STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
BOISE 83720-1000

LARRY ECHOHAWK
ATTORNEY GENERAL

TELEPHONE
(208) 334-2400

TELECOPIER
(208) 334-2530

NATURAL RESOURCES
TELECOPIER
(208) 334-2690

ATTORNEY GENERAL OPINION NO. 91-9

TO: The Honorable Michael Simpson
House of Representatives
786 Hoff Drive
Blackfoot, Idaho 83221

Per Request for Attorney General's Opinion

QUESTIONS PRESENTED

You have requested the Attorney General's legal opinion on the following questions raised by the One Percent Initiative:

1. Section 2 of the One Percent Initiative requires "a two-thirds vote of the qualified electors" in order to impose special taxes in excess of the one percent cap. Does this mean two-thirds of the electors voting, or two-thirds of all the qualified electors?

2. Section 2 of the One Percent Initiative creates a process for approving "special taxes" in excess of the one percent cap. What taxes would be covered by this process?

3. Section 1 of the One Percent Initiative states that the one percent "shall be collected by the counties and apportioned according to law to the taxing districts within the counties." How would this apportionment of taxes be done "according to law"?

4. Article 7, section 5 of the Idaho Constitution requires that all taxes "be uniform upon the same class of subjects within the territorial limits of the authority levying the tax . . ." How would the one percent property tax initiative be implemented in light of this constitutional provision?

5. Does the One Percent Initiative--with its cap on property taxes and its requirement of approval for additional taxes by two-thirds of all qualified electors--conflict with art. 8, sect. 3 of the Idaho Constitution, which allows creation of bonded indebtedness with consent of two-thirds of the qualified electors voting in the election? or with any other specialized taxing requirements of local government?

6. Article 7, section 6 of the Idaho Constitution prevents the Idaho legislature from imposing taxes on behalf of cities and counties, but allows the legislature, by statute, to invest such power to assess and collect taxes in local governmental entities. Does the One Percent Initiative comport with this basic structure of ad valorem taxation in Idaho?

7. Assuming that the One Percent Initiative fails to comport with the taxing structure created by the Idaho Constitution, should the initiative be removed from the ballot?

CONCLUSIONS

1. As written, the One Percent Initiative would require a super-majority of two-thirds of the qualified electors in any given district considering a "special tax." This voting standard for imposing special taxes in excess of the one percent cap will be impossible to implement because there is no means to determine the number of qualified electors in an area.

2. The term "special taxes" has no obvious meaning as used in the initiative. It would require a court decision in order to determine the meaning of this phrase.

3. The requirement in section 1 of the One Percent Initiative that taxes "shall be collected by the counties and apportioned according to law to the taxing districts within the counties" is inoperable because, under existing law, counties have no authority to adjust taxes imposed by taxing districts within their counties.

4. Idaho Constitution, art. 7, § 5, requires tax levies of taxing districts to be uniform within the boundaries of the districts. Therefore, the adjustment required by the One Percent Initiative is not simply to reduce levies to one percent of market value. The constitution also requires that the resulting levies be uniform. The inevitable result is that property taxes in each taxing district will bear no rational relation to the need of that district or the wishes of the taxpayers of that district.

5. The Initiative's requirement that "special taxes" be approved by two-thirds of the qualified electors would, taken literally, conflict with Idaho's Constitution, which allows creation of bonded indebtedness by a two-thirds vote of the qualified electors voting in the election. It would undermine the ability of government to function in times of emergency. It would conflict with special levies to fund such unpredictable but legally-required items as tort claim judgments and catastrophic medical indigency bills. It could also jeopardize the contract rights of bondholders who have purchased tax increment bonds under Idaho's Economic Development Act. Finally, it would introduce such a note of uncertainty as to threaten the ability of local governments to issue bonds at reasonable interest rates.

6. Art. 7, § 6, of the Idaho Constitution gives local communities the power to impose upon themselves for their needs such property tax burdens as they themselves determine through their governing officials. Statutory limits may be placed upon this local authority provided the limits are uniform as to each type of local government. The One Percent Initiative would deny this constitutional principle of local self-determination and would force discrimination in local taxing authority. This the initiative cannot do. Consequently, to impose a one percent limitation would require dismantling the system of property taxation under which we have operated since statehood.

7. An initiative, however badly drafted or facially unconstitutional, may be placed on the ballot for consideration by the voters.

BACKGROUND

On March 25, 1991, supporters of the One Percent Initiative submitted their proposed initiative to Secretary of State Pete Cenarrusa. The proposed initiative was transmitted to this office, as required by Idaho Code § 34-1809. Under this statute, it is the duty of the Attorney General to review a proposed initiative for matters of substantive import and to "recommend to the petitioner such revision and alteration of the measure as may be deemed necessary and appropriate." The Attorney General's recommendations, it must be stressed, remain "advisory only" and

the petitioners are free to "accept or reject them in whole or in part."

The Attorney General issued his Certificate of Review of the proposed initiative on April 5, 1991, concluding that "most of the substantive provisions of the initiative would be found to be unconstitutional if passed." The drafters of the initiative, as is their right, eliminated some of the original sections of the initiative and kept others. They did not replace the sections that were eliminated or address the issues that the original initiative had addressed in those sections. They chose not to clarify the conflicts that were identified by this office in the remaining sections. They also chose not to request further review by this office of their final work product.

On September 24, 1991, in response to an opinion request from Tom Boyd, Speaker of the House, this office issued an opinion which concluded that the proposed One Percent Initiative would have no impact upon either the homeowner's exemption found at Idaho Code § 63-105DD, or the exemption for speculative value of agricultural land found at Idaho Code § 63-105CC.

We now address the questions raised in your opinion request of September 26, 1991.

ANALYSIS

QUESTION 1.

The Two-Thirds Super-Majority.

Your first two questions address section 2 of the One Percent Initiative, which states:

> Cities, Counties, and taxing districts, by a two-thirds vote of qualified electors of such districts, may impose special taxes in excess of the one percent (1%), on such cities, counties and taxing districts.

Initially, you ask the meaning of the requirement that special taxes be approved "by a two-thirds vote of the qualified electors of such districts." The sponsors of the initiative have stated that this language is to be applied literally. It is their intent that all "special taxes" will require approval of <u>two thirds of those qualified to vote</u> at the election, not just <u>two thirds of those actually voting</u>. This raises the question how such a requirement would be carried out under Idaho law.

One problem with this super-majority requirement stems from the fact that it is impossible to identify the number of qualified electors in a given district on a particular date.

Many special taxing districts--such as hospital districts, irrigation districts, fire protection districts and recreation districts--base voter qualification upon residency within the district and do not require voter registration. In order to vote in these taxing districts, electors need only sign an oath form affirming their residency. The elector's oath need not be signed until just before the elector enters the polling booth. For example, Idaho Code § 42-3202 establishes voter qualification for water and sewer district elections:

> A "qualified elector" of a district, within the meaning of and entitled to vote under this act, unless otherwise specifically provided herein, is a person qualified to vote at general elections in this state, and who has been a bona fide resident of the district for at least thirty (30) days prior to any election in the district. No registration shall be required at any election held pursuant to this act, but each voter shall be required to execute an oath of election attesting his qualification. (Emphasis added.)

Under this electoral system, it is impossible to determine the number of "qualified electors" in the district. The number of qualified electors is constantly in flux and the required number of votes needed for approving a "special tax" changes every time someone moves into or out of the district.

The two-thirds super-majority voting requirement is likewise impossible to follow in districts that do have voter registration, such as counties, cities and school districts. No precise figures of qualified electors are available in these districts either. If a registered voter moves from a county and the county clerk is not aware of the change, the voter's registration at his or her former address will remain on the county rolls for up to four years. Idaho Code § 34-435. Thus, voter registration does not provide exact numbers of "qualified electors" within a county at any given time and cannot be relied upon to establish voter approval thresholds for "special tax" elections.

We therefore conclude, based on the practical problems facing the two-thirds super-majority voting requirement, that this provision of the One Percent Initiative cannot be enforced as written. The courts must either strike section 2 of the initiative in its entirety as inoperable (thus leaving no means for the public to exempt levies from the initiative) or interpret and apply section 2 in a manner at odds with its literal wording and the announced intent of its sponsors.

Regardless of the approach taken by the courts, in our opinion the courts would not allow the two-thirds super-majority provision to stand as written. Requiring the approval of two-

thirds of all qualified electors--whether they vote or not--turns every non-vote into a "No" vote. It systematically frustrates those who do exercise the franchise and even takes away from those who choose to abstain the right not to have their votes counted.

This requirement of the One Percent Initiative violates the basic principle of participatory democracy guaranteed to every Idahoan by art. 6, § 1, of the Idaho Constitution ("All elections by the people must be by ballot.") A reviewing court would not allow such a requirement to stand.

QUESTION 2.

The "Special Taxes" Exempt From the One Percent Limitation.

Your second question asks us to construe the meaning of those "special taxes" that section 2 of the initiative permits in excess of the one percent limit if approved by a two-thirds vote of the qualified electors.[1]

We note next that the choice of the term "special taxes" is ambiguous. The term is used sporadically throughout the Idaho Constitution and the Idaho Code, but has no consistent usage that would identify a particular tax in relation to section 2 of the initiative.

In the context of ad valorem taxes, the phrase appears more than 40 times. In its ad valorem use, a "special tax" is one that generates revenue for a special fund or purpose, rather than being a general revenue producing tax. Art. 7, sec. 15, of the Idaho Constitution, for example, speaks of levying "a special tax . . . for the creation of a special fund for the redemption of . . . warrants." A special tax is used to provide revenue for the district court fund. Idaho Code § 31-867. A special tax is used to defray the costs of equipping and maintaining fire protection districts. Idaho Code §§ 31-1420 and 31-1421. There are special taxes to support ambulance services, Idaho Code §§ 31-3901 and 31-3908; for the payment of highway bonds, Idaho Code §§ 40-808

[1] At the outset, we note a basic flaw in the wording of section 2 of the One Percent Initiative. Stripped to its essentials, this section states that, "Cities, Counties, and taxing districts, . . . may impose special taxes . . . on such cities, counties and taxing districts." This makes no sense. Cities, counties and taxing districts simply do not impose taxes, special or otherwise, on cities, counties and taxing districts. Any attempt to impose taxes on themselves would violate art. 7, § 4, of the Idaho Constitution, which provides that all public property is exempt from taxation.

through 40-813; for armories, Idaho Code § 46-722; for the construction of service memorials, Idaho Code § 65-104; and for the maintenance of those memorials, Idaho Code § 65-103. There are numerous other examples.

We must assume that the drafters of the One Percent Initiative did not intend that the "special taxes" enumerated in the Idaho Constitution and the Idaho Code were the ones that would be exempt from the one percent limitation if approved by the two-thirds super-majority. Traditionally, for example, the "special taxes" levied to support the district court fund, or to maintain fire and ambulance equipment, do not require special voter approval at all. Other "special taxes" require approval by a simple majority of the voters. Still others require a two-thirds vote. It does not seem likely that the drafters of the One Percent Initiative intended to single out just these taxes and subject them to the two-thirds super-majority voting requirement while leaving all other taxes unscathed. Nor can we assume that they intended to obliterate the carefully distinguished voting requirements that have evolved for different types of taxes over the last one hundred years.

It is possible the drafters of the initiative intended that the two-thirds super-majority would be needed to approve those specific taxes that push the tax levy over one percent. However, this likewise makes no sense. It is impossible to identify which particular tax is responsible for pushing the levy over one percent.

There is nothing in the initiative when construed as a whole that sheds any light upon the term "special taxes" found in section 2 of the initiative. The term is incapable of any legal application as written.

QUESTION 3.

Apportionment of Taxes "According to Law."

Subsection 1 of section 1 of the One Percent Initiative states:

> The maximum amount of all ad valorem tax on property subject to assessment and taxation within the state of Idaho shall not exceed one percent (1%) of the actual market value of such property. The one percent (1%) shall be collected by the counties and apportioned according to law to the taxing districts within the counties.

Your question asks precisely how counties will collect and apportion taxes "according to law" if the initiative passes and

becomes law. To address this question, we first review how the tax collection system works according to existing law. We then analyze the way the system would work if subject to a one percent limitation.

The Existing Property Tax Collection System

Although each city, county or other authorized taxing district levies a discrete tax, the districts do not actually "set levies." Instead, each district develops a budget that determines the amount of revenue from property taxes the district will need during its next fiscal year. See Idaho Code §§ 63-621 through 63-626. This dollar amount is then "certified" by each taxing district to the board of county commissioners in which the district exists. Idaho Code § 63-624. If the district is a multi-county district (if its boundaries overlap county boundaries), the total amount of revenue required from property taxes is apportioned between the counties, based on the percentage of the taxing district's taxable value located in each county. Idaho Code § 63-624.

On the second Monday of each September:

> The board of county commissioners shall make a tax levy as a percent of market value for assessment purposes of all taxable property in the taxing district, which when applied to the tax rolls, will meet the budget requirements certified by the taxing districts.

Idaho Code § 63-624. See also, §§ 63-901 and 31-1605.

The board's clerk must prepare four copies of the record of all levies set by the board of county commissioners and deliver one copy to the State Tax Commission. Idaho Code § 63-915. The State Tax Commission must "carefully examine" this report to determine if any county has:

> Fixed a levy for any purpose or purposes not authorized by law or in excess of the maximums provided by law for any purpose or purposes . . . .

Idaho Code § 63-917. If the State Tax Commission finds an unauthorized or excessive levy, it must report the levy to the prosecuting attorney (in the case of levies other than those imposed by the county) or to the Attorney General (in the case of county levies) who must bring suit to have such levy set aside as unlawful. Idaho Code § 63-917.

When the levies are approved, the auditor delivers the tax rolls with the tax computations to the county treasurer. Idaho Code § 63-1003. The treasurer prepares tax notices which must be mailed to taxpayers by the fourth Monday of November. Idaho Code § 63-1103. The notice must separately state the exact amount of tax due for each taxing district levying on the property to which the notice relates. Idaho Code § 63-1103(6).

All taxes collected by the treasurer are deposited into the county treasury and then "apportioned" from the county treasury to each taxing district. Idaho Code § 63-918. Because the amount of tax due for each taxing district is displayed on each tax bill, the amount to be apportioned to each taxing district is simply the amount collected which is designated as that district's tax.

How the One Percent Initiative Would Affect the Levy, Collection and Apportionment of Taxes

The One Percent Initiative repeals existing Idaho Code § 63-923, which is the vestige of the 1978 version of the One Percent Initiative. It does not repeal, amend or modify any other existing statute. Instead, it attempts to insert a one percent limitation on the amount of tax that can be imposed on any real property.

The One Percent Initiative does not limit the budgets certified by the taxing districts, or the levies set by boards of county commissioners, both according to law. The duties of the county auditor and the board of county commissioners remain the same. The levies set by the county will still be reported to the State Tax Commission and reviewed by that body to determine if any county has fixed a levy that is "in excess of the maximums provided by law

It is at this point in the system that the one percent limitation has its impact. The State Tax Commission will be unable to approve any levies which, in combination, cause taxes to exceed one percent of the actual market value of any property.

a) **Recourse to the Courts.**

Two possible solutions present themselves. First, the State Tax Commission could handle the matter as it presently does "according to law." As outlined earlier, the law now on the books, Idaho Code § 63-917, mandates the State Tax Commission to report all excessive levies to county prosecutors or to the Attorney General. The prosecutor or the Attorney General must then "immediately bring suit . . . to set aside such levy as being illegal."

This solution leads to both practical and legal problems. As a practical matter, the courts are not equipped to handle the massive influx of lawsuits that would result. Furthermore, taxing districts with multi-county boundaries could have their lawsuits brought in more than one county, thus giving rise to questions of jurisdiction or to inconsistent verdicts in different courts on the same issue. A final practical problem is presented by the inexorable deadlines of the annual property tax levy and collection process. As outlined above, these lawsuits would have to be filed and resolved between the date the levy is set (the second Monday of September) and the date the tax notices are mailed (the fourth Monday of November). The Idaho courts could not possibly handle these lawsuits in an eleven-week period.

Even if Idaho district courts could process these property tax lawsuits in eleven weeks, the legal problem created by the One Percent Initiative still would not be solved. The district courts are presently empowered only to "set aside" property tax levies found to be "illegal." They cannot themselves impose the levies once the illegal levies are set aside.[2] Thus, recourse to the courts is ultimately futile as a means of implementing the One Percent Initiative according to present law.

If the drafters of the One Percent Initiative intended that Idaho district courts be empowered to impose corrected tax levies on cities, counties, school districts and all other taxing districts, then an even more fundamental legal problem arises.

This implementation procedure would effectively impose on the judicial branch of government the duties of administering the ad valorem tax system of the state, which duties are both ministerial and at the same time profoundly policy-laden. Such an imposition of ministerial and policy-making duties lies beyond the functions provided for the judicial branch of government in article 5 of the Idaho Constitution and would violate the separation of powers principle of art. 2, sec. 1, of the Idaho Constitution. It is one thing for the courts to review the legality of administrative actions already taken. It is quite another thing to impose those duties on the courts themselves. Miller v. Miller, 113 Idaho 415, 418, 745 P.2d 294 (1987). It is our opinion that the Idaho judiciary would properly decline to assume the duties of tax apportionment that would be imposed on it under this reading of the One Percent Initiative.

b) **The Counties as Tax Czars.**

---

[2] Nor is the State Tax Commission empowered under existing law or under the One Percent Initiative to adjust or correct the levies it has disapproved or that a district court has set aside.

The second and only other solution would be to assume that the One Percent Initiative itself impliedly grants to counties the power to collect and apportion taxes to the various taxing districts within and between counties. That power would derive from the initiative language stating that the "one percent shall be collected by the counties and apportioned according to law to the taxing districts within the counties."

Such an implied grant of power or authority is authorized whenever such power is found to be necessary, usual and proper to carry out express authority. Bailey v. Ness, 109 Idaho 495, 708 P.2d 900 (1985). Implied powers of boards of county commissioners are also recognized by statute:

> Every county is a body politic and corporate, and as such has the powers specified in this title or in other statutes, and such powers as are necessarily implied from those expressed.

Idaho Code § 31-601 (emphasis added).

The county's powers are exercised by its board of county commissioners. Idaho Code § 31-602. The Idaho Supreme Court has validated exercise of implied powers by local governments. Alpert v. Boise Water Corp., 118 Idaho 136, 795 P.2d 298, (1990). However, if there is a "fair, reasonable, substantial doubt" about whether a power exists, the doubt is resolved against its existence. City of Grangeville v. Haskin, 116 Idaho 535, 777 P.2d 1208 (1989).

Such a solution to the problem of apportioning taxes under the one percent limit would work only if the board of county commissioners is given ultimate taxing authority over all other taxing districts in the county. At present, each county contains several independent taxing districts: the counties themselves, cities, school districts, highway districts, fire districts, irrigation districts and so forth. Each district has its own statutory authority to impose taxes up to a certain mill levy limit. The combined total of mill levies exceeds one percent of market value on properties in many areas of the state.

A board of county commissioners presently has no statutory authority to adjust the levies of these other independent taxing districts. If such authority is impliedly granted by the One Percent Initiative, then each board will become the tax czar in its county. Faced with the problem of scaling taxes down to one percent, the board would have several options. It could scale down taxes in equal proportion across all taxing districts. Or, it could eliminate entirely the tax levy in some districts in order to maintain tax revenue for other districts that are perceived as providing more essential services. Such a solution would centralize all taxing authority in the board of county

commissioners and effectively eliminate statutory budget authority of all other independent taxing districts.[3]

The basic problem here is that the drafters of the proposed One Percent Initiative frame a standard that is, at bottom, only a slogan: "taxation within the State of Idaho shall not exceed one percent (1%) of the actual market value of such property." However, they fail to provide any entity with authority to adjust tax levies to meet this standard. They also fail to provide any procedural mechanism to carry out their proposal.

We conclude that neither the existing statutes nor any provision of the One Percent Initiative expressly grants authority to the State Tax Commission to adjust levies and apportion taxes. Neither the Idaho Constitution nor the Idaho Code would permit imposition of such a duty on the courts. Finally, any attempt to centralize such authority in the boards of county commissioners would make the boards into local taxing czars and virtually destroy all the other independent taxing districts that now answer to the local electorate.

It follows that the One Percent Initiative cannot be implemented as written. It is our opinion that a reviewing court faced with the options of striking down the One Percent Initiative or upholding the initiative by creating from whole cloth a new tax apportionment system for the State of Idaho would choose the former option.

Courts are driven to the extreme measure of striking down a statute only when "it is so unclear or confused as to be wholly beyond reason, or inoperable, . . ." Gord v. Salt Lake City, 434 P.2d 449, 451 (Utah 1967). The One Percent Initiative fits these criteria. There is no possible means to implement it "according to law." Consequently, a reviewing court would strike it down.

QUESTION 4.

The Constitutional Requirement of Uniform Levies.

This opinion has already concluded that the One Percent Initiative cannot be implemented because it fails to provide a

[3] The mechanism presented here is over-simplified. Even if counties were given all authority to apportion taxes within the county, a residual problem would exist for all multi-county districts. At best, a county can be the tax czar for its own county; it can have no authority beyond its borders to set taxes in adjacent counties. The One Percent Initiative has no solution to this problem of apportioning taxes among multi-county taxing districts.

mechanism whereby counties, or any other governmental entity, can collect taxes and then apportion them subject to the one percent limit. Assuming, however, for the sake of argument, that counties were authorized to perform this task, it would then be necessary to inquire as to the standard they would use in making the apportionment.

We turn, therefore, to your question as to how the One Percent Initiative would be implemented in light of the uniformity requirements of art. 7, sec. 5, of the Idaho Constitution. That provision requires that each taxing district levy must be "uniform upon the same class of subjects within the territorial limits of the authority levying the tax. . . ."

Reading the One Percent Initiative in conjunction with art. 7, sec. 5 of the Idaho Constitution yields the following possible apportionment mechanism.[4] The board of county commissioners would first have to determine whether the cumulative levies on any property subject to ad valorem tax exceed one percent of the actual market value of the property. If so, the commissioners might then decide to reduce the levies proportionately to an amount that no longer exceeds one percent of actual market value. These reduced levies must then be uniformly applied to all property subject to tax within the geographical boundaries of each taxing district whose levy applies to the property.

A simplified hypothetical example may help clarify how the levies, once set, could be adjusted by a board of county commissioners under the One Percent Initiative. For this hypothetical example, assume a single county has two school districts. The hypothetical county also contains two cities and a fire district which serves one city ("City A") and part (but not all) of the county. The ad valorem budget, tax base and levy (unadjusted for the One Percent Initiative) of each district are:

HYPOTHETICAL COUNTY

District	Budget	Tax Base	Levy
County	$2,000,000	$1,000,000,000	0.20%
School District 1	$1,000,000	$ 250,000,000	0.40%
School District 2	$1,250,000	$ 312,500,000	0.40% *

[4] As noted above,an across-the-board proportionate reduction is only one possible scenario. The One Percent Initiative does not mandate this outcome. If counties are truly empowered to "apportion" taxes and bring them down to one percent of market value, then they are free to cut taxes in any way they see fit.

Fire District	$1,000,000	$ 420,000,000	0.24% *
City A	$1,500,000	$ 300,000,000	0.50%
City B	$ 750,000	$ 187,500,000	0.40%

* = Maximum statutory levy

Now, compare the taxes imposed on properties located in three different parts of the county. Example 1 is property located in City A and is subject to taxes by that city, the fire district, School District 2 and the county. Example 2 is rural property located in School District 1 and the county. Example 3 is property located in City B, School District 1 and the county. Each is subject to the following levies:

	Example 1	Example 2	Example 3
County	0.20%	0.20%	0.20%
School District 1		0.40%	0.40%
School District 2	0.40%		
Fire District	0.24%		
City A	0.50%		
City B			0.40%
Total Levies:	1.34%	0.60%	1.00%

The taxes levied on the property in the first example exceed the limitation of the One Percent Initiative. To reduce the taxes on this property to 1%, the levies imposed on it must be reduced to .7462686[5] of the levy first computed. The adjustment is:

	Levy	Adjustment	Adjusted Levy
County	0.20%	0.7462686	0.15%
School District 1			
School District 2	0.40%	0.7462686	0.30%
Fire District	0.24%	0.7462686	0.18%

[5] The adjustment is by one percent divided by the total levy. In this case, 0.0100 ÷ 0.0134 = 0.7462686.

City A	0.50%	0.7462686	0.37%
City B			
Total Levies:	1.34%	0.7462686	1.00%

Art. 7, sec. 5, mandates that these reduced levies apply uniformly to all property within a taxing district's boundaries. The property in Examples 2 & 3 can no longer be taxed at 0.20% by the county, when the property in Example 1 is only taxed at 0.15%. Thus, the lower county levy applies to all property in the county, even though some of that property is not taxed above 1%. As a result, the adjusted tax rates on all three properties in the hypothetical county become:

	Example 1	Example 2	Example 3
County	0.15%	0.15%	0.15%
School District 1		0.40%	0.40%
School District 2	0.30%		
Fire District	0.18%		
City A	0.37%		
City B			0.40%
Total Levies:	1.00%	0.55%	0.95%

Several things should be noted in this final step of the hypothetical. First, the adjustment required by the One Percent Initiative is not simply to reduce tax levies to one percent of market value. A second step, mandated by art. 7, sec. 5 of the Idaho Constitution, requires that the resulting levies be uniform. As a practical matter, this means that the property in the county with the highest mill levy is the one that must first be brought down to the one percent level. All other properties are then proportionately reduced. This means that some properties upon which tax levies did not originally exceed one percent will enjoy levies that are reduced yet lower.

Second, School District 1 and School District 2 each began with a 0.40% mill levy -- presumably the amount that local school boards, parents and taxpayers felt was the amount necessary to provide a comparable education for the children in these two school districts. After the adjustment, however, School District 1 still has a 0.40% tax levy, whereas School District 2 has a 0.30% tax levy. The children in the latter district experience a 25% cut in school funding, without any rational basis for the cut. Such an irrational disparity in funding might well be found to violate the requirement in art. 9, sec. 5, of the Idaho

Constitution that all Idaho students be provided a "uniform" and "thorough" education.

Third, it should be noted that City A had a 0.50% tax levy before the adjustment and City B had a 0.40% tax levy. After the adjustment, City A finds itself with a 0.37% tax levy, whereas City B still has a 0.40% levy. Those who live in City A have no voice whatsoever in this 26% tax cut, or in the corresponding loss of services the cut will mandate. The cut is triggered solely by events in other taxing districts.[6]

In short, the combined requirements of a one percent property tax limitation and the uniform levy requirements of art. 7, sec. 5, of the Idaho Constitution create the inevitable result that property taxes in each taxing district will bear no rational relation to the needs of that district or to the wishes of the taxpayers of that district.

QUESTION 5.

Your next question inquires as to the impact of the One Percent Initiative--with its one percent cap on property taxes, and its requirement that two-thirds of all qualified electors approve all special taxes--on bonded indebtedness or other special taxing situations.

We have identified four such taxing situations that deserve separate analysis: 1) bonded indebtedness provision of art. 8, sec. 3, of the Idaho Constitution; 2) tax increment financing bonds created pursuant to the Local Economic Development Act; 3) registered warrants; and 4) special levies.

(1) **Initiative's impact on constitutionally approved debt.**

It is difficult to reconcile the language of the initiative with Idaho Constitution art. 8, sec. 3, which provides in pertinent part:

> No county, city, board of education or school district, or other subdivision of the state, shall incur any indebtedness, or liability, in any manner, or for any

[6] It should take little imagination to visualize the extreme pressures that will be exerted on local public officials once it becomes known that the budgets they submit will inevitably be scaled down by unrelated budgeting decisions in other taxing districts. The One Percent Initiative would create an incentive to protect against this anticipated scale-down by submitting inflated budget requests.

> purpose, exceeding in that year, the income and revenue provided for it for such year, without the assent of two-thirds (2/3) of the qualified electors thereof voting at an election to be held for that purpose . . . . (Emphasis added.)

The One Percent Initiative excludes from the one percent limitation "any indebtedness approved by the voters prior to the time this section becomes effective." (Emphasis added.) Thus, by its specific terms, the One Percent Initiative does not grant an exemption for indebtedness approved after the date the initiative would become effective. However, as noted previously in this opinion, the initiative does allow "special taxes" to be exempt from the initiative if approved by two-thirds of the "qualified electors" of a district. This is a higher standard than two-thirds of those voting, which is the constitutional standard for approval of most bonds. If the initiative's higher standard were found to be constitutional, a bond could be approved by the constitutionally required two-thirds of voters still be subject to the one percent limitation. The one percent limitation would require cuts in levies whenever the total of all levies exceeded one percent.

Consequently, if constitutionally approved bonds are not given a tax levy priority over other levies, bondholders would not be assured of repayment of their bonds making such bonds unmarketable. Given the confusion created by the One Percent Initiative, bond counsel would almost certainly refuse to give an opinion that the bonds are legally required to be paid according to their terms. This would effectively undermine the provisions of Idaho Constitution art. 8, sec. 3 providing for bonded indebtedness.

2) **Tax Increment Financing Under the Local Economic Development Act.**

Chapter 29, title 50, of the Idaho Code, the Local Economic Development Act, gives certain municipalities the authority to issue bonds. These bonds are repaid using a device commonly known as tax increment financing. These bonds are not voter approved; hence, they are not covered by the initiative's exception for existing indebtedness.

Six tax increment financing areas now operate in Idaho pursuant to the Local Economic Development Act. The One Percent Initiative will have a serious impact on their ability to repay bonds. Those familiar with each of the areas indicate their area would be unable to meet debt service if the initiative passes.

Under the tax increment financing law, a municipality first creates an urban renewal agency which exercises authority over a given geographical area of a city. Idaho Code §§ 50-2005 through

-2007, 50-2903 and -2904. The agency then issues bonds, the proceeds of which are used for urban renewal projects within the agency's geographic area. Idaho Code § 50-2909. The bonds issued are a limited obligation of the agency, not the municipality. Idaho Code § 50-2910. Bonds are repaid solely from a special fund established for the purpose. Idaho Code § 50-2909. The income stream used to replenish the special fund is generated by dedicating property taxes above a certain base level to the fund. Idaho Code § 50-2908. The rationale is that the investment of the redevelopment agency in its geographic area encourages further development, thus raising tax revenues within the entire area. The tax upon the difference between the assessed value at the time the bonds were issued and subsequent years is applied to repayment of the bonds. Idaho Code §§ 50-2903(4) and 50-2908.

The One Percent Initiative would change the repayment structure set up by the Local Economic Development Act by lowering tax rates with corresponding reductions in the revenue available to repay bondholders. This raises the question whether the One Percent Initiative would violate Article I, § 10, of the United States Constitution. That section specifically forbids any state to "pass any . . . law impairing the obligation of their contracts."

Bondholders of tax increment financing bonds would likely challenge the initiative on grounds it impairs the obligation of contracts under the principles laid down by the United States Supreme Court in United States Trust Co. v. New Jersey, 431 U.S. 1 (1977), and Energy Reserves Group v. Kansas Power and Light, 459 U.S. 400 (1982).

On the other hand, we note that the California Supreme Court, in Amador Valley Joint Union High School District v. State Board of Equalization, 22 Cal. 3rd 208, 583 P.2d 1281 (1978), upheld that state's one percent law, Proposition 13, against a challenge that it unconstitutionally impaired contractual obligations. The Amador court found that although there was a possibility of default on bonds, the default was not "inevitable" and new revenues might be found from other sources, such as legislative enactments, to prevent default. Amador seems to require actual default rather than merely "substantial impairment" as discussed in United States Trust Co., *supra*, and Energy Reserves Group, *supra*. Thus, if the Idaho Supreme Court were to find a substantial impairment but adopt the reasoning of the California Supreme Court in Amador, it would not find that the initiative impaired the obligation of contracts, at least until actual default became inevitable. Rather, it would wait to see if other revenue became available such as through new legislation. This would leave open the possibility of future legislation to authorize some additional tax to repay existing bondholders.

As to future tax increment financing, the One Percent Initiative would create uncertainty as to future tax revenues and thus, the ability to repay the bonds. The practical effect would be the reduction or elimination of tax increment financing since investors would presumably be reluctant to buy bonds which might not be repaid.

3) **Registered Warrants.**

The One Percent Initiative would also cause problems to counties during times of emergency. Currently, counties are authorized to pay bills that arise during major emergencies by a system of registered warrants. Idaho Code § 31-1608 gives examples of the types of emergency that may be dealt with in this manner:

> [A]ny emergency caused by fire, flood, explosion, storm, epidemic, riot or insurrection, or for the immediate preservation of order or of public health or for the restoration to a condition of usefulness of public property, the usefulness of which has been destroyed by accident, or for the relief of a stricken community overtaken by a calamity, or the settlement of approved claims for personal injuries or property damages, exclusive of claims arising from the operation of any public utility owned by the county, or to meet mandatory expenditures required by law, or the investigation and/or prosecution of crime, punishable by death or life imprisonment, when the board has reason to believe such crime has been committed in its county . . . .

The statute next outlines the procedure the county commissioners must use to pay for emergency expenditures that were not anticipated or funded in their budget:

> [T]he board of county commissioners may, upon the adoption, by the unanimous vote of the commissioners, of a resolution stating the facts constituting the emergency and entering the same upon their minutes, make the expenditures necessary to investigate, provide for and meet such an emergency.

Finally, the statute sets forth the precise funding tool of registered warrants:

> If at any time there shall be insufficient moneys on hand in the treasury to pay any of such warrants, then such warrants shall be registered, bear interest, and be called in the manner provided by law for other county warrants.

Thus, the statute provides a mechanism by which counties can finance expenditures in time of emergency. The One Percent Initiative would dramatically impact this process. The initiative provides no exemption for levies to repay registered warrants. In other words, levies to repay registered warrants could suffer the same fate as levies to support cities, schools and other local governments. However, if levies to repay registered warrants are cut, payments to those persons who financed the emergency by taking registered warrants will also be affected. If this were permitted, the ability to finance expenditures in time of emergency would be undermined. The provisions of the current law are workable only because those who finance emergency expenditures know they will be repaid. Without that assurance, it is doubtful that counties would be able to finance their expenditures in times of emergency.

It is possible that the constitution and statutes could be read to give registered warrants a priority over other levies to guarantee repayment of persons financing emergency expenses. However, this too creates a problem in times of emergency. For example, in times of a major emergency such as the Teton Dam disaster, emergency expenditures themselves may exceed the one percent limit. If warrants to pay for the emergency are given priority, then no other taxing district could levy at all because the amount needed to redeem registered warrants would consume the entire one percent property tax allowed by the initiative. A levy by any other district, including the county for its normal operating purposes, would not be permitted since it would be a levy above one percent. Thus, even if registered warrants are given a priority over the levies of other districts, the initiative will create its own emergency by shutting down the functions of all other governments in the county. Even normal county functions would be shut down other than those funded as emergency expenses.

Whether registered warrants would be given a priority under the One Percent Initiative is unclear under current law. Idaho Constitution art. 7, sec. 5 provides for a levy of up to one percent to repay registered warrants. Thus, arguably, levies for registered warrants should be given priority over other levies since they are of constitutional stature. However, the Idaho Supreme Court has held that Idaho Constitution art. 7, sec. 15 is not self-executing. That is to say, the court found that the power of the board of county commissioners to levy taxes under this article was derived solely from statute and not from the constitutional provision. Oregon Shortline Railroad Company v. Gooding County, 33 Idaho 452, 454, 196 P. 196 (1921). The case was decided in 1921 and it is possible that the court would change its view today. However, assuming the court would continue to interpret the section as not being self-executing, levy authority would be defined by the statutes and the One

Percent Initiative does not provide any priority for the levy to repay registered warrants.

Thus, the initiative will create substantial problems in times of emergency since levies to pay registered warrants are not excluded from the one percent limitation. If they are not given a priority over other levies, investors will have no guarantee of repayment. Without an ability to fund emergency expenses, counties would be unable to adequately protect the public in times of emergency. If levies to repay registered warrants are given a priority over other levies, then a county could respond to an emergency. However, to do so would reduce or eliminate funding of other governmental functions. Following a major disaster, the effect would be to shut down most local governments.

4) **Other Levy Problems.**

Certain levies are exempt from the levy limitations of current law, but are not exempt from the proposed 1% initiative. Examples include school plant facilities reserve fund levies previously approved by voters (Idaho Code § 33-804), levies to pay tort claims (Idaho Code §§ 6-927 and 6-928), levies to pay extraordinary city expenses in times of emergency (Idaho Code § 50-1006), levies to pay catastrophic medical expenses (Idaho Code § 31-3503), and county expenses for noxious weed control (Idaho Code § 22-2482).

Since these expenses are given no exemption or priority of payment under the initiative, the initiative would provide no assurance of their payment. As an example, the school plant facility reserve fund provides a pay-as-you-go program for funding public school buildings, as opposed to borrowing to buy school buildings. Money is saved until sufficient to buy buildings. It requires a two-thirds vote of those voting to be authorized. School plant facilities reserve funds previously authorized by voters are not exempt from the 1% initiative. Thus, funding of these existing school building programs would be jeopardized by the initiative.

Extraordinary city expenses incurred in times of emergency are likewise given no priority under the initiative. This would cause the same kind of problems previously discussed that counties would face in times of emergency. Similarly, the initiative would undermine the financial ability of counties to address catastrophic medical problems or to eradicate noxious weeds threatening the agricultural base in their counties since these expenses are not exempt from the initiative. By not exempting tort claims, a major tort claim could take a substantial portion of the 1% authorization reducing the amount available for support of other governmental functions.

QUESTION 6.

Conflict With Idaho's System of Ad Valorem Taxation.

The final substantive question in your opinion request asks whether the One Percent Initiative comports with the basic structure of ad valorem taxation in Idaho as set forth in art. 7, sec. 6, of the Idaho Constitution. That provision states:

> The legislature shall not impose taxes for the purpose of any county, city, town or other municipal corporation, but may by law invest in the corporate authorities thereof, respectively, the power to assess and collect taxes for all purposes of such corporation.

This section contemplates local control of the level of property taxes within the limits of uniform laws established by the legislature. During Idaho's Constitutional Convention, Mr. Ainslie explained the provision as follows:

> Now, under the revenue law the state may exact a levy of so much for state purposes; and authorize the county to levy a tax, not exceeding so much more; and then the county commissioners of each county levy their own rate. In one county it may be more than it is in another. If the state makes a levy itself, if the legislature makes a levy, the rate of taxation in each county in the territory would be exactly the same; but <u>they authorize the different counties to levy a rate of taxation between so much, not to exceed so much, and they can go under that any amount they please</u>. In some counties they might make a higher levy than another.

Constitutional Convention Proceedings, Vol. II, p.1659. (Emphasis added.)

Thus, the drafters of our constitution understood that the legislature would set upper limits for taxes by cities, counties or other taxing districts. However, districts would be given the authority to make their own determination as to the levy within the limit set by the legislature.

In contrast, the One Percent Initiative does not limit taxation based upon upper limits judged adequate by the legislature and applied uniformly to cities, counties or other districts with similar responsibilities. Rather, as discussed in detail in response to Question 4, it makes taxing authority dependent upon the budgets and levies of other unrelated taxing districts.

The intent of art. 7, sec. 4, was also discussed by the Idaho Supreme Court in State v. Nelson, 36 Idaho 713, 719, 213 P. 358 (1923):

> Manifestly, the reason for placing this limitation upon the legislative power to tax is to give local communities, organized as municipal corporations, the power to impose upon themselves for their needs only such burdens in the way of taxation as they themselves determine through their governing officials.

(Emphasis added.) See also Fenton v. Board of County Commissioners, 20 Idaho 392, 119 P. 41 (1911); Hamilton v. Village of McCall, 90 Idaho 253, 409 P.2d 393 (1965).

The concept of the One Percent Initiative negates this fundamental concept of local self-determination in taxation within legislatively determined limits. Local governments will not be able to impose burdens "as they themselves determine through their governing officials." Rather, the level of authorized taxation will depend upon budgets and levies of unrelated local governments.

Just as the One Percent Initiative negates the fundamental concept of local self-determination in taxation, so too does it negate the fundamental concept of services provided to the citizenry within uniform limits applicable to similar units of government. For example, Idaho Constitution, art. 9, § 1, requires the legislature:

> to establish and maintain a general, uniform and thorough system of public, free common schools.

As long as the system of schools relies in part upon property taxes, it is difficult to see how the system can be "uniform" within the meaning of the constitution where local taxing authority of school districts of the same type is made non-uniform based upon levies of other unrelated taxing districts. (See examples set out in response to Question 4.)

Likewise, Idaho Constitution, art. 3, § 19, provides in pertinent part:

> The legislature shall not pass local or special laws in any of the following enumerated cases, that is to say:
>
> . . .
>
> For the assessment and collection of taxes.

This provision does not require identical treatment under tax laws. The legislature may adopt various classifications for

taxation provided the classifications are not arbitrary, capricious or unreasonable. As the Idaho Supreme Court held in the tax case of Sun Valley Co. v. City of Sun Valley, 109 Idaho 424, 429, 708 P.2d 147 (1985):

> Art. 3, § 19 of the Idaho Constitution prohibits the legislature from enacting local or special laws in matters of taxation. This Court has held that a law "is not special when it treats all persons in similar situations alike," Twin Falls Clinic and Hospital Bldg. v. Hamill, 103 Idaho 19, 26, 644 P.2d 341, 388 (1982), nor is it local "when it applies equally to all areas of the state." School Dist. No. 25 v. State Tax Commission, 101 Idaho 283, 291, 612 P.2d 126, 134 (1980). The test of whether a classification is local or special is whether the classification is arbitrary, capricious or unreasonable. Washington Court v. Paradis, 38 Idaho 364, 369, 222 P. 775, 369 (1923).

Thus, laws for the assessment and collection of taxes will be found to be unconstitutional if the classification resulting in disparate treatment is arbitrary, capricious or unreasonable. It is unlikely that a reviewing court would find that a one percent limitation, which destroys that uniformity, would be consistent with the constitution. The court would not be able to find a reasonable basis to support discrimination among counties, schools and cities where the discrimination is wholly unrelated to the needs or activities of those local governments and results from the budgets and levies of other unrelated taxing districts.

Thus, the one percent taxation concept is contrary to the system of local taxation and self-determination contemplated by the Idaho Constitution. It would discriminate against local governments and the communities they serve on a basis wholly unrelated to their needs or desires. Idaho's system of property taxation was not designed to allow one political subdivision to dominate or eliminate the financial wherewithal of another, especially without the input of all persons impacted. Contrary to the intent of the framers of the Idaho Constitution, the One Percent Initiative would force this result.

In conclusion, the concept of the One Percent Initiative is contrary to the system of property taxation created by our constitution. The One Percent Initiative cannot be implemented without dismantling the system of local property taxation under which Idaho has functioned for the last century. Dismantling the system is legally possible. It is conceivable, for example, that certain functions currently under local control could be shifted to the state. It is also conceivable that all local governmental units might be given alternative taxing authority such as income tax authority.

The critical point is that the language of the One Percent Initiative is aimed only at limiting property taxation. However, it cannot be implemented without dismantling the property tax system in effect since statehood. The public will vote upon the initiative. It is entitled to know that the initiative would dismantle and not merely limit our property tax system.

QUESTION 7.

The Right to Place the Initiative on the Ballot.

Your final question is whether the One Percent Initiative may be put on the ballot for the 1992 election despite the fact that it is so fatally flawed that it would not stand up under a court challenge. This precise question was addressed by the Idaho Supreme Court in the case of Associated Taxpayers of Idaho v. Cenarrusa, 111 Idaho 502, 725 P.2d 526 (1986). The court held:

> In brief, our Constitution guarantees our people the right to propose legislation through the initiative process. That right is not circumscribed or limited to "good" legislation or "constitutional" legislation. The voters may or may not enact the proposed legislation. If enacted it may be repealed by the next representative legislative session. . . .

111 Idaho at 505 (emphasis in original).

Thus, it is clear that Idaho voters have a right to vote on any proposed initiative, regardless of whether it is so poorly drafted as to be fatally flawed or even unconstitutional.

AUTHORITIES CONSIDERED:

1. United States Constitution:

   Article I, § 10.

2. Idaho Constitution:

   Art. 2, § 1.
   Art. 3, § 19.
   Art. 6, § 1.
   Art. 7, § 4.
   Art. 7, § 5.
   Art. 7, § 6.
   Art. 8, § 3.
   Art. 9, § 5.

3. Idaho Statutues:

Idaho Code chapter 29, title 50.
Idaho Code § 6-927.
Idaho Code § 6-928.
Idaho Code § 22-2482.
Idaho Code § 31-601.
Idaho Code § 31-602.
Idaho Code § 31-867.
Idaho Code § 31-1420.
Idaho Code § 31-1421.
Idaho Code § 31-1608.
Idaho Code § 31-3503.
Idaho Code § 31-3901.
Idaho Code § 31-3908.
Idaho Code § 33-804.
Idaho Code § 34-435.
Idaho Code § 34-1809.
Idaho Code § 40-808.
Idaho Code § 42-3202.
Idaho Code § 46-722.
Idaho Code § 50-1006.
Idaho Code § 50-2005.
Idaho Code § 50-2903(4).
Idaho Code § 50-2908.
Idaho Code § 50-2909.
Idaho Code § 50-2910.
Idaho Code § 63-105DD.
Idaho Code § 63-621.
Idaho Code § 63-624.
Idaho Code § 63-901.
Idaho Code § 63-915.
Idaho Code § 63-917.
Idaho Code § 63-918.
Idaho Code § 63-923.
Idaho Code § 63-1001.
Idaho Code § 63-1003.
Idaho Code § 63-1103.
Idaho Code § 65-103.
Idaho Code § 65-104.

4. Idaho Cases:

Alpert v. Boise Water Corp., 118 Idaho 136, 795 P.2d 298 (1990).

Associated Taxpayers of Idaho v. Cenarrusa, 111 Idaho 502, 725 P.2d 526 (1986).

Bailey v. Ness, 109 Idaho 495, 708 P.2d 900 (1985).

City of Grangeville v. Haskin, 116 Idaho 535, 777 P.2d 1208 (1989).

Fenton v. Board of County Commissioners, 20 Idaho 392, 119 P. 41 (1911).

Hamilton v. Village of McCall, 90 Idaho 253, 409 P.2d 393 (1965).

Miller v. Miller, 113 Idaho 415, 745 P.2d 294 (1987).

Oregon Shortline Railroad Company v. Gooding County, 33 Idaho 452, 196 P. 196 (1921).

School Dist. No. 25 v. State Tax Commission, 101 Idaho 283, 612 P.2d 126 (1980).

State v. Nelson, 36 Idaho 713, 213 P. 358 (1923).

Sun Valley Co. v. City of Sun Valley, 109 Idaho 424, 429, 708 P.2d 147 (1985).

Twin Falls Clinic and Hospital Bldg. v. Hamill, 103 Idaho 19, 644 P.2d 341 (1982).

Washington Court v. Paradis, 38 Idaho 364, 222 P. 775 (1923).

5. Other Cases:

Amador Valley Joint Union High School District v. State Board of Equalization, 22 Cal. 3d 208, 583 P.2d 1281 (1978).

Energy Reserves Group v. Kansas Power and Light, 459 U.S. 400 (1982).

Gord v. Salt Lake City, 434 P.2d 449 (Utah 1967).

United States Trust Co. v. New Jersey, 431 U.S. 1 (1977).

6. Other Authorities:

Constitutional Convention Proceedings, Vol. II, p.1659.

DATED this 25 day of November, 1991.

LARRY ECHOHAWK
Attorney General
State of Idaho

Analysis by:

David G. High
Deputy Attorney General
Chief, Civil Litigation Unit