IDAHO ATTORNEY GENERAL'S ANNUAL REPORT

OPINIONS

CERTIFICATES OF REVIEW

AND

SELECTED ADVISORY LETTERS

FOR THE YEAR

2015

Lawrence G. Wasden
Attorney General

Printed by The Caxton Printers, Ltd.
Caldwell, Idaho

This volume should be cited as:
2015 Idaho Att'y Gen. Ann. Rpt.

Thus, the Official Opinion 15-1 is found at:
2015 Idaho Att'y Gen. Ann. Rpt. 5

Similarly, the Certificate of Review of March 10, 2015 is found at:
2015 Idaho Att'y Gen. Ann. Rpt. 51

The Advisory Letter of January 6, 2015 is found at:
2015 Idaho Att'y Gen. Ann. Rpt. 67

CONTENTS

ATTORNEYS GENERAL OF IDAHO

GEORGE H. ROBERTS.....1891-1892
GEORGE M. PARSONS 1893-1896
ROBERT McFARLAND 1897-1898
S. H. HAYS.....1899-1900
FRANK MARTIN 1901-1902
JOHN A. BAGLEY 1903-1904
JOHN GUHEEN.....1905-1908
D. C. McDOUGALL 1909-1912
JOSEPH H. PETERSON 1913-1916
T. A. WALTERS 1917-1918
ROY L. BLACK.....1919-1922
A. H. CONNER 1923-1926
FRANK L. STEPHAN 1927-1928
W. D. GILLIS 1929-1930
FRED J. BABCOCK 1931-1932
BERT H. MILLER 1933-1936
J. W. TAYLOR 1937-1940
BERT H. MILLER 1941-1944
FRANK LANGLEY 1945-1946
ROBERT AILSHIE (Deceased November 16).....1947
ROBERT E. SMYLIE (Appointed November 24).....1947-1954
GRAYDON W. SMITH 1955-1958
FRANK L. BENSON 1959-1962
ALLAN B. SHEPARD 1963-1968
ROBERT M. ROBSON 1969-1970
W. ANTHONY PARK 1971-1974
WAYNE L. KIDWELL.....1975-1978
DAVID H. LEROY.....1979-1982
JIM JONES.....1983-1990
LARRY ECHOHAWK 1991-1994
ALAN G. LANCE 1995-2002
LAWRENCE G. WASDEN 2003

Lawrence G. Wasden
Attorney General

INTRODUCTION

Dear Fellow Idahoan:

It is again my pleasure to report to citizens and elected officials on the significant matters, legal victories and enforcement activities involving the Office of the Attorney General.

The highlights from 2015 feature winning a complex lawsuit in the U.S. Supreme Court, defending consumers and the marketplace, and settling a lawsuit that led to one of the largest financial recoveries in state history.

It is also important to note the accomplishments that occurred beyond the walls of a state or federal courtroom. Throughout 2015, deputies and staff in my office played an important role in making positive impacts on the lives of Idahoans living in every corner of the state.

For example, my Consumer Protection Division took steps necessary to protect charitable assets with investigations into a Treasure Valley-based aquarium and eastern Idaho hospital. My Natural Resources Division engaged in critical negotiations on water rights in north Idaho and helped broker an agreement dealing with conjunctive management issues on the Snake River and Eastern Snake Plain Aquifer. Investigators in my Internet Crimes Against Children Unit continued to protect Idaho's children from online sexual predators by initiating more than 300 investigations into possible crimes.

In January 2015, I began my fourth term as your Attorney General. Much has changed in Idaho, and nationally, during those 12 years in office. What hasn't changed, however, is my commitment to providing legal advice that is accurate and objective, defending Idaho's laws and sovereignty and adhering to the Rule of Law.

A major achievement in 2015 was winning a case at the nation's highest court. In March, in a 5-4 decision, the Supreme Court reversed a lower court decision, essentially defending the state's right to set Medicaid reimbursement rates. The decision was important because it reinforced the authority of the Idaho Legislature and rejected the notion that private interests could usurp that role.

Two other important victories occurred in the first quarter of 2015. In February, Idaho joined 19 other states and the federal government to resolve a lawsuit against Standard & Poor's Financial Services. The credit rating company paid $1.3 billion to end litigation from allegations it engaged in false, deceptive and misleading practices leading up to the national financial crisis that began in 2008. Of that total, Idaho recovered $21.5 million, the largest amount ever against a single defendant, with the exception of the recovery from the tobacco companies in 1998.

INTRODUCTION (Cont.)

Seven days later, the 9th U.S. Circuit Court of Appeals affirmed a decision finding that St. Luke's Health System violated state and federal antitrust laws when it purchased a physician-owned clinic. Throughout the rest of 2015, my Consumer Protection Division worked with St. Luke's to unwind the acquisition.

To protect Idaho's sovereignty over water, I joined 12 other states in a lawsuit challenging a new rule promulgated by the U.S. Environmental Protection Agency. In November, the state won an important early victory in the challenge to the rule, known as the Waters of the United States, or WOTUS, when a federal judge in North Dakota issued an injunction, in effect delaying imposition of the rule in the 13 states.

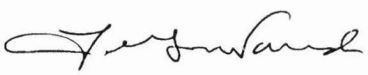
My office again traveled the state to educate and promote open and transparent government. Joining forces again with Idahoans for Openness in Government, the Idaho Press Club and League of Women Voters, we hosted seminars in Boise, Nampa and McCall on Idaho's Open Meeting and Public Records laws. The plan for 2016 is to hold seminars across eastern Idaho. I continue to believe that the best government is one that is open and transparent with the public it serves.

In addition to the seminars, my office updated its manuals on Open Meetings, Public Records and Ethics in Government to reflect the changes made by the Legislature. During the 2015 session, lawmakers agreed to put Open Meeting and Public Records laws into a new title of the Idaho Code. These chapters are now found in Title 74, aptly named "Transparent and Ethical Government."

These achievements, and others, reinforce my belief that the best approach to doing my job is to call legal balls and strikes fairly and squarely. My hope today is the same as when I was sworn into office in 2003: That Idaho's lawmakers and elected leaders continue to provide the Attorney General with the resources and authority necessary to provide the state with sound, cost-effective, legal counsel.

I encourage everyone to visit my website at http://www.ag.idaho.gov to learn more about the office, the work being done and the resources available for consumers and other legal matters.

Thank you for the interest in the legal affairs of our great state.



LAWRENCE G. WASDEN
Attorney General

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LAWRENCE G. WASDEN
ATTORNEY GENERAL
2015
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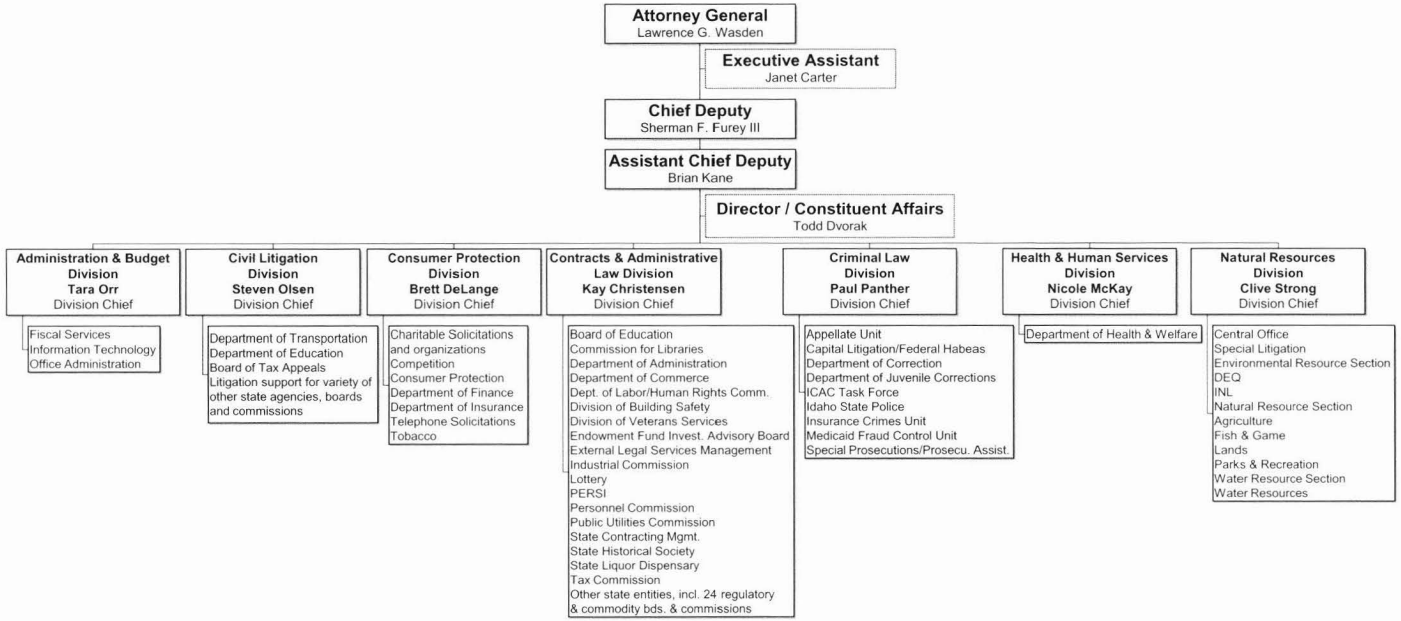
Office of the Idaho Attorney General
Organizational Chart - 2015



OFFICIAL OPINIONS
OF
THE ATTORNEY GENERAL
FOR THE YEAR 2015

LAWRENCE G. WASDEN

ATTORNEY GENERAL
STATE OF IDAHO

ATTORNEY GENERAL OPINION NO. 15-1

To: The Honorable Lawerence Denney
Idaho Secretary of State
Statehouse
VIA HAND DELIVERY

Per Request for Attorney General's Opinion

You asked this office for a clarification of the following question under the Sunshine Law:

QUESTION PRESENTED

Should a state employee lobbyist who proffers gifts and/or benefits to legislators and/or executive officials register and disclose his or her conduct as a lobbyist?

CONCLUSION

This answer is "yes" with limited exceptions explained below.

ANALYSIS

Regulation of lobbying in Idaho is statutory and is controlled by Idaho's Sunshine Law, Idaho Code §§ 67-6601 through 67-6630. "Lobby" and "lobbying" are defined in Idaho Code § 67-6602(j). This subsection is long and not explicitly broken into parts. It contains two independent definitions of lobbying (labeled as parts [I] and [II] below) and five "carve outs" from the definition of lobbying (labeled parts [III] through [VII] below).

In order to make this subsection more understandable, it is reformatted and broken up into two or three subparts for each of its seven parts. Those subparts are: (1) the kinds of contacts or communications covered by each part (labeled "[A]"); (2) the persons who are contacted (labeled "[B]"), and (3) the purposes of the contact (labeled "[C]"). Subsection (j) is set out in full below with an explicit structure imposed over the top of it:

[I] "Lobby" and "lobbying" each means:
- [A] attempting through contacts with, or causing others to make contact with
- [B] members of the legislature or legislative committees or an executive official
- [C] [i] to influence the approval, modification or rejection of any legislation by the legislature of the state of Idaho or any committee thereof or by the governor; or
  - [ii] to develop or maintain relationships with, promote goodwill with, or entertain members of the legislature or executive officials

[II] "Lobby" and "lobbying" shall also mean:
- [A] communicating
- [B] with an executive official
- [C] for the purpose of influencing
  - [i] the consideration, amendment, adoption or rejection of any rule or rulemaking as defined in section 67-5201, Idaho Code; or
  - [ii] any ratemaking decision, procurement, contract, bid or bid process, financial services agreement, or bond issue

[III] Neither "lobby" nor "lobbying" includes:
- [A] an association's or other organization's act of communicating
- [B] with the members of that association or organization; and

[IV] provided that neither "lobby" nor "lobbying" includes:
- [A] communicating
- [B] with an executive official
- [C] for the purpose of carrying out ongoing negotiations following the award of a bid or a contract

[V] [A] communications
- [B] conducted by and with attorneys for executive agencies

[C] involving ongoing legal work and negotiations

[VI] [A] interactions
[B] between parties in litigation or other contested matters; or

[VII] [A] communications
[B] [i] among and between members of the legislature and executive officials and their employees; or
[ii] by state employees
[C] while acting in their official capacity or within the course and scope of their employment.

Idaho Code § 67-6602(j) (bracketed subdivisions added; subsection reformatted).

Thus, a state executive officer or employee who contacts a legislator or who testifies before a legislative committee "to influence the approval, modification or rejection of any legislation" would be within subdivision [I][C][i]'s definition of lobbying unless that activity is "carved out" later in subsection (j). The same would apply to a state employee who communicates with an executive officer to influence rulemaking, contracting, etc.; the employee would be lobbying within the meaning of subdivision [II][C][i] or [ii] unless there is a "carve out."

However, subdivision [VII][C] is just such a carve out: State officers and employees may communicate with legislators or decision-making executive officers while acting in their official capacities or within the course and scope of their employment. This "carve out" for official capacity expression of the officer's or agency's position or views on legislation, rulemaking, procurement, etc. (these are activities otherwise covered by subdivisions [I][C][i] and [II][C][i] and [ii]) is not a "carve out" from all lobbying activities defined in subsection (j). In particular, there is no "carve out" from subdivision [I][C][ii]: contacts with legislative or executive officers "to develop or maintain relationships with, promote goodwill with, or entertain members of the legislature or executive officials."

To take a first step toward answering your specific question on whether state employees who proffer gifts and/or benefits to legislators and/or executive officials must register and report as lobbyists, the preceding analysis shows that a state employee who proffers such gifts or benefits is lobbying under § 67-6602(j). That makes the employee a "lobbyist" within the meaning of § 67-6602(k) and the employee's agency or constitutional office a "lobbyist's employer" within the meaning of § 67-6602(l).

That leads to the next question: Are there any "carve outs" from the general rules for registering and reporting by lobbyists that would apply to a state employee "who proffers gifts and/or benefits to legislators and/or executive officials?" As explained below, there are some narrow "carve outs."

Idaho Code § 67-6617 requires lobbyists to register with the Secretary of State. Idaho Code § 67-6618 provides a number of exemptions from registration and reporting, two of which may be applicable to state officers or employees "who proffer gifts and/or benefits to legislators and/or executive officers." The applicable part of § 67-6618 provides:

> **67-6618. Exemption from registration**. — The following persons and activities shall be exempt from registration and reporting under sections 67-6617 and 67-6619, Idaho Code:
>
> . . .
>
> (c) Persons who do not receive any compensation for lobbying and persons whose compensation for lobbying does not exceed two hundred fifty dollars ($250) in the aggregate during any calendar quarter, including persons who lobby on behalf of their employer or employers, and the lobbying activity represents less than the equivalent of two hundred fifty dollars ($250) of the employee's time per calendar year quarter, based on an hourly proration of said employee's compensation.
>
> (d) Elected state officers and state executive officers appointed by the governor subject to confirmation by the sen-

ate; elected officials of political subdivisions of the state of Idaho, acting in their official capacity.

. . .

Subsection (c)'s exception is highly dependent upon the hourly rate of the employee involved. For example, a lower-paid staffer who is tasked with providing coffee and doughnuts to a legislative delegation visiting an agency might well be acting on behalf of the agency "to develop or maintain relationships with, promote goodwill with, or entertain members of the legislature or executive officials," but there is an exemption from registering and reporting as a lobbyist under subsection (c) so long as the staffer was not paid more than $250 while performing those duties. On the other hand, a highly-paid employee who took a legislator to a tailgate party, a football game, and out for dinner afterward could easily exceed the $250 limit in an afternoon and evening. Subsection (c)'s exception is strictly dependent upon the hourly compensation of the employee.

Subsection (d)'s exception is narrow: Among state officers and employees it applies only to elected officers and executive officers appointed by the governor and confirmed by the senate. Thus, to take an example, a department director appointed by the governor and confirmed by the senate as provided in Idaho Code § 67-2404 would be exempt from registering and reporting as a lobbyist for gifts "to develop or maintain relationships with, promote goodwill with, or entertain members of the legislature or executive officials," but a deputy director appointed by the director pursuant to § 67-2403 would not.

Idaho Code § 67-6619 also contains an implicit exception from reporting of lobbying activities. It is set out below:

67-6619. Reporting by lobbyists. — . . .

(2) Each annual, semiannual and monthly periodic report shall contain:

(a) The total of all expenditures made or incurred on behalf of such lobbyist by the lobbyist's employer or employers, not including payments made directly to

> the lobbyist, during the period covered by the report.
> . . .
>
> (b) The name of any legislator or executive official to whom or for whose benefit on any one (1) occasion, an expenditure . . . in excess of one hundred dollars ($100) per person on and after January 1, 2011, for the purpose of lobbying, is made or incurred and the date, name of payee, purpose and amount of such expenditure. Expenditures for the benefit of the members of the household of a legislator or executive official shall also be itemized if such expenditure exceeds the amount listed in this subsection.
>
> . . .
>
> (e) The itemization threshold in subsection (2)(b) of this section shall be adjusted biennially by directive of the secretary of state, using consumer price index data compiled by the United States department of labor.[1]
>
> . . .

Thus, under subsection (2)(b) and (e), state officers or employees who are not otherwise exempt from registering and reporting as lobbyists and who "proffer gifts and/or benefits to legislators and/or executive officials" (or members of their households) but who do not spend more than $105 per legislator or executive officer (together with members of their households) in doing so must report their aggregate expenditures under subsection (2)(a), but need not break down their expenditures by the individual person lobbied.

In summary, with the exception of elected state officials and state officers appointed by the governor and approved by the senate, a state officer or employee who "proffers gifts and/or benefits to legislators and/or executive officials" is generally required to register and report as a lobbyist. There are two exceptions: for employees whose compensation for time spent lobbying does not exceed $250 (who need not register or report) and for lobbying

expenditures that do not exceed $105 per person (who need not report upon whose behalf the expenditures were made).

AUTHORITIES CONSIDERED

1. Idaho Code

§ 67-2403.
§ 67-2404.
§§ 67-6601 through 67-6630.
§ 67-6602(j).
§ 67-6602(k).
§ 67-6602(l).
§ 67-6617.
§ 67-6618.
§ 67-6618(c).
§ 67-6618(d).
§ 67-6619.
§ 67-6619(2)(a).
§ 67-6619(2)(b).
§ 67-6619(2)(e).

Dated this 16th day of March, 2015.

LAWRENCE G. WASDEN
Attorney General

Analysis by:

MICHAEL S. GILMORE
Deputy Attorney General

[1] The current lobbying reporting forms on the Secretary of State's website show that the $100 figure found in subsection (2)(b) has been increased to $105 pursuant to subsection (2)(e) to take into account changes in the Consumer Price Index.

ATTORNEY GENERAL OPINION 15-2

To: Director Thomas Schultz
Idaho Department of Lands
300 N. 6th St. #103
Boise, ID 83702
Via Statehouse Mail

Per Request for Attorney General's Opinion

You requested this office provide an opinion concerning the following question.

QUESTION PRESENTED

Are the lands occupied by the old state penitentiary subject to Article IX, §§ 7 and 8, which require the State Board of Land Commissioners to conduct a public auction to sell or lease lands granted to the State by the general government?

CONCLUSION

There are no constitutional restraints on the sale or disposition of penitentiary reserve lands. Such lands are not subject to the Idaho Constitution art. IX, sections 7 and 8, and may be sold or leased in accordance with the legislative directive in Idaho Code § 58-337.

FACTUAL BACKGROUND

In 1869, the Territory of Idaho began construction of a penitentiary on 280 acres of land east of Boise that is now the site of the old penitentiary and a complex of other state buildings. House Concurrent Resolution No. 8, *Laws and Resolutions of the 5th Legislative Assembly of the Terr. of Idaho* 176-77 (1869). Prior to Statehood, with the purchase of adjoining property, land occupied by the penitentiary grew to approximately 550 acres.

When Idaho was admitted to the Union in 1890, the United States made a number of land grants to Idaho for various purposes. Pursuant to Section 4 of the Idaho Admission Act, sections 16 and 36 in every township were granted to Idaho "for the support of common schools." 26 Stat. L. 215, ch. 656 (1890). Pursuant to Section 6 of the Admission Act, 50 sections of land were granted for "the purpose of erecting public buildings." *Id.* at 216. Pursuant to Section 8, 72 sections of land were granted with the income from the lands to be deposited in a permanent fund to be used for "university purposes." *Id.* Pursuant to Section 10, 90,000 acres of land were donated for the support of an agricultural college. *Id.* Pursuant to Section 11, 500,000 acres were granted for the support and maintenance of various state institutions, including 50,000 acres of land "for the support and maintenance of the penitentiary, located at Boise City . . . ." *Id.* at 216-17.

Finally, pursuant to Section 9 of the Idaho Admission Bill, the United States granted the territorial penitentiary and its associated 550 acres of land to the State:

> That the penitentiary at Boise City, Idaho, and all lands connected therewith and set apart and reserved therefor, and unexpended appropriations of money therefor, and the personal property of the United States now being in the Territory of Idaho which has been in use in the said Territory in the administration of the Territorial government, including books and records and the property used at the constitutional convention which convened at Boise City in the month of July, eighteen hundred and eighty-nine, are hereby granted and donated to the State of Idaho.

26 Stat. L. at 216. For convenience in this Opinion, the 550 acres of lands originally occupied by the territorial penitentiary, and granted to the State in Section 9 of the Admission Act, are referred to as the "penitentiary reserve lands."

In 1902, Idaho selected lands for support of the penitentiary pursuant to Section 11 of the Idaho Admission Bill. The selected lands included 267.27 acres adjoining the penitentiary reserve lands on the east boundary. After a land sale in 1949, there remains 80 acres in Section 13, T3N, R2E and

107.21 acres in Section 18, T3N, R3E, a total of 187.27 acres, adjoining the penitentiary reserve lands. Those 187.27 acres are referred to herein as "penitentiary endowment lands."

ANALYSIS

The "penitentiary . . . and all lands connected therewith" were granted to the State in Section 9 of the Admission Act. While the grants of endowment land in Sections 4, 6, 8, 10 and 11 of the Admission Act required the granted lands to be used for the support and maintenance of the endowed institutions, the grant in Section 9 does not specify a purpose for the penitentiary reserve lands. Rather, it is an unconditional grant and donation of the penitentiary and connected lands to the State of Idaho.[1] Unlike the other land grants, there is no requirement that earnings from the sale or lease of penitentiary reserve lands be used for the support of state prisons or other institutions. Thus, the general provision in Section 12 of the Admission Act that lands granted to the state "shall be held, appropriated, and disposed of exclusively for the purpose herein mentioned" does not, by its terms, apply to the penitentiary reserve lands.

Because the Admission Act does not restrict the disposition of the penitentiary reserve lands, the remaining question is whether the drafters of the Idaho Constitution nonetheless intended for the penitentiary reserve lands to be subject to the same restrictions on disposition as were placed on endowment lands.

Art. IX, sec. 7 of the Idaho Constitution provides:

> State board of land commissioners. — The governor, superintendent of public instruction, secretary of state, attorney general and state controller shall constitute the state board of land commissioners, who shall have the direction, control and disposition of the public lands of the state, under such regulations as may be prescribed by law.

This general provision gave the Board of Land Commissioners (Land Board), authority over all "public lands of the state." The term "public lands" also appears in art. IX, sec. 8 of the Idaho Constitution, which provides that

the Land Board shall "provide for the location, protection, sale or rental of all the lands heretofore, or which may hereafter be granted to or acquired by the state by or from the general government." These references to "public lands" must be read in conjunction with Section 14 of the Admission Act, which provided that "[a]ll lands granted in quantity or as indemnity by this act shall be selected, under the direction of the secretary of interior, from the surveyed, unreserved, and unappropriated public lands of the United States." 26 Stat. L. at 217. Upon conveyance, the selected federal public lands became "public lands of the state" and were placed under the authority of the Land Board pursuant to art. IX, sec. 7 of the Idaho Constitution. The Admission Act provisions addressing the selection and conveyance of "public lands," along with the constitutional provisions in art. IX vesting the Land Board with control and disposition of "public lands," establish that the drafters of the Idaho Constitution used the term "public lands" to refer to those lands granted to the state by the general government for the support of specific state institutions, including the penitentiary endowment lands granted to the State under Section 11 of the Admission Bill.

The lands constituting the territorial penitentiary, however, were not unappropriated public lands available for selection to support public schools or other endowed institutions. The lands for the territorial penitentiary were acquired from the United States by the Territory of Idaho in 1869,[2] and thereafter were not public lands, as such term is used in the Admission Act and the Constitution. Rather, as noted in Section 9 of the Admission Act, the penitentiary lands had been set apart and reserved. 26 Stat. L. at 216. Recognizing that the penitentiary was not public land to be managed by the Land Board, the drafters of the Idaho Constitution created another constitutional board to manage the penitentiary. Art. X, sec. 5 of the Idaho Constitution originally provided, in part:

> The governor, secretary of state and attorney general shall constitute a board to be known as the state prison commissioners, and shall have the control, direction and management of the penitentiaries of the states.

This more specific provision established a distinct category of property known as the "penitentiaries of the state," and placed management of such property in the board of state prison commissioners. When art. X, sec.

5 was amended in 1941, the management of "penitentiaries . . . [and] their . . . properties" was transferred to the Board of Correction:

> **State prisons — Control over.** — The state legislature shall establish a nonpartisan board to be known as the state board of correction, and to consist of three (3) members appointed by the governor, ... This board shall have the control, direction and management of the penitentiaries of the state, their employees and properties . . . .

Idaho Const. art. X, § 5 (emphasis added).

The Board of Correction's authority over "penitentiaries . . . [and] their . . . properties" included, by its terms, the land occupied by, and immediately surrounding, the state penitentiaries, but does not include lands granted to the State for the financial support of the state penitentiaries. Such lands retain their unique constitutional characterization as "public lands" under the management of the Land Board, and such characterization distinguishes them from penitentiary "properties" under the authority of the Board of Correction. Because the categories of land remain distinct, the Board of Correction's authority over penitentiary "properties" does not conflict with the Land Board's general authority over "public lands" set aside for the support and maintenance of state penitentiaries.[3]

Moreover, even if the term "public lands" in art. IX, sec. 7 were interpreted to include "properties" occupied by the old state penitentiary, the Constitution's vesting of land management authority in the Board of Correction over such a subset of "public lands" would not create an unconstitutional interference with the Land Board's general authority over "public lands," because the two boards are constitutionally created and of equal stature. *See* State v. State Bd. of Educ., 33 Idaho 415, 429, 196 P. 201, 205 (1921) (a constitutional board "while functioning within the scope of its authority, is not subject to the control or supervision of any other branch, board or department of the state government"); *see also id.* at 434, 196 P. at 207 (Dunn, J., dissenting) (the powers of two boards created by the constitution "are certainly equal in rank . . . though not so in extent").

Given the equal stature of the Land Board and the Board of Correction, the specific provision granting the Board of Correction authority over management of penitentiary properties takes precedence over the more general provision granting the Land Board authority over all "public lands." "A basic tenet of statutory construction is that the more specific statute or section addressing the issue controls over the statute that is more general." Mulder v. Liberty Nw. Ins. Co., 135 Idaho 52, 57, 14 P.3d 372, 377 (2000); Lewis v. Woodall, 72 Idaho 16, 18, 236 P.2d 91, 93 (1951) (affirming "general principle that statutory rules of construction apply to the interpretation of constitutional provisions").

Thus, under the plain terms of the Idaho Constitution, the penitentiary reserve lands are not subject to the requirement in art. IX, sec. 8 of the Idaho Constitution that the Land Board manage "public lands" to "secure the maximum long term financial return to the institution to which granted." Penitentiary reserve lands are not "public lands" but are a separate category of property, placed originally under the control of the Board of Correction.

In the absence of constitutional directives restricting the disposition of the penitentiary reserve lands, the Legislature directed their disposition by enacting Idaho Code § 58-337:

> **Lease of old penitentiary site.** — To preserve and enhance the cultural, educational, recreational and scenic values of the old penitentiary site at Boise, the state board of land commissioners or any other state agency having jurisdiction and control over the site is authorized to lease any part of the site to private persons, firms, or corporations for a term not to exceed fifty (50) years. The board is also authorized to relinquish control and custody over any part of the old penitentiary site to other state agencies for use as building or office space. Unless otherwise prohibited by law, proceeds from the rental of the old penitentiary site beyond cost of maintenance and historic interpretation shall be credited to the permanent building fund. For purposes of this act [section], the old penitentiary site at Boise includes all penitentiary reserve and acquired lands owned by the state of Idaho in:

> Sections 12 and 13, Township 3 North, Range 2 East, Boise Meridian, and the west half of Section 18, Township 3 North, Range 3 East, Boise Meridian.

Idaho Code § 58-337. Section 58-337 was enacted in 1974, shortly after closure of the old penitentiary in December 1973. It replaced an earlier provision enacted in 1969 declaring that the old prison site "shall be declared surplus as the new facilities become available at the new prison site south of Gowen Field."[4] 1969 Sess. Laws 772. The 1969 statute also authorized the Department of Lands to "dispose of the described property by sale or lease according to their prescribed procedures under the direction of the state land board." The 1974 legislation, by substituting specific disposition terms for the general reference in the 1969 legislation to land board disposition procedures, is further evidence of legislative intent to not subject penitentiary reserved lands to the disposition requirements of art. IX, sec. 8.

Because the penitentiary reserve lands are not "public lands" subject to the requirements of art. IX, sec. 8 of the Idaho Constitution, the disposition of the penitentiary reserve lands pursuant to Idaho Code § 58-337 does not conflict with the constitutional restrictions on disposition of "public lands" by the Land Board.

AUTHORITIES CONSIDERED

1. Idaho Constitution

Art. IX, § 7.
Art. IX, § 8.
Art. X, § 5.

2. Idaho Code

§ 58-337.

3. Session Laws

1941 Idaho Sess. Laws 486.
1969 Idaho Sess. Laws 772.

4. Idaho Cases

Lewis v. Woodall, 72 Idaho 16, 236 P.2d 91 (1951).
Mulder v. Liberty Nw. Ins. Co., 135 Idaho 52, 14 P.3d 372 (2000).
State v. State Bd. of Educ., 33 Idaho 415, 196 P. 201 (1921).

5. Other Authorities

House Concurrent Resolution No. 8, *Laws and Resolutions of the 5th Legislative Assembly of the Terr. of Idaho* 176-77 (1869).

Idaho Admission Act, 26 Stat. L. 215, ch. 656 (1890).

Idaho Admission Act, § 4.
Idaho Admission Act, § 6.
Idaho Admission Act, § 8.
Idaho Admission Act, § 9.
Idaho Admission Act, § 10.
Idaho Admission Act, § 11.
Idaho Admission Act, § 12.
Idaho Admission Act, § 14.

Dated this 13th day of November, 2015.

LAWRENCE G. WASDEN
Attorney General

Analysis by:

Steven W. Strack
Deputy Attorney General

[1] The granting language in Section 9 applies not only to the penitentiary, but also to the personal property used in the administration of the Idaho Territory, and the "books and records and the property used at the constitutional convention." All properties identified in Section 9 were granted to the State unconditionally.

[2] *See* House Concurrent Resolution No. 8, *Laws and Resolutions of the 5th Legislative Assembly of the Terr. of Idaho* 176-77 (1869) (directing governor to apply to General Land Office to acquire title to certain lands in sections 12 and 13, T3N, R2E, for use as territorial penitentiary).

[3] Notably, the 1941 Joint Resolution confirms that the authority of the Board of Correction would apply only to properties actually occupied by penitentiaries, and would not extend to penitentiary endowment lands, because the question presented to the voters made no mention of lands, but rather asked: "Shall section 5 of Article 10 of the Constitution be amended as to provide that the state legislature shall establish a non-partisan state board of correction to have the control, direction and management of the penitentiaries of the state . . ." 1941 Idaho Sess. Laws 486.

[4] This Opinion assumes the constitutionality of the legislation declaring the penitentiary reserve lands to be surplus, and assumes that the Board of Correction took the steps necessary to relinquish its authority over such lands vested in it by Idaho Constitution art. X, sec. 5. Department of Lands' records document earlier transfers of portions of the penitentiary reserve lands to the control of the Land Board by agreement dated April 3, 1964, and amended by agreement dated March 8, 1971, for the use and benefit of the Department of Agriculture and the State Board of Health. Those lands are now occupied by the State Health Laboratory.

Topic Index

and

Tables of Citation

OFFICIAL OPINIONS
2015

IDAHO CONSTITUTION CITATIONS

IDAHO CODE CITATIONS

ATTORNEY GENERAL'S CERTIFICATES OF REVIEW FOR THE YEAR 2015

LAWRENCE G. WASDEN

ATTORNEY GENERAL
STATE OF IDAHO

March 10, 2015

The Honorable Lawerence Denney
Idaho Secretary of State
Statehouse
VIA HAND DELIVERY

Re: Certificate of Review
Proposed Initiative Related to (1) Legalization of Medical Use of Marijuana; (2) Decriminalization of Possession of Three Ounces or Less of Marijuana; (3) Decriminalization of Possession of Marijuana-Related Drug Paraphernalia and Exclusion From Prosecution for Participants in Idaho's Medical Marijuana Program; and (4) Establishment of Idaho Industrial Hemp Program

Dear Secretary of State Denney:

An initiative petition was filed with your office on February 20, 2015. Pursuant to Idaho Code § 34-1809, this office has reviewed the petition and has prepared the following advisory comments. Given the strict statutory timeframe within which this office must review the petition, our review can only isolate areas of concern and cannot provide in-depth analysis of each issue that may present problems. Further, under the review statute, the Attorney General's recommendations are "advisory only." The petitioners are free to "accept or reject them in whole or in part." Due to the available resources and limited time for performing the reviews, we did not communicate directly with the petitioner as part of the review process. The opinions expressed in this review are only those that may affect the legality of the initiative. This office offers no opinion with regard to the policy issues raised by the proposed initiative.

BALLOT TITLE

Following the filing of the proposed initiative, this office will prepare short and long ballot titles. The ballot titles must impartially and succinctly state the purpose of the measure without being argumentative and without

creating prejudice for or against the measure. While our office prepares titles for the initiative, petitioners may submit proposed titles for consideration. Any proposed titles should be consistent with the standard set forth above.

MATTERS OF SUBSTANTIVE IMPORT

A. Summary of the Initiative

The initiative submitted for review is comprised of Sections 1 through 5, and each but Section 5 (re: Severability) contains a separate title, findings, and substantive provisions. As a preliminary matter, the divergent types of laws proposed by the initiative may run counter to the "single subject rule" set forth in art. III, sec. 16 of the Idaho Constitution, which states:

> **Unity of subject and title. --** Every act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title; but if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be embraced in the title.

The Idaho Court of Appeals has stated that the "critical task" in analyzing whether an act "embraces one subject and matters properly connected to it" is to identify the "general subject" matter of the bill:

> The critical task is to identify the "general subject" of the bill. In our view, the "general subject" of the bill here in question is the award of attorney fees in civil actions. The text of the statute . . . plainly falls within this subject. Its provisions are germane to, and are not incongruous with, the subject. To define the subject more narrowly, by limiting it to enumerated civil actions mentioned in the title, would be to treat the title as a catalog or index to the act. The Supreme Court rejected this approach in *Kerner [v. Johnson*, 99 Idaho 433, 452, 583 P.2d 360, 379 (1978)] and, accordingly, we reject it here.

Cheney v. Smith, 108 Idaho 209, 210, 697 P.2d 1223, 1224 (Ct. App. 1985). *See also* Cox v. City of Sandpoint, 140 Idaho 127, 131, 90 P.3d 352, 356 (Ct. App. 2003) (an act providing a comprehensive recodification and revision of the laws relating to municipal corporations satisfied art. III, sec. 16).

A cursory review of the initiative's Sections shows it combines the decriminalization of medical marijuana (Section 1) and possession of three ounces (or less) of marijuana (Section 2) with the establishment of an "Idaho Industrial Hemp Program" (Section 4), the latter of which focuses on agricultural farming of industrial hemp. The combination of such diverse subjects may not conform with art. III, sec. 16.

Sections 1 through 5 of the initiative are summarized as follows.

1. Section 1: Idaho Medical Marijuana Program

The initiative, which is self-titled the "Idaho Medical Marijuana Act" (hereafter "Act"), declares that persons engaged in the use, possession, manufacture, sale and/or distribution of marijuana to persons suffering from debilitating medical conditions, as authorized by the procedures established in the Act, are protected from arrest, prosecution, property forfeiture, and criminal and other penalties under Idaho law. A summary of the Act's provisions, tentatively denominated as Idaho Code § 39-9200, *et seq.*, begins with its purpose, which is:

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

Prop. I.C. § 39-9202.[1]

In general, the Act authorizes the Idaho Department of Health and Welfare ("Department") to establish a comprehensive registration system for

instituting and maintaining the production and dispensing of marijuana for use by persons diagnosed with a debilitating medical condition. Prop. I.C. § 39-9206. The Act directs the Department to approve or deny applications for "registry identification cards" presented by "qualifying patients," their "designated caregivers," and "agents" of "medical marijuana organizations." Prop. I.C. §§ 39-9203(3); 39-9203(17) (corrected);[2] 39-9208 to 39-9213. The Department is required to issue "registration certificates" to qualifying "medical marijuana organizations," defined as "medical marijuana production facilities," "medical marijuana dispensaries," and "safety compliance facilities." Prop. I.C. §§ 39-9203(10)-(12), (16), (18) (corrected); 39-9207; 39-9213; 39-9215. The Act permits, without state civil or criminal sanctions, marijuana to be produced by medical marijuana production facilities throughout the state (and qualified patients and/or designated caregivers whose registry identification cards allow them to "cultivate" marijuana), tested for potency and contaminants at safety compliance facilities, and transported to medical marijuana dispensaries for sale to qualifying patients and/or their designated caregivers.

The Act provides that: (1) qualifying patients ("patients") may possess up to three ounces of marijuana, and, if a patient's registry identification card states that the patient "is exempt from criminal penalties for cultivating marijuana," the patient may also possess up to 12 marijuana plants in an enclosed locked facility, etc., and any marijuana produced from those plants; and (2) designated caregivers ("caregivers") to assist up to three patients' medical use of marijuana,[3] and to independently possess, for each patient assisted, the same amounts of marijuana described above, but not exceeding a total of 36 marijuana plants (assuming the caregiver's registry identification card bears a "cultivator" exemption), and any marijuana produced from those plants. Prop. I.C. §§ 39-9203(2)(b).

In order to become a qualified patient, a person must have a "practitioner" (defined as a person authorized to prescribe drugs pursuant to the Medical Practice Act (I.C. §§ 18-5400, *et seq.*)) provide a written certification that, in the practitioner's professional opinion, the patient "is likely to receive therapeutic or palliative benefit from the medical use of marijuana to treat or alleviate the patient's debilitating medical condition or symptoms associated with the debilitating medical condition." Prop. I.C. § 39-9203(15), (22) (corrected). The certification must specify the patient's debilitating medical con-

dition and may only be signed (and dated) in the course of a "practitioner-patient relationship after the practitioner has completed a full assessment of the qualifying patient's medical history and current medical condition." *Id.* Minors are also entitled to be issued registry identification cards as patients under certain criteria. Prop. I.C. § 39-9210(2).

A "debilitating medical condition" means not only the conditions listed (such as cancer, glaucoma, HIV, AIDS, "agitation of Alzheimer's disease," post-traumatic stress disorder, etc.), but also any treatment of those conditions "that produces cachexia or wasting syndrome, severe and chronic pain, severe nausea, seizures, including those characteristic of epilepsy, or severe and persistent muscle spasms, including those characteristic of multiple sclerosis," any terminal illness with life expectancy of less than 12 months, or "[a]ny other medical condition or its treatment added by the department pursuant to section 39-9204." Prop. I.C. § 39-9203(4). The Act provides two methods in which to add new debilitating medical conditions or treatments to the list: (1) the public may petition the Department, and (2) "upon receipt by the department of a petition signed by at least fifty (50) practitioners requesting the debilitating medical condition or treatment be added." Prop. I.C. § 39-9204.

"Agents" are defined as principal officers, board members, employees, or volunteers of a medical marijuana organization who are at least 21 years old and who have "not been convicted of a felony offense." Prop. I.C. § 39-9203(1). A "felony offense" means a felony which is either a "violent crime" or a violation of a state or federal controlled substance law. Prop. I.C. § 39-9203(8). Caregivers, in contrast, do not have the "felony offense" restriction, but are required to be at least 21 years old and agree "to assist no more than three (3) qualifying patients with the medical use of marijuana." Prop. I.C. § 39-9203(6); *see* n. 3, *supra.*

Patients may apply for registry identification cards for themselves and their caregivers by submitting a written certification issued by a practitioner within the last 90 days, application and fee, and a "designation as to who will be allowed to cultivate marijuana plants for the qualifying patient's medical use if a medical marijuana dispensary is not operating within fifteen (15) miles of the qualifying patient's home and the address where the marijuana plants will be cultivated." Prop. I.C. § 39-9209(1).[4] The Department is obligated to verify the information in an application (or renewal request) for

a registry identification card, and approve or deny the application within ten days after receiving it, and must issue a card within five more days thereafter. Prop. I.C. § 39-9210(1). If a registry identification card "does not state that the cardholder is authorized to cultivate marijuana plants, the department must give written notice to the registered qualifying patient . . . of the names and addresses of all registered medical marijuana dispensaries." Prop. I.C. § 39-9210(3). The registry identification cards must include a "random twenty (20) digit alphanumeric identification number that is unique to the cardholder," and a "clear indication of whether the cardholder has been authorized by this chapter to cultivate marijuana plants for the qualifying patient's medical use." Prop. I.C. § 39-9211(1)(d), (g). The Department may deny an application or renewal request for a registry identification card for failing to meet the requirements of the Act, and must provide written notice of its reasons for doing so. Prop. I.C. § 39-9212. Registry identification cards expire after one year, and may be renewed for a fee. Prop. I.C. § 39-9213.

Medical marijuana organizations must have operating documents that include procedures for the oversight of the organization and accurate record-keeping, and are required to implement security measures to deter theft of marijuana and unauthorized entrance into areas containing marijuana. Prop. I.C. § 39-9215. Medical marijuana production facilities must restrict marijuana cultivation, harvesting, etc., within an enclosed, locked facility only accessible to registered agents. Prop. I.C. § 39-9215(3). Medical marijuana production facilities and dispensaries "may acquire usable marijuana or marijuana plants from a registered qualifying patient or registered designated caregiver only if the . . . patient or . . . caregiver receives no compensation for the marijuana." Prop. I.C. § 39-9215(4).

The Department is required to "establish and maintain a verification system for use by law enforcement personnel and registered medical marijuana organization agents to verify registry identification cards." Prop. I.C. § 39-9218. Patients are required to notify the Department within ten days of any change in name, address, designated caregiver, and their preference regarding who may cultivate marijuana for them, and, upon receipt of such notice, the Department has ten days to issue a new registry identification card. Prop. I.C. § 39-9219(1)(4). If the patient changes the caregiver, the Department must notify the former caregiver that "his duties and rights . . . for the qualifying

patient expire fifteen (15) days after the department sends notification." Prop. I.C. § 39-9219(6).

The Department is required to keep all records and information received pursuant to the Act confidential, and any dispensing of information by medical marijuana organizations or the Department must identify cardholders and such organizations by their registry identification numbers and not by name or other identifying information. Prop. I.C. § 39-9221(1), (2). Department employees may notify state or local law enforcement about suspected fraud or criminal violations if the employee who suspects the fraud or criminality "has conferred with his supervisor and both agree the circumstances warrant reporting." Prop. I.C. § 39-9221(6)(a), (6)(b). Department employees may notify the board of medical examiners "if they have reason to believe that a practitioner provided a written certification without completing a full assessment of the qualifying patient's medical history and current medical condition, or if the department has reason to believe the practitioner violated the standard of care, or for other suspected violations of this chapter." Prop. I.C. § 39-9221(6)(c).

Prop. I.C. § 39-9222 creates a rebuttable presumption that patients and caregivers are deemed to be lawfully engaged in the medical use of marijuana if their conduct complies with the Act. However, the provision does not specify the types of cases (criminal, civil or administrative) to which the presumption applies. Next – and most significantly – it provides that patients, caregivers and practitioners are not subject to arrest, prosecution or penalty in any manner, or denial of any right or privilege, including any civil penalty or disciplinary action by a court or occupational or professional licensing board or bureau for conduct authorized by the Act. Practitioners are protected from sanctions for conduct "based solely on providing written certifications" (with the required diagnosis), but may be subject to sanction by a professional licensing board for "failing to properly evaluate a patient's medical condition or otherwise violating the standard of care for evaluating medical conditions." Prop. I.C. § 39-9222(4). No person is subject to criminal or civil sanctions for selling marijuana paraphernalia to a cardholder or medical marijuana organization, being in the presence of "the medical use of marijuana," or assisting a patient as authorized by the Act. Prop. I.C. § 39-9222(5).

The Act makes medical marijuana organizations and their agents immune from criminal and civil sanctions, and searches or inspections, if their conduct complies with the Act. Prop. I.C. § 39-9222(6)-(8). Further, the mere possession of, or application for, a registry identification card "may not constitute probable cause or reasonable suspicion, nor may it be used to support the search of the person or property of the person possessing or applying for the registry identification card." Prop. I.C. § 39-9222(10). Based upon the discussion that follows regarding the relationship between the Act and federal law, such a provision would have no impact upon a probable cause determination made in compliance with the Fourth Amendment of the United States Constitution. Prop. I.C. § 39-9222(11) states that no school, landlord or employer may be penalized or denied any benefit under state law for enrolling, leasing to, or employing a cardholder or (leasing to) a medical marijuana organization. However, the Act "does not prevent the imposition of any civil, criminal, or other penalties" for possession or engaging in the medical use of marijuana on a school bus, preschool, primary or secondary school grounds or in any correctional facility, nor does it allow smoking marijuana on any other form of public transportation or in any public place. Prop. I.C. § 39-9205.

Subsection (13) of Prop. I.C. § 39-9222 warrants brief discussion; it states:

> A qualifying patient or designated caregiver may not be subject to criminal penalty, or have his or her parental rights and/or residential time with a child restricted due to his or her medical use of marijuana, or his or her child/ren's medical use of marijuana, in compliance with the terms of this chapter, absent written findings supported by substantial evidence that such use has resulted in a long-term impairment that interferes with the performance of parenting functions.

In short, Prop. I.C. § 39-9222(13) precludes criminal penalties and other parental-related sanctions based on a patient's medical use of marijuana in situations lacking substantial evidence of "long-term impairment" that interferes with parenting functions. More precisely, if a patient's "short-term" marijuana impairment resulted in harm or endangerment to the patient's child,

the patient could "not be subject to criminal penalty" or parental-related sanction. For example, a patient could not be convicted of child endangerment based on driving under the influence of marijuana (with a child in the vehicle) if the patient was impaired by marijuana for only the "short-term." Idaho law recognizes no "short-term impairment" exception to its criminal or parental-related laws for any other substance, whether legally prescribed or not.

The "Limitations" provision, Prop. I.C. § 39-9205, states that, when any civil, criminal or other penalty is sought to be imposed on a patient (or visiting patient) for operating a motor vehicle (or boat, etc.) while under the influence of marijuana, the patient "may not be considered to be under the influence of marijuana solely because of the presence of metabolites or components of marijuana without noticeable actions of impairment including slurred speech and lethargic movements." Prop. I.C. § 39-9205(4). This provision presents the following legal concerns: (1) Idaho's driving under the influence laws already address the need for prosecutors to prove "impairment" regardless of what substances (including legally prescribed drugs) caused such impairment, (2) the provision is based on what may be an incorrect assumption that persons are currently "considered to be under the influence of marijuana *solely* because of the presence of metabolites or components of marijuana," and (3) requiring the state to prove impairment of patients by showing *both* slurred speech *and* lethargic movements may impermissibly invade the state's ability to choose how to prove a criminal offense with admissible and relevant evidence; additionally, the plain language of the provision appears to preclude successful prosecution of patient-defendants who choose not to speak at all.

The Department is given the task of making extensive rules, pursuant to the Idaho Administrative Procedure Act ("IDAPA") for implementing the Act's measures, including rules for: the form and content of applications and renewals; a system to "numerically score competing medical marijuana dispensary applicants;" the prevention of theft of marijuana and security at facilities; oversight; recordkeeping; safety; dispensing of medical marijuana "by use of an automated machine;" and safe and accurate packaging and labeling of medical marijuana. Prop. I.C. § 39-9206. Notably, the provision requires that, in establishing application and renewal fees for registry identification cards and registration certificates, "[t]he total amount of all fees must generate revenues sufficient to implement and administer this chapter, except fee

revenue may be offset or supplemented by private donations." Prop. I.C. § 39-9206(1)(g)(i). The same self-funding requirement is repeated in Prop. I.C. § 39-9206(1)(g)(iii). A "medical marijuana fund" is established by Prop. I.C. § 39-9228, consisting of "fees collected, civil penalties imposed, and private donations," and is to be administered by the Department.

Under the heading "Affirmative defense," the Act provides that patients, visiting patients, and caregivers "may assert the medical purpose for using marijuana as a defense to any prosecution of an offense involving marijuana intended for a qualifying patient's or visiting qualifying patient's medical use, and this defense must be presumed valid if" several criteria are met. Prop. I.C. § 39-9223(1). If evidence shows that the listed criteria are met, the defense "must be presumed valid." *Id.* Further, Prop. I.C. § 39-9223(2) allows a person to assert the "medical use" affirmative defense "in a motion to dismiss, and the charges must be dismissed following an evidentiary hearing if the person shows the elements listed in subsection (1)." Prop. I.C. § 39-9223 clearly creates a conclusive presumption, which is not only disfavored in law, but is also completely inconsistent with the way affirmative defenses operate – i.e., by requiring the defense to present prima facie evidence at trial to support an affirmative defense before a jury instruction on the affirmative defense is deemed warranted. Moreover, the provision gives defendants the unprecedented opportunity of having an affirmative defense be the basis not only of acquittal at trial, but dismissal prior to trial. Finally, if the patient or caregiver succeeds in demonstrating a medical purpose for the patient's use of marijuana, there can be no disciplinary action by a court or occupational or professional licensing board, etc. Prop. I.C. § 39-9223(3).

Under the heading "Discrimination Prohibited," the Act makes it illegal for schools, landlords, nursing facilities, intermediate care facilities, hospice houses, hospitals, etc., to penalize a person solely for his status as a cardholder, unless to do so would violate federal law or cause the entity to lose a monetary or licensing benefit under federal law. Prop. I.C. § 39-9224(1). Subsection (5) of Prop. I.C. § 39-9224 presents several legal difficulties; it reads:

> There is no presumption of neglect or child endangerment by a qualified patient or qualified caregiver for conduct allowed under this chapter, unless the person's behavior

> creates an unreasonable danger to the safety of the minor(s) as established by written findings of clear and convincing evidence that such neglect or child endangerment is a direct outcome of a qualifying patient or caregiver's medical use or cultivation of marijuana.

Concerns about Subsection (5) include, but are not limited to: (1) the provision precludes a "presumption" of neglect or child endangerment that does not currently exist; (2) it does not specify the types of proceedings to which it applies, although "neglect or child endangerment" implies criminal, child protection and family law proceedings; (3) by its exclusionary language (i.e., beginning with "unless"), the provision could be construed as *creating* a presumption of neglect or child endangerment in certain situations, and (4) the provision does not explain how such a presumption would impact the ultimate burden of proof in a proceeding. As a practical matter, it seems unlikely that a party would try to show "clear and convincing" proof (one of the highest standards in law) that "neglect or child endangerment" is a "direct outcome" of a patient's or caregiver's medical use or cultivation of marijuana merely to employ a "presumption" of neglect or child endangerment. To prevail in most (if not all) proceedings, a party must meet a standard of proof less rigorous than the clear and convincing standard – it makes no sense to prove more to gain less.

The Act has measures for revoking registry identification cards and registration certificates for violations of its provisions, including notice and confidentiality requirements. Prop. I.C. §§ 39-9226, 39-9227. Under Prop. I.C. § 39-9227(7), it is a misdemeanor for an employee or official of the Department to breach the confidentiality of information. Subsection (8) of Prop. I.C. § 39-9227 reads, "[a] person who intentionally makes a false statement to a law enforcement official about any fact or circumstance related to the medical use of marijuana to avoid arrest or prosecution is guilty of an infraction . . . ." It is very questionable whether the phrase "any fact or circumstance relating to the medical use of marijuana" would withstand a "void for vagueness" constitutional challenge in court. The Act contains a "Severability" clause which states that if any of its provisions are "declared invalid for any reason, such declaration shall not affect the validity of the remaining portions of this act." The Act, Section 5.

If the Department fails to adopt rules to implement the Act within 120 days of the Act's enactment, any citizen may commence a mandamus action to compel compliance. Prop. I.C. § 39-9229(1), (2). If the Department fails to issue or deny an application or renewal for a registry identification card within 45 days after submission of such application, a copy of the application is deemed a valid registry identification card. Prop. I.C. § 39-9229(3). Further, if the Department is not accepting applications or has not adopted rules for applications within 140 days after enactment of the Act, a "notarized statement" by a patient containing the information required in an application, with a written certification issued by a practitioner, etc., will be deemed a valid registry identification card. Prop. I.C. § 39-9229(4). The Department must submit an annual public report to the Legislature with information set out in Prop. I.C. § 39-9220.

In sum, the Act generally decriminalizes under state law the possession of up to three ounces of marijuana and (if authorized as a "cultivator") 12 marijuana plants for patients and up to 36 plants for caregivers (up to 12 for each of a maximum of three patients cared for). The Act also protects agents of medical marijuana production facilities, medical marijuana dispensaries and safety compliance facilities from civil forfeitures and penalties under state law, and makes it illegal under state law to discriminate against all such participants in regard to education, housing and employment. Patients certified by practitioners as having debilitating medical conditions may obtain marijuana for medicinal use from his (or his caregiver's) cultivation of marijuana (if authorized on the registry identification card), the patient's caregiver or a medical marijuana dispensary. Patients, caregivers and agents of medical marijuana organizations must obtain registry identification cards, and medical marijuana organizations must obtain registry certificates from the Department, and continuously update relevant information. The Department is tasked with an extensive list of duties, including, *inter alia:* formulating rules and regulations to implement and maintain the Act's numerous and far-reaching measures; verifying information and timely approving applications and renewal requests submitted for registry identification cards and registration certificates; establishing and maintaining a law enforcement verification system; providing rules for security; recordkeeping; oversight; maintaining and enforcing confidentiality of records and providing an annual report to the Idaho Legislature.

2. Section 2: Decriminalization of Possession of Three Ounces or Less of Marijuana

Section 2 of the initiative, entitled "Small Amount Marijuana Decriminalization," seeks to amend I.C. § 37-2732(c) by adding subsection (4), which states in relevant part:

> Any person who is found to possess marijuana, which for the purposes of this subsection shall be restricted to all parts of the plants of the genus Cannabis, including the extract or any preparation of cannabis which contains tetrahydrocannabinol (THC), in an amount of three (3) ounces net weight or less, it shall be an infraction, and upon conviction may be fined not more than one hundred dollars ($100) for the first offense, not more than five hundred dollars ($500) for the second offense, and not more than one thousand dollars ($1,000) for the third and any subsequent offense.

First, the proposed amendment to I.C. § 37-2732(c) leaves intact subsection (3), which makes the possession of up to three ounces of marijuana a misdemeanor. *See* I.C. § 37-2732(c)(3), (e). For clarity and consistency, the addition of subsection (4) to make possession of three ounces or less of marijuana an infraction should be accompanied by an amendment to subsection (3) excluding such possession as a misdemeanor. Second, I.C. § 18-113A makes the maximum punishment for an infraction $300. Therefore, the fines established by Prop. I.C. § 37-2732(c)(4) are not legal, and must be revised accordingly. Third, the definition of "marijuana" is inconsistent with the definition set out in I.C. § 37-2701(t), which excludes from the definition:

> . . . the mature stalks of the plant . . . , fiber produced from the stalks, oil or cake made from the seeds or the achene of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks, except the resin extracted therefrom or where the same are intermixed with prohibited parts of such plant, fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination . . . .

As a result of defining marijuana more broadly (i.e., with no exclusions) than I.C. § 37-2701(t), Prop. I.C. § 37-2732(c)(4) theoretically punishes, as an infraction, the possession of parts or products of marijuana plants that has previously been legal.

The last paragraph of proposed I.C. § 37-2732(c)(4) provides that 50% of all funds generated by marijuana possession tickets will go to the Idaho Department of Education, and the remainder will be placed into the state's general fund. Local courts collect and distribute funds from infraction tickets pursuant to legally prescribed methods and procedures. Therefore, this provision may be in conflict with laws pertaining to such methods of disbursement.

3. Section 3: Decriminalization of Possession of Marijuana-Related Drug Paraphernalia and Exclusion From Prosecution for Participants in Idaho's Medical Marijuana Program

Section 3 of the initiative seeks to amend I.C. § 37-2734A by adding subsection (4), which would (1) decriminalize the possession of marijuana paraphernalia by any person, and (2) exclude participants in the Idaho Medical Marijuana Program from infraction penalties for such possession. The proposed statute reads:

> Any person who is found to possess marijuana-related drug paraphernalia is guilty of an infraction and upon conviction may be fined not more than five hundred dollars ($500) per infraction, with the exception - any person who provides adequate recommendation to show their qualification and participation in the Idaho Medical Marijuana Program, or another State's medical marijuana program, is excluded from prosecution under this law.

Prop. I.C. § 37-2734A(4). As noted above, I.C. § 18-113A makes the maximum punishment for an infraction $300. Therefore, the $500 fine proposed by the addition of subsection (4) is inconsistent with this statute. Next, subsection (1) of I.C. § 37-2734A makes it unlawful to possess (etc.) drug paraphernalia.[5] That subsection should be amended to exclude possession of mar-

ijuana-related drug paraphernalia as described in subsection (4) of Prop. I.C. § 37-2734A.

As with Section 2 of the initiative (decriminalization of possession of three ounces or less of marijuana), Prop. I.C. § 37-2734A(4) provides that 50% of all funds generated by marijuana-related paraphernalia tickets will go to the Idaho Department of Education, and the remainder will be placed into the state's general fund. Because local courts collect and distribute funds from infraction tickets in accordance with legally prescribed methods, this provision may conflict with such laws.

4. Section 4: Establishment of Idaho Industrial Hemp Program

Section 4 of the initiative proposes to add the "Idaho Industrial Hemp Act" as chapter 54 of title 22 of the Idaho Code, under the Idaho Department of Agriculture's supervision. Prop. I.C. §§ 22-5400, *et seq.* The Industrial Hemp Act's intent is "to establish policy and procedures for growing industrial hemp in Idaho so that farmers and other businesses in the Idaho agricultural industry can take advantage of this market opportunity." Prop. I.C. § 22-5403. "Industrial hemp" is defined as "varieties of the plant cannabis sativa having no more than 0.3 percent tetrahydrocannabinol (THC), whether growing or not, that are cultivated or possessed by a licensed grower in compliance with this chapter."

Several points of clarification and/or correction are initially warranted. The Act sets up a licensing process overseen by the "Director," who is further described as the "Director of agriculture, food and markets." Prop. I.C. §§ 22-5404(4), 22-5406(a). Such an official position does not exist in Idaho, and it is presumed that this provision should be corrected to identify "Director" as the Director of the Department of Agriculture for the State of Idaho. Similarly, the Act describes a "secretary" as having a role in the licensing process, but it is unclear who that reference pertains to. *See* Prop. I.C. §§ 22-5406(c)(1), 22-5406(d)(3). Also, in order to obtain a license, an applicant must give written permission to have a criminal conviction record procured by the "Idaho criminal information center," an agency that does not exist in Idaho. *See* Prop. I.C. §§ 22-5406(c)(1), 22-5406(d)(1).

The basic requirements for obtaining a hemp grower's license, valid for two years and renewable, are that the person or business entity may not have any felony convictions in any state; they must authorize a check of their criminal history; provide sufficient information to show the intent and capability to grow industrial hemp; file documentation with the Director "certifying that the seeds obtained for planting are of a type and variety compliant with the maximum concentration of tetrahydrocannabinol (THC)" (i.e., .3% or less); maintain records of sales and production and records showing compliance with the laws. Prop. I.C. § 22-5406(a)-(f). A unique requirement is that the grower must also ensure "that all parts of the industrial hemp plant that do not enter the stream of commerce as hemp products are destroyed, incorporated into the soil, or otherwise properly disposed of." Prop. I.C. § 22-5406(e)(1). A grower must also allow the Director (or designee) to inspect, at their discretion, the hemp growing process at each point of sowing, growing, harvesting, storage and processing. Prop. I.C. § 22-5406(g).

The Director must adopt rules for regulating the Industrial Hemp Act, including rules for testing industrial hemp during growth for THC levels and for supervising "the industrial hemp during sowing, growing season, harvest, storage and processing." Prop. I.C. § 22-5408. The Director is given authority to revoke industrial hemp grower licenses for false statements or misrepresentations on an application for a license (or renewal), and failure to comply with the provisions of the Idaho Hemp Act and rules promulgated under it. Prop. I.C. § 22-5407. The Department of Agriculture is tasked with submitting an annual report to the legislature, without any identifying information about licensed growers, containing the number of industrial hemp licenses and renewals, the number of revocations and suspensions of licenses, and the number of industrial hemp producers and earnings in fees. Prop. I.C. § 22-5409.

If the Department fails to adopt rules to implement the Idaho Industrial Hemp Act within 120 days of the Act's enactment, any citizen may commence a mandamus action to compel compliance. Prop. I.C. § 22-5412(1), (2). If the Department fails to issue an industrial hemp license (or renewal) or notice of denial within 45 days of submission of such application, a copy of the application is deemed a valid industrial hemp license. Prop. I.C. § 22-5412(3). If the Department is not accepting applications or has not adopted rules allowing Idaho farmers to submit applications within 140 days

after enactment of the Idaho Industrial Hemp Act, a "notarized statement" by an applicant containing the information required in an application pursuant to Prop. I.C. § 22-5406 "is deemed an industrial hemp license." Prop. I.C. § 22-5412(4).

For consistency and clarity, the Idaho Industrial Hemp Act should be accompanied with exclusionary provisions allowing licensed growers to possess industrial hemp and growing materials without committing infractions as provided in Section 2 (possession of three ounces of marijuana or less) and Section 3 (possession of marijuana paraphernalia).

5. Section 5: Severability

Section 5 of the initiative, entitled "Severability," states, if any provision of this Act "is declared invalid for any reason, such declaration shall not affect the validity of the remaining portions of this act."

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

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

> In *Bartkus v. Illinois,* 359 U.S. 121 [1959], . . . and *Abbate v. United States,* 359 U.S. 187 [1959], . . . this Court reaffirmed the well-established principle that a federal prosecution does not bar a subsequent state prosecution of the same person for the same acts, and a state prosecution does not bar a federal one. The basis for this doctrine is that prosecutions under the laws of separate sovereigns do not, in the language of the Fifth Amendment, "subject [the defendant] for the same offence to be twice put in jeopardy":
>
> "An offence [sic], in its legal signification, means the transgression of a law. . . . Every citizen of the United States is also a citizen of a State or territory. He may be said to owe allegiance to two sovereigns, and may be liable to punish-

> ment for an infraction of the laws of either. The same act may be an offense or transgression of the laws of both. . . . *That either or both may (if they see fit) punish such an offender, cannot be doubted."*

United States v. Wheeler, 435 U.S. 313, 316-17, 98 S. Ct. 1079, 1082-83, 55 L. Ed. 2d 303 (1978) (superseded by statute) (quoting Moore v. Illinois, 55 U.S. 13, 19-20, 14 How. 13, 19-20, 14 L. Ed. 306 (1852)) (footnote omitted; emphasis added); *See* State v. Marek, 112 Idaho 860, 865, 736 P.2d 1314, 1319 (1987) ("[T]he double jeopardy clause of the fifth amendment does not prohibit separate sovereigns from pursuing separate prosecutions since separate sovereigns do not prosecute for the 'same offense.'"). Under the concept of "separate sovereigns," the State of Idaho is free to create its own criminal laws and exceptions pertaining to the use of marijuana. However, the State of Idaho cannot limit the federal government, as a separate sovereign, from prosecuting marijuana-related conduct under its own laws.

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

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

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

> It is clear from the text of the [Controlled Substances] Act that Congress has made a determination that marijuana has no medical benefits worthy of an exception. The statute expressly contemplates that many drugs "have a useful and legitimate medical purpose and are necessary to maintain the health and general welfare of the American people," § 801(1), but it includes no exception at all for any medical use of marijuana. Unwilling to view this omission as an accident, and unable in any event to override a legislative determination manifest in a statute, we reject the Cooperative's argument.
>
> . . . .
>
> For these reasons, we hold that medical necessity is not a defense to manufacturing and distributing marijuana. The Court of Appeals erred when it held that medical necessity is a "legally cognizable defense." 190 F.3d. at 1114. It further erred when it instructed the District Court on remand to consider "the criteria for a medical necessity exemption, and, should it modify the injunction, to set forth those criteria in the modification order." *Id.* at 1115.

Id. at 493-95.

The Oakland Cannabis Buyers' Cooperative decision makes clear that prosecutions under the federal Controlled Substances Act are not subject to a "medical necessity defense," even though state law precludes prosecuting persons authorized to use marijuana for medical purposes, as well as those

who manufacture and distribute marijuana for such use. Therefore, passage of the initiative would not affect the ability of the federal government to prosecute marijuana-related crimes under federal laws.

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

The same holds true in regard to federal regulations pertaining to housing and employment. In Assenberg v. Anacortes Housing Authority, 268 Fed. Appx. 643, 644 (unpublished) (9th Cir. 2008), contrary to the plaintiff's contention that, because he was authorized under state law to use marijuana for medical purposes, he was illegally denied housing. The Ninth Circuit explained:

> The district court properly rejected the Plaintiffs' attempt to assert the medical necessity defense. *See Raich v. Gonzales*, 500 F.3d 850, 861 (9th Cir.2007) (stating that the defense may be considered only when the medical marijuana user has been charged and faces criminal prosecution). The Fair Housing Act, Americans with Disabilities Act, and Rehabilitation Act all expressly exclude illegal drug use, and AHA did not have a duty to reasonably accommodate Assenberg's medical marijuana use. *See* 42 U.S.C. §§ 3602(h), 12210(a); 29 U.S.C. § 705(20)(C)(i).
>
> AHA did not violate the Department of Housing and Urban Development's ("HUD") policy by automatically terminating the Plaintiffs' lease based on Assenberg's drug use without considering factors HUD listed in its September 24, 1999 memo. . . .
>
> Because the Plaintiffs' eviction is substantiated by Assenberg's illegal drug use, we need not address his claim . . . whether AHA offered a reasonable accommodation.

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

Similarly, the Oregon Supreme Court recently held that, under Oregon's employment discrimination laws, an employer was not required to accommodate an employee's use of medical marijuana. Emerald Steel Fabricators, Inc., v. Bureau of Labor and Industries, 230 P.3d 518, 520 (Or. 2010). Therefore, none of the provisions of the initiative can interfere or otherwise have an effect on federal laws, criminal or civil, which rely, in whole or part, on marijuana being illegal under the federal Controlled Substances Act.

C. Recommended Revisions or Alterations

The initiative contains many "findings" throughout its provisions. The findings have not been verified for the purposes of this review due to time constraints. The Office of the Attorney General takes no position on those findings. In addition to the legal and non-legal problems previously discussed, Section 1 of the initiative, regarding the proposed Idaho Medical Marijuana Program, has several other aspects that merit consideration, described as follows:

1. Prop. I.C. § 39-9203(4)(a) reads in part, "agitation of Alzheimer's disease," which would be more correctly phrased "agitation of Alzheimer's patients."

2. Under Prop. I.C. § 39-9203(1), medical marijuana organization agents cannot have been convicted of a felony offense (as defined), but there is no such requirement for caregivers under Prop. I.C. § 39-9203(6), which may be intentional or an oversight.

3. Prop. I.C. § 39-9203(4)(a) defines "debilitating medical condition" as including a list of conditions "or the treatment of these conditions." However, Prop. I.C. § 39-9203(4)(b) more accurately explains that "debilitating medical condition" means "a chronic or debilitating disease or medical

condition *or its treatment that produces cachexia or wasting syndrome, severe and chronic pain, (etc.).*" It is recommended that the phrase "or the treatment of these conditions" be excised from Prop. I.C. § 39-9203(4)(a) as surplusage.

4. In Prop. I.C. § 39-9203(4)(c), there is no indication of who decides whether a patient has a terminal illness "with life expectancy of less than twelve (12) months" in order to qualify as having a debilitating medical condition. It is recommended that the provision state who is given that responsibility.

5. Prop. I.C. § 39-9203(5) should appropriately capitalize the reference to the Department of Health and Welfare, which capitalization should be consistent throughout the initiative. Likewise, "Department" should be capitalized throughout the initiative.

6. Prop. I.C. § 39-9203(7) is preceded by "Qatar," which should be omitted.

7. Prop. I.C. § 39-9206(1)(a) misidentifies a proposed provision as 39-9104, instead of 39-9204.

8. The provision that allows a new debilitating medical condition or treatment to be added to such list if 50 or more practitioners sign a petition making a request does not have any public hearing, notice or public comment provisions. These omissions may violate due process and/or equal protection constitutional requirements. *See* Prop. I.C. § 39-9204(2); *cf.* Prop. I.C. § 39-9206(1)(a). It is recommended that the provision be modified to allow for public hearing, notice and public comment.

9. Prop. I.C. § 39-9207(e) appears to allow only one medical marijuana dispensary in counties of over 20,000, which is inconsistent with Prop. I.C. § 39-9207(4), which allows the Department to "register additional medical marijuana organizations at its discretion."

10. The registration requirements of patients, caregivers and agents do not require the applicants to include their social security numbers – only their names and dates of birth. This less-than-certain method of identification could present identification issues at hearings or trials of cardholders

for non-compliance with the Act or violations of criminal law. *See* Prop. I.C. §§ 39-9208(2), 39-9209(1). It is recommended that Social Security numbers, identifying numbers such as driver's licenses, or other state-issued identification of persons applying (and proposed caregivers) for registry identification cards be required in the applications for such cards.

11. There are no criteria for a registry identification card to have the "cultivator" authorization on it. *See* Prop. I.C. §§ 39-9203(2)(a)(ii) and (b)(ii), 39-9209(1)(c)(v), 39-9210(3). If it is intended that the Department create rules for such qualifications, it is recommended that such responsibility be included in the "Rulemaking" provisions of Prop. I.C. § 39-9206.

12. The provision authorizing the Department to conduct a "background check" of any "prospective medical marijuana organization agent" does not indicate whether those checks are for criminal history under the N.C.I.C. system or some other format, and does not explain who qualifies as a "prospective" medical marijuana organization agent. *See* Prop. I.C. § 39-9210(4). It is recommended that such details be provided in the proposed provision.

13. The Department is not required to prepare or present any financial information regarding the implementation and/or maintenance of the Act's provisions in its annual report to the Idaho Legislature. *See* Prop. I.C. § 39-9220. If an oversight, it is recommended that additional criteria concerning finances be included in the provision.

CERTIFICATION

I HEREBY CERTIFY that the enclosed measure has been reviewed for form, style, and matters of substantive import. The recommendations set forth above have been communicated to the Petitioner via a copy of this Certificate of Review, deposited in the U.S. Mail to Dana Wilson, 901 Sapphire Ct., Nampa, Idaho 83686.

Sincerely,

LAWRENCE G. WASDEN
Attorney General

Analysis by:

JOHN C. McKINNEY
Deputy Attorney General

[1] References to "proposed" statutes are preceded with "Prop."

[2] The initiative misnumbered the definitions in Prop. I.C. § 39-9203 after subsection (8) by listing the subsequent subsection again as (8), and continuing the count from that point. The reference to I.C. § 39-9203(17) reflects a correct sequential numbering of the subsection of that proposed statute, and other misnumbered subsections will be indicated as "corrected."

[3] The registration requirements for designated caregivers inconsistently state that such caregivers will not provide services "for more than five (5) registered qualifying patients[.]" Prop. I.C. 39 § 9209(1)(c)(iv).

[4] The Act also allows "visiting qualifying patients" from other states to possess medical marijuana while in Idaho. Prop. I.C. § 39-9203(21) (corrected).

[5] Subsection (3) of I.C. § 37-2734A makes a violation of subsection (1) a misdemeanor, punishable by not more than one year in imprisonment and a $1,000 fine, or both.

May 26, 2015

The Honorable Lawerence Denney
Idaho Secretary of State
Statehouse
VIA HAND DELIVERY

RE: Certificate of Review
Proposed Referendum Petition, 2015 House Bill 312, as Amended in the Senate, as Amended in the Senate

Dear Secretary of State Denney:

A proposed referendum petition was filed with your office on May 5, 2015. Pursuant to Idaho Code § 34-1809, this office has reviewed the petition and has prepared the following advisory comments. Given the strict statutory timeframe within which this office must review the petition, our review can only isolate areas of concern and cannot provide in-depth analysis of each issue that may present problems. Further, under the review statute, the Attorney General's recommendations are "advisory only." The petitioners are free to "accept or reject them in whole or in part." Due to the available resources and limited time for performing the review, we did not communicate directly with the petitioner as part of the review process. The opinions expressed in this review are only those that may affect the legality of the referendum. This office offers no opinion with regard to the policy issues raised by the proposed referendum.

BALLOT TITLE

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

MATTERS OF SUBSTANTIVE IMPORT

The referendum petition addresses 2015 House Bill 312, as Amended in the Senate, as Amended in the Senate, 2015 Idaho Session Laws, Chapter 341, which passed both the House of Representatives and the Senate and was signed into law by the Governor on April 21, 2015.

Sections 6 and 7 of this Act became immediately effective on April 21, 2015, when the Act was signed into law by the Governor and will continue in effect until the outcome of a referendum election (if one is held). Pursuant to Idaho Code § 34-1803, if supporters of the referendum petition submit to the Secretary of State the requisite number of signatures to qualify the referendum for the 2016 general election ballot within the time prescribed by that section, the remaining sections of this Act will not take effect unless they are approved by a majority of the voters casting ballots on the referendum in that general election.

CERTIFICATION

I HEREBY CERTIFY that the enclosed measure has been reviewed for form, style, and matters of substantive import, and that I have no recommendations to revise or alter the measure. This information has been communicated to the Petitioner via a copy of this Certificate of Review, deposited in the U.S. Mail to Alan R. Littlejohn, P. O. Box 192, Athol, Idaho 83801.

Sincerely,

LAWRENCE G. WASDEN
Attorney General

Analysis by:

Michael S. Gilmore
Deputy Attorney General

June 10, 2015

The Honorable Lawerence Denney
Idaho Secretary of State
Statehouse
VIA HAND DELIVERY

RE: Certificate of Review
Proposed Initiative Amending the Idaho Sales Tax Statutes

Dear Secretary of State Denney:

An initiative petition was filed with your office on May 15, 2015. Pursuant to Idaho Code § 34-1809, this office has reviewed the petition and prepared the following advisory comments. Given the strict statutory time-frame within which this office must review the petition, our review can only isolate the areas of concern and cannot provide in-depth analysis of each issue that may present problems. Further, under the review statute, the Attorney General's recommendations are "advisory only." The petitioners are free to "accept them in whole or in part." The opinions expressed in this review are only those that may affect the legality of the initiative. This office offers no opinion with regard to the policy issues raised by the proposed initiative nor the potential revenue impact to the state budget.

BALLOT TITLE

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

MATTERS OF SUBSTANTIVE IMPORT

The two principal purposes of the proposed initiative are (1) to lower the overall sales tax rate from six percent (6%) to five percent (5%); and (2)

to broaden the sales tax base by including "services" within the sales tax scheme. In addition to taxing services, another significant way the initiative would broaden the sales tax base is to expand the definition of "sales" to include contracts for applying, installing, cleaning, altering, improving, decorating, treating, storing, or repairing real property. *See* proposed Idaho Code § 63-3612(k). This provision has the effect of transforming many contracts for the improvement of real property into retail sales and subject to sales tax.

One overarching complication of this review is that the petitioners used prior versions of some of the statutes when constructing the proposal. Thus, it does not include many recent amendments made to the relevant statutes. Some of the recent amendments are minor; however, some of the statutory changes are significant. The petitioners will need to revise the proposal to include the most recent version of the relevant statutes (*see* Sections 6, 7, 10, 12 and 14).

The proposed amendment in Section 1 to Idaho Code § 63-602L will not affect Idaho sales tax because that code section relates to personal property tax. This code section exempts from property taxation certain intangible personal property. Personal property tax is a distinct tax that is applied separately from Idaho's sales tax. Likewise, Section 23 has implications beyond sales tax. The petitioners may want to omit these amendments in order to limit the effect of the initiative to Idaho sales tax only, if that is the intent of the initiative. Omission of the elements would resolve any claim that this initiative violates the single subject rule under art. III, sec. 16 of the Idaho Constitution.[1]

Section 2 proposes a new section to Idaho Code pertaining to Computer Software and Digital Goods. This amendment pulls "computer software" out of the tangible personal property definition in Idaho Code § 63-3616 and creates a new taxable item outside tangible personal property. Section 2 defines "computer software" to include information stored in electronic media. The proposal also defines "digital goods" separately from computer software. Historically, digital goods have been interpreted to fall under the definition of computer software as "information stored in an electronic medium." Bifurcating these definitions could create internal inconsistencies. The petitioners may wish to review these definitions to make digital goods a subset of computer software if that is their intent. However, the proposal

makes both items taxable which may make the issue immaterial. The drafters should also note that this area of taxation presents difficulty in defining these terms in this rapidly changing industry. This will also be a problem in the proposed sourcing sections as well. Finally, it should be noted that the imposition of tax on these types of transactions is a departure from the direction taken by the legislature the past few years as they have passed multiple bills exempting most sales of software and digital goods.

The proposed amendment in Section 4 will shift the tax obligation from the contractor to the purchaser since real property contracts would be taxable under the proposed changes to Idaho Code § 63-3612(2)(k). This will produce not only a tax shift, but the amount of tax paid on each contract will increase significantly. Moreover, it is possible the proposed initiative may tax the sale of new homes and not tax the sale of existing homes. If a builder builds a home that he intends to sell upon completion, he may be able to purchase the materials and the subcontract services for resale. Under the language of the proposed initiative, the sale of the newly constructed home may be categorized as a retail sale. The sale of an existing home would not be a retail sale.

The proposed changes to Idaho Code § 63-3613, subsection (a)(6), include contracts for applying, installing, cleaning, altering, improving, decorating, treating, storing, or repairing tangible personal property or real property. Recall that Idaho Code §§ 63-3622A and 63-3622O prohibit the imposition of taxes on retail sales to governmental entities. By including contracts described in subsection (a)(6) as retail sales, the initiative will completely exempt those contracts performed for governmental entities from taxation whereas under present law, materials used on government contracts are taxable. Contractors working at the Idaho National Laboratory (INL), Mountain Home Air Force Base, and contractors building or repairing highways or other roads are just a few examples of contracts that would completely escape taxation under the proposed initiative.

The petitioners should also revise the proposed changes to Idaho Code § 63-3613, subsection (f), which is incomplete.

Section 8 of the initiative, which creates a new Idaho Code § 63-3614A, broadly defines the term "services" to mean "all activities engaged in

for other persons for a consideration, which activities involve predominantly the performance of a service as distinguished from selling or leasing property." This definition incorporates nearly every conceivable service. Moreover, this definition of "service" is, in part, circular, as the definition uses the same term it is defining (i.e., a "service" is an activity predominantly involving the performance of a "service"). The petitioners may want to provide more clarification in the definition of the term "service."

Of note, too, is that the new statute will not tax services performed for an "employer" by an "employee." The initiative does not contain a specific definition for either term, both of which are the subject matter of countless lawsuits. For instance, the classification of a worker as an employee or as an independent contractor is often problematic. The activities of an independent contractor may mirror that of an employee. Under a strict interpretation of the initiative, the activities of the independent contractor would be taxable while the activities of the employee would not be taxable, even though the services performed are identical. The petitioners may wish to clarify these terms and address their intent with regard to worker classification in order to avoid confusion.

Additionally, Section 8 does not include services provided by certain licensed medical professionals. It would appear that the drafters seek to exempt medical related services. However, by exempting the service providers rather than the service provided, the exemption could extend to any service provided by a licensed medical professional. For instance, a registered nurse could operate a day care out of her home. Those services provided by the nurse would be exempt under the proposed Idaho Code § 63-3614A. On the other hand, a day care operated by a non-licensed medical professional (such as a teacher or a full-time child care provider without a medical designation) would be fully taxable. Additionally, the list of service providers excludes some health care professionals and includes other health care professionals. Physical therapists are included, but occupational and speech therapists are not. This could be an impediment to passage by those excluded from the exemption and should be more broadly worded to include all health care professionals "licensed" by certain state boards.

Finally, it should be noted that Section 8's definition of "services" is in contradiction to the information contained in the petitioners' Section 24.

As stated above, this initiative generally seeks to impose a sales tax on the sale of services, and in Section 8, the term "services" is defined in the broadest way possible. However, in Section 24, the petitioners indicate many, many types of services would remain exempt, to include the comprehensive and wide-ranging fields of agricultural services, industrial services, transportation services, information services, health services, medical services, social services, and educational services. The two sections seem incongruent.

In Section 10, the petitioners seek to exclude "computer software" from the definition of "tangible personal property" in Idaho Code § 63-3616. As mentioned above, the code section used in Section 10 is not current with Idaho Code. Moreover, the Idaho Legislature has amended Idaho Code § 63-3616 in significant ways over the past three consecutive legislative sessions. Not only is the language used in Section 10 not current with Idaho Code, the changes proposed here would undo these very recent amendments (and would make more items taxable). It is unclear if that result is compatible with the petitioners' general intent.

The addition of the phrase "including sales of services" in Section 11 is redundant. The amendment to Idaho Code § 63-3612 includes the sales of services in the definition of "sales." The additions in this section may not be necessary.

The inclusion of the term "or service(s)" in Section 12 and Section 13 may not achieve the result intended by the drafters and may cause unnecessary confusion. By way of example, Idaho Code § 63-3621(f) relates to inventory held for resale. It is not clear how holding inventory for resale relates to services and the imposition of Idaho's use tax. Similarly, the addition of "or services" to Idaho Code § 63-3622(c) relates to tangible personal property sold for resale. The drafter's intent in adding "or services" is not apparent in relation to the resale of tangible personal property and could benefit from additional clarification.

The proposed Idaho Code § 63-3622D in Section 14 does not exempt any services except those services consumed in a production process. There are many statutes that provide exemptions of tangible personal property but would not be exempt from related services. For example, the occasional sale exemption exempts the transfer of tangible personal property between related

entities. The proposed initiative would impose tax on service transaction between related entities. There are other exemptions that similarly exempt transactions involving tangible personal property, but related service transactions would be taxed under the initiative. Some obvious examples include the pollution control exemption, the research and development exemption, and the logging exemption. The drafters of the initiative have the prerogative to maintain any of the exemptions for sales of tangible personal property while taxing sales of related services, but the petitioners may wish to consider some consistency for service related transactions.

The drafters also included sourcing provisions in Sections 18, 19 and 20. These sourcing rules seem unduly complex. Moreover, the sourcing rules may or may not be consistent with other provisions of the Idaho sales tax laws. Sourcing is defined as the point where the retail sale occurs. Subsection (5) of proposed Idaho Code § 63-3642 states that services "performed and consumed" in Idaho will be sourced to that location in Idaho. Services "performed" in another state yet "consumed" in Idaho will be sourced to Idaho where the "consumption" occurred. Services "performed" in Idaho yet "consumed" in another state will be sourced to that other state. The terms "performed" and "consumed" appear to be terms of art which could benefit from an explicit definition. Additionally, this section affects services related to sales of computer software and digital goods. It's worth noting that recent legislative changes also included provisions for remotely accessed software which will need to be addressed in the sourcing rules.

In Section 21, the petitioners provide language governing which contracts will be subject to the sales tax on services as well as which contracts are eligible for refunds. The operative dates in this section are based upon the dates of the written contract, as well as the nature of the services. This staggered implementation seems unduly complex and would present a huge administrative burden both for taxpayers as well as for tax administrators.

In Section 22, the petitioners seek to repeal approximately 26 sales tax exemptions. This section presents some substantive difficulties. First, the petitioners seek to repeal at least two of these exemptions in other portions of the initiative; repealing sections twice is redundant. Second, several of the exemptions pertain to matters involved in interstate commerce (i.e., railroad rolling stock, large motor vehicles, sales to out-of-state contractors). By

repealing tax exemptions related to interstate commerce (or, said in the reverse, by allowing for a state tax on interstate commerce), the initiative may run afoul of the federal constitutional prohibition against excessively burdening interstate commerce.

Additionally, Sections 24 and 25 present a challenge from a drafting standpoint. These sections contain no actual statutory language to be adopted; there is neither new law to be implemented, nor existing law to be amended. Rather, these sections are merely statements of intent regarding sales tax exemptions. It is axiomatic that an initiative contains law. *See* Idaho Code § 34-1804 (which indicates that referenda refer to acts of the legislature, and initiatives pertain to proposed laws). The petitioners may want to revisit these sections and propose specific statutory language to be implemented.

Finally, the proposed statutes appear to raise revenue for the State of Idaho. This raises the question of whether an initiative that raises revenue will be struck because it did not originate in the House of Representatives. Article III of the Idaho Constitution provides that all bills which raise revenue must originate in the House. There is an argument that an initiative not originating in the House which raises revenue will be prohibited.

By using the term "bill," the drafters of the Constitution implied that the provision only applies to legislative enactments. An initiative, as allowed for in art. III, sec. 1, is a process for the people through signatures and voting to enact legislation. The history of the federal Origination Clause is all about balance between the two legislative houses. Idaho seems to have just copied the federal practice. The Idaho Constitutional Convention in 1889 adopted this section without debate or amendment. At the federal level, the clause had two motives. First, it put the fiscal authority in the House of Representatives, which was seen as being the house closest to the people. Second, it acted as a counterbalance to the special powers granted only the Senate - the power to advise and consent to Presidential appointments and to ratify treaties.

Thus, the rationale for requiring revenue raising measures in the House seems inapplicable to initiatives. If, in fact, one of the motives is to give the power to the body closest to the people, then it seems logical that the initiative process could be used to raise revenue.

CERTIFICATION

I HEREBY CERTIFY that the enclosed measure has been reviewed for form, style, and matters of substantive import. The recommendations set forth above have been communicated to the Petitioner via a copy of this Certification of Review, deposited in the U.S. Mail to Betsy McBride, League of Women Voters of Idaho, 12923 N. Schicks Ridge Rd., Boise, Idaho 83714.

Sincerely,

LAWRENCE G. WASDEN
Attorney General

Analysis by:

David B. Young
Deputy Attorney General

[1] If these provisions remain, the title of the initiative may need to be broadened to inform voters that the initiative addresses more than sales tax, in order to permit a legal defense to be proffered under art. III, sec. 16 of the Idaho Constitution.

October 20, 2015

The Honorable Lawerence Denney
Idaho Secretary of State
Statehouse
VIA HAND DELIVERY

RE: Certificate of Review
Proposed Initiative Amending the Idaho Sunshine Act to Limit Campaign Contributors to a State Office to Constituents of that Office

Dear Secretary of State Denney:

An initiative petition was filed with your office on September 28, 2015, and forwarded to this office on the same day. Pursuant to Idaho Code § 34-1809, this office has reviewed the petition and prepared the following advisory comments. Given the strict statutory timeframe within which this office must review the petition, our review can only isolate areas of concern and cannot provide in-depth analysis of each issue that may present problems. Further, under the review statute, the Attorney General's recommendations are "advisory only." The petitioners are free to "accept them in whole or in part." The opinions expressed in this review are only those that may affect the legality of the initiative. This office offers no opinion with regard to the policy issues raised by the proposed initiative nor the potential revenue impact to the state budget.

BALLOT TITLE

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

MATTERS OF SUBSTANTIVE IMPORT

The principal purpose of the proposed initiative is clearly stated in the first sentence of the proposed law itself: To require any person who contributes to a candidate for office, to be a constituent of that office, i.e., to live in the district (or in Idaho for statewide offices). The proposed initiative would amend Idaho Code sections 67-6610 and 67-6610A to restrict contributions from candidates to State offices to contributions from a constituent of that office.[1] Further, contributions from corporations to a "Legislative Authorized Candidate Committee" or "State Authorized Candidate Committee" would not be permitted. (The quoted terms are used but not defined in the proposed initiative.) The proposed initiative would not restrict contributions to Political Action Committees or to State Party Committees if the contributions were not earmarked for specific candidates.

First, reviewing the proposed initiative for form and style pursuant to Idaho Code § 34-1809(1)(c), the amendments to sections 67-6610 and 67-6610A are not shown in "legislative format," i.e., they do not show which words in the current statutes would be stricken and do not show which words not in the current statutes would be inserted. This is the normal way in which changes from existing statutes are shown by amending legislation. This office recommends that the initiative should be revised to show changes from current sections of the Idaho Code by use of legislative format. *See*, for example, the legislative format used in another proposed initiative reviewed earlier this year: http://www.sos.idaho.gov/elect/inits/2016/init02.html. In addition, the proposed initiative uses capitalized terms like "Legislative Authorized Candidate Committee" or "State Authorized Candidate Committee" that are intended to have a specific meaning, but are not defined in the law. This office recommends that these and other capitalized terms contained in the proposed initiative that are not now found in Idaho law be defined in the initiative.

Second, reviewing the proposed initiative for matters of substantive import under Idaho Code § 34-1809(1)(a), the initiative is unconstitutional under the First Amendment. To begin, its prohibition of corporate contributions to candidates is unconstitutional under the natural extension of the holding in Citizens United v. Federal Election Com'n, 558 U.S. 310, 130 S. Ct. 876, 175 L.Ed.2d 753 (2010). Citizens United was a case involving a Federal

law that prohibited corporations and unions from making independent expenditures for electioneering communications (broadcasts or wide deliveries of materials that mention a candidate by name during the month or two before an election) or that advocate for the election or defeat of a candidate for Federal office. For example, Citizens United said: "The First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office," 558 U.S. at 339; "Prohibited, too, are restrictions distinguishing among different speakers, allowing speech by some but not others," *id.* at 340; and, "No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations," *id.* at 365.

Citizens United struck down a law limiting corporations' electioneering communications or independent advocacy for or against Federal candidates as a violation of the First Amendment's Free Speech Clause. It did not address the constitutionality of prohibiting corporate donations to a candidate's campaign. But it is clear from Citizens United that the same rules of constitutional law would apply to individuals and corporations in the law of Free Speech under the First Amendment and elections.

The rules of First Amendment Free Speech law for campaign contributions were elaborated in McCutcheon v. Federal Election Comm'n, 572 U.S. —, 134 S. Ct. 1434, 188 L.Ed.2d 468 (2014). McCutcheon involved a Federal statute that as practical matter, limited the number of candidates for Federal office to whom a political donor could contribute the maximum allowed contributions per candidate by the indirect means of an aggregate limit on total donations to Federal candidates and political action committees (PACs). 134 S. Ct. at 1442-44. This prohibition against giving the maximum contribution to as many candidates or PACs as the donor wished was struck down as a violation of the donor's Free Speech rights to donate. Among other things, the Court said:

> The right to participate in democracy through political contributions is protected by the First Amendment, but that right is not absolute. Our cases have held that Congress may regulate campaign contributions to protect against corruption or the appearance of corruption. ... At the same time, we have made clear that Congress may not regulate contributions simply to reduce the amount of money in poli-

> tics, or ***to restrict the political participation of some in order to enhance the relative influence of others.***

134 S. Ct. at 1441 (emphasis added; citations omitted). Thus, we may infer that it is unconstitutional to limit persons to donating only within their own legislative district to enhance the relative influence of those within the district compared to those without the district.

> Any regulation must . . . target what we have called quid pro quo corruption or its appearance . . . dollars for political favors. . . . Campaign finance restrictions that pursue other objectives, we have explained, impermissibly inject the Government into the debate over who should govern.

134 S. Ct. at 1441 (citations and internal punctuation omitted). Thus, we may infer that limiting political donations to persons within a legislative district is unconstitutional.

> The First Amendment is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, . . . in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests. . . . ***[T]he First Amendment safeguards an individual's right to participate in the public debate through political expression and political association. . . . When an individual contributes money to a candidate, he exercises both of those rights:*** The contribution serves as a general expression of support for the candidate and his views and serves to affiliate a person with a candidate.
>
> . . . .
>
> ***. . . The Government may no more restrict how many candidates or causes a donor may support than it may tell a newspaper how many candidates it may endorse.***

> . . . [Under the statute under review a] donor must ***limit the number of candidates he supports,*** and may have to choose which of several policy concerns he will advance—***clear First Amendment harms . . . .***

134 S. Ct. at 1448-49 (emphasis added; citations and internal punctuation omitted). Thus, we may again infer an unlimited First Amendment right to donate to any candidate.

> . . . This Court has identified only one legitimate governmental interest for restricting campaign finances: preventing corruption or the appearance of corruption. . . . We have consistently rejected attempts to suppress campaign speech based on other legislative objectives. No matter how desirable it may seem, it is not an acceptable governmental objective to level the playing field, or to level electoral opportunities, or to equalize the financial resources of candidates. . . . The First Amendment prohibits such legislative attempts to fine-tune the electoral process, no matter how well intentioned.

Id. at 1450 (citations and internal punctuation omitted). Thus, we may infer that limiting allowable donors to those who live in a particular legislative district is unconstitutional because it is not tailored to the issue of *quid pro quo* corruption.

McCutcheon did not explicitly address the issue of whether contributions to candidates can be limited in whole or in part to contributions from people in the candidate's constituency. But decisions of two Federal Courts of Appeals have, and both have concluded that such restrictions were unconstitutional.

- In Landell v. Sorrell, 382 F.3d 91, 146 (2nd Cir. 2002), *reversed on other grounds*, Randall v. Sorrell, 548 U.S. 230, 126 S. Ct. 2479, 165 L.Ed.2d 482 (2006), a Vermont statute that limited out-of-state contributions to a candidate to 25% of total contributions to the candidate was held unconstitutional. As the United States Supreme Court said: "The Act also limits the amount of contributions a candidate, political

committee, or political party can receive from out-of-state sources. . . . The lower courts held these out-of-state contribution limits unconstitutional, and the parties do not challenge that holding." *Id.* at 239.

- In VanNatta v. Keisling, 151 F.3d 1215 (9th Cir. 1998) , cert denied, 525 U.S. 1104, 119 S. Ct. 870, 142 L.Ed.2d 771 (1999), an Oregon initiative that prohibited a candidate's use of donations from out-of-district residents was held unconstitutional: "Measure 6 is not closely drawn to advance the goal of preventing corruption and under this analysis fails to pass muster under the First Amendment." 151 F.3d at 1221.

Contrary decisions like State v. Alaska Civil Liberties Union, 978 P.2d 597 (Alaska 1999), *cert. denied*, 528 U.S. 1153, 120 S. Ct. 1156, 145 L.Ed.2d 1069 (2000), pre-date Citizens United and McCutcheon and would not seem to be consistent with them.

This constitutional analysis is not complete; further analysis would only identify more First Amendment problems. Suffice it to say, no initiative prohibiting corporate donations to candidates for State office or restricting allowable donations to those from constituents within a district will withstand constitutional challenge. There does not seem to be any way to preserve the proposed initiative's goal in a constitutional manner.

CERTIFICATION

I HEREBY CERTIFY that the enclosed measure has been reviewed for form, style, and matters of substantive import. The recommendations set forth above have been communicated to the Petitioner via a copy of this Certification of Review, deposited in the U.S. Mail to Robert A. Perry, 9215 N. Great Hall Drive, Hayden, Idaho 83835.

Sincerely,

LAWRENCE G. WASDEN
Attorney General

Analysis by:

Michael S. Gilmore
Deputy Attorney General

[1] This means that contributors to a legislative campaign would have to live in that legislative district, contributors to a district judge's campaign would have to live in that judicial district, and contributors to a campaign for statewide office like Governor or Justice of the Supreme Court would have to live in Idaho. The rest of this review focuses on legislative candidates, but a similar analysis would apply for a candidate for district judge in a judicial district or for a candidate for statewide office.

October 22, 2015

The Honorable Lawerence Denney
Idaho Secretary of State
Statehouse
VIA HAND DELIVERED

RE: Certificate of Review
Proposed Initiative Relating to The College, Not Cancer Act

Dear Secretary of State Denney:

An initiative petition was filed with your office on September 23, 2015. Pursuant to Idaho Code § 34-1809, this office has reviewed the petition and prepared the following advisory comments. Given the strict statutory timeframe within which this office must review the petition, our review can only isolate areas of concern and cannot provide in-depth analysis of each issue that may present problems. Further, under the review statute, the Attorney General's recommendations are "advisory only." The petitioners are free to "accept or reject" the recommendations "in whole or in part." The opinions expressed in this review are limited to those that may affect the legality of the initiative. This office offers no opinion with regard to the policy issues raised by the proposed initiative.

BALLOT TITLE

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

MATTERS OF SUBSTANTIVE IMPORT

A. Summary of the Initiative.

The proposed initiative, which is entitled "The College, Not Cancer Act" (hereinafter "Act"), presents code sections that petitioners want added to Idaho Code, title 33, chapter 37 (hereinafter "Education Code") and title 56, chapter 10. These proposed code sections modify existing tax rates found in Idaho Code, title 63 (hereinafter "Tax Code"). The petitioners' objectives are to raise revenue to decrease the cost of tuition for students attending public universities and to increase state funding for tobacco cessation programs. The petitioners propose to raise this revenue by increasing the cigarette tax from 57¢ to $2.07 per package of 20 cigarettes. Additionally, petitioners propose raising the percentage-based tax on other tobacco products from 40% of the wholesale price to 52% of the wholesale price.

The Act specifies that portions of the funds raised by the increase of tax revenue coming from the cigarette tax should be continuously apportioned for the use of the State Board of Education to reduce the cost of tuition and to benefit public community and technical colleges. To facilitate this apportionment, the Act establishes a "State Board Affordable Higher Education Fund" and a "Community and Technical College Investment Fund," both to be overseen by the State Board of Education. The Act directs the Board of Education to use the Higher Education Fund "for the sole purpose of direct and equal application to each resident undergraduate student's tuition bill at Idaho's public four-year colleges and universities." Likewise, the Community and Technical College Fund may only be used "for public community and technical colleges."

The Act further specifies that portions of the funds raised from the increase of tax revenue should be apportioned for the use of the Department of Health and Welfare to fund a tobacco cessation program. The Act establishes an "Idaho Tobacco Prevention and Cessation Fund" to be directed by the Department of Health and Welfare. The Department of Health and Welfare is to use the apportioned funds for the sole "purpose of funding a statewide tobacco prevention and control program."

To fund these programs, the Act divides the "cumulative increased revenues derived from the cigarette tax increase . . . and the tobacco tax increase" so that 80% of this revenue is apportioned to the Higher Education Fund, 10% of the revenue is apportioned to the Community and Technical

College Fund, and the remaining 10% of the revenue is apportioned to the Tobacco Prevention Fund.

B. Constitutionality of the Initiative.

The Act, as written, might not conform to the requirements of art. III, sec. 18 of the Idaho Constitution. That section states:

> No act shall be revised or amended by mere reference to its title, but the section as amended shall be set forth and published at full length.[1]

This section prohibits the insertion of words or substitution of phrases into a preexisting statute by mere reference.[2] In order to effectively amend statutory language, an act must set forth the language of the amended statute in its entirety.

The Act could be challenged for violating art. III, sec. 18. The plain language of the Act indicates its intent to amend the tax rates on cigarettes and other tobacco products as provided in Idaho Code sections 63-2506, 63-2552, and 63-2552A. The Act also does not set forth the complete language of these statutes, as amended. Rather, the Act describes how each section's rate should be modified. As such, the Act may violate the prohibition on substituting phrases into a preexisting statute by mere reference.

The Act can avoid art. III, sec. 18 challenges by making simple changes to the language of the Act. By directly amending the Tax Code sections referenced by the Act instead of creating new sections in the Education Code, the Act will avoid making an amendment by reference. Additionally, such a revision also plays a practical purpose: by amending the Tax Code section directly, the Act avoids the odd effect of defining tax rates in the Education Code.

C. Conformity to Statutory Framework.

The sections proposed by the Act could be reformulated to better adhere to the style and system of existing laws. Current statutes for cigarette and tobacco taxes already have a mechanism for taxing cigarette and tobacco

products and appropriating revenue generated by these taxes. Rather than modifying the statutes, the Act proposes new sections that run parallel to existing ones. These parallel sections unnecessarily complicate existing laws and may lead to confusion when applying the Act and when collecting cigarette and tobacco taxes. Problems introduced by creating these parallel sections can be avoided by amending the statutes directly.

Presently, all taxation of cigarettes and other tobacco products and the distribution of revenues from such taxation is defined in chapter 25 of the Tax Code, Cigarette and Tobacco Products Taxes. That chapter sets forth definitions related to cigarette and tobacco products, how these products are taxed, and how such taxes are enforced and collected. The chapter also establishes how revenue raised from cigarette and tobacco products taxes are appropriated.[3]

The Act proposes an additional layer of appropriation on to what is an already complex appropriation process. The Act would appropriate the "cumulative increased revenues" from the cigarette tax and tobacco tax increases while leaving the existing mechanism for appropriating revenue generated by these taxes in place. The existing statutory framework creates a cascading appropriation of funds, which includes appropriations to public schools to fund substance abuse prevention programs, the central cancer registry fund, and the cancer control fund.[4] By adding another layer in a different code section rather than modifying the existing process, the Act introduces further complexity and ambiguity as to how funds should be appropriated.

If the Act is adopted, the tax rate on cigarette and tobacco products and the appropriation of revenue from such taxes would not be plainly found within the language of chapter 25 of the Tax Code. Taxpayers or other interested individuals may find it difficult to discover the tax rate on cigarettes or the appropriation of such revenue if they have to look in other chapters to find that information. If the Act instead modifies the existing code sections, it will prevent taxpayer confusion by grouping all cigarette and tobacco taxation and related revenue appropriation sections within the same chapter.

Furthermore, the language that the Act uses to appropriate funds does not follow the typical legislative style. It is atypical for specific appropriation language to appear in the same section as the fund created to receive the

appropriated revenue. When creating funds, instead of specifically appropriating revenue to the fund, the legislature often uses a phrase similar to the following: "subject to appropriation by the legislature."[5] It is more typical for specific appropriation language to be found in the revenue-generating sections than in fund-creating sections.[6] Thus, while the Act's language related to the creation of funds may be appropriately located, the specific appropriation of revenue to these funds likely should be moved to the revenue-generating code sections.

The language the Act uses to create funds also does not follow the typical legislative style because it does not specify that the funds created by the Act are created in the state treasury. When establishing a fund, the legislature typically employs a phrase similar to the following: "the fund is hereby created in the state treasury." This language is likely used to ensure compliance with art. VII, sec. 7 and 13 of the Idaho Constitution, which requires "[a]ll taxes levied for state purpose [to] be paid into the state treasury" and that "[n]o money shall be drawn from the treasury, but [by] appropriations made by law." The Act does not state that the funds it proposes to create are created in the state treasury. While using this language may be overly formalistic, adopting the phrase "created in the state treasury" complies with legislative style and may avoid challenges to the Act.

D. Recommended Revisions, Alterations, and Miscellaneous Issues.

1. The "Section 2. Purpose" of the Act states that it wants to reduce the tuition costs of "students and families" and wants to promote achievement at public "two and four-year colleges and universities," however it only proposes to use tax revenue to decrease the tuition of undergraduate students at four-year colleges or universities. For two-year colleges and technical colleges, the Act proposes a fund to benefit the institutions, but does not propose a fund tasked with reducing the tuition for such students. It is unclear if this different treatment of students of two-year colleges and students of four-year colleges is intentional.

2. The title of Proposed Idaho Code section 33-3717D does not have a period at the end of the title.

3. The phrase "cumulative increased revenues," found in Proposed Idaho Code sections 33-3717F, 33-3717G, and 56-1055 is ambiguous as it may refer to year-to-year gross tax increases or to the amount by which the new tax rate increases revenue generated in a single taxable year above what would have otherwise been generated under the superseded statutory language. If the former interpretation of the phrase is controlling, then it is unclear whether the Act's proposed appropriations would occur if there is a year-to-year decline in tax revenue. This ambiguity may be avoided by defining how cumulative increased revenues are to be calculated.

4. Proposed Idaho Code section 56-1055 currently reads, "[T]hat portion of the cumulative increased revenues derived from the tobacco tax increase . . . and the tobacco tax increase." The first instance of "tobacco tax increase" should be changed to "cigarette tax increase" as the petitioners drafted it in Proposed Idaho Code sections 33-3717F and 33-3717G.

5. All instances of the phrase "any other currently relevant sections, Idaho Code" should be changed to "any other currently relevant Idaho Code sections" to improve clarity and to be consistent with the rest of the Idaho Code.

CERTIFICATION

I HEREBY CERTIFY that the enclosed measure has been reviewed for form, style, and matters of substantive import. The recommendations set forth above have been communicated to the Petitioner via a copy of this Certification of Review, deposited in the U.S. Mail to William Moran II, 17322 Can-Ada Road, Nampa, Idaho 83687.

Sincerely,

LAWRENCE G. WASDEN
Attorney General

Analysis by:

Nathan Nielson
Deputy Attorney General

[1] Idaho Const. art. III, § 18.

[2] Noble v. Bragaw, 12 Idaho 265, 276, 85 P. 903, 906 (1906).

[3] *See* Idaho Code §§ 63-2506, 63-2520, 63-2552A, and 63-2564.

[4] Revenue from the 57¢ tax on cigarettes is presently appropriated thusly, ordered by statutory preference: $3,315,000 to public schools to provide substance abuse programs; $3,315,000 to juvenile probationary services; any necessary funds to the state refund account; $5,000,000 to the state building fund; $120,000 to the central cancer registry fund; $300,000 to the cancer control fund; an amount equal to the annual general fund appropriation to the general fund; to the permanent building fund for Capitol Building restoration; $4,700,000 to GARVEE; $5,000,000 to the secondary aquifer planning management and implementation fund; and then to the state highway fund.

This distribution model is scheduled to change in 2019, at which time the cigarette tax will be appropriated thusly: $3,315,000 to public schools to provide substance abuse programs; $3,315,000 to juvenile probationary services; any necessary funds to the state refund account; 17.3% to the permanent building fund; 0.4% to the central cancer registry fund; 1% to the cancer control account; the amount equal to the annual general fund appropriation for bond levy equalization; for 2005 through 2006, all money shall be appropriated to the economic recovery reserve fund; to the permanent building fund for Capitol Building restoration; and the remainder to the economic recovery reserve fund.

The revenue from the 5% tax on other tobacco products is appropriated thusly, in order of statutory preference: 50% of this amount to public schools for safety improvements and substance abuse prevention programs less $200,000 to the State Police toxicology lab and $80,000 to the Commission on Hispanic affairs for substance abuse prevention programs. The other 50% is to be used by juvenile corrections.

The revenue from the 35% tax on other tobacco products is appropriated thusly, in order of statutory preference: to the state refund account, as needed with the remainder to the general fund.

[5] E.g., Idaho Code § 56-1018.

[6] E.g., Idaho Code § 49-452.

October 30, 2015

The Honorable Lawerence Denney
Idaho Secretary of State
Statehouse
VIA HAND DELIVERY

RE: Certificate of Review
Proposed Initiative Amending the Idaho Sales Tax Statutes

Dear Secretary of State Denney:

An initiative petition was filed with your office on October 7, 2015. Pursuant to Idaho Code § 34-1809, this office has reviewed the petition and prepared the following advisory comments. Given the strict statutory time-frame in which this office must review the petition, our review can only isolate areas of concern and cannot provide in-depth analysis of each issue that may present problems. Further, under the review statute, the Attorney General's recommendations are "advisory only." The petitioners are free to "accept them in whole or in part." The office offers no opinion with regard to the policy issues raised by the proposed initiative or the potential revenue impact to the state budget.

BALLOT TITLE

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

MATTERS OF SUBSTANTIVE IMPORT

Note: This proposed initiative is nearly identical to an initiative filed with your office on May 15, 2015, by the same petitioners. Only a few sections in that initiative have been modified in this initiative. This Office issued

its Certificate of Review of that initiative on June 10, 2015. That review is applicable to the majority of the present initiative. Accordingly, this review incorporates by reference this Office's prior review, available at: http://www.ag.idaho.gov/publications/op-guide-cert/2015/C06102015.pdf. The two Certificates of Review should be read together.

On the whole, the changes to the initiative are modifications to existing Idaho sales and use tax exemptions.

As noted in the prior review, the petitioners will need to revise the proposal to include the most recent version of the Idaho Code (i.e., Section 7, modified since the last review, but still not containing the complete code section, Idaho Code § 63-3613; Section 25 which contains an incomplete version of Idaho Code § 63-3622O; and Section 12 needs to add subsection (p) to Idaho Code § 63-3621).

The proposed amendment in Section 8 raises a question of completeness. The proposal contains a new term ("services") and provides its definition (Section 8), and includes services within the meaning of "sales" in Idaho Code § 63-3612 (*see* Section 6). This iteration of Section 8 provides a new list of services that are included within the meaning of the term "services," including "Information Services," "Social Services," and "Transportation Services." They are denominated with capital letters, as if they are titles. It is noted, however, that terms are nowhere defined within the proposal. (Those terms are included within a larger list of services contained in Section 24, but as before, Section 24 contains no actual statutory language to be adopted.) The petitioners would do well to define these terms.

In Section 22, the petitioners seek to repeal a list of various tax exemptions. One of the statutes listed in that Section 22 is Idaho Code § 63-3621 in its entirety. However, section 63-3621 is the section of the Code that provides for the imposition of the use tax. Apparently, the petitioners' actual intent as to Idaho Code § 63-3621 is to repeal only the food and beverage sample exemption contained therein (as evidenced by the supplemental material accompanying their initiative). The portions pertaining to food and beverage samples in Idaho Code § 63-3621 are subsections (n), (o) and (p). The petitioners are aware that Section 22 should be revised to indicate that the repeal in section 63-3621 is limited to those subsections. In turn, and to be

consistent, Section 12 should be revised to strike through subsections (n), (o) and (p) of Idaho Code § 63-3621.

CERTIFICATION

I HEREBY CERTIFY that the enclosed measure has been reviewed for form, style, and matters of substantive import. The recommendations set forth above have been communicated to the Petitioners via a copy of this Certificate of Review, deposited in the U.S. Mail to Betsy McBride, League of Women Voters of Idaho, P. O. Box 7018, Boise, Idaho 83714.

Sincerely,

LAWRENCE G. WASDEN
Attorney General

Analysis by:

David B. Young
Deputy Attorney General

Topic Index

and

Tables of Citation

CERTIFICATES OF REVIEW

2015

2015 CERTIFICATES OF REVIEW INDEX

IDAHO CONSTITUTION CITATIONS

UNITED STATES CODE CITATIONS

IDAHO CODE CITATIONS

ATTORNEY GENERAL'S SELECTED ADVISORY LETTERS FOR THE YEAR 2015

LAWRENCE G. WASDEN

ATTORNEY GENERAL
STATE OF IDAHO

January 6, 2015

The Honorable Christy Perry
Idaho State Representative
8791 Elkhorn Lane
Nampa, ID 83686

Re: Our File No. 15-50231 - Tribal Video Gaming Machines and Art. III, Sec. 20(2) of the Idaho Constitution

Dear Representative Perry:

Your letter of January 5, 2015, posed the following question:

> Are tribal video gaming machines described in Idaho Code 67-429B subject to the limitations in Idaho's Constitution Article III Section 20 subsection (2)?

The short answer to this question is yes. This letter also provides some history and background to explain this answer.

Art. III, subsection 20(1) of the Idaho Constitution authorizes three kinds of gambling in Idaho: (a) a State lottery "conducted in conformity with enabling legislation;" (b) pari-mutuel betting "conducted in conformity with enabling legislation;" and (c) bingo and raffle games operated by qualified charities "conducted in conformity with enabling legislation." Subsection 20(2) prohibits any imitation or simulation of various casino games as well as the casino games themselves. The current version of art. III, sec. 20 took effect after the passage of the Indian Gaming Regulatory Act, which is described below.

In 1987, the United States Supreme Court decided California v. Cabazon Band of Mission Indians, 480 U.S. 202, 107 S. Ct. 1083, 94 L.Ed.2d 244 (1987), which held that Congress had not authorized California to enforce its anti-gambling laws against high-stakes bingo offered by the Cabazon and Morongo Bands, even though the games were offered to non-Tribal members, because Congress had not extended State jurisdiction to the Tribes on whose reservations the games were played. *Id.* at 216-22.

In response, one year later Congress enacted the Indian Gaming Regulatory Act (IGRA), Public Law 100-497 (1988). Among other things, IGRA defined three classes of gaming:

- Class I Gaming consisted of "social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, Tribal ceremonies or celebrations." 25 U.S.C. § 2703(6).

- Class II Gaming included "bingo (whether or not electronic, computer, or other technologic aids are used . . .)" played for money or other prizes. *Id.* at § 2703(7)(A). With exceptions that do not apply to Idaho, Class II gaming did not include "any banking card games, including baccarat, chemin de fer, or blackjack . . . ." *Id.* at § 2703(7)(B).

- Class III gaming was residually defined as "all forms of gaming that are not class I gaming or class II gaming." *Id.* at § 2703(8).

IGRA thus gave the States a role in Indian Tribes' Class III gaming. Among other things, IGRA provided that:

> (1) Class III gaming activities shall be lawful on Indian lands only if such activities are . . .
>
> . . .
>
> (B) located in a State ***that permits such gaming for any purpose by any person, organization, or entity,*** and
>
> (C) ***conducted in conformance with a Tribal-State compact entered into and by the Indian tribe and the State . . .***

25 U.S.C. § 2710(d)(1) (emphasis added).

Congress has authority "[t]o regulate commerce . . . with the Indian tribes." U.S. Const. art. 1, § 8, cl. 3. Idaho agreed in 1890 that "Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States." Idaho Const. art. XXI, § 19. The sum of these constitutional provisions and of IGRA is that Idaho has no authority over gambling conducted by Tribes or Tribal members on reservation lands except as Congress has authorized.

Congress has provided in 25 U.S.C. § 2710(d)(1)(B) that Class III games are lawful on Indian lands if the State permits any person, organization or entity to conduct them and there is a State-Tribal Compact to do so. Concretely, this means that a Tribe may conduct a lottery, pari-mutuel betting, and raffles (in addition to bingo) if authorized by a compact with Idaho. The Ninth Circuit has for almost two decades interpreted IGRA's provisions concerning Class III gaming to mean that Tribes may conduct only Class III games authorized by the State, not other Class III gaming. Rumsey Indian Rancheria of Wintun Indians v. Wilson, 64 F.3d 1250, 1258 (9th Cir. 1994) ("IGRA does not require a state to negotiate over one form of Class III gaming activity simply because it has legalized another"), *as amended* 99 F.3d 321 (9th Cir. 1996), *cert. denied sub nom.* Sycuan Bank of Mission Indians v. Wilson, 521 U.S. 1118, 117 S. Ct. 2508, 138 L.Ed.2d 1012 (1997).

Four Idaho Tribes have Class III Gaming Compacts with the State and had them before 2002: The Coeur d'Alene, Kootenai, Nez Perce and Shoshone-Bannock Tribes. In 2002 the people approved the so-called Tribal Gaming Initiative, which enacted Idaho Code §§ 67-429A through 67-429C into law. That Initiative allowed any Tribe to amend its Compact to offer tribal video gaming machines as authorized by those sections of the Initiative. Three of the tribes so amended their compacts with approval from the Secretary of the United States Department of the Interior. A fourth tribe—the Shoshone Bannock Tribes—operates such machines pursuant to a most-favored-nations provision in its compact. Idaho v. Shoshone-Bannock Tribes, 465 F.3d 1095, 1097-98 (9th Cir. 2006). The Secretary's approval was issued in February 2003 and has not been successfully challenged. *See* Knox v. State ex rel. Otter, 148 Idaho 324, 336-38, 223 P.3d 266, 278-80 (2010). The Tribes are thus entitled to operate tribal video gaming machines consistent with section 67-429B as a matter of federal and state law.

Of course, the rulings regarding tribal video gaming machines in general do not mean that a given machine could never run afoul of art. III, subsection 20(2) of the Idaho Constitution. When the situation arises that the State believes a given machine violates that subsection, or does not pay out like a lottery or a pari-mutuel bet authorized by Idaho law, legal processes exist to resolve the dispute.

I hope this answers your question.

Sincerely,

BRIAN KANE
Assistant Chief Deputy

January 16, 2015

The Honorable Steven Thayn
Idaho State Senator
Statehouse
VIA HAND DELIVERY

Re: Our File No. 15-50285 - The State Selling or Providing Health Insurance

Dear Senator Thayn:

Your question was whether the State of Idaho may sell or provide health insurance. As explained below, the answer is yes. When analyzing the Legislature's authority under the Idaho Constitution, the question to be asked is not whether the Legislature may authorize legislation on a particular subject, but whether the Constitution prohibits legislation on a particular subject:

> "It must be kept in mind that the Constitution of the State of Idaho is not a delegation of power to the legislature but is a limitation on the power it may exercise, and that the legislature has plenary power in all matters for legislation except those prohibited by the constitution." *Idaho Tel. Co. v. Baird*, 91 Idaho 425, 428, 423 P.2d 337, 340 (1967).
>
> . . . .
>
> "Our State Constitution is a limitation, not a grant of power, and the Legislature has plenary powers in all matters, except those prohibited by the Constitution." *Rich v. Williams*, 81 Idaho 311, 323, 341 P.2d 432, 439 (1959).

Idaho Press Club, Inc. v. State Legislature of the State of Idaho, 142 Idaho 640, 642, 132 P.3d 397, 399 (2006).

The Idaho Constitution does not prohibit the State of Idaho from selling or providing health insurance. The State currently sells or provides many

kinds of insurance. For example, the State Insurance Fund, which is a state-created independent body corporate politic, offers workers' compensation insurance. Idaho Code § 72-901. Before the State Insurance Fund was structured as an independent body corporate politic, it was located within the Office of the Governor. *See* Idaho Code § 72-902 before 1998 amendments in 1998 Idaho Sess. Laws 1346. *See* also the Idaho Petroleum Clean Water Trust Fund Act, Idaho Code §§ 41-4901, et seq., which "create[s] and regulate[s] in the public interest the formation and operation of a liability insurance trust fund that will make contracts of liability insurance available to owners and operators of petroleum storage tanks," Idaho Code § 41-4902(2); and the Commodity Indemnity Fund Program, Idaho Code §§ 69-255, et seq., which does not describe itself as insurance, but nevertheless provides a program for payments to persons who have lost stored crops following the failure of a public warehouse that stores agricultural commodities.

In conclusion, the Legislature may authorize the State to sell or provide health insurance or may create a department, division or independent body corporate politic that does so.

I hope you find this analysis helpful.

Sincerely,

SHERMAN F. FUREY, III
Chief Deputy

January 26, 2015

E. Clayne Tyler
Clearwater County Prosecuting Attorney
P. O. Box 2627
Orofino, ID 83544

Dear Mr. Tyler:

Your e-mail of November 7, 2014, to Brian Kane requesting an attorney general opinion was forwarded to me for response.

In your e-mail you describe how the financial administration of the Clearwater County Ambulance District is handled by Clearwater County, and describe problems the County is facing in paying the District's warrants through the County's bank account. You ask four questions about the current relationship between the County and the District, and the arrangement that is used to administer the District's financial responsibilities. Those questions are:

1) Does this arrangement violate either the statutory or constitutional prohibitions against lending money?

2) Is Clearwater County violating any statutory or Idaho constitutional provision by managing the receipt of funds and payment of expenses of the Clearwater County Ambulance District without seeking any contribution for overhead and employee expenses incurred by the County?

3) Is it improper to operate an independent taxing district such as an Ambulance District utilizing the County Tax I.D. number?

4) If the answer to any of the above questions is "yes," can those problems be overcome by use of a joint powers agreement as contemplated by Idaho Code § 67-2328?

I will attempt to answer your questions in the same order they are presented.

1. Clearwater County's advances of money to satisfy Clearwater County Ambulance District warrants are likely legal under Idaho law.

Constitutional Analysis

There are provisions of Idaho law limiting a county's ability to loan funds. Art. VIII, sec. 4 of the Idaho Constitution states:

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

Art. XII, sec. 4, pointed out in your e-mail, states:

> **§ 4. Municipal corporations not to loan credit.** — No county, town, city, or other municipal corporation, by vote of its citizens or otherwise, shall ever become a stockholder in any joint stock company, corporation or association whatever, or raise money for, or make donation or loan its credit to, or in aid of, any such company or association: 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.

Because they are similar in many regards, and because they are often invoked by parties in the same controversies, these constitutional provisions are commonly discussed together by Idaho courts. Two of the more recently reported cases under the two constitutional provisions are: Boise Redevelopment Agency v. Yick Kong Corp., 94 Idaho 876, 499 P.2d 575

(1972) and Utah Power & Light Co. v. Campbell, 108 Idaho 950, 703 P.2d 714 (1985). In these cases, the Idaho Supreme Court determined that the intent of both art. VIII, sec. 4, and art. XII, sec. 4 of the Idaho Constitution, was to ensure that private enterprise was not funded with public moneys.

The Boise Redevelopment Agency case concerned the constitutionality of an urban renewal law that authorized municipalities to offer grants and loans of credit to urban renewal agencies. The Idaho Supreme Court found specifically that the "[p]laintiff, being a public and not a private enterprise, does not fall within the strictures and prohibition of Article 8, Section 4 and Article 12, Section 4 of the Idaho Constitution . . .". Boise Redevelopment Agency, 94 Idaho at 884, 499 P.2d at 583. In the Utah Power & Light case, the Idaho Supreme Court cited prior precedent, including Boise Redevelopment Agency, and also discussed debates during Idaho's Constitutional Convention of 1889, to show that:

> [i]t is obvious that the framers of the Idaho Constitution had no intention of limiting the power of municipalities to *contract* in furtherance of the public interest, but rather of limiting *loans* or *donations* of public credit. These words clearly limit the scope of the credit clause to cases in which the public credit is under the control of private interests.

Utah Power & Light, 108 Idaho at 954, 703 P.2d at 718 (emphasis added).

It seems then, that the Idaho Constitution prohibits counties from loaning public credit to private interests, but has not been interpreted to preclude the loaning of credit to other public bodies.

Idaho Code § 31-3908(2) specifically identifies providing ambulance service as a "governmental function." While no case speaks directly to loans from counties to ambulance districts, it is logical to conclude a statutorily organized ambulance district would be a public enterprise as envisioned by the Idaho Supreme Court in its decisions on the subject. Clearwater County, therefore, can loan funds to the Clearwater County Ambulance District in administration of the District's operation without violating the constitutional prohibitions on counties loaning their credit.

Statutory Analysis

Idaho law also contains certain provisions against counties loaning money. A board of county commissioners has only such powers as are expressly or impliedly conferred upon it by statute. Prothero v. Bd. of Comm'rs of Twin Falls County, 22 Idaho 598, 602, 127 P. 175, 177 (1912). There is no express statutory provision specifically authorizing a county to loan funds to an ambulance district in Idaho Code. Idaho Code § 31-2119 also prohibits county treasurers from loaning county or state funds or allowing anyone to use those funds, except as provided by law.

However, Idaho Code § 31-604 grants a county "authority as may be necessary to effectively carry out the duties imposed on it by the provisions of the Idaho Code and constitution." Idaho Code § 31-828 extends a county's board of commissioners the power "[t]o do and perform all other acts and things required by law not in this title enumerated, or which may be necessary to the full discharge of the duties of the chief executive authority of the county government." These statutory provisions grant an implied authority for the county and its board to perform acts that, while not expressly authorized in statute, are required to properly perform the duties of the county or board.

Idaho Code § 31-3901 identifies providing ambulance service as a governmental function and authorizes a county to establish its own ambulance service. Idaho Code § 31-3908 authorizes the establishment of separate ambulance districts in counties, provides that the board of county commissioners is the governing board of those districts, and tasks that board with exercising the duties and responsibilities it would have over its own county ambulance service. Essentially, this allows for a separate taxing district with its own levy limits that is otherwise managed in the same manner as a county ambulance service.

Because ambulance service is a governmental function; because the county board is required to manage both its own ambulance service and separate county ambulance districts in the same manner; and because the county board has implied authority to perform acts required to properly perform its duties, it is also likely that a county has the authority to make a loan of available funds in order to properly administer the financial concerns of a county ambulance district established under Idaho Code § 31-3908.

2. Clearwater County's method of managing the financial concerns of the Clearwater County Ambulance District is likely legal under Idaho law.

Idaho Code indicates that it is the county commissioners and the county treasurer themselves who are specifically charged with governing and running any ambulance district, including collecting its funds.

An ambulance service district is recognized as a legal taxing district and providing an ambulance service is a governmental function, however it operates entirely under the authority of the board of county commissioners that creates it. (*See* Idaho Code § 31-3908(3) "The board of county commissioners shall be the governing board of an ambulance service district created pursuant to this section, and shall exercise the duties and responsibilities provided in [this chapter].") The board of county commissioners is required to exercise the duties and responsibilities toward the district in the same manner and consistent with the remaining provisions in the chapter providing for the formation and administration of county ambulance services in general (title 31, chapter 39, Idaho Code). *Id.*

Specifically, title 31, chapter 39, Idaho Code, provides, among other things, that the county treasurer is to establish and use any ambulance service fund for the purposes of the enabling statute. Idaho Code § 31-3902 ("[t]he county treasurer . . . shall establish a fund to be designated as the ambulance service fund, and used exclusively for the purposes of this act."). Moreover, the chapter provides that the board of county commissioners "shall determine the manner in which said ambulance service shall be operated," and that it is empowered to make specified expenditures from the ambulance service fund. Idaho Code § 31-3903. Additionally, the board of county commissioners is to adopt a fee schedule for the use of the ambulance service, and that all such fees are to be "collected, accounted for and paid to the county treasurer for deposit in the ambulance service fund, and shall be used to pay expenses as incurred in the maintenance and operation of said ambulance service." Idaho Code § 31-3904.

In your e-mail, you also made note of Idaho Code § 31-2119, prohibiting county treasurers from loaning funds. You explained that, due to the County's bank's requirements for honoring warrants, the Treasurer must pay

the District's warrants with County money and then reimburse the County from the Ambulance District fund, essentially providing the Ambulance District with short term operating loans. Idaho Code § 31-2119 does prohibit county treasurers from loaning county or state funds "except as provided by law." As explained above, title 31, chapter 39, Idaho Code, requires counties to manage ambulance districts. Logically, as an integral part of the County's management of the Ambulance District, the County Treasurer's temporary loans to the Ambulance District would fall within the exception to the prohibitions against loans in Idaho Code § 31-2119.

The statutory treatment of ambulance districts is expressly different than that of other types of taxing districts in Idaho. For instance, a fire district is its own political subdivision and is governed by its own board of elected fire district commissioners (Idaho Code §§ 31-1416 and 31-1417). In contrast, an ambulance service district cannot operate separate from the board of county commissioners and the county that create it. The board of county commissioners decides the manner in which the ambulance service will be operated, including all decisions to make expenditures from the ambulance service fund for the purchase or lease of real property, construction of buildings, necessary equipment and to pay necessary salaries. Idaho Code § 31-3903. Under Idaho's statutory scheme, there is no other governing body with the authority to establish or make the managing/operational decision-making of an ambulance service district.

Because Idaho Code requires that any ambulance district be established, maintained and run by the board of *county* commissioners as well as the *county* treasurer, it seems that Clearwater County would not be violating any statutory provision by its managing the receipt of funds and payment of expenses of the Clearwater County Ambulance District and without seeking contribution for overhead and employee expenses.

Simply put, Clearwater County is statutorily required to manage the funds and pay the expenses of the Clearwater County Ambulance District as it would any other instrumentality of the County.

3. It is not improper for the Clearwater County Ambulance District to use the County's Tax I.D. number.

After I received your opinion request, we had a telephone conversation to clarify some of your questions. You told me during that conversation that the "County Tax I.D. number" you referenced in one of your questions was the County's federal Employer Identification Number (EIN). I contacted the Internal Revenue Service's Federal, State and Local Government Specialist in Boise to determine whether the Clearwater County Ambulance District is required to obtain its own EIN under Internal Revenue Code. An e-mail request for direction on this issue was answered as follows:

> If the County Ambulance Service is a separate entity from the County then they should have their own EIN. However, if it is just a name of a separate department within the County then they would not need a separate EIN. I have come across instances where a fire department is a separate department of a City or County. They don't have a separate EIN. All of their employees are filed under the City/Counties EIN.
>
> If the County Ambulance Service set up their own legal Governmental entity then they should have their own EIN. I would get the Controller's office involved in this. If they recognize the County Ambulance Service as a legal Government entity itself then they should have their own EIN.

That answer indicates that a district that is a separate governmental entity should have its own EIN. However, as explained in answer number 2. above, an ambulance district organized under Idaho Code § 31-3908 is never completely separate entity from its county.

I also discussed this with the Idaho State Controller's Office. The Controller's office independently researched whether an ambulance district may operate under a county's section 218 agreement, which allows state and local government employees to participate in the Social Security Act, or whether it needs its own agreement. The Controller's Office also determined that ambulance districts exist solely under the authority of counties and are, therefore, not separate political subdivisions, but are part of the county, and may participate in the county's agreement.

While there is no express statutory authority in Idaho authorizing an ambulance district to operate under a county's federal EIN, it is logical to con-

clude that the district can. Ambulance districts are instrumentalities of the county with little independent administrative authority; county boards are solely responsible for the administration of ambulance districts under Idaho law; and ambulance districts are treated in a similar manner by the Idaho State Controller's office for purposes of agreements concerning other federal programs.

Because the Clearwater County Ambulance District is an instrumentality of Clearwater County and not an independent governmental entity, it may operate under the County's EIN.

4. Even if Clearwater County's management of the Clearwater County Ambulance District was deemed improper, a joint powers agreement pursuant to Idaho Code § 67-2328 could still be entered into by the entities to legally continue the relationship as it now stands.

Idaho Code § 67-2328 allows public agencies to enter into agreements with one another for "joint or cooperative action which includes, but is not limited to, joint use, ownership and/or operation agreements." For purposes of joint powers agreements, a "public agency" is:

> . . . any city or political subdivision of this state, including, but not limited to counties; school districts; highway districts; and port authorities; instrumentalities of counties, cities or any political subdivision created under the laws of the state of Idaho; any agency of the state government; and any city or political subdivision of another state.

Idaho Code § 67-2327.

If an ambulance district is considered an instrumentality of a county as stated above, then the analysis of whether one can enter joint powers agreements ends here. "Instrumentalities of counties" are expressly identified in the above code excerpt as "public agencies" that may enter agreements under Idaho Code § 67-2327. However, even if ambulance districts are not considered part of their counties, they can still enter joint powers agreements.

While there is no direct statutory reference identifying an ambulance district as a public agency, a survey of various Idaho Code sections can only lead to the conclusion that Clearwater County Ambulance District is legally capable of entering into joint powers agreements. A "political subdivision" is a "public agency" under Idaho Code § 67-2327. There are many sections of Idaho Code that define "political subdivision" and most have similar wording. Under broadly applicable statutes, such as Idaho Code § 6-902 (governing tort claims against governmental agencies), and Idaho Code § 67-2809 (governing purchasing by political subdivisions), "political subdivision" is defined specifically to include "taxing districts." And, "taxing district" is explicitly defined in Idaho tax law as "any entity or unit with the statutory authority to levy a property tax." Idaho Code § 63-201. Since Clearwater County Ambulance District is a district organized under Idaho Code § 31-3908, with statutory authority to levy property taxes under subsection (4) of that code section, it is a public agency for purposes of Idaho Code § 67-2328, and may enter joint powers agreements.

Under a joint powers agreement, entities may not exercise powers beyond those that they already command when acting alone. Idaho Code § 67-2328(a). In your case, however, the logical agreement between Clearwater County and the Clearwater County Ambulance District would be a mirror of current practices, in which the County handles all the financial accounting of the Ambulance District. Since the County has the authority to operate its own ambulance service under the same title and chapter of Idaho Code that the Ambulance District operates, and in the same manner, it could perform all of those functions legally for the Ambulance District, so such an agreement would fall within the restrictions placed on joint powers agreements.

CONCLUSION

It is likely that the manner in which Clearwater County and the Clearwater County Ambulance District interact is permissible under Idaho law. The Clearwater County Ambulance District is governed by the Clearwater County Board of Commissioners, and the County has the statutory responsibility to manage all of the District's administrative functions. Because the County operates the District, it may loan the District money, administer the District's financial matters without reimbursement from

District funds, and share its EIN with the District. While the District can legally enter joint powers agreements, there is no need for such an agreement between Clearwater County and the District because the County is responsible for all of the functions of the District to begin with.

I hope this responds to your questions. If you have further questions or comments, please contact me at the number below.

Sincerely,

George R. Brown
Deputy Attorney General

January 26, 2015

The Honorable Ilana Rubel
Idaho State Representative
Statehouse
VIA HAND DELIVERY

Re: Our File No. 15-50391 - House Bill 2—Proposed Amendment to Idaho Code §§ 18-7301, 67-5901 and 67-5909

Dear Representative Rubel:

You ask several questions in connection with House Bill No. 2 ("HB 2"). The legislation, if adopted, would include freedom from discrimination on the basis of sexual orientation or gender identity as a civil right under Idaho Code § 18-7301 and prohibit such discrimination under the Human Rights Act through amendments to Idaho Code §§ 67-5901 and 67-5909. I will answer the questions in order posed.

Question No. 1: Does federal (or state) law already exist which protects gays/transgender people in Idaho from discrimination in employment, housing and public services/accommodations?[1] This question cannot be answered with a simple "yes" or "no" because the relevant law is not settled.

- **Title VII.** Title VII of the Civil Rights Act of 1964 prohibits discrimination on the basis of "sex." 42 U.S.C. § 2000e-2(a)(1). Title VII applies, with certain exceptions, to both public and private discrimination. *See, e.g.*, Fitzpatrick v. Bitzer, 427 U.S. 445, 447-48, 96 S. Ct. 2666, 2667-68, 49 L.Ed.2d 614 (1976). No appellate court has extended the statute's prohibition of sex discrimination to sexual orientation discrimination. However, the Equal Employment Opportunity Commission ("EEOC") concluded in 2012 that sexual stereotyping discrimination does fall within Title VII's prohibition. Macy v. Dep't of Justice, EEOC DOC 0120120821, 2012 WL 1435995, at *6 (Apr. 2012) (construing Title VII to prohibit discrimination on the basis of "gender"—a term that "encompasses not only a person's biolog-

ical sex but also the cultural and social aspects associated with masculinity and femininity"). A federal district court, moreover, denied a motion to dismiss in a suit alleging sex stereotyping discrimination by the Library of Congress. Terveer v. Billington, 34 F. Supp.3d 100, 116 (D.D.C. Mar. 2014) ("[u]nder Title VII, allegations that an employer is discriminating against an employee based on the employee's non-conformity with sex stereotypes are sufficient to establish a viable sex discrimination claim") (citing Price Waterhouse v. Hopkins, 490 U.S. 228, 251, 109 S. Ct. 1775, 1791, 104 L.Ed.2d 268 (1989)); *see generally* Zachary R. Herz, *Price's Progress: Sex Stereotyping and Its Potential for Antidiscrimination Law*, 124 Yale L.J. 396, 421 (2014) (discussing federal courts' varying application of Price Waterhouse, and observing that a "broader interpretation of *Price Waterhouse*" to include sexual stereotyping is "expanding"). It is therefore arguable, but not established, that Title VII prohibits gender identity and, by implication, sexual orientation discrimination.

• **Equal Protection Clause.** The Fourteenth Amendment to the United States Constitution guarantees equal protection of the laws. The Equal Protection Clause applies only to "state action" and thus ordinarily has no impact on private conduct. It is enforced principally through 42 U.S.C. § 1983. Employment or other forms of discrimination against individuals because of their sexual orientation or gender identity may violate the Equal Protection Clause. The important—and not definitively resolved—issue is what standard of review governs determination of whether the Clause has been violated. Traditionally, sexual orientation, and presumably gender identity, discrimination has been subjected to rational basis review, but the Ninth Circuit applied a "heightened" form of review in SmithKline Beecham Corp. v. Abbott Laboratories, 740 F.3d 471, *reh'g en banc denied,* 759 F.3d 990 (9th Cir. 2014). There, the court of appeals found that a prospective juror was struck from a venire panel because of his perceived sexual orientation. The panel then determined that United States v. Windsor, — U.S. —, 133 S. Ct. 2675, 186 L.Ed.2d 808 (2013), overruled prior circuit precedent applying rational basis scrutiny to sexual orientation discrimination. 740 F.3d at 480-84. Application of "heightened" scrutiny to governmental employment discrimination on the basis of sexual orientation/gender identity discrimination would likely result in relief under 42 U.S.C. § 1983.

- **Human Rights Act and Municipal Ordinances.** Idaho anti-discrimination statutes do not contain a specific prohibition with respect to sexual orientation or gender identity—as reflected by the proposed amendments in HB 2. *See* Idaho Code § 67-5909 (prohibiting discrimination on the basis of race, color, religion, sex, national origin, age or disability). However, it is theoretically possible that the term "sex" can be construed consistently with the EEOC's interpretation of Title VII. No Idaho state court has reached the issue. Various municipalities also have been active in this regard, adopting anti-discrimination ordinances that prohibit the denial of the "full enjoyment of" public accommodations because of sexual orientation and gender expression/identity. *See generally* Leslie M. Hayes and Lucy R. Juarez, *Idaho's Inconsistent System of Employment Protections for Lesbian, Gay, Bisexual and Transgender Individuals,* 57-FEB Advocate (Idaho) 39, 41-42 (Feb. 2014). Each of these ordinances defines the term "full enjoyment of" expansively "to include, but be limited to, the right to . . . any service offered or sold by any person or establishment to the public . . . without acts directly or indirectly causing persons of any particular sexual orientation and/or gender identity/expression to be treated as not welcome, accepted, desired or solicited." *See* Boise City Code § 6-02-02; Coeur d'Alene City Code § 9.56.020; Ketchum City Code § 9.24.020, Moscow City Code § 19-2.D; Pocatello City Code § 9.36.020; Sandpoint City Code § 5-2-10-2.

- **Fair Housing Act.** The Fair Housing Act prohibits various forms of discrimination, including on the basis of sex, in connection with the sale or rental of dwellings. 42 U.S.C. § 3604. Once again, the issue is whether the term "sex" extends to discrimination on the basis of sexual orientation/gender identity under this statute.

Question No. 2: Would the proposed text of HB 2 force clergy to marry gay couples? The answer is "no." Neither Idaho Code section 18-7301 nor section 67-5909 applies to religious ceremonies (which I understand to be the focus of the question by virtue of its reference to "clergy"). Idaho Code section 73-402 would likely be available to assert as a defense in the event an injunction or mandamus were sought against a religious order or a closely held religious corporation. *See* Burwell v. Hobby Lobby Stores, Inc., — U.S. —, 134 S. Ct. 2751, 2775, 189 L.Ed.2d 675 (2014).

Question No. 3: Would the proposed HB 2 impair any Idahoan's freedom of speech (or ability to express views on homosexuality)? As a general matter, the statutes amended by HB 2 regulate conduct, not speech. However, Idaho Code section 67-5909 contains provisions directed to, *inter alia,* written material such as notices and advertisements that may contain commercial speech. *See* Idaho Code §§ 67-5909(4), 67-5909(5)(b), 67-5909(7)(c), and 67-5909(8)(f). Commercial speech may be regulated more broadly than non-commercial speech. *See, e.g.*, Sorrell v. IMS Health Inc., — U.S. —, 131 S. Ct. 2653, 2667-68, 180 L.Ed.2d 544 (2011) ("Under a commercial speech inquiry, it is the State's burden to justify its content-based law as consistent with the First Amendment. . . . To sustain the targeted, content-based burden [the involved statute] imposes on protected expression, the State must show at least that the statute directly advances a substantial governmental interest and that the measure is drawn to achieve that interest."). Assuming that prevention of certain types of discrimination is a substantial government interest, a plausible argument exists that HB 2 satisfies this relaxed standard. The answer to this question is thus likely "no."

I hope that this letter adequately responds to your questions.

Sincerely,

BRIAN KANE
Assistant Chief Deputy

[1] I construe your reference to "transgender" to be to the term "gender identity" used (but not defined) in HB 2.

January 28, 2015

The Honorable Christy Perry
Idaho State House of Representatives
Statehouse
VIA HAND DELIVERY

Dear Representative Perry:

This letter is in response to your recent inquiry of this office with regard to Tribal gaming. Specifically, you have asked two questions:

1. Is a lottery (like the Idaho lottery) considered class III gaming; and
2. Would getting rid of the lottery, and prohibiting class III gaming in the State, have implications on the tribal gaming compacts?

Under 25 U.S.C. § 2703(8) State Lotteries are Considered Class III Gaming.

Class III gaming is a residual category for all gambling that is not Class I or II under the Indian Gaming Regulatory Act. 25 U.S.C. § 2703(8). It can be lawfully undertaken only if authorized by a tribal ordinance or resolution (*id.* § 2710(d)(1)(A)) and the gaming activities are "located in a State that permits such gaming for any purpose by any person, organization, or entity" (*id.* § 2710(d)(1)(B)). Class III gaming also must be "conducted in conformance with a Tribal-State compact" approved by the Secretary of the Interior. *Id.* § 2710(d)(1)(C). The Lottery is a form of Class III gaming, because it does not constitute a permissible form of Class I or Class II gaming. The five gaming Tribes in Idaho can offer Lottery-like gaming, because it is specifically allowed under Idaho law and authorized to be played by their compacts with the State. *See* Idaho Const. art. III, § 20(1)(a) (State Lottery authorized by state and conducted in conformance with enabling legislation). Title 67, chapter 74, Idaho Code (Idaho State Lottery).

Repeal of the Lottery Authorization in the Idaho Constitution and Statutes Would Create Legal Issues that are Unquantifiable at This Time.

The effect on the compacts from a repeal of the statutory authorization for the Lottery is unclear for two reasons. First, the Tribes almost certainly would argue that the Contracts Clause in the United States Constitution, and its counterpart provision in the Idaho Constitution, prevents the Legislature from modifying the compacts through a change in state law. The issue has been alluded to (Catawba Indian Tribe of South Carolina v. State, 642 S.E.2d 751, 754-55 (S.C. 2007); Dairyland Greyhound Park, Inc. v. Doyle, 719 N.W.2d 408, 439 (Wis. 2006)) but not definitely resolved in prior litigation. I note in this regard that the compacts have no expiration provisions. Substantial arguments exist for the proposition that States may modify their gaming laws so as to eliminate a form of gambling from a compact, the outcome cannot be predicted with any degree of certainty.

Second, even if the statutory authorization for the Lottery is repealed, the Tribes presumably would contend that art. III, sec. 20 of the Idaho Constitution establishes that form of gambling as consistent with state public policy notwithstanding the Legislature's determination to not authorize it. This means that in order to fully repeal the lottery, it is likely that art. III, sec. 20 would need to be amended to remove the lottery's authorization. It is worth noting that the genesis of art. III, sec. 20's lottery authorization is a direct result of a citizen initiative that led to the proposal of the constitutional amendment. Similarly, Idaho Code §§ 67-429B and 67-429C were similarly enacted by citizen initiative. It is predictable that in addition to law suits, there would likely be referendum and/or initiative activity.

I hope that you find this information helpful.

Sincerely,

Brian Kane
Assistant Chief Deputy

February 2, 2015

The Honorable Steven Harris
Idaho State Representative
Statehouse
VIA HAND DELIVERY

Re: Our File No. 15-50468 - Eminent Domain

Dear Representative Harris:

This letter is in response to your inquiry regarding the removal of eminent domain authority from an urban renewal agency, and the requirement that the creating entity exercise its right of eminent domain on behalf of the urban renewal entity. Specifically, you seek to know whether this removal and reassignment of authority is legally permissible.

Urban renewal authorities are created by statute. As statutory enactments, the authority of urban renewal authorities can be amended by statute. But, as the authority of an urban renewal authority is removed and placed back within the creating entity, care must be exercised to ensure that the purpose of creating urban renewal authority is not defeated. The Legislature has the authority to establish urban renewal agencies as well as assign authority and duties in accordance with the limits of the Idaho Constitution.

The question then becomes whether the proposed amendments will alter the structure of an urban renewal entity in such a way as to make it an "alter ego" of its creating entity. This question is significant because urban renewal agencies are used as vehicles to issue revenue bonds without violating art. VIII, sec. 3 and 4 of the Idaho Constitution. Urban Renewal Agency of City of Rexburg v. Hart, 148 Idaho 299, 301, 222 P. 3d 467, 469 (2009). The general steps within an urban renewal agency's authority are as follows:

1. City designates a deteriorated or blighted area as a revenue allocation area;
2. Urban renewal agency issues bonds to finance economic growth/ development;

3. Tax increases in the affected area are allocated to the urban renewal agency to retire bond allocations;

Id. Importantly within this process, the city may initiate the creation of the urban renewal agency through its designation of a deteriorated area, but the city does not exercise any control or authority over the urban renewal entity. Unknown, however, is when the Legislature connects the authority of the city with the authority of the urban renewal agency to such a degree that the agency does become an "alter ego" of the city.

Thus far, the courts have allowed a city to declare a need for urban renewal, to create the agency, to appoint itself as the commissioners (among others), and to remove commissioners without finding that urban renewal agencies are "alter egos" of cities. But, the removal of eminent domain authority from the urban renewal agencies could be the proverbial "straw" that breaks the camel's back, because it directly removes an authority of the urban renewal agency and places it with the city; thereby allowing the city to exercise direct control over the agency.

Although the Legislature has the authority to take this action, the Legislature should evaluate if the desired result is to call into question the legal significance and independence of urban renewal agencies as independent bodies corporate and politic.

Sincerely,

BRIAN KANE
Assistant Chief Deputy

February 3, 2015

Senator Marv Hagedorn
Idaho State Senator
Statehouse
VIA HAND DELIVERY

Representative Rick D. Youngblood
Idaho State Representative
Statehouse
VIA HAND DELIVERY

Re: Our File No. 15-50441 - Your Questions Regarding Concealed Weapons

Dear Senator Hagedorn and Representative Youngblood:

This letter will address your inquiry regarding a provision of Idaho's current concealed weapons statute, Idaho Code § 18-3302(9).

QUESTION PRESENTED

Does Idaho's current concealed weapons statute, Idaho Code § 18-3302(9), which prohibits a person from carrying a concealed weapon "on or about his person" while in a motor vehicle, violate Article I, section 11 of the Idaho State Constitution?

BRIEF ANSWER

Idaho Code § 18-3302(9) does not violate art. I, sec. 11 of the Idaho Constitution. Art. I, sec. 11's provision allowing the regulation of concealed weapons carried "on the person" does not limit the inherent authority of the Idaho Legislature to regulate the carrying of concealed weapons other than "on the person."

ANALYSIS

I. Idaho Const., Art. I, § 11

The right to bear arms is protected by both the Second Amendment of the United States Constitution and by art. I, sec. 11 of the Idaho Constitution. The latter provision, as originally adopted, read:

> § 11. Right to bear arms. – The people have the right to bear arms for their security and defense; but the legislature shall regulate the exercise of this right by law.

In 1978, this section was amended to read:

> **§ 11. Right to keep and bear arms.** – The people have the right to keep and bear arms, which right shall not be abridged; but this provision shall not prevent the passage of laws to govern the carrying of weapons concealed on the person nor prevent passage of legislation providing minimum sentences for crimes committed while in possession of a firearm, nor prevent the passage of legislation providing penalties for the possession of firearms by a convicted felon, nor prevent the passage of any legislation punishing the use of a firearm. No law shall impose licensure, registration or special taxation on the ownership or possession of firearms or ammunition. Nor shall any law permit the confiscation of firearms, except those actually used in the commission of a felony.

A review of the legislative history of the 1978 amendment yielded no insight into the choice of the term "on the person." The amendment appears to have passed with little discussion or controversy.

II. Idaho Code § 18-3302

Idaho Code § 18-3302 governs the carrying of concealed weapons by members of the public in Idaho. This statute sets forth the procedure by which members of the public may apply for, and sheriffs' offices may issue, a license to carry a concealed weapon. For purposes of this discussion, the relevant portions of this statute are:

> (7) Except in the person's place of abode or fixed place of business, or on property in which the person has any ownership or leasehold interest, a person shall not carry a concealed weapon without a license to carry a concealed weapon . . . .

> (9) While in any motor vehicle, inside the limits or confines of any city, a person shall not carry a concealed weapon on or about his person without a license to carry a concealed weapon. This shall not apply to any firearm located in plain view whether it is loaded or unloaded. A firearm may be concealed legally in a motor vehicle so long as the weapon is disassembled or unloaded.

(Emphasis added.) Idaho Code § 18-3302(7) provides the general rule that except in a person's home, business or property in which he has an interest, a person in Idaho cannot carry a concealed weapon without a license. Subsection (9) addresses the more specific situation of travelling in a vehicle within city limits, where a person must have a license to carry a concealed weapon "on or about his person." Idaho Code § 18-3302 uses the phrase "on or about his person" only in subsection (9). The phrase "on his person" is used in subsection (1) (providing that a sheriff may issue a license to a person to carry "a weapon concealed on his person") and subsection (7) (above). Five other instances in the statute refer simply to the carrying of a concealed weapon without regard to whether it is carried on the person or on or about the person. The phrase "on or about his person" is also used in Idaho Code § 18-3302B (prohibiting an intoxicated person from carrying a concealed weapon "on or about his person").[1]

DISCUSSION

A. The Constitutionality of Idaho Code § 18-3302(9) Has Not Been Challenged in Idaho Courts.

In reviewing the constitutionality of Idaho Code § 18-3302(9), the first question to consider is whether there is an appreciable difference between the language "on the person" and "on or about the person." Since the 1978 amendment to art. I, sec. 11 of the Idaho Constitution, this issue has not been addressed by Idaho courts.

Since the 1978 amendment, Idaho courts have ruled in a number of cases in which a weapon was found "on or about" a person in a vehicle and the driver was charged with violating Idaho Code § 18-3302(9). *See*, State v. Cutler, 143 Idaho 297, 141 P.3d 1166 (Ct. App. 2006) (handgun found on

ledge between driver's seat and doorsill); State v. Sheldon, 139 Idaho 980, 88 P.3d 1220 (Ct. App. 2003) (weapons found in a car after pat down of driver); State v. Veneroso, 138 Idaho 925, 71 P.3d 1072 (Ct. App. 2003) (knife between driver's seat and console); State v. Button, 136 Idaho 526, 37 P.3d 23 (Ct. App. 2001) (pistol was between front seats, under a purse). In none of these cases was the issue of whether the "on or about" provision violated the Idaho Constitution raised.

In another such case, shortly after the 1978 amendment, State v. McNary, 100 Idaho 244, 247, 596 P.2d 417, 420 (1979), the Idaho Supreme Court addressed what constitutes carrying a weapon "on or about" the person:

> One carries a weapon "upon or about his person" not only when he physically is carrying it in his clothing or in a hand-bag of some sort, but also when he goes about with the weapon in such close proximity to himself that it is readily accessible for prompt use.

In McNary, the driver had concealed a pistol in a zippered bag under the front seat of his vehicle. Like the other cases, there was no constitutional challenge in McNary.

As I will discuss below, both the United States Supreme Court and the Idaho Supreme Court, in relation to searches incident to arrest, seem to presuppose some distinction between "the arrestee's person" and "the area within his immediate control." At present, the issue of whether "on or about the person" violates the Idaho Constitution has not been raised or addressed, at least in any reported decisions of the Idaho Supreme Court or Court of Appeals. The broader meaning of that term, at least as applied to vehicles within city limits, seems to have been accepted without controversy.

B. *Expressio Unius Est Exclusio Alterius* Does Not Limit the Idaho Legislature's Authority to Regulate the Carrying of Concealed Weapons "on or about the person."

One question raised in this inquiry is the impact of the principle of *expressio unius est exclusio alterius*, as set forth in Idaho Press Club, Inc. v. State Legislature, 142 Idaho 640, 132 P.3d 397 (2006), in art. I, sec. 11 of the

Idaho Constitution. For this discussion, the question is whether the inclusion of a specific provision in art. I, sec. 11, which allows regulation of concealed weapons carried "on the person," necessarily excludes any regulation of concealed weapons carried other than "on the person." It does not.

In Idaho Press Club, the Press Club sought a declaratory judgment holding that the closing of House and Senate legislative committee meetings to the public violated art. III, sec. 12 of the Idaho Constitution, which provided that: "The business of each house, and of the committee of the whole shall be transacted openly and not in secret session." The district court held that art. III, sec. 12 did not apply to meetings of legislative committees, and the Press Club appealed. The Idaho Supreme Court affirmed. As relevant here, the Court held:

> "Our State Constitution is a limitation, not a grant of power, and the Legislature has plenary powers in all matters, except those prohibited by the Constitution." (Citation omitted.) Because the Constitution is not a grant of power, there is no reason to believe that a Constitutional provision enumerating powers of a branch of government was intended to be an exclusive list. The branch of government would inherently have powers that were not included in the list. The converse is true, however, with a respect to provisions limiting power. When the framers drafted a provision expressly limiting certain powers, there is no reason to believe that they intended the limitation to be broader than they drafted it. The purpose of such provision is to define the limitations. It is not reasonable to assume that they intended to impose other, unstated limitations. Had they wanted to impose limitations in addition to those stated, they could easily have done so. Therefore, the rule of construction *expressio unius est exclusio alterius* applies to provisions of the Idaho Constitution that expressly limit power (citations omitted) but it does not apply to provisions that merely enumerate powers (citations omitted). The provision at issue here is a limitation on the power of the legislature to close its proceedings. Thus, *expressio unius est exclusio alterius* applies as a rule of construction. Under this well-recognized rule of construction,

> Article III, § 12 does not apply to legislative committees because the drafters did not include such committees in its provisions . . . . The drafters could have written Section 12 to require that the business of each house and of all committees shall be transacted openly and not in secret session, but it did not do so.

142 Idaho at 642-43 (emphasis added; citations omitted).

In other words, *expressio unius est exclusio alterius* applies only to what the Constitution says a branch of government cannot do. It does not apply to what it can do. The Legislature's powers are not limited by the list of what it can do in art. I, sec. 11 of the Idaho Constitution, but they are limited by the list of what it can't do.

The drafters of art. I, sec. 11 granted power to the Legislature to enact legislation regulating the carrying of concealed weapons on the person, establish minimum sentences for gun-related crimes, provide penalties for possession of firearms by convicted felons and punish the use of a firearm. *See*, 1990 Idaho Att'y Gen. Ann. Rpt. 16 (the 1978 amendment to art. I, sec. 11 "specifically empowers" the Legislature to regulate concealed weapons). This grant of power to legislate on certain matters is not a limitation. It would not limit the power of the Legislature to legislate on other matters, such as the carrying of concealed weapons other than on the person. The rest of the Legislature's inherent powers are not included on this list. *Expressio unius est exclusio alterius* does not apply to this non-exclusive list.

But, *expressio unius est exclusio alterius* would apply to the express limitations in art. I, sec. 11. The drafters limited the power of the Legislature by providing that the Legislature cannot impose licensure, registration or special taxation on the ownership or possession of firearms or ammunition, or permit the confiscation of firearms not actually used in the commission of a felony.

If the reverse were true – that is, if the only laws the state could enact involving firearms are limited to those art. I, sec. 11 expressly says it can enact – then a number of other laws would also be unconstitutional. These include Idaho Code section 18-3301 (Deadly weapon – possession with intent

to assault), section 18-3302A (Sale of weapons to minors), section 18-3302D (Possessing weapons or firearms on school property), section 18-3302E (Possession of a weapon by a minor), section 18-3302F (Prohibition of possession of certain weapons by a minor), and section 18-3309 (Authority of governing boards of public colleges and universities regarding firearms). These laws are not unconstitutional. They were enacted by way of the inherent power of the Legislature, which was not limited by the additional grant of authority in art. I, sec. 11 to regulate the carrying of concealed weapons on the person.

C. Regulation of Concealed Weapons Does Not Violate the Idaho or United States Constitutions.

The inherent authority of the Idaho State Legislature to regulate the carrying of concealed weapons has long been recognized. This authority does not appear to originate with the 1978 amendment. The Idaho Supreme Court long ago held that the Legislature had authority, under the police power of the state, to regulate the possession of concealed weapons: "A statute prohibiting the carrying of concealed deadly weapons would be a proper exercise of the police power of the state." In re Brickey, 8 Idaho 597, 70 P. 609 (1902). Similarly, the United States Supreme Court recognized in the late 19th Century that the possession of concealed weapons could be prohibited without violating the Second Amendment. Robertson v. Baldwin, 165 U.S. 275, 281-82, 17 S. Ct. 326, 329, 41 L. Ed. 715 (1897).

In its seminal Second Amendment opinion, District of Columbia v. Heller, 554 U.S. 570, 128 S. Ct. 2783, 171 L.Ed.2d 637 (2008), the U.S. Supreme Court performed a comprehensive and detailed review of the Second Amendment and its historical underpinnings. The Court concluded that the Second Amendment provided for a private right to keep and bear arms. But, it also observed:

> Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose (citations omitted) . . . [N]othing in our opinion

> should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.

Id. at 626-27 (citations omitted). In a footnote, the Court referred to the types of measures discussed in this passage as "presumptively lawful" and stated that the list of such measures "does not purport to be exhaustive." *Id.* n.26. Among the other presumptively lawful regulations were prohibitions against carrying concealed weapons. *Id.* at 626. Where the state may prohibit the carrying of concealed weapons without violating the constitution, regulations short of prohibition should also be constitutional.

The Office of the Attorney General opined in 1990 that "[t]here is nothing in the United States or Idaho constitution that grants a person the constitutional right to carry a concealed weapon." 1990 Idaho Att'y Gen. Ann. Rpt. 16. There is nothing in Idaho case law since that time that would suggest a right to carry concealed weapons. To the contrary, and as noted above, the Supreme Court's seminal opinion in Heller suggests that certain regulations of concealed weapons do not violate constitutional rights.

In exercising its police power to regulate concealed weapons, the Legislature has always regulated weapons "on or about the person." That specific language appears to originate from Idaho's first concealed weapons law, enacted in 1909.[2] The Office of the Attorney General is aware of no legal case, either before or after the 1978 amendment, which has ever called into question the Legislature's authority to regulate concealed weapons "on or about the person." There is no indication in the legislative record that the 1978 amendment intended to circumscribe the Legislature's authority to regulate concealed weapons. In context, it appears that the 1978 amendment was meant to codify the regulations then in place, not restrict those regulations.

D. An Amendment to Idaho Code § 18-3302(9) to Change "on or about the person" to "on the person" May Result in Requiring a Concealed Carry License in Circumstances More Narrow Than Those in Which Searches are Allowed Under the Fourth Amendment.

In the inquiry to our office, two Fourth Amendment cases were mentioned which provide a means of considering the issue at hand in another manner.

In Arizona v. Gant, 556 U.S. 332, 129 S. Ct. 1710, 173 L.Ed.2d 485 (2009), one of the cases addressed in the inquiry to our office, the U.S. Supreme Court discussed the search-incident-to-arrest exception to the Fourth Amendment's warrant requirement, and stated:

> [A] search incident to arrest may only include "the arrestee's person and the area 'within his immediate control'—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence." (Citation omitted.) That limitation, which continues to define the boundaries of the exception, ensures that the scope of a search incident to arrest is commensurate with its purposes of protecting arresting officers and safeguarding any evidence of the offense of arrest that an arrestee might conceal or destroy. (Citation omitted.) If there is no possibility that an arrestee could reach into the area that law enforcement officers seek to search, both justifications for the search-incident-to arrest exception are absent and the rule does not apply.

556 U.S. at 339 (emphasis added; citations omitted).

The other case also involved the search-incident-to-arrest exception to the Fourth Amendment's warrant requirement. In State v. Pedersen, 157 Idaho 790, 339 P.3d 1194 (Ct. App. 2014), the Idaho Court of Appeals stated that:

> Searches incident to arrest are allowed because "it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape," and it is further reasonable "for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction." (Citation omitted.) A search

> incident to arrest is not limited to the arrestee's person but may extend to "the area 'within his immediate control'—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence."

157 Idaho at 792, 339 P.3d at 1196 (emphasis added; citation omitted).

The constitutionality of Idaho Code § 18-3302(9) does not depend on courts' interpretation of the Fourth Amendment. The former involves a statutory provision governing the circumstances under which a license is required; the latter governs the legality of searches. While there is an "apples and oranges" aspect to this part of the discussion, it is instructive to note that the scope of a search incident to arrest under the Fourth Amendment is more broad than simply "on the person," and is more like "on or about the person" as Idaho Code §18-3302(9) currently reads. If the language of section 18-3302(9) had initially been "on the person," courts may have interpreted it more broadly, and consistent with the reasoning in Fourth Amendment search-incident-to-arrest cases.

However, if the statute is amended to apply only to weapons "on the person," appellate courts may interpret the change in language to mean that the Legislature's intent has changed as well, and that a license to carry a concealed weapon in a vehicle within city limits would not be required for instances other than "on the person." In that case, a license to carry a concealed weapon in a vehicle inside city limits would apply to a narrower set of circumstances than the search-incident-to-arrest exception to the Fourth Amendment's warrant requirement. Thus, as to vehicles, the Fourth Amendment would still allow a search of a person and the area within his immediate control, but a license to carry concealed would be required for weapons carried "on the person."

The current "on or about the person" language in Idaho Code § 18-3302(9) is not unconstitutional. If the Legislature seeks to clarify what that language means, it could consider amending section 18-3302(9) to delete "on or about the person" and use language such as "within the person's immediate control" or "within the person's immediate physical control." Such an amendment would likely be constitutionally defensible under art. I, sec, 11 of

the Idaho Constitution, or under the Second Amendment to the U.S. Constitution.

CONCLUSION

Idaho Code § 18-3302(9) is constitutionally defensible under art. I, sec. 11 of the Idaho Constitution, or the Second Amendment to the United States Constitution.

Regulations involving the carrying of concealed weapons do not violate either the United States Constitution or the Idaho Constitution.

Since the amendment of art. I, sec. 11 of the Idaho Constitution in 1978, there has been no constitutional challenge to Idaho Code § 18-3302(9). While a number of cases involving that statute have reached Idaho appellate courts, the constitutionality of the statute has yet to be called into question.

Art. I, sec. 11's provision allowing the regulation of concealed weapons carried "on the person" does not limit the inherent authority of the Idaho Legislature to regulate the carrying of concealed weapons other than "on the person." The principle of *expressio unius est exclusio alterius* does not serve as a limitation on the Legislature's inherent power to regulate concealed weapons.

The Second Amendment does not govern licenses to carry concealed weapons issued pursuant to Idaho Code § 18-3302(9). An amendment to section 18-3302(9) to change "on or about the person" to "on the person" may result in a narrower and more restrictive interpretation of that statue. This narrowing may alter the requirement to obtain a license to carry a concealed weapon in a vehicle inside city limits, because it might not extend to areas within a person's immediate physical control.

The Legislature could consider amending Idaho Code § 18-3302(9) to replace "on or about the person" with language such as "within the person's immediate control" or "within the person's immediate physical control." This would clarify the intent of the statute. Such an amendment would be constitutionally defensible under art. I, sec. 11 of the Idaho Constitution, or under the Second Amendment to the U.S. Constitution.

I hope this information is helpful. Please feel free to contact our office if you have any questions.

Sincerely,

BRIAN KANE
Assistant Chief Deputy

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[1] "On or about" is often viewed as vague and, in the most recent edition of Black's Law Dictionary, as "mere jargon." Black's Law Dictionary (9th ed. 2009) available at Westlaw BLACKS.

[2] 1909 Idaho Sess. Laws 6 ("If any person . . . shall carry concealed upon or about his person, any dirk, dirk knife, bowie knife, dagger, slung shot, pistol, revolver, gun or any other deadly or dangerous weapon, within the limits and confines of any city, town or village, or in any public assembly or in any mining, lumbering, logging, railroad, or other construction camp within the State of Idaho") (emphasis added).

February 3, 2015

The Honorable Ilana Rubel
Idaho State Representative
Statehouse
VIA HAND DELIVERY

Re: Our File No. 15-50478 - House Bill 2—Applicability of FERPA to Private Party Suits

Dear Representative Rubel:

You ask whether the Free Exercise of Religion Protected Act ("FERPA"), Idaho Code §§ 73-401 through 73-404, can be asserted as a defense in a civil action between private parties. The Idaho Supreme Court has not addressed this issue, but the federal judiciary has in the context of the substantively identical Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. §§ 2000bb through 2000bb-4. As discussed below, three federal courts of appeals have concluded that RFRA provides a defense only against governmental defendants; one court of appeals has held the contrary. The issue is, therefore, undecided, but it is foreseeable that the Idaho Supreme Court would find the federal court majority rule persuasive. But, even if only civil suits by or against governmental entities are contemplated for FERPA enforcement, the Idaho Rules of Civil Procedure may offer a method for securing a FERPA determination in a private suit.

Idaho Code section 73-402(1) through (3) of FERPA provides that the free exercise of religion is a fundamental right even where facially neutral governmental laws, rules or actions are involved and prohibits substantially burdening the right except to further a compelling governmental interest through the least restrictive means. Subsection (4) contains the statute's enforcement language:

> A person whose religious exercise is burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. A party who prevails in any action to enforce

> this chapter against a government shall recover attorney's fees and costs.

This provision echoes the corresponding provision in RFRA:

> A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

42 U.S.C. § 2000bb-1. The Idaho Supreme Court thus will likely look to federal court construction of RFRA for guidance in interpreting FERPA. *See, e.g.*, Consol. Concrete Co. v. Empire W. Constr. Co., Inc., 100 Idaho 234, 237, 596 P.2d 106, 109 (1979) ("[s]ince our statute was enacted subsequent to these decisions, it is presumed that the interpretation placed upon the federal act by the federal courts was adopted by the legislature as part of our statute").

The Sixth Circuit Court of Appeals examined the issue of whether RFRA applies in suits solely between private parties and concluded that it does not—thereby following the Seventh and Ninth Circuits. Gen. Conference Corp. of Seventh-Day Adventists v. McGill, 617 F.3d 402 (6th Cir. 2010); *see also* Tomic v. Catholic Diocese of Peoria, 442 F.3d 1036, 1042 (7th Cir. 2006) (dicta); Sutton v. Providence St. Joseph Med. Ctr., 192 F.3d 826, 834 (9th Cir. 1999). The court quoted at length from a dissent by now-Justice Sotomayor in a Second Circuit opinion, Hankins v. Lyght, 441 F.3d 96 (2d Cir. 2006):

> "Two provisions of the statute implicitly limit its application to disputes in which the government is a party. Section 2000bb–1(c) states that '[a] person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a *government*' (emphasis added). . . . When read in conjunction with the rest of the statute, . . . it becomes clear that this section reflects Congress's understanding that RFRA claims and defenses

> would be raised only against the government. For instance, section 2000bb–1(b) of RFRA provides that where a law imposes a substantial burden on religion, the *'government'* must "demonstrate[ ] . . . that application of the burden' is the least restrictive means of furthering a compelling governmental interest (emphasis added). The statute defines 'demonstrate' as 'meet[ing] the burdens of going forward with the evidence and of persuasion.' 42 U.S.C. § 2000bb–2(3). Where, as here, the government is not a party, it cannot 'go[ ] forward' with any evidence. In my view, this provision strongly suggests that Congress did not intend RFRA to apply in suits between private parties."

617 F.3d at 410 (Sotomayor, J., dissenting). The Hankins majority, however, concluded to the contrary:

> The RFRA's language surely seems broad enough to encompass such a case. The statutory language states that it "applies to all federal law, and the implementation of that law," (citation omitted), and that a defendant arguing that such a law substantially burdens the exercise of religion "may assert [a violation of the RFRA] as a . . . defense in a judicial proceeding." (Citation omitted.) This language easily covers the present action. The only conceivably narrowing language is the phrase immediately following: "and obtain appropriate relief against a government." (Citation omitted.) However, this language would seem most reasonably read as broadening, rather than narrowing, the rights of a party asserting the RFRA. The narrowing interpretation—permitting the assertion of the RFRA as a defense only when relief is also sought against a governmental party—involves a convoluted drawing of a hardly inevitable negative implication. If such a limitation was intended, Congress chose a most awkward way of inserting it. The legislative history is neither directly helpful nor harmful to that view.

441 F.3d at 103 (citations omitted). I note in this regard that FERPA was adopted in 2000 and that, while three of the four decisions cited above were

issued subsequent to its passage, the Ninth Circuit decided Smith in 1999. Consequently, it is quite possible that, if faced with the issue, the Idaho Supreme Court would follow the federal court majority rule.[1]

It warrants mention that there may be a procedural mechanism to allow the application of FERPA to be tested in a suit between private parties. A defendant who believes that a particular state or local law substantially burdens his or her religious practices conceivably could sue the involved governmental entity or an enforcement officer of the entity to seek a declaration of the law's validity under the circumstances alleged in the private suit and then seek consolidation of the two suits pursuant to I.R.C.P. 42(a). That provision authorizes consolidation "[w]hen actions involving a common question of law or fact are pending before the court." If the defendant succeeded on the FERPA claim, the private plaintiff would be entitled to no relief.

I hope that this brief analysis is adequate for your purposes. Please contact me with any questions.

Sincerely,

BRIAN KANE
Assistant Chief Deputy

[1] A recent student law review article explores the issue in substantial detail. Shruti Chaganti, *Why the Religious Freedom Restoration Act Provides a Defense in Suits by Private Plaintiffs*, 99 Va. L. Rev. 343 (2013). The author suggests that several other appellate decisions support the proposition that RFRA provides a defense in a private suit. *See id.* at 347 n.7 (citing Worldwide Church of God v. Philadelphia Church of God, 227 F.3d 1110, 1120-21 (9th Cir. 2000); Christians v. Crystal Evangelical Free Church (In re Young), 141 F.3d 854, 863 (8th Cir. 1998); EEOC v. Catholic Univ. of Am., 83 F.3d 455, 468-69 (D.C. Cir. 1996)). The latter two decisions involved enforcement actions by persons acting under the color of federal law, while the Worldwide Church decision did not consider the question whether RFRA could be raised as a defense in a private suit and did not address the earlier-decided Smith. *See* Listecki v. Official Comm. of Unsecured Creditors (In re Archdiocese of Milwaukee), 496 B.R. 905, 915 (E.D. Wis. 2013) (creditors committee "falls within the definition of 'government' because it acts under the color of law pursuant to the authority granted to it by the bankruptcy court"). Consequently, while the article provides helpful analysis concerning the underlying issue, based on existing precedent the several decisions discussed in the text are the more likely source of guidance to the Idaho Supreme Court.

February 3, 2015

The Honorable Bart Davis
Idaho State Senator
Statehouse
VIA HAND DELIVERY

Re: Our File No. 15-50480 - State Employee Lobbying

Dear Senator Davis:

This letter is in response to your recent inquiry of this office regarding a state employee lobbying for a company outside of the State of Idaho. Specifically, you have asked whether Idaho Code § 18-1357 prohibits a government employee from working as a lobbyist in another state. As explained in greater detail below, the answer to this question is highly fact specific because it will depend on whether the employee's conduct in another state coupled with his state employment is being used in a way that results in a pecuniary benefit to the employee. It is also worth noting that cases such as these can be extremely difficult to prove beyond a reasonable doubt and seemingly small factual changes can completely change the outcome.

Idaho Code § 18-1357 provides:

> **18-1357. Compensating public servant for assisting private interests in relation to matters before him.** — (1) Receiving compensation. A public servant commits a misdemeanor if he solicits, accepts or agrees to accept compensation for advice or other assistance in preparing or promoting a bill, contract, claim, or other transaction or proposal as to which he knows that he has or is likely to have an official discretion to exercise.
>
> (2) Paying compensation. A person commits a misdemeanor if he pays or offers or agrees to pay compensation to a public servant with knowledge that acceptance by the public servant is unlawful.

Perhaps the best way to evaluate this provision is with a hypothetical. Assume that a public servant is employed as the executive director of a board that authorizes the use of Brand X's widgets within its regulatory arena. Public servant lobbies for and is paid by Brand X in neighboring states, but not Idaho. Part of public servant's pitch is that Idaho uses Brand X's widgets. Public servant has accepted payment in return for promoting a contract (or other transaction or proposal) over which he also has an official discretion to exercise. More importantly, as executive director, public servant is directly responsible for the day-to-day decisions with regard to implantation of the Brand X widgets within the regulatory structure. Public servant will likely resolve doubts in favor of Brand X to ensure that it does not damage his ability to lobby in other states. For example, problems would likely not be highlighted, hard questions unasked, and similar issues would not be resolved in favor of the regulatory authority. In sum, public servant cannot reconcile his official function in authorizing widgets from his private interest in promoting widgets even when done outside the state.

Compare this with a scenario in which the above facts are the same with one key factor changed. Public servant authorizes the use of widgets, but lobbies on behalf of Joe's Famous Kick Balls over which his Board has no discretion or authority. Based on the disconnectedness of these activities, there is likely no violation of the above statute.

You have also asked whether an employee with no discretion would be permitted under this statute to lobby out of state. The answer to this is that it might be legal, but this office would strongly advise against such an arrangement. Part of the dilemma is that discretion is not always overtly assigned and recognized within a statute. An employee with seemingly little discretion may be in a position to "lose" an unfavorable review, or "not receive" a competing bid in time. Even though an employee with discretion may be able to legally comply with the law, care should be taken so that the result is not that every decision of the entity is cast under a cloud of suspicion.

Other statutes are also relevant within the scenario presented. For example, Idaho Code § 18-1359(1)(c) prohibits public servants from using or disclosing confidential information obtained by reason of their position to obtain a pecuniary benefit for themselves. A person with confidential information gleaned from his position in Idaho could use such information for his

own pecuniary advantage while lobbing in another state. For example, a person who knew the conditions under which oversize load permits would be granted in one state could gain a lobbying advantage and be paid well for lobbying for the adoption of similar provisions in another state.

Idaho Code § 59-704(3) requires appointed public officials to declare real or potential conflicts of interest. Idaho Code § 59-705(1) provides that intentionally failing to do so can result in a civil penalty.

Understandably, these are not easy questions. Government requires a sacrifice at times of tantalizing private opportunities. These temptations resisted, however, result in a more credible government that can fulfill its role as trustee of the people. *See* Idaho Code § 59-702.

I hope that you find this letter helpful.

Sincerely,

BRIAN KANE
Assistant Chief Deputy

February 9, 2015

Elisha Figueroa
Administrator
Idaho Office of Drug Policy
Executive Office of the Governor

Re: Informal Opinion Re: Statutory Definition of Marijuana As a Controlled Substance

Dear Ms. Figueroa:

This informal opinion letter is in response to four questions you have presented in regard to several aspects of Idaho's marijuana laws.

QUESTIONS PRESENTED AND CONCLUSIONS

1. "Under Idaho law, if a substance contains any amount of tetrahydrocannabinol (THC) is it a controlled substance?"

Conclusion: Yes. *See* I.C. § 37-2705(d)(27).

2. "Under Idaho law, is an oil extracted from the cannabis plant, containing CBD and less than .3% THC a controlled substance?"

Conclusion: Yes -- *unless* (a) it contains no "quantity" of THC *and* (b) it is excluded from the definition of "marijuana." *See* I.C. §§ 37-2701(t) and 37-2705(d)(27).

3. "Under Idaho law, is cannabidiol (CBD), a non-psychoactive component of marijuana, a controlled substance?"

Conclusion: Yes -- *unless* (a) it contains no "quantity" of THC *and* (b) it is excluded from the definition of "marijuana." *See* I.C. §§ 37-2701(t) and 37-2705(d)(27).

4. "Under Idaho law, under what circumstances would hemp and hemp extracts, oils, and derivatives be legal to cultivate, produce, possess, or consume in Idaho?"

Conclusion: (a) Hemp plants: Because hemp plants meet the statutory definition of "marijuana," no circumstance makes the "cultivation, production, possession, or consumption" of hemp plants legal in Idaho. *See* I.C. § 37-2701(t).

(b) Hemp extracts, oils and derivatives: These substances are illegal in Idaho *unless* (a) they contain no "quantity" of THC *and* (b) they are excluded from the definition of "marijuana." *See* I.C. §§ 37-2701(t) and 37-2705(d)(27).

ANALYSIS

Question 1: Under Idaho Law, If a Substance Contains Any Amount of Tetrahydrocannabinol (THC) Is It a Controlled Substance?

Idaho Code § 37-2705(a) states, the "controlled substances listed in this section are included in schedule I." Subsection (d) of that list -- "Hallucinogenic substances" – includes

> . . . [a]ny material, compound, mixture or preparation *which contains any quantity* of the following hallucinogenic substances . . . unless specifically excepted . . . :
>
> . . . .
>
> (19) Marihuana;
>
> . . . .
>
> (27) Tetrahydrocannabinols or synthetic equivalents of the substances contained in the plant, or in the resinous extractives of Cannabis . . . .

(Emphasis added.) Under the plain literal reading of I.C. § 37-2705(a) and (d)(27), if a substance contains any quantity of *either* marijuana or THC, it is a controlled substance. The question of whether such a statute is subject to

further interpretation has been answered in recent years by the Idaho Supreme Court.

Because the best guide to legislative intent is the wording of the statute itself, the interpretation of a statute must begin with its literal words. Verska v. Saint Alphonsus Reg'l Med. Ctr., 151 Idaho 889, 893, 265 P.3d 502, 506 (2011); State v. Doe, 147 Idaho 326, 328, 208 P.3d 730, 732 (2009). The words of a statute "'must be given their plain, usual, and ordinary meaning; and the statute must be construed as a whole. *If the statute is not ambiguous, this Court does not construe it, but simply follows the law as written.*'" Verska, 151 Idaho at 893, 265 P.3d at 506 (quoting State v. Schwartz, 139 Idaho 360, 362, 79 P.3d 719, 721 (2003) (emphasis added)). "[W]here statutory language is unambiguous, legislative history and other extrinsic evidence should not be consulted for the purpose of altering the clearly expressed intent of the legislature." *Id.* (quoting City of Sun Valley v. Sun Valley Co., 123 Idaho 665, 667, 851 P.2d 961, 963 (1993)).

The language of I.C. § 37-2705(a) and (d)(27) is not ambiguous; it defines as schedule I controlled substances any "material, compound, mixture or preparation *which contains any quantity*" of "Tetrahydrocannabinols" (i.e., THC). Such language could not be any more plain. Therefore, if a substance contains any amount of THC, it is a schedule I controlled substance.

Question 2: Under Idaho Law, Is an Oil Extracted From the Cannabis Plant, Containing CBD and Less Than .3% THC a Controlled Substance?

As set forth above, Idaho Code § 37-2705(a) and (d)(19) and (27) define as schedule I controlled substances any "material, compound, mixture or preparation *which contains any quantity*" of either "marihuana" ((d)(19)) or "Tetrahydrocannabinols" (i.e., THC) ((d)(27)) (emphasis added). Therefore, in order for an oil extracted from the cannabis plant to not be a controlled substance, two conditions must be met. First, the oil extract cannot contain "any quantity" of THC -- not just less than .3%. Second, the oil extract cannot be deemed "marijuana" under Idaho Code § 37-2701(t), which reads in relevant part:

> "Marijuana" means all parts of the plant of the genus Cannabis, regardless of species, and whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin. *It does not include* the mature stalks of the plant unless the same are intermixed with prohibited parts thereof, fiber produced from the stalks, oil or cake made from the seeds or the achene of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks, except the resin extracted therefrom or where the same are intermixed with prohibited parts of such plant, fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination . . . .

(Emphasis added.)

In sum, unless an oil extract contains no THC *and* is excluded from the definition of "marijuana" under Idaho Code § 37-2701(t) in any of the ways highlighted above, such oil is a controlled substance in Idaho.

Question 3: Under Idaho Law, Is Cannabidiol (CBD), a Non-Psychoactive Component of Marijuana, a Controlled Substance?

As explained in the answer to Question 2, in order for any substance to not be a schedule I controlled substance under Idaho Code § 37-2705, two requirements must be met: (1) the substance cannot contain "any quantity" of THC, and (2) the substance must be excluded from the definition of "marijuana" under Idaho Code § 37-2701(t). Assuming cannabidiol does not contain any THC (which is more than the undersigned knows), in order to not be deemed "marijuana" under Idaho Code § 37-2701(t), it must be derived or produced from (a) mature stalks of the plant; (b) fiber produced from the stalks; (c) oil or cake made from the seeds or the achene of such plant; (d) any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks; or (e) the sterilized seed of such plant which is incapable of germination.

As with any substance, such as the example of oil extracted from a cannabis plant described in Question 2, unless cannabidiol (CBD) contains no quantity of THC and is derived or produced in one of the ways excepting it from the definition of "marijuana" found in Idaho Code § 37-2701(t), it is a controlled substance in Idaho.

Question 4: Under Idaho Law, Under What Circumstances Would Hemp and Hemp Extracts, Oils, and Derivatives Be Legal To Cultivate, Produce, Possess, or Consume In Idaho?

(a) Hemp Plants

Hemp plants are considered "marijuana" under Idaho Code § 37-2701(t) because they are plants "of the genus Cannabis, regardless of species." *See Merriam-Webster Online Dictionary, n.d.*, www.merriam-webster.con/dictionary/hemp (Feb. 9, 2015). Therefore, there is no circumstance that would make the cultivation, production, possession, or consumption of a hemp plant legal in Idaho.

(b) Hemp Extracts, Oils, And Derivatives

As explained previously, regardless of the substance, in order to not be a schedule I controlled substance, two conditions must be met -- the substance cannot contain "any quantity" of THC, and it must be excluded from the definition of "marijuana" under Idaho Code § 37-2701(t).

Even assuming hemp extracts, oils, and derivatives meet the first condition of containing no "quantity" of THC, they must have been produced or be derived in accordance with one of the exceptions to "marijuana" set forth in Idaho Code § 37-2701(t). It bears repeating; they must be derived from (a) mature stalks of the plant; (b) fiber produced from the stalks; (c) oil or cake made from the seeds or the achene of such plant; (d) any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks; or (e) the sterilized seed of such plant which is incapable of germination. Once both conditions have been met, the cultivation, production, possession, or consumption of hemp extracts, oils, and derivatives would not be illegal under Idaho law.

(c) Effect Of Federal Law On Idaho Laws

Assuming, *arguendo*, the United States Congress were to pass a law (or laws) decriminalizing the possession, production, consumption, etc. of hemp or any other substance(s) containing a low percentage of Tetrahydrocannabinol (THC), such as under .3%, the question of whether Idaho could continue to make criminal what the federal government decriminalizes is presented. The answer to that question is that, under the principle of "separate sovereigns," Idaho is free to enforce its own laws, just as the federal government is free to do the same. The United States Supreme Court has explained:

> In *Bartkus v. Illinois*, 359 U.S. 121, 79 S. Ct. 676, 3 L.Ed.2d 684 [1959] and *Abbate v. United States*, 359 U.S. 187, 79 S. Ct. 666, 3 L.Ed.2d 729 [1959], this Court reaffirmed the well-established principle that a federal prosecution does not bar a subsequent state prosecution of the same person for the same acts, and a state prosecution does not bar a federal one. The basis for this doctrine is that prosecutions under the laws of separate sovereigns do not, in the language of the Fifth Amendment, "subject [the defendant] for the same offence to be twice put in jeopardy":
>
> > "An offence [sic], in its legal signification, means the transgression of a law. . . . Every citizen of the United States is also a citizen of a State or territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either. The same act may be an offense or transgression of the laws of both. . . . *That either or both may (if they see fit) punish such an offender, cannot be doubted.*"

United States v. Wheeler, 435 U.S. 313, 317, 98 S. Ct. 1079, 1083, 55 L.Ed.2d 303 (1978) (superseded by statute) (quoting Moore v. Illinois, 55 U.S. 13, 19-20, 14 How. 13, 19-20, 14 L.Ed. 306 (1852)) (footnote omitted; emphasis added); *See* State v. Marek, 112 Idaho 860, 865, 736 P.2d 1314, 1319 (1987) ("[T]he double jeopardy clause of the fifth amendment does not prohibit sep-

arate sovereigns from pursuing separate prosecutions since separate sovereigns do not prosecute for the 'same offense.'"); *see also* United States v. Oakland Cannabis Buyers' Cooperative, 532 U.S. 483, 486, 121 S. Ct. 1711, 1715, 149 L.Ed.2d 722 (2001) (prosecutions under the federal Controlled Substances Act are not subject to a "medical necessity defense" even though state law precludes prosecuting persons authorized to use marijuana for medical purposes, as well as those who manufacture and distribute marijuana for such use).

Therefore, under the concept of "separate sovereigns," the state of Idaho is free to create its own criminal laws and exceptions pertaining to the use of marijuana, and is not legally bound by what criminal laws the federal government adopts.

If you have any questions or comments, please feel free to contact me at your convenience.

DATED this 9th day of February, 2015.

JOHN C. McKINNEY
Deputy Attorney General
Appellant Unit

February 9, 2015

The Honorable Linden Bateman
Idaho State Representative
Statehouse
VIA HAND DELIVERY

Re: Our File No. 15-50565 - Open Meeting Law

Dear Representative Bateman:

This letter is in response to your recent inquiry of this office with regard to the Idaho Open Meeting Law. Specifically, you propose adjusting the civil penalties within the legislation upward as follows:

1. Idaho Code § 67-2347(2) from $50 to $500;
2. Idaho Code § 67-2347(3) from $500 to $5,000; and
3. Idaho Code § 67-2347(4) from $500 to $5,000.

The establishment of these fine amounts is a policy question for the legislature. This office is not aware of any legal impediments to the amendments you have proposed.

Please contact me with any additional questions.

Sincerely,

BRIAN KANE
Assistant Chief Deputy

February 10, 2015

The Honorable Paul E. Shepherd
Idaho House of Representatives
Statehouse
Boise, Idaho
VIA HAND DELIVERY

Re: House Bill 51

Dear Representative Shepherd:

You asked this office to analyze House Bill 51, which addresses regulation of suction dredges.

House Bill 51 includes several provisions that attempt to declare that certain suction dredge activities are either exempt from, or not subject to, provisions of the Clean Water Act, 33 U.S.C. §§ 1251, *et seq.*, the Endangered Species Act, 16 U.S.C. §§ 1532, *et seq.*, and the Wild and Scenic Rivers Act, 16 U.S.C. §§ 1271, *et seq.* Such provisions raise constitutional concerns, because "a state law which conflicts with federal law is 'without effect.'" Idaho Dep't of Health & Welfare v. McCormick, 153 Idaho 468, 471, 283 P.3d 785, 788 (2012) (quoting U.S. Const. art. VI, cl. 2 ("Supremacy Clause")). House Bill 51 also conflicts with several state constitutional and statutory provisions placing environmental protections upon certain rivers and streams. In addition, the large number of ambiguities in House Bill 51 may render portions of it unenforceable.

Clean Water Act

Section 1 of the bill sets forth certain legislative findings, including the following:

> [T]he Legislature of the State of Idaho finds that in-stream suction dredge mining does not discharge or add pollutants into the receiving waters and therefore cannot be regulated

> under Section 402 of the National Pollutant Discharge Elimination System permit program of the Clean Water Act.

Legislative findings provide a factual foundation for proposed legislation, and "guide [the] application" of the statute. Payne v. Skaar, 127 Idaho 341, 344, 900 P.2d 1352, 1355 (1995). "Judicial inquiry does not concern itself with the accuracy as to the legislative finding, but only with the question of whether it so lacks any reasonable basis as to be arbitrary." Employment Sec. Agency v. Joint Class "A" School Dist. No. 151, 88 Idaho 384, 392, 400 P.2d 377, 381 (1965). Here, the legislative finding suggests that one purpose of the proposed section 47-1317A is to provide a means of exempting suction dredges from National Pollutant Discharge Elimination System (NPDES) permit requirements. Such a finding lacks any legal basis and is not sufficient to exempt suction dredges from NPDES requirements. The Environmental Protection Agency (EPA) has issued a NPDES general permit for small suction dredges (intake nozzle of five inches diameter or less) in Idaho. 78 Fed. Reg. 20,316 (Apr. 4, 2013). The EPA acted pursuant to the Clean Water Act. 33 U.S.C. § 1342. State legislation cannot "contradict or limit the scope of the [Clean Water Act], for that would run squarely afoul of our Constitution's Supremacy Clause." Northern Plains Resource Council v. Fidelity Exploration and Dev. Co., 325 F.3d 1155, 1165 (9th Cir. 2003). A determination of whether the EPA acted within the scope of its Clean Water Act authority in requiring suction dredges to comply with the NPDES general permit is a matter that can only be challenged in a judicial action.

Endangered Species Act

Subsection (5) of the proposed Idaho Code § 47-1317A, while ambiguous, appears to be an attempt to authorize the incidental take of anadromous fish eggs by suction dredges. The following Idaho anadromous fish species are listed as threatened or endangered under the Endangered Species Act (ESA): sockeye salmon, fall chinook salmon, spring/summer chinook salmon, and steelhead. To the extent that subsection (5) purports to grant a waiver of incidental take limitations applicable to listed anadromous fish, it is not enforceable. State agencies have no authority to waive federal prohibitions on the take of listed anadromous fish by suction dredgers. Any state authorization of a "taking" prohibited by Section 9 of the ESA would subject the State to action seeking to enjoin such authorization. *See* Strahan

v. Coxe, 127 F.3d 155 (1st Cir. 1997) (where a private activity requires a state license or permit, the state's authorization of the activity may constitute a taking and thus is prohibited by Section 9 of the ESA).

House Bill 51 cites the decision in Karuk Tribe of California v. USFS, Case No. CV-04-4275-SBA (June 21, 2005), in support of its finding that suction dredges operations should not be restricted by the provisions of the ESA. The cited decision, however, was overturned in Karuk Tribe of California v. USFS, 681 F.3d 1006 (9th Cir. 2012), which held that the Forest Service, before approving recreational suction dredge operations, must, under the Endangered Species Act, consult with federal fish management agencies regarding potential impacts on fish species listed as endangered or threatened.

Wild and Scenic Rivers Act

Subsection (6) of the proposed Idaho Code § 47-1317A provides:

> The rules shall provide that streams in established mining districts that were taken out by giving them a designation, natural or recreational, shall be put back in these established mining districts under full multiple use as originally intended because it is necessary to work in small streams during dangerous unworkable high water in large streams, thus having a place to work.

This provision, if enacted, would conflict with federal statutes and regulations prohibiting or restricting dredge mining in Wild and Scenic Rivers and associated streams. *See* 16 U.S.C. § 1280 (withdrawing beds and banks of Wild and Scenic River and all federal lands within two miles of the river channel from appropriation under federal mining laws). The provision would also conflict with Idaho Code § 47-1323, which prohibits dredge mining on those portions of the St Joe River, Middle Fork Salmon River, Middle Fork of the Clearwater River, and the Lochsa and Selway Rivers designated as wild and scenic rivers pursuant to the National Wild and Scenic Rivers System Act.

State-Designated Natural Rivers

Subsection (6) appears to conflict with art. XV, sec. 7 of the Idaho Constitution, which authorizes the Idaho Water Resource Board "to formulate

and implement a state water plan for optimum development of water resources in the public interest." The power vested in the Water Board to adopt a state water plan is exclusive, and "the legislature cannot modify the state water plan by statute." Idaho Power Co. v. State of Idaho, 104 Idaho 570, 574, 661 P.2d 736, 740 (1983). In 2012, the most recent Idaho Comprehensive State Water Plan was adopted and became effective. It provides: "The Idaho Water Resource Board will exercise its authority to protect the unique features of rivers where it is in the public interest to protect recreational, scenic, and natural values." Idaho Comprehensive State Water Plan, Section 2D. Pursuant to its constitutional authority and Idaho Code § 42-1734A, the Water Board has designated certain rivers as natural rivers. *See* http://maps.idwr.idaho.gov/StateProtectedStreams for a list of protected rivers. Once a river or stream is designated as a natural river, dredge or placer mining and mineral extraction within the stream bed is prohibited. The legislative directive to promulgate rules putting natural rivers "back in these established mining districts" would effectively modify Idaho's constitutionally adopted state water plan, a result prohibited by the decision in Idaho Power Co. v. State of Idaho.

Other Issues

Section 2 of House Bill 51, which would create a new code section designated as 47-1317A, contains a number of ambiguities that may prove obstacles to its implementation. "[A] statute must be sufficiently definite to enable the court to place thereon a reasonable construction and declare the legislative intent." Rural Elec. Co. v. City of Burley, 89 Idaho 112, 118, 403 P.2d 580, 583 (1965). A statute is "void and unenforceable" where "uncertainty is inherent in the enactment itself, resulting from inconsistencies or ambiguities or indefiniteness in the language used, so as to make it impossible to determine and effectuate the legislative intent." *Id.* (quoting Beatty v. City of Santa Fe, 263 P.2d 697, 700 (N.M. 1953).

For brevity's sake, this letter will not attempt to identify all ambiguities in House Bill 51; rather, it will address those that appear to be particularly problematical. The first such ambiguity appears in Section 2 (p.1, ll. 26-28), which provides that orders and permits "shall be conducted pursuant to negotiated rulemaking." The negotiated rulemaking procedures of the Administrative Procedure Act (APA), however, are designed only for the

establishment of rules, which are defined in the APA to be "an agency statement of general applicability." Idaho Code § 67-5201. Section 2 fails to provide how the negotiated rulemaking provisions of the APA may be employed to issue permits. Such guidance is advisable, because it would be highly impractical to apply the notice, publication, public comment, and legislative review provisions of negotiated rulemaking to orders and permits. *See* Idaho Code §§ 67-5220, 67-5222, and 67-5223.

Next, Section 2 (p. 1, ll. 32-33) provides that "[a]ny rules, permits or orders are not to interfere to the point that they perform a taking of the placer or claim." The verb "interfere," however, has no subject, creating an ambiguity that may render implementation and enforcement impossible.

Next, Section 2 (p. 1, ll. 34-36) provides that "such rules shall provide that no permit or special permit need be obtained from the department of lands or state board of land commissioners, such as joint applications for operations that move fewer than four (4) cubic yards per hour." Read literally, the section provides that no permits need ever be obtained for suction dredge mining, because the "such as" clause simply provides an example of operations that do not require a permit, and does not modify the language before the comma. While it may be intended that operations are exempt from permit requirements only when they move fewer than four cubic yards of material per hour, such intent will not modify the literal meaning of the provision. *See* State v. Dunn, 13 Idaho 9, 14, 88 P. 235, 236 (1907) (the court will not depart from the literal meaning of a statute, for "the court has no authority to say that the Legislature did not mean what they have clearly said").

Setting aside the above-discussed ambiguity, and assuming that the permit exemption is intended to apply to section dredges that move "fewer than four (4) cubic yards per hour," such a provision is a substantial departure from existing statutory standards that classify suction dredges based on intake hose diameter, which is readily verifiable. It is unclear how the Department of Lands would verify the number of yards moved per hour by any particular suction dredge. This same issue is found on page 2, ll. 36-38, which exempts suction dredges from bonding requirements if they move less than five cubic yards per hour.

Next, Section 2 (p. 1, l. 37) refers to "[t]he rules adopted pursuant to this section." Nothing in section 2, however, directs the Department of Lands to promulgate rules to implement the statute. Moreover, Section 2 appears to assume, erroneously, that regulation of suction dredging is subject solely to regulation by the Department of Lands. The Department of Water Resources (IDWR), however, regulates and issues permits for small scale suction dredge mining activities under the Stream Channel Alteration Act (Idaho Code 42-3801, *et seq.*) and IDWR's Stream Channel Alteration Rules (IDAPA 37.03.07.045). House Bill 51 creates ambiguity as to IDWR's continued authority to regulate such activities. If not expressly resolved by legislation, such ambiguity will likely result in confusion over the scope of IDWR's regulatory authority.

Next, Section 2 (p. 2, ll. 4-6) states the "precept" that "No low arbitrary horsepower ratings on suction dredges, as those ratings: make it dysfunctional to the point of disabling the intended application." The subject referred to by the preposition "it" is unclear.

Next, Section 2 (p. 2, ll. 25-27) requires the Department of Lands to "take notice" in its rules that "the amount of anadromous fish eggs and fish taken by fishermen is large while there are no documented cases of harm from suction dredge miners." It would not be advisable for state agencies to be publishing factual findings stating that fishermen are taking "large amounts" of anadromous fish eggs listed as threatened or endangered under the Endangered Species Act (ESA). Such findings would likely be quoted by interests seeking to restrict the sport harvest of listed species.

Section 2 (p. 2., ll. 30) then goes on to state that "a waiver should be granted outside the time there are no anadromous fish eggs to a part-time dredger, if the dredger can show there are no anadromous fish eggs in the area of operation." The term "waiver," however, lacks a clear reference to any permit or permit requirement, so it is unclear exactly what is to be waived.

An additional issue in Section 2 (p. 2, ll. 25-37) is the use of the term "part time dredger" to identify those persons who qualify for a waiver. The terms "part-time dredger" and "full-time dredger," are not defined in House Bill 51 or elsewhere in title 47, chapter 13, Idaho Code. Nor do such terms have any plain meaning that could be referred to by the Department of Lands

or a reviewing court. This type of ambiguity may provide opportunities to challenge the implementation and enforcement of House Bill 51.

Next, Section 2 (p. 3, ll. 7-8) defines the term "dredge" to mean "a subsurface hose that can measure from two inches (2") to ten inches (10") in diameter." H.B. 51 would not, however, amend the existing definitions in Idaho Code § 47-1313, which classify suction dredges with intakes over eight inches in diameter to be "motorized earth-moving equipment." The differing definitions would create an ambiguity in the implementation of the remaining provisions of title 47, chapter 13, Idaho Code, which impose requirements on the use of "motorized earth-moving equipment" that are not applicable to smaller suction dredges.

A final ambiguity appears in Section 2 (p. 3, ll. 19-30), which purports to create two crimes: "mineral trespass" and "interfering with a mining operation." Section 2, however, does not identify whether such crimes are felonies or misdemeanors. The failure to identify the severity of the criminal action or to otherwise identify potential penalties likely renders such provisions unenforceable. "A statute may be void for vagueness if it fails to give adequate notice to people of ordinary intelligence concerning the conduct it proscribes, or if it fails to establish minimal guidelines to govern law enforcement or others who must enforce the statute." State v. Korsen, 138 Idaho 706, 712, 69 P.3d 126, 132 (2003) (citations omitted).

Sincerely,

STEVEN W. STRACK
Deputy Attorney General

February 20, 2015

Representative Judy Boyle
Capitol Building, EW 29
Boise, ID 83720

Re: Your Questions Regarding Concealed Weapons

Dear Representative Boyle:

Thank you for contacting our office with your inquiry regarding concealed weapons carried "about the person." This letter will address that subject.

QUESTION PRESENTED

Can the Idaho Legislature regulate carrying a concealed weapon "about the person" without violating the plain language of the Idaho Constitution?

BRIEF ANSWER

Yes. Art. I, sec. 11 of the Idaho Constitution does not limit the inherent power of the Idaho Legislature to regulate concealed weapons, including weapons carried other than "on the person." Thus, the Idaho Legislature can regulate the carrying of concealed weapons "about the person."

DISCUSSION

The right of Idaho citizens to keep and bear arms is protected by both the Second Amendment to the United States Constitution and by art. I, sec. 11 of the Idaho Constitution. The latter provision, as originally adopted, read:

> **§ 11. Right to bear arms.** – The people have the right to bear arms for their security and defense; but the legislature shall regulate the exercise of this right by law.

In 1978, this section was amended to read:

> **§ 11. Right to keep and bear arms.** – The people have the right to keep and bear arms, which right shall not be abridged; but this provision shall not prevent the passage of laws to govern the carrying of weapons concealed on the person nor prevent passage of legislation providing minimum sentences for crimes committed while in possession of a firearm, nor prevent the passage of legislation providing penalties for the possession of firearms by a convicted felon, nor prevent the passage of any legislation punishing the use of a firearm. No law shall impose licensure, registration or special taxation on the ownership or possession of firearms or ammunition. Nor shall any law permit the confiscation firearms, except those actually used in the commission of a felony.

(Emphasis added).

Our office previously reviewed the legislative history of the 1978 amendment to seek to determine why it contains the term "on the person," which was not included in art. I, sec. 11 prior to that amendment. We found no information that would help us make that determination. The 1978 amendment does appear to have passed with little discussion or controversy.

Based on the clear language of art. I, sec. 11, the Idaho legislature may regulate arms carried "concealed on the person." Your inquiry goes to whether the legislature can also regulate the carrying of a concealed weapon "about the person," which would seem to have a greater scope than "on the person."

Implicit in this inquiry is an additional question, that is, whether art. I, sec. 11 of the Idaho Constitution, by expressly stating that the Legislature can regulate concealed weapons carried "on the person," but omitting to state that the Legislature could regulate concealed weapons carried in another manner, thereby limits the Legislature's authority to regulate the carrying of concealed weapons in any other manner than "on the person"? The answer to this question involves a principle of statutory construction known as *expressio*

unius est exclusio alterius, that is, that the express mention of one thing excludes all others as applied. Applied here, does the express mention of regulation of concealed weapons "on the person" in art. 1, sec. 11, exclude all other types of regulation of concealed weapons?

The application of this principle was discussed by the Idaho Supreme Court in Idaho Press Club v. State Legislature, 142 Idaho 640, 132 P.3d 397 (2006). The Idaho Press Club case did not involve a question involving the right to keep and bear arms, but the Supreme Court's analysis in that case is instructive for this discussion.

In Idaho Press Club, the Press Club sought a declaratory judgment holding that the closing of House and Senate legislative committee meetings to the public violated art. III, sec. 12 of the Idaho Constitution, which provided that: "The business of each house, and of the committee of the whole shall be transacted openly and not in secret session." Art. III, sec. 12 was silent as to legislative committees. The district court held that art. III, sec. 12 did not apply to meetings of legislative committees, and the Press Club appealed. The Idaho Supreme Court affirmed. As relevant here, the Court held:

> "Our State Constitution is a limitation, not a grant of power, and the Legislature has plenary powers in all matters, except those prohibited by the Constitution." (Citation omitted.) Because the Constitution is not a grant of power, there is no reason to believe that a Constitutional provision enumerating powers of a branch of government was intended to be an exclusive list. The branch of government would inherently have powers that were not included in the list. The converse is true, however, with a respect to provisions limiting power. When the framers drafted a provision expressly limiting certain powers, there is no reason to believe that they intended the limitation to be broader than they drafted it. The purpose of such provision is to define the limitations. It is not reasonable to assume that they intended to impose other, unstated limitations. Had they wanted to impose limitations in addition to those stated, they could easily have done so. Therefore, the rule of construction *expressio unius est exclusio alterius* applies to provisions of the Idaho Constitution

> that expressly limit power (citations omitted) but it does not apply to provisions that merely enumerate powers (citations omitted). The provision at issue here is a limitation on the power of the legislature to close its proceedings. Thus, *expressio unius est exclusio alterius* applies as a rule of construction. Under this well-recognized rule of construction, Article III, § 12 does not apply to legislative committees because the drafters did not include such committees in its provisions . . . . The drafters could have written Section 12 to require that the business of each house and of all committees shall be transacted openly and not in secret session, but it did not do so.

142 Idaho at 642-43 (emphasis added; citations omitted).

In other words, *expressio unius est exclusio alterius* applies only to what the Constitution says a branch of government cannot do. It does not apply to what it can do. In Idaho Press Club, this meant that because art. III, sec. 12 did not prohibit legislative committees from having closed meetings, they were not prohibited from doing so. Art. III, sec. 12 did not have to expressly allow such meetings to make them constitutionally permissible.

Following the same reasoning, art. I, sec. 11 of the Idaho Constitution does not prohibit the Legislature from regulating concealed weapons carried "about the person." It does not have to expressly allow the Legislature to do so for such regulation to be constitutional. The list of things that the Legislature can do in the first part of art. I, sec. 11 (regulate the carrying of concealed weapons "on the person," establish minimum sentences for gun-related crimes, provide penalties for possession of firearms by convicted felons and punish the use of a firearms) is not an exclusive list, and it is not a limitation of the Legislature's power to legislate on other matters, such as the carrying of concealed weapons other than on the person. The principle of *expressio unius est exclusio alterius* does not apply to this list.

But, *expressio unius est exclusio alterius* does apply to the list of express limitations on legislative power found later in art. I, sec. 11, in which the drafters provided that the Legislature cannot impose licensure, registration or special taxation on the ownership or possession of firearms or ammu-

nition, or permit the confiscation of firearms not actually used in the commission of a felony. Here, in contrast to the first part of art. I, sec. 11, the drafters are setting forth what the Legislature cannot do. This list is exclusive. The Legislature can regulate all other matters related to firearms except those on this list of prohibitions.

If the reverse were true – that is, if the only laws the Legislature could enact involving firearms are limited to those that art. 1, sec. 11 expressly says it can enact -- then a number of other laws would also be unconstitutional. These include Idaho Code section 18-3301 (Deadly weapon – possession with intent to assault), section 18-3302A (Sale of weapons to minors), section 18-3302D (Possessing weapons or firearms on school property), section 18-3302E (Possession of a weapon by a minor), section 18-3302F (Prohibition of possession of certain weapons by a minor), and section 18-3309 (Authority of governing boards of public colleges and universities regarding firearms). Art. I, sec. 11 does not contain an express grant of authority to the Legislature to legislate on these matters, yet these laws are not unconstitutional. The Legislature cannot do what art. 1, sec. 11 says it cannot do, but it has inherent power to regulate arms beyond the express grants of authority in art. I, sec. 11.

Consistent with this, in 1990 the Office of the Idaho Attorney General opined that "[t]here is nothing in the United States or Idaho constitution that grants a person the constitutional right to carry a concealed weapon." 1990 Idaho Att'y Gen. Ann. Rpt. 16. Nothing in Idaho case law since that time would suggest a constitutional right to carry concealed weapons. We are aware of no legal case, either before or after the 1978 amendment, which has called into question the legislature's authority to regulate concealed weapons "on or about the person."

Finally, while your question was directed toward the Idaho Constitution, it may be helpful to take note of the seminal Second Amendment opinion of the U.S. Supreme Court in District of Columbia v. Heller, 554 U.S. 570, 128 S. Ct. 2783, 171 L.Ed.2d 637 (2008). Heller is important primarily because the U.S. Supreme Court affirmed the private right of individual citizens to keep and bear arms. However, the Court also observed that:

> Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose (citations omitted) . . . . [N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.

Heller, 554 U.S. at 626-27. A footnote referred to the types of measures discussed in this passage as "presumptively lawful" and stated that the list of such measures "does not purport to be exhaustive." *Id.*, n.26. Among the other presumptively lawful regulations were prohibitions against carrying concealed weapons. *Id.* at 626.

CONCLUSION

The Idaho Legislature may regulate the carrying of concealed weapons both "on the person" and "about the person" without violating either art. I, sec. 11 of the Idaho Constitution, or the Second Amendment to the United States Constitution. Art. 1, sec. 11's provision allowing the regulation of concealed weapons carried "on the person" does not limit the inherent authority of the Idaho Legislature to regulate the carrying of concealed weapons other than "on the person."

I hope this information is helpful. Please feel free to contact our office if you have any questions. Thank you again for bringing us this interesting and important question.

Sincerely,

PAUL R. PANTHER
Deputy Attorney General
Chief, Criminal Law Division

March 2, 2015

The Honorable Mike Moyle
Idaho State Representative
Statehouse
VIA HAND DELIVERY

Re: Our File No. 15-50730 – House Bill 100

Dear Representative Moyle:

House Bill 100 ("H. 100") would amend Idaho Code §§ 59-1342 and 59-1346, which address the computation of retirement benefits. It would amend those sections to remove the legislative exemption (for legislators leaving the Legislature on or after July 1, 2015) from the "split calculation" that applies to other elected and appointed (sometimes referred to as "E/A") officials in the computation of a PERSI retirement benefit when the elected or appointed official was in the office on average less than 20 hours per week (called "part-time service" for the rest of this letter).[1] You have asked whether H. 100 might raise constitutional issues in light of art. III, sec. 23 of the Idaho Constitution.[2]

As we understand your inquiry, it asks whether H. 100 runs afoul of the restriction contained in art. III, sec. 23 against legislators setting their own compensation (except to lower their compensation from that otherwise established by the Citizens' Committee by a concurrent resolution enacted by the twenty-fifth legislative day). In previous analyses, this office has superficially addressed these issues, but has not undertaken a comprehensive analysis of this question. This analysis will supersede any prior analysis of this issue.

This question actually raises two questions:

1. Are retirement benefits considered a part of "rate of compensation of the Legislature" for art. III, sec. 23 purposes; and

2. Would legislative alteration of retirement benefits require the approval of the Citizens' Committee under art. III, sec. 23?

"Rate of Compensation" Includes Both Salary and Benefits.

Art. III, sec. 23 of the Idaho Constitution addresses the compensation of the Legislature. It provides that the Legislature does not have the authority to establish "the rate of its compensation and expense" and provides that the Citizens' Committee on Legislative Compensation ("Citizens' Committee") shall establish the rate of compensation and expenses for legislators (subject to rejection by concurrent resolution). Neither compensation, nor rate of compensation with regard to a legislative rate of compensation, is defined by the constitutional provision or by the statute. Compensation is generally defined as being composed of salary plus benefits and any other perks having monetary value offered by an employer. A benefit is anything that is offered that can be assigned a monetary value. This means that any analysis should determine whether a monetary value can be assigned to a benefit. Considering compensation to include more than just salary and expenses is consistent with the approach taken by the Citizens' Committee on Legislation Report, which is attached to this response for your review.

The Citizens' Committee Has Discretion with Regard to Benefits Paid to Legislators.

Art. III, sec. 23 of the Idaho Constitution provides:

> The legislature shall have no authority to establish the rate of its compensation and expense by law. There is hereby authorized the creation of the citizens committee on legislative compensation, which shall consist of six members, three to be appointed by the governor and three to be appointed by the supreme court, whose terms of office and qualifications shall be as provided by law. Members of the committee shall be citizens of the state of Idaho other than public officials holding an office to which compensation is attached. The committee shall, on or before the last day of November of each even-numbered year, establish the rate of compensation and expenses for services to be rendered by members of the legislature during the two-year period commencing on the first day of December of such year. The compensation and expenses so established shall, on or before such date, be filed

> with the secretary of state and the state controller. The rates thus established shall be the rates applicable for the two-year period specified unless prior to the twenty-fifth legislative day of the next regular session, by concurrent resolution, the senate and house of representatives shall reject or reduce such rates of compensation and expenses. In the event of rejection, the rates prevailing at the time of the previous session, shall remain in effect. . . .

(Emphasis added.)

One means of interpreting H. 100 is that the amendment to Idaho Code §§ 59-1342 and 59-1346 will address the *computation* of a retirement benefit, not "the rate of compensation" for legislative service "during the two-year period commencing on the first day of December of [even numbered years]." Idaho Code § 59-1342 governs service retirement and Idaho Code § 59-1346 governs early retirement. As such, these sections provide the applicable multiplier, provide for a minimum benefit, and mandate the method of computation in particular instances, including when an elected or appointed official has both elected or appointed "part-time" service and non-elected or appointed service and the majority of that service is elected or appointed. In such cases, two calculations are required (called a "split calculation"). The retirement benefit from the part-time E/A service is calculated, and a separate calculation is done for the non-E/A service. Idaho Code §§ 59-1342(5) and 59-1346(2). Under the current versions of these subsections, members of the Legislature who would otherwise be subject to a split calculation are exempt and only one calculation is done, which in effect treats part-time service as full-time service.[3] As a result of the exemption, a legislator may receive a larger monthly retirement benefit than he would receive if he were subject to the split calculation.

The term used, repeatedly, in art. III, sec. 23 of the Idaho Constitution is "rate of compensation." Further, under the terms of sec. 23, the "rate of compensation" is "for services to be rendered by members of the legislature during the two-year period commencing on the first day of December of such year." The language used and the entirety of the process set up by art. III, sec. 23 reflects that the "rate of compensation" refers to compensation for the immediately following two year period, that is, current compensation. *See*

also Beitelspacher v. Risch, 105 Idaho 605, 617, 671 P.2d 1068, 1080 (1983), *concurring and dissenting* (Bistline) (setting out, verbatim, provisions from The Statement of Meaning and Purpose of the Proposed Constitutional Amendment Offered by House Joint Resolution Number 6, which provisions state, inter alia, that "*[t]he provisions of this amendment would remove the initial salary review from legislative hands and return them to the people*").[4]

An argument can be advanced that H. 100 would constitute a change in the benefits received by a legislator, and, therefore, H. 100 would require approval by the Citizens' Committee. There are most likely three ways in which this change could apply to legislators:

1. Legislators that prior to their election had accrued full-service time through employment or office holding in another state capacity. Examples of this would be a former school teacher or county clerk who is then elected to office.

2. Legislators who have been in office for a number of years and anticipate transitioning to a full-time position either as an employee or as an elected official.

3. Legislators who have only recently begun service and have no prior service time, or significant legislative service time.

H. 100 could affect the amount of retirement allowance paid to a legislator after he stops work upon retirement if that legislator fits into the "majority of [part-time] service" condition. It would do so by changing the method of computation of a retirement benefit to be paid after the cessation of legislative service. However, it does not affect the rate of compensation paid to a legislator for legislative services rendered during the period December 1, 2014 through November 30, 2016. It makes no change to the salary (or unvouchered expense allowances) as most recently established in May of 2014 by the Citizens' Committee. Since this change would not result in direct compensation through a change in salary or expenses, the question then becomes whether the exemption from the split in service calculation has any monetary value.

A change in the calculation of service time has a financial value, particularly to legislators who have accrued service time over the course of several years.[5] Recognizing that the value of the service time changes based upon its calculation, it seems likely that a present value could be assigned to that calculation. In looking at the three scenarios above, there may potentially be three outcomes:

1. A legislator with prior (to being a legislator) service time currently accruing service time would likely be able to show a definitive monetary value based on the change in calculation.

2. A legislator with significant time accrued at the current rate may be able to demonstrate a predicted or hypothetical monetary value based on intended actions. It is unknown whether this predicted injury would be sufficient to establish standing and is beyond the scope of this analysis. This office would likely defend the statute and PERSI in such a circumstance.

3. A legislator without significant time in service would likely be unable to demonstrate a monetary value sufficient to raise a claim.

This means that it is factually specific as to whether a legislator could bring an action claiming that H. 100 violates art. III, sec. 23. Such a claim would require a showing that the change in benefit calculation was one having a monetary value and therefore the conditions of art. III, sec. 23 have not been met—namely, the Citizens' Committee has not had the opportunity to review and approve the change in rates, and the Legislature would also have an opportunity to review and reject or reduce such rates by the 25th day.[6]

If art. III, sec. 23 of the Idaho Constitution were read to preclude the change made in H. 100 based on an interpretation of "rate of compensation" to include a potential retirement benefit, then it would seem that the Legislature would have no authority to legislate in any area that would affect the pension amount of a retired legislator. However, since 1976, there have been a number of legislative changes to the PERSI statutes, which could have increased retirement benefits for retiring legislators, including for example, the split calculation legislative exemption made in 1990 (retroactive to 1985);

several increases in the multiplier (including increases effective October 1, 1993, October 1, 1994 and June 30, 2000), and enactment of more favorable early retirement factors (effective July 1, 1980). We are not aware of any argument having being made that these changes were precluded under art. III, sec. 23. Any arguments to the contrary have been removed by the Citizens' Committee's adoption of the benefit and rates as provided for by art. III, sec. 23. In sum the Legislature has the authority to adopt legislation in this area, but application of those provisions to itself is likely contingent on approval of the Citizens' Committee.

As reflected by their minutes and report, the Citizens' Committee discusses two areas in addition to compensation and expenses. Those are requirements for payment and additional benefits. In 2014, the Committee reviewed the Legislature's additional benefits including retirement, medical, dental, and life insurance provisions and by verbal assent agreed to make no changes to section V.[7] Based upon the changes suggested by H. 100, there is a legitimate question as to whether those changes would also need to be approved by the Citizens' Committee. This office would recommend that the Citizens' Committee approval be requested to avoid any confusion as to the legal effect. This approval is consistent with the conclusion that art. III, sec. 23, by its terms, applies to the amounts to be paid to legislators for, and related to services providing during, the immediately following two year period. *See* http://legislature.idaho.gov/sessioninfo/2014/interim/140506_comp1030AM-Minutes.pdf.

This approval also raises a question with regard to the effective date of H. 100. Based on the above, if the assumption is that the change in calculation of service accrual has a monetary value, the earliest effective date for this legislation would probably be December 1, 2016, assuming approval of the change by the Committee. But this also raises the possibility of alternative scenarios. For example if the Legislature makes this change, but the Committee rejects it, then the rate would likely not go into effect. Or if the Legislature were to adopt H. 100, the Committee approves it, and then the 2017 Legislature, which could contain new legislators, were to reject the Committee's recommendation in its entirety in order to preserve the current service calculation with regard to retirement benefits.

It is important to note that it is difficult to opine in this area with any level of certainty. Based upon the above, the most conservative legal counsel that can be offered is that the Legislature possesses the authority to adopt H. 100. But, that legislation will likely require approval (which could be as simple as "maintaining the benefits as provided by statute") by the Citizens' Committee and subsequent acceptance by the 2017 Legislature. Equally however, a court may review H. 100 and determine that service accrual has no monetary value, the Citizens' Committee has no oversight and the effective date is July 1, 2015. Two competing approaches are available here, and it is within the Legislature's ambit to determine which has more merit as it weighs adoption of H. 100.

I am happy to discuss the content of this letter more fully if necessary.

Sincerely,

BRIAN KANE
Assistant Chief Deputy

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[1] The legislative exemption from the split calculation was enacted in 1990 with an emergency clause and a retroactive date of July 1, 1985. *See* 1990 Idaho Sess. Laws 738.

[2] Art. III, sec. 23, as it currently reads, was amended as proposed by H.J.R. No. 6 (1976 Idaho Sess. Laws 1217) and ratified at the general election on November 2, 1976.

[3] Subsection (5) in Idaho Code § 59-1342 now provides:

> (5) If the majority of a member's credited service is as an elected official or as an appointed official, except as a member of the Idaho legislature, and that official was normally in the administrative offices of the employer less than twenty (20) hours per week during the term of office, or was normally not required to be present at any particular work station for the employer twenty (20) hours per week or more during the term of office, that member's initial service retirement allowance shall be the sum of:
>
> (a) That amount computed under subsection (1) and/or (2) of this section for only those months of service as an elected or an appointed official that are in excess of the months of other credited service, without consideration of any other credited service; and
>
> (b) That accrued service retirement allowance that is computed from an average monthly salary for salary received during the member's total months of credited service excluding those excess months referenced in subsection (5)(a) of this section.
>
> The initial service retirement allowance of members of the Idaho legislature will be computed under subsection (1) and/or (2) of this section, on the basis of their total months of credited service.

Subsection (2) in Idaho Code § 59-1346, with some minor variation because it applies to early retirement, requires the same calculation.

[4] Considering the preference that the Citizens' Committee have the initial review of legislative rate of compensation, H. 100 may be more appropriately discussed with the Committee to determine if the Committee recommends that the Legislature make a change as contemplated by H. 100.

[5] In this regard, consideration may want to be made of a more equitable statutory resolution of this matter in essence treating the first ten years of legislative service as part time, but each year after ten is accrued as currently in the code. This would recognize those legislators who have devoted a substantial part of their careers to the public service of the State of Idaho. This decision is within the discretion of the Legislature and could involve an amendment to H. 100 or a new piece of legislation.

[6] No legal argument likely could be raised if H. 100 were adopted and signed into law prior to the 25th day of the session, and then the benefit rates were reduced as set forth by H. 100 by concurrent resolution as provided for in art. III, sec. 23 by the 25th day of the session. As of the drafting of this analysis, it is the 47th legislative day, well beyond the 25th day for such adjustments.

[7] It is unknown why the Committee changed from its prior practice of having a motion to approve and instead simply adopted by verbal assent the continuation of benefits. In 2012, the Committee moved the adoption of maintaining the same additional benefits after a brief discussion of them. See Minutes, Citizens' Committee On Legislative Compensation, June 25, 2102, p. 5. This office recommends that the Committee approve all recommendations for rate of compensation and expenses by motion in the future.

March 3, 2015

The Honorable John Rusche
Idaho State Representative
Statehouse
VIA HAND DELIVERY

Re: Our File No. 15-50770 - 2015 Senate Bill 1066

Dear Representative Rusche:

Your e-mail presented questions on three topics concerning Senate Bill 1066 (SB 1066):

(1) Can the presidential primary be closed and the May primary be open if the party so designates (or vice versa)?

(2) If one is unaffiliated but chooses to vote in the closed primary, must one then "unaffiliate" in the time between March and May? How would that work in maintaining accurate voter rolls?

(3) If only one party chooses to hold a presidential primary (what you characterize as a private party election), can state or county resources be used to support the primary election activity of one party for the purpose of choosing delegates to a specific private event – the national nominating convention?

The answer to the first questions is "yes." The answer to the first part of the second question is "yes," five election cycles out of seven and "no" for the other two. The answer to the second part of the second question is that there would be ample time to update party affiliation records. The answer to the third question is "yes."

Parties May "Open" One of the Two Primary Elections and "Close" the Other

Section 8 of SB 1066 would amend Idaho Code § 34-904A to allow separate designations of open and closed primaries for the presidential and/or regular primary elections. The language to this effect is in the amendment to subsection (2), which would read as follows:

> (2) A political party . . . may, no later than . . . the last Tuesday in the November prior to a primary or presidential election, notify the secretary of state in writing that the political party elects to allow, in addition to those electors who have registered with that political party, any of the following to vote in such party's primary **or** presidential primary elections:
>
> (a) Electors designated as "unaffiliated";
>
> (b) Electors registered with a different political party . . . . In the event a state chairman . . . elects to allow electors to vote in that party's primary **or** presidential primary elections pursuant to this paragraph (b), the state chairman shall identify which political parties' registrants are allowed to vote in such primary **or** presidential primary election.

(Bolding and italics added.)

The language of paragraph 2(b) does not explicitly state that a state party chairman may make different notifications about opening or closing the party's presidential primary and regular primary elections, but nothing in paragraph 2(b) explicitly prevents it. The ordinary reading of the bolded, italicized "or's" in that paragraph is that the notifications are independent of each other and need not be the same. When "or" is used in a statute, its ordinary meaning is to list or denote alternatives:

> [T]he legislature's use of the word "or" in I.C. § 18-7018 is important. The word "or" is a "function word" used to express an alternative. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1585 (1993). This Court has previously concluded that the word "or" should be given its normal disjunctive meaning unless doing so would produce an absurd or unreasonable result. State v. Rivera, 131 Idaho 8, 10, 951 P.2d 528, 530 (Ct. App. 1998).

State v. Salinas, 150 Idaho 771, 772-73, 250 P.3d 822, 823-24 (Ct. App. 2011). *Also* Sprague v. Caldwell Transp., Inc., 116 Idaho 720, 722, n.1, 779 P.2d 395, 397, n.1 (1989) (same rule of construction applied in non-criminal statutes). Accordingly, the most likely construction of this statute[1] is that it would allow state party chairmen to make different notifications concerning closing or opening the presidential and regular primaries.

If an "Unaffiliated" Elector Declares a Party Affiliation to Vote in the March Presidential Primary Election, in Five Election Cycles Out of Seven, Current Statute Would Allow the Elector to Change From a Party Affiliation for the March Presidential Primary to "Unaffiliated" for the May Primary Election

Idaho Code § 34-411A(1) regulates when an elector may change a party affiliation to become unaffiliated before a primary election — that change must take place by the deadline for filing candidacy papers for the primary election:

> **34-411A. Primary elections — Changing party affiliation — Unaffiliated electors.** — (1) For a primary election, an elector may change such elector's political party affiliation or become "unaffiliated" by filing a signed form with the county clerk no later than the last day a candidate may file for partisan political office prior to such primary election, as provided for in section 34-704, Idaho Code. An "unaffiliated" elector may affiliate with the party of the elector's choice by filing a signed form up to and including election day. The application form described in section 34-1002, Idaho Code, shall also be used for this purpose.

Under Idaho Code section 34-704, the deadline for candidates to file Declarations of Candidacy is the tenth Friday before the primary election, which is the third Tuesday in May. The deadline for candidates filing their papers can thus be as early as March 9 (when the primary election is held on May 15) or as late as March 15 (when the primary election is held on May 21).

Senate Bill 1066 provides that the presidential primary would be the second Tuesday in March. The table below shows the second Tuesday in

March (the presidential primary date under SB 1066), the deadline for filing candidacy papers (the last day for changing party affiliation to unaffiliated under section 34-704), and the primary election date for each primary election for the next seven presidential elections, after which the cycle would repeat:

Presidential Primary Date (Second Tuesday in March)	**Deadline for Changing Party Affiliation (Tenth Friday Before Primary Election)**	**Primary Election Date (Third Tuesday in May)**
Tuesday, March 8, 2016	Friday, March 11, 2016	Tuesday, May 17, 2016
Tuesday, March 10, 2020	Friday, March 13, 2020	Tuesday, May 19, 2020
Tuesday, March 12, 2024	Friday, March 15, 2024	Tuesday, May 21, 2024
Tuesday, March 14, 2028	Friday, March 10, 2028	Tuesday, May 16, 2028
Tuesday, March 9, 2032	Friday, March 12, 2032	Tuesday, May 18, 2032
Tuesday, March 11, 2036	Friday, March 14, 2036	Tuesday, May 20, 2036
Tuesday, March 13, 2040	Friday, March 9, 2040	Tuesday, May 15, 2040

As the table shows, in five of the seven years (2016, 2020, 2024, 2032, and 2036, all of which are shaded), the deadline for filing changing party affiliation from a party registrant to unaffiliated (which coincides with the time for Declarations of Candidacy shown above) falls after the presidential primary election, and there is a three-day window during which an elector who registered as a party member in the presidential primary election can "unaffiliate" in time for the upcoming regular primary election. In 2028 and 2040, this is not possible because the presidential primary election will be held four days after the filing deadline.

As for whether changing party registration information would "work in maintaining accurate voter rolls," the current deadline for changing party affiliation to vote in the primary is 67 days before the primary election. That would seem to be time enough to update voter registration data, particularly in light of Idaho Code § 34-408, which provides for closing of the clerk's registration records 24 days before the election.

The State and County May Bear the Cost of a Presidential Primary in Which Only One Party Participates

Four political parties currently qualify for the ballot in Idaho: The Republican, Democratic, Libertarian and Constitution Parties. Under SB 1066, none, one, two, three or all four of them could notify the Secretary of State that the party wishes to participate in a presidential primary. The issue is whether, if just one of these parties opts for a presidential primary, state or county resources can be used to support the primary election of just one party for the purpose of choosing delegates to a national nominating convention? Although there does not appear to be any specific law directly on point, the answer is probably "yes."

If only one party were able to qualify for the ballot in Idaho, under current law the state and county would still run its primary election, provided that there were contested elections. *See* Idaho Code § 34-904(3) (no primary election need be held for certain parties without contested races.) Thus, it is theoretically possible under current law that a primary could be held for only one party, although that is highly unlikely.

Nevertheless, even if only one party qualified for the primary election ballot, states have a legitimate interest in conducting a political party's primary, if nothing more than to make sure that only eligible voters participate, that voting and ballot counting are overseen by state or county officials, etc. Cf. Peace And Freedom Party v. Shelley, 114 Cal.App.4th 1237, 1244-47, 8 Cal.Rptr.3d 497, 502-04 (Cal.App. 3 Dist. 2004). Thus, the presidential primary may go forward even if only one of Idaho's four political parties opts to do so.

I hope you find this letter helpful.

Sincerely,

BRIAN KANE
Assistant Chief Deputy

[1] If there is an ambiguity in the proposed amendment to section 34-904A, the Secretary of State would be the officer on the front line to resolve any ambiguity. He would be the one initially to administer this subsection to determine whether a party had authority to open one of the primaries and close the other. In that case, the Secretary of State's construction of the statute would be entitled to deference in the same manner as an agency is entitled to deference in the following quotation:

> Where an agency interprets a statute or rule, this Court applies a four-pronged test to determine the appropriate level of deference to the agency interpretation. This Court must determine whether: (1) the agency is responsible for administration of the rule in issue; (2) the agency's construction is reasonable; (3) the language of the rule does not expressly treat the matter at issue; and (4) any of the rationales underlying the rule of agency deference are present. *Preston v. Idaho State Tax Comm'n*, 131 Idaho 502, 504, 960 P.2d 185, 187 (1998). There are five rationales underlying the rule of deference: (1) that a practical interpretation of the rule exists; (2) the presumption of legislative acquiescence; (3) reliance on the agency's expertise in interpretation of the rule; (4) the rationale of repose; and (5) the requirement of contemporaneous agency interpretation. *Id.* at 505, 960 P.2d at 188.

Duncan v. State Bd. of Accountancy, 149 Idaho 1, 3, 232 P.3d 322, 324 (2010).

March 20, 2015

The Honorable Steven Miller
Idaho House of Representatives
Statehouse
Boise, Idaho
VIA HAND DELIVERY

Re: House Bill 291

Dear Representative Miller:

You asked this office whether the public records exemption proposed in House Bill 291 is covered by existing public record exemptions. House Bill 291 would add two new exemptions to the public records law: an exemption for "[l]and management plans required for voluntary stewardship agreements entered into pursuant to law," and an exemption for "written agreements relating to the conservation of all species of sage grouse entered into voluntarily by owners or occupiers of land with a soil conservation district."

First, it is unclear what types of documents may constitute "[l]and management plans required for voluntary stewardship agreements," since the term "voluntary stewardship agreement" does not appear elsewhere in the Idaho Code. For purposes of this analysis, I assume that such an agreement would include elements common to most land management plans, and may include records relating to the production of crops and livestock on the property.

Idaho courts "narrowly construe exemptions to the disclosure presumption" of Idaho Code § 9-338. Hymas v. Meridian Police Dept., 156 Idaho 739, 745, 330 P.3d 1097, 1103 (Ct. App. 2014). Thus, in applying existing public record exemptions to land management plans and sage grouse conservation agreements, the courts would place the "burden of persuasion" on the custodial agency to "'show cause' or prove, that the documents fit within one of the narrowly-construed exemptions." *Id.*

Given the above principle, under existing law, a request for disclosure for a land management plan or sage grouse conservation agreement would likely require the agency to carefully review the plan or agreement to identify elements such as production records, trade secrets, or locations of endangered species that may be exempt from disclosure. Idaho Code §§ 9-340(D)(1) and (2), and 9-340E(1). Such elements would be redacted, but the remainder of the land management plan or sage grouse conservation plan may be disclosable.

Certain elements of land management plans and sage grouse conservation agreements may also be exempt from disclosure pursuant to applicable federal laws, which are incorporated by reference in Idaho Code § 9-340A. Soil and water conservation districts participating in United States Department of Agriculture (USDA) conservation programs may be subject to the privacy requirements of the Food, Conservation and Energy Act of 2008, Pub. L. No. 110-246, which prohibits disclosure of the names, locations, cropland acreages, production histories, and conservation practices of producers participating in certain USDA-sponsored conservation programs. Soil conservation districts, as USDA cooperators, are required to comply with the privacy protections in Pub. L. No. 110-246.

In sum, it is likely that existing public record exemptions would exempt certain elements of land management plans and sage grouse conservation agreements from public disclosure, while other elements of such plans and agreements would remain public records while in the custody of a state agency.

Sincerely,

STEVEN W. STRACK
Deputy Attorney General

March 31, 2015

Representative Melissa Wintrow
EG60, Capitol Building
Boise ID 83720

Re: House Bill 320

Dear Representative Wintrow:

Thank you for your inquiry to our office regarding House Bill 301. Based on your email to Mr. Kane, and our telephone conversation, I believe your inquiry covers three basic questions:

QUESTIONS PRESENTED

1. What is the impact of House Bill 301 on the ability of a person who does not possess a concealed weapons license to carry a concealed weapon outside the limits or confines of a city?

2. Would House Bill 301 require landowners or leaseholders to allow open carry of firearms on their private property?

3. Does House Bill 301 impact Idaho's status as a "Brady alternative" or "permit alternative state" in which a concealed weapons license holder is not required to undergo a federally-mandated background check to purchase a firearm?

BRIEF ANSWERS

1. House Bill 301 does not impact the carrying of concealed weapons outside city limits by a person who does not have a concealed weapons license, with one primary exception. Under current law, a person may only carry concealed without a license in his or her own abode, business or property in which he or she has an ownership interest. Under House Bill 301, a person may also carry concealed without a license on the private property of another person, with the owner's or leaseholder's permission.

2. House Bill 301 contains language that could give rise to a challenge to a property owner's or leaseholder's right to prohibit the carrying of firearms on her property. Such a challenge would likely be resolved in favor of the property owner or leaseholder.

3. Idaho's status as a "Brady alternative" or "permit alternative" state could be impacted by passage of House Bill 301, due to inconsistencies between House Bill 301 and federal requirements.

DISCUSSION

I. House Bill 301

House Bill 301 would repeal the current Idaho Code § 18-3302 and enact a new section 18-3302. Many, but not all provisions of the old statute would remain in the new statute. As relevant to the questions presented, there are three subsections of House Bill 301 that are relevant to this discussion, subsections (3) through (5) of Section 2 of House Bill 301. These provide:

> (3) No person shall carry concealed weapons on or about his person without a license to carry concealed weapons, except:
>
> (a) In the person's place of abode or fixed place of business;
>
> (b) On property in which the person has any ownership or leasehold interest;
>
> (c) On private property where the person has permission to carry concealed weapons from any person with an ownership or leasehold interest;
>
> (d) Outside the limits of or confines of any city.
>
> (4) Subsection (3) of this section shall not apply to restrict or prohibit the carrying or possession of:
>
> (a) Any deadly weapon located in plain view;
>
> (b) Any lawfully possessed shotgun or rifle;
>
> (c) A firearm that is not loaded and is concealed in a motor vehicle;
>
> (d) A firearm that is not loaded and is secured in a case; and
>
> (e) A firearm that is disassembled or permanently altered such that it is not readily operable.

(5) The requirement to secure a license to carry concealed weapons under this section shall not apply to the following persons:

(a) Officials of a city, county or the state of Idaho;
(b) Any publicly elected Idaho official;
(c) Members of the armed forces of the United States or of the national guard when in performance of official duties;
(d) Criminal investigators of the attorney general's office and criminal investigators of a prosecuting attorney's office, prosecutors and their deputies;
(e) Any peace officer as defined in section 19-5101(d), Idaho Code, in good standing;
(f) Retired peace officers or detention deputies with at least ten (10) years of service with the state or a political subdivision as a peace officer or detention deputy and who have been certified by the peace officer standards and training council;
(g) Any person who has physical possession of his valid license or permit authorizing him to carry concealed weapons.

II. Impact of House Bill 301 on the Carrying of Concealed Weapons Outside City Limits

A. House Bill 301, Subsection (3)(d) and Idaho Code § 18-3302(12)(d): Concealed Carry Outside City Limits

Idaho Code § 18-3302(12)(d) currently provides that:

(12) The requirement to secure a license to carry a concealed weapon under this section shall not apply to the following persons:

. . .

(d) Any person outside the limits of or confines of any city while engaged in lawful hunting, fishing, trapping or other lawful outdoor activity;

The formal differences between Section 2, subsection (3)(b) of House Bill 301 and paragraph (12)(d) of the current Idaho Code § 18-3302 are obvious. The question is whether there is any substantive difference between the two.

A basic principle of statutory construction is that the interpretation of a statute "must begin with the literal words of the statute; those words must be given their plain, usual and ordinary meaning; and the statute must be construed as a whole." In re Guardianship of Doe, 157 Idaho 750, 756, 339 P.3d 1154, 1160 (2014), citing A & B Irrigation Dist. v. Idaho Dep't of Water Resources, 154 Idaho 652, 654, 301 P.3d 1270, 1272 (2012). Idaho Code § 18-3302(12)(d) limits the carrying of concealed weapons outside city limits to persons engaged in "lawful hunting, fishing, trapping or other lawful outdoor activity." There is no definition for "lawful outdoor activity" in section 18-3302 or elsewhere in title 18, chapter 33, Idaho Code. The Merriam-Webster Dictionary defines "outdoor" as "of or relating to the outdoors," and defines "outdoors" as "outside a building: in or into the open air." *See* http://www.merriam-webster.com/dictionary/outdoor (Mar. 31, 2015); http://www.merriam-webster.com/dictionary/outdoors (Mar. 31, 2015). The plain language of the statute, then, would refer to any activity that is lawful and that is conducted outside a building. This could include any activities that do not violate the law.

One might argue that use of the references to hunting, fishing and trapping seek to set a context which is more limited, such as to limit the application of paragraph (12)(d) to uninhabited areas where activities such as hunting, fishing and trapping take place, or to traditional game-taking activities. But the statute includes any "other lawful activity" outside the limits of a city, along with hunting, fishing and trapping. If the legislature had intended that this apply only outside of inhabited areas, or only to activities involving the taking of game or shooting, it could have said so. It did not.

Where a statute is not ambiguous, one need not resort to legislative history or other extrinsic evidence to interpret it. State v. Owens, 158 Idaho 1, 5, 343 P.3d 30, 34 (2015), citing Verska v. Saint Alphonsus Reg'l Med. Ctr., 151 Idaho 889, 893, 265 P.3d 502, 506 (2011). Because paragraph (12)(d) is not ambiguous, there is not a need to resort to legislative history here. But, if the legislative history of the current section 18-3302(12)(d) is examined,

the result is not different. Prior to the amendment of paragraph (12)(d) in 2006, the same provision read:

> Any person outside the limits or confines of any city, *or outside any mining, lumbering, logging or railroad camp, located outside any city,* while engaged in lawful hunting, fishing, trapping or other lawful outdoor activity;

2006 Idaho Sess. Laws 910 (emphasis added). The intent at the time of the amendment, if one can be discerned, would seem to have been to broaden the application of the no-license provision to "other lawful activity" anywhere outside city limits by eliminating qualifiers (outside any mining, lumbering, logging, or railroad camps) that made it more narrow.

B. House Bill 301(3)(b) and Idaho Code § 18-3302(7): Concealed Carry On Private Property

House Bill 301 contains a limitation on a person's ability to carry a concealed weapon outside city limits (and elsewhere). Subsection (3)(b) of Section 2 provides that a person need not have a concealed weapons license to carry on private property, when a person with an ownership or leasehold interest in that property has given permission. Thus, an owner or leaseholder has the authority to exclude or limit the carrying of concealed weapons on privately-held land.

On the other hand, Idaho Code § 18-3302(7) provides:

> Except in the person's place of abode or fixed place of business, or on property in which the person has any ownership or leasehold interest, a person shall not carry a concealed weapon without a license to carry a concealed weapon. . . .

Thus the current statute is more limited than House Bill 301. Under the current statute, one may carry a concealed weapon without a license only in one's home, place of business or one's other private property. House Bill 301 would allow concealed carry without a license on the property of another person, with that other person's permission.

C. House Bill 301(5) and Idaho Code § 18-3302(12): Persons Who Do Not Need a Concealed Weapons License

Subsection (5) of House Bill 301 lists categories of persons who do not need a concealed weapons license under any circumstance. Subsections (a), (b), (d), (e), (f) are all included in some form or another in the current version of Idaho Code § 18-3302. *See* Idaho Code § 18-3302(12)(a)–(g). These provisions do not appear to expand the classes of persons authorized to carry concealed weapons in Idaho without a license.

Subsection (c) of House Bill 301 appears to replace language in the current Idaho Code § 18-3302(12)(b), which refers to "employees of the adjutant general and military division of the state where military membership is a condition of employment when on duty." There is no direct reference to members of the U.S. military in the current statute, as there is in H 301. On the other hand, paragraph (12)(a) provides that the following persons need not have concealed weapons licenses: "Officials of a county, city, state of Idaho, the United States, peace officers, guards of any jail, court appointed attendants or any officer of any express company on duty" (emphasis added). Officials of the United States, jail guard, court-appointed attendants or officers of express companies are not included in House Bill 301, so to that extent it appears to limit the categories of persons who could carry concealed weapons, whether inside or outside city limits.

III. Impact of House Bill 301 on Private Property Rights

As the discussion above illustrates, subsection (3) of Section 2 of House Bill 301 provides, among other things, that a person must obtain the permission of a property owner or leaseholder to carry concealed without a license on the owner's or leaseholder's property. However, subsection (4) of Subsection 2 provides that subsection (3)

> . . . shall not apply to restrict or prohibit the carrying or possession of:
> (a) Any deadly weapon located in plain view;
> (b) Any lawfully possessed shotgun or rifle;
> (c) A firearm that is not loaded and is concealed in a motor vehicle;

(d) A firearm that is not loaded and is secured in a case; and
(e) A firearm that is disassembled or permanently altered such that it is not readily operable.

Thus, while permission of the property holder or leaseholder would be required to carry a concealed weapon without a license on the property of another under subsection (3)(b), subsection (4) can be read to mean that no such permission would be required to openly carry either handguns or long guns on the property of another.

A landowner or leaseholder has no duty to permit persons to enter her property, has the right to exclude them, and could prohibit persons carrying firearms, concealed or openly, from entering her property. But, whether or not this is the legislature's intent, it appears that subsection (4) is setting up a situation where a property owner's action in prohibiting the carrying of weapons on her property could be challenged. Such a challenge would likely be resolved in favor of the property owner or leaseholder, but the possibility of such a challenge – which would raise quite substantial property rights concerns - is raised by subsection (4).

IV. Idaho's "Brady-Alternative" Status

House Bill 301 could impact Idaho's status as a "Brady alternative" or "permit alternative" state. A state gains that status when it has a concealed weapons licensing system that allows a license to avoid the federally-mandated background check necessary to purchase a firearm. In other words, the license serves as the alternative to the background check. According to the U.S. Bureau of Alcohol, Tobacco and Firearms, National Instant Criminal Background Check checks are conducted for all firearms transactions in Idaho. *See* https://www.atf.gov/content/firearms/firearms-industry/permanent-brady-state-lists (Mar. 31, 2015). The ATF lists Idaho as a "Brady Alternative" state, in that an Idaho concealed carry license qualifies as an alternative to a background check for an Idahoan purchasing a firearm in Idaho. *See* https://www.atf.gov/content/firearms/firearms-industry/permanent-brady-permit-chart (Mar. 31, 2015). The ATF's "Brady Permit Chart" shows that in Idaho, "Concealed weapons permits qualify" as alternatives to the otherwise mandated background check.

Earlier this session, correspondence between the federal Bureau of Alcohol, Tobacco and Firearms and our Bureau of Criminal Information came to my attention, in which the ATF expressed concerns about House Bill 243's potential impact on Idaho's Brady Alternative status. House Bill 243 and House Bill 301 contain similar provisions dealing with crimes that disqualify a person from obtaining a concealed weapons license. In the case of House Bill 301, the relevant provision is subsection (11) of Section 2, which provides a list of disqualifiers, including crimes, age, drug use, and others which would not allow a person to obtain a concealed weapons license in Idaho.

The potential Brady alternative problem deals with these disqualifiers. The Idaho list in Section 2, subsection (11) of House Bill 301 does not list two disqualifiers on the federal list, i.e., being an alien admitted to the U.S. on a non-immigrant visa (18 U.S.C. § 921(g)(5)(B)), and having committed a "misdemeanor crime of domestic violence" (18 U.S.C. § 921(g)(9)). There is a catch-all provision in subsection 11(m) that would also disqualify someone who is "for any other reason" ineligible to have or get a firearm under state or federal law. While this would seem at first glance to gather up all the federal disqualifiers that are not set forth in the list of state disqualifiers, it presents another problem. This section goes on to say that in determining whether a person is ineligible, the sheriff "shall not consider":

> (i) A conviction, guilty plea or adjudication that has been nullified by expungement, pardon, setting aside or other comparable procedure by the jurisdiction where the conviction, guilty plea or adjudication occurred or in respect of which conviction, guilty plea or adjudication *the applicant's civil right to bear arms either specifically or in combination with other civil rights has been restored* under operation of law or legal process; or
> (ii) Except as provided for in paragraph (f) of this subsection, an adjudication of mental defect, incapacity or illness or an involuntary commitment to a mental institution if the applicant's civil right to bear arms has been restored under operation of law

(Emphasis added.) Subsection11(m)(i) above provides that a sheriff shall not consider a conviction or plea if "*the applicant's civil right to bear arms either*

specifically or in combination with other civil rights has been restored under operation of law or legal process." It is apparently the ATF's position, as conveyed by their employee Ms. Julie Miller, that it is not enough for the applicant's right to bear arms be restored; instead, all of his "core civil rights," i.e., the right to serve on a jury, hold public office and vote, must be restored in order for him to lawfully possess a firearm.

Idaho law allows for restoration of all civil rights upon discharge from a sentence. Idaho Code § 18-310(2). However, the same provision provides that the right to own a firearm is not restored for certain enumerated crimes. To have that right restored, one must file a separate petition with the Idaho Commission of Pardons and Parole. Idaho Code § 18-310(3). To that extent, Idaho Code § 18-310 does not appear to be inconsistent with federal law on the issue of restoration of rights. But, House Bill 301 is inconsistent with federal law (according to the ATF) to the extent that it requires a sheriff to issue a license where only the right to own a firearm is restored. Such a restoration does not appear possible under current Idaho law, but I have not had the chance to research the laws of other states, from whom persons could move to Idaho and seek a license here. In any event, although current Idaho law on restoration of rights appears consistent with the ATF position, House Bill 301 is not, and ATF has raised concerns in that regard.

A related issue involves "misdemeanor crimes of domestic violence." 18 U.S.C. § 921(a)(33) defines "misdemeanor crime of domestic violence" as follows:

> (33)(A) Except as provided in subparagraph (C), the term "misdemeanor crime of domestic violence" means an offense that—
>
> (i) is a misdemeanor under Federal, State, or Tribal law; and
>
> (ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent,

> or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.

Idaho Code § 18-918(3)(b) provides that a person is guilty of misdemeanor domestic battery when they commit a battery as defined in Idaho Code § 18-903 against a household member that does not result in traumatic injury, so that there is at least one Idaho statute that would qualify as a "misdemeanor crime of domestic battery."

18 USC § 921(a)(33) goes on to provide that as to a "misdemeanor crime of domestic violence:"

> (B)(i) A person shall not be considered to have been convicted of such an offense for purposes of this chapter, unless— . . .
> (ii) A person shall not be considered to have been convicted of such an offense for purposes of this chapter if the conviction has been expunged or set aside, or is an offense for which the person has been pardoned *or has had civil rights restored* (if the law of the applicable jurisdiction provides for the loss of civil rights under such an offense) unless the pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess or receive firearms.

(Emphasis added.) Some federal courts, including the Ninth Circuit, have held that rights cannot be restored unless they are first lost. In Idaho, a person's rights are not suspended for a misdemeanor, but only for a crime for which a person is committed to the custody of the Idaho Department of Correction. Idaho Code § 18-310. A person convicted of, for example, misdemeanor domestic battery would not have lost his rights; therefore, according to some federal courts including our own Ninth Circuit, he cannot have those rights restored, and continues to be ineligible to possess a firearm under federal law. While this sounds like a Catch-22 situation, a recent 9th Circuit case (that cites a slightly older case) supports this conclusion. *See* U.S. v. Chovan, 735 F.3d 1127 (9th Cir. 2013), which cited U.S. v. Brailey, 408 F.3d 609 (9th Cir. 2005).

I would add that due to the attempt to get you as quick a response as possible, I have not had the opportunity to flesh these conclusions out with

further research. However, it does look like there are some potential issues that merit consideration. I can only caution at this time that if Idaho concealed carry law does not comply with federal law, then Idaho could lose its "Brady alternative" or "permit alternative" status, and Idahoans licensed to carry concealed may not be able to purchase a firearm without undergoing a background check.

CONCLUSION

House Bill 301 does not impact the carrying of concealed weapons outside city limits by a person who does not have a concealed weapons license, with one main exception: It would allow a person to carry concealed on the property of another person with that person's permission. This is not expressly permitted under the current Idaho Code § 18-3302. Another small exception relates to the list of persons who do not need to have a license to carry concealed. House Bill 301 reduces this list somewhat.

Subsections (3) and (4) of Section (2) of House Bill 301 contains language that may give rise to a challenge to the rights of a property owner to prohibit the open carry of handguns and long guns on her private property. While such a challenge would likely be resolved in favor of property owners, it would raise very substantial property rights concerns.

Because of inconsistencies between House Bill 301 and federal requirements regarding restoration of rights, Idaho's status as a "Brady alternative" or "permit alternative" state could be impacted by passage of House Bill 30. Communicating with the ATF to ensure that Idaho is compliant may be a wise course of action to ensure continuation of Idaho's current status as a Brady alternative state.

Thank you again for making this inquiry to our office. Please feel free to contact me if you have any questions.

Sincerely,

PAUL R. PANTHER
Deputy Attorney General
Chief, Criminal Law Division

May 13, 2015

The Honorable Luke Malek
Idaho State Representative
721 N. 8th St.
Coeur d'Alene, ID 83814

Re: Our File No. 15-51356 - Minimum Wage

Dear Representative Malek:

This letter is in response to your recent inquiry as to whether a local minimum wage ordinance would be preempted by state or federal law? More specifically, this office understands that this question arises out of an interest by citizens to place an initiative on the ballot to this effect.

Given the regulatory specificity in the state statute, one can infer that the Legislature intended to occupy the field. *See* Idaho Code § 44-1504 (specifying excluded employees); *id.* I.C. § 44-1505 (exclusion of certain workers with disabilities); *id.* I.C. § 44-1506 (authorizing DOL director to issue apprentice exceptions). Consequently, even though compliance with a local ordinance requirement might not come into conflict with the state statute in a particular instance, the careful balancing of the affected interests in title 44, chapter 15, Idaho Code, suggests that the Legislature intended to regulate comprehensively (and exclusively). This might be an area in which the Legislature will want to clarify in an upcoming session.[1]

For a good (and conflicting) analysis of the issue, take a look at Darin M. Dalmat, *Bringing Economic Justice Closer to Home: The Legal Viability of Local Minimum Wage Laws Under Home Rule*, 39 Colum. J.L. & Soc. Probs. 93, 139 (2005) (classifying Idaho as a "legislative" State for purposes of local law preemption analysis). (Enclosed for your convenience.)

Since this question arises from a locally proposed initiative, it should be pointed out that Idaho law strongly discourages pre-election challenges to otherwise validly qualified initiatives. With regard to initiatives, the Idaho Supreme Court clarifies and directs:

> However, the initiative process arises from the Idaho Constitution, Article III, Section 1, and extends to the cities by legislative mandate. I.C. § 50–501. It is not an inconvenience created by rabble rousers and malcontents to vex established authority. The initiative process is a mandate, significant enough to be embodied in the Idaho Constitution, that enables voters to address issues of concern. Sometimes it compels authorities to listen when nothing else will. To the extent the conclusion in this case is inconsistent with *Weldon, Gumprecht and Perrault* they are overruled.
>
> In this case the initiative may not pass in which case the issue of whether it steps over the bounds of a proper initiative would be moot. The initiative may pass and be the proper subject of an adjudication, or the City council may exercise its authority to amend or reject it. The validity of the action sought by the petition may or may never be the proper subject for Court action. Just as the Court would not interrupt the legislature in the consideration of a bill prior to enactment, the Court will not interrupt the consideration of a properly qualified initiative.

City of Boise City v. Keep the Commandments Coalition, 143 Idaho 254, 257, 141 P.3d 1123, 1126 (2006).

This means that the city could be placed in the position of defending the legality of the ordinance if it were adopted by initiative and the city chose not to repeal it. As reflected above, the question of preemption is close enough that at this point in time, a plausible argument could be advanced to defend a local ordinance.

I hope that you find this analysis helpful.

Sincerely,

BRIAN KANE
Assistant Chief Deputy

[1] For example, the Legislature has clearly stated its intent to occupy the field with regard to firearms regulation in Idaho Code § 18-3302J. Adoption of a similar provision in title 44, chapter 15, Idaho Code, could be considered by the Legislature

May 13, 2015

J. Kelso Lindsay
Commissioner, 2nd District
Mica Kidd Island Fire Protection District
6891 W. Kidd Island Rd.
Coeur d'Alene, ID 83814-7356

Re: Our File No. 15-50978 - Open Meeting Law

Dear Commissioner Lindsay:

This letter is in response to your recent inquiry regarding whether Idaho's Open Meeting Law permits an entity to use social media, Skype, or other web conferencing to conduct a meeting? The answer is that it depends.

Idaho Code permits the use of telecommunications devices to conduct a meeting. These devices include telephone, video conferencing and similar communications equipment. Idaho Code § 67-2342(5). Computer and internet based services appear to qualify as similar equipment. The statute also requires that one member of the governing body, a director, or the chief administrative officer, be physically present at the location designated in the meeting notice to ensure the public has a physical place to "attend" the meeting. Idaho Code § 67-2342(5). Finally, the conduct of the meeting must be audible to all who attend—the public must be able to hear and observe the conduct of the meeting. Idaho Code § 67-2342(5).

Social media, on the other hand, likely does not comply with the requirements of a meeting. For example, some social media requires that you be a member to observe or participate in that medium. This blocking of citizens from observation of the "meeting" would cause it to fail under the Open Meeting Law. Additionally, a meeting should have a start and end point so that citizens can observe the discussion and resolution of the matter. Ongoing discussions, and never-ending meetings would defeat this purpose—particularly since citizens would have no idea when an issue is to be resolved or voted upon. Absent a change in the Open Meeting statute, this office recom-

mends strict compliance with the Open Meeting Law instead of "thinking outside the box" with regard to compliance.

In simplest terms, the Open Meeting Law likely permits a meeting as you have via telecommunications devices, but likely does not permit a meeting by "Facebook" threads or an ongoing message board or forum. As discussed above, the legality of the meeting is in the details. The best recommendation that this office can offer is that your entity should carefully discuss the conduct of its meetings with the entity's attorney to ensure that all of the requirements of the Open Meeting Law and Idaho Code § 67-2342(5) are met. The key element is whether the public can observe its government in action—which requires access to the meeting, and the ability to observe and hear its conduct.

Sincerely,

BRIAN KANE
Assistant Chief Deputy

October 21, 2015

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

RE: Response to Request for Legal Opinion Re: Use of County Facilities by Private Non-Profit Corporation

Mr. Emery:

This letter is response to your request for a legal opinion on "whether county real estate (e.g., county buildings, offices, storage space, etc.) or county resources/funds may be used for the benefit of a private Non-Profit Corporation." The short answer to your inquiry is "no." Our reasons for that conclusion follow.

In your letter, you cite to two Idaho Code sections (Idaho Code §§ 31-807 and 31-809). However, the issue you present has analytical foundations in the Idaho Constitution. The Idaho Constitution requires that public funds only be expended for public purposes. Art. XII, sec. 4 of the Idaho Constitution prohibits a county from raising money for or making a donation to a privately owned company or association, even if the electors of the county approve of such an action.[1]

In Boise Redevelopment Agency v. Yick Kong Corp, the Idaho Supreme Court described the rationale of the framers in adopting art. XII, sec. 4 as follows:

> The purpose of such a prohibition [against lending credit and raising money for private interests] is clear. Favored status should not be given any private enterprise or individual in the application of public funds. The proceedings and debates of the Idaho Constitutional Convention indicate a consistent theme running through the consideration of the constitutional

> sections in question. It was feared that private interests would gain advantages at the expense of the taxpayers. This fear appeared to relate particularly to railroads and a few other large businesses who had succeeded in gaining the ability to impose taxes, at least indirectly, upon municipal residents in western states at the time of the drafting of our constitution.

94 Idaho 876, 883-84, 499 P.2d 575, 582-83 (1972) (emphases added). *See* In Idaho Falls Consol. Hospitals, Inc. v. Bingham Cnty. Comm'rs, 102 Idaho 838, 841, 642 P.2d 553, 556 (1982) ("[I]t is apparent that the framers of the Idaho Constitution were primarily concerned about private interests gaining advantage at the expense of the taxpayer.").

Regarding art. VIII, sec. 4 of the Idaho Constitution, it similarly prohibits a county from directly or indirectly loaning or pledging its full faith and credit to any corporation no matter the amount or purpose.[2] Further, in analyzing art. VIII, sec. 2, the Idaho Supreme Court has read the "public purpose doctrine" into the Idaho Constitution.

In Bd. of County Comm'rs of Twin Falls County v. Idaho Health Facilities Auth. the Supreme Court explained that public purpose doctrine "must be inherent throughout state government and must be a fundamental limitation upon the power of state government under the Idaho Constitution, even though not expressly stated in it. Thus, no entity created by the state can engage in activities that do not have primarily a public, rather than a private purpose, nor can it finance or aid any such activity." 96 Idaho 498, 502, 531 P.2d 588, 592 (1974) (citing Idaho Const. art. VIII, § 2; Village of Moyie Springs, Idaho v. Aurora Mfg. Co., 82 Idaho 337, 353 P.2d 767 (1960) (emphasis added).

A "public purpose is an activity that serves to benefit the community as a whole and which is directly related to the function of government." Idaho Water Resource Bd. v. Kramer, 97 Idaho 535, 559, 548 P.2d 35, 59 (1976). Accordingly, the loaning or sharing of state employees or facilities must benefit the community and be directly related to the function of government in order to satisfy the public purpose doctrine.

An opinion issued by Idaho Attorney General in 1995, a copy of which is enclosed, concluded that the public purpose doctrine prevented the State from loaning employees to aid the United Way in a fundraising campaign for two principal reasons. First, the primary purpose of the lending program was to promote a private, albeit philanthropic, purpose. Second, by lending employees only to United Way, gave United Way favored status and preferential treatment.

The 1995 Opinion also offered advice on how state government entities and private charitable organizations may share facilities or employees. After acknowledging the dearth of Idaho case law on the subject, the 1995 Opinion synthesized the Opinions of three other Attorneys General Offices to offer the following advice:

> The most important point to remember is that when the state shares either public facilities or state personnel with a private charitable foundation, that arrangement must benefit the community, and it must be directly related to the function of government. Moreover, it would be desirable that the foundation's sole or principle purpose is to support the state agency, and the foundation only engages in activities which the state agency is specifically authorized to conduct. Finally, any sharing arrangement affecting personnel or other state resources should be memorialized in writing, and the state should retain some control over the foundation to ensure that the public purpose justifying the sharing arrangement continues to be served.

1995 Idaho Att'y Gen. Ann. Rpt. 53.

This is an important issue and we appreciate your inquiry. We trust you will find the foregoing helpful in advising your clients. Please do not hesitate to contact me if you have any further questions.

Very truly yours,

BRETT T. DELANGE
Deputy Attorney General
Consumer Protection Division

[1] Art. XII, sec. 4 reads in full: "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."

[2] Art. VIII, sec. 4 provides: "No county . . . 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."

Topic Index

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2015

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IDAHO CONSTITUTION CITATIONS

UNITED STATES CODE CITATIONS

IDAHO CODE CITATIONS