

**IDAHO  
ATTORNEY  
GENERAL'S  
ANNUAL REPORT**

**OPINIONS**

**SELECTED INFORMAL  
GUIDELINES**

**CERTIFICATES OF REVIEW**

AND

**SELECTED ADVISORY  
LETTERS**

FOR THE YEAR

**2011**

**Lawrence G. Wasden**  
Attorney General

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2011 Idaho Att’y Gen. Ann. Rpt. 55

The Advisory Letter of January 21, 2011  
is found at:

2011 Idaho Att’y Gen. Ann. Rpt. 79

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## ATTORNEYS GENERAL OF IDAHO

GEORGE H. ROBERTS.....	1891-1892
GEORGE M. PARSONS .....	1893-1896
ROBERT McFARLAND .....	1897-1898
S. H. HAYS.....	1899-1900
FRANK MARTIN .....	1901-1902
JOHN A. BAGLEY .....	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

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## INTRODUCTION

Dear Fellow Idahoan:

Although 2011 was a difficult year financially, the State of Idaho's legal representation, through the Office of the Attorney General, was at its best.

The Office of the Attorney General represented the State in several 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 Affordable 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 continues to work with the Idaho State Board of Land Commissioners to ensure that the endowments of the State of Idaho achieve 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.

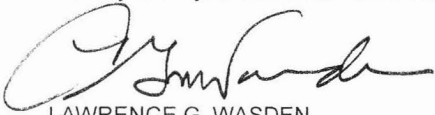
The Consumer Protection Division recovered \$7,563,698 for Idaho consumers and taxpayers. Importantly, the Consumer Protection Division has been at the forefront of protecting Idaho's homeowners throughout the foreclosure crisis. Within the past year, the Division has worked with 49 other states to bring about meaningful mortgage foreclosure relief through settlement of certain claims against major mortgage servicers. The Division has also continued its efforts in the ongoing claims surrounding the Tobacco Master Settlement Agreement, as well as efforts regarding average wholesale pricing within the pharmaceutical arena.

Like 2010, 2011 was difficult for my Office from a financial perspective. In spite of the record collections of the Consumer Protection Division, my Office's budget faced ongoing reductions, while addressing an increasing workload. This pressure is significant because 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 my website at <http://www.ag.idaho.gov> where you will find details about my Office and our work, including a variety of consumer and legal publications.

Thank you for your interest in Idaho's legal affairs.



LAWRENCE G. WASEN  
Attorney General

# ANNUAL REPORT OF THE ATTORNEY GENERAL

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## OFFICE OF THE ATTORNEY GENERAL LAWRENCE G. WASDEN ATTORNEY GENERAL 2011 STAFF ROSTER

### ADMINISTRATION

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

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

### DEPUTY ATTORNEYS GENERAL

Rob Adelson	Rebekah Cudé	Blair Jaynes	Cheryl Meade	Erick Shaner
Lawrence Allen	Timothy Davis	Joseph Jones	Melissa Moody	Phil Skinner
Stephanie Allig	Thomas Donovan	Kenneth Jorgensen	Megan Mooney	Clay Smith
LaMont Anderson	Peg Dougherty	Angela Kaufmann	Tyson Nelson	Jessica Smith
James Baird	Darrell Early	John Keenan	Charina Newell	Andrew Snook
Garrick Baxter	Lori Fleming	M. Scott Keim	Brian Nicholas	Nicholas Spencer
Matthew Beeter	Robert Follett	S. Kilminster-Hadley	Mark Olson	Russell Spencer
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Brian Benjamin	Cheryl George	Karl Klein	Michael Orr	David Stanish
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Dallas Burkhalter	Stephanie Guyon	Jessica Lorello	Kenneth Robins	Kathleen Trever
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Alan Conlogue	Krista Howard	Kendal McDevitt	Jeffrey Schrader	Mark Withers
Andrea Courtney	Donald Howell	John McKinney	Steve Schuster	David Young
		Michael McPeck		

### INVESTIGATORS

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

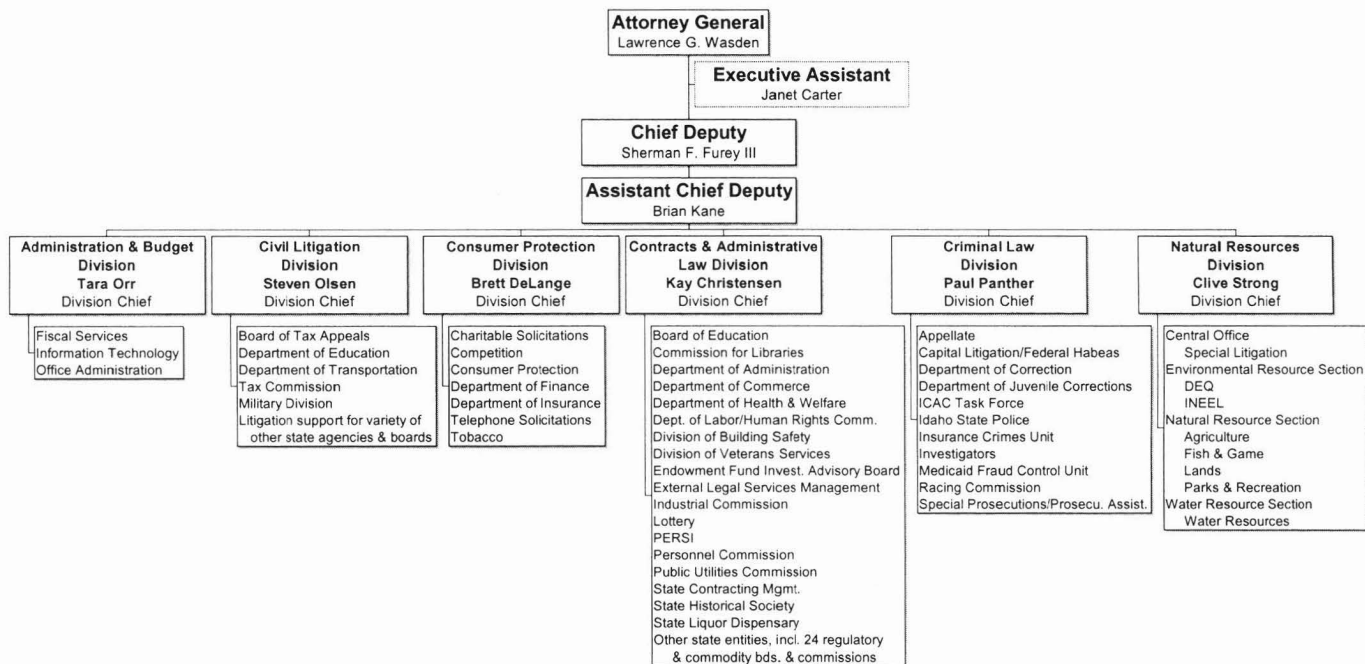
### PARALEGALS

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

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Mandy Ary	Renee Charlton	Eric Jensen	Roseann Newman	Aimee Stephenson
Renee Ashton	Robert Cooper	Cecil Jones	Frances Nix	Jodie Stoddard
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Casey Boren	Beth Harasimowicz	Lynn Mize	Nicole Romero	Kim Youmans
	Trudy Jackson		Dustin Russell	

# Office of the Idaho Attorney General Organizational Chart - 2012



**OFFICIAL OPINIONS  
OF  
THE ATTORNEY GENERAL  
FOR THE YEAR 2011**

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

**ATTORNEY GENERAL OPINION NO. 11-1**

To: Anne-Marie Kelso  
Office of the Prosecuting Attorney  
1130 Third Avenue North, # 105  
Payette, ID 83661

Per Request for Attorney General's Opinion

**QUESTIONS PRESENTED**

1. Whether the Oil and Gas Conservation Act, Idaho Code title 47, chapter 3, preempts local land use planning authority to authorize and regulate oil and gas well locations and conditions.
2. If the Oil and Gas Conservation Act does not preempt local land use ordinances completely, what matters remain subject to county planning and zoning authority?
3. What right does a county have with regard to the protection of ground water when regulating oil and gas exploration?

**LEGAL STANDARDS****A. Local Land Use Planning Act**

“With the enactment of [the Local Land Use Planning Act] in 1975, the legislature intended to give local governing boards broad powers in the area of planning and zoning.” White v. Bannock County Comm’rs, 139 Idaho 396, 400, 80 P.3d 332, 336 (2003). The stated purpose of the Local Land Use Planning Act, title 67, chapter 65, Idaho Code, (“LLUPA”) is to “promote the health, safety, and general welfare of the people of the state of Idaho” by, *inter alia*, “ensur[ing] that the important environmental features of the state and localities are protected,” “protect[ing] of prime agricultural, forestry, and mining lands for production of food, fibre, and minerals,” ensuring “that the development on land is commensurate with the physical characteristics of the land,” protecting “fish, wildlife, and recreation resources,” and “avoid[ing] undue water and air pollution.” Idaho Code § 67-6502.

The LLUPA requires local governments to “conduct a comprehensive planning process” that, among other things, analyzes “the intrinsic suitability of lands for uses such as agriculture, forestry, mineral exploration and extraction.” Idaho Code § 67-6508. In adopting comprehensive plans, local governments are required to “consider the effect the . . . comprehensive plan would have on the source, quantity and quality of ground water in the area.” Idaho Code § 67-6537(4). Zoning ordinances may “establish standards to regulate and restrict the height, number of stories, size, construction, reconstruction, alteration, repair or use of buildings and structures; percentage of lot occupancy, size of courts, yards, and open spaces; density of population; and the location and use of buildings and structures.” Idaho Code § 67-6511. Local governments may grant special use permits that attach conditions to particular developments as necessary to address the social, economic, fiscal and environmental effects of the proposed special use. Idaho Code § 67-6512.

Local governments may adopt ordinances imposing standards for public and private developments that address such things as building design, spacing, public access, landscaping, water systems, sewage systems, and drainage systems. Idaho Code § 67-6518. When local ordinances “impose higher standards than are required by any other statute or local ordinance, the provisions of [the local] ordinances . . . shall govern.” *Id.* State agencies are directed to “comply with all plans and ordinances adopted under this chapter unless otherwise provided by law.” Idaho Code § 67-6528.

## **B. Oil and Gas Conservation Act**

The Idaho Oil and Gas Conservation Act (hereinafter “OGCA”) was enacted in 1963 “to foster, encourage and promote the development, production and utilization of natural resources of oil and gas in the state of Idaho in such a manner as will prevent waste; to . . . provide for the . . . greater ultimate recovery of oil and gas [and encourage] the greatest possible economic recovery of oil and gas . . .” Idaho Code § 47-315. The OGCA designates the state board of land commissioners to act as the “oil and gas conservation commission” (hereinafter “Commission”) and vests the Commission with the authority to regulate:

- (1) the drilling and plugging of wells and all other operations for the production of oil or gas;
- (2) the shooting and treatment of wells;
- (3) the spacing or locating of wells;
- (4) operations to increase ultimate recovery, such as cycling of gas, the maintenance of pressure, and the introduction of gas, water, or other substances into a producing formation; and
- (5) the disposal of salt water and oil-field wastes. To classify and reclassify pools as oil, gas, or condensate pools, or wells as oil, gas, or condensate wells. To make and enforce rules, regulations, and orders reasonably necessary to prevent waste, protect correlative rights, to govern the practice and procedure before the commission, and otherwise to administer this act.

Idaho Code § 47-319. The overarching responsibility of the Commission is to prevent waste, Idaho Code § 47-316, a term defined to mean, in part, “the production of gas in quantities or in such manner as will unreasonably reduce reservoir pressure or unreasonably diminish the quantity of oil or gas that might ultimately be produced” from a given gas field. Idaho Code § 47-318(c).

The OGCA describes the Commission’s authority as follows:

The commission shall have and is hereby given jurisdiction and authority over all persons and property, public and private, necessary to enforce the provisions of this act, and shall have power and authority to make and enforce rules, regulations and orders, and do whatever may reasonably be necessary to carry out the provisions of this act. Any delegation of authority to any other state officer, board or commission to administer any and all other laws of this state relating to the conservation of oil and gas, or either of them is hereby rescinded and withdrawn and such authority is hereby unqualifiedly conferred upon the commission, as herein provided.



Section 47-317(b). The Statement of Purpose for the OGCA states that it was modified from a model act of the Interstate Oil Compact Commission, with four objects in mind: (1) ensure the preservation of information obtained from exploratory drilling, (2) prevent the waste of oil and gas, (3) prevent pollution of fresh water supplies, and (4) protect correlative rights in oil and gas pools. Statement of Purpose, House Bill 168 (Idaho Leg. 1963).

### **C. Preemption**

The Idaho Constitution, art. XII, sec. 2, provides that a county “may make and enforce, within its limits, all such local police, sanitary and other regulations,” but also provides that county regulations are preempted if “in conflict with . . . the general laws.” Explicit conflict, and hence preemption, exists where the county “expressly allow[s] what the state disallows, and vice versa.” Envirosafe Serv. of Idaho, Inc. v. County of Owyhee, 112 Idaho 687, 689, 735 P.2d 998, 1000 (1987). Conflict, and hence preemption, is implied “[w]here it can be inferred from a state statute that the state has intended to fully occupy or preempt a particular area, to the exclusion of [local governmental entities].” *Id.*, quoting Caesar v. State, 101 Idaho 158, 161, 610 P.2d 517, 520 (1980). Preemption is also implied “where uniform statewide regulation is called for due to the particular nature of the subject matter to be regulated.” *Id.*

### **D. Statutory Construction**

In construing a statute, Idaho courts attempt “to discern and implement the intent of the legislature.” Lelifeld v. Johnson, 104 Idaho 357, 367, 659 P.2d 111, 121 (1983). “Legislative intent can be ascertained by applying rules of grammatical construction or by a plain-language interpretation of the statute.” State v. Rhode, 133 Idaho 459, 463, 988 P.2d 685, 689 (1999). If the language of the statute is ambiguous, “courts variously seek edification from the statute’s legislative history, examine the statute’s evolution through a number of amendments, and perhaps seek enlightenment in the decisions of sister courts which have resolved the same or similar issues.” Lelifeld, 104 Idaho at 367, 659 P.2d at 121. If decisions of sister courts construe a statute later adopted by the Idaho Legislature, it is assumed that the Legislature was aware of, and intended to adopt, such construction. *Id.* at 369, 659 P.2d at 123. If such construction occurs later in time, it is appropriate to turn to such construction by sister states as persuasive authority. Corp. of Presiding

Bishop of Church of Jesus Christ of Latter-Day Saints v. Ada County, 123 Idaho 410, 418, 849 P.2d 83, 91 (1993).

## ANALYSIS

### I.

## THE EXPRESS PREEMPTION PROVISION IN THE OGCA DOES NOT APPLY TO LOCAL GOVERNMENTS

The plain language of the OGCA rescinds and withdraws “[a]ny delegation of authority to any other *state officer, board or commission* to administer any and all other laws of this state relating to the conservation of oil and gas. . . .” Idaho Code § 47-317(b) (emphasis added). While it is clear that the Legislature intended to grant to the Commission the power to administer all laws related to conservation of oil and gas to the exclusion of all other state officers, boards and commissions, it is less clear whether the Legislature intended to preempt the authority of local governments to regulate oil and gas wells. In such circumstances, principles of statutory interpretation must be applied to “identify the domain expressly pre-empted by that language.” Walker v. American Cyanamid Co., 130 Idaho 824, 828, 948 P.2d 1123, 1127 (1997) (internal quotation omitted) (discussing federal preemption).

The terms “state officer, board or commission” are not defined in the OGCA, but such terms, used elsewhere in the Idaho Code, are used to refer solely to elected and appointed officials of the State of Idaho. *See, e.g.*, Idaho Code § 34-1701 (setting forth three categories of public officers subject to recall: “state officers,” “county officers,” and “city officers”); § 59-831 (distinguishing state officers from county officers for bonding purposes). Such examples imply that the term “state officer, board or commission” would not be understood by the Legislature to include county officers or boards of county commissioners.

This is confirmed by other examples of explicit preemption in the Idaho Code that specifically identify counties among the preempted entities. *See, e.g.*, Idaho Code § 18-3302J (stating “no county, city, agency, board or any other political subdivision of this state may adopt or enforce any law, rule, regulation” regulating firearms and providing exceptions); § 18-4113

(“it is the intent of the legislature to preempt, to the exclusion of city and county governments, the regulation of the sale, loan, distribution, dissemination, presentation, or exhibition of material or live conduct which is obscene”); § 37-3305 (“[t]he provisions of this chapter shall be construed to preempt more stringent regulation of retail sales of pseudoephedrine products by any county, city or other political subdivision”); § 55-2605 (“[l]ocal governmental law is herein preempted and local governments shall not have authority to establish or enforce noise standards for outdoor sport shooting ranges”); § 61-1703 (under specific conditions, public utilities commission “is vested with the authority to preempt local government land use decisions pertaining to the construction of transmission facilities in national interest electric transmission corridors”).

In short, while the plain language of the OGCA explicitly precludes state entities other than the Commission from regulating oil and gas wells, there is nothing to indicate that the Legislature intended to preempt counties from regulating oil and gas wells. This interpretation can neither be confirmed nor denied by the OGCA’s legislative history, which contains no discussion of the preemption provision. Likewise, the evolution of the statute through the amendment process is unrevealing, since the relevant preemption language has not been amended since its initial enactment in 1963.

The Colorado Supreme Court, in interpreting a nearly identical preemption provision in the Colorado Oil and Gas Conservation Act, concluded that the plain language of the statute did not preempt local authority.<sup>1</sup> In Bd. of County Comm’rs v. Bowen/Edwards Assoc’s, 830 P.2d 1045 (Colo. 1992) (hereinafter “Bowen/Edwards”), the Court began its preemption analysis by examining the plain language of the preemption provision. The Court held that the preemption provision did not preempt county regulations since the rescission and withdrawal of authority to regulate oil and gas wells applied only to state officers and did “not include within its express terms *local* or *county* officers, boards, or commissions.” *Id.* at 1057. Thus, the Court concluded that the statute was “merely an effort to clarify that the only *state* administrative body with regulatory authority over oil and gas activities is the Oil and Gas Conservation Commission.” *Id.*

In reaching its conclusion, the Court also examined the purposes of the Colorado Oil and Gas Conservation Act, which are similar in substance to those of the OGCA, namely prevent waste, safeguard correlative rights, and

promote the development, production and utilization of oil and gas. *Compare* Colo. Rev. Stat. § 34-60-102(1) and Idaho Code § 47-315. After examining the preemption provision, the Court examined the powers vested in the Colorado oil and gas conservation commission, which included the power to “regulate the drilling, production, and plugging of wells, the shooting and chemical treatment of wells, the spacing of wells, and the disposal of salt water and oil field wastes.” 830 P.2d at 1049 (citing Colo. Rev. Stat. § 34-60-106(2)); *cf.* Idaho Code § 47-319 (similar provisions). The Court also examined the “extensive list of technical requirements” that the commission was authorized to enforce “relating to developmental and operational aspects of oil and gas production.” 830 P.2d at 1049. The Court concluded that neither the purposes of the Colorado Oil and Gas Conservation Act nor the scope of authorities vested in the commission compelled an interpretation at odds with the plain language of the preemption provision.

The rationale of the Colorado Supreme Court is consistent with the plain terms of Idaho Code § 47-317(b), and is consistent with the historical practice of the Idaho Legislature in explicitly naming local governments when expressing an intent to preempt local regulations. Given those facts, Idaho Code § 47-317(b) is likely to be interpreted as only precluding regulation of oil and gas wells by other state officers, boards, commissions and agencies, leaving intact county land use ordinances affecting the location, construction, and operation of oil and gas wells.

## II.

### **THE OGCA DOES NOT “OCCUPY THE FIELD” OF OIL AND GAS REGULATION TO THE EXTENT THAT PREEMPTION OF ALL LOCAL LAND USE PLANNING ORDINANCES IS IMPLIED**

When explicit language preempting local regulation is not present, preemption may still be implied if “the state has acted in the area in such a pervasive manner that it must be assumed that it intended to occupy the entire field of regulation.” Envirosafe Serv. of Idaho, 112 Idaho at 689, 735 P.2d at 1000. Regulations are “pervasive” if they set forth a “comprehensive statutory scheme” or act in “an all-encompassing fashion.” *Id.* at 690, 735 P.2d at 1001.

While the OGCA vests the Commission with broad authority to foster development of oil and gas resources and prevent waste, the areas to be regulated by the Commission are limited to technical aspects of well drilling and operation, such as the drilling, plugging, shooting, and spacing of wells, operations to increase recovery, including the introduction of gas, water, or other substances into a producing formation, and the disposal of salt water and oil field wastes. Idaho Code § 47-319. The Commission is “authorized and it is its duty to prevent waste of oil and gas and to protect correlative rights, and otherwise to administer and enforce this act . . . [it] has jurisdiction over all persons and property necessary *for that purpose*.” Idaho Code § 47-319(b) (emphasis added). The Commission’s general authority to prevent waste and protect correlative rights is accompanied by a laundry list of specific authorities that grants the Commission the power to regulate the sampling, drilling, metering, and testing of wells. Idaho Code § 47-319(d). Rules promulgated by the Commission must be “reasonably necessary to prevent waste, protect correlative rights, to govern the practice and procedure before the commission, and otherwise to administer this act.” Idaho Code § 47-319.

Noticeably missing from the Commission’s grant of authority is a general power to regulate oil and gas production to protect public health and welfare.<sup>2</sup> The absence of such authority, and the laundry list of technical aspects of oil and gas production to be regulated by the Commission, compels the conclusion that the Legislature did not intend to so completely occupy the field of oil and gas production as to exclude any application of local ordinances.

Courts from other states reviewing similar grants of authority to oil and gas commissions have likewise concluded that the application of local zoning ordinances to oil and gas wells is not completely excluded. In Bowen/Edwards, the Colorado Supreme Court concluded that the “enactment of a state statute addressing certain aspects” of oil and gas development and production did not indicate legislative intent to occupy the field and exclude county land use ordinances. 830 P.2d at 1058. While the state statutes “require[d] uniform regulation of the technical aspects of drilling, pumping, plugging, waste prevention, safety precautions . . . environmental restoration [and] the location and spacing of wells,” they were not, in the Court’s view, “so patently dominant over a county’s interest in land-use control, nor are the respective interests of both the state and the county so irreconcilably in con-

flict, as to eliminate by necessary implication any prospect for a harmonious application of both regulatory schemes.” *Id.*

Courts from other jurisdictions have noted that while zoning controls are “narrower” than oil and gas regulations “because they ordinarily do not relate to matters of statewide concern,” they are also “broader in terms of subject matter, as they deal with all potential land uses and generally incorporate an overall statement of community development objectives that is not limited solely to energy development [and] includes serving police power objectives relating to the safety and welfare of its citizens, encouraging the most appropriate use of land throughout the borough, conserving the value of property, minimizing overcrowding and traffic congestion, and providing adequate open spaces.” Huntley & Huntley, Inc. v. Borough Council, 964 A.2d 855, 865 (Pa. 2009). The breadth of regulation under the LLUPA is similarly broad. White, 139 Idaho at 400, 80 P.3d at 336. Given that the potential breadth of zoning regulations that may apply to oil and gas developments under the LLUPA exceeds the zone of subjects governed by the OGCA, a finding of legislative intent to occupy the field of regulation is unlikely.

### III.

#### **THE NEED FOR UNIFORM REGULATION OF OIL AND GAS DEVELOPMENT AND OPERATIONS DOES NOT EXCLUDE APPLICATION OF LOCAL LAND USE PLANNING ORDINANCES**

Preemption may also be implied where “uniform statewide regulation is called for due to the particular nature of the subject matter to be regulated” or is “fraught with such unique concerns and dangers to both the state and the nation that its regulation demands a statewide, rather than local, approach.” Envirosafe Serv. of Idaho, 112 Idaho at 691, 735 P.2d at 1002. The need for uniform regulation is more likely to be implied in the event of “unique importance and complexity of the subject matter.” *Id.*

A review of statutes and court decisions from other jurisdictions reveals a common understanding that while there is a need for unitary regulation of the technical aspects of oil and gas production at the state level in order to prevent waste and protect correlative rights, there is no similar need

for unified regulation of other aspects of oil and gas production, thus providing a window for application of local zoning ordinances that do not interfere with state objectives.

In Bowen/Edwards, the Colorado Supreme Court concluded that while a “unitary source of regulatory authority at the state level of government over the technical aspects of oil and gas development and production serves to prevent waste and to protect the correlative rights of common-source owners and producers,” the intent to consolidate state regulatory authority did not “expressly preempt any and all aspects of a county’s land-use authority over those areas of a county in which oil and gas activities are occurring or are planned.” 830 P.2d at 1058. The Court went on to explain the fundamental difference between the unitary state regulations and local land use ordinances:

While the governmental interests involved in oil and gas development and in land-use control at times may overlap, the core interests in these legitimate governmental functions are quite distinct. The state’s interest in oil and gas development is centered primarily on the efficient production and utilization of the natural resources in the state. A county’s interest in land-use control, in contrast, is one of orderly development and use of land in a manner consistent with local demographic and environmental concerns. Given the rather distinct nature of these interests, we reasonably may expect that any legislative intent to prohibit a county from exercising its land-use authority over those areas of the county in which oil development or operations are taking place or are contemplated would be clearly and unequivocally stated. We, however, find no such clear and unequivocal statement of legislative intent in the Oil and Gas Conservation Act.

*Id.* at 1057.

In Penneco Oil Co. v. County of Fayette, 4 A.3d 722 (Pa. 2010), the Pennsylvania Supreme Court found that zoning ordinances and oil and gas regulations can coexist because the traditional purposes of zoning are distinct from the purposes of oil and gas regulatory provisions. *Id.* at 727. So long

as the zoning ordinance does not “regulate oil and gas wells in the same manner as the [statewide oil and gas act],” or attempt to “enact a comprehensive scheme relative to the oil and gas development within the county but instead reflect traditional zoning regulations that identify which uses are permitted in different areas of the locality,” preemption is not implied. *Id.* at 732-33.

It is also notable that the 2004 Model Oil and Gas Conservation Act drafted by the Interstate Oil and Gas Compact Commission includes the following model provision regarding the scope of an oil and gas commission’s authority:

SECTION 4. GENERAL AUTHORITY OF THE [COMMISSION].

The [commission] shall have exclusive authority [, subject only to any applicable local zoning and land-use regulations]:

- (a) to regulate an oil and gas operation;
- (b) to prevent the waste of oil, gas, or by-products;
- (c) to protect correlative rights . . . .

Model Oil and Gas Conservation Act, Interstate Oil and Gas Compact Comm’n (2004)(<http://www.iogcc.state.ok.us/Websites/iogcc/docs/ModelAct-Dec2004.pdf>) (bracketed material in original). The model act’s recognition that states may opt to explicitly defer to local zoning ordinances confirm that state objectives for oil and gas production can be fulfilled without preempting local zoning and land use regulations. Such reasoning is applicable to the OGCA, even though the OGCA was based on an earlier version of the model act, since the subjects regulated in the model act and the OGCA are similar. Indeed, if anything, the subjects regulated in the OGCA are narrower in scope than the subjects regulated by the 2004 model act, leaving a broader area of subjects open for local regulation.

The cited authorities all support the proposition that the need for unitary regulation of the technical aspects of oil and gas development and production does not require preemption of local zoning and land use regulations addressing objectives that are not in conflict with the purposes and objectives of the OGCA.



#### IV.

### **EVEN THOUGH NOT PREEMPTED GENERALLY, A LOCAL LAND USE ORDINANCE IS PREEMPTED IF AN ACTUAL OR OPERATIONAL CONFLICT EXISTS BETWEEN THE ORDINANCE AND THE OGCA**

You asked if the OGCA is not a complete preemption, what matters remain subject to county planning and zoning authority? You also asked what authority does a county possess with regard to the protection of ground water when regulating oil and gas exploration?

As a general matter, local ordinances cannot permit what a state statute or regulation forbids or prohibit what state enactments allow. Envirosafe Serv. of Idaho, 112 Idaho at 689, 735 P.2d at 1000. For example, in Town of Frederick v. North American Res. Co., 60 P.3d 758 (Colo. Ct. App. 2002), the Colorado Court of Appeals struck down portions of a city ordinance purporting to impose setback and noise abatement requirements on oil and gas operations, since the city's requirements exceeded setback and noise abatement requirements in state oil and gas regulations. *Id.* at 765.

Actual conflict may also exist where a local ordinance obstructs the execution of the full purposes and objectives of the Legislature. See Hines v. Davidowitz, 312 U.S. 52, 67-68, 61 S. Ct. 399, 404, 85 L. Ed. 581 (1941) (state statute preempted if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress"). For example, the Colorado Supreme Court, on the same day it held that local land use planning was not preempted generally in Bowen/Edwards, issued a companion decision addressing a city ordinance forbidding any oil or gas wells within city limits. The Court held that allowing the city to prohibit all oil and gas development in a specified area would conflict operationally with state statutes vesting decisions about location and spacing with the state oil and gas commission and would thwart the state objective of avoiding waste and protecting correlative rights:

[I]t is often necessary to drill wells in a pattern dictated by the pressure characteristics of the pool, and because each well will only drain a portion of the pool, an irregular drilling

pattern will result in less than optimal recovery and a corresponding waste of oil and gas. Moreover, an irregular drilling pattern can impact the correlative rights of the owners of oil and gas interests in a common source or pool by exaggerating production in one area and depressing it in another.

Voss v. Lundvall Bros., Inc., 830 P.2d 1061, 1067 (Colo. 1992). The Court cautioned that preemption of the city's total ban on drilling did not mean all local ordinances would be preempted, since many local ordinances "do not frustrate and can be harmonized with the development and production of oil and gas in a manner consistent with the stated goals" of state oil and gas legislation. *Id.* at 1069. This principle is embodied in the LLUPA, which provides that local governments may set standards for such things as building design, open spaces, parking spaces, water systems, sewer systems, etc., and that such standards shall govern if "higher" than standards imposed by statute. Idaho Code § 67-6518. Local standards may include provisions to "avoid undue water and air pollution." Idaho Code § 67-6502(k). While "[c]ounty ordinances cannot conflict with state statutes and are void to the extent that they do . . . [c]ounty ordinances can . . . complement or supplement state statutes regulating water quality to the extent they are not in conflict." Idaho Dairymen's Ass'n v. Gooding County, 148 Idaho 653, 660, 227 P.3d 907, 914 (2010). Thus, local governments can impose standards upon oil and gas developments of the type described in Idaho Code § 67-6518, including standards to protect ground water, if such standards do not create operational conflicts with OGCA provisions, rules, or orders of the Commission, or otherwise frustrate the stated goals and purposes of the OGCA.

It would be premature, however, to apply the above guidelines to further define the matters that the county may regulate without conflicting with the OGCA or regulations promulgated by the Commission. In most instances, determining preemption requires a searching factual inquiry, as addressed by the Colorado Supreme Court in Bowen/Edwards:

[T]here may be instances where the county's regulatory scheme conflicts in operation with the state statutory or regulatory scheme. For example, the operational effect of the county regulations might be to impose technical conditions

on the drilling or pumping of wells under circumstances where no such conditions are imposed under the state statutory or regulatory scheme, or to impose safety regulations or land restoration requirements contrary to those required by state law or regulation. To the extent that such operational conflicts might exist, the county regulations must yield to the state interest. Any determination that there exists an operational conflict between the county regulations and the state statute or regulatory scheme, however, must be resolved on an ad-hoc basis under a fully developed evidentiary record.

830 P.2d at 1060; *see also* Town of Frederick, 60 P.3d at 764 (affirming trial court's fact-based determination that town's special use permit and building permit requirements for oil and gas wells did not create an "operational conflict" in the absence of corresponding state rules); Bd. of County Comm'rs v. BDS Int'l, 159 P.3d 773 (Colo. Ct. App. 2006) (evidentiary hearing needed to determine whether operational conflicts existed between oil and gas commission rules and county regulations imposing conditions on oil and gas developments pertaining to water quality, soil erosion, wildlife, vegetation, livestock, cultural and historic resources, geologic hazards, wildfire protection and recreation impacts).

Here, with no factual record, it is not practical to determine what aspects of pending gas development projects may be regulated by Payette County. A response to your questions would require a detailed inquiry into the nature, purpose, and objective of the particular zoning ordinance, and a determination of its operational effects on oil and gas development.

## CONCLUSION

Because the OGCA does not express, either explicitly or impliedly, an intent to preempt the operation of local land use planning authorities, such authorities may be applied to oil and gas developments if done in a manner consistent with the goals, objectives, and authorities of the Local Land Use Planning Act and in the absence of operational conflicts between the zoning ordinance and the OGCA or Commission rules or orders.

## AUTHORITIES CONSIDERED

### 1. Idaho Constitution:

Art. XII, § 2.

### 2. Idaho Code:

§ 18-3302J.

§ 18-4113.

§ 34-1701.

§ 37-3305.

Title 47, chapter 3.

§ 47-315.

§ 47-316.

§ 47-317(b).

§ 47-318(c).

§ 47-319.

§ 47-319(b).

§ 47-319(d).

§ 55-2605.

§ 59-831.

§ 61-1703.

Title 67, chapter 65.

§ 67-6502.

§ 67-6502(k).

§ 67-6508.

§ 67-6511.

§ 67-6512.

§ 67-6518.

§ 67-6528.

§ 67-6537(4).

### 3. United States Supreme Court Cases:

Hines v. Davidowitz, 312 U.S. 52, 61 S. Ct. 399, 85 L. Ed. 581 (1941).

**4. Idaho Cases:**

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

Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Ada County, 123 Idaho 410, 849 P.2d 83 (1993).

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

Idaho Dairymen's Ass'n v. Gooding County, 148 Idaho 653, 227 P.3d 907 (2010).

Leliefeld v. Johnson, 104 Idaho 357, 659 P.2d 111 (1983).

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

Walker v. American Cyanamid Co., 130 Idaho 824, 948 P.2d 1123 (1997).

White v. Bannock County Comm'rs, 139 Idaho 396, 80 P.3d 332 (2003).

**5. Other Cases:**

Bd. of County Comm'rs v. BDS Int'l, 159 P.3d 773 (Colo. Ct. App. 2006).

Bd. of County Comm'rs v. Bowen/Edwards Assoc's, 830 P.2d 1045 (Colo. 1992).

Huntley & Huntley, Inc. v. Borough Council, 964 A.2d 855 (Pa. 2009).

Penneco Oil Co. v. County of Fayette, 4 A.3d 722 (Pa. 2010).

Town of Frederick v. North American Res. Co., 60 P.3d 758  
(Colo. Ct. App. 2002).

Voss v. Lundvall Bros., Inc., 830 P.2d 1061 (Colo. 1992).

**6. Other Authorities:**

Colorado Oil and Gas Conservation Act, Colo. Rev. Stat. 34-60-100 *et seq.*  
Colo. Rev. Stat. § 34-60-102(1).  
Colo. Rev. Stat. § 34-60-105(1).  
Colo. Rev. Stat. § 34-60-106(2).  
Colo. Rev. Stat. § 34-60-106(2)(d).  
Model Oil and Gas Conservation Act, Interstate Oil and Gas Compact  
Comm'n (2004).  
Statement of Purpose, House Bill 168 (Idaho Leg. 1963).

DATED this 21st day of January, 2011.

LAWRENCE G. WASDEN  
Attorney General

**Analysis by:**

STEVEN STRACK  
Deputy Attorney General

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<sup>1</sup> Colorado Rev. Stat. § 34-60-105(1) provides, in part:

The commission has jurisdiction over all persons and property, public and private, necessary to enforce the provisions of this article, and has the power to make and enforce rules, regulations, and orders pursuant to this article, and to do whatever may reasonably be necessary to carry out the provisions of this article. Any delegation of authority to any other state officer, board, or commission to administer any other laws of this state relating to the conservation of oil or gas, or either of them, is hereby rescinded and withdrawn and such authority is unqualifiedly conferred upon the commission, as provided in this section.

<sup>2</sup> *Cf.* Colo. Rev. Stat. § 34-60-106(2)(d) (Colorado oil and gas commission to regulate “[o]il and gas operations so as to prevent and mitigate significant adverse environmental impacts on any air, water, soil, or biological resource resulting from oil and gas operations to the extent necessary to protect public health, safety, and welfare, including protection of the environment and wildlife resources, taking into consideration cost-effectiveness and technical feasibility”).

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**PLANNING AND ZONING**

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**ZONING**

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**ATTORNEY GENERAL'S  
SELECTED  
INFORMAL GUIDELINES  
FOR THE YEAR 2011**

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

February 3, 2011

Don Drum, Executive Director  
PERSI  
P.O. Box 83720  
Boise, ID 83720-0078

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

Re: PERSI 1% Mandatory Cost of Living Adjustment (COLA)

Dear Mr. Drum:

When the inflationary requirements are met, Idaho Code § 59-1355 of the Public Employee Retirement System of Idaho (PERSI) statutes provides for a 1% mandatory cost of living adjustment to retiree benefit payments (the “1% COLA”).<sup>1</sup>

**QUESTIONS PRESENTED**

1. Do current PERSI retirees have a vested (contractually protected) right to the 1% COLA?
2. Do non-retiree members of PERSI have a vested right to the 1% COLA (after retirement)?
3. If there is a vested right to the 1% COLA, under what circumstances, if any, can the 1% COLA be eliminated for either current PERSI retirees or non-retiree PERSI members?

**CONCLUSIONS**

1. Current PERSI retirees have a vested right to the 1% COLA.
2. A non-retiree PERSI member has a vested right to the 1% COLA (after retirement) if he has worked for a legally significant time in reliance on the belief that he will receive the COLA. If a court were

to determine, as a matter of law, that the statutory vesting period (five years) was legally significant, a member who has worked for five years could have a protected right to the 1% COLA.

3. Assuming the COLA is a vested right, it is subject only to reasonable modification for the purpose of keeping the pension flexible and maintaining its integrity.

### ANALYSIS

There are few reported Idaho cases related to public pensions. From these cases, it is clear that the Idaho Supreme Court has found that:

- Public pension benefits are a form of deferred compensation. Deferred compensation arrangements lead to reasonable expectations on the part of participants and such reasonable expectations are vested and entitled to contractual protection.
- Contractual protection begins when a person has worked for a legally significant time in reliance on the benefit. A person need not work all the way to retirement for the protection to begin.
- Contractually protected (vested) rights are subject only to reasonable modification for the purpose of keeping the pension flexible and maintaining its integrity.
- Whether a person has worked long enough to have a protected right and whether a modification to that right would be sustained as reasonable would require a fact-specific analysis.<sup>2</sup>

Since the Idaho cases are few in number, a brief review of the cases is informative.

In Hanson v. City of Idaho Falls, 92 Idaho 512, 446 P.2d 634 (1968), the Idaho Supreme Court rejected an argument that the Police Retirement Fund Act<sup>3</sup> violated art. VIII, sec. 3 of the Idaho Constitution limiting debt of political subdivisions. The Court found that the Act was within the exception for “ordinary and necessary expenses.” In so holding, the Court stated that it “could not be argued in good faith” that the weekly/monthly pay of police did not constitute an ordinary and necessary expense. Thus, the Court rejected

plaintiffs' argument that because a small portion (4%) of this pay was withheld and contributed to the Idaho Falls police retirement fund, it did not constitute compensation. Rather, the Court stated that the pension plan funded by the 4% "must be considered compensatory in nature." In so stating, the Court rejected the gratuities rule of public pensions (that a pension is a gift from the sovereign subject to change at any time) in favor of "the better reasoned rule in most American jurisdictions," which is that "the rights of the employees in pension plans such as Idaho's Retirement Fund are vested, subject only to reasonable modification for the purpose of keeping the pension system flexible and maintaining its integrity." *Id.* at 514, 446 P.2d at 636. The Court further spoke to the expectations aspect of public pensions when it stated "[w]e expect much from our law enforcement staffs; we should not lightly impair their expectations, or the expectations of their widows and children, for whatever additional compensation to which they are entitled under the P.R.F. Act." *Id.* at 515, 446 P.2d at 637. *See also* Booth v. Sims, 193 W. Va. 323, 338 (1995) ("the deferred compensation embodied in a pension entitlement creates a reliance interest in the state employee that the law of contracts protects").<sup>4</sup>

In Engen v. James, 92 Idaho 690, 448 P.2d 977 (1969), there was a dispute about the applicability of a 1965 statutory change to Engen, a police member of the Coeur d'Alene Police Retirement Fund, who was receiving a disability retirement in 1965 but was not permanently retired under the statute. Rejecting a jurisdictional challenge because the statute was repealed in 1967, the Court cited Hanson approvingly, stating "this court recently held that 'the rights of the employees in pension plans such as Idaho's Retirement Fund Act are vested, subject only to reasonable modification for the purpose of keeping the pension system flexible and maintaining its integrity.'" 92 Idaho at 693, 448 P.2d at 980. With regard to Engen, the Court stated that "[i]f respondent had acquired pension rights under I.C. § 50-2116(i), those existing rights could not be taken from him by a later act of the legislature. This follows from the compensatory nature of pension plans, as this court held in [Hanson]." *Id.*

In 1976, the Court decided Lynn v. Kootenai County Fire Protective District #1, 97 Idaho 623, 550 P.2d 126 (1976). Lynn involved a constitutional challenge to a change to the Firemen's Retirement Fund (FRF) statute, title 72, chapter 14, Idaho Code. Mr. Lynn had over 23 years of service as a paid fireman when he retired in September of 1974 because of a non-service

disability. He challenged the constitutionality of a change to the FRF statutes that reduced his retirement allowance from what it would have been had he retired prior to the effective date of the amendment (which was January 1, 1974). The Court held that the amendment violated the equal protection clause of the Fourteenth Amendment in that it resulted in firemen with less service receiving more benefits. The Court also stated:

It should be noted that S.L.1973, Ch. 105, s 3, may have unconstitutionally infringed upon Lynn's vested rights to retirement benefits from the Firemen's Retirement Fund. This court has adopted the rule 'the rights of the employees in pension plans such as Idaho's Retirement Fund Act are vested, subject only to reasonable modification for the purpose of keeping the pension system flexible and maintaining its integrity.' Hanson v. City of Idaho Falls, 92 Idaho 512, 514, 446 P.2d 634, 636 (1968). See, Pearson v. County of Los Angeles, 49 Cal.2d 523, 319 P.2d 624 (1957); Bakenhus v. City of Seattle, 48 Wash.2d 695, 296 P.2d 536 (1956).

Lynn is entitled to retirement benefits pursuant to I.C. § 72-1429F as it existed prior to amendment in 1973. Therefore, we remand the case to the Industrial Commission and order the Commission to enter an award of benefits pursuant to statute.

97 Idaho at 627, 550 P.2d at 130 (emphasis added).

In the 1983 case of Nash v. Boise City Fire Department, 104 Idaho 803, 663 P.2d 1105 (1983), the Idaho Supreme Court considered whether a statutorily imposed 3% cap on the cost of living adjustment (COLA) could be applied to Nash, who had been a full-time firefighter from 1953 to October of 1978 and who retired after the effective date of the change (July 1, 1978). Prior to the legislative change, the COLA was determined in relation to the increase or decrease in wages paid to working firemen, but there was no cap. The question before the Court was whether the new 3% cap applied to firefighters retiring after July 1, 1978 "who earned benefits by virtue of service prior to that date." 104 Idaho at 803, 663 P.2d at 1105. The Court held that the 3% cap could not be applied to Nash. *Id.* at 808, 663 P.2d at 1110.

In considering the nature of public employee pension rights in Idaho, the Nash court stated that the “issue presented requires a determination of whether the level of a public employee’s rights in a pension plan which has vested may be unilaterally altered by a subsequent legislative act.” *Id.* at 804, 663 P.2d at 1106. The Court made specific reference to Hanson and Engen:

In *Hanson v. City of Idaho Falls*, 92 Idaho 512, 514, 446 P.2d 634 (1968), this court placed Idaho squarely in line with Massachusetts and other jurisdictions which reject both the gratuity and the strict contract theory, holding further that reasonable modification can be made to keep the plan flexible:

“The better reasoned rule in most American jurisdictions today is that the rights of the employees in pension plans such as Idaho’s Retirement Fund Act are vested, subject only to reasonable modification for the purpose of keeping the pension system flexible and maintaining its integrity. [Citations omitted.] Since the employee’s rights are vested, the pension plan cannot be deemed to provide gratuities. Instead it must be considered compensatory in nature.”

In *Engen v. James*, 92 Idaho 690, 693, 448 P.2d 977 (1969), we held that the legislature could not by later act take away vested retirement rights of a Coeur d’Alene policeman, stating,

“Thus, if respondent had acquired pension rights under I.C. § 50-2116(i), those existing rights could not be taken from him by a later act of the legislature. This follows from the compensatory nature of pension plans, as this court held in [*Hanson*].”

104 Idaho at 806, 663 P.2d at 1108 (emphasis added; internal citations omitted). See also Mickey v. Mickey, 292 Conn. 597, 620-621 (2009) (“[p]ension benefits represent a form of deferred compensation for services rendered.... [T]he employee receives a lesser present compensation plus the contractual



right to the future benefits payable under the pension plan.” (Citations omitted; internal quotation marks omitted.)

The Nash court quoted at some length from Hanson, in which the Idaho Supreme Court quoted with approval the reasoning of a 1958 California case:

*Abbott v. City of San Diego*, 165 Cal.App.2d 511, 332 P.2d 324 (Cal.App.1958), cited in *Hanson* concerned a modification of a pension plan, changing it from a plan whereunder the benefit fluctuated with prevailing salary scales to a plan for payment on a fixed formula basis. The court held that the modifications could not be applied to firemen employed before the effective date of the modification. The court stated at 332 P.2d 328:

““To be sustained as reasonable, alterations of employees’ pension rights must bear some material relation to the theory of a pension system and its successful operation, and changes in a pension plan which result in disadvantage to employees should be accompanied by comparable new advantages.’ *Allen v. City of Long Beach*, 45 Cal.2d 128, 131, 287 P.2d 765, 767. ‘ \* \* \* it is advantage or disadvantage to the particular employees whose own contractual pension rights, already earned, are involved which are the criteria by which modifications to pension plans must be measured’ (*Abbott v. City of Los Angeles*, 50 Cal.2d 438, 326 P.2d 484, 489)....”

104 Idaho at 806, 663 P.2d at 1108 (emphasis added). The Nash court further cited Abbott:

The pension fund in *Abbott* argued, as the Fund here argues, that the modification was necessary to keep the fund flexible and actuarially solvent. The court rejected this argument, stating,

“This argument neglects consideration of the requirement that any such change must be reasonable and must be related to the integrity of the system as applied to the vested rights under consideration. [Citations] There is no showing in the instant case that the amendments under consideration ‘bear any material relation to the integrity or successful operation or to the preservation or protection of the *pension program applicable to these plaintiffs*.’” (Emphasis in original.) *Id.* 332 P.2d at 330.

104 Idaho at 806, 663 P.2d at 1108 (emphasis added).

The Nash court also relied on a Massachusetts case from 1981, Dullea v. Massachusetts Bay Transportation Authority, 421 N.E.2d 1228 (Mass. App. 1981). Citing Dullea, the Nash court stated that “an employee’s rights to a pension will not vest until he has worked for a legally significant period of time in reliance on the belief that he will be protected by a pension.” 104 Idaho at 807, 663 P.2d at 1109. The Nash court rejected Appellants’ reliance on cases from Louisiana and Florida cited for the proposition that modifications acting to the detriment of the employee can be made without providing corresponding benefits, stating “[t]hose cases involved jurisdictions where the employee’s rights do not vest until retirement.” *Id.* at 808, 663 P.2d at 1110.

After this discussion of the guiding principles, the Court applied them to Mr. Nash’s case, first noting that:

- (1) The rights of Nash are unquestionably vested, he having worked twenty-five years, the last fifteen of which included the period when the pension plan provided for a fluctuating formula free of the 3% “cap.”<sup>5</sup>
- (2) The Firemen’s Retirement Fund is not insolvent or unable to meet its obligations either now or in the near future.
- (3) The Fund, assuming the present levels of income to it, will grow for fifteen or twenty years, then level off and then become zero within another ten years. (It would appear the

Fund's growth period will include the period of Nash's life expectancy.)

Under these facts, the Court held that the 3% cap could not be applied to Nash. *Id.* See also Board of Trustees v. Carenbauer, 211 W. Va. 602, 618 (2002) (where police officer had been a contributing member of plan for 12 years prior to statutory amendment at issue, although he was not yet eligible to retire, he detrimentally relied on the plan's prior provisions). Implicit in the holding in Nash is that the Court recognized that the COLA is part of the pension contract. See also Calabro v. City of Omaha, 247 Neb. 955, 962-963 (1995).<sup>6</sup>

The Nash court specifically stated that it was not adopting two rules, apparently enunciated in Dullea:

The first is the suggestion in Dullea that the government can reduce benefits when the plan becomes "financially burdensome" to an employer. Once the employee's rights have vested, it is not unreasonable to expect that under some circumstances an increased level of employer contribution (requiring increased tax levies) might be required without looking to increased employee contributions or a reduction of benefits.

Conversely, there can be extraordinary circumstances where the employee may be required to increase his contributions without a corresponding increase in benefits in order to preserve the financial integrity of the system. However, those circumstances are not presented by this record.

104 Idaho at 808, 663 P.2d at 1110.

In 1988, the Idaho Supreme Court considered a public pension issue directly involving PERSI. In McNichols v. Public Employee Retirement System of Idaho, 114 Idaho 247, 755 P.2d 1285 (1988), the plaintiffs had been misclassified for many years by their employer as police officer members. Classification as a police officer member requires the member and the employer pay a higher contribution rate than is paid for and by non-police

officer members (called general members). Police officer members can retire earlier than general members with full pension benefits.

In 1985, the Idaho Legislature amended the definition of police officer member to delineate various specific employee positions to be included within that definition. Neither of the plaintiffs' positions was included in the statutory definition of police officer. Plaintiffs argued that the legislative change did not satisfy the tests of Hanson and Nash. The Court acknowledged that Idaho had adopted the compensatory theory of public pension plans and that Nash was a correct application of that theory. 114 Idaho at 249, 755 P.2d at 1287. However, the Court rejected plaintiffs' argument that the definitional change violated Hanson and Nash, finding that neither of those cases dealt with the issue before it of whether the state can reduce, on a prospective basis, the "rate at which the employees earn retirement benefits." *Id.* at 248, 755 P.2d at 1286.

While the McNichols court phrased the issue in terms of whether the Legislature could prospectively reduce the rate at which an employee earns retirement benefits, the Court's actual holding does not shed significant light on what exactly a Legislature could do on a prospective basis in this regard. The Court discussed at length the fact that the plaintiffs were misclassified for years and so the prospective classification of them as general members (as opposed to police officer members) was not to be questioned. "It does not seem logical to hold that once an administrative agency misinterprets a legislative mandate, the legislature is powerless to alter or amend the misinterpretation. Thus, prospectively from July 1, 1985, Smith and McNichols would continue to earn retirement benefits, but only at the general member rate, and not at the rates previously earned while classified as a 'police officer member.'" *Id.* at 251, 755 P.2d at 1289.

The McNichols court was not faced with the question of whether the Legislature could modify previously earned benefits since the statute at issue provided that no retroactive changes would result. "[T]he earned and accrued benefits of McNichols and Smith are preserved by statute, even if initially accrued in error." *Id.*<sup>7</sup> The Court did not discuss what other changes, besides correcting an earlier misclassification, might constitute an acceptable prospective change. While McNichols can be cited for the proposition that the Legislature can modify the rate at which employees accrue future bene-

fits, it is not clear what that statement might mean if and when the issue were something beyond the prospective classification as a police officer member versus a general member.<sup>8</sup>

**A. Current PERSI Retirees Have a Contractual Right to the 1% COLA**

Based on the Idaho Supreme Court's holdings discussed above, in particular its holding in Nash, it is the opinion of this author that current PERSI retirees have a contractual right to the 1% COLA. The Court in Nash held that a firefighter who retired after the statutory change at issue had a right to the COLA. A person who retired prior to a statutory change would have at least as protected a right if not better.<sup>9</sup> See, e.g., Allen v. Board of Administration, 34 Cal.3d 114, 121 (1983) (as to retired employees, the government's power to change a pension may be even more restricted (than for current employees), the retiree being entitled to the fulfillment without detrimental modification of the contract which he already has performed); Andrews v. Anne Arundel County, Maryland, 931 F. Supp 1255, 1265 (D. Md. 1996) *aff'd* 113 F.3d 1175 (4th Cir), *cert. denied* 522 U.S. 1015, 118 S. Ct. 600, 139 L.Ed.2d 489 (1997) (a diminution of pension benefits is more likely than not an even *more* substantial impairment than a diminution of annual salary because the individual receiving pension benefits is typically already living on a reduced income as compared to her pre-retirement earnings. Thus, a decrease in benefits would potentially have a greater impact).<sup>10</sup>

A non-retiree PERSI member has a contractually protected right to the 1% COLA if he has worked for a legally significant time in reliance on the belief that he will receive the 1% COLA. In Lynn, the plaintiff had 23 years of service. In Nash, the plaintiff had 25 years of service. In neither case did the Court say specifically how much service would be enough to satisfy that requirement, and the Court's analysis and holdings suggest that the determination would be made on a case-by-case basis. However, neither case addressed what effect, if any, a statutory vesting period would have on the analysis. If the PERSI statutory five-year vesting period were determined, as a matter of law, to be a legally significant time, a member with five years' of credited service could have a contractually protected right to the 1% COLA. See Booth v. Sims, 193 W. Va. at 340 ("[l]ine drawing in this ... regard must be made on a case-by-case basis, but after ten years of state service detrimental reliance is presumed.")

When rights in a pension plan are vested (afforded contractual protection), the Legislature may modify those rights only if the modifications are reasonable and are necessary to keep the fund flexible and to maintain the fund's integrity. To be reasonable, alterations must bear some material relation to the theory of a pension system and its successful operation and changes in a plan which disadvantage employees should be accompanied by comparable new advantages to the particular employee being affected. Nash, 104 Idaho at 806, 663 P.2d at 1108. The validity of a legislative modification to the COLA statute would require factual findings and determinations regarding the reasonableness of the modification and its necessity for maintaining the integrity of the retirement fund.

Nash provides some insight into how an Idaho court would apply the "reasonable modification/necessary to keep the fund flexible and to maintain its integrity" criteria. In Nash, the Fund had argued that the cap was needed to keep the fund flexible and actuarially solvent. The Nash court rejected this argument, specifically noting that the Fund itself was neither insolvent nor unable to meet its obligations "either now or in the near future" and that it would be able to pay benefits for the period of Nash's life expectancy. Based on Nash, it appears that for a statute eliminating the 1% COLA to be found reasonable (vis-à-vis current retirees and those non-retiree members who had worked a "legally significant" period in reliance), the PERSI Fund would have to be insolvent or unable to meet current or near future obligations. That the COLA might be considered financially burdensome was not deemed sufficient to warrant modification by the Nash court.<sup>11</sup>

### **B. Any Challenge to a Change to the COLA Statute That Would Reduce or Eliminate the 1% COLA for Retirees or Non-Retiree Members Would Likely Include an Impairment Claim**

If a change to the COLA statute were made that would reduce or eliminate the 1% COLA for retirees or non-retiree members, any challenge would likely include an impairment claim based on the contract clauses of the U.S. and Idaho Constitutions (Article I, Section 10 of the U.S. Constitution, and art. I, sec. 16 of the Idaho Constitution, prohibiting states from passing laws impairing contractual obligations). While not specifically articulated as such, the Court's analysis in Nash is analogous to a constitutional contractual impairment analysis. Consideration of Nash in that context, therefore, may

provide useful insight. *See also Engen*, 92 Idaho at 693, 448 P.2d at 980 (referring to rights being taken away by legislative act).

When an impairment claim is made, courts generally use a three-pronged analysis in reviewing the claim. The first question involves the existence of a contract (is there a contract, when was it formed, and what are its terms). If a contract exists, the court next analyzes whether the challenged state act substantially impairs the contract. If a substantial impairment is found, the court considers whether the impairment can be justified by an important public purpose. *See generally United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, 97 S. Ct. 1505, 52 L. Ed.2d 92 (1977); *General Motors Corp. v. Romein*, 503 U.S. 181, 186, 112 S. Ct. 1105, 1109, 117 L. Ed.2d 328 (1992).

In general, a statute is itself treated as a contract when the language and circumstances evince a legislative intent to create private rights of a contractual nature enforceable against the state. *United States Trust*, 431 U.S. at 17, n. 14. Legislation that deprives a person of the benefit of a contract, or adds new duties or obligations, necessarily impairs the contract. *Northern Pac. Ry. Co. v. State of Minnesota*, 208 U.S. 583, 591, 28 S. Ct. 341, 343, 52 L. Ed. 630 (1908). *See also Curr v. Curr*, 124 Idaho 686, 692, 864 P.2d 132, 138, n. 3 (1993) (internal citations omitted) (a legislative act impairs the obligation of a contract when it attempts to take from a party a right to which he is entitled by the contract or which deprives him of the means of enforcing the right). An impairment appears to be substantial where the right abridged was one that induced the parties to contract in the first place or where the impaired right was one on which there had been reasonable and specific reliance. *Baltimore Teachers Union v. Mayor and City Council of Baltimore*, 6 F.3d 1012, 1017 (4th Cir. 1993), *cert. denied* 510 U.S. 1141, 114 S. Ct. 1127, 127 L. Ed.2d 435 (1994). To be justified by an important public purpose, the challenged action must be reasonable and necessary to serve that purpose. *City of Omaha*, 247 Neb. at 969 (citing *United States Trust*). To be reasonable, the action must have a material relation to the theory of the pension system and its successful operation, and any disadvantages created by a change should be accompanied by comparable new advantages. The necessity inquiry is tested at two levels: (i) whether a less drastic modification was available to accomplish the purpose; and (ii) whether the government could have adopted alternative means to achieve its goals (a means that did not involve changing the contract). *City of Omaha*, 247 Neb. at 969.

Reviewing Nash with an eye toward a contract impairment analysis, the following conclusions appear reasonable:

- The Idaho Supreme Court has apparently determined that a statutory contract does exist for retirees and for those persons who have worked for a legally significant period of time in reliance on the benefit. Under Nash, the contract included a COLA and the COLA was a previously earned benefit. *See also Strunk v. Public Employees Retirement Board*, 338 Or. 145 (2005) (en banc) (statute mandating an annual cost of living adjustment was part of statutory contract).
- In Nash, the state's act of capping the COLA at 3% was a substantial impairment (the Court would not go to the third test, requiring justification, if the second were not met). *See also City of Omaha*, 247 Neb. at 968 (court did not hesitate to find that by eliminating the supplemental payment (COLA) plan, the city enacted a *substantial* impairment on the plaintiffs' contractual rights). *See also United Firefighters of Los Angeles City v. City of Los Angeles*, 210 Cal.App.3d 1095 (2 Dist. 1989), *cert. denied* 493 U.S. 1045, 110 S. Ct. 843, 107 L. Ed.2d 837 (1990) (3% cap on cost-of-living adjustment held to be a substantial impairment).
- Finally, in Nash, the Court determined that the impairment was not justified. The Court specifically stated that the fund was not insolvent or unable to meet its obligations, current or in the near future, and also noted that the fund would be able to pay Nash's benefit for the duration of his expected lifetime. The Nash court specifically noted that it would not adopt the suggestion that the government could reduce benefits when the plan becomes "financially burdensome" to an employer and noted that "[o]nce the employee's rights have vested, it is not unreasonable to expect that under some circumstances an increased level of employer contribution ...might be required without looking to increased employee contributions or a reduction of benefits."<sup>12</sup> *See also United States Trust*, 431 U.S. at 26, 29 ("[a] governmental entity can always find a use for extra money, ... [i]f a State could reduce its financial obligations whenever it wanted to spend the money for what it regarded as a public purpose, the Contract Clause would provide no protection at all[.]. ...a State can-



not refuse to meet its legitimate financial obligations simply because it would prefer to spend the money to promote the public good rather than the private welfare of its creditors.”)

While not binding on an Idaho court, other courts have also considered contract clause challenges to changes to retirement statutes. In Strunk v. Public Employees Retirement Board, 338 Or. 145 (2005) (en banc), at issue were a number of changes to the Oregon public employee retirement statute including, inter alia, a change to the application to members’ accounts of an assumed rate of return and a temporary suspension of an annual statutory cost of living adjustment provision. In finding that the change to the application of the assumed rate of return was an unconstitutional impairment, the Court rejected the state’s economic hardship defense. The Court stated that were it to recognize an economic hardship defense to a challenge to a change in the assumed earnings rate guarantee (which it did not), there would be a very high threshold for such a defense to succeed, noting “we emphasize that we are not dealing here with legislation that impairs private contracts. Instead, we are dealing with a statutory contract. In other words, it is one of the *parties* to the contract (the state) that now is attempting to rely on a change in circumstances to permit it to alter its contractual obligations in a constitutional manner.” *Id.* at 207 (emphasis in original). The Court also discussed the report of an assigned Special Master that “demonstrate[d] that the state’s recent fiscal status is both serious and has resulted in substantial detriments to the provision of governmental services across the state.” However, the Court held that those findings did “not justify a rewriting of the assumed earnings rate guarantee in a manner that would result in the elimination of earnings both promised and actually credited over time to Tier One members’ regular accounts.” *Id.* at 208. As to the temporary suspension of the COLA, the Strunk court found that suspension was a breach of the PERS contract (as opposed to an impairment) applicable to the affected members. *Id.* at 224.<sup>13</sup>

See also City of Omaha, 247 Neb. 955 (elimination of a cost of living supplemental payment was an unconstitutional impairment; while bankruptcy threat was well documented, the county did not show that termination of the payment was the only viable alternative to addressing its fiscal problems and there was no new comparable advantage to offset the disadvantage caused by elimination of the payment); United Firefighters of Los Angeles

City v. City of Los Angeles, 210 Cal.App.3d 1095 (2 Dist. 1989) (city charter amendment placing a 3% cap on COLA was unconstitutional where city failed to justify the impairment); Maryland State Teachers Assoc., Inc. v. Hughes, 594 F. Supp. 1353, 1364-68 (D. Md. 1984), *cert. denied* 475 U.S. 1140, 106 S. Ct. 1790, 90 L.Ed.2d 336 (1986) (the County has failed to make a sufficient showing that the means which it has adopted to address its “problem” is the least drastic available).

**C. Current PERSI Retirees and Non-Retiree PERSI Members Who Have Worked for a Legally Significant Time in Reliance on the COLA Have a Vested Right to the 1% COLA**

In conclusion, it is the opinion of this author that current PERSI retirees and non-retiree PERSI members who have worked for a legally significant time in reliance on the COLA have a vested (contractually protected) right to the 1% COLA. The right can be altered only if modifications are reasonable and for the purpose of keeping the pension flexible and maintaining its integrity.

In Nash v. Boise City Fire Department, a case involving the Firemen’s Retirement Fund and a cap imposed on its statutory COLA, the Idaho Supreme Court found the cap could not be applied to the challenging member when the member was found to have worked long enough to have a vested (protected) right to the COLA; the Firemen’s Retirement Fund was not insolvent or unable to meet current or near future obligations and the Fund would grow for the remainder of the member’s life.

Sincerely,

BRIAN KANE  
Assistant Chief Deputy

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<sup>1</sup> The PERSI COLA is tied to inflation/deflation based on the Consumer Price Index – Urban (CPI-U) for the 12 months ending August of the current year and becomes effective the following March. Idaho Code § 59-1355 provides for a mandatory COLA ranging from -6% to 1% if the CPI-U is between -94% and 101%. If the CPI-U is above 101%, the statute provides that the COLA shall be 1% (called the 1% COLA). The 1% COLA is not subject to legislative review. If the CPI-U is above 101%, the PERSI Board can provide a greater COLA (called a discretionary COLA) (not to exceed 6%) if it finds that the

## INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

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Fund's actuarial assets exceed its actuarial liabilities (including the increased liability that would be created by the COLA). The discretionary COLA is subject to legislative review.

<sup>2</sup> If a court were to determine, as a matter of law, that a certain term of employment was legally significant, such as the five-year vesting period as discussed below, a factual analysis of that aspect would likely be unnecessary.

<sup>3</sup> The Police Retirement Fund Act was enacted in 1947, and, under the Act, local municipalities could establish a retirement fund for police officers.

<sup>4</sup> The use of the term "vested" does not refer to a statutory vesting period (such as the five-year vesting period for PERSI members). In pension cases, there are two distinct issues of contract: (1) an employee's contract right to collect a pension after statutory eligibility requirements have been met; and (2) the employee's legitimate expectations, also contractual in nature, that the government will not detrimentally alter the pension once the employee has spent sufficient time in the system to have substantially relied to his or her detriment. The first issue involves whether the employee has remained in government service for such a length of time that he or she can collect benefits; the second issue involves the employee's reliance on promised government benefits after years of government service but before actual retirement age. Pension eligibility and reasonable expectations about the system's continued benefits are entirely separate issues. Booth v. Sims, 193 W. Va. at 337. In Hanson, the Court used the term "vested" in the second sense to denote that the member had a legally protected contract right. See also Calabro v. City of Omaha, 247 Neb. 955, 966-967 (1995) (discussing difference between vesting for eligibility purposes and vesting for contractual protection purposes).

<sup>5</sup> In neither Lynn nor Nash was there discussion of what effect, if any, a statutory vesting period would have on the court's analysis of whether a person had worked for a "legally significant" period to warrant contractual protection. In 1977, the Court decided Jackson v. Minidoka Irrigation District, 98 Idaho 330, 563 P.2d 54 (1977). Jackson claimed wrongful discharge and, among other things, claimed a loss of retirement benefits. In rejecting the claim for retirement benefits, the Court stated:

It is true that employer contributory retirement benefits constitute deferred compensation to the employee. Hanson v. City of Idaho Falls, 92 Idaho 512, 446 P.2d 634 (1968); Jacoby v. Grays Harbor Chair and Mfg. Co., 77 Wash.2d 911, 468 P.2d 666 (1970). The pension plan becomes part of the contract of employment and contractual rights to the retirement benefits can thus be created between an employer and his employees. Muggill v. Reuben H. Donnelley Corp., 62 Cal.2d 239, 42 Cal. Rptr. 107, 398 P.2d 147 (1965); Taylor v. Multnomah County Deputy Sheriff's Retirement Board, 265 Or. 445, 510 P.2d 339 (1973). The contractual right is vested in the employee subject, however, to reasonable contingencies such as continued employment, which are necessary to keep the pension system flexible and maintain its integrity.

98 Idaho at 335, 563 P.2d at 59 (emphasis added). Under the applicable provisions of the Idaho Public Employee Retirement System, a participant in the program is not eligible for retirement benefits unless the member has accumulated five years of membership service. Since Ms. Jackson had not complied with that contingency, the Court held that "she has stated no claim to retirement benefits." *Id.* The challenged action in Jackson was an employment decision, not a legislative act, so it is not clear if an Idaho court would consider the five-year statutory vesting period in a challenge to a legislative change to the COLA statute. If an Idaho court were to determine that the right to contractual protection is triggered by the statutory five-year vesting period in the PERSI statutes, a member with five years' credited service could be entitled to

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contractual protection.

<sup>6</sup> The PERSI COLA statute was first enacted in 1969 at which time it provided for an adjustment between -3% to 3%. In 1979, the statute was amended to provide for the 1% COLA and to read, in relevant part, as it does today.

<sup>7</sup> Since the legislation at issue provided that those benefits earned during the period of the misclassification would not be changed, the Court did not have to address whether there were earned benefits requiring protection. However, the Court's emphasis on the misclassification of the plaintiffs suggests that the Court may have considered, without stating, that Plaintiffs could not have reasonably relied on a classification to which they were not legitimately entitled.

<sup>8</sup> Once the classification statute was applied to plaintiffs in McNichols, they began to pay a lower employee contribution rate and accrued future service as general members. Upon retirement, their allowance would be based on a combination of police officer and general member service (called mixed service). With regard to the 1% COLA, an argument could be made that retirees and non-retiree members have *already earned* the 1% COLA. Contribution rates are reviewed and set each year after receipt by the PERSI Board of the annual actuarial valuation. A COLA was first provided for in the PERSI statutes in 1969. Our understanding is that since 1976, the annual actuarial valuation has assumed a 1% COLA. Contribution rates reflect that assumption and could support an argument that the 1% COLA is an earned benefit because prior employee contributions (of both retirees and non-retirees) have paid for it, at least in part.

<sup>9</sup> In Attorney General Opinion No. 96-1, the Attorney General concluded that Idaho courts would not recognize a member's right to "future accrual of benefits" as distinguished from previously earned benefits. 1996 Idaho Att'y Gen. Ann. Rpt. 5. The specific context of the opinion involved a political subdivision's right to withdraw from PERSI and the effect of such withdrawal on its employees vis-à-vis pension rights. In Nash, the Court found that Mr. Nash had a protected right to a certain COLA and that the COLA was a previously earned benefit by virtue of prior service.

<sup>10</sup> Over the past two to three years, three states (Colorado, Minnesota and South Dakota) have legislatively changed (reduced or temporarily reduced) retiree COLAs. Lawsuits are pending in each state, which lawsuits include claims of contracts and/or takings clause violations. Idaho cases suggest a contract clause analysis, but it is not clear that a takings challenge has been rejected per se since it does not appear as if a takings clause claim has been made. The takings clause prohibits the state from taking property without due process and without just compensation.

<sup>11</sup> The Nash court's analysis is consistent with cases from other states that have adopted the same or similar reasoning, including states relied upon by Idaho courts, including Washington, Oregon and California. See, e.g., Bakenhus v. City of Seattle, 48 Wash.2d 695 (1956) (cited in Lynn); Taylor v. Multnomah County Deputy Sheriff's Retirement Board, 265 Or. 445 (1973) (cited in Jackson); Abbott v. City of San Diego, 165 Cal.App.2d 511 (1958) (cited in Nash).

<sup>12</sup> The reasonable modification/flexible and integrity criteria applied by Idaho and other courts appears to be an interpretation, specific to public pensions, of the reasonable/necessary for an important public purpose prong of a contractual impairment analysis. See City of Omaha, 247 Neb. at 969; Andrews, 931 F. Supp. at 1265. The reference in Nash to a potential increase in employer contributions appears to go to the ability to address the perceived problem through alternative means as discussed in contract impairment cases.

<sup>13</sup> The Oregon COLA statute at issue was similar to Idaho Code § 59-1355 in that it mandated a yearly COLA determination and provided for an increase or decrease, subject to a 2% cap.

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**ATTORNEY GENERAL'S  
CERTIFICATES OF REVIEW  
FOR THE YEAR 2011**

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



## CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

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January 25, 2011

The Honorable Ben Ysursa  
Idaho Secretary of State  
**HAND DELIVERED**

RE: Certificate of Review  
Proposed Initiative to Broaden the Sales Tax Base and Lower  
the Sales Tax Rate

Dear Secretary of State Ysursa:

An initiative petition was filed with your office on December 28, 2010. Pursuant to Idaho Code § 34-1809, this office has reviewed the petition and prepared the following advisory comments. Given the strict statutory timeframe in which this office must 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, nor the potential revenue impact to the state budget.

### **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 purpose of the proposed initiative is to broaden the sales tax base to include services and lower the rate from six percent (6%) to five percent (5%). Included within the definition of sales are contracts for applying,

installing, cleaning, altering, improving, decorating, treating, storing, or repairing real property. *See* proposed Idaho Code § 63-3612(k). This provision has the effect of making many contracts for the improvement of real property retail sales subject to sales tax. Idaho Code §§ 63-3622A and 63-3622O prohibit or exempt the imposition of taxes on sales to governmental entities, which means the proposed initiative will completely exempt materials and labor used on government contracts. Under present law, materials used on government contracts by contractors are taxed. Contractors working at the Idaho National Laboratory (INL), Mountain Home Air Force Base, and contractors building or repairing highways and other roads are just examples of contracts that would completely escape taxation under the petitioners' proposal.

Alternatively, the petitioners could consider amendments similar to states like Washington, which treat most contracts as retail sales, but for government contracts, the contractor is taxed on the materials used or consumed.

The proposed initiative may, in certain instances, tax the sale of new homes. If a builder builds a home that he intends to sell upon completion, he may be able to purchase the materials and the subcontract services for resale. Once the house is complete and he sells it, this may be a retail sale. Sales of existing homes are not considered to be retail sales pursuant to the initiative.

The proposed statute does not exempt any services except for those services consumed in a production process. Idaho Code § 63-3622D. There are many other statutes that provide exemptions of tangible personal property but would not exempt related services. For example, the occasional sale exemption exempts the transfer of tangible personal property between related entities. The proposed initiative would impose tax on service transactions between related entities. There are other exemptions that similarly exempt transactions involving tangible personal property, but related service transactions would be taxed under the initiative. Some obvious examples include the pollution control exemption, the research and development exemption, and the logging exemption. The drafters of the initiative have the prerogative to either provide for or not provide for exemptions. However, since the proposed initiative does not remove any of the exemptions for sales of tangible personal property, the petitioners may wish to consider some consistency for service-related transactions.

Though not classified as an exemption, the initiative does not impose tax on services provided by “. . . licensed medical doctors, dentists, osteopaths, physical therapists, optometrists, physician assistants, midwives, podiatrists, hospitals, nursing homes, chiropractors, nurse practitioners, naturopaths, or psychologists.” See proposed Idaho Code § 63-3614A.<sup>1</sup> In a broad sense, the drafters are not taxing medically-related services. The method they have chosen to reach that result is to exclude services provided by certain medically-related professionals. The services provided by these professionals are not subject to sales tax regardless of whether the services are medically related. For example, if a physical therapist opened a day care at her business location that she operated in conjunction with her physical therapy business, the child care may be exempt from sales tax even though child care provided by a licensed day care would be taxable under the proposed statute.

The drafters of the initiative have included several sections to source the sale of tangible personal property and services to certain locations.<sup>2</sup> These sourcing rules seem unduly complex for the state sales tax and may or may not be consistent with other provisions of the Idaho sales tax law. Sourcing is defined as the point at which a retail sale occurs. The statute then provides a series of rules to determine the location of the sale. However, if the sale occurs in Idaho, then the transaction is subject to sales tax. Under present law, if delivery of tangible personal property occurs in Idaho, then the sale takes place in Idaho. If the sale takes place in another state, and if no sales tax is charged, then use tax is due if the property is used in Idaho.

The sourcing rules for services are inconsistent. For example, proposed Idaho Code § 63-3642(1)(a) provides that if the service is received by the purchaser at a business location of the seller, the sale is sourced to that location. Paragraph (1)(b) provides that if the service is not received at the business location of the seller, it is sourced to the location where received. In short, pursuant to subsection (1), the sale is sourced to the location where the service is received.

Subsection (5) of proposed Idaho Code § 63-3642 introduces some new terms for sourcing of services. Pursuant to this provision, the sale is sourced to Idaho if the consumption of the service occurs in Idaho, even if the service is performed outside Idaho. These provisions are confusing. Under one provision, the service is sourced to Idaho if the service is received in Idaho, whereas under a second provision, the service is sourced to Idaho if it

is consumed in Idaho. The provision creates a conflict between the terms “receipt” and “consume.” If an Idaho mechanic repairs a car belonging to an Oregon resident at the mechanic’s business location in Idaho, the service is performed in Idaho and, presumably, the receipt of the service occurs in Idaho. However, if the Oregon resident drives his car back to Oregon where he keeps it and uses it, the services may be said to be consumed in Oregon. The petitioners may want to clarify the sourcing rules for services.

The proposed statutes appear to raise revenue for the State of Idaho. The initiative does not address revenue impact, but since it only lowers the rate to five percent (5%) and substantially broadens the tax base, there is a likelihood that the initiative will raise revenue. This raises the question of whether an initiative that raises revenue may not be allowed because it is contrary to art. III, sec. 14 of the Idaho Constitution, which provides that all revenue raising bills originate in the House. At a minimum, there is an argument that an initiative to raise revenue is prohibited by art. III, sec. 14, which provides that “[b]ills may originate in either house, but may be amended or rejected in the other, except that bills for raising revenue shall originate in the house of representatives.”<sup>3</sup>

By using the term “bill,” the drafters of the Constitution implied that the provision only applies to legislative enactments. An initiative, as allowed for in art. III, sec. 1, is a process for the people through signatures and voting to enact legislation. The history of the federal Origination Clause is all about balance between the two legislative houses. Idaho seems to have just copied the federal practice. The Idaho Constitutional Convention in 1889 adopted this section without debate or amendment. At the federal level, the clause had two motives. First, it put the fiscal authority in the House of Representatives, which was seen as being the house closest to the people. Second, it acted as a counterbalance to the special powers granted only the Senate – the power to advise and consent to Presidential appointments and to ratify treaties.<sup>4</sup> Thus, the rationale for requiring revenue raising measures in the House seems inapplicable to initiatives. If, in fact, one of the motives is to give the power to the body closest to the people, then it seems logical that the initiative process could be used to raise revenue.

**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 Robert C. Huntley, The Huntley Law Firm, PLLC, P. O. Box 2188, Boise, Idaho 83701.

Sincerely,

LAWRENCE G. WASDEN  
Attorney General

**Analysis by:**

BRIAN D. NICHOLAS  
Deputy Attorney General

WILLIAM A. VON TAGEN  
Deputy Attorney General

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<sup>1</sup> The drafters inserted “midwives” twice in the sentence identifying the professionals who are providing services for purposes of the tax on services.

<sup>2</sup> See proposed Idaho Code §§ 63-3642 and 63-3643.

<sup>3</sup> We are unaware of any case authority and we are unsure whether a court has ever addressed the issue, but we believe we are compelled to raise the issue for the petitioners to consider.

<sup>4</sup> The Federalist No. 66 (Alexander Hamilton).

CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

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March 23, 2011

The Honorable Ben Ysursa  
Idaho Secretary of State  
**HAND DELIVERED**

RE: Certificate of Review  
Referendum Petition SB 1108

Dear Secretary of State Ysursa:

This letter shall serve as the Certificate of Review for the referendum petition submitted to the Secretary of State's office on March 18, 2011, and forwarded for review to this office on March 21, 2011. It appears that the Secretary of State has certified the petition as to form, and completed the initial review as provided for in Idaho Code § 34-1804. The referendum concerns Senate Bill 1108, 2011 Idaho Session Law Chapter 96, which having passed both houses and been signed into law meets the requirements of Idaho Code § 34-1803. It is worth noting that Sections 6 and 10-12 may be stayed according to Idaho Code § 34-1803. Sections 1-5, 7-9, and 13-25 have an emergency clause. Those sections of the law will remain effective pending the outcome of the referendum election (if held).

**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 Sheri Wood, President, Idaho Education Association, P. O. Box 2638, Boise, Idaho 83701-2638.

Sincerely,

LAWRENCE G. WASDEN  
Attorney General

**Analysis by:**

BRIAN KANE  
Assistant Chief Deputy

CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

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March 23, 2011

The Honorable Ben Ysursa  
Idaho Secretary of State  
**HAND DELIVERED**

RE: Certificate of Review  
Referendum Petition SB 1110

Dear Secretary of State Ysursa:

This letter shall serve as the Certificate of Review for the referendum petition submitted to the Secretary of State's office on March 18, 2011, and forwarded for review to this office on March 21, 2011. It appears that the Secretary of State has certified the petition as to form, and completed the initial review as provided for in Idaho Code § 34-1804. The referendum concerns Senate Bill 1110, 2011 Idaho Session Law Chapter 97, which having passed both houses and been signed into law meets the requirements of Idaho Code § 34-1803. SB 1110 does not go into effect until 2012.

**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 Sheri Wood, President, Idaho Education Association, P. O. Box 2638, Boise, Idaho 83701-2638.

Sincerely,

LAWRENCE G. WASDEN  
Attorney General

**Analysis by:**

BRIAN KANE  
Assistant Chief Deputy



CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

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April 11, 2011

The Honorable Ben Ysursa

Idaho Secretary of State

**HAND DELIVERED**

RE:     Certificate of Review  
         Referendum Petition SB 1184

Dear Secretary of State Ysursa:

This letter shall serve as the Certificate of Review for the referendum petition submitted to the Secretary of State's office on April 8, 2011, and forwarded for review to this office on April 8, 2011. It appears that the Secretary of State has certified the petition as to form, and completed the initial review as provided for in Idaho Code § 34-1804. The referendum concerns Senate Bill 1184, 2011 Idaho Session Law Chapter 247, which having passed both houses and been signed into law meets the requirements of Idaho Code § 34-1803. Sections 1, 2, 3, 4, 7, 8, 9, 12, 13, 14, 15, 16, 17 and 18 of SB 1184 are effective on July 1, 2011, while Sections 5, 6, 10 and 11 of SB 1184 will be in effect on July 1, 2012.<sup>1</sup>

**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 Michael Lanza, Chair, Idahoans for Responsible Education Reform, P. O. Box 163, Boise, Idaho 83701.

Sincerely,

LAWRENCE G. WASDEN  
Attorney General

**Analysis by:**

BRIAN KANE  
Assistant Chief Deputy

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<sup>1</sup> House Bill 345 has passed both houses and is awaiting the Governor's signature. One of the effects of HB 345 would be to declare an emergency and make all sections of SB 1184 effective immediately. See HB 345, Section 9 (amending Section 19 of SB 1184).

# CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

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May 13, 2011

The Honorable Ben Ysursa  
Idaho Secretary of State  
**VIA HAND DELIVERY**

RE: Certificate of Review  
Proposed Initiative to Make Torture of Animals a Felony

Dear Secretary of State Ysursa:

An initiative petition was filed with your office on April 29, 2011. 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 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 the proposed initiative.

## **BALLOT TITLE**

The petition contains the following short ballot title:

Initiative amending Chapter 35, Title 25, Idaho Code, Animal Care law, to add felony penalties for repeat violations and torture.

The petition contains the following long title:

Initiative amending section 25-3502, Idaho Code, to include definition of "torture"; to amend section 25-3504, Idaho Code, to change references for penalty classifications;

and to amend section 25-3520A, Idaho Code, to increase fines for misdemeanor violations, and to add felony penalties for third and subsequent violations, and for any violations that include the intentional torture of an animal.

These titles are appropriate under Idaho Code § 34-1809(2).

## **MATTERS OF SUBSTANTIVE IMPORT**

### **A. Summary of the Initiative**

The Initiative amends the Cruelty to Animals chapter of title 25 of the Idaho Code to increase the fine applicable to misdemeanor violations of that law and to add felony provisions for repeat offenders or those who torture animals. Specifically, the Initiative amends the definitions section, Idaho Code § 25-3502, to delete “torture” from the definition of “cruelty” and adds a definition for the word “torture.” Second, it amends the section creating a crime, Idaho Code § 25-3504, by deleting language that violation of that section is a misdemeanor and adding torture as grounds for allowing law enforcement to seize an animal (in addition to cruelty). Third, it amends the penalty section, Idaho Code § 25-3520A, to state that first and second offenses are misdemeanors; changes the fine for a first-time offense from \$100 to \$400; changes the minimum fine for a second offense from \$200 to \$600; and makes a third offense or a violation that includes intentional torture a felony punishable by a prison sentence of between six months and three years and a fine of up to \$9,000. Finally, it includes a severability clause.

### **B. Legal Effect of the Initiative, if Enacted**

The Initiative, if enacted, would succeed in its apparent purpose. It would increase the fine for a first or second offense and would elevate third offenses to felony status. It would also create a new felony for torture of an animal. Specifically, the statute is constructed such that torture is in the nature of a penalty enhancement rather than part of the crime itself. A jury would have to find the underlying crime of cruelty to an animal, with the aggravating element of intentional torture. Although the lower limit of the penalty for the felony (six months in prison) is more consistent with a misdemeanor, we are unaware of any limitation on the ability of an initiative to set a felony punishment at six months to three years.

**C. Recommended Revisions or Alterations**

No substantive revisions or alterations are suggested. As a matter of form, “Section 5” should be amended to read “Section 4,” because there is currently no Section 4.

**CERTIFICATION**

I HEREBY CERTIFY that the enclosed measure has been reviewed for form, style, and matters of substantive import. The recommendations set forth above have been communicated to Petitioner via a copy of this Certificate of Review, deposited in the U.S. Mail to Virginia Hemingway, 3906 S. Yorktown Way, Boise, Idaho 83706.

Sincerely,

LAWRENCE G. WASDEN  
Attorney General

**Analysis by:**

KENNETH K. JORGENSEN  
Deputy Attorney General

## CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

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December 12, 2011

The Honorable Ben Ysursa  
Idaho Secretary of State  
**HAND DELIVERED**

RE: Certificate of Review  
Proposed Initiative to Broaden the Sales Tax Base  
and Lower the Sales Tax Rate

Dear Secretary of State Ysursa:

An initiative petition was filed with your office on December 6, 2011. Pursuant to Idaho Code § 34-1809, this office has reviewed the petition and prepared the following advisory comments. Given the strict statutory time-frame 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 which may affect the legality of the initiative. This office offers no opinion with regard to the policy issues raised by the proposed initiative, nor the potential revenue impact to the state budget.

### **BALLOT TITLE**

Following the filing of the proposed initiative, our 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 purpose of the proposed initiative is to broaden the sales tax base to include services and lower the rate from six percent (6%) to five percent

(5%). Included within the definition of sales are contracts for applying, installing, cleaning, altering, improving, decorating, treating, storing, or repairing real property. *See* proposed Idaho Code § 63-3612(k). This provision has the effect of making many contracts for the improvement of real property retail sales subject to sales tax. Idaho Code §§ 63-3622A and 63-3622O prohibit or exempt the imposition of taxes on sales to governmental entities, which means the proposed initiative will completely exempt materials and labor used on government contracts. Under present law, materials used on government contracts by contractors are taxed. Contractors working at the Idaho National Laboratory (INL), Mountain Home Air Force Base, and contractors building or repairing highways and other roads are just examples of contracts that would completely escape taxation under the petitioners' proposal.

Alternatively, the petitioners could consider amendments similar to states like Washington, which treat most contracts as retail sales, but for government contracts, the contractor is taxed on the materials used or consumed.

The proposed initiative may, in certain instances, tax the sale of new homes. If a builder builds a home that he intends to sell upon completion, he may be able to purchase the materials and the subcontract services for resale. Once the house is complete and he sells it, this may be a retail sale. Sales of existing homes are not considered to be retail sales pursuant to the initiative.

The proposed statute does not exempt any services except for those services consumed in a production process. Idaho Code § 63-3622D. There are many other statutes that provide exemptions of tangible personal property but would not exempt related services. For example, the occasional sale exemption exempts the transfer of tangible personal property between related entities. The proposed initiative would impose tax on service transactions between related entities. There are other exemptions that similarly exempt transactions involving tangible personal property, but related service transactions would be taxed under the initiative. Some obvious examples include the pollution control exemption, the research and development exemption, and the logging exemption. The drafters of the initiative have the prerogative to either provide for or not provide for exemptions. However, since the proposed initiative does not remove any of the exemptions for sales of tangible personal property, the petitioners may wish to consider some consistency for service-related transactions.

Though not classified as an exemption, the initiative does not impose tax on services provided by “. . . licensed medical doctors, dentists, osteopaths, physical therapists, optometrists, physician assistants, midwives, podiatrists, hospitals, nursing homes, chiropractors, nurse practitioners, naturopaths, or psychologists.” *See* proposed Idaho Code § 63-3614A.<sup>1</sup> In a broad sense, the drafters are not taxing medically-related services. The method they have chosen to reach that result is to exclude services provided by certain medically-related professionals. The services provided by these professionals are not subject to sales tax regardless of whether the services are medically related. For example, if a physical therapist opened a day care at her business location that she operated in conjunction with her physical therapy business, the child care may be exempt from sales tax even though child care provided by a licensed day care would be taxable under the proposed statute.

The drafters of the initiative have included several sections to source the sale of tangible personal property and services to certain locations.<sup>2</sup> These sourcing rules seem unduly complex for the state sales tax and may or may not be consistent with other provisions of the Idaho sales tax law. Sourcing is defined as the point at which a retail sale occurs. The statute then provides a series of rules to determine the location of the sale. However, if the sale occurs in Idaho, then the transaction is subject to sales tax. Under present law, if delivery of tangible personal property occurs in Idaho, then the sale takes place in Idaho. If the sale takes place in another state, and if no sales tax is charged, then use tax is due if the property is used in Idaho.

The sourcing rules for services are inconsistent. For example, proposed Idaho Code § 63-3642(1)(a) provides that if the service is received by the purchaser at a business location of the seller, the sale is sourced to that location. Paragraph (1)(b) provides that if the service is not received at the business location of the seller, it is sourced to the location where received. In short, pursuant to subsection (1), the sale is sourced to the location where the service is received.

Subsection (5) of proposed Idaho Code § 63-3642 introduces some new terms for sourcing of services. Pursuant to this provision, the sale is sourced to Idaho if the consumption of the service occurs in Idaho, even if the service is performed outside Idaho. These provisions are confusing. Under one provision, the service is sourced to Idaho if the service is received in Idaho, whereas under a second provision, the service is sourced to Idaho if it



is consumed in Idaho. The provision creates a conflict between the terms “receipt” and “consume.” If an Idaho mechanic repairs a car belonging to an Oregon resident at the mechanic’s business location in Idaho, the service is performed in Idaho and, presumably, the receipt of the service occurs in Idaho. However, if the Oregon resident drives his car back to Oregon where he keeps it and uses it, the services may be said to be consumed in Oregon. The petitioners may want to clarify the sourcing rules for services.

The proposed statutes appear to raise revenue for the State of Idaho. The initiative does not address revenue impact, but since it only lowers the rate to five percent (5%) and substantially broadens the tax base, there is a likelihood that the initiative will raise revenue. This raises the question of whether an initiative that raises revenue may not be allowed because it is contrary to art. III, sec. 14 of the Idaho Constitution, which provides that all revenue-raising bills originate in the House. At a minimum, there is an argument that an initiative to raise revenue is prohibited by art. III, sec. 14, which provides that “[b]ills may originate in either house, but may be amended or rejected in the other, except that bills for raising revenue shall originate in the house of representatives.”<sup>3</sup>

By using the term “bill,” the drafters of the Constitution implied that the provision only applies to legislative enactments. An initiative, as allowed for in art. III, sec. 1, is a process for the people through signatures and voting to enact legislation. The history of the federal Origination Clause is all about balance between the two legislative houses. Idaho seems to have just copied the federal practice. The Idaho Constitutional Convention in 1889 adopted this section without debate or amendment. At the federal level, the clause had two motives. First, it put the fiscal authority in the House of Representatives, which was seen as being the house closest to the people. Second, it acted as a counterbalance to the special powers granted only the Senate – the power to advise and consent to Presidential appointments and to ratify treaties.<sup>4</sup> Thus, the rationale for requiring revenue-raising measures in the House seems inapplicable to initiatives. If in fact one of the motives is to give the power to the body closest to the people, then it seems logical that the initiative process could be used to raise revenue.

**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 Robert C. Huntley, The Huntley Law Firm, PLLC, P. O. Box 2188, Boise, Idaho 83701.

Sincerely,

LAWRENCE G. WASDEN  
Attorney General

**Analysis by:**

WILLIAM A. VON TAGEN  
Deputy Attorney General

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<sup>1</sup> The drafters inserted “midwives” twice in the sentence identifying the professionals who are providing services for purposes of the tax on services.

<sup>2</sup> See proposed Idaho Code §§ 63-3642 and 63-3643.

<sup>3</sup> We are unaware of any case authority, and we are unsure whether a court has ever addressed the issue, but we believe we are compelled to raise the issue for the petitioners to consider.

<sup>4</sup> The Federalist No. 66 (Alexander Hamilton).

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**ATTORNEY GENERAL'S  
SELECTED  
ADVISORY LETTERS  
FOR THE YEAR 2011**

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

January 21, 2011

The Honorable William Killen  
Idaho State Representative  
VIA HAND DELIVERY

Re: Our File No. 11-35557 — State Nullification of Federal Law

Dear Representative Killen:

This letter is in response to your recent inquiry regarding the theory of State nullification of federal law. Nullification generally is considered to take one of two forms. The first is where a State acts within the system, whether through a court challenge, or through a concentrated series of efforts designed to repeal or amend offending legislative provisions. The second form is most simply described as outright defiance of the law; in other words, a State simply would ignore a federal provision, or a decision of a federal court.

**Nullification, If Meant As A Term Through Which Offending Legislation Or Judicial Decisions Are Overturned By Working Within The Existent Constitutional And Legal Framework, Is Permissible And Encouraged By Our System Of Checks And Balances.**

Idaho has historically participated in a number of these efforts including the current challenge to the Healthcare Reform Law, as well as various resolutions addressed to the federal government with respect to the State sovereignty and specific federal legislative enactments. (See H.C.R. 64, 44 and S.J.M. 106, 60th Leg., 2d Reg. Sess. (Idaho 2010)). These examples reflect how a State can work within the constitutionally designed system to overturn or amend a provision that offends a State's notion of sovereignty and federal overreaching.

**Nullification As Defiance Of Federal Law Or Enactment Is Inconsistent With A State Officer's Duty To Act In Conformity With The Federal And State Constitutions.**

Nullification is generally the argument that States have the ability to determine the constitutionality of a federal enactment, and if a State finds the enactment unconstitutional, it can ignore or otherwise refuse to adhere to the federal requirements. The basis for this argument is that the States came together to create the federal government, and therefore the States retain the ultimate discretion as to the reach of federal authority.<sup>1</sup> The adoption of these Resolutions in some respects represents the apex of the ongoing argument between Alexander Hamilton and Thomas Jefferson over the scope and influence of the fledgling federal government.<sup>2</sup>

These arguments arose cyclically throughout the Nation's early history, reaching a virtual breaking point in 1828-1833 in what was referred to as the "Nullification Crisis." President Andrew Jackson expressly rejected the theory of nullification as incompatible with the existence of the Union and destructive to the very purpose of the Constitution.<sup>3</sup> Southern State nullification advocates nevertheless continued to press their cause, and their arguments formed a central justification for the Civil War.

### **The Legal Difficulty Of Idaho's Nullification Claim.**

As a historical matter, many of the original States came into existence first as English colonies and then as sovereign parties to the Articles of Confederation. Idaho's road to state status followed a much different path.

Virtually all land within Idaho is the result of the United States making a claim to the land, which was disputed by the British until the adoption of several treaties leading ultimately to the creation of the Oregon Territory.<sup>4</sup> Congress then created the Territory of Idaho and, ultimately, the State of Idaho. Once Idaho was admitted as a State,<sup>5</sup> it acquired all of the privileges and immunities held by each of the other States, but as reflected above, the right of nullification, the right of secession, and the compact theory had all been rejected by the United States by the time of statehood.

The framers of the Idaho Constitution were acutely aware of that fact. Article I, sec. 3 of our Constitution states:

**State inseparable part of Union.** — The 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.



The framers therefore expressly recognized Idaho's status as a part of the United States and the supremacy of the United States Constitution. Consistent with this recognition, every legislator is required to affirm "that I will support the constitution of the United States and the constitution of the state of Idaho."<sup>6</sup> Legislators and other state officials, in other words, pledge to carry out their duties in a fashion that directly conflicts with the second form of the nullification theory.

The alpha and omega of the nullification theory, in sum, rest upon rejecting the principle that the United States Constitution is the supreme law of the land.<sup>7</sup> The theory runs contrary to the very purpose of the federal constitution and Idaho's express constitutional acknowledgment in Article I, sec. 3 of that supremacy.

### **Courts Have Expressly Rejected Nullification.**

Our history is replete with federal enactments that were unpopular in one State or another, or even within regions. Taking the logic of the nullification theory to its natural extension, federal law would become a patchwork of regulation depending upon which States chose to comply. It is hardly surprising, given this specter, that no court has ever upheld a State effort to nullify a federal law.

The most instructive case on nullification is likely Cooper v. Aaron.<sup>8</sup> This case arose out of a belief by the State of Arkansas that it was not bound to follow the Supreme Court's decision in Brown v. Board of Education.<sup>9</sup> Arkansas, through its governor and legislature, claimed that there is no duty on the part of a state official to obey federal court orders based upon the Court's interpretation of the federal constitution.<sup>10</sup> The governor and the legislature, in practical effect, were advancing the theory that the States were the ultimate arbiters of the constitutionality of federal enactments and decisions.

The Court expressly rejected this argument stating: "No state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it."<sup>11</sup> The Court went further: A governor who asserts power to nullify a federal court manifests that the fiat of a state governor, and not the Constitution of the United States, would be the supreme law of the land.

## CONCLUSION

There is no right to pick and choose which federal laws a State will follow. Aside from ignoring the Supremacy Clause in Article VI, Clause 2 of the United States Constitution, that contention cannot be reconciled with Article I, sec. 3 of the Idaho Constitution or the oath of office prescribed in Article III, sec. 25. I hope this brief analysis responds adequately to your inquiry.

Sincerely,

BRIAN KANE  
Assistant Chief Deputy

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<sup>1</sup> See *Kentucky Resolutions*, Thomas Jefferson (November 16, 1798 & December 3, 1799), and *Virginia Resolution*, James Madison (December 24, 1709).

<sup>2</sup> Hamilton actually suggested sending the Army into Virginia as a pretext—thus, even the earliest arguments for nullification were viewed as latent arguments for civil war. See also Jonathon Elliot, *Answers of the Several State Legislatures: "State of New Hampshire" Debates in the Several State Conventions on the Adoption of the Federal Constitution*, pp. 538-539 (1907).

<sup>3</sup> Jackson also expressly rejected the right to secede, noting that the Constitution forms a government, not a league of States. *President Jackson's Proclamation Regarding Nullification*, December 10, 1832.

<sup>4</sup> Joint British and United States Claim was provided for in *Treaty of 1818*. The *Oregon Treaty* (1846) established the boundary between United States Claims and British Claims at the 49th Parallel. The territory of Oregon was created on August 14, 1848. The territory of Idaho was created on March 4, 1863 (12 Stat. L. 808, ch. 117).

<sup>5</sup> Reviewing the Idaho Admission Bill, § 19 specifically applies the laws of the United States. See 26 Stat. L. 215, ch. 656; am 1998, P.L. 105-296.

<sup>6</sup> Idaho Const. art. III, sec. 25 (Oath of Office). See also Idaho Code § 59-401.

<sup>7</sup> U.S. Const. art. 6, cl. 2.

<sup>8</sup> 358 U.S. 1, 78 S. Ct. 1401, 3 L. Ed. 2d 19 (1958).

<sup>9</sup> 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954).

<sup>10</sup> 358 U.S. at 4, 78 S. Ct. at 1403.

<sup>11</sup> *Id.* at 18, 78 S. Ct. at 1410.

ADVISORY LETTERS OF THE ATTORNEY GENERAL

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January 25, 2011

The Honorable Richard Wills  
Idaho House of Representatives  
VIA HAND DELIVERY

Re: Our File No. 11-35590 — Constitutionality of State-Law  
Enforcement Authority for Tribal Officers

Dear Representative Wills:

This letter responds to your inquiry received today concerning the constitutionality of the State of Idaho to have law enforcement privileges as peace officers in the state and the counties. I assume that your question relates to House Bill No. 33 (“HB 33”).

In brief summary, HB 33 authorizes “[a]n employee of a police or law enforcement agency of a federally-recognized Indian tribe within the state of Idaho, while engaged in the conduct of his or her employment as a law enforcement officer, . . . to enforce state laws anywhere with the exterior limits of the reservation of the tribe employing such officer.” That authority is conditioned on the following conditions: (1) the law enforcement officer must have been appointed by the governing body of the tribe; (2) the officer must be certificated by the Idaho Peace Officers Standards and Training Council; (3) the officer has not been decertified by the Council; (4) the officer’s authority takes effect 30 days after the appointing tribe has mailed a notice containing certain information, including a copy of the officer’s Council certificate; and (5) the appointing tribe provides indemnification insurance in the amount of not less than \$2 million for bodily or personal injury, death or property damage or loss as the result of any one occurrence or accident, regardless of the number of persons injured or the number of claimants, attendant to the officer’s performance of duties pursuant to the “peace officer” authorization. HB 33 additionally directs that the tribal officer, *inter alia*, to “cooperate with the investigative and judicial requirements related to prosecution of the arrested person as may be reasonably required by the respective county sheriff and/or prosecuting attorney.” The legislation immunizes the State, counties and cities from liability for the tribal officer’s performance of “peace officer”

duties and contains provisions related to the tribe's waiver of immunity from suit "to the extent necessary to permit recovery under the policy or contract of insurance" within policy limits. HB 33, finally, leaves unimpaired the authority of (1) the State, its political subdivisions and law enforcement agencies to enter into cooperative agreements with tribes related to law enforcement, and (2) "state, county and city law enforcement officers to enforce state law within the exterior boundaries of an Indian reservation."

HB 33 unambiguously extends "peace officer" status to tribal law enforcement officers to enforce state law within the appointing tribe's reservation when the legislation's conditions are satisfied. No consent or concurrent authorization from the county sheriff whose territorial jurisdiction includes the reservation is necessary. The legislation, however, leaves unimpaired the authority of county sheriffs to enforce state law and to exercise existing authority to enter into law enforcement-related cooperative agreements with tribes.

I have enclosed for your information a letter dated February 23, 2010, to former Representative James W. Clark discussing various constitutional issues about which he inquired in connection with House Bill No. 500 (60th Leg., 2d Reg. Sess. (Idaho 2010)) ("HB 500"). Although that legislation differed in several respects, the differences do not affect the legal analysis' relevance here. Our analysis revealed no constitutional flaw in HB 500, and, for the same reasons, none likely exists with respect to HB 33.

I hope that this letter responds adequately to your email inquiry. Please contact me if you have any questions.

Sincerely,

BRIAN KANE  
Assistant Chief Deputy

February 3, 2011

The Honorable Cherie Buckner-Webb  
Idaho House of Representatives  
STATEHOUSE MAIL

Re: Our File No. 11-35665 — Conflict-of-Interest Question

Dear Representative Buckner-Webb:

This letter is in response to your request for an analysis on whether it is permissible to serve on the Idaho Commission on the Arts while also serving as a member of the Idaho House of Representatives. The request raises two questions: (1) whether your dual service creates a conflict of interest, and (2) whether the dual service violates the principle of separation of powers. As explained more fully below, although holding both positions may not create a conflict of interest, this dual office-holding is likely unconstitutional because it violates the separation of powers. As a result, it is recommended that you resign from one of the positions.

## ANALYSIS

### I. Conflict of Interest

The first question is whether serving simultaneously as a Representative in the Idaho House of Representatives and a Commissioner for the Idaho Commission on the Arts creates a conflict of interest. Service as both legislator and commissioner does not necessarily create a conflict, but requires vigilance to ensure that actions you take as a legislator do not benefit the Commission in a manner that results in your own private pecuniary gain.

The Idaho Ethics in Government Act of 1990, Idaho Code §§ 59-701, *et seq.*, governs conflicts of interest for public officials. The Act defines a conflict of interest as “any official action or any decision or recommendation by a person acting in a capacity as a public official, the effect of which would be to the private pecuniary benefit of the person or a member of the person’s household, or a business with which the person or a member of the person’s

household is associated . . . .” Idaho Code § 59-703(4). A legislator who has a potential conflict must seek legal advice on whether a conflict in fact exists. *Id.* at § 59-704. If, in the opinion of counsel, a conflict does not exist, then the legislator may proceed. *Id.* If, however, counsel concludes that a conflict does exist, the legislator must “disclose the nature of the potential conflict of interest and/or be subject to the rules of the body of which he/she is a member and shall take all action required under such rules prior to acting on the matter.” *Id.* at § 59-704(1).

House Rule 38(3) in turn establishes that if a Representative’s “personal interest in [an] issue under consideration conflicts with the public’s interest, the member’s legislative activities can be subject to limitations, unless such conflicts are disclosed to the presiding officer or to the body.” Upon disclosure of any such conflict, the Representative may “vote upon any question or issue to which the conflict relates, unless [she] requests to be excused.” *Id.* Where a Representative has a conflict and intentionally fails to disclose it, the Act mandates a civil penalty and permits the House to impose other discipline. Idaho Code § 59-705; *see also* House Rule 76.

### **The Interests of the House and the Commission Do Not Create a Conflict of Interest**

This analysis leads to two conclusions. First, the interests of the House of Representatives and the Commission, even if adverse, cannot themselves create a conflict of interest for the purposes of the Act. As far as the Act and House Rules are concerned, a “conflict of interest” is not a conflict between competing institutional interests, but rather a conflict between the public interest and a public official’s private interest: Under House Rule 38(3), a conflict must involve a Representative’s “personal” interest, and under the Act, it must involve a Representative’s interest in “private pecuniary benefit.” *Id.* at § 59-703(4). Thus, even if your service as a Representative at times requires you to vote on matters or take other actions that may further or set back the interests of the Commission as an institution, and even if your service on the Commission requires you to take actions that are adverse to the interests of constituents from your legislative district, those competing public interests cannot themselves render your actions problematic under the Act. As long as your own private pecuniary interests are not at stake, the Act does not recognize a conflict.

### **Disclosure and/or Recusal Are Required When Public and Personal Interests Conflict**

The second conclusion to draw from the Act is that a conflict of interest will likely exist if actions you take as a legislator benefit the Commission in a manner that results in “private pecuniary benefit” for yourself, your household, or businesses with which you or members of your household are associated. Idaho Code § 59-703(4). For example, a planned vote in favor of a bill to increase compensation for commissioners under Idaho Code § 67-5603 would likely reflect a conflict of interest because you would personally benefit economically from your own vote as a Representative. This conflict would trigger disclosure requirements under section 59-704(1) and House Rule 38(3). Failure to comply with those requirements would result in a civil penalty and, possibly, discipline from the House of Representatives. *See* Idaho Code §§ 59-705 and 59-706; *see also* House Rule 76.

The mere fact of dual service as a Representative and Commissioner does not create a conflict of interest under the Ethics in Government Act. But specific actions you plan to take as a legislator could reflect a conflict of interest if they will result in private pecuniary benefit to you as a Commissioner.

## **II. Separation of Powers**

A second question is whether dual service as a Representative and Commissioner would violate the doctrine of separation of powers. This doctrine holds that the “three branches of government . . . should remain separate and distinct so that each is able to operate independently.” Sweeney v. Otter, 119 Idaho 135, 139, 804 P.2d 308, 312 (1990). The Idaho Constitution implements the doctrine by stating that “no person . . . charged with the exercise of powers properly belonging to [the legislative, executive, or judicial] department[] shall exercise any powers properly belonging to either of the others, except as in this constitution expressly directed or permitted.” Idaho Const. art. II, § 1.

Serving simultaneously as a Commissioner and as a Representative is inconsistent with the plain language of the Idaho Constitution. On one hand, the Commission is part of the executive branch. *See* Idaho Code § 67-5602 (providing that commissioners are appointed by the governor); § 67-5607 (describing the commission as an agency). Powers exercised by a

Commissioner, therefore, are executive in nature. On the other hand, the position of Representative is plainly part of the legislative branch. *See* Idaho Const., art. III, § 1. Powers exercised by a legislator are, thus, legislative in nature. To hold the two positions at once is to exercise both executive and legislative powers. This is incompatible with Art. II, sec. 1's basic command that "no person . . . charged with the exercise of powers properly belonging to [the legislative] department[] shall exercise any powers properly belonging to either [the executive or judicial department]."

The Idaho Constitution permits a person to exercise both executive and legislative powers if "expressly directed or permitted" in the Constitution itself, but no such direction or permission exists with respect to a legislator who wishes to also serve as a Commissioner. Idaho Const., art. II, § 1. Thus, this form of dual service is unconstitutional. It is recommended that one position is selected for service, either legislator or commissioner, and the other position resigned to avoid the scenarios described above.

The Attorney General's Office has consistently followed this reasoning in evaluating similar questions involving dual service. As far back as 1985, for example, we concluded that the Governor could not appoint a judicial officer to the Children's Trust Account Board—part of the executive branch—because doing so would violate the separation of powers. *See* Attorney General Op. No. 85-5.

My response to your question is not an official response of the Attorney General, and is intended only to informally address your request for statutory interpretation. If you have any additional questions, please contact me.

Sincerely,

BRIAN KANE  
Assistant Chief Deputy



## ADVISORY LETTERS OF THE ATTORNEY GENERAL

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February 8, 2011

The Honorable Tim Corder  
Idaho State Senate  
HAND DELIVERED

Re: Agency Authority to Comment Upon Pending Legislation

Dear Senator Corder:

You asked this office to advise you regarding the authority of an Idaho Department of Fish and Game (“IDFG”) employee to author a newspaper opinion piece setting forth the Idaho Fish and Game Commission’s (“Commission”) opposition to pending legislation and the rationale for such opposition. You also asked us to address under what conditions a state employee may publicly advocate a commission or agency position on pending legislation.

Attached to your letter was an opinion piece by Mark Gamblin, regional supervisor for the Idaho Department of Fish and Game, which appeared in the Idaho State Journal. The opinion piece noted the Commission opposed Senate Bills 1015 and 1016, explained the reasons for such opposition, and provided legislative contact information for anyone supporting or opposing the bills. It is our understanding that the opinion piece was prepared pursuant to the Commission’s direction to IDFG to make known the Commission’s opposition to the bills, and was prepared as part of Mr. Gamblin’s official duties.

You also forwarded a press release from the Idaho Conservation Officer’s Association stating the Association’s opposition to Senate Bills 1015 and 1016.

As a general matter, it appears that the authority of members of the executive branch to comment officially on pending legislation is constitutionally-based. Art. IV, sec. 8 of the Idaho Constitution provides that the governor may “from time to time, by message, give to the legislature information of the condition of the state, and shall recommend such measures as he shall deem expedient.” The governor also has the power to veto legislation. Idaho

Const. art. VI, § 10. Inherent in the executive's power to recommend legislative measures and veto legislation is the power to comment publicly upon pending legislative measures.

Under the separation of powers doctrine, the allocation among executive branch agencies of the governor's power to comment publicly upon pending legislation and to advocate such views to the Legislature is a matter of executive discretion. The power of executive branch members to express their views on pending legislation to members of the Legislature is recognized in Idaho Code § 67-6618, which exempts "state executive officers appointed by the governor subject to confirmation by the senate" from registering as lobbyists when "acting in their official capacity." Indeed, among the essential purposes of agencies is the development of expertise in specialized areas in order to better inform the formation of policy by the governor and Legislature.

It should also be noted that Idaho public employees retain the right, under the terms of Idaho Code § 67-5311(2), to "[e]xpress an opinion as an individual privately and publicly on political subjects," to be "politically active in connection with a question which is not specifically identified with a political party, such as a constitutional amendment, referendum, approval of a municipal ordinance or any other question or issue of a similar character," and to "participate fully in public affairs, except as prohibited by law, in a manner which does not materially compromise the neutrality, efficiency, or integrity of the employee's administration of state functions." Idaho Code § 67-5311(2)(b), (j) and (n).

Idaho Code § 67-5311 reflects the rights of public employees embodied in the federal and state constitutions to speak out on public issues. Speech on matters of public concern receives the highest degree of constitutional protection, requiring that the employee's interest in commenting upon matters of public concern be balanced against the interest of the state, as an employer, in promoting the efficiency of the public services it performs. Lockhart v. State, Dept. of Fish and Game, 127 Idaho 546, 552, 903 P.2d 135, 141 (Idaho App. 1995). Thus, while state agencies may limit employees from commenting upon internal office affairs, they may not "establish conditions of public employment which infringe upon an employee's constitutional right of free speech." Gardner v. Evans, 110 Idaho 925, 933, 719 P.2d 1185, 1193 (1986).

## ADVISORY LETTERS OF THE ATTORNEY GENERAL

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In conclusion, Idaho law does not prohibit the Commission, employees of IDFG, or employee associations from commenting publicly upon pending legislation that may affect matters of public concern.

This letter is provided to assist you with the legal questions presented in your letter and is not intended as a formal legal opinion or to represent the views of this office on any policy issues presented by pending legislation. Rather, this response is an informal and unofficial expression of the views of this office limited solely to the legal questions you presented based upon the research of the author.

Sincerely,

STEVEN W. STRACK  
Deputy Attorney General

ADVISORY LETTERS OF THE ATTORNEY GENERAL

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February 23, 2011

The Honorable Dennis Lake  
Idaho House of Representatives  
VIA ELECTRONIC MAIL

Re: Draft Legislation Requiring Library Internet Use Policy

Dear Representative Lake:

This letter is intended to complement Mr. Brian Kane's letter of February 1, 2011. It is brief, as I understand the response is urgent. It is not an Opinion of the Office of the Attorney General.

There is a constitutional concern regarding impairment of contract in violation of the United States Constitution, Article I, Section 10, and of the Idaho Constitution, art. I, sec. 16. Simply put, if a library district has an outstanding bond of recent vintage, the prohibition on the receipt of tax revenues most likely means the bond cannot be repaid. It may be the proposed legislation still passes constitutional muster (*see, e.g. Sanderson v. Salmon River Canal Co., Ltd.*, 45 Idaho 244, 263 P. 32 (1927)), but at the very least, the proposed legislation invites a lawsuit.

I see two ways around this potential problem. First, restrict the prohibition on receiving tax revenues to those revenues used to fund the maintenance and operation portion of the library budgets. There may, however, still be a problem with preexisting short-term contracts. Second, just require libraries to have the desired policy without the threat of withholding tax revenues.

Withholding tax revenues requires a mechanism to do so. The State Tax Commission can be directed to review library internet policies to ensure they conform to the law. If they do not, the State Tax Commission can be directed neither to approve property tax levies nor to distribute sales tax revenues to the offending districts. Explicit authority giving the State Tax Commission this responsibility and power should be included in the legislation. While the State Tax Commission has broad power to promulgate rules

relating to tax matters found in title 63, Idaho Code, this legislation affects title 33. Without explicit authority in the legislation, it is not clear the State Tax Commission has the implicit authority to promulgate rules affecting this title.

If you have questions, please contact either Brian Kane or me.

Sincerely,

CARL E. OLSSON  
Deputy Attorney General

ADVISORY LETTERS OF THE ATTORNEY GENERAL

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March 2, 2011

The Honorable Erik Simpson  
The Honorable Tom Trail  
Idaho House of Representatives  
VIA HAND DELIVERY

Re: Our File No. 11-36023 — Possession of Firearms on the  
Campuses of Public Colleges and Universities in Idaho

Dear Representatives Simpson and Trail:

This is in response to your request to the Office of the Attorney General for legal analysis on the constitutionality of RS20499, which amends various sections of Idaho Code that relate to the regulation of firearms possession on the campuses of public colleges and universities in Idaho. You have also asked for legal analysis on a number of related issues, specifically:

1. Whether any of Idaho's public higher education institutions have been granted any authority to regulate concealed carry of firearms, and if such authority exists, how the exercise of such authority would be limited by art. I, sec. 11 of the Idaho Constitution.

2. Whether the Idaho Legislature's authority to regulate the concealed carry of firearms extends to the campuses of such institutions.

3. Whether, currently, a license issued pursuant to either Idaho Code § 18-3302 or § 18-3302H to a person with no relationship, contractual or otherwise, to an Idaho public higher education institution is valid on the campus of that institution.

4. Whether enactment of RS20499 would impair the ability of an Idaho public higher education institution to remove a person found to be violating state or federal law from its campus.

This office has conducted substantial research regarding legal issues relevant to the regulation of firearms possession on the campuses of public colleges and universities in Idaho, and that legal analysis is attached (*see* July 5, 2007 letter to Rep. Tom Trail; July 5, 2007 letter to Sen. Gary J. Schroeder).

On your question regarding the constitutionality of RS20499, the regulation of firearms in Idaho must be consistent with art. I, sec. 11 of the Idaho Constitution, which was amended in 1978 to provide that:

The people have the right to keep and bear arms, which right shall not be abridged; but this provision shall not prevent the passage of laws to govern the carrying of weapons concealed on the person nor prevent passage of legislation providing minimum sentences for crimes committed while in possession of a firearm, nor prevent the passage of legislation providing penalties for the possession of firearms by a convicted felon, nor prevent the passage of any legislation punishing the use of a firearm. No law shall impose licensure, registration or special taxation on the ownership or possession of firearms or ammunition. Nor shall any law permit the confiscation of firearms, except those actually used in the commission of a felony.

Idaho's laws regarding concealed weapons are codified in title 18, chapter 33, Idaho Code. In 2008, the Idaho Legislature enacted Idaho Code § 18-3302J, and stated its intent to wholly occupy the field of firearms regulation within this state by preempting firearms regulation by counties, cities, agencies, boards or any other political subdivisions of this state. Although there is no constitutional or statutory provision in Idaho that *specifically authorizes* or *specifically prohibits* the regulation of firearms on public university and college campuses, subsection 5(c) of that statute states, nonetheless, that this section (Idaho Code § 18-3302J) shall not be construed to affect "[t]he authority of the board of regents of the university of Idaho, the boards of trustees of the state colleges and universities, the board of professional-technical education and the boards of trustees of each of the community colleges established under chapter 21, title 33, Idaho Code, to regulate in matters relating to firearms." The purpose of RS20499 appears to be to *specifically prohibit* the Idaho State Board of Education (acting as the Regents of the University of Idaho and as the trustees of the state public colleges and universities, including the state professional-technical college) and the governing boards of the state community college districts from regulating the lawful possession of firearms on the campuses of the higher education institutions, except in undergraduate student housing owned or operated by an institution. The Idaho Supreme Court has not addressed constitutional issues regarding

the regulation of concealed weapons since the 1978 amendment to art. I, sec. 11 of the Idaho Constitution. Accordingly, we are not able to determine how an Idaho court would rule regarding the constitutionality of any Idaho statutes regulating concealed weapons, including RS20499.

With respect to your questions on related issues pertaining to firearms regulation, as we stated above, there is no constitutional or statutory provision in Idaho that specifically authorizes or specifically prohibits the regulation of firearms on public university and college campuses. If such authority exists, then art. I, sec. 11 of the Idaho Constitution, could operate to limit such authority, as it permits the Idaho Legislature to enact laws to govern the carrying of concealed weapons. On the question of whether the Idaho Legislature's authority to regulate the concealed carry of firearms extends to the campuses of Idaho's public colleges and universities, this presents the issue of whether an Idaho public higher education's governing board has constitutional authority to regulate firearms. The State Board of Education, in its capacity as Regents of the University of Idaho, has constitutional authority pursuant to art. IX, sec. 10 of the Idaho Constitution. Idaho courts have not addressed whether that constitutional authority extends to regulate firearms on the University of Idaho campus.

You have asked whether, currently, a license issued pursuant to either Idaho Code § 18-3302 or § 18-3302H to a person with no relationship, contractual or otherwise, to an Idaho public higher education institution is valid on the campus of that institution. The State Board of Education has not adopted a firearms policy for the colleges and universities under its supervision, but the University of Idaho, Idaho State University, and Boise State University have adopted firearms policies for their respective institutions. These policies currently prohibit the possession of firearms and the carry of firearms on campus, whether open carry, concealed carry without a license, or concealed carry with a license. Finally, you asked whether enactment of RS20499 would impair the ability of a public higher education institution to remove a person



found to be violating state or federal law from campus. RS20499 appears to be limited to the issue of regulation of firearms, and does not appear to affect any other university authority to remove or ban a person from campus who is found to be violating a state or federal law.

This letter is provided to assist you. It is an informal and unofficial response of the Office of the Attorney General based on the research of the author.

Sincerely,

BRIAN KANE  
Assistant Chief Deputy

ADVISORY LETTERS OF THE ATTORNEY GENERAL

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March 10, 2011

The Honorable Wendy Jaquet  
Idaho House of Representatives  
VIA HAND DELIVERY

Re: Our File No. 11-36134 — City of Bellevue-Casino Operation Authority

Dear Representative Jaquet:

This letter responds to your email inquiry received on March 8, 2011, that asks whether “the City of Bellevue as a charter city [could] allow a casino” and whether “an Idaho [Indian] tribe [could] purchase land in Bellevue for the purpose of constructing a casino.” The discussion below is not intended, and should not be deemed, to express the official position of the Attorney General. It reflects a preliminary analysis prepared by our Office under significant time constraints to assist you in determining whether to propose legislation.

Article III, sec. 20 of the Idaho Constitution contains a general prohibition against gambling in this State. It excludes from that general prohibition three forms of gambling activity: “[a] state lottery which is authorized by the state if conducted in conformity with enabling legislation; . . . [p]arimutuel betting if conducted in conformity with enabling legislation; and . . . [b]ingo and raffle games that are operated by qualified charitable organizations in the pursuit of charitable purposes if conducted in conformity with enabling legislation.” It appears likely none of those excepted forms of gambling encompasses the type of casino activities that you identify—*i.e.*, pull-tabs. The term “state lottery”—most reasonably read—applies to the current *state-run* lottery and would not include a “lottery” operated by a political subdivision. *See* Idaho Code §§ 67-7401 to 67-7452. Your email suggests that Bellevue’s status as a “charter city” may have a bearing on the issue, but it is unclear why. Although certain “special” charter cities—*i.e.*, cities issued charters prior to statehood and exempted in part from operation of general state law—have retained a measure of independence not enjoyed by other municipalities (*see, e.g., Bagley v. Gilbert*, 63 Idaho 494, 499-502, 122 P.2d 227, 230-31 (1942)), the limitation imposed by art. III, sec. 20 is constitutional and thus binding even on that category of city.

Bellevue is not located within an Indian reservation. Given its location, tribal gaming there would be subject to otherwise applicable state law. *See, e.g., Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49, 93 S. Ct. 1267, 1270-1271, 36 L. Ed. 2d 114 (1973). The Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701-2721, does authorize gaming on lands acquired after the statute's 1988 effective date in trust for a tribe by the United States for purposes of tribal gaming activities, but that gaming also would be subject to the general prohibition in art. III, sec. 20 under Ninth Circuit precedent. *Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 64 F.3d 1250 (9th Cir. 1994), *amended*, 99 F.3d 321 (9th Cir. 1996). An initiative adopted in 2002 and codified at Idaho Code §§ 67-429B & 67-429C does authorize a specific form of video machine gaming on "Indian lands" subject to IGRA. Pull-tabs are not encompassed within the category of gaming permitted under these statutes.

Finally, even if it is assumed that the term "Indian lands" as used in section 67-429C includes locations outside an Idaho tribe's reservation and pull-tabs were included as a permissible form of gambling under section 67-429B, such off-reservation gaming activity must occur on lands taken into trust by the Secretary of the Interior in compliance with IGRA's provisions. Under the federal statute, the Secretary is authorized to take that action only "after consultation with the Indian tribe and appropriate State and local officials, including officials of other nearby Indian tribes, [upon a determination] that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community, but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination." 25 U.S.C. § 2719(b)(1)(A). There are, consequently, significant legal and policy issues attendant to off-reservation gaming by a tribe of the type that you specify.

I hope that you find this analysis helpful. Please contact me with any additional questions.

Sincerely,

BRIAN KANE  
Assistant Chief Deputy

March 21, 2011

The Honorable Monty J. Pearce  
Idaho State Senate  
VIA HAND DELIVERY

Re: Our File No. 11-36244 — Nature of States' Rights

Dear Senator Pearce:

You have requested this Office's views on "the concept of state sovereignty, sometimes referred to as States' Rights." The general nature of the question requires an equally general response that may provide little assistance to the extent that you are contemplating preparation of legislation directed at particular issues. It also must be emphasized that the analysis below is not intended, and should not be deemed to be, an official opinion of the Attorney General. Our response has been prepared under significant time constraints, is preliminary in nature and has been provided solely to assist you in preparing, supporting, opposing or seeking amendments to proposed legislation.

### **THE CONTRASTING FEDERAL AND STATE CONSTITUTIONAL MODELS**

In ordinary usage, the term "States' rights" refers to those powers reserved to the States notwithstanding their entry into the Union and is viewed best as a function of "Federalism." The most explicit expression of the "Federalism" concept appears in the Tenth Amendment to the United States Constitution, which provides: "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." This provision is complemented by the Ninth Amendment, which provides that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." These amendments mean, most fundamentally, that the Federal Government possesses only those powers granted to it by the Constitution—as opposed to having all powers except as limited by the Constitution. This "limited" or "delegated power" government model sharply

contrasts with the approach to legislative power contained in the Idaho Constitution. As Justice Taylor explained over 50 years ago:

In creating the federal government, the people of the original colonies and their delegates were constrained and actuated by an abiding fear of a despotic usurpation of power by a strong central government. Out of this apprehension arose the division of the powers of government, the bill of rights, and many other restrictive provisions. To remove all uncertainty it was provided by the Tenth Amendment 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 colonies were independent sovereignties and as such possessed unlimited governmental power. By the restrictions which they wrote into the constitution and particularly by the Tenth Amendment, they sought to and did retain the status of sovereign states under the constitution. That same status, with its characteristics of sovereignty, has been extended to all of the states subsequently admitted to the Union.

In drafting and adopting the constitution of this state, the people created a government of unlimited sovereign powers. The only limitations were those expressly set forth in the constitution itself, and the limitations imposed by the delegation of powers to the federal government. Nowhere in our state constitution is there any provision to the effect that powers not specifically given are reserved to the people, such as the Tenth Amendment to the federal constitution. Specific limitations upon the power of the state government are contained in the declaration of rights. Art. 1. This declaration concludes with § 21, to-wit:

“This enumeration of rights shall not be construed to impair or deny other rights retained by the people.”

By its terms, this is a reservation of rights and not a limitation upon the governmental powers vested in the state government. It clearly appears to be a safety device for the protection of rights not specifically enumerated, rather than an expression of the will of the people to limit either of the departments of the state government in the exercise of their proper functions. This thought is borne out by the fact that the section is a parallel to the Ninth Amendment to the federal constitution, but in the case of the federal government, the Tenth Amendment was added, and deemed necessary, to reserve powers not delegated.

In re Petition of Idaho State Fed’n of Labor (AFL), 75 Idaho 367, 377, 272 P.2d 707, 713 (1954) (Taylor, J., dissenting). It is thus settled that “our State Constitution is an instrument of limitation and not of grant and that the legislature has plenary power in all matters of legislation except where prohibited by the constitution.” Smylie v. Williams, 81 Idaho 335, 339, 341 P.2d 451, 453 (1959); *accord* Troutner v. Kempthorne, 142 Idaho 389, 395, 128 P.3d 926, 932 (2006). The “Federalism” approach, again, is the converse: Congress has only those powers identified in the United States Constitution.

### THREE PRIMARY LIMITATIONS ON FEDERAL AUTHORITY

#### 1. State “Processes” Cannot Be Commandeered

The precise scope of the powers delegated by the States to the Federal Government under the United States Constitution—and hence the reach of, *inter alia*, the Tenth Amendment—nonetheless is unclear. Under current United States Supreme Court jurisprudence, the question turns on whether, in a particular context, “an incident of state sovereignty is protected by a limitation on an Article I power” granted to Congress under the federal constitution. New York v. United States, 505 U.S. 144, 157, 112 S. Ct. 2408, 2418, 120 L. Ed. 2d 120 (1992). The Court in New York, for example, found Congress’ attempt to “commandeer” state processes through a “coercive” statutory provision requiring a State to take “title” of nuclear waste impermissible under

the Tenth Amendment to the extent not supported by the exercise of congressional authority under the Commerce and Spending Clauses of Article I. *Compare id.* at 162 (“[w]hile Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States, the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress’ instructions”), *with id.* at 173 (“[t]he . . . first set of incentives, in which Congress has conditioned grants to the States upon the States’ attainment of a series of milestones, is thus well within the authority of Congress under the Commerce and Spending Clauses”). Five years later in Printz v. United States, 521 U.S. 898, 117 S. Ct. 2365, 138 L. Ed. 2d 914 (1997), the Court invalidated on the “commandeering” rationale provisions of the Brady Handgun Violence Prevention Act that imposed a duty on local law enforcement officials to conduct gun background checks. *See* 18 U.S.C. § 922(s)(2).

## 2. There Must Be a Substantial Economic Activity Relationship

However, the Tenth Amendment, either separately or in combination with the Ninth Amendment, is only one prong of the modern “Federalism” analysis employed by the Supreme Court to cabin the reach of congressional authority. A second prong lies in the Court’s review of Congress’ exercise of asserted Commerce Clause powers. Over the last 15 years, this review has become arguably more stringent and resulted in the invalidation of the Gun-Free School Zones Act in United States v. Lopez, 514 U.S. 549, 115 S. Ct. 1624, 131 L.Ed.2d 626 (1995), and the civil remedy provision of the Violence Against Women Act in United States v. Morrison, 529 U.S. 598, 120 S. Ct. 1740, 146 L. Ed. 2d 658 (2000), because of their perceived lack of a substantial relationship to economic activity. The legal and practical effect of these decisions is to leave the type of regulation invalidated within the province of the States to adopt if they chose to do so. This seeming willingness to construe Congress’ Commerce Clause powers less expansively than in the past is not without bounds, as reflected in Gonzalez v. Raich, 545 U.S. 1, 125 S. Ct. 2195, 162 L. Ed. 2d 1 (2005), where it held California’s “medical marijuana” authorization preempted by the federal Controlled Substances Act because, in the majority’s view, the federal statute addressed “quintessentially economic” activities. *Id.* at 25.

### 3. States Should Remain Immune From Suit

The final component of modern “Federalism” is the Supreme Court’s renewed emphasis on preserving the States’ immunity from unconsented suit by private parties for retroactive monetary relief to enforce federal statutes enacted under Congress’ Article I authority. A highly detailed analysis of this aspect of Federalism is beyond the scope of the present letter, but one decision—Alden v. Maine, 527 U.S. 706, 119 S. Ct. 2240, 144 L. Ed. 2d 636 (1999)—warrants mention. There, the Court invalidated a provision of the federal Fair Labor Standards Act authorizing suit in state court by aggrieved state employees to recover compensation and liquidated damages. It reasoned in part:

Underlying constitutional form are considerations of great substance. Private suits against nonconsenting States—especially suits for money damages—may threaten the financial integrity of the States. It is indisputable that, at the time of the founding, many of the States could have been forced into insolvency but for their immunity from private suits for money damages. Even today, an unlimited congressional power to authorize suits in state court to levy upon the treasuries of the States for compensatory damages, attorney’s fees, and even punitive damages could create staggering burdens, giving Congress a power and a leverage over the States that is not contemplated by our constitutional design. The potential national power would pose a severe and notorious danger to the States and their resources.

A congressional power to strip the States of their immunity from private suits in their own courts would pose more subtle risks as well. “The principle of immunity from litigation assures the states and the nation from unanticipated intervention in the processes of government.” . . . When the States’ immunity from private suits is disregarded, “the course of their public policy and the administration of their public affairs” may become “subject to and controlled by the mandates of judicial tribunals without their consent, and in favor of individual interests.” . . . While the States have relin-



quished their immunity from suit in some special contexts—at least as a practical matter . . . , this surrender carries with it substantial costs to the autonomy, the decisionmaking ability, and the sovereign capacity of the States.

*Id.* at 750 (citations omitted). The States' immunity from suit, in short, is part and parcel of maintaining their status as sovereign entities which surrendered some, but not all, of their sovereignty to the national government by entry into the federal constitution.

## CONCLUSION

As demonstrated above, Idaho's reserved rights provision underlies a state system that grants plenary authority to the Legislature over the affairs of the State of Idaho and its citizens. Applying the accepted principles of Federalism, the State can most successfully assert its sovereignty upon a showing that the Federal Government has overstepped by:

1. Commandeering the state or its resources;
2. Overreaching by legislating in an area bereft of substantial economic activity; or
3. Infringing on the state's immunity from suit.

As legislation or a judicial challenge to federal action is considered, the above represent the most likely means of successfully asserting state sovereignty. As this analysis has been prepared in the abstract, it is impossible to determine the legal viability of any contemplated legislation. Should you desire an analysis of a specific piece of legislation, please forward it to this Office.

This Office hopes that this brief analysis of a very complex issue adequately responds to your inquiry. Please contact me if you have further questions.

Sincerely,

BRIAN KANE  
Assistant Chief Deputy

April 15, 2011

The Honorable Ben Ysursa  
Idaho Secretary of State  
Statehouse  
VIA HAND DELIVERY

Re: Our File No. 11-36563 — Commission for Reapportionment

Dear Secretary Ysursa:

This letter is in response to your recent inquiry regarding the appointment of individuals to serve on the Commission for Reapportionment. Specifically, you asked:

Which elected or appointed officials are precluded from serving on the Commission for Reapportionment pursuant to Article III, Sec. 2 of the Idaho State Constitution and Section 72-1502, Idaho Code?

The composition of the Commission is set forth by art. III, sec. 2, ¶ 2, of the Idaho Constitution, which states that the Commission is comprised of six members, selected respectively by the leaders of the two largest political parties in the House and Senate, as well as the state chairmen of the two largest political parties. The upcoming Commission should be composed of members selected (one each) by the Speaker of the House, the House Minority Leader, the President Pro Tem of the Senate, the Senate Minority Leader, the State Republican Party Chair, and the State Democratic Party Chair. If no appointment is made by any of these designees, then the Idaho Supreme Court fills the vacancy.

The membership of the Commission is further limited in that members cannot “be an elected or appointed official in the state of Idaho at the time of designation or selection.” Idaho Const. art. III, § 2, ¶ 2. This limitation raises two primary questions. First, what is meant by an “elected or appointed public official”? And, what is the limitation, if any, on the qualifier, “in the state of Idaho”? Paragraph three of art. III, sec. 2 authorizes the

Legislature to enact laws to implement this constitutional provision, including “additional qualifications for commissioners and additional standards to govern the commission.” Through Chapter 15 of Title 72, the Legislature has provided the legal structure to implement art. III, sec. 2.

Idaho Code § 72-1502 sets forth additional qualifications for members of the Commission. Specifically:

No person may serve on the commission who:

- (1) Is not a registered voter of the state at the time of selection; or
- (2) Is or has been within one (1) year a registered lobbyist; or
- (3) Is or has been within two (2) years prior to selection an elected official or elected legislative district, county or state party officer. The provisions of this subsection do not apply to the office of precinct committeeperson.

Notably, this section does not define either “elected or appointed public official,” nor does it clarify “in the state of Idaho.” This provision requires that members be registered voters at the time of appointment, and prohibits lobbyists, elected officials or elected legislative district, county or state party officers. This section expressly permits a precinct committeeperson to serve on the Commission (assuming he or she is a registered voter).

Reading these provisions together, it is clear that their sweep is broad. Constitutionally, any official elected or appointed in the State of Idaho is prohibited. Statutorily, this prohibition is broadened to apply two years retroactively to officials, and include lobbyists within the prohibition. The only carve out is made for precinct committeemen who, while elected, are not state or local *government* officials. Their exclusion presumably reflects the Legislature’s understanding that the constitutional limitation is less expansive than the statutory limitations on Commission membership. This Office cannot conclude beyond a reasonable doubt that this legislative construction of art. III, sec. 2(2) departs from the constitutional provision’s mandate. See Bannock County v. Citizens’ Bank & Trust Co., 53 Idaho 159, 176, 22 P.2d 674, 681 (1933).

Looking specifically at positions restricted from membership on the Commission, art. III, sec. 2 and Idaho Code § 72-1502 appear to operate

together to exclude any appointed or elected State or local government officeholder in contrast to a precinct committeeperson, who is not a government officer, but a political party officer. As examples, this prohibition appears to restrict City Council members, Mayors, County Commissioners, Mosquito Abatement District Board Members, and even substitute legislators (within two years of appointment) from service on the Commission.

The rationale for the statutory restriction likely lies in a legislative concern over the influence accorded the political parties by their Commission-member appointment power. It seeks, on one hand, to place the Commission beyond the taint of an electorally beholden membership, but, on the other, recognizes the need to maintain an adequate pool of politically active individuals from which to draw the Commission. We cannot say that this is an unreasonable compromise, or, as discussed above, plainly incompatible with the less than clear language in art. III, sec. 2(2). In sum, your question is answered by Idaho Code § 72-1502.

Sincerely,

BRIAN KANE  
Assistant Chief Deputy

ADVISORY LETTERS OF THE ATTORNEY GENERAL

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August 18, 2011

Idaho's Citizen Commission for Reapportionment  
Capitol Building  
700 W. Jefferson Street  
Boise, ID 83720-0054

Re: Our File No. 11-37838 — August 16, 2011,  
Inquiry Regarding Deadline for Submission

Commissioners:

This letter is in response to your recent inquiry regarding the deadline for submission of the legislative and congressional redistricting plans to the Office of the Secretary of State. As noted in your letter, art. III, sec. 2(4) of the Idaho Constitution provides that the Redistricting Commission has ninety (90) days from the date the commission is convened to submit a legislative and a congressional redistricting plan to the Office of the Secretary of State.<sup>1</sup>

The Secretary of State convened the Redistricting Commission on June 7, 2011. Calculating from that date, the ninety (90) day deadline expires on Sunday, September 4, 2011, the day before Labor Day. Pursuant to Idaho Code § 73-108, both Sunday and Labor Day are designated holidays. Thus, under Idaho Code § 73-110, the redistricting plans may be submitted on the first business day after the holidays. Because the first business day is Tuesday, September 6, 2011, both the legislative and congressional redistricting plans must be submitted to the Office of the Secretary of State by the close of business on that day. The Redistricting Commission's deadline for submission of both a legislative and a congressional plan is 5:00 p.m. on Tuesday, September 6, 2011.

ADVISORY LETTERS OF THE ATTORNEY GENERAL

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If you have any questions concerning this matter, please contact me.

Sincerely,

BRIAN KANE  
Assistant Chief Deputy

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<sup>1</sup> This deadline is mirrored in Idaho Code § 72-1508.

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