ATTORNEY GENERAL OPINION NO. 95-03

To: R. Michael Southcombe, Chairman
Idaho State Tax Commission
STATEHOUSE MAIL

Per Request for Attorney General's Opinion

QUESTIONS PRESENTED

1. What is the current status of Idaho Code § 63-923?

2. How is the new law, House Bill 156, to be implemented given the status of Idaho Code § 63-923?

CONCLUSION

1. Through legislative oversight, the provisions of Idaho Code § 63-923 are not modified by any other statute. Idaho Code § 63-923 is, however, incapable of implementation and likely to be struck down if presented to a court.

2. Idaho Code § 63-923 imposes no impediment to the full implementation of House Bill 156.

BACKGROUND

On November 7, 1978, the electorate of the State of Idaho adopted Initiative Petition No. I. The chief provision of this initiative was to limit the maximum amount of ad valorem tax on any property subject to assessment and taxation within the State of Idaho to one percent (1%) of the actual market value of such property. The initiative also purported to limit increase in market values to a maximum of two percent (2%) for any given year.

The legislature immediately amended the provisions of Initiative Petition No. I. In 1979, House Bills 166, 280, 306, and 308 were introduced to either amend Initiative Petition No. I or to ameliorate its effects on certain taxing districts. Aside from actually amending the language of Initiative Petition No. I, codified as Idaho Code § 63-923, the principal thrust of the legislature's concern with the initiative petition was embodied in a new statute, Idaho Code § 63-2220. This new section was an attempt to place a cap on ad valorem taxes by limiting the budget requests of taxing districts. The one percent (1%) limitation codified in Idaho Code § 63-923 was not, however, referred to in Idaho Code § 63-2220. The code, therefore, reflected two (2) distinct strategies for controlling ad valorem taxes—a cap on

taxes of one percent (1%) of assessed value and a limitation on budgets funded by the property tax.

In 1980, the legislature amended Idaho Code § 63-923 to make Idaho Code § 63-2220 the exclusive state strategy for limiting ad valorem taxes. The legislature did this by inserting the words "Except as provided in Section 63-2220, Idaho Code . . ." at the very beginning of Idaho Code § 63-923. The effect of this language was to nullify the impact of Idaho Code § 63-923, although Idaho Code § 63-2220, itself, contained a one percent (1%) limitation. This one percent (1%) limitation was removed from Idaho Code § 63-2220 in 1981, thus eliminating entirely the one percent (1%) strategy for limiting ad valorem taxes.

The state changed its approach to limiting ad valorem taxes in 1990. House Bill 366 repealed the budget limitation strategy codified in Idaho Code § 63-2220 and substituted what became known as Truth in Taxation. This was codified in Idaho Code §§ 63-2224 through 63-2226. These sections sought to limit ad valorem taxes by maximizing public comment whenever a taxing district requested an amount of ad valorem tax revenues which would cause the tax rate to increase from the rate in effect during the previous year. The critical language which, in 1980, had been inserted into Idaho Code § 63-923, "Except as provided in Section 63-2220, Idaho Code . . ." was amended to read, "Except as provided in Section 63-2224, Idaho Code . . . ." The approach, however, was still to nullify the effect of the one percent (1%) limitation contained in section 63-923, Idaho Code, while simultaneously attempting to control ad valorem taxes using a strategy other than the one percent (1%) limitation.

In 1995, the strategy for controlling ad valorem taxes changed again. The approach, introduced in House Bill 156, is two-fold. First, there was a shift in some of the funding for public schools from the property tax to general fund revenues. Second, a variant of the budget limitation strategy originally codified in Idaho Code § 63-2220 was reimposed. In adopting this revised approach to limiting ad valorem taxes, the legislature repealed Truth in Taxation (Idaho Code §§ 63-2224 through 63-2226), but did not amend the one percent (1%) limitation of Idaho Code § 63-923. This failure to amend means that, on its face, Idaho Code § 63-923 now requires the implementation of the one percent (1%) limitation as well as the new approach set forth in section 63-2220A.

ANALYSIS

Question 1:

From 1981 through 1994, Idaho Code § 63-923, the one percent (1%) limitation on ad valorem taxes, was effectively nullified. The one percent (1%) limitation was effective, "Except as provided in" either section 63-2220 or section 63-2224, Idaho Code. Each of those provisions permitted imposition of tax in excess of one percent (1%) of market value

while attempting to limit ad valorem taxes using approaches different than the one percent (1%) limitation of section 63-923.

Effective January 1, 1995, Idaho Code § 63-2224 was repealed. On its face, therefore, the one percent (1%) limitation of Idaho Code § 63-923 is no longer limited by reference to other statutes. Nevertheless, it is unlikely that Idaho courts will enforce the one percent (1%) limitation. It was not the intent of the legislature to terminate the statutory nullification of Idaho Code § 63-923. Even if it were, the statutory scheme set forth in Idaho Code § 63-923 cannot be implemented.

THE LEGISLATURE DID NOT INTEND TO ELIMINATE ITS PREVIOUS STATUTORY NULLIFICATION OF IDAHO CODE § 63-923

There are several compelling reasons to support the view that the Idaho Legislature did not intend to eliminate the statutory nullification of Idaho Code § 63-923. First, it was clearly the legislature's purpose for fourteen (14) years to restrain the one percent (1%) limitation while attempting to curb ad valorem taxes through other means. Second, the current language of Idaho Code § 63-923 provides that it is limited in its effect by a statutory provision which has been repealed. This leads to the inescapable conclusion that the legislature's failure to amend Idaho Code § 63-923 was an oversight rather than a policy determination. Third, supporting the hypothesis that the failure to limit Idaho Code § 63-923 was unintentional is the fact that the fiscal impact statement attached to House Bill 156 grossly underestimates the fiscal impact unless one assumes that the legislature had no intention of reviving the one percent (1%) limitation.[1] Fourth, the minutes of the House Revenue and Taxation Committee, wherein House Bill 156 was debated extensively, are devoid of any reference to Idaho Code § 63-923. Fifth, while Idaho Code §§ 63-923 and 63-2220A are not in conflict, in practice it will be difficult to reconcile the application of the sections. Sixth, the one percent (1%) limitation cannot be implemented given Idaho's ad valorem tax structure.

IDAHO CODE §§ 63-923 AND 63-2220A ARE NOT IN CONFLICT, BUT ARE DIFFICULT TO RECONCILE IN PRACTICE

There are a number of ways to affect the level of taxes imposed on property. Limits can be placed on the taxing district's budget request. This will result, other things being equal, in a lower levy. Another approach is to place limits on the amount of the levy. In fact, at various places in the Idaho Code, maximum levies are provided for various taxing districts and funds. Idaho Code § 63-2220A adopts the strategy of limiting taxing district budget requests in order to place a limit on the amount of ad valorem taxes a taxing district can impose.

Idaho Code § 63-923 adopts a different limitation mechanism entirely. Rather than limit budget requests or levy amounts, Idaho Code § 63-923 attempts to restrain ad valorem taxes by placing a limit of one percent (1%) of the assessed valuation as the total tax levy that can be imposed on any given piece of property. Theoretically, then, there is no conflict between the approaches codified in sections 63-923 and 63-2220A. Theoretically, each section imposes a ceiling on ad valorem taxes. Whichever section imposes the lower ceiling on property in a given tax district will impose the tight constraint on ad valorem taxation within that district. As discussed in the following section the difficulty lies not with the theory, but with the practical application of the one percent (1%) limitation to Idaho's ad valorem tax structure.

OVERVIEW OF IDAHO'S AD VALOREM TAX STRUCTURE

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 tax districts.

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

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 Tax Commission. Idaho Code § 63-915. The 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 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 the district's tax.

HOW IDAHO CODE § 63-923 AFFECTS THE LEVY, COLLECTION AND APPORTIONMENT OF TAXES

Idaho Code § 63-923 inserts a one percent (1%) limitation on the amount of tax that can be imposed on any real property.

The section does not limit the budgets certified by the taxing districts, or the levies set by boards of county commissioners. 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 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 implementation of Idaho Code § 63-923 has its impact. The Tax Commission will be unable to approve any levies which, in combination, cause taxes to exceed one percent (1%) of the actual market value of any property.

A. Recourse to the Courts

Two possible solutions present themselves. First, the Tax Commission could handle the matter as it presently does "according to law." The law mandates the 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."

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. Finally, 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 Idaho Code § 63-923 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. Recourse to the courts is ultimately futile as a means of implementing Idaho Code § 63-923.

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, 297 (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 by Idaho Code § 63-923.

B. Counties as Ultimate Tax Authorities

The second solution is to assume that Idaho Code § 63-923 impliedly grants to counties the power to collect and apportion taxes to the various taxing districts within and between 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 (1%) 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 Idaho Code § 63-923, then each board will become the ultimate tax authority in its county. Faced with the problem of scaling taxes down to one percent (1%), the board would have several options. It could either 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.[2]

There is no express grant of authority to the 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 ultimate taxing authorities and virtually destroy all the other independent taxing districts that now answer to the local electorate.

It follows, from the above discussion, that Idaho Code § 63-923 cannot be implemented as written. It is our opinion that a reviewing court faced with the options of striking down this section or upholding it 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). Idaho Code § 63-923 fits these criteria. There is no possible means to implement it "according to law." Consequently, a reviewing court would strike it down.

THE CONSTITUTIONAL REQUIREMENT OF UNIFORM LEVIES

This opinion has already concluded that Idaho Code § 63-923 cannot be implemented because it fails to provide a mechanism whereby counties, or any other governmental entity, can collect taxes and then apportion them subject to the one percent (1%) 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 the question of how Idaho Code § 63-923 can 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 authority levying the tax . . . ."

Reading Idaho Code § 63-923 together with art. 7, sec. 5 of the Idaho Constitution yields the following possible apportionment mechanism.[3] 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 (1%) 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 (1%) 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. 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 (1%) limitation of each district) are:

Hypothetical County

District	Budget	Tax Base	Levy
County	$2,000,000	$1,000,000,000	0.30%
School District 1	$750,000	$250,000,000	0.30%
School District 2	$937,500	$312,500,000	0.30%*
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:

District	Example 1	Example 2	Example 3
County	0.30%	0.30%	0.30%
School District 1		0.30%	0.30%
School District 2	0.30%		
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 Example 1 exceed the one percent (1%) limitation. To reduce the taxes on this property to one percent (1%), the levies imposed on it must be reduced to .7462686[4] of the levy first computed. The adjustment is:

District	Levy	Adjustment	Adjusted Levy
County	0.30%	0.7462686	0.224%
School District 1			
School District 2	0.30%	0.7462686	0.224%
Fire District	0.24%	0.7462686	0.179%
City A	0.50%	0.7462686	0.373%
City B			.40%
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 and 3 can no longer be taxed at 0.30% by the county, when the property in Example 1 is only taxed at 0.224%. Thus, the lower county levy applies to all property in the county, even though some of that property is

not taxed above one percent (1%). As a result, the adjusted tax rates on all three properties in the hypothetical county become:

District	Example 1	Example 2	Example 3
County	0.224%	0.224%	0.224%
School District 1		0.30%	0.30%
School District 2	0.224%		
Fire District	0.179%		
City A	0.373%		
City B			0.40%
Total Levies:	1.00%	0.524%	0.924%

Several things should be noted in this final step of the hypothetical. First, the adjustment required by Idaho Code § 63-923 is not simply to reduce tax levies to one percent (1%) 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 levy is the one that must first be brought down to the one percent (1%) 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 0.30% 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 0.30% tax levy, whereas School District 2 has a 0.2240% tax levy. That children in the latter district experience a 25% cut in school 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 0.373% 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.[5]

In short, the combined requirements of a one percent (1%) 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 2:

Since Idaho Code § 63-923 cannot be implemented, it has no effect on the implementation of those statutes affected by House Bill 156.

AUTHORITIES CONSIDERED

1. Idaho Constitution:

Art 2, § 1.
Art. 7, § 5.
Art. 9, § 5.

2. Idaho Code:

§ 31-601.
§ 31-602.
§ 31-1605.
§ 63-621 through 63-626.
§ 63-901.
§ 63-915.
§ 63-917.
§ 63-918.
§ 63-923.
§ 63-1003.
§ 63-1103.
§ 63-1103(6).
§ 63-2220.
§ 63-2220A.
§ 63-2224 through 63-2226.

3. Idaho Cases:

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

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

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

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

4. Other Cases:

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

DATED this 10th day of August, 1995.

ALAN G. LANCE
Attorney General

Analysis by:

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[1] The fiscal impact statement associated with House Bill 156 estimates the impact on the General Fund for fiscal year 1996 to be $40 million. The impact on the General Fund in fiscal years 1997 and 1998 is estimated at $44 million and $47.5 million, respectively. According to the best estimates of the Tax Commission, however, these figures are understated by at least $200 million per year in additional lost revenues to local governments if one assumes implementation of Idaho Code § 63-923.

[2] As noted above, an across-the-board proportionate reduction is only one possible scenario. The one percent (1%) limitation does not mandate this outcome. If counties are truly empowered to "apportion" taxes and bring them down to one percent (1%) of market value, then they are free to cut taxes in any way they see fit.

[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 ultimate tax authority for its own county; it cannot have authority beyond its borders to set taxes in adjacent counties. The one percent (1%) limitation has no solution to this problem of apportioning taxes among multi-county taxing districts.

[4] The adjustment is by one percent (1%) divided by the total levy. In this case, 0.0100 / 0.0134 = 0.742686.

[5] 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 (1%) limitation would create an incentive to protect against this anticipated scale-down by submitting inflated budget requests.