

**IDAHO
ATTORNEY
GENERAL'S
ANNUAL REPORT**

**OPINIONS
CERTIFICATES OF REVIEW
AND
SELECTED ADVISORY
LETTERS**

FOR THE YEAR

2010

Lawrence G. Wasden
Attorney General

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This volume should be cited as:
2010 Idaho Att’y Gen. Ann. Rpt.

Thus, the Official Opinion 10-1 is found at:
2010 Idaho Att’y Gen. Ann. Rpt. 5

Similarly, the Certificate of Review of January 14, 2010
is found at:
2010 Idaho Att’y Gen. Ann. Rpt. 37

The Advisory Letter of January 19, 2010
is found at:
2010 Idaho Att’y Gen. Ann. Rpt. 143

CONTENTS

| | |
|--|-----|
| Roster of Attorneys General of Idaho | v |
| Introduction | vii |
| Roster of Staff of the Attorney General | 1 |
| Organizational Chart of the Office of the Attorney General | 2 |
| Official Opinions—2010 | 5 |
| Topic Index to Opinions | 31 |
| Table of Statutes Cited | 32 |
| Certificates of Review—2010 | 37 |
| Topic Index to Certificates of Review | 135 |
| Table of Statutes Cited | 136 |
| Selected Advisory Letters—2010 | 143 |
| Topic Index to Advisory Letters | 201 |
| Table of Statutes Cited | 206 |

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 | 1903-1904 |
| 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 |
| ALLAN B. SHEPARD | 1963-1968 |
| ROBERT M. ROBSON | 1969-1970 |
| W. ANTHONY PARK | 1971-1974 |
| 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:

I am pleased to report that, although 2010 was a difficult year financially, the State of Idaho's legal representation was at its best.

The Office of the Attorney General represented the State in a number of legal proceedings, addressing federal intrusion on state authority. State and federal relations dominated the Office's attention. From Idaho's joinder in a suit brought to challenge the Patient Protection and Care Act, to ongoing efforts to remove federal oversight of predator populations, my Office has been active, aggressive, and effective. My Office will continue these efforts, and work tirelessly through the appropriate legal channels, to stem the ongoing advancement of federal influence over sovereign state responsibilities.

My Office has worked with the Idaho State Board of Land Commissioners to ensure that the endowments of the State of Idaho will soon be achieving more defensible market-rate returns. These returns translate into added dollars for some of Idaho's most deserving constituencies—public schools, mental health hospitals, and higher education. My Office will continue these efforts to make certain that the noble purpose behind the creation and management of these endowment lands is not lost.

Our Consumer Protection Division recovered \$12,710,300 for Idaho consumers and taxpayers. More importantly, the Consumer Protection Division has been at the forefront of protecting Idaho's homeowners throughout the foreclosure process. 2010 marked the first year that complaints about banks and loans were the leading consumer complaint, and my Office responded quickly to shut down predatory and deceptive loan modification companies. The Consumer Protection Division also added a housing counselor specifically to assist Idaho's homeowners, as well as implemented, at no taxpayer expense, an education program related to foreclosures, mortgage modifications, and purchasing a home.

Like 2009, 2010 was 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 and we faced significant, ongoing budget pressure. This required the Office to address a growing caseload, while dealing with the loss of more than 26 deputy attorneys general, paralegals, and other staff. Additionally, the Office was forced to take furlough days to meet the holdbacks. Furloughs and vacancies are not sustainable options for the State of Idaho over the long term. My Office cannot refuse to defend a lawsuit, or simply skip a court hearing. An ongoing failure to appropriately fund Idaho legal representation will result in significant legal liability to the State of Idaho.

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, thereby minimizing Idaho's legal expenditures.

I encourage you to visit our website at <http://www.ag.idaho.gov> where you will find details about us, along with copies of all of our publications.

Thank you for your support.

A handwritten signature in black ink, appearing to read 'L. Wasden', with a stylized, flowing script.

LAWRENCE G. WASDEN
Attorney General

ANNUAL REPORT OF THE ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL LAWRENCE G. WASDEN ATTORNEY GENERAL 2010 STAFF ROSTER

ADMINISTRATION

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

DIVISION CHIEFS

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

DEPUTY ATTORNEYS GENERAL

| | | | | |
|-------------------|-----------------|----------------------|------------------|--------------------|
| Rob Adelson | Timothy Davis | Karin Jones | Michael McPeck | Nicholas Spencer |
| Lawrence Allen | Thomas Donovan | Kenneth Jorgensen | Cheryl Meade | Marcy Spilker |
| Stephanie Altig | Peg Dougherty | Angela Kaufmann | Melissa Moody | David Stanish |
| LaMont Anderson | Darrell Early | John Keenan | Tyson Nelson | Steve Strack |
| Kent Bailey | Rosemary Emory | M. Scott Keim | Brian Nicholas | Weldon Stutzman |
| James Baird | Lori Fleming | S. Kilminster-Hadley | Mark Olson | Jennifer Swartz |
| Garrick Baxter | Robert Follett | Brent King | Carl Olsson | Katherine Takasugi |
| Matthew Beeler | Roger Gabel | Karl Klein | Michael Orr | Josh Taylor |
| Mary Jo Beig | Cheryl George | Elizabeth Koeckeritz | Paul Panther | Timothy Thomas |
| Brian Benjamin | Michael Gilmore | Chris Kronberg | James Price | Chris Topmiller |
| Nancy Bishop | Patrick Grace | Mark Kubinski | Neil Price | Mitch Toryanski |
| Jennifer Birken | Jennifer Grunke | Deena Layne | Whitaker Riggs | Kathleen Trever |
| Craig Bledsoe | Joanna Guilfooy | William Loomis | Kenneth Robins | Melissa Vandenberg |
| Rondee Blessing | Stephanie Guyon | Jessica Lorello | Tracey Rolfsen | Steve Vinsonhaler |
| Chris Bromley | Susan Hamlin | Robert Luce | Denise Rosen | Karl Vogt |
| Dallas Burkhalter | Harriet Hensley | Emily Mac Master | Kristine Sasser | William vonTagen |
| Lisa Carlson | Jane Hochberg | Karin Magnelli | Nicole Schafer | Julie Weaver |
| Corey Cartwright | John Homan | Jennifer Marcus | Jeffrey Schrader | Peggy White |
| Doug Conde | Krista Howard | René Martin | Steve Schuster | Mark Withers |
| Alan Conilogue | Donald Howell | Kendal McDevitt | Erick Shaner | Brian Wonderlich |
| Andrea Courtney | Blair Jaynes | John McKinney | Clay Smith | Scott Woodbury |
| Rebekah Cudé | Joseph Jones | | Andrew Snook | David Young |

INVESTIGATORS

| | | | | |
|--------------------|------------|----------------|-------------|---------------|
| Scott Birch, Chief | Ben Gagnon | Jim Kouril | Scott Smith | Michael Steen |
| | | Tawni Limesand | | |

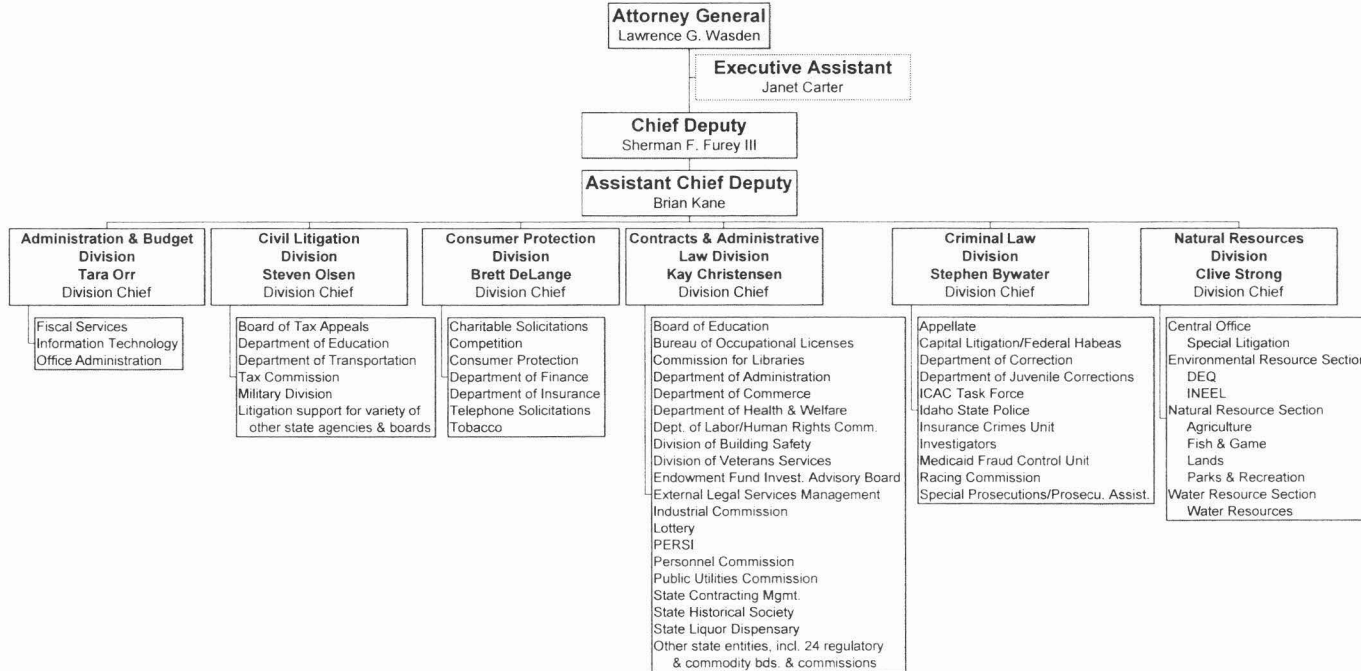
PARALEGALS

| | | | |
|--------------------|-----------------|-------------------|---------------|
| Kathie Brack | Beth Kittlemann | Renea Ridgeway | Beccie Stange |
| Suzy Cooley-Denney | Sandra McCue | Jean Rosenthal | Lisa Warren |
| Rita Jensen | Bernice Myles | Victoria Rutledge | Ray Williams |
| Vicki Kelly | | | Paula Wilson |

NON-LEGAL PERSONNEL

| | | | | |
|----------------------|-----------------|-------------------|------------------|-------------------|
| Christine Allbritton | G. Luke Carter | Bryce Jensen | Teri Nealis | Micki Schlapia |
| Mandy Ary | Renée Chariton | Eric Jensen | Rosean Newman | Aimee Stephenson |
| Reene Ashton | Robert Cooper | Cecil Jones | Frances Nix | Jodie Stoddard |
| Sherrie Bengtson | Jodi Darling | John Lorbeck | Sandy Piotrowski | Lonny Tutko |
| Jennifer Bithell | Deborah Forgy | Reta Massano | Marchelle Premo | Teresa Taylor |
| Kriss Bivens Cloyd | Marilyn Gerhard | Patty McNeill | Karen Rash | Olga Valdivia |
| Patricia Boehm | Leslie Gottsch | Ronda Mein | Greg Rast | Deborah Wetherell |
| Karen Bolian | Terry Hancock | Patricia Miller | Kathy Ream | Robert Wheeler |
| Casey Boren | Trudy Jackson | Lynn Mize | Dustin Russell | Kim Youmans |
| | | Barbara Mortensen | | |

Office of the Idaho Attorney General Organizational Chart - 2010



**OFFICIAL OPINIONS
OF
THE ATTORNEY GENERAL
FOR THE YEAR 2010**

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

ATTORNEY GENERAL OPINION NO. 10-1

To: Mr. M. Dean Buffington, Chairman
Endowment Fund Investment Board
816 W. Bannock Street, Suite 301
Boise, ID 83702

Per Request for Attorney General's Opinion

You have requested an Attorney General's Opinion regarding the fiduciary responsibilities of the Endowment Fund Investment Board ("EFIB") in its roles as trustee of the financial assets of the Public School Endowment and as the administrator of the Credit Enhancement Program for School District Bonds established by Idaho Code § 57-728 ("Credit Enhancement Program").

EXECUTIVE SUMMARY

The EFIB is the day-to-day trustee of the financial assets of the Public School Endowment. In all investment decisions entrusted to the EFIB concerning the endowments' assets, the EFIB is bound by the fiduciary duties established by the Idaho Admission Bill, the Idaho Constitution, and the statutory and common law of Idaho. Both the pledging of the financial assets of the Public School Endowment to guarantee a school bond and the purchase of notes under the Credit Enhancement Program to provide funds for a school bond debt service payment are investment decisions.

The EFIB's fiduciary duties require it to determine that the investments represented by the Credit Enhancement Program satisfy the Public School Endowment terms. To satisfy the terms of the trust, an investment must secure the maximum long-term return to the Public School Endowment when considered in conjunction with the trust's investment portfolio and investment strategies. In addition, the current and future beneficiaries of the Public School Endowment must be treated with impartiality in investment decisions.

The EFIB thoroughly reviewed the investment aspects of the initial pledge of endowment assets under the Credit Enhancement Program. The

information it reviewed established that the initial pledge narrowed the future investment options for the Public School Endowment. The information also identified that this narrowing could produce a lower return to the trust and that fees could offset this lower return. In light of this information, the EFIB's fiduciary duties to the Public School Endowment required that it either establish fees to offset the projected loss of return to the trust or that it decline to invest under the Credit Enhancement Program. Rather than decline to invest, the EFIB decided to establish fees to comply with its statutory and fiduciary duties.

QUESTIONS PRESENTED

1. Do the EFIB's fiduciary duties to the Public School Endowment extend to its decision to pledge the endowment fund to guarantee school bonds issued under the Credit Enhancement Program?
2. If the EFIB's fiduciary duties extend to decisions by the Board to pledge the endowment fund to guarantee school bonds under the Credit Enhancement Program, what must the Board do to fulfill its fiduciary duties?
3. If the EFIB's fiduciary duties extend to decisions by the Board to pledge the endowment fund to guarantee school bonds under the Credit Enhancement Program, may the Board provide a guarantee based upon the benefit to a single Idaho public school district?

BACKGROUND

A. Establishment and Management of the Public School Endowment

The original corpus of the Public School Endowment was established by Sections 4, 5 and 7 of the Idaho Admission Bill. 26 Stat. L. 215, ch. 656; am. 1998, P.L. 105-296; am. 2007, P.L. 110-77. The Idaho Constitution sets forth additional terms of the Public School Endowment trust and specifies that the State Board of Land Commissioners ("Land Board") is its trustee. *See* Idaho Const. art. IX, §§ 3, 4, 7 and 11; *see also*, Pike v. State Bd. of Land Comm'rs, 19 Idaho 268, 113 P. 447 (1911). The management of the Public School Endowment is split between two agencies: the land and natural

resource assets of the trust are managed by the Department of Lands and the financial assets of the trust are managed by the Endowment Fund Investment Board (“EFIB”). See Idaho Code § 57-718 (establishing the EFIB); Idaho Code § 58-101 (establishing the Department of Lands). Both agencies are under the direction of the Land Board in its role as the trustee of the Public School Endowment. See Idaho Code § 57-718 (establishing the EFIB in the Land Board); Idaho Code § 58-101 (Land Board exercises its constitutional functions through the Department of Lands); see also, Idaho Code § 58-104(11) (Land Board has the power to direct and oversee the EFIB and the Department of Lands).

Delegates to the Idaho Constitutional Convention declared that the Public School Endowment is a sacred trust. The framers of the Idaho Constitution imposed restrictive trust provisions on the management of the trust to ensure that it would continue in perpetuity. Idaho Const. art. IX, §§ 3, 4 and 8; see I. W. Hart, Proceedings and Debates of the Constitutional Convention of Idaho 1889 647 (1912). The Idaho Legislature recognized these trust obligations when it declared that each of the endowments established by the Idaho Admission Bill are “trust funds of the highest and most sacred order” and directed that the management and investment of the endowment must be “in accordance with the highest standard . . .” Idaho Code § 57-715.

The Idaho Constitution establishes that the objective of the endowment trusts is to secure the maximum long-term return to the beneficiaries of the particular trust. Idaho Const. art. IX, § 8. In the late 1990s, the State of Idaho reviewed methods to manage the land and financial assets of the endowments to determine which methods would secure the maximum long-term return to the endowment beneficiaries. The review culminated in amendments to the Idaho Constitution often referred to as “Endowment Reform.” One of the amendments during Endowment Reform granted broader investment authority to the endowment trustees. See Idaho Endowment Fund Investment Bd. v. Crane, 135 Idaho 667, 23 P.3d 129 (2001) (summarizing the 1998 legislative activities and voter approved amendments relating to the endowments). Article IX, sec. 11 of the Idaho Constitution now provides:

The permanent endowment funds other than funds arising from the disposition of university lands belonging to the state, may be invested in United States, state, county, city, village, or school district bonds or state warrants or other investments in which a trustee is authorized to invest pursuant to state law.

B. Investment of the Endowments

Prior to Endowment Reform, the investment of the financial assets of the endowments was limited by statute to certain investment types based upon then existing constitutional constraints in art. IX, sec. 11 of the Idaho Constitution. These assets primarily consisted of fixed income investments such as bonds and certain guaranteed loans. Investment in stocks was not permitted. *See Engelking v. Investment Bd.*, 93 Idaho 217, 458 P.2d 213 (1969).

The Endowment Reform revision to art. IX, sec. 11 of the Idaho Constitution expanded the types of authorized investments in which the endowment funds could be invested. The primary restriction upon the investment options available to the EFIB under Endowment Reform is the “Prudent Investor Rule.” The Prudent Investor Rule requires in pertinent part:

(1) A trustee shall invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill and caution.

(2) A trustee’s investment and management decisions respecting individual assets must be evaluated not in isolation but in the context of the trust portfolio as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the trust.

Idaho Code § 68-502; *see also*, 1982 Idaho Att’y Gen. Ann. Rpt. 82 (Prudent Investor Rule applies to the investment of all assets held by the state in a fiduciary capacity); Restatement (Third) of Trusts § 90 (2007) (general standard of prudent investment applicable to trustees). In addition to its application

under the law generally applicable to a trustee, the Idaho Legislature specifically applied the Prudent Investor Rule to the investment of the endowments. Idaho Code § 57-723.

Under the Prudent Investor Rule as set forth in Idaho Code, the trustee is required to consider a list of circumstances, including:

(d) The role that each investment or course of action plays within the overall trust portfolio . . . ;

(e) The expected total return from income and the appreciation of capital; [and],

. . . .

(g) Needs for liquidity, regularity of income and preservation or appreciation of capital

Idaho Code § 68-502(3). In the context of the Public School Endowment, the Prudent Investor Rule requires that the EFIB consider how each individual investment interacts with the other investments and assets held by the endowment. The overall portfolio must support the objective of securing the maximum long-term return to the beneficiaries in furtherance of the purpose of providing a perpetual source of support and maintenance of Idaho's public schools. An investment that does not support the risk and return objectives of the Public School Endowment is not a prudent investment.

C. Guaranty of School Bonds by the Public School Endowment

1. The Guaranty Program and the Credit Enhancement Program

In 1999, the Idaho Legislature enacted the Idaho School Bond Guaranty Act ("Guaranty Program") and the Credit Enhancement Program. Title 33, chapter 53, Idaho Code; Idaho Code § 57-728. Under the Guaranty Program, the sales tax of the State of Idaho is pledged to guarantee the debt service payments of bonds issued by Idaho public school districts under the program. *See* Idaho Code § 33-5303. The pledge of the state's sales tax revenue provides bondholders with a second source of payment should a school

district default on its bonds. The state's guaranty results in the award of a higher credit rating to the bonds by rating agencies. This higher credit rating in turn allows the school district to pay a lower interest rate on its bonds. The Guaranty Program is administered by the Office of the Treasurer ("Treasurer").

The Credit Enhancement Program is available to certain Idaho public school districts that have qualified for the Guaranty Program. *See* Idaho Code § 57-728(8) (limiting eligibility based upon the balance of outstanding guaranties to the district). The Credit Enhancement Program is administered by the EFIB and is "intended to benefit school districts by authorizing the board to purchase notes issued by the State of Idaho for the purpose of making debt service payments under the [Guaranty Program]." Idaho Code § 57-728(1).

When the EFIB issues a guaranty under the Credit Enhancement Program, it pledges the Public School Endowment's assets as a third source of payment should a school district default on its bonds. In the event of a school district default, the EFIB does not directly make the school district's bond payment. Instead, the EFIB loans funds from the Public School Endowment to the State of Idaho in exchange for a promissory note issued by the Treasurer on behalf of the State of Idaho. The promissory note is held by the EFIB as an investment for the Public School Endowment until the Treasurer is able to repay the loan. The terms of the loan are set forth in statute, including the interest paid to the Public School Endowment. Idaho Code § 57-728. Bonds issued with a guaranty under the Credit Enhancement Program generally receive a higher credit rating than those guaranteed only by the Guaranty Program. This higher credit rating lowers interest paid to bond holders, reducing the costs to the school district and its taxpayers.

2. Idaho Endowment Fund Investment Board v. Crane and Implementation of the Credit Enhancement Program

The Credit Enhancement Program was challenged in a suit filed shortly after its approval. Crane, 135 Idaho 667, 23 P.3d 129. In Crane, the Idaho Supreme Court considered several legal issues, including whether the Credit Enhancement Program complied with the terms of the Idaho Constitution governing the preservation and investment of the Public School Endowment. The court concluded that the Credit Enhancement Program complied with the Idaho Constitution because "the purchase of notes is not a

transfer or use of endowment funds but fits squarely within the definition of an investment to be held as an asset of the fund, which in turn will produce income for the fund.” *Id.* at 673, 23 P.3d at 135.

Following the Crane decision, the Treasurer and the EFIB implemented the Guaranty Program and the Credit Enhancement Program. Under the original provisions of the Credit Enhancement Program, a guaranty was issued unless the EFIB objected to an application. Idaho Code § 57-728(2) (2002). All guaranties issued by the EFIB under the Credit Enhancement Program prior to 2009 were issued without formal consideration by the EFIB. No Idaho school district has defaulted on its bond obligations and neither the Guaranty Program nor the Credit Enhancement Program has been called upon to pay the debt service payments under its guaranties.

Revisions enacted in 2009 allow the Guaranty Program to operate separately from the Credit Enhancement Program and redress administrative and technical issues that had arisen in the decade since the enactment of the two programs. *See* 2009 Senate Bill No. 1154. The 2009 revisions required that the EFIB draft administrative rules to implement the Credit Enhancement Program. *See* Idaho Code § 57-728(2).

3. The EFIB Rules

As directed by the Legislature, the EFIB engaged in rules promulgation. As part of the rulemaking process, the Board considered the nature of the credit enhancement process, the costs incurred by the EFIB to issue a guaranty and the nature of the investment the EFIB was making as the trustee of the Public School Endowment. The Board’s deliberation related to the EFIB Rules included testimony by representatives of public schools asserting that fees for the pledge of Public School Endowment assets were not justified because of the limited risk that the EFIB would purchase promissory notes under the program and because of the interest provided in statute should the EFIB purchase promissory notes. *See*, Final Minutes, Endowment Fund Investment Board Special Board Meeting, August 27, 2009; Final Minutes, Endowment Fund Investment Board Regular Meeting, August 12, 2009; Draft Minutes, Endowment Fund Investment Board Special Executive Committee Meeting, June 30, 2009 (collectively, the “EFIB Meeting Minutes”).

At public meetings on the issue, EFIB staff and EFIB members provided information concerning the opportunity cost and other investment considerations related to the initial pledge of the Public School Endowment assets under the Credit Enhancement Program. *Id.* The information reviewed by the EFIB concerning the investment costs of pledging the Public School Endowment included a discussion of the impact of the guaranties on the liquidity of the fund and the impact on investment options available to the fund. *See* EFIB Meeting Minutes.

The EFIB approved temporary and proposed rules governing the administration of the program effective April 30, 2009. The EFIB subsequently revised the temporary and proposed rules (collectively, the “EFIB Rules”). Aug. 5, 2009, Idaho Administrative Bulletin, Vol. 09-8, pp. 125-128; Oct. 7, 2009, Idaho Administrative Bulletin, Vol. 2, Vol. 09-10, pp. 303-305. The EFIB Rules impose fees both for the review of applications and for the issuance of a guaranty. Aug. 5, 2009, Idaho Administrative Bulletin, Vol. 09-8, pp. 125-128; Oct. 7, 2009, Idaho Administrative Bulletin, Vol. 2, Vol. 09-10, pp. 303-305. Because the Land Board is the constitutional trustee of the Public School Endowment, the EFIB presented its decision concerning fees for the Credit Enhancement Program to the Land Board at its July and August 2009 meetings. *See*, Final Minutes, Regular Land Board Meeting, August 18, 2009; Final Minutes, Regular Land Board Meeting, July 21, 2009. The Land Board ratified the EFIB’s decisions on the EFIB Rules by taking no action on the rules.

ANALYSIS

A. The EFIB is Acting as a Trustee of the Public School Endowment when Administering the Credit Enhancement Program

The only Idaho case considering the Credit Enhancement Program is Crane. The Crane court did not specifically consider the EFIB’s role in administering the Credit Enhancement Program. The discussion in Crane and other decisions by Idaho courts, however, clarify the fiduciary responsibilities of the Public School Endowment’s trustees and the role of the Legislature in the management of the endowments.

The Idaho Constitution grants to the Legislature the authority to prescribe the framework for the management of the land and financial assets of the Public School Endowment. Idaho Const. art. IX, §§ 3 and 8. The framework established by the Legislature, however, must be consistent with the terms of the Idaho Constitution and the Idaho Admission Bill. See United States v. Fenton, 27 F. Supp. 816 (D. Idaho 1939) (fiduciary duty to recover endowment funds cannot be limited by state law); Idaho Watersheds Project v. State Bd. of Land Comm'rs, 133 Idaho 64, 67, 982 P.2d 367, 370 (1999) (statute cannot direct the Land Board to consider the benefit to parties other than the trust when assessing a lease application); Engelking, 93 Idaho 217, 458 P.2d 213 (investments are limited by the Idaho Constitution and cannot be expanded by the Legislature); State v. Peterson, 61 Idaho 50, 97 P.2d 603 (1939) (endowment lands cannot be impaired by law allowing adverse possession); State v. Fitzpatrick, 5 Idaho 499, 51 P. 112 (1897) (Legislature cannot enact legislation resulting in a diversion of Public School Endowment funds from the support of the public schools).

In Crane, the court recognized that the purchase of a promissory note to be held as an asset of the Public School Endowment is within the investments permitted by art. IX, sec. 11 of the Idaho Constitution. Crane, 135 Idaho at 673, 23 P.3d at 135. Critical to the court's analysis was the finding that the Credit Enhancement Program involved an "investment." An investment is defined as "an expenditure to acquire property or assets to produce revenue" Black's Law Dictionary 825 (6th ed. 1990). Thus, for the Board to accept the risk of guaranteeing a school bond, it must be compensated. Accepting the risk without a corresponding return would not meet the definition of an investment. The court did not discuss but appears to accept that the EFIB could reasonably determine that the purchase of promissory notes is a prudent investment for the Public School Endowment.

The Crane court also did not consider whether the initial pledge of trust assets represented by the issuance of a guaranty is a permitted investment for the Public School Endowment. As the EFIB recognized in its deliberations concerning the EFIB Rules, guaranties providing the benefits conferred by the Credit Enhancement Program are offered by private companies and institutional investors. Such guaranties are not offered without cost and have produced revenue to the guarantor. These guaranties are made for the purpose of producing such revenue. See Final Minutes, Endowment Fund

Investment Board Special Meeting, August 27, 2009. The issuance of a guaranty is thus also an investment. To the extent that it represents a permitted investment by a trustee, it is within the investments authorized by art. IX, sec. 11 of the Idaho Constitution.

Even though the investment is permitted, the Legislature cannot require action by the EFIB that is contrary to its constitutional duties as trustees. See Idaho Watersheds, 133 Idaho at 67, 982 P.2d at 370; Restatement (Third) of Trusts § 78 (2007) (trustee has the duty to administer the trust solely in the interest of the beneficiaries). The EFIB is acting as a trustee to the Public School Endowment when considering the initial investment represented by the issuance of a guaranty under the Credit Enhancement Program and the pledge to purchase notes under the terms set forth in statute. The EFIB must satisfy its fiduciary duties when electing to invest under the Credit Enhancement Program.

B. The EFIB's Duties to the Public School Endowment are to Consider the Investment Represented by the Issuance of a Guaranty in the Context of the EFIB's Investment Strategy and Investment Portfolio

The EFIB's duties to the Public School Endowment arise from the terms of the Idaho Admission Bill, the Idaho Constitution, and the common and statutory law applicable to trustees. A primary investment objective of the trustees of the endowments is to manage the assets of the trust to secure the maximum long-term return to the beneficiaries. Idaho Const. art. IX, § 8. As trustees, the Prudent Investor Rule requires that the consideration of the investment be made in the context of the whole of the trust's investments and the investment objectives of the trust. Idaho Code § 68-502; Restatement (Third) of Trusts § 90 (2007).

The interest on notes purchased by the Public School Endowment under the Credit Enhancement Program is set forth in statute. At the time of the issuance of a guaranty, the EFIB must consider whether these terms represent an investment that, within the current and projected structure of the Public School Endowment portfolio as a whole, is reasonably projected to produce the maximum long-term return to the trust.

In addition, the EFIB must consider whether the guaranty itself presents an investment meeting the constitutionally established investment objective of producing the maximum long-term return to the Public School Endowment. The issuance of a guaranty represents a potential cost to the Public School Endowment not addressed by the interest on notes that may be issued under the guaranty. Whenever funds are used to acquire an investment other investments are foregone. This is true even where the investment is a guaranty and the pledged funds remain available to the EFIB for other investments. The funds must be placed in investments the EFIB can quickly liquidate to purchase promissory notes from the Treasurer on as little as ten days' notice. *See Idaho Code § 33-5305(2); see also, Final Minutes, Endowment Fund Investment Board Special Meeting, August 27, 2009 (discussing need for liquidity in investments to the extent necessary to purchase promissory notes under the Credit Enhancement Program).*

The fiduciary considerations related to the issuance of the guaranty are the same as the considerations for the purchase of the notes issued by the Treasurer in the event of a school district default: do the terms of the pledge represent an investment that, within the current and projected structure of the Public School Endowment Portfolio as a whole, is reasonably projected to produce the maximum long-term return to the trust. Once the pledge is made, the EFIB must consider the outstanding guaranties and the obligations they impose when developing the investment strategy for the trust and designing its investment portfolio. Adjustments to the strategy and portfolio to account for the guaranty may produce a lower return to the Public School Endowment. As the EFIB recognized in its discussions, the lower return can be offset if school districts pay fees designed to provide the present value of the lower return for deposit in the trust. *See Final Minutes, Endowment Fund Investment Board Special Meeting, August 27, 2009.*

The offset represented by the fee is critical to the EFIB's exercise of its fiduciary duties. A trustee may determine that an investment with a likely risk of loss is a prudent investment because it satisfies investment purposes other than return. Other investment purposes include preservation of capital or investments in a sector that counterbalance or "hedge" other investments in the portfolio. *See Idaho Code § 68-502(3) (trustee may consider the need for preservation of capital and the expected return of the portfolio as a whole when considering an investment).* The pledge under the Credit Enhancement Program does not satisfy any investment purpose for the portfolio of the

Public School Endowment. Instead, the EFIB has determined that the pledge likely produces a loss to the trust if the lower return is not offset by fees. Investment through the pledge without the fees is thus a breach of the EFIB's fiduciary duties to the trust.

C. The EFIB May Not Consider the Benefit to an Individual School or to School Districts Generally when Administering the Credit Enhancement Program

The trustees of the Public School Endowment must act in furtherance of the purposes of the trust and in compliance with the trust's terms. *See Restatement (Third) of Trusts* § 77 (2007) (Duty of Prudence); *Restatement (Third) of Trusts* § 78 (2007) (Duty of Loyalty). The Idaho Admission Bill and the Idaho Constitution provide that the purpose of the trust is the perpetual support and maintenance of public schools. Idaho Admission Bill §§ 4 and 5 (endowment used only for the support of schools); Idaho Const. art. IX, § 3 (endowment used only for the maintenance of schools). The terms of the trust also require that it is to be managed to secure the maximum long-term return to the beneficiaries. Idaho Const. art. IX, § 8. The EFIB's duties, therefore, are to invest the financial assets of the Public School Endowment in a portfolio designed to provide the maximum financial return to the current and future beneficiaries.

The purpose of a school bond is within the duties of the Idaho Legislature but is not within the purposes and terms of the Public School Endowment. *See* Idaho Const. art. IX, § 1 (it is the duty of the Idaho Legislature to establish and maintain a system of public free common schools); Idaho Admission Bill §§ 4 and 5; Idaho Const. art. IX, § 3 (the revenue of the Public School Endowment shall be used for the support and maintenance of public schools and no other purpose). Public schools may issue bonds only for specific purposes related to the erection and equipment of school buildings. Idaho Code § 33-1102. In *Roach v. Gooding*, 11 Idaho 244, 81 P. 642 (1905), the Idaho Supreme Court considered a state statute allowing for the issuance of bonds for the construction of university facilities secured by the revenues from the University Endowment. The Court looked to Idaho Admission Bill, sec. 5, which provides:

- (2) Use of proceeds. –
- (A) In general. Proceeds of the sale of school land –
 - (i) . . . shall be deposited in the public school permanent endowment fund and expended only for the support of public schools; . . .

The Roach court also reviewed the decisions of other states concerning proper use of funds limited to the support of public schools. The court adopted the analysis of the other states that had considered the issue and concluded that the language in the Idaho Admission Bill and the Idaho Constitution concerning the support and maintenance of the public schools means the continuing and regular expenses of the school and not the erection and equipment of school buildings. *Id.* at 254, 81 P. at 646. Because the erection and furnishing of school buildings is not a purpose of the trust, the EFIB may consider only the investment aspects of the issuance of a guaranty under the Credit Enhancement Program and not the other public benefits arising from the guaranty. *See also, Idaho Watersheds*, 133 Idaho at 67, 982 P.2d at 370 (Land Board may not consider benefits to the livestock industry or revenue to local jurisdictions when leasing endowment land).

The investment aspects of the guarantee are not limited to the impact on the current portfolio held by the Public School Endowment. The trustees owe a duty of impartiality when dealing with the current and the future beneficiaries of the trust. Restatement (Third) of Trusts § 79 (2007); *see also, Restatement (Third) of Trusts* § 90 (2007) comment i (discussing the requirement of impartiality between present and future beneficiaries in the context of prudent investment). The duty of impartiality requires that the trustees invest and administer the trust so that the trust estate will produce income that is reasonably appropriate for the diverse present and future interests of its beneficiaries. *Id.* This duty prohibits the trustees from using the trust corpus, including its land and financial assets, to advantage a current beneficiary in a manner which diverts or reduces income to the detriment of future beneficiaries. *See also*, 1976 Idaho Att’y Gen. Ann. Rpt. 1 (terms of the Agricultural College Endowment provided that the revenue from the endowment, not the corpus of the endowment, may be used for the benefit of the college; use and

disposition of the trust lands are within the sound discretion of the Land Board as trustees).

The duty of impartiality is also contained within the terms of the Public School Endowment. The establishment of a perpetual trust and the investment directive of securing the maximum long-term return to the beneficiaries require impartiality. If the EFIB were to consider the benefit to a single school district or the general benefit to school districts in the short term, the EFIB would be favoring the beneficiaries of the endowment at a particular period in time over the future beneficiaries of the perpetual trust. Favoring current beneficiaries is a breach of the EFIB's fiduciary duties to the future beneficiaries of the Public School Endowment.

CONCLUSION

The EFIB acts as a trustee when determining whether to invest the Public School Endowment under the Credit Enhancement Program. As a trustee, the EFIB must comply with the Prudent Investor Rule and the duties of loyalty and impartiality in the administration of the Credit Enhancement Program. These fiduciary duties require that the EFIB determine that the investments represented by the Credit Enhancement Program will secure the maximum long-term return to the endowment when considered in conjunction with the trust's investment portfolio and investment strategies. The EFIB is also prohibited from selecting an investment that improperly favors either current or future beneficiaries.

Investment through the Credit Enhancement Program without fees is an investment that does not comply with the duties of loyalty, impartiality or the Prudent Investor Rule. As a condition of its investment through the Credit Enhancement Program, the EFIB decided to impose fees to offset the projected loss of return to the trust caused by the narrowing of investment opportunities. Had the EFIB decided otherwise, it would have breached its fiduciary obligations. The EFIB chose instead to impose offset fees, fulfilling its duties of loyalty and impartiality as well as the requirements of the Prudent Investor Rule.

AUTHORITIES CONSIDERED

1. Idaho Constitution:

Art. IX, § 1.
 Art. IX, § 3.
 Art. IX, § 4.
 Art. IX, § 7.
 Art. IX, § 8.
 Art. IX, § 11.

2. Idaho Code:

§ 33-1102.
 § 33-5303.
 § 33-5305(2).
 § 57-715.
 § 57-718.
 § 57-723.
 § 57-728.
 § 57-728(1).
 § 57-728(2).
 § 57-728 (8).
 § 58-101.
 § 58-104(11).
 § 68-502.
 § 68-502(3).

3. Idaho Cases:

Engleking v. Investment Bd., 93 Idaho 217, 458 P.2d 213 (1969).

Idaho Endowment Fund Investment Bd. v. Crane, 135 Idaho 667, 23 P.3d 129 (2001).

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

Pike v. State Bd. of Land Comm'rs, 19 Idaho 268, 113 P. 447 (1911).

Roach v. Gooding, 11 Idaho 244, 81 P. 642 (1905).

State v. Fitzpatrick, 5 Idaho 499, 51 P. 112 (1897).

State v. Peterson, 61 Idaho 50, 97 P.2d 603 (1939).

4. Other Cases:

United States v. Fenton, 27 F. Supp. 816 (D. Idaho 1939).

5. Other Authorities:

1976 Idaho Att'y Gen. Ann. Rpt. 1.

1982 Idaho Att'y Gen. Ann. Rpt. 82.

Black's Law Dictionary (6th ed. 1990).

Draft Minutes, Endowment Fund Investment Board Special Executive Committee Meeting, June 30, 2009.

Final Minutes, Endowment Fund Investment Board Regular Meeting, August 12, 2009.

Final Minutes, Endowment Fund Investment Board Special Meeting, August 27, 2009.

Final Minutes, Regular Land Board Meeting, July 21, 2009.

Final Minutes, Regular Land Board Meeting, August 18, 2009.

I.W. Hart, Proceedings and Debates of the Constitutional Convention of Idaho 1899 (1912).

Idaho Administrative Bulletin, Vol. 09-8 (Aug. 5, 2009).

Idaho Administrative Bulletin, Vol. 2, Vol. 09-10 (Oct. 7, 2009).

Idaho Admission Bill, 26 Stat. L. 215, ch. 656.

Idaho Admission Bill, §§ 4 and 5.

Restatement (Third) of Trusts §§ 77, 78, 79, 90 (2007).

Dated this 8th day of January, 2010.

LAWRENCE G. WASDEN
Attorney General

Analysis by:

JULIE K. WEAVER
Deputy Attorney General

ATTORNEY GENERAL OPINION NO. 10-2

To: The Honorable Denton Darrington
The Honorable Richard Wills
STATEHOUSE MAIL

Per Request for Attorney General's Opinion

You have requested an Attorney General's Opinion regarding whether the Legislature may mandate that a duly-elected sheriff be certified by the Police Officer Standards and Training ("POST") Council either prior to his or her election or within a reasonable time following his or her election. This opinion addresses that question.

QUESTION PRESENTED

May the Idaho Legislature require a sheriff to be certified by POST either prior to his or her election or within a reasonable period of time following his or her election?

CONCLUSION

The Idaho Legislature currently requires sheriffs to satisfy certain requirements including, in the case of first-time sheriffs who have not previously been certified by POST, completion of a tutorial prescribed by POST and other training requirements. The Legislature could expand the qualification requirements to include POST certification.

ANALYSIS

The Office of Sheriff is provided for in art. XVIII, sec. 6 of the Idaho Constitution, which provides, in relevant part:

The legislature by general and uniform laws shall, commencing with the general election in 1986, provide for the election biennially, in each of the several counties of the state, of county commissioners and for the election of a sheriff, a county assessor, a county coroner and a county

treasurer, who is ex-officio public administrator, every four years in each of the several counties of the state.

Idaho Const. art. XVIII, § 6.¹

Article XVIII, sec. 6 contains the only reference to the Office of Sheriff in the Idaho Constitution. In 1914, the Idaho Supreme Court, in interpreting art. XVIII, sec. 6, stated:

This provision of the Constitution creates, by specific reference all county officers as constitutional officers, and provides that the legislature, by general and uniform laws, shall provide for municipal officers as public convenience may require, and prescribe their duties and fix their terms of office. This provision of the constitution distinguishes county officers from municipal officers, making the first constitutional officers, while the creation of municipal officers is left wholly with the legislature.

Hodges v. Tucker, 25 Idaho 563, 572, 138 P. 1139, 1141 (1914).

That a sheriff is a constitutional officer in the sense that the Legislature must provide for his or her election, *i.e.*, the Legislature cannot eliminate the Office of Sheriff absent a constitutional amendment, does not mean the Legislature is prohibited from requiring a sheriff to meet certain qualifications, which are not mandated by the Constitution. In fact, the Legislature already does so.² Idaho Code § 34-618 provides:

Election of county sheriffs – Qualifications. – (1) At the general election, 1972, and every four (4) years thereafter, a sheriff shall be elected in every county.

(2) No person shall be elected to the office of sheriff unless he has attained the age of twenty-one (21) years at the time of election, is a citizen of the United States and shall have resided within the county one (1) year next preceding his election.

(3) Each candidate shall file his declaration of candidacy with the county clerk.

(4) Each candidate who files a declaration of candidacy shall at the same time pay a filing fee of forty dollars (\$40.00) which shall be deposited in the county treasury.

(5) Each person who has been elected to the office of sheriff for the first time shall complete a tutorial concerning current Idaho law and rules as prescribed by the Idaho peace officers standards and training academy, unless the person is already certified as a chief of police, peace officer or detention deputy in the state of Idaho, and shall attend the newly elected sheriffs' school sponsored by the Idaho sheriffs' association.

Most notable among the qualifications listed for purposes of this opinion are, of course, the qualifications listed in subsection (5), requiring a first-time sheriff to complete a tutorial prescribed by POST unless he or she is already certified. If the Legislature can compel completion of a tutorial through POST and attendance at the "newly elected sheriffs' school," it can undoubtedly require certification. Thus, the question becomes whether section 34-618 comports with the Constitution. The answer to that question is yes.

In Leonardson v. Moon, 92 Idaho 796, 806, 451 P.2d 542, 552 (1969), the Idaho Supreme Court recognized: "Unlike the federal constitution, the state constitution is a limitation, not a grant, of power." Thus, the Court "look[s] to the state constitution not to determine what the legislature may do, but to determine what it may not do. If an act of the legislature is not forbidden by the state or federal constitutions, it must be held valid." *Id.* (citing Eberle v. Neilson, 78 Idaho 572, 306 P.2d 1083 (1957); Idaho Telephone Company v. Baird, 91 Idaho 425, 423 P.2d 337 (1967)). Consistent with this, it is clear the "legislature may prescribe duties in addition to those prescribed by the Constitution, provided, those prescribed by the legislature do not conflict with the duties either expressly or impliedly prescribed by the Constitution." Wright v. Callahan, 61 Idaho 167, 178, 99 P.2d 961, 965 (1940). This principle logically extends to the Legislature's ability to prescribe certain qualifications required of a constitutional officer so long as those qualifications do not conflict with the qualifications prescribed by the Constitution.

Although not directly on point, Robinson v. Bodily, 97 Idaho 199, 541 P.2d 623 (1975), is instructive. In Robinson, the Idaho Supreme Court considered a challenge to the election laws based on the Bonneville County Clerk's refusal to print the name of a putative candidate for county commissioner on the general ballot after his unsuccessful bid in the primary election. *Id.* The Court rejected the challenge and held "the Idaho election laws constitutional." *Id.* at 200, 541 P.2d at 624. In doing so, the Court recognized: "Individuals who wish to run for public elective office (including county commissioner) must meet certain qualifications." *Id.* at 201, 541 P.2d at 625. Implicit in this statement and the Court's ultimate holding is that requiring an elected official to satisfy certain qualifications is constitutionally permissible.

The United States Supreme Court's opinion in Storer v. Brown, 415 U.S. 724, 94 S. Ct. 1274, 39 L.Ed.2d 714 (1974), is also instructive. At issue in Storer was a provision of the California Elections Code that "forbids ballot position to an independent candidate for elective public office if he voted in the immediately preceding primary," "or if he had a registered affiliation with a qualified political party at any time within one year prior to the immediately preceding primary election." *Id.* at 72. The constitutionality of these provisions was challenged, in part, "as adding qualifications for the office of the United States Congressman, contrary to art. I, § 2, cl. 2, of the Constitution." *Id.* In analyzing the constitutional question, the Court noted that "a State has an interest, if not a duty, to protect the integrity of its political processes from frivolous or fraudulent candidacies." *Id.* at 733 (citing Jenness v. Fortson, 403 U.S. 431, 442 (1971)). As such, a state may, in furtherance of its interests and consistent with the Constitution, limit access to its ballots and impose candidacy requirements. *Id.* at 732-33. As applied here, the State of Idaho undoubtedly has an interest in ensuring that individuals elected to the Office of Sheriff who, along with county prosecutors, are vested with the "primary duty of enforcing all the penal provisions of any and all statutes of this state" (Idaho Code § 31-2227), meet certain minimum requirements up to and including POST certification, which is, by statute, required of all other peace officers in the State of Idaho, including deputy sheriffs. *See* Idaho Code § 19-5109.

In sum, the Idaho Constitution does not prohibit the Legislature from imposing certain qualifications on sheriffs, including the requirement that they be POST certified.

AUTHORITIES CONSIDERED

1. United States Constitution:

Art. I, § 2, cl. 2.

2. Idaho Constitution:

Art. V, § 23.

Art. XVIII, § 6.

Art. XVIII, § 10.

3. Idaho Code:

§ 19-5109.

§ 31-2227.

§ 34-615.

§ 34-617.

§ 34-618.

4. United States Supreme Court Cases:

Jenness v. Fortson, 403 U.S. 431, 91 S. Ct. 1970, 29 L.Ed.2d 554 (1971).

Storer v. Brown, 415 U.S. 724, 94 S. Ct. 1274, 39 L.Ed.2d 714 (1974).

5. Idaho Cases:

Eberle v. Neilson, 78 Idaho 572, 306 P.2d 1083 (1957).

Hodges v. Tucker, 25 Idaho 563, 138 P. 1139 (1914).

Idaho Telephone Co. v. Baird, 91 Idaho 425, 423 P.2d 337 (1967).

Leonardson v. Moon, 92 Idaho 796, 451 P.2d 542 (1969).

Robinson v. Bodily, 97 Idaho 199, 541 P.2d 623 (1975).

Wright v. Callahan, 61 Idaho 167, 99 P.2d 961 (1940).

DATED this 10th day of February, 2010.

LAWRENCE G. WASDEN
Attorney General

Analysis by:

JESSICA M. LORELLO
Deputy Attorney General

¹ Article XVIII, sec. 6 currently reads substantially the same as when it was originally enacted. With respect to the Office of Sheriff, the only notable changes are (1) the original provision did not include the “commencing with the general election” language, which first appeared in 1948 using the election year 1950, and was later amended four times from 1950 to 1962 to 1964 to 1970 and finally to 1986; and (2) the original provision included a sentence prohibiting the sheriff and county assessor from holding the term of office immediately succeeding the term for which he was elected, which was deleted in 1909. 1909 Idaho Sess. Law 439 (S.J.R. No. 6).

² The Legislature also requires other constitutional officers to meet certain qualifications, which are not specified in the Idaho Constitution. See, e.g., Idaho Code § 34-615 (qualifications for district judges (compare with Idaho Const. art. V, § 23)); Idaho Code § 34-617 (qualifications for county commissioner (compare with Idaho Const. art. XVIII, § 6, 10)).

Topic Index
and
Tables of Citation
OFFICIAL OPINIONS
2010

| TOPIC | OPINION | PAGE |
|---|---------|------|
| ENDOWMENT FUND INVESTMENT | | |
| The fiduciary duties of the Endowment Fund Investment Board require the EFIB determine that the investments represented by the Credit Enhancement Program will secure the maximum long term return to the endowment | 10-1 | 5 |
| Investment through the Credit Enhancement Program without fees is an investment that does not comply with the duties of loyalty, impartiality or the Prudent Investor Rule | 10-1 | 5 |
| LAW ENFORCEMENT | | |
| The Legislature could expand the qualification requirements for sheriffs to include Police Officer Standards and Training (POST) certification | 10-2 | 22 |
| LEGISLATURE | | |
| The Legislature could expand the qualification requirements for sheriffs to include Police Officer Standards and Training (POST) certification | 10-2 | 22 |

UNITED STATES CONSTITUTION CITATIONS

| ARTICLE & SECTION | OPINION | PAGE |
|-------------------|---------|------|
| ARTICLE I | | |
| § 2, cl. 2 | 10-2 | 22 |

IDAHO CONSTITUTION CITATIONS

| ARTICLE & SECTION | OPINION | PAGE |
|----------------------|---------|------|
| ARTICLE V | | |
| § 23 | 10-2 | 22 |
| ARTICLE IX | | |
| § 1 | 10-1 | 5 |
| § 3 | 10-1 | 5 |
| § 4 | 10-1 | 5 |
| § 7 | 10-1 | 5 |
| § 8 | 10-1 | 5 |
| § 11 | 10-1 | 5 |
| ARTICLE XVIII | | |
| § 6 | 10-2 | 22 |
| § 10 | 10-2 | 22 |

IDAHO CODE CITATIONS

| SECTION | OPINION | PAGE |
|----------------------------|---------|------|
| 19-5109 | 10-2 | 22 |
| 31-2227 | 10-2 | 22 |
| 33-1102 | 10-1 | 5 |
| Title 33, chapter 53 | 10-1 | 5 |
| 33-5303 | 10-1 | 5 |
| 33-5305(2) | 10-1 | 5 |

2010 OFFICIAL OPINIONS INDEX

| | | |
|------------------|------|----|
| 34-615 | 10-2 | 22 |
| 34-617 | 10-2 | 22 |
| 34-618 | 10-2 | 22 |
| 57-715 | 10-1 | 5 |
| 57-718 | 10-1 | 5 |
| 57-723 | 10-1 | 5 |
| 57-728 | 10-1 | 5 |
| 57-728(1) | 10-1 | 5 |
| 57-728(2) | 10-1 | 5 |
| 57-728(8) | 10-1 | 5 |
| 58-101 | 10-1 | 5 |
| 58-104(11) | 10-1 | 5 |
| 68-502 | 10-1 | 5 |
| 68-502(3) | 10-1 | 5 |

**ATTORNEY GENERAL'S
CERTIFICATES OF REVIEW
FOR THE YEAR 2010**

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

CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

January 14, 2010

The Honorable Ben Ysursa
Idaho Secretary of State
STATEHOUSE MAIL

Re: Certificate of Review
Proposed Initiative Relating to Animal Cruelty

Dear Secretary of State Ysursa:

An initiative petition was filed with your office on December 15, 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 within which this office must review the petition, our 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 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

A. Amendment Is Consistent With the Statute

The proposed initiative ("Initiative") seeks to amend the definition of animal cruelty in title 25, chapter 35, Idaho Code. At the outset, I note that

there is a citation error in the Initiative. While the intent of the Initiative sponsor is to amend the definition of “cruel” or “cruelty” in Idaho Code § 25-3502(5), the citation in the Initiative is to the definition of “animal” in Idaho Code § 25-3502(2). The sponsors should correct this citation.

Title 25, chapter 35, Idaho Code, currently defines “cruel” or “cruelty” as:

- (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 Initiative proposes amending the definition of “cruel” or “cruelty” by the addition of a new paragraph:

- (f) For any person other than a licensed veterinarian to perform the following medical procedures: Cropping, trimming or cutting off the ear of a dog; Debarking by cutting or injuring the vocal cords of a dog; Docking or cutting off the tail of a dog over five days of age; Surgically birthing or performing a Caesarian section on a dog; and Removing the dewclaws from a dog over five days of age.

Initiative at 1.

The amendment to the definition of “cruel” or “cruelty” is consistent with the statutory scheme in title 25, chapter 35, Idaho Code. The statute’s prohibitions on animal cruelty are dependent on the definition of “cruel” or “cruelty” in the statute. *See e.g.*, Idaho Code §§ 25-3504 and 25-3505 (Supp. 2009). By amending the definition of “cruel” or “cruelty” to include other prohibited conduct, the Initiative does not conflict with the statutory scheme.

B. Technical Terms Should Be Defined

The Initiative seeks to amend the definition of “cruel” or “cruelty” by reference to several “medical procedures,” including “cropping,” “debarking,” “docking,” “surgically birthing,” and “Caesarian section.” However, the Initiative does not define the meaning of the medical procedures.

Idaho Code § 73-113 governs the construction of words and phrases in statutes, and provides in part:

Words and phrases are construed according to the context and the approved usage of the language, but technical words and phrases, and such others as have acquired a peculiar and appropriate meaning in the law, . . . are to be construed according to such peculiar and appropriate meaning or definition.

If a statute is unambiguous, a court will give the language of a statute its plain meaning. Purco Fleet Services, Inc. v. Idaho State Dep’t of Finance, 140 Idaho 121, 124, 90 P.3d 346, 349 (2004) (citations omitted). Common words are given “the same meaning in a statute as they have among the people who rely on and uphold the statute.” *Id.* (citations omitted). Moreover, when interpreting a statute “words and phrases are to be assumed to have been used in their popular sense, if they have not acquired a technical meaning.” Filer Mut. Telephone Co. v. Idaho State Tax Comm’n, 76 Idaho 256, 261, 281 P.2d 478, 480-81 (1955).

The medical procedures set forth in the Initiative may be common terms in the field of veterinary science, but the procedures may not be common terms “among the people who rely on and uphold” the provisions of title

25, chapter 35, Idaho Code. Purco Fleet Services, 140 Idaho at 124, 90 P.3d at 349. In other words, a dog owner may not know the meaning of the medical procedures addressed in the Initiative. Since the medical procedures likely have a technical meaning that may not be commonly known, the Initiative sponsors should consider defining the medical terms to eliminate any ambiguity in the Initiative.

C. Amendment 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 § 25-3502 be reproduced in the proposed Initiative, with amendments indicated appropriately by underscoring for additions and strikeouts for deletions. These underscoring and strikeouts, while not required constitutionally, may facilitate informed decision-making by those who would be considering 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 the Petitioner via a copy of this Certificate of Review, deposited in the U.S. Mail to Talitha Neher, 11322 W. Hinsdale Court, Boise, Idaho 83713.

Sincerely,

LAWRENCE G. WASDEN
Attorney General

Analysis by:

TYSON K. NELSON
Deputy Attorney General

CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

February 3, 2010

The Honorable Ben Ysursa
Idaho Secretary of State
STATEHOUSE MAIL

Re: Certificate of Review
Proposed Initiative Relating to the Health Supplements and
Therapeutics Protection Act

Dear Secretary of State Ysursa:

An initiative petition was filed with your office on January 19, 2010. Pursuant to Idaho Code § 34-1809, this office has reviewed the petition and has prepared the following advisory comments. Given the strict statutory timeframe within which this office must review the petition, our 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 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

At the outset, I note that there is a typographical error in the proposed initiative ("Initiative"). The last sentence of proposed section 29-9102 states,

“[t]his Act shall not be construed to limit the State of Idaho’s ability in its capacity to *regulation* pharmaceutical or biologic therapeutics.” (Emphasis added.) I believe that the sponsors intended to state “regulate” instead of “regulation.” If this is correct, the sponsors should correct this error.

Further, in proposed section 29-9103, the Initiative defines “Nutrition or therapeutic product.” Other sections of the Initiative refer to “*nutritional* or therapeutic product.” (Emphasis added.) The Initiative should be drafted so that the term is consistent throughout its language.

The Initiative Is Inconsistent With the United States Constitution and Federal Laws

The Initiative seeks to prohibit federal law or regulation of “nutritional or therapeutic products” that are manufactured in Idaho and that remain within the borders of Idaho. “Nutrition or therapeutic product” is defined broadly in subsection 29-9103(b) of the Initiative, so as to include pharmaceutical, biological, and “nutritional” supplements. As worded, this definition could include not only pharmaceutical and dietary supplement products, but also controlled substances or “illegal drugs.”

The Initiative is inconsistent with the United States Constitution. Article VI of the United States Constitution, commonly referred to as the “Supremacy Clause,” states, in part:

This Constitution, and laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.

U.S. Const. art. VI, cl. 2.

The U.S. Supreme Court has held that state laws that conflict with federal law are “without effect” under this article. As the U.S. Supreme Court explained in M’Culloch v. State of Maryland, 17 U.S. 316, 1819 WL 2135 (U.S. Md.), 4 L. Ed. 579 (1819):

The people of the United States have seen fit to divide sovereignty, and to establish a complex system. They have conferred certain powers on state governments, and certain other powers on the national government. As it was easy to foresee that question must arise between these governments thus constituted, it became of great moment to determine, upon what principle these questions should be decided, and who should decide them. The constitution, therefore, declares, that the constitution itself, and the laws passed in pursuance of its provisions, shall be the supreme law of the land, and shall control all state legislation and state constitutions, which may be incompatible therewith The laws of the United States, then, made in pursuance of the constitution, are to be the supreme law of the land, anything in the laws of any state to the contrary notwithstanding.

M'Culloch, 17 U.S. at 326-27. The Idaho Supreme Court has ruled consistently. See, e.g., Zimmerman v. Volkswagen of America, Inc., 128 Idaho 851, 920 P.2d 67 (1996), *cert. denied*, 520 U.S. 1115, 117 S. Ct. 1245, 137 L.Ed.2d 327 (1997) ("It is well settled that any state law which conflicts with federal law is 'without effect' as provided under the Supremacy Clause of the United States Constitution.")

This Initiative has the potential to conflict with a number of federal laws, including but not limited to, the federal Food, Drug, and Cosmetic Act, the Dietary Supplement Health and Education Act, and the Comprehensive Drug Abuse Prevention and Control Act. Because of this conflict, it will be considered "without effect."

The Initiative's limitation to intrastate activities does not remedy the Supremacy Clause issue. Congress is authorized to regulate intrastate activities that substantially affect interstate commerce, and courts have held that the regulation of drugs falls within that category. See Gonzales v. Raich, 545 U.S. 1, 125 S. Ct. 2195, 162 L.Ed.2d 1 (2005) (holding that the application of the federal Controlled Substances Act provisions criminalizing the manufacture, distribution or possession of marijuana to intrastate growers and users did not violate the Commerce Clause); Deyo v. United States, 396 F.2d 595 (9th Cir. 1968) (holding that the application of the federal Food, Drug, and

Cosmetic Act provisions criminalizing LSD regardless of whether the drug crossed state boundaries is constitutional).

In addition, certain federal laws governing the manufacture, sale, and distribution of drugs clearly apply not only to interstate activities, but to intrastate activities as well. *See, e.g.*, 21 U.S.C. § 331 (2009) (prohibited acts and penalties under the federal Food, Drug, and Cosmetic Act). There are also federal laws specifically precluding states from establishing regulations regarding drugs that are different from the federal laws. *See, e.g.*, 21 U.S.C. § 379r (1997) (statute regarding national uniformity for nonprescription drugs). An Idaho state law cannot “override” or preempt such laws. A court would likely rule that the Initiative, if passed, was without effect regardless of its limitation to intrastate activities.

CERTIFICATION

I HEREBY CERTIFY that the enclosed measure has been reviewed for form, style, and matters of substantive import. The recommendations set forth above have been communicated to the Petitioner via a copy of this Certificate of Review, deposited in the U.S. Mail to Alanna Grimm, 2817 E. St. James Ave., Hayden, Idaho 83835-7544.

Sincerely,

LAWRENCE G. WASDEN
Attorney General

Analysis by:

JANE E. HOCHBERG
Deputy Attorney General

CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

February 8, 2010

The Honorable Ben Ysursa
Idaho Secretary of State
STATEHOUSE MAIL

Re: Certificate of Review
Proposed Initiative Related to Arrest Authority

Dear Secretary of State Ysursa:

An initiative petition was filed with your office on January 19, 2010. Pursuant to Idaho Code § 34-1809, this office has reviewed the petition and has prepared the following advisory comments. Given the strict statutory timeframe within which this office must review the petition, our 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." Due to the number of initiatives that were submitted for review and the available resources for performing the reviews, we did not communicate directly with the petitioner as part of the review process. 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 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

A. Introduction

This proposed section would declare that a federal officer may not make any “arrest, search or seizure in this state without the written permission of the [county] sheriff” unless such act meets certain limited exceptions, some of which require the permission of the Idaho attorney general. The sheriff can deny permission “for any reason that the sheriff or his designee considers sufficient.” The initiative requires the arrest and prosecution of any federal officer who acts without the permission of the sheriff for kidnapping, trespassing, or theft, respectively. The initiative also declares invalid any federal laws purporting to give federal officers “the authority of a county sheriff.”

B. The Initiative Is Clearly Unconstitutional

The Supremacy Clause of the United States Constitution provides: “This Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.” U.S. Const. art. VI, cl. 2 (emphasis added). State law that conflicts with federal law is “without effect.” Altria Group, Inc., v. Good, — U.S. —, 129 S. Ct. 538, 543, 172 L.Ed.2d 398 (2008). Under the Preemption clause, it is “clear that federal law is as much the law of the several States as are the laws passed by their legislatures.” Haywood v. Drown, — U.S. —, 129 S. Ct. 2108, 2114, 173 L.Ed.2d 920 (2009). “Preemption doctrine stems from the Supremacy Clause of the United States Constitution and invalidates any state law that contradicts or interferes with any Act of Congress.” Hayfield Northern Railroad Co., Inc. v. Chicago and Northwestern Transp. Co., 467 U.S. 622, 627, 104 S. Ct. 2610, 81 L.Ed.2d 527 (1984). The State of Idaho would violate the federal Constitution if it interfered with the acts of Congress, which would include preventing enforcement of federal laws by federal law enforcement officers and criminally prosecuting them for performing their legal duties.

C. Recommended Revisions or Alterations

There are no alterations or revisions to this initiative that would render it constitutional.

CERTIFICATION

I HEREBY CERTIFY that the enclosed measure has been reviewed for form, style, and matters of substantive import. The recommendations set forth above have been communicated to the Petitioner via a copy of this Certificate of Review, deposited in the U.S. Mail to Alanna Grimm, 2817 E. St. James Ave., Hayden, Idaho 83835-7544.

Sincerely,

LAWRENCE G. WASDEN
Attorney General

Analysis by:

KENNETH K. JORGENSEN
Deputy Attorney General

CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

February 10, 2010

The Honorable Ben Ysursa
Idaho Secretary of State
STATEHOUSE MAIL

Re: Certificate of Review
Proposed Initiative Related to Enforcement of Federal Laws

Dear Secretary of State Ysursa:

An initiative petition was filed with your office on January 19, 2010. Pursuant to Idaho Code § 34-1809, this office has reviewed the petition and has prepared the following advisory comments. Given the strict statutory timeframe within which this office must review the petition, our 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." Due to the number of initiatives that were submitted for review and the available resources for performing the reviews, we did not communicate directly with the petitioner as part of the review process. 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 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

A. Introduction

This initiative declares that it receives its authority from the rules of the House of Representatives and the Tenth Amendment, and seeks to declare as nullities and unenforceable in Idaho all federal statutes that do not specifically state the enumerated grant of power to Congress in the United States Constitution authorizing passage of said statute, or which are inconsistent with the framer's intent regarding such enumerated power. It requires the Secretary of State to keep a registry of nullified federal statutes, and the attorney general to certify a statute as nullified or not nullified. The initiative would also grant that the Idaho Legislature can certify federal laws as nullities, and delegates to county sheriffs the authority to unilaterally deem federal laws nullities. The initiative then prohibits sheriffs from enforcing federal laws deemed nullities, criminalizes enforcement of nullified federal laws by federal employees, and grants unspecified civil remedies to any person who has had a nullified federal law enforced or attempted to be enforced against them.

B. The Initiative Is Clearly Unconstitutional

The Supremacy Clause of the United States Constitution provides: "This Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding." U.S. Const. art. VI, cl. 2 (emphasis added). State law that conflicts with federal law is "without effect." Altria Group, Inc. v. Good, — U.S. —, 129 S. Ct. 538, 543, 172 L.Ed.2d 398 (2008). Under the Preemption clause, it is "clear that federal law is as much the law of the several States as are the laws passed by their legislatures." Haywood v. Drown, — U.S. —, 129 S. Ct. 2108, 2114, 173 L.Ed.2d 920 (2009). "Preemption doctrine stems from the Supremacy Clause of the United States Constitution and invalidates any state law that contradicts or interferes with any Act of Congress." Hayfield Northern Railroad Co., Inc. v. Chicago and Northwestern Transp. Co., 467 U.S. 622, 627, 104 S. Ct. 2610, 81 L.Ed.2d 527 (1984). This initiative clearly and plainly (and in fact has the stated purpose of) contradicts and interferes with acts of Congress.

The rationale of the initiative seems to be that federal statutes that exceed the grant of limited powers in the Constitution or that do not expressly state what enumerated power justified that act are unconstitutional. Even assuming this underlying premise, the fatal flaw in this initiative is that it usurps the constitutional authority to declare federal law unconstitutional. It is simply not within the Idaho Attorney General's or the Idaho Legislature's authority to declare federal laws null and void; that authority lies exclusively with the Supreme Court of the United States and the federal courts created by Congress. U.S. Const. art. III, §§ 1 and 2. Both state and federal courts are constitutionally bound to declare void any state action that contradicts or interferes with the acts of Congress.

C. Recommended Revisions or Alterations

There are no alterations or revisions to this initiative that would render it constitutional.

CERTIFICATION

I HEREBY CERTIFY that the enclosed measure has been reviewed for form, style, and matters of substantive import. The recommendations set forth above have been communicated to the Petitioner via a copy of this Certificate of Review, deposited in the U.S. Mail to Alanna Grimm, 2817 E. St. James Ave., Hayden, Idaho 83835-7544.

Sincerely,

LAWRENCE G. WASDEN
Attorney General

Analysis by:

KENNETH K. JORGENSEN
Deputy Attorney General

CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

February 10, 2010

The Honorable Ben Ysursa
Idaho Secretary of State
STATEHOUSE MAIL

Re: Certificate of Review
Proposed Initiative Related to Idaho Firearms Freedom Act

Dear Secretary of State Ysursa:

An initiative petition was filed with your office on January 19, 2010. Pursuant to Idaho Code § 34-1809, this office has reviewed the petition and has prepared the following advisory comments. Given the strict statutory timeframe within which this office must review the petition, our 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." Due to the number of initiatives that were submitted for review and the available resources for performing the reviews, we did not communicate directly with the petitioner as part of the review process. 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 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

A. Introduction

This section declares that certain types of personal firearms, accessories, and ammunition manufactured in Idaho and that remain within its borders are “not subject to federal law or federal regulation, including registration, under the authority of congress to regulate interstate commerce.”

B. The Initiative Is Clearly Unconstitutional

The Supremacy Clause of the United States Constitution provides: “This Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.” U.S. Const. art. VI, cl. 2 (emphasis added). State law that conflicts with federal law is “without effect.” Altria Group, Inc. v. Good, — U.S. —, 129 S. Ct. 538, 543, 172 L.Ed.2d 398 (2008). Under the Preemption clause, it is “clear that federal law is as much the law of the several States as are the laws passed by their legislatures.” Haywood v. Drown, — U.S. —, 129 S. Ct. 2108, 2114, 173 L.Ed.2d 920 (2009). “Preemption doctrine stems from the Supremacy Clause of the United States Constitution and invalidates any state law that contradicts or interferes with any Act of Congress.” Hayfield Northern Railroad Co., Inc. v. Chicago and Northwestern Transp. Co., 467 U.S. 622, 627, 104 S. Ct. 2610, 81 L.Ed.2d 527 (1984). The State of Idaho (and its political subdivisions) would violate the federal Constitution if it interfered with the acts of Congress, which would include declaring a federal law unconstitutional. Any challenge to the regulatory authority of Congress would need to be raised in the appropriate federal forum.

C. Recommended Revisions or Alterations

There are no alterations or revisions to this initiative that would render it constitutional.

CERTIFICATION

I HEREBY CERTIFY that the enclosed measure has been reviewed for form, style, and matters of substantive import. The recommendations set forth above have been communicated to the Petitioner via a copy of this Certificate of Review, deposited in the U.S. Mail to Alanna Grimm, 2817 E. St. James Ave., Hayden, Idaho 83835-7544.

Sincerely,

LAWRENCE G. WASDEN
Attorney General

Analysis by:

KENNETH K. JORGENSEN
Deputy Attorney General

CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

February 10, 2010

The Honorable Ben Ysursa
Idaho Secretary of State
STATEHOUSE MAIL

Re: Certificate of Review
Proposed Initiative Related to Idaho Right to Protection Act

Dear Secretary of State Ysursa:

An initiative petition was filed with your office on January 19, 2010. Pursuant to Idaho Code § 34-1809, this office has reviewed the petition and has prepared the following advisory comments. Given the strict statutory timeframe within which this office must review the petition, our 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." Due to the number of initiatives that were submitted for review and the available resources for performing the reviews, we did not communicate directly with the petitioner as part of the review process. 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 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

A. Introduction

This initiative apparently addresses three substantive matters. First, it provides that a “lawful citizen of Idaho” has the right to self-defense, defined as “the right to defend himself or herself, unless he or she is in the act of committing a crime, without interference from federal or state agencies.” Second, it provides that, “Law abiding citizens of Idaho shall not have their gun or ammunition rights waived by any governmental agency nor shall their guns or ammunition be tracked, with but not limited to, markings or radio frequency identification (RFID) dust, paint, or by any other direct identifiers.” Third, the initiative states that citizens have a constitutional “right to privacy in such citizen’s home . . . and to be anonymous as long as such citizen is not in the act of committing a crime.” The initiative continues that the state and federal government had “surmised [sic]” powers in excess of constitutional grants despite lack of “authority to supersede these constitutional guarantees.”

B. Review and Recommended Revisions or Alterations

Generally, it is difficult to discern what the legal goal of this initiative is. Although it would be included in the “Crimes and Punishments” section of the Idaho Code (title 18), it does not define a crime or set any punishment.

As to the first substantive matter, Idaho already recognizes a right of self-defense. *See, e.g.*, Idaho Code §§ 18-4009 and 18-4010. Because it must be presumed that this legislation would change the right of self-defense, it must either restrict or expand that right. It might restrict that right by limiting it to “lawful citizen[s] of Idaho.” If it is not the intent to deny self-defense to non-citizens or those who obtained their citizenship rights unlawfully, perhaps this language should be stricken.

Likewise, the right of self-defense might be expanded by the proposal through omission of the reasonability requirement. Currently, under Idaho law, a person may not use unreasonable or excessive force in self-defense. If it is the intent of this initiative to remove that, making it possible to kill a criminal who is not actually a threat to the life or health of the victim, the initiative should be worded accordingly.

If it is not the intent to change Idaho law regarding self-defense, then this portion of the initiative should be deleted. If, on the other hand, it is the desire to change the law, then the best course would be to instead amend the statutes governing self-defense.

As to the second substantive matter, this law would apply to prevent the tracking of guns or ammunition of "law abiding citizens of Idaho" by Idaho citizens and government. It would also prevent Idaho governmental agencies from "waiv[ing]" the gun rights of any "law abiding citizens of Idaho." This law would be preempted by federal law such that this would not apply to federal officials.

Although this initiative would make tracking guns illegal, it does not provide a penalty for such conduct. What conduct constitutes the crime of tracking a gun or ammunition is also vague. For example, a store that keeps internal records of gun or ammunition sales might be guilty of criminal activity under this section, as could a gun club that keeps track of what weapons its members own or shoot on a regular basis.

The initiative also does not define "law abiding citizens." Presumably the intent here is to allow the tracking of weapons possessed by criminals, but does not specify whether this means someone with a past conviction, someone currently suspected of criminal activity, or both.

As to the third substantive matter, it again does not define a crime or a punishment. It states that Idaho citizens enjoy a constitutional right to privacy. It should be noted that it is unclear if this initiative is merely referring to the privacy granted by the Fourth Amendment (and its Idaho counterpart) or rather refers to the penumbral privacy from which the right to abortion derives. Again, if this initiative is merely to declare that citizens have the rights already granted by the Idaho and United States Constitutions, such would be merely redundant. If it is to declare that those rights must be defined differently than as held by precedent of the Supreme Court of the United States and the Idaho Supreme Court, such a declaration is preempted and of no legal effect.

If this initiative is intended to grant specific rights in excess of the constitutions as interpreted by the respective highest courts, such specific rights should be specifically articulated. As it is currently written, one interpretation of this part of the initiative is that police may search a “home, farm, vehicle, trailer, or any other place of domicile” only when the citizen who lives in such a place is “in the act of committing a crime.” This appears to prevent the search of a home or other domicile for evidence of past crimes. Whether it is the intent of the initiate to prevent police from searching for evidence of past crimes in a domicile should be clearly stated. Otherwise, this section should be rewritten to give guidance as to its intent and effect.

CERTIFICATION

I HEREBY CERTIFY that the enclosed measure has been reviewed for form, style, and matters of substantive import. The recommendations set forth above have been communicated to the Petitioner via a copy of this Certificate of Review, deposited in the U.S. Mail to Alanna Grimm, 2817 E. St. James Ave., Hayden, Idaho 83835-7544.

Sincerely,

LAWRENCE G. WASDEN
Attorney General

Analysis by:

KENNETH K. JORGENSEN
Deputy Attorney General

CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

February 11, 2010

The Honorable Ben Ysursa
Idaho Secretary of State
STATEHOUSE MAIL

Re: Certificate of Review
Proposed Initiative Related to Idaho Honest and Secure Money Act

Dear Secretary of State Ysursa:

An initiative petition was filed with your office on January 19, 2010. Pursuant to Idaho Code § 34-1809, this office has reviewed the petition and has prepared the following advisory comments. Given the strict statutory timeframe within which this office must review the petition, our 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 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

A. Introduction

Entitled "Idaho Honest and Secure Money Act," the initiative proposes to create a monetary system that would be restricted to intrastate

transfers in Idaho. The proposed monetary system would be “tied to individual electronic cards issued to persons.” Only “Idaho persons” could hold the contemplated accounts “unless otherwise authorized by the legislature of Idaho.”¹ The initiative contemplates a for-profit “Private Market Exchange” that would be incorporated under the laws of Idaho and would set the standards for private market currencies in Idaho, which would be backed at least 100% by tangible assets.

The initiative proposes that the “Private Market Exchange” be created with \$60 million from “[t]he state of Idaho or one of its agencies or [the] public.” According to the proposed legislation, “[s]uch monies can be appropriated from any Idaho public fund for which such appropriation is both lawful and appropriate as determined by the governor or as required by legislative action.”²

Most of the provisions of the proposed laws would be struck down by a reviewing court as violating Article I, Section 8 of the U.S. Constitution, which gives the federal government the exclusive power to coin money and issue bills of credit.

B. Article I, Section 8 of the U.S. Constitution, Gives the Federal Government the Exclusive Power to Coin Money; States are Prohibited from Coining Money or Issuing Bills of Credit, Including Credit via “Electronic Cards”

Article I, Section 8 of the U.S. Constitution states, in relevant part:

[1.] The congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States;

[2.] To borrow money on the credit of the United States;

[3.] To regulate commerce with foreign nations, and among the several states, and with the Indian tribes;

[4.] To establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States;

[5.] **To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures;**

[6.] To provide for the punishment of counterfeiting the securities and current coin of the United States;

. . . .

(Emphasis added.)

The United States Supreme Court has declared:

A state cannot do that which the federal constitution declares it shall not do; it cannot ‘coin money.’ Here is an act inhibited in terms so precise, that they cannot be mistaken; they are susceptible but of one construction. And it is certain, that a state cannot incorporate any number of individuals and authorize them to coin money; such an act would be as much a violation of the constitution, as if money were coined by an officer of the state, under its authority; the act being prohibited, cannot be done by a state, directly or indirectly. The same rule applies to bills of credit issued by a state.

Briscoe v. Bank of Commonwealth of Kentucky, 36 U.S. 257, 258-59, 1837 WL 3545 (U.S. Ky.), 9 L. Ed. 928 (1837).

In Norman v. Baltimore & Ohio Railroad Co., 294 U.S. 240, 303, 55 S. Ct. 407, 414, 79 L. Ed. 885 (1935), the Supreme Court stated:

The broad and comprehensive national authority over the subjects of revenue, finance, and currency is derived from the aggregate of the powers granted to the Congress, embracing the powers to lay and collect taxes, to borrow money, to regulate commerce with foreign nations and among the several states, to coin money, regulate the value thereof, and of foreign coin, and fix the standards of weights and measures, and the added express power ‘to make all laws which shall be necessary and proper for carrying into execution’ the other enumerated powers. [Citation omitted.]

The Constitution ‘was designed to provide the same currency, having a uniform legal value in all the States.’ It was for that reason that the power to regulate the value of money was conferred upon the federal government, while the same power, as well as the power to emit bills of credit, was withdrawn from the states. The states cannot declare what shall be money, or regulate its value. Whatever power there is over the currency is vested in the Congress. [Citation omitted.]

As set forth above, the United States Constitution conferred the exclusive power to coin money and regulate its value on the federal government so that all states would have the same currency, with a uniform legal value in all states. The power to coin money, regulate its value, and issue bills of credit was withdrawn from the states. The states cannot declare what shall be money or regulate its value, and whatever power there is over currency is vested in Congress.³

The United States Constitution’s prohibition on states coining money extends to every branch, agency, and instrumentality of state government.⁴ The U.S. Supreme Court has held that “trustees or representative officers of a parish, county, or other local jurisdiction” have no authority to issue negotiable securities or coupons payable in the future “of such a character as to be unimpeachable in the hands of bona fide holders.”⁵

Although the initiative does not use the phrase “coin money,” the initiative attempts to create an alternate system of legal tender, specifically: “a sound monetary unit that can be used as the basis of commerce if and when the current financial practices of the United States government significantly debase the U.S. dollar which has no hard backing.”⁶ This is impermissible under the United States Constitution. It does not matter that the sound monetary unit would be transferred electronically. If the monetary unit (“money”) must be accepted to discharge public or private debts, as contemplated by this initiative, then the monetary unit qualifies as legal tender, which only the United States government may produce.⁷

The United States Constitution’s prohibition on states coining money would extend to the “Private Market Exchange” because the “Private Market Exchange” is an instrumentality of state government. As described in the ini-

tiative, the “Private Market Exchange” would be an “Idaho corporation with at least a 50% economic interest, 50% of the representatives on the board, and 50% of the voting rights controlled by the state of Idaho.”⁸ The initiative specifies that “[t]he State of Idaho shall under no circumstances dilute its voting interest in the Private Market Exchange.”⁹ The “Private Market Exchange” would be funded by state monies as well.¹⁰ Because the “Private Market Exchange” would be an instrumentality of state government, the monetary system and currency created by the “Private Market Exchange” would be in violation of Article 1, Section 8 of the U.S. Constitution.

MATTERS OF FORM

Proposed subsection 26-3805(12) states that the private market exchange shall be free to “extend its business activities other related core competencies . . .” This sentence appears to be missing a word. The preposition “to” could be inserted so that it would read to “extend its business activities to other related core competencies.”

Proposed section 26-3803 appears to be missing the words “the” and “Idaho Code §” as shown here: “The state of Idaho or one of its agencies or [the] public shall invest a sum not to exceed \$60 million dollars in a Private Market Exchange except as provided by [Idaho Code §] 26-3804.”

Proposed section 26-3802 provides that “[t]he only currency which shall not be backed by tangible assets shall optionally be the currency of any sovereign nation.” It is not clear what is meant by “optionally.”

Proposed section 26-3804 states that the “governor shall submit such proposal to the legislature for approval within one year of the enactment of this bill, unless no bids are submitting meeting the minimum requirements as set forth in this legislation or allow for an adequate risk adjusted expected return on public assets.” It is unclear what is meant by “allow for an adequate risk adjusted expected return on public assets.” Additionally, the word “submitting” should be “submitted.”

Proposed subsection 26-3805(6) refers to “the corporation,” where “the corporation” is undefined. Is “the corporation” the same as the “Private Market Exchange”? If so, this should be clarified. On a related note, the

“Private Market Exchange” is sometimes capitalized and sometimes lower-case. Whether capitalized or not, the phrase should be consistent throughout.

Proposed subsection 26-3805(10) refers to the issuance of a warrant based upon “probably cause.” The word “probably” should be “probable.”

Proposed subsection 26-3805(11) refers to “a United States government choosing to respect the purposes for which the exchange were establishes and as such” The word “establishes” should be “established.” Additionally, it is unclear what is meant by “a” United States government – “the” United States government?

This section also states that “[a]ll accounts shall be held by Idaho persons unless otherwise authorized by the legislature of Idaho.” “Idaho persons” is not defined. It is unclear what is meant by Idaho persons. Does this phrase mean Idaho residents? Or those who have been in Idaho for a specified period of time, regardless of whether they are official residents? Does Idaho resident include those who are officially residents, but are living in another state?

Proposed subsection 26-3807(2) refers to duties of various persons “to the extent that their actions effect the financial health of the Private Market Exchange.” The word “effect” should be “affect.”

Proposed section 26-3808 states: “If a part of this Act shall be submitted to the qualified electors of the State of Idaho, for their approval or rejection at the regular general election, to be held on the second day of November, A.D., 2010, and each for himself says:

I have personally signed this petition; I am qualified elector of the State of Idaho; my residence and post office are correctly written after my name.” It is unclear why this sentence begins with “[i]f a part of this Act,” when no conclusion follows. If a part of this Act shall be submitted . . . then what?

Proposed subsection 26-3805(3) states that “[o]ne or more customer numbers of appropriate entropy shall be stored on the card and shall be indeterminable by any card reader, absent private codes stored on the shared

CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

serves encompassing the exchange.” Subsection (4) also refers to “a private alphanumeric code of sufficient entropy known only to the holder of the card.”

“Entropy” is defined at the online Merriam-Webster’s Dictionary as follows:

1: a measure of the unavailable energy in a closed thermodynamic system that is also usually considered to be a measure of the system’s disorder, that is a property of the system’s state, and that varies directly with any reversible change in heat in the system and inversely with the temperature of the system; *broadly* : the degree of disorder or uncertainty in a system

2 a: the degradation of the matter and energy in the universe to an ultimate state of inert uniformity **b:** a process of degradation or running down or a trend to disorder

3: CHAOS, DISORGANIZATION, RANDOMNESS

Substituting the word “randomness” for “entropy” in the two sections above might be clearer.

CONCLUSION

The power to coin money and issue bills of credit is reserved to the federal government. The proposed initiative, if passed, would likely be struck down by a reviewing court because it attempts to give the State of Idaho power that it does not have under Article I, Section 8 of the U.S. Constitution.

CERTIFICATION

I HEREBY CERTIFY that the enclosed measure has been reviewed for form, style, and matters of substantive import. The recommendations set forth above have been communicated to the Petitioner via a copy of this Certificate of Review, deposited in the U.S. Mail to Alanna Grimm, 2817 E. St. James Ave., Hayden, Idaho 83835-7544.

Sincerely,

LAWRENCE G. WASDEN
Attorney General

Analysis by:

MELISSA N. MOODY
Deputy Attorney General

¹ Proposed subsection 26-3805(11).

² Proposed section 26-3803.

³ See also Legal Tender Cases, 79 U.S. 457, 1870 WL 12742 (U.S.Tex.), 20 L. Ed. 287 (1870).

⁴ Lewis D. Solomon, *Local Currency: A Legal and Policy Analysis*, 5 WTR Kan. J.L. & Pub. Pol’y 59, 82 (Winter 1996).

⁵ Policy Jury of Parish of Tensas v. Britton, 82 U.S. 566, 1872 WL 15415 (U.S.La.), 21 L. Ed. 251 (1872). See also Valley v. Rapides Parish Sch. Bd., 434 F.2d 144, 158 (5th Cir. 1970) (acknowledging that a school board cannot print or coin money).

⁶ Proposed subsection 26-3801(2).

⁷ See generally Kerry Lynn Macintosh, *How to Encourage Global Electronic Commerce: The Case for Private Currencies on the Internet*, 11 Harv. J.L. & Tech. 733 (1998).

⁸ Proposed section 26-3803.

⁹ Proposed section 26-3807.

¹⁰ Proposed section 26-3803.

CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

February 16, 2010

The Honorable Ben Ysursa
Idaho Secretary of State
STATEHOUSE MAIL

Re: Certificate of Review
Proposed Initiative Related to Animal Identification

Dear Secretary of State Ysursa:

An initiative petition was filed with your office on January 19, 2010. Pursuant to Idaho Code § 34-1809, this office has reviewed the petition and has prepared the following advisory comments. Given the strict statutory timeframe within which this office must review the petition, our 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 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 add a new chapter to title 25, which is the Idaho Code title pertaining to animals. The Initiative proposes to add a chapter that would prohibit the State of Idaho from participating in the National Animal Identification System.

The National Animal Identification System (“NAIS”) has historically been a voluntary endeavor, although there have been efforts to make the system mandatory. On February 5, 2010, the United States Department of Agriculture (“USDA”) Animal and Plant Health Inspection Service (“APHIS”) announced that it was refocusing NAIS efforts on disease traceability, and that the new focus would be only on animals that move in interstate commerce. Specifically, the USDA stated that, “Producers who raise animals and move them within a State, Tribal Nation, or to local markets, as well as to feed themselves, their families, and their neighbors are not part of USDA’s framework’s scope and focus. Animals moving in interstate commerce into normal marketing channels are those that will fall under USDA’s new animal disease traceability approach.” APHIS Factsheet: Questions and Answers: New Animal Disease Traceability Framework (February 2010) (“Fact Sheet”). Producers who are local only will not be required to participate in the federal program (although states may have their own internal systems used to address specific diseases).

Given that recent change, the Initiative authors may wish to revise the Initiative to ensure that the Initiative is consistent with USDA’s new focus.

A. The Initiative Contains an Incorrect State Name at Material Points in the Initiative

It is a basic tenet of constitutional law that a state may enforce laws only within its own borders. *See, e.g., Healy v. Beer Institute, Inc.*, 491 U.S. 324, 336, 109 S. Ct. 2491, 2499, 105 L.Ed.2d 275 (1989) (stating that, “[A] statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State’s authority and is invalid regardless of whether the statute’s extraterritorial reach was intended by the legislature.”) However, at three different points, the Initiative references Missouri, rather than Idaho.

First, proposed subsection 25-4001(2) provides that, “As used in this chapter, the following terms mean: . . . ‘Department,’ the Missouri department of agriculture.” That presumed error renders the entirety of proposed section 25-4003 ineffective, because that section sets forth the duties of “the department of agriculture.” Neither the Idaho Legislature, nor the Idaho voters through the initiative process, may impose duties upon the *Missouri* Department of Agriculture.

Second, to the extent that any portion of proposed section 25-4003 would remain effective, subsection 25-4003(2) attempts to require that the “department of agriculture” “[d]evelop a procedure with the United States Department of Agriculture whereby such citizen’s data shall be expunged from the USDA National Premises Information Repository as well as the *Missouri* animal identification plan system.” (Emphasis added.) Similarly, section 25-4004, as proposed, provides that, “Nothing in this section shall be construed as: . . . (4) authorizing the *department of agriculture* to establish any requirement of participation in the *Missouri* specific source verification.” (Emphasis added.) Idaho lacks authority to require that actions be taken by the Missouri Department of Agriculture, or regarding the Missouri animal identification plan system.

The State of Idaho cannot regulate nor impose duties on the Missouri Department of Agriculture. Therefore, those provisions of the Initiative set forth in the preceding paragraph would be unenforceable.

B. The Initiative Impairs the Obligation of Contracts

The Initiative seeks to add a new subsection providing that:

All cooperative agreements between the federal government and this state, or between this state and other states, established before the effective date of this section and related to the establishment of animal tracking, tagging, registration, or information databases, premises registration, or information databases, use of electronic identification for animal tagging purposes, and other matters related to the national animal identification system are hereby terminated and null and void as to this state’s participation.

Article I, Section 10 of the United States Constitution (the “Contract Clause”) provides that “no state shall . . . pass any . . . law impairing the obligation of contracts” The “Contract Clause limits the power of the States to modify their own contracts as well as to regulate those between private parties.” U.S. Trust Co. of New York v. New Jersey, 431 U.S. 1, 17, 97 S. Ct. 1505, 1515, 52 L.Ed.2d 92 (1977). The Contract Clause applies to contracts which pre-exist the effective date of a law, or in which a right has become

CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

vested. Stated differently, the Initiative could not terminate an agreement nor render its provisions null and void, if a party to the agreement had a vested interest in the performance of the given provision. Moreover, assuming the Initiative is approved, the Initiative could not terminate an agreement that was effective prior to the approval of the Initiative.

C. The Initiative May Fit More Appropriately in Title 25, Chapter 2, Idaho Code

Title 25, chapter 2, Idaho Code, addresses the “Inspection and Suppression of Diseases Among Livestock.” Idaho Code § 25-207B specifically addresses the “Identification of livestock, poultry or fish – Rules for disease control.” While I have not found any specific inconsistencies or conflicts between section 25-207B and the Initiative, the authors may want to review that section and determine whether the Initiative may fit more appropriately as part of section 25-207B.

CERTIFICATION

I HEREBY CERTIFY that the enclosed measure has been reviewed for form, style, and matters of substantive import. The recommendations set forth above have been communicated to the Petitioner via a copy of this Certificate of Review, deposited in the U.S. Mail to Alanna Grimm, 2817 E. St. James Ave., Hayden, Idaho 83835-7544.

Sincerely,

LAWRENCE G. WASDEN
Attorney General

Analysis by:

ANGELA SCHAER KAUFMANN
Deputy Attorney General

CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

February 16, 2010

The Honorable Ben Ysursa
Idaho Secretary of State
STATEHOUSE MAIL

Re: Certificate of Review
Proposed Initiative Relating to the Certification of Candidates for
President, Vice President, and Presidential Electors

Dear Secretary of State Ysursa:

An initiative petition was filed with your office on January 19, 2010. Pursuant to Idaho Code § 34-1809, this office has reviewed the petition and has prepared the following advisory comments. Given the strict statutory timeframe within which this office must review the petition, our 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 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

No State May Add to the Constitutional Qualifications of Office for Federal Officers

You have presented an initiative petition that, if adopted, will require candidates for President, Vice President, and their electors to provide copies of their birth certificates to the Secretary of State to permit the candidates to be placed on the ballot. The Constitution of the United States is the supreme law of the land, and all legislative, executive, and judicial officers of the United States and of the several states and all the people in the land are bound thereby. Dodge v. Woolsey, 59 U.S. 331, 1855 WL 8235 (U.S. Ohio), 15 L. Ed. 401 (1855). The United States Supreme Court held, in Powell v. McCormack, 395 U.S. 486, 89 S. Ct. 1944, 23 L.Ed.2d 491 (1969), that the United States House of Representatives had DQ power to exclude from its membership any person who was duly elected by his or her constituents and who met the age, citizenship, and residence requirements specified in the United States Constitution. Under the Supremacy Clause of the United States Constitution, the states may not impose additional restrictions or limitations. So long as a candidate for the Senate or House meets the requirements set forth in the United States Constitution, he or she is qualified to run for federal office.

The same analysis applies to the Office of President. Article II, Section 1, Clause 5 of the U.S. Constitution lists the qualifications of office. Notably, a person must be a natural born citizen, 35 years old, and a resident of the United States for at least 14 years. No requirement that birth certificates be shown to the Secretaries of State is contained within that provision. Naturally, following the previous analyses of the United States Supreme Court with regard to heightened state restrictions for federal candidates, whose qualifications are outlined within the United States Constitution, these added qualifications are unconstitutional.

CONCLUSION

Based upon the above analysis and existing case law, it appears that the substantive provisions of this initiative, if adopted, would be declared unconstitutional.

CERTIFICATION

I HEREBY CERTIFY that the enclosed measure has been reviewed for form, style, and matters of substantive import. The recommendations set forth above have been communicated to the Petitioner via a copy of this Certificate of Review, deposited in the U.S. Mail to Alanna Grimm, 2817 E. St. James Ave., Hayden, Idaho 83835-7544.

Sincerely,

LAWRENCE G. WASDEN
Attorney General

Analysis by:

BRIAN P. KANE
Deputy Attorney General

CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

February 16, 2010

The Honorable Ben Ysursa
Idaho Secretary of State
STATEHOUSE MAIL

Re: Certificate of Review
Proposed Initiative Relating to the Idaho Health Care Freedom Act

Dear Secretary of State Ysursa:

An initiative petition was filed with your office on January 19, 2010. Pursuant to Idaho Code § 34-1809, this office has reviewed the petition and has prepared the following advisory comments. Given the strict statutory timeframe within which this office must review the petition, our 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 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

A. Introduction

The proposed initiative ("Initiative") seeks to create a new chapter of Idaho Code called the Idaho Health Care Freedom Act. The Initiative seeks

CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

to preserve the freedom of an individual or entity in Idaho to determine to purchase health care or not, and to prevent coercion to buy a health insurance policy. The Initiative intends that:

1. No law or rule shall directly or indirectly compel any person, employer, or health care provider to participate in any health care system.
2. A person or employer may pay directly for lawful health care services and shall not be required to pay penalties or fines for doing so.
3. A health care provider may accept direct payment for lawful health care services and not be penalized or fined for accepting direct payment from a person or employer for lawful health care services.
4. Subject to reasonable and necessary rules that do not substantially limit a person's options, the purchase or sale of health insurance in private health care systems shall not be prohibited by law or rule.
5. Health care services a health care provider or hospital is required to provide are not affected.
6. Health care services permitted by law are not affected.
7. Services provided pursuant to title 72, Idaho Code, or any statutes relating to worker's compensation are not prohibited.
8. Laws or rules in effect as of December 1, 2009, are not affected.
9. The "terms of conditions" of any health care system do not have the affect of punishing a person or employer for directly paying for lawful health care services, or for a health care provider or hospital from accepting such payment.

10. Any federal law, code, or mandate contrary to the Act is null and void, as are any actions taken by any federal employee or agent of the federal government who actively attempts to enforce laws nullified by this Act.
11. Any legislation, code, or administrative action whose enforcement or threatened enforcement might have the indirect effect of violating the Act shall be null and void. For example, if an individual or business is required to file income tax returns and the effect of filing would have the same economic effect of penalties or fines for not purchasing health insurance, the requirement to file would be null and void, and no civil or criminal enforcement for failure to file such income tax returns could take place.
12. An individual who attempts to compel a person in Idaho into surrendering a right or property guaranteed by the Act by directly or indirectly threatening enforcement of a law or code which would be nullified by the Act shall be subject to penalties detailed in the Act.
13. A county attorney or the attorney general can prosecute an arrest, search, seizure, or attempts at such actions, with kidnapping, trespass, theft or applicable homicide. Individuals involved can also be charged with other applicable criminal offenses in title 18, Idaho Code. Prosecution for extortion or other criminal offenses is provided for. Victims of crimes prosecutable under this section are entitled to pursue independent concomitant civil actions.

B. A Constitutional Basis for Idaho Health Care Freedom Act May Become a Question

Proposed section 41-6001 provides as its purpose the preservation of freedom of an individual or entity in Idaho to determine whether to purchase health care or not. Further, the public policy of Idaho is stated as preventing any and all forms of coercion that might compel persons in the state to buy a health insurance policy. Included in any such coercive action by the federal

government “to the extent such violates standards enumerated in the ninth and tenth amendments to the United States Constitution or any other Constitutional standards which might apply to a specific Public Law.”

The Ninth Amendment to the U.S. Constitution states that, “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” The Tenth Amendment states that, “The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.”

The undersigned is not aware of any federal requirements that would be in conflict with the Initiative. There are currently penalties in federal code for seniors who do not timely enroll in Medicare Part A, hospital insurance (42 U.S.C. § 1495r), or for not being enrolled in Medicare Part D or otherwise having prescription drug coverage after their enrollment periods (42 U.S.C. § 1395w-113). However, those provisions would appear to fall under exception (C)(4) of proposed section 41-6003, for laws or rules in effect as of December 1, 2009. If the Initiative passes and there is a new congressional enactment, questions of potential conflict and preemption will have to be addressed.

C. Terms Are Not Consistent in the Proposed Legislation

A number of terms are used throughout the Initiative that creates ambiguity about who is the intended actor or health care entity. The Purpose statement in proposed section 41-6001 preserves the freedom of an individual or entity to decide whether to purchase health care. The definition of “person” in proposed subsection 41-6002(6) includes individuals and various corporate, public, private, municipal bodies, and the state. In the definition of “Health care system” in proposed subsection 41-6002(3), the reference is to “any public or private entity” that performs various health care functions.

In the Prohibitions contained in proposed subsection 41-6003(A)(1), the right against compulsion to participate in any health care system belongs to “any person, employer or health care provider.” Proposed subsection 41-6003(A)(2) allows for a “person or employer” to pay directly for lawful health care services, and a “health care provider” to receive direct payment from a “person or employer” for those services. “Employer” and “health care

provider” are not defined. In proposed subsection 41-6003(C)(1), there is a reference to a health care provider or hospital, also undefined. Proposed subsection 41-6003(C)(5) reiterates the prohibition on punishing a person or employer for paying directly for lawful health care services, or punishing a “health care provider or hospital” from accepting direct payment. It is not clear why there are differences in these various provisions.

Likewise, the authority cited in various sections differs, and does not reflect Idaho’s practice that the use of the term “regulation” refers to a federal regulation, while “rule” is a promulgation of an Idaho state agency. Proposed subsection 41-6002(4) defines “Lawful health care services” as those that are permitted or not prohibited by law or regulation. Proposed subsection 41-6002(5) defines “Penalties or fines” as actions established by law or rule. Proposed subsection 41-6003(C)(4) states that the prohibitions do not affect laws or rules in effect as of December 1, 2009, which would omit federal regulations.

Proposed subsection 41-6004(A) makes “any federal law, code, or mandate” null and void if contrary to the provisions of the Act. How “code” and “mandate” differ from federal law and regulation is not clear. In proposed section 41-6005, the Act nullifies “[a]ny legislation, code or administrative action” whose enforcement might have the indirect effect of violating the Act.

As in proposed section 41-6003, the Initiative provides that a law or rule shall not compel a person, employer, or health care provider to participate in any health care system “directly or indirectly.” The concept of an indirect effect is also contained in proposed section 41-6005. The concept of “indirect effects” from statutory regulatory actions leaves the scope of the proposal indefinable.

MATTERS OF FORM

Idaho Code § 34-1801A sets out requirements for the form of an initiative. The Initiative includes the warning set out in that Code section, stating that it is a felony for anyone to sign any initiative or referendum petition with any name other than his own, or to knowingly sign his name more than once for the measure, or to sign such petition when he is not a qualified elector. This Initiative contains two signature pages, one of which has 20 signa-

CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

tures; the other, 15. There is an individual in Coeur d'Alene who has signed both pages, in apparent violation of the requirement.

In addition, Idaho Code § 34-1804 requires that each signature sheet shall contain signatures of qualified electors from only one county. The signatories to the Initiative live in Hayden, Coeur d'Alene, Athol, Post Falls, Bonners Ferry, and Moscow, not all of which are in Kootenai County, where the majority of them reside.

The numbering scheme used in the proposed new chapter is not internally consistent, nor is it generally the numbering usually used for Idaho statutes.

House Bill No. 391 has been introduced into the Legislature, adding a new title 39, chapter 90, Idaho Code. It is also called the Idaho Health Freedom Act, with provisions that are significantly different from the Initiative, but with the same concepts of public policy. Should this bill pass this legislative session and the Initiative passes in the November election, it is not clear how the differences in language and placement in Idaho Code would be reconciled.

CERTIFICATION

I HEREBY CERTIFY that the enclosed measure has been reviewed for form, style, and matters of substantive import. The recommendations set forth above have been communicated to the Petitioner via a copy of this Certificate of Review, deposited in the U.S. Mail to Alanna Grimm, 2817 E. St. James Ave., Hayden, Idaho 83835-7544.

Sincerely,

LAWRENCE G. WASDEN
Attorney General

Analysis by:

JEANNE T. GOODENOUGH
Deputy Attorney General

CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

February 16, 2010

The Honorable Ben Ysursa
Secretary of State
STATEHOUSE MAIL

Re: Certificate of Review
Proposed Initiative Relating to the Licensure Penalty of Midwifery

Dear Secretary of State Ysursa:

An initiative petition was filed with your office on January 19, 2010. Pursuant to Idaho Code § 34-1809, this office has reviewed the petition and has prepared the following advisory comments. Given the strict statutory timeframe within which this office must review the petition and the complexity of the legal issues raised in this petition, our 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 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 Amendment Is Consistent with the Statute

The proposed initiative ("Initiative") seeks to amend the provision pertaining to the unlicensed practice of midwifery in title 54, chapter 55,

Idaho Code. At the outset, I note that there is a citation error in the Initiative. The intent of the sponsors is to amend the provision in the midwifery statute that is captioned “LICENSURE – PENALTY.” The sponsors refer to this provision as Idaho Code § 54-5406. The correct reference is to section 54-5506 (emphasis added).

The correction is necessary because chapters 65 and 251 of Idaho Session Laws 2009, effective July 1, 2009, each purported to enact a new chapter 54 in title 54. In order to resolve the issue, Session Laws 2009, chapter 251, was codified as title 54, chapter 54, while Session Laws 2009, chapter 65, was codified as title 54, chapter 55 through the use of brackets. Chapter 65 is the chapter which pertains to the practice of midwifery. The sponsors should correct this citation.

In its entirety, Idaho Code § 54-5506 reads as follows:

[54-5506] 54-5406. Licensure — Penalty. [Null and void, effective July 21, 2014.] — (1) The board shall grant a license to any person who submits a completed application, pays the required license fee as established by the board and meets the qualifications set forth in section 54-5407 [sic], Idaho Code.

(2) All licenses issued under this chapter shall be for a term of one (1) year and shall expire on the birthday of the licensee unless renewed in the manner prescribed by rule. Except as set forth in this chapter, rules governing procedures and conditions for license renewal and reinstatement shall be in accordance with section 67-2614, Idaho Code.

(3) It is a misdemeanor for any person to assume or use the title or designation “licensed midwife,” “L.M.” or any other title, designation, words, letters, abbreviations, sign, card or device to indicate to the public that such person is licensed to practice midwifery pursuant to this chapter unless such person is so licensed. Any person who pleads guilty to or is found guilty of a second or subsequent offense under this subsection (3) shall be guilty of a felony.

(4) Except as provided in section 54-5408 [sic], Idaho Code, on and after July 1, 2010, it shall be a misdemeanor for any person to engage in the practice of

midwifery without a license. Any person who pleads guilty to or is found guilty of a second or subsequent offense under this subsection (4) shall be guilty of a felony.

Idaho Code § [54-5506] 54-5406 (Supp. 2009).

The sponsors propose amending this section by eliminating subsection (4) in its entirety. This change would have the effect of eliminating any sanctions for unlicensed practice. It also eliminates any regulatory authority with regard to unlicensed practice, except in the very narrow circumstance in which an unlicensed person held out to the public as a licensed midwife.

This amendment to the penalty provisions of the midwifery statute is inconsistent with the statutory scheme pertaining to the existing regulation of midwifery in title 54, chapter 55, Idaho Code. The proposed elimination of the penalty for unlicensed practice will, in effect, change the existing statutory scheme pertaining to licensing from mandatory to voluntary. Although it is contrary to the existing statutory scheme, the proposed change is not impermissible. It is our understanding that there may be legislation proposed during the current legislative session, which would have a similar effect on the existing title 54, chapter 55, Idaho Code.

CERTIFICATION

I HEREBY CERTIFY that the enclosed measure has been reviewed for form, style, and matters of substantive import. The recommendations set forth above have been communicated to the Petitioner via a copy of this Certificate of Review, deposited in the U.S. Mail to Alanna Grimm, 2817 E. St. James Ave., Hayden, Idaho 83835-7544.

Sincerely,

LAWRENCE G. WASDEN
Attorney General

Analysis by:

S. KAY CHRISTENSEN
Deputy Attorney General

CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

February 16, 2010

The Honorable Ben Ysursa
Idaho Secretary of State
STATEHOUSE MAIL

Re: Certificate of Review
Proposed Initiative Relating to Membership in Organizations
Undermining U.S. Sovereignty

Dear Secretary of State Ysursa:

An initiative petition was filed with your office on January 19, 2010. Pursuant to Idaho Code § 34-1809, this office has reviewed the petition and has prepared the following advisory comments. Given the strict statutory timeframe within which this office must review the petition, our 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 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

Membership in Organizations Is a Policy Issue

This initiative seeks to directly prohibit local governments from joining the International Council for Local Environmental Initiatives as well as any entity of the United Nations. It appears that a prohibition of this nature may be permissible as a limitation on the expenditure of public funds.¹ Although the provision contains significant penalty provisions, it does not contain any enforcement mechanism. In other words, if a county were to be in violation of this provision, who would be the reviewing or enforcing entity? Similarly, the initiative does not provide any entity with the authority to investigate a claim that one of the governmental entities has joined one of the prohibited organizations.

It appears that the initiative presupposes that the Office of the Attorney General would enforce this Act. But, it does not expressly state that fact, nor provide the means for enforcement. Additionally, the Act seeks to remove any discretion from the attorney general to refuse to bring an enforcement action. Such a limitation on discretion would likely not survive a constitutional challenge. The attorney general is an executive officer of the state. Idaho Const. art. IV, § 1. Initiative power is exercised under art. III, sec. 1 of the Idaho Constitution. As an exercise of legislative power, an initiative cannot invade the province of executive discretion. Idaho Const. art. II, § 1. By removing the decisional authority of the attorney general in legal matters of the state, the initiative creates an improper exercise of executive power. Idaho Const. art. II, § 1.

CONCLUSION

As outlined above, this initiative raises a significant policy issue, and improperly invades the province of executive authority. Additionally, care should be exercised in the abridgement or termination of any exchange of ideas at any level of government.

CERTIFICATION

I HEREBY CERTIFY that the enclosed measure has been reviewed for form, style, and matters of substantive import. The recommendations set forth above have been communicated to the Petitioner via a copy of this Certificate of Review, deposited in the U.S. Mail to Alanna Grimm, 2817 E. St. James Ave., Hayden, Idaho, 83835-7544.

Sincerely,

LAWRENCE G. WASDEN
Attorney General

Analysis by:

BRIAN P. KANE
Deputy Attorney General

¹ But within this area, if the federal government has directed participation, there may be preemption problems with this initiative as well. As this office is not well-versed in local/ federal/ international dynamics, this analysis is beyond the scope of this review. The initiative proponents are encouraged to research and ensure that preemption has not occurred within this area.

CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

February 16, 2010

The Honorable Ben Ysursa
Idaho Secretary of State
STATEHOUSE MAIL

Re: Certificate of Review
Proposed Initiative Relating to the National Guard (Amend
Idaho Code § 46-107 and Title 46, Idaho Code)

Dear Secretary of State Ysursa:

An initiative petition was filed with your office on January 19, 2010. Pursuant to Idaho Code § 34-1809, this office has reviewed the petition and has prepared the following advisory comments. Given the strict statutory timeframe within which this office must review the petition, our 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 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.

INTRODUCTION

The proposed initiative ("Initiative") seeks to amend Idaho Code § 46-107 to provide the following: "The governor, however, shall not be obliged to make any effort to conform to any terms of the national defense act

or other laws of the United States, which exceed the authority vested in the federal government by the United States Constitution.” The Initiative also proposes to amend title 46 by adding a new chapter to limit federal authority to deploy any branch of the Idaho militia, including the National Guard, outside the territorial boundaries of the United States. For the reasons set forth below, it is likely the court would find the proposed amendments unconstitutional.

MATTERS OF SUBSTANTIVE IMPORT

A. The Proposed Amendments to Title 46, Idaho Code, Are Unconstitutional

The Initiative seeks to limit the governor’s authority to deploy “any branch of the Idaho militia, including the national guard” outside the territorial boundaries of the United States unless one of the following conditions is met:

- (1) The governor wishes parts of the militia to participate in training exercises. No member of Idaho militia shall be compelled to be outside the United States for a training exercise for more than a month in any given year.
- (2) The territory of the United States has been invaded by a foreign army, and such deployment is necessary to specifically repel such an invasion.
- (3) Participants in a domestic insurrection have fled across a border of the United States and such deployment is necessary to give chase.

The proposed amendments directly conflict with Idaho Code § 46-101. Section 46-101 states: “The state of Idaho does hereby accept the benefits and provisions of the national defense act, and it is the intent of this code to conform to all laws and regulations of the United States affecting the national guard.” The National Defense Act gives Congress the discretionary authority to “determine [sic] that more units and organizations are needed for the national security than are in the regular components of the ground and air forces, the Army National Guard of the United States and the Air National Guard of the United States, or such parts of them as are needed, together with such units of other reserve components as are necessary for a balanced force,

shall be ordered to active Federal duty and retained as long as so needed. 32 U.S.C. § 102 (underlining added).

The proposed amendments suggest that the governor has the power to declare a federal law, code, or treaty null and void, specifically when he or she determines that the United States government has exceeded its authority as defined in Article I, Section 8 of the United States Constitution. However, under the Idaho Constitution, the governor has no authority over the state's military forces when they have been called into national duty. The Idaho Constitution provides that "[t]he governor shall be commander-in-chief of the military forces of the state, except when they shall be called into actual service of the United States." Idaho Const. art. IV, § 4 (underlining added). Contrary to the proposed legislation, the governor is not vested with the discretion to resist foreign deployment, or resist conforming to the National Defense Act. Under the United States Constitution, Congress has the power to "provide for calling forth the militia to execute the laws of the Union" U.S. Const. art. I, § 8, cl. 15. Pursuant to federal law, Congress has the authority to determine the national security needs of the United States, which includes the discretion to deploy the National Guard.

The Initiative proposes to limit the federal government's authority to deploy the Idaho National Guard outside the territorial boundaries of the United States. Under the Preemption Clause, it is "clear that federal law is as much the law of the several States as are the laws passed by their legislatures." Haywood v. Drown, — U.S. —, 129 S. Ct. 2108, 2114, 173 L.Ed.2d 920 (2009). "Preemption doctrine flows from the Supremacy Clause of the United States Constitution and invalidates any state law that contradicts or interferes with any Act of Congress." Hayfield Northern Railroad Co., Inc. v. Chicago and Northwestern Transp. Co., 467 U.S. 622, 627, 104 S. Ct. 2610, 81 L.Ed.2d 527 (1984). Therefore, the governor would violate the United States Constitution, as well as the Idaho Constitution, by not conforming to federal law pursuant to the authority vested in the Congress.

B. Recommended Revisions or Alterations

There are no alterations or revisions to this Initiative that would render it constitutional.

CERTIFICATION

I HEREBY CERTIFY that the enclosed measure has been reviewed for form, style, and matters of substantive import. The recommendations set forth above have been communicated to the Petitioner via a copy of this Certificate of Review, deposited in the U.S. Mail to Alanna Grimm, 2817 E. St. James Ave., Hayden, Idaho 83835-7544.

Sincerely,

LAWRENCE G. WASDEN
Attorney General

Analysis by:

STEVE VINSONHALER
Deputy Attorney General

CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

February 16, 2010

The Honorable Ben Ysursa
Idaho Secretary of State
STATEHOUSE MAIL

Re: Certificate of Review
Proposed Initiative Relating to the Protection of Property Rights

Dear Secretary of State Ysursa:

An initiative petition was filed with your office on January 19, 2010. Pursuant to Idaho Code § 34-1809, this office has reviewed the petition and has prepared the following advisory comments. Given the strict statutory timeframe within which this office must review the petition, our 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 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 Initiative Raises Significant Policy Issues

At the outset, it should be noted that several concepts have been included within this initiative, which may be more appropriately formatted

through a series of statutes. Instead of combining all of these items into a single statute, proposed section 67-6539, it would be more effective to set out the many provisions of this proposed single act as discrete statutory sections. Along those same lines, it would likely be more beneficial and clear if the initiative were redrafted to reflect changes throughout the Local Land Use Planning Act (the chapter into which the proposed amendment is to be inserted). The initiative purports to significantly impact a number of provisions throughout the Local Land Use Planning Act, and would thus be clearer if the existing Act were amended to reflect these changes, as opposed to tacking an additional conflicting provision on to the end of the chapter.

The proposed initiative seeks to limit a number of the powers of entities with regard to planning and zoning decisions. Most significantly, the proposed initiative could not impair the ability of local government to enact zoning ordinances in such a way as to reduce or eliminate their police powers as outlined by the Idaho Constitution. *E.g.*, Idaho Const. art. XII, § 2 and art. XI, § 8. Similarly, the initiative seeks to require a governmental entity to pay the landowner 120% plus the costs incurred by the landowner in the change of use. Although permissible, this provision would likely significantly increase the costs to government with regard to enacting planning and zoning decisions as virtually any decision would become the object of a claim.

Similarly, based upon the proposed addition to the Land Use Planning Act, this would likely create a series of conflicts, which would likely be resolved through litigation. If enacted, this measure would likely result in significant litigation with regard to the scope of the addition to the Code, its effect on existing land use systems, and most future land use decisions.

This initiative also attempts to limit the authority of the federal government with regard to federal environmental regulations and other similar decisions affecting uses of land. The Supremacy Clause of the United States Constitution provides that federal laws and treaties are “the supreme law of the land.” U.S. Const. art. VI, cl. 2. Accordingly, when Congress acts within the scope of its constitutional authority, the laws it enacts may preempt state or local action within that field. Based upon the significant federal laws and regulatory systems in existence, it appears likely that portions of this initiative would likely be struck down as preempted.

CONCLUSION

Based upon the analysis above, it appears that portions of this initiative will likely be preempted where the restrictions on government action conflict with federal law. Stylistic changes should be made to more appropriately make this initiative consistent with the existing Idaho Code. Adoption of this initiative would also increase the likelihood and quantity of litigation within this area.

CERTIFICATION

I HEREBY CERTIFY that the enclosed measure has been reviewed for form, style, and matters of substantive import. The recommendations set forth above have been communicated to the Petitioner via a copy of this Certificate of Review, deposited in the U.S. Mail to Alanna Grimm, 2817 E. St. James Ave., Hayden, Idaho 83835-7544.

Sincerely,

LAWRENCE G. WASDEN
Attorney General

Analysis by:

BRIAN P. KANE
Deputy Attorney General

CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

February 16, 2010

The Honorable Ben Ysursa
Idaho Secretary of State
STATEHOUSE MAIL

Re: Certificate of Review
Proposed Initiative Relating to Vaccination Choice Protection Act

Dear Secretary of State Ysursa:

An initiative petition was filed with your office on January 19, 2010. Pursuant to Idaho Code § 34-1809, this office has reviewed the petition and has prepared the following advisory comments. Given the strict statutory timeframe within which this office must review the petition, our 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.

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MATTERS OF SUBSTANTIVE IMPORT

A. Introduction

The proposed initiative (“Initiative”) seeks to create a new chapter of Idaho Code called the Vaccination Choice Protection Act. The Initiative states in its Purpose section, proposed section 39-9201, that vaccines are not subject to adequate testing to ensure long-term safety, and that the U.S. government has “put in place measures that would give vaccine manufacturers immunity from prosecution in certain circumstances despite studies which do not prove long term safety or efficacy.” The Purpose language also creates a right for every person to determine his own health care needs or those of his or her minor children; that no one should be forcibly medicated; and a prophylactic non-emergent treatment should never be given to a minor without a parent’s consent, particularly when the safety and efficacy of a product has not been adequately tested. The Initiative further provides:

1. No person qualified to consent to their own care as specified in Idaho Code § 39-4502 can be vaccinated without consent.
2. For those not qualified to give consent, a specific written permission for each vaccine injected shall be required, executed by persons qualified to give consent by section 39-4504.
3. Each patient will be given the package insert for a vaccine prior to injection, or will be informed that none exists.
4. Warnings specific to pregnant women will be repeated orally to the woman before vaccination.
5. Warnings pertaining to fertility will be repeated orally to any individual under the age of 50 or his or her parent.
6. No competent person can be threatened or coerced in any way to accept a vaccination. Describing potential negative health consequences of not being vaccinated are not coercion or threat.

7. No person can be treated differently by the government or any of its agencies for failing to get vaccinated, including selective quarantining or segregating non-vaccinated people from society.
8. In the event of quarantine or health emergency, no individual can be forced to be vaccinated, even in the event of martial law.
9. Employers who force employees to get vaccinated under threat of any type of reprisal shall be fully liable for any ill health effects the forcibly-vaccinated employee might suffer. "This right to prosecution cannot be waived by written contract or waiver."
10. No employee or consultant of the state, any agency, county, or municipal corporation shall be forced or intimidated to take a vaccine by any agent of the state, county, or municipality. Members of the state militia have the same protection.
11. The provisions of this section (proposed section 39-9207) apply to any and all federal officials and agents of the United States government. The right to determine the course of one's health is a valid natural right protected under the Ninth Amendment to the United States Constitution, and there is no enumerated power that would allow the government to force vaccinate the people of Idaho. Any law to the contrary is null and void.
12. If any individual, including a doctor, Idaho peace officer, member of the state militia, any federal official or member of the military attempts to force vaccinate someone else, the person who is being so assaulted is entitled to self defense the same as if his life were directly under attack and has the unquestioned right to respond with whatever force he or she feels necessary. The person exercising his right to self defense shall not be charged with any crime, even if it results in the death of the person attempting to vaccinate the individual against his will. If the person being assaulted in the

attempt to force vaccinate him is killed, the person who killed that individual shall be charged with any applicable homicide.

13. An individual who attempts to compel a person in Idaho into surrendering a right or property guaranteed by the Act by directly or indirectly threatening enforcement of a law or code which would be nullified by the Act shall be subject to penalties detailed in the Act.
14. A county attorney or the attorney general can prosecute an arrest, search, seizure, or attempts at such actions, with kidnapping, trespass, theft, or applicable homicide. Individuals involved can also be charged with other applicable criminal offenses in title 18, Idaho Code. Prosecution for extortion or other criminal offenses is provided for. Victims of crimes prosecutable under this section are entitled to pursue independent concomitant civil actions. Individuals violating proposed subsections 39-9202 [39-9203] (A), (B), and (G) can be charged with battery as described under Idaho Code § 18-903 or any other applicable criminal offenses. Individuals guilty of violating subsections 39-9202 [39-9203] (D) or (E) shall be penalized for failure to obtain consent as provided in title 39, chapter 45, Idaho Code, or other applicable offenses. Victims have a right to independently pursue concomitant civil actions against perpetrators.

B. A Constitutional Basis for Idaho Health Care Freedom Act May Become a Question

Proposed section 39-9207 asserts a right to determine the course of one's health that is protected under the Ninth Amendment to the U.S. Constitution. The Ninth Amendment states that, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." The undersigned is not aware of any federal law or requirement that would force vaccinations under emergency or other circumstances. Such issues would need to be addressed if the Initiative becomes law and there is a potentially conflicting congressional enactment.

C. The Terms of the Initiative Are Vague or Contradict Other Law

Proposed section 39-9202 defines “competent person” as “any emancipated minor or person eighteen (18) or more years of age who is of sound mind.” However, as to infectious, contagious, or communicable disease, which is the type of scenario encompassed by the Initiative, Idaho Code § 39-3801 allows a minor 14 years of age to consent to the furnishing of hospital, medical, and surgical care related to the diagnosis or treatment of reportable diseases. Idaho Code § 39-4302 states that, “Any person of ordinary intelligence and awareness sufficient for him or her generally to comprehend the need for, the nature of and the significant risks ordinarily inherent in any contemplated hospital, medical, dental or surgical care, treatment or procedure is competent to consent thereto on his or her own behalf.”

The difference in who can consent for a minor is of significance in relation to proposed subsection 39-9203(F), the only section where the term “competent person” is used: “No competent person can be threatened or coerced in any way to accept a vaccination.” According to the definition in the Initiative, a minor can be required to be vaccinated because a parent consents, but if the minor qualifies under Idaho Code § 39-4503, the minor can refuse the vaccination. These sections are not readily reconciled, which is a conflict inherent in subsection (A) of this proposed section as well: “No person qualified to consent to their own care as specified in 39-4503, Idaho Code, can be vaccinated without his or her consent.” It is not clear what happens when parent and child disagree on whether the child should be vaccinated.

The definition of “vaccine” in the Initiative is “any biopharmaceutical agent or biological product designed to stimulate a humoral immune response to a specific pathogen or antigen.” There is another definition of “vaccine” in House Bill No. 432, which is “any preparations of killed microorganisms, living attenuated organisms or living fully virulent organisms that are approved by the federal food and drug administration and recommended by the federal advisory committee on immunization practices of the centers for disease control and prevention.” The latter is a more accurate definition and reflects the federal statutory scheme for the approval of pediatric vaccines. 42 U.S.C. § 1396s. If both the statute and the Initiative are enacted into law, there will be two very different definitions of “vaccine” in Idaho Code.

Proposed sections 39-9203(G), 39-9204, 39-9205, and 39-9206 have significant public health implications, which are outside the scope of this review. Section 39-9205 makes employers liable for any ill health effects from vaccination forced through threat of reprisal, which is undefined. Liability for ill health effects is a matter for civil litigation, not “prosecution.”

In proposed section 39-9208, the law on the right of self defense against one who attempts to force another individual to accept a vaccination is dramatically restated. This section allows for self defense as if the individual is directly under attack and provides an unquestioned right to respond with whatever level of force the individual feels is necessary. The individual under attack shall not be charged with any crime even if the individual kills the “attacker.” If the individual is killed, the “attacker” is to be charged with any applicable homicide. However, current law provides that a homicide is justifiable if committed when resisting any attempt to murder someone, to commit a felony, or to do some great bodily injury to any person. Idaho Code § 18-4009. This is a much higher standard than stated in the Initiative. Furthermore, self defense to the commission of an offense must be based on a reasonable means of resistance, not an excessive level of force in relation to the threat. Idaho Code §§ 19-202 and 19-202A. The Initiative makes no attempt to resolve the contradictions with current criminal law, or to amend the pertinent criminal Code sections.

As in proposed section 39-9209, the Initiative subjects to criminal penalties anyone who attempts to compel a person in Idaho into surrendering a right or property guaranteed by the Act by directly or indirectly threatening a person with enforcement of a law or code that would be nullified by the Act. The concept of “indirect effects” and “threatened enforcement” from statutory or regulatory actions leaves the scope of the proposal indefinable.

In the Remedies provision in proposed section 39-9210, references are made to section 39-9202. These should probably be to section 39-9203. Subsection 39-9210(4) provides for sanctions available for failure to obtain consent in title 39, chapter 45, Idaho Code. However, the provisions regarding who can give consent to medical care do not have penalty provisions.

MATTERS OF FORM

Idaho Code § 34-1801A sets out requirements for the form of an initiative. The Initiative includes the warning set out in that Code section, stating that it is a felony for anyone to sign any initiative or referendum petition with any name other than his own, or to knowingly sign his name more than once for the measure, or to sign such petition when he is not a qualified elector. This Initiative contains two signature pages, one of which has 20 signatures; the other, 15. One individual in Coeur d'Alene has signed both pages, in apparent violation of the requirement.

In addition, Idaho Code § 34-1804 requires that each signature sheet shall contain signatures of qualified electors from only one county. The signatories to the Initiative live in Hayden, Coeur d'Alene, Athol, Cataldo, Post Falls, Bonners Ferry, and Moscow, not all of which are in Kootenai County, where the majority of them reside.

The numbering scheme used in the proposed new chapter is not internally consistent, nor is it generally the numbering usually used for Idaho statutes.

CERTIFICATION

I HEREBY CERTIFY that the enclosed measure has been reviewed for form, style, and matters of substantive import. The recommendations set forth above have been communicated to the Petitioner via a copy of this Certificate of Review, deposited in the U.S. Mail to Alanna Grimm, 2817 E. St. James Ave., Hayden, Idaho 83835-7544.

Sincerely,

LAWRENCE G. WASDEN
Attorney General

Analysis by:

JEANNE T. GOODENOUGH
Deputy Attorney General

CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

February 17, 2010

The Honorable Ben Ysursa
Idaho Secretary of State
STATEHOUSE MAIL

Re: Certificate of Review
Proposed Initiative Relating to the Regulations and Policies
Targeting Greenhouse Gas Emissions

Dear Secretary of State Ysursa:

An initiative petition was filed with your office on January 19, 2010. 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 review the petition, our 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

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MATTERS OF SUBSTANTIVE IMPORT

The proposed initiative seeks to add a new chapter to title 39, Idaho Code, entitled "Regulations and Policies Targeting Greenhouse Gas Emissions." Essentially, the initiative prevents enactment of state and local

laws, and enforcement of federal laws and policies regarding greenhouse gas (GHG) emissions. The initiative raises numerous legal issues. The following reviews the three major areas of concern.

A. The Initiative Conflicts With Governor Otter's Executive Order No. 2007-05, Issued May 16, 2007, as the Initiative Prohibits Addressing GHG Emissions While the Governor Specifically Ordered the Reduction of GHG Emissions

The legislative intent embodied in proposed Idaho Code § 39-9001 states “that any state or regional program to implement a cap and trade system or any other program to address nontoxic greenhouse gas emissions be void and null in the state of Idaho . . . [and] . . . that absolutely no public policy designed to modify greenhouse gas emissions should be undertaken by any Idaho entity, particularly at taxpayer expense.”

Proposed Idaho Code § 39-9002 states:

The state of Idaho as well as the regulatory agencies, counties, and municipal corporations established by Idaho law shall not:

1. Specifically tax or set penalties or fines tied to the production of nontoxic GHGs.
 2. Limit the production of nontoxic GHGs.
 3. Adopt or enforce a state or regional program to regulate the emission of GHGs.
 4. Adopt regulatory disincentives specifically designed to modify GHG emissions.
 5. Adopt any public policy specifically designed to modify GHG emissions.
 6. Expend any resources under the Idaho's disposal including public funds to modify GHG emissions indirectly through public education efforts.
- Prohibited activities would include:
- a. Advertising that carbon dioxide and other nontoxic GHGs need to be reduced.
 - b. Advertising the nontoxic GHGs are harmful to individuals or the environment.

- c. Sponsor propaganda campaigns in public schools designed to convince students that GHGs are responsible for climate change.
- d. Any other public education efforts designed to limit GHGs.

Executive Order No. 2007-05 states in pertinent part that:

1. The Director of the Department of Environmental Quality shall take a leadership role to work with all state government departments and agencies and shall serve as the central point of contact for coordination and implementation of GHG reduction efforts and other associated activities.
2. The Director of the Department of Environmental Quality shall develop a GHG emission inventory and provide recommendations to the Governor on how to reduce GHG emissions in Idaho, recognizing Idaho's interest in continued growth, economic development and energy security.

Thus, the initiative prohibits what Governor Otter specifically ordered – the reduction of GHG emissions.

B. The Initiative Will Likely Conflict With the Idaho Legislature's Mandate Under Idaho Code § 39-118C of the Environmental Protection and Health Act Because if GHG Emissions Become a Regulated Pollutant Under the Clean Air Act (CAA), the State of Idaho Will Be Required to Implement the Associated Regulations to Maintain an Approved Title V Program

Idaho Code § 39-118C requires that the Department of Environmental Quality provide for an air quality operating permit program under title V of the federal CAA. The State of Idaho has a fully approved title V operating permit program. See 66 Fed. Reg. 50574 (October 4, 2001). A requirement for approval is:

. . . that the permitting authority have adequate authority to issue permits and assure compliance by all sources required to have a permit under this subchapter with each applicable standard, regulation or requirement under this chapter.

42 U.S.C. § 7661a(b)(5)(A). The United States Environmental Protection Agency (EPA) recently published a proposed rule “to tailor the major source applicability thresholds for GHG emissions under the prevention of significant deterioration and title V programs of the CAA and to set a PSD significant level for GHG emissions.” 74 Fed. Reg. 55292 (October 27, 2009). In so doing, EPA noted, “[t]his proposal is necessary because EPA expects soon to promulgate regulations under the CAA to control GHG emissions and, as a result, trigger PSD and title V applicability requirements for GHG emissions.” *Id.*

Consequently, at some point in the near future, GHG emissions will become a regulated pollutant subject to certain regulations and requirements. Idaho Code § 39-118C requires Idaho have the authority to adopt these requirements in order to maintain its title V program approval. The initiative conflicts with Idaho Code § 39-118C, because it prohibits the regulation of GHG emissions that Idaho will be required to regulate to maintain its title V program.

C. The Initiative Violates the Supremacy Clause of the United States Constitution as the State of Idaho Cannot Make Null and Void the Application of Federal Laws and Mandates on GHG Emissions Within the State of Idaho

Proposed Idaho Code § 39-9003 states:

1. Any federal law, code, or mandate to the contrary of the provisions of this Chapter is null and void and of no force or effect in Idaho.
2. Any federal law designed to tax or set penalties or fines tied to the production of nontoxic greenhouse gases emitted in the state of Idaho is null and void and of no force or effect in Idaho.
3. The state of Idaho shall accept no money from the federal government or any other person that would require violating the prohibitions in Section 39-9002.
4. Any federal employee or agent of the federal government who actively attempts to enforce laws nullified by this Chapter or commits a violation pursuant

to 39-9005 is subject to the penalties and prosecution described in Section 39-9006.

As discussed above, the federal government has proposed at least two rules to regulate GHG emissions. Article VI, Clause 2 of the United States Constitution establishes the Constitution, federal statutes, and U.S. treaties as “the supreme law of the land.” It states:

This Constitution, and the laws of the United States which shall be made in pursuance thereof: and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.

In Massachusetts v. EPA, 549 U.S. 497, 127 S. Ct. 1438, 167 L.Ed.2d 248 (2007), the United States Supreme Court held that the Clean Air Act does give EPA the authority to regulate tailpipe emissions of GHGs. It directed EPA to review its contention that it has discretion in regulating carbon dioxide and other GHG emissions as its current rationale for not regulating was found to be inadequate. It held the agency must articulate a reasonable basis in order to avoid regulation. 549 U.S. at 534.

The Court also stated:

When a State enters the Union, it surrenders certain sovereign prerogatives These sovereign prerogatives are now lodged in the Federal Government, and Congress has ordered EPA to protect Massachusetts (among others) by prescribing standards applicable to the “emission of any air pollutant from any class or classes of new motor vehicle engines, which in [the Administrator’s] judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.” 42 U.S.C. § 7521(a)(1).

549 U.S. at 519-20.

CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

On December 7, 2009, EPA issued its final “Endangerment and Cause or Contribute Findings for Greenhouse Gas under Section 202(a) of the Clean Air Act.” As a result, Section 202(a) requires that EPA promulgate GHG emissions standards for motor vehicles. EPA has stated that it intends to issue such standards by March 2010. Additionally, as noted above, EPA’s tailoring rule, proposed as a result of GHG emission regulation of motor vehicles, regulates GHG emissions from industrial sources.

Article VI, Clause 2 of the United States Constitution prevents a state from declaring a federal law null and void. The judges in every state are bound by federal law. Therefore, proposed Idaho Code § 39-9003, which makes null and void federal GHG emission laws as they apply to Idaho, is unconstitutional as it violates the Supremacy Clause.

CERTIFICATION

I HEREBY CERTIFY that the enclosed measure has been reviewed for form, style, and matters of substantive import. The recommendations set forth above have been communicated to the Petitioner via a copy of this Certificate of Review, deposited in the U.S. Mail to Alanna Grimm, 2817 E. St. James Ave., Hayden, Idaho 83835-7544.

Sincerely,

LAWRENCE G. WASDEN
Attorney General

Analysis by:

LISA J. KRONBERG
Deputy Attorney General

CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

February 17, 2010

The Honorable Ben Ysursa
Idaho Secretary of State
STATEHOUSE MAIL

Re: Certificate of Review
Proposed Initiative Related to the Idaho Health Insurer Protection Act

Dear Secretary of State Ysursa:

An initiative petition was filed with your office on January 19, 2010. Pursuant to Idaho Code § 34-1809, this office has reviewed the petition and has prepared the following advisory comments. Given the strict statutory timeframe within which this office must review the petition, our 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.

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MATTERS OF SUBSTANTIVE IMPORT

State Law Cannot Supersede or Nullify Federal Law

The proposed initiative is likely unconstitutional. The initiative seeks to nullify any “law, code, mandate, or regulation” of the federal government if it takes any of a series of enumerated actions. This initiative seeks to elevate state law above that of the federal law. As outlined below, this elevation likely violates the Supremacy Clause.

The Supremacy Clause of the United States Constitution provides: “This Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.” U.S. Const. art. VI, cl. 2. State laws that conflict with federal law are “without effect.” Altria Group, Inc. v. Good, — U.S. —, 129 S. Ct. 538, 543, 172 L.Ed.2d 398 (2008). Under the Preemption Clause, it is “clear that federal law is as much the law of the several States as are the laws passed by their legislatures.” Haywood v. Drown, — U.S. —, 129 S. Ct. 2108, 2114, 123 L.Ed.2d 920 (2009). “Pre-emption doctrine stems from the Supremacy Clause of the United States Constitution and invalidates any state law that contradicts or interferes with any Act of Congress.” Hayfield Northern Railroad Co., Inc. v. Chicago and Northwestern Transp. Co., 467 U.S. 622, 627, 104 S. Ct. 2610, 81 L.Ed.2d 527 (1984). This bill would clearly and plainly (and in fact has the stated purpose) of contradicting and interfering with acts of Congress.

The rationale of the proposed initiative seems to be that federal statutes that exceed the grant of limited powers in the Constitution can be nullified or declared void by the state. Even assuming this underlying premise, the fatal flaw in this initiative is that it usurps the constitutional authority to declare federal law unconstitutional. It is simply not within the state’s authority to declare federal laws null and void; that authority lies exclusively with the Supreme Court of the United States and the federal courts created by Congress. U.S. Const. art. III, § 1. Both state and federal courts are constitutionally bound to declare void any state action that contradicts or interferes with the acts of Congress.

CONCLUSION

For the reasons set forth above, it is likely that a court reviewing this initiative, if enacted, would find its content to be unconstitutional. Additionally, this initiative raises numerous ancillary legal issues, most of which would likely be fatal, too numerous to mention given the strict time-frame in which this analysis must occur.

CERTIFICATION

I HEREBY CERTIFY that the enclosed measure has been reviewed for form, style, and matters of substantive import. The recommendations set forth above have been communicated to the Petitioner via a copy of this Certificate of Review, deposited in the U.S. Mail to Alanna Grimm, 2817 E. St. James Ave., Hayden, Idaho 83835-7544.

Sincerely,

LAWRENCE G. WASDEN
Attorney General

Analysis by:

BRIAN P. KANE
Deputy Attorney General

CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

February 17, 2010

The Honorable Ben Ysursa
Idaho Secretary of State
STATEHOUSE MAIL

Re: Certificate of Review
Proposed Initiative Relating to the Informed Jury Act

Dear Secretary of State Ysursa:

An initiative petition was filed with your office on January 19, 2010. Pursuant to Idaho Code § 34-1809, this office has reviewed the petition and has prepared the following advisory comments. Given the strict statutory timeframe within which this office must review the petition, our 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 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

A. Summary of the Proposal

The proposed initiative sets forth a new chapter to be designated as Idaho Code § 2-701, *et seq.*, entitled the “Informed Jury Act.” We understand the proposed initiative to intend the following general results: (1) juries in Idaho’s courts will have the right to ignore judicial precedent that they believe to be in error and to reach their own determination of both the facts and the law in all cases; (2) judges must inform the jury that it is not bound by the judge’s interpretation of the law; must read a specific statement to the jury regarding jury nullification; and must distribute copies of the Idaho and United States Constitutions to the jury; and (3) failure to adhere to these provisions will result in mistrial and/or removal of the judge.

B. The Proposed Initiative May Pose Constitutional Concerns

The Idaho Constitution provides that the “legislature shall have no power to deprive the judicial department of any power or jurisdiction which rightly pertains to it.” Idaho Const. art. V, § 13. A statute dictating that juries “have the right to ignore any judicial precedents they believe to be in error” may violate this constitutional provision, as it would serve to deprive the judiciary of its traditional function of interpreting the law and issuing precedential decisions regarding those interpretations. See Mead v. Arnell, 117 Idaho 660, 669, 791 P.2d 410, 419 (1990) (holding that art. V, sec. 13 of the Idaho Constitution is “clear that it is the duty of the Court to interpret the law”).

Whether a violation of the separation of powers doctrine would be implicated is not as clear under these circumstances as it would be if this proposed legislation were initiated by the Legislature itself, as an initiative instead stems from the constitutional provision that “[t]he people reserve to themselves the power to propose laws, and enact the same at the polls independent of the legislature.” Idaho Const. art. III, § 1. To the extent, however, that the initiative process involves the exercise of legislative authority by the people, there is the potential that this proposed statute unconstitutionally infringes upon the judiciary’s “power or jurisdiction which rightly pertains to it.” Idaho Const. art. V, § 13; see State v. Kellogg, 98 Idaho 541, 546, 568 P.2d 514, 519 (1977) (J. Bakes, dissenting) (discussing “the exclusive grant

of legislative authority to the senate and house of representatives of Idaho and to the people of Idaho acting by referendum or initiative”).

Another constitutional concern presented by the proposed initiative is the fact that the initiative would permit juries to ignore not only legal precedent from the state courts, but also legal precedent from the United States Supreme Court, as well as any federal laws that a jury subjectively believes to be contrary to the Constitution. As the Supremacy Clause of the United States Constitution provides: “This Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.” U.S. Const. art. VI, cl. 2. A jury’s disregard of federal laws and United States Supreme Court precedent potentially violates the Supremacy Clause.

The proposed initiative also includes, in its proposed section 2-705, a mandatory statement to the jury that includes the following language:

Remember also that if you ever serve on a jury in a federal case, Supreme Court rulings have affirmed the rights of the jury to determine both the facts and the law, even if the judge instructs you that such rights do not exist and that you are barred in his or her court room from exercising them.

This language raises the same constitutional concerns, as it attempts to influence the jurors’ conduct in the federal courts, even where the proposed initiative is intended to apply only to the state courts. Significantly, the United States Supreme Court has held that “it is emphatically the province and duty of those [federal] judges to say what the law is. At the core of this power is the federal courts’ independent responsibility – independent from . . . the separate authority of the several States – to interpret federal law.” Williams v. Taylor, 529 U.S. 362, 378-79, 120 S. Ct. 1495, 1505, 146 L.Ed.2d 389 (2000) (internal quotation marks and citation omitted). The Williams court clarified that “requir[ing] the federal courts to cede this authority to the courts of the States would be inconsistent with the practice that federal judges have traditionally followed in discharging their duties under Article III of the Constitution.” *Id.* In short, the provisions permitting jurors to disregard federal laws and precedent in the state courts, when applicable, as well as the provision requiring a mandatory statement to the jury that encourages disre-

gard of federal laws and precedent in the federal courts, may violate the Supremacy Clause. *See also* Haywood v. Drown, — U.S. —, 129 S. Ct. 2108, 2114-16, 173 L.Ed.2d 920 (2009) (holding that a state cannot pass a law that nullifies a federal claim or cause of action); Howlett By and Through Howlett v. Rose, 496 U.S. 356, 371, 110 S. Ct. 2430, 2440, 110 L.Ed.2d 332 (1990) (“The Supremacy Clause forbids state courts to disassociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source.”).

C. The Proposed Initiative Is Inconsistent with Other Statutory Provisions

The proposed initiative is inconsistent with several other provisions of the Idaho Code. Idaho Code § 9-102 provides:

All questions of law arising upon the trial, including the admissibility of testimony, the facts preliminary to such admission, and the construction of statutes and other writings, and other rules of evidence, **are to be decided by the court** when submitted and before the trial proceeds, and **all discussions of law are to be addressed to the court**. Whenever the knowledge of the court is by this chapter made evidence of a fact, the court is to declare such knowledge to the jury, who are bound to accept it.

(Emphasis added.) Courts are statutorily required to “take judicial notice” of “[w]hatever is established by law,” Idaho Code § 9-101, which leads to the courts’ statutory obligation “to declare such knowledge to the jury, **who are bound to accept it.**” Idaho Code § 9-102 (emphasis added).

With respect to criminal trials, Idaho Code § 19-2129 provides: “**The court must decide all questions of law** which arise in the course of a trial.” (Emphasis added.) Idaho Code § 19-2131 similarly provides: “On the trial of an indictment for any other offense than libel, **questions of law are to be decided by the court**, questions of fact by the jury; and **although the jury have the power to find a general verdict, which includes questions of law as well as of fact, they are bound, nevertheless, to receive as law what is laid down as such by the court.**” (Emphasis added.)

The proposed initiative is also inconsistent with Idaho Code § 2-101, which defines a jury as a body “invested with power to present or indict a person for a public offense or try a question of **fact**.” (Emphasis added.) Similarly, the proposed initiative is inconsistent with Idaho Code § 2-104, which defines a trial jury as a body “sworn to try and determine by a verdict a question of **fact**.” (Emphasis added.)

In order for the proposed initiative to clearly take full effect, these inconsistent statutes would also need to be amended or repealed, as “implied repeal of special statutes by general statutes is not favored.” Rydalch v. Glauner, 83 Idaho 108, 119, 357 P.2d 1094, 1101 (1961); Callies v. O’Neal, 147 Idaho 841, 216 P.3d 130, 136 (2009).

As a practical matter, the proposed initiative would involve further inconsistencies with a great many statutory provisions, as it has the potential to render ineffectual the civil and criminal laws underlying litigation. For example, while Idaho Code § 18-902 prohibits the crime of assault, the proposed initiative permits a jury to ignore this statute if it subjectively believes the statute to be “in error,” “wrong, against the Constitution or the principles governing normal human conscience.” The initiative would also permit the jury to ignore laws defining the boundaries of liability, such as statutes of limitations, as well as federal laws, so long as the claims are raised in the state courts.

D. Additional Comments

Section 2-707 of the proposed initiative states that “[t]he repeated failure of a judge to abide by the provisions of section 2-704 shall be grounds for dismissal pursuant to procedures established relative to Article V, section 28 of the Idaho State Constitution.” Article V, sec. 28 of the Idaho Constitution provides that “[p]rovisions for the retirement, discipline and removal from office of justices and judges shall be as provided by law.” Thus, the proposed initiative merely refers to the general fact that procedures for removal will be as provided by an unidentified law. Currently, the “procedures established relative to Article V, section 28 of the Idaho State Constitution” for removal of judicial officers are set forth in Idaho Code §§ 1-2103 and 1-2103A. For the sake of clarity, the proposed initiative should either refer directly to these statutory procedures or should set forth separate procedures within the body of the new statute.

As a more minor point, it may be advisable to remove quoted language from the proposed initiative or to instead paraphrase the substance of the language at issue, particularly in the proposed Statement to Jury contained in section 2-705. For example, the quotation from Chief Justice John Jay appears to be slightly misquoted in the proposed initiative, as most sources list the actual quote as: “You [juries] have a right to take it upon yourselves to judge both, and to determine the law as well as the fact in controversy.” Quoted language is unusual in a statute; including potentially misquoted language in the body of a statute would be inadvisable.

The proposed Statement to Jury also includes the following language:

If any law in this case violates either of those documents [the Constitutions] as you plainly understand them, you are obligated to **return a not guilty verdict with regards to the charge** involving that statute. Remember, that your decision is **affecting the life of another person** and if you blindly accept a law you know to be wrong, against the Constitution or the principles governing normal human conscience, you are **just as guilty of harming this person** as those who passed such an unjust law.

(Emphasis added). The above language appears to be narrowly drafted to apply to criminal cases, as it specifies that the jury is “obligated to return a not guilty verdict with regards to the charge,” and as it refers to the jury’s effect upon “the life of another person.” However, the proposed initiative is intended to apply to all cases in Idaho’s state courts, which would include civil cases. Civil cases do not involve verdicts of “guilty” or “not guilty,” nor do they involve criminal charges. Furthermore, some civil cases involve entities as the parties, rather than individual “persons.” It is recommended that the above language be revised and broadened in order to be relevant to the broader range of cases to which the proposed initiative is intended to apply.

CERTIFICATION

I HEREBY CERTIFY that the enclosed measure has been reviewed for form, style, and matters of substantive import. The recommendations set forth above have been communicated to the Petitioner via a copy of this Certificate of Review, deposited in the U.S. Mail to Alanna Grimm, 2817 E. St. James Ave., Hayden, Idaho 83835-7544.

Sincerely,

LAWRENCE G. WASDEN
Attorney General

Analysis by:

KARIN D. JONES
Deputy Attorney General

CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

February 17, 2010

The Honorable Ben Ysursa
Idaho Secretary of State
STATEHOUSE MAIL

Re: Certificate of Review
Proposed Initiative Related to the Protection of Idahoans
from Unlawful IRS Prosecution and Seizures

Dear Secretary of State Ysursa:

An initiative petition was filed with your office on January 19, 2010. Pursuant to Idaho Code § 34-1809, this office has reviewed the petition and has prepared the following advisory comments. Given the strict statutory timeframe within which this office must review the petition, our 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 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

A. Summary of the Proposal

The proposed initiative sets forth a new chapter to be designated as Idaho Code § 63-4701, *et seq.*, entitled “Protection of Idahoans from Unlawful IRS Prosecution and Seizures.” We understand the proposed initiative to intend the following general results: (1) the United States government will be required to produce to the Idaho Secretary of State documentation supporting the authority of the United States and the Internal Revenue Service (“IRS”) to collect personal income taxes; (2) following a public comment period, the Idaho Attorney General will review the aforesaid documentation and issue a legal opinion and “certification of taxability” concerning the authority of the United States and the IRS to collect personal income taxes; (3) actions taken in conjunction with the attempted collection of personal income tax will be prohibited if the Idaho Attorney General does not issue a “certification of taxability”; and (4) notwithstanding the issuance of a “certification of taxability,” the State of Idaho may still prohibit the enforcement of federal personal income tax statutes, and a county sheriff may prevent the enforcement of any such “tax statutes that he considers to be unlawful or nullified based on his own personal knowledge of the law.”

B. The Proposed Initiative Likely Violates the Supremacy Clause

The Supremacy Clause of the United States Constitution provides: “This Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.” U.S. Const. art. VI, cl. 2. The Idaho Constitution similarly provides that “[t]he state of Idaho is an inseparable part of the American Union, and the Constitution of the United States is the supreme law of the land.” Idaho Const. art. I, § 3. Pursuant to the Supremacy Clause, a state cannot ignore federal legislation or pass state legislation providing that federal law will not be followed within the state. *See, e.g., Haywood v. Drown*, —U.S.—, 129 S. Ct. 2108, 2114-16, 173 L.Ed.2d 920 (2009) (holding that a state cannot pass a law that nullifies a federal claim or cause of action); *Howlett By and Through Howlett v. Rose*, 496 U.S. 356, 371, 110 S. Ct. 2430, 2440, 110 L.Ed.2d 332 (1990) (“The Supremacy Clause forbids state courts to disassociate themselves from federal law because of

disagreement with its content or a refusal to recognize the superior authority of its source.”); Oxygenated Fuel Ass’n, Inc. v. Davis, 331 F.3d 665, 667 (9th Cir. 2003) (holding that state law is preempted when it conflicts with federal law).

The proposed initiative likely violates the Supremacy Clause because its intent is to prohibit the enforcement of particular federal income tax statutes and to criminalize any actions associated with enforcement of those statutes. According to the proposed initiative, even if the Idaho Attorney General issues a “certificate of taxability,” verifying that the IRS has the authority to enforce these federal statutes, the state would still be permitted to pass legislation prohibiting their enforcement. Furthermore, county sheriffs would be permitted to prohibit their enforcement based upon their own subjective interpretation of the federal statutes’ validity, “even if a certification exists.” Additionally, during the time period between the effective date of the Act and the issuance of a “certification of taxability” by the Attorney General, enforcement of the federal statutes would be prohibited by the proposed initiative. This nullification of federal statutes enacted pursuant to the United States Constitution, even to the extent such nullification may be temporary or may be applied sporadically, would almost certainly violate the Constitution.

Furthermore, as the United States Supreme Court has clarified, it is the role of the federal judiciary, not the separate states, to interpret federal law. “[I]t is emphatically the province and duty of those [federal] judges to say what the law is. At the core of this power is the federal courts’ independent responsibility – independent from . . . the separate authority of the several States – to interpret federal law.” Williams v. Taylor, 529 U.S. 362, 378-79, 120 S. Ct. 1495, 1505, 146 L.Ed.2d 389 (2000) (internal quotation marks and citation omitted). The Williams court clarified that “requir[ing] the federal courts to cede this authority to the courts of the States would be inconsistent with the practice that federal judges have traditionally followed in discharging their duties under Article III of the Constitution.” *Id.* The provisions in the proposed initiative allowing the state – through the Attorney General’s Office – to pass final judgment on the validity of the federal income tax statutes, regardless of what the United States Supreme Court may hold on the subject, does not comport with the Supremacy Clause or with the basic premise that the federal courts are the final authority with respect to the interpretation of federal law.

Additionally, the state does not have the authority to regulate the conduct of the federal government unless it has clear and unambiguous congressional authorization to do so. See Hancock v. Train, 426 U.S. 167, 96 S. Ct. 2006, 2012, 48 L.Ed.2d 555 (1976) (holding that “the activities of the Federal Government are free from regulation by any state”) (internal citation omitted). The proposed initiative attempts to regulate federal agents’ enforcement of federal income tax laws and additionally attempts to direct the federal government to undertake particular conduct (providing the documentation delineated in the proposed initiative). Absent clear and unambiguous congressional authorization to regulate these federal activities, these provisions are likely unenforceable.

C. The Proposed Initiative May Be Unconstitutionally Vague

In addition to the above, the provisions of the proposed initiative that are intended to prohibit actions related to enforcement of federal income tax statutes may be unconstitutionally vague. As the Idaho Supreme Court has articulated:

The void-for-vagueness doctrine is premised upon the due process clause of the Fourteenth Amendment to the U.S. Constitution. **This doctrine requires that a statute defining criminal conduct be worded with sufficient clarity and definiteness that ordinary people can understand what conduct is prohibited and that the statute be worded in a manner that does not allow arbitrary and discriminatory enforcement.** It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Furthermore, as a matter of due process, no one may be required at the peril of loss of liberty to speculate as to the meaning of penal statutes. This Court has held that due process requires that all “be informed as to what the State commands or forbids” and that “men of common intelligence” not be forced to guess at the meaning of the criminal law. A statute may be void for vagueness if it fails to give adequate notice to people of ordinary intelligence concerning the conduct it proscribes, or if it fails to establish minimal guidelines to govern law enforcement or others who must enforce the statute.

State v. Korsen, 138 Idaho 706, 711-12, 69 P.3d 126, 131-32 (2003) (internal citations omitted and emphasis added).

As discussed previously, the proposed initiative provides, regardless of whether the Idaho Attorney General certifies that the United States has the authority to collect personal income tax, that county sheriffs may disregard this authority and prevent enforcement of the statutes. In addition, enforcement of the federal statutes must also “remain in compliance with other acts of the State which might still otherwise prohibit the enforcement of certain personal income tax statutes.” Thus, the proposed initiative is not sufficiently clear and definite so that ordinary people can understand what conduct associated with enforcement of the federal income tax statutes is prohibited. For example, the proposed initiative criminalizes the act of “threatening [a] person with the enforcement of a law or code which would be nullified by this act,” but the proposed initiative does not clarify when such a law or code is actually “nullified,” as individual sheriffs would have the authority to subjectively determine whether nullification is appropriate. In addition, the statute allows for arbitrary enforcement, as it permits individual sheriffs to decide whether or not the conduct of enforcing the federal income tax statutes is “unlawful . . . based on [their] own personal knowledge of the law . . . , even if a certification exists.”

Additionally, it is unclear whether the “covered actions” set forth in proposed section 63-4703 are intended to be prohibited, or if only the “unauthorized seizures” and “color of law violations” set forth in proposed sections 63-4707 and 63-4708 are prohibited. Consolidation of all prohibited actions into a single section – and clarification of exactly what conduct is prohibited – would be advisable.

D. Additional Comments

Following are some additional recommendations on more minor issues.

It may be advisable to remove quoted language from section 63-4701 of the proposed initiative or to instead paraphrase the substance of the language at issue. Quoted language is unusual in a statute, and it does not appear to materially add to the substance of the stated purpose of the initiative.

CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

Proposed subsections 63-4703(1) and 63-4703(2) are identical. One of these subsections should be removed.

Proposed subsection 63-4703(3) is missing the word “person.” The subsection should presumably read as follows: “Enforcement of any liens against personal property of any natural [**person**] relating to failure to file personal income tax returns or pay personal income taxes.”

CERTIFICATION

I HEREBY CERTIFY that the enclosed measure has been reviewed for form, style, and matters of substantive import. The recommendations set forth above have been communicated to the Petitioner via a copy of this Certificate of Review, deposited in the U.S. Mail to Alanna Grimm, 2817 E. St. James Ave., Hayden, Idaho 83835-7544.

Sincerely,

LAWRENCE G. WASDEN
Attorney General

Analysis by:

KARIN D. JONES
Deputy Attorney General

CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

February 17, 2010

The Honorable Ben Ysursa
Idaho Secretary of State
STATEHOUSE MAIL

Re: Certificate of Review
Proposed Initiative Relating to the State Sovereignty Act

Dear Secretary of State Ysursa:

An initiative petition was filed with your office on January 19, 2010. Pursuant to Idaho Code § 34-1809, this office has reviewed the petition and has prepared the following advisory comments. Given the strict statutory timeframe within which this office must review the petition, our 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 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 Initiative Violates the Supremacy Clause

The Supremacy Clause of the United States Constitution provides that federal laws and treaties are "the supreme law of the land." U.S. Const.

CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

art. VI, cl. 2. Accordingly, when Congress acts within the scope of its constitutional authority, the laws it enacts may preempt state or local action within that field. The Sixteenth Amendment to the United States Constitution provides Congress with the power to levy income taxes, without any requirement that the states receive a portion thereof. U. S. Const. amend. XVI. No authority exists for the states to withhold without federal authorization any part of these taxes. No state law, such as this initiative, would permit a state to undertake any denial or abridgment of the federal power to levy and collect taxes without a corresponding federal enactment. It appears that this initiative would likely be preempted.

CONCLUSION

Based upon the above analysis, this initiative, if adopted and subsequently challenged, would likely be struck down as an unconstitutional enactment.

CERTIFICATION

I HEREBY CERTIFY that the enclosed measure has been reviewed for form, style, and matters of substantive import. The recommendations set forth above have been communicated to the Petitioner via a copy of this Certificate of Review, deposited in the U.S. Mail to Alanna Grimm, 2817 E. St. James Ave., Hayden, Idaho 83835-7544.

Sincerely,

LAWRENCE G. WASDEN
Attorney General

Analysis by:

BRIAN P. KANE
Deputy Attorney General

CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

December 13, 2010

The Honorable Ben Ysursa
Idaho Secretary of State
STATEHOUSE MAIL

Re: Certificate of Review
Proposed Initiative Relating to Legalization of Medical Use
of Marijuana

Dear Secretary of State Ysursa:

An initiative petition was filed with your office on November 15, 2010. Pursuant to Idaho Code § 34-1809, this office has reviewed the petition and has prepared the following advisory comments. Given the strict statutory timeframe within which this office must review the petition, our review can only isolate major 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 petitioner is free to "accept or reject them in whole or in part." Due to the available resources and limited time for performing the reviews, we did not communicate directly with the petitioner as part of the review process. The opinions expressed in this review are only those that may affect the legality of the initiative. This office offers no opinion with regard to the policy issues raised by this proposed initiative.

BALLOT TITLE

Following the filing of the proposed initiative, this office will prepare short and long ballot titles. The ballot titles must impartially and succinctly state the purpose of the measure without being argumentative and without creating prejudice for or against the measure. While our office prepares titles for the initiative, petitioner may submit proposed titles for consideration. Any proposed titles should be consistent with the standard set forth above.

MATTERS OF SUBSTANTIVE IMPORT

A. Introduction

The Initiative, which is self-titled the “Idaho Medical Choice Act,” declares that persons engaged in the use, possession, manufacture, sale, and/or distribution of marijuana to persons suffering from debilitating medical conditions, as authorized by the procedures established in the Initiative, are protected from arrest, prosecution, property forfeiture, and criminal and other penalties under Idaho law. A summary of the Initiative’s provisions, tentatively denominated as Idaho Code § 39-4700, *et seq.*, begins with its purpose, which is:

THEREFORE the purpose of this chapter is to protect from arrest, prosecution, property forfeiture, and criminal and other penalties, those patients who use marijuana to alleviate suffering from debilitation medical conditions, as well as their physicians, primary caregivers and those who are authorized to produce marijuana for medical purposes.

Prop. I.C. § 39-4702.¹

The Initiative authorizes “qualifying patients” to use marijuana for medical purposes, and “primary caregivers” to assist patients’ medical use of marijuana. Prop. I.C. §§ 39-4703 and 39-4704. To be a qualified patient, the patient’s primary care physician must certify that the patient “is likely to receive therapeutic or palliative benefit from the medical use of marijuana to treat or alleviate the patient’s debilitating medical condition or symptoms associated with the debilitating medical condition.” Prop. I.C. § 39-4703(1). The Idaho Department of Health and Welfare (“Department”) is mandated to set up a state registry maintaining the names of qualified patients and their primary caregivers authorized to use (and assist in the use of) marijuana for medical purposes, and issue a “registry identification card” to the patient and caregiver, which is valid for two (2) years. Prop. I.C. § 39-4704(1).

The specific requirements for being a “primary caregiver” are set forth in Prop. I.C. § 39-4703(12), and include that the caregiver “[i]s not currently on felony probation or parole under the Idaho Department of

Correction or on misdemeanor probation under any county in Idaho.” Prop. I.C. § 39-4703(12)(c). Minors are also entitled to be issued registry identification cards under certain criteria. Prop. I.C. § 39-4704(10). A denial by the Department of an application or renewal request for a registry identification card based on falsified information is “a final agency decision” subject to the provisions of the Idaho Administrative Procedure Act. Prop. I.C. § 39-4704(2).

The Initiative requires the Department to accept applications from entities for permits to operate as “Alternative Treatment Centers” with the “first two (2) centers issued a permit in the Panhandle, North Central, Central, Eastern, Southwest, South Central, and Southeast health districts” as non-profit entities — but subsequent centers may be nonprofit or for-profit entities. Prop. I.C. § 39-4707(1). The Director of the Department of Health and Welfare (“Director”) must: require applicants to provide “such information as the department determines to be necessary pursuant to rules adopted pursuant to this chapter”; adopt rules requiring Centers to maintain written documentation of each delivery and pickup of marijuana; “adopt rules to [m]onitor, oversee, and investigate all activities performed” by a Center; and “adopt rules to [e]nsure adequate security of all facilities twenty-four (24) hours per day, including production and retail locations, and security of all delivery methods to registered qualifying patients.” Prop. I.C. § 39-4707. Additionally, if an application to operate a Center is denied because of falsified information, or later suspended or revoked “for cause,” such a determination “shall be subject to review pursuant to” the Idaho Administrative Procedure Act. Prop. I.C. § 39-4707(3). Once a permit is issued to a person to operate such a facility, the Alternative Treatment Center is authorized to:

acquire a reasonable initial and ongoing inventory, as determined by the department, of marijuana seeds or seedlings and paraphernalia, possess, cultivate, plant, grow, harvest, process, display, manufacture, deliver, transfer, transport, distribute, supply, sell or dispense marijuana, or related supplies to qualifying patients or their primary caregivers who are registered with the department. . . .

Prop. I.C. § 39-4707(1). The Initiative does not provide specific qualifications for employment, ownership, or holding any other position at an

Alternative Treatment Center. The Initiative limits the dispensing of marijuana to no more than two and one-half (2½) ounces in any fourteen (14) day period, and requires careful record-keeping of how disbursements are made. Prop. I.C. § 39-4710. Alternative Treatment Centers are allowed to charge registered qualifying patients and primary caregivers for the “reasonable costs associated with the production and distribution of marijuana for the cardholder.” Prop. I.C. § 39-4707(6).

The Director is mandated to issue a report to the governor and legislature within one (1) year of the Initiative’s enactment, stating the actions taken to implement the provisions of the Initiative, and must thereafter provide annual reports of the number of applications for registry identification cards, the number of qualifying patients and primary caregivers registered, and other relevant information.² Prop. I.C. § 39-4717(1).

The Initiative exempts from state criminal liability any actions authorized within its provisions, and provides that qualifying patients and primary caregivers (for each qualifying patient under their care) may possess up to two and one-half (2½) ounces of usable marijuana and twelve (12) marijuana plants (no more than six (6) mature plants). Prop. I.C. § 39-4706(1). Among other protections listed, Prop. I.C. § 39-4706 reads in part:

(6) A qualifying patient or primary caregiver shall not be denied tenancy or be subject to eviction for acting in accordance with this act, unless the person’s behavior is such that it creates an unreasonable danger or threat to the property under lease or to the health of co-existing tenants.

(7) A qualifying patient or primary caregiver shall not be denied potential employment or terminated from existing employment in the public or private sector for acting in accordance with this act, unless the person’s behavior is such that it inhibits the performance of job duties.

. . . .

(11) A qualifying patient shall not be denied employment in the public or private sector on the basis of a positive test for marijuana.

Finally, conduct authorized by the Initiative is an available affirmative defense in a criminal case. Prop. I.C. § 39-4711.

B. If Enacted, the Initiative Would Have No Legal Impact on Federal Criminal, Employment, or Housing Laws Regarding Marijuana

Idaho is free to enforce its own laws, just as the federal government is free to do the same. The United States Supreme Court has explained:

In *Bartkus v. Illinois*, 359 U.S. 121 [1959], . . . and *Abbate v. United States*, 359 U.S. 187 [1959], . . . this Court reaffirmed the well-established principle that a federal prosecution does not bar a subsequent state prosecution of the same person for the same acts, and a state prosecution does not bar a federal one. The basis for this doctrine is that prosecutions under the laws of separate sovereigns do not, in the language of the Fifth Amendment, “subject [the defendant] for the same offence to be twice put in jeopardy”:

An offence [sic], in its legal signification, means the transgression of a law. . . . Every citizen of the United States is also a citizen of a State or territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either. The same act may be an offense or transgression of the laws of both. . . . *That either or both may (if they see fit) punish such an offender, cannot be doubted.*”

United States v. Wheeler, 435 U.S. 313, 317, 985 S. Ct. 1079, 1083, 55 L.Ed.2d 303 (1978) (superseded by statute) (quoting Moore v. Illinois, 55 U.S. 13, 19-20, 14 How. 13, 19-20, 14 L.Ed. 306 (1852)) (footnote omitted; emphasis added). See State v. Marek, 112 Idaho 860, 865, 736 P.2d 1314, 1319 (1987) (“[T]he double jeopardy clause of the fifth amendment does not prohibit separate sovereigns from pursuing separate prosecutions since separate sovereigns do not prosecute for the ‘same offense.’”). Under the concept of “separate sovereigns,” the State of Idaho is free to create its own criminal laws and exceptions pertaining to the use of marijuana. However, the State

of Idaho cannot limit the federal government, as a separate sovereign, from prosecuting marijuana-related conduct under its own laws.

In United States v. Oakland Cannabis Buyers' Cooperative, 532 U.S. 483, 486, 121 S. Ct. 1711, 1715, 149 L.Ed.2d 722 (2001), the United States Supreme Court described a set of circumstances that appear similar to the system proposed in the Initiative:

In November 1996, California voters enacted an initiative measure entitled the Compassionate Use Act of 1996. Attempting “[t]o ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes,” Cal. Health & Safety Code Ann. § 11362.5 (West Supp. 2001), the statute creates an exception to California laws prohibiting the possession and cultivation of marijuana. These prohibitions no longer apply to a patient or his primary caregiver who possesses or cultivates marijuana for the patient’s medical purposes upon the recommendation or approval of a physician. *Ibid.* In the wake of this voter initiative, several groups organized “medical cannabis dispensaries” to meet the needs of qualified patients. . . . Respondent Oakland Cannabis Buyers’ Cooperative is one of these groups.

A federal district court denied the Cooperative’s motion to modify an injunction that was predicated on the Cooperative’s continued violation of the federal Controlled Substance Act’s “prohibitions on distributing, manufacturing, and possessing with the intent to distribute or manufacture a controlled substance.” *Id.* at 487. On appeal, the Ninth Circuit determined “medical necessity is a legally cognizable defense to violations of the Controlled Substances Act.” *Id.* at 489. However, the United States Supreme Court reversed the Ninth Circuit and held:

It is clear from the text of the [Controlled Substances] Act that Congress has made a determination that marijuana has no medical benefits worthy of an exception. The statute expressly contemplates that many drugs “have a useful and legitimate medical purpose and are necessary to maintain the health and general welfare of the American people,” § 801(1), but it includes no exception at all for

any medical use of marijuana. Unwilling to view this omission as an accident, and unable in any event to override a legislative determination manifest in a statute, we reject the Cooperative's argument.

. . . .

For these reasons, we hold that medical necessity is not a defense to manufacturing and distributing marijuana. The Court of Appeals erred when it held that medical necessity is a "legally cognizable defense." 190 F.3d. at 1114. It further erred when it instructed the District Court on remand to consider "the criteria for a medical necessity exemption, and, should it modify the injunction, to set forth those criteria in the modification order." *Id.*, at 1115.

The Oakland Cannabis Buyer's Cooperative decision makes clear that prosecutions under the federal Controlled Substances Act are not subject to a "medical necessity defense," even though state law precludes prosecuting persons authorized to use marijuana for medical purposes, as well as those who manufacture and distribute marijuana for such use. Therefore, passage of the Initiative would not affect the ability of the federal government to prosecute marijuana-related crimes under federal laws.

In sum, Idaho is free to pass and enforce its own laws creating or negating criminal liability relative to marijuana. But, as the United States Supreme Court's Oakland Cannabis Buyer's Cooperative decision demonstrates, even if the Initiative is enacted, persons exempted from state law criminal liability under its provisions would still be subject to criminal liability under federal law.

The same holds true in regard to federal regulations pertaining to housing and employment. In Assenberg v. Anacortes Housing Authority, 286 Fed. Appx. 643, 644, 2008 WL 598310 at 1 (unpublished) (9th Cir. 2008), contrary to the plaintiff's contention that, because he was authorized under state law to use marijuana for medical purposes, he was illegally denied housing, the Ninth Circuit explained:

The district court properly rejected the Plaintiff's attempt to assert the medical necessity defense. *See Raich v.*

Gonzales, 500 F.3d 850, 861 (9th Cir.2007) (stating that the defense may be considered only when the medical marijuana user has been charged and faces criminal prosecution). The Fair Housing Act, Americans with Disabilities Act, and Rehabilitation Act all expressly exclude illegal drug use, and AHA did not have a duty to reasonably accommodate Assenberg's medical marijuana use. *See* 42 U.S.C. §§ 3602(h), 12210(a); 29 U.S.C. § 705(20)(C)(i).

AHA did not violate the Department of Housing and Urban Development's ("HUD") policy by automatically terminating the Plaintiff's lease based on Assenberg's drug use without considering factors HUD listed in its September 24, 1999 memo. . . .

Because the Plaintiff's eviction is substantiated by Assenberg's illegal drug use, we need not address his claim . . . whether AHA offered a reasonable accommodation.

The district court properly dismissed Assenberg's state law claims. Washington law requires only "reasonable" accommodation. [Citation omitted.] Requiring public housing authorities to violate federal law would not be reasonable.

Similarly, the Oregon Supreme Court recently held that, under Oregon's employment discrimination laws, an employer was not required to accommodate an employee's use of medical marijuana. *Emerald Steel Fabricators, Inc. v. Bureau of Labor and Industries*, 348 Or. 159, 161, 230 P.3d 518, 520 (2010). Therefore, the "protections" provisions of the Initiative, Prop. I.C. § 39-4706, cannot interfere or otherwise have an effect on federal laws, criminal or civil, which rely, in whole or part, on marijuana being illegal under the federal Controlled Substances Act.

C. Recommended Revisions or Alterations

The Initiative has at least two (2) references to a "certification that meets the requirements of section 39-4705, Idaho code [sic]." The first, Prop. I.C. § 39-4704(1)(a), lists such a certification as a requirement for a qualifying patient or primary caregiver to be given a registry identification card by

the Department. The second, Prop. I.C. § 39-4704(10)(b), requires a minor's parent or legal guardian to submit such a certification in order to have the minor issued a registry identification card. However, Prop. I.C. § 39-4705 reads:

If the registered qualifying patient's certifying physician notifies the department in writing that either the registered qualifying patient has ceased o [sic] suffer from a debilitating medical condition or that the practitioner no longer believes the patient would receive therapeutic or palliative benefit from the medical use of marijuana, the card shall become null and void upon notification of the patient from the department. However, the registered qualifying patient shall have fifteen (15) days to dispose of his or her marijuana.

It is clear that the "certification" referred to in Prop. I.C. § 39-4704(1)(a) and (10)(b) is not Prop. I.C. § 39-4705. Rather, Prop. I.C. § 39-4703(1) seems to be the correct reference — which defines "certification" as a physician's "professional opinion the patient is likely to receive therapeutic or palliative benefit from the medical use of marijuana," etc.

It also appears that Prop. I.C. § 39-4704(10) subsections (d), (e), and (f) should be re-designated as subsections (i), (ii), and (iii) because they are logically subsections to Prop. I.C. § 39-4703(c). Finally, the Initiative has many misspellings and omitted words throughout its text. See Prop. I.C. §§ 39-4703(2)(e) ("medical condition or its treatment *hat* is approved"); 39-4703(11) (physician is one "with whom the patient has a bona fide physician-patient and who . . . ;" "authorization for a patient to *used* medical marijuana").

CERTIFICATION

I HEREBY CERTIFY that the enclosed measure has been reviewed for form, style, and matters of substantive import. The recommendations set forth above have been communicated to the Petitioner via a copy of this Certificate of Review, deposited in the U.S. Mail to Theresa Knox, 5919 S. Fireglow Ave., Boise, Idaho 83709.

Sincerely,

LAWRENCE G. WASDEN
Attorney General

Analysis by:

JOHN C. McKINNEY
Deputy Attorney General

¹ References to “proposed” I.C. [Idaho Code] § 39-4700, et seq., will read, “Prop. I.C. § 39-4700,” etc.

² Under Prop. I.C. § 39-4717(3), the Director must report to the governor and legislature within two (2) years of the initiative’s effective date and every two (2) years thereafter:

evaluate whether there are sufficient numbers of alternative treatment centers to meet the needs of registered qualifying patients throughout the state; evaluate whether the maximum amount of medical marijuana allowed pursuant to this chapter is sufficient to meet the medical needs of qualifying patients; and determine whether any alternative treatment center has charged excessive prices for marijuana that the center dispensed.

Topic Index
and
Tables of Citation
CERTIFICATES OF REVIEW
2010

2010 CERTIFICATES OF REVIEW INDEX

| CERTIFICATE TITLE/DESCRIPTION | DATE | PAGE |
|---|----------|------|
| Proposed Initiative Relating to Animal Cruelty | 1/14/10 | 37 |
| Proposed Initiative Relating to the Health Supplements and Therapeutics Protection Act | 2/3/10 | 41 |
| Proposed Initiative Related to Arrest Authority | 2/8/10 | 45 |
| Proposed Initiative Related to Enforcement of Federal Laws | 2/10/10 | 48 |
| Proposed Initiative Related to Idaho Firearms Freedom Act | 2/10/10 | 51 |
| Proposed Initiative Related to Idaho Right to Protection Act | 2/10/10 | 54 |
| Proposed Initiative Related to Idaho Honest and Secure Money Act | 2/11/10 | 58 |
| Proposed Initiative Related to Animal Identification . | 2/16/10 | 66 |
| Proposed Initiative Relating to the Certification of Candidates for President, Vice President, and Presidential Electors . . | 2/16/10 | 70 |
| Proposed Initiative Relating to the Idaho Health Care Freedom Act | 2/16/10 | 73 |
| Proposed Initiative Relating to the Licensure Penalty of Midwifery | 2/16/10 | 79 |
| Proposed Initiative Relating to Membership in Organizations Undermining U.S. Sovereignty | 2/16/10 | 82 |
| Proposed Initiative Relating to the National Guard . . . | 2/16/10 | 85 |
| Proposed Initiative Relating to the Protection of Property Rights | 2/16/10 | 89 |
| Proposed Initiative Relating to Vaccination Choice Protection Act | 2/16/10 | 92 |
| Proposed Initiative Relating to the Regulations and Policies Targeting Greenhouse Gas Emissions . . . | 2/17/10 | 99 |
| Proposed Initiative Related to the Idaho Health Insurer Protection Act. | 2/17/10 | 105 |
| Proposed Initiative Relating to the Informed Jury Act . | 2/17/10 | 108 |
| Proposed Initiative Related to the Protection of Idahoans from Unlawful Internal Revenue Service Prosecution and Seizures | 2/17/10 | 115 |
| Proposed Initiative Relating to the State Sovereignty Act | 2/17/10 | 121 |
| Proposed Initiative Relating to Legalization of Medical Use of Marijuana | 12/13/10 | 123 |

UNITED STATES CONSTITUTION CITATIONS

| ARTICLE & SECTION | DATE | PAGE |
|------------------------------|-------------|-------------|
| ARTICLE I | | |
| § 8 | 2/11/10 | 58 |
| § 8 | 2/16/10 | 85 |
| § 8, cl. 15 | 2/16/10 | 85 |
| § 10 | 2/16/10 | 66 |
| ARTICLE II | | |
| § 1, cl. 5 | 2/16/10 | 70 |
| ARTICLE III | | |
| § 1 | 2/10/10 | 48 |
| § 1 | 2/17/10 | 105 |
| § 2 | 2/10/10 | 48 |
| ARTICLE VI | | |
| cl. 2 | 2/3/10 | 41 |
| cl. 2 | 2/8/10 | 45 |
| cl. 2 | 2/10/10 | 48 |
| cl. 2 | 2/10/10 | 51 |
| cl. 2 | 2/16/10 | 89 |
| cl. 2 | 2/17/10 | 99 |
| cl. 2 | 2/17/10 | 105 |
| cl. 2 | 2/17/10 | 108 |
| cl. 2 | 2/17/10 | 115 |
| cl. 2 | 2/17/10 | 121 |
| Ninth Amendment | 2/16/10 | 73 |
| Ninth Amendment | 2/16/10 | 92 |
| Tenth Amendment | 2/16/10 | 73 |
| Sixteenth Amendment | 2/17/10 | 121 |

2010 CERTIFICATES OF REVIEW INDEX

IDAHO CONSTITUTION CITATIONS

| ARTICLE & SECTION | DATE | PAGE |
|--------------------|---------|------|
| ARTICLE I | | |
| § 3 | 2/17/10 | 115 |
| ARTICLE II | | |
| § 1 | 2/16/10 | 82 |
| ARTICLE III | | |
| § 1 | 2/16/10 | 82 |
| § 1 | 2/17/10 | 108 |
| § 18 | 1/14/10 | 37 |
| ARTICLE IV | | |
| § 1 | 2/16/10 | 82 |
| § 4 | 2/16/10 | 85 |
| ARTICLE V | | |
| § 13 | 2/17/10 | 108 |
| § 28 | 2/17/10 | 108 |
| ARTICLE XI | | |
| § 8 | 2/16/10 | 89 |
| ARTICLE XII | | |
| § 2 | 2/16/10 | 89 |

UNITED STATES CODE CITATIONS

| SECTION | DATE | PAGE |
|---------------------------------|----------|------|
| 21 U.S.C. § 331 | 2/3/10 | 41 |
| 21 U.S.C. § 379r | 2/3/10 | 41 |
| 29 U.S.C. § 705(20)(C)(i) | 12/13/10 | 123 |
| 32 U.S.C. § 102 | 2/16/10 | 85 |
| 42 U.S.C. § 1395w-113 | 2/16/10 | 73 |

2010 CERTIFICATES OF REVIEW INDEX

| | | |
|----------------------------------|----------|-----|
| 42 U.S.C. § 1396s | 2/16/10 | 92 |
| 42 U.S.C. § 1495r | 2/16/10 | 73 |
| 42 U.S.C. § 3602(h) | 12/13/10 | 123 |
| 42 U.S.C. § 7521(a)(1) | 2/17/10 | 99 |
| 42 U.S.C. § 7661a(b)(5)(A) | 2/17/10 | 99 |
| 42 U.S.C. § 12210(a) | 12/13/10 | 123 |

IDAHO CODE CITATIONS

| SECTION | DATE | PAGE |
|----------------------------|---------|------|
| 1-2103 | 2/17/10 | 108 |
| 1-2103A | 2/17/10 | 108 |
| 2-101 | 2/17/10 | 108 |
| 2-104 | 2/17/10 | 108 |
| 9-101 | 2/17/10 | 108 |
| 9-102 | 2/17/10 | 108 |
| Title 18 | 2/10/10 | 54 |
| Title 18 | 2/16/10 | 73 |
| Title 18 | 2/16/10 | 92 |
| 18-902 | 2/17/10 | 108 |
| 18-903 | 2/16/10 | 92 |
| 18-4009 | 2/10/10 | 54 |
| 18-4009 | 2/16/10 | 92 |
| 18-4010 | 2/10/10 | 54 |
| 19-202 | 2/16/10 | 92 |
| 19-202A | 2/16/10 | 92 |
| 19-2129 | 2/17/10 | 108 |
| 19-2131 | 2/17/10 | 108 |
| Title 25 | 2/16/10 | 66 |
| Title 25, chapter 2 | 2/16/10 | 66 |
| 25-207B | 2/16/10 | 66 |
| Title 25, chapter 35 | 1/14/10 | 37 |
| 25-3502 | 1/14/10 | 37 |
| 25-3502(2) | 1/14/10 | 37 |
| 25-3502(5) | 1/14/10 | 37 |
| 25-3504 | 1/14/10 | 37 |
| 25-3505 | 1/14/10 | 37 |

2010 CERTIFICATES OF REVIEW INDEX

| | | |
|----------------------------|----------|-----|
| 34-1801A | 2/16/10 | 73 |
| 34-1801A | 2/16/10 | 92 |
| 34-1804 | 2/16/10 | 73 |
| 34-1804 | 2/16/10 | 92 |
| 34-1809 | 1/14/10 | 37 |
| 34-1809 | 2/3/10 | 41 |
| 34-1809 | 2/8/10 | 45 |
| 34-1809 | 2/10/10 | 48 |
| 34-1809 | 2/10/10 | 51 |
| 34-1809 | 2/10/10 | 54 |
| 34-1809 | 2/11/10 | 58 |
| 34-1809 | 2/16/10 | 66 |
| 34-1809 | 2/16/10 | 70 |
| 34-1809 | 2/16/10 | 73 |
| 34-1809 | 2/16/10 | 79 |
| 34-1809 | 2/16/10 | 82 |
| 34-1809 | 2/16/10 | 85 |
| 34-1809 | 2/16/10 | 89 |
| 34-1809 | 2/16/10 | 92 |
| 34-1809 | 2/17/10 | 99 |
| 34-1809 | 2/17/10 | 105 |
| 34-1809 | 2/17/10 | 108 |
| 34-1809 | 2/17/10 | 115 |
| 34-1809 | 2/17/10 | 121 |
| 34-1809 | 12/13/10 | 123 |
| Title 39 | 2/17/10 | 99 |
| 39-118C | 2/17/10 | 99 |
| 39-3801 | 2/16/10 | 92 |
| 39-4302 | 2/16/10 | 92 |
| Title 39, chapter 45 | 2/16/10 | 92 |
| 39-4502 | 2/16/10 | 92 |
| 39-4503 | 2/16/10 | 92 |
| 39-4504 | 2/16/10 | 92 |
| Title 46 | 2/16/10 | 85 |
| 46-101 | 2/16/10 | 85 |
| 46-107 | 2/16/10 | 85 |
| Title 54, chapter 54 | 2/16/10 | 79 |
| Title 54, chapter 55 | 2/16/10 | 79 |

2010 CERTIFICATES OF REVIEW INDEX

| | | |
|----------------|---------|----|
| 54-5506 | 2/16/10 | 79 |
| 67-2614 | 2/16/10 | 79 |
| Title 72 | 2/16/10 | 73 |
| 73-113 | 1/14/10 | 37 |

**ATTORNEY GENERAL'S
SELECTED
ADVISORY LETTERS
FOR THE YEAR 2010**

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

January 19, 2010

Senator Robert L. Geddes
President Pro Tempore
Idaho Senate
Hand Delivered

Re: Hunting from Motorized Vehicles

Dear Senator Geddes:

You asked this office to review the rules of the Idaho Fish and Game Commission restricting the use of motorized vehicles while hunting for the purpose of answering the following questions:

1. Does the rule prohibit hunters/farmers from riding an all-terrain vehicle (“ATV”) with a gun?
2. Does the rule apply to private property owners riding their ATVs solely within their private property with a gun?
3. Does the rule violate the Second Amendment and corresponding Idaho Constitutional provisions?
4. Is this rule being enforced properly throughout the state?

INTRODUCTION

Both the Idaho Code and the rules of the Idaho Fish and Game Commission restrict the use of motor vehicles while hunting. Idaho Code § 36-1101 prohibits the hunting “of the game animals or game birds of this state from or by the use of any motorized vehicle except as provided by commission rule.” Exceptions are provided for physically disabled persons, who may apply for a special permit that allows the person to hunt from a motorized vehicle which is not in motion. *Id.*

Rule 411 of the Rules Governing the Taking of Big Game Animals, IDAPA 13.01.08, provides as follows:

01. Use Restriction. In designated areas and hunts, hunters may only use motorized vehicles on established roadways which are open to motorized traffic and capable of being traveled by full-sized automobiles. Any other use by hunters is prohibited. All off-road use by hunters is prohibited.

02. Exceptions. This use restriction rule shall not apply to the following permissible motorized vehicle uses:

- a. Holders of a valid Handicapped Persons Motor Vehicle Hunting Permit may use a motorized vehicle as allowed by the land owner or manager.
- b. Hunters may use a motorized vehicle to retrieve downed game if such travel is allowed by the land owner or manager.
- c. Hunters may use a motorized vehicle to pack camping equipment in or out if such travel is allowed by the land owner or manager; however, hunters shall not hunt while packing camping equipment.
- d. Private landowners, their authorized agents and persons with written landowner permission may use a motorized vehicle on their private land; however, they may not hunt from or by the use of any motorized vehicle as prohibited by Section 36-1101(b)(1), Idaho Code.

Identical restrictions are included in the Rules Governing the Taking of Upland Game Animals, IDAPA 13.01.07.101, and the Rules Governing the Taking of Game Birds, IDAPA 13.01.09.302. The Rules apply only in specified game management units designated as “motor vehicle use restriction units.” IDAPA 13.01.08.412.

Generally speaking, the Fish and Game Commission has authority to establish, by rule or proclamations, “by what means, what sex, and in what amounts and numbers the wildlife of this state may be taken.” Idaho Code § 36-104(b)(2). Such rules and proclamations “shall have full force and effect as law.” Idaho Code § 36-105(2). Wildlife may be “only captured or

taken at such times or places, under such conditions, or by such means, or in such manner, as will preserve, protect, and perpetuate such wildlife, and provide for the citizens of this state and, as by law permitted to others, continued supplies of such wildlife for hunting, fishing and trapping.” Idaho Code § 36-103(a).

Regulation of ATV use falls within the Commission’s authority to establish the means by which wildlife may be taken. This authority is confirmed in Idaho Code § 36-103(b), which recognizes that the “methods and means of administering and carrying out the state’s [wildlife] policy must be flexible” and vests in the Commission the authority to ascertain all relevant facts and implement the state’s wildlife policy through “regulation and control of fishing, hunting, trapping, and other activity relating to wildlife.”

ANALYSIS

Issue 1: Does the rule prohibit hunters/farmers from riding an all-terrain vehicle (“ATV”) with a gun?

Response: No. The rules restricting motor vehicle use (hereinafter “Rules”) do not apply to ATVs on established roadways which are open to motorized traffic and capable of being traveled by full-sized automobiles. Thus, any person riding an ATV on an established roadway may carry a gun unless otherwise prohibited by law or ordinance from doing so.

Additionally, the Rules apply only to “hunters.” The term “hunter” is defined in the Rules to mean “a person engaged in the activity of hunting as defined in Section 36-202(j), Idaho Code.” IDAPA 13.01.08.411.04.c. In turn, the term “hunting” is defined in the Idaho Code to mean:

. . . chasing, driving, flushing, attracting, pursuing, worrying, following after or on the trail of, shooting at, stalking, or lying in wait for, any wildlife whether or not such wildlife is then or subsequently captured, killed, taken, or wounded. Such term does not include stalking, attracting, searching for, or lying in wait for, any wildlife by an unarmed person solely for the purpose of watching wildlife or taking pictures thereof.

Idaho Code § 36-202(j). Thus, the Rules do not prohibit farmers, ranchers, or any other person from carrying a gun on their ATV so long as they are not engaged in the act of hunting. This principle is embodied in the hunting license provisions of the Idaho Code, which provide that “[n]othing contained herein shall be construed to prohibit citizens of the United States who are residents of the state of Idaho from carrying arms for the protection of life and property.” Idaho Code § 36-401(g).

There may be situations where a farmer or rancher using their ATV for non-hunting purposes during a hunting season happens to spot a big game animal and decides to take the opportunity to harvest it. In such a situation, if the farmer or rancher immediately ceased use of the ATV and went after the animal on foot, a court would likely conclude that the farmer or rancher was not engaged in a hunting activity while using the ATV. Determining whether a person is engaged in the act of “hunting” would likely be a factual question to be resolved on a case-by-case basis.

For example, in State v. Thompson, 130 Idaho 819, 948 P.2d 174 (1997), the Court had to determine whether a person whose license had been earlier revoked was engaged in the act of hunting when such person was discovered by a conservation officer dressed in camouflage, carrying a bow and elk call, and walking hurriedly down a road. There were no elk in the immediate vicinity, and when confronted, the person stated that he was simply going to shoot the bow at targets. The Court held that there was sufficient evidence for the magistrate to conclude that the person was engaged in the act of hunting, especially given the fact that he had stated earlier in the day that he was waiting for his friends so they could go hunting together. The Thompson case demonstrates that the courts will look to both subjective intent and objective evidence in determining whether a person is engaging in the act of hunting.

Issue 2: Does the rule apply to private property owners riding their ATVs solely within their private property with a gun?

Response: No. As provided in subsection (d) of the Rule, the Rules do not apply to private landowners using a motor vehicle on their private lands. Such persons, however, remain subject to Idaho Code § 36-1101, which prohibits hunting from motor vehicles or hunting with the use of a motor vehicle.

Issue 3: Does the rule violate the Second Amendment and corresponding Idaho Constitutional provisions?

Response: No. The Second Amendment provides: “A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed.” U.S. Const. amend. II. The Supreme Court recently confirmed that the terms of the Second Amendment “guarantee the individual right to possess and carry weapons.” District of Columbia v. Heller, 554 U.S. 570, 595, 128 S. Ct. 2783, 2799, 171 L.Ed.2d 637 (2008). Article I, sec. 11 of the Idaho Constitution likewise provides, in relevant part, that the “people have the right to keep and bear arms, which right shall not be abridged.”

Nothing in the Rules prohibits or restricts the right of persons to carry firearms. The Rules only restrict the means of transportation persons may use while engaged in the act of hunting. Hunting restrictions that have only incidental impact on the bearing of firearms do not violate the Second Amendment. *See, e.g., State v. Walsh*, 870 P.2d 974 (Wash. 1994) (statute prohibiting hunting of big game with artificial light was reasonable regulation of conduct under state’s police power rather than impermissible infringement on defendant’s Second Amendment right to bear arms).

Issue 4: Is this Rule being enforced properly throughout the state?

Response: In response to our inquiry, the Department of Fish and Game informed us that it has prepared a list of frequently asked questions that are provided to the public and to enforcement personnel to help ensure consistent enforcement of the Rules throughout the state.

CONCLUSION

The Fish and Game Commission Rules appear to be narrowly tailored to address only hunting from motorized vehicles, and persons not engaged in hunting are not affected by the Rules. The analysis and conclusions herein are based on the research of the author in response to your request for assistance and are not intended as a formal legal opinion or to represent the views of this office on any policy issues.

Sincerely,

STEVEN W. STRACK
Deputy Attorney General

ADVISORY LETTERS OF THE ATTORNEY GENERAL

February 9, 2010

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

Re: Our File No. 10-31035 – Legislation to Allow Thermal Energy Systems in Schools

Dear Senator Pearce:

On February 3, 2010, you asked the Attorney General's Office to review a draft bill relating to "thermal energy and revenue for schools." According to the drafter of the bill (John Watts), the proposed legislation is intended to accomplish three things: (1) authorize school districts to develop and operate or contract to have someone operate "a thermal energy system"; (2) allow school districts to "sell excess thermal energy (hot water) to a legal entity" with the proceeds going to the district; and (3) allow school districts to bond for the development and construction of "renewable energy systems." Transmittal Letter at 1. This letter responds to your inquiry. The proposed legislation and transmittal letter are also attached for your review.

BACKGROUND

The primary goal of construing a statute is to give effect to the intent of the Legislature. Sherwood v. Carter, 119 Idaho 246, 254, 805 P.2d 452, 460 (1991). The starting point for construing a statute is the literal wording of the statute. Wolf v. Farm Bureau Ins. Co., 128 Idaho 398, 404, 913 P.2d 1168, 1174 (1996). When interpreting a statute, courts will normally give the language of the statute its ordinary, plain and rational meaning in order to determine the intent of the Legislature. City of Boise v. Industrial Com'n, 129 Idaho 906, 909, 935 P.2d 169, 172 (1997). There is no occasion for judicial construction of a statute unless it is ambiguous, absurd or in conflict with other statutes. Gibson v. Bennett, 141 Idaho 270, 274, 108 P.3d 417, 421 (2005).

LEGAL ANALYSIS

The proposed legislation is in three sections. The first two sections are new statutes (33-604 and 33-605), and the last section amends Idaho Code § 33-1102. The first section provides:

33-604. Renewable Thermal Energy. The board of trustees for each school district is empowered to establish, create, develop, own, maintain, operate and contract for the establishment, creation, development, ownership, maintenance and the operation of thermal heating and cooling energy generation and distribution systems, including hot or chilled water systems, where thermal energy is generated from biomass, geothermal or solar renewable energy.

(Emphasis added.) In simple terms, each school district is authorized to construct and operate thermal energy generation and distribution systems where such systems are “fueled” by “biomass, geothermal or solar renewable energy.” Geothermal and solar are common terms.

The term “biomass” is not a commonly used term and is not defined in the legislation. However, the United States Department of Energy defines the term “biomass” as “biologically generated energy sources such as heat derived from combustion of plant matter, or from combustion of gases or liquids derived from plant matter, animal waste, or sewage, or from combustion of gases derived from landfills, or hydrogen derived from these same sources.” 10 C.F.R. § 451.2 (2006).¹ Specifically, excluded from the concept of renewable biomass is the energy (heat) derived from the burning of community solid waste. *Id.*

Idaho statutes distinguish the terms “biomass” and “landfill gas.” For example, Idaho Code § 31-869 lists fuel sources for electric generating plants as including “landfill gas, wood waste or other biomass fuels.” Elsewhere, Idaho Code § 63-3622QQ addresses alternative methods of generating electricity as including “geothermal resources, biomass, cogeneration, sun or landfill gas.”

If enacted, Section 33-604 would apparently allow school districts to develop and operate (or a third-party to develop and operate) “thermal heating and cooling energy generation and distribution systems.” Although the transmittal letter indicates that the proposed legislation is not intended to permit school districts to generate electricity, the literal wording of the first section does not prohibit the generation of electricity. The proposed text would allow school districts to construct “thermal heating and cooling energy generation and distributions systems, including hot or chilled water systems, . . .”. The use of the word “including” is not a term of limitation but is a word used “to introduce illustrative examples.” Natural Resources Defense Council v. Abraham, 271 F.Supp.2d 1260, 1264 (D. Idaho 2003) *overruled on other grounds*, 388 F.3d 701 (9th Cir. 2004). Thus, thermal energy generation (using any of the three “fuel” sources) could be used to generate electricity to heat or cool water. Likewise, solar energy could be used to directly heat water (or some other fluid), or solar energy could be used to generate electricity to heat or cool water.

The second section of the proposed legislation is apparently directed to the sale or exchange of “excess thermal hot or chilled water.” This section provides in part:

33-605. Sale of Excess Energy. The board of trustees of a school district which operates an energy system as described in Section 33-604 Idaho Code may use, sell or exchange excess thermal hot or chilled water not needed by the school district subject to the following conditions:

- (1) Revenues from the sale of energy as described in Section 33-604 shall be used for the benefit of the school district.
- (2) Sale of energy as described in Section 33-604 shall be pursuant to a school district written contract approved by resolution of the board of trustees of the school district.
- (3) Energy as described in Section 33-604 may be sold to any persons, corporations, or entities, public or private, for any lawful purpose.

(Emphasis added.)

Based upon our review of this section, there are some internal ambiguities. Although the main body of this section addresses the sale or exchange of excess “hot or chilled water,” the title and three conditions all address the “sale of energy.” If this section is intended to limit the sale or exchange to only “hot or chilled water” (as suggested in the transmittal letter), then the drafter may want to clarify this point to eliminate any ambiguity in what commodity may actually be sold by the school district. The drafter might consider the following changes:

33-605. Sale of Excess ~~Energy~~ Hot or Chilled Water. The board of trustees of a school district which operates an energy system as described in Section 33-604 Idaho Code may use, sell or exchange excess thermal hot or chilled water not needed by the school district subject to the following conditions:

- (1) Revenues from the sale of ~~energy hot or chilled water as described in Section 33-604~~ shall be used for the benefit of the school district.
- (2) Sale of ~~energy hot or chilled water as described in Section 33-604~~ shall be pursuant to a school district written contract approved by resolution of the board of trustees of the school district.
- (3) ~~Energy Hot or chilled water as described in Section 33-604~~ may be sold to any persons, corporations, or entities, public or private, for any lawful purpose.

Under the Idaho Public Utilities Law, the sale of water for compensation within Idaho is subject to regulation by the Public Utilities Commission unless such use is exempted. Idaho Code §§ 61-124 and 61-125. The sale of water for other beneficial uses would be exempt because a school district is a “not for profit” entity. Idaho Code § 61-104. Moreover, our Supreme Court has held that the furnishing of limited amounts of water under contract was not subject to the regulation of the Commission especially where the primary purpose of the water system was to furnish water to the primary user. Humbird Lumber Co. v. Pub. Util. Com’n of State of Idaho, 39 Idaho 505, 228 P. 271 (1924); Stoechr v. Natatorium Co., 34 Idaho 217, 200 P.132

(1921). Moreover, the third condition of proposed Section 33-605 contemplates that the hot or chilled water may be sold to “any person.”

Finally, the third section of the proposed legislation amends Idaho Code § 33-1102. The amendment would allow school bonds to be issued to construct “renewable energy systems” as described in proposed Section 33-604. Our comments above address Section 33-604.

Two other points should be mentioned. Use of a geothermal resource would require that the school district or its contractor comply with the Geothermal Resources Act (for geothermal resources having a temperature of 212 degrees or more) or comply with procedures for low temperature geothermal resources (having a temperature of 85 degrees or less). *See* Idaho Code § 42-4001, *et seq.* (Geothermal Resources Act) and Idaho Code § 42-233 (low temperature geothermal resources). A biomass facility may also require an air quality permit issued by the Department of Environmental Quality. IDAPA 58.01.01.200, *et seq.*

This legal analysis is provided for your assistance. It is based upon the legal review of the author and is an informal response of the Office of the Attorney General. Please contact me if you have further questions or need further assistance.

Sincerely,

DONALD L. HOWELL, II
Deputy Attorney General

¹ Elsewhere, the Department of Energy defines biomass as “any organic matter that is available on a renewable or recurring basis, including agricultural crops and trees, wood and wood waste and residues, plants (including aquatic plants), grasses, residues, fibers, and animal waste, municipal waste, and other waste materials. 10 C.F.R. § 440.3 (2009).

ADVISORY LETTERS OF THE ATTORNEY GENERAL

February 16, 2010

The Honorable Robert L. Geddes
President Pro Tempore
Idaho State Senate
Statehouse
Boise, ID 83720

Re: Our File No. 10-31199 — The Mobile-Sierra Doctrine and Senate Bill No. 1143 (2009)

Dear Senator Geddes:

On February 9, 2010, you asked the Attorney General's office about the *Mobile-Sierra* Doctrine and how this legal doctrine might affect negotiated rate contracts between an electric utility and a retail industrial customer in Idaho. You also asked about other benefits of reintroducing Senate Bill No. 1143 from last year. This letter responds to your inquiry.

BACKGROUND

Under both federal law and Idaho law, the Federal Energy Regulatory Commission (FERC) and the Idaho Public Utilities Commission (PUC or Commission), respectively, have authority to approve utility rates set by contract rather than the usual practice of setting rates by tariff. Whether set by tariff or contract, both federal law and state law require that the rates for electric service be "just and reasonable." 16 U.S.C. § 824d(a) (2005) (the Federal Power Act); Idaho Code § 61-301 ("All charges made, demanded or received by any public utility . . . shall be just and reasonable."). Federal and state laws also require that rate contracts be filed with the appropriate regulatory commission before they go into effect. 16 U.S.C. § 824d(c), (d) (2005); Idaho Code § 61-305.

THE MOBILE-SIERRA DOCTRINE

1. Federal Law. The *Mobile-Sierra* Doctrine gets its name from two decisions issued by the United States Supreme Court in 1956. United Gas Pipe Line Co. v. Mobile Gas Serv. Corp., 350 U.S. 332, 76 S. Ct. 373, 100 L.

Ed. 373 (1956) and Federal Power Commission v. Sierra Pacific Power Co., 350 U.S. 348, 76 S. Ct. 368, 100 L. Ed. 388 (1956). In these cases, utility rates were set by contract rather than by tariff. In both cases, the question before the Court was whether the utility's filing of a subsequent tariff with a higher rate would replace or abrogate the lower rate contained in the previously filed contract. The Court concluded that the filing of a subsequent tariff was not legally sufficient by itself to defeat the presumption that the previous contract rate was just and reasonable. The Court held that a utility that freely enters into a contract is not "entitled to be relieved of its improvident bargain . . . [unless] the rate is so low as to adversely affect the public interest. . . ." Sierra, 350 U.S. at 355, 76 S. Ct. at 372; Morgan Stanley Capital Group v. Public Utility Dist. No. 1 of Snohomish County, 554 U.S. 527, 533, 128 S. Ct. 2733, 2739, 171 L.Ed.2d 607 (2008).

2. State Law. Several Idaho statutes recognize the ability of public utilities to enter into rate-setting contracts with their customers. Idaho Code §§ 61-307, 61-622, and 61-623 authorize the PUC to review proposed rate contracts, and if necessary, to suspend the effective date of such contracts so the PUC may thoroughly review the provisions of the contracts.

The Idaho Supreme Court has described the Commission's authorities in U.S. v. Utah Power & Light Co., 98 Idaho 665, 570 P.2d 1353 (1977). In Utah Power & Light, the Supreme Court observed that:

Idaho Code § 61-622 provides that before a public utility can raise rates or alter contracts to affect a rate increase a showing must be made before the Commission that such increase is justified. Idaho Code § 61-502 gives the Commission the authority either upon its own motion or upon complaint to abrogate existing rates including those set by contract if they are found to be "unjust, unreasonable, discriminatory, preferential, or in any way in violation of law" and fix new rates in their stead. Idaho Code § 61-503 completes the Commission's power over rate-making by giving it the authority, implicit in the prior statutes, to investigate rate schedules and contracts affecting rates. The delegation of rate-making authority to the Commission was upheld by this Court at an early date. Idaho Power & Light Co. v. Blomquist, 26 Idaho 222, 141 P. 1083 (1914).

98 Idaho at 667-68, 570 P.2d at 1356 (emphasis added).

Once the PUC has approved a contract rate, the rate in the contract may only be amended by the PUC upon a finding that it is necessary to prevent serious harm to the public interest. Agricultural Products Corp. v. Utah Power & Light Co., 98 Idaho 23, 29-30, 557 P.2d 617, 623-624 (1976); Utah Power & Light Co., 98 Idaho at 669-70, 570 P.2d at 1357-58. Thus, to justify interference with a utility contract, there must be a finding that the contract rate adversely affects the public interest. The same is true with contracts subject to FERC jurisdiction. NRG Power Marketing, LLC v. Maine Public Utilities Comm'n., — U.S. —, 130 S. Ct. 693, 78 U.S.L.W. 4038 (2010). Of course, both FERC and the PUC recognize that parties can “contract out of the *Mobile-Sierra* presumption by specifying in their contracts that a new rate filed with the Commission would supersede the contract rate.” Snohomish, 554 U.S. at 534, 128 S. Ct. at 2739.

The United States Supreme Court and the Idaho Supreme Court have generally identified three conditions when FERC and the PUC may abrogate contract rates: “where [a rate] might [1] impair the financial ability of the public utility to continue its service, [2] cast upon other consumers an excessive burden, or [3] be unduly discriminatory.” Agricultural Products, 98 Idaho at 29, 557 P.2d at 623; Sierra, 350 U.S. at 355, 76 S. Ct. at 372; Snohomish, 554 U.S. at 548, 128 S. Ct. at 2747. In Snohomish, the Supreme Court also noted that these three factors “are not the exclusive components of the public interest” standard. 554 U.S. at 549, 128 S. Ct. at 2747.

IDAHO RATE CONTRACTS

Idaho’s three electric public utilities provide retail electric service under contract to six large industrial customers. Idaho Power provides electric service to three contract customers; Avista Utilities provides electric service to one contract customer; and PacifiCorp (dba Rocky Mountain Power) provides electric service to two contract customers.¹ At the present time, the six special rate contracts all provide that the contract rate may be subsequently modified by a tariff rate change approved by the PUC. Thus, the rate contracts all provide that the rates may be changed by a subsequently approved tariff. However, as a practical matter, the rates in the contracts (with the exception of the Avista rate contract) are currently subject to rate freezes

as a result of recent rate case proceedings. *See* PUC Order Nos. 30482 at 5; 30978 at 2. Consequently, the rates in the three Idaho Power contracts are generally “fixed” until January 1, 2012, and the rates in the two PacifiCorp contracts are fixed until December 31, 2010.

You also asked us to comment on the differences between Idaho Code §§ 61-622 and 61-623. Both these statutes authorize the Public Utilities Commission to suspend proposed rate increases or new utility services until the PUC completes its review of the proposals. Both statutes were part of the original Public Utilities Law enacted in 1913. Idaho Code § 61-622 addresses the Commission’s suspension authority over existing rates, while Idaho Code § 61-623 is applicable to the setting of the rates for new utility services. Grindstone Butte Mut. Canal Co. v. Idaho Power Co., 98 Idaho 860, 574 P.2d 902 (1978). The normal suspension period in both statutes is six months.

In Grindstone Butte, our Supreme Court noted that the distinction between the two statutes is confusing and this confusion required the Supreme Court to construe the meanings of both statutes. *Id.* at 863, 574 P.2d at 905. Consequently, efforts to eliminate the confusion between the two sections and clarify the Commission’s suspension authority would be beneficial. Last year’s Senate Bill No. 1143 consolidated the two sections and would have eliminated Idaho Code § 61-623.

This legal analysis is provided for your assistance. It is based upon the legal research of the author and is an informal response of the Office of the Attorney General. Please contact me if you have further questions or need further assistance.

Sincerely,

DONALD L. HOWELL, II
Deputy Attorney General

¹ Idaho Power has an additional rate contract, but the new customer has not taken service yet.

February 24, 2010

Senator Tim Corder
Idaho Senate
Hand Delivered

Re: Senate Bill No. 1346

Dear Senator Corder:

You asked the following questions with regard to Senate Bill No. 1346: (1) does the delegation of authority to the Idaho State Department of Agriculture (“ISDA”) create any conflict with federal law, and (2) are there any conflicts with existing laws relating to the confidentiality of nutrient management plans?

The first sentence of Senate Bill No. 1346 provides that: “The Idaho department of agriculture shall have authority to administer all laws to protect the quality of water within the confines of a beef cattle animal feeding operation that is not under permit issued by the federal environmental protection agency.” With the exception of the provision exempting beef cattle feeding operations “under permit issued by the federal environmental protection agency,” this language duplicates the provision of Idaho Code § 22-4902(2), which provides that: “The department shall have authority to administer all laws to protect the quality of water within the confines of a beef cattle animal feeding operation.”

The duplication of the broad provision of authority in Idaho Code § 22- 4902(2), but with the exclusion of authority over beef cattle animal feeding operations that are under a point source discharge permit issued by the U.S. Environmental Protection Agency, may create some confusion as to whether it is the Legislature’s intent that ISDA be prohibited completely from administering state water quality laws whenever a cattle feeding operation is covered by a point source discharge permit, even if state water quality laws are not otherwise preempted by operation of federal law. To clear up such confusion, you may wish to consider amending Idaho Code § 22- 4902(2), so that there is only one statutory provision addressing ISDA’s authority to regulate water quality within beef cattle animal feeding operations.

As for the provisions related to nutrient management plans, exempting nutrient management plans from the general provisions of the Public Records Act does not create any conflicts with existing laws. Under the terms of Idaho Code § 22-2718(4)(f), nutrient management plans are already exempt from public disclosure if they were created under the “OnePlan” system, and such exemption was upheld by the Idaho Supreme Court in Idaho Conservation League, Inc. v. Idaho State Dept. of Agriculture, 143 Idaho 366, 146 P.3d 632 (2006). Senate Bill No. 1346 would simply extend the exemption to all nutrient management plans.

We would note, however, that extending the exemption to “all information generated as a result of such [nutrient management] plan” will likely pose some difficulties in implementation and interpretation. ISDA routinely conducts inspections of beef cattle operations, in part to ensure compliance with nutrient management plans. It is unclear whether such inspection reports would be exempt from disclosure since the information therein is arguably generated “as a result of” the nutrient management plan. Currently, ISDA considers inspection reports and any information that is part of the inspection (photos, maps, etc.) to be a public record. It may be desirable to clarify legislative intent with regard to this issue. One possible way of proceeding would be to limit the exemption to “all information generated by the beef cattle feeding operation as a result of such plan.” Such language would leave intact the existing ISDA practice of making inspection reports generated by ISDA available as public records, while protecting private information generated by the agricultural producer.

The provisions exempting nutrient management plans from public disclosure may be properly placed in title 22 of the Idaho Code, despite the provisions of Idaho Code § 9-349, which provides as follows:

On and after January 1, 1996, any statute which is added to the Idaho Code and provides for the confidentiality or closure of any public record or class of public records shall be placed in this chapter. Any statute which is added to the Idaho Code on and after January 1, 1996, and which provides for confidentiality or closure of a public record or class of public records and is located at a place other than this chapter shall be null, void and of no force and effect

regarding the confidentiality or closure of the public record and such public record shall be open and available to the public for inspection as provided in this chapter.

To the extent that section 9-349 purports to bind future legislative action, it is unenforceable: a previous legislature cannot limit the legislative authority of a future legislature. For housekeeping and ease of use reasons, however, it may be desirable to place the exemption for nutrient management plans within the body of Idaho Code § 9-340D.

This foregoing analysis was based on our limited review of Senate Bill No. 1346 in response to your request for assistance and is not intended as a formal legal opinion or to represent the views of this office on any policy issues. In preparing this analysis, the sole question reviewed was whether the draft legislation violates any constitutional provisions facially or conflicts facially with existing legislation, and does not preclude the possibility that the legislation could be implemented “as applied” in an unconstitutional manner.

Sincerely,

STEVEN W. STRACK
Deputy Attorney General

ADVISORY LETTERS OF THE ATTORNEY GENERAL

February 24, 2010

The Honorable Judy Boyle
Idaho House of Representatives
STATEHOUSE MAIL

Re: Our File No. 10-31309 – House Bill No. 531

Dear Representative Boyle:

This letter is in response to your inquiry of this office regarding House Bill No. 531. Specifically, you asked two questions. The first questioned the ongoing validity of Idaho Code § 9-349, which purports to nullify any statute passed not in conformity with its mandate that all exemptions be contained within the Public Records Act. As we discussed, all statutes are on equal footing with all other statutes. No statute can operate to nullify future legislative enactments. Additionally, I note that House Bill No. 531 creates an exemption within Idaho Code § 9-340C, through the addition of a new paragraph 28. The additional confidentiality language proposed in Idaho Code § 36-402 would be read in a manner consistent with the creation of the new paragraph 28 in Idaho Code § 9-340C.

Your second question involved the effect of the addition of confidentiality language within Idaho Code § 36-402. As we discussed, certain information is shared between government and law enforcement agencies with regard to the licensing information, which you seek to protect. Although an argument could likely be made that these changes do not impact the ability of these entities to share this information, these concerns may be addressed through a relatively straightforward addition of language. I recommend the insertion of the phrase: “Except as otherwise provided by law,” to the beginning of the proposed amendments to Idaho Code § 36-402. The entire sentence would then read:

Except as otherwise provided by law, any personal information including, but not limited to, names, personal and business addresses and phone numbers, sex, height, weight, date of birth, social security and driver’s license numbers, or any other identifying numbers and/or information related to any

Idaho fish and game licenses, permits and tags unless written consent is obtained from the affected person shall be confidential and not subject to disclosure pursuant to the provisions of chapter 3, title, 9, Idaho Code.

I think that the addition of this clause would permit agencies currently sharing information with Fish and Game to continue doing so. I hope that you find this helpful. If you would like to discuss this or any other issue, please contact me.

Sincerely,

BRIAN KANE
Assistant Chief Deputy

March 11, 2010

Representative Frank Henderson
Idaho House of Representatives
VIA ELECTRONIC MAIL
fhenderson@house.idaho.gov

Re: Our File No. 10-31457 – Idaho Department of Transportation

Dear Representative Henderson:

You have asked us to identify a federal regulation requiring the Idaho Transportation Department (ITD) to have “cash in the bank at the time of bid advertisement.” Although there is no federal regulation directly on point, the answer to the over-arching question whether ITD must have cash in the bank at the time of bid advertisement is that it must. Our analysis follows.

Highway Act construction projects are financed by funds that are apportioned to the states from the Highway Trust Fund by the Secretary of Transportation. Apportioned funds are “available for expenditure” by the state on qualifying highway projects. 23 U.S.C. § 118. These apportioned funds are administered by the Federal Highway Administration and the Secretary of Transportation.

Before federal funds may be committed to any particular highway construction project, the state must obtain approval of its program through adoption of the State Transportation Improvement Plan (STIP). 23 U.S.C. § 105. The program, in turn, contains the specific projects proposed as recipients of (Highway Act) funds apportioned to the state. The individual projects must also be submitted for approval. 23 U.S.C. § 106. Eventually, this leads to a formalized “project agreement” which, in turn, permits the state to advertise for bids on the project, contract with a private party for the construction, and submit the contract for approval by the Secretary of Transportation. 23 U.S.C. §§ 110, 112.

The state supervises the construction project and pays contractors out of state funds. After the project has been completed, it receives a federal inspection verifying that the completed project meets the Highway Act

Standards. 23 U.S.C. § 114. The state is not entitled to recoup its costs from the federal apportionment until after the project and inspection are complete and the verification is received. 23 U.S.C. § 123.

Because the state must pay the contractors out of state funds, the “project agreement” also includes an “obligation document” with the Federal Highway Administration (FHWA). The state submits the “obligation document” to provide evidence that the funds it will use to pay the contractors are readily available (“in the bank”) as opposed to providing evidence that it has been authorized to attempt to obtain the money (bonding authority). Under a bonding scenario, instead of the submission of an obligation document, the state is required to submit for approval an advanced construction document to FHWA.

In either of these two situations, costs incurred by the state prior to FHWA acceptance of the obligation document or the advanced construction document cannot be paid for with federal money. 23 C.F.R. § 1.9. Through experience, however, ITD knows that the Secretary of Transportation will accept nothing less than documentation proving that funds are readily available for payment of all costs at the time the bids are let and the project construction commences.

This analysis is provided to assist you. It is an informal and unofficial expression of the views of this office, based solely on the research of the author. If you have any additional questions in this regard, please do not hesitate to call.

Sincerely,

S. KAY CHRISTENSEN
Deputy Attorney General
Chief, Contracts and Administrative Law Division

April 6, 2010

Senator Steve Bair
947 W. 200 S.
Blackfoot, Idaho 83221

Senator Jeff C. Siddoway
1764 E. 1200 N.
Terreton, Idaho 83450

Re: Potential Conflicts of Interest – Dual Employment

Dear Senator Bair and Senator Siddoway:

You have requested legal guidance from the Office of the Attorney General regarding potential conflicts of interest issues that may arise if a person who is on the board of directors of the Big Lost River Irrigation District (“BLRID”) also serves simultaneously as the watermaster for Water District No. 34 (“WD34”). The BLRID is located in Butte and Custer counties and within WD34, and is one of the largest water users in WD34, if not the largest.

QUESTIONS PRESENTED

Your inquiry encompasses two analytically distinct but related questions:

1. May a member of the board of directors of the Big Lost River Irrigation District simultaneously serve as the watermaster for Water District No. 34?
2. If a member of the board of directors of the Big Lost River Irrigation District simultaneously serves as the watermaster for Water District No. 34, how should potential conflicts of interest be addressed?

CONCLUSIONS

1. Yes, a person may simultaneously serve on the BLRID board and as watermaster for Water District 34, but only with the approval of the Director of the Department of Water Resources. Idaho law does not explicitly bar the same person from simultaneously serving as a watermaster and as an irrigation district director. The Ethics in Government Act only requires the watermaster to disclose potential conflicts of interest, and the Idaho Code's requirements that officers devote their full time to their official duties and not accept pecuniary benefits from persons subject to their regulatory or administrative authority do not appear to bar watermasters from serving on the board of an irrigation district and being compensated for such service. Moreover, the common law doctrine of incompatible offices also does not apply because the position of director of the BLRID is a private position rather than a public office. The Department of Water Resources' employee conflict of interest policy, however, applies to the watermaster and precludes the watermaster from also being a director of the BLRID absent the consent of the Director.

2. If a member of the board of directors of the BLRID simultaneously serves as the watermaster for Water District No. 34, the person must disclose to the Director, as required by the Ethics in Government Act, any actual or potential conflicts of interest that arise as a result of simultaneously serving as a director of the BLRID. Provided the watermaster makes such required disclosures, the watermaster need not be recused and may continue to perform the functions and duties of the watermaster's office. Pursuant to his broad authority to supervise and instruct the watermaster, however, the Director may appoint the board member to the position of watermaster subject to specific instructions for addressing any actual or potential conflict of interest, or may take direct control of the watermaster's water distribution duties in the event of an actual conflict of interest after appointment.

ANALYSIS

I.

MAY A MEMBER OF THE BOARD OF DIRECTORS OF THE BIG LOST RIVER IRRIGATION DISTRICT SIMULTANEOUSLY SERVE AS THE WATERMASTER FOR WATER DISTRICT NO. 34

No provision of the Idaho Code and no reported decision of the Idaho Supreme Court or the Idaho Court of Appeals addresses the question of whether the same person may simultaneously serve as a watermaster¹ and as a director of an irrigation district located in the same water district. In the absence of such controlling authority, your question is appropriately analyzed under applicable provisions of the Idaho Code, the common law doctrine of incompatible offices, and the Department of Water Resources' policy relating to conflicts of interest.

A. The Idaho Ethics in Government Act of 1990

The Ethics in Government Act of 1990 ("Ethics in Government Act"), Idaho Code §§ 59-701 to 59-705, is intended to, among other things, assure the impartiality of public officials, inform citizens of potential conflicts of interest between an official's public trust and private concerns, prevent public office from being used for personal gain, prevent special interests from unduly influencing governmental actions, and assure that governmental functions and policies reflect the public interest. Idaho Code § 59-702.

Under the Ethics in Government Act, actual or potential conflicts of interest must be disclosed, but they do not require recusal or removal from office. Provided an official's potential conflicts of interest are properly disclosed as provided in the Act, Idaho Code §§ 59-704(1) to (5), the official may still fulfill his or her duties:

A public official shall not take any official action or make a formal decision or formal recommendation concerning any matter where he has a conflict of interest and has failed to disclose such conflict as provided in this section. Disclosure of a conflict does not affect an elected public official's authority to be counted for purposes of determining a quorum and to debate and to vote on the matter, unless the public official requests to be excused from debate and voting at his or her discretion.

Idaho Code § 59-704. Thus, the Ethics in Government Act does not bar the same person from simultaneously serving as watermaster for WD34 and as a director of the BLRID.

B. Idaho Code § 59-511: Officers to Devote Entire Time to Duties

Idaho Code § 59-511 provides, in relevant part: “Each executive and administrative officer shall devote his entire time to the duties of his office and shall hold no other office or position of profit. . . .” This statute would bar the watermaster for WD34 from simultaneously serving as a director of the BLRID if a watermaster is an “executive or administrative officer,” and if a BLRID directorship is an “office or position of profit.” *Id.*

While neither section 59-511 nor any other provision of title 59, chapter 5, Idaho Code, defines these statutory terms, the chapter’s focus on the state treasury and legislative appropriations suggests that a watermaster is not an “officer” for purposes of the statute. Chapter 5 of title 59 addresses “Salaries of Officers” and is concerned with officers whose salaries are paid out of “the state treasury” pursuant to legislative appropriations. Idaho Code §§ 59-501, 59-503, 59-508. The Legislature has specifically provided that watermasters’ salaries are not paid out of the state treasury or pursuant to legislative appropriations, but rather are paid by the water districts, and are charged against the lands of the water users in the water district. Idaho Code §§ 42-610, 42-612, 42-613, 42-618. Thus, the statutory structure of which Idaho Code § 59-511 is a part, and the purposes it serves, suggest that a watermaster is not an “executive or administrative officer” for purposes of the statute. See Xerox Corp. v. Ada County Assessor, 101 Idaho 138, 141, 609 P.2d 1129, 1132 (1980) (holding that statutes that are in pari materia “must be construed to effect a common purpose”).²

This conclusion is supported by the fact that in the absence of a resolution by the water users of a water district authorizing the watermaster to work throughout the year, a watermaster works—and is paid—only during the irrigation season. Idaho Code § 42-608. Moreover, in smaller water districts, the watermaster position is often a part-time position. Thus, if Idaho Code § 59-511 applies to watermasters, it would bar a person who serves as watermaster during part of the year from obtaining employment during the remainder of the year, and would also bar a part-time watermaster from holding another job.³ This would impose an economic hardship on watermasters and discourage qualified persons from seeking the position. It is unlikely the Legislature intended such a result.

C. Idaho Code § 18-1356

Idaho Code § 18-1356 provides that the public servants of an “agency exercising regulatory functions” may not “accept or agree to accept any pecuniary benefit from a person known to be subject to such regulation.” Idaho Code § 18-1356(1). The statute further provides that public servants having “administrative authority” may not “accept or agree to accept any pecuniary benefit from a person known to be interested in or likely to become interested in any matter before such public servant.” Idaho Code § 18-1356(3).

The Department exercises the “regulatory function” of distributing water to the water users in WD34, and the watermaster is subject to the Director’s control, direction, and supervision in such matters. Idaho Code §§ 42-602, 42-607, 42-613A. Further, the BLRID is “subject to such regulation,” and the BLRID’s payments to directors could qualify as a “pecuniary benefit.” Idaho Code § 18-1356(1). Thus, section 18-1356(1) could be interpreted as barring the WD34 watermaster from serving simultaneously as a BLRID director. For similar reasons, Idaho Code § 18-1356(3) also could be interpreted as establishing the same bar.⁴

Such an interpretation is unlikely, however, because Idaho Code § 18-1356 is a criminal statute addressing “bribery and corruption,” and includes an exception that probably would apply to the question at hand. Under this exception, the prohibitions of Idaho Code § 18-1356(1) and (3) do not apply to “fees” or “any other benefit” to which the recipient “is otherwise legally entitled.” Idaho Code § 18-1356(5)(a). The “minimum sum” and expense reimbursements the BLRID pays to its directors probably constitute a “fee” or “other benefit” to which the directors are “legally entitled” under the BLRID’s bylaws and title 43 of the Idaho Code, which governs irrigation districts. Thus, Idaho Code § 18-1356 would not bar the WD34 watermaster from simultaneously serving as a BLRID director.

D. The Common Law Doctrine of Incompatible Offices

The common law doctrine of incompatible offices applies in determining whether there is an inherent conflict of duties between two public offices.⁵ *See generally* 63C Am. Jur. 2d *Public Officers and Employees* § 58 (discussing the “nature and determination of incompatibility”). Under the

incompatible offices doctrine, the same person may not simultaneously hold two public offices that are inherently incompatible. Stolberg v. Caldwell, 402 A.2d 763, 773 (Conn. 1978).

The threshold inquiry for purposes of an incompatibility analysis is whether both of the offices in question are governmental or public offices, because the incompatibility doctrine only applies to incompatible public offices. See Coyne v. State ex rel. Thomas, 595 P.2d 970, 973 (Wyo. 1979) (“Incompatibility of office or position requires the involvement of two governmental offices or positions”); 63C Am. Jur. 2d *Public Officers and Employees* § 60 (similar); Lawrence G. Wasden, *Idaho Ethics in Government Manual* (Idaho Office of the Attorney General) (Aug. 2008) at 20 (“one person holding two public offices”); Bill Lockyer, *Conflicts of Interest* (Office of the Attorney General, California Dept. of Justice), at 114 (2004) (“the doctrine concerns a conflict between potentially overlapping public duties. . . . To fall within the common law doctrine of incompatible offices, two elements must be present. First, the official in question must hold two public offices simultaneously.”) (citation omitted).⁶

Any potential incompatibility between a public office and a private office is addressed under a traditional conflict of interest analysis. The incompatible offices doctrine is not the same as a traditional conflict of interest analysis, and the two should not be confused or be viewed as interchangeable. See Lockyer, *Conflicts of Interest* at 114 (distinguishing “the doctrine of incompatibility of offices on the one hand and the conflict-of-interest notion of incompatible activities on the other”); Coyne, 595 P.2d at 973 (explaining that “incompatibility of office or position is not the same as conflict of interest”); Detroit Area Agency on Aging v. Office of Services to the Aging, 534 N.W.2d 229, 233 (Mich. Ct. App. 1995) (distinguishing “incompatibility” and “conflict of interest”).

For purposes of your inquiry, it is assumed that the office of water-master for WD34 is a “public office” under an incompatibility analysis. Determining whether the office of director of the BLRID is a “public office” requires a brief review of applicable Idaho law.

The BLRID is an irrigation district established pursuant to title 43 of the Idaho Code. Under Idaho law, an irrigation district ““is a public corpora-

tion having such incidental municipal powers as are necessary to its internal management and the proper conduct of its business.” Barker v. Wagner, 96 Idaho 214, 217, 526 P.2d 174, 177 (1974) (citation omitted). The “primary purpose” of an irrigation district is to acquire and operate an irrigation system “as a business enterprise for the benefit of land owners within the [irrigation] district.” *Id*; see also Brizendine v. Nampa Meridian Irrigation Dist., 97 Idaho 580, 587, 548 P.2d 80, 87 (1976) (“an irrigation district’s primary purpose is the acquisition and operation of an irrigation system as a business enterprise for the benefit of its shareholders.”). Thus, an irrigation district holds title to water rights and other property in trust for the benefit of its shareholders. Idaho Code § 43-316; Nelson v. Big Lost River Irrigation Dist., 148 Idaho 157, 158 n.1, 219 P.3d 804, 805 n.1 (2009).

In short, irrigation districts are structured and intended to create private rather than public benefits. The Idaho Supreme Court’s decision in Brizendine is instructive on this point. In Brizendine, the Court explained that the Idaho Tort Claims Act does not protect irrigation districts because unlike a “municipal or public corporation,” the primary purpose of irrigation districts is not to promote “the welfare of the general public” or “the public good,” but rather to acquire and operate “an irrigation system as a business enterprise for the benefit of its shareholders.” Brizendine, 97 Idaho at 587, 548 P.2d at 87.

Consistent with the private purposes and benefits of an irrigation district, its directors are elected by its shareholders, not the general public. Idaho Code § 43-201. Further, the directors owe a fiduciary duty and a duty of loyalty to the irrigation district and its shareholders, Idaho Code § 43-204B, not to the general public. Thus, it is unlikely that the office of director of an irrigation district is a “public office” for purposes of an incompatibility analysis under Idaho law. The doctrine of incompatible offices therefore would not bar the same person from simultaneously serving as WD34 watermaster and as a director of the BLRID.

It is important to note that this conclusion does not mean that the duties of the WD34 watermaster and those of a director of the BLRID are “compatible” or would never conflict. As previously discussed, the incompatible offices doctrine cannot be substituted for a traditional conflict of interest analysis. Further, the Department’s conflict of interest policy provides that Department employees may not simultaneously hold a private office that

is not compatible with their public office functions. The next section discusses the application of these policies to your inquiry.

E. The Department's Employee Policy on Conflicts of Interests

The Rules of the Division of Human Resources and Personnel Commission ("Personnel Rules") require all "appointing authorities" to establish the policies and standards "necessary to prevent conflicts of interest." IDAPA 15.04.01.024. The Director is subject to this obligation because he is statutorily authorized to appoint the watermasters for water districts. Idaho Code § 42-605(3); *see also* IDAPA 15.04.01.010.06; Idaho Code § 67-5302(3) (defining "appointing authority"). The Department has adopted a written "Employee Conduct" policy that addresses conflict of interest issues.⁷

The Department's policy expressly recognizes that "a high standard of conduct, honesty and impartiality, by Department employees is essential to insure the proper performance of business and strengthen public faith and confidence in the integrity of the Department and its employees."⁸ "Employees are expected to act impartially in performing official duties and not give preferential treatment to any outside organization or individual."⁹ The policy seeks to avoid not only actual conflicts of interest but also any potential for the appearance of impropriety.¹⁰

The Department's policy also provides that outside activities "must be compatible with the role of the employee as a public employee. The [outside] employment must not conflict with the best interest of the Department or the proper performance of the employee's responsibilities."¹¹ Thus, Department employees "shall not accept or serve in any policy-making position or office of an organization, board or commission in which an opportunity for conflict of interest might arise between the activity and department employment, except upon written approval of the Director."¹² This prohibition applies to the WD34 watermaster if he or she is considered a Department "employee" for purposes of a conflict of interest analysis in matters of water distribution. *See* Letter from David G. High, Assistant Attorney General, to Martel L. Miller, Deputy Director, Department of Administration (Apr. 12, 1977), at 2 (concluding that a watermaster is an employee of the Department for purposes of the Idaho Tort Claims Act).¹³

While a watermaster is elected by the water users of a district and paid by the water district, the watermaster must also be appointed by the Director. Idaho Code § 42-605(3), (10). The Director has “direction and control” over the distribution of water in a water district, Idaho Code § 42-602, and as previously discussed, the watermaster is subject to the Director’s supervisory authority in such matters. Idaho Code §§ 42-602, 42-613A. The watermaster must take an oath to “faithfully perform” his water distribution duties as defined by Idaho law and file it with the Department. Idaho Code § 42-605(10).

Further, the Idaho Supreme Court has held that a watermaster is not an “employee” or “agent” of the water users for purposes of distributing water in a water district. Jones v. Big Lost River Irr. Dist., 93 Idaho 227, 229, 459 P.2d 1009, 1011 (1969). Rather, in this capacity the watermaster is “responsible to” and “works for” the Department. *Id.*; see also Marty v. State, 117 Idaho 133, 140, 786 P.2d 524, 531 (1989) (stating that the watermaster was an agent of the Department); Nettleton v. Higginson, 98 Idaho 87, 93, 558 P.2d 1048, 1054 (1977) (referring to the watermaster as “the state’s agent”); R.T. Nahas Co. v. Hulet, 114 Idaho 23, 27, 752 P.2d 625, 629 (Ct. App. 1988) (same). Accordingly, for purposes of a conflict of interest analysis in matters of water distribution, the WD34 watermaster is appropriately viewed as an “employee” of the Department.

This conclusion finds support in the nature and purpose of water districts under Idaho law. A water district is not a private entity but rather is “an instrumentality of the state of Idaho for the purpose of performing the essential governmental function of distribution of water among appropriators under the laws of the state of Idaho.” Idaho Code § 42-604. Water districts are an essential part of the “framework of evenhanded oversight” for administering water rights under Idaho law, and the Department of Water Resources’ “principal tool” for carrying out its legislative mandate to distribute water in accordance with the prior appropriation doctrine. In re Idaho Dept. of Water Resources Amended Final Order Creating Water Dist. No. 170, 148 Idaho 200, 211-12, 220 P.3d 318, 329-30 (2009). It would be inconsistent with the nature and purposes of a water district to conclude that watermasters should not be subject to conflict of interest policies requiring that their official water distribution duties be performed impartially, without giving preferential treatment, and without creating the appearance of impropriety.¹⁴

As previously discussed, the Department's conflict of interest policy bars employees from accepting or serving "in any policy-making position or office of an organization, board or commission in which an opportunity for conflict of interest might arise between the activity and department employment, except upon written approval of the Director."¹⁵ A chair on the BLRID's board of directors plainly constitutes "a policy-making position or office" of a "board." Thus, the question becomes whether an "opportunity" for a conflict of interest "might arise" if the WD34 watermaster simultaneously serves on the BLRID board of directors.

An opportunity for a conflict of interest might arise if the watermaster serves as a BLRID director. For instance, the WD34 watermaster plays an important role in administering the "Rotation Credit" system, under which certain surface water rights in WD34 can be "rotated" for storage water credits in Mackay Reservoir. IDAPA 37.03.12.040.02. The BLRID owns Mackay Reservoir, and the "Rotation Credit" system is subject to the BLRID's approval and consent. IDAPA 37.03.12.040.02.b; *see also Order of Partial Decree for General Provisions in Administrative Basin 34 (In re SRBA, Subcase No. 91-00005-34)* (May 8, 2001), at Exhibit A ("Water rights from the Big Lost River diverted below Mackay Dam and Reservoir may be rotated into storage with the consent of the Big Lost River Irrigation District . . ."). Further, while a watermaster is a "ministerial officer" and may distribute water "only in compliance with applicable decrees," Almo Water Co. v. Darrington, 95 Idaho 16, 21, 501 P.2d 700, 705 (1972), the every day work of a watermaster in discharging this duty necessarily involves the exercise of discretion in making certain determinations, such as whether a water user is actually receiving the decreed quantity, or whether a water delivery call would be futile because water would not reach the senior appropriators in a sufficient quantity for it to be applied to beneficial use.¹⁶ Gilbert v. Smith, 97 Idaho 735, 739, 552 P.2d 1220, 1224 (1976). It is important that there be no actual conflict of interest, or even an opportunity for the appearance of impropriety, in the exercise of this discretion.

Thus, the conflict of interest provisions of the Department's "Employee Conduct" policy generally would bar the same person from simultaneously serving as the WD34 watermaster and as a director of the BLRID. The Department's policy has an important exception, however: it does not apply "upon written authorization of the Director."¹⁷ The Department's policy does not provide the standards for exercising this authority, but presumably

the Director may take relevant considerations into account in making an exception to the basic prohibition against simultaneously serving as WD34 watermaster and on the BLRID's board of directors.

In sum, nothing in the Idaho Code, reported Idaho decisions, or the common law doctrine of incompatible offices would bar the same person from simultaneously serving as the WD34 watermaster and as a BLRID director. In contrast, the Department's conflict of interest policies would apply to bar such a situation, unless the Director made an exception to the general policy in a written authorization or decision. Under the Department's policies, the question of whether to allow the same person to simultaneously serve as the WD34 watermaster and as a director of the BLRID is committed to the sound discretion of the Director.

II.

IF A MEMBER OF THE BOARD OF DIRECTORS OF THE BIG LOST RIVER IRRIGATION DISTRICT SIMULTANEOUSLY SERVES AS THE WATERMASTER FOR WATER DISTRICT NO. 34, HOW SHOULD POTENTIAL CONFLICTS OF INTEREST BE ADDRESSED

The Ethics in Government Act explicitly requires a public official to disclose potential or actual conflicts of interest, and defines the required process and means of disclosure. Idaho Code § 59-704. Provided the required disclosures are made, the public official need not recuse himself or herself: the official may still participate in the proceedings and take any action authorized by law. *Id.*¹⁸

These provisions require the WD34 watermaster to disclose actual or potential conflicts of interest to the Director. Provided the watermaster discloses actual or potential conflicts of interest to the Director, the watermaster need not recuse himself or herself and may continue performing the duties of the watermaster's office.¹⁹

While the Ethics in Government Act does not require recusal of the watermaster if there is a potential or actual conflict of interest, the Director has authority to give the watermaster specific instructions in such a situation, and even to take direct control of the watermaster's functions to avoid or resolve a conflict of interest. While the watermaster performs the distribution

of water in a water district, it is the Director who has “direction and control” over such matters. Idaho Code § 42-602. The Director also has supervisory authority over watermasters in the distribution of water. *See id.* (“Director of the Department of Water Resources To Supervise Water Distribution Within Water Districts”) (section title); *Id.* § 42-613A (referring to “the supervisory responsibilities of the director of the department of water resources over the activity of watermasters delivering water within water districts”).

Thus, should an actual or potential conflict of interest arise as a result of the WD34 watermaster also serving as a director of the BLRID, the Director could address the situation by issuing specific instructions to the watermaster. Alternatively, the Director could remove the watermaster from the conflict situation and take direct control of water distribution.

The Director might also consider providing instructions to the watermaster before conflicts arise. Such proactive instructions could help avoid or resolve conflict situations more quickly and efficiently than by responding only after they have already developed. The Director could issue such instructions pursuant to his supervisory authority, and such instructions could take any one of several forms. For instance, the Director could issue such instructions as part of his written approval under the Department’s “Employee Conduct” policy, or as part of his formal appointment of the watermaster. The instructions could also be issued in a separate letter or order to the watermaster.

In sum, the only requirement Idaho law establishes with regard to actual or potential conflicts that arise as a result of the same person simultaneously serving as the WD34 watermaster and as a director of the BLRID is that the watermaster properly disclose such conflicts as set forth in Idaho Code § 59-704. Beyond this, if the Director in his discretion decides to waive the Department’s conflict of interest policy and appoint a BLRD board member as the watermaster, he has broad authority to supervise the watermaster’s water distribution activities to address any conflict of interest situation, including, but not limited to, issuing specific instructions to the watermaster or taking direct control of the watermaster’s water distribution functions, if necessary or advisable to ensure the proper distribution of all water rights.

ADVISORY LETTERS OF THE ATTORNEY GENERAL

I hope that the foregoing discussion responds to the concerns underlying your request for legal guidance. Please feel free to contact me should you have any comments or questions on any of these matters. This letter is provided to assist you. The response is an informal and unofficial expression of the views of this office based upon the research of the author.

Sincerely,

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

¹ The term “watermaster” as used herein refers only to a watermaster elected and appointed to distribute water in a water district pursuant to chapter 6, title 42 of the Idaho Code.

² No reported decision of the Idaho Supreme Court or the Idaho Court of Appeals has held that Idaho Code § 59-511 applies to watermasters, and this office is not aware of any such holding by any Idaho court. It should be noted, however, that the Idaho Supreme Court has referred to a watermaster as an “administrative officer” in some other contexts. Big Wood Canal Co. v. Chapman, 45 Idaho 380, 390, 263 P. 45, 48 (1927); Nampa & Meridian Irr. Dist. v. Barclay, 56 Idaho 13, 20, 47 P.2d 916, 919 (1935); Mays v. District Court of Sixth Judicial Dist. in and for Butte County, 34 Idaho 200, 206, 200 P. 115, 116 (1921).

³ Further, the office of director of the BLRID might not constitute an “office or position of profit” for purposes of Idaho Code § 59-511. The only payments to directors authorized by the BLRID’s bylaws are reimbursements for expenses, and “a minimum sum” for each day spent attending board meetings or while engaging in official business. *Big Lost River Irrigation District By-Laws And Policies 2004* at 8 (Article III § 6). Reimbursements for expenses probably would not be deemed “profit,” and even the “minimum sum” might not constitute a “profit.” Attending board meetings or engaging in BLRID business, for example, could result in a loss of income the director otherwise would have received in pursuing his or her occupation. Thus, a court might conclude that the “minimum sum” a director receives is not “profit” but simply mitigation for such a loss.

⁴ The WD34 watermaster’s statutory authority to distribute water to the water users in WD34 probably would constitute “administrative authority,” and the BLRID would be “interested” in any “matter” of water distribution pertaining to its water rights that came before the watermaster. Idaho Code § 18-1356(3).

⁵ A common law inquiry is appropriate because the Idaho Code provides that the common law provides the rule of decision “in all cases not provided for in these compiled laws.” Idaho Code § 73-116; *see also* Attorney General Opinion No. 91-7 (Aug. 5, 1991), at 9-10 and n.9 (discussing application of the common law doctrine of incompatibility to the offices of watermaster and water district treasurer).

⁶ This document may be viewed at the following URL: <http://ag.ca.gov/publications/coi.pdf>.

⁷ The Department’s “Employee Conduct” policy is part of a larger policy document that is maintained on the Department’s intranet. A copy of the “Employee Conduct” policy is attached hereto.

⁸ Attachment at 1 (“Personal Conduct”). The Personnel Rules also recognize that “a high standard of honesty, ethics, impartiality, and conduct by state employees is essential to ensure proper per-

formance of state business and strengthen the faith and confidence of the people of Idaho in the integrity of state government and state employees.” IDAPA 15.04.01.024.

⁹ Attachment at 4 (“Gratuities”).

¹⁰ See Attachment at 2-3 (“which might have the appearance of impropriety”); *Id.* at 3 (“appearance of impropriety . . . reasonable perceptions . . . avoid the appearance of impropriety”).

¹¹ Attachment at 2 (“Outside Activities”).

¹² Attachment at 2 (“Outside Activities”).

¹³ “A watermaster is a public administrative officer who performs functions both for the Department of Water Resources and for his water district. He is elected by and paid by water users in the water district. Thus, for some purposes he could be considered an employee of the water district.” *Id.* at 1.

¹⁴ See *generally* Attachment at 2-4.

¹⁵ Attachment at 2 (“Outside Activities”).

¹⁶ This is not intended to be an exhaustive list of the instances in which a watermaster’s duty might require the exercise of discretion.

¹⁷ Attachment at 2 (“Outside Activities”).

¹⁸ The act provides that an “elected legislative public official” must also take any action required by the rules of the body of which he/she is a member after disclosing a conflict of interest. Idaho Code § 59-704(1). Such rules might conceivably require recusal, but the act itself does not, and in any event, a watermaster is not a “legislative public official.”

¹⁹ The official has the option of seeking legal counsel to determine whether an actual or potential conflict of interest exists. Idaho Code § 59-704. Should the legal advice be that there is an actual conflict of interest, an appointed official must disclose the conflict through a filing with the appointing authority. *Id.* § 59-704(3). The appointing authority may seek an advisory opinion from the Attorney General, and the official may then act on the legal advice. *Id.*

ADVISORY LETTERS OF THE ATTORNEY GENERAL

June 24, 2010

The Honorable Donna Jones, Controller
Office of the Controller
VIA STATEHOUSE MAIL

Re: Our File No. 10-33111 – Ability to Take Unpaid/Furlough
Leave When Annual Salary Is Set By State Code

Dear Controller Jones:

This letter is in response to your recent inquiry of this office regarding a reduction in a salary set by statute. Specifically, you question whether Tax Commissioners may take furloughs rejecting a portion of their salary when it is set by Idaho Code § 63-102. In relevant part, Idaho Code § 63-102 provides:

(1) A member of the state tax commission shall be appointed by the governor, to serve at his pleasure, as chairman. Each member of the state tax commission shall devote full time to the performance of duties. Commencing on July 1, 2008, the annual salary for members of the state tax commission shall be eighty-five thousand four hundred forty-seven dollars (\$85,447).

This office provided similar analyses for salaries set by statute for executive and judicial officers, which are attached for your review. Within those analyses, this office concluded that once the Legislature has established a salary through statute, only the Legislature may modify that salary. If the recipient of the salary wishes to reject all or a portion of their salary, they may do so by making a charitable contribution to the state, but will likely be taxed on the full amount of their salary (a charitable deduction may be available). The same analysis applies here.

As provided above, the Commissioners' salaries are set by statute. Comparing the express statute with that governing compensation for other tax commission employees reveals that the Legislature specifically intended for Commissioners to be treated differently. Idaho Code § 63-103 addresses Tax

ADVISORY LETTERS OF THE ATTORNEY GENERAL

Commission employees and their compensation. In relevant part, Idaho Code § 63-103(2) provides:

(2) The compensation of all state tax commission employees shall be paid upon the same basis and in the same manner as the compensation of other state employees is paid.

The Code indicates that the Legislature expressly intended to directly set the salary for Commissioners, while permitting the Commissioners discretion to set the salaries of their employees in accordance with the rest of the state system. This separation makes practical sense in order to avoid a scenario in which the Commissioners set their own salaries.

An argument could be made that the Legislature amended the Commissioner salaries by reducing the Commission's appropriation. However, a review of the relevant appropriation bills reveals that although certain appropriations of the Commission were reduced, no express salary appropriation for the Commissioners, and no intent language reducing the Commissioners' salaries, could be located. Based upon this review, the Controller is bound to follow the law. In order to address this issue in future years, the Controller or the Tax Commission may wish to recommend to the Legislature appropriate language to permit the Commissioners to reduce their salaries through refusal of amounts, or furloughs as necessary. This office would be happy to assist in any such efforts.

Sincerely,

BRIAN KANE
Assistant Chief Deputy

ADVISORY LETTERS OF THE ATTORNEY GENERAL

June 28, 2010

Tom Luna, Superintendent
Idaho Department of Education
650 West State Street
P.O. Box 83720
Boise, Idaho 83720-0027

THIS LETTER IS NOT AN OFFICIAL OPINION OF THE ATTORNEY GENERAL

Dear Mr. Luna:

QUESTION PRESENTED

Superintendent of Public Instruction Tom Luna posed the following question and a further observation in his letter to this office dated June 24, 2010:

I am writing to formally request an Attorney General's opinion on whether or not a public charter school in the State of Idaho can receive payments from the state if its charter has been revoked by the authorized chartering entity but is on appeal to the State Board of Education.

Idaho Code sections 33-5208 and 33-5209 govern public school finance of public charter schools and the revocation and appeals processes of public charter schools. However, the law is unclear as to whether the Idaho State Department of Education is still able or required to distribute state funding to the public charter school if it has submitted an appeal to the State Board of Education under I.C. 33-5209(4).

CONCLUSION

For the reasons stated below, I conclude that a public charter school is not entitled to receive payments from state funds after its charter has been revoked and while revocation of that charter is on appeal to the State Board

of Education, except for payments for which the right of payment accrued before the charter was revoked, unless the decision to revoke the charter has been stayed by administrative or judicial order.

ANALYSIS

Superintendent Luna is correct that the Public Charter Schools Act of 1998 (the “PCS Act”), as amended, title 33, chapter 52, Idaho Code, “is unclear as to whether the Idaho State Department of Education is still able or required to distribute state funding to the public charter school if it has submitted an appeal to the State Board of Education under I.C. 33-5209(4).” In fact, the PCS Act does not explicitly address that issue at all. Its sole provision regarding appeal of a decision to revoke a charter is found in subsection 33-5209(4), which is silent on state payments during the pendency of an appeal to the Board of Education.

Thus, we must look to more general sources of law than the PCS Act to answer Superintendent Luna’s questions. From the early stages of this country’s legal history, and at the time the Idaho Constitution was being drafted in the late-nineteenth century, it was generally understood that, “Wherever a statute is silent, it must be understood that the matter not therein provided for is left to the operation of the general rules of law.” Wilmington & R.R. Co. v. Baker, 3&4 Dev. & Bat. 75, 1838 WL 491 (N.C. 1838); *also*, In re Hartman, 9 Abb.Pr.N.S. 124 (N.Y. 1870).

Although not phrased in the terms of these nineteenth-century cases, the Idaho Supreme Court has adopted similar principles in the twentieth and twenty-first centuries. When an Idaho district court reviewed the State Insurance Fund Manager’s discharge of his duties over the Fund’s surpluses and reserves and payments of dividends under statutes that did not make the Manager’s actions reviewable under the Idaho Administrative Procedure Act, the Idaho Supreme Court nevertheless affirmed the district court’s choice of a standard of review borrowed from the Idaho Administrative Procedure Act. Hayden Lake Fire Protection Dist. v. Alcorn, 141 Idaho 388, 400-401, 111 P.3d 73, 85-86 (2005). In a similar case of borrowing rules of law from one related field to another, in Glenn Dick Equipment Co. v. Galey Const., Inc., 97 Idaho 216, 220-223, 541 P.2d 1184, 1188-1191 (1975), the Idaho Supreme Court noted the similarities between sales and leases of equipment and the ambiguous nature of certain agreements, which were not clearly a sale or a

lease, and concluded that certain statutes that applied to warranties for commercial sales of equipment would be applied also to warranties for commercial leases of equipment. Although the Idaho Supreme Court did not give extensive reasons for affirming the district court in Hayden Lake, in Glenn Dick it explained that it would turn to the sales statute for a rule of law to apply to leases “when the case involves the same considerations that gave rise to the Code provisions and an analogy is not rebutted by additional antithetical circumstances.” 97 Idaho at 222, 541 P.2d at 1190.

The Administrative Procedure Act was not generally adopted by reference in its entirety for hearings prescribed by the PCS Act. Instead, the PCS Act adopts by reference only a single section of the Administrative Procedure Act—Idaho Code § 67-5242 addressing conduct of hearings. See Idaho Code § 33-5207(2) and § 33-5209(3). Thus, I conclude that the Administrative Procedure Act does not generally apply to the State Board of Education’s review of a decision of the Public Charter School Commission.¹ Nevertheless, given the cases reviewed earlier, I think that it is likely that an Idaho court would turn to the principles of the Administrative Procedure Act to determine whether the Department of Education “is still able or required to distribute state funding to the public charter school if it has submitted an appeal to the State Board of Education” because this question “involves the same considerations that gave rise to the Code provisions and an analogy is not rebutted by additional antithetical circumstances.” The considerations that give rise to the Administrative Procedure Act provisions are how to treat the effect of an administrative decision pending review, for which I see no “antithetical circumstances.”

The most important principles for the effect of judicial review on an administrative decision are found in two sections of the Administrative Procedure Act, the first addressing effective dates of agency orders, and the second addressing stay of agency orders. The first section is Idaho Code § 67-5246(5). It provides:

67-5246. Final orders — Effectiveness of final orders. —

* * * *

(5) Unless a different date is stated in a final order, the order is effective fourteen (14) days after its service date if a party has not filed a petition for reconsideration. If a party has filed a petition for reconsideration with the agency head, the final order becomes effective when:

- (a) The petition for reconsideration is disposed of; or
- (b) The petition is deemed denied because the agency head did not dispose of the petition within twenty-one (21) days.

The second section is Idaho Code § 67-5274. It provides:

67-5274. Stay. — The filing of the petition for review does not itself stay the effectiveness or enforcement of the agency action. The agency may grant, or the reviewing court may order, a stay upon appropriate terms.

See also Idaho Rule of Administrative Procedure 780, IDAPA 04.11.01.780, regarding Stay of Orders: “Any party or person affected by an order may petition the agency to stay any order, whether interlocutory or final. Interlocutory or final orders may be stayed by the judiciary according to statute. The agency may stay any interlocutory or final order on its own motion.”

From these two sections of the Administrative Procedure Act and the administrative rule promulgated under that Act, I conclude that upon the effective date and time of the Public Charter School Commission’s decision to revoke a charter, in the absence of an administrative or judicial stay of the decision to revoke the charter, the formerly chartered public charter school will no longer be a public charter school. Thus, from that time forward, it will no longer be an entity entitled to receive payments that accrue to public charter schools after that date and time. I further conclude that the public charter school whose charter has been revoked will be a public charter school until

the effective date and time of the revocation and will continue to be able to receive payments that accrued based upon its status as a public charter school before the effective date and time of its revocation.

Very truly yours,

MICHAEL S. GILMORE
Deputy Attorney General

¹ Of course, if my analysis is incorrect and the Administrative Procedure Act does apply to a public charter school's appeal to the State Board of Education from an order of revocation, then the sections of the Administrative Procedure Act that I quote would apply directly rather than by adoption by analogy.

ADVISORY LETTERS OF THE ATTORNEY GENERAL

August 12, 2010

The Honorable Les Bock
Idaho State Senator
950 W. Bannock St., Ste. 1100
Boise, ID 83702

Re: Our File No. 10-33436 — Authority of Auditorium Districts

Dear Senator Bock:

This letter is in response to an inquiry you submitted to this office regarding the authority of Auditorium Districts. Included within your inquiry was an analysis that distinguished the Greater Boise Auditorium District (GBAD) from the Pocatello District to support more expansive authority for GBAD. From a cursory review of the facts known to this office, it appears that GBAD's attorney has provided legal advice to the District reaching a more narrow conclusion than that advocated within your analysis. This office has reviewed the case law, the statutory authority, as well as Art. VIII, sec. 4 of Idaho's Constitution, and would likely advise a similarly situated client to also adopt the more narrow construction at this time. To assist you in your ongoing analysis, this office has outlined the basis of this conclusion below.

Activity of the Auditorium District Must Inure to the Purpose of the District

It appears that the actions of GBAD are consistent with its statutory grant of authority under Idaho Code § 67-4902, and Ameritel Inns Inc. v. Pocatello-Chubbuck Auditorium or Community Center District, 146 Idaho 202, 192 P.3d 1026 (2008).

The language of Idaho Code § 67-4902 specifically provides:

An auditorium or community center district is one to build, operate, maintain, market and manage for public, commercial and/or industrial purposes by any available means public auditoriums, exhibition halls, convention centers, sports arenas and facilities of a similar nature, and for that purpose any

such district shall have the power to construct, maintain, manage, market and operate such facilities.

The literal language of the statute requires that an auditorium district “build, operate, maintain, market *and* manage” public facilities. The Legislature’s inclusion of the word “and” indicates that an auditorium district is one that performs all of the listed functions in the statute. Ameritel, 146 Idaho at 205, 192 P.3d at 1029. If the Legislature wanted to make it clear that an auditorium district could choose to only market public facilities, then it could have used the words “and/or,” as it did when describing the purposes that auditorium district facilities must serve. *Id.* and *see* Idaho Code § 67-4902. The holding in the Ameritel decision was that the authority of auditorium districts could not be used to simply market existing public facilities within its borders. Ameritel, 146 Idaho at 206, 192 P.3d at 1030.

Based on the facts presented to this office, it appears that the actions of GBAD are consistent with both the statutes and the Idaho Supreme Court’s limitation of district powers in Ameritel.¹ You may also wish to point out to your constituent that a means exists to dissolve the District if he perceives that it no longer serves a valid function (Idaho Code § 67-4930). Also enclosed is an analysis by Deputy Attorney General Steve Vinsonhaler, which reached a similar conclusion with regard to the limited marketing ability of the BVCB, recognizing that an agreement for pursuing and marketing convention business for the Boise Center on the Grove is likely permissible (because the BCotG was built by the District).²

Expanded District Authority Must Comply with Art. VIII, Sec. 4

Idaho law limits the ability of governmental entities such as auditorium districts to provide various forms of credit and aid to private corporations. Art. VIII, sec. 4 of the Idaho Constitution provides the following limitations:

§ 4. County, etc., not to loan or give its credit. — No county, city, town, township, board of education, or school district, or other subdivision, shall lend, or pledge the credit or faith thereof directly or indirectly, in any manner, to, or in aid of any individual, association or corporation, for any amount or for any purpose whatever, or become responsible

for any debt, contract or liability of any individual, association or corporation in or out of this state.

The limitations of this provision would appear to preclude the formation of a district designed to primarily benefit a private corporation. Any amendment to Idaho Code § 67-4902 would have to be carefully crafted to ensure that the public purpose of the District was not diminished due to additional obligations to the ancillary benefits of such a district. For example, an auditorium district that advertised the availability of hotels (private corporations) or restaurants (private corporations) without an anchor to the auditorium facility would be subject to challenge.

In Attorney General Opinion No. 95-07, a similar scenario was analyzed involving the loaning of state employees to the United Way.³ This analysis began with Art. VIII, sec. 2 of the Idaho Constitution, which is the limitation on the state, rather than political subdivisions of the state contained in Art. VIII, sec. 4. Paramount within this constitutional limitation are four protections:

1. It prevents the public's money from passing in the control of private associations or persons. Fluharty v. Board of County Comm'rs of Nez Perce County, 29 Idaho 203, 158 P. 320 (1916).
2. It prevents aiding or promoting a particular commercial enterprise to the detriment of others in the same field. Village of Moyie Springs v. Aurora Mfg. Co., 82 Idaho 337, 353 P.2d 767 (1960).
3. It prevents conferring of "favored status" on any corporation or private individual with the award of public funds. Boise Redevelopment Agency v. Yick Kong Corp., 94 Idaho 876, 499 P.2d 575 (1972); and
4. It precludes government action designed to principally aid private corporations or enterprises. Idaho Water Resource Board v. Kramer, 97 Idaho 535, 559, 548 P.2d 35, 59 (1976).

ADVISORY LETTERS OF THE ATTORNEY GENERAL

The protections of Art. VIII, sec. 4, are significant. Within the context of an auditorium district, particularly with broadened authority to generally promote tourist activities, hotels, restaurants, shops, etc., it is easy to envision scenarios in which segments of the district participants would be elevated over others. This office is aware that a current complaint within the District is that certain areas are promoted over others and to the detriment of certain District members. Any proposed amendment(s) to the auditorium district statutes would have to be made in a way that complies with Art. VIII, sec. 4, and meets the requirements of a public purpose.

I hope that you find this letter helpful. Please contact me if you have specific amendments you would like to consider or otherwise need further assistance on this issue.

Sincerely,

BRIAN KANE
Assistant Chief Deputy

¹ It is worth noting that both GBAD and the BVCB are represented by counsel, and so this analysis will defer to the legal analysis offered by these attorneys to their respective clients with regard to the specifics of the decisions reached and actions taken.

² DAG Vinsonhaler's analysis was similarly limiting in its scope in that it only analyzed activities directly related to pursuing and attracting convention business to the Boise Center, and should not be read or interpreted as to opening additional marketing avenues. Given the Ameritel decision, it appears doubtful that marketing efforts beyond those designed to advance the purposes of the Auditorium District would withstand judicial scrutiny. The precise boundaries of these efforts likely cannot be identified without legislation or judicial review.

³ A copy of Attorney General Opinion No. 95-07 is included with this analysis for your review.

ADVISORY LETTERS OF THE ATTORNEY GENERAL

October 6, 2010

Honorable Brent Hill
Senator, District 34
STATEHOUSE MAIL

Dear Senator Hill:

I am responding to your September 23, 2010, letter regarding two separate aspects of Idaho law, both dealing with marriage.

A. The Physical Presence Requirement as it Relates to Marriage

In your first question, you asked about the legal requirement that bride and groom must appear in person at the clerk's office to obtain a marriage license. You wrote:

Male and Female are both U.S. citizens and legal residents of Idaho. They are both serving in the armed forces. One has been deployed to Iraq, and the other is temporarily stationed in North Carolina. They want to have a judge in the United States marry them via a video broadcast. The Idaho county, however, refuses to issue them a marriage license, claiming that both Male and Female must appear in person to obtain the license.

- a. Idaho Code § 32-403 does not appear to require both parties to be physically present in order to obtain a marriage license. Am I reading it incorrectly? Are there administrative rules that contain such a requirement?
- b. What amendment might be appropriate to address this situation?

I will respond to your questions in the order you posed them.

1. Does Idaho Code § 32-403 require parties to be physically present in order to obtain a marriage license?

No Idaho case has ever directly addressed this issue;¹ however, it appears from my research that courts would interpret this statute to require the physical presence of both parties to obtain a marriage license.

To interpret Idaho Code § 32-403, one must look first to the plain language of the statute. See State v. Schwartz, 139 Idaho 360, 362, 79 P.3d 719, 721 (2003). Idaho Code § 32-403 states, in relevant part:

Every county recorder who shall have personal knowledge of the competency of the parties for whose marriage a license is applied for, shall issue such license upon payment or tender to him of his legal fee therefor; and if such recorder does not know of his own knowledge that the parties are competent under the laws of the state to contract matrimony, he shall take the affidavit in writing of the person or persons applying for such license, and of other persons as he may see proper, and of any persons whose testimony may be offered; and if it appears from the affidavit so taken that the parties for whose marriage the license in question is demanded are legally competent to marry, the recorder shall issue such license, and the affidavits so taken shall be his warrant against any fine or forfeiture for issuing such license.

The plain language of the statute is unclear whether a person must be present in person to obtain a marriage license. However, principles of statutory interpretation require courts to construe statutes relating to the same subject matter together to further legislative intent. State v. Barnes, 133 Idaho 378, 382, 987 P.2d 290, 294 (1999). Thus, looking to Idaho Code § 32-404 aids in interpreting the legislative intent behind Idaho Code § 32-403.

Idaho Code § 32-404 states:

The county recorder shall have power to administer **all oaths** required or provided for in this chapter, and if any person in any such affidavit shall willfully and corruptly swear falsely to any material fact as to the competency of any person for

whose marriage the license in question refers, or concerning the procuring or issuing of which such affidavit may be made, shall be guilty of perjury, and, upon conviction thereof, shall be punished as provided by statute in other cases of perjury.

(Emphasis added).

It seems the Legislature contemplated that the county recorder would administer and effectuate all affidavits required for a marriage license. The county recorder can only administer the affidavit if the affiants (bride and groom) appear before the county recorder in person. A county recorder cannot sign an affidavit, or take an affidavit, if the affiants are physically elsewhere.

Interpreting Idaho Code § 32-403 to require the physical presence of the parties is consistent with other states' marriage laws, which also require the physical presence of the would-be spouses, as well as internet instructions for the public on "How to Get a Marriage License in Idaho."²

My research did not uncover any administrative rules that require physical presence. The requirement that the parties be personally present before the county recorder comes directly from the statutes. People have always gone to the courthouse to get a marriage license; therefore, the Legislature appears to have assumed, without explicitly stating, that an in-person appearance is a requirement. Other states have been more explicit in legislating the requirement for personal presence, as set forth below.

2. What amendment might be appropriate to address this situation?

You wish to amend the statute to provide for exceptions to the personal appearance requirement. Statutes from California and Pennsylvania offer models for this type of amendment. The Pennsylvania statute specifically addresses marriage for those serving with the military on active duty, which would address the scenario you presented. It is worth noting that both of these states' laws make the personal appearance an explicit requirement.

Pennsylvania's statute reads:

(a) **General rule.** – Each of the applicants for a marriage license shall appear in person and shall be examined under oath or affirmation as to:

- (1) The legality of the contemplated marriage.
- (2) Any prior marriage or marriages and its or their dissolution.
- (3) The restrictions set forth in section 1304 (relating to restrictions on issuance of license).
- (4) All the information required to be furnished on the application for license as prepared and approved by the department.

(b) **Exception.** – If an applicant is unable to appear in person because of his active military service, the applicant shall be permitted to forward an affidavit, which verifies all of the information required under subsection (a), to the issuing authority.

(c) **Form.** – The department shall develop and make available affidavit forms to be used by applicants under subsection (b).

(d) **Definition.** – As used in this section, the term “active military service” means active service in any of the armed services or forces of the United States or this Commonwealth.

23 Pa. C.S.A. § 1306.³

California's statute reads:

If for sufficient reason, as described in subdivision (d), either or both of the parties to be married are physically unable to appear in person before the county clerk, a marriage license may be issued by the county clerk to the person solemnizing the marriage if the following requirements are met:

- (a) The person solemnizing the marriage physically presents an affidavit to the county clerk explaining the reason for the inability to appear.

- (b) The affidavit is signed under penalty of perjury by the person solemnizing the marriage and by both parties.
- (c) The signature of any party to be married who is unable to appear in person before the county clerk is authenticated by a notary public or a court prior to the county clerk issuing the marriage license.
- (d) Sufficient reason includes proof of hospitalization, incarceration, or any other reason proved to the satisfaction of the county clerk.

West's Ann. Cal. Fam. Code § 426.

Either of these statutes could serve as a model for an amendment to permit individuals on active-duty military to obtain an Idaho marriage license without being physically present at the courthouse.

B. The Lawful Presence Requirement as it Relates to Marriage

In your second question, you asked about the requirement that individuals be lawfully present in the United States before they may marry in Idaho. You wrote:

Male and Female are not married and are residing in the U.S. illegally. They have been in Idaho for twelve years and have four children who were born here. For whatever reasons – religious, moral or social – they want to get married, but §32-403(2)(b)(iii) requires the applicants be lawfully present in the United States. Consequently, Idaho is requiring the couple to live together without getting married. This appears hypocritical for a state that espouses family values.

- a. Could a provision be added that would allow the couple to petition the court to exempt them from the requirements of § 32-403(2)(b)? What would be the suggested wording for such an amendment?
- b. Are there other solutions for this issue that I have not considered?

- c. What would be the adverse consequences to allowing illegal aliens to marry?

I will address your questions in the order you posed them.

1. Could a provision be added that would allow the couple to petition the court to exempt them from the requirements of § 32-403(2)(b)? What would be the suggested wording for such an amendment?

If I understand your question correctly, you are asking if a provision could be added to the law that would give a judge the authority to decide whether certain illegal aliens could marry. The short answer is “no.” Marriage is a full-fledged fundamental right protected by both the Due Process Clause and the Equal Protection Clause. Loving v. Virginia, 388 U.S. 1, 12, 87 S. Ct. 1817, 1824, 18 L.Ed.2d 1010 (1967); Griswold v. Connecticut, 381 U.S. 479, 481-86, 85 S. Ct. 1678, 1680-82, 14 L.Ed.2d 510 (1965); Zablocki v. Redhail, 434 U.S. 374, 98 S. Ct. 673, 54 L.Ed.2d 618 (1978).

While Idaho certainly could craft a law that would give *all* illegal aliens the ability to marry in Idaho, Idaho cannot craft a law that allows a judge to decide, on a case-by-case basis, who might be exempted from the requirements of Idaho Code § 32-403(2)(b). This type of amendment would almost certainly violate the Equal Protection Clause of the U.S. Constitution, and it would also be vulnerable to attacks on Due Process grounds.

Based on this analysis, I cannot suggest wording for an amendment that would exempt certain illegal aliens, but not others, from the requirement of Idaho Code § 32-403(2)(b). However, as mentioned above, the Legislature could certainly grant all undocumented aliens the right to marry.⁴

2. Are there other solutions for this issue that I have not considered?

If the undocumented aliens wanted to bring a lawsuit themselves, challenging Idaho’s laws as unconstitutional, they might be successful.

In 2007, an undocumented alien and his U.S. citizen fiancée sued in federal court, alleging that Pennsylvania’s policy requiring foreign nationals

to prove lawful presence in the United States to obtain a marriage license violated their equal protection and due process rights. The federal court granted their preliminary injunction. In other words, the federal court agreed that they had a fundamental right to marry, and that the policy of requiring foreign nationals to prove their lawful presence in the United States as a condition precedent for obtaining a marriage license likely failed strict scrutiny. Buck v. Stankovic, 485 F.Supp.2d 576 (2007).

3. What would be the adverse consequences to allowing illegal aliens to marry?

Set forth below is a summary of policy arguments with regard to the legal determination of “who may marry.” This office takes no position on any of the arguments presented below. Policy determinations are properly within the province of Idaho’s Legislature.

Allowing illegal aliens to marry lends legal support to the proposition that non-heterosexual couples should be allowed to marry. Supporters of gay marriage argue that individuals who are violating a federal law by being present in the United States should not have *more* rights than law-abiding gay/lesbian citizens. See *Doma and the Constitutional Coming Out of Same-Sex Marriage*, 24 Wis. J.L. Gender & Society 145 (Spring 2009) (“It is ironic indeed that an individual illegally present in the United States enjoys the fundamental right to marry the individual of his or her choice, while GLBT Americans are deprived of this fundamental right.”).

Allowing illegal aliens to marry in Idaho could encourage more illegal aliens to come to Idaho. Similarly, allowing illegal aliens to marry in Idaho would give illegal aliens a legal stronghold from which to argue for *more* rights and privileges: healthcare, driver’s license, unemployment benefits, education, etc.

An argument has been made by an Arizona state legislator who wants to ban any immigrants from getting married – even to U.S. citizens – that allowing illegal aliens to marry could threaten national security. This legislator argues that a marriage license is an important legal paper that can be leveraged into obtaining additional identification papers that could contain falsehoods that threaten our country’s security.

CONCLUSION

This letter is an informal analysis by the author. It should not be relied upon as an official opinion of the Office of Attorney General. I hope that you find its content helpful. I conducted significant research to attempt to answer your questions, including making a trip to the Legislative Services Library to personally review every amendment to Idaho Code § 32-403 since it was first enacted in 1895. I mention this because, if you have any additional questions on these statutes, it may be easier to discuss these issues over the phone or in person. Please feel free to contact me at your convenience, should you wish to discuss any of these issues more fully.

Sincerely yours,

MELISSA N. MOODY
Deputy Attorney General

¹ The case of State v. Thomas, 82 Idaho 473, 355 P.2d 674 (1960), involved a man who was charged with perjury for falsely swearing to his competency to marry. In that case, which is the only case that cites Idaho Code § 32-403, the Idaho Supreme Court did not address the issue whether an individual was required to appear in person before a county recorder to obtain a marriage license. However, significantly, the Court seemed to assume this requirement without deciding it.

² The attached document was located in an internet search on 9/29/10. It instructs parties on how to get a marriage license in Idaho, and specifically states that “[b]oth bride and groom must be present” at the county courthouse.

³ In Pennsylvania, a prisoner who wanted to marry via videoconferencing unsuccessfully challenged a court clerk’s decision to refuse to provide a videoconferencing option. The Superior Court held that the court clerk did not owe a duty to implement videoconferencing so that the inmate could marry. In re Coats, 849 A.2d 254 (Pa. Super. 2004).

⁴ In fact, it may be that illegal aliens *already have this right* and that state statutes – such as Idaho’s – that require individuals to prove they are in the United States legally in order to obtain a marriage license, are unconstitutional.

At least one legal commentator argues that statutes like Idaho’s violate both the substantive Due Process and Equal Protection clauses, and are preempted under the U.S. Supremacy Clause because the federal government has the sole authority to regulate immigration. Christopher Nelson, *Protecting the Immigrant Family: The Misguided Policies, Practices and Proposed Legislation Regarding Marriage License Issuance*, 4 U. St. Thomas L.J. 643 (Spring 2007).

There is other authority for the proposition that illegal aliens possess the same fundamental right to marry that all other citizens do. Theck v. Warden, I.N.S. 22 F.Supp.2d 1117, 1122 (C.D. Cal. 1998)

ADVISORY LETTERS OF THE ATTORNEY GENERAL

(holding that an excludable alien had a fundamental constitutional right to marry); Manwani v. U.S. Department of Justice, 736 F. Supp. 1367, 1382 (W.D.N.C. 1990) (holding that section 5 of the Immigration Marriage Fraud Amendments of 1986, implicated the constitutionally-protected interest of the alien spouse).

The Ohio Supreme Court has held that its state statute did not require Social Security numbers from those who did not possess them. In so doing, the Court rejected the restrictive interpretation of a county which refused to allow undocumented noncitizens to marry. Vasquez v. Kutscher, 767 N.E.2d 267 (Ohio 2002). It should be noted, however, that Ohio's lenient approach regarding Social Security numbers could not be utilized in Idaho without changing Idaho's more restrictive legislation.

Topic Index

and

Tables of Citation

SELECTED ADVISORY LETTERS

2010

| TOPIC | DATE | PAGE |
|--|---------|------|
| AGRICULTURE | | |
| Amending code section so there is only one statutory provision addressing the State Department of Agriculture's authority to regulate water quality within beef cattle animal feeding operations would eliminate confusion | 2/24/10 | 158 |
| Exempting nutrient management plans from the general provisions of the Public Records Act does not create any conflicts with existing laws; however, extending the exemption to "all information generated as a result of such [nutrient management] plan" will likely pose some difficulties in implementation and interpretation | 2/24/10 | 158 |
| AUDITORIUM DISTRICTS | | |
| Activity of auditorium district must inure to the purpose of the district | 8/12/10 | 186 |
| Expanded auditorium district authority must comply with Art. VIII, sec. 4 of the Idaho Constitution . . . | 8/12/10 | 186 |
| COMMISSIONS AND BOARDS | | |
| A person may simultaneously serve on an irrigation district board of directors and as watermaster for a water district, but only with approval of the Director of the Department of Water Resources | 4/6/10 | 165 |
| If a member of the board of directors of an irrigation district simultaneously serves as the watermaster for a water district, the person must disclose to the Director of the Department of Water Resources any actual or potential conflicts of interest that arise as a result of such simultaneous service | 4/6/10 | 165 |

| TOPIC | DATE | PAGE |
|---|---------|------|
| Once the Legislature has established a salary through statute, only the Legislature may modify that salary. If the recipient of the salary wishes to reject all or a portion of their salary, they may do so by making a charitable contribution to the state, but will likely be taxed on the full amount of their salary | 6/24/10 | 179 |
| EDUCATION | | |
| A public charter school is not entitled to receive payments from state funds after its charter has been revoked and while revocation of that charter is on appeal to the State Board of Education, except for payments for which the right of payment accrued before the charter was revoked, unless the decision to revoke the charter has been stayed by administrative or judicial order | 6/28/10 | 181 |
| EMPLOYMENT | | |
| A person may simultaneously serve on an irrigation district board of directors and as watermaster for a water district, but only with approval of the Director of the Department of Water Resources | 4/6/10 | 165 |
| If a member of the board of directors of an irrigation district simultaneously serves as the watermaster for a water district, the person must disclose to the Director of the Department of Water Resources any actual or potential conflicts of interest that arise as a result of such simultaneous service | 4/6/10 | 165 |
| Once the Legislature has established a salary through statute, only the Legislature may modify that salary. If the recipient of the salary wishes to reject all or a | | |

| TOPIC | DATE | PAGE |
|--|---------|------|
| portion of their salary, they may do so by making a charitable contribution to the state, but will likely be taxed on the full amount of their salary | 6/24/10 | 179 |
| FISH AND GAME | | |
| Fish and Game Commission rules appear to be narrowly tailored to address only hunting from motorized vehicles, and persons not engaged in hunting are not affected by the rules | 1/19/10 | 143 |
| IRRIGATION | | |
| A person may simultaneously serve on an irrigation district board of directors and as watermaster for a water district, but only with approval of the Director of the Department of Water Resources | 4/6/10 | 165 |
| If a member of the board of directors of an irrigation district simultaneously serves as the watermaster for a water district, the person must disclose to the Director of the Department of Water Resources any actual or potential conflicts of interest that arise as a result of such simultaneous service | 4/6/10 | 165 |
| MARRIAGE | | |
| Idaho Code § 32-403 would be interpreted to require the physical presence of both parties to obtain a marriage license | 10/6/10 | 190 |
| While Idaho could craft a law that would give all illegal aliens the ability to marry in Idaho, Idaho cannot craft a law that allows a judge to decide, on a case-by-case basis, who might be exempted from the statutory requirements for the application and issuance of marriage licenses | 10/6/10 | 190 |

| TOPIC | DATE | PAGE |
|---|---------|------|
| MOTOR VEHICLES | | |
| Fish and Game Commission rules appear to be narrowly tailored to address only hunting from motorized vehicles, and persons not engaged in hunting are not affected by the rules | 1/19/10 | 143 |
| PUBLIC RECORDS ACT | | |
| Addition of clause “except as otherwise provided by law” would permit agencies currently sharing information with Fish and Game to continue doing so .. | 2/24/10 | 161 |
| Exempting nutrient management plans from the general provisions of the Public Records Act does not create any conflicts with existing laws; however, extending the exemption to “all information generated as a result of such [nutrient management] plan” will likely pose some difficulties in implementation and interpretation | 2/24/10 | 158 |
| PUBLIC UTILITIES COMMISSION | | |
| The furnishing of limited amounts of water under contract to an adjacent user is not subject to the regulation of the PUC especially where the primary purpose of the water system was to furnish water to the primary user | 2/9/10 | 149 |
| The PUC may approve a contract that sets the service rate between a public utility and a consumer. The PUC may abrogate a rate contract if it finds: that the rate impairs the financial ability of the utility to continue service; the contract places an excessive burden on other consumers; or the contract is unduly discriminatory | 2/16/10 | 154 |

2010 ADVISORY LETTERS INDEX

| TOPIC | DATE | PAGE |
|--|---------|------|
| STATUTES | | |
| All statutes are on equal footing with all other statutes; no statute can operate to nullify future legislative enactments | 2/24/10 | 161 |
| TRANSPORTATION | | |
| The Idaho Transportation Department must have cash in the bank at the time of bid advertisement . . | 3/11/10 | 163 |
| WATER RESOURCES | | |
| A person may simultaneously serve on an irrigation district board of directors and as watermaster for a water district, but only with approval of the Director of the Department of Water Resources | 4/6/10 | 165 |
| If a member of the board of directors of an irrigation district simultaneously serves as the watermaster for a water district, the person must disclose to the Director of the Department of Water Resources any actual or potential conflicts of interest that arise as a result of such simultaneous service | 4/6/10 | 165 |

UNITED STATES CONSTITUTION CITATIONS

| ARTICLE & SECTION | DATE | PAGE |
|------------------------------|-------------|-------------|
| Second Amendment | 1/19/10 | 143 |

IDAHO CONSTITUTION CITATIONS

| ARTICLE & SECTION | DATE | PAGE |
|------------------------------|-------------|-------------|
| ARTICLE I | | |
| § 11 | 1/19/10 | 143 |
| ARTICLE VIII | | |
| § 2 | 8/12/10 | 186 |
| § 4 | 8/12/10 | 186 |

UNITED STATES CODE CITATIONS

| ARTICLE & SECTION | DATE | PAGE |
|--------------------------------|-------------|-------------|
| 16 U.S.C. § 824d(a) | 2/16/10 | 154 |
| 16 U.S.C. § 824d(c), (d) | 2/16/10 | 154 |
| 23 U.S.C. § 105 | 3/11/10 | 163 |
| 23 U.S.C. § 106 | 3/11/10 | 163 |
| 23 U.S.C. § 110 | 3/11/10 | 163 |
| 23 U.S.C. § 112 | 3/11/10 | 163 |
| 23 U.S.C. § 114 | 3/11/10 | 163 |
| 23 U.S.C. § 118 | 3/11/10 | 163 |
| 23 U.S.C. § 123 | 3/11/10 | 163 |

IDAHO CODE CITATIONS

| ARTICLE & SECTION | DATE | PAGE |
|------------------------------|-------------|-------------|
| 9-340C | 2/24/10 | 161 |
| 9-340D | 2/24/10 | 158 |
| 9-349 | 2/24/10 | 158 |

2010 ADVISORY LETTERS INDEX

| | | |
|----------------------------|---------|-----|
| 9-349 | 2/24/10 | 161 |
| 18-1356 | 4/6/10 | 165 |
| 18-1356(1) | 4/6/10 | 165 |
| 18-1356(3) | 4/6/10 | 165 |
| 18-1356(5)(a) | 4/6/10 | 165 |
| Title 22 | 2/24/10 | 158 |
| 22-2718(4)(f) | 2/24/10 | 158 |
| 22-4902(2) | 2/24/10 | 158 |
| 31-869 | 2/9/10 | 149 |
| 32-403 | 10/6/10 | 190 |
| 32-403(2)(b) | 10/6/10 | 190 |
| 32-403(2)(b)(iii) | 10/6/10 | 190 |
| 32-404 | 10/6/10 | 190 |
| 33-1102 | 2/9/10 | 149 |
| Title 33, chapter 52 | 6/28/10 | 181 |
| 33-5207(2) | 6/28/10 | 181 |
| 33-5208 | 6/28/10 | 181 |
| 33-5209 | 6/28/10 | 181 |
| 33-5209(3) | 6/28/10 | 181 |
| 33-5209(4) | 6/28/10 | 181 |
| 36-103(a) | 1/19/10 | 143 |
| 36-103(b) | 1/19/10 | 143 |
| 36-104(b)(2) | 1/19/10 | 143 |
| 36-105(2) | 1/19/10 | 143 |
| 36-202(j) | 1/19/10 | 143 |
| 36-401(g) | 1/19/10 | 143 |
| 36-402 | 2/24/10 | 161 |
| 36-1101 | 1/19/10 | 143 |
| 36-1101 (b)(1) | 1/19/10 | 143 |
| 42-233 | 2/9/10 | 149 |
| Title 42, chapter 6 | 4/6/10 | 165 |
| 42-602 | 4/6/10 | 165 |
| 42-604 | 4/6/10 | 165 |
| 42-605(3) | 4/6/10 | 165 |
| 42-605(10) | 4/6/10 | 165 |
| 42-607 | 4/6/10 | 165 |
| 42-608 | 4/6/10 | 165 |
| 42-610 | 4/6/10 | 165 |
| 42-612 | 4/6/10 | 165 |

ADVISORY LETTERS OF THE ATTORNEY GENERAL

| | | |
|---------------------------|---------|-----|
| 42-613 | 4/6/10 | 165 |
| 42-613A | 4/6/10 | 165 |
| 42-618 | 4/6/10 | 165 |
| 42-4001, et seq. | 2/9/10 | 149 |
| Title 43 | 4/6/10 | 165 |
| 43-201 | 4/6/10 | 165 |
| 43-204B | 4/6/10 | 165 |
| 43-316 | 4/6/10 | 165 |
| Title 59, chapter 5 | 4/6/10 | 165 |
| 59-501 | 4/6/10 | 165 |
| 59-503 | 4/6/10 | 165 |
| 59-508 | 4/6/10 | 165 |
| 59-511 | 4/6/10 | 165 |
| 59-701 to 59-705 | 4/6/10 | 165 |
| 59-702 | 4/6/10 | 165 |
| 59-704 | 4/6/10 | 165 |
| 59-704(1) to (5) | 4/6/10 | 165 |
| 61-104 | 2/9/10 | 149 |
| 61-124 | 2/9/10 | 149 |
| 61-125 | 2/9/10 | 149 |
| 61-301 | 2/16/10 | 154 |
| 61-305 | 2/16/10 | 154 |
| 61-307 | 2/16/10 | 154 |
| 61-502 | 2/16/10 | 154 |
| 61-503 | 2/16/10 | 154 |
| 61-622 | 2/16/10 | 154 |
| 61-623 | 2/16/10 | 154 |
| 63-102 | 6/24/10 | 179 |
| 63-103 | 6/24/10 | 179 |
| 63-103(2) | 6/24/10 | 179 |
| 63-3622QQ | 2/9/10 | 149 |
| 67-4902 | 8/12/10 | 186 |
| 67-4930 | 8/12/10 | 186 |
| 67-5242 | 6/28/10 | 181 |
| 67-5246(5) | 6/28/10 | 181 |
| 67-5274 | 6/28/10 | 181 |
| 67-5302(3) | 4/6/10 | 165 |
| 73-116 | 4/6/10 | 165 |