosecute under Idaho Code §§ 18-3801 and 18-3802.

Sincerely yours,

MICHAEL S. GILMORE
Deputy Attorney General

¹ *MDS Investments* also contains a definition of a slot machine in Part III.B of the opinion, 138 Idaho at 201-03, 65 P.3d at 459-61. The court does not say whether this definition is common law, which could be modified by statute, or constitutional, which could not be modified by statute. Thus, at this time it is impossible to know how the Tribal Gaming Initiative's definition of tribal video gaming devices, see Idaho Code § 67-429B(1)(a)-(f), would be encompassed by or outside of the court's definition of a slot machine and/or whether that definition has been or could be altered by statute. Those questions, which would run to the interpretation of Idaho's Tribal-State Gaming Compacts, simply are not presented by or relevant to this guideline's analysis of a Twin Falls bar owner's using tribal video gaming machines.

² Idaho Code § 67-7447 provides that neither title 18, chapter 38, nor title 18, chapter 49, apply to the operations of the Idaho State Lottery:

§ 67-7447. Lawful activity.—Chapters 38 and 49, Title 18, Idaho Code, or any other state or local law or regulation providing any penalty, disability, restriction, regulation or prohibition for the manufacture, transportation, storage, distribution, advertising, possession, or sale of any lottery tickets or shares or for the operation of any lottery game shall not apply to the tickets or shares of the state lottery established in this chapter.

This exemption for the Idaho State Lottery from the application of these criminal statutes would not exempt a bar owner who conducted his own lottery from these statutes.

³ IGRA separates gaming activities into three classes: Class III gaming is a catch-all category for all forms of gaming not placed in Class I or Class II gaming. See 25 U.S.C. § 2703(8). Class III games likely include the tribal video gaming machines.

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**ATTORNEY GENERAL'S
CERTIFICATES OF REVIEW
FOR THE YEAR 2007**

**LAWRENCE G. WASDEN
ATTORNEY GENERAL
STATE OF IDAHO**

CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

February 13, 2007

The Honorable Ben Ysursa
Idaho Secretary of State
HAND DELIVERED

Re: Certificate of Review
Initiative Regarding the Public Employee Accountability Act

Dear Secretary of State Ysursa:

An initiative petition was filed with your office on January 12, 2007, and received by this office on January 16, 2007. Pursuant to Idaho Code § 34-1809, this office has reviewed the initiative petition and has prepared the following advisory comments. It must be stressed that, given the strict statutory time frame in which this office must respond and the complexity of the legal issues raised in this initiative petition, this office's review can only isolate areas of concern and cannot provide in-depth analysis of each issue that may present problems. Further, under the review statute, the Attorney General's recommendations are "advisory only," and the petitioners are free to "accept or reject them in whole or in part."

BALLOT TITLE

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

MATTERS OF SUBSTANTIVE IMPORT

A. Introduction

Entitled the "Public Employee Accountability Act," the initiative petition ("Initiative") seeks to significantly modify current Idaho law in sev-

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eral ways. Petitioners have presented an Initiative that seeks to eliminate absolute judicial immunity (and would appear to also abolish absolute legislative and prosecutorial immunity), provides for a grand jury to inquire into a prosecutor's decision not to charge a crime upon a party's request, and directs the Legislature on the issue of impeachment. Specifically, the petitioners seek the following:

1. Add a definition of "malfeasance" to the Idaho Tort Claims Act;
2. Define "Public Employee" to include "all members of the judicial branch of government";
3. Delete absolute immunity for all public employees, including the judicial branch;
4. Require a grand jury to be called and convened if any party believes a public employee engaged in a judicial or quasi-judicial proceeding has committed a crime against him/her if a prosecutor has declined to charge the public employee;
5. Toll the statute of limitation until fourteen (14) days after the grand jury renders a finding;
6. Provide the grand jury with broad powers including investigating new criminal allegations and directing police inquiry;
7. Require that a bill of particulars be submitted to the state Legislature, which must initiate impeachment proceeding within fifteen days if a public official who is subject to impeachment is found in violation of the law;
8. Prohibit the Legislature from referring a grand jury's bill of particulars regarding an impeachable officer to Judicial Council;
9. If extraordinary funding for the grand jury is needed, the state treasurer must take funds from either the general fund or an emergency fund and allocate them to the county treasurer where the grand jury is seated;
10. Direct the Idaho Legislature to amend the Initiative to preserve the intent and principles of the Initiative if any portion of the Initiative is ruled unconstitutional; and
11. Grant to the state Legislature the authority to amend the Idaho constitution to achieve the intent and principles of this act.

Most of the provisions of this measure would likely be struck down by a reviewing court as unconstitutional. In addition, the definition of “malfeasance” included in the Initiative is problematic. “Malfeasance” as defined includes “an act for which there is no authority or warrant of law or which a person ought not to do at all, or the unjust performance of some act, which party performing it has no right, or has a legal and fiduciary duty not to do.” The definition is so broadly worded that it would likely create confusion as to what constitutes malfeasance.

B. The Proposed Initiative Likely Violates Article III, § 16, Prohibiting Consideration of More than a Single Subject

The Initiative can be broken down into several subject matters. The first is the “clarification” of the Idaho Tort Claims Act to include the judiciary as a “public employee” and the denial of absolute immunity for any public employee. Judges, prosecutors, witnesses and legislators are historically entitled to absolute immunity from civil suit under the common law. Mitchell v. Forsyth, 472 U.S. 511, 521, 105 S. Ct. 2806, 2812-13 (1985). The language abolishing absolute immunity would apply to all of them.

A second subject is the impaneling of a grand jury when a prosecutor declines to criminally charge “a public employee engaged in a judicial or quasi judicial proceeding [who] has committed a crime” A “public employee” can be not only the judge, but the public defender or prosecutor as the Initiative defines the term.

While the Initiative on the whole appears to be focusing on the judiciary, the expanded definition covers far more than simply judges. An additional subject concerns impeachment proceedings of a “public official subject to impeachment process.” Again, while the Initiative overall appears to be directed to the judicial system and judges in particular, this section covers a broader group of judicial and executive officers.

The final subject matter covers extraordinary funding for a county grand jury and directing the funding to come from state coffers.

Article III, § 16 of the Idaho Constitution states:

Unity of subject and title.—Every act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title; but if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be embraced in the title.

In re Crane, 27 Idaho 671, 689, 151 P. 1006 (1915), states “the purpose of the clause . . . is to prevent combining of incongruous and objects totally distinct” The Initiative addresses removing absolute immunity of public employees, summoning a grand jury, directing impeachment proceedings in the legislature, and funding grand jury proceedings. It appears likely that the breadth of the subjects, which should be set forth in distinct enactments (or Initiatives), would provide a basis for this Initiative being found unconstitutional.

In addition to this broad constitutional question, the proposed Initiative sections also appear likely to violate several specific constitutional provisions. A brief overview of specific concerns are presented.

C. The Proposed Initiative Likely Violates Article I, § 8, Giving the District Court Sole Discretion to Impanel a Grand Jury

Idaho Constitution, art. I, § 8, provides in part that “a grand jury may be summoned upon the order of the district court in the manner provided by law,” while Idaho Code § 2-501 provides that “grand juries shall not be summoned unless the district judge so directs.”

The Initiative directs a grand jury to be impaneled at the request of a party who believes a “public employee” has committed a crime against him. The Idaho Supreme Court in Parsons v. Idaho Tax Commission, 110 Idaho 572, 716 P.2d 1344 (1986), determined that access to a grand jury is not a constitutionally protected common law right and that a district court has discretionary authority not to call a grand jury.

The Initiative provides an aggrieved party may request a grand jury; it appears that upon receiving a request, a district court could take no action but to summon the grand jury. Displacing the district court’s constitutional

authority to summon a grand jury would likely violate this constitutional provision.

D. The Proposed Initiative Likely Violates Article III, § 9, Which Gives a Legislative House the Sole Power to Make Its Own Rules of Proceedings

In the Initiative, once the Legislature receives a bill of particulars from the jury foreman, it is required to initiate impeachment proceedings within fifteen (15) days. Article V, § 4 of the Idaho Constitution provides that “[t]he house of representatives solely shall have the power of impeachment.” The Initiative further prohibits the Legislature “from referring the matter to the Judicial Council.”

Section 9 of article III of the Idaho Constitution gives each house the power to determine its own rules of proceeding. As stated by Keenan v. Price, 68 Idaho 423, 437, 195 P.2d 662 (1948), “[t]he power of the legislative houses to make their own rules is for orderly procedure and the expedition and disposition of their business.” To mandate that the Legislature begin impeachment proceedings in a time certain and to prohibit referral to another body would prevent the Legislature from making rules for its orderly procedure.

E. The Proposed Initiative Likely Violates Article IV, § 9, Providing the Governor Sole Discretion to Convene Extraordinary Sessions of the Legislature as well as Separation of Powers When an Extraordinary Session is Called for Impeachment

The Initiative requires the Legislature to initiate impeachment proceedings within fifteen (15) days after receipt of a bill of particulars from the jury foreman. The Idaho Legislature is only in session beginning the second Monday of January (article III, § 8) and ending usually in March or April. If a bill of particulars is presented outside this time frame, the Legislature would have to be called back into session to consider the bill within fifteen (15) days.

The authority to call an extraordinary session of the Legislature rests solely in the governor’s discretion under Idaho Constitution, article IV, § 9 (“governor may, on extraordinary occasions, convene the legislature by

proclamation, stating the purposes for which he has convened it”). Although the Initiative doesn’t clearly direct the governor to act, if the impeachment proceedings were required when the Legislature was not in session, the governor would be required to act because there is no other mechanism for calling a special session. Requiring the governor to convene the Legislature to begin impeachment proceedings likely violates the discretionary power of a governor.

F. The Proposed Initiative Section Concerning Funding Likely Violates Several Constitutional Provisions

The Initiative requires the state to fund a grand jury if extraordinary funds are needed. The foreman of a grand jury would submit a request for state funds to the Attorney General who in turn would notify the State Treasurer. The State Treasurer is required, upon threat of being charged with a misdemeanor, to take funds either from general fund or an emergency fund and allocate them to the county treasurer without delay. The method of providing for funding violates numerous constitutional provisions.

Article VII of the Idaho Constitution governs finance and revenue for the State of Idaho. Section 13 of this article prohibits money being drawn from the treasury “but in pursuance of appropriations made by law.” There is no appropriation for payments from the treasury to a county for grand jury expenses, unless the courts were to construe the language of Section IV of the Initiative, which does not use the ordinary language of appropriation, to be an appropriation.

Section 15 of the same article provides a system of county finance and requires that if a county issues any warrants that are outstanding and unpaid and there is no money in the county treasury for payment, the commissioners “shall levy a special tax . . .” This is the method provided by the Idaho Constitution for paying unfunded grand jury expenses.

Finally, Idaho Constitution, article XII, § 3, prohibits the state from assuming any debts of any county “unless such debts shall have been created to repel invasion, suppress insurrection or defend the state in war.” Paying grand jury expenses does not fit into any of these categories.

G. The Proposed Initiative Section Concerning the Legislature's Amending the Initiative and/or the Constitution Likely Violates Article III, § 1, and Article XX, § 1

The final section of the Initiative directs the state Legislature to “amend this act to conform to any adverse decision rendered by a court of law in order to preserve the intent and principles of this act” if any portion of this Initiative is declared unconstitutional. But one legislative act (this Initiative) can never bind a future legislature.

In his Commentaries, Blackstone stated the centuries-old concept that one legislature may not bind the legislative authority of its successors:

Acts of parliament derogatory from the power of subsequent parliaments bind not. . . . Because the legislature, being in truth the sovereign power, is always of equal, always of absolute authority: it acknowledges no superior upon earth, which the prior legislature must have been, if it's [*sic*] ordinances could bind the present parliament.

1 W. Blackstone, Commentaries on the Laws of England 90 (1765). See *also* H.L.A. Hart, The Concept of Law 145 (1961) (recognizing that Parliament is “sovereign, in the sense that it is free, at every moment of its existence as a continuing body, not only from legal limitations imposed *ab extra*, but also from its own prior legislation”). United States v. Winstar Corp., 518 U.S. 839, 872, 116 S. Ct. 2432, 2453, 135 L. Ed. 2d 964 (1996) (footnote included in text).

Simply put, the Initiative cannot bind a future legislature to exercise the legislative power in the manner that the Initiative prescribes. To do so would violate the future legislature’s right to legislate as it determines. To attempt to prevent a future legislature from legislating contrary to the intent and principles of the Initiative would likely violate that portion of article III, § 1 of the Idaho Constitution which states, “The legislative power of the state shall be vested in a senate and house of representatives.”

Lastly, the Initiative directs the state Legislature to utilize the passage of this Initiative to amend the Idaho Constitution if necessary. This likewise

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runs afoul of the principle that one legislative act cannot bind or direct a future legislative act.

Further, article XX, §1 of the Idaho Constitution provides that the constitution can only be amended upon a two-thirds vote of each house of the legislature and a majority of the electors. As indicated in Idaho Mutual Benefit Assoc. v. Robinson, 65 Idaho 793, 799, 154 P.2d 156 (1944), “[t]he people, not the legislature, amend the constitution.” The Initiative directs the Legislature to do something it cannot do and consequently a court would likely hold it unconstitutional.

CONCLUSION

The Public Employee Accountability Act contains many constitutional infirmities, contradictions, and confusing terminology. It is beyond the scope of this review to definitively point out each and every transgression, but this certificate of review reflects that, upon review by a court of competent jurisdiction, the Public Employee Accountability Act will likely be found unconstitutional in many regards.

I HEREBY CERTIFY that the enclosed measure has been reviewed for form, style, and matters of substantive import, and that the recommendations set forth above have been communicated to petitioner David M. Estes, 1317 9th Ave., Lewiston, ID 83501 by deposit in the U.S. Mail of a copy of this certificate of review.

Sincerely,

LAWRENCE G. WASDEN
Attorney General

Analysis by:

BARBARA BEEHNER-KANE
MICHAEL GILMORE
Deputy Attorneys General

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**ATTORNEY GENERAL'S
SELECTED
ADVISORY LETTERS
FOR THE YEAR 2007**

**LAWRENCE G. WARDEN
ATTORNEY GENERAL
STATE OF IDAHO**

ADVISORY LETTERS OF THE ATTORNEY GENERAL

January 24, 2007

Representative Elaine Smith
District 30, Pocatello
House Seat B
Idaho State Legislature
State Capitol Building
P.O. Box 83720
Boise ID 83720-0038

Dear Representative Smith:

You have made a request of the Attorney General for an opinion regarding the Idaho Promise Scholarship and whether such scholarship payments can be used to attend private sectarian and nonsectarian universities and colleges. Your concern appears to be based on the use of public funds to help fund private colleges and universities, and whether such funding violates what you refer to as the separation of church and state.

As you are no doubt aware, the Idaho Promise Scholarship is capable of being funded with either public funds appropriated by the legislature or through private donations. Idaho Code § 33-4313. To the extent public funds are used to provide scholarship money to students attending private sectarian colleges or universities, the Idaho Supreme Court would likely find that aspect of the program unconstitutional. Whether the court would find unconstitutional use of the scholarship to assist students attending a private, non-sectarian school is largely an open question at this point.

SCHOLARSHIPS TO PRIVATE SECTARIAN INSTITUTIONS

The statutory basis for the Idaho Promise Scholarship Program clearly indicates that the funds are not to be used for sectarian purposes. Specifically, Idaho Code § 33-4305 provides as follows:

The purpose of this act is:

- (1) To establish a state scholarship program for the most talented Idaho secondary school graduates or the equivalent, consisting of category A students with

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outstanding academic qualifications and category B students with a cumulative grade point average for grades nine (9) through twelve (12) of 3.0 or better or achieving an ACT score of 20 or better or who become eligible after the student's first semester or who meet any other criteria as may be established by the state board of education and the board of regents of the university of Idaho, who will enroll in undergraduate nonreligious academic and professional-technical programs in eligible postsecondary institutions in the state; and

(2) To designate the state board of education and the board of regents of the university of Idaho as the administrative agency for the state scholarship program.

(Emphasis added.) However, the definition of an “eligible postsecondary institution,” found at Idaho Code § 33-4306, does not exclude private sectarian or nonsectarian colleges or universities. Rather, the only restriction placed on such institutions is that the private educational institution be non-profit and not controlled by a public or political subdivision.

Additionally, rules promulgated by the State Board of Education provide that a scholarship “applicant shall not enroll in an educational program leading directly to a baccalaureate degree in theology or divinity.” IDAPA 08.01.05.103.03. The state board rules do not make any other distinction between public or private educational institutions in relation to the eligibility of a student for a scholarship grant.

The U.S. Supreme Court recently held that refusing to provide public scholarship funds to students attempting to obtain a degree in theology does not violate the Free Exercise, Establishment or Free Speech clauses of the First Amendment¹ or the Equal Protection Clause of section 1 of the Fourteenth Amendment to the U.S. Constitution.² Locke v. Davey, 540 U.S. 712, 124 S. Ct. 1307, 158 L. Ed. 2d 1 (2004). Locke involved a challenge to Washington State's Promise Scholarship Program, which denies scholarships to students seeking a degree in theology. The denial was based on the Washington State Constitution, which provides, in pertinent part: “Religious Freedom . . . No public money or property shall be appropriated for or applied

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to any religious worship, exercise or instruction, or the support of any religious establishment.” Washington State Constitution, art. I, §11. The Locke Court stated that states are free to have a more restrictive view, as expressed in their constitutions, than is present in the U.S. Constitution. As the Court observed, “Most States that sought to avoid an establishment of religion around the time of the founding placed in their constitutions formal prohibitions against using tax funds to support the ministry.” Locke, 540 U.S. at 723, 124 S. Ct. at 1314.

Idaho is one of those states, having been required to adopt a constitution containing a prohibition against using tax funds to support religious institutions as part of the federal enabling legislation that allowed Idaho to become a state. Idaho’s constitutional prohibition is found at article IX, § 5:

Sectarian appropriations prohibited.—Neither the legislature nor any county, city, town, township, school district, or other public corporation, shall ever make any appropriation, or pay from any public fund or moneys whatever, anything in aid of any church or sectarian or religious society, or for any sectarian or religious purpose, or to help support or sustain any school, academy, seminary, college, university or other literary or scientific institution, controlled by any church, sectarian or religious denomination whatsoever; nor shall any grant or donation of land, money or other personal property ever be made by the state, or any such public corporation, to any church or for any sectarian or religious purpose; provided, however, that a health facilities authority, as specifically authorized and empowered by law, may finance or refinance any private, not for profit, health facilities owned or operated by any church or sectarian religious society, through loans, leases, or other transactions.³

By a separate constitutional provision, Idaho has clearly prohibited sectarian instruction in public school classrooms. Article IX, § 6.

The Idaho Supreme Court has interpreted article IX, § 5, in a manner that is much more restrictive than the U.S. Supreme Court’s interpretation of the First Amendment to the U.S. Constitution. Doolittle v. Meridian Joint

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School District No. 2, Ada County, 128 Idaho 805, 813, 919 P.2d 334, 342 (1996); Epeldi v. Engelking, 94 Idaho 390, 488 P.2d 860 (1971)*. Doolittle involved a question of whether federal funds, made available through the Individuals with Disabilities Education Act (IDEA), could be used to fund a sign language interpreter at a parochial school. In analyzing the issue, the court stated that normally such use of funds would be unconstitutional under Idaho's constitution:

The Idaho Constitution has been held to provide greater restrictions on the state's involvement in parochial activities than the Establishment Clause of the First Amendment. *Board of County Comm'rs v. Idaho Health Facilities Auth.*, 96 Idaho 498, 509, 531 P.2d 588, 599 (1974); *Epeldi v. Engelking*, 94 Idaho 390, 395, 488 P.2d 860, 865 (1971), *cert. denied*, 406 U.S. 957, 92 S. Ct. 2058, 32 L. Ed. 2d 343 (1972). Article IX, section 5 of the Idaho Constitution prohibits appropriation or payment of public funds for any purpose which aids or helps support a school controlled by a church or sectarian society. Article IX, section 5 of the Idaho Constitution has been held to prohibit the use of public funds to provide for transportation of parochial students to their school, *Epeldi*, 94 Idaho at 398, 488 P.2d at 868, and to prohibit the expenditure of state funds to provide financing to a hospital owned by a religious sect, *Idaho Health Facilities Auth.*, 96 Idaho at 509, 531 P.2d at 599. The payment of public funds for an interpreter and [plaintiff's] tuition to a parochial school directly aids and supports a parochial school. Such payment of public funds is prohibited by article IX, section 5 of the Idaho Constitution.

Doolittle, 128 Idaho at 813, 919 P.2d at 342 (emphasis added). However, because the public school district that should have paid for the child's interpreter had accepted federal funds, the state constitutional prohibition was preempted by the requirements of the IDEA.

The Epeldi decision, *supra*, is significant because it prohibits providing to sectarian education institutions even the indirect benefit of busing its pupils using public funds. Epeldi involved a constitutional challenge to the

then-current version of Idaho Code § 33-1501, which had been amended to require public school districts to bus private school pupils. By statute, the State of Idaho, acting through the State Board of Education and the State Superintendent of Public Instruction, were to reimburse public school districts for transportation costs. However, they refused to do so as far as such costs related to the transportation of parochial school pupils, based on their view that the payment for such transportation violated article IX, § 5 of the Idaho Constitution. The parents of parochial school pupils then filed a declaratory judgment action seeking a ruling that Idaho Code § 33-1501, as amended, was constitutional. The trial court ruled in the plaintiffs' favor, and the State defendants appealed.

The Epeldi court rejected the trial court's reliance on the First Amendment of the U.S. Constitution for the simple reason that article IX, § 5 of the Idaho Constitution is more restrictive. While the Idaho Constitution contains similar protections in article I, § 4, the Epeldi court noted that "unlike the provisions of the Federal Constitution, the Idaho Constitution contains provisions specifically focusing on private schools controlled by sectarian, religious authorities." Epeldi, 94 Idaho at 395, 488 P.2d at 865. The court further observed that:

This section in explicit terms prohibits any appropriation by the legislature or others (county, city, etc.) or payment from any public fund, anything in aid of any church or to help support or sustain any sectarian school, etc. By the phraseology and diction of this provision it is our conclusion that the framers of our constitution intended to more positively enunciate the separation between church and state than did the framers of the United States Constitution. Had that not been their intention there would have been no need for this particular provision, because under Idaho Const. art. 1, § 3, the exercise and enjoyment of religious faith was guaranteed (comparable to the free exercise of religion guaranteed by the First Amendment of the United States Constitution) and it further provides no person could be required to attend religious services or support any particular religion, or pay tithes against his consent (comparable to the establishment clause of the First Amendment).

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Id. Further, the Idaho Supreme Court did not agree with decisions of the U.S. Supreme Court holding that the provision of money to parents of parochial pupils to turn over to the parochial school was not direct or indirect aid to the parochial school:

The Idaho Const. art. IX, § 5, requires this court to focus its attention on the legislation involved to determine whether it is in “aid of any church” and whether it is “to help support or sustain” any church affiliated school. The requirements of this constitutional provision thus eliminate as a test for determination of the constitutionality of the statute, both the “child benefit” theory discussed in *Everson v. Board, supra*, and the standard of *Board of Education v. Allen, supra, i.e.*, whether the legislation has a “secular legislative purpose and a primary effect that neither advances nor inhibits religion.” In this context, while we recognize that even though this legislation does assist the students to attend parochial schools, it also aids those schools by bringing to them those very students for whom the parochial schools were established. Thus, it is our conclusion that this legislation, the effect of which would be to aid the school, is prohibited under the provisions of Idaho Const. art. IX, § 5.

Id. 94 Idaho at 395-96, 488 P.2d at 865-86 (citing *Everson v. Board of Education*, 330 U.S. 1, 67 S. Ct. 504, 91 L. Ed. 711 (1947); *Board of Education of Central School Dist. No. 1 v. Allen*, 392 U.S. 236, 242, 88 S. Ct. 1923, 1926, 20 L. Ed. 2d 1060, 1065 (1968)).

Thus, the *Epeldi* court specifically rejected what it termed the “child benefit” legal theory developed under the First Amendment to the U.S. Constitution in such cases as *Everson v. Board of Education*, 330 U.S. 1, 67 S. Ct. 504, 91 L. Ed. 711 (1947) and carried through to *Zelman v. Simmons-Harris*, 536 U.S. 639, 652, 122 S. Ct. 2460, 2467, 153 L. Ed. 2d 6041 (2002). The Idaho Supreme Court has left no doubt that it considers article IX, § 5 of the Idaho Constitution much more restrictive than the First Amendment to the U.S. Constitution when it comes to spending public funds.

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Idaho is largely in line with other states that have constitutional provisions similar to article IX, § 5.⁵ For example, the Montana Supreme Court refused to allow a school district to pass a levy to fund teachers to provide instruction to students at the local parochial high school. Chambers v. School District No. 10 of the County of Deer Lodge, 472 P.2d 1013 (Mont. 1970). The Chambers court rejected arguments that relied on the First Amendment to the federal constitution, and turned to the following provision in the Montana Constitution:

Neither the legislative assembly, nor any county, city, town, or school district, or other public corporations, shall ever make directly or indirectly, any appropriation, or pay from any public fund or moneys whatever, or make any grant of lands or other property in aid of any church, or for any sectarian purpose, or to aid in the support of any school, academy, seminary, college, university, or other literary, scientific institution, controlled in whole or in part by any church, sect or denomination whatever.

Chambers, 472 P.2d at 1017 (quoting art. XI, sec. 8, Mont. Const.). The court noted that refusing to allow public funds to be raised by levy and spent in support of a parochial did not prevent parents and their children from the free exercise of the religion of their choice in violation of the First Amendment to the U.S. Constitution. Rather, the court stated that raising public tax money for such purposes was illegal in the first instance.

California held unconstitutional a law directing its State Superintendent of Public Instruction to lend, free of charge, text books and other instructional material to sectarian schools. California Teachers Association v. Riles, 632 P.2d 953 (Cal. 1981). The sectarian schools were allowed to keep the instructional materials until they were worn out or out-of-date. The state legislature appropriated public tax funds to support the program. The program was challenged as unconstitutional on its face and unconstitutional as administered, all in violation of the California Constitution. The main constitutional arguments were based on, among other provisions, the following:

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Neither the Legislature, nor any county, city and county, township, school district, or other municipal corporation, shall ever make an appropriation, or pay from any public fund whatever, or grant anything to or in aid of any religious sect, church, creed, or sectarian purpose, or help to support or sustain any school, college, university, hospital, or other institution controlled by any religious creed, church, or sectarian denomination whatever; nor shall any grant or donation of personal property or real estate ever be made by the state, or any city, city and county, town, or other municipal corporation for any religious creed, church, or sectarian purpose whatever; provided, that nothing in this section shall prevent the Legislature granting aid pursuant to Section 3 of Article XVI.

Article XVI, § 5, Cal. Const. The other relevant constitutional provision stated as follows:

No public money shall ever be appropriated for the support of any sectarian or denominational school, or any school not under the exclusive control of the officers of the public schools; nor shall any sectarian or denominational doctrine be taught, or instruction thereon be permitted, directly or indirectly, in any of the common schools of this State.

Article IX, § 8, Cal. Const. The California Supreme Court reviewed U.S. Supreme Court case law interpreting the First Amendment to the U.S. Constitution, and largely rejected its analysis:

It seems clear to us that in most instances the “child benefit” doctrine leads to results which are logically indefensible. In any event, the concept is not relevant in this case, for in our view the textbook loan program authorized by section 60315 does not qualify under the “child benefit” theory because it cannot be characterized as providing sectarian schools with only indirect, remote, and incidental benefits.

Riles, 632 P.2d at 962.

The constitutional proscription against spending public funds on sectarian schools does vary somewhat from state to state. Some states have allowed public funds to go to private sectarian schools and institutions in spite of language in their constitutions that would appear to prohibit such conduct. See, Kotterman v. Killian, 972 P.2d 606 (Ariz. 1999); Jackson v. Benson, 578 N.W.2d 602 (Wis. 1998). However, given the strong position the Idaho Supreme Court has taken in interpreting article IX, § 5 of the Idaho Constitution, it would likely find that providing public scholarship funds to students attending private sectarian colleges and universities is unconstitutional.

SCHOLARSHIPS TO PRIVATE NONSECTARIAN INSTITUTIONS

The Idaho Constitution contains no specific prohibition against using public funds to support, directly or indirectly, private schools, colleges or universities. A couple of constitutional provisions imply that the legislature must spend public funds supporting public schools, colleges and universities rather than private, nonsectarian ones. For example, article IX, § 1 of the Idaho Constitution states as follows:

Legislature to establish system of free schools.—

The stability of a republican form of government depending mainly upon the intelligence of the people, it shall be the duty of the legislature of Idaho, to establish and maintain a general, uniform and thorough system of public, free common schools.

However, the use of the term “school” in that provision has been interpreted to mean elementary and high school levels. Pike v. State Board of Land Commissioners, 19 Idaho 268, 113 P. 447 (1911). In addition, article X, §1 of the Idaho Constitution states as follows:

State to establish and support institutions.—

Educational, reformatory, and penal institutions, and those for the benefit of the insane, blind, deaf and dumb, and such other institutions as the public good may require, shall be established and supported by the state in such manner as may be prescribed by law.

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Here again, such language does not expressly prohibit spending public funds on private nonsectarian colleges or universities. Rather, it implies that public funds should be spent on educational institutions established by the state.

Simply stated, without guidance from the Idaho Supreme Court, your question regarding the use of the Idaho Promise Scholarship to assist a student in attending a private college or university cannot be answered at this point. The emphasis in the Idaho Constitution is plainly placed on a prohibition against supporting sectarian school, colleges and universities, or teaching religious or sectarian classes in any public school. The Idaho Supreme Court will need to determine whether public funds can be diverted from the support of “free common schools” and educational institutions “as the public good may require,” to private colleges and universities through the distribution of Promise Scholarships.

This letter is provided to assist you. The response is an informal and unofficial expression of the views of this office based on the research of the author.

Sincerely,

CHRIS KRONBERG
Deputy Attorney General
Idaho State Department of Education

¹ The First Amendment to the U.S. Constitution states: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the government for a redress of grievances.”

² Section 1 of the Fourteenth Amendment to the U.S. Constitution states: “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

³ The language regarding health care facilities was added in 1980 by ratification at the general election. An effort to amend article IX, § 5, to allow public school funds to be used to transport pupils to private schools went down to defeat in 1972. The proposed 1972 amendment simply added after the phrase “any sectarian or religious purpose,” the phrase “except that this prohibition shall not prevent appropriations for school transportation programs.”

ADVISORY LETTERS OF THE ATTORNEY GENERAL

⁴ “The appropriation of public funds to public hospitals operated by religious sects does not violate the First Amendment to the Constitution of the United States, Bradfield v. Roberts, 175 U.S. 291, 20 S. Ct. 121, 44 L. Ed. 168 (1899). But this does not mean that such commitment of funds is not violative of the Idaho Constitution. The Idaho Constitution places a much greater restriction upon the power of state government to aid activities undertaken by religious sects than does the First Amendment to the Constitution of the United States.” Board of County Commissioners of Twin Falls County v. Idaho Health Facilities Authority, 96 Idaho 498, 509, 531 P.2d 588, 599 (1975) (citing Epeldi v. Engelking, 94 Idaho 390, 488 P.2d 860 (1971)).

⁵ See, Bush v. Holmes, 886 So. 2d 340 (Fla. Ct. App. 2004); Chittenden Town School District v. Department of Education, 738 A.2d 539 (Vt. 1999); Neal v. Fiscal Court, Jefferson County, 986 S.W.2d 907 (Ky. 1999); Opinion of the Justices (Choice in Education), 616 A.2d 478 (N.H. 1992); Fannin v. Williams, 655 S.W.2d 480 (Ky. 1983); California Teachers Ass'n v. Riles, 29 Cal. 3d 794, 176 Cal. Rptr. 300, 632 P.2d 953 (1981); Sheldon Jackson College v. State of Alaska, 599 P.2d 127 (Alaska 1979); Bloom v. School Committee of Springfield, 379 N.E.2d 578 (Mass. 1978); McDonald v. School Bd. of Yankton, Etc., 246 N.W.2d 93 (S.D. 1976); Paster v. Tussey, 512 S.W.2d 97 (Mo. 1974) (en banc); Gaffney v. State Department of Education, 220 N.W.2d 550 (Neb. 1974); Chambers v. School District No. 10 of the County of Deer Lodge, 472 P.2d 1013 (Mont. 1970); Spears v. Honda, 499 P.2d 130 (Hawaii 1969); Dickman v. School District No. 62C, Oregon City, 366 P.2d 533 (Or. 1960); Almond v. Day, 89 S.E.2d 851 (Va. 1955).

ADVISORY LETTERS OF THE ATTORNEY GENERAL

February 1, 2007

Via Hand Delivery

The Honorable Maxine Bell
Idaho House of Representatives
STATEHOUSE

Re: Our File No. 2007LEG016—Idaho Primary Election Process

Dear Representative Bell:

This letter is in response to questions raised concerning the U.S. Supreme Court case California Democratic Party et al. v. Jones¹ and Idaho's primary election process. The specific questions are:

1. Must Californians register as members of a political party to vote in a primary election?
2. What is the effect of Jones on Idaho law?
3. What action, if any, should the Idaho Legislature take in response to Jones?

Response to Question 1:

Californians do not have to register as members of a political party to vote in their state primary election. California currently has a "modified" closed primary system. In a modified closed primary, only persons who are registered members of a political party may vote the ballot of that party. However, unaffiliated voters (those who decline to state party affiliation when registering) may vote the ballot of a political party *if authorized by the individual party's rules* and the party provides notice of that fact to the Secretary of State at least 135 days prior to the primary election. In its last primary election, three of California's seven qualified political parties notified the Secretary of State of their rules allowing unaffiliated voters to vote their ballot. They were the American Independent Party, Democratic Party, and the Republican Party.

Response to Question 2:

Jones has no effect upon the constitutionality of Idaho primary election law.

Prior to 1996, California had a “closed” primary system in which only registered party members could vote the ballot of that political party. In 1996, California voters passed Initiative 198 (“Prop 198”) which allowed any voter to choose freely from among any candidate of any political party. This is known as a “blanket” primary. The candidate of each party who received the most votes became the party’s nominee for the general election. The rules of California’s Democratic Party, Libertarian Party, Peace and Freedom Party, and Republican Party all prohibited persons who were not party members from voting in their party’s primary. These party rules were in conflict with Prop 198. As a result, the four parties sued California’s Secretary of State, Bill Jones, alleging that the new law violated their First Amendment right of association under the U.S. Constitution.²

The U.S. District Court for the Eastern District of California upheld the constitutionality of Prop 198, as did the U.S. Court of Appeals for the Ninth Circuit. The parties appealed the Ninth Circuit decision to the U.S. Supreme Court. The Supreme Court recognized a distinction between *selecting* a candidate as a party nominee and *voting* for a candidate of one’s choice in a general election. It said that, while voting for a candidate of one’s choice may be a citizen’s fundamental right, “selecting the candidate of a group to which one does not belong . . . falls far short of a constitutional right, if indeed it can even fairly be characterized as an interest.”³ The Court held that Prop 198 forced parties to adulterate one of their basic functions: to choose its own leaders.

California’s argument for a blanket primary was that it enhanced the democratic nature of the election process and the “representativeness” of elected officials. It put forward that Prop 198 served seven state interests:

1. To produce elected officials who better represented the electorate;
2. To expand candidate debate beyond the scope of partisan concerns;

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3. To ensure disenfranchised persons enjoyed the right to cast an effective vote;
4. To promote fairness;
5. To afford voters greater choices;
6. To increase voter participation; and
7. To protect privacy by not requiring voters to declare party affiliation.

The Court observed that, to infringe upon a fundamental constitutional right, in this case, the right to freely associate, a state's law must serve a compelling state interest. The Court concluded that all of the interests posited by California were either illegitimate or not compelling.⁴ As for the promotion of fairness, the Court found nothing fair about "permitting nonparty members to hijack the party."⁵

The situation in Idaho differs from the situation in Jones in several respects. First, Idaho holds *open* primaries, not *blanket* primaries. Additionally, Idahoans do not declare their party affiliation when registering to vote. While any registered voter may vote any party's primary ballot, the voter must vote only one party's ballot and may not freely choose among any candidate of any political party. So, while registering as a party member is not required or even permitted, to vote a primary ballot, voters must still affiliate with a single party in some small way. Moreover, the Jones court observed that "the blanket primary may be constitutionally distinct from the open primary" It declared, "**This case does not require us to determine the constitutionality of open primaries.**"⁶ Jones, therefore, does not affect the constitutionality of Idaho primary election law.

Response to Question 3:

Unlike the four political party plaintiffs in Jones, the rules of Idaho's two major political parties do not contain a prohibition against non-party members voting the primary ballot of their party. The Bylaws of the Idaho State Democratic Party and the Rules of the Idaho Republican Party are completely silent on the primary election process, and it is these bylaws and rules that govern the parties. Each party has a platform, as well. The 2006 Idaho Democratic Party Platform articulates support for the right of independents to vote in primary elections. It expresses the view that Idahoans should not be

ADVISORY LETTERS OF THE ATTORNEY GENERAL

required to publicly declare a party preference when registering to vote and declares that the “right” of all Idahoans to keep their political preferences private and to vote in all elections must be preserved.⁷ Idaho statutes prescribing the state’s open primary system are consistent with all of these views. In contrast, the Idaho State Republican Platform states:

The Idaho Republican Party Believes that Primary elections in the Idaho Republican Party should be open to all the people who have registered as a Republican prior to the primary election and that the Idaho Legislature should pass legislation that would provide for the same. To allow those who have no loyalty or allegiance to the Idaho Republican Party or its’ [sic] platform and Resolutions to select our candidates is simply not proper.⁸

Idaho statutes are inconsistent with the views expressed in the Idaho Republican Party Platform since Idaho law does not require party registration and does not require party registration to vote a party’s primary ballot. Unlike rules, however, planks of a platform are policy statements that set forth an organization’s views, aims, and aspirations.⁹ They are not “rules governing the Idaho Republican Party”¹⁰ and, therefore, have no binding effect upon the party, let alone upon the Idaho State Legislature. Therefore, the legislature, while it may amend Idaho’s primary election process if it chooses, is not legally bound to do so based upon the Jones decision.

I hope that the information contained in this letter is helpful to you. Please contact me if you would like to discuss this issue further.

Kind regards,

MITCHELL E. TORYANSKI
Deputy Attorney General

¹ 530 U.S. 567 (2000).

² “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the government for a redress of grievances.” U.S. Const. Amend. 1 (emphasis added).

³ 530 U.S. 567, 573 (2000).

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- ⁴ 530 U.S. 567, 582 (2000).
- ⁵ 530 U.S. 567, 584 (2000).
- ⁶ 530 U.S. 567, 577, n.8 (2000).
- ⁷ Idaho State Democratic Party Platform, adopted June 24, 2006, IIB(2)(c).
- ⁸ Idaho State Republican Party Platform, adopted June 17, 2006, § XXIV.
- ⁹ Roberts Rules of Order, Newly Revised § 59 (10th ed. 2000).
- ¹⁰ Rules of the Idaho Republican Party, Rules of the Convention, article III, section 4(b).

ADVISORY LETTERS OF THE ATTORNEY GENERAL

February 16, 2007

Representative Scott Bedke
Idaho House of Representatives
HAND DELIVERY

Re: Idaho Center for Livestock and Environmental Studies

Dear Representative Bedke:

This letter is in response to your letter of January 24, 2007, to Attorney General Lawrence G. Wasden, and it is provided to assist you. It is an informal and unofficial response of the Office of the Attorney General (OAG) based solely on the research of the author.

Your letter of January 24, 2007, provides information about a proposed Idaho Center for Livestock and Environmental Studies (Center), which is intended to be an expansion of the “research and teaching mission” of the University of Idaho College of Agriculture and Life Sciences. You then inquire:

Questions have been raised whether the University may enter into an agreement that would allow a non-profit entity to operate a University owned facility such as the Center in the manner contemplated. We would appreciate your opinion on this matter: is this organizational structure legal?'

Yes, subject to qualification.

Based on our research, we conclude that the Board of Regents of the University of Idaho has general statutory authority to alienate interests in the real and personal property of the University of Idaho. That authority, however, is subject to the limitations of the public purpose doctrine.

The public purpose doctrine is a constitutional limitation on the power of government to enter into transactions, such as leases, with private parties. The doctrine does not prohibit all leases of public property to private

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parties; rather, it sets the parameters for legally permissible leases. The doctrine is somewhat misnamed, since it focuses not only on the purpose for which a transaction is entered into, but also on the particulars of the transaction. It seeks to ensure that a public purpose is served and that public money has not been impermissibly used in achieving that purpose through a private party.

The “Budget and Operational Feasibility” for the Idaho Center for Livestock and Environmental Studies, January 2007, which we reviewed as part of our research, states that the nonprofit corporation that will be leasing and then operating the land and buildings that comprise the Center will be an organization qualified under 26 U.S.C. § 501(c)(3) of the Internal Revenue Code.

Assuming that the relevant aspects of the public purpose doctrine are satisfied, and assuming that the nonprofit organization is, in fact, qualified under Section 501(c)(3), there are no apparent provisions of Idaho law that would specifically preclude the regents from leasing the Center to, and entering into an operating agreement with, a nonprofit corporation qualified as a tax exempt entity under Section 501(c)(3) of the Internal Revenue Code.

Please contact me if you wish to discuss matters further.

Sincerely,

MICHAEL G. MCPEEK
Deputy Attorney General
Contracts & Administrative Law Division

¹ Your letter and the “Budget and Operational Feasibility” (BOF) for the Idaho Center for Livestock and Environmental Studies, January 2007, which we reviewed as part of our research, both indicate that one expected source of funding to develop the Center is a contribution of \$10 million from the University of Idaho’s Agricultural College Endowment. This projected source of funds raises legal issues that are outside the scope of the particular inquiry made in your letter, but which may materially affect the proposed funding structure for the project. Because of the potential significance of these issues, we have flagged them for you in Appendix A to this letter. We are not issuing a legal opinion regarding the issues identified in Appendix A, since those issues are outside the scope of the specific opinion request received by the OAG; nor do we represent that our listing of other issues is comprehensive. Our assumption is that legal counsel for the appropriate entities will address these issues.

APPENDIX A

Listed below are legal issues we have identified that are outside the scope of the particular issue on which you requested an opinion in your letter of January 24, 2007, but which may be material to the Center project as currently proposed. We have not issued a legal opinion regarding these issues since they are outside the scope of the specific opinion request received by the OAG; nor do we represent that this listing of issues is comprehensive. Our assumption is that legal counsel for the appropriate entities will address these issues.

- Whether the section of the Idaho Admission Act granting land to the state for the use and support of an agricultural college, as provided in the First Morrill Act, and the restrictions contained in the First Morrill Act, which were accepted by the state as a precondition to receiving the federal grant of lands for an agricultural college, prohibit the state and the board of regents of the University of Idaho from applying any of the assets contained in the agricultural college permanent endowment, agricultural college earnings reserve fund, and agricultural college income fund “directly or indirectly, under any pretence whatever, to the purchase, erection, preservation, or repair of any building or building” of the Center?
 - o See § 10 of the Idaho Admission Act, 26 Stat. L. 215, ch. 656; First Morrill Act, 12 Stat. 50, ch. 130, codified as 7 U.S.C. §§ 301 – 308; 7 U.S.C. § 305; Idaho Code § 33-2813; Evans v. Van Duesen, 31 Idaho 614, 620, 174 P. 122 (1918).
- If the state and the board of regents are prohibited from applying the assets of the agricultural college permanent endowment, agricultural college earnings reserve fund, and agricultural college income fund to constructing the buildings that are to make up the Center, may the state and the regents, nevertheless, apply a portion of those assets to acquire land for the Center under the following exception contained in 7 U.S.C § 305?
 - o “First. If any portion of the fund invested, as provided by the foregoing section, or any portion of the interest thereon, shall, by

any action or contingency, be diminished or lost, it shall be replaced by the State to which it belongs, so that the capital of the fund shall remain forever undiminished; and the annual interest shall be regularly applied without diminution to the purposes mentioned in the fourth section of this act, *except that a sum, not exceeding ten per centum upon the amount received by any State under the provisions of this act may be expended for the purchase of lands for sites or experimental farms, whenever authorized by the respective legislatures of said States.*” (Emphasis added.)

- If the 10% exception in 7 U.S.C. § 305 is applicable, what is the correct legal standard for applying the exception? Does it mean the historical proceeds of prior land sales plus the proceeds of any current sales? Or the current value of the agricultural college assets under management by the endowment investment board and the proceeds of any current sales? Does it include the value of any unsold agricultural college endowment lands being managed by the land board through the department of lands? Are there other possible interpretations of the 10% exception?

ADVISORY LETTERS OF THE ATTORNEY GENERAL

March 20, 2007

Hand Delivered

The Honorable Monty J. Pearce
Idaho State Senate
Statehouse
Boise, ID 83720

Re: Your Inquiry About Permissible Uses of Social Security
Numbers
Our File 2007LEG141

Dear Senator Pearce:

Last Friday you asked whether it is legal for cellular telephone companies to require a Social Security number when contracting with an individual for cellular telephone service. This letter answers your inquiry.

BACKGROUND

The Social Security Number (SSN) was originally devised as a way to keep an accurate record of an individual's earnings and to subsequently track benefits paid under the Social Security program. The Social Security Act of 1935 authorized the creation of a recordkeeping program. Pub. Law No. 74-271. Over the years, use of the SSN as a general identifier has grown to the point where it is the most commonly used "identifier for all types of record-keeping systems in the United States." Social Security Administration website, [www.socialsecurity.gov/faq/socialsecuritynumber & card?no.29](http://www.socialsecurity.gov/faq/socialsecuritynumber%20&%20card?no.29). Social Security numbers are used by governments and businesses.

Various state and federal laws require a person to provide his or her SSN for certain purposes. The federal Privacy Act (5 U.S.C. § 552a) regulates the use of SSNs by federal, state and local government agencies. For example, the use of SSNs pertain to federal tax returns, banking transactions, drivers licenses, and marriage licenses in Idaho. Idaho Code §§ 32-403(2), 49-306(2). When a governmental agency requests an SSN from an individual, the Privacy Act generally requires the agency to inform the person of the

authority for requesting the information, whether disclosure is mandatory or voluntary, what use will be made of the information, and the consequences, if any, of failure to provide the SSN.

With the growing concern about identity theft and misuse of SSNs, Congress now prohibits federal, state and local governments from displaying SSNs on drivers' licenses, motor vehicle registrations, or other identification documents related to motor vehicles. Intelligence Reform and Terrorism Prevention Act of 2004, Pub. Law No. 108-458, § 7214 (2004).

YOUR QUESTION

Because the SSN is the most commonly used general identifier, businesses may ask for or require an individual's SSN. There is no Idaho or federal law that prohibits businesses from asking for an SSN. An individual may refuse to give his or her SSN, however, the business may then decline to provide the requested service. Consequently, it is legal for a cellular telephone company to require a Social Security number before doing business with an individual. Giving an SSN to a cellular company is voluntary. If the individual does not have an SSN, companies may use other means to identify a person.

I hope this information answers your inquiry. Please call me at 334-0312 if you have additional questions.

Sincerely yours,

DONALD L. HOWELL, II
Deputy Attorney General

ADVISORY LETTERS OF THE ATTORNEY GENERAL

March 30, 2007

Hand Delivered

The Honorable Jeff Siddoway
Capitol Building
P.O. Box 83720
Boise, ID 83720-0081

Re: Inquiry Regarding What Constitutes a “Futile Call”

Dear Senator Siddoway:

This letter is in response to the questions presented in your March 6, 2007, inquiry regarding what constitutes a “futile call.”

QUESTIONS PRESENTED

1. Does Idaho statute or case law provide a definition of what constitutes a “futile call” against a groundwater user?
2. Have other states established definitions or guidelines for when a call against a groundwater user would be futile?
3. Should the legislature attempt to come up with a definition of futile call for ground water users, or is that something that should not be a hard and fast rule and better left to the Director of the Idaho Department of Water Resources to better recognize that each call will present different and complex facts that need to be evaluated on a case-by-case basis?

CONCLUSION

Idaho case law and administrative rule recognize and define the futile call doctrine. While the legal definition of futile call is firmly rooted in the prior appropriation doctrine and does not vary greatly from state to state, the application of the legal definition of futile call varies based upon the hydro-logic context in which the delivery call is made.

Whether the Idaho Legislature should attempt to further define “futile call” in the context of a surface to ground water call is a question of policy not law committed to the sound discretion of the Idaho Legislature. There are two factors the Idaho Legislature should consider in determining whether to further define “futile call.” First, legislation generally is best suited for establishing rules of broad application. Second, whether a call is futile is a highly fact-specific determination based upon the unique hydrologic conditions of each water source.

ANALYSIS

1. Idaho Case Law and Administrative Rules Define Futile Call

The Idaho Supreme Court recognized the futile call doctrine in Gilbert v. Smith, 97 Idaho 735, 552 P.2d 1220 (1976). The Idaho Supreme Court defined futile call as follows: “[I]f due to seepage, evaporation, channel absorption or other conditions beyond the control of the appropriators the water in the stream will not reach the point of the prior appropriator in sufficient quantity for him to apply it to beneficial use, then a junior appropriator whose diversion point is higher on the stream may divert the water.” *Id.* at 739, 552 P.2d at 1224. *See also* Wells A. Hutchins, *Idaho Law of Water Rights*, 5 Idaho L. Rev 1, 52 (1968) (“If neither the surface flow nor underflow of a stream, if undisturbed, would reach the point of diversion of a prior appropriator, such appropriator cannot complain of a diversion of water above him by a junior appropriator . . .”).

The Idaho Department of Water Resources’ (“IDWR” or “Department”) Rules for Conjunctive Management of Surface and Ground Water Resources (“CM Rules”) define futile call in the context of senior surface water and junior groundwater users: “A delivery call made by the holder of a senior-priority surface or ground water right that, for physical and hydrologic reasons, cannot be satisfied within a reasonable time of the call by immediately curtailing diversions under junior-priority ground water rights or that would result in waste of the water resource.” IDAPA 37.03.11.010.08.

2. Other Western States Definition of Futile Call Are Similar to Idaho's Definition

Other states in the western United States recognize the futile call doctrine in much the same form as Idaho. *See Albion-Idaho Land Co. v. Nave Irr. Co.*, 97 F.2d 439, 444 (10th Cir. 1938) (“The paramount right of the prior appropriator does not justify him in insisting that the water be wasted and lost by denying its use to the junior appropriator under such circumstances”); *Dern v. Tanner*, 60 F.2d 626, 628 (D. Mont. 1932) (“Whenever their needs for irrigation are reasonably supplied, the water is open to the next in priority, whatever the effect on plaintiffs’ appliances. So, likewise, whenever the volume of water is too small to afford a head practicable for irrigation at plaintiffs’ lands.”); *Empire Lodge Homeowners’ Ass’n v. Moyer*, 39 P.3d 1139, 1145, n.7 (Colo. 2001) (“A futile call determination lifts curtailment of diversions that would otherwise result from administration of decreed priorities”); *San Carlos Apache Tribe v. Superior Court ex rel. County of Maricopa*, 972 P.2d 179, 195, n.9 (Ariz. 1999) (“The futile call doctrine provides that a senior appropriator may prevent a junior appropriator from diverting water only when doing so will be of some benefit to the senior”); *Mitchell Irr. Dist. v. Whiting*, 136 P.2d 502, 511 (Wyo. 1943) (“By closing the junior canals in Wyoming, the effect would have been, as we have seen, to injure the holders of rights inferior to plaintiff, and the plaintiff would probably have received no benefit whatsoever”); *State ex rel. Cary v. Cochran*, 292 N.W. 239, 247 (Neb. 1940) (“After determination that a given quantity of water passing a certain point on the river would not, even if uninterrupted, reach the headgate of the Kearney canal in usable quantities, the administrative officers of the state may lawfully permit junior appropriators to divert it for irrigation purposes”); *Cleary v. Daniels*, 167 P. 820, 823 (Utah 1917) (“While, under such circumstances, he retains all of his rights to the water, yet he may not insist that the water be wasted merely because he has a prior right to use it”).

Of particular note in regard to your question of the application of the futile call doctrine in other states in the context of senior surface water users and junior groundwater users is the case of *Fellhauer v. People*, 447 P.2d 986, 997 (Colo. 1968). In dicta, the Colorado Supreme Court examined the application of the futile call doctrine:

The Colorado system of appropriation was tailored to the conditions of surface stream diversions in an arid western climate.

[S]uch factors as well size, the transmissibility and saturated thickness of an aquifer, and the spacing of wells did not complicate the century-old problems for which the doctrine was designed. Wells junior in time are frequently scattered at indiscriminate distances and bear random priorities. Although wells closest to a senior diversion frequently will have the greatest impact, appropriation rules look exclusively to seniority, disregarding the all-important factors of proximity and actual effect. As a result, the first wells called upon to stop pumping must be the most junior wells, even though they may be geographically the most distant and the least offensive to the senior. Strict administration on the basis of seniority would plainly prevent a full beneficial use of water in the aquifer.

Because of these complexities, the need for detailed engineering data on well size, location, operation, priority and anticipated effects is essential to an effective application of the appropriation theory to well operations. Wells which number in the thousands cannot be governed by priority where priorities are unknown. Futile calls on distant or even proximate diversions are unavoidable without a precise understanding of the well-surface relationship in each case. And, of course, effective economic planning calls for certainty in supply predictions. Unavailability of, or inattention to, critical information of this type makes it possible to transform well-operators who are located in an overdeveloped aquifer or near surface streams into involuntary dry land operators as they wait for senior rights to come back to life. Much ground water will remain inac-

cessible to all, sealed from economic productivity by misapprehension of hydrologic fact.

These wells must be administered in accordance with priority, along with other factors. Offhand, we know of no reason why the state engineer cannot take into account the relative priorities of wells, subject to appropriate judicial review. However, the issues involved have not been presented too thoroughly in the briefs and, therefore, it will be the better part of wisdom for us not to speak determinatively. Also, these questions can better be presented after the state engineer acts according to plan, rules and regulations.

Id. at 996-97 (internal quotations omitted).

Only a few states have attempted to define futile call by statute or rule. Colorado defines the futile call concept by statute as follows: “In the event that a discontinuance has been ordered pursuant to the provisions of this paragraph (a), and nevertheless such discontinuance does not cause water to become available to such senior priorities at the time and place of their need, then such discontinuance order shall be rescinded.” Colo. Rev. Stat. § 37-92-502(2)(a). Wyoming statute uses but does not define the term, providing that, “The state engineer shall not regulate the stream to protect [an] instream flow right . . . [i]f the call for regulation is a futile call” Wyo. Stat. Ann. § 41-3-1008. In Oregon, futile call is defined by rule as follows: “A call for distribution of surface water is futile when a junior appropriator has been denied the use of water and, in the judgement of the watermaster, an inadequate amount of water, or no water, reaches the senior appropriator” Or. Admin. R. 690-250-0020(1).

3. Whether the Definition of Futile Call for Purposes of Surface to Ground Water Delivery Calls Should Be Defined by Statute is a Policy Question Committed to the Sound Discretion of the Legislature

The decision on whether to legislatively define the futile call doctrine is a policy determination committed to the sound discretion of the Idaho

ADVISORY LETTERS OF THE ATTORNEY GENERAL

Legislature. In deciding whether to pursue such legislation, however, it is important to consider the realities of conjunctive administration of surface and ground water. As illustrated by Fellhauer, “intelligent administration” of junior ground water rights involves highly complex factual reviews of “engineering data on well size, location, operation, priority and anticipated effects.” *Id.* at 994, 996. Anticipated effects of administration of junior water rights are particularly difficult in a groundwater setting. Those complexities were aptly described by Douglas L. Grant, former professor of law at the University of Idaho, in a 1987 law review article:

When water is diverted from a surface stream, the flow is directly reduced, and the reduction is soon felt by downstream users unless the distances involved are great. When water is withdrawn from an aquifer, however, the impact elsewhere in the basin or on a hydrologically connected stream is typically much slower. If a well withdraws groundwater that is tributary to a surface stream, the stream will be depleted gradually and the full impact might not be felt for weeks, months, years, or even decades. Conversely, if the well is closed after a period of operation, the stream depletion does not terminate immediately but may continue gradually diminishing, for weeks, months, years, or decades. Delayed impact complicates the administration of priorities. . . .

Douglas L. Grant, *The Complexities of Managing Hydrologically Connected Surface Water and Groundwater Under the Appropriation Doctrine*, 22 LAND & WATER L. REV. 63, 74 (1987). Given the hydrologic complexities, the obvious question is whether it is possible to legislate a more definitive definition of “futile call” than presently exists.

This letter is provided to assist you. The response is an informal and unofficial expression of the views of this office based upon the research of the author.

Sincerely,

CLIVE J. STRONG
Deputy Attorney General
Chief, Natural Resources Division

ADVISORY LETTERS OF THE ATTORNEY GENERAL

April 17, 2007

The Honorable Frank N. Henderson
362 S. Ponderosa Loop
Post Falls, ID 83854

Re: Eligibility of Individuals to Serve on Both the Coeur d'Alene School District Board of Trustees and the North Idaho College Board of Trustees

Dear Representative Henderson:

You asked for an opinion concerning the eligibility of individuals to serve both as a member of the Coeur d'Alene School District Board of Trustees and the North Idaho College Board of Trustees. As I discuss further below, after reviewing the law applicable to service on these boards, I conclude that dual service is not prohibited.

Trustees at both the junior college level and the public school district level are elected positions, except in limited circumstance where an individual is appointed to fill a vacancy. Idaho Code §§ 33-501 and 33-2106. Statutorily, a trustee in either position must be a school elector residing in the district. A public school trustee must also be a resident of the trustee zone from which the trustee is elected. Idaho Code § 33-501. Your question does not provide information concerning the residency of the trustee in question, and I have assumed that residency is not at issue.

The statutory ethics provisions applicable to elected public officials apply to elected members of local governmental boards. *See* Idaho Code §§ 18-1351 to -1361A (the Bribery and Corrupt Influence Act); Idaho Code §§ 59-201 to -209 (the Prohibitions Against Contracts with Officers); Idaho Code §§ 59-701 to -705 (the Ethics in Government Act). In addition, public school district trustees are governed by the limitations on authority set forth in Idaho Code § 33-507. None of these provisions specifically prohibits service as a trustee because of the potential that a conflict may arise between that service and other activities of the trustee. Should a conflict arise, each of these statutory provisions contains processes for disclosure of conflicts and abstention from voting and participating in matters involving a conflict.

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The doctrine of incompatibility of office may prevent service on two boards where the trustee cannot provide full allegiance to both public institutions simultaneously or where service in both positions causes the consolidation of government functions in a single individual in a manner that could adversely affect the participation of others in public functions. *See* 63C Am. Jur. 2d Public Officers and Employees § 57 (2007). In this instance, the doctrine of incompatibility does not apply to prevent participation on both boards. The two institutions do not have competing interests. They do not compete for students, staff, or funding. In addition, as elected positions on multiple-member boards, the service of other elected trustees provides avenues for participation by competing viewpoints.

Should a conflict arise between the trustee's duties to the college and the school district, the trustee must disclose the conflict and abstain from participation in the matter. If the conflict is ongoing, the dual service may become incompatible and necessitate resignation or removal from one of the boards. Absent a conflict, however, service in both positions is consistent with Idaho law.

This letter is provided to assist you. It represents an informal and unofficial expression of the views of this office based on the research of the author. If I can be of further assistance on this matter, please do not hesitate to contact me.

Sincerely,

JULIE K. WEAVER
Deputy Attorney General
Contracts & Administrative Law Division

ADVISORY LETTERS OF THE ATTORNEY GENERAL

July 3, 2007

Senator Bart M. Davis
P.O. Box 50660
Idaho Falls, ID 83405-0660

Dear Senator Davis:

This is in response to your request for a legal opinion from the Office of the Attorney General regarding questions you have posed on the subject of possible relocation from Moscow to Boise of the University of Idaho College of Law. You inquire:

1. Does the Idaho Constitution permit the University of Idaho's College of Law to be "formally moved in whole . . . from Moscow and located in the state capitol"?
2. Does the Idaho Constitution permit the University of Idaho's College of Law to be "formally moved . . . in significant part from Moscow and located in the state capitol"?
3. What legal steps "would be required in order to make such a change should the Board of Regents, the legislature, and the Governor reach some consensus"?

DISCUSSION

Prior to making this response, we engaged in substantial research. We reviewed the territorial act establishing the University of Idaho; the text of art. IX, sec.10 of the Idaho Constitution and the case law regarding that provision; the debates of the constitutional convention; other potentially relevant constitutional provisions, such as art. XI, sec. 2, and the related case law, if any; rules of statutory and constitutional construction; Idaho Supreme Court cases dealing with the University of Idaho and its board of regents; as well as constitutional provisions and case law from other jurisdictions with constitutional provisions similar to art. IX, sec. 10. As you know, it can be extremely difficult to predict how the current members of the Idaho Supreme Court might interpret state constitutional provisions adopted at statehood and

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never amended. Nevertheless, based on the factors considered, we have exercised our best judgment as to how the Idaho Supreme Court would interpret the state constitutional provisions, particularly art. IX, sec. 10, relevant to the questions you have posed.

There are no Idaho Supreme Court cases on point regarding relocation, in whole or in part, of a college or department of the University of Idaho. Analogous precedent from other jurisdictions in which courts specifically addressed the authority of a legislature or university governing board to relocate a college or department of a university whose geographical location was fixed by the state's constitution is limited to two cases, both decided more than 100 years ago. These cases are: *People ex rel. Jerome*, 24 Colo. 175, 49 P. 286 (Colo. 1897) (holding that the regents of Colorado University at Boulder did not have authority under the state constitution to effectively move the three-year medical school program from Boulder to Denver by conducting the last two years of the program in Denver and leaving only a "shell" of the program in Boulder); and *Sterling v. Regents of the University of Michigan*, 110 Mich. 369, 68 N.W. 253 (Mich. 1896) (holding that the state constitution prohibited the legislature from requiring that the regents of the University of Michigan at Ann Arbor close the homeopathic college at Ann Arbor and transfer the college to Detroit).

Colorado addressed the impact of *People ex rel. Jerome* by amending art. VIII, sec. 5 of its constitution in 1910 to specifically grant authority to move part of the Colorado University School of Medicine from Boulder to Denver. As originally adopted at statehood in 1876, art. VIII, sec. 5, "confirmed" the "location" of Colorado University at Boulder, and that provision was relied on by the Colorado Supreme Court in reaching its decision in *People ex rel. Jerome*. The 1910 amendment provided, in pertinent part:

[T]hat the regents of the university may, whenever in their judgment the needs of the institution demand such action, establish, maintain and conduct all but the first two years of the departments of medicine, dentistry and pharmacy, of the university, at Denver

The 1910 amendment paved the way for the merger in 1911 of the Colorado University School of Medicine with the Denver and Gross College

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of Medicine in Denver. The latter college had been created in 1902 through the merger of the Medical Department of the University of Denver with Gross Medical School, which was a for-profit medical school. In 1922, art. VIII, sec. 5 of the Colorado Constitution was amended to grant authority to move the entire medical school from Boulder to Denver:

That the regents of the university may whenever in their judgment the needs of the institution demand such action, establish, maintain and conduct all or part of the departments of medicine, dentistry, and pharmacy at the university, at Denver

All of the Colorado University School of Medicine was moved to Denver in 1924.

Colorado University is now a system with three distinct institutions: Colorado University-Boulder; Colorado University-Colorado Springs; and Colorado University-Denver and Health Sciences Center, the latter institution having been formed in 2004 by a merger of Colorado University-Denver and the Health Sciences Center. Art. VIII, sec. 5 of the Colorado Constitution was most recently amended in 1972 to provide, in pertinent part, that:

(1) The following educational institutions are declared to be state institutions of higher education: the university at Boulder, Colorado Springs, and Denver; the university at Fort Collins; the school of mines at Golden; and such other institutions of higher learning as now exist or may hereafter be established by law if they are designated by law as state institution. The establishment, management, and abolition of the state institutions shall be subject to the control of the state, under the provisions of the constitution and such laws and regulations the general assembly may provide; except that the regents of the university at Boulder, Colorado Springs, and Denver may, whenever in their judgment the needs of that institution demand such action, establish, maintain, and conduct all or any part of the schools of medicine, dentistry, nursing, and pharmacy of the university, together with hospitals and supporting facilities and programs related

to health at Denver; . . . and provided further, that subject to prior approval by the general assembly, nothing in this section shall be construed to prevent the state institutions of higher education from hereafter establishing, maintaining, and conducting or discontinuing, centers, medical centers, or braches of such institutions in any part of the state.

CONCLUSION

Based on the foregoing and our analysis of the other sources mentioned earlier, we conclude that neither the legislature nor the board of regents has authority to close the University of Idaho College of Law and to relocate the entire college to Boise. Art. IX, sec. 10 of the Idaho Constitution locates the University of Idaho in Moscow, subject to change by constitutional amendment. The University's territorial charter was perpetuated by art. IX, sec. 10. The charter defines the University as consisting of its colleges or departments, including not only those in existence at the time the state constitution was ratified but also those "professional or other colleges or departments as may from time to time be added thereto or connected therewith." The College of Law was established in 1909. Since the University is located in Moscow and since the University consists of its colleges or departments, art. IX, sec. 10, contemplates that those colleges or departments will be located in Moscow as well. Art. IX, sec. 10, however, does not prohibit the establishment of branches of the University of Idaho outside Moscow; but it would prohibit closure of a college or department at the University of Idaho in Moscow and its relocation in whole to a branch of the University in another city.

The phrase "significant part" is problematic. Nothing in the Idaho Constitution prohibits establishment of a branch or branches of the University of Idaho, or of one of its colleges, in a location or locations other than Moscow. But neither the legislature nor the University's regents has the constitutional authority to do indirectly what they do not have the authority to do directly. They do not have the authority to offer so much of the College of Law's program in Moscow in another city so as to effect a de facto "removal" of the College of Law from Moscow. The point at which a de facto removal is crossed would be a question for ultimate determination by the courts.

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Closure of the College of Law at Moscow and its entire relocation to Boise would require an amendment to art. IX, sec. 10 of the Idaho Constitution. Similarly, an amendment also would be required if so much of the College of Law was to be moved from Moscow as to constitute a de facto removal of the College of Law from Moscow.

We hope this letter is of assistance to you. It is an informal and unofficial expression of the view of this office based upon the research of the author. If you have any questions concerning our research or the conclusions we have reached, please do not hesitate to call.

Sincerely,

MICHAEL G. MCPEEK
Deputy Attorney General
Contracts & Administrative Law Division

ADVISORY LETTERS OF THE ATTORNEY GENERAL

October 25, 2007

The Honorable Robert L. Geddes
President Pro Tem
Idaho State Senate
370 Mountain View Ave.
Soda Springs, ID 83276

The Honorable Lawrence Denney
Speaker of the House
Idaho House of Representatives
P.O. Box 114
Midvale, ID 83645

Re: Our File No. 07-20957 – Idaho Open Meeting and Public
Records Laws

Gentlemen:

Thank you for your letter of August 30, 2007, in which you pose eight questions regarding Idaho's open meeting and public records laws.

INTRODUCTION

The questions you pose fit, roughly, into three categories. The first category relates to the Idaho Public Records Act and, specifically, to correspondence or communication between a legislator and a constituent regarding legislation or issues arising from the constituent's dealings with state government. The second category of questions also relates to the Idaho Public Records Act but focuses on technology issues and, specifically, on how digital records are treated under that law. You ask both about records kept on state equipment and also equipment belonging to an elected state official or, perhaps, even a computer or computer server owned by some third party. The third category of questions also relates to technology but focuses on open meetings. You ask about legislators using instant messaging or some form of text messaging to communicate with one another in a manner that allows all the members of a legislative committee to participate in the discussions.

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My analysis will examine the questions you pose and the statutes that govern those questions. Specifically, I will examine Idaho's public records laws and the rules governing open meetings and how the issues you have presented are addressed. I will not examine issues beyond the statutes, such as questions of constitutional dimension, including separation of powers, the speech and debate clause, or the right of an individual citizen to petition his government or legislative representative for a change in laws or redress of grievances, except to the extent these concepts are incorporated into the Idaho Public Records Act. This opinion presumes that the Idaho Public Records Act is valid and enforceable against all state officers in all instances. I should add that, in any review of this statute by a court, I believe that the court would most likely hold that it is valid against a state officer, whether the office is created by statute or by constitution. I will also not recommend or suggest any changes to the open meeting or public records laws. If, after reviewing this letter, you or other members of the Legislature feel that changes are necessary, this office will be happy to review any such proposed legislation. I should add that, in any instances where I believe there is some ambiguity in the law and how a matter might be resolved by a court, it is always best to resolve the ambiguity by a change in the statute, rather than by awaiting a court decision. Statutory changes give certainty and can better assure that the result intended is the result in fact.

QUESTIONS PRESENTED

1. A constituent sends a legislator an e-mail commenting/complaining about a situation, which the constituent would like to see rectified with legislation. Through further exchanges of e-mails the issues are defined and the legislator replies to the constituent saying he/she is having the legislation drafted. Are these e-mails "documents specifically related to draft legislation" and as such exempt under Idaho Code § 9-340F(1) or any other provision of law?
2. A constituent sends an e-mail to a legislator seeking the legislator's help in solving a problem the constituent is having with a public agency, but which does not involve the drafting of legislation. Is the exchange of e-mails protected from disclosure under article I, section 10 of the Constitution or any other provision of law? If there is an

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expectation of confidentiality from the constituent in #1 and #2, is that a factor?

3. For several years now, state funds have been used to lease laptops and software for legislators to use not only for state business, but with the express purpose of allowing their use for personal or business interests as well, simply as a practical matter. If a legislator uses a state-owned laptop and software to communicate with his/her private business entity back home or uses that laptop for other personal matters that do not involve the public business, are these communications exempt?
4. Conversely, if the e-mail between a legislator and another legislator or public official is done through the use of privately owned equipment and software, but nonetheless relates to public business, are those communications exempt?
5. Are e-mails between lobbyists and legislators exempt if the nature of the communication deals with a single, private interest?
6. Many legislators also utilize “instant messaging” to communicate with each other during floor action. Is instant messaging more akin to a telephone conversation, since it leaves no record after one exits the program, or should IM be considered another form of a public record? Are there, in fact, reasons for applying different standards to e-mail, instant messaging or text messaging via cell phone?
7. If enough members of a standing committee to constitute a quorum are communicating with each other regarding committee business through instant messaging or e-mail, does that constitute an official meeting, and as such subject to the rules of procedure for House and Senate committees?
8. In most cases public records acts neither require public officials to be custodians of public records nor define records retention standards. However, if a publicly requested e-mail or electronic document has already been “deleted” at the time the request is made, what proce-

dures or standards exist in law to define what is required to recover a copy?

ANALYSIS

A. General Observations

The answers to the questions you pose require their analysis in the context of the Idaho Public Records Act (“PRA”) or, in one instance, in the context of open meetings. The PRA can be found at Idaho Code §§ 9-337 through 9-350. The first part of this analysis will always be to determine whether the records you describe are public records. “Public record” is defined at Idaho Code § 9-337(13):

“Public record” includes, but is not limited to, any writing containing information relating to the conduct or administration of the public’s business prepared, owned, used or retained by any state agency, independent public body corporate and politic or local agency regardless of physical form or characteristics.

(Emphasis added.) The Idaho Supreme Court, in considering this section, said:

Thus, a record may be a public record if it is a writing that (1) contains information relating to the conduct or administration of the public’s business, *and* (2) was prepared, owned, used or retained by a governmental agency.

Cowles Pub. Co. v. Kootenai County Bd. of County Com’rs, 144 Idaho 259, 159 P.3d 896 (2007).

The PRA, as is evident by the definition above, pertains to “writings.” The PRA goes on to define “writings” in Idaho Code § 9-337(15):

“Writing” includes, but is not limited to, handwriting, typewriting, printing, photostating, photographing and every means of recording, including letters, words, pictures,

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sounds or symbols or combination thereof, and all papers, maps, magnetic or paper tapes, photographic films and prints, magnetic or punched cards, discs, drums or other documents.

This broad definition is intended to cover not only records written on paper but records that are contained on computer tapes and hard drives.

Likewise, once it has been determined that a record is a public record, the PRA governs its disclosure not only when the record is in the custody of a public officer or agency, but also when custody has been entrusted with a third party, including private individuals.

Idaho Conservation League, Inc. v. Idaho State Dept. of Agriculture, 143 Idaho 366, 146 P.3d 632 (2006).

Thus, the primary determination in a public records case is whether the record at issue is a public record. If it is, then, unless an exemption applies, it must be produced. In examining the records that you list, the first issue faced is whether those records are public records. The second issue is whether an exemption applies (or exemptions apply).

Exemptions to the PRA apply only to the extent necessary. The court will not infer exemptions and will not exempt a document from disclosure unless it fits within the clear language of an exemption. If a record is exempt, then the procedure, under Idaho Code § 9-339, is to respond to the request for information and specifically cite the provision of Idaho law that exempts the record from disclosure. The requester is to be notified of the exemption and of his right to appeal the public officer's determination of exemption and declination to disclose.

If there are costs associated with retrieving and copying a public record, then, under certain instances, those costs may be charged to the requester. In most cases, Idaho Code § 9-338(8) provides that the public agency, public official, or public officer may charge only the actual cost of copying the record. In most instances, this does not include administrative or labor costs. However, administrative and labor costs may be charged if the

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request is for more than 100 pages of paper records, the request includes records from which nonpublic information must be deleted, or the actual labor associated with locating and copying documents exceeds two person hours. In addition, the actual cost of retrieving information from computer discs (or a duplicate of computer discs) may be charged to the requester. In the case of retrieving records from archives, whether they are physical or electronic archives or information within a deleted electronic file, the actual cost of retrieving and copying the records can be substantial.

B. Specific Questions Presented

The above rules apply to the specific questions that you have presented. The above rules will determine whether the record is a public record, whether an exemption exists, and whether the requester can be charged the cost of retrieving and copying the record.

The questions you present and the responses to those questions are as follows:

Question 1: A constituent sends a legislator an e-mail commenting/complaining about a situation, which the constituent would like to see rectified with legislation. Through further exchanges of e-mails the issues are defined and the legislator replies to the constituent saying he/she is having the legislation drafted. Are these e-mails “documents specifically related to draft legislation” and as such exempt under Idaho Code § 9-340F(1) or any other provision of law?

Response to Question 1: At the outset, the e-mail messages that you describe, from a constituent to a legislator and from a legislator to a constituent, meet the definition of a public record. In other words, they relate to the “conduct or administration of the public’s business.” Therefore, unless there is some specific exemption, such records must be produced in response to a request. You have correctly identified Idaho Code § 9-340F as applying to such a request. The correspondence relates to draft legislation. Idaho Code § 9-340F(1) is the specific exemption. It provides:

Records consisting of draft legislation and documents specifically related to such draft legislation or research requests submitted to the legislative services office by a

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member of the Idaho Legislature for the purpose of placing such draft legislation into a form suitable for introduction as official proposed legislation of the Legislature of the state of Idaho, unless the individual legislator having submitted or requested such records or research agrees to waive the provisions of confidentiality provided by this subsection.

I believe that this exemption would cover the situation you describe. The e-mail message(s) from the constituent to the legislator and the legislator's e-mail message(s) to the constituent would be exempt from disclosure as "documents specifically related to such draft legislation." It should be noted that this exemption applies only to draft legislation. It does not apply in an instance where a constituent writes to a legislator about an actual bill pending before the Legislature. Items within a constituent's letter or e-mail message relating to an actual bill may be exempt, but that would depend upon the applicability of other exemptions, such as the fact that his letter or message contains highly personal information, which would be exempt under Idaho Code § 9-340A and the Federal Privacy Act.

Question 2: A constituent sends an e-mail to a legislator seeking the legislator's help in solving a problem the constituent is having with a public agency, but which does not involve the drafting of legislation. Is the exchange of e-mails protected from disclosure under article I, section 10 of the constitution or any other provision of law? If there is an expectation of confidentiality from the constituent in #1 and #2, is that a factor?

Response to Question 2: In the situation you describe, the e-mail message from the constituent to the legislator appears to relate to the "conduct or administration of the public's business." Therefore, unless there is some specific exemption, such records must be produced in response to a request. Unlike correspondence regarding draft legislation, there is no general exemption for constituent letters or e-mail messages that raise concerns about the way an agency of government conducts its business. Such correspondence is, therefore, exempt only if another specific exemption applies. There are many exemptions to the PRA. If the e-mail message from the constituent fits into one of these exemptions, it would be exempt from disclosure. For instance, if it raises significant privacy concerns, it would probably be exempt under either Idaho Code § 9-340C or, perhaps, Idaho Code § 9-340A.

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In some instances, the courts expect state officers and state agencies to withhold public records that implicate a right to privacy or that might endanger an individual's safety or life. For instance, a letter from an inmate complaining about other inmates or about something going on in a prison would probably be exempt from disclosure, but only to the extent necessary to protect the interests of the complaining prisoner. For instance, the letter or e-mail message itself might not be exempt in its entirety, but the name of the reporting inmate or other identifying information might be. Most likely, this exemption would be read by examining some of the statutes referred to in Idaho Code § 9-340A.

Another exemption that could come into play under Idaho Code § 9-340A is Idaho Code § 9-203, which addresses confidential communications. Idaho Code § 9-203(5) provides that “[a] public officer cannot be examined as to communications made to him in official confidence, when the public interests would suffer by disclosure.” It is important to note that this exemption contains a standard. A court could review the communication to determine whether “the public interests would suffer by disclosure.” A court would probably exempt only so much of the communication as is necessary to protect the writer or the public interests.

You specifically ask about art. I, § 10 of the Idaho Constitution. This provision of the constitution is incorporated into the PRA by Idaho Code § 9-340A. Art. I, § 10, provides that “[t]he people shall have the right to assemble in a peaceable manner, to consult for their common good; to instruct their representatives, and to petition the legislature for the redress of grievances.” (Emphasis added.) An argument might be made that e-mail messages or other writings to legislators are exempt from disclosure because their disclosure might inhibit a citizen from writing to his legislator. In other words, a citizen who might ordinarily be prepared to write to his legislator and complain, for instance, about the actions of a state agency might be inhibited from doing so if he thought his letter might be disclosed as a public record.

There is no case law in Idaho that examines this type of situation. Similarly, I have been unable to find any case law from other jurisdictions that is directly on point. An argument in favor of disclosure is that the disclosure of a letter to a legislator does not inhibit or infringe upon one's ability to petition his legislator. In other words, the only right guaranteed is that of the right to petition, not the right to anonymity.

Still, a right to privacy might, under certain circumstances, justify the withholding of a constituent's name and, perhaps, home address and other identifying information from a response to a request for information. In Kidd v. Department of Justice, 362 F. Supp. 2d 291 (D.D.C. 2005), the court upheld the Federal Bureau of Investigation's ("FBI") withholding of an individual's name and home address from information that was disclosed pursuant to a request under the federal Freedom of Information Act. The court agreed with the FBI that the disclosure of this information would violate a right to privacy held by the citizen who wrote to the FBI. Where facts contained in a constituent's e-mail message to a legislator would expose the constituent to an unnecessary and unwarranted invasion of privacy, a court might uphold the withholding of this type of information. However, how a court will rule is not a certainty. A better approach would be to provide a specific exemption within the PRA if the Legislature feels it important to withhold a citizen's name and address when responding to a request for information under the PRA.

The right to petition government or the right to instruct a legislator under art. I, § 10 of the Idaho Constitution would most likely fail to exempt a writing, including an e-mail message or letter, to a legislator. Certain information might be withheld, particularly if other information in the letter fits within an exemption provided for under the PRA. The extent of the exemption depends upon the nature of the letter and, most likely, will be granted only to the extent necessary to protect a constituent's right of privacy.

Question 3: For several years now, state funds have been used to lease laptops and software for legislators to use not only for state business, but with the express purpose of allowing their use for personal or business interests as well, simply as a practical matter. If a legislator uses a state-owned laptop and software to communicate with his/her private business entity back home or uses that laptop for other personal matters that do not involve the public business, are these communications exempt?

Response to Question 3: Most likely, the communications you describe are not public records as that term is defined in the PRA and expanded upon in the Cowles case. Incidental computer or e-mail use that has been authorized and does not relate to the "conduct or administration of the public's business" is not a public record as that term is defined at Idaho Code § 9-337(13). The Cowles case recognizes that not every writing on a

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public computer is a public record. In order to be a public record, it must relate to the “conduct or administration of the public’s business.”

There is, however, a cautionary note, which comes from the Cowles case. In that particular case, where a supervisor had been sending e-mail messages of highly personal nature to a subordinate, the court ruled that, even though the messages were personal, they related to the “conduct or administration of the public’s business.” If a legislator was sending personal or highly suggestive e-mail messages to an employee of the legislative branch of government or to a state employee, those messages could be considered to relate to the “conduct or administration of the public’s business.” Likewise, although it has not been ruled upon, if the volume of e-mail traffic or computer usage were such that it raised questions about how public resources were being used, then such information could be deemed to relate to the “conduct or administration of the public’s business” and, therefore, a public record. However, in the hypothetical that you raise, where the behavior has been specifically authorized, and it is within the limits set by the Legislature and not excessive, such communications would not be public records or subject to disclosure unless a legislator chose to voluntarily disclose them.

Question 4: Conversely, if the e-mail between a legislator and another legislator or public official is done through the use of privately owned equipment and software, but nonetheless relates to public business, are those communications exempt?

Response to Question 4: I do not believe that the communications in this scenario would be exempt simply because they are kept on a private computer or on privately owned equipment or a privately owned computer server. In Idaho Conservation League, the Idaho Supreme Court held that a public record remains a public record, regardless of how it is retained. As stated above, the court held:

Clearly, a document need not be retained by an agency to qualify as a public record. In fact, the only relevant statute using the word “possession” is the provision quoted by ISDA that simply directs the custodian of the records to make available photocopying equipment so the public may exercise its right to copy public records.

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143 Idaho at 368, 146 P.3d at 634. The court went on to state:

This statute indicates a clear policy by the Legislature that the public has a right to view and inspect records relating to the public's business and this right cannot be denied by the expediency of having some other entity conduct the public's business at some other location.

143 Idaho at 369, 146 P.3d at 635. Thus, if a legislator is utilizing a Hotmail® account, for instance, or is receiving communications on a Hotmail® account or other private computer server or equipment, and the nature of a communication is such that it would be defined as a public record, it remains a public record, despite the fact that it is not retained on state-owned equipment.

Question 5: Are e-mails between lobbyists and legislators exempt if the nature of the communication deals with a single, private interest?

Response to Question 5: Once again, the relevant inquiry here is whether the communication is a public record. If it does not relate to the conduct or administration of the public's business, then it is not a public record. If it does relate to the conduct or administration of the public's business, then it is a public record. It appears, from your question, that the type of e-mail message to which you refer would be of a highly personal nature and deal with private interests that are of concern to only the lobbyist and the legislator. This type of message would not be a public record, as that term is defined. Nevertheless, if the lobbyist's message solicits action from the lawmaker in his capacity as a legislator, it would contain information relating to the conduct or administration of the public's business and, consequently, be subject to disclosure. Likewise, if the lobbyist is inviting a legislator to attend an event that requires the lobbyist to spend money, and this expenditure of funds is reportable as a lobbying expense under the Idaho Sunshine Act, any correspondence relating to such expenditure is public record.

Question 6: Many legislators also utilize "instant messaging" to communicate with each other during floor action. Is instant messaging more akin to a telephone conversation, since it leaves no record after one exits the program, or should IM be considered another form of a public record? Are there, in fact, reasons for applying different standards to e-mail, instant messaging or text messaging via cell phone?

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Response to Question 6: For purposes of analyzing this question, I assume that your representation that instant messaging “leaves no record after one exits the program” is correct. If there is no record, then there is no public record that can be disclosed. It is the same as a telephone conversation or any other conversation. Evidence of the communication exists only in the memory of the parties to the communication. The PRA generally does not address the issue of records retention. The only exception is that, once a request for information is made, there is a duty to retain the record(s) requested until a response is made. Additionally, in the event the request is denied, there is an obligation to retain the record(s) until the time for appealing the denial has passed. In other words, if someone were to deliver a request for information to a legislator while the legislator is engaged in instant messaging, then there might be an obligation to preserve the record by printing the instant message. If the legislator has exited the program before the request is made, and there is no record, then there is no obligation to attempt to produce a record that no longer exists. If information is retained on a server somewhere, there may be an obligation to obtain this information from the owner of the server.

Question 8: In most cases public records acts neither require public officials to be custodians of public records nor define records retention standards. However, if a publicly requested e-mail or electronic document has already been “deleted” at the time the request is made, what procedures or standards exist in law to define what is required to recover a copy?

Response to Question 8: Although out of order, I will take this question up next, as it relates to public records. (Question 7 relates to open meetings.) Assuming the e-mail message in the scenario in Question 8 still exists in a deleted file, the public agency or public officer may have an obligation to retrieve and retain it. However, someone requesting this information could be called upon to pay the actual costs of recovering the record. This would include labor time, if the labor exceeds two person hours, as well as the actual cost of the retrieval of the record. The requester could be given an estimate of the cost to recover the record and asked to pay those estimated expenses before recovery is attempted. Of course, if the record has been deleted and, for whatever reason, is no longer accessible, then there is no obligation to attempt to retrieve or to reconstruct the record from an individual’s memory or to create a new record. Recovery would be attempted only if the informa-

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tion sought still exists and is recoverable. The issue of what obligation a public agency, public officer, or public employee has to retrieve “deleted” records is one that might be addressed with legislation.

Question 7: If enough members of a standing committee to constitute a quorum are communicating with each other regarding committee business through instant messaging or e-mail, does that constitute an official meeting, and as such subject to the rules of procedure for House and Senate committees?

Response to Question 7: Neither Idaho law nor Idaho courts have addressed this particular issue. The Idaho Open Meeting Act (“OMA”) may not apply to the Idaho Legislature. The OMA applies to public agencies created by or pursuant to statute. The Legislature is created pursuant to the Idaho Constitution. The Legislature has rules that, in many respects, mirror the OMA and require open meetings. These rules do not address meetings through instant messaging or via e-mail. The Legislature is the final arbiter of its own rules. As such, a court would most likely not review the rules of the Legislature to determine whether communication via instant messaging or e-mail requires an open meeting. Of course, a court could examine the constitution, or a court could rule that the OMA applies to the Legislature and that it encompasses instant messaging and e-mail and review the scenario you present. However, I believe that, most likely, the court would rule that the OMA does not apply to the Legislature. Given the uncertainty of a court’s ruling, it would probably be better for the Legislature to address this issue if it is of concern.

I hope my responses to your questions and the other information contained herein will be of assistance to you. If you have further questions or concerns, do not hesitate to call upon me.

This letter is provided to assist you. The response is an informal and unofficial expression of the views of this office based upon the research of the author.

Very truly yours,

WILLIAM A. VON TAGEN
Deputy Attorney General
Chief, Intergovernmental and Fiscal Law Division

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