

**IDAHO
ATTORNEY
GENERAL'S
ANNUAL REPORT**

OPINIONS

CERTIFICATES OF REVIEW

AND

**SELECTED ADVISORY
LETTERS**

FOR THE YEAR

2009

Lawrence G. Wasden
Attorney General

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This volume should be cited as:

2009 Idaho Att’y Gen. Ann. Rpt.

Thus, the Official Opinion 09-1 is found at:

2009 Idaho Att’y Gen. Ann. Rpt. 5

Similarly, the Certificate of Review of April 15, 2009
is found at:

2009 Idaho Att’y Gen. Ann. Rpt. 31

The Advisory Letter of February 5, 2009
is found at:

2009 Idaho Att’y Gen. Ann. Rpt. 55

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ATTORNEYS GENERAL OF IDAHO

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



Lawrence G. Wasden
Attorney General

INTRODUCTION

Dear Fellow Idahoan:

Thank you for reviewing the 2009 annual report for the Office of the Attorney General. I am pleased to report that although 2009 was a difficult year financially, the State of Idaho's legal representation was at its best.

Natural Resources Management was a significant issue for our state during 2009. Following a federal court hearing in Montana, Idaho received permission to proceed with a managed wolf hunt, which was successful and will likely go a long way in showing that states are the best managers of their resources. My Office remains dedicated to ensuring our state remains actively in control of its natural and wildlife resources.

Our Consumer Protection Division recovered \$7,431,388 for Idaho consumers and taxpayers. This Division also collected \$5.9 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 2009, our Office transferred more than \$660,000 to the General Fund.

As I mentioned above, this year was particularly difficult for my Office from a financial perspective. In spite of the record collections of our Consumer Protection Division, my Office's budget was reduced by almost 10%. This has required the Office to address a growing caseload, while being confronted with more than 20 fewer attorneys, paralegals, and other staff. Additionally, the Office has been forced to take furlough days to meet the holdbacks. Legally, furloughs and vacancies are not sustainable options for the State of Idaho. My Office cannot simply not defend a lawsuit, or skip a hearing. An ongoing failure to appropriately fund Idaho legal representation may result in significant legal liability to the State of Idaho.

As my predecessors have pointed out in their annual reports, the Attorney General's Office is the single best resource and most cost-effective option for providing Idaho with legal representation. I continue to urge the Legislature and my fellow elected officials to further consolidate and provide the resources to the Office of the Attorney General to minimize Idaho's legal expenditures.

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

2009
STAFF ROSTER

ADMINISTRATION

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

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

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Lawrence Allen	Andrea Courtney	Blair Jaynes	Kathleen McRoberts	Andrew Snook
Stephanie Allig	Rebekah Cudé	Joseph Jones	Cheryl Meade	Theodore Spangler
Stephanie Ammirati	Timothy Davis	Karin Jones	Melissa Moody	Nicholas Spencer
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Lisa Carlson	John Homan	Kendal McDevitt	Steve Schuster	Brian Wonderlich
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Doug Conde				David Young

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		Tawni Limesand		

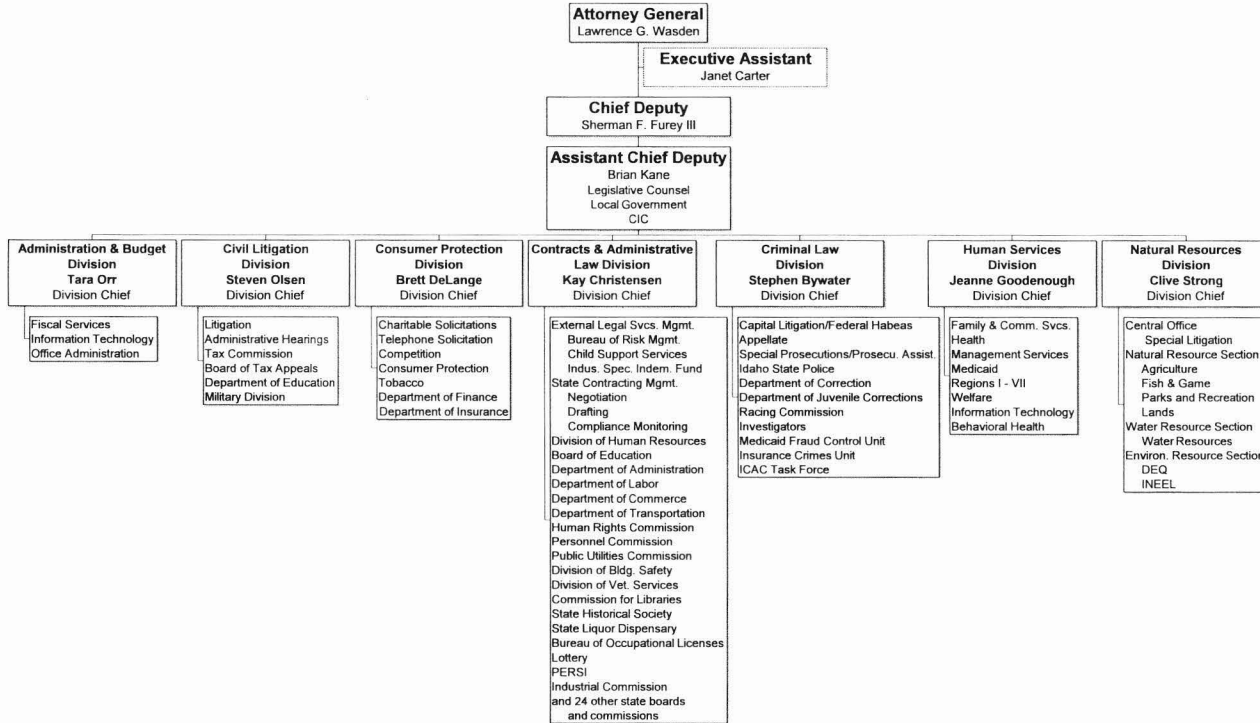
PARALEGALS

Kathie Brack	Vicki Kelly	Renea Ridgeway	Deborah Thompson
Suzy Cooley-Denney	Sandra McCue	Jean Rosenthal	Ray Williams
Stacey Genta	Bernice Myles	Victoria Rutledge	Paula Wilson
Debbi Judd	Karen Rash	Beccie Stange	

NON-LEGAL PERSONNEL

Christine Allbritton	Robert Cooper	Rita Jensen	Lynn Mize	Dannielle Simon
Renee Ashton	Jodi Darling	Cecil Jones	Barbara Mortensen	Aimee Stephenson
Sherrie Bengtson	Deborah Forgy	Gerry Karpavich	Roseann Newman	Jodie Stoddard
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Casey Boren	Trudy Jackson	Ronda Mein	Dustin Russell	Melissa Ward
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Renee Chariton				Kim Youmans

**Office of the Idaho Attorney General
Organizational Chart - 2010**



**OFFICIAL OPINIONS
OF
THE ATTORNEY GENERAL
FOR THE YEAR 2009**

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

ATTORNEY GENERAL OPINION NO. 09-1

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

Per Request for Attorney General's Opinion

You have requested an Attorney General's Opinion regarding the constitutionality of those provisions in Idaho Code § 58-310A exempting single family cottage site leases from the public auction requirements of art. IX, sec. 8 of the Idaho Constitution and substituting a "market rent" requirement in lieu of public auctions.

QUESTIONS PRESENTED

1. Can the Idaho Legislature, pursuant to Idaho Code § 58-310A, exempt leases of state endowment lands for "single-family, recreational cottage sites and homesites" from the public auction requirement of art. IX, sec. 8 of the Idaho Constitution?
2. Are the Idaho State Board of Land Commissioners ("Land Board" or "Board") cottage site leasing rules, which allow a lessee to retain a percentage of the leasehold value¹ of a lease upon transfer, consistent with the Board's constitutional duty to secure the maximum long-term financial return for its beneficiaries?

CONCLUSIONS

1. A reviewing court likely would conclude the Idaho Legislature does not have the authority to exempt leases of state endowment lands for single-family recreational cottage sites and homesites from the public auction requirement of art. IX, sec. 8 of the Idaho Constitution.
2. A reviewing court likely would conclude that the cottage site leasing rules, IDAPA 20.03.13, violate the constitutional mandate that endowment lands be managed solely for the financial benefit of endowed institutions. The rates allow leasehold values to accrue

when contract rent is below market rent, then allow lessees to retain 90% of leasehold values upon assignment of the leases. A reviewing court is likely to find that the leasing rules impermissibly allowed lessees to receive over \$21 million from the assignment of leaseholds in the last six years that rightfully should have gone to the beneficiaries.

BACKGROUND

The Land Board began leasing state endowment lands for residential cottage sites in 1924. The majority of the cottage site leases were issued in the mid-1940s and early 1950s. Minutes of Meeting of the Idaho State Bd. of Land Comm'rs, April 8, 1997, at 1. Trust assets include 354 cottage site lots on Priest Lake and 168 cottage site lots on Payette Lake. Each cottage site is owned in fee simple by the State of Idaho as trustee for the beneficiaries and is subject to the constitutional directive to provide the maximum long-term financial return to endowment beneficiaries. Idaho Const. art. IX, § 8. This system can be summed up as follows:

The state leases the lots, and lessees are authorized to construct and own single-family residences on the sites. The cottage sites are to be managed, like all endowment trust assets, to provide “maximum long-term financial return” to the trust beneficiaries, primarily public schools.

Philip S. Cook and Jay O’Laughlin, Analysis of Procedures for Residential Real Estate (Cottage Site) Leases on Idaho’s Endowment Lands at 1 (October 2008).

Rents for Priest Lake lots in 1945 were as low as \$10 per year. Cook and O’Laughlin at 4. From 1945 to 1988, rents were established using a flat rate with sporadic adjustments. Minutes of Meeting of the Idaho State Bd. of Land Comm'rs, April 8, 1997, at 1. Adjustments were made by calculating the leasehold value upon the assignment of leases, then dividing by three (to account for the fact that the lots were not usable part of the year), then multiplying by 7.5%, the average earnings the endowments were earning at the time. Minutes of Meeting of the Idaho State Bd. of Land Comm'rs, August 4, 1981.

In 1981, as recreational homes became more popular and accessible on a year-round basis, leasehold values began to increase. Lessees expressed the concern to the Board that the above-described formula, which tied rents to leasehold values, would result in “very large increases” in rent. Minutes of Meeting of the Idaho State Bd. of Land Comm’rs, August 4, 1981. In lieu of rent increases, the Board adopted the “premium rent” concept, whereby, upon assignment of a lease, the State “would get 10% of the leasehold value after the improvements were subtracted.” *Id.* Premium rent was adopted so that when lessees sold leaseholds for value, “the State could share in the profit.” Minutes of Meeting of the Idaho State Bd. of Land Comm’rs, October 13, 1981.

Rules for payment of premium rent were adopted by the Board in 1987. The rules acknowledge that leasehold value “accrues to a leasehold estate when the contract rent is below the market rent.” IDAPA 20.03.13.010.06. Leasehold value is determined at the time of assignment of a lease by subtracting the value of the lessee’s improvements and personal property from the full sales price. IDAPA 20.03.13.025. Upon sale, 10% of leasehold value is paid to the Board as premium rent. IDAPA 20.03.13.027.²

While cottage sites were subject to the public auction requirements of Idaho Code § 58-310, expiring leases were not advertised for auction. Only four applications to conflict a lease were ever received, and none resulted in an auction. Idaho Sen. Res. and Env’t Comm., Hearing of February 16, 1990 at 2 (testimony of Dept. of Lands Director Stan Hamilton) (tape of hearing on file with Legislative Council Office). Nonetheless, lessees remained concerned that the increased demand for recreational properties would lead to conflict auctions upon expiration of cottage site leases. Idaho Sen. Res. and Env’t Comm., Minutes of March 7, 1990. Consequently, lessees sought, and the Idaho Legislature, in 1990, enacted, Idaho Code § 58-310A, which abolished the use of public auctions as a means of establishing market rents in lieu of a general requirement that the Land Board “ensure that each lot generates market rent throughout the duration of the lease.” The legislation was silent as to the means to be used to determine market rent, leaving such determination to the discretion of the Land Board. Despite the concerns expressed by legislators during the hearings of the need for the Board to achieve a market rent to eliminate leasehold value, the Board has not amended its 1987 rules, which allow leasehold values to accrue due to disparities between contract rents and market rents.

Following the enactment of Idaho Code § 58-310A, the Land Board hired an appraiser to determine market rents for the cottage sites at Priest Lake and Payette Lake. The appraiser recommended rents ranging from 4.5% to 5.5%, depending on lot value. Minutes of Meeting of the Idaho State Bd. of Land Comm'rs, June 11, 1991. The Board, however, decided to maintain annual rents at 2.5% of fee simple value, a rate that was established in 1988. *Id.* The 2.5% annual rental rate has remained in place since 1988, despite several appraisals and market rent studies concluding that the market rate is substantially above 2.5%. *See, e.g.,* John T. McFadden, Appraisal Report: Project Report with Comparable Sales for Priest Lake Cottage Site Appraisals at 24-25 (1998) (recommending a rate of 3.5% for cottage sites at Priest Lake); Bradford T. Knipe, Complete Appraisal, Self Contained Report and Market Analysis of 14 Payette Lake Cabin Sites at 156, 163 (1998) (recommending a rate of return between 4% and 6% for cottage sites at Payette Lake). In every report, the authors noted that the existence of leasehold values indicated that the 2.5% contract rental rate was below the market rate. McFadden at 22; Knipe at 151; Cook & O'Laughlin at 11; John Duffield, Final Report: Economic Analysis of the Values of Surface Uses of State Lands at 8 (1993).

While the nominal rental rate has remained at 2.5%, the effective rate in many years has been substantially less, due to Board decisions to freeze or phase-in rent increases caused by substantial appreciation of fee simple values. *See, e.g.,* Minutes of Meeting of the Idaho State Bd. of Land Comm'rs, June 11, 1991, at 2 (retaining phase-in schedule of ten years); Minutes of Meeting of the Idaho State Bd. of Land Comm'rs, June 9, 1992, at 2 (staff comment that ten-year phase-in period for Payette Lake with maximum annual increase of 5.3% “would not reach the target value unless it is fixed statically at the 1992 level over that 10-year period”); Minutes of Meeting of the Idaho State Bd. of Land Comm'rs, December 4, 2007, at 1 (substituting motion to freeze Payette Lake rental rates at the 2007 value in lieu of motion to limit increase to 25%); Minutes of Meeting of the Idaho State Bd. of Land Comm'rs, June 19, 2008, at 5 (rejecting recommended 23% increase at Priest Lake and unspecified increase at Payette Lake and voting to implement 15% increase with report back to Board at December 2008 meeting); Minutes of Meeting of the Idaho State Bd. of Land Comm'rs, December 16, 2008, at 4 (rescinding 15% rent increase and voting to freeze rents at then-current levels).

ANALYSIS**I.****A REVIEWING COURT IS LIKELY TO FIND THAT THE PROHIBITION OF CONFLICT AUCTIONS IN IDAHO CODE § 58-310A VIOLATES THE REQUIREMENT IN ART. IX, SEC. 8 OF THE IDAHO CONSTITUTION THAT ALL DISPOSALS OF ENDOWMENT LANDS MUST OCCUR BY PUBLIC AUCTION**

Art. IX, sec. 8 of the Idaho Constitution provides, in part:

The legislature shall, at the earliest practicable period, provide by law that the general grants of land made by congress to the state shall be judiciously located and carefully preserved and held in trust, subject to disposal at public auction for the use and benefit of the respective object for which said grants of land were made

(Emphasis added.) The first statutes defining the duties of the Land Board implemented the public auction requirement, in part, by providing that, where two or more people apply to lease the same land, the Board must auction off and lease the lands to the applicant who will pay the highest annual rental. 1905 Idaho Sess. Laws 138 (codified as amended at Idaho Code § 58-310).

Prior to 1990, cottage site leases were subject to the conflict auction requirement of Idaho Code § 58-310 when two or more people sought to lease the same parcel. In response to lessee concerns that they might lose “any amount they spent to procure and maintain the leases except the value of their improvements,” Idaho H. Res. and Conservation Comm., Minutes of March 7, 1990 (attachment, “Legislative Fact Sheet in Support of SB 1516,” prepared by Payette Lakes Cabin Owners Association and Pilgrims Cove Association), the Idaho Legislature, in 1990, enacted Idaho Code § 58-310A, which declares “that leases for single family, recreational cottage sites and homesites shall not be subject to the conflict application and auction provisions of sections 58-307 and 58-310, Idaho Code.” The legislative findings contained in Idaho Code § 58-310A expressly state:

- (b) That single family, recreational cottage sites and homesites have typically been held by the same family, sometimes for as long as fifty (50) years;

- (c) That, in the case of single family, recreational cottage sites and homesite leases, the conflict application and auction procedure have caused considerable consternation and dismay to the existing lessee at the prospect of losing a longtime lease

Idaho Code § 58-310A(1) (emphasis added).

Prior to the enactment of Idaho Code § 58-310A, Representative Wayne Sutton requested the Attorney General to prepare a legal guideline addressing the bill’s constitutionality. The legal guideline prepared by the Attorney General’s office expressed the concern that:

[I]n light of the legislative findings [in § 58-310A] it may be inferred that the rejection of conflict applications . . . is designed, at least in part, for the benefit of long term, single family lessees. . . . The finding could be interpreted as implying an intent to benefit someone other than the beneficiaries of the trust, resulting in the bill being overturned as a breach of the state’s duty of undivided loyalty to the beneficiaries of the endowment lands trusts.

1990 Idaho Att’y Gen. Ann. Rpt. 120, 125. The guideline further concluded that, based upon then-available precedents, it was “possible to interpret article 9, section 8, as vesting in the legislature the discretion to lease public lands by methods other than by public auction,” but the guideline also “cautioned that this conclusion is somewhat tentative, given that it is supported only by ambiguous statements of the Idaho Supreme Court, the delegates to the constitutional convention, and the early legislature.” *Id.*

Since publication of the legal guideline, the Idaho Supreme Court has clarified both the duty of undivided loyalty to the beneficiaries and the public auction requirement of art. IX, sec. 8 of the Idaho Constitution. These decisions of the Idaho Supreme Court cast serious doubt on the constitutionality of Idaho Code § 58-310A. The evolution of the case law

as related to the interpretation of art. IX, sec. 8, is set forth in the following section.

A. Court Decisions Interpret Art. IX of the Idaho Constitution to Impose a Duty of Undivided Loyalty on the Legislature and Land Board to Manage Endowment Lands for the Sole Benefit of Endowed Institutions

Art. IX, sec. 7 of the Idaho Constitution provides that the Board shall “have the direction, control and disposition of the public lands of the State, under such regulations as may be prescribed by law.” Art. IX, sec. 8 of the Idaho Constitution imposes a duty upon the Board to provide for the rental of state lands “under such regulations as may be prescribed by law, and in such manner as will secure the maximum long-term financial return to the institution to which granted.”

While art. IX, sec. 8 of the Idaho Constitution directs the Land Board to “secure the maximum long-term financial return” for endowed institutions, it also authorizes the Legislature to regulate the process by which the Board exercises its powers and duties. Such regulations must be consistent, however, with the constitutional duties imposed on the Board if a regulation “goes beyond the scope of regulating the action of the board in the discharge of its constitutional duties, it is void.” Rogers v. Hawley, 19 Idaho 751, 760, 115 P. 687, 690 (1911).

The Idaho Supreme Court, in interpreting art. IX, sec. 8 of the Idaho Constitution, has described public endowment land as a trust *res* overseen by the Land Board as trustee, and the court has held that principles of basic trust law apply to the Board in the exercise of its constitutional and statutory duties. Moon v. State Bd. of Land Comm’rs, 111 Idaho 389, 393, 724 P.2d 125, 129 (1986). The Board’s obligation to trust beneficiaries is “of the most sacred and highest order.” State ex rel. Moon v. State Bd. of Examiners, 104 Idaho 640, 642, 662 P.2d 221, 223 (1983).

Since the enactment of Idaho Code § 58-310A, the court has emphasized that the trust terms in art. IX of the Idaho Constitution prohibit the Legislature from directing the Board to act for the benefit of any party other than the trust beneficiaries. In Idaho Watersheds Project v. State Bd. of Land

Comm'rs, 133 Idaho 64, 982 P.2d 367 (1999) (hereinafter IWP III), the court reviewed the constitutionality of Idaho Code § 58-310B, which authorized the Board, in awarding grazing leases, to consider not only the direct return to the endowment beneficiaries but also indirect benefits to the endowment beneficiaries resulting “from tax revenues from all sources generated by the lessee’s proposed activities on the leasehold and those activities related thereto.” Idaho Code § 58-310B(6)(e). The stated purpose of the legislation was to “support the endowed institutions by encouraging a healthy Idaho livestock industry so as to generate related business and employment opportunities on a state and local level, thus supporting additional sales, income and property taxes.” Idaho Code § 58-310B(2)(a). In holding section 58-310B to be unconstitutional, the court quoted the provision in art. IX, sec. 8, that state lands are to be:

. . . judiciously located and carefully preserved and held in trust, subject to disposal at public auction *for the use and benefit of the respective object for which said grants of land were made*

133 Idaho at 67, 982 P.2d at 370 (emphasis original). The court concluded that “by attempting to promote funding for the schools *and* the state through the leasing of school endowment lands,” Idaho Code § 58-310B violated the mandate of art. IX, sec. 8 of the Idaho Constitution that the only allowable criteria for awarding leases is the “‘maximum long term financial return’ to the schools.” *Id.*

In light of the IWP III decision, it is likely that a court would hold the stated purpose of Idaho Code § 58-310A violated the duty of undivided loyalty to trust beneficiaries, since, as discussed above, the elimination of the public auction requirement was done explicitly for the benefit of the lessees, not the benefit of the trust beneficiaries. The mere fact that the Legislature instructed the Board to secure “market rent” in lieu of conflict auctions would not be sufficient to salvage the statute: In IWP III, the court gave no weight to legislative findings that providing a stable livestock industry would ultimately “enhance long-term financial returns to the endowed institutions.” Idaho Code § 58-310B.

B. The Idaho Supreme Court Has Held that Art. IX, Sec. 8 of the Idaho Constitution Mandates Public Auctions for All Leases of State Lands in the Event of Conflicting Applications

The public auction requirement of art. IX, sec. 8 of the Idaho Constitution, which applies to all “disposals” of endowment lands, was first interpreted in Tobey v. Bridgewood, 22 Idaho 566, 127 P. 178 (1912), which addressed a permit to appropriate water on state lands. There, in a general discussion of provisions applying to the disposition of state lands, the court suggested that both sales and leases were dispositions of state land and subject to the “disposal at public auction” requirement of art. IX, sec. 8. 22 Idaho at 582-84, 127 P. at 183-84.

Tobey was overruled in Idaho-Iowa Lateral & Reservoir Co. v. Fisher, 27 Idaho 695, 151 P. 998 (1915). The issue before the court was whether easements and rights-of-way were subject to the public auction requirement. The court reconciled a perceived conflict between the public auction requirement of art. IX, sec. 8, and the eminent domain provisions of art. IV, sec. 1 of the Idaho Constitution, by holding that if the requirement of a “public auction at a minimum price of ten dollars per acre be construed to apply only where a fee-simple title is to be conveyed, then the two sections . . . are reconciled, and both are made effective.” *Id.* at 706, 151 P. at 1001.

Several years later, in East Side Blaine County Live Stock Ass’n v. State Bd. of Land Comm’rs, 34 Idaho 807, 198 P. 670 (1921), the court had before it a challenge to a Land Board action refusing to hold a conflict auction when there were competing applications to lease certain grazing lands. The court upheld a writ of mandate requiring the Board to offer the lease at public auction. As authority for the writ, it cited both art. IX, sec. 8, and two statutes requiring the Board to hold a conflict auction upon receiving competing lease applications. The court, by holding that the “provisions of the Constitution and statutes above referred to made it the duty of the State Board of Land Commissioners . . . to offer the lease of said lands at auction to the highest bidder,” appeared to conclude that the public auction provisions of art. IX, sec. 8, apply to grazing leases. It did not, however, explicitly overrule the holding in Idaho-Iowa Lateral & Reservoir Co. limiting the public auction requirement to fee simple transfers.

The above-described decisions were the best guidance available at the time of the passage of Idaho Code § 58-310A. As noted in the Attorney General guideline discussed above, such decisions left open an interpretation of art. IX, sec. 8, that excluded leases from public auction requirements. Since the enactment of Idaho Code § 58-310A, however, a series of decisions has clarified that the public auction requirement of art. IX, sec. 8, does apply to leases of state endowment lands.

The first case, Idaho Watersheds Project, Inc. v. State Bd. of Land Comm’rs, 128 Idaho 761, 918 P.2d 1206 (1996) (hereinafter IWP I), involved a conflict auction between IWP and a rancher, who was a long-standing lessee of the property in question. The Board awarded the lease to the rancher, despite his refusal to make a bid at the conflict auction. The court held that:

The Board does not have the discretion to grant a lease to an applicant who does not place a bid at an auction, *based upon Idaho’s constitutional and statutory mandate that the Board conduct an auction.* Idaho Const. art. IX, § 8; I.C. § 58-310.

IWP I, 128 Idaho at 766, 918 P.2d at 1211 (emphasis added). Thus, while the decision hinged on the auction requirements of Idaho Code § 58-310, the court explicitly identified a “constitutional . . . mandate” that the Board conduct public auctions for leases.

Following the decision in IWP I, an attempt was made to amend art. IX, sec. 8, by changing the “disposal at public auction” language to “sale at public auction.” H.J.R. No. 6, 1998 Idaho Sess. Laws 1366, 1367. The effort ultimately failed due to procedural errors. See Idaho Watersheds Project v. State Bd. of Land Comm’rs, 133 Idaho 55, 982 P.2d 358 (1999) (hereinafter IWP II) (holding H.J.R. No. 6 unconstitutional for presenting multiple amendments in single ballot). The effort demonstrates, however, that IWP I was widely understood to interpret the “disposal at public auction” requirement of art. IX, sec. 8, to apply to leases. For example, the statements for the proposed amendment specifically stated that “[a] lease is sometimes promoted as being within the term ‘disposal,’” and stated that the proposed change would clarify that “a lease is not a permanent disposition and should be distinguished from ‘sale.’” *Id.* at 63, 982 P.2d at 366.

The issue of whether the public auction language applies to leases was again addressed in IWP III. There, the court held that language in art. IX, sec. 8, providing that endowment lands are “subject to disposal at public auction for the use and benefit of the respective object for which said grants of land were made” prohibited legislation requiring that grazing leases be awarded based on both direct returns to beneficiaries and tax revenues to the State. In holding Idaho Code § 58-310B to be unconstitutional, the court quoted the provision in art. IX, sec. 8, that states endowment lands are to be:

. . . judiciously located and carefully preserved and held in trust, subject to disposal at public auction *for the use and benefit of the respective object for which said grants of land were made*

IWP III, 133 Idaho at 67, 982 P.2d at 370 (emphasis original). While the court did not explicitly hold that the constitution required public auctions of leases, the “use and benefit” language relied upon by the court is directly tied to the “disposal at public auction” requirement, and the fairest reading of the court’s opinion is that leases are disposals of endowment property and thus subject to all requirements of art. IX, sec. 8.

In sum, the IWP decisions establish two important precedents that likely would lead a reviewing court to declare unconstitutional those provisions of Idaho Code § 58-310A prohibiting public auctions for cottage site leases. IWP III establishes that the court will closely examine any statute that directs action for the benefit of lessees rather than for the benefit of endowed institutions. As discussed above, the legislative findings in Idaho Code § 58-310A plainly declare that the Legislature’s intent was to provide relief to lessees from the “considerable consternation and dismay” that accompanied the “prospect of losing a long-time lease.” Such findings establish that the Legislature’s intent was to provide relief to lessees, not to maximize endowment income. The legislative history affirms such intent. For example, during the hearings on Senate Bill 1516, the bill ultimately enacted as Idaho Code § 58-310A, Senator Vance stated:

[W]hat I want to do is translate this from lawyer to farmer. I’ll tell you what this is. The legislative finding is that more than one person wants the lease. The first person wants to stay because he’s been there a long time. So the State is

required, currently, the State is required to auction and the lessee may be upset after such a long time, that someone else may be interested in the lease. So since the Board has never had occasion to follow the law in this matter, and since the constitution requires that the State manage the land to experience maximum gain. These are point by point, you can read it yourselves. And finally that since we need to maximize long-term gains, it is hereby declared that we aren't going to do it anymore. That's what they're saying. It's the craziest thing I've ever witnessed. I can't believe it.

Idaho Sen. Res. and Env't Comm., Hearing of February 16, 1990 (tape of hearing on file in Legislative Council Office) (emphasis added). Given the plain language of the findings and the legislative history, it is likely a reviewing court would conclude that Idaho Code § 58-310A was enacted to benefit lessees rather than beneficiaries, a result prohibited by art. IX, sec. 8. Even if the court failed to strike down Idaho Code § 58-310A on the basis of the Legislature's stated intent to benefit lessees, it likely would conclude, in light of IWP I and IWP III, that public auctions are mandated by art. IX, sec. 8 of the Idaho Constitution, and, therefore, it was beyond the Legislature's authority to exempt cottage site leases from public auction requirements.

II.

A REVIEWING COURT LIKELY WOULD CONCLUDE THE LAND BOARD'S COTTAGE SITE LEASING RULES, BY ALLOWING AN IMPERMISSIBLE SHIFT OF FINANCIAL GAINS FROM BENEFICIARIES TO LEASEHOLDERS, ARE INCONSISTENT WITH THE BOARD'S CONSTITUTIONAL DUTY TO OBTAIN THE MAXIMUM LONG-TERM FINANCIAL RETURN FOR ENDOWMENT BENEFICIARIES

In addition to the facial conflict between Idaho Code § 58-310A and the public auction requirement of art. IX, sec. 8, a reviewing court likely would conclude that the Board's rules implementing Idaho Code § 58-310A have provided lessees an impermissible privilege in the form of a benefit from sales of leasehold value, which serves to the detriment of the state endowment

trust beneficiaries in direct contravention of art. IX, sec. 8. While Idaho Code § 58-310A directs the Land Board to procure market rent, the Board's cottage site rules continue to allow leasehold values to accrue as the result of disparities between contract rents and market rents and, in turn, allow lessees to retain 90% of leasehold value at the time of transfer of a lease.

Prior to the enactment of Idaho Code § 58-310A, art. IX, sec. 8 of the Idaho Constitution and Idaho Code § 58-308 specifically entitled a lessee to be reimbursed in full only for the value of his improvements upon a subsequent re-leasing of the premises as a result of a conflict auction. All value in the appreciation of the property belonged rightfully to the endowment beneficiary. The State had the option, though never exercised, of capturing the value of property appreciation by procuring market rent through the use of conflict auctions upon the expiration or termination of a lease.

The passage of Idaho Code § 58-310A foreclosed the Board from using conflict auctions to establish market rent for cottage sites. Thus, the only open and competitive market that exists for cottage site leases is the private leasehold market, which allows lessees to gain private benefit from the failure of the Board to maintain contract rents at market rates. Free from the risk of conflict auctions, a substantial market for the sale of cottage site leaseholds has developed, and lessees have been allowed to reap most of the benefits of the increases in market appreciation.

The cottage site leasing rules expressly acknowledge that leasehold value "accrues to a leasehold estate when the contract rent is below the market rent." IDAPA 20.03.13.010.06. Because contract rents were allowed to fall below the price buyers were willing to pay in an open market, buyers began buying leaseholds, paying the difference between contract rent and market rent, discounted to present value. The amounts at issue are substantial. According to a recent analysis by Idaho Department of Lands financial staff, 79 lease transfers occurred from 2003 through 2009, and the total value of leasehold interests for the 79 transfers was \$23,594,664, of which over \$21,000,000 went to lessees. If contract rents had been equivalent to market rent, this money would have gone to the trust beneficiaries.

The link between abolishment of conflict auctions and the enrichment of lessees at the expense of trust beneficiaries is found in the "Legislative Fact

Sheet in Support of SB 1516” (ultimately, Idaho Code § 58-310A) submitted by the Payette Lakes Cabin Owners Association, Inc., and the Pilgrims Cove Association.

[F]orty six leases are scheduled to renew in 1990, and all of them are potentials for conflict bid applications. That is why it is absolutely critical for SB 1516 to pass this year. These lessees not only may lose their leases in a conflict bid, but the majority of lessees have paid for their leases and will lose substantial amounts of money. Lessees would lose that amount of money that they paid for their lease over and above the assessed value of their improvements. For example, a lessee who paid \$90,000 for his leasehold that contains \$40,000 of cabin and improvements would get paid for the \$40,000 of improvements if his lease was lost in a conflict bid. But, the lessee would lose the remaining \$50,000 that he had originally paid for his lease! One hundred percent of the money from a conflict bid goes to the state; the lessee is only reimbursed by the winner of the bid for the amount of the improvements on the lot. If a lessee paid \$115,000 for his lease that contained improvements of \$30,000, he would be reimbursed \$30,000 by the winning conflict bidder and would lose the remaining \$85,000 of his investment forever!

Idaho H. Res. and Conservation Comm., Minutes of March 7, 1990 (attachment entitled “Legislative Fact Sheet in Support of SB 1516”) (emphasis added). As the lessees correctly noted, prior to the enactment of Idaho Code § 58-310A, 100% of all sums bid for property in an open-market conflict auction would have been belonged, and should have been paid, to the trust beneficiaries in accordance with the requirements of the Idaho Constitution.

Ironically, many legislators, in hearings on the bill that became Idaho Code § 58-310A, expressed concern that lessees were reaping huge financial benefits from the assignment of leaseholds. For example, Senator Donesley, after hearing the director of the Department of Lands describe the process for lease assignments, stated:

[W]hat you've just described, while it sounds acceptable on its face, you've described the benefit of enjoying the property and then selling it for a profit after the enjoyment of the property. Somewhere in there is a slice of the state given that it is state property being enjoyed, it's appreciating and the profit from the sale which is going into private pocket and now we're having a bill to protect that kind of situation. So I was going along fine until you got to that last part, it looks to me like a double benefit.

Idaho Sen. Res. and Env't Comm., Hearing of February 16, 1990 (tape of hearing on file in Legislative Council Office). Senator Reed also expressed concerns regarding the sale of leasehold interests by lessees "without passing along to the state their fair rate." *Id.* Perhaps in response to such concerns, Senator Noh suggested that leasehold sales would "serve as a basis for appraisals of the value of the leases," to which Idaho Department of Lands Director Hamilton replied:

Mr. Chairman, there are relationships. First of all the leasehold interest exists because by classic economic theory, a leasehold exists when rentals, when contract rentals are lower than market rentals. And I think that is general first economics 101. So I think there is a relationship there. As rents go up, the leasehold values do come down. And there is a relationship there that can be determined.

Id. Director Hamilton's comments seemed to address the Senator's concerns over lessees profiting from lease sales by suggesting that contract rents would be adjusted to market rates, so that leasehold values would come down. Thus, it appears that the Legislature, in enacting Idaho Code § 58-310A, expected that the problem of lessees profiting from the assignment of leases would be corrected by requiring market rent.

Of course, as lessees have pointed out, not all lessees profit from the assignment of leaseholds, since most lessees have paid substantial amounts of money to purchase their leaseholds. For example, if a lessee buys a leasehold for \$90,000, then sells it several years later for \$90,000, such lessee gets only \$81,000 from the sale, since the State must be paid 10%, or \$9,000. Thus,

lessees profit only when they are able to sell their leasehold for 10% over their original purchase price. Idaho H. Res. and Conservation Comm., Minutes of March 7, 1990 (attachment, “Questions and Answers Concerning Lease Lot Issues and SB 1516,” prepared by Payette Lakes Cabin Owners Association and Pilgrims Cove Association). This fact, however, is beside the point. The concern that a reviewing court would likely focus on is not whether individual lessees profit but whether rent money that should be going to beneficiaries is going instead to lessees. This issue would be addressed by looking at gross leasehold values, not the net profits or losses of individual lessees.

The assignment of leaseholds for significant amounts of money demonstrates that Idaho Code § 58-310A, as implemented by the Board, has inhibited, rather than promoted, the receipt of market rent by the State. A reviewing court likely would conclude that the accrual and sale of substantial leasehold values, with the majority of the sales price going to lessees, is a violation of the Board’s constitutional duty to secure the maximum long-term financial return to the endowment beneficiaries.

AUTHORITIES CONSIDERED

1. Idaho Constitution:

Art. IX, § 7.

Art. IX, § 8.

2. Idaho Code:

§ 58-308.

§ 58-310.

§ 58-310A.

§ 58-310B.

3. Idaho Administrative Rules:

IDAPA 20.03.13.010.06.

IDAPA 20.03.13.025.

IDAPA 20.03.13.027.

4. Idaho Cases:

East Side Blaine County Live Stock Ass'n v. State Bd. of Land Comm'rs, 34 Idaho 807, 198 P. 670 (1921).

Idaho-Iowa Lateral & Reservoir Co. v. Fisher, 27 Idaho 695, 151 P. 998 (1915).

Idaho Watersheds Project, Inc. v. State Bd. of Land Comm'rs, 128 Idaho 761, 918 P.2d 1206 (1996).

Idaho Watersheds Project v. State Bd. of Land Comm'rs, 133 Idaho 55, 982 P.2d 358 (1999).

Idaho Watersheds Project v. State Bd. of Land Comm'rs, 133 Idaho 64, 982 P.2d 367 (1999).

Moon v. State Bd. of Land Comm'rs, 111 Idaho 389, 724 P.2d 125 (1986).

Rogers v. Hawley, 19 Idaho 751, 115 P. 687 (1911).

State ex rel. Moon v. State Bd. of Examiners, 104 Idaho 640, 662 P.2d 221 (1983).

Tobey v. Bridgewood, 22 Idaho 566, 127 P. 178 (1912).

5. Other Authorities:

1905 Idaho Sess. Laws 138.

1998 Idaho Sess. Laws 1366.

1990 Idaho Att'y Gen. Ann. Rpt. 120.

Bradford T. Knipe, Complete Appraisal, Self Contained Report and Market Analysis of 14 Payette Lake Cabin Sites (1998).

John Duffield, Final Report: Economic Analysis of the Values of Surface Uses of State Lands (1993).

John T. McFadden, Appraisal Report: Project Report with Comparable Sales for Priest Lake Cottage Site Appraisals (1998).

Idaho H. Res. and Conservation Comm., Minutes of March 7, 1990 (attachment, "Legislative Fact Sheet in Support of SB 1516," prepared by Payette Lakes Cabin Owners Association and Pilgrims Cove Association).

Idaho H. Res. and Conservation Comm., Minutes of March 7, 1990 (attachment, "Questions and Answers Concerning Lease Lot Issues and SB 1516," prepared by Payette Lakes Cabin Owners Association and Pilgrims Cove Association).

Idaho Sen. Res. and Env't Comm., Hearing of February 16, 1990 (tape of hearing on file at Legislative Council Office).

Idaho Sen. Res. and Env't Comm., Minutes of March 7, 1990.

Minutes of Meeting of the Idaho State Bd. of Land Comm'rs, August 4, 1981.

Minutes of Meeting of the Idaho State Bd. of Land Comm'rs, October 13, 1981.

Minutes of Meeting of the Idaho State Bd. of Land Comm'rs, June 11, 1991.

Minutes of Meeting of the Idaho State Bd. of Land Comm'rs, June 9, 1992.

Minutes of Meeting of the Idaho State Bd. of Land Comm'rs, April 8, 1997.

Minutes of Meeting of the Idaho State Bd. of Land Comm'rs,
December 4, 2007.

Minutes of Meeting of the Idaho State Bd. of Land Comm'rs,
June 19, 2008.

Minutes of Meeting of the Idaho State Bd. of Land Comm'rs,
December 16, 2008.

Philip S. Cook and Jay O'Laughlin, Analysis of Procedures
for Residential Real Estate (Cottage Site) Leases on Idaho's
Endowment Lands (October 2008).

Dated this 5th day of August, 2009.

LAWRENCE G. WASDEN
Attorney General

Analysis by:

STEVEN STRACK
ROBERT FOLLETT
Deputy Attorneys General

¹ The term "leasehold value" refers to the "value which accrues to a leasehold estate when the contract rent is below the market rent." IDAPA 20.03.13.010.06. The term "contract rent" refers to the rental rate specified in the cottage site leases (currently 2.5%). The term "market rent" refers to the rent that a cottage site would command if offered in a competitive and open market. Leasehold value can also be defined as the value of the bargain rent over the remaining lease term, discounted to present value. Bargain rent is the difference in value between contract rent and market rent.

² The rule imposing premium rent stated that such rent was to be "required through December 31, 1992 or until contract rents have been increased to full market rents, whichever comes first." IDAPA 20.03.13.027. After December 31, 1992, however, the Board has continued to apply IDAPA 20.03.13.027 and include premium rent provisions in cottage site leases as a matter of Board policy.

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**ATTORNEY GENERAL'S
CERTIFICATES OF REVIEW
FOR THE YEAR 2009**

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

April 15, 2009

The Honorable Ben Ysursa
Idaho Secretary of State
STATEHOUSE MAIL

Re: Certificate of Review
Proposed Initiative Petition Regarding Bible Curriculum

Dear Secretary of State Ysursa:

A proposed initiative petition was filed with your office on March 19, 2009, and received by this office on the same day. Pursuant to Idaho Code § 34-1809, this office has reviewed the proposed initiative and prepared the following advisory comments. This office offers no opinion regarding any policy issues raised by the initiative; the opinions expressed in this review pertain only to the legal issues raised by the initiative.

MATTERS OF SUBSTANTIVE IMPORT

A. Introduction

Titled “Public Schools—Bible Curriculum,” the initiative seeks to amend the Idaho Constitution to allow elective courses on the Bible to be offered in the public school systems of the State of Idaho.

Petitioner seeks to:

1. Amend the Constitution to permit the Bible to be taught as an academic elective course in public schools; and
2. Accomplish this constitutional amendment through a proposed initiative referendum.

Petitioner may not accomplish the constitutional amendment through the method that Petitioner has chosen.

B. The Idaho Constitution Provides the Only Means by Which a Constitutional Amendment May Be Accomplished

The Idaho Constitution, art. XX, sec. 1, states:

How Amendments May Be Proposed.—Any amendment or amendments to this Constitution may be proposed in either branch of the legislature, and if the same shall be agreed to by two-thirds of all the members of each of the two houses, voting separately, such proposed amendment or amendments shall, with the yeas and nays thereon, be entered on their journals, and it shall be the duty of the legislature to submit such amendment or amendments to the electors of the state at the next general election, and cause the same to be published without delay for at least three times in every newspaper qualified to publish legal notices as provided by law. Said publication shall provide the arguments proposing and opposing said amendment or amendments as provided by law, and if a majority of the electors shall ratify the same, such amendment or amendments shall become a part of this Constitution.

According to the Idaho Constitution, the only method for proposing constitutional amendments is through the Legislature. Prior to placement of a constitutional amendment on the ballot, a two-thirds vote of each house of the Legislature is required. Although citizens may stand in the place of the Legislature by exercising their initiative power, this power does not extend to constitutional amendments. Any amendment to the Idaho Constitution must originate in the Legislature.

If the citizens of Idaho wish to see changes to the Constitution, they should consult with members of the Idaho Legislature, who may follow the process set forth in the Idaho Constitution for proposing a constitutional amendment.

C. Litigation is Likely if a Law Were Adopted Permitting the Use of Bibles in Public Schools

The use of the Bible in the classroom, even when taught as a non-religious text, has been challenged in both state and federal courts around the country. The use of religious texts in public schools raises many issues of concern with respect to the First Amendment, as well as the provision in Idaho's Constitution that prohibits sectarian teaching in public schools. Idaho Const. art. IX, § 6.

Idaho Code reflects Idaho's Constitution, which has been interpreted as drawing a sharper line between church and state than the U.S. Constitution. *See* Idaho Code § 33-1603 ("No sectarian or denominational doctrine shall be taught in public schools, nor shall any books, tracts, papers or documents of sectarian or denominational character be used therein.").

The use of the Bible in the classroom has been both upheld and struck down by courts. Given the difference in outcome around the country, it is impossible to forecast the result of any litigation that would arise should a law be enacted that would permit the Bible to be used in the classroom.

MATTERS OF FORM

A constitutional amendment cannot be initiated directly by citizens, but only by the Legislature; nevertheless, a law can be proposed directly by citizens through an initiative. If citizens desire that a law be enacted, for example, a law permitting the Bible to be used in the classroom, then an initiative should suggest a statute rather than a constitutional amendment.

Under art. III, sec. 1 of the Idaho Constitution, legislative power can be exercised by either of two means: It can be proposed as a bill and enacted by both houses of the Legislature, or it may be enacted by means of an initiative. Regardless of whether it is put forth as a bill or as an initiative, it should appear in a format capable of being included in the Idaho Code. The drafter should endeavor to put this initiative in a more traditional legislative format. In other words, the initiative should be drafted as legislation and in such a manner as to facilitate its inclusion in the Idaho Code. Legislation is to be complete upon passage and should not require any further acts to become law. This initiative, even if it were to be considered as legislation and

not a constitutional amendment, fails this test and could be subject to challenge. It needs to be redrafted in a legislative format. If this initiative is to be altered to propose a law, several changes should be made: (1) the bracketed text reading “setting out full text of measure proposed” and the brackets themselves should be deleted; (2) all references to “referendum” should be removed from the initiative to be clear that the Petitioner is advancing an initiative, not a referendum (which is the citizens’ determination through voting of a measure passed by the Legislature); (3) every effort should be made to remove typographical errors and misspellings; and (4) it should be drafted in the form it will appear in the Idaho Code.

CONCLUSION

The proposed initiative seeks to do what it cannot do under Idaho’s Constitution: generate a constitutional amendment through initiative/referendum. Because, according to Idaho’s Constitution, a constitutional amendment must originate in the Legislature, this initiative as proposed conflicts with constitutional law in Idaho.

Suggestions for amending the initiative to conform with the permissible uses of the initiative power have been set forth in this review. These suggestions are not policy recommendations, nor are they comments on the underlying merits of the Petitioner’s proposed constitutional amendment. The suggestions are set forth for the sole purpose of providing the correct legal framework for an initiative.

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 Petitioner via a copy of this Certificate of Review, deposited in the U.S. Mail to Charles Seldon, 3077 E. Bonview Dr., Boise, Idaho, 83712-8502.

Sincerely,

LAWRENCE G. WASDEN
Attorney General

Analysis by:

MELISSA N. MOODY
WILLIAM A. VON TAGEN
Deputy Attorneys General

July 15, 2009

The Honorable Ben Ysursa
Idaho Secretary of State
STATEHOUSE MAIL

Re: Certificate of Review
Proposed Initiative Related to Absentee Voting

Dear Secretary of State Ysursa:

An initiative petition was filed with your office on June 15, 2009. Pursuant to Idaho Code § 34-1809, this office has reviewed the petition and has prepared the following advisory comments. It must be stressed that, given the strict statutory timeframe in which this office must respond to the complexity of the legal issues raised in this petition, this office's review can only isolate areas of concern and cannot provide in-depth analysis of each issue that may present problems. Further, under the review statute, the Attorney General's recommendations are "advisory only." The petitioners are free to "accept or reject them in whole or in part." The opinions expressed in this review are only those that may affect the legality of the initiative. This office offers no opinion with regard to the policy issues raised by the proposed initiative.

BALLOT TITLE

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

MATTERS OF SUBSTANTIVE IMPORT

The proposed initiative seeks to amend Idaho Code § 34-1002 by adding the paragraph:

Any registered elector may make written application to the county clerk for status as a permanent absentee voter. The county clerk shall notify each political subdivision of an elector's status as a permanent absentee voter pursuant to section 34-1408, Idaho Code. Each qualified registered permanent absentee voter shall automatically receive an absentee ballot for each election for which the elector is entitled to vote and need not submit a separate request for each election. Ballots received from permanent absentee voters shall be validated, processed and tabulated in the same manner as other absentee ballots. Status as a permanent absentee voter shall be terminated upon any of the following events: the written request of the voter; the death or disqualification of the voter; the cancellation of the voter's registration record; or the return of an ongoing absentee ballot as undeliverable.

Petitioners' language is clear, but it would be better if they put the initiative into legislative format. In other words, the petitioners may wish to consider restating Idaho Code § 34-1002 and show precisely how the initiative would change that section of Idaho Code. Since petitioners are proposing to add language, the added language should be shown as underscored and in the location in the statute where petitioners propose that the new language should be placed. Although petitioners are not seeking to delete any language from Idaho Code § 34-1002, deletions could be shown with strikeout, should they be proposed. Putting the proposed initiative into legislative format would eliminate the possibility (albeit remote) that the initiative, if passed, would be codified in a manner other than intended by the petitioners. Failure to do so means that, should the initiative pass, codifiers, or perhaps the Legislature, may be called upon to put the language of the proposed initiative into a legislative or code format. The underscoring, while not required constitutionally, may facilitate informed decision-making with respect to individuals who are considering whether to sign the petition. It is recommended, although not required, that an underlined draft be used for circulation and

CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

collection of signatures in order to facilitate informed decision-making, as well as to assist the codification of the initiative, should it pass.

Art. III, sec. 1 of the Idaho Constitution vests the legislative power of the state in the Senate and House of Representatives and in the people, through the initiative process. Laws passed by initiative are on equal footing with legislation enacted by the Legislature, and the two must comply with the same constitutional requirements. Westerberg v. Andrus, 114 Idaho 401, 757 P.2d 664 (1984). As the proposed initiative is on equal footing with other legislation passed and considered by the Legislature, it does not appear that the initiative raises any significant legal issues.

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 Petitioner via a copy of this Certificate of Review, deposited in the U.S. Mail to Larry Grant.

Sincerely,

LAWRENCE G. WASDELL
Attorney General

Analysis by:

WILLIAM A. VON TAGEN
Deputy Attorney General

CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

September 29, 2009

The Honorable Ben Ysursa
Idaho Secretary of State
STATEHOUSE MAIL

Re: Certificate of Review
Proposed Initiative Related to Animal Cruelty

Dear Secretary of State Ysursa:

An initiative petition was filed with your office on August 31, 2009. Pursuant to Idaho Code § 34-1809, this office has reviewed the petition and has prepared the following advisory comments. Given the strict statutory timeframe in which this office must respond to the complex legal issues raised in this petition, our review only isolates areas of concern and does not provide a detailed analysis of each issue that may present problems. Further, under the review statute, the Attorney General's recommendations are "advisory only." Petitioners are free to "accept or reject them in whole or in part." This office offers no opinion with regard to the policy issues raised by the 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 our office prepares titles for the initiative, petitioners may submit proposed titles for consideration. Any proposed titles should be consistent with the standard set forth above.

MATTERS OF SUBSTANTIVE IMPORT

The proposed initiative ("Initiative") seeks to amend Idaho Code § 25-3504, Committing Cruelty to Animals, "to make it a misdemeanor for any person to perform, or otherwise procure or arrange for the performance

CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

of, an ear cropping procedure on any dog within this state, except by a licensed veterinarian.” Initiative at 1. The Initiative proposes adding the following paragraphs to Idaho Code § 25-3504:

- (a) Any person who performs, or otherwise procures or arranges for the performance of, an ear cropping on any dog within the state is guilty of a misdemeanor.
- (b)
 - (1) This section does not apply to a procedure performed by a licensed veterinarian.
 - (2) Nothing in this section shall prohibit any of the following:
 - (A) Showing a dog with cropped ears in a dog show or competition.
 - (B) Owning or harboring a dog with cropped ears.
 - (C) Selling, buying or adopting a dog with cropped ears.
- (c) A peace officer, officer of a humane society, or officer of an animal control or animal regulation department of a public agency may enforce this chapter.
- (d)
 - (1) Any person who violates this section is subject to a civil penalty in an amount not to exceed five thousand dollars (\$5,000) for each violation.
 - (2) The civil penalty shall be payable to the local agency initiating the proceeding to enforce this section to offset the costs to the agency related to court proceedings.
- (e) A person or entity that violates this section may be prosecuted by the district attorney of the county in which the violation occurred, or by the city attorney of the city in which the violation occurred.
- (f) For the purpose of this section, the following term has the following meaning: (1) “Ear cropping” means the surgical alteration, manipulation or removal of any part of a

dog's ear so that the ear then heals in a pointed, erect or severed state.

A. The Initiative's Prohibitions are Not Consistent with the Statutory Scheme of the Cruelty to Animals Statute

Before discussing the specific provisions of the Initiative, a brief discussion of the statutory scheme in title 25, chapter 25, Idaho Code (the "Cruelty to Animals Statute"), is instructive. Prohibited conduct in the Cruelty to Animals Statute is divided into one general section and several conduct-specific sections. The general prohibition against committing cruelty to animals is found in Idaho Code § 25-3504, which provides:

Every person who is cruel to any animal, or who causes or procures any animal to be cruelly treated, or who, having the charge or custody of any animal either as owner or otherwise, subjects any animal to cruelty, is, for every such offense, guilty of a misdemeanor and shall, upon conviction, be punished in accordance with section 25-3520A, Idaho Code. Any law enforcement officer or animal care and control officer, subject to the restrictions of section 25-3501A, Idaho Code, may take possession of the animal cruelly treated, and provide care for the same, until final disposition of such animal is determined in accordance with section 25-3520A or 25-3520B, Idaho Code.

Idaho Code § 25-3504 (Supp. 2009). The Cruelty to Animals Statute defines the terms "cruel" or "cruelty" to mean five types of conduct:

- (a) The intentional and malicious infliction of pain, physical suffering, injury or death upon an animal;
- (b) To maliciously kill, maim, wound, overdrive, overload, drive when overloaded, overwork, torture, torment, deprive of necessary sustenance, drink or shelter, cruelly beat, mutilate or cruelly kill an animal;

(c) To subject an animal to needless suffering, inflict unnecessary cruelty, drive, ride or otherwise use an animal when same is unfit;

(d) To abandon an animal;

(e) To negligently confine an animal in unsanitary conditions or to negligently house an animal in inadequate facilities; to negligently fail to provide sustenance, water or shelter to an animal.

Idaho Code § 25-3502(5) (Supp. 2009). The general prohibition on committing cruelty to animals in Idaho Code § 25-3504 depends on the definition of “cruel” or “cruelty” in Idaho Code § 25-3502(5). In other sections of the Cruelty to Animals Statute, specific acts are prohibited, *e.g.*, poisoning animals (Idaho Code § 25-3503), carrying in a cruel manner (Idaho Code § 25-3505), exhibition of cockfights (Idaho Code § 25-3506), exhibition of dogfights (Idaho Code § 25-3507), impounding without food or water (Idaho Code § 25-3510), permitting animals to go without care (Idaho Code § 25-3511), use of a high-altitude decompression chamber (Idaho Code § 25-3516), and beating and harassing animals (Idaho Code § 25-3518). The specific sections prohibit conduct apart from that conduct defined as “cruel” in Idaho Code § 25-3502(5).

The Initiative’s proposed amendment is not consistent with the statutory scheme in the existing Cruelty to Animals Statute. The Initiative proposes to add language prohibiting ear cropping directly to Idaho Code § 25-3504. The prohibition in section 25-3504 is dependent upon the definition of “cruel” or “cruelty” in Idaho Code § 25-3502(5). Rather than amending the definition of “cruel” or “cruelty” to include ear cropping, the Initiative proposes adding an ear cropping prohibition and a definition of ear cropping directly to Idaho Code § 25-3504. The Initiative’s approach could cause confusion regarding what conduct is “cruel” and therefore prohibited under section 25-3504.

If the Initiative sponsors seek to prohibit ear cropping on dogs as an act of animal cruelty under Idaho Code § 25-3504, the Initiative could amend the definition of “cruel” or “cruelty” in Idaho Code § 25-3502(5) to include

the term “ear cropping” (currently found in subsection (f) of the Initiative). Alternatively, the Initiative sponsors could propose a new section specifically prohibiting ear cropping on dogs, in the same manner other specific acts are prohibited under the Cruelty to Animals Statute, *e.g.* poisoning animals (Idaho Code § 25-3503), exhibition of dogfights (Idaho Code § 25-3507), *etc.* Either approach would make the Initiative’s proposed language more consistent with the existing statutory scheme in the Cruelty to Animals Statute.

B. The Nature of the Penalty is Ambiguous and May Be Unconstitutionally Vague

The Initiative proposes that “[a]ny person who performs, or otherwise procures or arranges for the performance of, an ear cropping procedure on any dog within this state is guilty of a misdemeanor.” Initiative at 1 (emphasis added). The Initiative, however, rather than incorporating the fines otherwise specified in the Idaho Code for misdemeanors,¹ provides that persons in violation of the ear cropping section would be “subject to a civil penalty in an amount not to exceed five thousand dollars (\$5,000) for each violation.” *Id.* (Emphasis added.) Regarding payment of the penalty, the Initiative proposes “[t]he civil penalty shall be payable to the local agency initiating the proceedings to enforce this section to offset the costs to the agency related to the court proceedings.” *Id.*

The nature of the proposed penalty in the Initiative is ambiguous. The Initiative provides a civil penalty for what is declared to be a misdemeanor crime. As discussed below, if a statute or act carries both a misdemeanor criminal provision and a civil penalty, those provisions should be set forth separately, to make it clear that a person may face a misdemeanor charge (with the potential for jail time and a criminal fine) and/or a civil penalty. “Statutes that are found to be vague, indefinite or uncertain are in violation of the constitutional provisions found in the Fourteenth Amendment to the United States Constitution or Article I, section 13 of the Idaho Constitution.” Cowan v. Board of Comm’rs of Fremont County, 143 Idaho 501, 513, 148 P.3d 1247, 1259 (2006) (citations omitted). A statute may be so vague as to violate constitutional due process requirements “if it is found to contain 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. I, 109 Idaho 956, 960, 712 P.2d 657, 661 (Ct. App. 1985).

The Initiative’s proposed penalty language is a significant departure from the existing penalty provisions in the Cruelty to Animals Statute. All violations of the existing Cruelty to Animals Statute are misdemeanors punishable according to the penalties in Idaho Code §§ 25-3505 (poisoning animals) and 25-3520A (all other violations). Civil penalties are not a part of the statutory scheme in the Cruelty to Animals Statute because the Legislature made the policy determination that all persons committing cruelty to animals should be subject to criminal penalties. Specifically, Idaho Code § 25-3504, the subject of the Initiative, provides that violator is “guilty of a misdemeanor and shall, upon conviction, be punished in accordance with section 25-3520A, Idaho Code.”

In contrast, the Initiative’s proposed penalty is ambiguous and creates a conflict with the existing Cruelty to Animals Statute. As the Initiative is written, a person is left to guess if unlawful ear cropping is a crime or not. The Initiative either criminalizes ear cropping punishable by an inconsistent civil penalty, or the Initiative decriminalizes an act of cruelty in an existing statute that only allows criminal penalties. Moreover, the Initiative imposes a new penalty on “[a]ny person who violates this section.” Initiative at 1 (emphasis added). By reference to “this section,” the Initiative is referring to Idaho Code § 25-3504, which already provides for a penalty pursuant to Idaho Code § 25-3520A. Consequently, the Initiative’s proposed language creates two penalty provisions in Idaho Code § 25-3504 that are in direct conflict. The Initiative’s sponsors should clarify whether unlawful ear cropping is a misdemeanor crime and subject to criminal penalties, or if the unlawful act is a law violation punishable by a civil penalty. The Initiative’s sponsors should also clarify if ear cropping violations are punishable by the existing penalty in section 25-3504 or a new penalty.

When a particular statute authorizes both criminal and civil penalties, the different penalties are clearly distinguishable. For example, chapter 39 of title 25, Idaho Code, distinguishes between civil and criminal penalties for violations:

- (1) Failure to comply with provisions of this chapter, or rules promulgated thereunder, shall constitute a violation. Civil penalties may be assessed against a violator as follows:

- (a) A civil penalty as assessed by the department of agriculture or its duly authorized agent not to exceed five thousand dollars (\$5,000) for each offense;
- (b) Assessment of a civil penalty may be in conjunction with any other department administrative action.
- (c) No civil penalty may be made in conjunction with any other department administrative action.

...

- (8) Any person, firm or corporation violating any of the provisions of this chapter, or rules promulgated thereunder by the division of animal industries shall be guilty of a misdemeanor, and upon conviction, shall be subject to a fine of not less than one hundred dollars (\$100) nor more than five thousand dollars (\$5,000) for each offense.

Idaho Code § 25-3905 (Supp. 2009). *See also* Idaho Code § 25-3706 (Supp. 2009) (providing a civil penalty and misdemeanor criminal penalty for violations). In contrast to penalty provisions in other laws, the penalty proposed in the Initiative does not clearly identify the nature of the penalty.

Like the nature of the penalty, the Initiative's penalty payment language is also ambiguous and conflicts with Idaho law. The Initiative proposes that "[t]he civil penalty shall be payable to the local agency initiating the proceedings to enforce this section to offset the costs to the agency related to the court proceedings." Initiative at 1. If unlawful ear cropping is a misdemeanor crime, the proposed language conflicts with the payment procedures for fines set forth in Idaho Code § 19-4705. The Initiative sponsors should clarify the penalty payment language so that it is consistent with the existing Cruelty to Animals Statute.

C. The Enforcement Provision Conflicts with the Cruelty to Animals Statute and Idaho Law

The Initiative's proposed language addressing enforcement conflicts with existing language in the Cruelty to Animals Statute. The Initiative proposes amending Idaho Code § 25-3504 to state: "A peace officer, officer of

a humane society, or officer of an animal control or animal regulation department of a public agency may enforce this chapter.” Initiative at 1 (emphasis added). However, the proposed language would conflict with the enforcement section already in the Cruelty to Animals Statute: “Law enforcement agencies and animal care and control agencies that provide law enforcement or animal care and control services to a municipality or county, may enforce the provisions of this chapter in that municipality or county.” Idaho Code § 25-3501A(1) (emphasis added). Assuming the voters approved the Initiative, there would be two different sections addressing enforcement of the Cruelty to Animals Statute. Moreover, the Initiative’s proposed enforcement language would expand the enforcement beyond those agencies mentioned in section 25-3501A(1) to include the “officer of a humane society” and the “animal regulation department of a public agency.” Initiative at 1. By amending Idaho Code § 25-3504 with a new enforcement section, the Initiative creates a conflict in the Cruelty to Animals Statute.

We also note that subsection (e) of the Initiative provides:

A person or entity that violates this section may be prosecuted by the district attorney of the county in which the violation occurred, or by the city attorney of the city in which the violation occurred.

Initiative at 1 (emphasis added). Idaho has county prosecuting attorneys rather than district attorneys. *See* Idaho Const. art. V, § 18, and Idaho Code § 31-2601, *et seq.* Therefore, we recommend that the Initiative sponsors change the language to identify prosecutors in a manner consistent with other Idaho Code provisions.

D. Amendments Should Be Printed In Full

Art. III, sec. 18 of the Idaho Constitution prohibits any act from being “revised or amended by mere reference to its title, but the section as amended shall be set forth and published at full length.” *See Golconda Lead Mines v. Neill*, 82 Idaho 96, 99-101, 350 P.2d 221, 222-23 (1960). We, therefore, recommend that the full text of Idaho Code § 25-3504, and any other section amended by the Initiative, be reproduced in the proposed initiative, with amendments indicated appropriately by underscoring for additions and strikeouts for deletions. These underscorings and strikeouts, while not

required constitutionally, may facilitate informed decision-making with respect to whether to sign the petition.

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 Petitioner via a copy of this Certificate of Review, deposited in the U.S. Mail to Talitha Neher.

Sincerely,

LAWRENCE G. WASDEN
Attorney General

Analysis by:

TYSON K. NELSON
Deputy Attorney General

¹ Unless otherwise provided in the Idaho Code, a misdemeanor crime “is punishable by imprisonment in a county jail not exceeding six (6) months, or by a fine not exceeding one thousand dollars (\$1,000) or by both.” Idaho Code § 18-113 (Supp. 2009).

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**ATTORNEY GENERAL'S
SELECTED
ADVISORY LETTERS
FOR THE YEAR 2009**

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

ADVISORY LETTERS OF THE ATTORNEY GENERAL

February 5, 2009

The Honorable Patrick A. Takasugi
Idaho House of Representatives
Capitol Annex
STATEHOUSE MAIL

Re: Our File No. 09-25324 – Honorary Representative of Japan

Dear Representative Takasugi:

Recently, you asked if it would be a conflict of interest for you to be appointed as an honorary representative of Japan to promote trade and cultural exchanges between the government of Japan and the State and people of Idaho. You indicate that there would be no salary associated with this position but that you would be reimbursed with compensation to offset postage and stationery costs.

I have reviewed the Idaho ethics statutes, and I do not believe that there would be any conflict of interest. I have also reviewed the rules of the Idaho House of Representatives and do not find any prohibition there. Of course, if some legislation should come before the House that involves Japan, then that legislation would have to be examined, along with your relationship with the nation of Japan, to determine if you have a conflict of interest that would require you to disclose the conflict to the House or to abstain from voting on a particular matter.

For the purposes of this analysis, I have not reviewed federal statutes. I do not believe that any federal statutes would prohibit you from serving as a special representative to Japan in an unpaid, honorary capacity, but this is something you might wish to confirm.

ADVISORY LETTERS OF THE ATTORNEY GENERAL

Congratulations on this honor. If you have any 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 12, 2009

The Honorable Shirley G. Ringo
Idaho House of Representatives
Capitol Annex
STATEHOUSE MAIL

Re: House Bill No. 79

Dear Representative Ringo:

This letter is in response to your request dated February 11, 2009, in which you ask whether House Bill No. 79 (“HB 79”) is legally permissible. HB 79 would provide public charter schools the option to implement an admissions preference for children of employees of the school, as well as previous students of the school returning after having withdrawn due to relocation of a parent or guardian due to academic transfer, employer or military transfer or reassignment.

Idaho Code § 33-5206(1) precludes charter schools from discriminating against any student “on any basis prohibited by federal or state constitutions or any federal, state, or local law.” This provision prohibits discrimination against members of a legally protected class, such as race (protected by Title VI of the Civil Rights Act of 1964); gender (protected by Title IX of the Education Amendments of 1972); or disability (protected by the Individuals With Disabilities Education Improvement Act of 2004).

Idaho law permits charter school enrollment preferences that are not in violation of state or federal law. For example, Idaho law currently provides for preferences in admission if the school’s initial capacity is insufficient to enroll all pupils who submit a timely application. Idaho Code § 33-5205(3)(j) permits preference to be given to returning students, children of founders, and siblings of students already enrolled or already selected in the lottery process. In addition, Idaho Code § 33-5206(1) allows for preference to be given to students who reside in the attendance area of the public charter school. A preference for children of school employees or previous students also appears permissible.

ADVISORY LETTERS OF THE ATTORNEY GENERAL

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

Sincerely,

JENNIFER A. SWARTZ
Deputy Attorney General

February 17, 2009

The Honorable Darrell Bolz
Idaho House of Representatives
Capitol Annex
STATEHOUSE MAIL

Re: Our File No. 09-25416 – Reduction of Legislators’ Salaries

Dear Representative Bolz:

Thank you for your recent inquiry concerning the authority of the Legislature over salaries paid to its members and the Legislature’s ability to amend those salaries. You state that the Legislature is presently considering a percentage-based cut in salaries. You ask whether a percentage-based reduction in salary could be adopted by the Legislature. A previous letter from this office explained that there are limitations upon the Legislature’s ability to change the salaries of legislators or salaries of executive or judicial branch officers. I believe that these constitutional limitations would prohibit the type of adjustment that you are contemplating.

**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 establish the salaries of legislators. First, the Citizens Committee on Legislative Compensation (“the Committee”) fixes the salaries of legislators. Second, the salaries fixed by the Committee are not effective until an intervening election occurs. Third, the Legislature can reject the increase proposed by the Committee only by a concurrent resolution of both houses within 25 legislative days. The constitutional provision states:

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.*

Idaho Const. art. III, § 23 (emphasis added).

Pursuant to this provision of the Idaho Constitution, the Legislature had the option, by concurrent resolution, of rejecting or reducing the proposed rate of compensation set by the Committee. The Legislature has already done this by rejecting the recommendation of the Committee. The Legislature chose rejection, rather than reduction, of the proposed increase. This rejection took place prior to the 25th legislative day. *See* HCR 6, adopted by the House of Representatives on January 22, 2009 (11th legislative day), and adopted by the Senate on January 30, 2009 (19th legislative day). Once the Legislature has rejected the Committee's recommendation, and the 25th legislative day has passed, the legislative salaries revert to those paid during the prior legislative session. The Legislature has no further discretion with regard to the salaries of legislators. Absent some additional constitutional authority, art. III, sec. 23, does not permit the Legislature to make any further reductions in members' salaries.

I hope that this letter is of some assistance to you. If you have any 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 17, 2009

Via E-Mail And Statehouse Mail

The Honorable Bart M. Davis
Majority Leader
Idaho State Senate
Capitol Annex
STATEHOUSE MAIL
bmdavis@senate.idaho.gov

Re: Our File No. 09-25930 – Art. III, sec. 16 of the Idaho Constitution

Dear Senator Davis:

This letter is in response to your recent inquiry of this office regarding art. III, sec. 16 of the Idaho Constitution. Article III, sec. 16, requires that the Legislature provide notice of the provisions to be amended by a statute through the bill's title. Your questions arise from Federated Publications, Inc. v. Idaho Business Review, Inc., 146 Idaho 207, 192 P.3d 1031 (2008). Specifically, you question whether a statute of limitations should be placed on challenges to state legislative actions. As outlined within this letter, such a limitation may not have been effective in the Federated case and may be of limited legal value looking forward.

Article III, sec. 16, restricts legislation through the following:

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.

The Legislature is accorded wide discretion in designing titles to its enactments. Golconda Lead Mines v. Neill, 82 Idaho 96, 350 P.2d 221 (1960). A violation under this section must be substantial and clearly mani-

fested before a court will nullify a statute under this section. *Id.*; Kerner v. Johnson, 99 Idaho 433, 583 P.2d 360 (1978).

The Federated court found the violation to be both substantial and manifest. Federated at 1035. The title to the statute omitted any reference to private parties, while the statute clearly affected the rights of private parties with respect to their notice requirements. *Id.* The statute affected a distinct group, non-governmental entities, without providing appropriate notice through the title to the bill. *Id.*

A statute of limitations would likely not have changed the result in this case because the facts giving rise to the cause of action did not occur until *The Idaho Statesman* (through Federated Publications) brought suit against the *Idaho Business Review* to curtail its publication of non-governmental legal notices. *Id.* It would be difficult to write a statute of limitations that expired prior to a cause of action ripening. Similarly, the result may be undesirable in that the effect would be that an unconstitutional statute survives indefinitely because it was not timely challenged regardless of its infringement on constitutional rights. A statute of limitations such as this would raise significant questions regarding the doctrine of judicial review as well.

There may, however, be an avenue to craft a statute of limitations to place an appropriate procedural safeguard on acts of the Legislature. A statute of limitations setting a deadline for procedural attacks on legislation may be able to survive a constitutional challenge, because the purpose of art. III, sec. 16, is to prevent the Legislature from sneaking provisions into amendments without providing the public with notice of the changes. Presumably, after the statute has been enacted, published, and enforced, the requirement for notice at the law-making stage has been diminished. The difficulty with attempting to distill procedural violations from substantive violations may be virtually impossible since a procedural violation would likely not involve a particularized harm sufficient to permit standing to challenge the violation. A substantive violation, on the other hand, likely could not withstand limitations because the result would be to permit an otherwise unconstitutional enactment to stand.

Lastly, the Federated outcome appears to be the result of some significant policy considerations coupled with a substantive oversight on the part

ADVISORY LETTERS OF THE ATTORNEY GENERAL

of the drafters of the amendments to Idaho Code § 60-601. An attempt to implement a statute of limitations with regard to the situation in Federated should be approached with a great degree of caution.

Your second question asked about the discussion of severability within Concerned Taxpayers of Kootenai County v. Kootenai County, 137 Idaho 496, 50 P.3d 991 (2002). Concerned Taxpayers pertained to the resort county option sales tax, which permitted certain cities, based upon population, to implement a discretionary tax to offset property taxes and meet the cyclical demand for services that these counties encountered. The tax was struck down as a violation of art. III, sec. 19 of the Idaho Constitution, in part because the offending provision could not be severed. The court found that the limiting provision of the tax (the population requirement) was an integral part of the act and therefore could not be severed. *Id.* at 502, 997. In reaching this determination, the court identified that the intent of the Legislature in the enactment of this taxing authority was specifically to limit that authority to particular places. *Id.* In other words, if the court were to sever the population requirement, it would have created a statewide local option tax, a legislative act. *Id.*

After reviewing this case and its holding, it appears that the general rules regarding severability remain intact in Idaho.

I hope that you find this letter helpful. This letter represents the informal opinion of its author and is not an official opinion of the Office of Attorney General. If you would like to discuss this matter in greater detail, please contact me.

Sincerely,

BRIAN P. KANE
Deputy Attorney General

March 20, 2009

Via E-Mail and Statehouse Mail

The Honorable Monty J. Pearce
Idaho State Senate
Capitol Annex
STATEHOUSE MAIL
mpearce@senate.idaho.gov

Re: Our File No. 09-26107 – Payette County Planning and Zoning

Dear Senator Pearce:

Recently, you forwarded to me a letter that you received from a constituent, Betty Lee Clarich, who had received the letter from Mary Mejia, the Administrator for the Payette County Planning and Zoning Commission (“P&Z Commission”). In the letter, Ms. Mejia asks Ms. Clarich to cease attempting to contact members of the P&Z Commission on a matter before it. You asked me to inform you as to the correctness, under Idaho law, of this action.

Enclosed, for your review, is an Idaho Supreme Court decision: Idaho Historic Preservation Council, Inc. v. City Council of the City of Boise, 134 Idaho 651, 8 P.3d 646 (2000). In that case, the Boise City Council had presided over a hearing at which a developer appealed a decision from the Boise City Historic Preservation Commission concerning the demolition of a building in Boise. During the hearing, it was revealed that telephone calls were made to members of the city council regarding the matter during the time it had the matter under consideration. Although some of the city council members acknowledged they had received telephone calls, none of them disclosed who the calls were from or the substance of any of the conversations. After the hearing, the Idaho Historic Preservation Council filed a petition in the district court for a review of the city council’s decision. The district court ruled, and the Idaho Supreme Court affirmed, that the city council erred because it received and considered information outside of the official record when considering the developer’s appeal. According to the Court, the matter was before the city council, not in its legislative capacity, but rather in

a quasi-judicial capacity. The Court reiterated that the members of the city council should have no ex parte contacts unless the substance of those contacts was disclosed on the record in such a fashion as the parties to the hearing could respond to them, just as they would have the opportunity to respond to anything said during the hearing itself. The Court held:

Since the substance of the telephone calls received by the members of the City Council was not recorded or disclosed at the public hearing, the Commission had no opportunity to rebut any evidence or arguments the City Council may have received from the callers. The Court of Appeals has held that prior notice of fact-finding sessions, maintenance of a transcribable record, and the opportunity to present and rebut evidence are elements of “a common core” of procedural due process requirements. *See Gay*, 103 Idaho at 629, 651 P.2d at 563.

134 Idaho at 654, 8 P.3d at 649. The P&Z Commission’s Administrator is taking a cautious approach and is acting in accordance with the rule expressed by the Idaho Supreme Court.

The Idaho Supreme Court’s decision in the Boise City case has been criticized as, essentially, restricting the ability of citizens to petition their local government on matters of planning and zoning. Many of the objections have merit, and it is interesting to note that two justices of the Idaho Supreme Court dissented from the majority opinion. Nonetheless, the rule expressed in the case is the law, and it appears that the P&Z Commission’s Administrator is acting in accordance with the law. If contacts from citizens are to be allowed outside of the public hearing, then they would have to be in such a fashion as to allow them to be reviewed, made part of the record, and rebutted by all interested parties.

I hope that this letter has been of some assistance to you. If you have any 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

April 13, 2009

Mr. Dane H. Watkins, Jr.
Prosecuting Attorney
Bonneville County
605 North Capital
Idaho Falls, ID 83402

Re: Wild Land Fires and Fire Protection Districts

Dear Dane:

Thank you for your correspondence of April 1, 2009, regarding the wild land fires and close encroachment to existing residences that remain outside existing fire protection districts or departments.

One of the solutions to the problem discussed was the option of homeowners creating a new, or joining an existing, fire protection district under title 31, chapter 14, Idaho Code. As you posed, “Assuming the homeowners do neither, the surrounding agencies are seeking guidance how to respond in the absence of a district.” This letter will try to review the law thoroughly and respond to your inquiry.

Idaho law provides several methods or options for setting up a fire protection district, department, or other fire control entity within a given area.

The first is the fire protection district law cited in title 31, chapter 14, Idaho Code. This statute provides for establishment of fire protection districts for “the protection of property against fire and the preservation of life.” Idaho Code § 31-1401, *et seq.* Areas of a fire protection district embraced within a city’s limits may be included within the fire district with the permission of the city and the fire protection district. Idaho Code § 31-1429. Further, fire protection districts may enter into mutual aid agreements per Idaho Code § 31-1430 and joint powers agreements per Idaho Code §§ 67-2326 to 67-2333.

Counties are specifically authorized to enter “into contracts with a city or a fire protection district for the provision of fire or life protection services, or both of them, in areas of the county not otherwise receiving fire or life

protection.” Idaho Code § 31-868. Cities have the “power to erect engine houses, purchase or lease fire engines and all other apparatus to maintain a fire department, to provide water for fire purposes in the city” Idaho Code § 50-309.

Also, where applicable “volunteer fire departments” may be organized to provide fire protection services in remote or rural areas organized as nonprofit corporations instituted with “a primary purpose of firefighting, fire protection, or other emergency services, which has entered into an agreement with a validly organized city or county to provide fire fighting, fire protection, or other emergency services to a distinct service area.” Idaho Code § 6-2402.

Lastly, in those areas where there are no existing fire officials, district, department, or volunteer organization, the local county sheriff has authority. In addition to keeping the peace, the sheriff of the county is charged to “[p]erform such other duties as are required of him by law.” Idaho Code § 31-2202(1) and (10). With regard to the fire safety and life protection, where no organized fire authority, department, or district exists, “the county sheriff, or his deputy, shall be assistants to the state fire marshal in carrying out the provisions of the international fire code and such other regulations as set forth by the fire marshal.” Idaho Code § 41-256. “The fire chief is authorized to administer and enforce [the International Fire Code]. Under the chief’s direction, the fire department is authorized to enforce all ordinances of the jurisdiction pertaining to: a. [t]he prevention of fires; [and] b. [t]he suppression or extinguishment of dangerous or hazardous fires.” IDAPA 18.01.50.011.01.a and b. *See also* Idaho Fire Code § 104.1 (hereinafter IFC) [<http://www2.iccsafe.org/states/idaho06/>]. In other words, where there is no fire official, department, or district in place for a particular area, the sheriff of the county is authorized to carry out the ordinances of the district in the prevention of fires and call upon outside local fire officials to assist.

In your inquiry, if local homeowners call 911 or other local emergency number, requesting assistance due to a fire, and the area where the homeowner is located is not under any fire protection district or department, or other volunteer department or organization, the sheriff will be called to respond. At that point, in order to respond to the emergency, the sheriff—as the local fire official under Idaho Code § 41-256 and authority under IFC § 104.1—may call on other emergency responders including outside fire

officials, districts, or departments to answer the call. *See* IDAPA 18.01.50.011.01.a. and b.

Depending upon which fire control entity responded, there are options for reimbursement for incurred expenses. If the sheriff calls upon a local fire protection district or fire department to respond to the call, the district or department, extinguishing a fire or responding to a call for emergency assistance to persons or property not situated within the taxing authority of the fire district or city fire department, is authorized to charge a reasonable fee for the services provided and shall have a lien upon the property serviced, which lien shall be filed of record against the property in the name of the district or city in the time and manner provided by Idaho Code § 45-507 for liens of original contractors. Idaho Code § 31-1430. In other words, the district or department is enabled to file a lien under the mechanic's lien statute, section 45-507. Procedure under that statute enables the district or department to commence an action for recovery within six months after the claim has been filed. Idaho Code § 45-510. Such a lien would have priority over certain other claims against the property. *See* Idaho Code § 45-512.

With regard to volunteer fire departments, Idaho law provides a remedy for expenses incurred. A volunteer fire department is defined as a fire department organized as a nonprofit corporation with a primary purpose of firefighting, fire protection, or other emergency services, which has entered into an agreement with a validly organized city or county to provide fire fighting, fire protection, or other emergency services to a distinct service area. Idaho Code § 6-2402(1). A volunteer fire department may establish a schedule of charges for services that the volunteer department provides that is not to exceed the state fire marshal's recommended schedule of charges. *See* Idaho Code § 6-2402(2). The statute provides that a service charge may be charged the property owner when the appropriate procedures are followed as set out at section 6-2402(2)(a). Ultimately, if the volunteer fire department is not recompensed according to the statute, it may file an action for recovery of unpaid service charges that are authorized by law. *See* Idaho Code § 6-2402(6). Oftentimes, the homeowners obtain insurance that provides for reimbursement for such unforeseen fire dangers.

Finally, there is another statute that provides some relief. Any forest or range fire that is burning out of control "or without adequate and proper

precautions having been taken to prevent its spread” is a public nuisance. Idaho Code § 38-107. Persons responsible for causing the fire must make “a reasonable effort to control or extinguish it immediately.” The director of the Idaho Department of Lands “or any fire warden may summarily abate the nuisance.” The person “willfully or negligently responsible for the starting or existence of such fire shall be liable for the costs incurred by the state” Idaho Code § 38-107. A civil action may be filed on behalf of the state to recover costs incurred. *Id.*

Hopefully, this letter will assist you with regard to your local officials responsible for fire safety and life protection. This letter represents an informal and unofficial expression of the views of the Office of the Attorney General based upon research and review of the author.

This letter may raise an additional inquiry. Please do not hesitate to contact this office. You may contact me directly at (208) 334-4283. Thanks for the opportunity to be of assistance.

Sincerely,

JOHN C. KEENAN
Deputy Attorney General

ADVISORY LETTERS OF THE ATTORNEY GENERAL

May 13, 2009

The Honorable Leland G. “Lee” Heinrich
Idaho State Senate
P.O. Box 1092
Cascade, ID 83611

Re: Our File No. 09-26883 – Open Meeting and Public Records Laws

Dear Senator Heinrich:

Thank you for your letter of April 24, 2009, concerning executive sessions and some questions that you received from a constituent.

In your first question, you ask, “After adjourning from an executive session, does a city council have to announce any decisions that were made or not made during the executive session?”

Answer to Question 1: The Idaho Open Meeting Law is clear that no final decision may be made during any executive session. This is found in Idaho Code § 67-2345(3), which provides, “No executive session may be held for the purpose of taking any final action or making any final decision.” In other words, a city council may not make any final decision during an executive session. Because no decision may be made, there is nothing to report.

Your second question asks, “What is the time given for a city to respond to a written request for public information?”

Answer to Question 2: The answer to this question is found in the Idaho Public Records Law. Specifically, this is addressed in Idaho Code § 9-339(1), which provides, in relevant part:

A public agency or independent public body corporate and politic shall either grant or deny a person’s request to examine or copy public records within three (3) working days of the date of the receipt of the request for examination or copying. If it is determined by employees of the public agency or

independent public body corporate and politic that a longer period of time is needed to locate or retrieve the public records, the public agency or independent public body corporate and politic shall so notify in writing the person requesting to examine or copy the records and shall provide the public records to the person no later than ten (10) working days following the person's request.

In your third question, you ask, "What is the legal notice policy for a public employee when terminated? Is there any protocol as to who gets terminated within a department depending on his position during a 'RIFF'? Reduction in Force!"

Answer to Question 3: The answer to this question is going to be addressed in a city's ordinances or its personnel policy. Idaho statutes that govern municipal corporations do not cover this issue. It is best put to the city's personnel director or to the city attorney.

I hope that this letter has been of some assistance to you. If you have any 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

June 9, 2009

The Honorable John W. Goedde
Idaho State Senate
525-B W. Harrison Ave.
Coeur d'Alene, ID 83814

Re: Our File No. 09-27485 – YouTube

Dear Senator Goedde:

Thank you for your recent e-mail message concerning animal cruelty on YouTube. You ask whether the Idaho Legislature has any ability to control access to this website. In my opinion, the Legislature's ability is extremely limited, and any attempts would result in a suit against the state by YouTube or those who access it. The cause of action would be based upon the First Amendment.

The e-mail message that you forwarded to me states, "We are asking you, the senate and assembly to pass a law against this website, owned and operated in your state, that protect animals against this form of cruelty." YouTube is not an Idaho business. To my knowledge, the principals of this business do not live within the State of Idaho. YouTube is not operated from within the State of Idaho. In addition, the language I quoted above refers to the "assembly." This makes me think that this message, which was sent to you, was actually drafted with the intention that it be sent to state legislators of another state, most likely California. This would be consistent, as I believe that YouTube originates from that state.

I hope that this letter has been of some assistance to you. If you have any 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

June 11, 2009

The Honorable Branden Durst
Idaho House of Representatives
P.O. Box 170117
Boise, ID 83717

Re: Our File No. 09-27507 – Government Employment

Dear Representative Durst:

Thank you for your e-mail message of June 1, 2009, requesting information on how the “Hatch Act” applies to you.

The Hatch Act applies to federal employees. If you are seeking or should be hired for a federal civil service position, then your political activities, including your ability to run for partisan political office, will be extremely limited. Idaho has a state version of the Hatch Act, which is Idaho Code § 67-5311, “Limitation of political activity.” This section prohibits classified state employees from being a candidate or holding elective office in any partisan election. Being a member of the State Legislature is a partisan political position. Your ability to hold such an office would be limited. In addition, the “separation of powers” provisions of the Idaho Constitution, found in art. II, would limit your ability to serve in the executive branch of government.

I have enclosed a copy of a prior legal opinion from this office concerning the Hatch Act. I have also enclosed a copy of Idaho Code § 67-5311. After you have had a chance to review the enclosed materials and this letter, please feel free to call me and I will be happy to discuss your specific concerns with you.

Very truly yours,

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

ADVISORY LETTERS OF THE ATTORNEY GENERAL

July 10, 2009

David M. Dahle, Lieutenant Colonel
Idaho National Guard
Office of the Judge Advocate General
Idaho Military Division
3882 W. Ellsworth, Bldg. 440
Boise, ID 83705-8037

Re: Our File No. 09-27573 – Temporary Employees

Dear Colonel Dahle:

I recently received from you a request for an opinion on whether Idaho's personnel system rules are applicable to temporary employees of the Military Division. This letter is in response to your request.

The definition of temporary appointment, as found in the portion of the Idaho Code governing the state personnel system, applies to the Military Division in the same manner as any other division of government. Such definitions are applicable to other code sections unless a different meaning is clearly required by a particular section's context.

Title 67, chapter 53, Idaho Code, governs Idaho's personnel system. Idaho Code § 67-5301 establishes the Division of Human Resources within the Office of the Governor to administer a personnel system for classified employees. Idaho Code § 67-5302 sets forth the pertinent definitions to be used in the law governing the state personnel system. This law is applied to state employees in Idaho Code § 67-5303. This section defines employees subject to the chapter as classified employees and enumerates categories of nonclassified employees (those whose positions are exempt from personnel system rules).

All departments of the state of Idaho and all employees in such departments, except those employees specifically defined as nonclassified, shall be classified employees, who are subject to this chapter and to the system of personnel

administration which it prescribes. Nonclassified employees shall be: . . . (k) Employees of the military division . . . (n) Temporary employees

Idaho Code § 67-5303.

While nonclassified employees are not subject to Idaho’s personnel system rules as administered by the Division of Human Resources, some are still subject to law found within the “Definitions” section of chapter 53. That section states: “As used in this chapter, and other applicable sections of the Idaho Code, each of the terms defined in this section shall have the meaning given in this section unless a different meaning is clearly required by the context.” Idaho Code § 67-5302.

Temporary employees are regulated through definition in chapter 53.

“Temporary appointment” means appointment to a position which is not permanent in nature, and in which employment will not exceed one thousand three hundred eighty-five (1,385) hours during any twelve (12) month period. No person holding a temporary appointment may work in excess of one thousand three hundred eighty-five (1,385) hours during a twelve (12) month period of time for any one (1) department

Idaho Code § 67-5302(33).

Employees of the Military Division are not subject to the administration of the personnel rules in chapter 53 by the Division of Human Resources because they are specifically identified as nonclassified employees in Idaho Code § 67-5303(k). Temporary employees are also specifically identified as nonclassified employees in Idaho Code § 67-5303(n) and not subject to the personnel rules in chapter 53. However, the “Definitions” section of the code pertaining to the state’s personnel system does govern nonclassified employees, regardless of what department or agency they work for, if they are on temporary appointment. Because the meanings of the definitions in Idaho Code § 67-5302 are applicable to statutes outside chapter 53, those appointed

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to a temporary position still cannot work more than 1,385 hours a year unless they are employed under a statute that identifies a different definition of their employment.

Even though they are nonclassified employees and not subject to the administration of the personnel rules in chapter 53 by the Division of Human Resources, temporary employees of the Military Division are subject to the 1,385 hours per year requirement found in Idaho Code § 67-5302(33) because there is no other applicable statute that would govern their employment in that regard. While other terms of their employment do not fall under chapter 53, because they are nonclassified employees, the hourly requirements pertain to any type of state employee, classified or nonclassified, whose hours are not governed in a different statute.

While civilian employees of the Military Division are identified as nonclassified employees by statute, those who are temporarily appointed to a position in the Division are still governed by rules set forth in the definition of “temporary appointment” found in Idaho Code § 67-5302.

I hope that this letter has been of some assistance to you. If you have any 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

September 17, 2009

The Honorable Fred Wood
Idaho House of Representatives
P.O. Box 1207
Burley, ID 83318-0828

Re: Our File No. 09-28543 – Hospitals Incurring Debt via Bonding

Dear Representative Wood:

This letter is in response to your recent inquiry with regard to art. VIII, sec. 3 of the Idaho Constitution. Specifically, you question whether art. VIII, sec. 3C, permits public hospitals to incur debt through the issuance of bonds. As explained in greater detail below, public hospitals may be able to incur debt through bonding under this section, but clarification of this ability through an amendment to the Constitution would make this authority more legally defensible.

Article VIII, sec. 3 of the Idaho Constitution sets forth, in general terms, the limitations and permissions of entities to enter into long-term debt. Generally, an entity may incur debt to address an ordinary and necessary expense of government or through an election in which 2/3 of the voters approve the debt. Article VIII, sec. 3, also includes specific subparts identified as sec. 3A (Environmental Bonding), sec. 3B (Port Districts), and sec. 3C (Hospitals and Health Districts). For purposes of this inquiry, sec. 3C is the most relevant.

Article VIII, sec. 3C, states, in relevant part:

Provided that no ad valorem tax revenues shall be used for activities authorized by this section, public hospitals, ancillary to their operations and in furtherance of health care needs in their service areas, may: (i) acquire, construct, install and equip facilities or projects to be financed for, or to be leased, sold or otherwise disposed of to persons, associa-

tions or corporations other than municipal corporations and may, in the manner prescribed by law, finance the costs thereof; (ii) engage in shared services and other joint or cooperative ventures; (iii) enter into joint ventures and partnerships; (iv) form or be a shareholder of corporations or a member of limited liability companies; (v) have members of its governing body or its officers or administrators serve as directors, managers, officers or employees of any venture, association, partnership, corporation or limited liability company as authorized by this section; (vi) own interests in partnerships, corporations and limited liability companies No provisions of this Constitution including, but not limited to Sections 3 and 4 of Article VIII, and Section 4 of Article XII, shall be construed as a limitation upon the authority granted under this section.

(Emphasis added.)

Notably, the above provision permits the financing of projects by hospitals and hospital districts. The scope of the clauses “to be financed” and “[n]o provisions of this Constitution . . . shall be construed as a limitation” have not been determined by an Idaho appellate court. Since this office does not advise clients or financial institutions with regard to the issuance of bonds or how the entities incur debt, bond counsel for these entities was consulted.

Bond counsel for the entities enumerated within art. VIII, sec. 3, indicate that, based upon the language above, they are unable to issue an “unqualified opinion” with regard to the issuing of bonds directly by these hospitals. Counsel does acknowledge that an argument could be made that the phrase “to be financed” includes the incurring of debt and issuance of bonds, but the more legally defensible interpretation is to conclude that it does not directly permit such issuance.¹ Bond counsel believes the “to be financed” and “[n]o provisions . . . shall be construed as a limitation” language was intended to permit joint venture entities to borrow without reference to constitutional limits. Their view is that, for example, a public hospital could create a joint venture with a group of doctors to operate a clinic, and such joint venture entity could borrow money without violating any constitutional prohibitions. However, a public hospital itself could not directly borrow or guarantee such debt. Thus, it is likely that a hospital seeking to issue bonds would likely have

to do so under the main text of art. VIII, sec. 3, which would then require a 2/3 affirmative vote of the qualified electors within the applicable hospital boundaries.

Reading the text of art. VIII, sec. 3C, it appears that the Idaho Constitution recognizes that these types of entities should be treated differently than other subdivisions of government and intended to allow greater flexibility with regard to the authority of hospitals to incur debt in order to meet the health demands of their constituency. With this in mind, the Legislature may wish to consider a minor amendment to art. VIII, sec. 3C, to eliminate the legal uncertainty of the phrase "to be financed." The following amendment is submitted for your consideration:

(i) incur indebtedness or liability to purchase, contract, lease or construct or otherwise acquire facilities, equipment, technology and real property for health care operations as provided by law;

The remaining clauses would need to be renumbered to reflect the addition of this paragraph at the beginning. This recommendation does two things of note. First, as mentioned above, it removes the legal uncertainty that currently exists with regard to the scope of the provision. Second, this will allow the Legislature appropriate oversight with regard to these entities' ability to incur debt.

I hope that you find this response helpful. Please contact me if you would like to discuss this issue more fully or if you would like to discuss alternative amendments to this provision.

Sincerely,

BRIAN P. KANE
Deputy Attorney General

¹ A bond counsel's legal opinion standard is that the attorney is "firmly convinced" that the Idaho Supreme Court would reach the same legal conclusion as the bond counsel.

November 2, 2009

Via E-Mail and U.S. Mail

The Honorable Phylis K. King
Idaho House of Representatives
P.O. Box 83720
Boise, ID 83720-0081
pking@house.idaho.gov

Re: Manufactured Housing Parks

Dear Representative King:

Your October 13, 2009, request to the Office of the Attorney General relative to legislation you are considering proposing next legislative session has been forwarded to me for a response. I apologize for the delay in responding to your request.

You have asked the office whether draft legislation you are considering would constitute a taking under federal or state constitutional provisions. Specifically, you are considering amending Idaho Code § 55-208 to provide that a manufactured housing park rule restricting the type or size of a mobile home permitted in the park may not be applied to a tenant whose mobile home was in compliance with park rules prior to the adoption or amendment of the rule. For the following reasons, there should not be a valid takings claim made against such a proposal should it become law.

The Fifth Amendment to the United States Constitution provides that private property shall not be taken for public use without just compensation. Article I, sec. 14 of the Idaho State Constitution has a fairly similar provision.

Courts have recognized three situations in which a taking requiring just compensation may occur: (1) when a government action causes physical *occupancy* of property, (2) when a government action causes physical *invasion* of property, and (3) when government *regulation* effectively eliminates all economic value of private property.

The most easily recognized type of “taking” occurs when government physically occupies private property. Clearly, when the government seeks to use private property for a public building, a highway, a utility easement, or some other public purpose, it must compensate the property owner.

Physical invasions of property, as distinguished from physical occupancies, may also give rise to a “taking” where the invasions are of a recurring or substantial nature. Examples of physical invasions include, among others, flooding and water related intrusions.

Like physical occupations or invasions, a regulation that affects the value, use, or transfer of property may also constitute a “taking,” but here only if it “goes too far.” Although most land use regulation does not constitute a “taking” of property, the courts have recognized that when regulation divests an owner of the essential attributes of ownership, it amounts to a “taking” subject to compensation. Your proposed regulation would be evaluated under this latter category of takings claims.

Regulatory actions are harder to evaluate for “takings” because government may properly regulate or limit the use of private property, relying on its authority and responsibility to protect public health, safety, and welfare. Accordingly, government may abate public nuisances, terminate illegal activity, and establish building codes, safety standards, or sanitary requirements generally without creating a compensatory “taking.” Government may also limit the use of property through land use planning, zoning ordinances, setback requirements, and environmental regulations.

If a government regulation, however, destroys a fundamental property right—such as the right to possess, exclude others from, or dispose of property—it could constitute a compensable “taking.” Similarly, if a regulation imposes substantial and significant limitations on property use, there could be a “taking.” In assessing whether there has been such a limitation on property use as to constitute a “taking,” the court will consider both the purpose of the regulatory action and the degree to which it limits the owner’s property rights. In the end, if a regulation prohibits all economically viable or beneficial uses of property, there may be liability for just compensation unless government can demonstrate that laws of nuisance or other pre-existing limitations on the use of the property prohibit the proposed uses.

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With that backdrop in mind, courts have been quite clear that, “States have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails.” Pennell v. City of San Jose, 485 U.S. 1, 12, n.6, 108 S. Ct. 849, 857, 99 L.Ed.2d 1 (1988). Thus, for example, courts have consistently held that even rent control laws are not *per se* takings. *Id.*

In light of these rules, a provision in Idaho law prohibiting the applicability of a subsequently adopted mobile home park rule that would require an existing mobile home to move should not be found to effect a taking. Fundamentally, such a prohibition does not prohibit all economically viable or beneficial uses of the mobile home park. The fact is that even with such a statutory rule in place, the mobile home park owner’s property still can be utilized in a variety of economic and beneficial uses, not the least of which is continuing to collect rent from the covered mobile home tenant.

Thank you for contacting the Attorney General’s Office. If you have any further questions or concerns that you would like to discuss, please do not hesitate to contact me.

Very truly yours,

BRETT T. DELANGE
Deputy Attorney General
Chief, Consumer Protection Division

November 18, 2009

Via Hand Delivery

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

Re: Unvouchered Expense Allowance

Dear Speaker Denney:

This letter is in response to your recent inquiry regarding Section II, ¶ 3 of the Report of the Idaho Citizens' Committee on Legislative Compensation. Specifically, you ask whether this paragraph permits the Legislature, or the Controller, discretion in the payment of the unvouchered expense allowance. As explained in more detail below, this lump sum must be paid pursuant to the terms outlined within Section II, ¶ 3.

Section II, ¶ 3 provides in pertinent part:

Each member of the Legislature shall receive a lump sum unvouchered constituent service allowance of two thousand, five hundred dollars (\$2,500) to be paid annually, on the last pay date preceding the first day of December, for expenses incurred maintaining the office of the legislator.

Notably this provision contains three mandates: (1) Each member is to receive the payment; (2) the amount is \$2,500;¹ and (3) it is to be paid on the last pay date prior to December 1. No other proof for payment is required other than the recipient be a member of the Legislature. Reviewing this paragraph and its mandates, it is clear that no discretion with regard to the payment is left to either the Legislature or the Controller. Payment of this unvouchered lump sum should be made in precisely the manner directed by the Citizens' Committee through ¶ 3 of Section II.

ADVISORY LETTERS OF THE ATTORNEY GENERAL

I hope that you find this letter helpful.

Sincerely,

BRIAN P. KANE
Deputy Attorney General

¹ There is a provision for pro-rating the amount, but that issue has not been raised or addressed in this analysis.

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and

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