# IDAHO ATTORNEY GENERAL'S ANNUAL REPORT

# OPINIONS

# SELECTED INFORMAL GUIDELINES

AND

# SELECTED ADVISORY LETTERS

FOR THE YEAR

## 2014

**Lawrence G. Wasden**
Attorney General

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2014 Idaho Att'y Gen. Ann. Rpt.

Thus, the Official Opinion 14-1 is found at:
2014 Idaho Att'y Gen. Ann. Rpt. 5

Similarly, the Informal Guideline of April 16, 2014 is found at:
2014 Idaho Att'y Gen. Ann. Rpt. 51

The Advisory Letter of January 9, 2014 is found at:
2014 Idaho Att'y Gen. Ann. Rpt. 67

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**Lawrence G. Wasden**
Attorney General

# INTRODUCTION

Dear Fellow Idahoan:

This was a year of landmarks for my Office. First, 2014 will long be remembered as the year the Snake River Basin Adjudication was completed; and, marking that historic event, the year in which United States Supreme Court Justice Antonin Scalia traveled to Boise to address our Deputy Attorneys General and staff. Second, this year also saw the expansion of my Office's Public Corruption and Internet Crimes Against Children Units. Each of these successes, and others too numerous to list, highlight why the Idaho Attorney General's Office continues to successfully represent Idaho, and protect the state's legal interests throughout the State, the Western region and nationally.

After more than 20 years, and the adjudication of more than 158,000 claims for water rights, the Snake River Basin Adjudication has been completed. The final decree was issued on August 25, 2014. This represents the culmination of an amazing body of work and legal effort on the part of my Natural Resources Division attorneys and staff, as well as the Idaho Department of Water Resources. Completion of this Adjudication makes Idaho the envy of other states embarking on, or in the midst of, similar adjudications.

My Consumer Protection Division recovered $3.9 million for Idaho consumers and taxpayers in 2014. Highlighting the year, the Division prevailed in an important antitrust case opposing the acquisition of the Nampa-based Saltzer Medical Group by St. Luke's Health System, to ensure that Treasure Valley residents would continue to have lower prices, better choices and robust competition in healthcare. The win headlined other successful antitrust judgments and settlements involving E-books and DRAM chips that the Division also obtained last year. Additionally, the Division has continued its efforts defending Idaho's multi-million dollar Tobacco Master Settlement Agreement payments from attack by the tobacco companies.

Public corruption continues to be an issue throughout Idaho. In the past year, my Office was given the responsibility for investigating complaints of corruption against elected county officials by the Legislature. This narrow increase in responsibility resulted in more than 50 complaints being received and reviewed by my Office.

My Office has continued presenting Open Meetings and Public Records seminars around Idaho. In conjunction with the League of Women Voters, the Idaho Press Club and Idahoans for Open Government, I presented open government training in the communities of Sandpoint, Coeur d'Alene, Moscow and Lewiston. These efforts will continue in southwest Idaho during the coming year. An informed citizenry is the truest guardian of our republic!

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

# OFFICE OF THE ATTORNEY GENERAL
# LAWRENCE G. WASDEN
# ATTORNEY GENERAL
## 2014
## STAFF ROSTER

### ADMINISTRATION

| | | | | |
|---|---|---|---|---|
| Sherman Furey III<br>Chief Deputy | Brian Kane<br>Assistant<br>Chief Deputy | Janet Carter<br>Executive Assistant | DeLayne Deck<br>Receptionist/<br>Secretary | Teri Nealis<br>Legal Secretary |

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Steven Olsen, Civil Litigation
Brett DeLange, Consumer Protection
Kay Christensen, Contracts & Administrative Law
Paul Panther, Criminal Law
Clive Strong, Natural Resources

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### PARALEGALS

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|---|---|---|---|
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| Matt Cundiff | | | |

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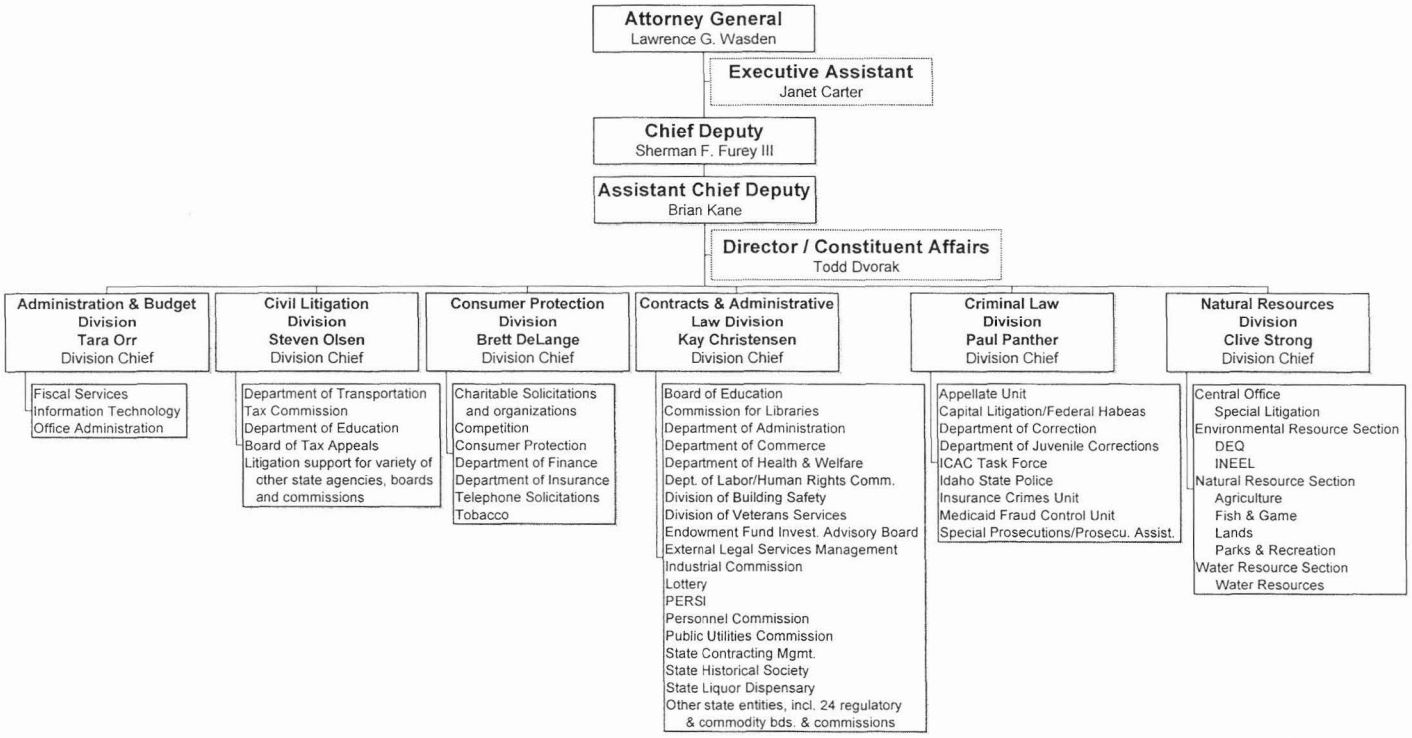
# Office of the Idaho Attorney General
# Organizational Chart - 2014



# OFFICIAL OPINIONS
# OF
# THE ATTORNEY GENERAL
# FOR THE YEAR 2014

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

## ATTORNEY GENERAL OPINION 14-1

To: Zachary Pall
Lewis County Prosecuting Attorney
510 Oak Street, Suite #2
Nez Perce, ID 83543

Per Request for Attorney General's Opinion

## QUESTION PRESENTED

Are individuals under commitment to the Department of Health and Welfare pursuant to Idaho Code § 66-317, *et seq.*, entitled to register as voters in the counties where they have been dispositioned, assuming they have remained in the county for at least thirty days?

## CONCLUSION

Individuals who have been committed as involuntary patients pursuant to Idaho Code § 66-317, *et seq.*, to a facility located in a county other than their county of residence before commitment do not become eligible to register to vote in the county of their commitment solely on the basis of their commitment to such a facility in the county.

## ANALYSIS

This formal opinion addresses the county in which a person committed to a facility for treatment of the mentally ill may register to vote and/or vote while committed to such a facility. The terms "facility," "mentally ill" and "involuntary patient" are defined in Idaho Code section 66-317 and take their meaning from that section. This analysis assumes that the Question Presented addresses individuals:

(1) who (a) were or have become qualified electors registered to vote, or (b) were or have become eligible to become qualified electors registered to vote,

(2) in the county in which they were resident at the time that they were committed to another county to a facility defined in Idaho Code section 66-317, and
(3) there was or is no intervening event that prevents them from (a) continuing to be qualified electors registered to vote in Idaho, or (b) from becoming qualified electors registered to vote in Idaho,
(4) since they are committed to such a facility.

In other words, this analysis assumes that the individual at issue was eligible to vote or eligible to register to vote somewhere in Idaho, but not in the county in which the facility is located.

The starting point in this analysis is the Idaho Constitution.

- Art. VI, sec. 2, provides that every citizen of the United States who is 18 years old "who has resided in this state and in the county where he or she offers to vote for the period of time provided by law, if registered as provided by law, is a qualified elector."
- Art. VI, sec. 5, provides that, "For the purpose of voting, no person shall be deemed to have gained or lost a residence by reason of his presence or absence . . . while kept at any alms house or other asylum[1] at the public expense."
- Art. VI, sec. 4, provides that the legislature "may prescribe qualifications, limitations, and conditions for the right of suffrage, additional to those prescribe[d] in this article, but shall never annul any of the provisions in this article contained."

Taking these three sections together, sec. 2 establishes that a citizen's ***residence*** in the state and a county create a right to register to vote in that county and to vote if registered; sec. 5 provides that a person is not deemed ***to gain or lose residence*** while kept in an asylum at public expense; and sec. 4 allows the Legislature to prescribe additional qualifications, limitations and conditions for voting that do not annul these provisions. The plain language of these sections of art. VI of the Idaho Constitution leads to the conclusion that commitment to mental health facilities does not by itself change one's residence to the county in which the facility is located.

Statutes reinforce these constitutional provisions. Idaho Code § 34-104 provides a general rule that defines a "qualified elector" as a citizen 18 years or more of age "who has resided in this state and in the county at least thirty (30) days next preceding the election at which he desires to vote, and who is registered as required by law." Idaho Code § 34-107 defines "residence" for voting purposes as the principal or primary home or abode to which even an absent person intends to return:

> **34-107. "Residence" defined.** — (1) "Residence," for voting purposes, shall be the principal or primary home or place of abode of a person. Principal or primary home or place of abode is that home or place in which his habitation is fixed and to which a person, whenever he is absent, has the present intention of returning after a departure or absence therefrom, regardless of the duration of absence.
>
> (2) In determining what is a principal or primary place of abode of a person the following circumstances relating to such person may be taken into account: business pursuits, employment, income sources, residence for income or other tax pursuits, residence of parents, spouse, and children, if any, leaseholds, situs of personal and real property, situs of residence for which the exemption in section 63-602G, Idaho Code, is filed, and motor vehicle registration.
>
> (3) A qualified elector who has left his home and gone into another state or territory or county of this state for a temporary purpose only shall not be considered to have lost his residence.
>
> (4) A qualified elector shall not be considered to have gained a residence in any county or city of this state into which he comes for temporary purposes only, without the intention of making it his home but with the intention of leaving it when he has accomplished the purpose that brought him there.
>
> (5) If a qualified elector moves to another state, or to any of the other territories, with the intention of making it his permanent home, he shall be considered to have lost his residence in this state.

Subsections (1), (2) and (4) strongly suggest that a person involuntarily committed to a facility does not meet the criteria for residency in the facility's county.

- Under subsection (1), it is doubtful that a place of involuntary commitment will become "the principal or primary home or place of abode . . . to which [an involuntarily committed] person . . . has the present intention of returning after a departure or absence" by reason of the commitment.
- Under subsection (2), it is doubtful that an involuntarily committed person has changed his or her "business pursuits, employment, income sources, residence for income or other tax pursuits, residence of parents, spouse, and children, if any, leaseholds, situs of personal and real property, situs of residence for which [a homestead exemption] is filed, and motor vehicle registration" by reason of the commitment.[2]
- Under subsection (4), it is also likely that a committed person has gone to a facility "for temporary purposes only, without the intention of making it his home but with the intention of leaving it when he has accomplished the purpose that brought him there."

If these subsections were not sufficient to show that involuntary commitment is unlikely to lead to a change in residency for voting, section 66-325 of the title and chapter of the Idaho Code on hospitalization of the mentally ill lays the issue to rest:

> **66-325. Residence not affected by place of treatment.** — For purposes of this chapter, the terms "residence," "residing," or "resides" shall refer to the place where the mentally ill person lives. None of the time spent in any facility shall be regarded as contributing toward, or acquiring, residence for any purpose.

From these statutes, I conclude that involuntarily committed residents of facilities described in Idaho Code section 66-317 do not acquire the right to register to vote in the county in which the facility is located simply by spending 30 days at the facility.

That does not mean there could never be circumstances unrelated to the involuntary commitment that might give such a person the right to vote in the county of the facility. For example, using the criteria of Idaho Code § 34-107(2), if an involuntarily committed person was living with a family and intended to return to that family and the family moved to the county of the facility, found jobs in that county, bought a home in that county, and changed the site of their motor carrier registration to that county, it is likely that the involuntarily committed person's family had established sufficient ties to the community that the involuntarily committed person could "piggy back" upon the family's relocation and register as a voter in the county. But that ability to change the county of voter registration would be not based upon a period of commitment to a facility within the county, but upon other factors unrelated to the commitment.

Lastly, this opinion addresses the case of Hawkins v. Winstead, 65 Idaho 12, 138 P. 972 (1943), which construed art. VI, sec. 5 of the Idaho Constitution, in particular the following portions of that section: "For the purpose of voting, no person shall be deemed to have gained or lost a residence by reason of his presence or absence while employed in the service . . . of the United States . . . ". Hawkins was not a voting rights case; it presented the question of whether a person serving in the armed forces and assigned to a base near Boise could acquire residence in Ada County for purposes of filing for divorce. The Idaho Supreme Court observed that this constitutional provision for voting residence did not control residency for purposes of divorce. 65 Idaho at 15, 138 P. at 973. Hawkins then held that the soldier, who had received permission to live off-base in Boise and who in fact lived off-base, had established residency for purposes of the divorce statutes.

Although Hawkins was a divorce case, nevertheless, it overruled Powell v. Spackman, 7 Idaho 692, 65 P. 503 (1901), which held that a veteran's home was an alms house for purposes of voting residence under art. VI, sec. 5: "[*Powell*] was wrong in that it placed veterans living at the Soldiers' Home on a level with paupers living in an alms house. Such veterans were not, and the veterans now living at the Soldiers' Home, are not, paupers, and we refuse to brand them as such." 65 Idaho at 18, 138 P. at 974.

Whatever else can be said about Hawkins, it is not case law that a person can become a resident of a county simply by being involuntarily com-

mitted to a mental health facility in the county. Hawkins did not address the effect of involuntary commitment to an asylum on voting residence; it addressed whether a soldier's home was an alms house. Hawkins is not authority that art. VI, sec. 5, does not continue to apply for those committed to "asylums" (using art. VI's nineteenth century language) or "facilities" (using Idaho Code § 66-317's twenty-first century language).

For all of these reasons, I conclude that individuals who have been committed as involuntary patients pursuant to Idaho Code § 66-317, *et seq.*, to a facility located in a county other than their county of residence before commitment do not become eligible to register to vote in the county of their commitment solely on the basis of being in the county during their term of commitment.

## AUTHORITIES CONSIDERED

**1. Idaho Constitution**:

Art. VI, § 2.
Art. VI, § 4.
Art. VI, § 5.

**2. Idaho Code:**

§ 34-104.
§ 34-107.
§ 34-107(2).
§ 63-602G.
§ 66-317.
§ 66-317, et seq.
§ 66-325.

**3. Idaho Cases:**

Hawkins v. Winstead, 65 Idaho 12, 138 P. 972 (1943).

Powell v. Spackman, 7 Idaho 692, 65 P. 503 (1901).

**4. Other Authorities:**

Dictionary.com Online Dictionary, http://dictionary.reference.com/browse/asylum?s=t (accessed Feb. 24, 2014).

Webster's Ninth New Collegiate Dictionary, p. 111 (1983).

*Students and Voting*, Idaho Office of the Secretary of State, http://www.idahovotes.gov/VoterReg/Students_Voting%20Residency.htm (accessed Feb. 24, 2014).

DATED this 3rd day of March, 2014.

LAWRENCE G. WASDEN
Attorney General

**Analysis by:**

MICHAEL S. GILMORE
Deputy Attorney General

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[1] As used in the Constitution of 1889, asylum probably had a meaning that dictionary.reference.com now describes as dated: "*obsolete* an institution for the shelter, treatment, or confinement of individuals, esp. a mental hospital (formerly termed **lunatic asylum**)." *See* http://dictionary.reference.com/browse/asylum?s=t. *See* also Webster's Ninth New Collegiate Dictionary, "4: an institution for the relief or care of the destitute or afflicted and esp. the insane," p. 111 (1983). The facilities defined in Idaho Code § 66-317 would thus be included in what art. VI, sec. 5 calls an asylum.

[2] The Idaho Secretary of State's office has many publications that provide useful information for assessing residency or domicile for purposes of voter registration. Although these publications do not have the force and effect of law, they provide practical guidance on determining voting residency. The publication, "*Students and Voting*," poses many questions that are also relevant for persons committed to a facility.

Some of the factors which may be relevant in determining whether domicile has been established for voting purposes by a student, as well as any other applicant, are as follows:

(1) Has the applicant registered to vote elsewhere?

(2) If married, where does his or her spouse reside?

(3) Where does the applicant keep his personal property?

(4) Does the applicant have any community ties to the locale he claims as his domicile—membership in church, social or service clubs, etc.?

(5) Where does the applicant maintain his checking and saving accounts, if any?
(6) Where does the applicant pay taxes, and what address did he list as his residence on his last income tax return?
(7) What is the residence listed on the applicant's driver's license?
(8) If the applicant owns an automobile, where is it registered?
(9) If the applicant is employed, where is his job located?
(10) Does the applicant live year round at his claimed domicile, or does he divide it elsewhere? If it is divided, how much time is spent elsewhere and for what reason?
(11) What residence does the applicant list on his selective service registration, hunting or fishing licenses, insurance policies, or other official papers and documents which required a statement of residence or address?

http://www.idahovotes.gov/VoterReg/Students_Voting%20Residency.htm (accessed Feb. 24, 2014). Except in very unusual cases, the answers to these questions would not point to establishment of residency for voting purposes in the county of the facility.

## ATTORNEY GENERAL OPINION NO. 14-2

To: Thomas M. Schultz, Jr., Director
Idaho Department of Lands
STATEHOUSE MAIL

Per Request for Attorney General's Opinion

## INTRODUCTION

In 2002, this office issued Attorney General Opinion No. 02-1 answering three questions from the Idaho Department of Lands ("Department") concerning the land bank fund created by Idaho Code § 58-133. Question "C" of that opinion was:

What "expenses" of property sale/acquisition, if any, can be paid for out of the proceeds from the sale of endowment lands that are invested in the land bank fund?

The opinion concluded that the Department could not deduct expenses from the sale proceeds prior to depositing the proceeds in the land bank fund. The Department has now asked the follow-up question of whether the Department may pay expenses associated with the sale of endowment land from the land bank fund after deposit of the sale proceeds.

## QUESTION PRESENTED

Whether the Department may pay expenses associated with the sale of endowment land from the land bank fund after deposit of the sale proceeds.

## CONCLUSIONS

No. Idaho Code § 58-133 states, "Moneys from the sale of lands which are a part of an endowment land grant shall be used only to purchase land for the same endowment." The expenses associated with the sale of endowment lands are administrative costs. Therefore, such expenses are chargeable against the Department of Lands' appropriation from the earnings reserve fund. Idaho Code § 57-723A(3).

## ANALYSIS

The land bank fund was created as part of the "endowment reform" in the late 1990s. Prior to endowment reform, all proceeds from the sale of endowment lands were required to be deposited in the appropriate permanent endowment fund. The land bank fund was created as a narrow exception to this general rule. Because the endowment fund is to "remain inviolate and intact," the land bank fund exception must be narrowly construed.

Idaho Code § 58-133, which created the land bank fund, authorizes the Board of Land Commissioners (the "Land Board") to deposit proceeds from the sale of endowment land in the land bank fund for temporary holding pending the purchase of other endowment land. The proceeds may be held in the land bank fund for up to five years. If the proceeds have not been encumbered to purchase other land within five years, the sale proceeds and all earnings must be deposited in the earnings reserve fund, unless the period is extended by the Legislature.

Attorney General Opinion No. 02-1 concluded that the expenses associated with the sale of endowment lands cannot be deducted from the proceeds of the sale of endowment land prior to the deposit of the proceeds in the land bank fund. This conclusion was based upon the plain language of Idaho Code § 58-316, which requires that the Director of the Department of Lands deposit "all purchase moneys arising from the sale of state land" with the Treasurer, and that the Treasurer credit the proceeds to the land bank fund to which the land sold belonged.

Opinion No. 02-1 left open the question of whether the Department of Lands could deduct sale expenses after sale proceeds are deposited in the land bank fund. That question is answered by the plain language of the statute, which states: "Moneys from the sale of lands which are a part of an endowment land grant shall be used only to purchase land for the same endowment." Idaho Code § 58-133(2). Thus, the only permissible use of endowment land sale proceeds is to purchase other land.

Accordingly, sale proceeds deposited in the land bank fund cannot be used to pay expenses associated with the sale of endowment land. Also, because Idaho Code § 58-316 requires that the Director deposit all purchase

moneys with the Treasurer, the expenses cannot be deducted from the sale proceeds prior to deposit in the land bank fund. *See also*, Idaho Code § 58-128 (requiring land board to deposit daily with treasurer all money received); Idaho Code § 67-1302 (requiring state officers and employees to deposit money received on behalf of the state with the treasurer).

While the use of sale proceeds deposited in the land bank fund are strictly limited to the purchase of land and expenses associated with such purchases, Idaho Code § 57-723A(3) provides that the Department's administrative costs may be paid out of the earnings reserve fund. Since the expenses of selling endowment lands arise out of the Department's duty to administer endowment lands, such expenses are appropriately paid out of the Department's earnings reserve fund appropriation.

## AUTHORITIES CONSIDERED

**1. Idaho Code:**

Idaho Code § 57-723A(3).
Idaho Code § 58-128.
Idaho Code § 58-133.
Idaho Code § 58-133(2).
Idaho Code § 58-316.
Idaho Code § 67-1302.

**2. Other Authorities:**

2002 Idaho Att'y Gen. Ann. Rpt. 5

DATED this 11th day of August, 2014.

LAWRENCE G. WASDEN
Attorney General

**Analysis by:**

EDITH L. PACILLO
Deputy Attorney General

## ATTORNEY GENERAL OPINION NO. 14-3

To: Kit Coffin
Risk Management Program Manager
Idaho Department of Administration
STATEHOUSE MAIL

Per Request for Attorney General's Opinion

You have requested an Attorney General's Opinion concerning whether the University of Idaho "University" has any exemption from the requirement that it procure its insurance solely as prescribed by the Department of Administration. This opinion addresses the question you have presented.

### QUESTION PRESENTED

Does the University of Idaho ("University") have any exemption from the requirement for sole provision of insurance by the State of Idaho Risk Management Program within the Department of Administration (other than group insurance for State employees)?

### CONCLUSION

For the reasons stated below, the University of Idaho should not obtain its own risk (i.e., liability) or property insurance unless it does so by paying premiums with moneys not derived in whole or in part from State funds. It may obtain its own risk or property insurance if it pays the premiums with money not obtained in whole or in part from State funds.

I reach these conclusions for the following reasons. There are two exceptions in title 67, chapter 57, Idaho Code, under which the University of Idaho may obtain insurance coverage in addition to that procured by the Director of the Department of Administration. The first is in Idaho Code sections 67-5765 and 67-5766, which are among the sections authorizing purchase of group insurance for life, medical and disability coverage. Group insurance was not within the scope of the Question Presented, so this exception is not relevant.

The second exception is implicit, not explicit. Idaho Code sections 67-5773 and 67-5775 give the Director authority to determine the nature and extent of insurance coverage for risk and property and to procure necessary insurance and/or not to insure according to the Director's determination of what is cost beneficial. However, there is an implicit exception to the Director's authority under Idaho Code section 67-5773(1)(a) — when premiums are not paid in whole or in part from State funds. Under section 67-5773(1)(a), it would appear that the University of Idaho could obtain risk or property insurance on its own if no State funds were involved. However, Idaho Code section 6-920 of the Idaho Tort Claims Act would preclude even that where liability insurance (what section 67-5773 calls risk insurance) is involved. Under these statutes, the only risk or property insurance that the University of Idaho may obtain on its own is property insurance paid with premiums not derived in whole or in part from State funds.

This statutory review does not complete the analysis, however. Idaho Constitution, art. IX, sec. 10, gives the University of Idaho's Regents "general supervision of the university, and the control and direction of all the funds of, and appropriations to, the university, under such regulation as may be prescribed by law." No Idaho Supreme Court case law has extended the Regents' authority under this section to trump the statutes cited, although one cannot say with assurance that this could not happen. On the other hand, there is case law that the Legislature may not restrict the University's use of funds other than State funds.

There is a presumption that statutes are constitutional. There is no existing case law holding that art. IX, sec. 10, overrides the Idaho Tort Claims Act or the Risk Management statutes. In the absence of precedent that construes art. IX, sec. 10, to the contrary, both the Department of Administration and the University of Idaho should follow the applicable statutes and the scant constitutional case law under art. IX, sec. 10, as follows: The University of Idaho cannot use appropriated funds to purchase its own risk or property insurance, but may use funds other than State funds to purchase whatever risk or property insurance it wishes.

## ANALYSIS

This opinion begins with a statutory analysis, then turns to a constitutional analysis under art. IX, sec. 10 of the Idaho Constitution.

### A. Statutory Analysis

Title 67, chapter 57, Idaho Code, creates the Idaho Department of Administration ("Department") and gives it authority to manage many programs for other agencies of State government. Chapter 57 is the starting point of this statutory analysis. After that, the Idaho Tort Claims Act, title 6, chapter 9, Idaho Code, is reviewed and tied back into Chapter 57.

#### 1. The Structure of Title 67, Chapter 57, Idaho Code.

Chapter 57 is not explicitly organized into separate parts for the Department's various functions. However, its sections may be catalogued as follows:

[A] Sections 67-5701 through 67-5704. Creation of the Department and general provisions for accounting of funds.
[B] Section 67-5705. Division of Public Works created.
[B.1] Sections 67-5706 through 67-5709A. Division of Public Works — management of existing State facilities.
[B.2] Sections 67-5710 through 67-5713. Division of Public Works — construction or retrofitting of State facilities.
[C] Sections 67-5714 through 67-5744. Division of Purchasing — purchasing and management of State property.
[D] Sections 67-5745 through 67-5745E. Idaho Education Network.
[E] Sections 67-5746 through 67-5759. Miscellaneous provisions and repealed sections.
[F] Section 67-5760. Insurance.
[F.1] Sections 67-5761 through 67-5772. Group insurance — life, medical and disability.
[F.2] Sections 67-5773 through 67-5778. Risk management — risk and property.

[G] Sections 67-5779 through 67-5782. Property records management.

2. The Department's Authority Over Risk and Property Insurance Is Unique — There Are No Explicit Statutory Exceptions From the Department's Authority.

In addition to risk management, which is the subject of this opinion, title 67, chapter 57's principal statutory authorities that authorize the Department to administer programs on behalf of other State agencies are:[1]

- Office Space, Office Buildings and Related Facilities. The Department allocates office space for State agencies in Boise, leases space for multi-agency facilities elsewhere, controls parking at the Capitol Mall, prepares a statewide facilities needs plan, manages facilities in the Capitol Mall, and sells, transfers or disposes of certain administrative facilities. Idaho Code §§ 67-5706 through 67-5709A.

- Construction of Public Works. The Department's Division of Public Works and/or the Permanent Building Fund Advisory Council approve, contract for and/or build major public works. Idaho Code §§ 67-5710 through 67-5711D.

- Purchasing. The Department's Division of Purchasing purchases, acquires, trades, sells and disposes of State property and maintains adequate stocks of property. Idaho Code §§ 67-5714 through 67-5744.

- Information and Communications Technology. The Department's Idaho Technology Authority reviews, plans, coordinates, approves and promotes information technology and telecommunications for State agencies. Idaho Code §§ 67-5745 through 67-6745E.

- Group Insurance. The Department procures life, medical and disability group insurance for State employees. Idaho Code §§ 67-5761 through 67-5772.

- Property Records. The Department controls and manages the State's integrated property management records. Idaho Code §§ 67-5779 through 57-5782.

There are numerous exceptions to the Department of Administration's authorities over other State agencies that are listed above. For example:

- Office Space, Office Buildings and Related Facilities. Legislative facilities are excepted from the Department's management of Capitol Mall facilities. Idaho Code § 67-5709(6). State institutions of higher learning are excepted from the Department's planning for facilities needs. Idaho Code § 67-5708B.

- Construction of Public Works. The Board of Regents of the University of Idaho and the Departments of Transportation, Fish and Game, Parks and Recreation, Lands and Water Resources are excepted from contracting for public works through the Department of Administration. Idaho Code § 67-5711.

- Purchasing. State institutions of higher learning, the legislative and judicial branches and constitutional executive officers are excepted from using the Division of Purchasing when acquiring property. Idaho Code §§ 67-5716(14) and 67-5728.

- Information and Communications Technology. State institutions of higher learning are covered by Idaho Technology Authority sections, but constitutional executive officers are not. Idaho Code § 67-5745A(2). Constitutional officers and institutions of higher learning are not required to obtain Department approval for communications equipment and facilities, but are subject to Department coordination of their acquisition and installation of equipment and facilities. Idaho Code § 67-5747(1).

- Group Insurance. The Department's authority to obtain group insurance "is in addition to and not in derogation of" other governmental entities' (including universities') abilities to obtain group insurance. Idaho Code §§ 67-5765 and 67-5767.

- Property Records. Universities are among the State agencies for which the Department is in possession and control of their property records, but constitutional officers, the Legislature and the judiciary are not. Idaho Code § 67-5779(4).

In contrast to the statutes described above, many of which explicitly exclude or include colleges and universities, the risk management statutes that the Director administers have ***no*** explicit exceptions. Idaho Code section 67-5773 gives the Director decision-making authority over insurance coverage (other than coverage for life and disability insurance) if the premium is paid in whole or in part with State funds. Under section 67-5773, the Director may give due consideration to the recommendations of other State institutions,[2] but in the end, the Director may "[d]etermine the nature and extent of needs for insurance coverages . . . as to risks and property of all . . . institutions . . . of the state" when the premiums are paid in whole or in part from State funds and "[d]etermine the character, terms, and amount of insurance coverages required by such needs":

> **67-5773. Powers and duties — Risk management.** — (1) The director of the department of administration shall:
>
> (a) **Determine the nature and extent of needs for insurance coverages of all kinds**, other than life and disability insurances, **as to risks and property of all** offices, departments, divisions, boards, commissions, **institutions**, agencies and operations of the government of the state of Idaho, **the premiums on which are payable in whole or in part from funds of the state**.
>
> (b) Determine the character, terms, and amounts of insurance coverages required by such needs.
>
> . . .
>
> (d) Administer all such coverages on behalf of the insured, including making and settlement of loss claims arising thereunder. . . .
>
> . . .

> (2) As to all such needs and coverages, the director shall give due consideration to information furnished by and recommendations of any office, department, division, board, commission, institution or agency.

Idaho Code § 67-5773 (emphasis added).

Section 67-5773 does not explicitly state that the Director's authority "over the character, terms and amounts of insurance coverages" for risk and property required by her determinations of need for insurance premiums paid in whole or in part from State funds is exclusive, but it does not vest authority in any other officers or agencies to determine insurance needs, to determine the character, terms and amounts of insurance coverages, or to administer insurance coverages. It would be inconsistent with the scheme of the Director's determination of insurance needs and of the character, terms and amounts of insurance coverages to construe this statute to allow other agencies and institutions to make their own independent determinations of how the agency should or should not be insured for risk or property, at least with regard to premiums purchased in whole or in part with State funds.

Likewise, under Idaho Code section 67-5775, the Director determines the need for, form of and amount of insurance for liability and property with the goal of overall savings to the State rather than to any one department or institution. Under that section, the Director also determines whether it is cost effective to insure certain risks and/or property or to leave them uninsured:

> **67-5775. Risk management guidelines. — In determining need for, form and amount of, procuring and administering insurance coverages**, the director of the department of administration shall give due consideration to:
>
> (1) **omission of insurance policy coverage as to property and risks as to which insurance and claim administration costs may be disproportionately great in reference to the amount of risk;**
>
> (2) **ultimate economies possible through use of reasonable deductions;**

> (3) use of comprehensive coverages and blanket coverages insuring property and risks of two (2) or more offices, departments, divisions, boards, commissions, institutions and agencies;
>
> (4) reliability of and service provided by insurers to be selected as insurance carriers, as well as financial condition and competitive premium rate;
>
> (5) means through which risks may be improved with ultimate savings to the state through reduction in insurance losses and costs.

Idaho Code § 67-5775 (emphasis added). Again, although this section does not explicitly state that the Director's authority to "procur[e] and administer[] insurance coverages" is exclusive, it does not invest the authority to procure insurance in any other officer or agency.

The presence of exceptions from the Department's authority over other State agencies and institutions in all of chapter 57's major programs but one is telling — the absence of exceptions for risk management indicates that there are no exceptions for risk management. KGF Dev., LLC v. City of Ketchum, 149 Idaho 524, 528, 263 P.3d 1284, 1288 (2010) (where a statute contains a specific and exhaustive list of interests that allow exercise of authority under the statute, that list is exclusive and does not include matters not listed).

3. Construing Sections According to Chapter 57's Structure.

Chapter 57's structure plays an important role in this analysis. In particular, one generally worded section must be placed in context. Idaho Code section 67-5766 states that the "authority hereby given shall be in addition to and not in derogation of any power existing in any . . . college, . . . university or other institution . . . supported in whole or in part by public funds." This section does not explicitly state what power is given to whom or what power is not derogated. Read in isolation, this section might apply to all powers listed in chapter 57.

Idaho Code sections 67-5762 through 67-5764 give the Department and other governmental entities the power to purchase group insurance. Idaho Code sections 67-5764 and 67-5766 include colleges and universities in nearly identical lists of government entities with those powers. Idaho Code section 67-5765 refers to existing contracts for group insurance for a similar list of government entities.

Thus, I conclude that the "power" referred to in Idaho Code section 67-5776 is the power of the Department and many other governmental agencies to purchase the types of group insurance listed in the preceding sections and not other powers listed elsewhere in chapter 57. *See generally* State v. Hammersley, 134 Idaho 816, 821, 10 P.3d 1285, 1290 (2000) ("where a word is capable of many meanings," "a word is known by the company it keeps"); State ex rel. Wasden v. Daicel Chemical Indus., Ltd., 141 Idaho 102, 109, 106 P.3d 428, 435 (2005) ("[w]here a statute contains specific terms followed by a general term the latter will typically be regarded as referring to things of a like class to those particularly described").

This conclusion is supported by the legislative history. The Idaho Code sections now codified as 67-5763 through 67-5766 were sections one through four of 1959 Idaho Session Law, chapter 216. That session law dealt exclusively with group insurance and was codified as sections 59-1201 through 59-1204. 1980 Idaho Session Law, chapter 237, sections 12 through 15, redesignated these four sections as 67-5763 through 67-5766 without otherwise amending them and placed them amid other sections addressing group insurance. Thus, the legislative history supports the conclusion that Idaho Code section 67-5766's broad language applies only to group insurance and not to other insurance.

4. The Idaho Tort Claims Act Explicitly Gives the Department Exclusive Authority Over Risk Insurance.

The Idaho Tort Claims Act (ITCA) includes State colleges and universities within its definition of the State. Idaho Code § 6-902(1). The ITCA subjects the State and its employees to liability under State tort law and commits the State to provide defenses to the State and its employees under both State and Federal tort law (with such exceptions as are contained in the Act). Idaho Code § 6-903(a)-(c). Idaho Code sections 67-5773's and 67-5775's

centralization in the Department of decision-making authority over risk insurance is consistent with the ITCA, which places all decisions regarding acquisition of the State's liability insurance[3] (or, in the alternative, use of the retained risk account) in the Department. ITCA sections 6-919 and 6-920 give the Department authority to procure liability insurance, and the latter section gives the Department exclusive authority to obtain liability insurance:

> **6-919. Liability insurance for state — Comprehensive plan by division of insurance management.** — The administrator of the division of insurance management in the department of administration shall provide a comprehensive liability plan which will cover and protect the state and its employees from claims and civil lawsuits. ***He shall be responsible for the acquisition and administration of all liability insurance of the state or for the use of the retained risk account provided in section 67-5776, Idaho Code, to meet the obligations of the comprehensive liability plan.***
>
> The administrator shall, after consultation with the departments, agencies, commissions, and other instrumentalities of the state, provide a comprehensive liability plan for the state providing liability coverage to the state and its employees in amounts not less than the minimum specified in section 6-924, Idaho Code. ***He shall have the authority to use the retained risk account provided in section 67-5776, Idaho Code, or to purchase, renew, cancel and modify all policies according to the comprehensive liability plan.***
>
> **6-920. Liability insurance for state procured by division of insurance management.** — ***No state agency or institution other than the administrator of the division of insurance management in the department of administration may procure liability insurance under this act.*** All state agencies and institutions shall comply with this act and the comprehensive liability plan developed by the administrator of the division.

Idaho Code §§ 6-919 and 6-920 (emphasis added).

Thus, I conclude that Idaho statutes do not allow the University of Idaho to obtain its own liability insurance except as provided by the Department (Idaho Code §§ 6-919, 6-920, 67-5773 and 67-5775) unless the premiums are not paid in whole or in part with State funds. Further, although the Idaho statutes are not explicit with regard to property insurance, I further conclude that they do not allow the University of Idaho to separately insure its property, unless the premiums are not paid in whole or in part with State funds (Idaho Code §§ 67-5773(1)(a) and 67-5775).

This conclusion is bolstered by State v. Continental Cas. Co., 126 Idaho 178, 879 P.2d 1111 (1994) (Continental II). Continental II followed State v. Continental Cas. Co., 121 Idaho 938, 829 P.2d 528 (1992) (Continental I), in which the Idaho Supreme Court held that Idaho State University's ("ISU") statutory authority as a legal entity was similar to the University of Idaho's constitutional authority as a legal entity, that under the statutes ISU was a legal entity separate from the State of Idaho, and that the State was not a named insured on ISU's insurance policy. 121 Idaho at 940, 829 P.2d at 530.

Nevertheless, just two years later in Continental II, the Court equated ISU with the State for economic, tort, insurance and self-insurance purposes. Acknowledging that the Legislature created ISU as "a body politic and corporate . . . having power to sue and be sued in its own name, . . . the focus of our inquiry is not so much on the legal-political relationship between ISU and the State, but on the economic relationship between the State, ISU and BRM [the Bureau of Risk Management, which was then a statutorily-created Bureau in the Department]." 126 Idaho at 183, 879 P.2d at 1116. The Court reviewed Idaho Code sections 67-5773 and 67-5775 and related sections dealing with the BRM's program of retained risk management and purchase of insurance, including BRM's option "not to procure insurance to cover those risks, but to manage those risks through a program of 'retention' or 'self-insurance.' " *Id.*

Continental II explained that Idaho Code sections 67-5773 and 67-5775 are part of a larger scheme directly tied to State funding and State appropriations:

> These code sections make it clear that the State funds its risk management program through mandatory assessments to the various state agencies. The State, through the BRM, assesses the risk exposure of the various agencies, ***determines what risks to insure***, negotiates the purchase of insurance, and charges the agencies proportionately to pay for the insurance and to fund a reserve account to pay for those losses which are not insured. ***Thus, at the same time the State funds its various agencies, it also requires those agencies to remit a portion of those state funds to the retained risk account to finance the State's risk management program. Because the State is ultimately liable for those uninsured losses incurred by agencies as a result of claims brought under the ITCA, the State is essentially requiring agencies to use their state appropriated money to fund a reserve account to pay losses for which the State is ultimately liable.***

126 Idaho at 184, 879 P.2d at 1117 (emphasis added).

We conclude that the economic family concept is applicable to the facts of this case. The State, ISU and BRM represent one "economic family." The State, in funding ISU, and requiring ISU to remit funds into the retained risk account, has done nothing other than move assets among separate members of the same economic family. It is actually the State who is funding the retained risk account, and it is the State which bears the ultimate economic burden of loss. ***The State required ISU, as well as its other agencies, to contribute to the retained risk account, out of funds appropriated to these agencies by the state legislature.*** The retained risk program and payments made thereto by ISU did not shift any risk of loss from ISU to the State. The State established and mandated agency participation in the retained risk program in order to create reserves from which the State could pay for losses for which the State would be ultimately liable.

126 Idaho at 185, 879 P.2d at 1118 (emphasis added).

The statutes regarding the Department's authority to decide what to insure and what not to insure are still like they were when Continental II was decided. Continental II did not erode Continental I's observation that ISU's

statutory authority was like the University of Idaho's constitutional authority in the sense that both were legally distinct from the State. Thus, the "economic family" analysis would also apply to the State, the Department of Administration and the University of Idaho like it applied to the State, BRM and ISU. Because the State ultimately bears losses associated with the University of Idaho's tort liability or property loss, the State and the University are one economic family for such purposes under Continental II. These observations are important elements in construing the University of Idaho's constitutional authority.

## A. Constitutional Analysis

1. Origin of Art. IX, Sec. 10 of the Idaho Constitution.

Art. IX, sec. 10 of the Idaho Constitution addresses the University of Idaho. It was amended during the Idaho Constitutional Convention to reduce the Board of Regents' authority over appropriated funds. As first taken up during the convention, art. IX, sec. 10 (which was then sec. 14 of the draft of art. IX) gave the University of Idaho Board of Regents ***exclusive*** control over funds appropriated to the University. The motion to adopt this section proposed the following language:

> The location of the university of Idaho, as established by existing laws, is hereby confirmed. All the rights, immunities, franchises and endowments heretofore granted by the territory of Idaho are hereby perpetuated unto the said university. The regents shall have the general supervision of the university and ***exclusive*** control and direction of all the funds of, and appropriations to the university, under such regulations as may be prescribed by law.

Proceedings and Debates of the Constitutional Convention of Idaho 1889 (1912), p. 766 (emphasis added) (Constitutional Debates).

The motion to adopt this section prompted a debate, in Delegate Claggett's words, over the wisdom of "taking the whole subject of the control of the university and university funds away from the legislature and away from any and every other authority." Constitutional Debates, p. 766. After a

discussion about whether the words "under such regulations as may be prescribed by law" preserved a legislative role for oversight of university funds, *id.* at 766-772, the delegates resolved the issue by agreeing to strike the word "exclusive" from what was then the final sentence of the section and adopting it with that amendment. *Id.* at 772. The section was later amended to add a sentence concerning sale of the University's endowment land, *id.* at 850-861, and adopted as it appeared in the original Idaho Constitution, *id.* at 1450-1452:

> **§ 10. State University — Location, regents, tuition, fees and lands.** The location of the University of Idaho, as established by existing laws, is hereby confirmed. All the rights, immunities, franchises, and endowments, heretofore granted thereto by the territory of Idaho are hereby perpetuated unto the said university. ***The regents shall have the general supervision of the university, and the control and direction of all the funds of, and appropriations to, the university, under such regulations as may be prescribed by law.*** No university lands shall be sold for less than ten dollars per acre, and in subdivisions not to exceed one hundred and sixty acres, to any one person, company or corporation.

(Emphasis added). In 2010, this section was amended to insert the following sentence authorizing tuition before the last sentence: "The regents may impose rates of tuition and fees on all students enrolled in the university as authorized by law." The amendment authorizing tuition does not address the subject matter of the bolded, italicized sentence above and should not change the application of the case law decided under art. IX, sec. 10.

Art. IX, sec. 10 has an unresolved tension between the regents' "general supervision of the university, and the control and direction of all funds of, and appropriations to, the university," and the extent to which those funds are subject to "such regulations as may be prescribed by law." The case law does not resolve this tension with regard to risk and property insurance.

2. <u>The Supreme Court of Idaho's Construction of Art. IX, Sec. 10 of the Idaho Constitution and Related Laws</u>.

The Supreme Court of Idaho has interpreted art. IX, sec. 10, and statutory provisions relating to the University of Idaho several times. This section of the opinion reviews those cases.

Roach v. Gooding, 11 Idaho 244, 81 P. 642 (1905), construed section 8 of the Idaho Admissions Act, which included the phrase "university purposes." Section 8 provided:

> **§ 8. University land grant.** — The lands granted to the territory of Idaho by the Act ... entitled, "An act to grant lands to . . . Idaho . . . for university purposes," are hereby vested in the state of Idaho . . . and the proceeds [from sale of university lands] shall constitute a permanent fund . . . the income thereof to be used exclusively for ***university purposes. . . .***

Idaho Admissions Act, ch. 656, § 8, 26 Stat. L. 215 (emphasis added).

In Roach, the issue was whether the Legislature could use income from the endowment fund established under section 8 of the Idaho Admission Act to pay for bonds for the construction and equipment of a science building at the University of Idaho. The answer was a resounding "no" because the construction of campus buildings was not a "university purpose":

> Counsel for plaintiffs further contend that the words "university purposes," as used in section 8 of the admission act, include the erection of buildings. We cannot agree with that contention, as the provisions of that section must be construed in connection with the other provisions of said act, taking them all together. It is clear that it was not intended to permit the interest or income from such funds to be used in the erection or equipment of buildings. As we view it, ***the "purpose" of the university is not in any sense the erection or equipment of buildings therefor.***

11 Idaho at 251, 81 P. at 644-645 (emphasis added).

Roach held under the Idaho Admissions Act that providing buildings for the University of Idaho was a State responsibility separate from "university" or "educational" purposes: "[T]he general attitude and policy of Congress has been to provide an endowment fund for educational purposes; the income thereof only to be used to support the institution, leaving the people of the state to furnish the buildings." 11 Idaho at 251-252, 81 P. at 645. Thus, Roach drew a line between the use of endowment funds for university purposes and for the construction of buildings. Under Roach, to the extent the Regents of the University of Idaho have constitutional authority over certain funds under art. IX, sec. 10, it would seem likely that their authority is at its weakest for funds not associated with "university purposes"; and funds related to buildings or equipment of buildings fall outside of "university purposes." Although Roach does not address this issue, the general tenor of its analysis also suggests that tort liability or property insurance would similarly fall outside of "university purposes."

Idaho Revised Political and Civil Code § 491 (1908) authorized the Board of Regents to spend certain funds on the construction of buildings. Consistent with Roach's treatment of such funds as distinct from funds for educational purposes, those funds were subject to claims arising from the construction project (even if general university funds or the State Treasury was not) even though § 491 contained no explicit authorization for making construction-related claims.

> . . . The Board of Regents should make payment accordingly out of any funds that they have in their hands for the erection of said foundation [for the building]. If they have not sufficient funds for that purpose, they ought to make said payments out of the first money coming into their hands for the erection and construction of said Administration Building. . . .
>
> . . . They have no authority whatever to incur any indebtedness against the state, directly or indirectly, in the erection of university buildings for which they have no funds to pay. . . .

Moscow Hardware Co. v. Regents of Univ. of Idaho, 19 Idaho 420, 431-432, 113 P. 731, 734 (1911). From this, I conclude that when the Legislature authorizes the University of Idaho to spend funds for a specific purpose, those funds are subject to the ordinary rules of law that apply to funds associated with the purpose — in Moscow Hardware's, case, to claims associated with a construction project. Putting Roach and Moscow Hardware together, it seems likely that the non-"university" business side of managing property (or, by analogy, liability regarding property) with appropriated funds would be subject to "such regulations as may be prescribed by law."

State ex rel. Black v. State Bd. of Educ., 33 Idaho 415, 196 P. 201 (1921), involved a direct confrontation between the authority of the Board of Regents and the Executive Branch. The Regents asserted the right to retain proceeds from the sale of a University boiler rather than give the proceeds to the State Treasurer; to pay claims against the University without submitting them to the Board of Examiners; to purchase supplies and to enter into printing contracts without using the Department of Administration's predecessor, the Commissioner of Public Works; and to employ attorneys without going through the Attorney General. 33 Idaho at 424-425, 196 P. at 203. After quoting art. IX, sec. 10 of the Idaho Constitution, the Court explained that the "regulations as may be prescribed by law" under that section are those dealing with "methods and rules for the conduct of business" that do not interfere with the "constitutional discretion" of the Regents:

> The regulations which may be prescribed by law, and which must be observed by the regents in their supervision of the University, and the control and direction of its funds, refer to methods and rules for the conduct of its business and accounting to authorized officers. Such regulations must not be of a character to interfere essentially with the constitutional discretion of the board, under the authority granted by the Constitution.

33 Idaho at 427, 196 P. at 204. Thus, "[i]f a claim against the regents is a claim against the state, it must be presented to the Board of Examiners for approval," *id., i.e.*, when the State is also subject to a claim against the University, the normal rules that apply to all State entities apply to the University. As the Court elaborated, when appropriated funds are coupled with certain conditions, the Regents must abide by them; but the Regents need

not comply with the conditions of appropriation if the funds spent are not State funds:

> ***When an appropriation of public funds is made to the University, the Legislature may impose such conditions and limitations as in its wisdom it may deem proper. If accepted by the regents, it is coupled with the conditions, and can be expended only for the purposes and at the time and in the manner prescribed, and can be withdrawn from the state treasury only as provided by law.***
>
> . . . .
>
> If the regents have funds available for the purpose of making purchases of supplies, they may do so without requisition upon and without the consent of the Commissioner of Public Works, and if they have money which is available for the purchase of land, or the payment of counsel fees, or to employ accountants and auditors, other than state accountants and auditors, we know of no valid reason why they should not do so. This in no way would involve the power of the Legislature to provide that the accounts and records of the regents shall also be examined and audited by regular accountants and auditors of the state.
>
> In the absence of conditions contained in an appropriation which, by being accepted, raised an implied contract on the part of the Board of Regents, there is no obligation resting upon them to pay to the State Treasurer the proceeds of the sale of property belonging to the University. The same may be paid to the treasurer of the University.

33 Idaho at 430, 196 P. at 205 (emphasis added).

Under Black, the Legislature may attach conditions to the use of appropriated funds with which the University must comply, at least with regard to matters that do not interfere "with the constitutional discretion of the board." However, the Legislature cannot similarly restrict the University's use of other funds. Roach and Moscow Hardware both suggest that the

Legislature may attach conditions to the funding of University buildings and equipment and that those conditions do not interfere with the constitutional discretion of the Board of Regents. Although there is no case law to that effect, analogous reasoning would also apply to tort liability, which, like buildings, would not seem to be part of the Regents' constitutional discretion for matters that would pertain to education.

Thus, when the University of Idaho wished to construct an infirmary on campus with a grant of Federal funds and a Federal loan, it was within the Regents' power to do so only so long as no appropriated funds (which would be subject to art. VIII, sec. 3's provisions on debt limitations) would be used to repay the loan; only net income from the infirmary and from a residence hall could be used to repay the loan. State ex rel. Miller v. State Bd. of Educ., 56 Idaho 210, 215-216, 52 P.2d 141, 143 (1935). In Miller, the line continued to be clear: appropriated funds were subject to legislative or constitutional terms; other funds were not.

The final case to be reviewed is Dreps v. Bd. of Regents of Univ. of Idaho, 65 Idaho 88, 139 P.2d 467 (1943). Dreps presented the question of whether an anti-nepotism statute applied to the University of Idaho, and, if so, whether it was unconstitutional to apply it to the University. *Id.* at 89, 139 P.2d at 467.

Only four of the five justices of the Idaho Supreme Court participated in the Dreps hearing and opinion. 65 Idaho at 101, 139 P.2d at 474. Two of the five justices joined an opinion that held that an anti-nepotism statute did not apply to the University of Idaho because it would be unconstitutional for it to apply. *Id.* at 89-101, 139 P.2d at 467-473. Their plurality opinion appeared first in the Idaho Reports. The remaining two justices held that the anti-nepotism law was not intended to apply to the University of Idaho and declined to reach the constitutional issues because it was unnecessary to do so. *Id.* at 100-101, 139 P.2d at 473-474. Their opinion followed the first plurality.

The first plurality's broad view of the University of Idaho's constitutional prerogatives, based in part upon the Constitutional Debates earlier reviewed, appeared to state on the one hand that any interference with the Regents' constitutional discretion was unconstitutional, *id.* at 96-97, 139 P.2d

at 471, while acknowledging on the other hand while quoting from a Michigan case that "[i]n making appropriations for its support, the Legislature may attach any conditions it may deem expedient and wise, and the Regents cannot receive the appropriation without complying with the conditions. This has been done in several instances." *Id.* at 98-99, 139 P.2d at 472.

Whatever else can be said of Dreps, the first plurality's ambiguous discussion of art. IX, sec. 10, did not command a majority of the Court and is not precedent.[4] Gonzalez v. Thacker, 148 Idaho 879, 881, 231 P.3d 524, 526 (2009), citing Osick v. Pub. Employee Ret. System of Idaho, 122 Idaho 457, 460, 835 P.2d 1268, 1271 (1992). As Osick summarized: "The provisions of art. 5, § 6 of our constitution . . . lead us to conclude that where the third vote necessary to pronounce a decision is by a justice who concurs in the result only, the rationale contained in the opinion is not a decision of the Court and is not controlling in other cases," and, "the opinion is interesting, but not controlling." *Id.* When there are two different two-Justice pluralities, as there were in Dreps, then there is no basis for elevating the discussion of one opinion over the other. Thus, in the end, Dreps does not bear on this analysis. Thus, Roach, Moscow Hardware, Black and Miller provide whatever guidance there is.

3. Applying the Statutes in Light of Art. IX, Sec. 10.

The Idaho Supreme Court has not construed art. IX, sec. 10 of the Idaho Constitution to determine whether the Legislature may constitutionally put conditions on the University of Idaho's procurement of insurance for risks and/or property. As a result, this opinion's analysis must acknowledge that uncertainty.

The Legislature appropriates general fund moneys to the University of Idaho. *E.g.*, 2014 Idaho Sess. Laws 307, page 763, section 1, part III ($79,155,000 of general funds appropriated to the University of Idaho for fiscal year 2015). Appropriation bills are ordinarily silent regarding risk management and insurance, as they are on other provisions of State law, as well.

However, the Department of Administration is authorized by statute to "charge each office, department, division, board, commission, institution,

agency and operation for which the department provides insurance coverage and receive payment in advance for the reasonably apportioned share of the cost incurred." Idaho Code § 67-5777(1). Those moneys are deposited into the retained risk account, section 67-5776(2)(a), which "shall be used solely for payment of premiums, costs of maintaining the operation of the risk management office, or upon losses not otherwise insured and suffered by the state as to property and risks," section 67-5776(1).

The amounts that the Department of Administration can charge "shall not exceed the current appropriation or funds available for the purpose of the affected office, department, division, board, commission, institution, agency or operation." Idaho Code § 67-5777(2). If an agency refuses to pay what the Department charges, the Department may certify the delinquency to the State Treasurer, and the State Controller may draw a warrant on the agency's funds in the State Treasury for the Department's benefit. Idaho Code § 67-5778. Thus, every legislative appropriation of funds to the University of Idaho (as well as every other appropriation to a State agency) is subject to the condition that the appropriation may be charged by the Department for risk management purposes and may be intercepted by the Department if not paid over as charged.

"It is generally presumed that legislative acts are constitutional, that the state legislature has acted within its constitutional powers, and any doubt concerning interpretation of a statute is to be resolved in favor of that which will render the statute constitutional." Med. Recovery Services, LLC v. Strawn, 156 Idaho 153, 159, 321 P.3d 703, 709 (2014), quoting Olsen v. J.A. Freeman Co., 117 Idaho 706, 709, 791 P.2d 1285, 1288 (1990). Given (1) the statutory scheme that provides that the Department shall procure such risk or property insurance as the Director determines is necessary, and that gives exclusive authority to the Department to procure liability insurance for the State, and (2) the Court's decision in Moscow Hardware that University funds for the construction of a building are subject to the normal rules of law associated for claims against such funds and its *dicta* in Black that the Legislature may impose conditions and limitations that it deems wise on funds appropriated to the University of Idaho, there is a sound, defensible argument to be made that the University of Idaho cannot spend appropriated funds to procure risk or property insurance in addition to that obtained by the Department.

Given the availability of this sound, defensible argument and the presumption of constitutionality that every statute enjoys, I conclude that the Department of Administration and the University of Idaho should comply with the statutory provisions giving the Department and only the Department authority to spend appropriated funds to pay premiums for risk or property insurance, unless and until a court of competent jurisdiction declares otherwise.

However, this opinion must acknowledge that some language in Black suggests otherwise. In particular, Black twice explained how the Legislature may regulate the University: "When an appropriation of public funds is made to the University, the Legislature may impose such conditions and limitations as in its wisdom it may deem proper," and, "In the absence of conditions contained in an appropriation which, by being accepted, raised an implied contract on the part of the Board of Regents, there is no obligation resting upon them to pay to the State Treasurer the proceeds of the sale of property belonging to the University." 33 Idaho at 430, 196 P. at 205.

These two statements of the principle that the Legislature may impose conditions on the University make sense in context: If the Legislature expects to claw back to the Treasury some of the funds that it appropriates to the University, which was an issue in Black, it must say so in the appropriation itself. But neither statement is tied to the more general language of art. IX, sec. 10 of the Idaho Constitution concerning the regents' "control and direction of all the funds of, and appropriations to, the university, under such regulations as may be prescribed by law." And neither statement discusses the other side of the coin discussed in Black: "If a claim against the regents is a claim against the state, it must be presented to the Board of Examiners." 33 Idaho at 427, 196 P. at 204.

Continental II made it clear that risk management claims against a University (in that case ISU) are claims against the State. Continental II extensively discussed the regulations concerning risk management funds that are prescribed by law, none of which were contained in an appropriation bill, but which are of general applicability to State agencies and institutions.

The University of Idaho might argue in court that once it pays to the Department the portion of its appropriated funds necessary to finance the University's share of the retained risk account, then any further interference

with the Regents' decision on how to spend its remaining appropriated funds is an unconstitutional interference with the Regents' control and direction of those funds. Such an argument would not be frivolous and would present an unanswered question of constitutional law to the Idaho courts. However, the answer to that question cannot be predicted with any certainty from the existing case law. Unless and until an Idaho court rules to the contrary, as said before, both the Department and the University should abide by the existing statutes with regard to appropriated funds.

However, given Miller's clear holding that the University of Idaho is not legislatively constrained in how it spends funds that are not derived from appropriation, and the implicit exception in Idaho Code section 67-5773(1)(a) to the Department's authority when insurance premiums are not paid in whole or in part with State funds, I conclude that the University of Idaho is free to spend funds not derived in whole or in part from appropriated funds for risk or property insurance, even if Idaho Code section 6-920 would otherwise apply with regard to liability insurance and would otherwise prohibit the University from doing so.

## AUTHORITIES CONSIDERED

**1. Idaho Constitution:**

Art. V, § 6.
Art. VIII, § 3.
Art. IX, § 10.

**2. Idaho Code:**

Idaho Revised Political and Civil Code § 491 (1908).
§ 6-902(1).
§ 6-903(a)-(c).
§ 6-919.
§§ 6-919 through 6-922.
§ 6-920.
§ 33-101.
Title 67, Chapter 57.
§ 67-5701 through 67-5704.
§ 67-5705.

§ 67-5706 through 67-5709A.
§ 67-5708B.
§ 67-5709(6).
§ 67-5710 through 67-5711D.
§ 67-5710 through 67-5713.
§ 67-5711.
§ 67-5714 through 67-5744.
§ 67-5716(14).
§ 67-5728.
§ 67-5740(b).
§ 67-5745 through 67-5745E.
§ 67-5745A(2).
§ 67-5746 through 67-5759.
§ 67-5747(1).
§ 67-5760.
§ 67-5761 through 67-5772.
§ 67-5761(1)(c).
§ 67-5762 through 67-5764.
§ 67-5763 through 67-5766 (formerly §§ 59-1201 through 59-1204).
§ 67-5764.
§ 67-5765.
§ 67-5766.
§ 67-5767.
§ 67-5773.
§ 67-5773 through 67-5778.
§ 67-5773(1)(a).
§ 67-5775.
§ 67-5776.
§ 67-5776(1).
§ 67-5776(2)(a).
§ 67-5777(1).
§ 67-5777(2).
§ 67-5778.
§ 67-5779 through 67-5782.
§ 67-5779(4).

**3. Session Laws:**

1959 Idaho Sess. Laws 471.

1974 Idaho Sess. Laws 1647.
1980 Idaho Sess. Laws 525.
2014 Idaho Sess. Laws 763.

**4. Idaho Cases:**

Dreps v. Bd. of Regents of Univ. of Idaho, 65 Idaho 88, 139 P.2d 467 (1943).

Gonzalez v. Thacker, 148 Idaho 879, 231 P.3d 524 (2009).

KGF Dev., LLC. v. City of Ketchum, 149 Idaho 524, 263 P.3d 1284 (2010).

Med. Recovery Services, LLC v. Strawn, 156 Idaho 153, 321 P.3d 703 (2014).

Moscow Hardware Co. v. Regents of Univ. of Idaho, 19 Idaho 420, 113 P. 731 (1911).

Olsen v. J.A. Freeman Co., 117 Idaho 706, 791 P.2d 1285 (1990).

Osick v. Pub. Employee Ret. System of Idaho, 122 Idaho 457, 835 P.2d 1268 (1992).

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

State v. Continental Cas. Co., 121 Idaho 938, 829 P.2d 528 (1992).

State v. Continental Cas. Co., 126 Idaho 178, 879 P.2d 1111 (1994).

State v. Hammersley, 134 Idaho 816, 10 P.3d 1285 (2000).

State ex rel. Black v. State Bd. of Educ., 33 Idaho 415, 196 P. 201 (1921).

State ex rel. Miller v. State Bd. of Educ., 56 Idaho 210, 52 P.2d 141 (1935).

State ex rel. Wasden v. Daicel Chemical Indus., Ltd., 141 Idaho 102, 106 P.3d 428 (2005).

**5. Other Authorities:**

Proceedings and Debates of the Constitutional Convention of Idaho 1889 (1912).

Idaho Admissions Act, ch. 656, § 8, 26 Stat. L. 215.

1977 Idaho Att'y Gen. Ann. Rpt. 129.

Dictionary-Reference.com.

DATED this 24th day of November, 2014.

LAWRENCE G. WASDEN
Attorney General

**Analysis by:**

MICHAEL S. GILMORE
Deputy Attorney General

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[1] This opinion does not comprehensively list every program in chapter 57 that the Department administers for other State agencies lest it inadvertently omit one or more of them. Likewise, it does not comprehensively list every exception to the Department's authority in chapter 57. Instead, it identifies the principal programs that the Department administers to show the kinds of exceptions that State agencies have from the Department's authority.

[2] The term "institution" is not defined every time it is used in chapter 57. However, its use in chapter 57 strongly suggests that colleges and universities, which are sometimes referred to as "institutions of higher education," are institutions when that word is used elsewhere in chapter 57 without a definition. For example:

- "State agency" is defined in section 67-5708B addressing facilities needs planning to include institutions in general, but explicitly excepts institutions of higher learning.
- "Agency" is defined in section 67-5716(14) of the purchasing statutes to include "officers, departments, divisions, bureaus, boards, commissions and institutions of the state," which strongly suggests that colleges and universities would be included among the covered "institutions" if they were not explicitly excepted.

• "State institutions of higher learning" are defined in section 67-5728 in a manner that strongly suggests that State colleges and universities are a subset of State institutions.

• Section 67-5740(b) addressing the acquisition of surplus Federal property uses the word "institutions" in a manner that includes the State colleges and universities mentioned in subsection (a).

• "Agency" is defined in section 67-5745A(2) in the Idaho Technology Authority to include "institutions of higher education," which suggests that colleges and universities are institutions.

• The group insurance statutes cover "offices, departments, divisions, boards, commissions, institutions, agencies," *e.g.*, subsection 67-5761(1)(c), and refer to colleges and universities "and other institutions operated by the State," section 67-5764, which also suggests that colleges and universities are State "institutions."

Thus, when the word "institution" is used but not defined in the risk management statutes, it seems likely that colleges and universities are institutions covered by the statutes. *Cf.* State ex rel. Miller v. State Bd. of Educ., 56 Idaho 210, 215, 52 P.2d 141, 143 (1935) (the University of Idaho Board of Regents are "the managers and corporate representative of an educational institution"). Moreover, the first example used in a dictionary definition of "institution" refers to a college as a kind of "institution": "1. an organization, establishment, foundation, society, or the like, devoted to the promotion of a particular cause or program, especially one of a public, educational, or charitable character: 'This college is the best institution of its kind.' " Dictionary-Reference.com (2014).

If that were not enough, the Idaho Tort Claims Act, which cross-references the risk management statutes, *see* sections 6-919 through 6-922, defines the State to include colleges and universities. Idaho Code § 6-902(1). It is doubtful that the Idaho Tort Claims Act would require colleges and universities to be part of the State for tort liability purposes, but not for risk management purposes, without spelling out such an exception. Finally, although a definition in the Education Title of the Idaho Code would not necessarily apply to title 67, chapter 57, Idaho Code, section 33-101 lists all of Idaho's four-year State supported colleges and universities as among the "state educational institutions" subject to the State Board of Education's control.

For all of these reasons, I conclude that the University of Idaho is a State institution within the meaning of the risk management statutes.

[3] The Idaho Tort Claims Act refers to "liability" insurance and "liability" plans in sections 6-919 and 6-920; sections 67-5773 and 67-5775 refer to "risk management" and insurance for "risk." This Opinion treats "risk" as including "liability" for the following reasons.

First, the Legislature placed risk management authority for the State in the Department of Administration 40 years ago. *See* 1974 Idaho Sess. Laws, chapter 252, sections 2 through 6, enacting sections 67-5753 through 67-5757. Sections 7 through 9 of that Session Law amended sections 6-919 through 6-921 of the Tort Claims Act to put the Department's Risk Manager (a statutory office that no longer exits) in charge of acquiring and administering "liability" insurance for the State. In the context of that Session Law, "risk" for tort and property purposes and "liability" under tort law and for loss of property appear to be the same thing or very closely related with regard to the State bearing financial uncertainty with regard to tort and property claims.

Second, the second dictionary definition of "risk," which applies to insurance, associates risk with financial responsibility for loss: "2. Insurance. a. the hazard or chance of loss. b. the degree of probability of such loss. c. the amount that the insurance company may lose. d. a person or thing with reference to the hazard involved in insuring him, her, or it. e. the type of loss, as life, fire, marine disaster, or earthquake, against which an insurance policy is drawn." Dictionary-Reference.com (2014). The meaning of "risk" in the insurance context is thus closely tied to liability (financial responsibility) in the tort or property context.

[4] 1977 Idaho Attorney General Opinion No. 17 cites the first Dreps plurality as though it were a majority opinion without qualifying that there was no majority.

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# ATTORNEY GENERAL'S SELECTED INFORMAL GUIDELINES FOR THE YEAR 2014

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

April 16, 2014

The Honorable Jason Monks
Idaho State Representative
1002 W. Washington Dr.
Meridian, ID 83642

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

Re: The Idaho Unfair Sales Act

Dear Representative Monks:

You have asked the Attorney General for information regarding the Idaho Unfair Sales Act, Idaho Code § 48-401, *et seq.* (the "Act"). Specifically, you have asked whether there is separate Idaho law addressing the issues of below cost pricing and deceptive advertising should the Act be repealed.

This letter will first provide an overview of the Act and its history. Thereafter, it will address remaining available Idaho law regarding below cost sales and deceptive advertising, should the Act be repealed.

## I.

## UNFAIR SALES ACT BACKGROUND

### A. Legislative History of the Unfair Sales Act

The Unfair Sales Act was originally enacted by the Legislature in 1939. *See* 1939 Idaho Sess. Laws 427-431. The Act, among other things, declared the practice of selling "certain items of merchandise below cost in order to attract patronage" to be a deceptive form of advertising and an unfair method of competition in that it "tends to create a monopoly in commerce." *See* Idaho Code § 48-404. The Act also prohibits deceptive advertising. Idaho Code § 48-412. The Act made it (and still does) a misdemeanor to sell goods below cost and authorized civil actions for injunctive relief and dam-

ages against below cost sellers. *See* Idaho Code §§ 48-405 and 48-406. The original Act placed the duty of prosecuting violators on each county's prosecuting attorney but also authorized private causes of action (which are still authorized today) for damages and injunctive relief.

The first amendments to the Unfair Sales Act came during the 1941 legislative session. *See* 1941 Idaho Sess. Laws 230-238. These amendments expanded the Act's enforcement provisions and made it a duty of the Attorney General to assist the various prosecuting attorneys in the enforcement of the Act. *Id.* at Sec. 4. Among the new sections that were added to the Act in 1941 were the following: (1) a new Section 8, which directed the Attorney General to appoint and employ investigators, attorneys and legal assistants to aid in prosecuting and enjoining violations of the Act; and (2) new Sections 10 and 11, which levied an excise tax on merchants to be collected for the use of the Attorney General in enforcing the Act and which appropriated the sum of $20,000 to pay expenses incurred by the Attorney General prior to the effective date of the new taxes.

The amendments of 1945, however, removed the primary responsibility for investigating and enforcing the Unfair Sales Act from the Office of the Attorney General and delegated it instead to the Commissioner of Finance. *See* 1945 Idaho Sess. Laws 387-088. The Act still provided for some involvement by the Attorney General, but this was limited to aiding and assisting in the prosecution of the Act when called upon to do so by the Commissioner of Finance. *Id.* at Sec. 2, amending § 8 of the Act. Since these amendments went into effect in 1945, the role of the Office of the Attorney General under the Act has been limited to that of aiding and assisting other departments of state government in enforcing the Act. The Attorney General has no independent enforcement authority under the law.

The Unfair Sales Act was next amended in 1955. *See* 1955 Sess. Laws 211-219. Section 8 of the Act, which had been codified as Idaho Code § 48-408, was repealed, and a new section 48 408 was enacted. The new section reads as follows:

> Supervision and administration of act by governor. -- (1) The governor of the state of Idaho shall have the responsibility for the supervision and administration of this act and he shall

> have the authority to designate any department of the state government to supervise and administer this act under his direction.
>
> (2) The governor or the department designated by him to supervise and administer this act shall employ such employees as may be required to supervise and administer this act, whose duties shall be:
>
> (a) To inspect and investigate the sales practices of all persons subject to this act;
>
> (b) To investigate and ascertain violations of this act;
>
> (c) To prosecute all violations of this act, either by injunction proceedings, criminal proceedings or both;
>
> (d) To aid and assist the attorney general of the state of Idaho and the prosecuting attorneys of the various counties in the enforcement of this act;
>
> (e) To collect such taxes as called for in this act;
>
> (f) To perform such other duties in connection with this act as may be designated by the governor.

Idaho Code § 48-408, as added by 1955 Idaho Sess. Laws at 211. The language of this section has not been amended in subsequent legislative sessions, nor have there been any reported cases interpreting this section of the Act.

Along with the amendment of Idaho Code § 48-408 in 1955, the Legislature amended the statutory section authorizing the levy and collection of taxes to pay for the enforcement of the Act. *See* 1955 Idaho Sess. Laws 211, Sec. 6, codified at Idaho Code § 48-410. This amendment increased the tax amount collectable from merchants and specifically provided that the funds were to be collected by the Governor's Office or the designated department for the enforcement of both the Act and the Fair Trade Act, title 48, chapter 3, Idaho Code (which the Legislature repealed in 2000). *See* 2000 Idaho Sess. Laws 377.

Interestingly enough, at the same time the Legislature delegated the duty to supervise and enforce the Act to the Governor, or to a department of state government the Governor so designated, the Legislature also enacted

legislation creating a state Department of Commerce and Development, and delegated to this new department the responsibility of "administer(ing) and supervis(ing) the provision of Chapters 3 and 4 [the Unfair Sales Act], Title 48, Idaho Code, as amended." *See* 1955 Idaho Sess. Laws 521, Sec. 3(5). The legislation also provided that "all moneys collected pursuant to the tax levied and imposed by Section 48-410, Idaho Code, as amended, shall be deposited to the credit of the Idaho Development and Publicity Fund." *See* Sec. 7 and Sec. 9. This tax, however, was repealed effective January 1, 1979. See 1978 Idaho Sess. Laws 412, Sec. 1.

This dual delegation of duties was noted in the 1977 legislative session. At that time, "to eliminate a statutory conflict," the Legislature struck the provision of the statute charging the (then) Division of Tourism and Industrial Development with the duty to administer and supervise the Act. *See* 1977 Idaho Sess. Laws 770-771. The Legislature left the language of Idaho Code § 48-408, assigning the Governor the duty of supervising and administering the Act, quoted above, unchanged.

The most recent substantive amendments to the Act occurred in 2009, wherein the Legislature repealed Idaho Code § 48-405A. This section had prohibited limiting any quantity of a good being sold to any one consumer.

### B. Enforcement History of the Unfair Sales Act

As is evident by a review of the Unfair Sales Act's legislative history, enforcement of the Act has rested with either the Governor's Office or a department of state government for all but approximately six of the Act's 75-year history. During those six years (from 1939 through 1945), enforcement responsibilities were delegated to either local county prosecutors or the Attorney General. The result, however, seems to have been the same no matter which division of state government was responsible for enforcing the Act—that is, it does not appear that aggressive enforcement has ever been the rule. Despite the Act's 75-year history, there are no reported Idaho cases interpreting the below cost provisions of the Act.

There is, however, one unreported district court memorandum decision of which we are aware denying a defendant's motion to dismiss a complaint filed by the state alleging violations of the Unfair Sales Act. The deci-

sion came in an old Ada County case, entitled State of Idaho, on Relation of W. D. Searns, Director of Unfair Sales for the Department of Commerce and Development v. Rosauer's Super Markets, Inc., Albertson's, Inc., Safeway Stores Incorporated, and Others, Civil Case No. 36021. In this case, the state alleged that all of the defendants had violated the Act and sought to enjoin future violations. Albertson's filed a motion to dismiss the complaint, alleging that the Act was unconstitutional in a number of respects. The district court denied Albertson's motion. It held, citing to Idaho Code § 48-405, that in order to prove a violation of the Act, the plaintiff must show (1) that the defendant sold product at less than cost, and (2) that he did so in "contravention of the policy" of the Act. The court reviewed the statute that defined the public policy of the Act (Idaho Code § 48-404), and found that a violation of the Act cannot be proven unless it can be shown that the sale of product below cost actually had an injurious effect on the defendant's competitors.

Enforcement of the Act has been perhaps deterred by the various exceptions found in the Act. For example, it is a defense to an allegation of violating the Act that one's competitor lowered his price first, and the accused offender is merely meeting his competitor's low price. Idaho Code § 48-407(d). This requires the prosecutor (or private plaintiff) to bear the burden of proving which business lowered its price below cost first. Other exceptions to the Act exist if the below cost product is a perishable or damaged item, or is the subject of a liquidation or court-ordered sale.

## II.

## BELOW COST SALES

With the Unfair Sales Act background in place, we now turn specifically to your first question: Is there Idaho law available to address below cost sales practices should the Act be repealed? As noted, the Act makes illegal the advertising, offer to sell or retail sale of any merchandise below a statutory definition of cost[1] in the State of Idaho. Idaho Code § 48-404. The Act specifically provides:

> [A]ny advertising, offer to sell or sale of any merchandise,[2] either by retailers or wholesalers, at less than cost as defined in this act, with the intent, or effect, of inducing the purchase

> of other merchandise or of unfairly diverting trade from a competitor or otherwise injuring a competitor, impairs and prevents fair competition, injures public welfare, and is unfair competition and contrary to public policy and the policy of this act, where the result of such advertising, offer or sale is to tend to deceive any purchaser or prospective purchaser, or to substantially lessen competition, or to unreasonably restrain trade, or to tend to create a monopoly in any line of commerce.

Idaho Code § 48-404.

Breaking the statutory provision above into its essential elements, the advertisement, offer or sale of merchandise by a retailer or wholesaler[3] violates the Act if each of the following three elements is satisfied:

1. The advertisement, offer or sale is below "cost," as that term is statutorily defined;

2. The advertisement, offer or sale is designed to induce purchase of other merchandise or unfairly divert trade from competitors; and

3. The advertisement, offer or sale results in (a) a tendency to deceive purchasers; (b) substantially lower competition; (c) an unreasonable restraint of trade; or (d) a tendency to create a monopoly.

Element one is fairly straightforward, given the definition in the Unfair Sales Act for "cost." Element two, however, is more problematic: Does not a retailer hope that an advertisement for an item of merchandise will lead to the purchase of other merchandise? There is no readily available test to determine when a specific advertisement is not "designed to induce purchase of other merchandise."[4] Further, in what instances is it "unfair" to divert trade from competitors? The statute is silent. At a fundamental level, robust competition in the market place involves businesses seeking to win over their competitors' customers and the market place properly rewards the more innovative, lower-priced, better provider of services with more customers and trade. Laws prohibiting such interaction are inimical to the principles of the market place.

Element three is similarly problematic. It is hard to understand how a below cost sale deceives purchasers, and how, in and of itself, it lowers competition. It is certainly foreseeable, however, as spelled out below, that some below cost sales may unreasonably restrain trade (although the Act itself is silent with respect to delineating those below cost sales which may reasonably restrain trade and those which may not), or have a tendency to create a monopoly. And it cannot be gainsaid but that these sales would be damaging to the market place and ultimately consumers. Thus, there is a valid reason to prohibit these sales. To the degree that such below cost sales occur, however, they are covered and prohibited by other Idaho law, as spelled out below. Thus, the Unfair Sales Act is not needed to prohibit such sales.

Idaho Code § 48-105 of the Idaho Competition Act prohibits predatory pricing. The United States Supreme Court has defined predatory pricing as "pricing below an appropriate measure of cost for the purpose of eliminating competitors in the short run and reducing competition in the long run."[5] The United States Supreme Court has made it clear, though, that it is vital to distinguish between procompetitive price cutting and anticompetitive predatory pricing because:

> [C]utting prices in order to increase business often is the very essence of competition. Thus, mistaken inferences in cases such as this one are especially costly, because they chill the very conduct the antitrust laws are designed to protect. "[W]e must be concerned lest a rule or precedent that authorizes a search for a particular type of undesirable pricing behavior end up by discouraging legitimate price competition."[6]

Thus, price cutting is not deemed predatory under federal antitrust law merely because it is intended to or does meet or beat competition and, in fact, is below the seller's costs.[7]

In Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp.,[8] the United States Supreme Court held that two elements must be proved to establish predatory pricing:

> First, a plaintiff seeking to establish competitive injury resulting from a rival's low prices must prove that the prices complained of are below an appropriate measure of its rival's costs.[9]
>
> . . . .
>
> The second prerequisite to holding a competitor liable under the antitrust laws for charging low prices is a demonstration that the competitor had a . . . dangerous probability, of recouping its investment in below cost prices. . . . Recoupment is the ultimate object of an unlawful predatory pricing scheme; it is the means by which a predator profits from predation. Without it, predatory pricing produces lower aggregate prices in the market, and consumer welfare is enhanced. Although unsuccessful predatory pricing may encourage some inefficient substitution toward the product being sold at less than its cost, unsuccessful predation is in general a boon to consumers.[10]

The Legislature has provided that the provisions of the Idaho Competition Act "shall be construed in harmony with federal judicial interpretation of comparable federal antitrust statutes." Idaho Code § 48-102(3). Thus, the rules laid down by the United States Supreme Court regarding predatory pricing under federal antitrust law would be followed by Idaho courts in applying Idaho's Competition Act. The bottom line, then, is that Idaho's Competition Act presently addresses below cost sales to the extent that such sales are deemed predatory, as set forth above.[11]

## III.

## DECEPTIVE ADVERTISING

The Unfair Sales Act also prohibits deceptive advertising.[12] The basis for such a provision is readily apparent. The market place works best when truthful information is communicated to consumers. With accurate information, consumers are best equipped to choose the product that best fits their needs. If the consumer is given false, deceptive or misleading information, this prevents them from making an informed choice. Such a result harms the

market place, consumers and businesses. Thus, a provision like the Act's prohibition of deceptive advertising is important. Even if the Act is repealed, however, there is other Idaho law that prohibits deceptive advertising.

The Idaho Consumer Protection Act was enacted with the purpose of deterring deceptive or unfair trade practices.[13] Under the Idaho Consumer Protection Act, an act or practice is unfair and deceptive if it is shown "to possess a tendency or capacity to deceive consumers."[14]

The Consumer Protection Act sets forth a number of acts or practices that are declared false, deceptive and misleading.[15] *See* Idaho Code § 48-603. Included therein are a number of provisions addressing deceptive representations regarding the advertising or promotion of a product. Subsection 48-603(17) is a "catch-all" provision that prohibits "any act or practice which is otherwise misleading, false, or deceptive to the consumer." The provision is broad in scope and reach.

The provisions of the Consumer Protection Act are enforced by the Attorney General.[16] Furthermore, Idaho Code § 48-608 of the Consumer Protection Act provides for a private cause of action. Thus, in summary, even if the Unfair Sales Act were repealed, remaining Idaho law would still be in place that prohibits deceptive advertising. Attorney General enforcement for deceptive advertising would still be available, and a remedy for violations thereof still provided private parties hurt by the deceptive advertising.[17]

Thank you for contacting the Attorney General's Office. If you have any further questions or concerns that you would like to discuss, please do not hesitate to contact me at 334-4114.

Sincerely,

BRETT T. DeLANGE
Deputy Attorney General
Consumer Protection Division

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[1] The statutory definition of "cost" depends on the type of seller. "Cost to the retailer" is the lower of the actual, bona fide cost of the merchandise to the retailer or the lowest prevailing replacement cost; less all trade discounts (other than cash discounts); plus a "cost of doing business" markup (6% of

the cost of the merchandise to the seller) and freight costs (actual) and cartage costs (0.75% of merchandise cost). Idaho Code § 48-403(a)(1) to (3). "Cost to the wholesaler" is calculated in the same manner as "cost to the retailer," but the "cost of doing business" markup is 2% of the cost to the seller plus cartage and freight costs. Idaho Code § 48-403(b)(1) to (3). "Cost to the direct seller" is calculated in the same manner, but permits a cartage cost of 1.5% and a "cost of doing business" markup of 8% based on cost to the seller plus freight. Idaho Code §48-403(b)(aa)(1) to (3).

[2] The Act does not define "merchandise." The commonly understood meaning of the term is "Goods or commodities that may be bought or sold." Webster's II New College Dictionary.

[3] Section 48-403 of the Act defines a number of terms in addition to costs, including "retailer," "wholesaler," and "direct seller."

[4] The situation presented here is to be distinguished from bait-and-switch advertising, wherein the seller advertises a good or service with the intent not to sell them but to lure the consumer to the seller's place of business and then switch the consumer from buying the advertised goods or service to other or different goods or service on a basis more advantageous to the seller. *See* IDAPA 04.02.01.020.06 (defining "bait and switch" sales). For such sales, Idaho law prohibits them as violations of the Idaho Consumer Protection Act. IDAPA 04.02.01.050.

[5] Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 117, 107 S. Ct. 484, 493, 93 L.Ed.2d 427 (1986).

[6] Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 594, 106 S. Ct. 1348, 1360, 89 L.Ed.2d 538 (1986) (citations omitted) (alteration in original); *see also* Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 337-38, 341, 110 S. Ct. 1884, 1890-91, 1893, 109 L.Ed.2d 333 (1990) (cutting prices to get more business is the essence of competition; hence a competitor injured by low but non-predatory price competition suffers no antitrust injury); Cargill, Inc., 479 U.S. at 117-18 (predatory pricing "is a practice that harms both competitors and competition. In contrast to price cutting aimed simply at increasing market share, predatory pricing has as its aim the elimination of competition. Predatory pricing is thus a practice 'inimical to the purposes of [the antitrust] laws, and one capable of inflicting antitrust injury.'") (citation omitted).

[7] *See, e.g.*, R.W. Int'l Corp. v. Welch Food, Inc., 13 F.3d 478, 488 (1st Cir. 1994) (nonpredatory, aggressive price competition not unlawful); Tri-State Rubbish, Inc. v. Waste Mgmt., Inc., 998 F.2d 1073, 1080 (1st Cir. 1993) ("A company that rationally prices its own product or service at or above its own costs does not violate the Sherman Act merely because its costs, and thus its prices, are lower than a rival's costs . . . .") (footnote omitted); American Academic Suppliers, Inc. v. Beckley-Cardy, Inc., 922 F.2d 1317 (7th Cir. 1991) ("Consumers like lower prices. The plaintiff must therefore show that the defendant's lower prices today presage higher, monopolistic prices tomorrow.")

[8] 509 U.S. 209 (1993).

[9] *Id.* at 222.

[10] *Id.* at 224.

[11] Separate sections of the Competition Act provide a variety of remedies for conduct in violation of the Act's provisions, including civil penalties, damages, injunctive relief, attorney fees and costs and a private cause of action. *See* Idaho Code §§ 48-108, 48-112 and 48-113.

[12] Idaho Code § 48-412.

[13] Idaho Code § 48-601.

[14] State ex rel. Kidwell v. Master Distribs. Inc., 101 Idaho 447, 453, 615 P.2d 116, 122 (1980).

[15] *See* Idaho Code § 48-603.

[16] *See* Idaho Code § 48-606.

[17] Remedies under the Consumer Protection Act, like the Competition Act, are broad and include provisions for civil penalties, restitution, damages, injunctive relief, attorney fees and costs. *See* Idaho Code §§ 48-606, 48-607 and 48-608.

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## IDAHO CODE CITATIONS

# ATTORNEY GENERAL'S SELECTED ADVISORY LETTERS FOR THE YEAR 2014

LAWRENCE G. WASDEN
ATTORNEY GENERAL
STATE OF IDAHO

January 9, 2014

The Honorable Thomas Loertscher
Idaho State Representative
Statehouse
VIA HAND DELIVERY

Re: Our File No. 14-46784 — Authority of County Prosecutors

Dear Representative Loertscher:

This letter is in response to your recent inquiry of this office regarding the authority and oversight of county prosecutors under Idaho law. Generally, oversight of prosecutors can be divided under two headings—criminal authority and civil authority.

**County Commissioners Have Little Oversight Over Criminal Prosecution.**

Oversight of prosecutors acting within their criminal prosecutorial authority is generally provided by the courts and electorate. Courts have options from dismissing unfounded charges all the way up to sanctions for prosecutorial misconduct, including the possibility of the Idaho State Bar providing additional oversight through disciplinary sanctions that could result in removal of a prosecutor's license to practice law. Similarly, the electorate determines every four years whether a prosecutor has diligently discharged the duties of prosecutor. The electorate can choose another prosecutor if the current one is not satisfactorily discharging the duties in the eyes of the electorate. This approach is supported by the holding in Conger v. Board of Comm'rs of Latah County, 4 Idaho 740, 742, 48 P. 1064, 1066 (1896).

**County Commissioners Function Both as Client and Oversight in Civil Matters Involving the Prosecuting Attorney.**

Within the civil arena, the Board of County Commissioners is provided with express oversight authority with regard to civil actions. Idaho Code § 31-813 directs:

> **31-813. Control of suits.** — To direct and control the prosecution and defense of all suits to which the county is a party in interest, and employ counsel to conduct the same, with or without the prosecuting attorney, as they may direct.

This oversight means that the prosecutor interacts with the Board of County Commissioners in a more traditional attorney/client relationship. In at least one case, the Idaho Supreme Court sustained the ability of the Board of County Commissioners to settle an ongoing action without the consent of the prosecuting attorney.

In Board of County Comm'rs v. Bassett, 14 Idaho 324, 93 P. 774 (1908), the prosecuting attorney took an appeal from a district court decision that the county must issue a liquor license without the county commissioners' knowledge, then the county commissioners settled the case without consulting with the prosecuting attorney. The Idaho Supreme Court reconciled the competing authorities of the prosecuting attorney and county commissioners as follows:

> . . . [I]t is made the duty of the prosecuting attorney, under Laws 1899, p. 25, to prosecute or defend all actions, applications, or motions, civil or criminal, in the district court of the county in which the people of the state or the county is interested or a party. The prosecuting attorney is the legal adviser of the board of county commissioners. Under the provisions of subdivision 13, § 1759, Rev. St. 1887, as amended, the board of commissioners is given the power to direct and control the prosecution and defense of all suits to which the county is a party in interest, and employ counsel to conduct the same, with or without the prosecuting attorney, as they may direct. Those provisions must be read in connection with the provisions of the statute, which prescribe the duties of the county attorney. Under the law it is made his duty to look after and defend any and all litigation instituted against the county, and, if it becomes necessary to take an appeal, he has full authority to take it, and it is unnecessary for him to wait for the action of the board of county commissioners to give him directions and orders in regard to the same. The

> statute gives the board of commissioners the right to direct the litigation, and, if that board sees fit to compromise or settle the case pending against the county, they have the right to settle or direct the case to be dismissed, and it appears from the record in this case that the board of county commissioners complied with the order and judgment of the district court without consulting the county attorney, which they had the legal right to do. As the case has been fully settled, no beneficial results can come from a determination of the issues made on this appeal.

14 Idaho at 326, 93 P. at 774.

**County Commissioners May Resolve a Civil Suit Without Prosecutor Approval.**

Practically, this means that the prosecuting attorney can act unilaterally with regard to cases that he or she is prosecuting or defending, but, in the end, the final decision is the county commissioners', who may act unilaterally to settle or dismiss. *See also* Anderson v. Shoshone County, 6 Idaho 76, 77-78, 53 P. 105, 105-106 (1898). A prosecuting attorney may prosecute or defend actions involving the county without the knowledge or approval of the county commissioners, but, once the county commissioners act formally to direct or control the litigation, the county commissioners have the final say on whether or how the matter will be prosecuted, defended or settled.

I hope that you find this analysis helpful. If you would like to discuss its content in more detail, please contact me.

Sincerely,

BRIAN KANE
Assistant Chief Deputy

January 30, 2014

Mike Rush, Executive Director
Idaho State Board of Education
P. O. Box 83720
Boise, ID 83720-2632

Re: Request for Opinion on Possession of Guns on Campus

Dear Executive Director Rush:

On behalf of the Idaho State Board of Education ("Board"), you have requested a response and legal analysis regarding three questions, two of which are directly related to Senate Bill No. 1254 ("SB 1254"). The following legal analysis addresses the Board's questions and is provided for your consideration and guidance.

**A. SB 1254**

SB 1254, in relevant part, would repeal Idaho Code § 18-3302J(5)(c) that presently exempts from state statutory preemption of firearms regulation "[t]he authority of the board of regents of the university of Idaho, the boards of trustees of the state colleges and universities, the board of professional technical education and the boards of trustees of each of the community colleges established under chapter 21, title 33, Idaho Code, to regulate in matters relating to firearms." It would further add a new provision, Idaho Code section 18-3309, to define the authority of governing bodies of public colleges and universities with respect to firearms regulation. In brief, the proposed new provision would grant general authority to those governing bodies to prescribe firearm rules and regulations (proposed section 18-3309(1)) but would exclude from the grant "regulating or prohibiting the otherwise lawful possession, carrying or transporting of firearms or ammunition by persons licensed under section 18-3302H or 18-3302K, Idaho Code" (proposed section 18-3309(2)(a)). Subsection (2)(b) of the new provision would only prohibit individuals licensed under those sections from carrying a concealed weapon in any student dormitory, residence hall or "public entertainment facility" with a seating capacity of at least one thousand persons.

### B. The Board's Questions

Your opinion request presents three questions:

1. Does the Board's constitutional and statutory authority to supervise, govern and control public education in the state allow it to establish policies, rules and regulations to ensure a climate conducive to knowledge and learning within the institutions' classrooms, laboratories, lecture halls and faculty offices, as well as the authority to manage institution property?

2. Would the proposed legislation impede or otherwise restrict the Board's constitutional and statutory authority by preventing the Board from prohibiting weapons within classrooms, laboratories, lecture halls and faculty offices on campus in order to maintain an environment conductive to knowledge and learning, as well as the authority to manage institution property?

3. If students, as defined under Idaho Code section 18-3302D, are present on campuses of higher education institutions "while attending or participating in any school sponsored activity, program or event," (such as school field trips, athletic camps, dual credit classes, etc.), would proposed section 18-3309 allowing concealed weapons on university campuses conflict with Idaho Code section 18-3302D(1)(b)?

We answer these questions in order.

### 1. Question No. 1

The first sentence in art. IX, sec. 2 of the Idaho Constitution answers this question for all public education institutions. It states that "[t]he general supervision of the state educational institutions and public school system of the state of Idaho, shall be vested in a state board of education, the membership, powers and duties of which shall be prescribed by law." As a structural matter, therefore, the Board is vested with authority to supervise the primary, secondary and post-secondary public school system (Evans v. Andrus, 124 Idaho 6, 10, 855 P.2d 467, 471 (1993)), but it must do so pursuant to "powers . . . prescribed by law." Section 33-107(1), Idaho Code, thus vests

within the Board the "power" to "[p]erform all duties prescribed for it by the school laws of the state." Art. IX, sec. 2, in short, commits the day-to-day operation of the public education system to the Board but reserves to the Legislature authority to enact laws that affect that operation—even laws that the Board may believe compromise its ability "to ensure a climate conducive to knowledge and learning." Within the parameters of that constitutional framework, the answer to the first question is yes.

**2. Question No. 2**

Although the term "school laws" in section 33-107(1), Idaho Code, is not defined, it presumably refers to those directly related to operation of the public education system and codified generally in title 33 of the Idaho Code. Nothing in art. IX, sec. 2 of the Idaho Constitution, however, prevents the Legislature from restricting those powers directly in the "school laws" or indirectly through the exercise of its police powers. One such police power is the regulation of firearms throughout Idaho and, more specifically, on state property subject to constraints imposed under the Second Amendment to the United States Constitution and art. I, sec. 11 of the Idaho Constitution. In re Brickey, 8 Idaho 597, 599, 70 P. 609 (1902); *see also* State v. Woodward, 58 Idaho 385, 391, 74 P.2d 92, 95 (1937) ("Under the Constitution, the right to bear arms may not be denied by the Legislature. . . . The Legislature only has the power to 'regulate the exercise of this right'; that is, among other things, it may prohibit carrying concealed weapons, or prescribe the kind or character of arms that may or may not be kept, carried, or used, and various other things of a regulatory character."). Consequently, to the extent that this question asks whether those portions of SB 1254 summarized above are unconstitutional through operation of art. IX, sec. 2 because they may impede the Board's authority "to maintain an environment conductive to knowledge and learning . . . to manage institution property[,]" the answer is no.

The University of Idaho is "a special case" (1981 Idaho Att'y Gen. Ann. Rpt. 221, 222 (Legal Guideline)) by virtue of art. IX, sec. 10 of the Idaho Constitution. The Supreme Court has recognized in a series of decisions that "[b]y this provision, the territorial act, creating the university and prescribing the powers, duties and authority of the Board of Regents, was written into the constitutional corporate charter of the university as fully as if it had been set out at length in the constitution." Dreps v. Bd. of Regents, 65

Idaho 88, 95, 139 P.2d 467, 470 (1943) (plurality op.).[1] The precise scope of the Board's authority[2] with respect to its supervision of the University is unclear, but art. I, sec. 11 of the Idaho Constitution unambiguously confers upon the Legislature sole authority to regulate firearms. This conclusion is buttressed by decisional authority from other states that recognize legislative authority to exercise police powers with respect to university boards that enjoy substantial constitutionally-based autonomy. *See, e.g.*, Regents v. State, 419 N.W.2d 773, 778 (Mich. Ct. App. 1988) (applicability of workmen's compensation statute); Kim v. Regents, 95 Cal. Rptr. 2d 10, 14 (Ct. App. 2000) ("[w]hile the University and Regents are intended to operate as independently of the state as possible, there are three areas in which they are subject to legislative regulation: appropriations regarding salaries; general police power regulations; and regulations governing matters of statewide concern not involving internal university affairs"). Art. IX, sec. 10 thus does not alter the conclusion reached with respect to art. IX, sec. 2 as to all other educational institutions.[3]

### 3. Question No. 3

We understand the need to reconcile Idaho Code section 18-3302D and the proposed section 18-3309. The two statutes should be read *in pari materia*, with the more specific statute controlling. Gooding County v. Wybenga, 137 Idaho 201, 204, 46 P.3d 18, 21 (2002); *see generally* Norman J. Singer & J.D. Shambee Singer, 1A *Sutherland Statutes and Statutory Construction* § 23:9 (7th ed. 2012) ("[w]here provisions of two acts are in conflict, standard statutory construction requires that a court adopt as controlling that provision more closely associated with the specific substance of the controversy"). Here, the more specific section 18-3302D(1)(b)—which applies only to students of public and private elementary and secondary schools (Idaho Code section 18-3302D(2)(e))—would apply under this rule of construction in the scenarios that the third question hypothesizes. We also note the age requirement of 21 years for licensure under Idaho Code section 18-3302(1)(l) incorporated into section 18-3302K. To the extent that the Board believes this potential conflict is not resolved through ordinary statutory construction canons, we recommend that it raise the issue in the legislative hearing process.

We hope that this letter adequately responds to the Board's inquiry. Please contact me with any questions.

Sincerely,

BRIAN KANE
Assistant Chief Deputy

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[1] Dreps held that the generally applicable nepotism statute did not apply to the regents' determination to reappoint a university infirmary nurse whose employment would otherwise have been barred. 65 Idaho at 100, 139 P.2d at 473. Two justices concluded that such application would infringe upon the Board of Regents' constitutional autonomy under art. IX, sec. 10 of the Idaho Constitution and that, in any event, the Legislature did not intend for the statute to apply to the University of Idaho. *Id.* Two justices concurred in the judgment on the basis of the second conclusion, finding no need to address the constitutional issue. 65 Idaho at 100-01, 139 P.2d 473-74 (Givens, J., concurring specially). One justice did not participate. 65 Idaho at 101, 139 P.2d at 474.

[2] The Board serves as the Board of Regents. *See* First Nat'l Bank v. Regents, 26 Idaho 15, 18, 140 P. 771 (1914) (per curiam) (Board serves as Board of Regents).

[3] We recognize that commentators have argued that firearm regulation is an incident of protecting academic freedom and that legislative authorization of concealed weapon possession interferes with such freedom. E.g., Shaundra K. Lewis, *Bullets and Books by Legislative Fiat: Why Academic Freedom and Public Policy Permit Higher Education Institutions to Say No to Guns*, 48 Idaho L. Rev. 1 (2011) (legislative authorization of concealed weapons subject to strict scrutiny review); Joan H. Miller, Comment, *The Second Amendment Goes to College*, 35 Seattle U. L. Rev. 235 (2011) (legislative authorization subject to intermediate scrutiny). We do not understand the Board, however, to suggest through its first two questions that some or all of the relevant SB 1254 provisions violate the First Amendment to the United States Constitution or art. I, sec. 9 of the Idaho Constitution.

February 4, 2014

The Honorable Monty Pearce
The Honorable Steven Thayn
Idaho State Senate
VIA HAND DELIVERY

Re: Our File No. 14-47081 — Idaho Health Insurance Exchange

Dear Senators Thayn and Pearce:

This letter is in response to your recent inquiry of this office regarding the Idaho Health Insurance Exchange. Specifically, you ask whether the Idaho Health Insurance Exchange is selling policies that allow for the coverage of abortions. This office has no oversight of the Idaho Health Insurance Exchange, and the Exchange is an independent body corporate and politic within the State of Idaho, therefore, you may wish to address your question directly to the Exchange.

It is worth noting that Idaho has specifically prohibited the Idaho Health Insurance Exchange from providing for abortion coverage in any qualified plan offered through the Exchange under Idaho Code § 41-1848. For your information that section of the code is set forth in full below:

> **41-1848. Legislative findings and purpose** — Coverage for abortions in state exchange prohibited. (1) The legislature finds that:
>
> (a) Pursuant to section 1303 of the patient protection and affordable care act, P.L. 111-148, states are explicitly permitted to pass laws prohibiting qualified health plans offered through an exchange in their state from offering abortion coverage;
>
> (b) It is the longstanding policy of this state to prefer live childbirth over abortion and to prohibit the use of taxpayer moneys to fund abortions unless the

mother's life is at risk or the pregnancy is a result of rape or incest;

(c) Idaho law prohibits certain insurance plans, policies and contracts issued in this state from offering coverage for elective abortions; and

(d) It is the purpose of this section to affirmatively prohibit qualified health plans that cover abortions from participating in exchanges within this state.

(2) Notwithstanding any other provision of law, no abortion coverage may be provided by a qualified health plan offered through an exchange created pursuant to the patient protection and affordable care act, P.L. 111-148, within the state of Idaho.

(3) The provisions of subsection (2) of this section shall not apply to an abortion performed if it is the recommendation of one (1) consulting physician that an abortion is necessary to save the life of the mother, or if the pregnancy is a result of rape, as defined in section 18-6101, Idaho Code, or incest as determined by the courts.

Based on this statute, the Exchange should only be offering plans in compliance with Idaho Code section 41-1848.

I hope that you find this information helpful.

Sincerely,

BRIAN KANE
Assistant Chief Deputy

February 12, 2014

The Honorable Ed Morse
House of Representatives
Idaho Legislature
Hand Delivered

Re: Aquifer Recharge Application with Out-of-State Place of Use Under Idaho Code § 42-401, *et seq.*

Dear Representative Morse:

You asked this office whether an out-of-state entity seeking to appropriate water from the State of Idaho for injection into an interstate aquifer with the purpose of using the water on an out-of-state place of use is subject to the application requirements of Idaho Code § 42-401, *et seq*. The specific facts you presented were for a water right application by an out-of-state entity for surface water out of Lake Pend Oreille. The surface water would be injected into the Rathdrum Prairie Aquifer ("RPA") within the State of Idaho. The RPA is an interstate aquifer that underlies both Idaho and Washington. Generally, ground water in the RPA flows from the north, near Lake Pend Oreille, to the southwest into the State of Washington. The RPA is hydraulically connected in places to the Spokane River. The proposed purpose of use for the application would be to increase flows within the Spokane River in the State of Washington.

Appropriation of water within the State of Idaho for use outside the state is governed by Idaho Code § 42-401, et seq. Idaho Code § 42-401(2) provides:

> Any person, firm or corporation or any other entity intending to withdraw water from any surface or underground water source in the state of Idaho and ***transport it for use outside the state*** or to change the place or purpose of use of a water right from a place in Idaho to a place outside the state shall file with the department of water resources an application for permit to do so.

(Emphasis added.)

The section goes on to provide a list of factors that the Director of the Idaho Department of Water Resources must consider when determining whether to grant or deny the application. Idaho Code § 42-401(3). Thus, under the facts you provided, the critical question is whether the diversion of water out of Lake Pend Oreille for injection into the RPA to enhance stream flows in the Spokane River constitutes the "transport [of water] for use outside the state." Idaho Code § 42-401(2).

A cardinal rule of statutory construction is that the terms in a statute will be given their plain, usual and ordinary meaning unless clearly expressed legislative intent is contrary or the plain meaning leads to absurd results. A & B Irr. Dist. v. Idaho Dep't of Water Resources, 154 Idaho 652, 654, 301 P.3d 1270, 1272 (2012). The plain meaning of the word "transport" is presumed to be the meaning given to it in common parlance. The ordinary meaning of the verb "transport" is "to transfer or convey from one place to another." Merriam Webster's Collegiate Dictionary, 1255 (10th ed. 1996). The meaning of "transfer" is "to convey from one person, place, or situation to another; to cause to pass from one to another." Merriam Webster's Collegiate Dictionary, 1253 (10th ed. 1996). The meaning of "convey" is "to bear from one place to another." Merriam Webster's Collegiate Dictionary, 254 (10th ed. 1996).

The definitions listed above use the phrases "to cause to pass," "to bear," and "to convey." The plain meaning of these phrases, as well as the general connotation of the word "transport," suggest that the movement of water must be done intentionally and by some human or mechanical means. Thus, under the factual scenario presented, it is clear that the water would be "transported" from Lake Pend Oreille to the RPA, because some mechanical means such as a pipeline or canal and injection works would be needed to accomplish the movement of the water from the lake to the aquifer. Because the water would be contained in a man-made conduit, it could be guaranteed to reach the RPA.

Once injected into the RPA, however, control over the injected water would be lost. The diffuse nature of water movement within the RPA does not fit easily within the commonly understood definition of "transport." Once

the injected water entered the RPA, there would be no human or mechanical means of ensuring it reached a place of use outside the State of Idaho. Thus, it could be argued that placing water into the RPA with the intent of using it on an out-of-state place of use would not constitute the "transport" of water under Idaho Code § 42-401(2).

Given the lack of certainty over how a court might interpret the term "transport" under the facts presented, you may want to consider a statutory amendment to ensure that Idaho Code § 42-401, *et seq.* would apply. The following amendments to Idaho Code § 42-401(1) and (2) would ensure an application, like the one described in the facts presented, would fall under Idaho Code § 42-401, *et seq.*:

> (1) The state of Idaho is dedicated to the conservation of its public waters and the necessity to maintain adequate water supplies for the state's water requirements. The state of Idaho also recognizes that under appropriate conditions the out-of-state ~~transportation and~~ use of its public waters is not in conflict with the public welfare of its citizens or the conservation of its waters.
> (2) Any person, firm or corporation or any other entity intending to withdraw water from any surface or underground water source in the state of Idaho ~~and transport it~~ for use outside the state or to change the place or purpose of use of a water right from a place in Idaho to a place outside the state shall file with the department of water resources an application for a permit to do so, subject to the requirements of chapter 2, title 42, Idaho Code.

This amendment would make clear that an application such as the one discussed herein would be subject to Idaho Code § 42-401, *et seq.*

Sincerely,

ANN Y. VONDE
Deputy Attorney General
Natural Resources Division

February 13, 2014

The Honorable Shawn Keough
Idaho State Senator
Statehouse
VIA HAND DELIVERY

Re: Our File No. 14-47176 — Political Parties and Open Meeting Law

Dear Senator Keough:

This letter is in response to your recent inquiry regarding political parties and the Idaho Open Meeting Law. Political parties are not subject to the Open Meeting Law, because they are not public agencies of the state. A public agency is defined by Idaho Code § 67-2341(4):

> (4) "Public agency" means:
> (a) any state board, commission, department, authority, educational institution or other state agency which is created by or pursuant to statute, other than courts and their agencies and divisions, and the judicial council, and the district magistrates commission;
> (b) any regional board, commission, department or authority created by or pursuant to statute;
> (c) any county, city, school district, special district, or other municipal corporation or political subdivision of the state of Idaho;
> (d) any subagency of a public agency which is created by or pursuant to statute, ordinance, or other legislative act.

As defined by Idaho Code § 34-501, a political party is an organization of electors under a given name. The definition of political party does not qualify as a public agency under any of the definitions provided above for a public agency. The Open Meeting Law only applies to public agencies or other entities with an express statutory requirement of compliance with the Idaho Open Meeting Law. For example, *see* Idaho Code § 41-6104(8),

requiring the Idaho Health Insurance Exchange to comply with the Open Meeting Law.

I hope that you find this information helpful.

Sincerely,

BRIAN KANE
Assistant Chief Deputy

February 13, 2014

The Honorable Monty J. Pearce, Chairman
Senate Resources & Environment Committee
P. O. Box 83720
Boise, ID 83720-0081

Re: Seizure of Property Related to Fish and Game Violations

Dear Senator Pearce:

I write in response to your questions regarding the authority for seizure of property related to investigations of violations of Idaho's fish and game laws (Idaho Code, Title 36, and rules or proclamations promulgated pursuant thereto).

The federal and state constitutions and Idaho's criminal procedural statutes and rules apply to the seizure of property related to criminal investigations, including those conducted for violations of Idaho's fish and game laws. The U.S. and Idaho Constitutions protect individuals from unreasonable seizures of property. Idaho Fish and Game officers may only seize property pursuant to a warrant issued by a court based on probable cause or pursuant to an exception to the warrant requirement by which the seizure is considered reasonable.

Title 19, chapter 44, Idaho Code, describes the uses and requirements for warrants that authorize officers to search for and seize property or intangibles. Idaho Code section 19-4402 indicates that search warrants may be issued to search for and seize the following types of property:

- Any property or intangible that constitutes evidence of a criminal offense.
- Contraband, the fruits of crime, or things otherwise criminally possessed.
- Weapons or other things by means of which a crime has been committed or reasonably appears about to be committed.

There are several recognized exceptions where officers do not need a warrant to seize the above types of property, including instances where such

property is in plain view of an officer from a lawful vantage point; where exigent circumstances exist, such as imminent risk of destruction of evidence; where the seizure is made in conjunction with a consensual search; where the seizure is made in conjunction with arrest of an individual; or where the property is found in a motor vehicle searched based on probable cause for contraband or evidence of criminal activity. Idaho Code section 36-1303 identifies items that may be searched with or without a warrant based on probable cause a person has in his possession any unlawfully taken wildlife or equipment or substances used to take such wildlife.

In addition, Idaho Code section 36-1304 specifically authorizes all officers empowered to enforce fish and game laws to seize at any time and hold as evidence any hunting, trapping or fishing equipment used in the commission of a violation of Title 36 or rules or proclamations promulgated pursuant thereto. This section also authorizes the seizure at any time of any wildlife that may have been taken or possessed unlawfully. Section 36-1304 also provides for the return of lawful equipment when no longer needed as evidence and for the disposition of unlawfully used equipment and unlawfully taken or possessed wildlife. Investigations of violations of fish and game laws involving multiple states under the Lacey Act may also entail the seizure of property under a federal warrant.

Even where there is probable cause that the property constitutes evidence of a violation of fish and game laws, seized property that is not contraband is subject to return if charges are not filed within applicable statutes of limitation. Most Title 36 misdemeanors have a one-year statute of limitation, but felonies and some misdemeanors have longer statutes of limitation. Fish and Game officers may issue uniform citations for misdemeanor violations; other misdemeanor and felony charges are within the discretion of the prosecutor. Where Title 36 charges have been filed, seized property is returned or disposed of in accordance with Idaho criminal procedures and applicable Title 36 requirements, typically at the conclusion of the case and any subsequent appeal.

Please let me know if I can be of further assistance.

Sincerely,

KATHLEEN E. TREVER
Deputy Attorney General

February 14, 2014

Honorable Dan Johnson
Idaho State Senate
P. O. Box 83720
Boise, ID 83720-0081

Honorable Bert Brackett
Idaho State Senate
P. O. Box 83720
Boise, ID 83720-0081

Re: Voltage Fees

Dear Senator Johnson and Senator Brackett:

## QUESTIONS PRESENTED

1. Whether the State could charge a "voltage registration fee" to electric vehicle owners in lieu of the fuel taxes other users pay?

2. Whether the State could "depreciate" the voltage fee in order to help offset the cost of new batteries for electric car owners?

## SHORT ANSWERS

1. Yes, the State could impose a fee in lieu of gas taxes. However, such a fee could create an apparent conflict with other provisions of the Idaho Code. To enact the fee in lieu of the gas tax, there would need to be amendments to both the vehicle registration and fuel tax statutes. Alternatively, a fuel tax could be imposed on the purchase of batteries for electric and hybrid vehicles without creating a conflict with existing statutes.

2. No, fuel taxes are dedicated solely to public highway purposes pursuant to the Idaho Constitution. Subsequently, a court may find that a depreciating registration fee in lieu of fuel taxes to offset the cost of new electric vehicle batteries would violate those provisions of the Idaho Constitution. However, other types of credits or cost recovery could be considered.

## DISCUSSION

### 1. A Voltage Fee or Tax

Idaho Code section 63-2402 imposes a fuel tax for the use of motor vehicles upon the highways of the State. The tax applies to "the consumption of fuels in the operation or propulsion of a motor vehicle on the highways of this state." The Legislature could enact an exception to the general fuel tax for those that pay a voltage registration fee in lieu of the fuel tax. The Idaho Code contains several provisions that provide a "fee in lieu of" a tax.

For instance, in Idaho, the motor vehicle registration fee is in lieu of other taxes upon the ownership of a vehicle. Idaho Code section 49-401 provides that the "registration fee imposed for vehicles registered under the provisions of this chapter shall be in lieu of all taxes on vehicles, general or local, and vehicles properly registered and for which the required fee for any part of the previous year has been paid shall be exempt from ad valorem taxation." Idaho Code § 49-401.

The registration fee provision indicates that registration is in lieu of all taxes. However, it should be noted that other provisions of the Idaho Code require the payment of sales tax upon the purchase of a motor vehicle. Sales tax is a tax on the transaction rather than on the ownership of the vehicles. Therefore, while not entirely clear, the statute could be interpreted as the registration fee is in lieu of other ownership (*e.g.* property) taxes the State could impose. This interpretation would be consistent with Idaho Code section 63-602J, which exempts from Idaho property tax "motor vehicles properly registered and for which the required [registration] fee has been paid." The general registration fee is in lieu of a tax that is similar in nature. Both the registration fee and the Idaho property tax are imposed on the ownership of property.

The proposed voltage registration fee is more complex. If the voltage registration fee is a flat fee, it would look more like an ownership or property tax. It could be argued that the voltage fee is assessed on electric vehicle owners without regard to the owner's use of the vehicle upon the roads. Under this theory, it could be argued that the vehicle voltage fee is replacing

a fuel tax for the use of highways with a type of property tax on the vehicles. In that case, the general registration fee statute would need to be amended.

Alternatively, a voltage registration fee could be tied directly to miles traveled upon Idaho highways. In this alternative, the fee would be tied to the use of the highways and roads and more closely resemble a fuel tax.

At this time, it appears that five states have adopted legislation approving some type of an increased registration or tax upon electric vehicles. Based on a cursory review, it appears that the majority of these states have applied a flat fee, rather than a per-mile fee. I would assume the states have opted for a flat tax or fee, because a per-mile fee might prove to be difficult to administer or costly to implement.

Under either type of fee discussed above, if the registration statutes are amended to provide for a voltage registration fee, it would be helpful to clarify that the fee is in lieu of the Idaho fuel tax and that the voltage fee is not prohibited under the general registration fee language discussed above.

Another alternative is to enact the voltage levy as a fuel tax. The Idaho Constitution specifically addresses the State's vehicle registration and fuel taxes and provides:

> [T]he proceeds from the imposition of any tax on gasoline and like motor vehicle fuels sold or used to propel motor vehicles upon the highways of this state and from any tax or fee for the registration of motor vehicles, in excess of the necessary costs of collection and administration and any refund or credits authorized by law, shall be used exclusively for the construction, repair, maintenance and traffic supervision of the public highways of this state . . . .

Idaho Const. art. VII, sec. 17 (emphasis mine). Under this provision, gasoline is taxed because it is a motor vehicle fuel.

However, the Constitution also contemplates that other "like motor vehicle fuels sold or used to propel motor vehicles" may be taxed. In the case of an electric vehicle, and a hybrid vehicle to some extent, the vehicle battery

has become the fuel that propels it down the highway. Therefore, it appears a motor vehicle fuel tax could be imposed on the batteries purchased for electric and hybrid vehicles.

**2. Recovering the Cost of the Batteries**

Determining the rate of the tax or amount of the fee may be difficult. However, whether the voltage levy is a fuel tax or a registration fee in lieu of a fuel tax, it will be subject to the constitutional provision discussed above. Because the Idaho Constitution states that fuel taxes or registration fees "shall be used exclusively for the construction, repair, maintenance and traffic supervision of the public highways of this state," a court probably would find that the fee/tax could only be used for public highway purposes. Reducing the tax to offset future battery costs for the vehicle owner would not be within the stated constitutional purpose.

Of course, the Legislature can enact other types of cost recovery measures. By way of example, when manufacturers began mass production of electric and hybrid vehicles several years ago, the federal government provided an income tax credit for the purchasers of such vehicles.

I hope this discussion is helpful. If you need additional information, please feel free to contact me.

Sincerely,

J. TIM THOMAS
Deputy Attorney General

February 18, 2014

The Honorable Shawn Keough
Idaho State Senate
Statehouse
VIA E-MAIL

The Honorable George Eskridge
Idaho House of Representatives
Statehouse
VIA E-MAIL

Re: Protection of Identity of Concealed Weapons Permit Holders

Dear Senator Keough and Representative Eskridge:

You have asked whether Idaho protects the identity of concealed weapons permit holders and whether someone who "leaked" the identity of those holders could be punished or held accountable in some way. You have forwarded Bonner County Resolution No. 14-09, the substantive content of which appears to already have been enacted into law.

First, Idaho does protect the confidentiality of licensees in two places. Idaho Code section 18-3302K(5) expressly exempts the information as follows:

> . . . Information relating to an applicant or licensee received or maintained pursuant to this section by the sheriff or Idaho state police is confidential and exempt from disclosure under section 9-340B, Idaho Code.

The exemption in Idaho Code section 9-340B(6) reads as follows:

> (6) Records of the sheriff or Idaho state police received or maintained pursuant to sections 18-3302, 18-3302H and 18-3302K, Idaho Code, relating to an applicant or licensee except that any law enforcement officer and law enforcement agency, whether inside or outside the state of Idaho, may access information maintained in the license record system as set forth in section 18-3302K(13), Idaho Code.

The second question you have asked is somewhat problematic, because an anti-leakage provision might be a difficult law to both write and

enforce because it runs into the First Amendment. If by leaking, you mean a county employee or contractor with access to records generated under sections 18-3302, 18-3302H or 18-3302K releasing information exempt from disclosure, it is likely that civil liability could be imposed for the knowing release of such information in violation of statute. It is possible that a bill with criminal penalties could withstand First Amendment challenge, but it would have to be narrowly tailored.

On the broader question of imposing civil or criminal liability upon someone else who truthfully discloses that a person applied for a concealed weapon permit, which was granted or denied, the First Amendment protects truthful statements of that kind, except in instances of invasion of privacy, in particular, (1) intrusion into plaintiff's seclusion or solitude or into his private affairs; or (2) public disclosure of private facts. *See* Jensen v. State, 139 Idaho 57, 62, 72 P.3d 897, 902 (2003). Whether the truthful disclosure of information about an application for a concealed weapon permit would fit within these categories is a very fact-bound question that would differ from case to case. For example, the public discussion of former Rep. Patterson's application for a concealed weapon permit would probably not fall within these exemptions.

Arguably, this situation is somewhat addressed by the Idaho Public Records Act, which provides immunity from loss or damages based upon a "good faith [attempt] to comply with the provisions of this chapter." *See* Idaho Code § 9-346. This means that if a concealed weapons license holder's identity were disclosed in "bad faith" and that person was somehow damaged by the release of this information, then a civil action could be maintained against that person.

The best way to address leak potential is to internally review access and security of documents such as this. Most importantly is controlling the number of individuals who have access to information that should be kept confidential—which in turn reduces the likelihood of leaks—and also more readily facilitates identification of the leak.

I hope that you find this information helpful.

Sincerely,

BRIAN KANE
Assistant Chief Deputy

February 28, 2014

The Honorable Chuck Winder
Idaho State Senator
Statehouse
VIA HAND DELIVERY

Re: Our File No. 14-47398 — Committee Meeting Locations

Dear Senator Winder:

This letter is in response to your inquiry of this office regarding whether a committee may change the location of its meeting if its scheduled or usual meeting place is blocked by protestors. Within the Legislature's authority is the power to "determine its own rules of proceeding." Idaho Const. art. III, sec. 9; Idaho Press Club, Inc. v. State Legislature of the State of Idaho, 142 Idaho 640, 646, 132 P.3d 397, 403 (2006). Consistent with this authority is the ability to set the time and place of meetings of legislative committees. This means that it is likely well within the authority of the Legislature and its committees to change the time and place of committee meetings when their usual place of meeting is unavailable because of a protest or some other event.

This office would encourage the broadest and earliest possible notice of a meeting location being moved in order to ensure the ability of the citizens to observe their government in action.

I hope that you find this letter helpful.

Sincerely,

BRIAN KANE
Assistant Chief Deputy

March 3, 2014

Representative Mike Moyle
Majority Leader
Idaho House of Representatives
Hand Delivered

Re: Senate Bill 1277aa

Dear Representative Moyle:

You asked this office to analyze Senate Bill 1277aa, which has four objectives. First, it would remove the provision limiting exchanges to "similar lands," as well as associated language requiring exchanges to aid in the consolidation, control, management or use of state lands. Second, it would prohibit exchanges for lands that have as their primary value buildings or other structures, unless such a building is used by a public entity for public purposes. Third, it would provide that cottage sites may be exchanged for lands of equal value. Fourth, it would define the term "exchange" to include transactions in which state lands are conveyed to a party other than the party from whom lands are received, which party then may immediately sell the former state lands to other parties if such sale is "expressly provided for in the exchange agreement."

**1. Removal of the "Similar Lands" Requirement**

Senate Bill 1277aa would eliminate the statutory requirement that endowment lands can only be exchanged for "similar lands," as well as the requirement that the exchange "consolidate state lands or aid the state in the control and management or use of state lands." Idaho Code § 58-138.

The proposed elimination of the similar lands and consolidation requirements is consistent with the provisions of art. IX, sec. 8 of the Idaho Constitution, which provides that the Legislature may authorize the State Board of Land Commissioners (Land Board) to exchange endowment lands "on an equal value basis for other lands under agreement with the United

States, local units of government, corporations, companies, individuals, or combinations thereof."

**2. Prohibiting Exchanges of Lands for Buildings**

Senate Bill 1277aa would prohibit the exchange of endowment lands for "lands that have as their primary value buildings or other structures, unless said buildings or other structures are continually used by a public entity for public purposes."

The Statement of Purpose cites as authority for such restrictions art. IX, sec. 7 of the Idaho Constitution, which 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." Art. IX, sec. 7 is a questionable basis for the proposed prohibition on the exchange of state lands for buildings; by its plain terms, the Legislature may regulate the Land Board's direction, control and disposition of endowment lands, but such regulations cannot direct, control or dispose of endowment lands—those powers are reserved to the Land Board. This principle was recognized in Rogers v. Hawley, 19 Idaho 751, 760, 115 P. 687, 690 (1911), in which the Court, in reviewing sec. 7, stated: "Now, it must be at once apparent that if [legislation] is a 'regulation' of the powers and duties of the board, it is valid and constitutional; but if it goes beyond the scope of regulating the action of the board in the discharge of its constitutional duties, it is void."

While the Hawley decision did not define the limits of legislative authority to regulate the activities of the Land Board, the Court has addressed similar language in art. IX, sec. 10 of the Idaho Constitution, providing the regents of the University of Idaho with "control and direction of all the funds of, and appropriations to, the university, under such regulations as may be prescribed by law." The Court concluded that:

> "Regulate" does not mean to prohibit, or destroy or change, but rather signifies "to adjust by rule, method or established mode; to direct by rule or restriction"; "to reduce to order, method or uniformity." It is the antonym of "disorder, upset, disarrange."

> The foregoing definitions all carry the implication that the word "regulations" used in this section of the constitution refers more to the manner, method, procedural and orderly conduct of business than to mandatory or prohibitive legislation.

Dreps v. Board of Regents of University of Idaho, 65 Idaho 88, 96, 139 P.2d 467, 471 (1943) (citations omitted). The Court went on to hold that "[s]uch regulations must not be of a character to interfere essentially with the constitutional discretion of the board, under the authority granted by the Constitution." *Id.*

The principles established in the Dreps decision apply with equal force to the Land Board. While the Legislature may prescribe "methods and rules for the conduct of [Board] business," 65 Idaho at 96, 139 P.2d at 471, it can neither require the Board to take certain management actions, prohibit the Board from taking certain management actions, or otherwise interfere with the discretion vested in the Land Board. Put another way, if a statute undertakes to make a land management decision that is reserved to the Land Board's discretion, it is void.

If a reviewing court were to apply the Dreps principles to Senate Bill 1277aa, the prohibition on acquiring lands whose primary value lies in buildings may not stand, since such a prohibition does not control the manner, method or procedure of the Board, but rather appears to embody the Legislature's business judgment as to acceptable investments for the endowment trust. As such, it delves into areas that the Constitution reserves to the Board's business judgment: "The 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." Barber Lumber Co. v. Gifford, 25 Idaho 654, 669, 139 P. 557, 562 (1914).

A reviewing court, however, may not apply the Dreps principles to Senate Bill 1277aa if it concludes that it does not affect the Board's self-executing constitutional powers. Art. IX, sec. 8 of the Idaho Constitution does not authorize the Land Board to exchange endowment lands; rather, it provides that the "legislature shall have power to authorize the state board of land

commissioners to exchange granted or acquired lands of the state . . . ." Nothing in art. IX, sec. 8 requires the Legislature to authorize exchanges: it is left to legislative discretion whether to grant or withhold such authority. As such, the Board's power to exchange endowment lands is derived entirely from Idaho Code § 58-138. Because the Legislature is empowered by art. IX, sec. 8 to grant or withhold the power to exchange, a reviewing court could conclude that Senate Bill 1277aa is not an impermissible intrusion upon the Land Board's discretionary powers, but instead implements the Legislature's authority to withhold from its grant of exchange authority the power to exchange endowment lands for lands whose primary value is derived from buildings or other structures.

In short, the issue of legislative authority to enact Senate Bill 1277aa may come down to the question of whether the reviewing court concludes that it is a proper exercise of the Legislature's authority to partially authorize exchanges or whether it is an unconstitutional attempt to exceed the Legislature's regulatory authority and interfere with the Board's discretion to determine the types of property that, in the Board's business judgment, best serve the interests of the beneficiaries.

Even if a reviewing court were to conclude that Senate Bill 1277aa can be upheld as an exercise of the Legislature's authority to only partially authorize exchanges, the court would still review the provision to determine if it otherwise complies with art. IX, sec. 8's mandate to manage state lands as a trust whose sole aim is to maximize long-term financial returns for beneficiaries. Facially, an intent to maximize financial returns for beneficiaries is not apparent, since the legislation does not prohibit exchanges for buildings generally, only for those buildings not "continually used by a public entity for a public purpose." In other words, on its face, the prohibition applies only to buildings held for the purpose of leasing space to private entities. Nothing in the bill or the Statement of Purpose explains how financial returns to beneficiaries will be maximized by prohibiting acquisition of buildings leased to private entities while allowing acquisition of buildings leased to public entities. Absent clarification, the most likely reason for such a prohibition is to prevent competition with private commercial leasing businesses. If a reviewing court were to reach such a conclusion, it may result in a finding that the legislation is unconstitutional, for the Legislature is prohibited from directing management of endowment lands to benefit private business. *See* Idaho

Watersheds Project v. State Bd. of Land Comm'rs, 133 Idaho 64, 67, 982 P.2d 367, 370 (1999) (examining committee minutes to determine that Legislature impermissibly took into consideration the stability of the livestock industry in enacting bill that discouraged leasing to non-grazing interests).

### 3. Cottage Site Exchanges

Senate Bill 1277aa, after prohibiting the exchange of endowment lands for buildings leased to private entities, goes on to provide: "Land that the state owns known as 'cottage sites' can be exchanged for lands of equal value, public or private."

The "cottage sites" provision creates ambiguity, because it is unclear whether the provision is intended to be an exception to the prohibition on exchanges for lands whose primary value is derived from buildings. The cottage sites provision is mere surplusage unless it functions as an exception to the prohibition, because the exchange of cottage sites is already authorized under the preceding general exchange provision, which applies to "any of the state lands" held by the state. "It is well established that we are required to give effect to every word, clause and sentence of a statute . . . and the construction of a statute should be adopted which does not deprive provisions of the statute of their meaning." George W. Watkins Family v. Messenger, 118 Idaho 537, 540, 797 P.2d 1385, 1388 (1990); Bradbury v. Idaho Judicial Council, 149 Idaho 107, 116, 233 P.2d 38, 47 (2009) ("[This] Court 'will not construe a statute in a way which makes mere surplusage of provisions included therein.'") (quoting Sweitzer v. Dean, 118 Idaho 568, 571-72, 798 P.2d 27, 30-31 (1990)). Further confusing the issue is the Statement of Purpose, which provides:

> The legislation also seeks to clarify that lands known as 'cottage sites' can be exchanged for land of equal value regardless of whether the land exchanged for is used for cottage sites, ranching, forestry, or other permitted uses of state lands. In other words the mandate of the Constitution is exchange for equal value, period.

Statement of Purpose, Senate Bill 1277aa. The Statement of Purpose suggests that for cottage site exchanges, the only restriction is that the lands be of equal

value, which would allow the exchange of cottage sites for commercial buildings. If so, then Senate Bill 1277aa embodies the Legislature's determination that certain endowment assets only be exchanged for lands or buildings occupied by public tenants, while other endowment assets can be exchanged for buildings occupied by private tenants. Such detailed land management directives may increase the risk of a court finding Senate Bill 1277aa to be an unconstitutional intrusion into the Board's discretionary business judgment regarding the types of assets that should be obtained in an exchange, rather than a mere withholding of a portion of the exchange authority granted by the Legislature.

**4. Defining "Exchange"**

Senate Bill 1277aa would define the term "exchange," as used in Idaho Code section 58-138, to mean:

> [A] transaction in which the state conveys the land to another party or parties pursuant to an agreement that predates the exchange, in which transaction a party conveying land to the state may be different from a party to whom the state conveyed land. The parties dealing with the state in such an exchange transaction shall not be prohibited from purchasing or selling assets related to accomplishing the transaction before, simultaneously or after said transaction, provided that all such prior and simultaneous purchases and sales are expressly provided for in the exchange agreement.

The Legislature's authority to define the terms used in a specific statute is well-recognized. State v. Hartzell, 155 Idaho 107, 100, 305 P.3d 551, 554 (Idaho App. 2013). Such definitions "do not apply for all purposes and in all contexts but generally only establish what they mean where they appear in that same act." *Id.* Thus, as a general principle, the Legislature can define the meaning of "exchange" as used in the context of Idaho Code section 58-138.

That conclusion does not, however, end the inquiry, because art. IX, sec. 8 of the Idaho Constitution cabins the otherwise plenary power of the

Legislature as applied to the management of state endowment lands. In relevant part, art. IX, sec. 8 provides:

> 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, and the legislature . . . shall have power to authorize the state board of land commissioners to exchange granted or acquired lands of the state on an equal value basis for other lands under agreement with the United States, local units of government, corporations, companies, individuals, or combinations thereof.

Under the terms of art. IX, sec. 8, an "exchange" is the only transaction that the Legislature can authorize aside from dispositions at public auction. The meaning of "exchange" as used in art. IX, sec. 8 cannot be altered legislatively: the Idaho Supreme Court has held that the interpretation of constitutional terms is a power reserved solely to the judiciary. Idaho Schools for Equal Educational Opportunity v. Evans, 123 Idaho 573, 583, 850 P.2d 724, 734 (1993). The Court has rejected past legislative attempts to circumvent constitutional limitations through statutory re-interpretation of constitutional terms. For example, in State v. Village of Garden City, 74 Idaho 513, 521-22, 265 P.2d 328, 331-32 (1953), the Court reviewed a legislative attempt to avoid the then-existing constitutional prohibitions on lotteries by defining slot machines as "gaming but not lottery." The Court held that the definitions, while "adroitly and cleverly drawn," did not alter the scope of the constitutional prohibition, because the "Legislature cannot amend or repeal the constitution, or any part of it, by legislative act, nor interpret it." *Id.*

In short, the breadth of the definition of "exchange" in Senate Bill 1277aa does not override any limitations implicit in the term "exchange" as used in art. IX, sec. 8. A reviewing court would interpret the meaning of "exchange" in art. IX by "ascertain[ing] the intent of the drafters by reading the words as written, employing their natural and ordinary meaning, and construing them to fulfill the intent of the drafters." Sweeney v. Otter, 119 Idaho 135, 139, 804 P.2d 308, 312 (1990). "In construing the constitution, the pri-

mary object is to determine the intent of the framers." Idaho Press Club, Inc. v. State Legislature, 142 Idaho 640, 642, 132 P.3d 397, 399 (2006) (quoting Williams v. State Legislature, 111 Idaho 156, 158-59, 722 P.2d 465, 467-68 (1986)). Such intent "comes from the words approved by the drafters and later adopted by the people." Idaho Press Club, Inc., 142 Idaho at 642, 132 P.3d 399. "The presumption is that words used in a Constitution are to be given the natural and popular meaning in which they are usually understood by the people who adopted them." Taylor v. State, 62 Idaho 212, 217, 109 P.2d 879, 880 (1941).

A detailed analysis has not been performed to determine the popular meaning of "exchange" at the time that the exchange authorization was added to art. IX, sec. 8 in 1935, but a preliminary analysis suggests that it would not have been understood to include three-party exchanges with the middle man holding the property only for immediate resale at a previously-fixed price. In 1935, most courts held that an "exchange" occurred "where property is transferred for property [with] no price being set upon either piece," but a sale occurred where the value of the exchanged properties was primarily "measured in money terms." Herring Motor Co. v. Aetna Trust & Savings Co., 154 N.E. 29, 31-32 (Ind. App. 1926); *see also* Postal Telegraph-Cable Co. v. Tonopah & Tidewater R. Co., 248 U.S. 471, 474, 39 S. Ct. 162, 163, 63 L. Ed. 365 (1919) (the term exchange "carries with it no implication of reduction to money as a common denominator"); Ross v. Kenwood Inv. Co., 131 P. 649, 653 (Wash. 1913) (where exchanged property "was dealt with therein as having a fixed and agreed value [the transaction] has generally been regarded in law as a sale rather than a mere exchange"); Grace v. McDowell, 120 P. 413, 415 (Or. 1912) (if "there is a fixed price at which the things are to be exchanged . . . then the transaction is a sale"). A number of courts still hold to this restrictive view of "exchange." *See* State ex rel. King v. Lyons, 248 P.3d 878, 893-95 (N.M. 2011) ("[e]xchanges of land based on the monetary value of each parcel may be considered equivalent to a sale where the appraised consideration is not cash, but land"). When an exchange is transacted solely for the purpose of immediate resale, a court may conclude that the monetary value of the land is the primary determinant of the viability of the transaction. In short, the case law suggests that in 1935, a transaction in which a third party acquires the land for the sole purpose of immediate resale at a set price would not have been viewed as an exchange.

An additional factor suggesting that the proposed definition of "exchange" includes transactions not understood to be exchanges in 1935 is presented by the fact that in facilitated exchanges, the third party merely acts as a middle man for immediate resale to a pre-determined party at a pre-determined price. Such a transaction, absent the middle man, would clearly violate the public auction requirement of art. IX, sec. 8. While the Department would only participate in the first transaction by acquiring land for land, and would not participate in the subsequent sale of the exchanged lands, a reviewing court may not turn a blind eye to the fact that the exchange is structured to facilitate the purchase of the endowment lands cottage sites at a set price, rather than by public auction. If a court concludes that the exchange would not occur "but for" the subsequent or simultaneous sale to the lessees, then the court may conclude that the primary reason for the exchange is to facilitate such a sale. If the primary purpose of the transaction, viewed as a whole, is to sell the endowment lands, then a court may conclude that it is subject to the "disposal at public auction" requirement of art. IX, sec. 8. In short, a court may conclude that the Land Board cannot accomplish through a third party what it is prohibited from doing directly.

Sincerely,

STEVEN W. STRACK
Deputy Attorney General
Natural Resources Division

March 12, 2014

The Honorable Scott Bedke
Speaker of the House
Idaho House of Representatives
VIA HAND DELIVERY

Re: Our File No. 14-47562 — Request for Analysis – Public School Subdistrict Bond Issues

Dear Speaker Bedke:

This letter is in response to your request of March 11, 2014, for legal analysis from this office on several questions concerning public school subdistricts and certain bond issues. For purposes of this analysis, a public school subdistrict will be referred to as a "subdistrict," and the public school district that a given subdistrict resides within and was created by will be referred to as the "parent district." Your specific questions are set forth below with analysis immediately following.

**1. If a created sub-district is paying on a voter approved bond, can the governing [parent] school district run a district wide bond and potentially force a sub-district to pay more than 5% cap of their assessed value?**

With regard to subdistrict indebtedness from the issuance of bonds, Idaho law specifically provides:

> No bonds of a school subdistrict may be issued, however, if the issuance of such bonds would cause the percentage of market value for assessment purposes of taxable property within the boundaries of the school subdistrict represented by the aggregate outstanding indebtedness of the school subdistrict, when added to the percentage of the assessed valuation of taxable property represented by the aggregate outstanding indebtedness of the school district within which the school subdistrict lies, to exceed five percent (5%).

Idaho Code § 33-354. In other words, a subdistrict cannot issue bonds if doing so creates aggregate outstanding indebtedness (AOI)[1] for the subdistrict and the subdistrict's share of the parent district's aggregate outstanding indebtedness that exceeds five percent (5%) of the subdistrict's market value for assessment purposes (MVAP).[2] Notably, the subdistrict's AOI includes both the subdistrict's individual bond indebtedness and the subdistrict's percentage of the parent district's bond indebtedness. Idaho Code § 33-354.

Additionally, with regard to parent district indebtedness from the issuance of bonds, Idaho law specifically provides:

> An elementary school district which employs not less than six (6) teachers, or a school district operating an elementary school or schools, and a secondary school or schools, or issuing bonds for the acquisition of a secondary school or schools, may issue bonds in an amount not to exceed five percent (5%) of the market value for assessment purposes [MVAP][3] thereof, less the aggregate outstanding indebtedness [AOI][4] . . .

Idaho Code § 33-1103(3). Thus, a parent district can issue bonds so long as the issuance of such bonds does not create indebtedness for the parent district that, taken together with existing AOIs, exceeds five percent (5%) of the parent district's MVAP. Significantly, the relevant statutes do not prohibit parent districts from issuing bonds that create indebtedness for a given subdistrict that exceeds the five percent (5%) limit established by Idaho Code section 33-354. So long as the parent district's bond indebtedness does not exceed the parent district's overall five percent (5%) limit set by Idaho Code section 33-1103, parent districts can continue to issue bonds, regardless of the increase to a subdistrict's indebtedness.

**2. Additionally, what bond limitations does sub-districting place on a whole school district for the purpose of levying bonds? And how does a sub-district affect a district wide plant facility or supplemental levy?**

Initially, please note that plant facility levies at both the district and subdistrict levels do not result in the issuance of bonds. *See* Idaho Code

§§ 33-804, 33-804A and 33-355. Rather, taxes levied for plant facility purposes are paid to the district or subdistrict school plant facilities reserve fund. Id. With that said, and as discussed above, Idaho law establishes the maximum amount of bond indebtedness a parent district may incur as follows:

> An elementary school district which employs not less than six (6) teachers, or a school district operating an elementary school or schools, and a secondary school or schools, or issuing bonds for the acquisition of a secondary school or schools, may issue bonds in an amount not to exceed five percent (5%) of the market value for assessment purposes [MVAP] thereof, less the aggregate outstanding indebtedness [AOI] . . .

Idaho Code § 33-1103(3). Subdistricts reside within the boundaries of their respective parent districts. *See* Idaho Code §§ 33-351 and 33-352. Additionally, a parent district's MVAP calculation includes all property within its boundaries, which would include any of the parent district's subdistricts. Idaho Code §§ 33-1103; *see also* Idaho Code §§ 33-351 and 33-352. Thus, a primary affect or limitation imposed upon a parent district by its subdistrict is the inclusion of the subdistrict's indebtedness in calculating the parent district's overall indebtedness for bond purposes. Ultimately, a parent district cannot issue bonds if the issuance of such bonds creates an indebtedness for the parent district, inclusive of all subdistrict indebtedness, that exceeds the five percent (5%) limit set by Idaho Code section 33-1103. However, plant facility levies and supplemental levies are subject to these sections statutory caps.

**3. Finally, could a centrally assessed business in the governing school district be prorated by sub-district?**

A centrally assessed business within one or more school districts or subdistricts could be prorated if the necessary separate tax code areas were created by the Idaho State Tax Commission. However, creating new separate tax code areas must be done in the calendar year prior to a proposed levy. *See* Idaho Code §§ 63-215(1)[5] and 63-807[6].

Creating public school subdistricts, along with new separate tax code areas, and the subsequent issuance of bonds on behalf of or involving such subdistricts involves significant budget, tax and organizational issues. Any school district considering such actions is encouraged to discuss its specific circumstances with its local board of trustees, district administrator(s), district business manager and private legal counsel, as well as the Idaho State Tax Commission, well in advance of any decisions on such actions.

I hope you find this analysis helpful.

Sincerely,

BRIAN KANE
Assistant Chief Deputy

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[1] "Aggregate outstanding indebtedness" shall have the same meaning as provided in section 33-1103, Idaho Code. Idaho Code § 33-354. *See also* Note 4 below.

[2] "Market value for assessment purposes" shall have the same meaning as set forth in section 33-1103, Idaho Code. Idaho Code § 33-354. *See also* Note 3 below.

[3] "Market value for assessment purposes" means the amount of the last preceding equalized assessment of all taxable property and all property exempt from taxation pursuant to section 63-602G, Idaho Code, and property exempt from taxation pursuant to section 63-602KK, Idaho Code, within the school district on the tax rolls completed and available as of the date of approval by the electorate in the school bond election. Idaho Code § 33-1103(1).

[4] "Aggregate outstanding indebtedness" means the total sum of unredeemed outstanding bonds, minus all moneys in the bond interest and redemption fund or funds accumulated for the redemption of such outstanding bonds, and minus the sum of all taxes levied for the redemption of such bonds, with the exception of that portion of such tax levies required for the payment of interest on bonds, which taxes remain uncollected. Idaho Code § 33-1103(1).

[5] "Any taxing district which shall be formed or organized hereafter, or which shall change any existing boundaries hereafter, shall cause one (1) copy of the legal description and map prepared in a draftsmanlike manner which shall plainly and clearly designate the boundaries of such district or municipality as formed or organized, or as altered, to be recorded with the county recorder and filed with the county assessor in the counties within which the unit is located and with the state tax commission within thirty (30) days following the effective date of such formation, organization or alteration but no later than the tenth day of January of the year following such formation, organization or alteration." Idaho Code § 63-215(1).

[6] "Except as otherwise provided by law, no taxing district formed or organized after the first day of January, in any year, shall be authorized to make a levy for that calendar year, nor shall the auditor of any county in which the taxing district may be situated be required to extend any levy on behalf of the taxing district upon the county rolls extended by him for the year." Idaho Code § 63-807.

April 28, 2014

Andrakay Pluid
Bonners Ferry City Attorney
P. O. Box 149
Bonners Ferry, ID 83805

Re: Opinion Request — Enforcement of State Criminal Statutes on Tribal Trust Land

Dear City Attorney Pluid:

You have requested this office's advice concerning the allocation of responsibility for enforcement of state criminal statutes on land held in trust for the Kootenai Tribe of Idaho by the United States. Your letter explains that the Tribe built the Kootenai Tribal Casino and Hotel on the property and that the trust land is located within the Bonners Ferry's municipal boundaries. Until recently, Bonners Ferry enforced state and tribal criminal law pursuant to a Law Enforcement and Fire Protection Agreement with the Tribe. The Tribe has now assumed responsibility for such enforcement. With the agreement's cancellation as to its law enforcement component, a question has arisen over whether Bonners Ferry or the Boundary County sheriff and prosecuting attorney has responsibility for enforcement of state criminal law to the extent that it may apply under federal common law standards.

We assume for purposes of this letter that the trust land constitutes "Indian country" under 18 U.S.C. § 1151. With that assumption in mind, we agree with you that state criminal jurisdiction is limited to crimes by non-Indians against non-Indians or victimless crimes committed by non-Indians. State v. Snyder, 119 Idaho 376, 377-79, 807 P.2d 55, 56-58 (1991); *accord* State ex rel. Poll v. Montana Ninth Jud. Dist. Ct., 851 P.2d 405, 408 (Mont. 1993). Implicit in this authority is the power to enforce state law through those governmental entities or officers who have that authority generally. Indian country remains part of the state in which it is located. *See* Nevada v. Hicks, 533 U.S. 353, 361-62, 121 S. Ct. 2304, 2311-12, 150 L.Ed.2d 398 (2001); Swenson v. Nickaboine, 793 N.W.2d 738, 742 (Minn. 2011). We also agree with you that the controlling statute for purposes of assigning enforce-

ment of state criminal law is Idaho Code § 31-2227. That statute provides in part that "the primary duty of enforcing all the penal provisions of any and all statutes of this state, in any court, is vested in the sheriff and prosecuting attorney of each of the several counties." For present purposes, the relevant sheriff and prosecuting attorney are those for Boundary County in which the trust land is situated.

Because the Law Enforcement and Fire Protection Agreement's law enforcement-related provisions have been terminated, we do not address their validity. We do note, however, that the general principles discussed above controlled during the period in which those provisions applied and that they were not subject to modification by the Tribe or Bonners Ferry.

We hope that this letter adequately responds to your inquiry. Please contact the undersigned with any related questions.

Sincerely,

CLAY R. SMITH
Deputy Attorney General

April 29, 2014

Senator Dan Johnson
Idaho State Legislature
P. O. Box 83720
Boise, ID 83720-0081

Dear Senator Johnson:

This letter responds to your question of whether art. III, sec. 28 of the Idaho Constitution or two statutes, sections 32-201 and 32-209, Idaho Code, related to marriage precludes an individual's request to be buried in the Idaho State Veterans Cemetery beside her same-sex partner.

As it relates to the situation described in the newspaper article referenced in your e-mail to our office, some clarification of the facts is necessary. The living veteran who is the subject of the article appears to be eligible for interment in the Idaho State Veterans Cemetery as a result of being a former member of the armed forces. In accordance with Idaho law and federal regulations, she likely would be eligible as a result of serving in the U.S. armed forces. However, it is worth noting that the Idaho Division of Veterans Services has not actually received a pre-registration application for burial benefits from the individual. Such application would need to be accompanied with the required proof of eligibility – discharge records reflecting honorable military service. As to the deceased same-sex partner of the veteran, no information has been provided to the State Veterans Cemetery that indicates she was a veteran or is otherwise independently eligible for interment at the State Veterans Cemetery. Consequently, although the veteran appears to be eligible for interment in the Cemetery, her deceased same-sex partner is not as a result of the law in the State of Idaho as set forth in more detail below.

The Idaho State Veterans Cemetery was established pursuant to section 65-108, Idaho Code, with its operation, management and control vested in the Idaho Division of Veterans Services (IDVS). It is owned and maintained by the State of Idaho as distinguished from national cemeteries, which are generally owned and operated by the U.S. Department of Veterans Affairs (National Cemetery Administration), the National Park Service or the Department of the Army. Federally-owned cemeteries are administered in

accordance with federal laws and regulations; whereas the Idaho State Veterans Cemetery is administered in accordance with the Idaho Code and Idaho administrative rules (IDAPA).

The administrator of the IDVS is authorized to inter qualified persons eligible for interment in the State Veterans Cemetery pursuant to section 65-202(9), Idaho Code. Eligibility for interment in the Cemetery is set forth in IDAPA 21.01.04 – Rules Governing the Idaho State Veterans Cemetery. Section 020 therein establishes that "an individual is eligible for interment at the cemetery if the individual is a qualified person." A qualified person is defined under Section 010 of the IDAPA rules as "a person who satisfies the requirements for eligibility for interment in national cemeteries found at 38 C.F.R. 38.620 and 38 U.S.C. Section 2402." So, the State Veterans Cemetery eligibility requirements borrow from the eligibility requirements applicable to interment in national cemeteries administered by the Department of Veterans Affairs (VA). VA rules at 38 C.F.R. § 38.620(e), in relevant part, provide that the spouse of a veteran is eligible for interment. The term "spouse" is not defined in that section or anywhere in Part 38 of Title 38 of the federal regulations. Interestingly, it is defined in other parts of VA regulations contained under Title 38, as well as in the U.S. Code at Section 101, Title 38, as "a person of the opposite sex who is a wife or husband." Although those definitions have not been amended yet, such definitions as applied to the administration of federal programs would be invalid, to the extent that they preclude spousal status for same-sex couples married in states authorizing such marriage, as a result of the U.S. Supreme Court decision in U.S. v. Windsor, — U.S. —,133 S. Ct. 786, 184 L.Ed.2d 527 (2012). There, the limitation of the terms "marriage" and "spouse" by Section 3 of the Defense of Marriage Act (DOMA) to mean only heterosexual unions was ruled unconstitutional under the Due Process Clause of the Fifth Amendment as applied to a same-sex couple validly married under the laws of the State of New York.

Regardless of how the term "spouse" or "marriage" is defined in federal law, the Idaho Constitution at art. III, sec. 28, states "[a] marriage between a man and a woman is the only domestic legal union that shall be valid or recognized in this state." Idaho statute has also defined marriage as between a man and a woman. Section 32-201, Idaho Code, states in relevant part "[m]arriage is a personal relation arising out of a civil contract between a man and a woman, to which the consent of parties capable of making it is necessary." These constitutional and statutory provisions control in this matter.

Additionally, Cemetery rules require that proof of eligibility be submitted by a non-veteran spouse of an armed forces member in the form of a valid record of marriage between that individual and the armed forces member. The rule further states that the burden of proof in establishing eligibility for interment rests upon the applicant. IDAPA 21.01.04.020.02 and 03. Although a spouse may be able to produce a valid marriage certificate from a state that allows same-sex marriages, Idaho law would not permit the Cemetery to recognize such. Section 32-209, Idaho Code, provides "[a]ll marriages contracted without this state, which would be valid by the laws of the state or country in which the same were contracted, are valid in this state, unless they violate the public policy of this state. Marriages that violate the public policy of this state include, but are not limited to, same-sex marriages, and marriages entered into under the laws of another state or country with the intent to evade the prohibitions of the marriage laws of this state."

Consequently, as a result of the well-established legal principles of the precedential authority of administrative rules in the hierarchy of expressions of law in the State of Idaho, they do not rise to the level of statutory law enacted by the Legislature, and certainly do not rise to the level of provisions of the state constitution. *See* Mead v. Arnell, 117 Idaho 660, 791 P.2d 410 (1990). To the extent that a rule conflicts with a statutory or constitutional provision, it must fail. "Administrative rules are invalid which do not carry into effect the legislature's intent as revealed by existing statutory law, and which are not reasonably related to the purposes of the enabling legislation." Holly Care Center v. State, Dep't of Employment, 110 Idaho 76, 78, 714 P.2d 45, 47, (1986). Accordingly, the Cemetery rule as it may incorporate any federal definition of the term "spouse" that, pursuant to Windsor includes same-sex spouse, or may otherwise recognize a same-sex spouse as eligible for interment benefits, is invalid to the extent its application is inconsistent with the constitutional and/or statutory provisions identified above.

If you have any further questions or need additional information, please do not hesitate to contact me at (208) 334-4525 or patrick.grace@ag.idaho.gov.

Sincerely,

PATRICK J. GRACE
Deputy Attorney General

June 4, 2014

The Honorable Robert Anderst
Idaho State Representative
7401 E. Grey Lag Dr.
Nampa, ID 83687

Re: Our File No. 14-48275 — Legislators as Precinct Committeemen

Dear Representative Anderst:

This letter is in response to your inquiry as to whether a legislator may also hold the position of precinct committeeman under Idaho law. You have also asked whether a precinct committeeman is a member of the legislative district committee. As explained in greater detail below, the answer to both questions is yes.

Idaho Code sections 34-614 and 614A set forth the statutory qualifications for election as a legislator. Art. III, sec. 6 of the Idaho Constitution sets forth additional constitutional qualifications for election as a legislator. None of them have any restriction prohibiting a candidate for legislature from running as a precinct committeeman. Idaho Code section 34-624 sets forth the qualifications for precinct committeemen. No restriction is present that prohibits a precinct committeeman from holding any other office. Idaho Code § 34-903(5) prohibits the placement of a name on the ballot for more than one partisan office, except for the position of precinct committeeman. That section reads as follows:

> (5) No candidate's name may appear on a ballot for more than one (1) partisan office, except that a candidate for precinct committeeman may seek one (1) additional office upon the same ballot. The provisions of this subsection shall not apply to the election of electors of president and vice-president of the United States.

Notably, there are two exceptions—one for precinct committeeman, and one for presidential electors. This provision specifically permits a precinct committeeman to appear on the ballot and be elected to hold two positions—precinct committeeman and one other partisan office.

Idaho Code § 34-503 provides an overview of the organization of a Legislative District Central Committee. Within that provision, the membership of the committee is identified as:

> The legislative district central committee of each political party in each legislative district shall consist of the precinct committeemen representing the precincts within the legislative district, and the legislative district chairman elected by the precinct committeemen.

Under Idaho law, if you are a precinct committeeman within the legislative district, then you are a member of the Legislative District Central Committee.

This office understands that the Idaho Republican Party has adopted rules that are consistent with these provisions and limits local committee rules to only those rules that are compatible with the State rules and Idaho law. Determination of that consistency is beyond the scope of analysis of this office and is a matter for the State Party and its attorney.

I hope that you find this letter helpful.

Sincerely,

BRIAN KANE
Assistant Chief Deputy

September 4, 2014

Douglas D. Emery
Owyhee County Prosecuting Attorney
P. O. Box 128
Murphy, ID 83650

Re: Our File No. 14-49220 — Request for Written Legal Opinion

Dear Mr. Emery:

Idaho Code section 31-3113 permits the prosecutor to contract with a city to prosecute non-conflicting misdemeanors and infractions. An agreement under Idaho Code section 31-3113 requires the unanimous approval of the County Commission. If your proposed agreement meets these conditions, it is permitted under Idaho Code section 31-3113. The separation of resources and avoidance of commingling of funds as contemplated in your letter should avoid the issues under similar agreements referenced in your letter.

Sincerely,

BRIAN KANE
Assistant Chief Deputy

September 23, 2014

David Hensley
Office of the Governor
VIA HAND DELIVERY

Re: Gas Prices in Idaho

Dear Mr. Hensley:

You have inquired of this office regarding gasoline prices. The following responds to those questions. By way of quick background, Idaho law addresses gasoline prices in two ways. One is through the Idaho Competition Act, which prohibits conspiracies to restrain commerce in Idaho by fixing prices. Idaho Code § 48-104. The other is through the Idaho Consumer Protection Act, which prohibits the charging of "an exorbitant or excessive price" for fuel during the duration of a disaster or emergency declaration. Idaho Code § 48-603(19). The Attorney General is responsible for conducting investigations under and enforcing both Acts. Idaho Code §§ 48-108 and 48-109; Idaho Code §§ 48-606 and 48-611.

It is important to distinguish between these two statutes, because their scope is different and so is the nature of the conduct each proscribes. These differences have implications both for enforcement and for public understanding of what the Attorney General and the State can and cannot do when consumers frustrated with price levels for fuel demand that the State "do something about high prices."

**The Idaho Competition Act and Price Fixing**

The anti-price fixing provision of the Idaho Competition Act is part of the State's antitrust laws. Among the legislative policies underlying these laws are "to maintain and promote economic competition in Idaho commerce" and "to provide the benefits of that competition to consumers and businesses in the state." Idaho Code § 48-102(2). The Legislature intends that the State's antitrust laws be construed in harmony with federal antitrust

statutes and federal case law interpreting those statutes. Idaho Code § 48-102(3).

Idaho Code § 48-104 declares that "[a] contract, combination, or conspiracy between two (2) or more persons in unreasonable restraint of Idaho commerce is unlawful." Consequently, if prices were fixed as the result of such a contract, combination or conspiracy, then there would be a violation of state law. Consumer complaints about fuel prices received by the Office of the Attorney General indicate that some consumers have misconceptions about how Idaho's anti-price fixing law functions.

Some consumers assume that if two or more stations owned by different companies charge the same price for fuel, then that must mean the owners have "fixed" prices. Similarly, some consumers also assume prices must have been "fixed" whenever fuel prices among most stations in a local market rise or fall close to each other in time, even though prices among the stations vary. Such assumptions confuse correlation and cause. The fact that two or more acts share some characteristic or characteristics in common does not, by itself, establish any cause, let alone that the acts have a common cause, or that a particular cause is legal or illegal. Federal and state antitrust laws operate on a more complicated level than surface correlations. A key premise of antitrust law is that there is a legally relevant distinction between "independent" and "concerted" action when it comes to determining the existence of anticompetitive conduct resulting in price fixing. Matushita Electric Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 588, 106 S. Ct. 1348, 1357, 89 L.Ed.2d 538 (1986); Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 768, 104 S. Ct. 1464, 1473, 79 L.Ed.2d 775 (1984).

Antitrust law does not prohibit companies from ever charging the same price. It also does not prohibit high prices in and of themselves. Rather, the law is concerned with how those companies came to charge that price. Under federal and state antitrust law, it is permissible for two or more persons to "independently" raise or lower their prices to the same level. Eso Corp. v. United States, 340 F.2d 1000 (9th Cir. 1965); *accord* United States v. International Harvester Co., 274 U.S. 693, 47 S. Ct. 748, 71 L. Ed. 1302 (1927). What the law prohibits is two or more parties agreeing in advance to fix their prices at a certain level. Monsanto, 465 U.S. at 767. Such conduct is the essence of "concerted" action.

If the conduct of the persons alleged to have engaged in "concerted" action to fix prices is as consistent with permissible competition as it is with illegal conspiracy, then the evidence is insufficient to support an inference of illegality. Matushita, 475 U.S. at 588. To establish an antitrust violation regarding price fixing, then, the evidence must reasonably exclude the possibility of independent action by the parties. Id. "[T]here must be direct or circumstantial evidence that reasonably tends to prove that [the parties] had a conscious commitment to a common scheme designed to achieve an unlawful objective." Monsanto, 465 U.S. at 768.

**The Idaho Consumer Protection Act and "Exorbitant or Excessive" Prices**

Generally, Idaho law does not intervene to restrict the price that a business charges consumers for goods and services. The Legislature, however, has enacted a narrow exception to that policy of non-intervention when it involves the price of fuel, food, pharmaceuticals or water during an officially declared disaster or emergency. In 2002, the Legislature amended the Idaho Consumer Protection Act to add Idaho Code § 48-603(19). 2002 Idaho Sess. Laws 1019. This subsection declares that an unlawful and unfair method of competition or unfair or deceptive act or practice in the conduct of trade or commerce occurs "where a person knows, or in the exercise of due care should know, that he has in the past, or is:"

> (19) Taking advantage of a disaster or emergency declared by the governor under chapter 10, title 46, Idaho Code, or the president of the United States under the provisions of the disaster relief act of 1974, 42 U.S.C. section 5121 et seq., by selling or offering to sell to the ultimate consumer fuel or food, pharmaceuticals, or water for human consumption at an exorbitant or excessive price; provided however, this subsection shall apply only to the location and for the duration of the declaration of emergency. In determining whether a price is exorbitant or excessive, the court shall take into consideration the facts and circumstances including, but not limited to:
>
> (a) A comparison between the price paid by the alleged violator for the fuel, food, pharmaceuticals,

> or water and the price for which the alleged violator sold those same items to the ultimate consumer immediately before and after the period specified by the disaster or emergency declaration;
> (b) Additional costs of doing business incurred by the alleged violator because of the disaster or emergency;
> (c) The duration of the disaster or emergency declaration.

Notwithstanding anything to the contrary contained elsewhere in the act, no private cause of action exists under this subsection.

The Legislature expressed the following intent in enacting Idaho Code § 48-603(19):

> The Legislature finds that during emergencies or disasters, some persons may take unfair advantage of consumers by greatly increasing prices for essential goods and services. While the pricing of consumer goods and services is generally best left to the marketplace under ordinary conditions, when a declared state of emergency or disaster results in abnormal disruptions of the market, the public interest requires that excessive and unjustified increases in the prices of essential consumer goods and services be prohibited.

2002 Sess. Laws 1019.

Idaho Code § 48-603(19) differs from the prohibition of price-fixing contained in the Idaho Competition Act in that it does not require "concerted" action by two or more retailers. Rather, it looks at retailers individually. Its focus is on the degree of a retailer's price changes and whether those prices can be said to be "exorbitant or excessive" in light of all relevant factors.

Idaho Code § 48-603(19) has several key features applicable here. First, it applies only to retail sales to consumers. In the case of motor fuel, that means it does not reach any person or entity up the distribution chain from the station owner from whom the consumer purchased fuel. For

instance, it does not reach the wholesaler from whom the station owner purchased fuel, nor does it reach the refiner of that fuel or the petroleum producer from whom the refiner obtained the crude oil that was refined into that fuel. If gas prices are high because of high wholesale prices, the law does not apply.

Second, the statute's application is narrowly confined in time. It applies only during the duration of a disaster or emergency officially declared by the President or the Governor. This feature needs to be stressed because there is public confusion regarding the scope of the statute. Many people erroneously assume that the statute prohibiting "exorbitant or excessive price[s]," which is commonly referred to as an "anti-price gouging" statute, applies generally—i.e., that it applies all the time. This erroneous assumption can, in turn, lead to misunderstanding regarding the Attorney General's statutory authority to act regarding fuel prices, and, therefore, to misplaced expectations of the Attorney General. As noted previously, the Legislature has made the public policy determination that the legally relevant time period during which "exorbitant or excessive price[s]" are proscribed is for the duration of an officially-declared disaster or emergency.

At present, there is no declaration or emergency declaration, so the price gouging provisions of the Idaho Consumer Protection Act do not apply. Even if there were such a declaration, the present data we do have does not suggest that Idaho motor fuel retailers are charging consumers "exorbitant or excessive price[s]" in violation of the Idaho Consumer Protection Act.

We also are not aware of information suggesting that state antitrust laws have been violated, nor information warranting an investigation of any retailers under the provision of the Idaho Competition Act that prohibits conspiracies to fix prices. This, of course, excludes the cartel practices of OPEC, but their anti-competitive actions are beyond the reach of Idaho's Competition Act.

For several years, the Office of the Attorney General has monitored retail and wholesale gasoline prices in various markets in Idaho on a weekly basis. We do this because gasoline is a major expenditure for Idahoans, and if companies are violating the law, it is important that we investigate and take action. Having data on hand assists us in monitoring the situation.

When we are concerned that Idaho law may have been violated, we have conducted investigations. A number of years ago, for example, we released a report setting forth our investigation of gas prices following Hurricane Katrina. After a very thorough investigation, we concluded that no Idaho law was violated. If you are interested in reviewing the report, it is available online at:

http://www.ag.idaho.gov/consumerProtection/gasolineIssues/postHurricaneKatrinaGasolinePrices_October%202006.pdf.

In 2008, the Legislature asked the Attorney General to investigate gas prices in the State, and he produced the following report:

http://www.ag.idaho.gov/consumerProtection/gasolineIssues/motorFuelPricesInIdaho_June2008.pdf.

As you can see, in both instances, the Office of the Attorney General concluded that Idaho law was not violated, albeit prices were high.

You have also asked about the Governor's authority regarding gas prices. There is nothing presently in statute that grants the Governor power to address or lower gas prices.

If you would like to discuss the contents of this letter further, please call.

Very truly yours,

BRETT T. DELANGE
Deputy Attorney General
Consumer Protection Division

October 10, 2014

Andrakay Pluid
Bonners Ferry City Attorney
7232 Main St.
P. O. Box 149
Bonners Ferry, ID 83805

Re: Question Regarding Ambulance Title and Idaho Constitution, Article VIII, Section 4

Dear Ms. Pluid:

I am writing in response to your September 22, 2014, request for an opinion with regard to whether the City of Bonners Ferry may be in violation of art. VIII, sec. 4 of the Idaho Constitution by signing as a co-signer with Boundary Volunteer Ambulance (BVA), a 501(c)(3) entity, onto the title of an ambulance to be used for emergency medical treatment for Boundary County and the City of Bonners Ferry.

It is my understanding that the ambulance was paid for through the grant process provided by Idaho Code § 56-1018B, which provides as follows:

> (1) There is hereby created in the dedicated fund of the state treasury a fund known as the emergency medical services fund III. Subject to appropriation by the legislature, moneys in the fund shall be used exclusively for the purpose of acquiring vehicles and equipment for use by emergency medical services personnel in the performance of their duties which include highway safety and emergency response to motor vehicle accidents.
>
> (2) The bureau of emergency medical services of the department of health and welfare shall be responsible for distributing moneys from the fund to qualifying nonprofit and governmental entities that submit an application for a grant

> from the fund. The bureau shall approve grants based on the following criteria:
>
> (a) The requesting entity is a nonprofit or governmental entity which holds a current license as an ambulance or nontransport service issued by the state of Idaho;
>
> (b) The requesting entity has demonstrated need based on criteria established by the bureau;
>
> (c) The requesting entity has provided verification that it has received the approval and endorsement of a city or county within its service area;
>
> (d) The requesting entity has certified that the title to any vehicle purchased with funds from the fund shall be in the name of the city or county which endorsed the application and shall submit proof of titling as soon as practicable;
>
> (e) The state of Idaho shall retain a security interest in the vehicle to secure the performance of the grant recipient to utilize the vehicle consistent with the intent described in the application.
>
> (3) Notwithstanding the requirements of subsections (2)(c) and (2)(d) of this section, the bureau of emergency medical services is authorized to approve and issue a grant to an applicant in the absence of an endorsement if the endorsement is withheld without adequate justification.

As you can see above, subsection (2)(d) of this statute requires that a vehicle granted under this provision must be titled to the City.

Art. VIII, sec. 4 of the Idaho Constitution provides that:

> No county, city, town, township, board of education, or school district, or other subdivision, shall lend, or pledge the credit or faith thereof directly or indirectly, in any manner, to, or in aid of any individual, association or corporation, for any amount or for any purpose whatever, or become responsible for any debt, contract or liability of any individual, association or corporation in or out of this state.

The arrangement between the City and BVA does not violate this provision, because the funds for the ambulance came from the Department of Health and Welfare, not the City, and because the mere co-signing on the title does not constitute an extension of credit or liability to BVA.

The Idaho Supreme Court has explained that, "to constitute a violation of Idaho Const. Art. 8 s 4 and Art. 12 s 4, 'it is essential that there be an imposition of liability, directly or indirectly, on the political body. Unless the credit or faith of respondent (public body) is obligated there is no constitutional inhibition.'" Hansen v. Kootenai County Bd. of Comm'rs, 93 Idaho 655, 662, 471 P.2d 42, 49 (1970). "'The word 'credit' as used in this provision implies the imposition of some new financial liability upon the State which in effect results in the creation of State debt for the benefit of private enterprises.'" *Id.* The City has not incurred any financial liability simply by appearing on the title of the ambulance along with BVA in compliance with Idaho Code § 56-1018B.

Caution should be exercised within the agreement between the City and the BVA. For example, a contingent liability could arise based upon the City's ownership of the vehicle and a BVA employee's use of the vehicle. *See, e.g.*, Boise Dev. Co., Ltd. v. City of Boise, 26 Idaho 347 143 P. 531 (1914) (Holding that a contingent liability violated art. III, sec. 3 of the Idaho Constitution). The City should carefully review its legal obligations with regard to titling and liability. Perhaps more importantly, the City should review the issues contained within this letter with its Risk Manager and insurance provider to ensure that any such arrangement is adequately covered. It may be necessary for any agreement to contain adequate provisions to ensure that no contingent liability can be assessed to the City.

Moreover, Idaho case law emphasizes that the purpose of art. VIII, sec. 4 is to prohibit the use of public funds to benefit private schemes. *Id.* The City's co-signing with BVA, a 501(c)(3) entity, onto the title of an ambulance to be used for emergency medical treatment for Boundary County and the City advances a public purpose. In order to ensure compliance with these factors, you may want to advise the City to adopt a resolution identifying the need for the ambulance, the fulfillment of a public purpose necessary to provide for the health, safety and welfare of its citizens under the authority in art. XII, sec. 2 of the Idaho Constitution and any other necessary provisions.

Finally, Idaho Code § 56-1018B(2)(d) does not appear to authorize any joint titling of the vehicle. The statute directs: "the title to any vehicle purchased with funds from the fund shall be in the name of the city . . . ." No allowance is made within the statute for joint ownership of the vehicle with a non-governmental entity. Based on this provision, it is recommended that the City strictly comply with the provisions of the statute, as well as provide the appropriate contracting arrangement to ensure the City's ownership and legal interests are fully protected.

As outlined above, it is likely that ownership of the ambulance by the City is legally defensible provided certain conditions are met. I hope that you find the content of this letter helpful. If you would like to discuss this issue in greater detail, please contact me.

Sincerely,

ROBERT M. ADELSON
Deputy Attorney General

October 21, 2014

Randall R. Adams
Adams & Gaffaney, LLP
1810 E. Schneidmiller Ave., Ste. 301
Post Falls, ID 83854

Re: Our File No. 14-49549 — Municipal Firearm Regulation

Dear Mr. Adams:

You have requested our views on the authority of the City of Coeur d'Alene to regulate the carrying of firearms during, in and around assemblies such as parades pursuant to Idaho Code § 50-308. That statute provides:

> Cities shall have power: to prevent and restrain riots, routs, noises, disturbances or disorderly assemblies; to arrest, regulate, punish, fine or set at work on the streets or elsewhere, vagrants or persons found without visible means of support or legitimate business; license and regulate theaters, halls, concerts, dances, theatrics, circuses, carnivals, exhibitions, amusements and other performances, where an admission fee may or may not be charged.

However, Idaho Code § 18-3302J(2) states:

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

The following subsection has a general exclusion (which itself has certain exceptions not relevant here) from this general preemption of local authority:

"A county may adopt ordinances to regulate, restrict or prohibit the discharge of firearms within its boundaries." Idaho Code § 18-3302J(3). Under settled principles of statutory construction, the answer to your question is that the City does not have the authority to regulate the carrying of firearms as an adjunct to its section 50-308 powers.

"[S]tatutes relating to the same subject, although in apparent conflict, are construed to be in harmony if reasonably possible." Cox v. Mueller, 125 Idaho 734, 736, 874 P.2d 545, 547 (1994). You suggest that these statutes do relate to the same subject. Assuming this to be true, the issue is what subject. Literally read, the common feature is that both deal with the scope of cities' police powers. One is quite general—authorizing them to regulate a broad range of public activities but silent as to firearms—while the second focuses exclusively on firearms. Another canon, to which your letter also refers, supplies the pole star under these circumstances: "Where more than one statutes are related to the same subject, the statutes are *in pari materia*. . . . When construing such statutes, 'the specific statute will control over the more general statute.'" Leavitt v. Craven, 154 Idaho 661, 667, 302 P.3d 1, 7 (2012) (citations omitted).

Here, as the more specific statute, section 18-3302J(2) controls. The introductory phrase "[e]xcept as expressly authorized by state statute" must be interpreted consistently with what follows; *i.e.*, express permission under another statute to regulate firearms. Section 50-308 contains no such authorization. The City thus may not regulate the *carrying* of firearms in or about public assemblies. It may regulate their *discharge* unless one of the exceptions in section 18 3302J(3) applies.

I hope that this analysis responds adequately to your request. Please contact me with any questions.

Sincerely,

BRIAN KANE
Assistant Chief Deputy

October 29, 2014

The Honorable Hy Kloc
Idaho State Representative
3932 Oak Park Place
Boise, ID 83703

Re: Our File No. 14-49613 — Request for Analysis – Local Government Community Match Under Idaho Reimbursement Incentive Act

Dear Representative Kloc:

This letter is in response to your request of October 13, 2014, for legal analysis from this office on the following question:

> Is a contribution of money or waiver of otherwise applicable fee pursuant to the IRIA [Idaho Reimbursement Incentive Act] defensible as an expenditure of public funds for a "public purpose" as that doctrine is specifically applied to economic development in *Village of Moyie Springs v. Aurora Mfg. Co.*, 82 Idaho 337, 353 P.2d 767 (1960)?

Based on the analysis below, it is likely that any community match provided by a local government to a private entity under the Idaho Reimbursement Incentive Act (IRIA) would need to be for a project that 1) served a public purpose, and 2) in which the local government would own a share of any property created proportionate to the local government's community match provided.

Under the IRIA, a business entity's application for a refundable tax credit must include proof of a community match. Idaho Code § 67-4739(1)(c). A community match is defined as:

> . . . [A] **commitment by the local government** that demonstrates its active support of the applicant creating new jobs in its jurisdiction. Such match **may include, but shall not be**

> **limited to, a contribution of money, fee waivers, in-kind services, the provision of infrastructure or a combination thereof**. Such match shall also include a letter of commitment by the governing elected officials of the jurisdiction detailing the local government's support that shall be included as part of an application.

Idaho Code § 67-4738(5) (emphasis added).

The Idaho Constitution restricts local government expenditures as follows:

> **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:** provided, that cities and towns may contract indebtedness for **school, water, sanitary and illuminating purposes:** provided, that any city or town contracting such indebtedness **shall own its just proportion of the property thus created** and receive from any income arising therefrom, its proportion to the whole amount so invested.

Idaho Const. art. XII, sec. 4 (emphasis added). Thus, the Idaho Constitution provides a local government cannot "raise money for, or make donation or loan its credit to, or in aid of" a private company except for "school, water, sanitary and illuminating purposes," so long as the local government "own[s] its just proportion of the property thus created." *See id.* This section of the Idaho Constitution is the basis for the "public purpose" doctrine set forth in Village of Moyie Springs v. Aurora Mfg. Co. and referenced in your inquiry.

In Village of Moyie Springs, the Idaho Supreme Court held that "expenditure of public money for a private purpose" was prohibited and that "it does not matter whether the money is derived by ad valorem taxes, by gift, or otherwise." Village of Moyie Springs v. Aurora Mfg. Co., 82 Idaho 337, 347, 353 P.2d 767, 773-74 (1960).[1] The Court also held that the powers of local governments are "limited to functions and purposes which are munici-

pal and public in character," and, significantly, the Court held "we do not agree that an ***incidental or indirect benefit to the public*** can transform a private industrial enterprise into a public one, or imbue it with a public purpose." Village of Moyie Springs, 82 Idaho at 346, 353 P.2d at 773 (emphasis added); *see also* Village of Moyie Springs, 82 Idaho at 346, 353 P.2d at 773 ("It is true, of course, that the city may be benefited by the location of the company in the city. It may produce employment for citizens of the community. It may tend to balance a locally restricted economy. But general benefit to the economy of a community does not justify the use of public funds of the city unless it be for a public as distinguished from a private purpose." (citing State ex rel. Beck v. City of York, 82 N.W.2d 269, 274 (Neb. 1957)).

Based upon the constitutional limitation in art. XII, sec. 4 and Village of Moyie Springs, a local government considering the IRIA should identify the public purpose being served.[2] When reviewing the permissive "commitments" provided for in Idaho Code § 67-4739(1)(c), caution should be exercised in providing certain commitments as opposed to others. For example, it is more difficult to defend a contribution of money or a fee waiver, as meeting the public purpose test. This difficulty can be compared to a commitment consisting of improved or upgraded infrastructure, which would benefit the people within the local government.

Considering the authorities above, it is likely that a community match of money or fee waiver offered by a local government to a private entity for purposes of IRIA would need to be in support of a project serving a public purpose, not merely providing an indirect benefit to the community, and a project in which the local government would own a share of any property created under the project proportionate to the community match provided. The direct answer to your question as to whether requirement of a "commitment" is legally defensible will be determined on a case-by-case basis that will be addressed by the entities involved and their counsel.

I hope you find this analysis helpful.

Sincerely,

BRIAN KANE
Assistant Chief Deputy

[1] With respect to your inquiry, a court would likely apply the same analysis to a community match of either money or the waiver of an otherwise applicable fee.

[2] As outlined in Village of Moyie Springs: sewage systems, water systems, power plants, public utilities, services essential to the welfare of all people in the local government, slum clearance, removal of blighted areas, protection and conservation of the public health, eliminate crime, or to protect the lives and limbs of people. *Id.* at 347-48, 353 P.2d 774, citing State v. Town of North Miami, Fla., 59 So.2d 779, 787 (Fla. 1952).

December 16, 2014

The Honorable Shawn Keough
Idaho State Senator
P. O. Box 101
Sandpoint, ID 83864

Re: Our File No. 14-50010 — Bingo and Merchant Promotional Contests and Drawings

Dear Senator Keough:

Your recent inquiry regarding bingo and merchant promotional contests and drawings was referred to me for response. From review, a constituent has inquired about the legality of hosting and operating a bingo night under a merchant promotion exception contained in art. III, sec. 20 of the Idaho Constitution and Idaho Code section 18-3801. The facts relayed in his email describe the following situation: MickDuff's Brewing Company wishes to host a bingo night at its establishment. MickDuff's intends to offer all attendees one free game card, no purchase necessary, simply by attending the event. Additional game pieces will be offered with the purchase of MickDuff's promotional merchandise (e.g., t-shirts). What is not clear from the facts is whether or not game pieces will be available for purchase as a standalone item. MickDuff's intends to play multiple bingo games per night. MickDuff's further inquired if offering to supply a free game card for each bingo game would change the answer to this inquiry.

First and foremost, it is important to know that neither the Idaho Lottery nor the Office of the Attorney General have the primary responsibility of enforcing Idaho's penal laws, including the gambling statute cited by MickDuff's. This primary duty and authority is granted to the sheriff and prosecuting attorney of each of the several counties. See Idaho Code § 31-2227. Further, Idaho State Police's Alcohol Beverage Control Bureau maintains oversight and regulation concerning by-the-drink licenses and may take a different read on the relevant gambling law. Finally, no part of this advice should be relied upon in the place of advice delivered to your constituent by his or her attorney; this represents a legal analysis to a legislator as required

by Idaho Code section 67-1401(6). This analysis is provided to assist you and your constituent, but is not binding or authoritative in the event local law enforcement has a different opinion or interpretation.

**Idaho Constitutional Provisions Regarding Gambling**

Idaho Constitution art. III, sec. 20 prohibits gambling with limited exceptions. Those exceptions include:

a. A state lottery which is authorized by the state if conducted in conformity with enabling legislation;
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.[1]

Bingo and raffle games run by charitable organizations for a charitable purpose are an exception to the prohibition on gambling. This constitutional provision also states that a number of activities are not gambling by definition:

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.[2]

Based on the facts presented to this office, it does not appear that MickDuff's is a charitable organization and that it will operate the bingo games in pursuit of a charitable purpose. Under a strict reading of the Constitution, the inquiry should end there and the conclusion would be MickDuff's may not operate bingo games regardless of all other facts. Additionally, MickDuff's inquiry suggests that because it will offer at least one game card free of charge per attendee, then it should fall under the exception to the definition of gambling as "a merchant promotional contest and drawing conducted incidentally to bona fide non gaming business operations."

But the playing of bingo as envisioned does not fall within this exception. It is logically inconsistent that one could offer prohibited gambling by providing a "first card free" promotion and then charge for precisely what is prohibited. This is reinforced by a canon of constitutional interpretation that the provisions of the Constitution are to be considered as a whole with effect given to each term in order to leave no part useless or devoid of meaning.[3] Distinct meaning is given to the words "bingo," "contest," and "drawing," and indicates that the drafters intended each to mean separate things, not inclusive of one or the other. The plain language of this constitutional provision requires that all bingo games under the definition of gambling must be run by charitable organizations for a charitable purpose. One cannot reasonably assume that the drafters meant only some bingo games must be operated by charitable organizations, while other bingo games may be run by private for profit entities. This conclusion is further supported by the enabling statutes contained in title 67, chapter 77, Idaho Code, for the lawful operation of bingo and raffles.

**Idaho Code Title 67, Chapter 77, Bingo**

Idaho adopted enabling legislation pertaining to bingo as specified by the Constitution. This enabling legislation upholds the constitutional mandate that all bingo games be operated by qualified charitable organizations in pursuit of charitable purposes.[4] There are four explicitly stated public policy reasons stated in Idaho Code § 67-7701 for only allowing charitable organizations and non-profits to operate bingo games:

1. To protect the public from fraudulently conducted bingo games and raffles;
2. To assure that charitable groups and institutions realize the profits from these games;
3. To prohibit professionals conducting bingo games or raffles for fees or a percentage of the profit; and
4. To provide that all expenditures by a charitable or nonprofit organization in conducting bingo games and raffles are in the best interest of raising moneys for charitable purposes.[5]

An interpretation that allows "promotional contests and drawings" to include bingo games as envisioned by the factual scenario presented,

infringes on the stated public policy against allowing non-charitable, for profit entities to operate bingo games.

Sincerely,

BRIAN KANE
Assistant Chief Deputy

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[1] Idaho Const. art. III, § 20(1).

[2] Idaho Const. art. III, § 20(4).

[3] Westerberg v. Andrus, 114 Idaho 401, 403, 757 P.2d 664, 666 (1988).

[4] Idaho Code §§ 67-7701; 67-7707.

[5] Idaho Code § 67-7701.

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