IDAHO ATTORNEY GENERAL'S ANNUAL REPORT

OPINIONS

CERTIFICATES OF REVIEW

AND

SELECTED ADVISORY LETTERS

FOR THE YEAR

2017

Lawrence G. Wasden
Attorney General

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This volume should be cited as:

2017 Idaho Att'y Gen. Ann. Rpt.

Thus, the Official Opinion 17-1 is found at:

2017 Idaho Att'y Gen. Ann. Rpt. 5

Similarly, the Certificate of Review of November 7, 2017 is found at:

2017 Idaho Att'y Gen. Ann. Rpt. 21

The Advisory Letter of January 18, 2017 is found at:

2017 Idaho Att'y Gen. Ann. Rpt. 33

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Lawrence G. Wasden
Attorney General

INTRODUCTION

My Fellow Idahoans:

2017 was my 15th year in office. Through our work, my attorneys and I conducted the Office of the Attorney General's business with a guiding principle that has defined my time in public office: To provide accurate and objective legal advice that defends Idaho's laws and sovereignty, while adhering to the Rule of Law. Looking ahead to the next year, I vow to continue making this principle central to our work.

My efforts to help educate Idaho residents, public officials and journalists on the state's open meetings and public records laws continued. My staff and I partnered with Idahoans for Openness in Government, as well as the Twin Falls Times-News, for a summer seminar in Twin Falls. It was the 40th such event in Idaho since 2004.

These accomplishments were in addition to the steady, principled and sage legal counsel dozens of dedicated deputy attorneys general provided to offices, agencies and boards throughout Idaho state government.

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

Thank you for your interest in Idaho's legal affairs.

LAWRENCE G. WASDEN
Attorney General

OFFICE OF THE ATTORNEY GENERAL
LAWRENCE G. WASDEN
ATTORNEY GENERAL
2017
STAFF ROSTER

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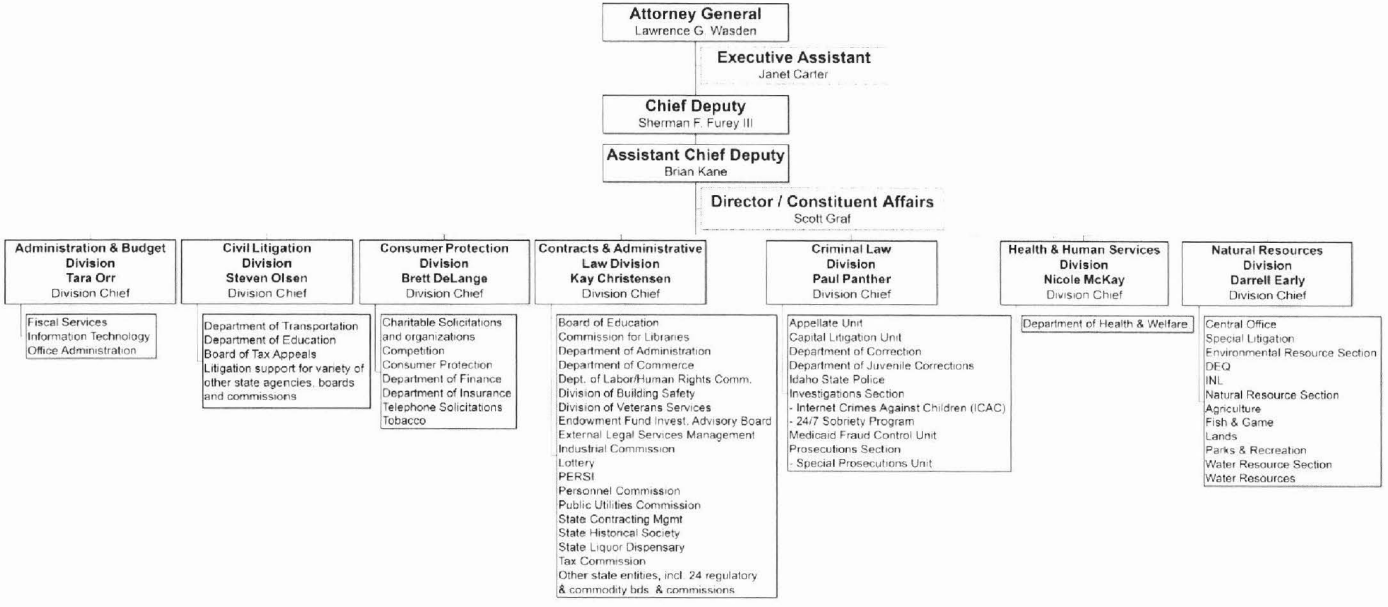
Office of the Idaho Attorney General
Organizational Chart - 2017



OFFICIAL OPINIONS
OF
THE ATTORNEY GENERAL
FOR THE YEAR 2017

LAWRENCE G. WASDEN

ATTORNEY GENERAL
STATE OF IDAHO

ATTORNEY GENERAL OPINION NO. 17-01

TO: Susan E. Buxton, Administrator
Idaho Division of Human Resources
VIA STATEHOUSE MAIL

Henry Atencio, Director
Idaho Department of Correction
VIA STATEHOUSE MAIL

Don Drum, Executive Director
Idaho Public Employee Retirement System
VIA STATEHOUSE MAIL

The following questions dealing with employees of the Idaho Department of Correction who qualify for police officer member status for purposes of the Idaho Public Employee Retirement System (PERSI) have been posed to this office.

QUESTIONS PRESENTED

1. For purposes of PERSI, what IDOC employees working inside a prison are eligible for police officer member status pursuant to Idaho Code § 59-1303(3)(e)(ii), and thus for Rule of 80 status?

2. If some IDOC employees are reclassified to a position not eligible for police officer member status, what impact would this have on their accrued retirement benefits and their retired benefits going forward?

CONCLUSIONS

1. Idaho Code § 59-1303 must be read in such a manner as to effectuate all subsections and make the entire provision internally consistent. When this is done, and when this statute is read in conjunction with other relevant statutes and rules, it is clear that, of IDOC employees who work in prisons, only wardens and correctional officers are eligible by law for police officer member status, and thus for

Rule of 80 status. Other IDOC employees who work within prisons, but who fall within like general classifications found throughout state government, are not within the scope of active law enforcement, and are not eligible for police officer member status or Rule of 80 status.

2. An employee currently occupying a police officer member position with Rule of 80 status, whose position is reclassified to that of a general member which does not give rise to Rule of 80 status, retains the benefits he or she has already accrued. As long as the employee remains in that same position, he or she will continue to be deemed to be a police officer member and retain Rule of 80 status for retirement purposes. If the employee moves to a different position, he or she will no longer be deemed to be a police officer member and will lose Rule of 80 status for purposes of accruing future benefits.

ANALYSIS

I.

CLASSIFICATION OF IDOC EMPLOYEES FOR PERSI PURPOSES

A. Legislative History of Idaho Code § 59-1303

In 1985, important changes were made to the relevant PERSI statutes by enactment of Senate Bill No. 1161 (SB 1161), as amended (formerly SB 1107). 1985 Idaho Sess. Laws 164. The stated purpose of SB 1161 was to "redefine police officers as they relate to the Public Employee Retirement System." Testimony in support of the bill was presented to the State Affairs Committee by Bob Venn, then-director of PERSI. He explained to the committee that police officers are engaged in hazardous duties, and that the purpose of the bill was to include additional definitions for police officer member status. When the committee expressed concern that employees who were not in hazardous duties might be included in the police officer category, Senator Batt stated that it was the bill's objective to remove employees who did not belong in the police officer member category.

SB 1161 included a new section, Idaho Code § 59-1302A, which among other things, dealt with the retirement status of employees of the Idaho Department of Correction ("IDOC"). 1985

Idaho Sess. Laws 164. In 1990, this section was redesignated as Idaho Code § 59-1303. 1990 Idaho Sess. Laws 611. Subsections (2) and (3)(e) of the current Idaho Code § 59-1303 are identical to the same subsections enacted in 1985 as part of SB 1161's new § 59-1302A, and subsection (4) is nearly identical to its 1985 version. These subsections contain three provisions that are relevant to this analysis.

First, Idaho Code § 59-1303(2) provides that police officer membership status for retirement purposes may be fixed only by law or by order of the Retirement Board.

Second, Idaho Code § 59-1303(3)(e)(v) clarifies that "[e]mployees of the department of correction serving in positions of personnel management, accounting, data processing, clerical services and in like general classifications found in departments throughout the state government and not within the scope of active law enforcement service are not eligible for police officer member status."

Third, Idaho Code § 59-1303(4)(a) authorizes the Retirement Board to designate an employee as a police officer member for retirement purposes when the position held is one in which the principal duties involve "hazardous law enforcement duties." Idaho Code § 59-1303(4)(a) defined "hazardous law enforcement duties" as "principal duties" which include a probability of early superannuation, are associated with life-threatening risk, involve compelling others to observe the law or pertain to preventing and reducing crime.

B. PERSI Police Officer Member Status as Fixed by Law

Idaho Code § 59-1303(3)(e) sets forth the categories of IDOC employees who are eligible for police officer member status in PERSI. For purposes of this discussion, these include in subsection (e)(i), the IDOC's director, the deputy director for probation and parole, and prison wardens. Subsection (e)(ii) describes those employees who work inside prisons, other than wardens, who are eligible for peace officer member status as:

> (ii) Employees of the department of correction <u>accountable for the custody, safety, safekeeping or supervision of persons confined in a department</u>

> confinement facility and whose work station is located within the confinement facility.

(*Emphasis added*). Subsection (e)(v) describes those IDOC employees not eligible for police officer member status as:

> (v) Employees of the department of correction serving in positions of personnel management, accounting, data processing, clerical services and in like general classifications found in departments throughout state government and not within the scope of active law enforcement service are not eligible for police officer member status.

(*Emphasis added*).

The key determination as to whether an IDOC prison employee is eligible for police officer member status is, then, whether the employee is (1) accountable for the custody, supervision and safety of prisoners, or (2) in a classification found elsewhere in state government and is not within the scope of active law enforcement service. In making this determination, the statutes and rules governing the Idaho Peace Officers Standards and Training Council (POST) are relevant.

In 2005, the Idaho legislature amended Idaho Code § 19-5109 to authorize Idaho POST to establish minimum basic training and certification standards for state correctional and probation and parole offices. 2005 Idaho Sess. Laws 417. In 2006, POST promulgated IDAPA 11.11.04, Rules for Correction, Adult Probation and Parole Officers. IDAPA 11.11.04.010.04 defines "Correction Officer" as any employee of an IDOC facility or private prison contractor "who is responsible for the first-line supervision, security, protection, and risk reduction of offenders housed in the correction facility." IDAPA 11.11.04.052.01 provides that every correctional officer employed after July 1, 2005 must be certified by Idaho POST within one year after being appointed as a correctional officer, unless POST grants additional time to complete certification. IDAPA 11.11.04.052.02 further provides that correctional officers employed prior to July 1, 2005, may be voluntarily certified by Idaho POST, although certification is not required for these officers.

The language used to describe the duties of a certified or grandfathered correctional officer in POST's administrative rules is very similar to that used to describe those IDOC employees working within a prison who are eligible for police officer status under Idaho Code § 59-1303(3)(e)(ii). Pursuant to POST rules, only those persons certified by Idaho POST as correctional officers, or employed by IDOC for less than one year as correctional officers, or grandfathered in under IDAPA 11.11.04.052.02, may engage in the "first-line supervision, security, protection and risk reduction of offenders" as defined in IDAPA 11.11.04.010.04. Pursuant to Idaho Code 59-1303(3)(e)(ii), only those employees working within a prison who are "accountable for the custody, safety, safekeeping or supervision of persons confined in a department confinement facility" are eligible for police officer member status in PERSI. Both the rule and the statute refer to the same duties - the supervision of inmates and the maintenance of safety and security in a correctional facility. Only correctional officers are authorized to perform these duties. There is no state-wide classification for correctional officers, and only correctional officers are within the scope of "active law enforcement service."[1]

C. PERSI Police Officer Member Status as Fixed by the Retirement Board

Police officer member status in PERSI may also be fixed by the Retirement Board. Relevant to this discussion, Idaho Code § 59-1303(4) provides that a member may be designated by the Board as a police officer member if the position held is "one in which the principal duties involve hazardous law enforcement duties." As noted earlier, subsection (4)(a) defines "hazardous law enforcement duties" as principal duties which are reasonably expected to increase the probability of early superannuation, or are associated with life-threatening risk, or involve compelling others to observe the law, or pertain to crime prevention or reduction. Subsection (4)(b) provides that where POST certification is required for continued employment, it shall be considered as evidence that the employee is a police officer member. Subsection (4)(c) states that occasional assignments to hazardous law enforcement duties do not create a condition for designation as a police officer member.

Idaho Code § 59-1303(4) is not controlling for IDOC prison employees, whose status is fixed by law. However, it reinforces the conclusion that Rule of 80 status was not intended to be conferred on all IDOC employees working within a prison, but rather to limit that status to those employees engaged in active and hazardous law enforcement duties on a regular, rather than an occasional, basis. These are the type of duties in which only correctional officers are authorized by law to engage.

II.

IMPACT OF CHANGE IN CLASSIFICATION STATUS

Idaho Code § 59-1303(7) deals with the situation in which a position is reclassified from one that makes the employee eligible for police officer member status to one that makes the employee eligible only for general member status for retirement purposes:

> (7) An active member classified as a police officer for retirement purposes whose position is reclassified to that of a general member for retirement purposes as a result of a determination that the position does not meet the requirements of this chapter for police officer status for retirement purposes shall become a general member but shall not lose retirement benefits earned and accrued prior to the reclassification. If that member continues to be employed in that same position until retired, that member then will be deemed to be a police officer member for the purposes of retirement eligibility.

Pursuant to this subsection, an employee in a reclassified position retains the retirement benefits accrued as a police officer member. If the same employee continues to be employed in the same position until retirement, then the employee is deemed a police officer member for purposes of retirement eligibility. In other words, the employee retains what benefits have already accrued, and is eligible for Rule of 80 status if he or she remains in the same position until retirement.

CONCLUSION

Employees in IDOC positions that are also found in other general classifications in other departments throughout state government are not entitled to Rule of 80 status because they are employees of the IDOC, their work station is located within a correctional facility and they have regular interaction with inmates. Instead, among those IDOC employees working inside prisons, only wardens and correctional officers are entitled to that status.

An employee currently occupying a position with Rule of 80 status, whose position is reclassified to one that does not give rise to Rule of 80 status, does not lose the benefits he or she has already accrued. So long as the employee remains in that position until he or she retires, the employee will remain eligible for Rule of 80 status for retirement purposes.

This analysis is limited to IDOC employees. The involved agencies should commence an immediate review of the classifications of all general category IDOC employees to assure that they meet the necessary criteria for Rule of 80 eligibility. Any such review should include a detailed analysis of relevant job functions in light of the criteria set forth in Idaho Code section 59-1303(3)(e)(ii), (e)(v), and (4)(a)-(c). We encourage the three directors to meet as quickly as possible to develop a plan for such a review.

AUTHORITIES CONSIDERED

1. Idaho Code:

§ 19-510A.
§ 19-5109.
§ 20-209C.
§ 59-1302A.
§ 59-1303.
§ 59-1303(2).
§ 59-1303(3)(e).
§ 59-1303(3)(e)(i).
§ 59-1303(3)(e)(ii).
§ 59-1303(3)(e)(v).

§ 59-1303(4).
§ 59-1303(4)(a).
§ 59-1303(4)(b).
§ 59-1303(4)(c).
§ 59-1303(7).

2. Idaho Session Laws

1985 Idaho Sess. Laws 164.
1990 Idaho Sess. Laws 611.
2005 Idaho Sess. Laws 417.

3. Idaho Administrative Code

IDAPA 11.11.04.
IDAPA 11.11.04.010.04.
IDAPA 11.11.04.052.01.
IDAPA 11.11.04.052.02.

Dated this 16th day of October, 2017.

LAWRENCE G. WASDEN
Attorney General

Analysis by:

S. KAY CHRISTENSEN
Deputy Attorney General

PAUL R. PANTHER
Deputy Attorney General

BRENDA M. BAUGES
Deputy Attorney General

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[1] A limited and temporary exception to this rule exists. Pursuant to Idaho Code §§ 19-510A and 20-209C, IDOC employees may exercise peace officer authority when they are designated by the Board of Correction and engaging in the transportation of prisoners, the apprehension of prisoners who have escaped or the apprehension and arrest of persons suspected of

violating the terms and conditions of their probation or parole. It is our understanding that in practice, these functions are exercised by correctional officers (transporting prisoners, apprehending escapees) or probation and parole officers (apprehending and arresting probation or parole violators), all of whom are subject to POST rules regarding certification.

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ATTORNEY GENERAL'S CERTIFICATES OF REVIEW FOR THE YEAR 2017

LAWRENCE G. WASDEN

ATTORNEY GENERAL
STATE OF IDAHO

November 7, 2017

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

RE: Certificate of Review
Proposed Initiative to Add a New Statute Requiring Idaho Expand Medicaid Eligibility

Dear Secretary of State Denney:

An initiative petition was filed with your office on October 18, 2017. Pursuant to Idaho Code § 34-1809, this office has reviewed the petition and prepared the following advisory comments. Given the strict statutory timeframe within which this office must review the petition, our review can only isolate areas of concern and cannot provide in-depth analysis of each issue that may present problems. Further, under the review statute, the Attorney General's recommendations are "advisory only." The petitioners are free to "accept them in whole or in part." The opinions expressed in this review are only those that may affect the legality of the initiative. This office offers no opinion regarding the policy issues raised by the proposed initiative, nor the potential revenue or expense impact to the state budget.

BALLOT TITLE

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

MATTER OF FORM

The proposed initiative is for the most part in proper legislative

format, although there is a small error in Section 2. It is not necessary to underline Section 1's newly proposed Idaho Code section because it is not amending an existing section of the Idaho Code. Section 2 has a minor error in that it fails to show amendments to the existing statute by striking out deleted words and underlining added words and should read as follows:

> 56-262. DEFINITIONS. The definitions contained in section 56-252, Idaho Code, shall apply to sections 56-260 through ~~56-266~~ 56-267, Idaho Code.

The remaining two sections of the proposed measure will appear only in the Session Laws and will not themselves be codified in Idaho Code.

The enactment clause and the emergency clause are consistent with the form those items take in standard legislation. Due to the unique statutory framework governing the passage and implementation of initiatives, the proponents may want to rework those portions of the petition to reflect the initiative process rather than the standard legislative process. Specifically, the enactment clause should read, "Be it Enacted by the Voters of the State of Idaho". The emergency clause is discussed in greater detail below.

SUMMARY OF INITIATIVE AND MATTERS OF SUBSTANTIVE IMPORT

The proposed initiative does the following:

Section 1 enacts a new Idaho Code § 56-267 to be added to the chapter on Public Assistance Law. This new section mandates that the state expand its Medicaid eligibility criteria to include all individuals under age sixty-five (65) whose modified adjusted gross income is less than or equal to the one hundred thirty-three percent (133%) of the federal poverty level who are not otherwise eligible for Medicaid coverage.

Section 2 amends Idaho Code § 56-262 in the chapter on Public Assistance Law to specify that definitions found in Idaho Code § 56-252 will apply to the new Idaho Code § 56-267.

Section 3 contains an emergency clause specifying that the provisions of the initiative will take full force and effect following passage and approval.

Section 4 is a version of a sunset clause, but instead of being tied to a specific date it is tied to a contingent condition. It declares that the expansion provision shall become null and void if the level of federal financial contribution for the expansion population is reduced below ninety percent (90%).

Section 1

This section represents the substantive portion of the initiative. As stated above, this section requires the state Medicaid program expand its eligibility criteria to include individuals under age sixty-five (65) with modified adjusted gross incomes less than or equal to the one hundred thirty-three percent (133%) of the federal poverty level who are not otherwise eligible for Medicaid coverage. The proposed expansion population tracks exactly with the proposed expansion population initially required by the Affordable Care Act (ACA). This definition for the expansion population also coincides with the population for which current federal law provides a ninety/ten federal/state financial match rate.

The implementation of this section will require the Idaho Medicaid program to develop and submit a state plan amendment to the federal Centers for Medicare & Medicaid Services (CMS). Until that state plan amendment is reviewed and approved by CMS, the Idaho Medicaid program cannot implement or administer Medicaid benefits for that expansion population as contemplated by the initiative. The typical timeframe required to draft and submit a state plan amendment to CMS is anywhere between sixty (60) and ninety (90) days. Following the submission of a proposed state plan amendment, CMS has up to ninety (90) days to evaluate the proposed amendment and issue its decision. Following receipt of the decision from CMS, the Medicaid program could then begin the process of implementing the amendment including the significant IT investment that would be required to update the electronic eligibility and management systems.

As stated above, the language of this section tracks with provisions of the ACA. Those basic provisions of the ACA were upheld by the United States Supreme Court against constitutional challenge in National Federation of Independent Business v. Sebelius, 567 U.S. 519, 132 S. Ct. 2566, 183 L. Ed. 2d 450 (2012).

Section 2

Section 2 presents no significant legal or policy issues.

Section 3

As stated above, Section 3 is an emergency clause which would be consistent with a piece of legislation that had been passed by the legislature. However, given the different statutory framework surrounding the initiative process, this clause is inappropriate. The effective date for a law resulting from an initiative election is set forth in Idaho Code § 34-1813. Based upon the provisions of section 34-1813, a successful initiative obtains the full force and effect of law from the date of the proclamation issued by the governor declaring the initiative has been approved by a majority of the votes cast. The emergency clause will not impact the date the initiative obtains the force and effect of law as initiatives do not wait for the same July 1 effective date that applies to legislation passed by the legislature. Since the effective date of the initiative would impact only the date on which the Idaho Medicaid program would be directed to seek the amendment of the Idaho Medicaid state plan, and not the date on which the proposed state plan amendment is to take effect, the statutory effective date does not pose a significant burden upon the Idaho Medicaid program.

Section 4

The sunset clause set forth in Section 4 of the proposed initiative presents a unique issue. As stated in the discussion of Section 1, the operation of the Medicaid program is governed by an approved state plan and until the program could get an amendment approved by CMS, the program would be required to continue providing the services resulting from Section 1 of the initiative even if the sunset clause in Section 4 was triggered. The same amendment process outlined in the analysis of Section 1 would apply including the anticipated timelines for

the submission approval and implementation of a state plan amendment arising because of the sunset clause in Section 4.

Although the program is not aware of CMS ever refusing to allow a state to discontinue an optional service, there is a possibility that the amendment to remove this service could be delayed or even denied, either of which could limit the application of the Section 4 sunset clause. If CMS outright denies the proposed amendment to return to the current eligibility criteria, the Medicaid program would have the opportunity to challenge that both administratively and if necessary through the courts; however, the program would be required to continue providing those services with a higher percentage of state funds until a final decision could be obtained. The time that the state would have to continue providing services could be anywhere from a few months to several years.

CERTIFICATION

I HEREBY CERTIFY that the enclosed measure has been reviewed for form, style, and matters of substantive import. The recommendations set forth above have been communicated to the Petitioner via a copy of this Certification of Review, deposited in the U.S. Mail to Emily Strizich, 225 N. Adams, Moscow, Idaho 83843.

Sincerely,

LAWRENCE G. WASDEN
Attorney General

Analysis by:

M. Scott Keim
Deputy Attorney General

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ATTORNEY GENERAL'S SELECTED ADVISORY LETTERS FOR THE YEAR 2017

LAWRENCE G. WASDEN

ATTORNEY GENERAL
STATE OF IDAHO

January 18, 2017

The Honorable Lynn Luker
Idaho State Representative
Statehouse
VIA HAND DELIVERY

Re: Our File No. 17-56588 - Tobacco Enforcement Measures

Dear Representative Luker:

This letter is in response to your recent inquiry regarding the use of minors in tobacco enforcement measures. Set forth below is the statutory structure and rules with regard to enforcement of tobacco sales to minors.

> 39-5710. CONDUCT OF ENFORCEMENT ACTIONS. (1) It is the intent of the legislature that law enforcement agencies, the attorney general, and the department shall enforce this chapter and rules promulgated pursuant thereto in a manner that can reasonably be expected to significantly reduce the extent to which tobacco products and electronic cigarettes are sold or distributed to minors.
>
> (2) Law enforcement agencies may conduct random, unannounced inspections at locations where tobacco products or electronic cigarettes are sold or distributed to ensure compliance with this chapter. A copy of all citations issued under this chapter shall be submitted to the department.
>
> (3) The department shall conduct at least one (1) random, unannounced inspection per year at all locations where tobacco products are sold or distributed at retail to ensure compliance with this chapter. The department shall conduct inspections for minor exempt permittees without the assistance of a minor. The department shall conduct inspections for all other permittees with the assistance of a minor. Each

> year the department shall conduct random unannounced inspections equal to the number of permittees multiplied by the violation percentage rate reported for the previous year multiplied by a factor of ten (10). Local law enforcement agencies are encouraged to contract with the department to perform these required inspections.
>
> *(4) Minors may assist with random, unannounced inspections with the written consent of a parent or legal guardian. When assisting with these inspections, minors shall not provide false identification, nor make any false statement regarding their age.*
>
> (5) Citizens may file a written complaint of noncompliance of this chapter with the department, or with a law enforcement agency. Permit holders under 26 U.S.C. section 5712, may file written complaints relating to delivery sales to the department or the attorney general's offices. Complaints shall be investigated and the proper enforcement actions taken.
>
> (6) Within a reasonable time, not later than two (2) business days after an inspection has occurred, a representative of the business inspected shall be informed in writing of the results of the inspection.
>
> (7) The attorney general or his designee, or any person who holds a permit under 26 U.S.C. section 5712, may bring an action in district court in Idaho to prevent or restrain violations of this chapter by any person or by any person controlling such person.

Idaho Code § 39-5710 (emphasis added).

The rules with regard to tobacco enforcement are here: https://adminrules.idaho.gov/rules/current/16/0725.pdf.

DHW has a contract with Benchmark to the permitting and inspections/enforcement.

I am aware that there is a hearing coming up with regard to a recent enforcement action. This is the first complaint that I am aware of regarding the system. A virtually identical system is used for the

enforcement of alcohol sales to minors. Any confusion with regard to the system is clarified with a single question when selling alcohol or tobacco: "May I see your ID?"

If you would like to discuss this issue or a specific situation more fully, please contact me.

Sincerely,

BRIAN KANE
Assistant Chief Deputy

January 23, 2017

The Honorable John Gannon
Idaho State Representative
Statehouse
VIA HAND DELIVERY

Re: Our File No. 17-56623 - Responsibility of County-Wide Highway Districts to Remove Snow from Streets and Sidewalks in Cities

Representative Gannon:

You asked whether a county-wide highway district is responsible to remove snow from streets and sidewalks in cities. The short answer is yes, single county highway districts are required to remove snow from streets and sidewalks in a city; provided those streets and sidewalks are within the district's highway system. A highway district is not responsible to remove snow from private streets and other streets or roads (and related sidewalks) that are not in the highway district's system.

1. An Overview of Highways and Public Rights of Way

There are four distinct types of public highway systems in Idaho; the state highway system, county highway systems, city highway systems and highway systems of highway districts. Idaho Code § 40-201. Highway district commissioners are required to prepare a map showing the general location of each highway and public right of way under their jurisdiction.

A public right of way for these purposes is any land dedicated and open to the public and under the jurisdiction of a public highway agency, although the public highway agency is not required to construct and maintain a travelled way for vehicular traffic in the right of way. Idaho Code § 50-1301. A highway agency may choose to construct a highway in a public right of way. A highway may be defined as "[t]he entire width between boundary lines of every way publicly maintained when any part is open to the use of the public for vehicular travel, with

jurisdiction extending to the adjacent property line, including sidewalks, shoulders, berms and rights-of-way not intended for motorized traffic." Idaho Code § 49-109(5). Generally, the right of way of a highway is fifty (50) feet wide, but may be less depending on individual circumstances. Idaho Code § 40-605.

2. Snow Removal Is Among the Responsibilities of Single County-Wide Highway Districts

Idaho Code § 40-1415 requires single county-wide highway districts to maintain city right-of-ways within city limits. The phrase "right-of-way" includes "accompanying curbs, gutters, culverts, sidewalks, paved medians, bulkheads and retaining walls." The statute then enumerates several maintenance duties of these types of highway districts including traffic and safety engineering, highway lighting, operation and maintenance of traffic control devices, and drainage necessary for right-of-maintenance. The statute, codified in 1985, does not specifically enumerate snow removal as a maintenance item.

At one time, the general definition of "maintenance" also did not enumerate snow removal as a duty. Formerly, Idaho Code § 40-114 defined "maintenance" for transportation purposes to mean "to preserve from failure or decline, or repair, refurbish, repaint, or otherwise keep an existing highway or structure in a suitable state for use." In 2013, the Legislature amended the definition of "maintenance" to include "without limitation, snow removal, sweeping, litter control, weed abatement and placement or repair of public safety signage." Idaho Code § 40-114(3)(my emphasis). The Legislature intended that the amendment (and the other provisions of the act of which it was a part) "shall apply to any and all existing and future highways and public rights-of-way." 2013 Idaho Sess. Laws 559.

A fundamental rule of statutory interpretation is to construe a statute to give force and effect to the legislature's intent. State v. Hagerman Water Right Owners, Inc., 130 Idaho 727, 947 P.2d 400 (1997). Further, in construing two statutes related to the same subject matter, the statutes should be construed harmoniously, if possible, to further the legislature's intent. In reading Idaho Code § 40-1415 together with Idaho Code § 40-114(3), a single county-wide highway

district is required to remove snow from streets and sidewalks in a city, as a part of its maintenance responsibilities.

However, it is important to note a county-wide highway district is not required to maintain all streets, side-walks and other city right-of-ways. Idaho Code § 67-2350 provides that, "No county, city or highway district shall be responsible for the removal of snow on roads in the county, city or highway district over which they have no jurisdiction." For instance, a public agency would not be responsible for the maintenance of private roads and accompanying sidewalks. A "private road" is a road not dedicated to the public and not part of a public highway system. Idaho Code § 50-1301(9). Nor would a highway district be responsible to remove snow from facilities under the jurisdiction of another public agency.

I hope this analysis is helpful.

Sincerely,

BRIAN KANE
Assistant Chief Deputy

January 26, 2017

The Honorable Caroline Nilsson Troy
Idaho State Representative
Statehouse
VIA HAND DELIVERY

Re: Our File No. 17-56679 - Campaign Contributions and Citizenship

Dear Representative Troy:

This letter is in response to your recent inquiry regarding campaign contributions and citizenship. You asked three specific questions, which are set forth and answered in turn below. At the outset, it is important to note that these prohibitions exist within federal law and are not replicated at the state level. This means that violations would have to be reported to and prosecuted by the Federal Government—most like the Federal Election Commission.

1. Can a non-U.S. citizen contribute to Idaho candidates or political committees, or make independent expenditures or electioneering communications in Idaho?

The Federal Election Campaign Act (FECA) prohibits any foreign national from contributing, donating or spending funds in connection with any federal, state or local election in the United States, either directly or indirectly. It is also unlawful to help foreign nationals violate that ban or to solicit, receive or accept contributions or donations from them.

There is an exception for an immigrant in possession of a "green card" reflecting lawful admittance as a permanent resident in the United States.

2. Can a foreign-owned corporation, or any other type of foreign-owned business entity, contribute to Idaho candidates or political committees, or make independent

expenditures or electioneering communications in Idaho?

The following groups and individuals are considered "foreign nationals" and are, therefore, subject to the prohibition:

- Foreign governments;
- Foreign political parties;
- Foreign corporations;
- Foreign associations
- Foreign partnerships;
- Individuals with foreign citizenship; and
- Immigrants who do not have a "green card."

3. Can the U.S.-based subsidiary of a foreign-owned corporation, or any other type of foreign-owned business entity, make contributions to Idaho candidates or political committees, or make independent expenditures or electioneering communications in Idaho?

A U.S. subsidiary of a foreign corporation or a U.S. corporation that is owned by foreign nationals may be subject to the prohibition. A domestic subsidiary of a foreign corporation (or a domestic corporation owned by foreign nationals) may not donate funds or anything of value in connection with state or local elections if:

1. These activities are financed by the foreign parent or owner; or

2. Individual foreign nationals are involved in any way in the making of donations to nonfederal candidates and committees.

I hope that you find this information helpful.

Sincerely,

BRIAN KANE
Assistant Chief Deputy

February 1, 2017

Dan Blocksom
Boise County Prosecuting Attorney
P. O. Box 186
Idaho City, ID 83631
VIA E-MAIL & REGULAR MAIL: DBlocksom@co.boise.id.us

Re: Our File No. 17-56719 - Conflicts of Interest

Dear Mr. Blocksom:

This letter is in response to your recent inquiry regarding conflicts of interest. Specifically you asked for a "second opinion" with regard to your legal analysis. This office, along with the Attorney General's Public Corruption Unit reviewed your analysis, and agrees with it in its entirety. Your analysis highlights the careful consideration that should precede the acceptance of an appointment to the County Commission by a County employee's family member. The best advice that this office can offer is that the County should follow your advice.

I hope that you find this letter helpful.

Sincerely,

BRIAN KANE
Assistant Chief Deputy

February 1, 2017

Senator Steve Vick
Idaho Statehouse
Sent via email to sjvick@senate.idaho.gov

Re: Our File No. 17-56762 - Land Board Authority to Purchase Private Lands

Dear Senator Vick:

Your recent inquiry regarding the authority of the State Board of Land Commissioners ("Land Board") has been forwarded to me for response. You specifically asked: "Does Article IX Section 8 of the Idaho Constitution give the Land Board the authority to purchase land from private ownership? If so please explain. If not where do they get that authority?"

The authority of the Land Board to sell, hold and acquire endowment lands is found in the Idaho Admissions Act, the Idaho Constitution, and general trust principles. At statehood, the federal government endowed the State of Idaho with lands to be used for the support of several state institutions, with the public schools being the most notable beneficiary. See generally, Idaho Admission Bill, 26 Stat. L. 215, ch. 656, §§ 4-12. Section 12 of the Admission Bill provides, in part, that "the lands granted by this section shall be held, appropriated and disposed of exclusively for the purpose herein mentioned, in such manner as the legislature of the state may provide." Id. at § 12.

Under the Idaho Constitution, the Land Board has "the direction, control and disposition of the public lands of the state, under such regulations as may be prescribed by law." Idaho Const. art. IX, § 7. Sec. 8 of art. IX addresses the Land Board's authority regarding endowment lands in particular and provides, in pertinent part, that:

> It shall be the duty of the state board of land commissioners to provide for the location, protection, sale or rental of all the lands heretofore, or which may hereafter be granted to or acquired by the state by or from the

> general government, under such regulations as may be prescribed by law, and in such manner as will secure the maximum long term financial return to the institution to which granted or to the state if not specifically granted; . . . The legislature shall, at the earliest practicable period, provide by law that the general grants of land made by congress to the state shall be judiciously located and carefully preserved and held in trust, subject to disposal at public auction for the use and benefit of the respective object for which said grants of land were made. . . .

Idaho Const. art. IX, § 8 (emphasis added). The underscored language, in particular, provides that endowment lands are held in a trust, for the benefit of the respective endowments. In the words of the Idaho Supreme Court, "[t]he State's endowment lands are part of a sacred trust reserved for the benefit of Idaho's public schools and public institutions. The [Land] Board, which manages those endowment lands, is the epitomic public trustee." Wasden v. State Bd. of Land Comm'rs, 153 Idaho 190, 195, 280 P.3d 693, 698 (2012).

Art. IX, sec. 8 does not require specific types of investments, nor does it prohibit the Land Board from making investments such as purchasing private property with endowment funds. As the trustee of endowment lands, the Land Board must follow general trust principles, and therefore act as a prudent fiduciary with undivided loyalty to the endowment trusts. See Barber Lumber Co. v. Gifford, 25 Idaho 654, 669, 139 P. 557, 562 (1914) (quoting Pike v. State Bd. of Land Comm'rs, 19 Idaho 268, 286, 113 P. 447, 453 (1911) and holding that the Land Board members "are, as it were, the trustees or business managers for the state in handling these lands, and on matters of policy, expediency and the business interest of the state, they are the sole and exclusive judges so long as they do not run counter to the provisions of the constitution or statute."

In addition, art. IX, sec. 8 sets forth the Land Board's duty "to provide for the location, protection, sale or rental of all the lands heretofore, or which may hereafter be granted to or acquired by the state . . . ." The use of the phrase "acquired by" suggests the state's authority to purchase or otherwise obtain lands without limitation on ownership of the lands being acquired. Further, Idaho Code § 58-133

provides that the Land Board "may select and purchase, lease, receive by donation, hold in trust, or in any many acquire for and in the name of the state of Idaho such tracts or leaseholds of land as it shall deem proper, . . .".

In order to fulfill its fiduciary obligations, the Land Board has the duty to invest endowment funds in a manner that will maximize the long-term financial return to the respective endowment beneficiaries. Depending on the circumstances, the maximum long-term financial return may be achieved by the purchase of privately-held land on a willing-seller, willing-buyer basis.

Sincerely,

ANGELA SCHAER KAUFMANN
Deputy Attorney General
Department of Lands

February 7, 2017

The Honorable Bert Brackett
Idaho State Senator
Statehouse
VIA HAND DELIVERY

Re: Our File No. 17-56801 - Idaho Boards and Commissions

Dear Senator Brackett:

The statutes governing many Idaho Boards and Commissions limit the number of members of the Board or Commission who can belong to the same political party.[1] The question presented is what happens when a member of such a body switches political affiliation to exceed the maximum number of members of the body who can be on the Board or Commission from one political party. There is no Idaho statute or case law addressing this question and in particular no case law establishing that such actions create a vacancy on the Board or Commission.

Idaho case law establishes that members of state Boards or Commissions can change or abandon their political party affiliation from time to time. In Troutner v. Kempthorne, 142 Idaho 389, 393, 128 P.3d 926, 930 (2006), the Court held that Randy Smith, then an Idaho State District Judge (and now a Ninth Circuit Federal Judge), who was a former chairman of the Idaho State Republican Party, was not necessarily still a member of the Republican Party when he assumed the bench and became a member of Judicial Council:

> A person would not be from a political party merely because the person had formerly been a member of that party. Just as people have the right to organize into a political party, they also have the right to change or end their party affiliation or to refuse [to] join a political party at all. Idaho Code § 1-2101(1) does not require that Council members be assigned to one of the existing political parties based upon a searching inquiry into their philosophical or political beliefs. The issue is simply

> whether the person is currently a member of a political party and, if so, which one.

142 Idaho at 392, n.2, 128 P.3d at 930, n.2.

Thus, when a member of a Board or Commission changes party affiliation so that the Board or Commission has a supermajority of one party that exceeds the statutory maximum, the question is: Does that create a vacancy? The answer appears to be no. There is no Idaho statute that generally declares a statutory office vacant simply because the office holder no longer meets one of the statutory requirements for the office. On the contrary, the circumstances under which an office becomes vacant by operation of law (as opposed to death or resignation) are few and far between.[2] Moreover, if for the sake of argument, an appointee to one of these Boards or Commissions becomes ineligible to continue to serve and serves for a fixed term, Idaho Code § 67-303 provides for the member's continued service until the member's successor takes office:

> **§ 67-303. Holding office after expiration of term. —** Every officer elected or appointed for a fixed term shall hold office until his successor is elected or appointed and qualified, unless the statute under which he is elected or appointed expressly declares the contrary. This section shall not be construed in any way to prevent the removal or suspension of such officer, during or after his term, in cases provided by law.

See also Idaho Code § 67-2601A(6) (members of building and construction-related boards serve until a successor is duly appointed and qualified); § 67-2602(2) (same for members of occupational and professional boards that contract for services with the Bureau of Occupational Licensing); § 67-6203 (same for commissioners of the Idaho Housing and Finance Association); § 67-6405 (same for Commissioners of the Idaho State Building Authority); § 67-8302 (same for Commissioners of the Idaho Food Quality Assurance Institute); § 67-8905 (same for Directors of the Idaho Energy Resources Authority).

Thus, when a member of one of the Boards or Commissions

listed in footnote one changes political parties and that change results in a super-majority for one party in violation of that Board or Commission's governing statute, the change in political affiliation does not in and of itself create a vacancy on the Board or Commission. The remedy for violation of the statute would appear to initially be political: asking the member of the Board or Commission to resign to allow the Governor to appoint an eligible replacement. Failing that, it is possible that the courts would maintain a challenge to the member's continued service, that law is not settled.

In Troutner, the Court refused to consider a challenge to the political composition of the Judicial Council at the time of appointment of a new member on the grounds that determination of the political affiliation of the new appointee was given to the Senate by virtue of separation of powers. This decision was three to two, and two members of the majority were justices pro tem (retired Justices of the Idaho Supreme Court.) *See* Part III.B of the majority, 142 Idaho at 393-94, 128 P.3d at 930-31. A majority of the members of the Idaho Supreme Court who decided the case were of the opinion that the District Court had authority to determine the political affiliation of the members of Judicial Council to determine whether the Council was constituted as provided by statute. 142 Idaho at 394-96, 128 P.3d at 931-33 (Justice Jones, dissenting).

There has been one important change in the law since Troutner was decided: The introduction of party registration of electors. *See* Idaho Code § 34-404(2). Thus, declared party affiliation is now a matter of public record and could easily be determined by a court. Thus, it is reasonably likely that a court might entertain a challenge to the continued service of a member of a Board or Commission who changes political affiliation and thus creates a super-majority for a party that is contrary to statute. But, until a court rules that the member's continued presence on the Board or Commission is contrary to statute and orders the member's removal from the Board or Commission, there would be no vacancy.

I hope you find this letter helpful.

Sincerely,

BRIAN KANE
Assistant Chief Deputy

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[1] A quick (but not necessarily comprehensive) computer search of the Idaho Code shows that statute limits the number of members who can be from the same political party in at least 21 bodies:

- Aeronautics Advisory Board, Idaho Code § 21-135 (not more than three of five members)
- Bingo-Raffle Advisory Board, Idaho Code § 67-7704 (not more than three of six members)
- Board of Correction, Idaho Code § 20-201A (not more than two of three members)
- Board of Environmental Quality, Idaho Code § 39-107 (not more than four of seven members)
- Board of Health and Welfare, Idaho Code § 56-1005 (not more than four of seven gubernatorially appointed members)
- Board of Tax Appeals, Idaho Code § 63-3802 (not more than two of three members)
- Commission for Blind and Visually Impaired, Idaho Code § 67-5403 (not more than three of five members)
- Commission of Pardons and Parole, Idaho Code § 20-210 (not more than four of seven members)
- Commission on Aging, Idaho Code § 67-5001 (not more than four of seven members)
- Economic Advisory Council, Idaho Code § 67-4704 (not more than five of eight members)
- Fish and Game Commission, Idaho Code § 36-102 (not more than four of seven members)
- Health Facilities Authority, Idaho Code § 39-1444 (not more than four of seven members)
- Industrial Commission, Idaho Code § 72-501 (not more than two of three members)
- Judicial Council, Idaho Code § 1-2101 (not more than three of six appointed members)
- Lottery Commission, Idaho Code § 67-7405 (not more than three of five members)
- Park and Recreation Board, Idaho Code § 67-4221 (not more than three

of six members)

- Personnel Commission, Idaho Code § 67-5307 (not more than three of five appointed members)
- Public Utilities Commission, Idaho Code 61-201 (not more than two of three members)
- Tax Commission, Idaho Const. art. VII, § 12, and Idaho Code § 63-101 (not more than two of four members)
- Transportation Board, Idaho Code 40-302 (not more than four of seven members)
- Water Resource Board, Idaho Code 42-1732 (not more than four of eight members)

[2] For example:

Some statutes provide that a vacancy may exist for reasons in addition to death and resignation and frequently put the determination of whether there is a vacancy in the hands of the Governor:

Idaho Code § 21-136 provides for the Aeronautics Advisory Board that "Should any member . . . resign, die, remove from the district from which he was appointed, or otherwise be removed from office, a vacancy shall exist," but does not declare a vacancy based a super-majority of one political party.

Idaho Code § 54-907 provides that there is a vacancy on the Board of Dentistry whenever "the regular term of a member expires or . . . a member dies, resigns or is removed from office by the governor."

Idaho Code § 54-1503 is similar for a vacancy on the State Board of Optometry: "when the regular term of a member expires or . . . a member dies, resigns or is removed from office by the governor."

Idaho Code § 54-3801 is broader for State Board of Cemeterians: "In case of a vacancy occurring . . . by reason of the death of any member, or his resignation, incapacity, neglect or refusal to act, or in any other way . . . ."

Idaho Code § 67-1054 allows the Governor to declare a vacancy in the office of State Treasurer when the Treasurer defaults.

At least one statute declares a vacancy for failure to comply with any statutory qualification:

Idaho Code § 25-2902 provides that there is a vacancy when a member of the Idaho Beef Council does not continue to meet the qualifications for the Council: "The qualifications of each member shall remain in effect during his entire term of office or his office shall be declared vacant by the governor."

Idaho Code § 59-901 is specific how vacancies occur in elective office:

§ 59-901. How vacancies occur. — (1) Every elective civil office shall be vacant upon the happening of any of the following events at any time before the expiration of the term of such office, as follows:

(a) The resignation of the incumbent.

(b) The death of the incumbent.

(c) Removal of the incumbent from office by lawful procedure.
(d) The decision of a competent tribunal declaring an elective office vacant due to apparent abandonment or prolonged incapacity or absence, or other basis as determined by the tribunal, provided such apparent abandonment, prolonged incapacity, absence or other basis is in excess of ninety (90) days.
(e) The incumbent ceasing to be a resident of the state, district or county in which the duties of his office are to be exercised, or for which he may have been elected.
(f) A failure to elect someone at the proper election, there being no incumbent to continue in office until a successor is elected and qualified, nor other lawful provisions for filling an elective office.
(g) A forfeiture of elective office as provided by any law of the state.
(h) Conviction of an incumbent officeholder of any felony, or of any public offense involving the violation of his oath of office.
(i) The acceptance of a commission to any military office, either in the militia of this state, or in the service of the United States, which requires the incumbent in the civil office to exercise his military duties out of the state for a period of not less than sixty (60) days.

The general statute on vacancies does not address how an office becomes vacant:

In contrast, Idaho Code § 59-904 contains extensive provisions for filling vacant State offices, but other than expiration of a statutory term of office, it provides no guidance on other reasons why an office becomes vacant.

February 8, 2017

The Honorable Paul Amador
Idaho State Representative
Statehouse
VIA HAND DELIVERY

Re: Our File No. 17-56805 - Idaho State Board of Education and State Department of Education

Dear Representative Amador:

You have asked our office several questions related to the make-up, structure, and operation of Idaho's State Board of Education and State Department of Education.

Relevant Information and Referenced Idaho Constitution and Statutes:

Article IX of the Idaho Constitution grants the general supervision of all public schools to the Idaho State Board of Education (the Board). Idaho Code section 33-101 provides that the Board is an executive department of the state government. Idaho Code section 33-102 provides that the state superintendent of public instruction serves as the executive secretary of the board. Idaho Code section 33-102A provides that the Board is authorized to appoint an executive officer, who may be the executive secretary, and who shall serve at the pleasure of the Board and have such duties and powers as prescribed by the Board. Idaho Code section 33-107 provides that the Board has general supervision through its executive departments of all public education supported by state funds. Section 33-107 also allows the Board to delegate to its executive secretary, executive officer, or other such administrators the necessary power to carry out and administer the policies, orders and directives of the Board.

Idaho Code section 33-125 provides for the establishment of the State Department of Education (Department) as an executive agency of the Board. Section 33-125 provides that the state superintendent shall serve as the executive officer of the Department and shall carry

out the policies, procedures and duties established by the Board. Idaho Code section 33-126 provides that the Department shall be organized in a manner determined by the Board on recommendations of the executive secretary.

Questions:

Seeing as the State Department of Education is an executive agency of the Board of Education (I.C. § 33-125) and the Board of Education is permitted to appoint an executive officer (or the executive secretary) of said executive agency to serve at the pleasure of the Board of Education (I.C. § 33-102A) for the general supervision of all public education (I.C. § 33-107);

- Does the State Superintendent of Public Education, as the executive secretary, serve at the pleasure of the State Board of Education to carry out and administer the policies, orders and directives of the Board for all public education in Idaho?

No. The Superintendent is a publically elected Constitutional Officer pursuant to art. IX, sec. 1 of Idaho's Constitution. By statute, the Superintendent serves on the Board as the Executive Secretary (I.C. § 33-102) and the Executive Secretary of the Board may serve as the Executive Officer of the Board of Education (I.C. § 33-102A); however, solely in the capacity as the Executive Secretary of the Board of Education, the Superintendent does not serve in that position at the pleasure of the Board. If the Executive Secretary were appointed as the Executive Officer of the State Board, then the Superintendent, solely in the capacity of the Executive Officer, would serve at the pleasure of the State Board.

Idaho Code section 33-107(4)(d) permits the Board to delegate "to its executive secretary, the superintendent of public instruction, if necessary to enhance the effectiveness and efficiency, such powers as he requires to perform duties and render decisions prescribed to the state board involving the exercise of judgment and discretion that affect the public schools in Idaho." That delegation of authority may be taken away (or reclaimed by the Board); however, by delegating authority to a constitutional officer, the Board does not retain the ability to dictate or

control how the superintendent of public instruction exercises judgment and discretion while performing duties and rendering decisions prescribed by the State Board.

- As noted in Idaho Code section 33-102A can the State Board of Education appoint an executive officer other than the executive secretary to administer all policies, orders and directives of the board related to public education in Idaho?

The State Board can appoint an Executive Officer other than the Executive Secretary (Superintendent) and the State Board currently has appointed an Executive Officer charged with administering various policies, orders and directives of the State Board, but not all policies, orders and directives of the State Board related to public education in Idaho. However, under the terms of Idaho Code section 33-102A, the Executive Officer "under the direction of the state board, ha[s] such duties and powers as prescribed by the said board of regents and the state board of education, not otherwise assigned by law." The Executive Officer of the Board of Education has not been assigned the same duties and functions as the Executive Secretary (Superintendent). In other words, the Executive Secretary (Superintendent) may serve as the Executive Director of the State Board, but the Executive Director's appointment does not reassign all Executive Secretary (Superintendent) functions to the Executive Director.

I hope you find this information helpful.

Sincerely,

BRIAN KANE
Assistant Chief Deputy

February 17, 2017

The Honorable Ilana Rubel
Idaho House of Representatives
Via Hand Delivery

Re: Our File No. 17-56850 - Constitutional Acreage Limitations

Dear Representative Rubel:

Your recent inquiry regarding the acreage limitations found in art. IX, secs. 8 and 10 of the Idaho Constitution has been forwarded to me for response. In order to respond to your questions it is first necessary to provide an historical overview of art. IX, sec. 8 and its amendments. A response to your questions follows the overview.[1]

A. Historical and Legal Background.

At statehood, the United States granted the State of Idaho lands to be held in trust for specified beneficiaries. *See* Idaho Admission Bill, 26 Stat. L. 215, ch. 656. Section 4 of the Admission Bill granted "Sections numbered 16 and 36 in every township of said state. . . . for the support of common schools . . . ." The United States also made grants of land for the benefit of public buildings (§ 6); university (§ 8); an agricultural college (§ 10); and a scientific school, normal schools, state hospitals, "the state university, located at Moscow," penitentiary and "other state, charitable, education, penal and reformatory institutions . . . ." (all § 11).

The Idaho Constitution addresses the disposition of granted lands in two sections. Art. IX, sec. 8 establishes limits on the disposition of the granted lands other than University lands. As originally written, art. IX, sec. 8 provided limitations on the disposition of school lands. Sec. 8, in pertinent part, read as follows:

> The legislature shall at the earliest practicable period, provide by law that the general grants of land made by Congress to the state, shall be judiciously located and

> carefully preserved and held in trust, subject to disposal at public auction for the use and benefit for the respective objects for which said grants of land were made, and the legislature shall provide for the sale of said lands from time to time and for the sale of timber on all state lands and for the faithful application of the proceeds thereof in accordance with the terms of said grants; ***provided, that not to exceed twenty-five sections of school lands shall be sold in any one (1) year, and to be sold in subdivisions of not to exceed one hundred and sixty (160) acres to any one individual, company or corporation.***

(Emphasis added.)

In 1915, the Idaho Legislature passed legislation to amend art. IX, sec. 8. The amendment, which was ratified in the 1916 general election and took effect on December 1, 1916, increased the section and acreage limitation:

> [T]he legislature shall, at the earliest practicable period, provide by law that the general grants of land made by Congress to the State shall be judiciously located and carefully preserved and held in trust, subject to disposal at public auction for the use and benefit of the respective objects for which said grants of lands were made, and the Legislature shall provide for the sale of said lands from time to time and for the sale of timber on all State lands and for the faithful application of the proceeds thereof in accordance with the terms of said grants: *Provided*, That ***not to exceed One Hundred (100) sections of school lands shall be sold in any one year, and to be sold in subdivisions of not to exceed Three Hundred and Twenty (320) acres of land*** to any one individual, company or corporation.

1917 Idaho Sess. Laws 328-29 (italics in original; brackets and bold italic emphasis added).[2]

In 1982, art. IX, sec. 8 was amended to read as it does now. While other parts of sec. 8 were also amended, for purposes of your question, the significant change was as follows: "provided, that not to exceed one hundred sections of ~~school~~ state lands shall be sold in any one year, and to be sold in subdivisions of not to exceed three hundred and twenty acres of land to any one individual, company or corporation." 1982 Idaho Sess. Laws 936 (strikeout and underscore in original).

Art. IX, sec 10 of the Idaho Constitution provides that "[n]o university lands shall be sold for less than ten dollars per acre, and in subdivisions not to exceed one hundred and sixty acres, to any one person, company or corporation." These limitations have been in place since statehood.

The acreage limitations in secs. 8 and 10 of art. IX must be considered together in addressing your questions regarding their meaning.

B. The Current Acreage Limitations in Article IX, Sections 8 and 10 are Lifetime Limitations.

The acreage limitation in art. IX, sec. 8 is ambiguous because it is not clear from the text whether the drafters intended the limitation to be annual or lifetime. As originally adopted, art. IX, sec. 8 provided in pertinent part "that not to exceed twenty five sections school lands may be sold ***in any one year***, and to be sold in subdivisions of not to exceed one hundred and sixty acres of land to any one individual, company or corporation." Idaho Const. art. IX, § 8 (emphasis added); *see also Proceedings and Debates of the Constitutional Convention of Idaho* (1889) ("*Proceedings*") p. 840. While the section limitation is qualified by the phrase "in any one year," the same is not true of the acreage limitation, which tends to indicate that the acreage limitation is something other than an annual restriction.

The Idaho Supreme Court has held that "generally, the statutory rules of construction apply to the interpretation of constitutional provisions." State ex rel. Kempthorne v. Blaine County, 139 Idaho 348, 350, 79 P.3d 707, 709 (2003); *see also* Wasden v. State Bd. of Land Comm'rs, 153 Idaho 190, 196, 280 P.3d 693, 699 (2012). A court will

first look at the plain language of a statute or constitutional provision, and if it is unambiguous, that language will control. Pioneer Irr. Dist. v. City of Caldwell, 153 Idaho 593, 597, 288 P.3d 810, 814 (2012). A statute is ambiguous if there is more than one reasonable interpretation. In that case, a court will ascertain legislative intent by reviewing the statute's context and legislative history. *Id.* If an ambiguous constitutional provision was adopted during the Idaho Constitutional Convention, a court may examine the *Proceedings* to determine the drafter's intent.

A review of the *Proceedings* shows that the drafters were concerned about striking the balance between encouraging settlers and discouraging land barons. The comments of Mr. Ainslie capture the essence of the acreage limitation debate:

> My amendment . . . provides that only twenty sections shall be sold in one year, and sold in subdivisions of not to exceed 160 acres to any one individual or corporation. People seek homesteads in this country. One hundred and sixty acres of land is a very fair farm for a person to make a living on. If you open the door, as the gentleman from Latah opens the door, you help the monied syndicates in putting around your lands a fence to keep population and settlement out. I am in favor of reserving all these lands and selling them under a restriction like the one contained in my amendment, and sell them to persons who will become permanent residents of our territory. . . .

Proceedings, p. 840. In an effort to encourage settlement while at the same time discouraging speculation or "land baron" activities, convention members approved the acreage limitation for sale of school lands.

Convention members expressed similar concerns about university lands, which are specifically addressed in art. IX, sec. 10 of the Idaho Constitution. As he did during the debate for art. IX, sec. 8, Mr. Ainslie wanted to prevent one person or entity from impeding settlement by purchasing large tracts of university land:

> The proposition coming from the gentleman from Latah fixes the price at ten dollars, but does not limit the quantity of land to be sold to any one person or corporation. Now large land grants always retard the development of any country. . . . My object is to . . . engraft a system of land laws in this territory that will result in the rapid development of Idaho and increase of its population, but if you place no limitation on the amount of public land to be sold, that any one individual can purchase, we may sell these lands off in large tracts and retard the settlement of the country, and I believe it is to the interest of the territory and of the new state that that we should say that no more than 160 acres of these public lands should be sold to any one individual or any company or corporation, and with that object in view, the sole object I have, I offered that amendment limiting the amount that any one person shall take.

Proceedings, p. 854.

Mr. Ainslie's concerns about settlement were the same for school lands and university lands. Given that art. IX, sec. 10 contains the same acreage limitation as sec. 8, without the phrase "in any one year," the logical conclusion is that the acreage limitation was intended to be lifetime, not annual. It appears that the convention members' concern about encouraging settlement and growth was addressed by the acreage limitation language in secs. 8 and 10.

The debate on the section limitation further supports the conclusion that the "in any one year" qualifier applies only to the section limitation. Mr. McConnell argued for rejection of the annual section limitation, and his remarks illustrate that the drafters distinguished between the annual section limitation and the acreage limitation:

> I would be willing to have engrafted in [his own amendment] the provision made by the honorable gentleman from Boise, Mr. Ainslie, that the sale of these lands should be limited to 160 acres to any one purchaser. I heartily agree with him in that, and in regard to incorporating it in my amendment. But I don't see the

> necessity of restricting the sale of these lands to twenty sections. . . . I cheerfully accept that amendment, so far as providing that no purchaser shall be entitled to the title of more than 160 acres. But I do not believe in limiting this board to the sale of only twenty sections in any one year, for I doubt whether it will be able to sell much more than that.

Proceedings, p. 841 (Mr. McConnell) (bracketed material added).

This interpretation is supported by the Idaho Supreme Court's decision in Pike v. State Bd. of Land Comm'rs, 19 Idaho 268, 113 P. 447 (1911). The court noted that the debate over selling school lands quickly versus holding them in perpetuity was resolved via a compromise "whereby sales were limited to twenty-five sections each year and to subdivisions of not exceeding 160 acres to any one individual, company, or corporation." *Id.* at 278, 113 P. at 450. The Pike court then engaged in a comparison of sec. 8 and 10, and held:

> . . . [W]hile [the framers] intended to limit the number of acres of university lands that might be sold to any one person, company or corporation, they did not desire to limit the number of acres that might be sold in any one year, and so they left out the limitation as to the amount of land that might be sold in any one year, in writing section 10, but repeated the limitation as to the number of acres that might be sold to any one person.

Id. at 282, 113 P. at 452.

In summary, if presented with the question, a court would most likely find that the acreage limitations in art. IX, secs. 8 and 10 of the Idaho Constitution are lifetime limitations, although that limitation is qualified, as discussed in more detail below.

C. Prior to November 3, 1982, the Acreage Limitation in Section 8 Applied Only to Public School Lands But Now Applies to Granted Lands Other than University Lands).

This section includes an analysis of two of your questions: (1) whether the 320 acre limitation in art. IX, sec. 8 of the Idaho Constitution applies to all granted lands; and (2) why the other types of educational endowment beneficiaries are not encompassed within the term "school lands" as used in art. IX, sec. 8.

Originally, the acreage limitation applied only to "school lands," a phrase that the Idaho Supreme Court interpreted in Pike. In that case, the Land Board proposed to sell approximately 23,938.18 acres of endowment land, which included scientific schools, state penitentiary, normal school, charitable institution, agricultural college and state hospital lands. A citizen sought to prevent the sale, arguing that it would violate art. IX, sec. 8's twenty-five section annual limitation because "school lands" included all educational institutions. The Court disagreed, noting that at the time of the constitutional convention,[3] the only grants of "school lands" that had been made by the United States were the university lands (addressed in art. IX, sec. 10) and Sections 16 and 36 in every township and range.[4] With that in mind, the Court reviewed the *Proceedings* and the entirety of art. IX, and concluded that "[i]t would therefore follow that by the words 'school lands' as here employed by the framers of the constitution, they meant sections 16 and 36 which had previously been granted to the territory for the use of the common schools." Pike, 19 Idaho at 282,113 P. at 452.

Thus, the Pike decision established that the lifetime limits in secs. 8 and 10 only applied to the acquisition of public school and University lands and had no application to the acquisition of other granted lands. In 1982, however, art. IX, sec. 8 was amended to delete the reference to "school lands," which had the effect of expanding the 320 acre limitation in sec. 8 to encompass all granted lands other than University lands.

There are caveats to the acreage limitation in art. IX, secs. 8 and 10. First, secs. 8 and 10 provide that the pertinent lands may "be sold in subdivisions of not to exceed [320 and 160, respectively] acres ***to any one individual, company or corporation***." (Emphasis added). Those sections do not necessarily prevent an individual, company or corporation from ***ultimately*** holding more than 320 acres of state land. In some cases, an individual might receive a land sale certificate from the state, and assign that certificate to another prior to the time that he

or she completes paying for the land and receives a deed. The Idaho Supreme Court has held that:

> The sale contemplated by Const. art. 9, § 8, takes place when the original purchaser enters into a contract of purchase with the state, and that original sale cannot call for more than the acreage limited by the Constitution. The constitutional provision does not prohibit the original purchaser from selling and assigning his interest, even though it be to one who has already purchased other school lands equaling or exceeding that acreage.

Webster-Soule Farm v. Woodmansee's Adm'r, 36 Idaho 520, 522, 211 P. 1090, 1091 (1922). However, "if the original purchase were made by the nominal purchaser not on his own behalf, but in the interest of another person, there being an agreement between them to evade the constitutional limitation, then such a transaction would be invalid." *Id.* at 524, 211 P. at 1091.

Second, as a matter of statutory interpretation, the phrase "individual, company or corporation" is written in the disjunctive, and "[t]he use of 'or' indicates [] alternatives, distinct from one another." State v. Hillbroom, 158 Idaho 789, 792, 352 P.3d 999, 1002 (2015). *See also* Idaho Power Co. v. Idaho Dep't of Water Resources, 151 Idaho 266, 273, 255 P.3d 1152, 1159 (2011) (construing a statute providing that " '[t]he director shall also have the authority to limit a permit or license for power purposes to a specific term'" and holding that "[t]he Legislature's use of the disjunctive 'or' specifically gives the Department the authority to include a term condition at the licensing stage, not just at the permitting stage. . . ."). If faced with the question, a court could find that an individual acting in his or her individual capacity, a company that he or she owns, and a corporation in which he or she is a shareholder could each own 320 acres.

D. The Land Board has Ultimate Responsibility for Ensuring that the Acreage Limitations are Not Exceeded.

The Idaho Legislature has authority under art. IX, sec. 8 to prescribe regulations for the sale or disposition of public lands, subject to the limitation that such regulations cannot interfere with the Land

Board's constitutional duty to "secure the maximum long term financial return to the institution to which granted or to the state if not specifically granted; . . .". Wasden, 153 Idaho at 195, 280 P.3d at 698 (2012). Under the Idaho Admission Act and the Idaho Constitution, the various "endowment lands are part of a sacred trust reserved for the benefit of Idaho's public schools and public institutions. The Board, which manages those endowment lands, is the epitomic public trustee." *Id.* at 195, 280 P.3d at 698 (2012). As the trustee, it is ultimately the Land Board's obligation to see that sales and dispositions of public lands are consistent with the Idaho Constitution.

Sincerely,

ANGELA SCHAER KAUFMANN
Deputy Attorney General
Natural Resources Division/
Department of Lands

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[1] For brevity's sake, throughout this correspondence, I have used the phrase "section limitation" to refer to prohibition on selling more than 100 (originally 25) acres of land in any one year. The phrase "acreage limitation" refers to the prohibition on selling more than 320 (originally 160) acres of school land (art. IX, § 8) or 160 acres of university land (art. IX, § 10) to any individual, corporation or company.

[2] In 1935, the Legislature passed another amendment (ratified on November 3, 1936) to provide that "[t]he legislature shall have power to authorize the state board of land commissioners to exchange granted lands of the state for other lands under agreement with the United States." 1937 Idaho Sess. Laws 497. In 1941 (ratified in 1942), sec. 8 was again amended to decrease the minimum price for school lands to five dollars ($5) per acre, and to clarify the 1936 amendment. 1943 Idaho Sess. Laws 377. The minimum price per acre for school lands was raised back to ten dollars ($10) per acre in an amendment effective in 1952.

[3] The Idaho Constitutional Convention was held in 1889, and the Idaho Admission Bill (which contained the various grants of endowment lands described above in Section A) was subsequently enacted.

[4] As noted above, Sections 16 and 36 were granted to the state "for the support of common schools." Idaho Admission Bill, 26 Stat. L. 215, ch. 656, § 4. Those lands are referred to as "public school lands."

March 10, 2017

Honorable Bert Brackett
Idaho State Senate
P. O. Box 83720
Boise, Idaho 83720-0081
Delivered by E-Mail

Re: Our File No. 17-57044 - Idaho Transportation Department (ITD) and Compass

Senator Brackett:

The Code of Federal Regulations you forwarded, which are attached, fairly represent the relationship between the State and Compass. I would stress that the federal regulations state the entities will cooperate with one another.

However, if a project (either an ITD project or one proposed by Compass) affects air quality, then Compass must determine the air quality affect and must approve the project per federal regulation.

What I have seen in the past is that Compass puts together a regional Transportation Investment Plan (TIP). The Idaho Transportation Board then includes the Regional TIP in the State's Idaho TIP (ITIP). If there is any question about projects, ITD and Compass then discuss and "cooperate" with one another in settling their final TIPs respectively.

Once the Compass TIP and Idaho TIP are approved by the respective entities, the TIPs are submitted to the Federal Highway Administration who approves a final State Transportation Investment Plan (STIP) which is referenced in the attached.

I hope this analysis is helpful.

Sincerely,

LAWRENCE G. ALLEN
Deputy Attorney General
Idaho Transportation Department

March 21, 2017

The Honorable Bert Brackett
Idaho State Senate
P. O. Box 83720
Boise, Idaho 83720-0081
VIA EMAIL: bbrackett@senate.idaho.gov

Re: Our File No. 17-57182 - Origination of Legislation Involving Bonds

Senator Brackett:

You asked whether legislation that proposes the issuance of bonds for state infrastructure must originate in the Idaho House of Representatives. While there is not an Idaho case on point, it appears that legislation authorizing bonds to pay for a specific program could originate in either chamber of the Legislature.

Art. III, sec. 14 of the Idaho Constitution states, "Bills may originate in either house, but may be amended or rejected in the other, except that bills for raising revenue shall originate in the house of representatives." (My underline). This provision often is called the Origination Clause.

The Idaho Supreme Court has had few occasions to interpret this provision. The Court held that legislation which levied a tax to pay for the relocation of a school was required to originate in the House of Representatives. Dumas v. Bryan, 35 Idaho 557, 207 P. 720 (1922). The tax was levied against all taxable property in the state.

However, legislation, which required employers to pay compensation into the state treasury for accident victims with no dependents, was held not be a "revenue raising" measure as contemplated by the Idaho Constitution. State ex rel. Parsons v. Workmen's Compensation Exchange, 59 Idaho 256, 81 P.2d 1101 (1938). In Parsons, the Court reasoned that required payment of "compensation" was not a tax, and therefore did not violate the origination requirement of the Idaho Constitution.

The federal constitution contains a similar Origination Clause: "All Bills for raising Revenue shall originate in the house of representatives; but the senate may propose or concur with amendments as on other bills." U.S. Const. art. I, § 7, cl. 1.

It is well settled that the federal Origination Clause is confined to bills that levy taxes. U.S. v. Norton, 91 U.S. 566, — S. Ct. —, 23 L. Ed. 454 (1875). The Origination Clause does not extend to other bills that incidentally create revenue to fund specific programs rather than levy a tax for the general purposes of government. *Id.* In particular, the United States Supreme Court found that an act of Congress which provided a national currency secured by United States bonds was not a "revenue raising" measure in terms of the Origination Clause. Twin City Nat. Bank of New Brighton v. Nebecker, 167 U.S. 196, 17 S. Ct. 766, 42 L. Ed. 134 (1897). Congress imposed a limited tax on certain banking associations to defray the costs associated with the bonds; however, the Court found the special tax was merely incidental to the act. The main objective of the act was to give the people a secure national currency based upon bonds honored by the United States.

Given the Idaho and federal cases referenced above, legislation that proposes bonding specifically for Idaho infrastructure would not be "raising revenue" as contemplated in the Origination Clause of the Idaho Constitution. Such legislation could originate in either chamber of the Idaho Legislature.

I hope that you find this brief analysis helpful.

Sincerely,

BRIAN KANE
Assistant Chief Deputy

March 22, 2017

The Honorable Brent Hill
President Pro Tempore
Idaho State Senate
Capitol Mail

Dear Senator Hill:

You inquired whether Senate Bill 1195 (S.B. 1195) would violate the Idaho Constitution's requirement that "bills for raising revenue shall originate in the house of representatives" because it did not originate in the house. As explained in more detail below, S.B. 1195 funds are collected from employers solely for the payment of unemployment benefits, and not likely revenues raised for general governmental purposes as contemplated by art. III, sec. 14 of the Idaho Constitution. Based upon this distinction, it appears that introduction of S.B. 1195 can be reasonably defended, but this issue may be avoided in its entirety by introduction of the same legislation in the House.

SHORT ANSWER

Idaho case law regarding this issue is somewhat ambiguous and leads to no direct answer. However, we offer the following answers to your question:

1. There is a fairly strong argument that the provision at issue in S.B. 1195 is not a revenue raising provision that would fall under the origination clause restrictions. The Idaho Supreme Court has stated that "[t]he intent and purpose of both the State and National governments in enacting the Unemployment Compensation statute was not to raise money for revenue purposes, but to raise money to do away with unemployment, such tax going into a special fund for that sole purpose . . . ." In re Gem State Academy Bakery, 70 Idaho 531, 542, 224 P.2d 529, 535 (1950) (citations omitted).

2. However, the conservative approach that would remove any risk of an origination clause challenge would be to have this bill originate in the House.

LEGAL BACKGROUND

Art. III, sec. 14 of the Idaho Constitution says:

> **Origin and amendment of bills.** — Bills may originate in either house, but may be amended or rejected in the other, except that bills for raising revenue shall originate in the house of representatives.

This constitutional provision is commonly known as the "origination" provision. Similar provisions are found in the United States Constitution and the constitutions of many states.

There are many cases under the federal constitution and other states origination clauses that are informative to the issue of what bills are for "raising revenue" and must, therefore, originate in the House. At the federal level, a general rule on the subject was laid down in U.S. v. Mayo, 1 Gall. 396, 26 F. Cas. 1230 (1813), when Circuit Justice Story wrote:

> The true meaning of 'revenue laws' in this clause is, such laws as are made for the direct and avowed purpose for creating and securing revenue or public funds for the service of the government. No laws, whose collateral and indirect operation might possibly conduce to the public or fiscal wealth, are within the scope of the provision.

Id. at 1231. Justice Story later authored a treatise on the Constitution where he expanded on his statements in that case. Joseph Story, *Commentaries on the Constitution of the United States*, § 880, 5th Ed. (1891).

Later the Circuit Judge in another federal case, U.S. ex. rel. Michels v. James, 13 Blatchf. 207, 26 F. Cas. 577 (1875), further clarified Justice Story's general rule, saying:

> Certain legislative measures are unmistakably bills for raising revenue. These impose taxes upon the people,

> either directly or indirectly, or lay duties, imposts or excises, for the use of the government, and give to the persons from whom the money is exacted no equivalent in return, unless in the enjoyment, in common with the rest of the citizens of the benefit of good government. It is this feature which characterizes bills for raising revenue. They draw money from the citizen; they give no direct equivalent in return.

Id. at 578.

Several state courts have relied on and cited this federal authority when deciding cases under their own origination clauses. *See, i.e.:* State v. Driscoll, 54 P.2d 571 (Mont. 1936); Northern Counties Investment Trust v. Sears, 41 P. 931 (Or. 1895); and H.A. Thierman Co. v. Commonwealth, 97 S.W. 366 (Ky. App. 1906).

There are only four cases reported in Idaho under the state's origination clause, the most important of which, Dumas v. Bryan, 35 Idaho 557, 207 P. 720 (1922), is mostly responsible for the ambiguity in Idaho law that makes any conclusive answer of the question presented difficult. In that case, the Court found that a Senate bill concerning all of the details required to move the state's normal school from Albion to Burley violated the origination clause because it included a provision enacting a statewide property tax to fund the move. The Dumas Court also held that bills containing a provision for collecting taxes resulting in a reduction of taxes are still bills for raising revenue. The Dumas Court cites Perry County v. Railroad Co., 58 Ala. 546 (1877), an Alabama case, as authority for that determination.[1]

S.B. 1195 is a modification of a statute in title 72, chapter 13, Idaho Code concerning the funding of compensation for unemployed workers. In Gem State Academy Bakery, 70 Idaho at 542, 224 P.2d at 535, the Idaho Supreme Court determined that:

> The intent and purpose of both the State and National governments in enacting the Unemployment Compensation statute was *not to raise money for revenue purposes*, but to raise money to do away with

> unemployment, such tax going into a special fund for that sole purpose . . . .

(Citations omitted and emphasis added). While the Gem State Academy Bakery Court ruled on the application of an exemption from the requirement of employer contribution to the unemployment security fund, its determination may be informative of the character of the contributions in an origination clause question.

DISCUSSION

S.B. 1195 is a bill that decreases a multiplier used to calculate the amount employers must contribute into the employment security fund, the fund from which benefits are paid to unemployed workers. The ultimate result of this adjustment is anticipated to be a reduction of the amount employers must contribute.

In order to determine whether S.B. 1195 must originate in the House, it must be determined if S.B. 1195 "raises revenue" in such a manner that it falls within the Origination Clause. Although the end result of S.B. 1195 is a reduction in amounts paid by employers, that fact is immaterial because the Dumas court already indicated that a reduction of tax can still constitute revenue raising for origination clause purposes when it quoted the Alabama case mentioned hereinabove.

However, there is a strong argument that S.B. 1195 does not "raise revenue" as contemplated by the origination clause at all. The employer contributions, which are calculated using the multiplication factor that S.B. 1195 changes in Idaho Code § 72-1350, go directly to the employment security fund and are used exclusively for unemployment payments made from that fund. Unlike the revenue contemplated by the general rule, or even the incidental revenue that the general rule excepts from the origination clause requirement, none of the money collected from employers under Idaho Code § 72-1350 is ever available for general governmental purposes. That contribution is used exclusively for payments of unemployment benefits, so legislation modifying that code section may not constitute a revenue raising provision, because the state never realizes any money from its collection.

Recognizing that origination of S.B. 1195 in the Senate can be defended, the argument can be avoided altogether by introducing a bill containing the substance of S.B. 1195 in the House.

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

Sincerely,

GEORGE R. BROWN
Deputy Attorney General
Idaho Tax Commission

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[1] For a more detailed discussion of the origination clause analysis in the Dumas case, *see* 1999 Idaho Att'y Gen. Ann. Rpt. 113 and Idaho Att'y Gen. Ann. Rpt. 5.

March 23, 2017

The Honorable Janet Trujillo
Idaho House of Representatives
Statehouse Mail

Dear Representative Trujillo:

Your request to Brian Kane for comment on property tax exemptions was given to me for analysis and response. You ask whether a property is exempt from paying property taxes if built, owned or leased by a subcontractor.

Based on conversations we have had over the course of this legislative session, I assume that your question refers to property that is either owned or used by a state entity. I will perform my analysis based on that assumption.

Art. VII, sec. 4 of the Constitution of the State of Idaho says:

> **Public property exempt from taxation.** — The property of the United States, except when taxation thereof is authorized by the United States, the state, counties, towns, cities, villages, school districts, and other municipal corporations and public libraries shall be exempt from taxation; provided, however, that unimproved real property owned or held by the department of fish and game may be subject to a fee in lieu of taxes if the fees are authorized by statute but not to exceed the property tax for the property at the time of acquisition by the department of fish and game, unless the tax for that class of property shall have been increased.

Idaho Code § 63-602A provides for the same exemption and also specifically excludes unimproved land held by the Department of Fish and Game, which may be subject to a fee in lieu of taxes. This exemption has never been directly challenged in Idaho courts.

The Idaho Supreme Court did have occasion to visit art. VII, sec. 4 in State v. Minidoka Cty., 50 Idaho 419, 298 P. 366 (1931) when hearing a case questioning the attachment of prior liens on a property that was taken by the state in a foreclosure. In that case, the Court analyzed similar constitutional provisions from other states and said:

> [U]nder a constitutional provision such as ours, such property is exempt from any charge of taxes either present or past. This upon the ground that the property itself is exempt, not merely that its owner, being sovereign, is beyond process.

Id. at 426, 298 P. at 369.

The plain wording of both art. VII, sec. 4 and Idaho Code § 63-602A exempts state *owned* property whether it is used for state purposes or is leased to private entities for non-governmental uses. However, property leased by the state is not exempt, even when used exclusively for governmental purposes, because there is no exemption for the state's *use* of a property.

This ownership exemption is different from some other statutory tax exemptions that have a use provision. For instance, Idaho Code § 63-602E exempts, among other property, "all property *used* exclusively for nonprofit school or educational purposes" but has no ownership requirement. (Emphasis added). Under section 63-602E, leased property of a nonprofit school is also exempt, so long as it is used for school purposes. Some exemptions have both ownership and use requirements. Idaho Code § 63-602C, commonly known as the "charitable" exemption, exempts "property belonging to any fraternal, benevolent, or charitable limited liability company, corporation or society . . . used exclusively for the purposes for which [such body] is organized. . . ." So, property must be *owned and used* by the charitable organization to be exempt. These distinctions are important to ensure no confusion exists between exemptions of state property and other typically exempt property.

So, property that is owned by the state, regardless of use, is exempt from taxation. This includes property that the state leases to private entities for non-governmental purposes. It is not uncommon for

property owned by state entities, such as endowment trust lands, to be leased out for private purposes, but that land enjoys the state's exemption. Property the state leases from private owners, however, is subject to property tax unless it benefits from another property tax exemption. This includes property that is used solely for governmental purposes. This is also a common situation with, for instance, state agencies leasing office space owned by private entities. Those properties remain taxable.

Sometimes, the state may enter into contracts that, for various reasons, may include the funding, construction, and ownership of property to transfer between the state agencies and private entities during various phases of development. Absent other exemptions, county assessors look exclusively to ownership to determine whether the exemption provided by art. VII, sec. 4 and Idaho Code § 63-602A applies to the subject property. If the property is initially owned by a private entity, it will be added to property tax rolls as required by law. Should the property then transfer to state ownership, it becomes exempt at that time. The underlying agreements regarding development and financing of the property do not apply to the application of the governmental exemption, only the ownership.

I hope this letter answers the questions you have. If I misunderstood your question, or if you would like to discuss this matter further, please contact me at the number below.

Sincerely,

George R. Brown
Deputy Attorney General
Idaho Tax Commission

April 14, 2017

Jan P. Frew, Administrator
Department of Administration
Division of Public Works
STATEHOUSE MAIL

Re: Our File No. 17-57269 - Idaho State Government Agencies Leasing Facilities From Non-Profit Foundations

Dear Jan:

This letter responds to your letter of March 27, 2017 inquiring whether Idaho state government agencies may lease facilities from non-profit foundations. The legal analysis contained herein responds to this inquiry specifically in the context of a Request for Proposal (RFP) process for the lease of a new regional office building for the Idaho Department of Fish and Game (IDFG). It concerns RFP criteria as they relate to potential proposals by the Idaho Fish and Wildlife Foundation (Foundation).

BACKGROUND

This office understands that IDFG worked with Linda Miller, the Leasing Program Manager for DPW, to develop the process used to secure a new regional office building. Research indicates that this involved a two-phase process, consistent with legislative appropriations and related financing: (1) securing vacant land for a building site in a highly competitive real estate market location with desired accessibility and other operational suitability, and (2) constructing an appropriate building. Based on Ms. Miller's recommendations, IDFG proceeded with a public, transparent request for proposals process for evaluation of land parcels on which an administrative facility could be constructed, with a clause that permitted IDFG to assign the lease or purchase of the land parcel to the Foundation. IDFG evaluated the responses to the RFP, selected the parcel, and the Foundation agreed to accept assignment of the purchase of the parcel. The Foundation is in the process of closing on the parcel. The next step in the process is to

request proposals from any interested and qualified party to construct the regional office facility on the parcel and to lease the facility to IDFG.

Management and Leasing of State Facilities

The inquiry is based on the authority of the Division of Public Works (DPW) and the Permanent Building Fund Advisory Council (PBFAC). DPW is generally charged with securing and allocating office space for state agencies. Idaho Code §§ 67-5706, 67-5708, 67-5708A and 67-5708B. PBFAC is charged with adopting standards for the allocations of space, and with reviewing and approving specifications for facilities that will be built with funds under the control of a non-state entity and owned or occupied by a state entity. Idaho Code §§ 67-5706 and 67-5710A.

The inquiry included correspondence from Deputy Attorney General Joanna Guilfoy to Larry Osgood, the Administrator of DPW, dated January 27, 2003. In the correspondence, Deputy Guilfoy states that there is nothing in law that would preclude IDFG from leasing space from a nonprofit foundation. Based on our review, this conclusion appears valid.

Idaho Code § 67-5708A provides the legal requirements for leasing of space from a private party by a state agency. The requirements are:

> No department, agency or institution may enter into or renew any lease of facilities after January 1, 1999, until a comprehensive analysis is performed by that department, agency or institution in accord with standards and criteria established by the director of the department of administration. The comprehensive analysis shall address, at a minimum, an evaluation of the need for facilities, space utilization, efficiency, long-term needs and objectives, and viable alternatives to meet the facility needs, including acquiring facilities with appropriated funds and leasing facilities through the state building authority. Departments, agencies, and institutions shall consult with the director when performing the comprehensive analysis and, with the

> director's assistance, shall select the alternative that best serves the long-term needs and objectives and that provides suitable facilities at the lowest responsible cost to the taxpayer measured over the time the facilities are expected to be needed, or forty (40) years, whichever is less. Departments, agencies and institutions shall include a summary of the comprehensive analysis annually in their budget requests to the governor and the legislature, and shall include in that summary, where appropriate, the time necessary to implement their selection.

Section 67-5708A mandates consideration only of the needs of the agency and the cost to the agency and ultimately to taxpayers. The legal entity status and profit to be made by the lessor are not factors within the statutorily required comprehensive analysis. No other law requires that these factors be considered.

Draft minutes detailing the discussion by the PBFAC at its March 7, 2017 meeting were also included with the inquiry. The discussion includes expressions of concern by council members and persons attending the meeting about whether it is advisable for state agencies to engage in this kind of transaction to lease needed facility space from non-profit entities, including foundations that solely or partially benefit public agencies, or rather seek direct legislative approval and appropriation to accomplish such. Such public policy matters are outside the scope of legal representation, and are not addressed in this response.

Public Purpose Doctrine

The materials included with the inquiry also reveal questions about the legality of procuring leased facility space in conjunction with a private entity such as the Foundation in this circumstance. The legal implications of activities involving both a private entity and a state agency have been previously addressed by this office in Attorney General Opinion No. 95-7. 1995 Idaho Att'y Gen. Ann. Rpt. 44. Where the activities meet a "public purpose test," those activities can be legally undertaken by the agency in conjunction with a private entity. To the extent that public funds or resources are expended on activity in

conjunction with a private entity, the activity must be directly related to the function of government and must not be primarily directed to promote a private purpose.

Some State of Idaho entities are closely associated with private nonprofit or charitable foundations whose sole purpose is to support the particular government entity. For example, Idaho's state universities and state colleges are associated with foundations whose sole purpose is to support the educational institution by soliciting financial support for the particular institution's use, which has included land acquisitions by the private foundations for the benefit of the institutions. *See, e.g.,* Idaho Code § 58-156. Other State of Idaho entities are closely associated with private nonprofit or charitable foundations whose purposes include, but are not limited to, support for a particular government entity, including the financing of property acquisition for the benefit of that entity. These include the Idaho Department of Fish and Game's association with the Idaho Fish and Wildlife Foundation and the Idaho State Bar's Association with the Idaho Law Foundation. A property acquisition or lease transaction between a state government entity and an associated nonprofit or charitable foundation may be appropriate under Idaho law where the transaction meets the public purpose test and the "lowest responsible cost" directive in Idaho Code § 67-5708A.

Ethical Considerations

Your letter mentions "ethical" concerns with the ownership of the parcel by the Foundation or with the Foundation's role in constructing and leasing the facility. The minutes of the PBFAC meeting provided with the letter also indicate some confusion as to the leadership of the Idaho Fish and Wildlife Foundation. This office reviews ethical concerns when they involve a potential violation of the laws relating to transparent and ethical government and bribery and corruption. *See* Idaho Code §§ 18-1351 to 18-1362 (Bribery and Corrupt Influences Act); title 74, chapters 1-5, Idaho Code (Transparent and Ethical Government). These laws do not appear to be implicated by the proposed transaction with the Foundation.

The Foundation is an independent legal entity; IDFG employees, including IDFG's director, and members of the Idaho Fish

and Game Commission are not voting members of the Foundation Board of Directors. IDFG's director and one designated member of the Fish and Game Commission are identified as *ex officio* members of the Board without any voting authority. We have no information that ethical matters addressed by the laws identified above, such as prohibited family or business relationships, compensation, or threats are involved in this transaction.

CONCLUSION

The process for securing facilities for IDFG's regional office are governed by Idaho Code section 67-5708A. The analysis under this provision is guided by the needs of the agency and the lowest cost to the taxpayers. Public policy concerns about the profit to be made by private entities or the competitive marketplace are not factors included by the legislature in the analysis of a public agency leasing transaction. In the absence of legally prohibited influence, the association between a private entity and a government agency is limited by the public purpose test. To the extent that public funds or resources are expended in conjunction with a private entity, the primary objective must be related to a function of government. The information provided indicates that the acquisition of the property and construction of a building is for the purpose of a regional office for IDFG to conduct its government business.

This information is provided to assist you. Please feel free to contact this office if you have any questions.

Sincerely,

PATRICK J. GRACE
Deputy Attorney General
Contracts and Administrative Law Division

June 21, 2017

Representative Matt Erpelding
Idaho House of Representatives
Idaho State Capitol
Boise, ID 83720
VIA EMAIL: merpelding@house.idaho.gov

Re: Our File No. 17-58054 - Inquiry Regarding Fireworks Regulation

Dear Representative Erpelding:

I am the Chief of the Criminal Law Division of the Office of the Attorney General. Your inquiry regarding fireworks in Idaho was forwarded to my office. For purposes of this response, I have aggregated your six questions by subject matter into three questions.

QUESTIONS PRESENTED

I. If a fireworks dealer requires a purchaser to sign an affidavit in which the purchaser agrees not to sell or use fireworks illegally[1], is such a practice consistent with the language and intent of the Idaho Fireworks Act, and specifically with Idaho Code 39-2603(2)?

II. When can fireworks, other than non-aerial or common fireworks, be sold and used in Idaho? Who can purchase fireworks, other than "safe and sane" fireworks, in Idaho?

III. Under Public Law 280, can the Idaho legislature regulate fireworks sales on tribal land?

BRIEF ANSWERS

I. The Idaho Fireworks Act neither requires nor prohibits that a seller obtain an affidavit from a purchaser in which the purchaser pledges not to sell or use fireworks illegally. While such a practice is not inconsistent with the intent of the Idaho Fireworks Act, including

Idaho Code 39-2603(2), it is purely voluntary. Whether a seller requires such an affidavit or a purchaser chooses to sign or go elsewhere to purchase fireworks it is a wholly private matter.

II. Special fireworks, that is, fireworks that are not "safe and sane" or nonaerial common fireworks, can be sold throughout the year. However, they may only be sold to a person with a permit to use them at a public display or event to take place on a date certain, and they must be sold only within a reasonable time period before such a display or event.

III. The Idaho Legislature cannot regulate fireworks on tribal land. In order for such regulation to take place, the Idaho Legislature would have to assume jurisdiction over fireworks regulation on tribal land, with the consent of the affected tribes.

ANALYSIS

I. The Practice of Requiring a Fireworks Purchaser to Sign an Affidavit Pledging that the Buyer Will Not Use Fireworks Illegally

The sale and use of fireworks in Idaho are governed by the Idaho Fireworks Act (the "Act"), Chapter 26 of Title 39 of the Idaho Code. A brief review of the Act's key provisions will assist in placing this issue in context.

The Act deals with two types of legal fireworks. "Nonaerial common fireworks" are designed to remain on or near the ground, not to travel outside a 15-foot circle, or emit burning material outside a 20–foot circle or above a height of 20 feet. Idaho Code § 39-2602(6). In contrast, "Special fireworks" are designed primarily for display and because of their more dangerous nature, are classified by the United States bureau of explosives and the United Nations. Idaho Code § 39-2602(8).

Idaho Code § 39-2603(2) provides that wholesalers may sell fireworks only:

> (a)(i) To a person with a valid sales tax seller's permit issued pursuant to section 63-3620, Idaho Code; and

> (ii) During period beginning sixty (60) days prior to a date on which the retail sale or use of nonaerial common fireworks is authorized under this chapter; or
> (b) To a person with a valid permit issued pursuant to section 39-2605, Idaho Code, within a reasonable time period before the display or event.

Subsection (2)(a) deals with the sale of nonaerial common fireworks to retailers, while subsection (2)(b) deals with the sale of special fireworks for use in a public display or event. Nonaerial common fireworks may only be sold twice during a year, from midnight June 23 to midnight July 5, and from midnight December 26 to midnight January 1. Idaho Code § 39-2606(1). Wholesalers may only sell to retailers for a period of 60 days prior to these two periods. Idaho Code § 39-2603(2)(a)(ii). Fireworks sold for a public display or event may be sold throughout the year, but must be sold "within a reasonable time period" before the display or event at which they will be used. Idaho Code §§ 39-2606(2) and 39-2603(2)(a) and (b).

In order to sell fireworks legally, wholesalers must obtain a license from the Idaho State Fire Marshall and retailers must obtain a permit from the local permitting authority, and both must provide a bond or certificate of liability for a minimum amount of $100,000. Idaho Code §§ 39-2603 and 39-2604. Persons using special fireworks in a public display or event must obtain a permit and, among other requirements, provide a bond or certificate of liability in an amount of $1,000,000. Idaho Code § 39-2605. The Act contains additional restrictions and penalties, including possible infractions, misdemeanors, and a civil injunctive remedy. Idaho Code §§ 39-2609 and 39-2613.

These provisions indicate that the legislature was very concerned about the dangers posed by fireworks, and that it intended to limit their use generally and prohibit their use in a dangerous manner. While the Act does not require a fireworks seller to obtain an affidavit from a purchaser in which the purchaser promises not to sell or use fireworks illegally, such a practice would not be inconsistent with the intent of the Act, including § 39-2603(2). Ultimately, however, the purchase and sale of fireworks is a voluntary transaction in which a seller may ask a purchaser to sign an affidavit, and a purchaser is free to sign it or take his or her business elsewhere.

II. Restrictions on the Sale and Use of Special Fireworks that Are Not Non-Aerial Common Fireworks or "Safe and Sane" Fireworks"

For purposes of this discussion, I assume that "safe and sane" refers to nonaerial common fireworks as defined in Idaho Code § 39-2602(6), which may be sold at retail in Idaho. As discussed in the preceding section, a wholesaler may sell special fireworks only to a person holding a permit authorized under Idaho Code § 39-2605, which includes, at subsection (3), a requirement that the permit include the date of the display or event. A wholesaler may sell fireworks to a permittee only "within a reasonable time period" before that display or event. Idaho Code § 39-2603(2)(b).

III. Public Law 280 and Regulation of Fireworks on Tribal Land

The United States Congress has the power to define the nature of federal, state, and tribal civil and criminal jurisdiction within Indian country. State v. Mathews, 133 Idaho 300, 311, 986 P.2d 323, 334 (1999), *citing* California v. Cabazon Band of Mission Indians, 480 U.S. 202, 207, 107 S. Ct. 1083, 1087, 94 L.Ed.2d 244, 253 (1987). In 1953, Congress enacted Public Law 280, which permitted states to assume jurisdiction over Indian affairs by affirmative legislative action. *See* Pub. Law No. 280, § 7, 67 Stat. 588 (1953).[2]

In 1963, the Idaho legislature enacted Idaho Code §§ 67–5101 and 67-5102. By way of section 67–5101, the state assumed civil and criminal jurisdiction on tribal land over compulsory school attendance, juvenile delinquency and rehabilitation, child protection, mental illness, public assistance, domestic relations, and operation of motor vehicles upon state and county highways and roads. Idaho Code § 67-5102 provided that concurrent jurisdiction in state civil and criminal matters may be extend to Indian country with the consent the tribe occupying the affected area.

Idaho has not assumed exclusive or concurrent jurisdiction of matters involving fireworks on tribal lands. Absent an assumption of such jurisdiction, with the consent of the affected tribe, the Idaho Legislature cannot regulate fireworks sales on tribal land.

CONCLUSION

A fireworks purchaser is not required by law to sign an affidavit promising not to use fireworks illegally. A fireworks seller may impose such a requirement, and a purchaser is free to agree or take his or her business elsewhere. Such a practice is not inconsistent with the Act's purpose of promoting the safe, legal and limited use of fireworks in Idaho.

Special fireworks, that is, fireworks that are not nonaerial common fireworks or "safe and sane" fireworks, can only be sold to a person possessing a permit issued pursuant to Idaho Code § 39-2605 for a public display or event. Such fireworks can only be sold within a reasonable time period before the display or event.

The Idaho Legislature does not have authority to regulate fireworks on tribal land at this time. Such authority would have to involve an assumption of jurisdiction by Idaho and the consent of the affected tribes.

I hope this information is helpful. Please feel free to contact me if you have any questions. Thank you for these interesting questions.

Sincerely,

PAUL R. PANTHER
Chief, Criminal Law Division

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[1] In this letter, references to the illegal sale or use of fireworks include both the sale and use of illegal fireworks and the illegal sale and use of otherwise legal fireworks.

[2] Public Law 280 was repealed by the Civil Rights Act of 1968 and replaced with 25 U.S.C. §§ 1321–1326, under which the United States consented to assumption of jurisdiction over criminal and civil matters on tribal lands by a state, with tribal consent.

June 29, 2017

Andrakay Pluid
City Attorney's Office
City of Bonners Ferry
7232 Main Street
P. O. Box 149
Bonners Ferry, ID 83805

RE: Our File No. 17-57-900 - Inquiry Regarding Idaho Code § 18-3302J

Dear Ms. Pluid,

I am the Chief of the Criminal Law Division of the Idaho Attorney General's Office. Your letter of June 1, 2017 requesting an opinion on Idaho Code § 18-3302J as it relates to the personnel policies of cities was forwarded to me.

QUESTION PRESENTED

In light of the Idaho legislature's preemption of the field of firearms regulation in Idaho through Idaho Code § 18-0332J, can an Idaho city adopt a policy that prohibits its employees from carrying firearms on their person while they are working for the city?

BRIEF ANSWER

There is no case law interpreting Idaho Code § 18-3302J. Idaho courts have held that where a statute is clear and unambiguous, its plain language is governing. There is a potential ambiguity as to whether § 18-3302J applies to a city's personnel policies involving firearms. The limited legislative history indicates that the legislature did not intend to limit a city's ability to regulate the carrying of firearms by its employees while they are working, and several apparently unintended consequences could result in applying § 18-3302J in that manner. The relationship between a city and its employees may be viewed as contractual rather than legislative in nature, so that a policy

regulating city employees' carrying of firearms while at work does not appear to be within the field of regulation preempted by the legislature in enacting § 18-3302J.

While these factors argue in favor of a city's ability to regulate the carrying of firearms by its employees while at work, a court could find that § 18-3302J is unambiguous. Given its broad sweep, a reviewing court could find that it does encompass city personnel policies governing the carrying of firearms while working. Therefore, the adoption of a policy regulating the carrying of firearms in the workplace should be carefully considered in consultation with the city's legal counsel and risk manager.

ANALYSIS

A. Idaho Code § 18-3302J and Statutory Interpretation

Your inquiry centers on Idaho Code § 18-3302J(1) and (2), which provide that

> (1) The legislature finds that uniform laws regulating firearms are necessary to protect the individual citizen's right to bear arms guaranteed by amendment 2 of the United States Constitution and section 11, article I of the constitution of the state of Idaho. It is the legislature's intent to wholly occupy the field of firearms regulation within this state.
>
> (2) Except as expressly authorized by state statute, no county, city, agency, board or any other political subdivision of this state may adopt or enforce any law, rule, regulation, or ordinance which regulates in any manner the sale, acquisition, transfer, ownership, possession, transportation, carrying or storage of firearms or any element relating to firearms and components thereof, including ammunition.

In light of these provisions, a response to your inquiry requires a determination as to whether a city policy banning the carrying of firearms by city employees while they are at work is a "law, rule,

regulation or ordinance" which the city would be prohibited from adopting or enforcing under Idaho Code § 18-3302J(2).

Where, as here, there is no Idaho case law to assist in interpreting a statute, a reviewing court is guided by general principles of statutory construction and a common sense appraisal of what the legislature intended. Lawless v. Davis, 98 Idaho 175, 176, 560 P.2d 497, 498 (1977). Where the language of a statute is plain and unambiguous, a reviewing court must give effect to it as written. State v. Rhode, 133 Idaho 459, 462, 988 P.2d 685, 688 (1999). Where that language is not unambiguous, the intent of a statute may also be inferred on grounds of policy or reasonableness. Summers v. Dooley, 94 Idaho 87, 89, 481 P.2d 318, 320 (1971). Where a statute is ambiguous, an interpretation that causes a harsh or oppressive result should be avoided. Lawless, 98 Idaho at 177, 560 P.2d at 499. More recently, the Idaho Supreme Court has held the clear and unambiguous meaning of a statute must be given effect, even if it produces a result that appears to be absurd. Verska v. Saint Alphonsus Reg'l Med. Ctr., 151 Idaho 889, 895-96, 265 P.3d 502, 508-09 (2011). *See, also*, Hoffer v. Shappard, 160 Idaho 868, 883, 380 P.3rd 681, 696 (2016) ("it is the province of the Legislature to make and amend laws; and . . . this court is without authority to amend laws enacted by the Legislature because we think them unwise.").

The question at this point turns to whether there is sufficient ambiguity in Idaho Code § 18-3302J to resort to statutory interpretation. In Idaho Code § 18-3302J(1), the legislature declared its determination that uniform "laws" for the regulation of firearms are necessary to preserve the rights of Idahoans to keep and bear arms under the constitutions of the United States and Idaho. The term "laws" here encompasses the terms "law, rule, regulation or ordinance" used in Idaho Code § 18-3302J(2). A public employer's personnel policies are generally not thought of or treated as laws or as being legislative in nature. Thus, § 18-3302J(2) is arguably ambiguous as to its application to a city's personnel policies.

Assuming for the sake of this discussion that such an ambiguity exists, the statute's legislative history and related issues will be discussed in the next sections.

B. Legislative History of Idaho Code § 18-3302J

The legislative history of Idaho Code § 18-3302J(2) is not extensive, but a review of what can be gleaned indicates that there was some discussion of the impact of Idaho Code § 18-3302J when this statue was originally enacted with the passing of Senate Bill 1441 (S.B. 1441) in 2008. Hearings on that bill where held before the Senate State Affairs Committee and the House Judiciary and Rules Committee. At both hearings, Boise City Attorney Steve Rutherford raised concerns that S.B. 1441 could impact a city's ability to regulate its own employees. The remarks of the bill's sponsor, Senator Curt McKenzie and his discussions with Mr. Rutherford and Representative Lynn Luker indicate that he believed, and Rep. Luker eventually agreed, that employers had a right to regulate the carrying of firearms at work by their employees, that S.B. 1441 would not change this and that it was not necessary to amend S.B. 1441 to make this more clear. *See*, Senate State Affairs Committee Minutes, February 27, 2008, pp. 2-4; House Judiciary, Rules and Administration Committee Minutes, March 13, 2008, pp. 3-4 (copies enclosed). This supports a conclusion that the legislature did not intend to preempt a city's ability to regulate the carrying of firearms by city employees when it enacted § 18-3302J.

C. Idaho Code § 18-3302J, Reasonableness and Unintended Consequences

If Idaho Code § 18-3302J(2) is viewed as preempting the ability of a city or other public entity to regulate the possession and carrying of firearms by its employees while at work, a number of potential negative and even absurd consequences would result that the Idaho legislature likely did not intend.

First, Idaho Code § 18-3302J(2) prohibits regulation "in any manner" of the sale, acquisition, ownership, possession, transfer, transportation or storage of firearms or ammunition. If this restriction is applied to a public agency's personnel policies, it would mean that the agency could not prohibit its employees from, among other things, storing their personal firearms and ammunition in the workplace, buying and selling firearms or ammunition at work, or openly carrying firearms at work.

Second, all law enforcement agencies have policies governing the use of firearms by their employees, including what types of firearms and ammunition their officers may carry and use, how firearms and ammunition are stored, how a loaded weapon is safely unloaded, who is authorized to carry and use a firearm, and other matters of concern for the safety of officers and the public. If Idaho Code § 18-3302J were applied to public entities' personnel policies, these types of policies would be prohibited.[1]

Third, application of Idaho Code § 18-3302J(2) to the personnel policies of public entities would very obviously make both personnel and risk management much more problematic.

Finally, private employers have the unquestioned ability to prohibit their employees from carrying firearms while working. Prohibiting public entities from regulating the carrying of firearms while at work would make them an exception to an otherwise universal rule regarding how employers can regulate their own workplace.

These consequences are avoided if Idaho Code § 18-3302J is interpreted as not preventing a public agency such as a city from regulating the carrying of firearms by its employees while they are working.

D. The Nature of the Public Entity – Public Employment Relationship

Some guidance on this issue may be offered by a Utah Supreme Court case that explored the relationship of a public entity and its employees under similar circumstances. Univ. of Utah v. Shurtleff, 144 P.3d 1109 (Utah 2006) involved the University of Utah's adoption of a policy that prohibited students and employees from carrying firearms on campus and while on University business off campus. Litigation ensued between the University and the Utah Attorney General over whether this policy violated Utah firearms laws. While that litigation was pending, the Utah legislature enacted a preemption statute which provided in part that

> Unless specifically authorized by the Legislature by statute, a local authority or state entity may not enact,

> establish, or enforce any ordinance, regulation, rule, or policy pertaining to firearms that in any way inhibits or restricts the possession or use of firearms on either public or private property.

Id. at 1113. *See* Utah Code Ann. § 53-5a-102(5) (formerly § 63-98-102).

Utah's constitution also provided that the right of Utahans to keep and bear arms could not be infringed, but also that "nothing herein shall prevent the legislature from defining the lawful use of arms." *Id.* at 1115; *see* Utah Const., art. I, § 6. Another provision of the Utah Constitution, article X, section 4, provided that general control and supervision of the higher education system in Utah was to be provided for by statute. In this context, the Utah Supreme Court had to determine whether the University's policy was preempted by Utah state law, whether the policy violated article I, section 6 of the Utah Constitution and whether it conflicted with article X, section 4.

As part of its analysis, the Court observed that laws enacted by a legislative body apply to everyone within that body's jurisdiction, as do rules promulgated by an administrative body. Persons who violate such laws or rules are punishable because they fit within a general category of persons or activities regulated. In contrast, a university does not have geographic jurisdiction or authority to regulate an entire class of persons or activities. The University's policy here applied only to its students and employees, with whom it had a voluntary, contractual or quasi-contractual relationship. *Id.* at 1116. This relationship was not legislative in nature, and did not derive from the University's status as a governmental entity. Therefore, the University's policy did not violate article I, section 6, the "keep and bear arms" provision of the Utah Constitution. *Id.*, 1116-117.

The Utah Supreme Court did invalidate the University's policy on grounds that it violated article X, section 4 of the Utah Constitution, which gave the legislature authority to manage all aspects of the University. *Id.* at 1117-121. Nonetheless, its analysis of the public employer-employee relationship is helpful here. Idaho Code § 18-3302J seeks to preempt the field of Idaho firearms regulation to ensure the establishment of uniform "laws" to protect the individual citizen's

right to bear arms under the constitutions of the United States and Idaho. The Utah Supreme Court found that those rights are not infringed where a public entity's personnel policy places limitations on employees carrying firearms while at work.

CONCLUSION

There is no case law interpreting Idaho Code § 18-3302J. Where a statute is clear and unambiguous, its plain language is governing. There is a potential ambiguity as to whether a public entity's personnel policy falls within the category of "any law, rule, regulation or ordinance" as prohibited in Idaho Code § 18-3302J(2). A review of the slender legislative history available indicates that the Idaho Legislature did not intend § 18-3302J to preempt a city from adopting policies to govern the carrying of firearms by its employees while they are working. Interpreting § 18-3302J(2)'s prohibitions in such a manner would lead to a number of results that were undoubtedly unintended and are absurd. In addition, a public entity-employee relationship may be viewed as contractual or quasi-contractual in nature, rather than one in which the public entity "legislates" a personnel policy as a governmental body. Following this analysis, a city should be able to regulate the possession and carrying of firearms by its employees while they are at work.

However, we caution that a reviewing court is not bound to accept this analysis. Idaho Code § 18-3302J was enacted only in 2008 and, as noted earlier, has yet to be the subject of review by an appellate court. While this letter represents our best effort to address the issue about which you inquired, a court addressing this issue could disagree with some or all of the views expressed in this letter. Specifically, a court could find that § 18-3302J(2) is unambiguous and its inclusive language is broad enough to include even the personnel policies of a city, regardless of what unintended or even absurd consequences might ensue. Thus, you may wish to seek additional legal counsel before proceeding, and consultation with your risk manager would also be advised.

Thank you for posing a most interesting question. If you have any questions about this letter or wish to discuss this issue further, please feel free to contact me.

Sincerely,

PAUL R. PANTHER
Chief, Criminal Law Division

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[1] This issue was anticipated when § 18-3302J was enacted in 2008. At the Senate State Affairs Committee Hearing on S.B. 1441, a representative of the National Rifle Association, Brian Judy, testified in favor of S.B. 1441 and stated that it would not impact the ability of law enforcement agencies to regulate the firearms their officers use. *See* Senate State Affairs Committee Minutes, February 27, 2008, p. 2. While Mr. Judy was not a legislator, his remarks, with those of Sen. McKenzie, support the conclusion that § 18-3302J, was viewed as not limiting a public entity's power to regulate the carrying of firearms by its employees.

August 8, 2017

Debora Kristensen, Chair
Citizens Committee on Legislative Compensation
State Capitol, Room W144
Boise, ID 83720
VIA STATEHOUSE MAIL

Re: Our File No. 17-57727 - Authority of the Citizen's Committee on Legislative Compensation

Dear Ms. Kristensen:

This letter is in response to your recent inquiry of this office regarding the authority of the Citizen's Committee on Legislative Compensation. Specifically, you asked two questions:

(1) Does the committee have the ability to consider Representative Trujillo's request prior to its next regularly scheduled meeting in 2018?

(2) What enforcement authority does the Committee have with regard to the compensation system established by the Committee?

As explained in greater detail below, this office concludes:

(1) The Legislative Compensation Committee may meet as often as necessary, but any determinations made by the Committee are only binding within the constitutional timeline. There is no retroactive application of a Committee determination because the Committee is specifically prohibited from changing rates of compensation within the current term. Based on these limitations, it may be more appropriate to refer Representative Trujillo to leadership within the House.

(2) Once the Committee establishes the rates, the Legislature is the adopting and enforcement entity. Each Chamber administers and enforces the Committee's compensation determinations for its own members.

Neither the constitution nor the statutes limit the number of meetings the Committee may hold.

Art. III, sec. 23 of the Idaho Constitution establishes the Citizen's Committee on Legislature. The Committee is limited in what it can do by the following:

> The committee shall, on or before the last day of November of each even-numbered year, establish the rate of compensation and expenses for services to be rendered by members of the legislature during the two-year period commencing on the first day of December of such year. The compensation and expenses so established shall, on or before such date, be filed with the secretary of state and the state controller. The rates thus established shall be the rates applicable for the two-year period specified unless prior to the twenty-fifth legislative day of the next regular session, by concurrent resolution, the senate and house of representatives shall reject or reduce such rates of compensation and expenses. In the event of rejection, the rates prevailing at the time of the previous session, shall remain in effect.

In sum, the Committee can meet as often as it feels necessary, but must establish the rate of compensation by November 30 of even numbered years. This rate is not a recommendation—it is the rate unless the Legislature takes an affirmative action to reject the rate so established, at which point the previous rate established by the Committee takes effect.

Similarly, the statutes place no limitation on the number of times that the Committee may meet. There are two limitations placed by the constitution and statutes on the Committee:

(1) The rates of compensation and expenses must be established by November 30 of even number years; and

(2) No change in the rate of compensation shall be made which applies to the legislature then in office except as

provided herein. (The only permissible change is the legislative rejection or reduction of rates).

The Committee can meet to discuss the rates of compensation and expenses, but any action regarding those rates will be unenforceable until the 2019 Legislative Session at the earliest. With regard to Representative Trujillo's specific request, the Committee could meet and discuss, but as explained above is powerless to issue any sort of binding or enforceable guidance. As explained below, the appropriate review may be better conducted through the Chamber's leadership and/ or ethics committee. This office defers to each chamber's ability to govern itself under art. III, sec. 9 of the Idaho Constitution within matters such as these.

Once the Committee establishes the rates, it is up to the Legislature to determine whether to reject or reduce them and thereafter to enforce them.

As indicated above, the Committee establishes the rates of compensation by November 30 of even numbered years. Those rates once established fulfill the extent of the Committee's responsibility under the constitution and statutes. This means that each Chamber is responsible for implementing and enforcing the rates of compensation. To this end, it is this office's understanding that each chamber has forms and processes implementing the Committee's established compensation and expense reimbursement rates. One avenue of enforcement with regard to a member's claim for a reimbursement or allowance may be through that Chamber's ethics committee, but that is a matter for each Chamber to decide for itself.

I hope you find this analysis helpful.

Sincerely,

BRIAN KANE
Assistant Chief Deputy

November 14, 2017

Ron G. Crane, Treasurer
Idaho State Treasurer's Office
STATEHOUSE MAIL

Re: Our File No. 17-59405 - State Treasurer Investment Advisory Board

Dear Treasurer Crane:

You inquired as to the duties of the State Treasurer Investment Advisory Board (Board) under Idaho Code section 67-1203B. Specifically, you ask whether the tax anticipation note (TAN) investment policy falls within the Board's responsibilities. Although issuance of the TAN does not fall under the general advisory authority of the Board, investment policy related to the TAN does fall within that general advisory authority. Idaho Code § 67-1203B(2).

It is important to note that the current Plan of Financing for the 2017 TAN incorporates very specific criteria for investments made thereunder. These criteria are in the form of contractual provisions and are not, therefore, subject to renegotiation during the term of the agreement. In the event that the Board makes recommendations regarding future TAN investment policy, those recommendations could not be implemented until the next TAN contract term. In addition, in making any recommendations, the Board must be mindful of any relevant federal statutory provisions.

Should you have any questions or concerns regarding this analysis, please do not hesitate to call.

Sincerely,

S. KAY CHRISTENSEN
Division Chief
Contracts and Administrative Law Division

November 22, 2017

The Honorable Bert Brackett
Idaho State Senate
VIA EMAIL

Re: Our File No. 17-59235 - Watering of Livestock on Lands to which Stockmen Hold Grazing Leases

Dear Senator Brackett:

You have asked "whether stockmen are required to have either a permitted/licensed water right, or a decreed water right in order to use water on lands to which they hold grazing leases." The answer depends on how a stockman is watering his livestock, the source of the water and when the stockman commenced his appropriation. This response examines the different types of stock water diversions (instream versus diverted), the different sources of water (ground water vs. surface water) and also discusses the ability of water users to defer certain types of water right claims in a water right adjudication.

DISCUSSION

Water Rights in General

Art. XV, sec. 3 of the Idaho Constitution guarantees that the "right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied . . . ." Under what is known as the "constitutional method" of appropriation, a water user could establish a water right simply by diverting water and putting it to beneficial use. Fremont-Madison Irrigation Dist. & Mitigation Grp. v. Idaho Ground Water Appropriators, Inc., 129 Idaho 454, 456, 926 P.2d 1301, 1303 (1996). The Idaho courts have recognized that in-stream watering of stock is a beneficial use and does not require the construction of a diversion in order to perfect an instream water right. State v. U.S., 134 Idaho 106, 111, 996 P.2d 806, 811 (2000); R.T. Nahas Co. v. Hulet, 106 Idaho 37, 44, 674 P.2d 1036, 1043 (Ct. App. 1983). For many years, the "constitutional method" applied to both

surface water and groundwater users. Thus, historically a stockman wishing to have his or her stock drink from a lake, river or stream, divert a creek to a tank or pond, or drill a well for stock water purposes was not required to obtain a permit or other approval to establish a water right. While a water user could file an application seeking a water right with the Idaho Department of Water Resources during this period, the decision regarding whether to do so was left to the water user. Fremont-Madison Irrigation Dist., 129 Idaho at 456, 926 P.2d at 1303. Beginning in 1963, however, things changed. In that year, the Idaho Legislature required that ground water appropriations must be acquired by a permit/licensing process. Idaho Code § 42-229 (1963 Idaho Sess. Laws 623). An exception to the mandatory permit requirement exists for domestic wells (which can include the water of livestock). Idaho Code § 42-227. In 1971, the Idaho Legislature made a similar permit/licensing process mandatory for surface water. Idaho Code § 42-103 (1971 Idaho Sess. Laws 843). This means the date a stockman established his or her water right and the nature of that water right is very important.

Permits for the Watering of Livestock

As noted above, commencing in 1971, Idaho law required that any new surface water rights be established via the permitting process. As enacted in 1971, this requirement ostensibly applied to in-stream watering rights as well as out of stream watering rights. In 1984, however, the Idaho Legislature enacted Idaho Code § 42-113(1)[1] which exempts the in-stream watering of livestock from the mandatory water right permitting/licensing process. The phrase "'in-stream watering of livestock' means the drinking of water by livestock directly from a natural stream, without the use of any constructed physical diversion works." *Id.* Thus, a permit or license is not necessary for the in-stream watering of livestock on land to which a stockman holds a grazing lease.

Because of the gap in law between 1971 and 1984, an instream stock water right could not be established between 1971 and 1984 without complying with the permit process. However, the result is of little consequence since any instream use of the water after the 1984 enactment would give rise to a new valid water right.

In 2000, the Idaho Legislature further amended Idaho Code § 42-113 by adding a new subsection (3) which treats certain out-of-stream diversions of water for livestock as essentially in-stream diversions and exempts them from the permitting/licensing process. Under this provision, any person having an already established instream water right pursuant to Idaho Code § 42-113(1) may divert water for livestock to a trough or tank away from a stream or riparian area so long as certain statutory criteria are met.[2] Idaho Code § 42-113(3). This subsection was established "to promote the watering of livestock away from streams and riparian areas" in order to protect streams and riparian areas. *Id.* Thus, a permit or license is not necessary for the diversion of water to a trough or tank for livestock so long as the statutory criteria of Idaho Code § 42-113(3) are met.

Water Right Adjudication Requirements

In the Snake River Basin Adjudication ("SRBA"), the Coeur d'Alene-Spokane River Basin Adjudication ("CSRBA") and the Palouse River Basin Adjudication ("PRBA"), the court entered orders authorizing potential claimants to defer the adjudication of domestic and stock water rights that meet the definition of domestic or stock water use as those terms are used in each adjudication's respective deferral orders. In the SRBA, domestic use is defined as:

> (a) the use of water for homes, organization camps, public campgrounds, livestock and for any other purpose in connection therewith, including irrigation of up to one-half (1/2) acre of land, if the total use is not in excess of thirteen thousand (13,000) gallons per day, or (b) any other uses, if the total use does not exceed a diversion rate of four one-hundredths (0.04) cubic feet per second and a diversion volume of twenty-five hundred (2,500) gallons per day. Domestic uses shall not include water for multiple ownership subdivisions, mobile home parks, or commercial or business establishments, unless the use meets the diversion rate and volume limitations set forth in subsection (b) above.

Order Governing Procedures in the SRBA for Adjudication of Deferred De Minimis Domestic and Stock Water Claims, In Re SRBA Case No. 39576, at 2-3 (June 28, 2012) (emphasis added).[3]

In the SRBA, stock watering use is defined as: "[T]he use of water solely for livestock or wildlife where the total diversion is not in excess of thirteen thousand (13,000) gallons per day." *Id.* at 3.

In the CSRBA and the PRBA, domestic use is defined in relevant part as set forth in Idaho Code § 42-1401A(4) as amended. *See* 1997 Idaho Sess. Laws 1192.

> (a) The use of water for homes, organization camps, public campgrounds, livestock and for any other purpose in connection therewith, including irrigation of up to one-half (1/2) acre of land, if the total use is not in excess of thirteen thousand (13,000) gallons per day, or * * *

Order Establishing Procedures for the Adjudication of De Minimis Domestic and Stockwater Claims in the Coeur d'Alene-Spokane River Basin Adjudication, In Re: The General Adjudication of Rights to the Use of Water From the Coeur d'Alene-Spokane River Basin Water System, at 2 (Nov. 12, 2008); *Order Establishing Procedures for the Adjudication of De Minimis Domestic and Stockwater Claims in the Palouse River Basin Adjudication*, In Re: The General Adjudication of Water From the Palouse River Basin Water System, at 1 (Mar. 1, 2017).

In the CSRBA and the PRBA, stock watering use is defined the same as in the SRBA: "[T]he use of water solely for livestock or wildlife where the total diversion is not in excess of thirteen thousand (13,000) gallons per day." *Id.*

The effect was to relieve stockmen of an obligation to file a claim in the adjudication unless they so desired. Thus, no decreed water right is necessary for the in-stream watering of livestock (or for an out-of-stream diversion that meets the criteria of Idaho Code § 42-113(3)) on land to which a stockman holds a grazing lease, so long as the use also meets the definition of domestic or stock water identified in each adjudication's respective deferral order.

Ground Water Diverted for Stock Water

The diversion of ground water for domestic purposes is exempt from the mandatory permitting/licensing process. Idaho Code § 42-227. The definition of domestic includes the watering of livestock if the total use is not in excess of 13,000 gallons per day ("gpd"). Idaho Code § 42-111. Thus, a permit or license is not necessary for a stockman's diversion of ground water for the watering of livestock on land to which the stockman holds a grazing lease so long as the total use is not in excess of 13,000 gpd.

Because the stockman's use of groundwater meets the definition of domestic use, the stockman is allowed to defer his or her claim in the SRBA, CSRBA and the PRBA. Thus, a decree is not necessary for the stockman's diversion of ground water for the watering of livestock so long as the total use is not in excess of 13,000 gpd.

The diversion of ground water for the watering of livestock where the diversion is in excess of 13,000 gpd is not exempt from the permitting/licensing process. Thus, a permit or license is necessary for a stockman's diversion of ground water for the watering of livestock if the total use is in excess of 13,000 gpd.

CONCLUSIONS

1. An IDWR permit is not required for the in-stream watering of livestock.

2. An IDWR permit is not required for the off-stream watering of livestock so long as the stockman had an existing in-stream water right prior to the construction of any diversion and the diversion meets statutory criteria of Idaho Code § 42-113(3).

3. If a stockman established an out-of-stream surface water diversion prior to May 19, 1971, then the stockman has established a water right based upon the constitutional method of appropriation. If the stockman's use meets the definition of domestic or stock water use adopted in an adjudication's deferral order, the stockman is allowed to defer his claim. This means that a stockman whose out-of-stream diversion for livestock meets the definition of

domestic or stock water use can continue to use the water without having his water right decreed at this time.

4. If the stockman's out-of-stream surface water diversion predates May 19, 1971, but does not meet the definition of domestic or stock water use as set forth in an adjudication's deferral order, the stockman was required to file a claim in the adjudication. The Final Unified Decree in the SRBA, entered August 26, 2014, closed the Snake River basin to any further late claims. Thus, the stockman would need to comply with the mandatory permit process and file a new application for permit. While the time for filing claims in the CSRBA has closed, no final decree has been entered so there may still be an opportunity to have a motion to file late claim in the CSRBA granted. Since the claims taking has not commenced in the PRBA, there is still an opportunity to file such a claim.

5. If a stockman's out-of-stream surface water diversion for livestock does not predate May 19, 1971, and does not meet the diversion criteria of Idaho Code § 42-113(3) then the stockman must comply with the permit/licensing process. Such a diversion without a permit would be an illegal diversion of water pursuant to Idaho Code § 42-201.

I hope you find this analysis helpful. If you have any further questions, please do not hesitate to reach out.

Sincerely,

DARRELL G. EARLY
Deputy Attorney General
Chief, Natural Resources Division
Office of the Attorney General

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[1] *See* 1984 Idaho Sess. Laws 299.

[2] Idaho Code § 42-113(3)(a) states that the diversion of water may occur only if the following conditions are met:

(i) The water is diverted from a surface water source to a trough or tank through an enclosed water delivery system;

(ii) The water delivery system is equipped with an automatic shutoff or flow control mechanism or includes a means for

> returning unused water to the surface water source through an enclosed delivery system, and the system is designed and constructed to allow the rate of diversion to be measured;
> (iii) The diversion is from a surface water source to which the livestock would otherwise have access and the watering tank or trough is located on land from which the livestock would have access to the surface water source from which the diversion is made;
> (iv) The diversion of water out of the stream in this manner does not injure other water rights;
> (v) The use of the water diverted is for watering livestock; and
> (vi) The bed and banks of the source shall not be altered as that term is defined in section 42-3802, Idaho Code, except that an inlet conduit may be placed into the source in a manner that does not require excavation or obstruction of the stream channel, unless additional work is approved by the director of the department of water resources.

The statute also requires that the amount of water diverted for watering of livestock in accordance with this subsection shall not exceed thirteen thousand (13,000) gallons per day per diversion and that before construction and use of a water diversion and delivery system, the person or other entity proposing to construct and use the system shall give notice to the Department. Idaho Code § 42-113(b)-(c).

[3] When the SRBA court entered its first deferral order in 1989, the definitions of domestic and stock water were codified at Idaho Code § 42-1401A(5) and (12), respectively. *Findings of Fact, Conclusions of Law, and Order Establishing Procedures for Adjudication of Domestic and Stock Water Uses*, at 3 (Jan. 17, 1989). Because the definition of domestic use changed over time, the SRBA court found it necessary to clarify the applicable definition of domestic. *See Order Governing Procedures in the SRBA for Adjudication of Deferred De Minimis Domestic and Stock Water Claims*, In Re SRBA Case No. 39576, at 2-3 (June 28, 2012).

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