

**IDAHO
ATTORNEY
GENERAL'S
ANNUAL REPORT**

OPINIONS

**SELECTED INFORMAL
GUIDELINES**

CERTIFICATES OF REVIEW

AND

**SELECTED ADVISORY
LETTERS**

FOR THE YEAR

2008

Lawrence G. Wasden
Attorney General

Printed by The Caxton Printers, Ltd.
Caldwell, Idaho

This volume should be cited as:

2008 Idaho Att’y Gen. Ann. Rpt.

Thus, the Official Opinion 08-1 is found at:

2008 Idaho Att’y Gen. Ann. Rpt. 5

Similarly, the Informal Guideline of January 7, 2008
is found at:

2008 Idaho Att’y Gen. Ann. Rpt. 63

Similarly, the Certificate of Review of January 29, 2008
is found at:

2008 Idaho Att’y Gen. Ann. Rpt. 93

The Advisory Letter of January 11, 2008
is found at:

2008 Idaho Att’y Gen. Ann. Rpt. 117

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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
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ROBERT M. ROBSON	1969
W. ANTHONY PARK	1970-1974
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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 reviewing the 2008 annual report for the Office of the Attorney General. I am pleased to report that the Office continued to successfully represent the State of Idaho's legal interests in all legal matters.

The year 2008 was an historical one for the Office as we successfully defended a challenge to an Idaho statute in the case of *Ysursa v. Pocatello Education Association et al.*, which was appealed to the United States Supreme Court. Although the opinion was issued in the state's favor prior to the printing of this volume, the case was briefed and argued in the fall of 2008. The *Ysursa* case represents the very best aspects of both the practice of law and our judicial system.

In July, the Governor and I, along with the U.S. Department of Energy (DOE), signed a settlement that provides a framework for removal of the most significant concentrations of buried nuclear waste. Most importantly, enforcement of the agreement remains with the Idaho Federal District Court. This settlement opens the door to a continued cooperative relationship between the State of Idaho and the Department of Energy.

This Office continues to be asked to investigate and prosecute cases around the state. The Special Prosecutions Unit handled 129 cases from 22 counties at the request of county prosecutors or county commissioners. These included 19 cases of violent crimes and 17 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 \$932,000 for Idaho consumers and taxpayers. This Division also collected \$2.9 million in civil penalties, fees and costs, which were 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 year-end 2008, our Office transferred more than \$1 million to the General Fund.

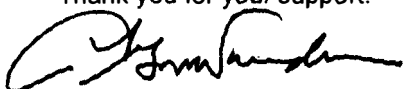
During 2008, attorneys in the Civil Litigation Division handled more than 870 cases -- 140 more than 2007. The Civil Litigation Division defended and advised the state's constitutional officers, represented 60 different departments and agencies, advised members of the judiciary, prosecuted cases before 28 different occupational licensing boards, defended over 70 employment claims and assisted in litigating natural resource and environmental claims.

Our Intergovernmental and Fiscal Law Division handled 270 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 "Lawrence G. 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 2008 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 von Tagen, Intergovernmental & Fiscal Law
S. Kay Christensen, Contracts & Administrative Law	Clive Strong, Natural Resources

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Stephanie Ammirati	Alan Conilogue	Blair Jaynes	Kathleen McRoberts	Marcy Spilker
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Mary Jo Beig	Roger Gabel	Chris Kronberg	Steve Parry	Mitch Toryanski
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Daniel Bower	Stephanie Guyon	Emily Mac Master	Kristine Sasser	Ann Wilkinson
Chris Bromley	Susan Hamlin	Karin Magnelli	Jeffrey Schrader	Mark Withers
Dallas Burkhalter	Harriet Hensley	Joseph Mallet	Steve Schuster	Brian Wonderlich
Cheri Bush	Jane Hochberg	René Martin	Erick Shaner	Scott Woodbury
Scott Campbell				David Young

INVESTIGATORS

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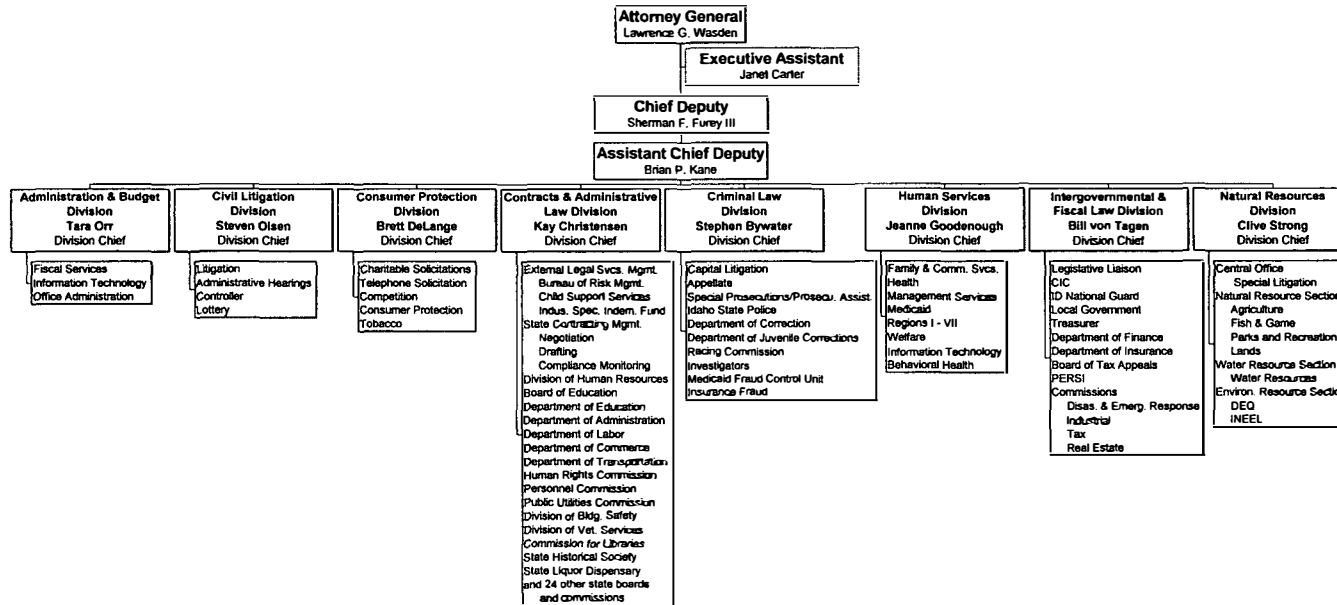
PARALEGALS

Rachel Balcerzak	Vicki Kelly	Lori Peel	Jan Rosenthal
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Suzy Cooley-Denney	Sandra McCue	Julie Raichart	Beccie Stange
Debbi Judd	Bernice Myles	Renea Ridgeway	Ray Williams
			Paula Wilson

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				Kim Youmans

Office of the Idaho Attorney General
Organizational Chart - 2008



**OFFICIAL OPINIONS
OF
THE ATTORNEY GENERAL
FOR THE YEAR 2008**

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

ATTORNEY GENERAL OPINION NO. 08-1

To: Mr. Calvin H. Campbell
Gooding County Prosecuting Attorney
Post Office Box 86
Gooding, ID 83330

Per Request for Attorney General's Opinion

You, along with E. Scott Paul, Lincoln County Prosecuting Attorney, Mike Seib, Jerome County Prosecuting Attorney, Nikki Cannon, Minidoka County Prosecuting Attorney, and Al Barrus, Cassia County Prosecuting Attorney, have requested an Attorney General's Opinion regarding several questions, each of which can be categorized as asking whether Idaho state law preempts local regulation of confined animal feeding operations ("CAFOs"). This opinion addresses the over-arching question you have presented.

QUESTION PRESENTED

Do Idaho's state laws pertaining to the regulation of confined animal feeding operations preempt county regulation of such operations?

CONCLUSION

The state CAFO siting laws expressly authorize counties to "enact ordinances and resolutions to regulate the siting of large confined animal feeding operations and facilities" Idaho Code § 67-6529. The Legislature recognized that county regulation is necessary for the purpose of considering the social and environmental impacts associated with CAFOs. Idaho Code § 67-6529B. Thus, even though the Legislature has delegated to the Department of Agriculture and the Department of Environmental Quality the responsibility to regulate water quality and waste water management requirements for the ongoing operation of CAFOs, it is unlikely that a court would conclude that state laws pertaining to the regulation of CAFOs fully occupy the field and, therefore, preempt all local ordinances related to similar environmental concerns. For example, county ordinances that seek to ensure the appropriateness of the location of a CAFO in light of the environmental characteristics of a site, such as setbacks or maximum livestock density require-

ments, are likely to be upheld by a court. County ordinances, however, that seek to directly impose water quality or waste management requirements on the ongoing operation of CAFOs once sited are likely to be found in conflict with, and therefore preempted by, state law. Whether specific provisions of a local zoning ordinance conflict with state laws applicable to CAFOs requires an analysis of the particular ordinance at issue, along with the applicable state laws. Such an analysis is beyond the scope of this opinion.

The lack of clarity with respect to the limits within which local governments may regulate CAFOs unfortunately pits local government and the regulated industry against one another and leads to costly and potentially lengthy litigation. Legislative action to more clearly define the respective regulatory authority of state agencies and local government is warranted.

ANALYSIS

A. Overview of Local Zoning Authority

Article XII, § 2 of the Idaho Constitution provides:

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.

While land use planning is primarily within the purview of local government, county ordinances that are in conflict with the general laws of the state are preempted. Idaho Const. art. XII, § 2. A conflict between local and state law may arise in a number of different situations. There may be a direct conflict between the two laws, which usually occurs when local law expressly allows what the state disallows and vice versa. State v. Musser, 67 Idaho 214, 176 P.2d 199 (1946); Envirosafe Services of Idaho, Inc. v. County of Owyhee, 112 Idaho 687, 689, 735 P.2d 998, 1000 (1987). A conflict may also arise when state law addresses an entire field or area of regulation. *Id.* When state law provides either expressly or by implication, that it preempts a field or area of regulation, county regulation in that field or area will be held to be in conflict with state general laws and in violation of the Idaho Constitution. Envirosafe, 112 Idaho at 689. Since none of the Idaho statutes applicable to

beef or dairy CAFOs expressly preempt local regulation of CAFOs, this opinion analyzes and applies the doctrine of implied conflict preemption.

B. Implied Preemption

1. General Principles

Idaho has adopted the doctrine of implied preemption, set forth by the Idaho Supreme Court as follows:

Where it can be inferred from a state statute that the state has intended to fully occupy or preempt a particular area, to the exclusion of [local governmental entities], a [local] ordinance in that area will be held to be in conflict with the state law, even if the state law does not so specifically state.

Envirosafe Services of Idaho, Inc. v. County of Owyhee, 112 Idaho 687, 689, 735 P.2d 998, 1000 (1987) (additional citations omitted). There are two typical situations in which implied preemption is found. The first situation:

[T]ypically applies in instances 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.

“The [local governmental entity] cannot act in an area which is so completely covered by general law as to indicate that it is a matter of state concern.”

Id. (citation omitted). The second situation:

[W]ill also apply where uniform statewide regulation is called for due to the particular nature of the subject matter to be regulated.

[I]f the court finds that the nature of the subject matter regulated calls for a uniform state regulatory scheme, supplemental local ordinances are preempted.

Id. (additional citations omitted).

2. Pertinent Factors

In Envirosafe, the court analyzed Idaho's Hazardous Waste Management Act ("HWMA"), Idaho Code §§ 39-4401 to 39-4432, to determine whether it implicitly preempted local regulation of hazardous wastes. After noting that the HWMA, like the CAFO statutes analyzed herein, did not expressly preempt local regulation, the court noted the following factors:

1. The HWMA contained a statement of legislative intent which provided, in part, that the purpose of the HWMA was to **enable the state to assume primacy** over hazardous waste.
2. The statement of legislative intent also mentioned the desire to **avoid duplicative, overlapping or conflicting** state and federal regulatory systems.
3. The Legislature also directed the Board of Health and Welfare to **adopt rules and regulations** regarding hazardous wastes **within the state**.
4. The Legislature gave the DHW director authority to cooperate with other states **to provide for uniform state regulations**.

The court deemed those factors to "evinced a strong legislative intent that regulation of the field of hazardous waste disposal be regulated by means of one, uniform statewide scheme enabling this state to enter into meaningful interstate agreements. Taken alone, this clear legislative intent is more than sufficient to preempt the field and preclude local governmental regulation of the subject matter." *Id.* at 690, 735 P.2d at 1001.

Next, the court used the second or alternate analysis, to determine whether the HWMA was a "comprehensive statutory scheme of the kind which implicitly evidences legislative intent to preempt the field." *Id.* The HWMA contained the following significant provisions:

1. Regulation, trip permits, and a manifest system for transporters.

2. A permit system for hazardous waste facilities.
3. Recording and reporting requirements for generators and facilities.
4. Fee systems and dedicated funds.
5. Sections dealing with citizen suits, local governmental notice, interstate cooperation, and employment security.
6. Broad enforcement provisions.

The court also found it significant that the local ordinance was mostly duplicative of the HWMA, and noted that courts in several other states had held that uniform, statewide treatment of hazardous waste was critical.

Whether there are state laws that specifically authorize the county as well as the state to regulate in a particular area is also important to the field preemption analysis. In Attorney General Opinion 83-6, the Attorney General's Office reviewed whether the Lake Protection Act preempted local regulation of lake encroachments. The fact that there was no specific authority provided for county regulation of lake encroachments, but instead the county ordinance at issue was based upon general authority provided to the county in the Local Planning Act, supported the conclusion that the Lake Protection Act was intended to be the exclusive means of regulating lake encroachments. Similarly, in Envirosafe, there was nothing in state law that specifically authorized a county to regulate hazardous waste; instead, only the state was given specific authority to regulate.

3. Policy and Local Deference

In the Envirosafe decision, the court carefully acknowledged the importance of local control, but noted that local control may be problematic in certain instances.

[T]he safe management and disposal of hazardous wastes is clearly an area which demands uniform, statewide treatment.
... Michigan is extremely limited in the number of facilities

that handle this waste properly. This is due partly because no community wants hazardous waste facility [*sic*] in its vicinity. Thus, local interests strongly want to retain their control. However, the same reasoning easily justifies state control. The legislature recognized that hazardous waste disposal areas evoke such strong emotions in localities that the decision as to where a landfill should go should not be given to the locality, which is far more swayed by parochial interests than the state. The legislature, instead, gave the power to a centralized decision maker who could act uniformly and provide the most effective means of regulating hazardous waste. [*Township of Cascade v. Cascade Resource Recovery, Inc.*, 118 Mich. App. 580, 325 N.W.2d 500, 504 (1982).]

It is important to note that the same considerations which permeated the holding in *Township of Cascade* are equally applicable here. The state of Idaho is limited to very few facilities which handle hazardous waste. Additionally, the treatment and storage of hazardous waste is a subject which inspires a unique amount of interest and concern from this state's citizenry. We recognize the unique importance of and benefit derived from local government regulation and that, ordinarily, local problems are best solved by local regulation, since local governmental entities are uniquely suited to fashioning workable solutions by virtue of their proximity to, and direct awareness of, the issues involved. By our ruling here, we in no way denigrate the function of local government. Instead, we acknowledge the unique importance and complexity of the subject matter.

Envirosafe, 112 Idaho at 691, 735 P.2d at 1002 (additional citations omitted).

C. Pertinent Acts and Statutes

Idaho Code contains several acts and statutes that authorize state agencies and counties to regulate various aspects of dairy and beef cattle CAFOs. Each will be discussed in turn.

1. The Beef Cattle Environmental Control Act

In 2000 the Idaho Legislature enacted the Beef Cattle Environmental Control Act, Idaho Code §§ 22-4901, *et seq.* (the “BCEC Act”). The BCEC Act contains the following declaration of policy and legislative intent:

(1) The legislature recognizes the importance of protecting state natural resources including, surface water and ground water. It is the intent of the legislature to protect the quality of these natural resources while maintaining an ecologically sound, economically viable, and socially responsible beef cattle industry in the state. The beef cattle industry produces manure and process wastewater which, when properly used, supplies valuable nutrients, and organic matter to soils and is protective of the environment, but may, when improperly stored and managed, create adverse impacts on natural resources, including waters of the state. ***This chapter is intended to ensure that manure and process wastewater associated with beef cattle operations are handled in a manner which protects the natural resources of the state.***

(2) Further, the legislature recognizes that the beef cattle industry is potentially subject to various state and federal laws designed to protect state natural resources and that the Idaho department of agriculture is in the best position to administer and implement these various laws. ***It is therefore the intent of the legislature that the administration of this law by the department of agriculture fully meets the goals and requirements of the federal clean water act and state laws designed to further protect state waters*** and that administration of this chapter by the department of agriculture shall not be more stringent than or broader in scope than the requirements of the clean water act and applicable state and federal laws. ***The department shall have authority to administer all laws to protect the quality of water within the confines of a beef cattle animal feeding operation.*** In carrying out this chapter the department shall prioritize its resources on operations which have the greatest potential to significantly impact the environment and ensure that any

requirements imposed under this chapter upon operators of beef cattle animal feeding operations are cost-effective and economically, environmentally and technologically feasible.

(3) Successful implementation of this chapter is dependent upon the department receiving adequate funding from the legislature and is dependent upon the department executing a memorandum of agreement with the United States environmental protection agency, the department of environmental quality and the Idaho cattle association which sets forth a working arrangement between the agencies to ensure compliance with this chapter and applicable state and federal laws, including the federal clean water act. Moreover, the legislature recognizes that it is important for the state to obtain a delegated national pollutant discharge elimination system (NPDES) permit program from the EPA under the clean water act.

Idaho Code § 22-4902 (Supp. 2007) (emphasis added). The authority granted to the ISDA director by the Idaho Legislature is similarly worded:

(1) The [ISDA director] through the division of animal industries is authorized to regulate beef cattle animal feeding operations to protect state natural resources, including surface water and ground water.

(2) In order to carry out its duties under this chapter, the department shall be the responsible state department to prevent any groundwater contamination from beef cattle animal feeding operations as provided under section 39-120, Idaho Code.

(3) The director shall have the authority to exercise any other authorities delegated by the director of the department of environmental quality regarding the protection of groundwater, surface water and other natural resources associated with confined animal feeding operations, and this shall be the authority for the director of the department of environmental quality to so delegate.

(4) The director of the department of environmental quality shall consult with the director of the department of agriculture before certifying discharges from beef cattle animal feeding operations as provided under 33 U.S.C. section 1341.

Idaho Code § 22-4903 (Supp. 2007).

Each beef CAFO is required to have a nutrient management plan, and once approved, the plan “shall be implemented and considered a best management practice.” Idaho Code § 22-4906 (Supp. 2007). Best management practices (“BMPs”) are defined as:

[P]ractices, techniques or measures which are determined to be cost-effective and practicable means of preventing or reducing pollutants from point sources or nonpoint sources to a level compatible with environmental goals, including water quality goals and standards for waters of the state. Best management practices shall be adopted pursuant to the state water quality management plan, the Idaho groundwater quality plan or this act.

Idaho Code § 22-4904(3). Nutrient management plans, in turn, are defined as “plan[s] prepared in conformance with the nutrient management standards or other equally protective standard for managing the **amount, placement, form and timing of the land application** of nutrients and soil amendments.” Idaho Code § 22-4904(10) (emphasis added).

Each beef cattle CAFO must also be designed and constructed in accordance with specific engineering standards, and plans and specifications must be submitted to and approved by ISDA in order to ensure the engineering standards are met.

ISDA promulgated rules under the BCEC Act, geared toward waste/nutrient management. *See* Rules of the Department of Agriculture Governing Beef Cattle Animal Feeding Operations, IDAPA 02.04.15.100 (“Beef Rules”). The Beef Rules define BMPs as “[p]ractices as defined in Title 22, Chapter 49, Idaho Code or other practices, techniques, or measures that are determined to be a cost-effective and practicable means of preventing

or reducing pollutants from point or non-point sources to a level compatible with *state environmental goals.*” IDAPA 02.04.15.010.05 (emphasis added). In addition, “nutrient management plan” and “nutrient management standard” are defined by reference to the USDA NRCS Conservation Practice Standard, and/or federal regulations. *See* IDAPA 02.04.15.010.12 and .13.

ISDA and DEQ are parties to The Idaho Beef Cattle Environmental Control Memorandum of Understanding (“Beef MOU”); the other parties are EPA and the Idaho Cattle Association (“ICA”). The stated objectives of the Beef MOU are “to ensure compliance with the [CWA] and [BCEC Act].” BeefMOU, p. 1.

These working arrangements are designed to reduce duplicative inspection and compliance efforts, increase the frequency of inspections of beef cattle animal feeding operations and provide a sound inspection and compliance program, in order to prevent pollution and protect water of the state and other natural resources in an environmentally proactive and economically achievable manner.

Beef MOU, p. 1. The MOU further provides that:

Beef cattle AFOs, regardless of whether the AFO actually has an NPDES permit, are responsible to construct, maintain and operate their facilities to prevent contamination of waters of the state by achieving the conditions specified in the Act and the [Guidelines] or [any applicable NPDES permits].

Beef MOU, p. 2. Under the Beef MOU, ISDA has the lead rule “in development and review of . . . (BMPs) for beef cattle AFOs, which protect Idaho’s natural resources. . . .” Beef MOU, p. 2. The MOU also provides, however, that “Nothing in this MOU shall be construed to release beef cattle AFOs from complying with applicable local, state or federal environmental statutes, regulations, permits or consent orders.” Beef MOU at page 6.

2. Dairy Waste Management Statutes

The statutory provisions pertaining to dairy waste are not contained in a separate act, but instead, are contained in title 37, chapter 4 (Sanitary Inspection of Dairy Products Act). Section 37-401 places certain mandatory duties upon ISDA and specifically conditions the issuance of a milk permit on compliance with applicable county livestock ordinances:

(2) Acting in accord with rules of the department, the director or agent of the department shall review plans and specifications for construction of new, modified or expanded waste systems and inspect any dairy farm to ascertain and certify sanitary conditions, waste systems and milk quality.

. . . .

(4) All dairy farms shall have a nutrient management plan approved by the department. The nutrient management plan shall cover the dairy farm site, and other land owned and operated by the dairy farm owner or operator. Nutrient management plans submitted to the department by the dairy farm shall include the names and addresses of each recipient of that dairy farm's livestock waste, the number of acres to which the livestock waste is applied, and the amount of such livestock waste received by each recipient. The information provided in this subsection shall be available to the county in which the dairy farm, or the land upon which the livestock waste is applied, is located. If livestock waste is converted to compost before it leaves the dairy farm, only the first recipient of the compost must be listed in the nutrient management plan as a recipient of livestock waste from the dairy farm. Existing dairy farms shall submit a nutrient management plan to the department on or before July 1, 2001.

. . . .

(6) The director or his agent may issue a permit to sell milk for human consumption to a new or expanding dairy

farm only upon presentation to the director by the new or expanding dairy farm of:

(a) A certified letter, supplied by the board of county commissioners, certifying the new or expanding dairy farm's compliance with applicable county livestock ordinances;

Idaho Code § 37-401. If a dairy has a violation regarding its waste system, ISDA is authorized to revoke the dairy's milk permit. In practical terms, this means that the milk for the days in question is processed and sold, but the value of the milk goes to the county in which the violation occurred, rather than to the dairy's owner/operator. Idaho Code § 37-403.

ISDA has promulgated Rules of the Department of Agriculture Governing Dairy Waste. *See* IDAPA 02.04.14.000, *et seq.* (the "Dairy Rules"). The Dairy Rules define "discharge violation" more broadly than the Beef Rules:

A practice or facility condition which has caused an unauthorized release of livestock waste into surface, ground water, or beyond the dairy farm's property boundaries or beyond the property boundary of any facility operated by the producer. Contract manure haulers, producers and other persons who haul livestock waste beyond the producer's property boundaries are responsible for releases of livestock waste between the property boundaries of the producer and the property boundaries at the point of application.

IDAPA 02.04.14.004.05. Like the Beef Rules, the Dairy Rules contain a definition of a nutrient management plan that incorporates by reference a USDA NRCS nutrient management standard.

The ISDA "Findings" contained in the Dairy Rules state:

The Department finds that pursuant to Section 67-5226(1), Idaho Code, these rules are necessary to protect the public health, safety and welfare of Idaho, enhance Idaho water quality and preserve the integrity of the Idaho dairy industry.

These rules establish design, construction, operation, location, and inspection criteria for dairy waste systems on Idaho dairy farms and enable the department to implement the 1999 NRCS nutrient management standards on dairy farms to appropriately manage livestock waste. These rules also provide penalty provisions.

IDAPA 02.04.14.005 (emphasis added). ISDA must approve the design, construction, operation and location of dairy waste systems, and those systems “must conform to the Idaho Waste Management Guidelines for Confined Feeding Operations, NMP, NMS, and Appendix 10D.” IDAPA 02.04.14.011.

Like the regulation of Beef cattle CAFOs, ISDA, IDEQ and EPA are parties to a Dairy MOU that sets out the manner in which the parties shall coordinate in the regulation of dairy CAFOs. The MOU provides, however, that “[n]othing in this agreement shall be construed to release a dairy from complying with applicable local, state, and federal environmental statutes, regulations, permits, or consent orders.” Dairy MOU, p. 5.

3. Agriculture Odor Management Act

In 2001 the Idaho Legislature enacted the Agriculture Odor Management Act, Idaho Code §§ 25-3801, *et seq.* (the “AOMA”). Pursuant to the AOMA, DEQ regulates odors from large swine and poultry operations, while odors from Beef CAFOs are regulated by ISDA under the BCEC Act. ISDA is also the lead agency for regulating odors from “operations where livestock or other agricultural animals are raised, or crops are grown, for commercial purposes, not to include [large swine and poultry operations and beef CAFOs].” Idaho Code §§ 25-3801(3) and 25-3803(3) (Supp. 2007).

The Legislature’s declaration of policy provides:

(1) The agriculture industry is a vital component of Idaho’s economy and during the normal course of producing the food and fiber required by Idaho and our nation, odors are generated. It is the intent of the legislature to manage these odors when they are generated at a level in excess of those odors normally associated with accepted agricultural practices in Idaho.

. . . .

(3) . . . In carrying out the provisions of this chapter, the [ISDA] will make reasonable efforts to ensure that ***any requirements imposed upon agricultural operations are cost-effective and economically, environmentally and technologically feasible.***

Idaho Code § 25-3801 (Supp. 2007) (emphasis added). The ISDA director is authorized to promulgate agriculture odor rules.

Pursuant to the AOMA, ISDA promulgated the Rules Governing Agriculture Odor Management, IDAPA 02.04.16.100, *et seq.* The Rules provide that management practices which are undertaken in accordance with the Rules Governing Dairy Waste; the Rules Governing Pesticide and Chemigation Use and Application; Rules Concerning Disposal of Cull Onion and Potatoes; Rules Governing Dead Animal Movement and Disposal; the Idaho NRCS Nutrient Management Standard 590, June 1999; Best Management Practices listed in the “Idaho Agricultural Pollution Abatement Plan,” August 2001; “Control of Manure Odors,” ASAE Standard EP379.2 Sections 5 and 6 in their entirety, November 1997; and/or “Composting Facility,” NRCS Conservation Practice Standard 317, March 2001; are considered accepted agricultural practices.¹

Despite the implementation of accepted agricultural practices, if an agricultural operation still generates odors in excess of those typically associated with that type of agriculture, the operation must develop and submit an odor management plan to ISDA. ISDA is further charged with reviewing and approving design plans for all new or modified liquid waste systems prior to construction. IDAPA 02.04.16.300. The systems must be designed by a professional engineer. The rules set forth general design standards, provide for inspections, and set forth the process and requirements for an odor management plan.

ISDA must respond to all odor complaints lodged against agricultural operations, and handles violations of the Rules.

4. CAFO Siting Laws and Rules

Although state agencies (particularly ISDA and DEQ) have a large role in regulating CAFOs, the Idaho Legislature has also recognized the role of counties in siting of CAFOs. Idaho Code § 67-6529 specifically requires that “[n]otwithstanding any provision of law to the contrary, a board of county commissioners shall enact ordinances and resolutions to regulate the siting of large confined animal feeding operations and facilities, as they shall be defined by the board . . .” Idaho Code § 67-6529(2) (emphasis added). Section 67-6529 also provides that a county “may reject a site regardless of the approval or rejection of the site by a state agency.” This section applies to both dairy and beef CAFOs.

In 2001 the Legislature passed the Site Advisory Team Suitability Determination Act, Idaho Code §§ 67-6529A, *et seq.* That Act allows a county to call upon ISDA to form a site advisory team “to assist counties and other local governments in the environmental evaluation of appropriate sites for confined animal feeding operations.” Idaho Code § 67-6529B. The site advisory team includes representatives from ISDA, IDEQ and the Idaho Department of Water Resources. If requested, the team must review information provided by the county and provide the county with a suitability determination that identifies the environmental risks posed by a proposed CAFO site, describes factors that contribute to the environmental risks and sets forth any possible mitigation of risk. Idaho Code §§ 67-6529C(2), (3) and (4); 67-6529F(3). Upon receipt of the report from the team, the county may use the report as the county deems appropriate. Idaho Code § 67-6529G. The Act also provides that counties may require an applicant for siting of a CAFO to submit an odor management plan as part of the application. Notably, the Act specifically provides that “this act does *not* preempt local regulation of a CAFO.” Idaho Code 67-6529D(3) (emphasis added). ISDA has promulgated rules regarding the Act. IDAPA 02.04.18.100, *et seq.*

D. Analysis

Since none of the statutes cited above expressly preempt local regulation of CAFOs, the issue presented turns on whether the Legislature impliedly preempted local regulation. Implied preemption may occur if the state fully occupies the field of regulation, in which case any local ordinance in the field is preempted. In addition, even when the state has not fully occu-

pied the field, implied preemption may occur when a specific county ordinance is found to be in conflict with state law. There is no doubt that the Legislature intended for the Idaho Department of Agriculture to administer a comprehensive program to regulate the operation of beef cattle CAFO wastewater storage and containment facilities. In enacting the Beef Cattle Control Act, the Idaho Legislature stated its intent to protect “state natural resources including, surface water and ground water,” Idaho Code § 22-4902, by ensuring “that manure and process wastewater associated with beef cattle operations is handled in a manner which protects the natural resources of the state.” *Id.* This objective was to be achieved through submission of a nutrient management plan for each CAFO to the Idaho Department of Agriculture. Idaho Code § 22-4905. Through this Act, the Legislature sought to preclude conflicting state and federal regulation and stated its intent that “administration of this law by the department of agriculture fully meets the goals and requirements of the federal clean water act and state laws designed to further protect state waters” Idaho Code § 22-4902(2).

In many ways, the Beef Cattle Control Act standing alone seems to mirror the factors cited by the Idaho Supreme Court in Envirosafe as a basis for finding an implied preemption of local regulation. State law provides authority to ISDA to regulate the design and construction of beef cattle CAFOs and the manner in which nutrients and soil amendments are land applied. The beef cattle law includes statements that indicate the Legislature intended to create a state-wide program to protect state natural resources, including surface and groundwater quality. In addition, the Legislature sought to ensure state primacy over the regulation of CAFO wastewater storage and containment facilities for beef cattle operations. Finally, the Legislature sought to protect a state resource—water—that has traditionally been exclusively regulated by the State. Idaho Code § 42-201(2) (2003). State law provides similar authority to ISDA regarding dairy CAFOs.

Unlike the situation considered in Envirosafe, however, state law provides specific authority to counties to regulate the siting of dairy and beef cattle CAFOs. Idaho Code §§ 67-6529 through 67-6529G (2006). Indeed, Idaho Code § 67-6529 expressly provides that “[n]otwithstanding any provision of the law to the contrary, a board of county commissioners shall enact ordinances and resolutions to regulate the siting of large confined animal feeding operations and facilities, as they shall be defined by the board” These siting statutes direct that counties consider the “social and environmental

impacts” arising from the location of CAFOs. Thus, counties are authorized to review and take into account information regarding the environmental risks posed by a CAFO. Idaho Code § 67-6529G (2006). This obviously could include risks to ground and surface water quality and air quality. In addition, counties are specifically authorized to require CAFOs to submit odor management plans. Idaho Code § 67-6529D (2006). There are also several other Idaho Code provisions that appear to recognize a more general regulatory role for counties. Finally, the Site Advisory Team Suitability Determination Act provides that it does not preempt local regulation of a CAFO. Idaho Code § 67-6529D (2006). The state dairy law also recognizes the requirement that dairy CAFOs comply with applicable local livestock ordinances.

In light of the significant role provided for counties in the siting of CAFOs, it is unlikely that a court will find that local regulation of the entire field of CAFO regulation is preempted. On the other hand, the Legislature’s express delegation of regulatory authority over operational aspects of CAFOs to the Department of Agriculture and the Department of Environmental Quality suggests that a court may, under a conflict analysis, determine an ordinance imposing restrictions that unduly interfere with state operational requirements for CAFOs is preempted. There is no bright line between what constitutes a siting condition and an operational condition. The mere fact that a local siting ordinance contains environmental conditions for the siting of a CAFO that may also be addressed in a nutrient management plan is not determinative of the question of whether the local ordinance is preempted. One must analyze the specific ordinance in question, in light of the pertinent legal provisions described above, in order to determine whether a local ordinance related to siting conflicts with state regulatory authority over the operation of CAFO wastewater storage and containment facilities.

CONCLUSION

Because the Legislature has authorized both the counties and the State to regulate CAFOs, and because these authorities overlap, it is unlikely that a court would conclude the State has completely occupied the field of CAFO regulation or that state law provides an exclusive regulatory program that preempts all local regulation. Although counties have authority to regulate siting of dairy and beef cattle CAFOs, county ordinances that seek to impose operational constraints on the ongoing operation of a CAFO after it is

sited are likely preempted. Each ordinance must be analyzed separately along with applicable state law to determine whether such a conflict exists.

AUTHORITIES CONSIDERED

1. Idaho Constitution:

Art. XII, § 2.

2. Idaho Code:

§ 22-4902.
§ 22-4903.
§ 22-4904.
§ 22-4905.
§ 22-4906.
§ 25-3801.
§ 25-3803(3).
§ 37-401.
§ 37-403.
§§ 39-4401 to 39-4432.
§ 42-201(2).
§ 67-6529.
§ 67-6529A.
§ 67-6529B.
§ 67-6529C.
§ 67-6529D.
§ 67-6529F.
§ 67-6529G.

3. Administrative Rules:

IDAPA 02.04.14.000, *et seq.*
IDAPA 02.04.14.004.05.
IDAPA 02.04.14.005.
IDAPA 02.04.14.011.
IDAPA 02.04.15.010.05.
IDAPA 02.04.15.010.12.

IDAPA 02.04.15.010.13.
 IDAPA 02.04.15.100, *et seq.*
 IDAPA 02.04.16.010.01.
 IDAPA 02.04.16.100, *et seq.*
 IDAPA 02.04.16.300.
 IDAPA 02.04.18.100, *et seq.*

4. Idaho Cases:

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

State v. Musser, 67 Idaho 214, 176 P.2d 199 (1946).

5. Other Authorities:

1983 Idaho Att’y Gen. Ann. Rpt. 69.

The Idaho Beef Cattle Environmental Control Memorandum of Understanding.

Dated this 1st day of August, 2008.

LAWRENCE G. WASDEN
 Attorney General

Analysis by:

ANGELA SCHAER KAUFMANN
 DOUGLAS CONDE
 Deputy Attorneys General

¹ “Accepted agricultural practices” are “those management practices normally associated with agriculture in Idaho, including but not limited to those practices identified in Section 100 of these rules, and which include management practices intended to control odor generated by an agricultural operation.” IDAPA 02.04.16.010.01.

ATTORNEY GENERAL OPINION NO. 08-2

To: POST Council
c/o Mr. Jeff Black, Executive Director
Peace Officer Standards and Training Academy
P.O. Box 700
Meridian, ID 83680-0700

Per Request for Attorney General's Opinion

You have requested an Attorney General's Opinion concerning whether members of the University Division of the Rexburg Police Department who patrol the premises of Brigham Young University-Idaho (BYU-Idaho) are peace officers as defined by Idaho Code § 19-5101(d). This analysis is significant because the City of Rexburg and prior decisions by the Peace Officer Standards and Training (POST) Council have relied upon an opinion that POST is permitted to certify employees of BYU-Idaho as peace officers under the terms of Rexburg's Law Enforcement Service Agreement with BYU-Idaho provided that the BYU-Idaho employees are "administered" by the city.

QUESTIONS PRESENTED

1. Does the City of Rexburg have constitutional or statutory authority to delegate its law enforcement authority to employees of a private corporation?

2.a. Does the POST Council have the authority to certify the employees of a private corporation as law enforcement officers?

2.b. If not, what is the status of the BYU-Idaho employees who have performed law enforcement functions while certified as peace officers by the POST Council?

CONCLUSIONS

1. No. Idaho municipal corporations cannot enter into a joint powers agreement to exercise the municipality's police power with any enti-

ty other than the State of Idaho or its political subdivisions. Idaho authorizes joint powers agreements to be entered into only between public entities. As a private educational institution, BYU-Idaho is not a public agency. The City of Rexburg exceeded its authority by entering into an agreement with BYU-Idaho for the joint exercise of law enforcement authority.

2.a. No. The POST Council can only certify peace officers who are employees of police or law enforcement agencies which are part of or administered by the state or its political subdivisions. Idaho Code §§ 19-5101 and 19-5109. Although the City of Rexburg entered into an agreement with BYU-Idaho to jointly share law enforcement powers, as explained in the answer to Question 1 above, that sharing of powers is *ultra vires*. Therefore, the POST Council has no lawful basis upon which to certify employees of BYU-Idaho.

2.b. POST Council previously certified BYU-Idaho employees as members of the University Division of the Rexburg Police Department. It is our opinion that under Idaho law these employees qualify as *de facto* officers and that all arrests and other lawful actions of BYU-Idaho employees certified in the past as law enforcement officers prior to a decision of a court of competent jurisdiction or de-certification by POST should be upheld.

INTRODUCTORY OVERVIEW

In 1988, the City of Rexburg and BYU-Idaho entered into a Law Enforcement Service Agreement (“Agreement”), under which employees of BYU-Idaho are to be “sworn in and commissioned as police officers of the City of Rexburg.” BYU-Idaho bears the costs of paying and equipping the officers, who are supervised in their law enforcement functions by the Rexburg Chief of Police. As BYU-Idaho employees, these officers also perform non-law enforcement functions and are supervised by BYU-Idaho in such capacity.

In 1989, the original Law Enforcement Service Agreement was reviewed by legal counsel for the Department of Law Enforcement¹ who concluded, without in-depth analysis, that the agreement complied with Idaho law. The City of Rexburg, BYU-Idaho, and the POST Council have relied upon the 1989 conclusion since its issuance.

Upon receipt of this request, this office reviewed the 1989 conclusion and determined that additional legal research and analysis was necessary to fully address the questions presented. As noted above, the 1989 legal analysis did not undertake a review of the comprehensive statutory system for the certification of police and law enforcement officers, nor did it analyze the limitations on agreements for the joint exercise of powers. Based upon an in-depth legal analysis, this opinion reaches the opposite conclusion, and insofar as the 1989 analysis concludes differently, it is overwritten as the position of this office by this formal opinion.

As part of this review, this office has completed a factual inquiry into the legal relationship created by the Agreement between BYU-Idaho employees and the City of Rexburg. To fully understand the Agreement, this office examined the hiring, training, scheduling, disciplinary, and termination practices of the University Division of the Rexburg Police Department. Based upon interviews with the Chief of the Rexburg Police Department, the City Attorney, and current and former Captains of the University Division, it appears that the Chief of the Rexburg Police Department exercises limited general supervision of the BYU-Idaho employees acting as peace officers.

FACTUAL BACKGROUND

This opinion is based upon the following facts, which were compiled from review of the relevant documents as well as interviews of the interested parties:

1. The University Division of the Rexburg Police Department (University Division) is the result of a contract between the City of Rexburg and Brigham Young University-Idaho, a private non-profit Utah corporation devoted to higher education and owned by the Corporation of the Church of Jesus Christ of Latter-Day Saints. Under the Law Enforcement Service Agreement, the University Division police officers are commissioned by the Rexburg Police Chief to perform law enforcement services on the premises of BYU-Idaho and within a two-block perimeter beyond the border of those premises.

2. The University Division police officers, as employees of BYU-Idaho, are subject to all applicable BYU-Idaho employment policies.

The owner of BYU-Idaho, the Corporation of the Church of Jesus Christ of Latter-Day Saints, has particular requirements for eligibility to work at BYU-Idaho. Prospective employees must agree to abide by a specific code of moral conduct. The Rexburg Police Department has tacitly agreed to this code as applied by BYU-Idaho to its employees in the University Division. In order to qualify for employment as a University Division police officer, the applicant is required to abide by specific standards of morality and living espoused by the Church.

3. Applicants for the University Division fill out the standard application for BYU-Idaho employment as well as an application specific to the University Division. University Division applicants have to complete the same physical fitness, written, and oral board examinations as members of the Rexburg Police Department. University Division applicants meet with an oral board, two members of which are representatives of the Rexburg Police Department employed outside the University Division. The top candidates are reviewed by the Captain of the University Division. The Chief of the Rexburg Police Department has the power to veto any hiring recommendation made by the Captain of the University Division. If both the Chief of the Rexburg Police Department and the University Division Captain are comfortable with a candidate, a conditional offer of employment is made. When the Chief of the Rexburg Police Department endorses a group of candidates, the final decision on who to hire is up to the Captain of the University Division. An officer with the Rexburg Police Department working outside the University Division cannot simply transfer to the University Division, but is required to fill out BYU-Idaho and University Division applications and go through the BYU-Idaho and University Division hiring process.

4. The salaries, benefits, and pensions of the University Division police and all costs attending the law enforcement services of the University Division are paid by BYU-Idaho and differ from those available to members of the rest of the Rexburg Police Department. The University Division maintains its own dispatch center and telephone number. Emergency calls made from landline telephones which are part of the BYU-Idaho telecommunications system go through the University Division dispatch, while such calls made off BYU-Idaho premises and from cellular telephones go through the Madison County Dispatch Center.

5. University Division patrol units bear the Rexburg Police insignia, but also have “University Division” on them. University Division vehicles and equipment are selected, purchased, owned, maintained, and replaced by BYU-Idaho.

6. University Division officers operate under a “two-hat” concept, performing as BYU-Idaho employees while enforcing campus rules and codes, conducting bank escorts, jumpstarting automobiles, unlocking doors, etc., and then providing police services under the Rexburg City Police Policy Manual when called upon to deal with a criminal offense. BYU-Idaho manages all University Division employment issues while the Rexburg Police Department manages just those issues specific to law enforcement that may arise when the BYU-Idaho employees are called upon to act as peace officers.

7. Performance evaluations of University Division officers are conducted by their supervisors in the University Division. University Division officer discipline for minor policy violations is handled by University Division supervisors and the Captain of the University Division who, as employees of BYU-Idaho, have more latitude in such matters than a Rexburg Police supervisor working outside the University Division. Copies of final disciplinary notices are sent to the Chief of the Rexburg Police Department. If the violation is serious or repetitive, the Chief of the Rexburg Police may place the officer on probation or remove his authority to act as a law enforcement officer (referred to as “decommissioning”).

8. The only disciplinary authority the Chief of the Rexburg Police has over a University Division officer is to terminate the officer’s commission, removing the authority to act as a law enforcement officer. Because the University Division officers are all BYU-Idaho employees, BYU-Idaho has the right to retain a decommissioned employee in a non-law enforcement capacity. If a University Division officer is decommissioned by the City of Rexburg and BYU-Idaho or the employee disagree with that decision, the City of Rexburg may be asked to revisit the issue and re-commission the BYU-Idaho employee. BYU-Idaho retains the right, without consulting the Rexburg Chief of Police, to terminate a University Division officer from BYU-Idaho employment. A University Division officer terminated by BYU-Idaho must resort to the BYU-Idaho employment grievance process; the City of Rexburg appeals process is unavailable to BYU-Idaho employees. The

Rexburg Police Chief does not notify POST of the BYU-Idaho termination of employment of an officer unless the Chief in the exercise of his discretion determines the conduct that prompted termination affects the officer's ability to continue to work as a police officer for another employer.

9. The scheduling of shifts and work assignments in the University Division is handled entirely within the University Division. The day-to-day operation of the University Division is handled by the Division's Captain, an employee of BYU-Idaho. The approval of timesheets, overtime, and vacation time is entirely up to the Captain of the University Division. The University Division Captain meets with the Rexburg Chief of Police every Monday. The University Division detectives meet with the detectives of the Rexburg Police Department every Tuesday. The University Division's patrol officers meet with the patrol officers of the Rexburg Police Department every Thursday. The Chief of the Rexburg Police approves the University Division's logs within a day or two of submission to him and has immediate access to the reports of the University Division's officers through a computer system, allowing the Chief to review the recent activity of the University Division. A Captain of the Rexburg Police Department reviews the citations written by the University Division officers.

10. Officers of the University Division cover shifts for the regular Rexburg Police and vice versa. The University Division has an investigator and the Rexburg Police Department has an investigator. If a significant crime or large investigation occurs on the University campus, the University Division and the Rexburg Police Department share personnel. The Rexburg Police Department assists the University Division with investigative work on campus crimes, but the University Division investigator remains the lead investigator.

11. Under the Agreement, BYU-Idaho indemnifies the City of Rexburg for any activities of the University Division officers related to any non-law enforcement activities. The City of Rexburg is required, by the agreement, to provide liability insurance for the University Division officers for their law enforcement-related conduct. ICRMP, the city's insurer, when contacted, advised that it does not provide liability coverage for BYU-Idaho's University Division officers since they are not public employees.

The above facts lead us to conclude, as explained below, that the University Division officers are not actually managed or supervised by the City of Rexburg. The management of the University Division is maintained by BYU-Idaho, with only limited involvement by the City of Rexburg.

ANALYSIS

I.

THE CITY OF REXBURG DOES NOT HAVE AUTHORITY TO SWEAR IN AND COMMISSION THE EMPLOYEES OF A PRIVATE CORPORATION AS LAW ENFORCEMENT OFFICERS

A. The Scope of a Municipal Corporation's Police Power

Rexburg is a municipality organized under art. XII, sec. 1 of the Idaho Constitution and its powers are outlined by title 50, chapter 3, of the Idaho Code. The City of Rexburg “may sue and be sued; contract and be contracted with . . . and exercise all powers and perform all functions of local self-government in city affairs as are not specifically prohibited by or in conflict with the general laws or the constitution of the state of Idaho.” Idaho Code § 50-301.

The constitution grants an incorporated city or town the legislative and executive power to “make and enforce, within its limits, all such local police, sanitary and other regulations as are not in conflict with its [city or town] charter or with the general laws.” Art. XII, § 2. This grant of police power is “broad” in scope. Rowe v. City of Pocatello, 70 Idaho 343, 348, 218 P.2d 695, 698 (1950).

But this “broad” grant of police power to cities is not without limitation. Idaho recognizes that a municipal corporation, as a creature of the state, possesses and exercises only those powers either expressly or impliedly granted by the state constitution or the Legislature. Alpert v. Boise Water Corp., 118 Idaho 136, 142, 795 P.2d 298, 304 (1990); Adams v. City of Pocatello, 91 Idaho 99, 104, 416 P.2d 46, 51 (1966) (“[I]t is the legislative function to prescribe police regulations governing the conduct of citizens, and the penalties to be enforced by the executive branch for a violation thereof”);

Caesar v. State, 101 Idaho 158, 160, 610 P.2d 517, 519 (1980) (“The legislature has absolute power to change, modify or destroy those powers at its discretion”) (citing State v. Steunenberg, 5 Idaho 1, 4, 45 P. 462, 463 (1896)).

Under this conditional grant of police powers, municipalities are authorized to form police services to prevent public offenses and keep the peace, Idaho Code § 19-204, and to employ police as set forth in Idaho Code § 50-209. The police authority possessed by a municipality’s appointed police officers is set forth in Idaho Code § 50-209:

Powers of policemen.—The policemen of every city, should any be appointed, shall have power to arrest all offenders against the law of the state, or of the city, by day or by night, in the same manner as the sheriff or constable.

Although Idaho cities are expressly granted the power to form a police service, the constitution and statutes do not authorize cities to delegate police power to private entities. No authority exists for the City of Rexburg to appoint the employees of the private company to serve as “peace officers.”² Since authority for cities to designate employees of non-public corporations as police officers does not exist, the inquiry then turns to whether a city may enter into a contract with a private entity for the joint exercise of police authority. As discussed in more detail below, agreements for the joint exercise of powers are expressly limited to agreements with other public entities.

B. Municipal Corporations Lack Authority to Contract for the Joint Exercise of Police Powers With Private Entities

1. The Joint Exercise of Powers Act is a Comprehensive Regulation of the Area of Public Agencies’ Agreements for the Joint Exercise of Police Powers With Other Entities

Joint powers agreements in Idaho are governed by Idaho Code §§ 67-2326 to 67-2333 inclusive. Idaho Code § 67-2326 provides:

Joint action by public agencies—Purpose.—It is the purpose of this act to permit the state and public agencies to make the most efficient use of their powers by enabling

them to cooperate to their mutual advantage and thereby provide services and facilities and perform functions in a manner that will best accord with geographic, economic, population, and other factors influencing the needs and development of the respective entities.

(Emphasis added.) Idaho Code § 67-2328(a) defines and limits the purpose of joint powers agreements through the following:

Any power, privilege or authority, authorized by the Idaho Constitution, statute or charter, held by the state of Idaho or a public agency of said state, may be exercised and enjoyed jointly with the state of Idaho or any other public agency of this state having the same powers, privilege or authority; but never beyond the limitation of such powers, privileges or authority

This authority is further defined as permitting cities to contract with one or more other public agencies to “perform any governmental service, activity, or undertaking which each public agency entering into the contract is authorized to perform, including, but not limited to joint contracting for services, supplies and capital equipment.” Idaho Code § 67-2332. This authority should not be “interpreted to grant to any state or public agency thereof the power to increase or diminish the political or governmental power of the United States, the state of Idaho, a sister state, nor any public agency of any of them.” Idaho Code § 67-2333.

2. A Joint Powers Agreement Between a City and a Non-Public Entity is Expressly Prohibited

In Idaho, a local ordinance that conflicts with a state law, or is expressly preempted by state regulation of the subject matter, is void. Envirosafe Serv. of Idaho v. Owyhee County, 112 Idaho 687, 689, 735 P.2d 998, 1000 (1987). A direct conflict, such as a municipality expressly allowing or undertaking what the state prohibits or prohibiting what the state requires, is a “conflict” in any sense. State v. Musser, 67 Idaho 214, 219-21, 176 P.2d 199, 201-02 (1946).

The Legislature has acted in an all-encompassing fashion towards regulating the field of agreements for the joint exercise of police authority. Idaho Code §§ 67-2326 to 67-2333 contain no language authorizing public agencies such as cities to jointly exercise their powers with non-public entities. Any agreement entered into between a city and any entity for the joint exercise of police authority must comply with the express requirements of Idaho Code §§ 67-2326 to 67-2333. The Law Enforcement Services Agreement entered into between the City of Rexburg, a municipal corporation, and BYU-Idaho, a private corporation, does not comply with Idaho Code § 67-2328 because the statute permits the sharing of municipal powers only between public entities. Therefore, to the extent the Law Enforcement Service Agreement purports to delegate the police power of the City of Rexburg to BYU-Idaho or its employees, that delegation is ineffective.

State preemption of the delegation of municipal police authority to employees of a private entity is analogous to the state preemption of Owyhee County ordinances regarding hazardous waste disposal at issue in Envirosafe. In each, “the very subject matter[s] involved” are “fraught with such unique concerns and dangers to both the state and the nation that its regulation demands a statewide, rather than local, approach.” 112 Idaho at 691, 735 P.2d at 1003. In Envirosafe, the Idaho Supreme Court found “the field of hazardous waste disposal is uniquely susceptible of, and appropriate for, uniform statewide regulation” and the enactment of the Hazardous Waste Management Act of 1983, a comprehensive legislative act governing the disposal of hazardous waste including PCBs, evidenced “a textually demonstrable commitment by the state to regulate the field uniformly on a statewide basis.” 112 Idaho at 692-93, 735 P.2d at 1004-05.

Similarly, the necessity of uniformity and fairness in law enforcement and criminal justice administration throughout Idaho makes uniform statewide regulation essential. In the simplest terms, within a valid joint exercise of powers agreement the two entities must possess a common power, which is then shared by the two entities for their mutual benefit. In the instant scenario, only the City of Rexburg possesses the police power while BYU-Idaho has no such power. Thus no sharing of powers can take place. An agreement for the joint exercise of powers between an Idaho municipality and a private entity is prohibited by Idaho law.³

II.

THE POST COUNCIL LACKS THE AUTHORITY TO CERTIFY THE EMPLOYEES OF BYU-IDAHO AS PEACE OFFICERS

A. The POST Council Lacks Authority to Enter Into Joint Exercise of Power Agreements With Private Entities

For the same reason that the City of Rexburg lacks the authority to delegate its police power to BYU-Idaho, a private entity, the POST Council does not have the authority under Idaho Code § 67-2330 to recognize the joint exercise of powers agreement between the City of Rexburg and BYU-Idaho and certify officers acting under that agreement. As an agency of state government, Idaho Code § 67-2327, the POST Council is only authorized to approve certification for peace officers empowered under an agreement made pursuant to all the terms and conditions of the joint exercise of powers statutory scheme. The City of Rexburg and BYU-Idaho Law Enforcement Service Agreement does not comply with these terms and conditions because, as set forth above, BYU-Idaho is not a public agency. Idaho Code §§ 67-2327, 67-2328.

B. The POST Council Exceeded Its Authority When It Certified BYU-Idaho Employees as Peace Officers Under the City of Rexburg and BYU-Idaho Law Enforcement Service Agreement

1. The POST Council Is Not Authorized to Certify the Employees of a Private Entity as Peace Officers

Based upon the conclusions reached above, further analysis of the authority of the POST Council to certify the police officers of the University Division is unnecessary because the Agreement between the City and BYU-Idaho is *ultra vires*; however, in the interest of thoroughness, we will complete the analysis. The 1981 legislation creating the POST Council gives the Council the power and duty to establish minimum requirements for employment, retention and promotion of peace officers, including eligibility standards, physical, mental, and moral fitness standards, and education and training requirements. Idaho Code § 19-5109(1)(a) through (f). The POST Council is also charged with certifying those “peace officers as having completed all requirements established by the council in order to be eligible for

permanent employment as peace officers in this state.” Idaho Code § 19-5109(1)(g).

Idaho Code § 19-5101(d) has, since 1981, defined a “peace officer” as:

any employee of a police or law enforcement agency which is a part of or administered by the state or any political subdivision thereof and whose duties include and primarily consist of the prevention and detection of crime and the enforcement of penal, traffic or highway laws of this state or any political subdivision. “Peace officer” also means an employee of a police or law enforcement agency of a federally recognized Indian tribe who has satisfactorily completed the peace officer standards and training academy and has been deputized by a sheriff of a county or a chief of police of a city of the state of Idaho.

Except where police powers are vested by statute in state, county, or municipal officers, the primary law enforcement officers of the State of Idaho are the sheriff and prosecuting attorney of each of the several counties. Idaho Code §§ 31-2202, 31-2227. Idaho Code § 31-2227, however, “does not destroy . . . the statutory or implied constitutional authority and duty of other peace officers.” Monson v. Boyd, 81 Idaho 575, 581, 348 P.2d 93, 96 (1959). Idaho Code defines a “peace officer” as “a sheriff of a county, or a constable, marshal, or policeman of a city or town.” Idaho Code § 19-510; *see also* Idaho Code § 18-8103(4). By statute, the director of the Idaho State Police and persons deputized by him as state policemen are peace officers authorized to exercise within any county the same powers as the sheriff. Idaho Code §§ 67-2902, 67-2905. A “peace officer” includes only the sheriff (and deputies) of a county, the policeman of a city or town, and state police.

“‘Law enforcement’ means any and all activities pertaining to crime prevention or reduction and law enforcement, including police, courts, prosecution, corrections, rehabilitation, and juvenile corrections.” Additionally, a “[l]aw enforcement agency means a governmental unit of one (1) or more persons employed full time or part time by the state or federal government, or a political subdivision thereof, for the purpose of preventing and detecting

crime and enforcing laws or local ordinances and employees of which are authorized to make arrests for crimes while acting within the scope of their authority.” Idaho Code § 18-8103(3).

After January 1, 1974, in Idaho all peace officers were required to “be certified by the council within one (1) year of employment.” Idaho Code § 19-5109(2). The act creating the POST Council, Idaho Code §§ 19-5101, *et seq.*, does not grant the Council the authority to certify the employees of a private entity as peace officers, because as outlined above, the term “peace officers” includes only a discrete group of qualified public officers.

2. University Division Officers are not “Administered by” the City of Rexburg and are not Eligible for POST Certification as Peace Officers

It was POST’s prior position and it is the current position of the City of Rexburg that, under the terms of the Law Enforcement Service Agreement, the University Division officers are “administered by” a political subdivision and therefore are entitled to POST certification as peace officers under Idaho Code § 19-5101(d). Closer examination of the statutory language and the facts of this matter lead us to the conclusion that this is not the case.

The word “administered” in Idaho Code § 19-5101(d), like all words in a statute, is interpreted according to its plain language. Where the language of a statute is plain, the court will not resort to principles of statutory construction. State Dep’t of Health and Welfare v. Housel, 140 Idaho 96, 103, 90 P.3d 321, 328 (2004). Common words in a statute, such as “administered,” are to be given their common meaning. Oregon Short Line R. Co. v. Pfozt, 53 Idaho 559, 27 P.2d 877 (1933). As explained by the Idaho Supreme Court in City of Lewiston v. Mathewson, 78 Idaho 347, 354, 303 P.2d 680, 684 (1956): “Laws are enacted to be read and obeyed by the people and in order to reach a reasonable and sensible construction thereof, words that are in common use among the people should be given the same meaning in the statute as they have among the great mass of the people who are expected to read, obey and uphold them.” The plain and ordinary meaning of the word “administered” in Idaho Code § 19-5101(d) is: “to manage or supervise the execution, use, or conduct of,” as in to *administer* a trust fund, or “to manage affairs.” Merriam-Webster Online, <http://www.merriam-webster.com/dictionary/Administered> (accessed April 5, 2008).

The word “administered” in Idaho Code § 19-5101 must also be viewed in light of the joint exercise of powers statutes, which limits such agreements to public agencies. In enacting Idaho Code §§ 19-5101, *et seq.*, in 1981, it must be presumed that the Legislature did so with full awareness of the joint exercise of powers statutes, Idaho Code §§ 67-2326 through 67-2333, enacted 11 years earlier. “Statutes are construed under the assumption that the legislature was aware of all other statutes and legal precedence at the time the statute was passed.” Druffel v. State, Dep’t of Transp., 136 Idaho 853, 856, 41 P.3d 739, 742 (2002). Therefore, the Legislature knew at the time it created the POST Council that public agencies had the power to enter into agreements for the joint exercise of law enforcement authority with other public agencies, Idaho Code § 67-2328, that such agreements might create new public entities, *id.*, and the law enforcement employees of such entities would be “administered” by the parties to a joint powers agreement, Idaho Code § 19-5101(d).

In our view the purpose and intent of the use of the word “administered” in this statute is demonstrated by the example of the peace officers in the Mini-Cassia Drug Enforcement Task Force. This task force is a separate entity created under the joint exercise of powers statutes by Cassia County, Minidoka County, the City of Rupert, and the City of Heyburn, all public agencies. The Mini-Cassia Drug Enforcement Task Force is wholly managed and conducted by the four political subdivisions that created it, each of which has members on the task force Board of Directors. The general operation of the task force is administered by the Board of Directors, with daily operations conducted by the task force commander, who reports to the board. In this instance the peace officer employees of the Mini-Cassia Drug Enforcement Task Force are in fact employees of a “law enforcement agency” that is “administered by . . . [a] political subdivision,” *i.e.*, the cities and counties that are the constituent parties of the joint powers agreement and contributors of resources to the drug enforcement task force. POST certification of the employees of this entity is entirely appropriate and as contemplated by the clear language of the statute.

The University Division officers, on the other hand, are not “administered,” that is actually managed or supervised, by the City of Rexburg. Management and supervision is delegated to BYU-Idaho. Under the “two-hat” concept, the University Division officers function as BYU-Idaho

employees until called upon to enforce the law. The scheduling of shifts and work assignments in the University Division is handled entirely within the University Division consisting exclusively of BYU-Idaho employees. The day-to-day operations as well as administrative matters such as approval of timesheets, overtime, and vacation time is solely in the discretion of the Captain of the University Division, who is a BYU-Idaho employee. The Chief of the Rexburg Police cannot terminate the employment of an officer but has authority only to terminate a University Division officer's commission, ostensibly removing the authority to act as a law enforcement officer. Only BYU-Idaho can fire a University Division officer.

3. The Statutory Requisites for POST Council Certification are not Present

The statutory requisites for POST Council certification of officers under the POST Council statute, Idaho Code § 19-5101(d), are not present here. The University Division officers are not employees of a police or law enforcement agency. They are employees of BYU-Idaho, which has no constitutionally or legislatively granted police power. BYU-Idaho is not a part of the State of Idaho or any political subdivision of Idaho. Furthermore, the University Division officers are not administered by the State of Idaho or any political subdivision. Accordingly, it is our view that the POST Council exceeded its authority in certifying the BYU-Idaho employees as peace officers.

C. **During the Time the BYU-Idaho Employees Were Certified by the POST Council They Were *de Facto* Officers Under Idaho Law**

Although it is our conclusion the POST Council lacked the authority to certify BYU-Idaho employees as peace officers of the University Division of the Rexburg Police Department, our research leads us to conclude that during the time the officers have been POST certified, the law enforcement actions of the officers have been legitimate under the *de facto* officer doctrine. As explained by the Idaho Supreme Court in State v. Whelan, 103 Idaho 651, 655, 651 P.2d 916, 920 (1982), “[a]n officer *de facto* is one who actually assumes and exercises the duties of a public office under color of a known and authorized appointment or election, but who has failed to comply with all the

requirements of the law prescribed as a precedent to the performance of the duties of the office.” A *de facto* officer is distinguished from a usurper, who has no lawful title nor color of right, in that “a *de facto* officer performs his duties under color of right of an actual officer qualified in law so to act.” *Id.* *De facto* officers act with the same powers and duties of the office as *de jure* officers. State v. Swenson, 119 Idaho 706, 708, 809 P.2d 1185, 1187 (Ct. App. 1991) (citing Gasper v. District Court, 74 Idaho 388, 394, 264 P.2d 679, 682 (1953)). The Idaho appellate courts have recognized and upheld the acts of *de facto* officers. Swenson, 119 Idaho at 708, 809 P.2d at 1187; State v. Wilson, 41 Idaho 616, 243 P. 359 (1925). A reasonable conclusion is that during the time the POST Council certified BYU-Idaho employees as members of the University Division of the Rexburg Police Department, the officers were *de facto* officers under Idaho law and their actions could not be successfully challenged as illegitimate.

AUTHORITIES CONSIDERED

1. Idaho Constitution:

Art. I, § 4.
Art. XII, § 1.
Art. XII, § 2.

2. Idaho Code:

§ 18-8103.
§ 19-204.
§ 19-510.
§ 19-511.
§ 19-5101.
§ 19-5109.
§ 31-2202.
§ 31-2227.
§ 50-209.
§ 50-301.
§ 67-2326.
§ 67-2327.
§ 67-2328.
§ 67-2330.

§ 67-2332.

§ 67-2333.

§ 67-2902.

§ 67-2905.

3. Idaho Cases:

Adams v. City of Pocatello, 91 Idaho 99, 416 P.2d 46 (1966).

Alpert v. Boise Water Corp., 118 Idaho 137, 795 P.2d 298 (1990).

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

City of Lewiston v. Mathewson, 78 Idaho 347, 303 P.2d 680 (1956).

Druffel v. State, Dep't of Transp., 136 Idaho 853, 41 P.3d 739 (2002).

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

Gasper v. District Court, 74 Idaho 388, 264 P.2d 679 (1953).

Monson v. Boyd, 81 Idaho 575, 348 P.2d 93 (1959).

Oregon Short Line R. Co. v. Pfost, 53 Idaho 559, 27 P.2d 877 (1933).

Rowe v. City of Pocatello, 70 Idaho 343, 218 P.2d 695 (1950).

State Dep't of Health and Welfare v. Housel, 140 Idaho 96, 90 P.3d 321 (2004).

State v. Musser, 67 Idaho 214, 176 P.2d 199 (1946).

State v. Steunenberg, 5 Idaho 1, 45 P. 462 (1896).

State v. Swenson, 119 Idaho 706, 809 P.2d 1185 (Ct. App. 1991).

State v. Whelan, 103 Idaho 651, 651 P.2d 916 (1982).

State v. Wilson, 41 Idaho 616, 243 P. 359 (1925).

4. Other Authorities:

Merriam-Webster Online Dictionary, <http://www.merriam-webster.com/dictionary/Administered> (accessed April 5, 2008).

Dated this 26th day of August, 2008.

LAWRENCE G. WASDEN
Attorney General

Analysis by:

RALPH R. BLOUNT
Deputy Attorney General

¹ Now the Idaho State Police.

² Under Idaho law only the governor has been granted the authority to delegate police power, and then only to railroad police or steamboat police, as the employees of private entities. Idaho Code § 19-511 permits the governor of the State of Idaho to appoint and commission a person designated by a railroad or steamboat company to serve, at the expense of the company, as a policeman, with the powers of a police officer upon the premises, cars, and boats of the company. The railroad and steamboat company employee so designated is required, while on duty, to wear a shield bearing the name of the company for which he is commissioned and the words "railroad police" or "steamboat police." Idaho Code § 19-511. The railroad and steamboat company designating such a person is responsible for any abuse of his authority. *Id.*

³ Based on the above analysis, if the Legislature were to authorize the City of Rexburg to grant law enforcement authority to BYU-Idaho, the delegation to or exercise of state law enforcement power by the employees of BYU-Idaho would have to be examined in light of the Establishment Clause in the First Amendment to the United States Constitution and art. I, sec. 4 of the Idaho Constitution.

ATTORNEY GENERAL OPINION 08-3

To: The Honorable Kate Kelly
Idaho State Senator
P. O. Box 654
Boise, ID 83701

Per Request for Attorney General's Opinion

Dear Senator Kelly:

QUESTIONS PRESENTED

1. Should the executive session exceptions set forth in Idaho Code § 67-2345 be interpreted narrowly by governing boards and their attorneys?
2. What is the scope and appropriate interpretation of Idaho Code § 67-2345(1)(a)?
3. What is the appropriate method of taking corrective action when the discussion in an executive session “drifts” from the session’s stated purpose?

CONCLUSIONS

1. Yes, the executive session exceptions set forth in Idaho Code § 67-2345 should be interpreted narrowly in order to fulfill the broad public purpose of allowing citizens to observe their governments at work, as provided by the Idaho Open Meetings Act.
2. Consistent with the conclusion to Question 1, the appropriate interpretation of Idaho Code § 67-2345(1)(a) is narrow in scope. An executive session should only be entered into under § 67-2345(1)(a) to discuss specific hiring issues regarding a specific person or a specific position. Discussions should not be held on broad questions such as whether to generally fill vacancies or whether sufficient funds exist to fill a vacancy.

3. Corrective action should be taken immediately upon recognition of the fact that an executive session has “drifted” from its stated purpose. Governing bodies should implement an oversight mechanism, such as having their attorney attend the executive session as an observer to assist in preventing and recognizing “drift.”

ANALYSIS

A. **The Idaho Open Meetings Act’s Executive Session Exceptions Should Be Interpreted Narrowly**

1. Broad Public Purpose of the OMA

In 1974 the Idaho Legislature adopted the current version of Idaho’s Open Meetings Act (“OMA”). The OMA begins with a sweeping preamble:

The people of the state of Idaho in creating the instruments of government that serve them do not yield their sovereignty to the agencies so created. Therefore, the legislature finds and declares that it is the policy of this state that the formation of public policy is public business and shall not be conducted in secret.¹

This preamble indicates that all inferences regarding whether to open or close a meeting should be resolved in favor of openness.² It is fundamental that where a statute is designed to protect the public, the language must be construed in light of the legislative intent and purpose and is entitled to a broad interpretation so that its public purpose may be fully carried out.³ More directly, statutes enacted for the public benefit must be interpreted favorably to the public.⁴ To effectuate the OMA’s remedial and protective purpose, “these enactments should be broadly construed and interpreted in the light most favorable to public access.”⁵

2. The Public Records Act Provides Guidance for Interpreting the OMA

The most applicable statute to which the OMA can be compared for purposes of this analysis is the Idaho Public Records Act.⁶ Under the Public

Records Act, the presumption is that all public records are open to disclosure and all exemptions are narrowly construed.⁷ Thus, pursuant to the Public Records Act, if a record is not obviously exempt from disclosure, then the court should hold that it is subject to disclosure.⁸ The same analysis is appropriate within the open meetings context.⁹ Both statutes share the same purpose—transparency and openness in government.¹⁰ As outlined above, both the OMA and Public Records Act were enacted for the benefit of the public; thus, they should be interpreted to benefit the public.

3. The OMA Requires Flexibility With an Eye Toward Openness

This interpretation is necessarily flexible, as no specific guidelines or “magic words” can account for the range and assortment of meetings, votes, and actions covered under the OMA and the realities of local government, while also safeguarding the public’s interest in knowing and observing the workings of governmental bodies.¹¹ In other words, courts should resist technical interpretations that serve to undermine the very purpose of the Open Meetings Act. Just as the courts should resist these interpretations, so too should governmental entities. Instead, government should strive to interpret the exceptions for executive sessions narrowly in order to give full purpose and effect to the OMA’s goal of open and accessible government.

B. The Scope of the OMA’s Hiring Exception Is Narrow

Idaho Code § 67-2345(1)(a) (“the Hiring Exception”) provides that “[a]n executive session may be held . . . to consider hiring a public officer, employee, staff member or individual agent. This paragraph does not apply to filling a vacancy in an elective office.”¹² A broad interpretation of the Hiring Exception could encompass general discussions such as the filling of staff vacancies or the sufficiency of funds for staffing issues. However, consistent with the general premise that the OMA should be interpreted narrowly and in favor of openness, as discussed above, the OMA’s Hiring Exception should likewise be given a much more narrow interpretation.

The language of the Hiring Exception is consistent with a narrow interpretation of the provision, in that the Exception applies only to the consideration of the hiring of “a public officer, employee, staff member or indi-

vidual agent.”¹³ Notably, the language refers to the hiring of a single individual, not the general filling of multiple staff vacancies or a general hiring need. Applying the principle that the OMA should be interpreted in favor of openness, the Exception should be interpreted to apply only to discussions of specific personnel issues regarding a specific person or position. Tangentially related considerations, such as funding issues related to hiring, have not been included in the language of the Hiring Exception and are topics more appropriately discussed in open sessions.¹⁴

Although Idaho case law is thus far silent on the issue of the proper interpretation of the Hiring Exception, other jurisdictions have interpreted executive session exceptions under their open meeting statutes in a narrow manner.¹⁵ As a Florida court has articulated:

The [open meeting] statute should be construed so as to frustrate all evasive devices. . . . The principle to be followed is very simple: When in doubt, the members of any board, agency, authority or commission should follow the open-meeting policy of the State.¹⁶

Idaho’s Hiring Exception should be construed in a similar manner, in conformance with the OMA’s general purpose of open government.

It is also helpful to analyze the specific purposes underlying various jurisdictions’ personnel and hiring exceptions to their open meetings statutes. The primary stated purpose of such an exception is “to avoid undue publicity and embarrassment to the affected employee,” or, in this case, to the job applicant whose credentials are being discussed.¹⁷ A Pennsylvania court examining the purpose of this type of exception noted:

Recognizing that certain areas such as discussions of personnel were against the public interest and/or personal privacy concerns outweighed those discussions being held in public, the General Assembly allowed those discussions to be held in private, but with the final decision being made in open session. In the case of hiring public officials, public policy allows that the selection process for public officials be conducted at executive session in order to attract the largest number of qualified candidates without compromising their

professional reputations or standing at their current positions. As the Board points out, personnel matters are intended to be discussed and voted on in executive session so that it may openly and candidly discuss the strengths and weaknesses of candidates. To engage in the screening of applicants at a public meeting would undoubtedly interfere with that process because qualified applicants would be discouraged from applying and the pool of candidates would not necessarily be comprised of those best qualified for the position.¹⁸

The above-stated purposes are completely inapplicable to general discussions regarding multiple staff vacancies or funding issues that do not relate to a specific job applicant. Accordingly, such broad discussions were not intended to be encompassed by the Hiring Exception.

In sum, Idaho's Hiring Exception should be construed to apply only to the narrow situation in which a specific candidate is being considered for a specific position.

C. Corrective Action Should be Taken Immediately

During an executive session in which a governmental body is discussing matters falling under the Hiring Exception, the discussion may drift to inappropriate tangential matters, such as the overall number of vacancies or revenue projections necessary to sustain positions. As outlined above, it is clear that these discussions were not intended to fall within this exception. A governmental body must be able to both recognize that these discussions are not appropriate within the executive session and to recognize that it must take immediate action to either return to the appropriate topic of discussion or to open the executive session to discuss in a public session those matters which are not the appropriate subject of the executive session.

Consistent with the broad public purpose of the OMA, it is apparent that corrective action should be encouraged by allowing governmental entities to recognize, learn from, and correct their mistakes. In fact, a governmental entity that is made aware of a violation which it refuses to address may be setting itself up to have a knowing violation proven against it. Analysis

and enforcement of the OMA should be undertaken in a manner that will encourage compliance, by permitting corrective action.

The Idaho Supreme Court has tacitly endorsed this premise through its holdings with regard to executive sessions held in violation of the OMA. Where deliberations are conducted at a meeting that violates the Open Meetings Act, but no firm and final decision is rendered upon the questions discussed, the impropriety of that meeting will not taint final actions subsequently taken upon questions conscientiously considered at later meetings, which do comply with the provisions of the Act.¹⁹ Many other jurisdictions have reached a similar conclusion, holding that a later meeting held in compliance with the applicable open meetings statute, and entailing a deliberation of the facts, will generally cure an earlier violation.²⁰

Governmental entities should establish a procedure whereby they can both recognize and address open meeting violations. Using the executive session example discussed within this letter, an entity can take several steps to facilitate compliance by consulting the entity's attorney in the executive session. During the executive session, the entity's attorney can:

1. Monitor the discussion;
2. Identify inappropriate departures from the exception under which the entity went into executive session;
3. Advise the entity to keep the discussion within the parameters of the exception under a narrow interpretation of its scope; and
4. Advise and assist the entity in the proper procedure to employ corrective action immediately.

Using the entity's attorney preserves the confidence of the executive session, because the discussions therein are protected by the attorney/client privilege, but it also allows the entity an impartial observer to "referee" the discussion and to prevent "drift" from occurring within the session. Taking immediate action ensures that no more than a sentence or two of "drift" occurs, and thereby preserves the spirit of the exception for the executive session.

It is worth noting that even if corrective action is taken, an open meeting violation has still occurred. But in the example above, since the entity has the violation brought to its attention and moves immediately to correct the violation, it will be difficult to prove a “knowing” violation of the OMA.

This scenario raises certain concerns with regard to the “degree” of the open meeting violation at issue. It seems reasonable that the above example could be considered a “mild” violation of the OMA. But what if the violation were more egregious, such as scripted outcome on a zoning decision or an executive session that did not fall under any of the exceptions set forth in Idaho Code § 67-2345(a)? Under such circumstances, an entity will likely not be able to immediately cure the violation, but may need to address the OMA violation directly²¹ and then take action, if possible, to cure the decision²² that violated the OMA.

Violations of the OMA should be avoided whenever possible. If an entity is in doubt as to the propriety of an executive session, the doubt should be resolved in favor of openness. If a violation occurs, the entity should acknowledge the violation as soon as possible and take the appropriate steps to correct the violation, even if that means holding the entire meeting *de novo* and as if the prior improper meeting never occurred.

I hope that you find this letter helpful.

AUTHORITIES CONSIDERED

1. Idaho Code:

§§ 9-337 to 9-350.
§ 67-2340.
§ 67-2345.
§ 67-2347.

2. Idaho Cases:

Baker v. Indep. Sch. Dist. of Emmett, No. 221, 107 Idaho 608, 691 P.2d 1223 (1984).

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

Magic Valley Newspapers Inc. v. Magic Valley Reg'l Med. Ctr., 138 Idaho 143, 59 P.3d 314 (2002).

State v. City of Hailey, 102 Idaho 511, 633 P.2d 576 (1981).

3. Other Cases:

Acker v. Texas Water Comm'n, 790 S.W.2d 299 (Tex. 1990).

Alaska Comty. Colleges' Federation of Teachers, Local No. 2404 v. Univ. of Alaska, 677 P.2d 886 (Alaska 1984).

Baker v. Town of Middlebury, 753 N.E.2d 67 (Ind. Ct. App. 2001).

Bd. of County Comm'rs of St. Joseph County v. Tinkham, 491 N.E.2d 578 (Ind. Ct. App. 1986).

Bd. of Educ. Sch. Dist. No. 67 v. Sikorski, 574 N.E.2d 736 (Ill. App. Ct. 1991).

Bd. of Public Instruction of Broward County v. Doran, 224 So. 2d 693 (Fla. 1969).

Bus. License Opposition Comm. v. Sumter County, 403 S.E.2d 638 (S.C. 1991).

City of Kenai v. Kenai Peninsula Newspapers, Inc., 642 P.2d 1316 (Alaska 1982).

City of Prescott v. Town of Chino Valley, 803 P.2d 891 (Ariz. 1990).

Common Council of City of Peru v. Peru Daily Tribune Inc., 440 N.E.2d 726 (Ind. Ct. App. 1982).

Cortese v. Sch. Bd. of Palm Beach County, 425 So. 2d 554 (Fla. Dist. Ct. App. 1982).

Delta Dev. Co., Inc. v. Plaquemines Parish Comm'n Council, 451 So. 2d 134 (La. Ct. App. 1984).

Floyd County Bd. of Educ. v. Ratliff, 955 S.W.2d 921 (Ky. 1997).

Fox v. City of Lakewood, 528 N.E.2d 1254 (Ohio 1988).

Gillespie v. San Francisco Public Library Comm'n, 79 Cal. Rptr. 2d 649 (Cal. Ct. App. 1998).

Hawkins v. City of Fayette, 604 S.W.2d 716 (Mo. Ct. App. 1980).

Illinois News Broadcasters Ass'n v. City of Springfield, 317 N.E.2d 288 (Ill. App. Ct. 1974).

Johnson v. Killion, 283 P.2d 433 (Kan. 1955).

Laman v. McCord, 432 S.W.2d 753 (Ark. 1968).

Miller v. City of Tacoma, 979 P.2d 429 (Wash. 1999).

Morning Call, Inc. v. Bd. of Sch. Dirs. of S. Lehigh, 642 A.2d 619 (Pa. 1994).

News & Observer Publishing Co. v. Interim Bd. of Educ. for Wake County, 223 S.E.2d 580 (N.C. Ct. App. 1976).

Olson v. Cass, 349 N.W.2d 435 (S.D. 1984).

Petition of Housing Auth. of City of Seattle, 383 P.2d 295 (Wash. 1963).

San Diego Union v. City Council, 196 Cal. Rptr. 45 (Cal. Ct. App. 1983).

Smith v. Marshall, 587 P.2d 320 (Kan. 1978).

Solas v. Emergency Hiring Council of the State, 774 A.2d 820 (R.I. 2001).

Szilagyi v. State ex rel. LaPorte Cmty. Sch. Corp., LaPorte County, 231 N.E.2d 221 (Ind. 1967).

Tanner v. Town Council of Town of East Greenwich, 880 A.2d 784 (R.I. 2005).

Town of Palm Beach v. Gradison, 296 So. 2d 473 (Fla. 1974).

Wolfson v. State, 344 So. 2d 611 (Fla. Dist. Ct. App. 1977).

Dated this 8th day of September, 2008.

LAWRENCE G. WASDEN
Attorney General

Analysis by:

BRIAN KANE
KARIN JONES
Deputy Attorneys General

¹ Idaho Code § 67-2340.

² See 2007 Idaho Open Meeting Law Manual 14. The Idaho Attorney General publishes the Idaho Open Meeting Law Manual annually; the advice in the manual for both government and its attorneys is: "If in doubt, open the meeting."

³ Johnson v. Killion, 283 P.2d 433 (Kan. 1955); see also Smith v. Marshall, 587 P.2d 320 (Kan. 1978).

⁴ Bd. of Public Instruction of Broward County v. Doran, 224 So. 2d 693, 699 (Fla. 1969); See also Wolfson v. State, 344 So. 2d 611, 613 (Fla. Dist. Ct. App. 1977); Laman v. McCord, 432 S.W.2d 753 (Ark. 1968).

⁵ Solas v. Emergency Hiring Council of the State, 774 A.2d 820, 824 (R.I. 2001).

⁶ Idaho Code §§ 9-337 to 9-350.

⁷ Cowles Pub. Co. v. Kootenai County Bd. of County Comm'rs, 144 Idaho 259, 264, 159 P.3d 896, 901 (2007), citing Federated Publ'ns, Inc. v. Boise City, 128 Idaho 459, 463, 915 P.2d 21, 25 (1996); see also Magic Valley Newspapers Inc. v. Magic Valley Reg'l Med. Ctr., 138 Idaho 143, 144, 59 P.3d 314, 315 (2002).

⁸ *Id.*

⁹ Acker v. Texas Water Comm'n, 790 S.W.2d 299, 300 (Tex. 1990), citing Cox Enters., Inc. v. Bd. of Trustees, 706 S.W.2d 956, 958 (Tex. 1986).

¹⁰ Compare Idaho Code § 9-338(1) and Idaho Code § 67-2340.

¹¹ Tanner v. Town Council of Town of East Greenwich, 880 A.2d 784, 797 (R.I. 2005).

¹² Idaho Code § 67-2345(1)(a).

¹³ *Id.*

¹⁴ See Common Council of City of Peru v. Peru Daily Tribune Inc., 440 N.E.2d 726, 729 (Ind. Ct. App. 1982) (noting, with respect to Indiana's open meetings statute: "[I]t is important to recognize what the statute does not say as well as what it does say. When certain items or words are specified or enumerated in the statute, then, by implication, other items or words not so specified are excluded.")

¹⁵ See, e.g., Miller v. City of Tacoma, 979 P.2d 429, 434 (Wash. 1999) (holding that Washington's executive session exception for the evaluation of applicants for public employment should be construed narrowly); Floyd County Bd. of Educ. v. Ratliff, 955 S.W.2d 921, 924 (Ky. 1997) (holding that "[t]he personnel exemption to the Open Meetings Act does not allow a general discussion concerning a school reorganization plan when it involves multiple employees"); San Diego Union v. City Council, 196 Cal. Rptr. 45, 49 (Cal. Ct. App. 1983) (refusing to interpret a personnel exception to an open meetings statute broadly, commenting: "[W]e must construe the 'personnel exception' narrowly and the 'sunshine law' liberally in favor of openness"); City of Prescott v. Town of Chino Valley, 803 P.2d 891, 893 (Ariz. 1990) (holding that the executive session exception for legal discussions should be interpreted narrowly, as "[g]enerally, executive sessions are permitted only when public discussion could harm the public's interest"); Illinois News Broadcasters Ass'n v. City of Springfield, 317 N.E.2d 288, 290 (Ill. App. Ct. 1974) ("[T]he exceptions allowing closed meetings are few and must be narrowly construed because they derogate the general policy of open meetings"); News & Observer Publishing Co. v. Interim Bd. of Educ. for Wake County, 223 S.E.2d 580 (N.C. Ct. App. 1976) (holding that "exceptions to our open meetings law should be strictly construed and [] those seeking to come within the exceptions should have the burden of justifying their actions").

¹⁶ Town of Palm Beach v. Gradison, 296 So. 2d 473, 477 (Fla. 1974).

¹⁷ Gillespie v. San Francisco Public Library Comm'n, 79 Cal. Rptr. 2d 649, 656 (Cal. Ct. App. 1998); see also Baker v. Town of Middlebury, 753 N.E.2d 67, 72-73 (Ind. Ct. App. 2001) (noting that discussions involving candidates for re-hire were appropriate in executive sessions in order to protect the privacy of the employees); City of Kenai v. Kenai Peninsula Newspapers, Inc., 642 P.2d 1316, 1326 (Alaska 1982) (noting that public discussion of job applicants' personal characteristics could damage the applicants' reputations).

¹⁸ Morning Call, Inc. v. Bd. of Sch. Dirs. of S. Lehigh, 642 A.2d 619, 624, n.9 (Pa. 1994).

¹⁹ See State v. City of Hailey, 102 Idaho 511, 514, 633 P.2d 576, 579 (1981); see also Baker v. Indep. Sch. Dist. of Emmett, No. 221, 107 Idaho 608, 611, 691 P.2d 1223, 1226 (1984).

²⁰ Alaska Comty. Colleges' Federation of Teachers, Local No. 2404 v. Univ. of Alaska, 677 P.2d 886 (Alaska 1984) (holding that the appropriate remedy is a *de novo* meeting; where subsequent validating meeting took place, court must inquire whether substantial reconsideration occurred—if not, ques-

tion is whether public injury from invalidation outweighs benefits derived from voiding decision); Cortese v. Sch. Bd. of Palm Beach County, 425 So. 2d 554 (Fla. Dist. Ct. App. 1982) (holding that failure to provide notice for workshop was cured by subsequent meetings where record indicated that ultimate decision was “bona fide”); Bd. of Educ. Sch. Dist. No. 67 v. Sikorski, 574 N.E.2d 736 (Ill. App. Ct. 1991) (holding that ratification at subsequent public meeting cured earlier violation and that the board was estopped from asserting its own violation of open meeting law to void a contract.); Szilagyi v. State ex rel. LaPorte Cmty. Sch. Corp., LaPorte County, 231 N.E.2d 221 (Ind. 1967); *contra* Bd. of County Comm’rs of St. Joseph County v. Tinkham, 491 N.E.2d 578 (Ind. Ct. App. 1986) (holding that award of bid at unlawful meeting was invalid); Delta Dev. Co., Inc. v. Plaquemines Parish Comm’n Council, 451 So. 2d 134 (La. Ct. App. 1984), *writ denied*, 456 So. 2d 172 (La. 1984) (holding that voidable action may be ratified in lawful session); Hawkins v. City of Fayette, 604 S.W.2d 716 (Mo. Ct. App. 1980); Fox v. City of Lakewood, 528 N.E.2d 1254 (Ohio 1988) (holding that adoption of a charter amendment concerning a matter discussed at an improper meeting cures the defect because of the public consideration attendant to its adoption); Bus. License Opposition Comm. v. Sumter County, 403 S.E.2d 638 (S.C. 1991); Olson v. Cass, 349 N.W.2d 435 (S.D. 1984) (holding that injunction against effectuating decision made at noncomplying meeting was unwarranted in light of previous opportunities for public discussion afforded at previous public meetings); Petition of Housing Auth. of City of Seattle, 383 P.2d 295 (Wash. 1963).

²¹ Likely a complaint will have been filed, which should be resolved prior to corrective action taking place.

²² One of the remedies under the Open Meetings Act is to void any decision that was reached through a violation. Idaho Code § 67-2347(1) and (4). It is not clear, however, how long an entity would be precluded from re-visiting a topic or decision point, the consideration of which was in violation of the Act. Presumably, the court order setting aside the decision would address this matter. For practicality purposes, when working on these issues, attorneys should consider this aspect within their proposed remedies to the reviewing entity.

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**ATTORNEY GENERAL'S
SELECTED
INFORMAL GUIDELINES
FOR THE YEAR 2008**

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

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

January 7, 2008

Office of the County Commissioners
County of Cassia
1458 Overland Avenue
Burley, ID 83318

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

Re: Creation of Herd Districts in the State of Idaho

Dear Board of Commissioners:

QUESTIONS PRESENTED

Your letter dated September 10, 2007, asked for legal guidance from the Attorney General's Office regarding certain issues related to herd districts. In your letter, you indicated that Cassia County (the "County") has already created the five-person panel contemplated in Idaho Code § 25-2401(2). You then asked the following three questions:

1. If a panel is established and the panel determines that a herd district is the correct method to control the movement of animals within an area, can the Commissioners then establish such a herd district without awaiting the receipt of a petition from the majority of the owners of taxable real property or do the requirements of Idaho Code § 25-2402 still have to be met?
2. If a herd district is created in an area where animals are currently fenced in, must the district place additional fences around the perimeter of the herd district?
3. If the panel determines that a herd district is not the correct method to control the movement of animals within an area, can the Commissioners then pass an ordinance that assigns

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liability to the owners of animals if the animals leave the area designated for control?

CONCLUSIONS

My conclusions, discussed in more detail below, are:

1. The Commissioners may not establish a herd district absent receipt of a petition from the majority of owners of taxable real property within the boundaries of the proposed district. The County may, however, regulate the movement of livestock via ordinance, as set forth in Idaho Code § 25-2401(2).
2. If the outer boundary of the herd district is already fenced, the district need not place additional fences in those already-fenced areas.
3. The County probably cannot “assign liability” via passage of an ordinance. However, the County may enact an ordinance regulating the movement of livestock within the county, and that ordinance’s existence may lead to application of the *negligence per se* doctrine in a negligence action.

ANALYSIS

At the outset, I will discuss general legal principles regarding livestock movement. The Idaho Supreme Court has provided a good background discussion of laws related to livestock and fencing:

At common law it was the duty of an owner of livestock to fence his animals in, and an adjoining landowner had no duty to fence his property so as to prevent others’ animals from entering it. However, that English common law rule does not prevail in Idaho and the “fence out” rule prevails in this state where if a landowner’s property is not within a herd district, and is outside a city or village, the landowner desiring to prevent animals of others from straying onto his property must fence them out.

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Herd districts are a legislative exception to the “fence out” rule. A majority of the landowners of more than 50% of the land within a proposed district may petition county commissioners for the creation of a herd district. I.C. § 25-2403. It is held that a herd district provides an alternative to landowners who wish to protect their land from damage caused by roaming stock but do not wish, or cannot afford, to fence their land. Once a herd district is created, the rule of fencing out, which requires landowners to keep out another’s livestock by construction of a fence, no longer applies. Rather, an owner of stock who allows animals to run at large in a herd district is guilty of a misdemeanor. I.C. § 25-2407. Additional civil liability is imposed for damage caused by trespasses of such animals without regard to the condition of the landowner’s fence. I.C. § 25-2408.

Easley v. Lee, 111 Idaho 115, 117, 721 P.2d 215, 217 (1986) (citations omitted).

A. If a Panel Is Established and Subsequently Determines That a Herd District Is the Correct Method to Control the Movement of Animals Within an Area, the Petition Procedure set Forth in Idaho Code § 25-2402 Must Nevertheless Be Followed. However, the Commissioners May Regulate via Ordinance

Idaho Code § 25-2401 is captioned “Commissioners may create herd districts.” However, a careful reading of that section leads to the conclusion that Commissioners may not unilaterally create a herd district, although Commissioners may regulate livestock via ordinance.

Prior to 1990, Section 25-2401 provided in its entirety as follows:

The board of county commissioners of each county in the state shall have power to create herd districts within such county as hereinafter provided; and when such district is so created, the provisions of this chapter shall apply and be enforceable therein.

See, e.g., 1990 Idaho Sess. Laws, ch. 222. In 1983, the Idaho Supreme Court held that “herd districts may not be created *sua sponte* by a county but only

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in response to a petition of a majority of the landowners within a certain area.” Benewah County Cattlemen’s Ass’n, Inc. v. Board of County Comm’rs, 105 Idaho 209, 213, 668 P.2d 85, 89 (1983).

Section 25-2401 was amended in 1990, in what may have been legislative adoption or clarification of the holding in *Benewah County*. That section now provides, in pertinent part:

(1) The board of county commissioners of each county in the state shall have power to create, modify or eliminate herd districts within such county as hereinafter provided; and when such district is so created, modified, or eliminated, the provisions of this chapter shall apply and be enforceable therein. On and after January 1, 1990, no county shall regulate or otherwise control the running at large of [livestock] within the unincorporated areas of the county unless such regulation or control is provided by the creation of a herd district pursuant to the provision of this chapter, except as provided by subsection (2) of this section. . . .

(2) A panel of five (5) members may be created in a county Only if a majority of said panel, after a public hearing held with notice as prescribed by law, concludes that the creation, modification or elimination of a herd district is insufficient to control or otherwise regulate the movement of livestock in an area, the board of county commissioners shall have the power to establish such control by ordinance

Idaho Code § 25-2401 (emphasis added). While the Idaho Supreme Court has yet to address the question you specifically posed, I conclude that, pursuant to Idaho Code § 25-2401, a county may not create a herd district, unless a petition is first presented to the Commissioners. Section 25-2401 provides that while commissioners “shall have the power to create, modify or eliminate herd districts,” that power may be exercised only “as hereinafter provided.” Idaho Code § 25-2401(1). The language set forth underlined above further clarifies that a county can control livestock running at large only in one of two ways: (1) by creation of a herd district “pursuant to this chapter,” or (2) in

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accordance with Section 25-2401(2). Thus, counties may create a herd district by following the procedures set forth in Section 25-2402, or may regulate animals running at large via ordinance as set forth in Section 25-2401(2).

That conclusion is supported by the Statement of Purpose for the legislation passed in 1990. The Statement provides:

This proposed legislation makes substantive changes to the current herd district law. It would allow a county, through an appointed panel, to control the movement of livestock by ordinance if it is deemed that the creation or modification of a herd district is insufficient to control or regulate the movement of livestock in an area. This proposed legislation sets forth requirements on the establishment of the panel and provides taxing authority.

Statement of Purpose, RS 23902C1 (1990 House Bill No. 713, as amended).

Thus, while Commissioners may not unilaterally create a herd district, they may, after a finding that the creation of a herd district is insufficient to control or regulate livestock movement, establish control via ordinance.

B. If a Herd District Is Created in an Area Where Animals are Already Fenced in, the District Need not Place Additional Fencing, so Long as the Existing Fences Will Prevent Livestock From Roaming, Drifting or Straying From Open Range into the District

Idaho Code § 25-2402 governs the installation of fencing following the creation of a herd district. Subsection (4) provides that:

The owners of taxable real property within the herd district shall: (a) Pay the costs, including on private land, of constructing and maintaining legal fences as required on the district's border with open range so as to prevent livestock, excepting swine, from roaming, drifting or straying from open range into the district.

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(Emphasis added.) The Idaho Supreme Court has held that “[t]he purpose of the herd district statutes was to provide an alternative to landowners who wished to protect their land from damage caused by roaming stock but did not desire, or were unable, to afford fence out stray cattle. A herd district ordinance requires fencing in.” Etcheverry Sheep Co. v. J.R. Simplot Co., 113 Idaho 15, 17, 740 P.2d 57, 59 (1987).

If there are existing fences around the perimeter of the herd district, separating open range from the district, the district need not build additional fences. However, if there are unfenced areas, fences will need to be built pursuant to Idaho Code § 25-2402(4)(a).

C. If the Panel Determines That a Herd District is NOT the Correct Method to Control the Movement of Animals Within an Area, the Commissioners may Enact an Ordinance Regulating the Movement of Animals

In your correspondence, the specific question you have asked is whether the Commissioners can “pass an ordinance that assigns liability to the owners of animals if the animals leave the area designated for control?” Before responding to that question, it is important to clarify the relative rights and liabilities under Idaho’s open range and herd district laws.

In 1999, the United States District Court for the District of Idaho certified the following question to the Idaho Supreme Court for decision:

Does § 25-2119 of the Idaho Code grant absolute immunity from liability for negligence to an owner of domestic animals involved in an accident on a public highway, where the owner of those animals has established that they were “lawfully” on the highway at the time of the accident?

Adamson v. Blanchard, 133 Idaho 602, 604, 990 P.2d 1213, 1215 (1999). In response to the question, the Idaho Supreme Court analyzed Idaho Code §§ 25-2118 and 25-2119.¹ The court held that Section 25-2118 was a grant of absolute immunity from damages for owners of livestock in open range areas, while Section 25-2119 was a grant of absolute immunity from damages from owners of livestock in herd districts, but only when the livestock are lawfully

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on the highway (*i.e.*, they are being driven on the highway). Specifically, the court held:

Idaho Code § 25-2118 relates to owner liability in open range and grants total immunity from liability for any damages. By contrast, I.C. § 25-2119 addresses only an owner's right to drive animals on public roads, or otherwise lawfully position animals upon the highway, and grants immunity only from liability for negligence associated with this activity. The legislature therefore used absolute language in I.C. § 25-2118 because it intended to completely immunize owners in open range areas from liability under any cause of action. The legislature then used more limited language in I.C. § 25-2119 because it intended to immunize owners from a negligence cause of action only in the limited situation where animals are lawfully present on the highway.

. . . the legislature intended to grant owners absolute immunity from any liability for damages in the open range, I.C. § 25-2118, and to grant absolute immunity from liability for negligence in order to preserve an owner's right to drive animals on the highway in a herd district.

133 Idaho at 607, 990 P.2d at 1218 (footnote omitted).

I have included that discussion because your correspondence sets forth your understanding that “if a vehicle strikes an animal while in a herd district or within the city limits of an incorporated city or village that the owner of the animal is strictly liable for any damages that result. . . .” September 10, 2007, correspondence. That statement is not entirely accurate, as the owner of the animal has been granted absolute immunity for negligence if the animal was lawfully on the highway. Moreover, rather than stating that “if a vehicle strikes an animal outside the limits of a herd district or a village or city, the owner of the vehicle is strictly liable,” it is more accurate to say that the owner of the animal enjoys absolute immunity from an action for damages, whether that action be under a negligence or a strict liability theory.

Your third question specifically asks whether the Commissioners may pass an ordinance assigning liability to animal owners if the animals

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leave the area designated for control. The law is not clear whether a county may “assign liability.” What is clear is that a county may enact an ordinance, which establishes control over livestock movement within the county. *See* Idaho Code § 25-2401(2). As held by the Idaho Supreme Court in an earlier case, “in the absence of a state legislative enactment clearly indicating that livestock must be free to roam the lands of Idaho uninhibited by the ownership or character of the lands, counties and municipalities may validly exercise their police power to prohibit such free roaming livestock.” Benewah County Cattlemen’s Ass’n, Inc. v. Board of County Comm’rs, 105 Idaho 209, 214, 668 P.2d 85, 90 (1983).

If Cassia County enacts an ordinance restricting the movement of livestock within county boundaries, that ordinance may form the basis for the application of the *negligence per se* doctrine in a tort action. In a standard negligence action, a plaintiff must prove “(1) a duty, recognized by law, requiring the defendant to conform to a certain standard of conduct; (2) a breach of that duty; (3) a causal connection between the defendant’s conduct and the resulting injury; and (4) actual loss or damage.” O’Guin v. Bingham County, 142 Idaho 49, 122 P.3d 308 (2005) (additional citations omitted). If a plaintiff is successful in establishing *negligence per se*, he or she has (by application of law) proven the first two elements of negligence, and need only prove a causation and damages.

In order for *negligence per se* to apply,

(1) the statute or regulation must clearly define the required standard of conduct; (2) the statute or regulation must have been intended to prevent the type of harm the defendant’s act or omission caused; (3) the plaintiff must be a member of the class of persons the statute or regulation was designed to protect; and (4) the violation must have been the proximate cause of the injury.

O’Guin, 142 Idaho at 52, 122 P.3d at 311.

In short, while the county may not be able to “assign liability,” passage of an appropriate ordinance regulating the movement of animals within

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the county may have the effect, in a negligence action, of satisfying the elements necessary for the doctrine of *negligence per se* to apply.

Sincerely,

ANGELA SCHAER KAUFMANN
Deputy Attorney General

¹ Idaho Code § 25-2118 provides that:

No person owning, or controlling the possession of, any domestic animal running on open range, shall have the duty to keep such animal off any highway on such range, and shall not be liable for damage to any vehicle or for injury to any person riding therein, caused by a collision between the vehicle and the animal. "Open range" means all unenclosed lands outside of cities, villages and herd districts, upon which cattle by custom, license, lease or permit, are grazed or permitted to roam.

Section 25-2119 provides that:

No person owning, or controlling the possession of, any domestic animal lawfully on any highway, shall be deemed guilty of negligence by reason thereof.

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July 2, 2008

Colonel G. Jerry Russell
Director, Idaho State Police
P.O. Box 700
Meridian, ID 83680-0700

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

Re: Law Enforcement Status of the Peace Officer Standards and
Training (POST) Academy Leadership

Dear Col. Russell:

This legal guideline letter is provided to assist you in determining the law enforcement status of the positions of POST Academy Training Coordinator II and III and Executive Director. This letter is the unofficial expression of the views of this office based upon the research of Deputy Attorney General Ralph Blount under the supervision of the author.

QUESTION PRESENTED

Do the positions of POST Academy Training Coordinator II and III and Executive Director meet Idaho's statutory definitions of "peace officer" and "law enforcement" such that they should be considered equivalent to ISP Sergeant, Lieutenant and Major positions? Because this issue is raised in the context of whether the positions of POST Academy Training Coordinator II and III and Executive Director should be non-commissioned employees of the Idaho State Police, issues regarding the Director's personnel power and authority and the effect of decommissioning these positions are also addressed.

CONCLUSION

No. The positions of POST Academy Training Coordinator II and III and Executive Director are not the equivalent of the respective positions of

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Idaho State Police Sergeant, Lieutenant and Major. Unlike the commissioned “peace officer” positions of Idaho State Police Sergeant, Lieutenant and Major, the Academy Training Coordinator II and III and Executive Director are not required to be commissioned and, therefore, incumbents may, but are not required to, maintain current POST certification as a condition of employment. The decision to commission or decommission, as officers of the Idaho State Police, the positions of POST Academy Training Coordinators II and III and Executive Director is within the discretion of the Director of Idaho State Police.

Your question did not specifically mention retirement issues. A more complete analysis would require additional facts not currently in our possession, but we do note that existing statutes (in title 59, chapter 13, Idaho Code) governing the Public Employee Retirement System (PERSI) provide for police officer member status for retirement purposes for certain positions or offices at specific state agencies, including ISP. If the decision were made to reclassify the positions of Academy Training Coordinators II and III and Executive Director as regular employees, we believe that such change would be relevant to PERSI and could be considered by PERSI in terms of its potential affect on the eligibility of those positions for police officer membership status. On that, our recommendation is that ISP contact PERSI to discuss this matter as needed and appropriate.

ANALYSIS

THE POST ACADEMY TRAINING COORDINATOR II AND III AND EXECUTIVE DIRECTOR ARE NOT “PEACE OFFICERS” WITHIN THE MEANING OF THE POST COUNCIL STATUTE

A. The POST Academy Training Coordinator II and III and Executive Director Are Employees of the Idaho State Police, a Law Enforcement Agency

“‘Law enforcement’ means any and all activities pertaining to crime prevention or reduction and law enforcement, including police, courts, prosecution, corrections, rehabilitation, and juvenile delinquency.” I.C. § 19-5101(c). Based upon the listing of terms, correct interpretation of the statute

requires that “where general words of a statute follow an enumeration of persons or things, such general words will be construed as meaning persons or things of like or similar class or character to those specifically enumerated.” State v. Kavajecz, 139 Idaho 482, 486, 80 P.3d 1083, 1087 (2003) (quoting State v. Hart, 135 Idaho 827, 831, 25 P.3d 850, 854 (2001)). In I.C. § 19-5101(c), the Legislature specifically listed several terms that pertain to crime prevention or reduction and law enforcement. The general words “any and all activities pertaining to crime prevention or reduction and law enforcement including” is found just prior to a list of broad categories of such activities: “police, courts, prosecution, corrections, rehabilitation, and juvenile delinquency.” Training of peace officers is a sub-category of police and is therefore “of like or similar class or character to” police. Kavajecz, 139 Idaho at 486, 80 P.3d at 1087. In our opinion, police training falls within the broad category of “law enforcement” as defined in I.C. § 19-5101(c).

More clearly, the Idaho Legislature has placed the POST Council and POST Academy within the Idaho State Police. I.C. § 19-5102 (“There is hereby established in the Idaho state police the Idaho peace officer standards and training council”); I.C. § 19-5116(a)(1), (2) (authorizing the POST Council to expend funds from the Peace Officer Standards and Training fund for “training peace officers . . . [and] [s]alaries, costs and expenses relating to such training”)

Furthermore, an analysis and comparison of the legislation creating the Idaho State Police, I.C. §§ 67-2901, *et seq.*, and the 1981 legislation creating the POST Council, I.C. §§ 19-5102, *et seq.*, reveals that the POST Council does not have personnel powers. The POST Council’s powers are limited to: (1) establishing minimum requirements for employment, retention and promotion of peace officers, including eligibility standards, physical, mental and moral fitness standards, education and training requirements; (2) certifying those peace officers as having completed all established requirements as eligible for permanent employment as peace officers in Idaho; (3) receiving and maintaining copies of current local laws; (4) maintaining files on the accreditation and continuing education status of peace officers in Idaho; and (5) approving or rejecting applications for POST certification. I.C. §§ 19-5109(1)(a) through (i), (8), (9). The POST Council is also authorized to expend funds from the Peace Officer Standards and Training fund for “training peace officers . . . [and] [s]alaries, costs and expenses relating to

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such training” I.C. § 19-5119(1), (2). However, while having the power and duty to set applicant and training standards, award certification, and exercise the powers of the purse, the POST Council does not have supervisory authority over POST Academy personnel. Instead, the Director of the Idaho State Police has the power to “appoint, subject to the approval of the governor, an administrator for each division within the state police” and all of the “powers and duties necessary to carry out the proper administration of the state police, and [the Director] may delegate duties to employees and officers of the state police.” I.C. § 67-2901(3)-(4). Therefore, the POST Academy Executive Director is an employee of the Idaho State Police, supervised by the Director of the Idaho State Police; although the Executive Director also receives guidance and direction from the POST Council.

This analysis is consistent with the administrative rules promulgated by the Idaho State Police for the POST Council, under which the “Executive Director shall be selected by the POST Council subject to approval of the Director of the Idaho State Police from the approved register established by the Idaho Division of Human Resources after competitive testing.” IDAPA 11.11.01.031.01.b (4-2-08). Pursuant to the Idaho State Police administrative rules, the “Executive Director will be employed by the Idaho State Police to serve under the direction of the POST Council in carrying out the duties and responsibilities of the Council.” IDAPA 11.11.01.031.02 (4-2-08). In turn, the “Executive Director shall have supervision over the employees and other persons necessary in carrying out the functions of POST.” IDAPA 11.11.01.031.03 (4-2-08). Furthermore, the administrative rules provide that the “Executive Director and his staff will be governed by the Policies and Rules of the state of Idaho and the Idaho State Police, concerning but not limited to fiscal, purchasing, and personnel matters.” IDAPA 11.11.01.031.04 (4-2-08).

Under the umbrella of the Idaho State Police, the POST Academy Training Coordinator II and III and Executive Director are employees of “law enforcement” as broadly defined in I.C. § 19-5101(c). Acknowledging their status as “law enforcement,” it must be determined whether the positions of POST Academy Training Coordinator II and III and Executive Director are “peace officers” under I.C. § 19-5101(d).

B. The Positions of POST Academy Training Coordinator II and III and Executive Director are not Peace Officers Under the POST

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Council Statute Because Their Duties do not Consist Primarily of the Prevention and Detection of Crime and the Enforcement of Penal, Traffic or Highway Laws of this State or any Political Subdivision

The definition of “Peace Officer” is set forth in I.C. § 19-5101(d). A “Peace Officer” is:

any employee of a police or law enforcement agency which is a part of or administered by the state or any political subdivision thereof and whose duties include and primarily consist of the prevention and detection of crime and the enforcement of penal, traffic or highway laws of this state or any political subdivision.

I.C. § 19-5101(d) (emphasis added). The Idaho Administrative Code for the Idaho State Police governing the POST Council mirrors the definition of peace officer in I.C. § 19-5101(d). IDAPA 11.11.01.010.30.

1. The POST Academy Training Coordinator II and III and the Executive Director Positions are not Equivalent to the Respective Idaho State Police Positions Sergeant, Lieutenant and Major

The job descriptions for the positions of Idaho State Police Sergeant, Lieutenant and Major indicate that applicants must possess a valid POST certification, although the position of Major may be filled by a non-commissioned manager with equivalent civilian certification to a POST Management certificate. The job descriptions for the positions of Idaho State Police Sergeant, Lieutenant and Major (available from the Idaho Department of Human Resources) establish that each is a supervisory position responsible for overseeing a special project, operation of patrol, traffic enforcement, investigations, crime prevention, public safety or related law enforcement work.

Idaho State Police Sergeants are “first line supervisors and/or shift commanders of a wide range of diverse law enforcement activities” whose work will “regularly involve oversight in planning and executing raids, and in

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conducting criminal pursuits, complex investigations, and sensitive surveillance.” Idaho State Police Lieutenants are distinguished from Sergeants by the added “responsibility to set policies and procedures to achieve defined goals; analyze and determine organizational effectiveness; delegate and coordinate work to achieve goals; and evaluate performance of subordinate supervisors.” Idaho State Police Majors are “headquarter-level staff positions responsible for planning, controlling, and directing statewide activities such as communications, patrol, traffic enforcement, investigations, crime prevention, public safety and support programs.” The duties of each of these positions include the conduct, supervision and management of the prevention and detection of crime and the enforcement of penal, traffic or highway laws of Idaho.

In contrast, the POST Academy Training Coordinator II and III and the Executive Director positions are training coordinators, supervisors and administrators. The POST Training Coordinator II coordinates, facilitates and supervises criminal justice training programs at the POST Academy or a POST region, serves as a criminal justice resource, and provides direction and informational services to agencies and personnel within a region. Because a POST Training Coordinator II must have a “strong criminal justice foundation in order to deal effectively with issues related to officer performance, equipment needs and application, patrol procedures, detention procedures, prison personnel issues, acceptable administrative practices, political impact and relationships,” an incumbent is likely to have background in law enforcement, but is not required to have a POST certification.

The POST Training Coordinator III is primarily a manager of “staff and program operations involving criminal justice training and development programs in the Basic Training Academy or over Regional Training Centers or the criminal justice support systems and services for officer and instructor standards and certifications.” Although a Training Coordinator III may be POST certified, there is no requirement that the incumbent be certified or even have any former law enforcement experience.

The POST Executive Director is the chief administrator of the Academy and an incumbent must have a Bachelor’s degree or higher, at least five years’ experience as a manager, and at least one year’s experience in the field of criminal justice as a Peace Officer, Detention Officer, Probation and

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Parole Officer, Corrections Officer or related field of law enforcement. There is no requirement that the POST Executive Director be POST certified.

The POST Academy Training Coordinator II and III and Executive Director are administrators, instructors and instructor supervisors responsible for peace officer training. The positions of Academy Training Coordinator II and III and Executive Director do not have “duties [that] include and primarily consist of the prevention and detection of crime and the enforcement of penal, traffic or highway laws of this state or any political subdivision.”

POST certification within one year of employment is required only of peace officers as defined in I.C. § 19-5101(d), with the exception of “any elected official or deputy serving civil process, the deputy director of the Idaho state police, [temporarily commissioned officers in times of emergency,] or those peace officers whose primary duties involve motor vehicle parking and animal control pursuant to city or county ordinance, or any peace officer acting under a special deputy commission from the Idaho state police.” I.C. § 19-5109(2). After January 1, 1974, all peace officers, as defined in I.C. § 19-5101(d), “shall be certified by the council within one (1) year of employment.” I.C. § 19-5109(2). “No peace officer shall have or exercise any power granted by any statute of this state to peace officers unless such person shall have been certified by the council within one (1) year of the date upon which such person commenced employment as a peace officer,” I.C. § 19-5109(3).

The Academy Training Coordinator II and III and Executive Director positions are not required to be POST certified. Nothing in the administrative rules of the Idaho Peace Officer Standards and Training Council requires certification of the Academy Training Coordinator II and III and Executive Director, although nothing in the rules or statutes would prohibit an incumbent in such a position from maintaining an existing Basic Certificate, IDAPA 11.11.01.071-076, 11.11.01.097.02-05, Intermediate Certificate, IDAPA 11.11.01.107, or Advanced Certificate, IDAPA 11.11.01.108. Additionally, under the applicable rules, several classes of law enforcement employees, such as a “full-time peace officer, county detention officer, or communications specialist appointed by a duly constituted Idaho law enforcement agency or a professional member of the POST Council staff” are “eligible for the award of a Supervisor, Master, or Management certificate” through comple-

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tion of appropriate continuing education. IDAPA 11.11.01.116.01.a. And, a “full-time peace officer appointed by a duly constituted Idaho law enforcement agency or a professional member of the POST Council staff” may be eligible to obtain an Executive certificate. IDAPA 11.11.01.116.01.a. This rule, however, serves to underscore the conclusion that Idaho State Police employees such as the Academy Training Coordinator II and III and Executive Director are not “peace officers” within the meaning of I.C. § 19-5101(d) and are not required to be POST certified pursuant to I.C. § 19-5109(2).

2. The Director of the Idaho State Police may Reclassify the Positions of POST Academy Training Coordinator II and III and Executive Director as Employees Rather Than Officers of the State Police

The Director of the Idaho State Police has statutory power to commission persons as “peace officers.” I.C. §§ 67-2902, 67-2905. The Director’s personnel powers include the power to delegate the constitutional police power or authority vested in the Director. I.C. § 67-2901(4) and (5)(i). The power to commission persons as “peace officers” is within the discretion of the Director, who “may delegate duties to employees and officers of the state police.” I.C. §§ 67-2901(4). The mere possession of a current POST certificate does not automatically grant “peace officer” status to the possessor. The Director has the express authority to “[e]stablish such ranks, grades and positions as shall appear advisable and designate the authority and responsibility in each such rank, grade and position,” and “[a]ppoint such personnel to such rank, grade and position as are deemed by him to be necessary for the efficient operation and administration of the Idaho state police” I.C. § 67-2901(10)(a)(b).

Only those persons commissioned by the Director of the Idaho State Police are authorized to act as “peace officers.” To the extent the Director of the Idaho State Police employs a POST-certified person in a position as a regular employee, *i.e.*, non-commissioned employee as opposed to an officer, the POST-certified person is not a “peace officer.” Employees of the Idaho State Police do not have the power to compel the Director to commission them merely by virtue of position and possession of a current POST certificate. A peace officer is a person commissioned by the Director of the Idaho State Police, a sheriff or deputy sheriff, constable, marshal, or policeman of a city

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or town. I.C. §§ 19-510, 67-2902. Possession of a POST certificate does not confer peace officer authority; it only indicates a possessor's eligibility to continue to be commissioned as a peace officer beyond the one-year anniversary date of hiring by a city, county or the state. I.C. § 19-5109(2).

If the personnel in the positions of Academy Training Coordinator II and III and Executive Director are not commissioned as officers, after their positions are reclassified as regular employees rather than officers, the incumbents will not be able to maintain current POST certificates. Under the current administrative rule:

The certification of any peace officer will be considered lapsed if the officer does not serve as a peace officer in Idaho for three (3) consecutive years. Provided, however, that an Idaho POST-certified peace officer who remains in an administrative, jail, communications, or [a] civil division duty assignment with a police or law enforcement agency that is a part of or administered by the state of Idaho or any political subdivision thereof or in a duty assignment as a tribal police officer with a federally recognized Indian tribe within Idaho and whose duties include and primarily consist of the prevention and detection of crime and the enforcement of penal, traffic or highway laws of this state or any political subdivision will retain their POST certification provided they satisfy the continuing training requirements of Sections 360 through 363 and work at least one hundred twenty (120) hours per year.

IDAPA 11.11.01.092 (4-2-08).² As set forth above, the duties of these positions do not “include and primarily consist of the prevention and detection of crime and the enforcement of penal, traffic or highway laws of this state or any political subdivision.” Also, the Academy Training Coordinator II and III and Executive Director do not work at least 120 hours per year in the “prevention and detection of crime and the enforcement of penal, traffic or highway laws of this state or any political subdivision.” Amendment of the above administrative rule to permit employees in these positions to maintain POST certification indefinitely through continuing education would likely increase retention of former “peace officers” in these positions.

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C. Summary

The positions of Academy Training Coordinator II and III and Executive Director are not the equivalent of the respective positions of Idaho State Police Sergeant, Lieutenant and Major. The Academy Training Coordinator II and III and Executive Director do not qualify as positions for which current POST certification is required as a condition of employment. The positions of Idaho State Police Sergeant, Lieutenant and Major are positions for which current POST certification is required as a condition of employment. A reclassification of the Training Coordinator and Executive Director positions could be relevant to PERSI in regard to police officer member status for retirement purposes. If the decision to reclassify is made, we suggest that ISP contact PERSI to discuss this matter.

Sincerely,

STEPHEN A. BYWATER
Deputy Attorney General
Chief, Criminal Law Division

Researched by:

RALPH R. BLOUNT
Deputy Attorney General

¹ As set forth above, the professional staff assigned to POST are employed by the Idaho State Police. The Rules of the Idaho Peace Officer Standards and Training Council (POST) in one section refers to the Idaho State Police employees assigned to POST as “professional member[s] of the POST Council staff.” IDAPA 11.11.01.116.01.a (4-2-03). This rule appears to contradict another later rule, which provides that the “Executive Director and his staff will be governed by the Policies and Rules of the state of Idaho and the Idaho State Police, concerning but not limited to fiscal, purchasing, and personnel matters.” IDAPA 11.11.01.031.04 (4-2-08). Additionally, the POST Council lacks personnel powers.

² This rule appears internally inconsistent as the duties of a “peace officer” assigned to an administrative, jail, communications or civil division duty assignment, will likely not “include and primarily consist of the prevention and detection of crime and the enforcement of penal, traffic or highway laws of this state or any political subdivision.” An alternative reading of this rule would appear to require that a “peace officer” assigned to POST works at least 120 hours per year in the “prevention and detection of crime and the enforcement of penal, traffic or highway laws of this state or any political subdivision.”

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October 9, 2008

Mr. Tom Luna
Superintendent of Public Instruction
Idaho State Department of Education
P.O. Box 83720
Boise, ID 83720-0027

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

Re: Charter School Funding

Dear Superintendent Luna:

You have requested the Attorney General's guidance with respect to whether public charter schools are entitled to benefit from the funding provision contained in Idaho Code § 33-1003(1). This provision is a special application of the educational support program, pertaining to school districts that experience qualifying decreases in average daily attendance. As discussed in more detail below, based on review of the relevant statute and the legislative history of the bill creating public charter schools, it appears that public charter schools may not benefit from Section 33-1003(1)'s funding provision.

Funding provisions for Idaho's public school districts are codified at title 33, chapter 10, Idaho Code. By definition, this chapter applies to "any public school district organized under the laws of the state, including *specially chartered school districts*." Idaho Code § 33-1001(8) (emphasis added). Public charter schools, which were not authorized in this state until 1998, are not the same as specially chartered school districts. Specially chartered school districts are districts that were operating under special charters granted by the territorial legislature prior to the time that the Idaho Constitution was adopted.¹ This distinction is significant because the funding provisions and governing law treat these two types of schools differently.

The educational support program is a source of funding for Idaho public schools. The method by which the program is calculated appears at

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Idaho Code § 33-1002. Special applications of the educational support program are detailed in Idaho Code § 33-1003.

The first special application, appearing in Idaho Code § 33-1003(1), permits a school district experiencing a decline in average daily attendance by an amount at least equal to 1% of its average daily attendance from the previous year to seek an apportionment in the current year based on the average daily attendance of the immediately preceding year, less 1%. By utilizing the previous year's figure for the apportionment, the district has the ability to maintain continuity and predictability in school funding, which is a useful management tool. In sum, a school would only see a 1% reduction within its apportionment rather than a multiple percentage decrease, which would be more likely to affect the day to day operations of the school.

To determine whether Idaho Code § 33-1003(1) applies to public charter schools, title 33, chapter 52, Idaho Code, the Public Charter Schools Act of 1998 (Act), must be examined. Under this Act, public charter schools are established as part of the State's program of public education and as schools which "operate independently from the existing traditional school district structure but within the existing public school system." Idaho Code § 33-5202.

Public charter school funding is governed by Idaho Code § 33-5208, "public charter school financial support." This section provides that each public charter school shall be funded through an apportionment from the state educational support program. This code section sets the method by which the amount of the apportionment is calculated. It also mandates the State Department of Education to make the apportionment to each public charter school in each fiscal year.

The comprehensive nature of Idaho Code § 33-5208 is apparent as it provides specific funding provisions for public charter school special education services, support for alternative schools and transportation support. Through this code section, the Legislature, anticipating the potential for an individual charter school to experience a substantial increase in student population from one year to the next, authorized the State Department of Education to make advance payments of the school's estimated annual apportionment. Idaho Code § 33-5208(5).

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Although authorizing an advance from the annual apportionment, it is important to note that the formula by which the apportionment was calculated was not altered. The apportionment is directly linked to student population. On this basis, the amount of the apportionment will increase or decrease annually, in relationship to any increase or decrease in student population. The funding provision contains no provision permitting the use of a previous year's attendance figures as a means of off-setting a decline in enrollment, nor does it include any reference to, or incorporation of, Idaho Code § 33-1003(1).² Although it has been amended several times since the adoption of the charter school legislation, this section pre-existed the charter school legislation and has never been amended to provide any special application pertaining directly to charter schools.

Previous correspondence from this office has suggested a different outcome. For instance, in 1998, Deputy Attorney General Coffin ("Coffin Letter"), addressing several issues pertaining to public charter schools, relied solely on Idaho Code §§ 33-1001, *et seq.*, when responding to the question "[h]ow will the state fund charter schools?" The Coffin Letter concluded:

Charter schools are "public schools." As such, charter schools should be funded the same way any other school is funded absent a specific mandate in Idaho Code to the contrary. Public schools are funded under Idaho Code § 33-1001, *et seq.* Charter schools located within a district are entitled to utilize all funding criteria, exceptions and alternative formulas available to other schools under the code.

This response makes no mention of the specific funding provisions pertaining to charter schools which appear in Idaho Code § 33-5208. In light of the specific mandate appearing in Section 33-5208, and the comprehensive nature of that provision, this prior analysis is no longer accurate. As has been discussed, Section 33-5208 specifically identifies the criteria, exceptions and formulas that pertain to funding for public charter schools: it is comprehensive and complete.

Earlier this year, Tim Hill and Jason Hancock asked whether the educational support program's special application pertaining to decreases in average daily attendance applied to public charter schools through Idaho

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Code § 33-1003(1). As indicated in the response to their question, the conclusion that it did was based on a limited review of statutory provisions. Bolstered by the observation that no statutory exemption prevented application, the conclusion also relied in part on this office's previous analyses of the topic.

Unfortunately, this office's previous examinations of the topic were based on abbreviated legal analysis and timing of the Hill/Hancock inquiry did not permit consideration of several other relevant sources, including legislative histories and amendments to controlling statutes that had been made in the time between the previous analyses. Therefore, to the extent that each of the previous letters is inconsistent with the conclusion reached in this letter, they should not be relied upon.

If I can be of further assistance in this matter, please do not hesitate to contact me.

Sincerely,

KRISTA L. HOWARD
Deputy Attorney General
Idaho Department of Education

¹ Howard v. Independent School Dist. No. 1 of Nez Perce County, 17 Idaho 537, 106 P. 692 (Idaho 1910).

² The funding provision for public charter schools makes specific references to provisions within title 33, chapter 10, Idaho Code, but makes no mention of Idaho Code § 33-1003. Idaho Code § 33-1002(4) is referenced. It contains the schedules by which state support units are calculated. Calculation of support units, in turn, is based on average daily attendance (ADA). ADA is calculated according to the formula which appears at Idaho Code § 33-1002(3). This section is also referenced. Ultimately, support units and average daily attendance are utilized in calculating the amount of per student support for each public charter school, as described in Idaho Code § 33-5208.

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**ATTORNEY GENERAL'S
CERTIFICATES OF REVIEW
FOR THE YEAR 2008**

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

CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

January 29, 2008

The Honorable Ben Ysursa
Idaho Secretary of State
STATEHOUSE MAIL

Re: Certificate of Review
Initiative Relating to Coal and Nuclear Power Plants in Idaho

Dear Secretary of State Ysursa:

An initiative petition was filed with your office on December 28, 2007, and received by this office the same day. Pursuant to Idaho Code § 34-1809, this office has reviewed the petition and prepared the following advisory comments. Given the strict statutory timeframe in which this office must respond and the complexity of the legal issues raised in this initiative petition, this office's review can only address major areas of concern and cannot provide an in-depth analysis of each issue that may present concerns. Further, under the review statute, the Attorney General's recommendations are "advisory only," and the petitioner is free to "accept or reject them in whole or in part." The opinions expressed in this review are only those that may affect the legality of the initiative. This office offers no opinion with regard to the policy issues raised by this proposed initiative.

BALLOT TITLE

Following the filing of the proposed initiative, this office will prepare short and long ballot titles. The ballot titles must impartially and succinctly state the purpose of the measure without being argumentative and without creating prejudice for or against the measure. While this office prepares the titles, if Petitioner would like to propose language with these standards in mind, he may do so. Any proposed language will be considered carefully.

MATTERS OF SUBSTANTIVE IMPORT

A. Introduction

The proposed initiative is entitled “Initiative to Protect Idaho Family’s Safety in Our Energy Future, and Adopt Laws Other States Use to Protect Themselves from Unwanted Coal and Nuclear Plants.” The initiative petition (or the “initiative”) submitted to our office for review contains a general preamble or “Statement of Purpose” and three paragraphs of “legal text” to be codified into law.¹ The Statement of Purpose describes the first legal paragraph as intending “to prohibit building any nuclear power plants, until a final waste repository is open, with certified room for the spent nuclear fuel rods and high-level radioactive waste” The preamble continues that the “banning of new nuclear power plants, until a final waste repository is open, simply adopts the common sense law that Oregon and California use to stop new nuclear power plants.” The Statement of Purpose and the first paragraph of legal text indicate that the drafter intends to exempt “research reactors 10 megawatts or under” from the provisions of the initiative.

The remaining two paragraphs of the initiative are described in the Statement of Purpose as allowing “the majority of the Statewide citizen vote to determine whether to allow granting the final permit for a coal or nuclear power plant to use Idaho.”² The petition recites that, although a local county commission would still decide whether to permit a nuclear or coal plant, “a statewide approval of voters will be required to grant the final permit. This allows local county control, but also allows statewide citizen veto of plans that threaten more harm than good to the State of Idaho.” The petition states that similar laws in Montana and Oregon have been used “to stop unwanted nuclear power plants.”

The preamble maintains that “out-of-state Corporations have plans to build merchant commercial nuclear and coal plants in Idaho” because other states prohibit these polluting plants. “Merchant plants sell to the higher bidder,” so Idaho would have to outbid other states to obtain the power from these plants. “That means Idahoans take all the risks to our families and our water, but we have no guarantee that we can use the electricity [produced by these plants], especially at a reasonable rate.”

B. The Construction of Coal Plants is Prohibited in Idaho

In 2007, the State of Idaho “opted out” of the federal Cap and Trade Program for Mercury emissions under the Clean Air Mercury Rule. To comply with the State’s zero-budget emission standard, the Rules for the Control of Air Pollution in Idaho provide that “no owner or operator shall construct or operate an electric generating unit (EGU), as defined in 40 C.F.R. 60.24, with a potential to emit mercury (Hg) emissions.” Rules 199, IDAPA 58.01.01.199. This rule prohibits any coal-fired power plant from being constructed in Idaho because coal power plants cannot capture all mercury emissions. As long as this rule remains in effect and Idaho does not participate in the federal Cap and Trade Program for Mercury, a coal-fired power plant cannot be constructed in Idaho.

C. As Written, the Nuclear Portion of the Initiative May be Preempted by Federal Law

The Supremacy Clause of the United States Constitution declares that the federal Constitution and the law of the United States “shall be the supreme law of the land.” Art. VI, cl. 2. Once constitution authority is evident, the inquiry turns to the scope of federal preemption. Louisiana Public Service Comm’n v. FCC, 476 U.S. 355, 368-69, 106 S. Ct. 1890, 1998-99 (1986).

The Atomic Energy Act of 1954 (the “AEA”) established the Atomic Energy Commission (now the Nuclear Regulatory Commission (NRC))³ and authorizes the Commission to regulate the private uses of nuclear materials in power generating facilities. 42 U.S.C. §§ 2011, *et seq.* In 1959, the AEA was amended to clarify the regulatory responsibilities between the NRC and the States. In pertinent part, subsections 2021(c)(1) and (k) provide that the NRC will retain regulatory authority over “the construction and operation of any [electric generating] facility,” while the states or local agencies may “regulate activities for purposes other than protection against radiation hazards.” 42 U.S.C. §§ 2021(c)(1) and (k). Section 2018 further provides that nothing in the AEA shall affect the authority of the appropriate federal, state, or local agency from regulating the “generation, sale, or transmission of electric power produced through the use of nuclear facilities licensed” by the NRC. 42 U.S.C. § 2018.

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The text of the initiative's first paragraph is similar to a provision in California law that requires the California Energy Commission to determine whether the federal government "has approved and there exists a demonstrated technology or means for the disposal of high-level nuclear waste." Cal. Pub. Res. Code § 25524.2.⁴ In 1983, the United States Supreme Court ruled that this California statute was not preempted by the AEA. Pacific Gas & Electric Company v. State Energy Resources Conservation & Development Commission ("PG&E"), 461 U.S. 190, 103 S. Ct. 1713 (1983). The Court first determined that the 1959 amendments to the AEA indicated "that the federal government should regulate the radiological safety aspects involved in the construction and operation of a nuclear plant, but that the States retain their traditional responsibility in the field of regulating electric utilities for determining questions of need, reliability, cost and other related state concerns." *Id.* at 205, 103 S. Ct. at 1723. The Court accepted California's argument that its waste disposal statute was directed at the economic aspects of nuclear power—not the safety aspects of nuclear power.⁵

California asserted that the lack of a federally approved method of waste disposal might lead to higher costs of interim measures or even shut-downs in reactors, thereby causing utilities to forego the power produced at their own facilities and requiring utilities to purchase replacement power. *Id.* at 213-14, 103 S. Ct. at 1727. The Court concluded that "the federal government maintains complete control of the safety and 'nuclear' aspects of energy generation; the states exercise their traditional authority over the need for additional generating capacity, the type of generating facility to be licensed, land use, ratemaking, and the like." *Id.* at 212, 103 S. Ct. at 1726; Deborah Tussey, Annotation, *State Regulation of Nuclear Power Plants*, 82 A.L.R.3d 751 (Supp. 2008). However, the Court declared that a "state moratorium on nuclear construction grounded in safety concerns" or "a state judgment that nuclear power is not safe enough to be furthered developed would conflict directly" with both the AEA and NRC regulations. PG&E, 461 U.S. at 213, 103 S. Ct. at 1727; English v. General Electric Company, 496 U.S. 72, 84-85, 110 S. Ct. 2270, 2278 (1990) ("State regulation of matters directly affecting the radiological safety of nuclear-plant construction and operation, 'even if enacted out of nonsafety concerns, would nevertheless infringe upon the NRC's exclusive authority.'").

Although the Supreme Court found language similar to the initiative's first paragraph was not preempted by the AEA, there are at least three

significant differences between the California statute and the proposed initiative. First, the regulatory scheme pertaining to electric utilities 25 years ago is quite different from the regulation of such utilities today. At the time of the PG&E case, California utilities were required to demonstrate a need for the power and the cost of such power to be produced by the nuclear power plants. Today several states (including California) have partially deregulated their electric utility industries. Cal. Pub. Util. Code §§ 330-398.5; California ex rel. Lockyer v. FERC, 383 F.3d 1006, 1009-10 (9th Cir. 2004), *cert. denied*, — U.S. —, 127 S. Ct. 2972, 168 L. Ed. 2d 719 (2007); California ex rel. Lockyer v. Dynegy, 375 F.3d 831, 836-37 (9th Cir. 2004). Moreover, today's electric power may be produced by alternative power suppliers such as cogenerators, small power producers and independent power producers. Transmission Access Policy Study Group v. FERC, 225 F.3d 667, 681 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1, 122 S. Ct. 1012 (2002). Producers selling into the wholesale market are called "exempt wholesale generators" (EWGs),⁶ or what are commonly referred to as "merchant" plants. A merchant plant is an entity that directly or indirectly operates facilities that produce electric power for sale in wholesale power markets. The initiative's Statement of Purpose specifically refers to "merchant nuclear and coal plants" selling power out of state. In Idaho, a "merchant" plant is not subject to the traditional public interest need or ratemaking authority of the Idaho Public Utilities Commission. Idaho Code §§ 61-129, 61-502, 61-526. Thus, the State does not exercise control over the public need for power, the cost of power, or the reliability for a merchant plant.

Second, the initiative does not expressly address economic conditions but refers to "Idahoans tak[ing] all the risks to our families and our water" and the "devastating risks to Idaho families" brought by "these polluting coal and nuclear power plants." It could be argued that the initiative appears to be based upon the health, safety and environmental concerns related to radiological contamination rather than economic or other State-allowed concerns.

Third, Idaho's Energy Facility Site Advisory Act prohibits cities and counties from considering the need for the energy, the financial characteristics, alternative generating resources, or other sites that were considered by a land use applicant. Idaho Code § 67-2355(2). Thus, our Legislature has restricted local governments from considering the need for power or economic characteristics when issuing local permits. In summary, a court might find these distinctions to be significant and rule the initiative preempted by the AEA.

D. The Proposed Initiative May Impede Interstate Commerce

Construction of a merchant nuclear plant in Idaho that intends to transmit all of its power outside Idaho may raise interstate commerce issues under the Commerce Clause of the United States Constitution, art. I, § 8, cl. 3. The AEA provides that every nuclear power plant that transmits its power in interstate commerce or sells power at wholesale in interstate commerce shall be subject to the regulatory provisions of the Federal Power Act and the Federal Energy Regulatory Commission (FERC). 42 U.S.C. § 2019. Generally, a state may not unreasonably burden interstate commerce. American Trucking Assoc. v. Michigan Public Service Commission, 545 U.S. 429, 125 S. Ct. 2419 (2005). The general rule is that where a state statute “regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, [then] it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.” Pike v. Bruce Church, 397 U.S. 137, 90 S. Ct. 844, 847 (1970).

E. Portions of the Initiative May Conflict With Other Constitutional Provisions and Fall Outside the Scope of Actions Allowable by Initiative or Referendum

Article III, § 1 of the Idaho Constitution recognizes that the people of Idaho reserve to themselves the power of the referendum and the power of the initiative. The referendum is “the power to approve or reject at the polls any act or measure passed by the legislature.” Idaho Const. art. III, § 1. The initiative is “the power to propose laws, and enact the same at the polls independent of the legislature.” *Id.* It is well settled in Idaho that initiative legislation carries “the same force and effect as legislation enacted by both houses of the legislature and approved by the governor.” State v. Finch, 79 Idaho 275, 280, 315 P.2d 529, 530 (1957). However, the power to propose or repeal laws by initiative or referendum, respectively, is not without limits.

The second and third paragraphs of the initiative require a statewide vote on nuclear power plants over 10 megawatts and coal-fired power plants. These paragraphs of the initiative are nearly identical to Oregon law.⁷ The two paragraphs appear to address two “timing” differences. In particular, the second paragraph purportedly requires a statewide election in those instances where “any State or local permit requirements that have been satisfied . . . the

CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

proposal shall be submitted to the electors of this state for their approval or rejection at the next available statewide general election.”⁸ In comparison, the third paragraph purportedly prohibits the issuance of any “State Permit, or any site certificate” for a nuclear or coal power plant “until the electors of this state have approved the issuance of the certificate at an election held pursuant to subsection (1) of this section.”⁹ In other words, the second paragraph pertains to state or local permits, which may have already been satisfied, while the third paragraph pertains to permits and site certificates that have not yet been issued.

The second paragraph presents two particular legal issues. First, this paragraph would subject permits issued by local governments to a statewide election. As mentioned above, a referendum is the “power to approve or reject at the polls any act or measure passed by the legislature.” Idaho Const. art. III, § 1 (emphasis added). As stated in the second paragraph, the initiative would require a vote on a permit issued not by the Legislature but by local government. By its terms, the Idaho Constitution does not permit a statewide referendum of a local body’s decision. Moreover, article XII, § 2 of the Idaho Constitution allows local governments to make and enforce “all such local police, sanitary, and other regulations as are not in conflict with its charter or with the general laws.” In particular, local governments may enact planning and zoning provisions under the Local Land Use Planning Act, Idaho Code § 67-6504. Gumprecht v. City of Coeur d’Alene, 104 Idaho 615, 661 P.2d 1214 (1983).¹⁰ Consequently, the second paragraph presents possible constitutional conflicts.

Second, the Idaho Supreme Court has held that “a referendum can only seek to reject an ‘act’ or ‘measure’ passed by a legislative body.” City of Boise v. Keep the Commandments Coalition, 143 Idaho 254, 256, 141 P.3d 1123, 1125 (2006). If the proposed referendum “is administrative in nature, it falls outside the scope of action allowable” by referendum. *Id.* Here, the second and third paragraphs do not seek to reject or propose laws, but address a permitting or certificate process. Weldon v. Bonner County Tax Coalition, 124 Idaho 31, 38-39, 855 P.2d 868, 875-76 (1993). In Gumprecht, the court held that use of the “initiative process for zoning matters is inconsistent with the comprehensive statutory procedures mandated by the Local Planning Act of 1975.” 104 Idaho at 616, 661 P.2d at 1215. The court in Keep the Commandments declined to ruled on the legality of the initiative before the

CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

election because the matter would not be ripe for judicial review unless and until passage by the voters. Davidson v. Wright, 143 Idaho 616, 151 P.3d 812 (2006), *reh'g denied* (2007). However, if presented with the initiative as written, there is likelihood that a court would find the referendum/initiative process in the second and third paragraphs improper.

F. Parts of the Initiative are Ambiguous and May Be Unconstitutionally Vague

As written, the initiative contains terms that are not defined and refers to permitting/certificate procedures that do not exist or are unclear. These shortcomings create ambiguity in the legal text and may expose the initiative to challenges of unconstitutional vagueness. An enactment may violate constitutional due process requirements if it contains “terms so vague that persons of common intelligence must guess at its meaning and differ as to its application.” Lindstrom v. District Bd. of Health Panhandle Dist. 1, 109 Idaho 956, 960, 712 P.2d 657, 661 (Ct. App. 1985). In particular, the first and third paragraphs of the legal text refer to a state “site certificate.” While California and Oregon have state agencies that issue “site certificates” for both nuclear and coal power plants, Idaho has no such state agency.¹¹ Consequently, it is unclear exactly what “certificate” electors must approve in the third paragraph of the legal text. The drafter of the initiative apparently recognizes this distinction because the Statement of Purpose declares that the initiative “law will be used in conjunction with any form of State Siting Board established in the future.” (Emphasis added.)

Next, the text of the first and third paragraphs refer to “any State permit or [any] site certificate” for the construction of any new nuclear plant or coal plant. However, this office is unaware of any State statute that requires the issuance of a state permit for the construction of a nuclear or coal plant. In addition, the phrase “high-level radioactive waste from these [nuclear] facilities” in the first paragraph may not be applicable. The Nuclear Waste Policy Act defines high-level waste as “the highly radioactive material resulting from the reprocessing of spent nuclear fuel” 42 U.S.C. § 10101(12). However, nuclear power plants do not typically “reprocess” spent nuclear fuel and commercial reprocessing is currently not practiced in the United States. NRC: www.nrc.gov/waste/high-level-waste.html. Thus, the proposed initia-

CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

tive uses terms and phrases that are not defined, are ambiguous, and address procedures that do not exist in Idaho law.

MATTERS OF FORM

The general style and format of the initiative's legal text does not conform to the Idaho statutes. For example, is the legal text one statute or more than one? The second and third paragraphs are numbered (1) and (2), respectively. There are several grammatical errors in the proposed initiative that should be corrected.

The petitioner may wish to review Idaho Code § 34-1801A and use it to draft the initiative petition so that it is substantially in the form prescribed by law. This statute prescribes the form that an initiative petition must substantially follow. The signature sheet should contain a "WARNING" at the top of the page that it is a felony for anyone to sign the petition who is not a qualified elector or for anyone to knowingly sign a petition more than once. After the "WARNING" language, there should be a section entitled "INITIATIVE PETITION" that includes a demand from the signing petitioners that the proposed initiative law be submitted to voters at a regular general election and a certification of the petitioners' status as qualified electors. The petitioner has not included these items in the initiative petition.

Other statutes also address requirements for an initiative petition and signature sheet. Idaho Code § 34-1804 requires that each "signature sheet shall contain signatures of qualified electors from only one (1) county." Idaho Code § 34-1807 requires that each page of signatures contain a sworn affidavit from the person circulating the petition. The affidavit requires that the person circulating the petition be 18 years old, a resident of Idaho, and sign and disclose his or her post office address. Idaho Coalition United for Bears v. Cenarrusa, 234 F. Supp. 2d 1159 (Idaho 2001), aff'd, 342 F.3d 1073 (9th Cir. 2003).

CERTIFICATION

I HEREBY CERTIFY that the enclosed measure has been reviewed for form, style, and matters of substantive import. The recommendations set forth above have been communicated to the Petitioner via a copy of this

CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

Certificate of Review, deposited in the U.S. Mail to Peter Rickards, 440
Fairfield St. N., Ste. 2, Twin Falls, ID 83301.

Sincerely,

LAWRENCE G. WASDEN
Attorney General

Analysis by:

DONALD L. HOWELL, II
Deputy Attorney General

¹ For purposes of our analysis here, we shall refer to the text of the proposed laws as “paragraphs” in their order of appearance.

² In 1982, Idaho Code § 39-3027 was enacted by initiative. This section provides: “No law shall be enacted by the State of Idaho to prohibit the use of nuclear energy the generation of electricity, unless the proposed measure shall have first been submitted to the electorate at the next earliest general election. The results of such submission of the question to the electorate shall be advisory in nature, and shall not prevent the legislature from acting in any manner on the measure.”

³ The Atomic Energy Commission was abolished in 1974 and its regulatory functions were transferred to the Nuclear Regulatory Commission. 42 U.S.C. §§ 5801, *et seq.*

⁴ Oregon has a similar statute at Or. Rev. Stat. § 469.595.

⁵ Oregon’s similar waste statute is also based on economic concerns. If there is “no permanent repository for high-level radioactive waste . . . the residents of [Oregon] may face the undue financial burden of paying for construction of a repository for such waste.” Or. Rev. Stat. § 469.593.

⁶ 18 C.F.R. § 366.1.

⁷ Or. Rev. Stat. § 469.597.

⁸ Query whether a DEQ “certificate” finding a “demonstrated technology” for spent fuel and high-level radioactive waste issued under the first paragraph would be subject to voter approval under the provisions of the second paragraph?

⁹ The third paragraph of the legal text is numbered as No. 2 and refers to the second paragraph of the legal text as subsection (1) of this section. The numbering of the three paragraphs should be corrected.

¹⁰ Article III, § 19, also prohibits the legislature from passing local or special laws regulating county business.

¹¹ In Oregon, the Energy Facility Siting Council is the state agency responsible for the siting of nuclear and coal-fired power plants. Or. Rev. Stat. §§ 469.310 and 469.320. A “site certificate” is the binding agreement between the State of Oregon and the applicant, authorizing the applicant to construct and operate a facility on an approved site, incorporating all conditions imposed by the council on the applicant. Or. Rev. Stat. § 469.300(26).

CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

October 24, 2008

The Honorable Ben Ysursa
Idaho Secretary of State
STATEHOUSE MAIL

Re: Certificate of Review
Proposed Initiative Petition Regarding Legal Tender in
Payment of Debts

Dear Secretary of State Ysursa:

A proposed initiative petition (“Initiative”) was filed with your office on September 11, 2008, and received by this office on September 25, 2008. Pursuant to Idaho Code § 34-1809, this office has reviewed the Initiative and has prepared the following advisory comments. Please know that, under the review statute, the opinions expressed in this review pertain only to the legal issues raised by the Initiative. This office offers no opinion regarding any policy issues raised by it. Furthermore, the Attorney General’s recommendations are “advisory only,” and Petitioners are free to “accept or reject them in whole or in part.”¹

BALLOT TITLE

Following the filing of the initiative petition, 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 this office prepares the titles, if Petitioner would like to propose language in line with these standards, we recommend that he do so. Any proposed language will be carefully considered.

MATTERS OF SUBSTANTIVE IMPORT

A. Introduction

Entitled “The Jubilee Initiative Petition,” the Initiative seeks to make gold or silver coins the only legal tender acceptable for the payment of debt within the State of Idaho. Petitioner seeks to:

1. Make “null and void” all contracts with financial institutions denominated in currencies not redeemable in gold or silver;
2. Make all fines, debts, settlements, or liens unenforceable unless denominated in gold or silver coins;
3. Make taxes payable in only gold or silver coins or in tax certificates issued by the taxing authority; and
4. Require the state legislature to establish depositories for the certification and circulation of gold and silver coins, to issue tax certificates, and create all needful rules and regulations “for orderly compliance with the Constitution.”

B. Congress, Not the States, Determines What Is Legal Tender

Citing Article I, § 10 of the United States Constitution, the Initiative declares that only gold and silver coin will be legal tender in Idaho.

Article I, § 10 of the U.S. Constitution is binding on the State of Idaho.² It imposes limitations upon the states and provides, in relevant part:

No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; *make anything but gold and silver coin a tender in payment of debts*; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility.

(Emphasis added.)

Article I, § 10, while it prohibits states from coining money and restricts their right to make anything but gold and silver coin tender, imposes no such limitation upon Congress. The Constitution, in fact, gives Congress the sole power to decide how the moneyed transactions between citizens should be regulated.³ Article I, § 8, cl. 5 of the U.S. Constitution declares that Congress shall have the power “[t]o coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures.” It is this section, wrote a federal district court in the case Nixon v. Phillipoff,⁴ that gives Congress the *exclusive* ability to determine what will be legal tender throughout the country. Nixon, a *pro se* plaintiff, brought an action against Phillipoff, who had filed a mortgage foreclosure action against his property and the clerk of court who had accepted Phillipoff’s filing fee, which he paid in Federal Reserve notes. One of Nixon’s arguments for dismissal was that Phillipoff had violated Article I, § 10 of the U.S. Constitution because he paid the foreclosure filing fee with Federal Reserve notes instead of “lawful money” (*i.e.*, gold and silver coin). Nixon asserted that § 10 requires a state to accept and recognize *only* gold and silver coin as legal tender, which is also Petitioner’s position. The court stated that Nixon’s interpretation of § 10 would, in effect, declare Federal Reserve notes illegal, creating an inconsistency with Article I, § 8, cl. 5. The court observed that:

[T]he power to coin money necessarily carries with it the power to declare what is money, and the constitution does not limit Congress to gold and silver coin. Section 8 sets forth the powers of Congress, while § 10 imposes a restriction on the states. It strains logic and constitutional interpretation to claim that the framers of the constitution sought to limit Congress’ power to coin money via an implication derived from a restriction directed not at Congress but at the states.⁵

Congress, the court observed, has the unrestricted power to declare what is and is not legal tender or, stated another way, what a creditor must accept as payment of a debt. Article I, § 10, acts only to remove from states their inherent sovereign power to declare currency.⁶ Because Congress has declared, through federal statute, that Federal Reserve notes are legal tender, states must accept them as such.⁷ Citing numerous federal cases that originate from the U.S. Supreme Court Legal Tender Cases of the 1800s to support its

CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

conclusion, the court concluded that Nixon's position was illogical and flew in the face of established legal precedent.⁸

It was in the Legal Tender Cases that the U.S. Supreme Court explained the purpose of § 10.

The Constitution was intended to frame a government as distinguished from a league or compact, a government supreme in some particulars over States and people. It was designed to provide the same currency, having a uniform legal value in all the States. It was for this reason the power to coin money and regulate its value was conferred upon the federal government, while the same power as well as the power to emit bills of credit was withdrawn from the States. *The States can no longer declare what shall be money, or regulate its value. Whatever power there is over the currency is vested in Congress.*⁹

(Emphasis added.)

Several years before the Legal Tender Cases were heard by the U.S. Supreme Court, the Supreme Court of the Territory of Idaho considered the issue. In the 1867 case of Haas v. Misner, the Idaho Territory Supreme Court concluded that taxes were debt within the meaning of federal law and any state law that required taxes to be paid only in gold or silver coin, or its equivalent, was null and void.¹⁰ The court observed that state laws that contravene "either by grafting limitations on or exceptions to the provisions of an act of congress" are invalid. The court noted that:

[t]he constitutionality of the act of congress authorizing the issuance of these [Treasury] notes and making them a "legal tender in the payment of all debts, public and private," has been affirmed by too many of the tribunals of last resort in many of the states of this Union to be now considered an open question¹¹

The Haas case was followed two years later by Crutcher v. Sterling, a case in which an Idaho sheriff sued the Territorial Treasurer, claiming that,

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under territorial statute, he was entitled to be paid in gold from the prison fund.¹² The court disagreed, holding that the sheriff had to accept payment in legal tender notes.

Ninety-five years later, in the case Herald v. State, an Idaho plaintiff questioned whether he could lawfully pay his taxes using Federal Reserve Notes as currency.¹³ He argued that Article I, § 10 of the U.S. Constitution precluded payment in anything but gold or silver coin. Predictably, the court stated that § 10 “was intended only to limit a state’s authority to create its own form of legal tender other than gold or silver.” Addressing the plenary authority of Congress over currency of the United States, the court quoted the U.S. Supreme Court in the Legal Tender Cases, which said:

Congress is vested with the exclusive exercise of the analogous power of coining money and regulating the value of domestic and foreign coin, and also with the paramount power of regulating foreign and interstate commerce. Under the power to borrow money on the credit of the United States, and to issue circulating notes for the money borrowed, its power to define the quality and force of those notes as currency is as broad as the like power over a metallic currency under the power to coin money and to regulate the value thereof. Under the two powers, taken together, Congress is authorized to establish a national currency, either in coin or in paper, and to make that currency lawful money for all purposes, as regards the national government or private individuals.¹⁴

Applying the legal authority cited above leads inexorably to the conclusion that the State of Idaho has no authority to declare what shall and shall not be legal tender in this state. That is the sole responsibility of Congress. Consequently, the declaration that only gold and silver coin shall be legal tender is unconstitutional and should be removed from the Initiative. Since the Initiative’s objectives spring from the legally flawed premise that the State of Idaho may determine legal tender, it follows that:

1. The clause that makes “null and void” all contracts with financial institutions denominated in currencies not

redeemable in gold or silver should be removed. Legal tender is what must be accepted by creditors in satisfaction of all debt. Additionally, it is likely that a court would find such a provision unconstitutional on the additional ground that voiding such contracts would result in an impermissible burden upon Congress' constitutional authority to regulate commerce.¹⁵

2. Because of Congress' peremptory authority to determine legal tender, the clause making all fines, debts, settlements, or liens unenforceable unless denominated in gold or silver coins is unconstitutional and should be removed.
3. The clause requiring taxes to be paid in legal tender is constitutional as long as it is Congress that establishes legal tender.¹⁶ The permissibility of allowing taxes to be paid with tax certificates is difficult to determine since the term "tax certificate" is not a commonly understood term, but rather a technical one, which is undefined in the Initiative and in the Idaho Code. The use of tax certificates to pay taxes is a concept that will require fuller development so that the provision is not void for vagueness. Petitioners may consider a separate initiative dealing with payment of taxes to avoid running afoul of the Unity of Subject and Title requirement of the Idaho State Constitution.¹⁷
4. In the Initiative's final clause directing that the Idaho Legislature create rules and regulations "for orderly compliance with the Constitution," Petitioner should specify that it is to the U.S. Constitution to which the word "Constitution" refers. Assuming that the reference is to the U.S. Constitution, Article I, § 10, the limitations imposed upon the states by this section require no state rule and regulation to effect compliance. The final sentence of the Initiative is therefore needless surplusage and should be struck. Moreover, it is likely that a court would find the requirement that the Legislature certify legal tender unconstitutional, given Congress's exclusive authority over the currency.

MATTERS OF FORM

The format and style of the Initiative does not conform to Idaho statutes. It is unclear if the Initiative is to form one statute or more than one.

Petitioner should review Idaho Code § 34-1801A and use it as a guide to draft the Initiative so that it substantially follows the form prescribed by law. This statute requires that initiatives be preceded with a “WARNING,” stating that it is a felony for anyone to sign the petition with a name other than their own or to knowingly sign the petition more than once or to sign if not a qualified elector. A section entitled “INITIATIVE PETITION” should follow the “WARNING” and should include a demand by petition signers that the proposed initiative be submitted to voters at a regular general election and a certification of their residence and their status as qualified electors. The Initiative lacks these elements.

Additionally, Idaho Code § 34-1804 requires that “[e]ach signature sheet shall contain signatures of qualified electors from only one (1) county.” Petitioner’s signature sheets contain the signatures of persons from multiple counties.

Finally, Idaho Code § 34-1807 requires that each sheet of every petition contain a notarized affidavit from the person who circulated the petition, which states that he/she is an Idaho state resident at least 18 years old, that he/she believes that each petition signer is an elector qualified to sign the petition, and which includes the circulator’s post office address.

CERTIFICATION

I HEREBY CERTIFY that the enclosed measure has been reviewed for form, style, and matters of substantive import. The recommendations set forth above have been communicated to the Petitioner via a copy of the Certificate of Review, deposited in the U.S. Mail to James W. Stivers, 1435 Desmet Road, Desmet, ID 83824.

CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

Sincerely,

LAWRENCE G. WASDEN
Attorney General

Analysis by:

MITCHELL E. TORYANSKI
Deputy Attorney General

¹ Idaho Code § 34-1809.

² See McCulloch v. State of Maryland, U.S. (4 Wheat.) 316 (1819).

³ See Ogden v. Saunders, 25 U.S. 213 (1827).

⁴ 615 F. Supp. 890 (D.C. Ind. 1985).

⁵ 615 F. Supp. 890, 893.

⁶ *Id.*

⁷ See 31 U.S.C. § 5103.

⁸ 615 F. Supp. 890, 894.

⁹ Idaho Op. Atty. Gen. No. 82-12 citing Legal Tender Cases, 79 U.S. (12 Wall) 457, 545 (1871).

Pronouncements on legal tender reaffirmed in Legal Tender Cases, 110 U.S. 421 (1884).

¹⁰ 1 Idaho 170 (1867).

¹¹ *Id.*

¹² 1 Idaho 306 (1869).

¹³ 107 Idaho 640, 691 P.2d 1255 (Ct. App. 1984).

¹⁴ 107 Idaho 640 quoting The Legal Tender Cases, 110 U.S. 421, 448 (1884).

¹⁵ See U.S. Const. Art. I, § 8, cl. 3.

¹⁶ See Herald v. State, 107 Idaho 640 (Ct. App. 1984), wherein the court observed that a statute requiring that property taxes be paid in lawful money of the United States did not unconstitutionally create a new form of legal tender.

¹⁷ Idaho Const. art. III, § 16, requires that “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.”

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**ATTORNEY GENERAL'S
SELECTED
ADVISORY LETTERS
FOR THE YEAR 2008**

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

ADVISORY LETTERS OF THE ATTORNEY GENERAL

January 11, 2008

Via E-Mail

The Honorable Ben Ysursa
Idaho Secretary of State
thurst@sos.idaho.gov

Re: Our File No. 08-21525 – Lobbyist Expenditure Reporting

Dear Secretary Ysursa:

You have asked whether Idaho Code § 67-6619 requires lobbyists to report what they actually spend for entertainment, food, and refreshments or report their value. This code section states, in relevant part:

Reported expenditures for entertainment, food and refreshments for legislators or other holders of public office or executive officials shall be the actual cost of the entertainment, food and refreshments.

Since this question has not been ruled upon by Idaho courts, it is not possible to know, with absolute certainty, the outcome.

Idaho Code § 67-6602(h) defines “expenditure” as including:

any *payment*, contribution, subscription, distribution, loan, advance, deposit, or *gift of money* or anything of value, and includes a contract, promise, or agreement, whether or not legally enforceable, to make an expenditure. The term “expenditure” also includes a promise to pay, a payment or a transfer of anything of value in exchange for goods, services, property, facilities or anything of value for the purpose of assisting, benefiting or honoring any public official or candidate, or assisting in furthering or opposing any election campaign.

ADVISORY LETTERS OF THE ATTORNEY GENERAL

Idaho Code § 67-6619 requires lobbyists to report the *amount expended* or *payment* that the lobbyist or his employer made for any lobbying purpose except for reimbursed personal living and travel expenses. If the price of admission to an event is \$100 per person, but the overhead is only \$75 per person, the lobbyist must report \$100. If the lobbyist were to report \$75 as a lobbying expense and \$25 as a donation to the event's sponsor or to charity, the lobbyist would have to argue that the \$25 paid was somehow not part of the reportable "totals of all expenditures made or incurred."¹ While the success of this argument would be fact dependent, I would not expect it to prevail in most cases. If the price of admission is \$100, the expenditure is \$100. The handling of the proceeds after expenses are paid is likely not relevant for Idaho Sunshine Law reporting purposes.

I hope that this letter is responsive to your request for clarification.

Very truly yours,

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

¹ Idaho Code § 67-6619(b)(1).

ADVISORY LETTERS OF THE ATTORNEY GENERAL

February 5, 2008

Mr. Lee Gagner
2555 Fieldstream Lane
Idaho Falls, ID 83404-7117

Re: Our File No. 08-21695 – Idaho Transportation Board
Qualifications

Dear Mr. Gagner:

It is my understanding, from our telephone conversation, that you are being considered for appointment to the Idaho Transportation Board. The qualifications for Board membership are set forth in Idaho Code § 40-302, which provides:

Board—Membership—Appointment—Qualification.—The board shall be composed of seven (7) members to be appointed by the governor. Not more than four (4) members shall at any time belong to the same political party. Members shall be well informed and interested in the construction and maintenance of public highways and highway systems, and their selection and appointment shall be made solely with regard to the best interests of the various functions of the board. At least one (1) member shall have special training, experience or expertise in the field of aeronautical transportation. Each member at the time of his appointment shall have been a citizen, resident and taxpayer of the state of Idaho and of the district from which he is appointed for at least five (5) years. *During his tenure of office no member shall hold or occupy any federal, state, county, or municipal elective or other appointive office, or any office in any political party.*

(Emphasis added.)

The emphasized language in the above statute is important because, at this time, you are also a Commissioner to the Idaho Housing and Finance Association (“IHFA”). The issue is whether your service as a Commissioner

ADVISORY LETTERS OF THE ATTORNEY GENERAL

disqualifies you from serving on the Transportation Board because it is an “appointive office,” as that term is used in Idaho Code § 40-302.

IHFA is created pursuant to chapter 62 of title 67, Idaho Code. Idaho Code § 67-6202 provides: “There is hereby created an independent public body corporate and politic to be known as the Idaho housing and finance association.” The phrase “independent public body corporate and politic” is used many times in Idaho law but is not clearly defined. Idaho Code § 67-6226 helps in defining this amorphous term. That code section provides: “It is recognized that the association is not, and has not been since its inception, a state or local agency for purposes of Idaho law.”

Idaho Code §§ 67-6202 and 67-6226 would appear to answer the question as to whether you are holding or occupying “any federal, state, county, or municipal elective or other appointive office” It is my opinion that the language in these two code sections would permit an IHFA Commissioner to be appointed to the Idaho Transportation Board. This conclusion is buttressed by practice. It is my understanding that former legislator Frank Bruneel was a Transportation Board member at the same time he served as an appointed member of the IHFA Board of Commissioners.

I hope that this letter is of some assistance to you. If you have further questions, do not hesitate to call upon me.

Very truly yours,

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

ADVISORY LETTERS OF THE ATTORNEY GENERAL

February 27, 2008

Hand Delivered

The Honorable Phil Hart
Idaho House of Representatives

Re: Our File No. 08-21813 – Senate Bill No. 1356

Dear Representative Hart:

This letter responds to your question concerning Senate Bill No. 1356 (“SB 1356”). Specifically, you have asked “whether SB 1356 is more restrictive than the State of Idaho Constitution, Article VI, Section 3, for the election of sheriffs with regards to felony convictions [and] [i]f in fact that is the case, is SB 1356 therefore unconstitutional?”

The Idaho Constitution places a limitation upon the law-making powers of the Legislature. If no restriction upon that power is found in the constitution, a legislative act is valid.¹ If the constitution and a statute conflict, the constitution will prevail, and the statute will not.² If a court may interpret a statute in two ways, one way being consistent with the constitution and the other inconsistent, the court will adopt the constitutional interpretation.³

Article VI, § 3, of the Idaho Constitution states:

Disqualification of certain persons.—No person is permitted to vote, serve as a juror, or hold any civil office who has, at any place, been convicted of a felony, and who has not been restored to the rights of citizenship, or who, at the time of such election, is confined in prison on conviction of a criminal offense.

This section does not prescribe qualifications for civil office but merely sets forth the conditions whereby a felony conviction will disqualify a person from holding civil office. In this case, a person cannot hold civil office if:

1. convicted of a felony and full rights of citizenship are not restored⁴ or

2. convicted of a felony and confined in prison on a criminal conviction.

The logical inference, then, is that persons are not disqualified from holding civil office for having been convicted of a felony if their full rights or citizenship have been restored and they are not in prison on a criminal conviction.

SB 1356 disqualifies persons from holding the office of county sheriff if a “convicted felon” at the time of election. Title 34 of the Idaho Code contains no definition of “convicted felon.” Therefore, this term must be defined using the plain words of the term. A felon is “one who has committed a felony.”⁵ Convicted felon, consequently, is a person who has committed a felony and has been convicted for it. SB 1356 makes no distinction between a convicted felon whose full rights of citizenship are not restored and one who has regained those rights. SB 1356 therefore prohibits what the constitution allows.

It could be argued that adding this limitation upon candidates for sheriff is within the power of the Legislature. Article VI, § 4 of the Idaho Constitution provides that:

The legislature may prescribe qualifications, limitations, and conditions for the right of suffrage, additional to those prescribe in this article, but shall never annul any of the provisions in this article contains.

The Idaho Supreme Court, however, examined the premise for this argument in detail and held that suffrage does not include holding office.⁶ Even if the issue were framed as one of suffrage (the citizen’s right to vote for the sheriff candidate of his or her choice), SB 1356 would not pass constitutional muster because it would render the phrase “and who has not been restored to the rights of citizenship” as superfluous language, which the rules of statutory construction discourage, and would annul or invalidate a provision of article VI, something that § 4 expressly disallows.

In summary, the provision of SB 1356 that prohibits *all* convicted felons from serving as county sheriff, including those who have had their full rights of citizenship restored, conflicts with the Idaho Constitution and is therefore unconstitutional.

ADVISORY LETTERS OF THE ATTORNEY GENERAL

Please contact me if you would like to discuss this matter further.

Sincerely,

MITCHELL E. TORYANSKI
Deputy Attorney General

¹ See State v. Dolan, 13 Idaho 693, 92 P. 995 (1907). See also, Idaho Power & Light Co. v. Blomquist, 26 Idaho 222, 141 P. 1083 (1914), and Independent Sch. Dist. v. Pfof, 51 Idaho 240, 4 P.2d 893 (1931).

² See Bingham County v. Idaho Com'n for Reapportionment, 137 Idaho 870, 55 P.3d 863 (2002).

³ See City of Idaho Falls v. Pfof, 53 Idaho 247, 23 P.2d 245 (1933).

⁴ Full rights of citizenship are restored to persons convicted of a felony crime upon final discharge (their satisfactory completion of imprisonment, probation, and parole, as the case may be) except for the right to ship, transport, possess, or receive firearms after conviction for certain offenses. Idaho Code § 18-310.

⁵ Merriam Webster's Collegiate Dictionary, p. 428 (10th ed. 1993).

⁶ See Rudeen v. Cenarrusa, 136 Idaho 560, 38 P.3d 598 (2001).

ADVISORY LETTERS OF THE ATTORNEY GENERAL

March 20, 2008

The Honorable Lee Heinrich
Idaho State Senate
Capitol Annex
Boise, ID 83701

Re: Our File No. 08-22087 – Public Records/Paid Warrants

Dear Senator Heinrich:

Thank you for your letter of March 18, 2008, regarding an inquiry from a constituent about access to public records.

The first question in your letter asks, “Does a private citizen have the right to review county records, specifically regarding paid warrants?” The Idaho Public Records Law provides, in Idaho Code § 9-338(1):

Every person has a right to examine and take a copy of any public record of this state and there is a presumption that all public records in Idaho are open at all reasonable times for inspection except as otherwise expressly provided by statute.

(Emphasis added.) A paid warrant would be a public record. Therefore, it may be examined following a public records request. Generally, the warrant would not be exempt from disclosure. Although, under certain unusual circumstances, perhaps an argument could be made that certain information on the warrant might be exempt from disclosure. I cannot think of any such circumstance, but an exemption would have to be reviewed on a case by case basis.

Your second question asks, “Can a county clerk deny public access to the paid warrants record when a private citizen shows up without warning to review such during regular hours?” The Public Records Act requires, under Idaho Code § 9-338, that public records be produced in response to a request to review the records. Idaho Code § 9-339 provides that records must be produced within three working days of the date of the request. Therefore, if an

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agency receives a request on a Monday, the warrant would have to be made available for review by Thursday of the same week. There is a provision in Idaho Code § 9-339 for an extension of time of up to ten days from the date of the request. Such an extension is provided if there is difficulty in locating or accessing the public record by the records custodian.

Idaho Code § 9-338(7) provides that examination of public records must be conducted during regular office hours, unless the custodian authorizes examination at some alternative time.

I hope that this information is of some assistance to you. I have enclosed two copies of the Idaho Public Records Law Manual, one for you and one for your constituent. If you have further questions, do not hesitate to call upon me.

Very truly yours,

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

ADVISORY LETTERS OF THE ATTORNEY GENERAL

March 25, 2008

The Honorable Stan Bastian
Idaho State Senate
Capitol Annex
Boise, ID 83701

Re: Our File No. 08-22000 – Local Improvement Districts

Dear Senator Bastian:

You have asked whether Idaho municipalities may create a local improvement district (“LID”) to acquire the public water supply facilities of a privately held water company.

Chapter 17 of title 50, Idaho Code, appears to permit creation of an LID for this purpose. The specific code sections that you cited in your letter all support this conclusion, to include Idaho Code § 50-1710, which states, “The council may either purchase, acquire or construct the improvements.” The municipality’s council may enact an ordinance providing for such a purchase and for LID creation after giving notice and holding a hearing pursuant to Idaho Code §§ 50-1708 and 50-1709. This process does not provide for a vote of electors in the prospective district.

In summary, a municipality’s purchase of a water facility from a privately held company through creation of an LID appears permissible.

Please contact me if you would like to discuss this issue further.

Sincerely,

MITCHELL E. TORYANSKI
Deputy Attorney General

ADVISORY LETTERS OF THE ATTORNEY GENERAL

July 2, 2008

The Honorable Les Bock
Idaho House of Representatives
350 N. Ninth Street, Suite 304
Boise, ID 83702

Re: Our File No. 08-01003 – Firearms in Public Buildings

Dear Representative Bock:

This letter is in response to your e-mail inquiry of this office regarding the interpretation of Idaho Code § 18-3302J, enacted by the Idaho Legislature during the 2008 session. Specifically, you have asked the following:

1. First, does the City of Boise have authority to prohibit attendees at Boise City Council meetings from carrying firearms into the City Hall or the City Council meeting itself?
2. Second, does the City of Garden City have authority to prohibit users of its public library from bringing firearms into the Garden City Public Library?

You stated, “The plain language of Idaho Code § 18-3302J appears to answer these questions in the negative.” This interpretation would likely be applied by a court asked to review these questions. If statutory language is unambiguous, a court applies the statute as written and does not resort to legislative history or rules of statutory interpretation to discern legislative intent.¹ Idaho Code § 18-3302J, which took effect on March 28, 2008, states, in relevant part:

Preemption of Firearms Regulation. (1) The legislature finds that uniform laws regulating firearms are necessary to protect the individual citizen’s right to bear arms guaranteed by amendment 2 of the United States Constitution and section 11, article I of the constitution of the state of Idaho. It is the legislature’s intent to wholly occupy the field of firearms regulations within this state.

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(2) Except as expressly authorized by state statute, no county, city, agency, board or any other political subdivision of this state, may adopt or enforce any law, rule, regulation, or ordinance which regulates in any manner the sale, acquisition, transfer, ownership, possession, transportation, carrying or storage of firearms or any element relating to firearms and components thereof, including ammunition.

(Emphasis added.)

I am unaware of any state statute that expressly authorizes cities to adopt or enforce laws, rules, regulations, or ordinances regulating the carrying of firearms into city halls, city council meetings, or public libraries. I am unaware of any state statute prohibiting the practice itself. Indeed, while Idaho Code § 50-308 states that cities have the authority to regulate and punish the carrying of concealed weapons, it does not address or authorize the regulation of openly carrying weapons. In addition, Idaho Code § 50-308 was enacted in 1967, and to the extent it is inconsistent with more recent and more specific statutes, such as Idaho Code § 18-3302J, it may be deemed amended or superseded by a reviewing court. Idaho Code § 50-343 provides that “[n]o city may in any manner regulate the lawful ownership, possession or transportation of firearms when carried or transported for purposes not prohibited by the laws of the state of Idaho.”

While cities, as subdivisions of the state, are constitutionally granted broad police powers to make and enforce police regulations, these regulations may not conflict with state law.² Given the Legislature’s express intent within Idaho Code § 18-3302J for the State to wholly occupy the field of firearms regulation, a city’s regulation of carrying firearms into city hall, into a city council meeting, or into the public library likely conflicts with state law. If a court were to find a local regulation in conflict with Idaho Code § 18-3302J as outlined above, the court would likely hold that the regulation is void.³

Finally, your e-mail message noted that the 1991 Washington Supreme Court case Cherry v. Municipality of Metropolitan Seattle had been cited for the proposition that Idaho cities can prohibit their employees from carrying firearms to work as a condition of employment.⁴ While an Idaho court may hold similarly, this answer cannot be predicted with certainty, since

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the issue has not been decided in a reported case by an Idaho court. Additionally, Cherry, as an opinion of a Washington state court, is not binding upon an Idaho court. Additionally, Washington's firearms preemption statute restricts only "laws and ordinances" that municipalities may enact, which is narrower in scope than Idaho's because Washington's does not also include "rule[s] [and] regulation[s]," as does Idaho Code § 18-3302J.⁵

I hope that you find this analysis helpful. Please know that this letter contains 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

Analysis by:

MITCHELL E. TORYANSKI
Deputy Attorney General

¹ See Sumpter v. Holland Realty, Inc., 140 Idaho 349, 93 P.3d 680 (2004). See also, State v. Ambro, 142 Idaho 77, 123 P.3d 710 (2005).

² See Rowe v. City of Pocatello, 70 Idaho 343, 218 P.2d 695 (1950). See also, Idaho Const. art. XII, § 2.

³ See Envirosafe Serv. of Idaho v. County of Owyhee, 112 Idaho 687, 735 P.2d 998 (1987).

⁴ 116 Wash.2d 794, 808 P.2d 746 (1991).

⁵ See RCWA 9.41.290.

ADVISORY LETTERS OF THE ATTORNEY GENERAL

July 7, 2008

Via Facsimile and U.S. Mail

Representative James W. Clark
8798 N. Clarkview Place
Hayden Lake, ID 83835

Re: Virtual Horse Racing

Dear Representative Clark:

This letter is in response to your letter of April 23, 2008.

QUESTION PRESENTED

Your letter of April 23, 2008, posed the following question to the Office of the Attorney General:

I would like to request an Attorney General's opinion reviewing the legality of virtual horse racing in Idaho.

I think that it is implicit in your question that you are asking this office to opine on the legality of gambling on virtual horse racing, so that is the question that I will address.

I conclude that gambling on virtual horse racing is not authorized under existing Idaho statutes and Idaho Racing Commission Rules and thus would be illegal. I further conclude that if the Idaho Racing Commission were to amend its rules in the manner proposed by proponents of virtual horse racing, the Idaho case law does not provide sufficient guidance to answer the question of whether gambling on virtual horse racing would be authorized by Idaho law.

ANALYSIS

A. Defining the Facts to Be Considered

To answer your question, I must first define “virtual horse racing.” As an abstract matter, I would define “virtual horse racing” broadly as “a computer simulation of horse racing shown in real time” by analogy to the dictionary definition of “virtual reality”: “A computer simulation of a real or imaginary system that enables a user to perform operations on the simulated system and shows the effects in real time.” The American Heritage Dictionary of the English Language (3d ed. 1992) (electronic version). The key difference between virtual horse racing and virtual reality is that the viewer of virtual horse racing would be passive and unable to influence events in the computer simulation (*e.g.*, the viewer could not make a given horse run faster or tell a jockey to conserve the horse’s energy for the final stretch), but a participant in virtual reality (*e.g.*, a flight simulator) influences the events simulated (*e.g.*, by operating the virtual airplane’s controls to turn, climb, etc.).

Moreover, the general definition of virtual horse racing would encompass everything from the crudest depiction of horse races where the winner is picked by an electronic “flip of the coin” to sophisticated software in which there are independent simulations of each horse and interactive results between the virtual horses that are not known or knowable in advance. The broad definition of virtual horse racing would also include the equivalent of “play-on-demand” computer games like solitaire or hearts as well as scheduled events with set starting times. There are too many unknowns concerning all of the possible ways that a virtual horse racing computer simulation could be configured to address your question generally.

Thus, I conclude that to answer your question, I must focus on a specific virtual horse racing proposal. I have read a description of a virtual horse racing proposal provided by an attorney for the company that is developing virtual horse racing software and have viewed a virtual horse racing demonstration prepared for representatives of the Offices of the Governor, the Attorney General, and the Idaho State Police. For purposes of this letter, I will accept the following description of the specific virtual horse racing proposal:

Virtual Racing is a live . . . event, with each race run in real-time. The virtual horse racing system consists of

computerized horse races that are rendered on computer servers, and . . . they can be simulcast[.]. The virtual horse races consist of . . . graphics that show the progression of a race from post to finish. The results of the race are not determined by a random number generator and are not known at the beginning of the race. Instead, in the virtual race system, each competitor's [virtual horse's] goal is to reach the finish line in the most expedient fashion, realizing its own limitations of stamina and optimal running speed. Each competitor [*i.e.*, each virtual horse and jockey] will make a tactical decision depending on its position in the race and its current parameter levels, such as remaining stamina and acceleration potential. Each competitor also has its own tendencies and preferences, such as surface and going preferences, and aggression tendencies, which equate to bonuses or penalties to the available speed and acceleration during an event. It is real time, by a computer algorithm, that considers an array of factors such as horse attributes, training histories, and racing tactics on a frame-by-frame, second-by-second basis.

As in all horse racing, a player's [bettor's] chance of correctly determining the outcome of the race is increased if: a player is knowledgeable of a horse's characteristics (*e.g.*, speed, stamina, running style); the horse's blood line (*e.g.*, is the horse a pacer, does the horse run in front, what of its genetics indicate a horse's desire to win, how quickly does the horse recover from injury, how quickly does the horse recover from a previous race); how the horse has been trained; the horse's behaviors during certain conditions (*e.g.*, how the horse behaves in certain gates, how quickly does the horse get out of the gate, how does the horse behave when against a rail, at what point the horse usually sprints for the line, the tendency to run to the lead from the start, run for position in the middle of the pack, run for the lead near the end or run at the back of the pack making a late run); as well as how the horse races on a specific track, the length of the race, weather conditions, and its competition.

[T]he outcome of the Virtual Race is determined by . . . factors that include the intrinsic abilities of the participants [the virtual horses]. For example, the participant's training and how the participant prepared for the event, the participant's natural predispositions to perform in the conditions presented by the venue, the tactics the participant has employed for the virtual race, and the participant's reaction and natural predisposition to react to the events that occur as the race unfolds in real time, are all factors that affect the ultimate race. In addition to the natural ability and condition of the horse, the outcome of a horse race depends on the training schedules of the horse, the horse's running strategy, the track surface and weather conditions, as well as real time decisions in the race. In addition to the characteristics of a horse, there is a contributing factor imposed by the rider of the horse. Since all components are logically separable, different combinations produce different results. Further, if you raced the same horses against each other several times, the outcome (the order of the finishing of the horses) would not be the same and there may be a different winner. This is true for several reasons, including the fact that their performance in these races would have been entered into their past performance history, the affect of interim workouts, and whether or not there is a jockey change. Because of the foregoing, the races are handicappable by players placing wagers. . . .

It is important to note that as in all horse races, the Virtual Race is broadcast on a fixed schedule. Thus, there is no ability for those placing wagers to play on demand. Further, as in all horse races, no one knows the outcome of the race until it is completed. The outcome of the virtual race is not based on a race that has statistically pre-determined fixed odds or specified chances of winning. Instead, the outcome is determined in real time as the virtual race takes place. Thus, each event is a unique race for which the outcome is unknown when the race begins and for which the outcome of the race cannot be fixed. Players make a specific wager on the outcome of the event using their knowledge

and evaluating the information available and then use the pari-mutuel system already in existence and utilized by the horse racing track.

Letter of Sheila R. Schwager, January 3, 2008, to Mike Bosen, Chairman, Idaho State Racing Commission.

In elaboration of Ms. Schwager's letter, we were told during the demonstration of virtual horse racing that existing pari-mutuel wagering systems would be used to take bets on the virtual horse races as they are used to take bets on races conducted on site or on races simulcast from race tracks other than the race track where the bets are placed. Further, virtual horse races would be scheduled in advance with known fields of virtual horses so that bettors would have an opportunity to assess the field before the virtual race. And, virtual horse races could be "simulcast" to other race tracks as well.

B. Reviewing the Controlling Constitutional and Statutory Law

The starting point to decide what gambling is legal in Idaho is article III, § 20 of the Idaho Constitution. The section provides:

§ 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.

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Idaho Code § 38-1801 defines gambling. The system of pari-mutuel betting on virtual horse racing that is described above falls within Idaho Code § 38-1801's definition of gambling because it involves wagering on the outcome of an event:

§ 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

The question then becomes whether the system of wagering on virtual horse racing described above falls within article III, § 20's exceptions to its prohibition against gambling. Article III, § 20, allows three kinds of gambling. Each kind of gambling has two components: (1) an allowable type of game, and (2) circumstances under which the game may be conducted. The three kinds of allowable gambling are:

Type of Game	Circumstances Under Which Game Is Allowed
a. Lotteries	Conducted by the State pursuant to enabling legislation
b. Pari-mutuel betting	Conducted in conformity with enabling legislation
c. Bingo & Raffles	Operated by qualified charitable organizations in the pursuit of charitable purposes if conducted in conformity with enabling legislation

Virtual horse racing is neither a lottery operated by the State nor a bingo game or raffle operated by a qualified charitable organization. Thus, virtual horse racing would be authorized only if it is pari-mutuel betting conducted in conformity with enabling legislation. I will assume in this letter that betting on virtual horse racing will use the pari-mutuel betting system already in place in race tracks in Idaho so that there will no issues regarding whether betting is pari-mutuel.¹ That leaves only the issue of whether the pari-mutuel betting will be conducted in conformity with enabling legislation.

C. Analysis of the Question Presented

The enabling legislation for pari-mutuel betting at horse racing tracks is the Idaho Racing Act, Idaho Code §§ 54-2501, *et seq.* (the “Act”). The Act does not define the word “race” and in particular does not define “race” to include or exclude a virtual horse race. Thus, I must delve deeper into the Act to determine whether it otherwise provides an implicit definition of the term “race.” Several of the Act’s definitions in Idaho Code § 54-2502 provide a starting point:

(4) “Host facility” means the racetrack at which the race is run, or the facility which is designated as the host facility if the race is run in a jurisdiction which is not participating in the interstate combined wagering pool.

. . . .

(10) “Race meet” means and includes any exhibition of thoroughbred, purebred, and/or registered horse racing, mule racing or dog racing, where the pari-mutuel system of wagering is used.

. . . .

(12) “Simulcast” means the telecast or other transmission of live audio and visual signals of a race, transmitted from a sending track to a receiving location, for the purpose of wagering conducted on the race at the receiving location.

Subsection (4)’s definition of “host facility” does not define “race,” but it ordinarily requires a “race” to originate at a “race track where the race is run,” unless the jurisdiction where the race is run does not participate in the interstate combined wagering pool. Subsection (4) can thus fairly be read to require a “race” to be something that originates at a “race track,” even if that race track does not necessarily participate in the interstate wagering pool.

Subsection (12)’s definition of “simulcast” refers to a “telecast or other transmission of live audio and visual signals of a race, transmitted from

a sending track,” which reinforces the conclusion that a “race” must originate at a “track,” which in context seems to be the same thing as a “race track.” Both subsections (4) and (12) require “races” to originate at “tracks,” but neither explicitly resolves the issue of whether the originating “race” may be a virtual horse race rather than a race featuring flesh-and-blood horses.

Subsection (10), in contrast, defines a “race meet” to “mean[] and include[] any exhibition of thoroughbred, purebred, and/or registered horse racing, [or] mule racing . . . , where the pari-mutuel system of wagering is used.” This reference to “race meets” is unambiguous—it refers to live animals, and there is no registration system for virtual horses. This interpretation is supported by history. When this definition was enacted in 1963, there were no computer-generated virtual horses; only live horses could then be registered.² *See also* Idaho Code § 54-2510, which provides that “at least one (1) race each day at each horse race meet shall be limited to Idaho bred horses” and which refers to the race meet licensee paying 10% of the purse won by an Idaho-bred horse to the Idaho breeder. Both of these provisions of Idaho Code § 54-2510 support the interpretation of the Act that race meets require live horses or mules to be raced. But, in the end, the requirement that a race meet must include races with live horses or mules and other statutory references to “live race meets,” *see* Idaho Code §§ 54-2512 and 54-2513, do not answer the question whether “race meets” can also include virtual horse races and whether races can include virtual horse races.

I, therefore, conclude that the Idaho Racing Act does not explicitly answer the question of whether a “race” under the Act can include a virtual horse race. At that point, I must turn to ordinary rules of statutory construction. One common rule of statutory construction is that “a word is known by the company it keeps” and that “only those commonly understood meanings, which are consistent with the context given, are to be considered in determining the meaning of a term undefined by statute.” State v. Hammersley, 134 Idaho 816, 821, 10 P.3d 1285, 1290 (2000). Application of this rule counsels strongly in favor of the word “race” meaning a race involving live horses or mules because the company that it keeps is with “thoroughbred, purebred, and/or registered horse” and “mules.”

Another rule of statutory construction is that courts will defer to an administrative construction of a term not defined in a statute under the following circumstances:

An agency's interpretation of its statutes is entitled to deference. *Simplot v. Idaho State Tax Comm'n*, 120 Idaho 849, 820 P.2d 1206 (1991). . . . The four-prong test of *Simplot* is: (1) the court must determine whether the agency has been entrusted with the responsibility to administer the statute at issue, (2) the agency's statutory construction must be reasonable, (3) the court must determine that the statutory language at issue does not treat the precise issue, and (4) a court must ask whether any of the rationales underlying the rule of deference are present. *Id.* If this test is met, the court must give "considerable weight" to the agency's interpretation. *Id.*

Pearl v. Board of Professional Discipline of Idaho State Bd. of Medicine, 137 Idaho 107, 113, 44 P.3d 1162, 1168 (2002). The case law recites five non-exclusive rationales that may support deference to an administrative agency's construction of a statute:

The fourth prong [of *Simplot*] requires the court to look for the rationales underlying deference. The rationales to be considered include:

(1) the rationale requiring that a practical interpretation of the statute exists, (2) the rationale requiring the presumption of legislative acquiescence, (3) the rationale requiring agency expertise, (4) the rationale of repose, and (5) the rationale requiring contemporaneous agency interpretation.

Preston v. Idaho State Tax Comm'n, 131 Idaho 502, 505, 960 P.2d 185, 188 (1998). "If the underlying rationales are absent then their absence may present 'cogent reasons' justifying the court in adopting a statutory construction which differs from that of the agency." *J.R. Simplot Co.*, 120 Idaho at 862, 820 P.2d at 1219. When only some of the rationales are present, the court must balance the supporting rationales, as all are not weighted equally. *Id.* at 862, 820 P.2d at 1219. "If one or more of the rationales underlying the rule are present, and no 'cogent reason' exists for denying the agency some defer-

ence, the court should afford ‘considerable weight’ to the agency’s statutory interpretation.” *Id.* at 862, 820 P.2d at 1219.

Canty v. Idaho State Tax Com’n, 138 Idaho 178, 184, 59 P.3d 983, 989 (2002).

The Idaho State Racing Commission (the “Racing Commission”) has construed the meaning of “race” in its Rules Governing Horse Racing, IDAPA 11.04.01.000, *et seq.* Rule 9.39, IDAPA 11.04.01.009.39, defines “race” as “[a] contest between horses for purse, stake or reward on any licensed race track and in the presence of a Judge or Judges.” Rule 9.20, IDAPA 11.04.01.009.20, defines “horse” to “[i]nclude[] filly, mare, colt, horse and gelding” Thus a “race” must be run by “horses,” and the examples given to elucidate the meaning of “horses” are live animals: fillies, mares, colts, horses and geldings. Again, applying the maxim that a word is know by the company it keeps, and the principle that when a statute or rule contains both general terms and specific terms, the general terms will take their meaning from the specific terms, *see State ex rel. Wasden v. Daicel Chemical Indus., Ltd.*, 141 Idaho 102, 109, 106 P.3d 428, 435 (2005), I conclude that the word “horse” used in these rules means a flesh-and-blood animal.

The Racing Commission’s Rules Governing Simulcasting, IDAPA 11.04.02.000, *et seq.*, do not contradict this construction of the word “horse.” Rule 7, IDAPA 11.04.02.007, refers to “simulcasting of horse . . . races.” Under Rule 10.23, 11.04.02.010.23, simulcasts originate from “Host or Host Association[s],” which are “racing association[s] conducting a licensed horse racing meeting . . . authorized . . . to simulcast its racing program.” Under Rule 10.35, IDAPA 11.04.02.010.35, a “simulcast” is “[t]he simultaneous telecast of audio and visual signals of running horse races and other permitted pari-mutuel events conducted for the purposes of pari-mutuel wagering.” No simulcast rule explicitly authorizes as a “permitted pari-mutuel event” a simulcast of virtual horse racing.

The Simulcast Rules do not define “horse” or “horse race.” However, unless the Racing Commission were to explicitly state that the Simulcast Rules have different definitions of “horse” or “horse race” than the Rules

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Governing Horse Racing, I opine that a reviewing court would say that the meaning of “horse” and “horse race” in the Simulcast Rules would be the same as in the Rules Governing Horse Racing. That being the case, none of these conditions for a simulcast are met by a broadcast of virtual racing—there are no audio or visual signals of running horse races; there are no horse races held and simulcast from a host association.

Now, I return to the Simplot standard to see whether a reviewing court would defer to the Racing Commission’s construction of “horse” and “race” in its current rules. The four Simplot factors all apply.

- (1) The Racing Commission is entrusted with administering the Idaho Racing Act. *See* Idaho Code § 54-2506 and § 54-2507 setting out the duties of the Racing Commission.
- (2) The Racing Commission’s construction of the term “race” to mean a race with actual flesh-and-blood horses is reasonable.
- (3) There is an ambiguity in the statute, which does not explicitly defines “horse” or “race.”
- (4) Several of the rationales for deference are present.
 - (a) Defining “race” to require or not to require live horses answers a practical question. *See Canty*, 138 Idaho at 184, 59 P.3d at 989, citing Simplot that “statutory language is often of necessity general and therefore cannot address all of the details necessary for its effective implementation,” so the agency must answer such questions, 120 Idaho at 858, 820 P.2d at 1215.
 - (b) Rule 9.20 defining “horse” and Rule 9.39 defining “race” have been in place at least since 1993, so there is a presumption of legislative acquiescence. *See Canty*, 138 Idaho at 184, 59 P.3d at 989, which states that legislative approval of rules satisfies this requirement. The Commission’s Rules, which were

first codified in their present form in 1993 after the creation of the Administrative Rules Coordinator's Office, had to be approved by the legislature, as did every amendment to them. *See* Idaho Code § 67-5291.

- (c) There is agency expertise brought to bear in defining “race” and “horse.” The Racing Commission has horse racing expertise. *Cf. Canty*, 138 Idaho at 184, 59 P.3d at 989 (Tax Commission has expertise in area of tax law); *Pearl v. Board of Professional Discipline of Idaho State Bd. of Medicine*, 137 Idaho 107, 114, 44 P.3d 1162, 1169 (2002) (Board of Medicine has expertise in medical discipline case); *Simplot*, 120 Idaho at 859, 820 P.2d at 1216 (“the expertise of an agency is often useful in technical areas of the law where the risk of failing to understand all of the implications of a decision are great”).
- (d) The definitions of “horse” and “race” have been in place for years, so there is an interest in repose. *Simplot*, 120 Idaho at 858, 820 P.2d at 1215.

The fifth rationale—whether the construction was contemporaneous with the 1963 Idaho Horse Racing Act—cannot be readily determined because of the lack of archives for most rulemaking preceding 1993.

This *Simplot* analysis leads me to opine that a reviewing court is most likely to hold that under current statutes and rules the only pari-mutuel gambling on horse racing authorized by enabling legislation is wagering on live horses running in races, whether in person at a track in Idaho or simulcast from another track elsewhere.

Thus, I conclude under the current statutes and rules that pari-mutuel gambling on virtual horse racing has not, as required by article III, § 20, been “authorized by . . . enabling legislation.”

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This conclusion does not end the inquiry concerning your question. I have been informed that the Racing Commission has been given proposed amendments to its rules, but has not yet officially acted upon the proposed amendments, and that the proposed amendments would address virtual horse racing. The proposed amendments would add the following definitions to the Simulcasting Rules:

[NEW] 22A. Horse Race. A contest authorized by the Commission that is among horses, including virtual horses, using the pari-mutuel wagering system at any licensed race track.

[REVISED] 23. Host or Host Association.
The racing association conducting a ~~licensed horse racing meeting~~ when it is authorized by the Commission to simulcast its horse racing program. It may also be considered the sending track which means any track from which simulcast signals originate.

[NEW] 39A. Virtual Horse. A computer-based, three dimensional graphical race horse, produced in a manner to replicate the characteristics of a living race horse.

If the Racing Commission were to adopt these or similar rules, the analysis of whether gambling on virtual horse races has been authorized by enabling legislation becomes a much closer question.³ I say this for the following reasons.

The Idaho Racing Act's definition of "simulcast" as "the telecast or other transmission of live audio and visual signals of a race, transmitted from a sending track to a receiving location, for the purpose of wagering conducted on the race at the receiving location" may have some flexibility not found in terms like "race meet," which I interpret always to require at least some live horses. The transmission of a virtual race would have live audio or visual signals, could be set up to be broadcast from a sending track to a receiving track, and could be telecast for the purpose of wagering conducted at the receiving track.

Whether a virtual race would be a race under the statute is the question. I have previously concluded that there is no definition of “horse” in the Idaho Racing Act and that “race” is not defined unambiguously to require real and not virtual horses. The question becomes whether the Racing Board can by rule define horse and horse race to include virtual horse racing.

The answer to that question would hearken back to another Simplot analysis and whether a court would defer to the Racing Board’s construction of these simulcasting terms. The four Simplot factors are: (1) whether the agency has been entrusted with the responsibility to administer the statute at issue, (2) whether the agency’s statutory construction is reasonable, (3) whether the statutory language at issue does not treat the precise issue, and (4) whether any of the rationales underlying the rule of deference are present. Canty, 138 Idaho at 184.

For the reasons given previously, factors (1) and (3) are met. Factor (2) is more problematic. I can find no tools in the case law to reliably predict how a district court, or ultimately the Idaho Supreme Court, would rule on whether it is reasonable to include virtual horse racing within the races that may be simulcast. The next two paragraphs provide examples of arguments that could be made in favor of and in opposition to the reasonableness of the Racing Commission’s proposed rules for virtual horse racing.

On the one hand, a virtual horse race is similar to a simulcast in several regards: Both originate at a site other than the race track at which the bettors are wagering. Both provide a video or audio representation of horses racing whose outcome no bettor at the Idaho track can know in advance of a race, and the bettor cannot see or hear the simulcast race with his or her own eyes and ears (*i.e.*, the bettor must rely upon a video or audio transmission to watch the race). Both show scheduled events rather than allow play on demand. Both unfold in real time. Both would serve the purpose of providing additional revenues for “distribution pursuant to the provisions of horsemen’s agreements and rules of the commission.” Idaho Code § 54-2508. There are undoubtedly other analogies to be drawn. Thus, one could argue that construing the simulcast provisions of the Act to include virtual horse racing is reasonable.

On the other hand, a virtual horse race has no explicit grounding in Idaho law. Virtual horse racing was unknown when the Idaho Racing Act was passed, and it has never been amended to allow virtual horse racing. The Act's specific references to live horses and mules do not authorize racing of anything but live horses. Additional arguments could also be made. Thus, one could argue that construing the simulcast provisions of the Act to include virtual horse racing is not reasonable.

It is not apparent which of the two preceding paragraphs' arguments and analyses would prevail. Nevertheless, I will examine the fourth Simplot factor—the five rationales for deference—to see whether any of them are present. I conclude that three of the five are present. The first rationale—the need for a practical construction—is present because the industry needs to know whether virtual horse racing may be part of a legal simulcast. The second rationale—legislative acquiescence—cannot be known until after the rule is proposed and reviewed by the Legislature. The third rationale—the exercise of agency expertise—is present because the agency is applying its expertise to define an undefined term. The fourth rationale—repose in the agency interpretation—is not present because this would be a new rule added to an existing rule. The fifth rationale—a contemporary agency interpretation—would probably be present because this interpretation is contemporaneous with the first time that the issue has been or could be presented to the agency. *Cf. Hamilton ex rel. Hamilton v. Reeder Flying Service*, 135 Idaho 568, 573, 21 P.3d 890, 895 (2001) (statute was interpreted by rule shortly after the statute was enacted). Accordingly, I conclude that a court would probably hold that there are reasons for deference to the Racing Commission's interpretation that would satisfy the fourth Simplot prong.

That brings me back to the second Simplot prong: reasonableness of the interpretation. My analysis is that there is insufficient guidance in the Idaho cases to answer this question. Accordingly, I conclude under the current statutes and the proposed rules that I cannot offer a better analysis on whether pari-mutuel gambling on virtual horse racing would be “authorized by . . . enabling legislation” than the following: The question is a very close call that will require resolution by the Idaho judiciary.

ADVISORY LETTERS OF THE ATTORNEY GENERAL

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 yours,

MICHAEL S. GILMORE
Deputy Attorney General

¹ Of course, the virtual horse racing software could be used in wagering systems other than pari-mutuel wagering. If there were no legal restrictions to the contrary, nothing in the software would prevent it from being used to allow betting against the house (*e.g.*, the house could offer odds on whether the brown filly in Race 1 would win, place or show). At least as demonstrated to us, the software creating the virtual horse race was independent of the system of betting upon the race.

² This definition of “race meet” was part of the original enactment of the Idaho Racing Act (then known as the “Idaho Horse Racing Act”). *See* 1963 Idaho Session Law, chapter 64, § 1, p. 247. The definition was twice amended—to add mule racing, 1984 Idaho Session Law, chapter 83, § 2, p. 661, and to add dog racing, 1987 Idaho Session Law, chapter 316, § 1, p. 158—but the essentials of the definition have not changed since 1963.

³ There are two kinds of review that apply to any newly adopted rule. One kind of review, and the kind that is always done for a newly adopted rule, is legislative review under Idaho Code § 67-5291. Legislative review requires standing legislative committees to examine every rule adopted in the previous year to determine whether “the rule violates the legislative intent of the statute under which the rule was made.” If the Legislature determines by a concurrent resolution that the rule violates the legislative intent and rejects the rule, the rule does not take effect (or ceases to be in effect if it is already in effect as a temporary rule). This process is political, and the substantive decision of whether a rule violates the legislative intent has not yet been subject to judicial review, although the Idaho Supreme Court has addressed issues of whether proper procedure was followed to reject a rule. *See Mead v. Arnell*, 117 Idaho 660, 791 P.2d 410 (1990). Legislative review is a political process, and this letter expresses no opinion on the likely results of legislative review.

The other kind of review, which would require a challenge to the proposed rules before the district court, *e.g.*, through a declaratory judgment action, *see* Idaho Code § 67-5278, or a petition for judicial review of the rule, *see* Idaho Code § 67-5270, is a judicial process. It is the purpose of this letter to attempt to review the issues that a district court would address.

ADVISORY LETTERS OF THE ATTORNEY GENERAL

July 31, 2008

Timothy L. Fleming
Boise County Prosecuting Attorney
P.O. Box 186
Idaho City, ID 83631

Re: Our File No. 08-00150 – County Prosecutor Qualifications

Dear Mr. Fleming:

This letter responds to your inquiry concerning the qualifications of county prosecuting attorney. Specifically, you have asked whether a candidate for prosecuting attorney, who is an affiliate member of the Idaho State Bar, must transfer to active status by the time of the general election in order to be elected to that office.

An affiliate member of the Bar who has been elected prosecuting attorney must transfer to active status *by the time he assumes office*. Idaho Code § 31-2601 states:

No person shall be eligible to qualify for the office of prosecuting attorney, who is not an attorney and counselor at law duly licensed to practice as such in the district courts of the state *at the time he assumes office as prosecuting attorney*.

(Emphasis added.) Idaho Code § 34-623(2) sets forth the qualifications a person must have by the day of the general election. It states:

No person shall be elected to the office of prosecuting attorney unless he has attained the age of twenty-one (21) years at the time of his election, *is admitted to the practice of law within this state*, is a citizen of the United States and a qualified elector within the county.

(Emphasis added.)

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The definitions of “active member” and “affiliate” of the Idaho State Bar are contained in Rule 301 of the Idaho Bar Commission Rules, as adopted by order of the Idaho Supreme Court in which the inherent power over admission to practice law resides.¹

“Active Member” means any person who is not a judge and who is licensed to practice law in the State of Idaho and is engaged in the active practice of law in this state.”

IBCR 301(a). Since being an attorney and counselor at law, duly licensed to practice as such in the district courts of the state, is a qualification of holding office, being an active member of the Bar is required of prosecuting attorneys at all times while holding office.

“Affiliate” means any person who has been admitted to the Bar of the State of Idaho but is not engaged in the active practice of law within the State of Idaho and who has no voting rights in matters concerning the regulation of the practice of law in this state.

IBCR 301(b). Although not engaged in the active practice of law, affiliates are persons who are admitted to the practice of law, which is the requirement for prosecuting attorney candidates on election day.

Should an affiliate who has been elected prosecutor be unable to transfer to active status before the first day of his term of office, a vacancy in the office of prosecuting attorney will have been created and must be filled pursuant to the procedures set forth in Idaho Code § 59-906.

I hope that you find the information contained in this letter helpful. It is an informal and unofficial expression of the views of this office based upon the research of the author.

ADVISORY LETTERS OF THE ATTORNEY GENERAL

Sincerely,

MITCHELL E. TORYANSKI
Deputy Attorney General

¹ See In re Edwards, 45 Idaho 676, 266 P. 665 (1928). See also Idaho Code § 3-408, which codifies the Supreme Court's supervisory powers.

ADVISORY LETTERS OF THE ATTORNEY GENERAL

December 23, 2008

The Honorable Darrell Bolz
Idaho House of Representatives
3412 College Ave.
Caldwell, ID 83605

Re: Our File No. 08-24676
Discretionary Authority of Legislature over
Constitutional Pay Limitations

Dear Representative Bolz:

This letter is in response to your recent inquiry regarding the constitutional limitations on legislative authority with regard to salary adjustments for the Idaho Legislature and Idaho's constitutional officers.

QUESTIONS PRESENTED

1. Does article V, § 27, of the Idaho Constitution prohibit the Legislature from amending Idaho Code § 59-501 to eliminate the incremental increases in 2009 and 2010 for the constitutional officers?
2. May a constitutional officer agree to have his or her increase "zeroed out" as an appropriation?
3. Can the Legislature simply not appropriate the money for the increases?
4. May the Legislature amend the recommendations of the Citizens Committee on Legislative Compensation?
5. Must both houses of the Legislature reject the recommendation of the Citizens Committee, or would it simply apply to the body that rejected it?

INTRODUCTION

The Idaho Constitution addresses the salaries of elected constitutional officers and legislators. Two provisions of the constitution both frame and control the analysis with regard to adjustments of these salaries.

The first three questions require analysis under article V, § 27 of the Idaho Constitution. The final two questions require analysis under article III, § 23 of the Idaho Constitution. Importantly, the Legislature has discretion to accept or reject legislative salary increases at the start of a legislative term of office, there is no discretion permitted for in-term adjustment of the executive and judicial constitutional officers' salaries. Section 23 of article III expressly grants the Legislature the ability to reject a proposed salary increase within the first 25 legislative days of the legislative session immediately following the recommendation of the Citizens Committee on Legislative Compensation ("Citizens Committee"). Conspicuously absent from article V, § 27, is a similar means of rejection or any degree of discretion by either the Legislature or the constitutional officers themselves. Each of these constitutional provisions will be discussed in greater detail below.

SHORT ANSWERS

1. The Legislature may amend Idaho Code § 59-501, but article V, § 27, would prohibit those amendments from taking effect prior to the next term of office for the constitutional officers.
2. Constitutional officers may not agree to have their increase "zeroed out," because article V, § 27, and Idaho Code § 59-501 apply to the constitutional officers, not the persons holding the constitutional office.
3. The Legislature must appropriate the money to the constitutional officers, who may then elect to return the money to the state.¹
4. The Legislature can only reject or reduce the recommendations of the Citizens Committee.

5. Both houses must approve a concurrent resolution rejecting or reducing the Citizens Committee's recommendation prior to the 25th legislative day.

ANALYSIS

A. Article V, § 27, Prohibits In-Term Salary Adjustments

In order to fully understand the limitation placed on the Legislature and other political institutions in the province of these constitutional officer salaries, the text of the Idaho Constitution is an appropriate starting point. Article V, § 27, states:

Change in compensation of officers.—The legislature may by law diminish or increase the compensation of any or all of the following officers, to wit: governor, lieutenant governor, secretary of state, state controller, state treasurer, attorney general, superintendent of public instruction, justices of the Supreme Court, judges of the court of appeals and district courts and magistrate judges; but no diminution or increase shall affect the compensation of the officer then in office during his term, provided, however, that the legislature may provide for the payment of actual and necessary expenses of these officers incurred while in performance of official duty.

(Emphasis added.)

Consistent with this section of the constitution, in 2006 the Legislature enacted the most recent amendments to Idaho Code § 59-501, which establishes the pay of the executive constitutional officers and provides for incremental increases on an annual basis throughout their January 2007 to January 2011 terms of office. The amounts of the incremental increases were established prior to the commencement of the constitutional officers' current elected terms in January 2007. The Legislature sought to smooth out increases to the constitutional officers by incrementally increasing the salaries of the officers, but, for constitutional purposes, the incremental increases must be analyzed no differently than if a lump sum increase had been approved. Thus,

any change to Idaho Code § 59-501 to increase, decrease, or eliminate an increase (this includes “freezing”) would operate as an in-term “diminution” in the compensation of the officer.

B. An Officer’s Refusal to Accept a Salary Increase Cannot Eliminate a Previously Approved Increase

Article V, § 27, is a limitation on the legislative power to reduce previously enacted salaries for certain executive and judicial officers. It does not prohibit the officers themselves from voluntarily agreeing to return part of their compensation once they have received it. A question has arisen regarding a constitutional officer’s ability to consent to a “freeze” of his or her salary, which would operate as an elimination of a previously enacted increase. An officer may be able to refuse to accept a portion of his salary, but it would require that the amount be appropriated to the officer and then returned by the officer in order to comply with the constitutional restriction on in-term adjustments to compensation.² In other words, the constitution specifically prohibits the Legislature, during the term of the elected official, from “zeroing out” an increase that has been enacted properly before that term began. This process insures that the salary of an officer is not increased or diminished in the officer’s term contrary to the constitutional limitation.

Practically speaking, this result flows logically from the constitutional restriction. The restriction within the constitution was intended to prevent the salaries of officers from becoming political bargaining chips. Additionally, the office survives whoever holds it. Therefore, a subsequent holder of the office should not be hindered by the political maneuvers of the current holder of the office. If the current holder of an office were to refuse his increases, this refusal would result in a diminution of salary within the current officer’s term because the increase had previously been enacted. This enactment binds the Legislature in a commitment to appropriate the amount designated in one of the few limitations on the plenary authority of the Legislature over the state budget.

The significance of the commitment created by the constitution is readily apparent. For example, an incumbent office holder could refuse his salary increase in his last year as retribution against a political opponent who defeated him at the polls. This is precisely one of the scenarios contemplated

by the constitution. Similarly, the officers of one party could determine that they were going to be “fiscally responsible” and refuse their increases and subject their opponents of another party to political pressure. Or, in another example, a well-to-do officer could ask that his salary be cut in half and limit the field of potential challengers. The constitution appears to place the constitutional salaries of the enumerated offices above this type of political gamesmanship. Although cumbersome at times, the constitution clearly intended that the salaries of the enumerated officers not be subjected to the annualized pressures of the Legislature.

However, the constitution does not prevent an officer from returning part of his compensation to the State by an affirmative act (for example, writing a check) on the officer’s part after the officer has received his or her compensation. That is a matter for the officer to decide. The officer may also be taxed on the full amount of his compensation, even if he returns a portion of it. Compensation for services actually received by an individual is included in his or her gross income if that person has the power to exercise some right or power over it. This would include the right to decide whether or not to repay some of the money to the payee. The repayment may qualify as a deductible contribution, depending on each individual’s situation.

There is some authority for the proposition that amounts an individual taxpayer is *required* to repay to his or her employer from compensation can, in some circumstances, exclude the repayment amount from income. The obligation to repay must arise before the right to receive the compensation accrues to the taxpayer, but, as outlined within this letter, the right to receive the increased compensation accrues to the officer at the start of his or her term and cannot be altered during that term.

C. Idaho Code § 59-501 Operates as an Appropriation in the Absence of an Express Appropriation

The limitation on alteration of Idaho Code § 59-501 exists, in part, because the constitutional limitation, coupled with the enactment of Idaho Code § 59-501, operates as an appropriation. In Reed v. Huston, 24 Idaho 26, 132 P. 109 (1913), the Legislature adopted a statute setting the salary of the Commissioner of Immigration, Labor and Statistics but then failed to appropriate the money to pay the salary. The court, relying on article V, § 27, treat-

ed the act setting the salary as an appropriation and directed the Controller (Auditor) to pay the salary out of any moneys available. A similar scenario is currently being contemplated. Idaho Code § 59-501 has set the salaries of the constitutional officers, but the Legislature is contemplating not providing an appropriation sufficient to fulfill the requirements of the statute. If this scenario occurred, application of article V, § 27, of the Idaho Constitution would treat Idaho Code § 59-501, which fixes the salaries of the constitutional officers, as the appropriation. A failure to appropriate and pay the salaries fixed by statute would result in an unconstitutional in-term diminution of the salaries of the constitutional officers. The Controller would have the authority to insure that the officer's salaries were paid in full.

D. Article III, § 23, Permits Legislative Rejection or Reduction of Legislative Salary Increases

Legislative salaries are largely placed beyond the reach of the Legislature. Significantly, three primary checks exist on the ability of the Legislature to set its salaries. First, a citizens committee fixes the salaries of legislators. Second, the salary fixed by the citizens committee is not effective until an intervening election occurs. Third, the Legislature can reject the increase only by a concurrent resolution of both houses within 25 legislative days. The relevant portion of the constitution reads as follows:

The rates thus established shall be the rates applicable for the two-year period specified unless prior to the twenty-fifth legislative day of the next regular session, by concurrent resolution, the senate and house of representatives shall reject or reduce such rates of compensation and expenses. In the event of rejection, the rates prevailing at the time of the previous session, shall remain in effect.

Importantly, the concurrent resolution must be approved by both houses prior to the 25th legislative day. In Beitelspacher v. Risch, 105 Idaho 605 (1983), the Idaho Supreme Court deferred to the Legislature's interpretation of its own rules in a challenge to whether the resolution rejecting a salary increase was approved by both houses prior to the 25th legislative day. Within Beitelspacher, the resolution was rejected in the House and, on the 24th legislative day, in the Senate. On the 25th legislative day, a motion to

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reconsider was made in the Senate, which was rejected. The court declined to intervene and determined that the Legislature, by signing the resolution and paying its members at the prior salary, had timely rejected the increase.

The Legislature has the authority to reject the increase, provided that both houses approve a concurrent resolution rejecting the increase prior to the 25th day. This rejection will operate, regardless of economic and political circumstances, until the next meeting of the Citizens Committee and term of office for legislators.

CONCLUSION

As outlined above, strict limitations exist with regard to in-term adjustments of constitutional officer and legislator salaries. Both article III, § 23, and article V, § 27, provide the Legislature with clear guidance and limitations on the adjustments to these salaries and must be complied with in their entirety. Additionally, the return of compensation, which has accrued to the officer, may trigger specific tax issues that should be discussed with their own accountant or attorney. I hope that you find this letter helpful. Please contact me if I can be of further assistance.

Very truly yours,

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

¹This election may trigger income tax events, which are beyond the scope of this opinion.

² A refusal of this type would likely require that the officer receive his or her salary and then donate it back to the State. As explained elsewhere within this letter, this process would create certain tax implications that should be addressed by the officer and his accountant or private attorney.

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