March 19, 1996

Honorable Pete T. Cenarrusa
Secretary of State
HAND DELIVERED

Re: Certificate of Review;
Initiative Regarding Radioactive Waste

Dear Mr. Cenarrusa:

An initiative petition was filed with your office on February 20, 1996. Pursuant to Idaho Code § 34-1809, this office has reviewed the petition and has prepared the following advisory comments. It must be stressed that, given the strict statutory time frame in which this office must respond and the complexity of the legal issues raised in this petition, our review can only isolate areas of concern and cannot provide in-depth analysis of each issue that may present problems. Further, under the review statute, the Attorney General's recommendations are "advisory only," and the petitioners are free to "accept or reject them in whole or in part."

BALLOT TITLE

Following the filing of the proposed initiative, our 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 the titles, if petitioners would like to propose language with these standards in mind, we recommend that they do so and their proposed language will be considered.

MATTERS OF SUBSTANTIVE IMPORT

The proposed initiative concerns the authority of the State of Idaho and its executive and representatives to enter into agreements regarding the receipt and storage of additional radioactive waste in the State of Idaho. This initiative cannot give the legislature or the people of Idaho, through the initiative or referendum process, an independent ability to prohibit or otherwise limit the federal government's shipment of radioactive waste into Idaho. Only federal courts, through their equitable powers, Congress, through its legislative powers (including waivers of sovereign immunity), and federal executive agencies (primarily the Department of Energy), through administrative action, accord or agreement, can limit the federal government's transportation, receipt and storage of radioactive waste in a particular state.

Federal courts have uniformly interpreted federal statutes and the U.S. Constitution as preventing state legislatures or citizen initiatives from enacting legislation to prohibit the shipment of radioactive waste into a particular state. *See, e.g.,* Jersey Central Power & Light v. Lacey, 772 F.2d 1103 (3d Cir. 1985), *cert. denied,* 475 U.S. 1013 (1986) (township ordinance prohibiting the importation of nuclear waste found to be unconstitutional and preempted by Atomic Energy Act of 1954 and Hazardous Materials Transportation Uniform Safety Act); *see also* Public Service Company of Colorado v. Andrus, 1991 WL 87528 (D. Idaho 1991) (prohibiting State of Idaho from physically blocking shipments of spent fuel into the state in violation of Supremacy and Commerce Clauses of U.S. Constitution).

Section 1

Section 1 of the proposed initiative requires that any agreement entered into by the governor or attorney general relating to the receipt and storage of additional radioactive waste must be approved by the legislature and the electorate. Specifically, section 1 would add a new Idaho Code section which would provide:

> 39-3031. Limitations on Entering Into Agreements. Neither the governor nor the attorney general is authorized to enter in to any agreement with any agency or department of the United States providing for the receipt and storage of additional radioactive waste in the state of Idaho unless and until: (1) the state legislature passes a bill approving the agreement; (2) the bill is referred to the people of the state for a referendum in accordance with Sections 34-1801 through 34-1822, Idaho Code; and, (3) the measure so referred to the people of the state is approved by a majority of the votes cast thereon, and not otherwise, as provided under Sections 34-1801 through 34-1822, Idaho Code.

To a certain extent, the duties of the governor and attorney general may be proscribed by the legislature. Art. 4, sec. 1, Idaho Constitution. Thus, requiring approval of any such agreements by the legislature may be lawful. (*See* Idaho Code § 67-429A relating to legislative approval of Indian Gaming Compacts.) However, there may be agreements which are solely within the province of the executive branch in fulfilling its duty to faithfully execute the laws already passed by the legislature. (*See* discussion below regarding section 4 of the proposed initiative and the State of Idaho's permit authority under existing law.) Requiring legislative approval in such circumstances may be a breach of the separation of powers doctrine. However, those agreements would have to be analyzed on a case-by-case basis.

From a legal standpoint, the most troubling aspect of section 1 is the voter approval requirement; specifically, the incorporation of the referendum statutes codified

at Idaho Code §§ 34-1801 through 34-1822. The referendum has generally been referred to as the "veto power" of the public over legislative enactments. Idaho Water Resource Board v. Kramer, 97 Idaho 535, 548 P.2d 35 (1976). In order to exercise this "veto power," the required number of signatures within a prescribed period of time must be submitted to delay the effectiveness of the statute pending a vote by the people on whether to approve or reject the measure. Idaho Code § 34-1801 *et seq*.

However, the proposed initiative requires voter approval of the legislative enactment, which itself must approve the agreement while incorporating the petition requirements contained in Idaho Code § 34-1801 *et seq*. This creates a situation which is opposite to the general use of the referendum process. Rather than a veto, the actions required by the proposed initiative is one of confirming legislation. If the petition requirements are incorporated, the proposed initiative conditions the effectiveness of the legislation approving the agreement upon voter approval and at the same time requires individuals who are in favor of the legislation to obtain the required amount of signatures (10 % of votes cast for governor at last preceding election, which is approximately 41,000 at the current time) in order to place the question on the ballot. Thus, if the required number of signatures could not be obtained, the question of approval or rejection of the legislation approving the agreement would never be on the ballot. Therefore, the legislation could never be approved by the electorate, and along with the agreement itself, would never be effective.[1]

The referendum powers contained in art. 3, sec. 1 of the Idaho Constitution were not intended for this type of action. Art. 3, sec. 1, provides in relevant part:

> The people reserve to themselves the power to approve or reject at the polls any act or measure passed by the legislature. This power is known as the referendum, and legal voters may, under such conditions and in such manner as may be provided by acts of the legislature, demand a referendum vote on any act or measure passed by the legislature and cause the same to be submitted to a vote of the people for their approval or rejection.

(Emphasis added.)

The use of the word "demand" clearly implies an intent that the referendum is more properly exercised as a "veto power." Instead, in this case, it is being used to require a certain portion of the electorate to affirmatively act to approve measures which have already been passed by the legislature.

If the intent of the drafters of the proposed initiative is to require an automatic submission of the legislation approving the agreement to the voters, then the incorporation of the referendum process should be deleted. The legality of such an

automatic submission is not free from concern. While the issue of automatic submission has not been addressed by Idaho courts, the South Dakota Supreme Court, in Wyatt v. Kundert, 375 N.W.2d 186 (S.D. 1985), addressed such an issue in a similar context.

South Dakota voters had approved an initiative (referred to as Chapter 240) which required voter approval of any proposed compact between South Dakota and any other state regarding the disposal of nuclear waste. The South Dakota Supreme Court struck down this automatic referral. After citation to art. 3, sec. 1 of the South Dakota Constitution (which is similar to art. 3, sec. 1, Idaho Constitution, and reserves the right of referendum to the people) and the statutorily enacted referendum procedure, the court held:

> In light of the foregoing constitutional provisions, legislative statutes and administrative rules, which dictate the mandatory legal procedures for referring legislation, we cannot conclude that Chapter 240, standing alone, constitutes a valid automatic in futuro referendum upon all legislative enactments regarding nuclear waste disposal. The opposite conclusion would negate the above-referenced provisions, statutes and rules, and this we cannot do. At best, Chapter 240 constitutes an additional codification of the people's desire to participate in the legislative decisions concerning radioactive disposal and statutorily authorized referendum elections after the hereinbefore-cited legal requirements have been fulfilled. Thus, in the future, if the electors desire a referendum election on legislative enactments concerning radioactive disposal, the proper referendum procedures will have to be fulfilled.

375 N.W.2d at 192. The court further held that the voter approval requirement was an unconstitutional automatic legislative referral. On this issue the court held:

> Nor can we conclude that Chapter 240 mandates or constitutes an automatic, in futuro, legislative referral of all enactments concerning nuclear waste disposal. Each South Dakota Legislature, in the future, can and must exercise its own independent inherent power to refer acts or questions to a vote of the people. Chapter 240 cannot bind future legislatures/legislative assemblies to an automatic exercise of its inherent power to refer. An opposite construction of Chapter 240 would lead to an unconstitutional infringement of the legislature's independent discretion and would burden the legislature's inherent power to refer those acts it deems a proper subject of legislative referral.
>
> Thus, to the extent that Chapter 240, Section 1, can be read as providing for an automatic in futuro legislative or electorate referral, we

> determine it to be an unconstitutional expression of the legislature's power in that it exceeds the inherent power of the legislature.

375 N.W.2d at 192-93.

If the Wyatt decision is followed in Idaho, an automatic legislative or electorate referral provision contained in the initiative would probably be declared unconstitutional by Idaho courts.

Section 2

Section 2 purports to condition the effectiveness of the recent settlement agreement regarding receipt and storage of radioactive waste on legislative and voter approval. Section 2 of the proposed initiative states:

> 39-3032. Approval of Prior Agreement Required. To be effective, the agreement providing for the receipt and storage of the additional radioactive waste at the Idaho National Engineering Laboratory, entered into by the governor and the attorney general with representatives of the United States on October 16, 1995, must be approved by the state legislature and referendum of the people of the state in accordance with Section 39-3031, [section 1 of the initiative] Idaho Code.

The agreement signed by Governor Batt, Attorney General Lance, the Department of Energy (DOE) and the Navy and incorporated into a court order by U.S. District Judge Edward Lodge on October 17, 1995, became effective on that date. Consequently, approval by either the legislature or a majority vote in a referendum is not necessary to make the agreement effective.

Both the governor and the attorney general had authority to enter into the above settlement agreement. When Governor Batt took office, he replaced his predecessor in relation to the existing federal lawsuits, pursuant to the Federal Rules of Civil Procedure. As a party to the lawsuit, the governor has the authority to negotiate a settlement and sign the settlement agreement under the Federal Rules of Civil Procedure. Further, in cases in which he is a party, he does not have to be represented by the attorney general unless he requests such representation. Idaho Code § 67-1401. Under constitutional and statutory authority, the attorney general is the legal representative of the State of Idaho and has the ability to negotiate and enter into a settlement agreement of any lawsuit against the State of Idaho. Idaho Code § 67-1401. Because the governor and attorney general had the authority to enter into the agreement, it is already effective.

Moreover, regardless of any legislative and/or voter rejection of the agreement at some future time, the agreement and the court order would still be effective and enforceable by and against the State of Idaho, because it has been incorporated into a federal district court decree.

Section 3

The proposed initiative's use of the term "waste" may create some results contrary to the intent of the petitioners. For example, the provisions of the petition could be interpreted to apply only to spent nuclear fuel that is also "waste." In contrast, spent nuclear fuel brought to Idaho for a useful purpose, such as research, would not constitute "waste," and could be outside the definition of section 39-3033. The provisions of the petition could also be interpreted to apply only to weapons-usable fissile material (*e.g.*, plutonium) that qualifies as "waste." If these potential results are contrary to the intent of the petitioners, the definition section should be clarified to remedy these effects.

Section 4

The savings provision of section 4 of the proposed initiative creates an ambiguity as to the impact of the initiative on the state's authority to regulate hazardous waste that is also radioactive ("mixed waste"). The State of Idaho has assumed primacy over the control of mixed waste from the U.S. Environmental Protection Agency (EPA). 55 Fed. Reg. 11,015 (March 26, 1990). Idaho regulates mixed waste under the Hazardous Waste Management Act, Idaho Code § 39-4401 *et seq.* Under this Act, Idaho has the authority to issue permits for the treatment, storage and disposal of all mixed waste within the state. EPA may reassume primacy of hazardous waste regulation if it determines the state's program is not in compliance with federal standards.

Much of the storage, treatment and disposal of federal mixed waste in Idaho is governed by a consent order signed in November 1995 by the State of Idaho, through the Department of Health and Welfare, Division of Environmental Quality (DEQ). This consent order approved DOE's Site Treatment Plan for the management of mixed waste, including mixed low-level, transuranic and high-level waste, at the Idaho National Engineering Laboratory (INEL). Under the Site Treatment Plan, DOE can only store or dispose off-site mixed waste at the INEL with DEQ's specific approval. Site Treatment Plan at pp. 2-6.

Under the language of the initiative, it is unclear whether DEQ's approval of the storage and/or disposal of out-of-state radioactive waste would be subject to the initiative's legislative and referendum approval process. If the initiative is intended to require legislative and electorate approval of permits which authorize receipt and storage of out-of-state radioactive waste, the inherent delay of this approval process could unduly

hamper DEQ's ability to review and issue permits, thereby jeopardizing the state's ability to maintain primacy over hazardous waste regulation.

The effect of the initiative on DEQ's permit authority regarding on-site mixed waste that has not yet been generated is also unclear. The definition of "additional radioactive waste" does not encompass mixed waste that is generated by the federal government in the State of Idaho after the effective date of the chapter. Such waste is "not located in the state of Idaho as of the effective date of the chapter" but is clearly within DEQ's regulatory and permitting authority. The proposed initiative should be amended to clarify this issue.

In conclusion, the proposed initiative, as presently worded, is very likely to be ruled unconstitutional. The process envisioned by the apparent adoption of the referendum petition requirement does not comport with the traditional use of the referendum power contained in the Idaho Constitution. Further, an automatic legislative or electorate referral provision also raises serious legal concerns. Section 2 of the proposed initiative is ineffective. The recent settlement agreement entered into by the Governor and the Attorney General is presently effective. It was entered into by individuals with the requisite authority and adopted by a federal district court. No legislative and/or voter rejection would negate the effectiveness of the agreement and its enforceability by or against the State of Idaho. In addition, there are certain definitional clarifications which need to be addressed. Last, the proposed initiative should be revised to more clearly address the interplay between the initiative's requirements and the Resource Conservation and Recovery Act.

I HEREBY CERTIFY that the enclosed measure has been reviewed for form, style and matters of substantive import and that the recommendations set forth above have been communicated to petitioner Diane Jones by deposit in the U.S. Mail of a copy of this certificate of review.

Sincerely,

ALAN G. LANCE
Attorney General

Analysis by:
THOMAS F. GRATTON
KATHLEEN TREVER
Deputy Attorneys General

[1] As we know from recent initiatives proposed in this state, the ease or difficulty in obtaining the required number of signatures does not necessarily bear any relationship to the opinion of the electorate when the vote is taken. Thus, the proponents of the agreement and the legislation approving the agreement may have difficulty obtaining the required number of signatures, yet the electorate may be in favor of the agreement. This is particularly true in the case of a referendum wherein the required number of signatures would have to be obtained within sixty (60) days after the final adjournment of the legislative session.