

**IDAHO
ATTORNEY
GENERAL'S
ANNUAL REPORT**

OPINIONS

CERTIFICATES OF REVIEW

AND

**SELECTED ADVISORY
LETTERS**

FOR THE YEAR

2012

Lawrence G. Wasden
Attorney General

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This volume should be cited as:

2012 Idaho Att’y Gen. Ann. Rpt.

Thus, the Official Opinion 12-1 is found at:

2012 Idaho Att’y Gen. Ann. Rpt. 5

Similarly, the Certificate of Review of February 21, 2012
is found at:

2012 Idaho Att’y Gen. Ann. Rpt. 35

The Advisory Letter of January 9, 2012
is found at:

2012 Idaho Att’y Gen. Ann. Rpt. 65

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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

INTRODUCTION

Dear Fellow Idahoan:

2012 was challenging and productive for both the State of Idaho and the Office of the Attorney General.

Among the more significant endeavors of my Office, Idaho joined 26 of her sister states in *National Federation of Independent Business v. Sebelius*, 576 U.S.—(2012). I had the pleasure of attending the United States Supreme Court for the arguments, and, although the outcome was not what Idaho had hoped, the proceedings reflected the essential elements of our constitutional republic. Importantly, the U.S. Supreme Court recognized limits to both the Commerce Power as well as the Federal Spending Power by prohibiting the federal government from dragooning state budgets to force compliance with federal regulations. My Office will continue to challenge, when legally appropriate, 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 \$24,966,282 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.

Again in 2012, the gravity of this Office's ultimate criminal duty came to bear, as a second convicted murderer was executed under the death penalty. My Office worked tirelessly to ensure justice was done, and I personally witnessed and served as legal counsel to the execution. The rule of law and justice were served.

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. WASDEN
Attorney General

ANNUAL REPORT OF THE ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL LAWRENCE G. WASDEN ATTORNEY GENERAL 2012 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	Paul Panther, Criminal Law
Brett DeLange, Consumer Protection	Clive Strong, Natural Resources

DEPUTY ATTORNEYS GENERAL

Rob Adelson	Darrell Early	John Keenan	Melissa Moody	Andrew Snook
Lawrence Allen	Lori Fleming	M. Scott Keim	Tyson Nelson	Nicholas Spencer
Stephanie Altig	Robert Follett	Chelsea Kidney	Charina Newell	Russell Spencer
LaMont Anderson	Roger Gabel	S. Kilminster-Hadley	Brian Nicholas	Marcy Spilker
James Baird	Cheryl George	Brent King	Mark Olson	Jason Spillman
Garrick Baxter	Michael Gilmore	Karl Klein	Carl Olsson	Steve Strack
Matthew Beeter	Jeanne Goodenough	Chris Kronberg	Michael Orr	Weldon Stutzman
Mary Jo Beig	Patrick Grace	Mark Kubinski	Edith Pacillo	Jennifer Swartz
Nancy Bishop	Jason Gray	Deena Layne	James Price	Katherine Takasugi
Craig Bledsoe	Jennifer Grunke	William Loomis	Neil Price	Timothy Thomas
Rondee Blessing	Joanna Guilfof	Jessica Lorello	Jerry Reynolds	Kathleen Trever
Chris Bromley	Stephanie Guyon	Gary Luke	Whitaker Riggs	Steve Vinsonhaler
Dallas Burkhalter	Susan Hamlin	Emily Mac Master	Kenneth Robins	Ann Vonde
Richard Burleigh	Harriet Hensley	Karin Magnelli	Tracey Rolfsen	William von Tagen
Lisa Carlson	Jane Hochberg	Jenifer Marcus	Denise Rosen	Adam Warr
Corey Cartwright	John Homan	René Martin	Kristine Sasser	Julie Weaver
Doug Conde	Krista Howard	Kendal McDewitt	Nicole Schafer	Peggy White
Alan Conlogue	Donald Howell	Nicole McKay	Steve Schuster	Mark Withers
Sean Costello	Blair Jaynes	John McKinney	Erick Shaner	Carl Withroe
Andrea Courtney	Joseph Jones	Michael McPeck	Phil Skinner	Cynthia Yee-Wallace
Timothy Davis	Kenneth Jorgensen	Cheryl Meade	Clay Smith	David Young
Peg Dougherty	Angela Kaufmann		Jessica Smith	Colleen Zahn

INVESTIGATORS

Scott Birch, Chief	Jim Kouril	Tawni Limesand	Alicia Marquardt	Michael Steen
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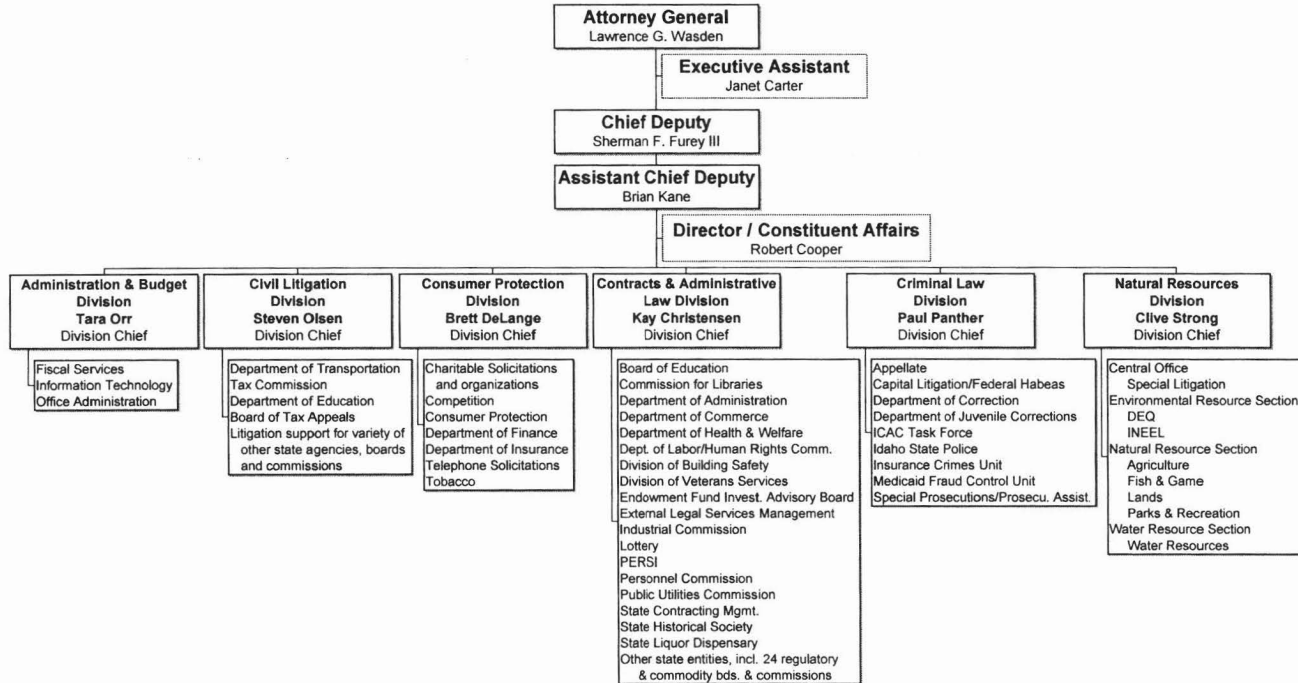
PARALEGALS

Mandy Ary	Rita Jensen	Bernice Myles	Lisa Warren
Kathie Brack	Vicki Kelly	Jean Rosenthal	Ray Williams
Patricia Campbell	Beth Kittlemann	Victoria Rutledge	Paula Wilson
Suzy Cooley-Denney	Catherine Minyard	Sam SeEVERS	

NON-LEGAL PERSONNEL

Renee Ashton	Colleen Funk	Reta Massano	Karen Rash	Jodie Stoddard
Sherrie Bengtson	Marilyn Gerhard	Patty McNeill	Greg Rast	Teresa Taylor
Kriss Bivens Cloyd	Leslie Gottsch	Ronda Mein	Kathy Ream	Lonny Tutko
Casey Boren	Trudy Jackson	Patricia Miller	Christine Riggs	Olga Valdivia
Trisha Briggs	Eric Jensen	Lynn Mize	Nicole Romero	Deborah Wetherell
G. Luke Carter	Cecil Jones	Roseann Newman	Dustin Russell	Robert Wheeler
Reene Chariton	Joni Kingland	Frances Nix	Micki Schlapia	Victoria Wigle
Robert Cooper	Nancy Lane	Dawn Phipps	Carla Shupe	Kim Youmans
Deborah Forgy	Aleah Lattin	Sandy Plotrowski	Aimee Stephenson	

Office of the Idaho Attorney General Organizational Chart - 2012



**OFFICIAL OPINIONS
OF
THE ATTORNEY GENERAL
FOR THE YEAR 2012**

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

ATTORNEY GENERAL OPINION 12-1

To: The Honorable Brent Hill
President Pro Tempore
Idaho State Senate
STATEHOUSE MAIL

Per Request for Attorney General's Opinion

You requested an Attorney General Opinion regarding art. III, sec. 14 of the Idaho Constitution (Origination Clause). The section requires that "bills for raising revenue shall originate in the house of representatives." This responds to your request. This opinion relies significantly on an earlier opinion (99-2) authored by Ted Spangler.

QUESTION PRESENTED

Is the initiation of fee legislation by the Idaho Senate defensible under art. III, sec. 14 of the Idaho Constitution?

CONCLUSION

Art. III, sec. 14 of the Idaho Constitution requires all revenue raising bills to originate in the Idaho House of Representatives. Application of this provision has generally been to legislation involving an increase or decrease involving a tax or taxing measure. It has not been traditionally applied to legislation involving fees. A challenge to a fee measure would be a case of first impression for Idaho courts. Based upon case law from other jurisdictions, a reasonable legal defense can be advanced to support the origination of fee legislation in either chamber of the legislature. As reflected in greater detail below, this defense is likely to become factually specific and require a determination as to whether the fee is truly a fee, or a tax disguised as a fee. If there is doubt as to whether the legislation creates a fee or a tax, it is recommended that such legislation originate in the House.

ANALYSIS

A. Reasons for Caution in the Analysis

The cautious approach to the initiation of fee legislation noted above is based on a number of considerations. The first cause for a conservative approach is reflected in Justice Harlan's statement concerning the Origination Clause of the federal constitution. "What bills belong to that class [of bills raising revenue] is a question of such magnitude and importance that it is the part of wisdom not to attempt, by any general statement, to cover every possible phase of the subject." Twin City Nat'l Bank v. Nebecker, 167 U.S. 196, 202, 17 S. Ct. 766, 769, 42 L. Ed. 134 (1897).

The next consideration counseling a conservative approach to the question is that if the Idaho Supreme Court rejects the interpretation that "revenue bills" are only those that levy taxes, the cost to the state could be high. Any controversy heard in a court will involve the payment of money to the state. To justify litigation, the amounts in question are likely to be high. If the law was initiated in the senate, and this is found unlawful, then the law is void. This means that those who paid money under that law will be due refunds. If the case is a class action, the resulting refunds could be large. *See, e.g., Ware v. Idaho State Tax Commission*, 98 Idaho 477, 483, 567 P.2d 423, 429 (1977) (Grocery credit case upholding a refund of only \$90.00 established that a class of an additional 27,980 plaintiffs might also be entitled to relief).

Third, the leading case on Idaho's Origination Clause is Dumas v. Bryan, 35 Idaho 557, 207 P. 720 (1922). This case is 90 years old and subject to conflicting interpretations.

A fourth consideration suggesting caution where fee legislation is initiated is whether the fee enacted is a fee or a tax. Simply labeling a tax a fee will not protect it on judicial review. *See, e.g., V-1 Oil Co. v. Idaho Petroleum Clean Water Trust Fund*, 128 Idaho 890, 920 P.2d 909 (1996) (One cent per gallon petroleum transfer fee used to fund the Clean Water Trust Fund held a tax, not a fee). If it is really a tax, not a fee, then the common rule is that initiation in the senate is fatal and the statute is void. The exception to this rule is if the revenue-raising portion of the enactment is merely incidental to the main purpose of the statute. If it is, then origination of the bill in the senate

is permitted. Dumas, however, may indicate that Idaho does not recognize this general exception. This is discussed below.

The fifth point counseling caution in where fee bills originate is simply that all these uncertainties are avoided if fee bills originate in the house. This removes any possibility of violating the Origination Clause.

B. The General Rule

The general rule is that origination clauses apply only to bills to levy taxes in the strict sense of the word.

At the federal level, this rule was laid down in United States v. Mayo, 1 Gall. 396, 26 F. Cas. 1230 (1813). Holding that laws creating fines and forfeitures are not “revenue laws” under the Origination Clause, Circuit Justice Story wrote:

The true meaning of ‘revenue laws’ in this clause is, such laws as are made for the direct and avowed purpose for creating and securing revenue or public funds for the service of the government. No laws, whose collateral and indirect operation might possibly conduce to the public or fiscal wealth, are within the scope of the provision.

Mayo, 26 F. Cas. at 1231.

Judge Story later authored a treatise on the Constitution in which he expounded on this statement.

[T]he history of the origin of the power already suggested abundantly proves that it has been confined to ‘bills to levy taxes’ in the strict sense of the words, and has not been understood to extend to bills for other purposes, which may incidentally create revenue.

Joseph Story, *Commentaries on the Constitution of the United States*, § 880, 5th Ed. (1891). Quoted in Morgan v. Murray, 328 P.2d 644, 648 (Mont. 1958).

In United States v. Norton, 91 U.S. 566, 1 Otto 566, 23 L. Ed. 454 (1875), the United States Supreme Court held that an act to create a postal money order system and to provide criminal penalties for embezzlement was not a “revenue bill” within the meaning of the Origination Clause. The court adopted Judge Story’s view of the matter, specifically referring to Mayo and the *Commentaries*. It quoted the *Commentaries* language noted above in its holding.

Another federal case from 1875 sheds more light on the proper interpretation of the federal Origination Clause. In United States ex. rel. Michels v. James, 13 Blatchf. 207, 26 F. Cas. 577 (1875), Circuit Judge Johnson held that a postage fee increase was not a “revenue bill.” He wrote:

Certain legislative measures are unmistakably bills for raising revenue. These impose taxes upon the people, either directly or indirectly, or lay duties, imposts or excises, for the use of the government, and give to the persons from whom the money is exacted no equivalent in return, unless in the enjoyment, in common with the rest of the citizens of the benefit of good government. It is this feature which characterizes bills for raising revenue. They draw money from the citizen; they give no direct equivalent in return.

James, 26 F. Cas. at 578.

The general rule, that origination clauses apply only to bills to levy taxes in the strict sense of the word, is widely adopted in several states. In Ennis v. State Highway Commission, 108 N.E.2d 687 (Ind. 1952), the Indiana Supreme Court looked into the constitutionality of an act establishing a toll road and toll road commission. One of the challenges to the act was that it had originated in the senate and that it was therefore invalid because it was a revenue-raising measure that was required to originate in the house. The court did not agree.

This court has held that the term ‘raising revenue’ is confined to acts that levy taxes, in the strict sense of the word, and does not apply to other purposes which may incidentally create revenue.

Ennis, 108 N.E.2d at 692.

The Supreme Court of Montana was faced with deciding whether a statute prohibiting sale of liquor by private individuals and providing for sale through a system of state liquor stores was void as a revenue-raising bill that originated in the senate. The court held it was not. In deciding the point, it discussed approvingly Judge Story's Mayo opinion and his treatise on the federal constitution discussed above. The court held that, despite its revenue-raising features, the purpose of the act was to regulate and limit the manufacture and sale of intoxicating liquor. State v. Driscoll, 54 P.2d 571 (Mont. 1936).

In Northern Counties Investment Trust v. Sears, 41 P. 931 (Or. 1895), the Oregon Supreme Court set forth the general origination clause test. It paraphrased the sentiments expressed in the federal James case noted above:

A law which requires a fee to be paid to an officer, and finally covered into the treasury, of a county, for which the party paying the fee receives some equivalent in return, other than the benefit of good government which is enjoyed by the whole community, and which the party may pay and obtain the benefits under the law, or let it alone, as he chooses, does not come within the category of an act for raising revenue

Northern Counties, 41 P. at 936.

In Yourison v. State, 140 A. 691 (Del. Super. 1928), two individuals were found guilty of having operated a fishing boat carrying passengers for hire without the required license. The defendants appealed seeking to overturn the statute on the grounds that it was a bill for raising revenue that improperly originated in the state senate. After reviewing the statute at issue, the Delaware Court concluded that the statute was not a revenue bill as it was not designed to raise revenue for the general expenses of the government.

A Texas case held that an act that originated in the senate conferring the vote on women who met certain qualifications, and imposing on them a poll tax, was not a revenue act and hence not violative of the Texas Constitution's origination clause even though the tax was imposed on women whether they intended to vote or not. The Texas Court found that the object of the bill was to confer the franchise on qualified women, not to raise rev-

enue. As such, it did not violate the Texas Constitution's origination clause. Stuard v. Thompson, 251 S.W. 277 (Tex. Civ. App. 1923).

The Kentucky Court of Appeals, quoting the federal Mayo and James opinions noted previously, held that a bill imposing license taxes on blended spirits and providing penalties for nonpayment violated the state constitution's origination clause. The Commonwealth of Kentucky argued that the bill only incidentally raised revenue. The main purpose of the statute was to regulate the industry. The court disagreed. It found that the statute required nothing of the manufacturer but payment of the tax. As such, it was clearly a revenue act that the Kentucky Constitution required originate in the house. The statute was declared void. H.A. Thierman Co. v. Commonwealth, 97 S.W. 366 (Ky. App. 1906).

In Opinion of the Justices, 150 A.2d 813 (N.H. 1959), the New Hampshire Supreme Court held that a bill making nominal increases in licensing fees and permits for pharmacies and pharmacists was not a "money bill" and did not violate the origination clause. In Opinion of the Justices, 152 N.E. 2d 90 (Mass. 1958), the Supreme Court of Massachusetts held that a bill was not a "money bill" when it expended state money on an option to purchase a rail line and contained provisions for repayment to the state by imposition of a tax on people served by that line. The court found that the chief purpose of the bill, which originated in the senate, was to avoid economic harm through the preservation of existing rail service. Repayment of the money used was incidental to the chief purpose of the bill. As such, it did not violate the origination clause.

These cases show the rule to be that origination clauses generally pertain strictly to taxes used for general government purposes, and for which the people who pay the tax receive no equivalent return other than the provision of good government. If the exaction is merely incidental to the main purpose of the bill, the origination clause is generally not violated. The question is whether Idaho subscribes to the general rule.

C. Idaho Cases

There are four reported Idaho cases on the state's origination clause. None directly address whether bills implementing fees must originate in the house.

In Worthen v. State, 96 Idaho 175, 525 P.2d 957 (1974), a bill amending the Idaho Income Tax Act originated in the house. The senate, however, added two significant amendments. The issue was whether the senate had the power to amend a revenue bill initiated in the house. The question arose because of differences between the origination clauses in the federal and Idaho constitutions. Article 1, Section 7 of the federal Constitution provides:

All bills for raising revenue shall originate in the house of representatives; but the senate may propose or concur with amendments as on other bills.

In contrast, art. III, sec. 14 of the Idaho Constitution provides:

Bills 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.

Notwithstanding the absence in the Idaho Constitution of language expressly authorizing the senate to amend revenue bills, the Idaho Supreme Court held that the senate could do so. The court stated that to prohibit the senate from amending house-originated revenue bills would be an obstruction of the legislative process. Art. III, sec. 14 must be read to mean that revenue bills must originate in the house, but the senate is permitted to amend such bills.

The Worthen holding was upheld in Gallagher v. State, 141 Idaho 665, 115 P.3d 756 (2005). A bill to temporarily increase the sales tax from 5% to 5.5% was introduced in the house. The senate amended the bill significantly, raising the increase to 6% and lengthening the period of time the temporary increase would be in effect. The house concurred in the amendments. The bill was passed and signed into law. Gallagher argued that the senate amendments raised significantly more money than the house version. The amendments, therefore, constituted a revenue bill unconstitutionally initiated in the senate. The Idaho Supreme Court, relying on Worthen, rejected Gallagher's arguments and upheld the statute.

State ex. rel. Parsons v. Workmen's Compensation Exchange, 59 Idaho 256, 81 P.2d 1101 (1938), involved worker's compensation benefits payable as a result of the work-related death of an employee. A bill initiated in the senate and subsequently enacted provided that in the event the deceased

worker left no dependents, the death benefit was payable to the state treasury. The surety liable to pay the death benefit sued, contending that this was a revenue law that should have originated in the house. The Idaho Supreme Court upheld the statute, in part reasoning that the provision objected to is analogous to a person dying intestate and without heirs. In such a case, the decedent's property escheats to the state.

Idaho's most important origination clause case is Dumas v. Bryan, 35 Idaho 557, 207 P. 720 (1922). Unfortunately, as well as being 90 years old, it is the most confusing of the cases. It also concerned a tax, not a fee, and so is not directly on point. It does, however, provide some insights into the issue at hand.

In 1921, the Legislature enacted a bill that originated in the senate. It provided for the transfer of the Albion Normal School from Albion to Burley. The first four sections of the bill authorized the move and directed how it was to be accomplished. The fifth section levied a statewide property tax to fund the move. Opponents of the move challenged the entire statute on Origination Clause grounds. The Idaho Supreme Court agreed the Origination Clause was violated.

The Idaho Supreme Court reviewed case law from other states with similar origination clauses. The court's attention was directed to:

[M]any cases holding that where the revenue part of an act is merely an incident and not the principal purpose for which it was enacted, the fact that it contains a provision for raising revenue as an incident to such purpose does not make it a revenue law within the meaning of this constitutional provision.

35 Idaho at 564, 207 P. at 722.

In particular, in Dumas, the court noted Chicago, B. & Q. R. Co. v. School District No. 1, 165 P. 260 (Colo. 1917), and Evers v. Hudson, 92 P. 462 (Mont. 1907). In School District No. 1, an act amended a statute establishing a system of public schools. Incident to the amendment was a provision for raising revenue to meet the requirements of the statute as amended. This was held not to violate the Colorado Constitution's origination clause. In Evers, an act providing for the establishment of county free high schools also pro-

vided for a property tax to provide funds for the current expenses of those schools. It also provided authority for bond issues. This was held not to violate the origination clause of the Montana Constitution.

Despite these and other state and federal cases with similar holdings, the Idaho Supreme Court held that the Albion statute violated the origination clause of the Idaho Constitution. In doing so, it enforced a stricter view of the origination clause than was current in other jurisdictions. Whether the court adopted this stricter view because it rejected the majority rule that revenue measures which are merely incidental to the main purpose of a statute do not run afoul of the origination clause, or because it took a harder line on what qualified as “incidental,” is not clear. Whatever the analysis, the court adopted a more conservative approach to the origination clause than was current. The Dumas court’s conservative approach counsels caution on the issue of whether fees are “revenue” under Idaho’s origination clause.

On the other hand, the Dumas court noted with approval a definition from Bouvier’s Law Dictionary that defined “revenue” as “the income of the government arising from taxation.” It also cited Millard v. Roberts, 202 U.S. 429, 26 S. Ct. 674, 50 L. Ed. 1090 (1906), which held that bills for other than tax purposes, but which may incidentally create revenue, are not revenue bills under the federal origination clause. The court noted that this decision approves Story on constitutional law when he lays down the rule that revenue bills are those that levy taxes in the strict sense of the word. These comments indicate that the court may view fees as outside the requirements of Idaho’s origination clause. This is only *dicta*, however, as the fee issue was not before the court.

Dumas can be read either as a rejection of the general rule discussed above, or as merely a stricter interpretation of what revenue-raising measures qualify as “incidental.”

The Idaho cases establish a number of points. Dumas teaches that originating a revenue bill in the senate is a fatal flaw that can result in the enacted statute being declared void. Worthen and Gallagher teach that the senate can amend a revenue bill. Parsons stands for the proposition that not every bill that results in money flowing to the state treasury is a revenue bill. None of these cases address whether a bill imposing a fee is “a bill for raising revenue.”

Historically, many fee bills originated in the senate. The period 2006 through 2010 provides several examples of fee bills enacted into law after originating in the senate. These include: 2006 Idaho Sess. Laws 881 (S.B. 1350aa) (providing for fees charged by county recorder for electronic duplication of records); 2006 Idaho Sess. Laws 828 (S.B. 1409aa) (increase in court filing fees); 2006 Idaho Sess. Laws 873 (S.B. 1343) (setting licensing fees for dental health professions); 2007 Idaho Sess. Laws 196 (S.B. 1086) (providing for wolf tag hunting fee); 2007 Idaho Sess. Laws 361 (S.B. 1118) (increasing snowmobile registration fees); 2008 Idaho Sess. Laws 424 (S.B. 1257) (application fees for certification of real estate education providers); 2008 Idaho Sess. Laws 433 (S.B. 1352) (revising fees for filing notice of water claims); 2008 Idaho Sess. Laws 924 (S.B. 1460) (increasing temporary motor vehicle permit fees); and, 2010 Idaho Sess. Laws 70 (S.B. 1267) (increasing licensing fees for attorneys). All of these bills originated in the senate, were passed by the house and became law.

If faced with the question whether bills creating fees fall under the limitation of the origination clause of the Idaho Constitution, the Idaho Supreme Court will likely find that fees are not so constrained. There are several reasons for this. First, Dumas is ambiguous and does not specifically address fees. Second, there are a number of post-Dumas cases from other jurisdictions adhering to the rule that only bills for taxes, strictly construed, are subject to the origination clauses in their jurisdictions. Third, the practice of introducing in the Idaho Senate bills establishing fees is one of long standing with which the Idaho House has traditionally concurred.

AUTHORITIES CONSIDERED

1. United States Constitution:

Art. 1, § 7.

2. Idaho Constitution:

Art. III, § 14.

3. Idaho Session Laws:

2006 Idaho Sess. Laws 828 (S.B. 1409aa).

2006 Idaho Sess. Laws 873 (S.B. 1343).

2006 Idaho Sess. Laws 881 (S.B. 1350aa).

2007 Idaho Sess. Laws 196 (S.B. 1086).

2007 Idaho Sess. Laws 361 (S.B. 1118).

2008 Idaho Sess. Laws 424 (S.B. 1257).

2008 Idaho Sess. Laws 433 (S.B. 1352).

2008 Idaho Sess. Laws 924 (S.B. 1460).

2010 Idaho Sess. Laws 70 (S.B. 1267).

4. United States Supreme Court Cases:

Millard v. Roberts, 202 U.S. 429, 26 S. Ct. 674, 50 L. Ed. 1090 (1906).

Twin City Nat'l Bank v. Nebecker, 167 U.S. 196, 17 S. Ct. 766, 42 L. Ed.134 (1897).

United States ex. rel. Michels v. James, 13 Blatchf. 207, 26 F. Cas. 577 (1875).

United States v. Mayo, 1 Gall. 396, 26 F. Cas. 1230 (1813).

United States v. Norton, 91 U.S. 566, 1 Otto 566, 23 L. Ed. 454 (1875).

5. Idaho Cases:

Dumas v. Bryan, 35 Idaho 557, 207 P. 720 (1922).

Gallagher v. State, 141 Idaho 665, 115 P.3d 756 (2005).

State ex. rel. Parsons v. Workmen's Compensation Exchange, 59 Idaho 256, 81 P.2d 1101 (1938).

V-1 Oil Co. v. Idaho Petroleum Clean Water Trust Fund, 128 Idaho 890, 920 P.2d 909 (1996).

Ware v. Idaho State Tax Commission, 98 Idaho 477, 567 P.2d 423 (1977).

Worthen v. State, 96 Idaho 175, 525 P.2d 957 (1974).

6. Other Cases:

Chicago, B. & Q. R. Co. v. School District No. 1, 165 P. 260 (Colo. 1917).

Ennis v. State Highway Commission, 108 N.E.2d 687 (Ind. 1952).

Evers v. Hudson, 92 P. 462 (Mont. 1907).

H.A. Thierman Co. v. Commonwealth, 97 S.W. 366 (Ky. App. 1906).

Morgan v. Murray, 328 P.2d 644 (Mont. 1958).

Northern Counties Investment Trust v. Sears, 41 P. 931 (Or. 1895).

Opinion of the Justices, 150 A.2d 813 (N.H. 1959).

Opinion of the Justices, 152 N.E. 2d 90 (Mass. 1958).

State v. Driscoll, 54 P.2d 571 (Mont. 1936).

Stuard v. Thompson, 251 S.W. 277 (Tex. Civ. App. 1923).

Yourison v. State, 140 A. 691 (Del. Super. 1928).

7. Other Authorities:

Joseph Story, *Commentaries on the Constitution of the United States*, § 880, 5th Ed. (1891).

DATED this 24th day of May, 2012.

LAWRENCE G. WASDEN
Attorney General

Analysis by:

CARL E. OLSSON
Deputy Attorney General

ATTORNEY GENERAL OPINION NO. 12-2

To: The Honorable Dean Mortimer
Idaho State Senate
7403 S. 1st E.
Idaho Falls, ID 83404

Per Request for Attorney General's Opinion

You have requested an Attorney General's Opinion regarding whether an out-of-state entity may operate as an Idaho project-based contract administrator.¹ You also ask what Idaho entities, other than the Idaho Housing and Finance Association, may operate as a project-based contract administrator throughout the entire State of Idaho. This opinion addresses those questions.

QUESTIONS PRESENTED

1. Under Idaho law, may an out-of-state entity operate as a project-based contract administrator in Idaho?
2. What Idaho entities, other than the Idaho Housing and Finance Association, may operate as a project-based contract administrator throughout the State of Idaho?

CONCLUSIONS

1. To serve as a project-based contract administrator, an entity must meet the definition of a "public housing agency" under the United States Housing Act of 1937, as amended. In Idaho, the only type of entity that qualifies as a public housing agency is a "housing authority," which is a creature of Idaho statute. Because an out-of-state entity cannot qualify as a housing authority in Idaho, it does not meet the definition of a "public housing agency," and, therefore, may not operate as a project-based contract administrator in Idaho.
2. Housing authorities created by Idaho cities or counties are empowered to operate only within their limited boundaries. A city housing authority generally may operate within its city limits plus five miles, and a county housing authority may operate within the county,

excluding any city located inside the county. The Idaho Housing and Finance Association, on the other hand, has statutory authority to serve the entire population of Idaho.

BACKGROUND

For over 30 years, the Idaho Housing and Finance Association (“IHFA”) has served as the U.S. Department of Housing and Urban Development’s (“HUD”) only project-based contract administrator (“PBCA”) in Idaho. On February 29, 2012, HUD announced a Notice of Funding Availability (“NOFA”) for the Project-Based Contract Administrator Program for the Administration of Project-Based Section 8 Housing Assistance Payments Contracts.² To receive funding under the NOFA, the applicant must fall within the definition of a “public housing agency.”

The question has arisen whether a housing agency of another state may serve as a PBCA in Idaho. HUD has stated in its NOFA that it will consider out-of-state applicants only if it fails to receive an application from a legally qualified in-state applicant. If HUD receives an application from a legally qualified in-state applicant, HUD will reject the out-of-state application. Assuming IHFA applies, HUD will consider it and will not consider any out-of-state applicants.

LEGAL STANDARDS

1. United States Housing Act of 1937

In section 1441 of the United States Housing Act of 1937, as amended by the Housing and Community Development Act of 1974 (“Housing Act”), Congress explains that the United States has a shortage of safe, decent and affordable housing for low-income families. *See* 42 U.S.C. § 1441. To help address this problem, HUD is empowered to enter into annual contributions contracts with public housing agencies to administer the Housing Act’s Section 8 housing program. Section 8 is a housing subsidy program created to help low-income families obtain decent, safe and sanitary dwellings, while also promoting economically mixed housing. *See* 42 U.S.C. § 1437f and 24 C.F.R. § 882.101.

The Housing Act defines a “public housing agency” as “any State, county, municipality, or other governmental entity or public body (or agency or instrumentality thereof) which is authorized to engage in or assist in the development or operation of low income housing.” 42 U.S.C. § 1437a(b)(6). Similarly, HUD regulations define a “public housing agency” as “[a]ny State, county, municipality or other governmental entity or public body (or agency or instrumentality thereof) which is authorized to engage in or assist in the development or operation of housing for low-income Families.” 24 C.F.R. § 882.102.

2. Idaho Housing Authorities and Cooperation Law

Finding that Idaho lacks safe and sanitary housing for low-income³ families and declaring that “insanitary and unsafe dwelling accommodations” encourage the spread of disease and crimes and constitute a menace to the health, safety, morals and welfare of Idahoans, in 1967, the Idaho Legislature enacted the Housing Authorities and Cooperation Law, title 50, chapter 19, Idaho Code. Section 50-1905 of the Housing Authorities and Cooperation Law provides:

In any city of the state of Idaho, there may be created an independent public body corporate and politic to be known as a housing authority, which shall not be an agency of the city; provided, however, that such authority shall not transact any business or exercise its powers hereunder until or unless the governing body of the city, by proper resolution, shall declare . . . that there is need for an authority to function in such city.

A city housing authority’s area of operation is limited to the city and the area within five miles of its territorial boundaries, but may not operate within the jurisdiction of another city’s housing authority or another county’s housing authority. *See* Idaho Code § 50-1903(g). Within its area of operation, a city housing authority may, among other things:

1. Contract with other housing authorities for services;
2. Prepare, carry out, acquire, lease and operate housing projects;⁴
3. Contract for the furnishing by any person of services, privileges, works or facilities for a housing project;

4. Lease or rent any dwellings, houses, buildings or facilities embraced in any housing project;
5. Investigate into living, dwelling and housing conditions and into the means and methods of improving such conditions;
6. Conduct examinations and investigations at public or private hearings;
7. Make, purchase, invest in or acquire loans to persons of low income to enable them to acquire, construct, improve, lease or refinance their dwellings; and
8. Make, purchase, invest in or acquire loans for the acquisition, construction, improvements, leasing or refinancing of land, buildings or developments for housing for persons of low income.

See Idaho Code § 50-1904.

To help it carry out housing projects within its area of operations, a city housing authority is authorized to “accept contributions, grants or other financial assistance from the federal government.” Idaho Code § 50-1923. In addition, the authority may lease or manage any housing project or undertaking constructed or owned by the federal government. *See id.*

3. Idaho County Housing Authorities and Cooperation Law

Codified in 1970, the County Housing Authorities and Cooperation Law, title 31, chapter 42, Idaho Code, is similar to the Housing Authorities and Cooperation Law, title 50, chapter 19, Idaho Code, in that the Idaho Legislature enacted the County Housing Authorities and Cooperation Law to combat the pervasive problems of insanitary and unsafe housing conditions and to provide habitable accommodations for Idaho’s low-income families. *See* Idaho Code § 31-4202. A county housing authority, which may operate throughout the county except within the limits of a city, is an independent public body corporate and politic and not a county agency. The governing body of the county creates a county housing authority after determining that the need for one exists.

A county housing authority’s powers mirror those of a city housing authority. *See generally* Idaho Code §§ 31-4204; 31-4207; 31-4209; 31-4213; 31-4214; 31-4216; and, 31-4218. Significantly, a county housing authority is empowered to:

[B]orrow money or accept contributions, grants or other financial assistance from the federal government for or in aid of any housing project within its area of operation, to take over or lease or manage any housing project or undertaking constructed or owned by the federal government, and to these ends to comply with such conditions and to make such trust indentures, leases or agreements as may be necessary, convenient or desirable. It is the purpose and intent of this act to authorize every authority to do any and all things necessary or desirable to secure the financial aid or cooperation of the federal government in the undertaking, construction, maintenance or operation of any housing project by such authority.

Idaho Code § 31-4223.

4. Idaho Housing and Finance Association

In 1972, the Idaho Legislature created IHFA to help address a myriad of social and economic troubles, including, but not limited to, a shortage of decent housing for Idaho's low-income⁵ population. *See* Idaho Code §§ 67-6201 and 67-6202. IHFA is an independent public body corporate and politic with extensive authority to operate throughout the state of Idaho. *See* Idaho Code § 67-6205(h). Some of IHFA's more significant public and essential government functions include:

1. Cooperating with housing authorities⁶ throughout Idaho in the development of housing projects;⁷
2. Executing agreements with any housing sponsor,⁸ mortgage lender,⁹ governmental agency or other entity;
3. Leasing, selling, constructing, financing, restoring, operating or renting any housing projects, nonprofit facilities, houses, lands or buildings embraced in any housing project;
4. Owning, holding and improving real or personal property;
5. Acquiring any real property to sell, lease, exchange or dispose of;
6. Investigating the housing conditions of its area of operations;
7. Providing research and technical assistance to eligible agencies to develop low-cost housing;

8. Making and undertaking commitments to make mortgage loans to persons of low income and to housing sponsors;
9. Acting as the designated housing resource clearinghouse in the state for matters relating to affordable housing;
10. Coordinating the development and maintenance of a housing policy for the state; and
11. Entering into agreements with and accepting grants, reimbursements or other payments from the United States, the State of Idaho or any municipality for furtherance of Idaho's housing policies.

See Idaho Code § 67-6207. IHFA also has authority to publish rules regarding its mortgage lending standards and the power to supervise housing sponsors and examine the income of any Section 8 renter. *See* Idaho Code §§ 67-6207A to 6207D. Within its area of operation, IHFA is authorized under title 67, chapter 62, Idaho Code, “to do any and all things necessary or desirable to secure the financial aid or cooperation of the state or federal government in the undertaking, construction, maintenance or operation of any housing project, nonprofit facility, economic development project or agricultural facility by IHFA.”

ANALYSIS

I.

AN OUT-OF-STATE ENTITY MAY NOT SERVE AS A PROJECT-BASED CONTRACT ADMINISTRATOR IN IDAHO

The IHFA, along with Idaho's city and county housing authorities, are “authorized to engage in or assist in the development or operation of low income housing.” 42 U.S.C. § 1437a(b)(6). As such, Idaho's housing authorities are public housing agencies under the federal Housing Act and may serve as PBCAs in Idaho.

The separate question is whether a public housing agency created by a foreign state may serve as a PBCA in Idaho. The answer is no, because only IHFA and Idaho city- and county-established housing authorities are authorized under Idaho law to act as public housing agencies in Idaho. An out-of-state public housing agency's authority under a foreign state's law is irrele-

vant. A foreign state may not authorize an out-of-state public housing agency to exercise the powers that Idaho has granted to its housing authorities. *See Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493, 501, 59 S. Ct. 629, 632, 83 L. Ed. 940 (1939). Furthermore, the State of Idaho is under no obligation to accept the laws of another state, particularly when those laws conflict with Idaho law or state policy. *See Nevada v. Hall*, 440 U.S. 410, 421, 99 S. Ct. 1182, 1188, 59 L.Ed.2d 416 (1979).

An out-of-state entity cannot meet the requirements necessary to qualify as an Idaho housing authority because the entity is, obviously, not the IHFA, nor the creation of an Idaho city or county. Consequently, without the ability to become a housing authority in Idaho, it cannot meet the definition of a public housing agency in Idaho and cannot serve as a PBCA in Idaho.

II.

ONLY THE IDAHO HOUSING AND FINANCE ASSOCIATION HAS STATUTORY AUTHORITY TO OPERATE AS A PROJECT-BASED CONTRACT ADMINISTRATOR THROUGHOUT THE STATE OF IDAHO

An authorized Idaho housing authority may serve as a PBCA within its limited area of operation, which is defined as the city and area within five miles of the city's territorial boundaries, Idaho Code § 50-1904(g), or as the entire county except within the corporate limits of a city within the county, Idaho Code § 31-4204(g). Only IHFA, however, has a defined area of operation that encompasses the entire state. *See* Idaho Code § 67-6205(h).

No Idaho-created entity other than IHFA is statutorily qualified to implement HUD's Section 8 programs throughout Idaho. Every city- or county-established housing authority, by definition, will be limited to the territorial limits of its establishing entity. IHFA is the proper entity to continue serving as Idaho's statewide PBCA under the Housing Act.

AUTHORITIES CONSIDERED

1. Federal Code:

42 U.S.C. § 1437a(b)(6).

42 U.S.C. § 1437f.

42 U.S.C. § 1441.

2. Idaho Code:

Title 31, chapter 42.

§ 31-4202.

§ 31-4204.

§ 31-4204(g).

§ 31-4207.

§ 31-4209.

§ 31-4213.

§ 31-4214.

§ 31-4216.

§ 31-4218.

§ 31-4223.

Title 50, chapter 19.

§ 50-1903(b).

§ 50-1903(g).

§ 50-1903(i).

§ 50-1904.

§ 50-1904(g).

§ 50-1905.

§ 50-1923.

Title 67, chapter 62.

§ 67-6201.

§ 67-6202.

§ 67-6205(b).

§ 67-6205(h).

§ 67-6205(j).

§ 67-6205(m).

§ 67-6205(p).

§ 67-6205(q).

§ 67-6207.

§ 67-6207A to 6207D.

3. Federal Regulations:

24 C.F.R. § 882.101.

24 C.F.R. § 882.102.

4. U.S. Supreme Court Cases:

Nevada v. Hall, 440 U.S. 410, 99 S. Ct. 1182, 59 L.Ed.2d 416 (1979).

Pacific Employers Ins. Co. v. Industrial Accident Comm'n, 306 U.S. 493, 59 S. Ct. 629, 83 L. Ed. 940 (1939).

DATED this 31st day of May, 2012.

LAWRENCE G. WASDEN
Attorney General

Analysis by:

STEPHANIE GUYON
Deputy Attorney General

¹ “Project-based contract administrator” is a term defined by the United States Housing Act of 1937, as amended, and refers, in part, to entities that administer federal housing subsidies under Section 8 of the Housing Act.

² The NOFA is published on HUD’s website at www.hud.gov.

³ “Person of low income” is defined in Idaho Code § 50-1903(i).

⁴ “Housing project” is defined in Idaho Code § 50-1903(b).

⁵ “Person of low income” is defined in Idaho Code § 67-6205(j).

⁶ “Housing authority” is defined as a housing authority established under the Housing Authorities and Cooperation Law, title 50, chapter 19, Idaho Code. Idaho Code § 67-6205(m).

⁷ “Housing project” is defined in Idaho Code § 67-6205(b).

⁸ “Housing sponsor” is defined in Idaho Code § 67-6205(p).

⁹ “Mortgage lender” is defined in Idaho Code § 67-6205(q).

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**ATTORNEY GENERAL'S
CERTIFICATES OF REVIEW
FOR THE YEAR 2012**

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

February 21, 2012

The Honorable Ben Ysursa
Idaho Secretary of State
Statehouse

HAND DELIVERED

RE: Certificate of Review
Proposed Initiative to Privatize Liquor Sales

Dear Secretary of State Ysursa:

An initiative petition was filed with your office on January 23, 2012. 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 that may affect the legality of the initiative. This office offers no opinion with regard to policy issues raised by the proposed initiative. Similarly, the accuracy of the potential revenue impact to the state budget is beyond the scope of this review.

BALLOT TITLE

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

MATTERS OF SUBSTANTIVE IMPORT

A. An Overview of the Initiative

The purpose of the proposed initiative is to "privatize" the retail sale of alcoholic liquor in the State of Idaho. If successful, this initiative will over-

turn Idaho's current liquor sales regime. It will eliminate the Idaho State Liquor Division ("state liquor division" or "division") and terminate existing state authority to import and sell alcoholic liquor.

By repealing the current title 23, chapter 2, Idaho Code, the initiative eliminates a surcharge currently added to the price of alcoholic liquor and other merchandise. Idaho Code § 23-217. This surcharge is currently credited monthly to the benefit of the drug court, mental health court, and family court services fund, as set forth in Idaho Code § 1-1635. While it appears that the initiative provides for a distribution to this fund, see proposed Idaho Code § 23-404(1)(v), the fund referenced there is not identified by a statutory reference. If the intent is to continue funding these programs, the proponents of the initiative should ensure that the appropriate language is contained within these provisions.

The proposal requires sale of all buildings, warehouses, retail stores or other facilities owned, as of July 1, 2013, by the State of Idaho as part of the state liquor division. This sale is required to take place after July 1, 2014. See proposed Idaho Code § 23-301(1). The provision prohibits these properties from being declared state surplus property and mandates that the property be sold for no less than 10% below the property's fair market value. There is no stated rationale as to why the properties should not be declared surplus, but instead seeks to prohibit continued state ownership or use of these properties for any purpose by the state. The statute does not include a provision for calculating fair market value, and it contains no rationale as to why the property cannot be sold for less than 10% of that value. There is no similar provision, mandating sale, pertaining to any personal property or fixtures which might be in the possession of the state liquor division.

Product and merchandise owned by the state liquor division and unsold by the effective date of the act are required to be either returned to product wholesalers for a refund or sold at a fair market price to privately-owned liquor retailers in the state. See proposed Idaho Code § 23-301(2). Currently, product is paid for at the time it is put into the stores. It is likely that it would not be possible for product that has been put into stores to be returned to product wholesalers for a refund.

Product being held for distribution at the division warehouse is held in bailment. It isn't owned by the division and likely could be returned to the

wholesaler. A question remains as to who would bear the cost of returning the product and ensuring its safety while it was being returned to the wholesaler. Likewise, it is unclear what would happen to any product that could not be returned but was not acquired by the privately-owned liquor retailers. In order to avoid these issues, and to provide for a smoother transition, the initiative proponents may want to include a grandfather clause as well as an effective date that would permit the orderly liquidation of existing inventory, whether owned or in the possession of the division.

Proposed Idaho Code § 23-201(3) mandates all contracts or agreements existing as of the effective date of the act, between the division and any person, “relating to the operation of a contract liquor store or relating to the purchase of any product, merchandise or other material or relating to any other matter,” shall terminate no later than one year after the effective date of the act. In addition to being vague (“or relating to any other matter”), this provision does not address the potential legal ramifications if the state, in complying with the statutory directive, breaches existing agreements. The proposal does not include any budgetary provisions for legal fees, costs, or damages arising out of any such breaches.

Proposed Idaho Code § 23-301 includes a definition of “liquor.” This definition may conflict with how existing Idaho Code § 23-105, which will not be changed as a result of the initiative, currently defines “alcoholic liquor.” Additionally, proposed Idaho Code § 23-301(5) defines “retail liquor license.” This subpart seeks to differentiate the retail sale of alcoholic liquor by the drink from the retail sale of “packaged” alcoholic liquor, using the phrase “for consumption off the licensed premises.” This phrasing might benefit from some additional consideration and review of existing provisions to ensure consistency with the law.

Proposed Idaho Code § 23-302(1) prohibits the county commissioners from limiting the number of retail liquor stores that may be established within a county, but does not mention the authority of cities in this regard. Proposed Idaho Code § 23-305(3) provides for county licensing fees. These provisions are problematic. They appear to conflict with Idaho Code § 23-916, which recognizes that in any given county, there may be licenses for the retail sale of liquor by the drink that are issued within incorporated city limits over which counties would have no control. Additionally, the initiative does not appear to provide or recognize the express authority for counties or

cities to require a local license for retail sale of liquor for off-premises consumption. It is difficult to ascertain whether a county or a city would have discretion to deny a license since the number of licenses cannot be limited. Currently, both counties and cities have specific authority to require licenses for by-the-drink liquor sales (existing Idaho Code § 23-901), retail beer sales (existing Idaho Code § 23-1009), and wine (existing Idaho Code § 23-1315).

Proposed Idaho Code § 23-302(5) includes a reference to the director of the state liquor division. The reference should be deleted.

Applicants for licensure are required to demonstrate that they meet all the qualifications and possess none of the disqualifications for licensure; a similar provision exists with regard to the transfer of liquor licenses. *See* proposed Idaho Code §§ 23-303 and 23-306. Under the caption “qualifications for retail liquor license,” proposed Idaho Code § 23-304 details what appear to be *disqualifying* conditions, but the initiative makes no mention of *qualifying* conditions. Because the statute does not establish specific licensure requirements, or *qualifications*, such as age, business licenses, documented training, work history, and bonding, proposed Idaho Code § 23-304 is somewhat confusing. The proponents of this provision may wish to revise the section so that it lists both qualifying and disqualifying conditions or re-title the section to accurately reflect that it lists only disqualifying conditions. If the second option is chosen, both proposed Idaho Code §§ 23-303 and 23-306 should be revised to maintain continuity in the requirements.

Proposed Idaho Code § 23-304 also appears to be missing a word or term. The section requires an applicant to submit an application and fee for “each [?] sought to be licensed.” It appears that the missing word might be “premises.”

Proposed Idaho Code § 23-306 provides for the approval of a request to transfer a license issued under the act, upon application providing “substantially” the same information required of an applicant for licensure. There is no stated rationale for why it might be appropriate for the recipient of a license pursuant to a transfer to provide anything other than information equivalent to that required of the original licensee. This provision also refers to “qualifications” and “disqualifications” for licensure. If the proponents make changes addressing the questions concerning qualifications and dis-

qualifications that were raised previously, this section will likely need some revision to maintain harmony between the sections.

The initiative requires liquor to be “sold [?] purchased” only in the original package. *See* proposed Idaho Code § 23-307. It appears that the word “or” has been omitted from the phrase. Additionally, proposed Idaho Code § 23-307(3) references an official seal or label “prescribed by the division.” As there will be no division, this provision would benefit from some additional revision.

An excise tax is established in proposed Idaho Code § 23-308. The provision requires the State Tax Commission to promulgate rules, and then it states that “[s]uch rules shall be approved by the Legislature.” Because Idaho’s Administrative Procedures Act, title 67, chapter 52, Idaho Code, already requires legislative review and approval of agency rules, it is difficult to tell whether the purpose of this language is to prevent the Legislature from rejecting the Tax Commission’s proposed rules, or whether it was intended as a reference to the requirements of the Administrative Procedures Act. Additionally, the number “46” has been inserted into proposed Idaho Code § 23-308(2), but this appears to be a typographical error and should be corrected.

Continuing the prohibition against locating liquor stores near schools, proposed Idaho Code § 23-312 provides for a 300 foot buffer zone. While the provision is clear that the buffer is to be 300 feet, it continues a flaw that existed in the previous version. The proposed section should be revised to make it clear that the buffer zone is measured from whatever entry door on the school that is located closest to the nearest entry door on the licensed premises.

The initiative leaves in place Idaho Code § 23-403. In light of the other funding provisions, which are included in the initiative, consideration should be given to deleting this section or at least subsection (a). Under the proposed initiative, there would be no division, and so no obligations to pay.

The initiative proposes amendments to Idaho Code § 23-404, pertaining to distribution of monies in the liquor account. As amended, there is a provision for the transfer of a percentage “beginning in FY 2010.” As the

state has passed FY 2010, this reference should be updated. Additionally, in the absence of the state liquor division, it is unclear as to who will be responsible for making the actual distributions and transfers out of this account.

Current Idaho Code § 23-409 contains a reference to monies being remitted to the drug and mental health court supervision fund *by the division*. If successful, the initiative will eliminate the division, so this reference should be corrected.

The proposed amendments to Idaho Code § 23-901 would benefit from the addition of the phrase “by the drink.” This phrase should be included in the title (“retail sale of liquor by the drink”) and elsewhere in the section. Additionally, throughout this section, there are references to this “act.” The correct reference should be to the “chapter,” since it is only chapter 9 that deals with the retail sale of liquor by the drink.

The amendments to Idaho Code § 23-914 neglect to delete the reference to the division that is contained in the title, as well as the reference to price. The new requirement is that liquor by the drink licensees must obtain their alcoholic liquor from a retail liquor store licensed pursuant to the provisions of title 23, chapter 3, Idaho Code.

Idaho Code § 23-919 has also been revised to delete the reference to state liquor stores, replacing it with a reference to licensed retail liquor stores. The phrase “or state distributor” should also be eliminated. The title would benefit by inserting the word “retail” before the phrase “LIQUOR STORE SALES NOT AFFECTED.”

It is unclear whether, and if so, how, the responsibilities of the director of the Idaho State Police will be changed by the initiative. Additionally, it is likely that the director may need to promulgate some additional rules. Nothing in the initiative speaks to these subjects, and, because rules promulgation takes time and additional responsibilities may require additional resources, it seems appropriate to consult the director of the Idaho State Police in this regard.

This review did not include any analysis of other potential references to the state liquor division or the director of the division, which might appear

elsewhere in statute. It would be appropriate for the proponents to incorporate and address any such additional references in the initiative.

B. Significant Constitutional Issues May Be Raised by the Initiative

Art. III, Sec. 16 of the Idaho Constitution Requires a Unity of Subject and a Single Subject

Reviewing the initiative, it appears that it may require additional amendments to ensure compliance with art. III, sec. 16 of the Idaho Constitution. These amendments are necessary because the title must reflect all of the code sections amended within the body of the legislation. The current title does not appear to comply with this requirement. Federated Publications, Inc. v. Idaho Business Review, Inc., 146 Idaho 207, 211, 192 P.3d 1031, 1035 (2008) (“Consequently the substance of the statute not included within the title is void.”). Cohn v. Kingsley, 5 Idaho 416, 429, 49 P. 985, 989 (1897).

A second requirement under art. III, sec. 16 is that every act embraces a single subject and all matter that is reasonably related thereto. Although this appears to provide a broad umbrella under which to legislate, the Courts have noted that a revenue-raising measure must be separated from a substantive measure. Reviewing this initiative, it appears that revenue is being raised through the creation of a tax (and which may run afoul of another constitutional limitation on the origin or revenue-raising measures), as well as substantive repeal and creation of a new liquor regime. A similar mixing of purposes was rejected when a salary increase for an officer was placed into a general appropriation bill that made no mention of the increase within its title. Hailey v. Huston, 25 Idaho 165, 168, 136 P. 212, 214 (1913). The proponents may desire to determine whether this should be introduced as two separate measures—one repealing and creating a new liquor regime, and another raising the necessary revenue—to assure strict compliance with Idaho’s constitution.

Art. III, Sec. 14 of the Idaho Constitution May Prohibit the Use of an Initiative to Raise Revenue

By establishing an excise tax and creating fees for issuance of licenses, the initiative appears to raise revenue for the State of Idaho. In fact, the

initiative specifically provides for the allocation and distribution of this revenue (in the form of the liquor fund). This raises the question whether an initiative that raises revenue may not be allowed because it is contrary to art. III, sec. 14 of the Idaho Constitution. This section 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.”

We think it likely, however, that the rationale for requiring revenue-raising measures to originate in the House seems inapplicable to initiatives. If, in fact, the motive is to give the power to the body closest to the people, it follows that the initiative process—which is the people’s process—could be used to raise revenues.

Art. III, Sec. 26 of the Idaho Constitution Expressly Authorizes the Legislature Control Over Intoxicating Liquors

The initiative could also be challenged as falling outside the ambit of the initiative power. Based on the Idaho Constitution’s express delegation of the plenary power over intoxicating liquors to the Legislature, it could be considered that the specific charge to the Legislature indicates that power is restricted solely to the Legislature. Art. III, sec. 26 states:

§ 26. Power and authority over intoxicating liquors.
— From and after the thirty-first day of December in the year 1934, the legislature of the state of Idaho shall have full power and authority to permit, control and regulate or prohibit the manufacture, sale, keeping for sale, and transportation for sale, of intoxicating liquors for beverage purposes.

Since this provision grants the Legislature “full power and authority,” a question arises as to whether the Legislature’s power in this arena can be checked by the people’s exercise of the initiative power. No case law exists on this issue, but in the event the initiative passes, this provision may reflect one avenue by which the initiative could be challenged under the Idaho Constitution.

CERTIFICATION

I HEREBY CERTIFY that the enclosed measure has been reviewed for form, style, and matters of substantive import. The recommendations set forth above have been communicated to the Petitioner via a copy of this Certificate of Review, deposited in the U.S. Mail to Jeffrey L. Ward, Idaho Federation of Reagan Republicans, P.O. Box 1274, Post Falls, Idaho 83877.

Sincerely,

LAWRENCE G. WASDEN
Attorney General

Analysis by:

TIMOTHY DAVIS
Deputy Attorney General

CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

September 28, 2012

The Honorable Ben Ysursa
Idaho Secretary of State
HAND DELIVERED

RE: Certificate of Review
Proposed Initiative Related to Legalization of Medical Use of Marijuana

Dear Secretary of State Ysursa:

An initiative petition was filed with your office on August 31, 2012. 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 review, 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 TITLES

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

MATTERS OF SUBSTANTIVE IMPORT

A. Summary of the Initiative

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

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

Prop. I.C. § 39-4702.¹

The initiative authorizes the Idaho Department of Health and Welfare (“Department”) to “establish a registry of qualifying patients, their primary caregivers, their designated growers and alternative treatment centers.” Prop. I.C. § 39-4704(1). The initiative allows: (1) qualifying patients (“patients”) to possess up to three ounces of marijuana for medical purposes, (2) primary caregivers (“caregivers”) to assist qualifying patients’ medical use of marijuana, (3) designated growers (“growers”) to grow marijuana for up to six qualifying patients at “marijuana grow sites,” and (4) alternative treatment centers (“Centers”) to grow, harvest, process, display, and supply marijuana to patients or their caregivers. Prop. I.C. §§ 39-4703, 39-4704, 39-4708. The Department is required to issue “registry identification cards,” valid for one year, to patients, caregivers, growers, and Center agents (i.e., officers, board members, and employees) whose applications for such cards are approved. Prop. I.C. §§ 39-4703(1), 39-4704(1), 39-4709(2).

To be a patient, the patient must have a “bona fide physician-patient relationship,” and the patient’s primary care physician must certify that the patient “may receive therapeutic or palliative benefit from the medical use of marijuana to treat or alleviate the patient’s debilitating medical condition or symptoms associated with the debilitating medical condition[.]” Prop. I.C. § 39-4703(2), (4), (20). The physician must have “completed a full assessment of the . . . patient’s current medical condition and past twelve (12) month medical history, including a personal physical examination.” Prop. I.C. § 39-4703(2). Minors are also entitled to be issued registry identification cards (impliedly) as patients under certain criteria. Prop. I.C. § 39-4704(17).

Caregivers and growers must be at least 18 years old, cannot be on felony probation, parole, or misdemeanor probation, and cannot have been “convicted of a felony drug offense, with the exception of medical use, production and possession of marijuana that would have been covered by this act had it been law[.]”² Prop. I.C. § 39-4703(10)(d), (19)(d). Additionally, “felony drug offense” does not include “[o]ne (1) offense for which the sentence, including any term of probation, incarceration or supervised release, was completed five (5) or more years earlier[.]” Prop. I.C. § 39-4703(9)(a). Center agents cannot have been convicted of a felony drug offense and must be at least 21 years old. Prop. I.C. §§ 39-4703(1), 39-4709(4). A denial by the Department of an application or renewal request for a registry identification card based on falsified information or a previous card revocation “may be a final agency decision” subject to the provisions of the Idaho Administrative Procedure Act, otherwise the applicant has ten days to appeal a denial to the Department. Prop. I.C. § 39-4710(8), (9).

The Department is required to establish rules for a “marijuana grow site registration system” to authorize production of marijuana by patients, caregivers, and growers who have been issued a registry identification card. Prop. I.C. §§ 39-4703(3), 39-4704(4). Patients, caregivers, and growers may possess three ounces or less of “usable marijuana” and twelve or fewer marijuana plants (up to four mature, four immature, and four seedlings). Prop. I.C. § 39-4706(1). All growers, whether a patient, caregiver, or mere “grower,” “must contain all marijuana plants in an enclosed, locked facility,” which “means a closet, room, greenhouse, fenced area or other enclosed area equipped with locks or other security devices that permit access only by a cardholder.” Prop. I.C. §§ 39-4703(8), 39-4704(8). A patient does not need to have an affiliated grower, caregiver, or Center to legally use marijuana – a

patient may register as a grower. Prop. I.C. § 39-4704(14). Prop I.C. § 39-4706(4)(a) states that “[p]ossession as a result of excess above (3) three ounces of usable marijuana that has been cured, and manicured to be taken to an alternative treatment center is allowed.” Any “excess” marijuana, up to one pound, harvested by a grower must be taken to a Center within three weeks of harvesting, and the grower will be reimbursed for the excess only “for proven legitimate growing costs, such as electricity and water.” Prop. I.C. § 39-4706(4)(a).

The Department is authorized to accept application from entities for permits to operate as Alternative Treatment Centers, which are to be non-profit entities. Prop. I.C. § 39-4708. Centers are authorized to:

Acquire a reasonable initial and ongoing inventory, as determined by the department, of usable marijuana, or marijuana seeds or seedlings and any apparatus, possess, cultivate, plant, grow, harvest, process, display, manufacture, deliver, transfer, transport, distribute, supply, sell or dispense marijuana, or related supplies to qualifying patients or their primary caregivers who are registered with the department pursuant to Section 39-4704, Idaho Code.

Prop. I.C. § 39-4708(1). The Department is authorized to charge fees for Center permits every two years, and is mandated to adopt rules for Centers to: document deliveries and pick-ups of marijuana for patients; monitor, oversee, and investigate “all activities performed by an alternative treatment center”; and, ensure 24-hour security for their locations and delivery methods. Prop. I.C. § 39-4708(9). Centers are allowed to dispense no more than three ounces of marijuana to a patient (or affiliated caregiver) in any 14-day period, and charge patients and caregivers for the “reasonable costs associated with the production and distribution of marijuana for the cardholder.” Prop. I.C. §§ 39-4708(8), 39-4714. The initiative requires Centers to “determine the grade and quality [of marijuana] and test for mold, pesticides, and other contaminants[,]” which may be done at the Center or by sending the marijuana to be tested to an independent lab. Prop. I.C. § 39-4714. Center “agents” must be registered with the Department before working at a Center, and may obtain a registry identification card. Prop. I.C. § 39-4709(2).

The initiative mandates constant updating of information pertinent to the issuance of registration identification cards by patients, caregivers, growers, and Center agents. Prop. I.C. § 39-4704, *et seq.* The Department is required to maintain a “list of the persons to whom it has issued registry cards,” which, along with “information contained in any application form or accompanying or supporting document, shall be confidential[.]” the only exceptions being: (a) use by Department employees as is necessary to perform official duties, and (b) use by state and local law enforcement agencies “only as necessary to verify that a person who is engaged in the suspected or alleged medical use of marijuana is lawful [sic] in possession of a registry identification card.” Prop. I.C. § 39-4704(11). Unlawful disclosure of registry identification card information constitutes a misdemeanor, punishable for not more than six months in jail, a \$1,000 fine, or both. Prop. I.C. § 39-4704(12).

Within 120 days of the Act’s enactment, the Director of the Department (“Director”) is required to appoint between seven and thirteen persons (at least one person from each of the seven Department regions of the state) to serve on a Medical Marijuana Oversight Committee (“Committee”). Prop. I.C. § 39-4717. The Committee is required to have “at least one physician . . . who recommends medical marijuana to some of his or her patients[.]” and all other members “shall be cardholders, or proponents of the legal availability of medical marijuana.” *Id.* The Committee is mandated to meet at least four times each year in public, and provide recommendations to ensure proper implementation of the Act, as well as report at least annually to the Department on the implementation of the Act and ongoing needs. *Id.* The Committee will “have the power to promulgate rules and regulations not inconsistent with [the Act] to govern its own conduct and public meetings.” *Id.*

Also within 120 days of the Act’s enactment, the Department must establish a “verification system,” which allows law enforcement personnel a way to determine whether a person is a current registered qualifying patient, grower, or registered primary caregiver. Prop. I.C. § 39-4704(19).

The initiative exempts patients, caregivers, growers, Centers, physicians and laboratories from “criminal penalties if they are following the provisions set forth in this chapter.”³ Prop. I.C. § 39-4715. The initiative further provides:

An alternative treatment center, an alternative treatment center agent, a physician, or any other person active [sic] in accordance with the provisions of this chapter shall not be subject to arrest, prosecution or any civil or administrative penalty, or denied any right or privilege including, but not limited to, civil penalty or disciplinary action by a professional licensing board, related to the medical use of marijuana as authorized under this chapter[.]

Prop. I.C. § 39-4706(2). The initiative exempts all persons assisting, or aiding and abetting in the use, possession, delivery, or production of medical marijuana, and all parents (and guardians, etc.) assisting minors in the authorized use of medical marijuana, from arrest and prosecution. Prop. I.C. § 39-4706(6), (7). Schools, landlords, and employers may not be penalized or denied any state benefit for enrolling, leasing to, or employing patients, caregivers or growers. Prop. I.C. § 39-4717. Further, interests in, or rights to, property that is owned, possessed or used “in connection with the medical use of marijuana or acts incidental to the medical use of marijuana may not be forfeited under any provision of state law providing that the property is used in accordance with the provisions of this [Act].” Prop. I.C. § 39-4706(8). Prop. I.C. § 39-4706(12) creates a “presumption,” which reads:

There will exist a presumption that a qualifying patient, primary caregiver, or grower is engaged in the medical use of marijuana if the qualifying patient, primary caregiver, or grower:

- (a) Is in possession of a registry identification card issued pursuant to this Chapter; and
- (b) Is in possession of an amount of marijuana that does not exceed the amount of allowed of [sic] usable marijuana.

It should be noted that the provision does not delineate whether the presumption described pertains to criminal proceedings, civil proceedings, or both. Nor does the provision state whether such a presumption is rebuttable.

Under the heading, “Discrimination Prohibited,” the initiative makes it illegal for schools and landlords to discriminate against any person on the

basis of their status as a cardholder (unless the school or landlord would lose a federal benefit), and for employers to discriminate on the basis of a person's status as a cardholder or positive drug test for the presence of marijuana unless the person is impaired on the job. Prop. I.C. § 39-4707. The initiative prohibits discrimination against cardholders in regard to medical care, organ transplants, custody and visitation rights, state-related benefits, and pain management plan contracts. Prop. I.C. § 39-4707(3)-(6).

In two unrelated, yet notable provisions, the initiative requires reciprocity with other states' registry identification card equivalents, Prop. I.C. § 39-4706(9), and allows patients, caregivers and growers to "give marijuana to another . . . patient, . . . caregiver, or grower to whom they are not connected through the department's registration process, . . . provided no moneys are exchanged for the marijuana, and that the recipient does not exceed the applicable limits of three (3) ounces of usable marijuana," Prop. I.C. § 39-4707(7). There are no direct monitoring requirements for such exchanges of marijuana.

The initiative contains a provision allowing nursing care type institutions to adopt reasonable restrictions on the use of marijuana by their residents. The provision, Prop. I.C. § 39-4711, states that such facilities "will not store or maintain the patient's supply of marijuana[.]" and that the facility employees are not responsible for providing marijuana to qualifying patients. However, a facility may not "unreasonably limit" a patient's access to or use of marijuana authorized by the Act, unless the facility would lose money or a licensing benefit under federal law.

The Director is mandated to issue a report to the governor and legislature annually on the work of the Medical Marijuana Oversight Committee, the actions taken by the Department to implement the provisions of the Act, and report the number of applications for registry identification cards, the number of qualifying patients and primary caregivers registered, and other relevant information. Prop. I.C. § 39-4718. Finally, the Department must promulgate such rules necessary to implement the Act within 90 days of the Act's enactment, unless otherwise specified.

In sum, the initiative generally decriminalizes under state law the possession of up to three ounces of marijuana for patients and caregivers, and up to three ounces of marijuana and twelve marijuana plants for growers. The

initiative protects participants from civil forfeitures and penalties under state law, and makes it illegal under state law to discriminate against such participants in regard to education, housing, and employment. Patients certified by physicians as having debilitating medical conditions may obtain marijuana for medicinal use from a grower authorized to grow marijuana at a marijuana grow site or from an alternative treatment center. Patients, caregivers, and growers must obtain a registry identification card from the Department, and Center agents must be registered with the Department before working at a Center. The Department is tasked with an extensive list of duties, including, *inter alia*: formulating rules and regulations to implement and maintain the initiative's numerous and far-reaching measures; verifying information and approving applications submitted for various types of permits; establishing and maintaining a law enforcement verification system; and, providing comprehensive annual reports to the Idaho Legislature and Governor.

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

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

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

An offence, in its legal signification, means the transgression of a law. . . . Every citizen of the United States is also a citizen of a State or territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either. The same act may be an

offense or transgression of the laws of both.
... *That either or both may (if they see fit)
punish such an offender, cannot be doubt-
ed."*

United States v. Wheeler, 435 U.S. 313, 317, 98 S. Ct. 1079, 1083, 55 L.Ed.2d 303 (1978) (superseded by statute) (quoting Moore v. Illinois, 14 How. 13, 19-20, 14 L.Ed. 306 (1852)) (footnote omitted; emphasis added); see State v. Marek, 112 Idaho 860, 865, 736 P.2d 1314, 1319 (1987) (“[T]he double jeopardy clause of the fifth amendment does not prohibit separate sovereigns from pursuing separate prosecutions since separate sovereigns do not prosecute for the ‘same offense.’”). Under the concept of “separate sovereigns,” the State of Idaho is free to create its own criminal laws and exceptions pertaining to the use of marijuana. However, the State of Idaho cannot limit the federal government, as a separate sovereign, from prosecuting marijuana-related conduct under its own laws.

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

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

A federal district court denied the Cooperative’s motion to modify an injunction that was predicated on the Cooperative’s continued violation of the federal Controlled Substances Act’s “prohibitions on distributing, manufac-

turing, and possessing with the intent to distribute or manufacture a controlled substance.” *Id.* at 487. On appeal, the Ninth Circuit determined “medical necessity is a legally cognizable defense to violations of the Controlled Substances Act.” *Id.* at 489. However, the United States Supreme Court reversed the Ninth Circuit and held:

It is clear from the text of the [Controlled Substances] Act that Congress has made a determination that marijuana has no medical benefits worthy of an exception. The statute expressly contemplates that many drugs “have a useful and legitimate medical purpose and are necessary to maintain the health and general welfare of the American people,” § 801(1), but it includes no exception at all for any medical use of marijuana. Unwilling to view this omission as an accident, and unable in any event to override a legislative determination manifest in a statute, we reject the Cooperative’s argument.

. . . .

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

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

In sum, Idaho is free to pass and enforce its own laws creating or negating criminal liability relative to marijuana. But, as the United States Supreme Court’s Oakland Cannabis Buyers’ Cooperative decision demon-

strates, even if the initiative is enacted, persons exempted from state law criminal liability under its provisions would still be subject to criminal liability under federal law.

The same holds true in regard to federal regulations pertaining to housing and employment. In *Assenberg v. Anacortes Housing Authority*, 268 Fed. Appx. 643, 2008 WL 598310 at 1) (unpublished) (9th Cir. 2008), contrary to the plaintiff's contention that, because he was authorized under state law to use marijuana for medical purposes, he was illegally denied housing. The Ninth Circuit explained:

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

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

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

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

Similarly, the Oregon Supreme Court recently held that, under Oregon's employment discrimination laws, an employer was not required to accommodate an employee's use of medical marijuana. *Emerald Steel Fabricators, Inc. v. Bureau of Labor and Industries*, 230 P.3d 518, 520 (2010). Therefore, the provisions of the initiative, Prop. I.C. §§ 39-4701, *et seq.*, cannot interfere or otherwise have an effect on federal laws, criminal or civil, which rely, in whole or part, on marijuana being illegal under the federal Controlled Substances Act.

C. Miscellaneous Potential Concerns

The Idaho Constitution, art. III, sec. 16, requires that acts "embrace but one subject and matters properly connected therewith" and that the subject of the act be expressed in the title and that any portion of the act not embraced by the title "shall be void." The proposal in question addresses registration of qualifying patients and caregivers; mandates reciprocity with other states' determinations of eligibility for registration; grants protections against criminal prosecutions; includes anti-discrimination provisions; defines criminal acts and conduct; requires collection and disbursement of funds; and, creates an oversight committee. Although this all deals generally with medical marijuana, it could be argued that the accumulation of requirements does not allow voters to vote for or against a single issue and that the State Constitution requires that voters should be allowed to cast their votes for discrete portions of the proposed law.

It should further be noted that although proposed section 39-4716 provides that fees collected "will be used" in a particular manner and "shall not go to a general fund," if passed, this statute will not prevent the Legislature from exercising its plenary power over the state fisc. Idaho Const. art. VII, §§ 11, 13, 16.

Finally, proposed section 39-4717 limits membership on the Committee to "one person from within the department," "at least one physician . . . who recommends medical marijuana to some of his or her patients," and "cardholders, or proponents of the legal availability of medical marijuana." Although it is common to create committees that are balanced between the political parties, requiring a particular view on a political topic as a condition for membership on a committee seems unprecedented. Creation of a committee designed to exclude views contrary to the proponents of the law is

likely subject to challenge on grounds that it violates the freedom of expression.

D. Recommended Revisions or Alterations

The initiative contains many “findings” in Prop. I.C. § 39-4701 that, with one exception, have not been verified for the purposes of this review due to time constraints. The claim that the National Association of Attorneys General (“NAAG”) is one of the organizations that have endorsed medical access to marijuana, as stated in the first “WHEREAS” clause, is outdated and possibly misleading. On September 17, 2012, counsel for NAAG represented to the Idaho Office of the Attorney General that, although NAAG passed a resolution in 1983 supporting legalization of medical marijuana, that resolution expired four years later. NAAG currently takes no position on the issue.

The initiative has several internal citations that are incorrect, described as follows:

- (1) Prop. I.C. § 39-4703(13) refers to “39-4704(3)” – it should read 39-4704(4);
- (2) Prop. I.C. § 39-4704(2) refers to “39-4710(1) or 39-4710(a)” – it appears it should read 39-4710(1)-(3);
- (3) Prop. I.C. § 39-4704(17)(b) refers to “39-4703(1)” – it should read 39-4704(1)-(2);
- (4) Prop. I.C. § 39-4708(5) refers to “39-4710(3)” – it should read 39-4710(4);
- (5) Prop. I.C. § 39-4710(1)(a) refers to “39-4703(2)” – it should read 39-4703(20);
- (6) Prop. I.C. § 39-4718(2) refers to “39-3704(11)” – it should read 39-4704(11);
- (7) SECTION 2 refers to “39-4704(10)” – it should read 39-4704(1).

There are several grammatical errors in the language of the initiative. First, the second sentence of the first paragraph of Prop. I.C. § 39-4708(1) reads: “Every alternative treatment center issued a permit regions shall be a nonprofit entity.” The word “regions” makes no sense in the overall context

of the sentence. Next, subsections (a) and (b) of Prop. I.C. § 39-4717(2) are redundant, as subsection (a) requires the Medical Marijuana Oversight Committee to “[p]rovide recommendations to ensure proper implementation of this Chapter,” and subsection (b) requires the Committee to “make recommendation to the department regarding appropriate regulations to carry out this Chapter.” Finally, SECTION 2 is grammatically incorrect, and should read in relevant part, “*and information . . . , are exempt from disclosure.*” (Italicized words indicating correct changes.)

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 Lindsey Rinehart, 2912 W. Malad, Boise, Idaho 83705.

Sincerely,

LAWRENCE G. WASDEN
Attorney General

Analysis by:

JOHN C. McKINNEY
Deputy Attorney General

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

² Whether a prior felony drug offense is excepted because it would have fallen under the proposed Act’s protections if the Act had been in effect is a matter that would be subject to litigation.

³ The initiative makes it a crime for persons to knowingly sell (etc.) a registration card, or altered registration card, issued under the Act. Prop. I.C. § 39-4713(1). Additionally, a “cardholder who sells or distributes marijuana to a person who is not allowed to use marijuana for medical purposes under [the Act] shall have his or her registry identification card revoked and is guilty of a crime.” Prop. I.C. § 39-4713(2).

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**ATTORNEY GENERAL'S
SELECTED
ADVISORY LETTERS
FOR THE YEAR 2012**

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

ADVISORY LETTERS OF THE ATTORNEY GENERAL

January 9, 2012

The Honorable Lenore Hardy Barrett
House of Representatives
Idaho Legislature
Hand Delivered

Re: Proposed Legislation Amending Idaho Code §§ 58-104
and 58-133

Dear Representative Barrett:

You asked the Attorney General's Office to review proposed legislation that would amend Idaho Code §§ 58-104 and 58-133 by: (1) creating a new section 58-104 consisting of legislative findings; (2) renumber and amend section 58-104(1) by requiring all nonagricultural improvements on public lands held in trust for public schools and other beneficiaries to be leased or sold to private persons and all nonagricultural business operations to be sold to private persons; and, (3) amend section 58-133 by requiring that all land sale proceeds deposited in the land bank fund be immediately transferred to the appropriate permanent endowment fund.

In response to your request, this letter first provides an overview of the authorities and court decisions addressing the respective powers and duties of the Legislature and the State Board of Land Commissioners regarding management of lands held in trust for public schools and other beneficiaries. It then reviews the proposed legislation section by section.

GENERAL OVERVIEW

In the Idaho Admission Act, the United States granted certain lands to the State of Idaho "for the support of common schools" and other institutions. Idaho Admission Act §§ 5-14, 26 Stat. L. 215. Such lands (hereinafter "endowment lands") must "be held, appropriated and disposed of exclusively for the purpose herein mentioned, in such manner as the legislature of the state may provide." Idaho Admission Act § 12.

The Idaho Constitution provides that “direction, control and disposition” of the endowment lands is vested in a board of land commissioners” (hereinafter “Land Board”), “under such regulations as may be prescribed by law.” Idaho Const. art. IX, § 7. The Land Board is further directed to “provide for the location, protection, sale or rental” of endowment lands, “under such regulations as may be prescribed by law, and in such manner as will secure the maximum long term financial return to the institution to which granted.” Idaho Const. art. IX, § 8. The phrase “prescribed by law” means such regulations as may be “prescribed by the legislature.” Howard v. Cook, 59 Idaho 391, 396, 83 P.2d 208, 210 (1938). The Legislature is specifically directed to “provide by law that the general grants of lands made by congress to the state shall be judiciously located and carefully preserved and held in trust, subject to disposal at public auction for the use and benefit of the respective object for which said grants of land were made.” Idaho Const. art. IX, § 8. The Legislature is also directed to “provide for the sale of said lands from time to time and for the sale of timber on all state lands and for the faithful application of the proceeds thereof in accordance with the terms of said grants.” *Id.*

The Idaho Constitution does not explicitly define the permissible scope of “regulations” that the Legislature may prescribe regarding the conduct of Land Board business. Early Idaho Supreme Court decisions, however, describe such regulations as a “limitation of [the] power” granted the Land Board to direct, control and dispose of endowment lands. Balderston v. Brady, 17 Idaho 567, 574, 107 P. 493, 495 (1910); *see also* Newton v. State Board of Land Comm’rs, 37 Idaho 58, 71, 219 P. 1053, 1057 (1923) (“the location, selection, direction, management, control, sale, rental, or disposition of state lands involves the exercise of the business and proprietary powers of the state, and the Legislature is given the authority to regulate the exercise of that power”). Other cases describe the “regulations prescribed by law” provision as authorizing the Legislature to “[r]egulate the procedure of the land board in its dealings with state lands” and to prescribe “the manner and method” by which the Board may “acquire and perfect title to state lands, and enter into the actual possession and enjoyment of such property for the use and benefit of the state.” Rogers v. Hawley, 19 Idaho 751, 761, 115 P. 687, 690 (1911); *see also* Allen v. Smylie, 92 Idaho 846, 852, 452 P.2d 343, 349 (1969) (Land Board to “lease for maximum return under procedural regulation of the legislature”); Idaho Watersheds Project v. State Bd. of Land Comm’rs, 133 Idaho 64, 68, 982 P.2d 367, 371 (1999) (finding auction procedures of § 58-310 to be a “regulation . . . prescribed by law that the Board has a duty to follow”).

While the cited cases confirm that the Legislature has authority to prescribe the manner in which the Land Board administers endowment lands, they also establish that the Constitution vests the Land Board with broad discretion as the state's "business manager" to make quasi-judicial decisions as to which particular uses of trust land assets will maximize long-term returns. "[The land] board is a constitutional agency charged with the administration of a public trust, and is vested with certain discretionary power in that behalf . . .". Barber Lumber Co. v. Gifford, 25 Idaho 654, 667, 139 P. 557, 561 (1914). "The grant of lands for the various purposes by the federal government to the state constitutes a trust, and the State Board of Land Commissioners is the instrumentality created to administer that trust, and is bound upon principles that are elementary to so administer it as to secure the greatest measure of advantage to the beneficiary of it [and to] that end, and of necessity, the board must have a large discretionary power over the subject of the trust." *Id.* at 666, 139 P. at 561. "[T]he state board of land commissioners has been entrusted with the duty to determine the best use or uses to be made of state land, in order to carry out the constitutional mandate of Section 8, Article IX, to secure from the endowment trust lands the maximum long-term financial return." State ex rel. Kempthorne v. Blaine County, 139 Idaho 348, 350, 79 P.3d 707, 709 (2003).

Because the Land Board's constitutional role as the business manager and administrator of the endowment lands trust necessarily incorporates certain discretionary powers to exercise business judgment in determining the best uses of endowment lands, any legislation that divests the Board of such authority is constitutionally suspect. As a general rule, the Legislature "cannot take from a constitutional officer a portion of the characteristic duties belonging to the office." Wright v. Callahan, 61 Idaho 167, 179, 99 P.2d 961, 966 (1940). Thus, if a legislative action "goes beyond the scope of regulating the action of the [land] board in the discharge of its constitutional duties, it is void." Rogers, 19 Idaho at 760, 115 P. at 690. The most recent application of this principle occurred in the Idaho Watersheds Project decision, wherein the court held unconstitutional statutory provisions that "remove[d] much of the Board's broad discretion [to determine what constitutes maximum long term financial returns] by impermissibly directing the Board to focus on the schools, the state, and the Idaho livestock industry in assessing lease applications." 133 Idaho at 67-68, 982 P.2d at 370-71.

Additional constraints on legislative authority over endowment lands arise from the fact that the United States' grant of certain lands to the State for

the support of public schools and other institutions “was a ‘solemn agreement’ which in some ways may be analogized to a contract between private parties. The United States agreed to cede some of its land to the State in exchange for a commitment by the State to use the revenues derived from the land to educate the citizenry.” Andrus v. Utah, 446 U.S. 500, 507, 100 S. Ct. 1803, 1807, 64 L.E.2d 458 (1980). The grant of lands in the Idaho Admission Act, and the Idaho constitutional provisions regulating the use and disposition of the lands, together “constitute a compact between the government and the state, which neither may abrogate nor modify without the consent of the other party to the pact.” Newton, 37 Idaho at 63, 219 P. at 1054. An Admission Act’s “specific enumeration of the purposes for which the lands were granted . . . is necessarily exclusive of any other purpose.” Ervien v. United States, 251 U.S. 41, 47, 40 S. Ct. 75, 76, 64 L. Ed. 128 (1919) (construing enumeration of purposes in New Mexico enabling act). In short, the grant of lands to the State for specific enumerated purposes created a trust, the corpus of which consists of the granted lands. See Idaho Const. art. IX, § 8 (granted lands to be “carefully preserved and held in trust”); Moon v. State Bd. of Land Comm’rs, 111 Idaho 389, 391, 724 P.2d 125, 127 (1986) (endowment lands held in trust).

Because endowment lands are held in trust, “the range of permissible goals” in legislation addressing the management of such lands “is narrower than when the Legislature exercises its police powers,” and the validity of legislative actions addressing management of trust lands are “tested by fiduciary principles.” Skamania County v. State, 685 P.2d 576, 580 (Wash. 1984). For example, trust principles were applied by the Idaho Supreme Court in holding that the Legislature may not direct the Land Board to consider the impact of endowment land leases on sales, income and property taxes when awarding leases of endowment lands. Idaho Watersheds Project, 133 Idaho at 67, 982 P.2d at 370. The Idaho Watersheds Project decision confirms that any statutory regulation that departs from the constitutional goal of maximizing long-term financial returns to the beneficiaries of granted lands will not survive judicial review.

Section 1: Legislative Findings

Section 1 of the proposed legislation sets forth certain legislative findings that include a mix of factual findings and legal conclusions. Legislative factual findings are typically accorded a high degree of judicial

deference, though the Idaho Supreme Court has recognized that plaintiffs may challenge “either the sufficiency or the motivation behind the Legislature’s findings” by establishing a “factual foundation of record that contravenes legislative findings.” Moon v. North Idaho Farmers Ass’n, 140 Idaho 536, 545, 96 P.3d 637, 646 (2004) (internal quotation mark omitted).

Legal conclusions labeled as “legislative findings” are not accorded the same level of deference. The duty of interpreting the Idaho Constitution is vested in the judiciary, which has rejected any “argument that the other branches of government be allowed to interpret the constitution for us.” Idaho Schools for Equal Educational Opportunity v. Evans, 123 Idaho 573, 583, 850 P.2d 724, 734 (1993); *see also* State v. Village of Garden City, 74 Idaho 513, 522, 265 P.2d 328, 332 (1953) (paying no deference to legislative designation of certain gambling devices as “games of chance” rather than constitutionally-prohibited “lotteries” because “[t]he interpretation of the constitution is a matter for the courts to determine”).

Here, subsection (5) of the proposed legislative findings provides:

It is hereby found, therefore, that trust assets must be managed to foster and promote their long term stability and permanency, and that the use of trust assets in the acquisition, holding, owning or operation of a potentially unlimited spectrum of business enterprises by the Idaho state board of land commissioners, except as provided herein, will expose trust assets to undue risk of loss and will not provide the appropriate standard of stability and permanency required for their “long term” management.

This finding is likely to be accorded little or no deference by a reviewing court, since it constructs a “standard of stability and permanency” for trust land assets, then adjudicates the risk of potential “business enterprises” against such standard. Nothing in the plain language of the Admission Act or the Idaho Constitution sets forth “stability and permanency” as standards for management of endowment lands, nor do any cases suggest that such standards apply to endowment lands. Indeed, the concepts of “stability and permanency” are difficult to reconcile with those provisions in the Admission Act and Idaho Constitution explicitly providing for the sale and

exchange of endowment lands. It was never contemplated that the State was under a duty to retain endowment lands permanently. Rather, the Land Board, under regulations prescribed by the Legislature, was to provide for the “location, protection, sale or rental” of endowment lands in such manner as will secure maximum long-term financial returns to endowed institutions. Idaho Const. art. IX, § 8. While in certain circumstances stability and permanency may maximize long-term financial returns, in other circumstances the drafters of the Idaho Constitution recognized that permanently retaining certain land assets would not maximize long-term returns. It, therefore, vested the Land Board with discretion to direct the disposition of endowment lands in accordance with sound business judgment. *See Pike v. State Bd. of Land Comm’rs*, 19 Idaho 268, 286, 113 P. 447, 453 (1911) (“[The Land Board] are, as it were, the trustees or business managers for the state in handling these lands, and on matters of policy, expediency and the business interest of the state, they are the sole and exclusive judges so long as they do not run counter to the provisions of the Constitution or statute.”)

The only authority cited for the “stability and permanency” standard is the holding from *Moon v. State Bd. of Examiners* that trust assets constitute “a trust of the most sacred and highest order” and the language from *United States v. Fenton* that trust assets “shall forever remain inviolate and intact.” 104 Idaho 640, 642, 662 P.2d 221, 223 (1983); 27 F. Supp. 816, 818 (D.C. Idaho 1939). Both cases, however, address only the permanent school endowment fund, which, by mandate of art. IX, sec. 3 of the Idaho Constitution, must “forever remain inviolate and intact.” *See Moon*, 104 Idaho at 642, 662 P.2d at 223; *Fenton*, 27 F. Supp. at 818. By applying court decisions addressing management of the permanent endowment fund to management of endowment lands, the findings ignore the fact that the Admission Act and Idaho Constitution establish separate and distinct duties and standards for management of the permanent school endowment fund and management of endowment lands:

The State of Idaho manages two separate trusts for the benefit of public schools. The Public School Fund is the res of the first trust, which is invested by the Investment Board. ... The State’s constitutional responsibilities regarding this trust and the protection of the money corpus are found in ID. CONST. art. 9, § 3. The second trust consists of school endowment

lands managed by the Land Board. The endowment lands themselves form the res of this trust and the State's constitutional duties regarding this trust and protection of the land corpus is found in ID. CONST. art 9, § 8.

Moon v. State Bd. of Land Comm'rs, 111 Idaho at 391, 724 P.2d at 127.

Because the public school permanent endowment fund has separate constitutional mandates deriving from the nature of the trust assets, it is improper to conflate the requirement that the permanent endowment fund forever remain intact with the trust requirements applicable to endowment lands. Under the Constitution, the only standard applicable to the Land Board's business management of endowment lands is the requirement that such management be rationally related to the goal of maximizing long-term financial returns to endowment beneficiaries. Thus, subsection (5) of the proposed findings, by substituting a "stability and permanency" standard for the constitutional mandate of maximizing long-term returns, is not likely to be accorded any deference by a reviewing court.

Subsection (6) of the proposed findings provides:

The protection of trust assets will be further fostered and promoted by requiring that proceeds from the sale of state endowment lands deposited into the land bank fund pursuant to section 58-133(2), Idaho Code, be immediately transferred to the permanent endowment fund for the benefit of the respective endowment beneficiaries.

A court may not give deference to this finding because it also employs the unsupported "stability and permanency" or "protection" standard in determining that funds in the land bank should not be available for the purchase of real property to be added to the endowment lands trust. The finding also fails to provide any rationale for its conclusion that prohibiting the use of sale proceeds to purchase additional real property for the benefit of endowed institutions would protect trust assets. Rather, it ensures that assets in the endowment lands trust cannot be replaced—in short, it makes the finding, without citation to supporting facts, that assets in the permanent endowment fund are better "protected" than assets in the endowment lands trust. Without

additional supporting authority, the finding is subject to both legal and factual challenge.

Section 2: Amendment of Idaho Code § 58-104

Section 2 of the proposed legislation would renumber Idaho Code § 58-104 as 58-104A and amend subsection 1, describing the powers of the Land Board, as follows:

To exercise the general direction, control and disposition of the public lands of the state; provided however that, except where the land is used by a public entity for a public purpose, all nonagricultural improvements on said land shall be leased or sold to private persons, and all nonagricultural business operations located on or using said land shall be sold to private persons.

The intent and meaning of the proposed revision is difficult to discern from its plain language. First, the proposed amendment employs the ambiguous term “nonagricultural” without a corresponding definition. In its most natural sense, the term “nonagricultural” means any activity other than the raising of livestock or the cultivation of crops. *See American Heritage Dictionary* 35 (4th ed. 2000) (defining “agriculture”). Such a definition, however, would prohibit the Land Board from engaging in its traditional and primary business operation of raising and selling timber, and would be inconsistent with Idaho Const. art. IX, sec. 8, which specifically directs the sale of timber from endowment lands.

Likewise, the phrase “except where the land is used by a public entity for a public purpose” defies easy interpretation. In the broadest sense of the term, any use of endowment lands engaged in by the Land Board for the purpose of maximizing income for beneficiaries is a “use” of the land by a public entity for a public purpose. Thus, a reviewing court could determine that so long as the Land Board is engaging in activities intended to fulfill its constitutional mandate of maximizing long-term financial returns, the exception applies.

Aside from such drafting concerns, the broader issue is whether the amendment “goes beyond the scope of regulating the action of the [land] board in the discharge of its constitutional duties,” therefore rendering it void. Rogers, 19 Idaho at 760, 115 P. at 690. As discussed in the general overview section above, the Idaho courts are likely to find any divestment of the Land Board’s broad discretion to be unconstitutional, if such divestment negatively impacts the Board’s ability to maximize long-term financial returns. The proposed legislation attempts to prohibit the Board from engaging in non-agricultural “business operations.” Such a prohibition appears to be derived from the principle that the government should not be engaged in “business.” Yet, it is well established that the Board, in managing state lands, is not exercising governmental powers, but is acting in a “proprietary or business capacity.” Rogers, 19 Idaho at 763, 115 P. at 691, quoting Balderston, 17 Idaho at 579, 107 P. at 496; *accord*, Newton, 37 Idaho at 71, 219 P. at 1057 (Land Board “exercise[s] the business and proprietary powers of the state”); Pike, 19 Idaho at 286, 113 P. at 453 (Land Board members act as “the trustees or business managers for the state in handling these [endowment] lands”); Barber Lumber Co., 25 Idaho at 669, 139 P. at 562 (“[t]he land business of the state placed in the hands of the State Board of Land Commissioners ought to be conducted on business principles so as to subserve the best interests of the people of the state”). Thus, any statute prohibiting the Land Board from engaging in “business operations” is at risk of being held unconstitutional, for it divests the Board of powers that are inherent in its constitutional directive to manage the endowment lands on behalf of the named beneficiaries.

The proposed legislation prohibiting the Land Board from operating “nonagricultural” businesses is also open to challenge because it is devoid of any findings that would allow the court to conclude that such a prohibition is rationally designed to maximize long-term financial returns to beneficiaries. None of the findings in Section 1 make any distinction between “agricultural” and “nonagricultural” businesses, much less establish that “nonagricultural” business operations inherently pose an unacceptable risk of loss. Indeed, any restriction prohibiting trustees from engaging in “nonagricultural” business operations with potentially higher returns is counterintuitive and directly contrary to requirements that the Legislature has imposed on all other trustees, namely the duty to “diversify the investments of the trust unless the trustee reasonably determines that, because of special circumstances, the pur-

poses of the trust are better served without diversifying.” Idaho Code § 68-503.

In short, absent factual findings that provide a rational basis for concluding that the Board’s operation of nonagricultural businesses will reduce long-term financial returns to beneficiaries, there is a risk that Section 2 of the proposed legislation would not survive judicial review.

Section 3: Amendment of Idaho Code § 58-133

Section 3 of the proposed legislation would amend Idaho Code § 58-133 by requiring all proceeds from the sale of endowment lands to be immediately deposited into the appropriate permanent endowment fund. The practical effect of such a requirement is to eliminate the land bank fund, which was established to allow the Land Board to use the proceeds from sales of endowment lands to purchase land assets on behalf of beneficiaries.

The land bank fund was established in 2000 by the general electorate’s ratification of House Joint Resolution No. 1, which proposed an amendment to Idaho Const. art. IX, sec. 4, providing that “proceeds from the sale of state lands may be deposited into a land bank fund to be used to acquire other lands within the state for the benefit of endowment beneficiaries,” with such deposits to be transferred to the permanent endowment fund if “not used to acquire other lands within a time provided by the legislature.” Idaho Const. art. IX, § 4. Two years earlier, the Idaho Admission Act had been amended to provide that proceeds from the sale of endowment lands “may be deposited into a land bank fund to be used to acquire, in accordance with State law, other land in the State for the benefit of the beneficiaries of the public school permanent endowment fund.” 112 Stat. L. 2822.

The plain language of art. IX, sec. 4 of the Idaho Constitution, as well as the legislative history of House Joint Resolution No. 1, establish that the determination of whether money from land sales should be deposited into the land bank fund for the purpose of acquiring other lands is left solely to the discretion of the Land Board. *See, e.g.*, Minutes, House State Affairs Committee (Jan. 25, 2000). While the Legislature may limit the amount of time that the money may remain in the land bank fund before being transferred to the appropriate permanent endowment fund, it cannot explicitly pro-

hibit the Land Board from depositing money in the land bank fund, since that would render the Board's discretionary constitutional authority to make such deposits a nullity. Likewise, any attempt by the Legislature to explicitly prohibit the Land Board from using money in the land bank fund to purchase new endowment lands would be inconsistent with the terms of art. IX, sec. 4, and hence void.

The issue, therefore, is whether the Legislature can nonetheless indirectly prohibit the Land Board from using the funds in the land bank for their intended purpose by setting the time frame in which the Board must use such funds to "zero." A reviewing court would likely conclude the answer is no, for the Legislature cannot evade constitutional limitations on its authority by acting indirectly:

The duty of the courts to declare void any statute which violates the Constitution is not limited to direct violations but extends to any evasion or indirection which may be practiced by the legislature. What cannot be done directly because of constitutional restriction cannot be accomplished indirectly by legislation which accomplishes the same result.

Robb v. Nielson, 71 Idaho 222, 226, 229 P.2d 981, 983 (1951) (quoting 11 Am. Jur. 724); see also O'Bryant v. City of Idaho Falls, 78 Idaho 313, 325, 303 P.2d 672, 678 (1956) ("mere schemes to evade law, once their true character is established, are impotent for the purpose intended . . . [t]hat which the constitution directly prohibits may not be done by indirection through a plan or instrumentality attempting to evade the constitutional prohibition") (internal quotations omitted).

In short, any legislation establishing a time frame for transfer of land bank funds to the permanent endowment funds must be consistent with the purposes for which the land bank fund was constitutionally established, i.e., use of such funds by the Land Board to purchase new endowment land assets. A time frame established solely to prevent use of land bank funds for their constitutionally-established purpose is likely to be ruled unconstitutional by a reviewing court.

CONCLUSIONS

In the event of a challenge, the proposed prohibition on the Land Board's conduct of "nonagricultural business operations" is likely to be closely scrutinized by a reviewing court and is at substantial risk of being ruled unconstitutional. Likewise, the proposed time limit for transfer of funds from the land bank fund to permanent endowment funds is irreconcilable with the purpose for which the land bank was established and is unlikely to survive judicial review.

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 the draft legislation. Rather, this response is an informal and unofficial expression of the views of this office limited 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

January 12, 2012

The Honorable John Goedde
Idaho State Senate
VIA HAND DELIVERY

The Honorable Dean Mortimer
Idaho State Senate
VIA HAND DELIVERY

Re: Our File No. 12-39303 — State Board of Education's
Pending Rule: Rules of Administration

Dear Senators Goedde and Mortimer:

The Senate Education Committee has before it the State Board of Education's pending rule: Rules of Administration, Docket No. 08-0201-1101. You have asked the Office of the Attorney General to address whether the State Board has statutory authority to promulgate rules related to negotiations between school districts and professional employees of those districts; and, if so, whether the pending rule is within that authority or exceeds it. As explained in greater detail below, this office interprets the rulemaking authority of the State Board in this instance as legally defensible.

These Rules Represent Reasonable Application of the Board's Authority

The starting point for this analysis is the pending rule, particularly subsection 151.02, which provides:

151. NEGOTIATIONS

* * *

02. Collective Bargaining Limited to Compensation and Benefits. Items that may be included in master contracts or negotiated agreements shall be limited to the specific items defined under the terms "Compensation" and "Benefits" under Section 33-1272, Idaho Code. For the purposes of the definition of "Compensation" as stated in Section 33-1272, Idaho Code, the term "salary" means:

a. Any monies *provided through public funding that are* paid to an employee pursuant to an employment contract, the form of which is approved by the Superintendent of Public Instruction pursuant to Section 33-513, Idaho Code; and

b. The process by which the school district board of trustees will determine local student achievement share awards pursuant to Section 33-1004I, Idaho Code.

c. The inclusion of any other items in a master contract or negotiated agreement is hereby prohibited. Any items included in violation of this provision are hereby declared null, void and of no force or effect.

Assuming for discussion that the State Board's rulemaking authority extends to subjects within those portions of title 33, chapter 12, Idaho Code, dealing with negotiations, we do not read the pending rule as constituting a rewriting of statute.

Idaho Code § 33-1271 authorizes "negotiations" between school districts and the authorized bargaining representatives of the professional employees of school districts "on matters related to compensation of professional employees." The statute further provides that "[a]s the only subject matter of negotiations is compensation provided through public funding, all negotiation sessions of the parties shall be conducted in open session, with all members of the public able to attend." Idaho Code § 33-1272 provides the following definitions of key terms contained in section 33-1271:

3. "Negotiations" means meeting and conferring in good faith in open session by a local board of trustees and the authorized local education organization, or the respective designated representatives of both parties, for the purpose of reaching an agreement related to the compensation of professional employees.

4. "Compensation" means salary and benefits for the professional employee.

5. “Benefits” is limited to employee insurance, leave time and sick leave benefits.

Reviewing the pending rule, it limits negotiations to the matters authorized in the statute—i.e., salary and benefits, which collectively constitute “compensation.” The statute provides a specific definition of what falls within the term “benefits.” Idaho Code § 33-1271(5). The State Board’s pending rule, however, does not focus on the meaning of “benefits.” Rather, a close reading of subsection 151.02 of the pending rule indicates that it is attempting to flush out the understanding of “salary,” which is a term the Legislature left undefined. It is common for administrative agencies to address in rule terms left undefined by the Legislature in order to establish the side-boards for how the term is to be understood. Paragraphs a. and b. of subsection 151.02 establish those side-boards. We read the thrust of the first sentence of paragraph c. as limiting “salary” to those matters referenced in paragraphs a. and b. Again, assuming for discussion of rulemaking authority, we do not believe the foregoing would be problematic.

The Board Can Adopt Rules Consistent With Its Art. IX, Sec. 2 Authority

The State Board of Education is specifically charged with supervision of the public school system of the State of Idaho. Idaho Const. art. IX, § 2. Turning to rulemaking authority itself, the State Board has a broad grant of rulemaking authority. Idaho Code § 33-107(3) grants the State Board “power to . . . [h]ave general supervision, through its executive departments and offices, of all entities of public education supported in whole or in part by state funds.” Idaho Code § 33-105(1) provides, in pertinent part, that “[t]he state board shall have power to make rules for its own government and the government of its executive departments and offices” Reading the two statutes together, it is reasonable to conclude that the State Board has broad rulemaking authority related to entities over which it has supervisory authority.

The State Board’s authority pursuant to the above provisions is discretionary. In other words, it has the power to promulgate rules within its authority, but is not required to do so. That is important to note, because when the Legislature wants the State Board to take mandatory rulemaking action on a subject, or wishes to qualify or limit the State Board’s rulemaking authority in an area, it uses express language to achieve those particular objectives.

For example, Idaho Code § 33-1612 deals with the subject of “thoroughness” of public education. The statute mandates that the State Board “adopt rules, pursuant to the provisions of chapter 52, title 67, Idaho Code, and section 33-105(3), Idaho Code, to establish a thorough system of public schools with uniformity as required by the constitution, but shall not otherwise impinge upon the authority of the board of trustees of the school districts. Authority to govern the school district, vested in the board of trustees of the school district, not delegate to the state board, is reserved to the board of trustees.” *Or see* Idaho Code § 33-5210(4)(e), which exempts charter schools “from rules governing school districts which have been promulgated by the state board of education, with the exception of state rules relating to . . . [a]ll rules which specifically pertain to public charter schools promulgated by the state board of education.”

Idaho Code §§ 33-1271 through 33-1276, the provisions of which all relate to collective bargaining in the context of public education, do not contain any reference to rules or rulemaking. Such silence, however, is not determinative to the question of whether or not the State Board has rulemaking authority in this area of public education. Idaho Code § 33-1276 specifically indicates that “[n]othing contained herein [sections 33-1271 through 33-1276] is intended to or shall conflict with, or abrogate, the powers or duties and responsibilities vested in the legislature, state board of education, and the board of trustees of school districts by the laws of the state of Idaho.” Thus, the State Board does not require specific statutory rulemaking authority within Idaho Code §§ 33-1271 through 33-1276 to make rules if the pending rule falls within its general rulemaking authority elsewhere in title 33.

We believe the pending rule is defensible under the State Board’s rulemaking authority stemming from Idaho Code §§ 33-105 and 33-107.

Sincerely,

BRIAN KANE
Assistant Chief Deputy

ADVISORY LETTERS OF THE ATTORNEY GENERAL

January 17, 2012

The Honorable Frank M. Henderson
Idaho House of Representatives
Statehouse
Boise, ID 83720-0038

Re: Board of Equalization/Advisory Board

Dear Representative Henderson:

I write in response to your memorandum to Brian Kane. You ask whether the Kootenai County Board of County Commissioners, sitting as a board of equalization, has legal authority to assign an advisory board to hear property valuation appeals. As I understand the proposal, the advisory board would hear valuation appeals and make recommendations to the Board of Equalization. The Board would then make the final determination on each case.

The legal authority to assign property tax appeals to an advisory board is unclear, but under current statutes, I believe the procedure will not withstand a court challenge.

Idaho Code § 63-501A provides taxpayers with the right to appeal property tax valuations to the county board of equalization. Idaho Code § 63-502 provides, “The board of equalization must examine and act upon all complaints filed with the board in regard to the assessed value of any property entered on the property rolls and must correct any assessment improperly made.” On its face, the statute requires the board of equalization to examine and act. The argument, of course, is that the board continues to do its statutory duty because it has the final say: the advisory board is just that, advisory. This is unpersuasive for at least two reasons. First, by placing an advisory body between the board of equalization and the taxpayer, the taxpayer is deprived of a chance to make his argument to the decision maker; the board is deprived of the opportunity to question either the taxpayer or the assessor. The give and take between taxpayer, assessor and the decision maker is absent. Second, without the ability to question the taxpayer, the board of

equalization will lack data to overturn the recommendation of the advisory board.

The advisory board will be the real decision maker; the board of equalization will be a rubber stamp. I do not believe the current statutes contemplate such an arrangement.

If you have questions or comments, please call me.

Sincerely,

CARL E. OLSSON
Deputy Attorney General

ADVISORY LETTERS OF THE ATTORNEY GENERAL

January 18, 2012

The Honorable William Killen
Idaho House of Representatives
Statehouse Mail

Re: Payment of Judgments, Idaho Code § 6-928

Dear Representative Killen:

Your question to Brian Kane was forwarded to me for response.

You ask whether Boise County can use the provisions of Idaho Code § 6-928 to pay the judgment entered against it in federal district court. I do not believe a court would find this statute available to Boise County.

You raise an interesting point when you note that the language in the statute permits a political subdivision to levy and collect a property tax in the amount necessary to pay the judgment notwithstanding “any provisions of law to the contrary.” Courts will not, however, look at this language and hold that it trumps a later statute. The key, then, is to look at the date the statute was enacted and the dates it was amended. If there was an earlier statute in conflict with the provisions of Idaho Code § 6-928 when it was enacted, and, arguably, when it was last amended, then the provisions of section 6-928 control. If, however, a statute enacted or amended after the passage or amendment of section 6-928 conflicts with the provisions of section 6-928, then the later statute will control.

Idaho Code § 6-928 was enacted in 1971 and last amended in 1996. The three percent cap found in Idaho Code § 63-802 was enacted in 1996 and last amended in 2010. To the extent Idaho Code § 6-928 and the three percent budget cap are incompatible, the three percent cap controls. With respect to Boise County’s situation, the two statutes are incompatible. The earlier statute provides for unrestricted property tax levies to pay judgments. Because the three percent budget cap contains no exception for judgments, it serves to restrict Idaho Code § 6-928. A county can levy property to pay a judgment, but the county’s budget cannot exceed the three percent cap.

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Because Idaho Code § 63-802 has been amended so many times since it was enacted in 1996, because the last amendment was as recent as 2010, and because none of these amendments provided for a “judgment payment” exception to the three percent cap, I believe a court would find the three percent cap statute controls. Such a finding would preclude Boise County from using Idaho Code § 6-928 to pay off the judgment it faces.

If you have any questions or comments, please contact me.

Sincerely,

CARL E. OLSSON
Deputy Attorney General

ADVISORY LETTERS OF THE ATTORNEY GENERAL

January 18, 2012

The Honorable Ben Ysursa
Secretary of State
Idaho Statehouse
Boise, Idaho 83702
Hand Delivered

Re: Land Bank Fund

Dear Secretary Ysursa:

When the State Board of Land Commissioners (“Land Board”) sells endowment lands, it may deposit some or all of the proceeds into the land bank fund—the proceeds are then available to purchase lands that become part of the endowment land trust. There is proposed legislation that would retain the land bank fund but require that all money deposited into the fund be immediately transferred into the appropriate permanent endowment fund. In light of this proposed legislation, you asked this office to determine whether the land bank fund is constitutionally-created and therefore outside the Legislature’s authority to abolish, either directly or indirectly. In part, your inquiry was prompted by past analyses provided to you that appeared to provide conflicting answers to this question.

The land bank fund was the result of an interim legislative committee established in 1997 to examine the issue of endowment reform. In response to the interim committee’s recommendations, the 1998 Legislature passed legislation that, among other things, (1) requested Congress to amend the Idaho Admission Act to authorize the establishment of a land bank fund; (2) proposed a constitutional amendment allowing money from the sale of endowment lands to be placed in a land bank fund; and, (3) passed Idaho Code amendments creating the land bank fund in the state treasury, to be effective if Congress amended the Admission Act and the electorate approved the constitutional amendments. 1998 Idaho Sess. L. 843, 1366, 1372.

In response to the Legislature’s request, Congress amended the Idaho Admission Act to provide that “[p]roceeds of the sale of school land . . . may

be deposited in a land bank fund to be used to acquire, in accordance with State law, other land in the State for the benefit of the beneficiaries of the public school permanent endowment fund; or . . . if the proceeds are not used to acquire other land in the State within a period specified by State law, shall be transferred to the public school permanent endowment fund.” 112 Stat. L. 2822 (1998).

The amendment to the Admission Act neither created a land bank fund nor mandated its creation. Rather, the term “may be deposited in a land bank fund” was intended to authorize the state to create such a fund. Then-Senator Kempthorne explained:

To provide more flexibility for land sales, legislation we are introducing today would give the state the authority to establish a new land bank fund which can be used to purchase additional land. For example, this land bank would allow the state to sell land that is difficult to manage in order to purchase land of higher functionality and greater investment return. [The endowment fund investment reform committee] concluded that the endowment should be managed as one fund by one governing body that would decide overall investment strategy using modern day so-called prudent investor investment strategies. The creation of the land bank and the earnings reserve are key elements of this strategy.

144 Cong. Rec. S7189 (June 25, 1998).

In 1998, the citizens of Idaho approved the amendment of Idaho Constitution article IX, section 4, which included the land bank fund provision. The Idaho Supreme Court subsequently held, however, that the amendment, as proposed, violated the “single subject rule” of article XX, section 2, since it purported to amend two separate provisions of article IX. Idaho Watersheds Project v. State Bd. of Land Comm’rs, 133 Idaho 55, 982 P.2d 358 (1999). As a result, the Legislature passed a new joint resolution submitting amendment of article IX, section 4 for consideration in the 2000 election. H.J.R. 1, 2000 Idaho Sess. L. 1669. The amendment passed, so that article IX, section 4 of the Idaho Constitution now provides, in part:

§ 4. Public school permanent endowment fund defined.

The public school permanent endowment fund of the state shall consist of the proceeds from the sale of such lands as have heretofore been granted, or may hereafter be granted, to the state by the general government, known as school lands Provided however, that proceeds from the sale of school lands may be deposited into a land bank fund to be used to acquire other lands within the state for the benefit of endowment beneficiaries. If those proceeds are not used to acquire other lands within a time provided by the legislature, the proceeds shall be deposited into the public school permanent endowment fund along with any earnings on the proceeds.

A review of the constitutional provisions and their history reveals that the discretionary term “may,” as used in section 4, does not imply that the creation and, by implication, subsequent abolishment of the fund, were left to legislative discretion.

First, the lack of language explicitly creating, or directing the creation of, a land bank fund does not suggest that the existence or creation of the fund was left to the discretion of the Legislature. An analogy is found in the language addressing the permanent endowment fund: nothing in article IX explicitly creates, or directs the creation of, the permanent endowment fund; rather, the constitutional provisions simply refer to the permanent endowment fund in the present tense for the purpose of establishing the nature and allowable uses of the fund. For example, article IX, section 3 states that the “public school permanent endowment fund of the state shall forever remain inviolate and intact.” Article IX, section 4 states that the “permanent school endowment fund shall consist of the proceeds from the sale of [endowment] lands” In short, the constitutional provisions presuppose that the Legislature shall take the steps necessary to establish the permanent endowment fund. Likewise, article IX, section 4, by referring to the land bank fund in the present tense, embodies the assumption that the Legislature must take the steps necessary to establish the land bank fund. Such assumption is embodied in article XXI, section 15, which provides: “[t]he legislature shall pass all necessary laws to carry into effect the provisions of this Constitution.” In short, reading article IX, section 4 *in pari materia* with article XXI, section 15, the Legislature must pass laws necessary to allow the

deposition of land sale proceeds into a land bank fund. See Keenan v. Price, 68 Idaho 423, 456, 195 P.2d 662, 682-83 (1948) (“a constitutional amendment becomes a part of the constitution and must be construed *in pari materia* with all of those portions of the constitution which have a bearing on the same subject”); R. E. W. Const. Co. v. District Court of Third Judicial Dist., 88 Idaho 426, 437, 400 P.2d 390, 396 (1965) (interpreting article XXI, section 15 to be a directive to the legislature).

This conclusion is confirmed by reading the land bank provision in section 4 *in pari materia* with those constitutional provisions addressing the sale of endowment lands. Article IX, section 7 provides that the Land Board “shall have the direction, control and disposition of the public lands of the state, under such regulations as may be prescribed by law,” and article IX, section 8 provides it is the “duty of the state board of land commissioners to provide for the location, protection, sale or rental of all the lands heretofore, or which may hereafter be granted to or acquired by the state by or from the general government, under such regulations as may be prescribed by law” While the Legislature may regulate the time, place, and manner of endowment land sales, the determination of whether beneficiaries are better served by the retention or sale of particular parcels is left to the discretion of the Land Board.

In other words, the constitution vests the Land Board with the discretion to examine each parcel of endowment lands and determine whether the beneficiaries are best served by retaining and managing such land for income, or by selling the land and investing the proceeds. The amendment of article IX, section 4 to provide that sale proceeds may be deposited into a land bank fund expands the Board’s discretion by providing the Board the option of selling lands and investing the proceeds in new lands, rather than transferring them to the permanent endowment fund. In short, the term “may” in section 4 refers to the Board’s discretionary authority to deposit money into the land bank and direct its use. The constitution’s grant to the Land Board of discretion to direct the use of sale proceeds to acquire new lands imposes on the Legislature a mandatory duty under article XXI, section 15 to pass all laws necessary to give effect to such provision.

Legislative history confirms that it was widely understood that the amendment of article IX, section 4 imposed upon the State of Idaho the obli-

gation to maintain a land bank fund. As required by Idaho Code § 67-453, the legislative council prepared statements for and against the amendment of article IX, section 4, and made those available before the 1998 election. The statements leave no doubt that the proposed amendment would establish a land bank. The statement in favor of the amendment stated: “[c]reating a Land Bank Fund lets the state eliminate the current, cumbersome requirement that land exchanges must be performed to acquire land for the public school endowment.” The statement opposing amendment stated: “[c]reating a Land Bank Fund and eliminating the requirement for land exchanges will turn the state into a land broker [and the] Land Bank Fund will divert investment money from the Public School Permanent Endowment Fund, possibly resulting in lower revenues.” Nothing in the legislative council’s statements implies that the existence of the land bank fund was left to legislative discretion.

After the Idaho Supreme Court held that the amendments, as proposed, violated the “single subject rule” of article XX, section 2, the amendment of article IX, section 4 was resubmitted to the people in the 2000 election. Again, the statements prepared by the legislative council do not suggest that the creation of a land bank fund was to be left to legislative discretion—rather, they leave no doubt that upon adoption of the amendment a functional land bank fund would exist. The legislative council’s statement provides that the “effect of adoption” would be to allow “the proceeds from the sale of public school endowment lands to be held in a separate fund, called a Land Bank Fund, for a limited amount of time set by the Legislature [and] used to buy other land for the benefit of public schools.” The statement “for” the proposed amendment stated that “[u]sing the Land Bank Fund referred to in the amendment, the state will be able to hold, for a limited time, the proceeds of a sale of public school endowment land for later purchase of replacement lands” The statement “against” the amendment stated “the amendment will promote a sell-off of public school endowment lands by eliminating the need for land exchanges and allowing sale and purchase transactions between the state and private parties . . . [a]llowing money to be held in the Land Bank Fund, even for a limited time, will divert investment money from the Public School Permanent Endowment Fund.” Once again, this history confirms that the establishment and continued existence of a land bank fund was not only contemplated by the amendment, it was essential to accomplish the purposes of the amendment.

CONCLUSION

The plain language of the Idaho Constitution, as well as the legislative history of the amendments addressing the land bank fund, confirm that the Legislature must enact and maintain laws necessary to carry out the constitutional provision allowing the Land Board to deposit proceeds from the sale of endowment land into a land bank fund to be used at the Board's discretion. Any legislative action attempting to abolish the land bank fund, either directly or by indirection, likely would be held to violate article IX, section 4. The Legislature may establish time limits for the holding of money in the land bank fund, provided such time limits are consistent with the maintenance of the fund for the purposes described in article IX, section 4.

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 the draft 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

January 31, 2012

The Honorable Dan Schmidt
Idaho State Senate
Statehouse
VIA HAND DELIVERY

Re: Our File No. 12-39538 — Political Appointments and Party Affiliation

Dear Senator Schmidt:

This letter is in response to your recent inquiry regarding political appointments and their party affiliation. Specifically, you ask whether an appointee would violate the grounds of their appointment or be subject to dismissal if one were to be appointed as a Democrat or Independent, and then register and vote in the Republican primary. The answer is that it depends.

To be certain, the political appointment process requires a modicum of integrity within the self-identification of party affiliation. In the past, this was achieved almost entirely through self-identification because Idaho did not require party registration or affiliation of any kind. Idaho Code § 34-904A requires selection of a political party affiliation or remaining unaffiliated. But this does not necessarily mean that a change in political party equates to removal from the office.¹

In Troutner v. Kempthorne, a gubernatorial appointment to the Idaho Judicial Council was challenged because the governor appointed a Republican, and a judge on the council had formerly been the Republican Party chairman. 142 Idaho 389, 391, 128 P.3d 926, 928 (2006). The Court recognized that in order to hold that a fourth Republican had been appointed, they would have been required to also hold that the judge could not cease being a party member upon his elevation to the bench.² 142 Idaho at 392, 128 P.3d at 929. Although this case was decided prior to enactment of Idaho Code § 34-904A, it is not certain that the outcome would be any different.

Idaho Code § 34-904A defines how a voter may select and qualify for the primary election ballot in an election, but it does not define membership within the party. Similarly, reviewing the definitions within the election statutes, only Idaho Code § 34-109 makes mention of a political party, defining it as: “. . . an affiliation of electors representing a political group under a given name as authorized by law.” Recognizing affiliation as the starting point for party membership is not helpful either because Idaho Code § 34-411A permits individuals to change voter affiliation subject to certain terms.³ Thus, the assumption of a former party chairman to that of a nonpartisan member of the judiciary would likely result in a holding similar to that in Troutner discussed above.

Overshadowing all of the above analysis is the political nature of appointments in general. As the Court in Troutner recognized, the requirement that a gubernatorial appointment be made with the “consent of the Senate,” brings it within the ambit of article IV, section 6 of the Idaho Constitution. Troutner at 393, 128 P.3d at 930. This means that the Senate has the “sole authority to pass upon the nominee’s qualifications.” *Id.* The questions posed within your request would appear to be questions appropriately posed to any nominee before the Senate (“Do you (nominee) plan to switch your affiliation? Would you (nominee) be willing to resign upon a switch in affiliation?”).

Addressing the question of removal, different boards and commissions have different standards of removal. Additionally, since many appointments are made by the governor, the change in affiliation is likely to call upon the governor’s discretion as to whether removal should be sought (in accordance with whatever terms apply⁴), or whether the change can be addressed within the existing makeup of the board.

This is a general overview of the current status of this area of the law. Depending on the specific situation, this analysis is subject to change. Clearly, given the recent change in the political party affiliation requirements, the advice and consent of the Senate will likely take on greater import as these qualifications are evaluated.

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

Sincerely,

BRIAN KANE
Assistant Chief Deputy

¹ For elected partisan officeholders, Idaho Code § 34-627 expressly provides the mechanism by which an officer holder may change parties—but does not include any provision for disqualification or removal from office based upon the change.

² Additionally, the Court found that the Democratic Party lacked standing in this regard, because the governor would not be required to appoint a Democrat if the board member were in violation—it would have simply required the governor to appoint someone else (including an independent or “unaffiliated” under Idaho Code § 34-904A).

³ It is worth noting that, although unlikely, most gubernatorial appointees are not required to be qualified electors—therefore it is possible, although not likely, that an appointee is not even registered to vote with any affiliation.

⁴ For example, a member of the State Tax Commission must be impeached (Idaho Code § 63-101(5)), while no provision for removal is made for members of the Idaho Judicial Council (Idaho Code § 1-2101 (The term of office for a permanent appointed member shall be six (6) years)).

ADVISORY LETTERS OF THE ATTORNEY GENERAL

February 2, 2012

The Honorable Carlos Bilbao
Idaho House of Representatives
Statehouse
VIA STATEHOUSE MAIL

Re: Our File No. 12-39394 — Question on Historical Racing

Dear Representative Bilbao:

This letter answers your letter of January 17, 2012. As your letter suggested, I was able to meet with representatives of Treasure Valley Racing earlier this week and have delayed preparing this response until after our meeting. This letter is not an official opinion of the Office of the Attorney General.

Your letter posed the following question:

I have recently been asked if “Historical Racing” should be allowed in the State of Idaho. “Historical racing” means a race involving live horses that was conducted in the past and that is rebroadcast by electronic means and shown on a delayed or replayed basis for the purpose of wagering conducted at a facility that is authorized to show simulcast and/or televised races.

My question pertains to the machine that transmits this race to the patron. Idaho Constitution article III, section 20, states no activities of gaming shall “employ any electronic or electromechanical imitation or simulation of any form of casino gambling.”

It is my conclusion that rebroadcasting of horse races previously run is not an electronic or electromechanical imitation or simulation of any form of casino gambling. The beginning point of my analysis is article III, section 20 of the Idaho Constitution:

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

a. A state lottery which is authorized by the state if conducted in conformity with enabling legislation; and

b. Pari-mutuel betting if conducted in conformity with enabling legislation; and

c. Bingo and raffle games that are operated by qualified charitable organizations in the pursuit of charitable purposes if conducted in conformity with enabling legislation.

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

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

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

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

b. Games that award only additional play.

Emphasis added. The question becomes whether pari-mutuel racing authorized by statute, in the case suggested by the letter, pari-mutuel betting on historical horse races,¹ would be an “electronic or electromechanical imitation or simulation of any form of casino gambling.”

To begin, horse racing, whether live or recorded, is not an imitation or simulation of any of the named casino gambling: blackjack, craps,

roulette, poker, baccarat, keno or slot machines. This strongly suggests that horse racing is not casino gambling itself. Nez Perce Tribe v. Cenarrusa, 125 Idaho 37, 40-41, 867 P.2d 911, 914-915 (1993), which addressed the 1992 amendment to the Idaho Constitution that enacted article III, section 20, in its current form, also strongly suggests that pari-mutuel betting on horse racing is not casino gambling because pari-mutuel racing was not affected by the amendment that explicitly outlawed casino gambling. But, neither article III, section 20 or Nez Perce Tribe nor other Idaho Supreme Court decisions that I reviewed provide an analytical framework for determining what forms of gambling are casino games.

A decision of the Supreme Court of California, Western Telcon, Inc. v. California State Lottery, 917 P.2d 651 (Cal. 1996), provides the analytical framework for answering this question. That case divided gambling into three categories, which the Court called gaming, lotteries and betting:

The three key forms of gambling are gaming, lotteries and betting. Gaming may be defined as the playing of any game for stakes hazarded by the players. A lottery may be defined as a distribution of prizes by lot or chance. Betting may be defined as promises to give money or money's worth upon the determination of an uncertain or unascertained event in a particular way, and (unlike a lottery) may involve skill or judgment.

917 P.2d at 655 (citations and internal punctuation omitted). As the decision of the California Court makes clear, gaming ("the playing of any game for stakes hazarded by the players") includes pari-mutuel betting because the winnings come from stakes provided by the persons making the bets, not by the house. *See* 917 P.2d at 656. The examples of "betting" given are all "house-banked" games in which the player bets against the operator of the game (often called "the house") and in which successful bets are paid by the house and unsuccessful bets are retained by the house. These kinds of house-banked games are often called casino games and are epitomized by the specific casino games listed in article III, section 20. *E.g.*, "The same is true of Nevada and New Jersey casinos, which run banking games such as blackjack and roulette (and keno)" 917 P.2d at 660.

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Article III, section 20 of the Idaho Constitution contrasts pari-mutuel betting, which is allowed “if conducted in conformity with enabling legislation,” with betting in casino games, all of which are (using the terms employed by the Supreme Court of California) banked games in which the better wagers against the house. I think it is most likely that the Supreme Court of Idaho would adopt a similar construction of the meaning of casino gambling and conclude that pari-mutuel betting on historical races, if authorized by enabling legislation, is not casino gambling. *E.g., also, DePaul v. Com.*, 969 A.2d 536 (Pa. 2009) (distinguishing between pari-mutuel betting and casino gambling); *Florida House of Representatives v. Crist*, 999 So.2d 601, 614 (Fla. 2008) (same); *Empress Casino Joliet Corp. v. Giannoulis*, 896 N.E.2d 277, 287-288 (Ill. 2008) (same); *State ex rel. Lemon v. Gale*, 721 N.W.2d 347, 357 (Neb. 2006) (same).

Sincerely,

MICHAEL S. GILMORE
Deputy Attorney General

¹At the moment, I am not aware of any statutes that are enabling legislation for pari-mutuel betting on historical racing. My assumption in this letter is that such legislation would be enacted. This letter focuses on whether such legislation would authorize an “electronic or electromechanical imitation or simulation of any form of casino gambling,” not on whether such legislation has properly provided for pari-mutuel betting.

February 3, 2012

The Honorable Jeff Nasset
Idaho House of Representatives

Re: Constitutional Challenges to Internet Sales Tax Agreement

Dear Representative Nasset:

Recently you requested advice from the Office of the Attorney General regarding the constitutionality of Idaho entering an Internet sales tax agreement with other states. Specifically, you requested an analysis on whether Idaho's entrance into an agreement regarding the collection of Internet sales tax would violate Article I, Section 10 of the United States Constitution. For the reasons set forth below, Idaho's entrance into an agreement of this nature will likely survive a constitutional challenge under Article I, Section 10.

It is difficult to make a specific conclusion on the constitutionality of the Internet sales tax agreement you are contemplating without reviewing the actual language. However, a general analysis may be helpful given the United States Supreme Court's scrutiny of interstate agreements in relation to the Constitution, and specifically, the Court's analysis of the Multistate Tax Compact.

I.

**AN INTERSTATE AGREEMENT IS PERMISSIBLE TO THE EXTENT
IT DOES NOT ENCROACH UPON FEDERAL SUPREMACY**

Article I, Section 10 of the United States Constitution reads in pertinent part as follows:

[1.] No state shall enter into any treaty, alliance, or confederation

 * * *

[3.] No state shall, without the consent of congress, . . . enter into any agreement or compact with another state . . .

The difference between the language in Clause 1 concerning treaties, alliances, or confederations and the language in Clause 3 regarding agreements or compacts is not evident from legislative history or case law. In fact, the Supreme Court stated in dicta that any distinct meaning attributed to those terms was lost.¹ Although many have commentated on the constitutional framers' intent, perhaps none are more convincing than Justice Joseph Story. Justice Story believed treaties, alliances, and confederations generally indicated military and political accords.² These were forbidden to the states. Compacts and agreements involve "mere private rights or sovereignty; such as . . . internal regulations for the mutual comfort and convenience of States bordering on each other."³ In this regard, it is likely that the Internet sales tax agreement will not involve Clause 1 of Article I, Section 10 because it does not raise the issues of military or political accords. Rather, the agreement at issue would more than likely be analyzed by a court under the language of Clause 3 of Article I, Section 10, otherwise known as the "Compact Clause."

The plain language of the Compact Clause would appear to require congressional consent in order for states to enter into agreements or compacts with another state. A literal interpretation would preclude Idaho, or any state for that matter, from entering into a multistate Internet sales tax agreement unless the United States Congress gave its consent. However, the United States Supreme Court, in interpreting similar agreements between states, refused to apply a strict construction to the Compact Clause.

The Supreme Court first addressed interstate agreements in State of Virginia v. State of Tennessee, 148 U.S. 503, 13 S. Ct. 728, 37 L. Ed. 537 (1893). The case involved a boundary dispute. Both states' legislatures ratified the boundaries; however, the agreement was made without federal congressional consent. In addressing a constitutional challenge to the boundary issues, the Supreme Court opined that the interpretation of "agreement" and "compact" in the Compact Clause must be used in context. Otherwise, a strict interpretation would require congressional consent on any agreement between states including agreements that in no way concern the United States.⁴ The Court felt a strict and inflexible criterion encompassing any agreement and compact between states would create absurdities not intended

by the framers. Rather, given the context of Article I, Section 10, the Court provided the following standard:

Looking at the clause in which the terms ‘compact’ or ‘agreement’ appear, it is evident that the prohibition is directed to the formation of any combination tending to increase the political power in the states, which may encroach upon or interfere with the just supremacy of the United States.⁵

(Emphasis added)

Thus, according to the Court, only those agreements which “encroach upon or interfere with the just supremacy of the United States” will violate the language of the Compact Clause.

The Court affirmed the standard of Virginia v. Tennessee in analyzing the constitutionality of the Multistate Tax Compact, and held that the reciprocal taxing statutes did not encroach or interfere with federal supremacy.⁶ States joining the MTC did not relinquish any sovereignty. Each state retained freedom to accept or reject the rules and regulations of the MTC and could withdraw at any time. In no way did the MTC grant a member state increased power or authority which would infringe upon the federal system.⁷ Thus, the reciprocal taxing agreement of the MTC did not violate the Compact Clause.

II.

AN INTERNET SALES TAX AGREEMENT WILL LIKELY BE PERMISSIBLE BASED UPON THE COURT’S ANALYSIS OF THE MULTISTATE TAX COMPACT

A multistate Internet sales tax agreement would likely withstand a constitutional challenge under the Compact Clause. Again, without a copy of the actual agreement, this analysis can only speculate as to the purpose and structure of such an agreement. The basic presumption is that the Internet sales tax agreement would likely create a reciprocal taxing scheme which would share some similarities to the MTC. If that is the case, member states do not relinquish any sovereignty by joining. Also, if the agreement is like

the MTC, then member states retain complete freedom to adopt or reject the rules, regulations, and guidance of the agreement or its administrative body. Member states would be free to withdraw at any time.

Moreover, it is presumed that the reciprocal taxing statutes will not attempt to grant Idaho new authority or power to tax which would infringe on the federal system. These agreements may only modify a state's existing authority over taxation. For example, the Internet sales tax agreement cannot grant Idaho the ability to tax an entity that does not have nexus or a connection to Idaho. Entering into an agreement of this nature cannot permit Idaho to extend beyond its existing authority to enforce and enact taxing statutes. In any case, courts will analyze a constitutional challenge under the Compact Clause based on whether such agreements encroach upon the federal government's supremacy. In light of the Court's analysis of the MTC, it is likely that the Internet sales tax agreement will not require federal congressional consent.

I hope this analysis is of assistance to you. If you have any additional questions or concerns, please do not hesitate to call upon me.

Sincerely,

CHELSEA KIDNEY
Deputy Attorney General

¹ U. S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 463, 98 S. Ct. 799, 808, 54 L.Ed.2d 682 (1978).

² *Id.*

³ *Id.* as cited in 2 J. Story, *Commentaries on the Constitution of the United States* § 1403, p. 264 (T. Cooley ed. 1873).

⁴ The examples of interstate agreements used by Justice Fields included 1) agreements to purchase land, 2) agreements to ship merchandise over a canal owned by another state, 3) agreements to drain a malaria district on the border, and 4) an agreement to combat immediate threats such as invasions or epidemics.

⁵ State of Virginia v. State of Tennessee, 148 U.S. 503, 519, 13 S. Ct. 728, 734, 37 L. Ed. 537 (1893).

⁶ U. S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 463, 98 S. Ct. 799, 808, 54 L.Ed.2d 682 (1978).

⁷ *Id.*

ADVISORY LETTERS OF THE ATTORNEY GENERAL

February 6, 2012

The Honorable Dennis Lake
Idaho House of Representatives
Statehouse
VIA HAND DELIVERY

Re: Our File No. 12-39575 — House Bill No. 444

Dear Representative Lake:

House Bill No. 444 (“H. 444”) amends Idaho Code sections 59-1342(5) and 59-1346(2) to remove the legislative exemption from the “split calculation” that is applicable to other elected and appointed officials in the calculation of a PERSI retirement benefit. H. 444 would remove the exemption for legislators leaving the Legislature on/after July 1, 2012. You have asked whether H. 444 implicates a protected property right.¹ This letter addresses whether there is a constitutionally protected property right to the legislative exemption.

H. 444 establishes July 1, 2012 as the date on which a current legislator must leave the Legislature in order to have his retirement allowance calculated under the current rule. As of July 1, 2012, legislators’ retirement allowances will be computed at the same rate as all other elected officials under Idaho Code § 59-1342(5) and § 59-1346(2). In sum, H. 444 provides notice that a change in the calculation of benefits is occurring based on the type of position held. The question is then whether current legislators have a property right in the current calculation method based upon a job that has not been announced, applied for, offered or accepted by a current legislator.

A Palpable Property Right Must Exist

As referred to above, to this office’s knowledge, no current legislator has an offer pending for a permanent state position beginning after July 1, 2012. To have a property interest, a person must have more than an abstract need or desire for it and more than a unilateral expectation of it. Instead, he must have a legitimate claim of entitlement to it. Maresh v. State Dep’t of Health & Welfare ex rel. Caballero, 132 Idaho 221, 227, 970 P.2d 14, 20

(1998) (citing Board of Regents of State Colleges v. Roth, 408 U.S. 564, 569, 92 S. Ct. 2701, 2705, 33 L.Ed.2d 548 (1972)).

It is not possible to consider all the various factual scenarios that might present in a property interest challenge to H. 444, if passed, as those would vary depending on any one legislator's history. As a consequence, this analysis focuses on the scenario described in the Statement of Purpose to H. 444. H. 444, as applied to a current legislator (who does not leave the Legislature before July 1, 2012) and currently has only legislative service, would not have a legitimate claim to the exemption from the split calculation. This claim would be deficient since he could have no reasonable expectation of getting a non-legislative job with a PERSI employer that would last long enough and would pay an amount high enough to enable him to benefit and "spike" his retirement benefit.² Based upon the numerous variables involved in a claim of this nature (including a job opening, a legislator applying for the job, being offered the job, then choosing to leave the Legislature and accept that position, and then serving in the new position for a long enough time to qualify), there is no protected property interest in the exemption from the split calculation under those circumstances.³ Absent a property interest, there can be no taking.

In sum, it does not appear that the amendment contained within H. 444 would permit a claim to a property right in a retirement calculation that is hedged upon a fulfillment of a series of unpredictable steps in order to qualify.

This letter is provided to assist you and represents the analysis of this office within limited time constraints, and as such is not an official opinion of the Office of Attorney General. I am happy to discuss the content of this letter more fully if necessary.

Sincerely,

BRIAN KANE
Assistant Chief Deputy

¹ If there is a property right, the state cannot take the property without due process and, if taken for public use, just compensation. U.S. Const. amends. V, XIV; Idaho Const. art. I, § 13; Idaho Const. art. I, § 14.

² The legislative exemption from the split calculation means that, for a legislator who fits into the parameters of the statute, all credited service is treated the same for purposes of calculating a retirement benefit, whereas for other elected/appointed officials who fit into the parameters of the statute, two calculations (a split calculation) are done. For legislators who fit into the parameters of the statute, the exemption can result in an increased retirement benefit because the legislative service gets the benefit of higher paying non-legislative service.

³ We have found no Idaho case that considers retirement benefits under a property rights analysis.

ADVISORY LETTERS OF THE ATTORNEY GENERAL

February 8, 2012

The Honorable Judy Boyle
House of Representatives
Idaho Legislature
Hand Delivered

Re: Preemption of State Regulations

Dear Representative Boyle:

You asked the Attorney General's Office to respond to the following inquiry: Can a state agency's rules trump a federal agency's rule when dealing with the same area of regulation?

Your inquiry is difficult to answer in the abstract, for the preemption of state agency rules by federal agency regulations requires an examination of the congressional delegation of authority to the federal agency.

The Supremacy Clause of Article VI of the United States Constitution provides Congress, when acting within the scope of its delegated powers, with the authority to preempt state law. Louisiana Pub. Serv. Comm'n v. F.C.C., 476 U.S. 355, 368, 106 S. Ct. 1890, 1898, 90 L.Ed.2d 369 (1986). Preemption occurs when Congress expresses a clear intent to preempt state law. *Id.* Congressional intent to supersede state law may also be implied if there is an actual conflict between federal and state law, where compliance with both federal and state law is in effect physically impossible, or where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the states to supplement federal law. *Id.* Intent to preempt state law may also be implied when the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress. *Id.* at 369.

The authority to preempt state laws can also be exercised by federal agencies when acting within the scope of congressionally-delegated authority. *Id.* "[A]n agency literally has no power to act, let alone preempt the validly enacted legislation of a sovereign State, unless and until Congress confers

power upon it.” *Id.* at 374. Thus, “the best way of determining whether Congress intended the regulations of an administrative agency to displace state law is to examine the nature and scope of the authority granted by Congress to the agency.” *Id.*

In short, the determination of whether a federal regulation preempts a state law or regulation requires an inquiry into (1) whether the statutes upon which the federal regulation are based embody an intent to supersede state law, and (2) the scope of congressional authority delegated to the agency.

This letter is provided to assist you with the legal questions presented in your letter and is not intended as a formal legal opinion. 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. If you have a particular class of state regulation in mind, we would be happy to follow up this letter with a more detailed analysis of whether such regulation may be preempted by federal agency action.

Sincerely,

STEVEN W. STRACK
Deputy Attorney General

March 6, 2012

The Honorable Les Bock
Idaho State Senate
State Capitol Building
P. O. Box 83720
Boise, ID 83720-0081

Re: Charter School Admission Preference

Dear Senator Bock:

This letter is in response to your request dated February 29, 2012, in which you ask whether proposed House amendment S1269, which provides an admissions preference to children of public charter school “builders,” would conflict with article IX, section 1 of the Idaho Constitution.

As you recognize, article IX, section 1 of the Idaho Constitution provides that the Legislature shall establish and maintain a system of “free public schools.” Public charter schools are included in this system, and, accordingly, are not permitted to charge tuition for the education they provide. However, where a public charter school’s capacity is insufficient to enroll all students who apply, Idaho and many other states have permitted charter schools to provide preference in admission to specific groups of students, so long as such preferences are not in violation of state or federal law. Specifically, Idaho Code section 33-5206(1) precludes charter schools from discriminating against any student “on any basis prohibited by the federal or state constitutions or any federal, state or local law.” This provision prohibits discrimination against members of a legally protected class, such as race (protected by Title VI of the Civil Rights Act of 1964); gender (protected by Title IX of the Education Amendments of 1972); or disability (protected by the Individuals With Disabilities Education Improvement Act of 2004).

Currently, Idaho Code § 33-5205(3)(j) permits preference to be given to returning students; children of founders (limited to 10% of the school’s capacity); siblings of students already enrolled or already selected in the lottery process; children of full-time employees of the school; and children who

previously attended the charter school and withdrew due to parental relocation, returning within three years. In addition, Idaho Code § 33-5206(1) allows for preference to be given to students who reside in the attendance area of the public charter school. The proposed House amendment and other enrollment preferences already established in Idaho statutes, are not inconsistent with article IX, section 1 of the Idaho Constitution.

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

Sincerely,

JENNIFER A. SWARTZ
Deputy Attorney General

ADVISORY LETTERS OF THE ATTORNEY GENERAL

March 13, 2012

The Honorable Wendy Jaquet
Idaho House of Representatives
Statehouse
VIA HAND DELIVERY

Re: Our File No. 12-39249 — Minimum Revenue Guarantees

Dear Representative Jaquet:

This letter is in response to your inquiry as to whether public entities are authorized to enter into agreements for the funding of minimum revenue guarantees. A minimum revenue guarantee is a contract used by airlines to provide service to airports that are viewed as a profitability risk. U.S. v. AMR Corp., 140 F. Supp. 2d 1141, 1157 (D. Kan. 2001). Use of these guarantees by small regional airports ensures a minimum level of air service at the airport and for its citizens.¹ Within your request, you posed three questions:

1. Does the legislative authority provided in Idaho Code §§ 50-321 and 50-322 include the authority to enter into agreements for air service to and from aviation facilities for the citizens of the city?
2. Whether the authority provided in Idaho Code § 31-876 permits county commissioners to enter into agreements for air service to and from aviation facilities?
3. Finally, if the above authority exists, may a group of cities enter into a joint powers agreement to share and exercise the authority referred to above?

As explained in greater detail below, general authority exists within Idaho's statutes to answer each of the above questions affirmatively. Although the general authority exists, it is essential that prior to entry into any of the arrangements discussed within this analysis, careful consideration through the entity's attorney be given to the structure, drafting, and detail of any agreement.

Cities, Counties, and Regional Authorities Have Express Authority to Operate and Maintain Airports

The Idaho Legislature has declared that the operation of airports is a public necessity, as well as a public purpose:

21-110. Public purpose of activities. — The acquisition of any lands or interest therein pursuant to this act, the planning, acquisition, establishment, construction, improvement, maintenance, equipment, and *operation of airports* and air navigation facilities, whether by the state separately or jointly with any municipality or municipalities and the exercise of any other powers herein granted to the department *are hereby declared to be public and governmental functions, exercised for a public purpose, and matters of public necessity.* All lands and other property and privileges acquired and used by or on behalf of the state in the manner and for the purposes enumerated in this act shall and are hereby declared to be acquired and used for public and governmental purposes and as a matter of public necessity.

Idaho Code § 21-110 (emphasis added).

Authority to operate airports by cities is provided within Idaho Code § 50-321, which expressly permits cities to construct, maintain, and operate airports, as well as “to provide for all costs and expenses incident or necessary to the exercise of the foregoing powers or the attainment of the foregoing objects out of the general fund of said city or in its discretion by special levy.” *See also City of Boise v. Frazier*, 143 Idaho 1, 137 P.3d 388 (2006). This express grant of authority is reinforced and clarified in Idaho Code § 21-401, which authorizes counties, highway districts, and cities: “[T]o maintain, operate and manage such aviation fields, airports and grounds and prescribe rules and regulations for the maintenance, operation and management thereof, and fix fees and rentals to be charged for the use of the same or any part thereof”² This provision grants additional authority in providing that: “Counties, highway districts and cities are hereby empowered to provide for all costs and expenses necessary or incident to the exercise of the foregoing powers or the attainment of the foregoing objects or any of them, out of the

general funds or out of any of the funds made available for such purposes, of such counties, highway districts and cities”³

Given the express statutory authorization for cities to construct, maintain, and operate airports, MRGs must be determined to fit within either the authority to construct, maintain, or operate an airport. Definitions are not provided within the statute. A review of *Black’s Law Dictionary* indicates that the terms “construct” and “maintain” are likely inapplicable to an MRG agreement.⁴ The question then becomes whether completion of an MRG agreement would be consistent with the authority to “operate” an airport under the statutes. *Black’s* defines operate as “to perform a function, or operation, or produce an effect.” Operation is further defined as “the process of operating or mode of action; an effect brought about in accordance with a definite plan; action; activity.”

In analyzing a city’s authority to “operate and maintain airports,” the Idaho Supreme Court has recognized that the expansion of a parking facility is consistent with the ordinary course of municipal business. *Frazier*, 143 Idaho at 4, 137 P.3d at 391. The Court specifically recognized that the expansion of the parking was a result of the rising demand of the citizens, recognizing that the city operated the airport on behalf of and for the benefit of its citizens. *Id.* Similarly, if a city can operate an airport, it is likely that the city would equally be able to contract for the provision of air service to and from the airport on behalf of its citizens. Absent such service, the public purpose of an airport becomes severely limited. Applying the reasoning from *Frazier*, a city’s operation and expansion of a parking facility was considered an ordinary expense of the city based on the authority contained in Idaho Code § 50-321. Similarly, demand for commercial air service to and from the airport by the citizens would appear to authorize a city to enter into agreements sufficient for the provision of that service. Although the service may be permitted, it is likely not sufficient to rise to the level of a necessity for purposes of incurring a debt or liability under article VIII, section 3 of the Idaho Constitution.

It appears that the use of contracts similar to MRGs was contemplated by the Legislature, because it included within Idaho Code § 21-401, the following provision: “Such aviation fields or airports shall in no case be leased to any person, association or corporation under such terms or condi-

tions as to give such person, association or corporation, the exclusive right to the use of such aviation fields or airports.” Clearly, the use of contracts to operate airports was considered, with the caveat that no airport could grant an exclusive right to an airline, rental car company, food service contractor or other entity to be a sole provider at the airport. Provided an MRG agreement does not run afoul of this limitation, it would likely be consistent with this provision.

Idaho Code Expressly Provides for the Use of Joint Powers Agreements

State and public agencies are authorized to cooperate to their mutual advantage, thereby providing services and facilities and performing “functions in a manner that will best accord with geographic, economic, population, and other factors influencing the needs and development of the respective entities.” Idaho Code § 67-2326. In this context, “public agency” refers to cities and other political subdivisions of the state. Idaho Code § 67-2327. Within the statutory constraints, any power which is held by the state or a public agency of the state can be exercised jointly with the state or any other public agency. Idaho Code § 67-2328.

Cities are clearly empowered to acquire, operate, and maintain aviation facilities. They have authority to provide for costs and expenses incident to the exercise of these stated powers. Idaho Code § 50-321. Further, cities are authorized to acquire, operate, and maintain *transit systems*. Idaho Code § 50-322.⁵ County commissioners, in their respective counties, may “establish, fund and operate public transportation services,” which the board of commissioners considers to be of public benefit. In this context, “public transportation services” is broadly defined. It includes “fixed transit routes; scheduled or unscheduled transit service . . . shuttle and commuter services between cities” Idaho Code § 31-876. As reflected above, Idaho Code § 21-401 authorizes cities, counties, and highway districts to construct and operate airports as well. Any doubt as to the ability of cities and counties to enter into joint powers agreements appears to be resolved by Idaho Code § 21-403:

21-403. Counties and municipalities may share in cost of airports. — Recognizing the need for airports as part of the national defense system and the inability of one (1) munici-

pality or one (1) county to finance the cost of such construction and maintenance thereof within its own limits or boundaries, it is the intent and purpose of this act to enable them to jointly and severally enter into contracts or agreements and share in the cost of such construction and maintenance.

In sum, it appears clear that a joint powers agreement for cost sharing by cities and counties is authorized both implicitly and expressly within the Idaho Code.⁶

Care Must Be Taken in the Preparation of Agreements to Not Run Afoul of Idaho's Constitutional Limitations

A. Operation of an Airport for the Benefit of Constituents Likely Fulfills a Public Purpose

Article XII, section 4 of the Idaho Constitution in relevant part limits aid to private corporations:

Municipal corporations not to loan credit. — No county, town, city, or other municipal corporation, by vote of its citizens or otherwise, shall ever become a stockholder in any joint stock company, corporation or association whatever, or raise money for, or make donation or loan its credit to, or in aid of, any such company or association

This provision directs that all expenditures must fulfill some public purpose, as opposed to aiding a private corporation. The Idaho Supreme Court has observed “. . . even though the legislature may have authorized various expenditures by counties or cities and villages, if such expenditures are contrary to the constitutional provision, they cannot be made.” City of Pocatello v. Peterson, 93 Idaho 774, 777, 473 P.2d 644, 647 (1970). We know that, to pass constitutional muster, government activities engaged in by a state, when funded by tax revenues, must have public, rather than a private purpose. Idaho Water Resource Board v. Kramer, 97 Idaho 535, 559, 548 P.2d 35, 58 (1976). Reviewing the Idaho Supreme Court's decision in Village of Moyie Springs v. Aurora Mfg. Co., 82 Idaho 337, 340, 353 P.2d 767, 769 (1960), care must be taken to ensure that the agreement is entered into for a public rather than a

private purpose. For example, Moyie Springs involved a case in which the city agreed to issue bonds for a private manufacturing corporation whereby the private company would receive the benefit of the municipalities' credit rating—which represented a direct lending of the municipalities' credit.

The Moyie Springs scenario is distinguishable from the MRG scenario. This office's understanding of the MRG is that it is a guarantee of a minimum level of air service to an airport, and in return for that service, the municipality guarantees that a minimum number of seats will be sold for the provision of that service or the municipality will make up the difference through a pledge of its revenue. In sum, the MRG operates as a subsidy to provide air service to its citizens, but only pays if the service is not fully utilized. The MRG is graduated in that it is reliant on the actual use and therefore the city could pay anywhere from nothing to the maximum MRG and any amount in between. In short, this graduation directly links the city's use of the air service to the city's purchase. Absent the MRG, air service would likely not be provided to the airport, be severely limited, or too costly for the citizens. The MRG thus becomes an option for rural or remote airports to provide their citizens with a minimum level of service and thereby fulfilling the public purpose of the airport—namely, that constituents have the benefit of air service.

B. A Record Establishing the Public Purpose is Recommended

In order to adequately establish the public purpose of the airport and air service to the airport, an entity should contemplate making findings within a resolution, ordinance, or other appropriate vehicle demonstrating the need and purpose of such service. Some sample findings might include:

1. The necessity of the agreement;
2. Recognizing it is a reasonable outgrowth of the city's clear authority to acquire, operate, and maintain an airline facility;
3. Assuring the citizens' access to regularly scheduled commercial air transportation is a crucial municipal and public function;
4. Public demand for air service is sufficient to require operation of an airport and provision of air service; and
5. The availability of a lower cost similar quality service is not plausible.

C. Any Agreement Should Not Create Any Debt or Liability Beyond One Year

Article VIII, section 3 of the Idaho Constitution generally bars cities from incurring debts or liabilities without first conducting an election to secure voter approval for the proposed expenditure. Frazier, 143 Idaho at 2, 137 P.3d at 389. Entry into an agreement should be done in such a fashion so as to not create any liability or debt beyond one year. This limitation is likely consistent with a city's evaluation of its demand for air service as it considers whether to enter into an MRG agreement. Care should be taken in the drafting to ensure that cancellation or failure to reenter into an agreement does not create a penalty. As necessary, non-appropriation and termination clauses should similarly be considered and drafted.

Consultation With the Entity's Attorney Should Be Undertaken Prior to Consideration, Drafting, or Adoption of an MRG Agreement

Consideration of entry into an MRG agreement should be undertaken through direct consultation with the governmental entity's attorney to ensure proper drafting, as well as the attorney's comfort level with defense of the legal authority to enter such agreement as well as the defensibility of the entered into agreement(s). This analysis should not be viewed as a substitute for that consultation, consideration, or representation, but rather simply examines whether a legal defense can be advanced for the use of MRG agreements generally within the current statutory structure. As evidenced by this analysis, final defensibility is intensely fact specific, meaning an agreement in one circumstance could be successfully challenged, while in another, successfully defended. Prior to consideration of taking any action contemplated within this analysis, this office recommends informed consideration by the entity in full consultation with the entity's attorney. This office does not represent individual political subdivisions who are parties to these agreements, nor would this office review specific agreements.

CONCLUSION

As outlined above, MRGs appear legally defensible provided care is taken in their consideration, drafting, and adoption. Legislation authorizing cities and counties to enter into agreements for the provision of air service or

including a definition of “operation” that includes the provision of “air service,” would improve the legal defensibility of these actions. The defensibility of an MRG agreement is likely to be highly fact specific and dependent on the actual agreements drafted and entered into—great care should be exercised in their consideration and adoption.

Sincerely,

BRIAN KANE
Assistant Chief Deputy

¹ It is worth noting that MRGs are not used solely to guarantee a minimum level of service, but may be required of airport concessionaires as well to ensure operational viability. For example, rental car companies desiring an on-airport car rental concession may include an MRG as part of their bid. See Greyhound Rent-A-Car, Inc. v. City of Pensacola, 676 F.2d 1380, 1381 n.2 (C.A.Fla. 1982).

² This section of the Code refers to air navigation facilities. Reviewing the Code, it is clear that air navigation facilities was used because it encompasses a broader range of activities than “airports.” For example, cities are authorized to construct and maintain aviation fields, airports, hangars, and other air navigation facilities. For purposes of this analysis, the term “airport” will be used for consistency.

³ A significant caveat exists within this section, as it continues to permit the use of bonds for any purpose except for maintenance and operations. It appears that the Legislature fully anticipated operations to occur on a year-to-year basis.

⁴ Construct is defined as: to build; erect; put together; make ready for use. Construct is distinguishable from “maintain,” which means to keep up, to keep from change, to preserve.

⁵ The term “transit system” is not defined in Idaho Code; however, as generally applied, the term refers to city- or county-operated bus, subway, or light rail systems. The statute is silent with respect to whether a city’s authority to acquire, operate and maintain a *transit system* would extend to the acquisition of airline transportation services.

⁶ This office understands that there is the possibility of a private-public entity partnership within this scenario. Care must be taken to ensure that participation in this partnership through an entity such as Fly Sun Valley, Inc. does not create an independent article XII, section 4 issue. Public-private partnerships are generally permitted, but require that the public portion of any monies is used solely for public purposes. No commingling of funds should occur if it results in the inability to determine whether the use is public or private.

ADVISORY LETTERS OF THE ATTORNEY GENERAL

June 29, 2012

The Honorable Donna M. Jones
State Controller
700 West State Street, 5th Floor
Boise, Idaho 83720

Re: Vacation and Sick Leave Entitlement of Certain State
Officials

Dear Controller Jones:

In letters dated January 26, 2012 and February 1, 2012, you inquired concerning the entitlement of elected Executive Branch officers to accrue sick leave during the term of their service and the entitlement of full-time commissioners on the Idaho Tax Commission, the Idaho Public Utilities Commission and the Industrial Commission to accrue vacation and sick leave. As your letters explained, these elected and appointed officers have annual salaries established by statute. *See* Idaho Code § 59-501 (elected Executive Branch officers); § 61-215 (Public Utilities Commission); § 63-102(1) (Tax Commission); § 72-503 (Industrial Commission). This office responded in a brief letter dated February 17, 2012, and answered the questions posed affirmatively.

The February 17 letter based its conclusion on Idaho Code §§ 59-1605 and 59-1606. Section 59-1605(1) provides that “[e]ligible nonclassified officers and employees shall accrue sick leave at the same rate and under the same conditions as is provided in section 67-5333, Idaho Code, for classified officers and employees,” and, in subsection (2), that “[s]ick leave shall be taken by nonclassified officers and employees in as nearly the same manner as possible as is provided in section 67-5333, Idaho Code, for classified officers and employees.” Section 59-1606(1) provides that “[e]ligible nonclassified officers and employees in the executive department and in the legislative department shall accrue vacation leave and take vacation leave at the same rate and under the same conditions as is provided in section 67-5334, Idaho Code, for classified officers and employees.” Section 67-5302(17), Idaho Code, defines the term “nonclassified employee” as “any person appointed to

or holding a position in any department of the state of Idaho, which position is exempted from the provisions of chapter 53, title 67, Idaho Code, as provided for in section 67-5303, Idaho Code.”

At your request, this office has re-examined the issues raised by the January 26 and February 1 letters. We conclude that the term “eligible” in sections 59-1605(1) and -1606(1) is ambiguous, and that in light of those statutes’ purpose, their application to state officers with statutorily fixed salaries leads to results not reasonably intended by the Legislature. We therefore construe the term “eligible” as not encompassing such officers. We also conclude that Attorney General Opinion No. 86-15 (1986), *reported at* 1986 Att’y Gen. Ann. Rpt. 80 (“Opinion No. 86-15” or “Opinion”), remains valid with respect to the inapplicability of section 67-5334 to elected Executive Branch officers.¹

We nevertheless do not believe it appropriate to issue a formal Attorney General’s opinion on the matters raised by your letter at this time because of long-standing practices with respect to the applicability of section 67-5333 to elected Executive Branch officers and full-time commission members and the applicability of section 67-5334 to the latter. We do recommend that the Controller’s Office give consideration to seeking legislative clarification if it chooses not to alter existing practices to conform with the analysis in this advice letter.

I.

TITLE 67, CHAPTER 53, IDAHO CODE

The Legislature established the present state personnel system in 1965. 1965 Idaho Sess. Laws 746 (codified as amended at Idaho Code §§ 67-5301 to 67-5343). The statute extends to any “classified officer or employee”—*i.e.*, all persons “appointed to or holding a position in any department of the state of Idaho which position is subject to the provisions of the merit examination, selection, retention, promotion and dismissal requirements of chapter 53, title 67, Idaho Code.” Excluded from “classified officer or employee” status are various categories of individuals, including “officers of the state of Idaho elected by popular vote” and “[m]embers of statutory

boards and commissions” (Idaho Code § 67-5303(a) and (b)), who are deemed “nonclassified employee[s]” (*id.* § 67-5302(17)).

Sick leave (Idaho Code § 67-5333) and vacation time (*id.* § 67-5334) are classified personnel practices controlled by title 67, chapter 53. Sick leave currently accrues at the rate of approximately .046 percent per hour of credited state service, with all unused leave forfeited at the time of separation from state employment. An exception to complete forfeiture is the right of an employee who retires in accordance with title 59, chapter 13 or title 33, chapter 1 to use one-half of the unused leave’s monetary value, as calculated by the employee’s compensation rate at the time of retirement, to be credited to the employee’s retirement account and “used by the Idaho public employee retirement board to pay premiums . . . for such health, dental, vision, long-term care, prescription drug and life insurance programs as may be maintained by the state, to the extent of the funds credited to the employee’s account pursuant to this section.” Idaho Code § 67-5333.

Vacation time accrues, with certain exceptions, at approximately .046 percent during the first 10,400 hours of credited service, .0577 percent during the second 10,400 hours of credited state service, .0692 percent of the third 10,400 hours of credited service, and .081 percent of credited service thereafter. Idaho Code § 67-5334(1). Other provisions regulate the maximum amount of accrued vacation time that may be accrued or taken during a calendar year; those amounts range between 192 and 336 hours depending upon the employee’s credited service. *Id.* § 67-5334(2)(b). Vacation time must “be taken on a workday basis” and “shall not be taken in advance of being earned and shall only be taken in pay periods subsequent to being earned.” *Id.* § 67-5334(2)(f). Upon separation from employment, an employee “shall receive a lump sum payment for accrued but unused vacation leave” calculated on the employee’s hourly rate of pay. *Id.* § 67-5334(3). That payment may not exceed the maximum accruals and accumulations otherwise provided for in § 67-5334(2)(b). *Id.* § 67-5334(2)(e).

Sections 67-5333 and 67-5334 thus (1) limit the amount of sick leave and vacation time that may be accrued and used during a calendar year; (2) allow a portion of unused sick leave at the time of retirement to be used to offset health-related insurance premiums that the retired employee otherwise would be responsible for; and, (3) authorize a lump-sum payment of unused

vacation time at the time of separation from employment. Overall, these provisions contain a highly regulated approach to mitigating the effect of illness or disability on continued income and enabling employees to take paid time off for vacation or personal purposes. Distinct benefits are conferred, but their availability is carefully circumscribed. Classified employees must take the sour with the sweet to the extent they seek to use sick leave or vacation time. Conversely, sections 67-5333 and 67-5334—whose purpose lies in replacing income that otherwise would be lost due to the inability to work because of illness or disability and to offer “a period of freedom, rest or diversion for the employee” and thereby “gain to the employer a recuperated and better satisfied employee” without loss of income (Seymour v. Christiansen, 1 Cal. Rptr. 2d 257, 261 (Cal. Ct. App. 1991))—have no significance where the affected individual’s entitlement to a particular salary is unaffected by inability to work due to sickness or by the amount of time that the individual devotes to vacationing.

II.

TITLE 59, CHAPTER 16, IDAHO CODE

In 1977, the Legislature extended certain provisions in title 67, chapter 53, Idaho Code, to “nonclassified officers and employees.” 1977 Idaho Sess. Laws 856 (codified as amended at Idaho Code §§ 59-1601 to 59-1608). That term plainly includes statewide elected officers and members of the Industrial, Public Utilities, and Tax Commissions. Section 59-1604(1)(a) and (b) accordingly provides in part that “[f]or purposes of payroll, vacation or annual leave, sick leave and other applicable purposes, credited state service shall be earned by . . . [t]he elective officers of the executive department, except the lieutenant governor . . . [and] [n]onclassified officers and employees of any . . . commission . . . except for part-time members of boards, commissions and committees.” Subsection (3) of section 59-1604 excepts “[m]embers of the legislature, the lieutenant governor, and members of part-time boards, commissioners and committees” from eligibility for “annual leave or sick leave.” As discussed above, sections 59-1605 and 59-1606 extend the sick leave and vacation time provisions in sections 67-5333 and 67-5334 to “eligible nonclassified officers and employees.”

III.

ATTORNEY GENERAL OPINION NO. 86-15

The issue in Opinion No. 86-15 was “[w]hether or not elected officials of the executive branch of state government are entitled to receive cash compensation for unused vacation leave upon leaving office at the end of their term.” In resolving the issue negatively, the opinion relied in part on now-repealed article IV, section 19 of the Idaho Constitution that specified the original compensation for the elected Executive Branch officers but provided authority to the Legislature to diminish or increase such compensation other than during the officers’ terms. Article IV, section 19 also provided that “[t]he compensations enumerated shall be in full for all services by said officers respectively, rendered in any official capacity or employment whatever during respective terms of office.” The Opinion reasoned that the Legislature exercised its authority under the constitutional provision through Idaho Code § 59-501—which set the annual compensation for the elected Executive Branch officers, and, like article IV, section 19, stated in subsection (5) that this compensation “shall be in full for all services by said officers.” It was therefore “clear that the elected officials of the executive branch . . . may not be paid more for their services than their per annum established by Idaho Code § 59-501.” The Opinion additionally relied on Buckalew v. City of Grangeville, 100 Idaho 460, 600 P.2d 136 (1979), where income earned by a police chief following an improper termination could not be used as an offset against his fixed salary because the salary compensation embodied an “incident [of his office] and belonging to the officer by virtue of his right to the office.” Opinion No. 86-15 at 5.

Opinion No. 86-15 concluded that “state elected officials of the executive branch receive fixed compensation so long as they hold their office.” Opinion No. 86-15 at 5. As such, the officers’ “right to compensation is not affected by sickness or vacation” but, instead, “is strictly a right incident to their holding office.” *Id.* The correlative principle, the Opinion held, is that the officers “can receive no more than the compensation fixed by . . . [article IV, section 19] and Idaho Code § 59-501.” *Id.* The statewide elected officers thus possessed no entitlement “to be paid their salary for the period of their unused vacation time.” *Id.*

Article IV, section 19 was repealed in 1998. The Legislative Council's rationale for the repeal was that the provision, insofar as it established the initial salaries for the elected Executive Branch officers, had become outdated by the Legislature's subsequent actions setting the officers' compensation and that the express authority to establish this compensation was provided in article V, section 27 of the Idaho Constitution. *See* Legislative Council's Statements for the Proposed Amendment, available at <http://www.sos.idaho.gov/elect/inits/sjr102st.htm> (last visited June 18, 2012).

IV.

ANALYSIS

The issue raised by your letters presents a question of statutory construction. The applicable standards are settled:

The interpretation of a statute “must begin with the literal words of the statute; those words must be given their plain, usual, and ordinary meaning; and the statute must be construed as a whole. If the statute is not ambiguous, this Court does not construe it, but simply follows the law as written.”

Verska v. Saint Alphonsus Reg'l Med. Ctr., 151 Idaho 889, 893, 265 P.3d 502, 506 (2011) (quoting State v. Schwartz, 139 Idaho 360, 362, 79 P.3d 719, 721 (2003)); accord McCann v. McCann, 152 Idaho 809, 275 P.3d 824 (2012).

On the other hand, if the statutory language is ambiguous, we must examine the proffered interpretations “and consider the ‘context in which [the] language is used, the evils to be remedied and the objects in view.’” [Citation omitted.] A statute will only be regarded as ambiguous when reasonable minds might differ as to its interpretation.

Callies v. O'Neal, 147 Idaho 841, 847, 216 P.3d 130, 136 (2009); accord Verska, 151 Idaho at 896, 265 P.3d at 509. The threshold determination is thus whether the relevant statutory provisions are ambiguous.

Idaho Code section 59-501 identifies the compensation to be paid elected Executive Branch officers and specifies in subsection (5) that such compensation “shall be in full for all services by said officers respectively rendered in any official capacity or employment whatever during their respective terms of office.” The salary provisions related to members of the Industrial, Public Utilities, and Tax Commissions require them to devote full time to the performance of their duties but do not contain the “in full for all services” language. Idaho Code §§ 61-215, 63-102(1) and 72-503. Notwithstanding the absence of the latter language, it is clear that the Executive Branch officers and the commission members not only have a statutory entitlement to the salaries so long as they hold their offices but also are entitled to no additional salary compensation for the time devoted to carrying out their offices’ responsibilities.² The Legislature, of course, may augment that salary through other statutory provisions and has done so with respect to participation in the Public Employee Retirement System (Idaho Code § 59-1302(14)(A)(b)) and group health and life insurance (*id.* § 67-5763)).³

Whether the sick leave and vacation time provisions in sections 67-5333 and 67-5334 may be used to increase, in practical effect, those salary levels, turns on the construction given to sections 59-1605 and 59-1606. Both provisions extend to “*eligible* nonclassified officers and employees” in sections 67-5333 and 67-5334. The term “eligible” is not defined in title 59, chapter 16. It could be construed to encompass all “nonclassified officers and employees” referenced in section 59-1604(1) who accrue credited state service for “payroll, vacation or annual leave, sick leave and other applicable purposes.” Although that subsection includes elected Executive Branch officers and full-time commission members, it does not address directly the substantive *eligibility* of the referenced officers and employees to sick leave or vacation time. It merely provides for the earning of credited state service for those purposes. The lack of specificity in subsection (1) with respect to eligibility contrasts with the explicit exclusion of certain groups of nonclassified officers from eligibility for sick leave and vacation time in subsection (3). Nonetheless, a plausible argument can be made that the term “eligible” in sections 59-1605(1) and 59-1606(1) includes all nonclassified officers and employees who may accrue state credited service for sick leave and vacation time purposes.

The dictionary definition of “eligible,” however, supports a different result. See Corp. of Presiding Bishop of Church of Jesus Christ of Latter Day Saints v. Ada County, 123 Idaho 410, 416, 849 P.2d 83, 89 (1993) (ordinary meaning assigned to statutory exemption language). “Eligible” is defined to mean “qualified to participate or be chosen.” Merriam Webster’s Collegiate Dictionary, 374 (10th ed. 1999). That definition is not satisfied here. Where an individual remains entitled to his or her salary even if, were sections 67-5333 and 67-5334 applied, sick leave or vacation time would be unavailable, the requisite reciprocity of benefit and burden essential to participation does not exist. Once again, the employee must take the bitter with the sweet. That reciprocity is absent here because an elected Executive Branch officer cannot be “docked” pay if unable to work as a result of illness for periods in excess of those for which sick leave has been accrued pursuant to section 67-5333 or if the officer takes more vacation time than his or her accrued hours would allow under section 67-5334. In short, the officer is not “eligible” for sick leave or vacation time because he or she (1) neither can nor will receive payments *as a result of the operation of sections 67-5333 and 67-5334* to avoid salary loss, and (2) cannot be limited in the use of sick leave or vacation time by those statutes’ requirements.⁴

These competing constructions of “eligible” create an ambiguity as to the scope of sections 59-1605 and 59-1606. Given this ambiguity, the Legislature’s presumed intent behind the extension of those statutes to “eligible nonclassified officers and employees”—to provide a measure of economic security with respect to illness or disability and a measure of respite from employment duties—counsels strongly against deeming elected Executive Branch officers and full-time commission members “eligible” nonclassified officers. The reason is implicit in the immediately preceding analysis: Extending sections 67-5333 and 67-5334 to those officers and commissioners would produce a monetary windfall, since they will never use sick leave or vacation time subject to the restrictions in the two statutes but will nevertheless accrue “unused” time that, as to sick leave, may be used to offset health-related insurance payments upon retirement, and, as to vacation time, for a one-time payment at the time of separation from employment. Such a windfall does not respond to “the evils to be remedied and the objects in view” prompting the statutes’ enactment. It also cannot be squared with giving effect to statutes setting sum-certain salary compensation for the performance of the involved offices.

V.

CONCLUSION

Upon re-examination, we conclude that the literal language of the salary statutes—Idaho Code sections 59-501, 61-215, 63-102(1) and 72-503—control. They specify the relevant compensation levels and cannot be reconciled with, in essence, additional salary accruals; *i.e.*, accruing compensable hours for a portion of hours *already paid* through the statutory salary. We therefore see no cause to revisit Opinion No. 86-15’s holding with respect to the accrual of vacation time by elected Executive Branch officers and further conclude that its reasoning supports a similar conclusion with respect to the lack of an entitlement for those officers to convert unused sick leave hours into additional compensation upon retirement. We find no basis to reach a different determination as to members of the Industrial, Public Utilities, and Tax Commissions with respect to the inapplicability of sections 67-5333 and 67-5334.

We nonetheless recognize that Opinion No. 86-15 has been applied only with respect to the accrual of vacation time by elected Executive Branch officers. Full-time commission members have accrued vacation hours under section 67-5334, and both elected Executive Branch officers and full-time commission members have accrued sick leave hours under section 67-5333. Should you determine not to apply the construction of “eligible” adopted in this analysis outside of the context addressed in Opinion No. 86-15, we suggest that the Controller’s Office consider seeking legislative clarification concerning the applicability of sections 67-5333 and 67-5334 to officials with statutorily-established salaries.

Please contact me with any questions.

Sincerely,

CLAY R. SMITH
Deputy Attorney General

¹ The February 17 letter deemed Opinion No. 86-15 is no longer binding with respect to the eligibility of elected Executive Branch officers for vacation time accrual because of the repeal of article IV, section 19 of the Idaho Constitution in 1998.

² The repeal of article IV, section 19 did not compromise the conclusion reached in Opinion No. 86-15, because Idaho Code § 59-501(5), like the repealed constitutional provision, expressly establishes compensation levels for payment “in full” for the officers’ services. As to the other salary-setting statutes, the purpose of those and similar laws is to ensure payment of a specified sum, no more and no less, to the official as a salary.

³ Implied repeal principles need not be considered, because, as discussed below, the term “eligible” does not include the officers and commission members at issue here. *See, e.g., Callies*, 147 Idaho at 847, 216 P.3d at 136 (“[c]ourts disfavor repeal by implication”).

⁴ Where an elected Executive Branch officer allegedly fails to carry out his or her constitutional duties in a diligent manner, the remedy lies in recall. Idaho Const. art. VI, § 6. Public Utility Commission members are subject to removal by the Governor “for dereliction of duty or corruption or incompetency.” Idaho Code § 61-202. Tax Commission members are subject to impeachment. *Id.* § 63-101(5). Industrial Commission members are subject to disciplinary processes before the Idaho Judicial Council, with Idaho Supreme Court review available. *Id.* § 72-501(7).

ADVISORY LETTERS OF THE ATTORNEY GENERAL

July 25, 2012

The Honorable Grant Burgoyne
2203 Mountain View Drive
Boise, ID 83706

Re: 10 Barrel Brewing Idaho, LLC Lease

Dear Representative Burgoyne:

You asked whether the lease between the Idaho Department of Lands and 10 Barrel Brewing Idaho, LLC, to use and occupy the Sherm Perry Building for a brew pub, complied with constitutional provisions requiring that all disposals of endowment properties take place by public auction. As you are aware, the Attorney General's Office, as legal counsel for the State Board of Land Commissioners ("Land Board"), is advising the Land Board on legal issues relating to the 10 Barrel Brewing lease. As such, it is not appropriate for this office to issue a legal opinion on legal issues related to this particular lease. We can, however, respond to the effect of the Wasden v. State Bd. of Land Comm'rs decision on the endowment commercial leasing program in general.

Article IX, section 8 of the Idaho Constitution provides, in part:

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

In Wasden v. State Bd. of Land Comm'rs, 153 Idaho 190, —, 280 P.3d 693, 700 (2012), the Idaho Supreme Court held that the term "'disposal' incorporates conveyances other than just sales—it contemplates both sales and leases." Based on this interpretation of "disposal," the Court concluded that "Article IX, § 8 requires public auctions for leases of endowment lands." 153 Idaho at —, 280 P.3d 701. Accordingly, it found Idaho Code § 58-310A

to be unconstitutional “because it exempts cottage site leases from the public auction requirement.” *Id.*

The holding in Wasden was based, in part, on a series of earlier decisions initiated by the Idaho Watersheds Project (IWP) that challenged grazing leases on endowment lands. Notably, in Idaho Watersheds Project v. State Bd. of Land Comm’rs, 133 Idaho 64, 982 P.2d 367 (1999), IWP submitted 24 conflict lease applications for grazing leases on state endowment lands. As the Court explained in a related decision, “[a] lease conflict occurs when an application is submitted by a person who is not the current lessee of the land covered by the application.” Idaho Watersheds Project v. State Bd. of Land Comm’rs, 133 Idaho 68, 69, 982 P.2d 371, 372 (1999). IWP’s conflict applications were processed under the terms of Idaho Code § 58-310B, which: (1) established certain qualifications that had to be met by conflict applicants of grazing leases, and (2) provided criteria which in certain circumstances denied the award of leases to high bidders. Pursuant to the terms of section 58-310B, IWP was deemed not to be a qualified applicant for certain leases, and was denied the award of another lease after being the high bidder at public auction. 133 Idaho at 66, 982 P.2d at 369.

The Court ultimately concluded that section 58-310B was unconstitutional, and ordered the Land Board to proceed with conflict auctions:

We note that I.C. § 58-310 provides a procedure for auctioning off and leasing public land “[w]hen two (2) or more persons apply to lease the same land,” with the exception of leases for single family, recreation cottage sites and home sites pursuant to I.C. § 58-310A and for leasing grazing land pursuant to I.C. § 58-310B. We conclude that I.C. § 58-310 is a “regulation[] ... prescribed by law” that the Board has a duty to follow for the rental of the school endowment public lands. Therefore, on remand, we direct that the Board follow the procedures in I.C. § 58-310 in leasing the land covered by the 1996 leases we have invalidated by our opinion today.

133 Idaho at 68, 982 P.2d at 371. *See also* Idaho Watersheds Project, 133 Idaho at 71, 982 P.2d at 374 (finding that certain lease applications by IWP were improperly denied and requiring “[o]n remand, the Board must auction

off and lease the land in question pursuant to the procedures in I.C. § 58-310”); Idaho Watersheds Project v. State Bd. of Land Comm’rs, 128 Idaho 761, 918 P.2d 1206 (1996) (enforcing terms of § 58-310).

The Wasden decision confirms that conflict auctions fulfill the “public auction” requirement. The Court addressed the constitutionality of Idaho Code § 58-310A, which exempted cottage site leases from conflict auctions and directed the Land Board to “reject any and all pending and future conflict applications filed under sections 58-307 and 58-310, Idaho Code” 153 Idaho at —, 280 P.3d at 699. The Court held the auction exemption in I.C. § 58-310A to be “constitutionally impermissible.” The practical effect of the Court’s striking of the exemption in section 58-310A was to make cottage site auctions subject to the conflict auction provisions of Idaho Code § 58-310. The Court impliedly endorsed the use of conflict auctions as a constitutional means of conducting public auctions for cottage sites, just as it had in the IWP cases and explicitly endorsed the use of conflict auctions for grazing leases.

Together, the Wasden and IWP decisions establish that the public auction requirement for leases is fulfilled by the conflict auction provisions of Idaho Code § 58-310. Under the conflict auction procedure, an auction is held only if “two or more persons apply to lease the same land.” Such auction is open to applicants only, and the lease is awarded “to the applicant who will pay the highest premium bid therefor,” with “the annual rental to be established by the state board of land commissioners,” unless the Board determines that the high bid should be rejected for fraud, collusion, or any other reason that in the judgment of the Board justifies the rejection of the bid. Idaho Code § 58-310. Similar conflict auction procedures have been in place since at least 1893. 1893 Idaho Sess. Laws 145.

A notable feature of conflict auctions is that the burden is on potential lessees to determine the availability of endowment properties that they may be interested in leasing and to submit a lease application. Absent the submission of conflicting applications, the Land Board is under no duty to hold an auction, and may proceed to negotiate lease terms with the sole applicant, provided that such lease terms comply with the constitutional mandate to secure the maximum long-term financial return to the endowment beneficiaries.

In short, the Wasden and IWP decisions establish that article IX, section 8 is not violated unless the statute in question prohibits the Land Board from conducting conflict auctions or interferes with Board discretion by requiring the Board to award leases to someone other than the high bidder. Neither concern applies to the statutory provisions governing the award of commercial leases. Idaho Code § 58-307(11) provides:

Commercial leases of the state lands shall not be subject to the conflict auction provisions of section 58-310, Idaho Code. The board may, at its discretion, consider individual applications or call for proposals and sealed bids by public advertisement, and may evaluate said proposals and award the lease to the bidder whose proposal achieves the highest return over the term of the lease and who is capable of meeting such terms and conditions as may be set by the board; in the alternative, the board may call for lease applications by public advertisement and if more than one (1) person files an application to hold an auction in the same manner as provided in section 58-310, Idaho Code. In all cases, the board must obtain a reasonable rental, based upon fair market value of the state land, throughout the duration of the lease. The board may reject any or all proposals and any or all bids, and may reoffer the lease at a later date if the board determines that the proposals or bids do not achieve the highest and best use of the land at market rental.

(Emphasis added.) Section 58-307(11) differs significantly from Idaho Code § 58-310A: although it provides that conflict auctions for commercial leases are not mandatory, it nonetheless preserves the Land Board's discretion to hold a conflict auction pursuant to the terms of section 58-310 when competing applications to lease are received. Thus, while the provisions exempting commercial leases from conflict auctions and providing alternative methods of awarding leases raise constitutional concerns when viewed in isolation, the subsection, viewed in its entirety, can be applied in a manner consistent with the public auction requirement of article IX, section 8 because it preserves the Board's authority to conduct conflict auctions. If the exemption and alternative procedures are held unconstitutional, a reviewing court likely would hold that the remainder of the subsection is constitutional.

ADVISORY LETTERS OF THE ATTORNEY GENERAL

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

Sincerely,

STEVEN W. STRACK
Deputy Attorney General

ADVISORY LETTERS OF THE ATTORNEY GENERAL

September 6, 2012

The Honorable Dean L. Cameron
1101 Ruby Dr.
Rupert, ID 83350

Re: Inquiry Regarding the Application of Use Tax and Proof to
Show Payment of Sales and Use Tax

Dear Senator Cameron:

Recently you asked the Attorney General's Office for an opinion on whether it is correct or legal for the State Tax Commission to assess use tax on untaxed purchases made by Idaho residents in Idaho from Idaho retailers. Further, you asked whether it is correct or legal for the Commission to conclude that the lack of an invoice showing tax paid is *prima facie* evidence that tax was not paid.

There is ample evidence that it is both correct and legal for the Commission to impose use tax under the facts presented and to presume that sales tax was not collected from the buyer if it is not separately stated on a purchase invoice. This conclusion is based on plain language of the Idaho Sales and Use Tax Act as it existed at its inception in 1965 and as it exists today. Further, while it is not necessary to look beyond the unambiguous language of the tax code to the legislative intent in order for an opinion to be upheld in a court of law, the analysis below nevertheless does so.

BACKGROUND

Mr. Douglas E. Reincke posed the following hypothetical. An Idaho-based business or individual makes a taxable purchase from an Idaho retailer. By code the retailer is required to collect sales tax unless the buyer requests an exemption in writing by supplying the appropriate documentation to the retailer which would relieve the latter of the collection responsibility. The buyer does not request an exemption, but the retailer does not include tax on the invoice. Sometime later within the statute of limitations, the Tax

Commission reviews the buyer's copy of the invoice, sees that no tax is displayed, and imposes a use tax liability on the buyer for unpaid taxes.

It is Mr. Reincke's position that the imposition of use tax by the Commission's auditors is restricted to the taxable use of tangible personal property in Idaho that was purchased out of state or from out of state non-registered vendors, where no other state's tax was rightly collected and, of course, Idaho's sales tax could not be imposed.

Mr. Reincke also believes that, "[T]he omission of separately stated sales tax on a purchase invoice is not conclusive that sales tax has not been paid on the transaction." By extension, he believes that only an audit of the retailer can provide the necessary evidence.

Mr. Reincke alleges that the 1965 "House Revenue and Taxation Committee Report in Support of House Bill 222," from the Chairman of the House Revenue and Taxation Committee to the Speaker of the House, provides the basis for his conclusion. It was this report that provided the basis for the Sales and Use Tax Act in that same year.

ANALYSIS

The imposition of use tax is predicated on the "use," "storage" or "consumptive use" of property in Idaho. The Committee Report provides these definitions:

Section 15 (a). This section defined as "storage" any keeping or retention of property in Idaho for a consumptive use within this state or for any purpose other than resale in the regular course of business or subsequent use or sale outside this state.

Section 15 (b). The term "use" is here defined as broadly as possible and includes anything arising out of the legal status of ownership and the incidence of ownership other than sale of property in the regular course of business. By this definition, **the use tax in its operation applies to any dealing with property on the part of the person holding or con-**

suming it. It is this breadth of definition that makes the use tax concomitant of the sales tax covering those areas involving transactions in tangible personal property which are not reached by the sales tax (emphasis added).

The definition above states that use tax is concomitant with sales tax for transactions not reached by sales tax, and there is no directive or prohibition that the Legislature intended to restrict such transactions to those that occurred out of state or resulted from purchases from non-registered vendors. Rather, by unambiguous language, use tax is to be applied to all situations where property is held or consumed in-state.

Section 15(a), shown above, was codified in 1965 to read as follows and is unchanged today as Idaho Code § 63-3615(a):

The term “storage” includes any keeping or retention in this state for any purpose except sale in the regular course of business or subsequent use solely outside this state of tangible personal property purchased from a retailer.

Section 15(b), also shown above, was codified in 1965. The language of the section today (Idaho Code § 63-3615(b)) is not identical, but the changes are not relevant to Mr. Reincke’s position:

The term “use” includes the exercise of any right or power over tangible personal property incident to the ownership or the leasing of that property or the exercise of any right or power over tangible personal **[of that] property** by any person in the performance of a contract, or to fulfill contract or subcontract obligations, whether the title of such property be in the subcontractor, contractor, contractee, subcontractee, or any other person, or whether the titleholder of such property would be subject to the sales or use tax, unless such property would be exempt to the titleholder under section 63-3622D, Idaho Code, **except that** the term “use” **[it] does not include the sale of that property in the regular course of business.** (Emphasised and parenthetical text represent the 1965 version).

Idaho Code § 63-3619 is the statute that imposes a sales tax collection responsibility on the seller. In the 1965 Committee Report, Subsection 63-3619(c) stated the following:

Though the retailer has primary liability for payment of the tax to the state pursuant to other provisions of this act, he has the duty of collecting the tax from the consumer upon whom it is imposed.

The codification of Section 63-3619 in 1965 reads as follows, and exists today with changes inconsequential to Mr. Reincke's issue:

Imposition and Rate of the Sales Tax. — An excise tax is hereby imposed upon each sale at retail at the rate of three percentum (3%) of the sales price of all property subject to taxation under this act and such amount shall be computed monthly on all sales at retail within the preceding month.

(a) The tax shall apply to, be computed on, and collected for all credit, installment, conditional or similar sales at the time of the sale or, in the case of rentals, at the time the rental is charged.

(b) The tax hereby imposed shall be collected by the retailer from the consumer. . . .

As we know from recent efforts to educate the public as to its use tax liabilities for untaxed purchases from remote sellers, voluntary compliance is insignificant to the aggregate amount owed. All states with a sales tax require sellers to act as agents of collection. For non-compliance, they face liability for uncollected tax, penalties and interest as consequences for not doing so. Nevertheless, the language of the sales tax statute does not preclude a use tax collection from the buyer.

Further, an administrative statute gives the Commission the explicit authority to collect use tax under the circumstances that Mr. Reincke presents:

When the tax commission determines that a retail sale is not exempt and the purchaser has failed to voluntarily pay sales or use tax in regard to the property or services purchased, the

tax commission may collect the sales tax which was due at the time of the sale or the use tax due at the time of storage, use or other consumption of the taxable goods or services by issuing to the purchaser a notice of deficiency determination, asserting tax together with interest, at the rate provided in section 63-3045, Idaho Code, and may assert penalties found elsewhere in this chapter (Idaho Code § 63-3624(h)).

In 1991, the following became an amendment to the administrative rules:

Reimbursement of Tax From the Purchaser to the Seller.

If the seller does not collect the sales tax at the time of the sale and it is later determined that sales tax should have been collected, the seller can then collect the sales tax from the purchaser if the delinquent tax has been paid by the seller. The legal incidence of the tax is intended to fall upon the buyer, Section 63-3619, Idaho Code (IDAPA 35.01.02.068.07).

According to the Commission's internally kept history of the administrative code, this language was added so that sellers had recourse against buyers when they, the sellers, were held liable for uncollected sales tax through an audit because of their failure to collect sales tax in the first instance from the buyer, or to properly account for those taxes. It was a logical addition in light of the legal incidence of the tax falling to the buyer, upon whom it is imposed, as noted in Section 19(c) above.

Idaho Code § 63-3621 is commonly referred to as the use tax statute. In the 1965 Act, and in the Committee Report, it was Section 21. Today's Idaho Code § 63-3621(a) is identical to Section 21(a) as enacted in 1965:

Every person storing, using, or otherwise consuming, in this state, tangible personal property is liable for the tax. His liability is not extinguished until the tax has been paid to this state except that a receipt from a retailer maintaining a place of business in this state or engaged in business in this state given to the purchaser is sufficient to relieve the purchaser

from further liability **for the tax to which the receipt refers. . . .**

(Emphasis added.)

Thus, the buyer under all circumstances (absent an exemption) owes a use tax, except that proof of the payment of sales tax will extinguish the liability. The Legislature clearly gave credence to the requirement for, and the review of, invoices as credible evidence in the administration of the tax law. The burden is upon the taxpayer to present evidence such as an invoice or receipt that the tax has been paid. Absent the taxpayer showing proof that the tax has been paid, the Commission in an audit may assume it has not been paid.

Other subsections of Idaho Code § 63-3621 that were also included in the original Sales and Use Tax Act refer to protections from tax liability afforded the sellers when the buyer presents a valid exemption claim. Despite these relief provisions, there is no indication that buyers are not responsible for tax that was owed but not collected by the seller.

Idaho Code § 63-3624(a) allows the Commission to prescribe, adopt, and enforce rules relating to the administration and enforcement of the Sales and Use Tax Act. It has done so in IDAPA 35.01.02.111.01:

In General. Every retailer doing business in this state and every purchaser storing, using, or otherwise consuming in this state tangible personal property shall keep complete and adequate records as may be necessary for the State Tax Commission to determine the amount of sales and use tax for which that person is liable under Title 63, Chapter 36, Idaho Code.

a. Unless the State Tax Commission authorizes an alternative method of record keeping in writing, these records shall show gross receipts from sales or rental payments from leases of tangible personal property, including any services that are a part of the sale or lease, made in this state, irrespective of whether the retailer or purchaser regards the receipts to be

taxable or nontaxable; all deductions allowed by law and claimed in filing the return; and the total purchase price of all tangible personal property purchased for sale or consumption or lease in this state.

b. These records must include the normal books of account ordinarily maintained by the average prudent businessman engaged in such business, together with all bills, receipts, invoices, cash register tapes, or other documents of original entry supporting the entries in the books of account, together with all schedules or working papers used in connection with the preparation of tax returns.

Thus, auditors routinely audit registered sellers and buyers for sales and use tax. As noted above, if the Tax Commission holds a seller for untaxed sales not substantiated by an exemption claim, the seller is entitled to recover that tax from the buyer (IDAPA 35.01.02.068.07.a.). If the Tax Commission audits the buyer, tax will be assessed on that side of the transaction. As a precaution, the Commission takes reasonable steps to prevent taxing the same transaction twice.

Section 20(g) of the Committee Report, indented below and cited by Mr. Reincke in defense of his position, is codified in the 1965 legislation similarly, while not identically. It refers to transactions in which a purchaser claims a resale exemption from a retailer only later to use the property in a taxable fashion. Under these circumstances, the burden of tax falls to the buyer rather than to the seller. This is a reasonable protection afforded the seller, as the buyer either misrepresented his intentions or changed his intentions after making an exempt purchase:

If a purchaser gives a resale certificate, primary responsibility for payment or a use tax in the event he later applies the property to a use that is other than resale or rental (which he had not intended at the time of purchase) will be upon the purchaser rather than the seller. The Tax Collector should collect from the seller only in the event that the purchaser fails to satisfy the responsibility primarily imposed upon him by this section.

The preceding does not suggest that, in Mr. Reincke's fact scenario, the absence of a resale certificate shifts the tax burden from the buyer to the seller. Simply put, there is no proscription on the Commission collecting tax from the buyer under the circumstances he presents.

Mr. Reincke notes Committee Report Section 21, Example 11, in defense of his position:

Retailer purchases fountain pens with his name engraved upon them to be used for distribution to customers in a promotional scheme. If this purchase is made in Idaho, it will be for consumption and subject to the sales tax. If the purchase is not made in this state and the goods are brought into Idaho, the retailer will pay a use tax on their value at the time of their use in this state and his purchase price will be presumptive evidence of their value. Use will occur when the goods are brought into Idaho and stored here for distribution to customers.

While the previous example illustrates one aspect of the application of use tax, there is no statutory proscription in the entire Sales and Use Tax Act preventing the Commission's application.

Finally, Section 21 of the Committee Report establishes that use tax is to be broadly applied to all transactions that have escaped sales tax, regardless of circumstances, and that the determining factor be whether "use," "storage" or "consumptive use" occurred pursuant to Section 15, cited beforehand, as codified in Idaho Code § 63-3615.

Imposition and Rate of the Use Tax. This tax is a necessary concomitant of the sales tax and is to be applied in all cases, in which any use, as defined in section 15, occurs at the rate of 3% of the value of all property acquired on or after July 1, 1965, with a recent sales price presumptive of the value of the property so used. The tax is imposed upon anyone using property in this state whether he be a resident of Idaho or a nonresident of this state.

ADVISORY LETTERS OF THE ATTORNEY GENERAL

There is no doubt that the 1965 Legislature viewed use tax as the way to collect tax when the sale was beyond the reach of sales tax. However, the statutes justify a broader use that Commission employees have applied since the earliest days of auditing.

Please call me if you have any further questions or concerns regarding this matter or anything which we may clarify.

Best Regards,

ERICK SHANER
Deputy Attorney General

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