IDAHO ATTORNEY GENERAL'S ANNUAL REPORT

OPINIONS

SELECTED INFORMAL GUIDELINES

AND

CERTIFICATES OF REVIEW

FOR THE YEAR

1996

Alan G. Lance
Attorney General

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1996 Idaho Att'y Gen. Ann. Rpt. 91

The Certificate of Review of March 19, 1996 is found at:
1996 Idaho Att'y Gen. Ann. Rpt. 245

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Alan G. Lance
Attorney General

INTRODUCTION

Dear Fellow Idahoan:

This volume of Idaho Attorney General Opinions, as well as selected Informal Guidelines and Certificates of Review, represents the midpoint of my term in office as your Attorney General. I am truly proud of the scholarship contained in this volume and express my sincere appreciation to the entire office staff for their substantial accomplishments during this past year.

The year 1996 represented our first full year as a consolidated Attorney General's Office and the advantages of our modern organizational structure have quickly become apparent. The cost of state legal services, which had been rising at 19% per year since 1988, has been halted. Likewise, the cost to the State for outside legal counsel, which had been rising at 29% annually for eight years, declined by 3% in 1995 and 4.8% in 1996. There are few state Attorneys General Offices that can rival the efficiencies and accomplishments of your Attorney General's Office.

In addition to Formal Opinions and Informal Guidelines, included in this volume are selected Certificates of Review concerning a number of controversial issues of the day. The subject of radioactive waste storage within the State of Idaho continues to be of great interest state-wide. The Term Limits Initiative, which was approved by the voters in Idaho and a number of other states, will be the subject of future litigation.

Although not referenced within the covers of this volume, our substantial Criminal Appellate workload continues to mount with a 21% increase in briefs filed in 1996 alone. Another significant development on the litigation front involved the Snake River Basin Adjudication, which in its entirety includes water rights on 85% of the lands within the State of Idaho. This complex litigation is entering an accelerated phase. Four cases were decided by the Idaho Supreme Court in 1996, which will likely resolve many impediments to the orderly and expeditious progress of this complex litigation.

While the challenges that face the Office of the Idaho Attorney General during these litigious times are many and substantial, I can assure you that the attorneys and staff of this office will continue to vigorously and capably represent the interests of the people of Idaho.

ALAN G. LANCE
Attorney General

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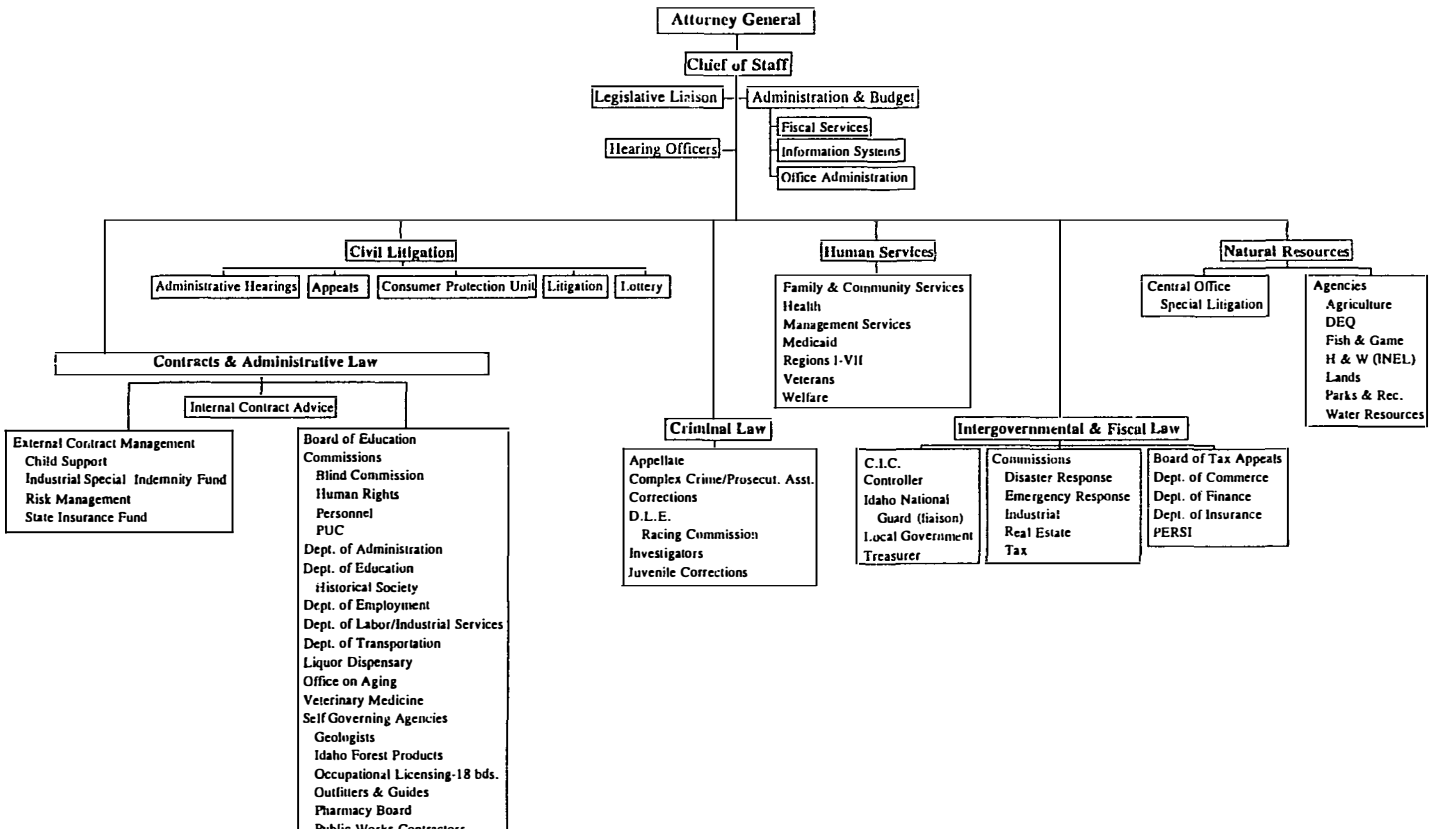

OFFICIAL OPINIONS
OF
THE ATTORNEY GENERAL
FOR 1996

ALAN G. LANCE
ATTORNEY GENERAL
STATE OF IDAHO

ATTORNEY GENERAL OPINION NO. 96-1

To: Mr. Jody B. Olson, Acting Chairman
Public Employee Retirement System of Idaho
607 N. Eighth Street
P.O. Box 83720
Boise, ID 83720-5518

Per request for Attorney General's Opinion

QUESTIONS PRESENTED

1. In the circumstances where a political subdivision requests to withdraw from PERSI, but continues in the same form as a qualified employing entity with the same employees, may the board allow the employer to withdraw from PERSI voluntarily, under Idaho Code § 59-1326?

2. If a political subdivision is allowed to voluntarily withdraw from PERSI under existent law or under any future legislation, is there a right for these current employees to continue to accrue membership credit in PERSI, *i.e.*, a right to future benefit accruals?

3. What fiduciary responsibility, if any, does PERSI have to preserve any rights to future benefit accruals should they exist?

CONCLUSION

1. Idaho Code § 59-1326 as presently written does not allow voluntary withdrawal from PERSI. There are no other statutory or non-statutory grounds that would allow voluntary withdrawal from PERSI by political subdivisions of the State of Idaho.

2. It does not appear that Idaho would recognize a right to future benefit accruals.

3. Although PERSI may have a fiduciary duty to challenge an invalid

statute that interferes with the members' benefits, the proposed changes would not create any such direct interference. However, through its fiduciary responsibility to its members, PERSI would have standing to challenge the statute if PERSI chose to do so.

Question No. 1

The only statute providing for employer withdrawal from PERSI under any circumstances is Idaho Code § 59-1326, which requires that certain conditions be met in order for an employer to be eligible to withdraw from the system. The conditions stated in the question exclude any possibility for withdrawal eligibility under Idaho Code § 59-1326. In addition, there are no non-statutory grounds for withdrawal from PERSI.

Idaho Code § 59-1326 provides for withdrawal only when an employer has incurred complete withdrawal or partial withdrawal as defined in that section. Complete withdrawal occurs, under Idaho Code § 59-1326(2), when the political subdivision incurring withdrawal ceases to employ active members. The conditions stated in the question presented establish that the employer continues in existence and continues to employ active qualified members. The conditions for complete withdrawal cannot be met under these circumstances.

Partial withdrawal, defined in Idaho Code § 59-1326(3), occurs when a political subdivision's average membership in PERSI declines by more than twenty-five members and twenty-five percent of the average membership over the course of one fiscal year. A political subdivision that has continued as a qualified employing entity could not meet either of these conditions. Remaining employees would continue as active members of PERSI, and all additional employees hired during the prior fiscal year would become members of PERSI. The conditions for partial withdrawal therefore cannot be met under the circumstances stated in the question.

Question No. 2

Your next question concerns the legal ramifications of allowing local governmental units to voluntarily withdraw from PERSI. It might be more accurate and helpful to divide your question into two separate questions. First,

is there a right to future benefit accruals? Second, if there is a right to future benefit accruals, does this right require that current employees of contracting employers be allowed to continue membership in PERSI? Regarding the latter question, as explained below, even in jurisdictions which clearly have held that there is a right to future benefit accruals, such right is not necessarily tied to a particular pension plan. Rather, the right is to a pension in general, whether it be the present pension system or an equivalent plan. Thus, even if there is a right to future accrual of benefits, this right does not necessarily mandate that the employees be allowed to remain in PERSI. The withdrawing entity might provide a pension plan with benefits substantially equivalent to PERSI which would protect the right to future benefit accruals.

With regard to the right to future benefit accruals, after extensive research it is the opinion of this office that Idaho law does not currently recognize such a right. Whether Idaho courts would expand and adopt the analysis of other jurisdictions which appear to recognize such a right is not easy to predict. However, current case law suggests that Idaho courts would not.

Traditionally, benefits under pension plans were treated in two radically different ways. Some jurisdictions treated such benefits as mere gratuities which could be changed or revoked at any time. Other jurisdictions considered the offer of a pension, once accepted, as an irrevocable contract which could not be modified without the express consent of the members, *i.e.*, a strict contract approach. Cohn, Public Employee Retirement Plans - The Nature of the Employees' Rights, University of Illinois Law Forum 32 (1968); and note, Public Employee Pensions in Times of Fiscal Distress, 90 Harvard Law Review 992 (1977).

More recently, courts have attempted to balance the interests of the state in having the ability to modify the pension plans to conform to changing conditions while protecting the reasonable expectations of the pension plan members. In order to accomplish this goal, several courts have adopted a sort of modified contract approach. *See* Allen v. City of Long Beach, 287 P.2d 765 (Cal. 1955); Dullea v. Massachusetts Bay Transportation Authority, 421 N.E.2d 1228 (Mass. App. Ct. 1981).

Modifications to public employee pensions in jurisdictions which have adopted some form of contract approach raise issues of breach of contract, and

impairment of contract under clauses contained in art. I, § 10 of the U.S. Constitution, and Idaho Constitution art. 1, § 16. However, other jurisdictions have disregarded the contract approach, and instead examine public employee pension benefits under a property rights approach or the doctrine of promissory estoppel. Spiller v. Main, 627 A.2d 513 (Maine 1993); Pineman v. Oechslin, 488 A.2d 803 (Conn. 1985); and Christensen v. Minneapolis Municipal Employees Retirement Board, 331 N.W.2d 740 (Minn. 1983).

In Idaho, the courts have adopted, to some extent, the modified contract approach first enunciated in California. In Hanson v. City of Idaho Falls, 92 Idaho 512, 514, 446 P.2d 634 (1968), the Idaho Supreme Court rejected both the gratuity and strict contract approach:

> The better reasoned rule in most American jurisdictions today is that the rights of the employees in pension plans such as Idaho's Retirement Fund Act are vested subject only to reasonable modification for the purpose of keeping the pension system flexible and maintaining its integrity. Since the employee's rights are vested, the pension plan cannot be deemed to provide gratuities. Instead, it must be considered compensatory in nature.

(Citations omitted.)

In Nash v. Boise City Fire Department, 104 Idaho 803, 663 P.2d 1105 (1983), the Idaho Supreme Court further clarified public employee pension rights in Idaho. In Nash, the plaintiff was a full-time paid fire fighter from 1953 to October 17, 1978. In 1978 the pension statute was amended to place a three percent cap on the amount of the increase or decrease of the cost of living adjustment. The question facing the court was whether the three percent cap applied to fire fighters retiring after the July 1, 1978, effective date of the amendment, "who earned benefits by virtue of service prior to that date." 104 Idaho at 803, 663 P.2d at 1105 (emphasis added).

The court stated that the "issue presented requires a determination of whether the level of a public employee's rights in a pension plan which has vested may be unilaterally altered by a subsequent legislative act." 104 Idaho at 804, 663 P.2d at 1106. The court in Nash quoted extensively from Dullea v. Massachusetts Bay Transportation Authority, *supra*. The court, quoting from

Dullea, emphasized the problems underlying both the gratuity and strict contract theories:

> It is true that a few cases that adopt the label of "contract" have approached the terms of a retirement plan as they would a bond indenture, but closer to the realities is a view that "contract" protects the member of a retirement plan in the core of his reasonable expectations, but not against subtractions which, although possibly exceeding the trivial, can claim certain practical justifications. Attention should then center on the nature of these justifications in light of the problems of financing and administering these massive plans under changing conditions.

104 Idaho at 805, 663 P.2d at 1107.

Next, the Idaho Supreme Court, quoting Abbott v. City of San Diego, 332 P.2d 324 (Cal. Ct. App. 1958), stated, "it is an advantage or disadvantage to the particular employees whose own contractual pension rights, already earned, are involved which are the criteria by which modifications to pension plans must be measured." 104 Idaho at 806 (emphasis added). The Idaho Supreme Court, further quoting from a California decision in Betts v. Board of Admin. of Public Employees' Retirement System, 582 P.2d 614 (Cal. 1978), summarized the principles which must be considered by the courts in determining whether a modification is reasonable:

> An employee's vested contractual pension rights may be modified prior to retirement for the purpose of keeping a pension system flexible to permit adjustments in accord with changing conditions and at the same time maintain the integrity of the system. Such modifications must be reasonable, and it is for the court to determine upon the facts of each case what constitutes a permissible change. To be sustained as reasonable, alterations of employee's pension rights must bear some material relation to the theory of a pension system and its successful operation, and changes in a pension plan which result in disadvantage to employees should be accompanied by comparable new advantages.

(Citations omitted.)

The Idaho Supreme Court further noted that Dullea had concluded that California has developed more realistic guidelines for analyzing the rights of the public employees in their pensions. The court, again quoting from Dullea, stated, "an employee's rights to a pension will not vest until he has worked for a legally significant period of time in reliance on the belief that he will be protected by a pension." 104 Idaho at 807, 663 P.2d at 1109.

After setting forth these principles, the Idaho Supreme Court held that the rights of Nash were unquestionably vested, his having worked twenty-five years, the last fifteen of which included the period when the pension plan provided for a fluctuated formula free of the three percent cap. 104 Idaho at 808, 663 P.2d at 1110. Under these facts, the court held that the three percent cap should not be applied to Nash.

With Nash's approval of the approach adopted by California courts, there is an argument that Idaho would similarly adopt the California approach to the rights of future accrual of benefits in a like situation. This question has never been specifically addressed by Idaho courts. Subsequent to Nash, the California Supreme Court, in State of California v. Eu, 816 P.2d 1309 (Cal. 1991), clearly held that a public employee has a right to future accrual of benefits in a pension the same as or equivalent to the existing plan for as long as they are employed by the particular governmental entity. The decision in Eu was predictable, given earlier California decisions.

In Kern v. City of Long Beach, 179 P.2d 799 (Cal. 1947), which was cited with general approval by Nash, the court stated that "the right to a pension vests upon acceptance of employment." *Id.* at 801. The court in Kern further stated:

> An employee may acquire a vested contractual right to a pension but that this right is not rigidly fixed by the specific terms of the legislation in effect during any particular period in which he serves. The statutory language is subject to the implied qualification that the governing body may make modifications and changes in the system. The employee does not have a right to any fixed or definite benefits, but only to a substantial or reasonable pension. There is no inconsistency therefore in holding that he has a vested right to a pension but that the amount, terms and conditions of the benefits may be altered.

Id. at 803. Thus, the court held that the plaintiff had a vested pension right and that the defendant city, by completely repealing all pension provisions, had attempted to impair its contractual obligations.

In Pasadena Police Officers Association v. City of Pasadena, 195 Cal. Rptr. 339 (Cal. Ct. App. 1983), the court further clarified the holding of Kern in respect to changes in plans which were prospective only. In Pasadena, the defendants contended that the amendments in question did not impair the vested contractual rights of the employees because the amendments purported to be prospective. The court rejected this argument, stating:

> Also inconsistent with defendants' theory is the Supreme Court's recent summary of the pension cases stating, "by entering public service an employee obtains a vested contractual right to earn a pension on terms substantially equivalent to those then offered by the employer." This statement indicates the employee has a vested right not merely to preservation of benefits already earned pro rata, but also, by continuing to work until retirement eligibility, to earn the benefits, or their substantial equivalent, promised during his prior service.

Id. at 343 (citations omitted; emphasis added). In United Firefighters of Los Angeles City v. City of Los Angeles, 259 Cal. Rptr. 65 (Cal. Ct. App. 1989), the California Court of Appeals further stated, "upon acceptance of public employment one acquires a vested right to a pension based on the system then in effect."

Clearly, these cases at the very least suggested that California recognized a right to a pension once employment begins, which right includes the right to future accrual of benefits on substantially the same level as long as the employee works for the government entity. As stated above, any doubt as to the opinion of the California Supreme Court on the right to future accrual of benefits was erased in State of California v. Eu, *supra.* In *Eu*, the court was faced with a challenge to Proposition 140 which, in relevant part, stated that no other pension or retirement benefits shall accrue as a result of service in the legislature, such service not being intended as a career occupation. This same provision provided that it should not be construed to advocate or diminish a vested pension or retirement benefits which may have accrued under an existing law, but upon adoption of the act no further entitlement to nor vesting in

any existing program shall accrue to any such legislator. Incumbent legislators challenged that section of the proposition, claiming that it was an impairment of their contractual rights.

The legislators argued that they were impliedly promised pension benefits substantially equivalent to those offered by the then-existing provisions of the pension system, and that these benefits included both the primary right to receive any vested pension benefits upon retirement, as well as the collateral right to earn future pension benefits through continued service on terms substantially equivalent to those then offered. *Id.* at 1331. The court, after citing to previous California cases (including some of those quoted above), concluded that incumbent legislators had a vested right to earn additional pension benefits through continued service. *Id.* at 1332. The court further held that "as we have previously discussed, the pension provisions of Proposition 140, which abruptly terminate an incumbent legislator's right to earn future pension benefits through continued service, must be deemed an impairment, not a mere 'modification' or 'adjustment' of the vested pension rights of incumbent legislators, whether or not they will enter a new term on or after November 6, 1990." *Id.* at 1333.

The court went on to hold that the federal constitutional contract clause would also likely protect the incumbent legislators in this situation, stating that "although the issue is not entirely free of doubt, we conclude that the foregoing federal cases would not withhold federal contract clause protection from incumbent state legislators who have acquired vested pension rights under state law." *Id.*

Therefore, in California, an employee's rights to a pension vest at the time of his or her employment. Thereafter, no modifications can be made to the plan which either affect earned or accrued rights or impair the ability of the employee to earn future benefits during continued service. The question then becomes whether Idaho courts, which have in the past looked favorably on the California approach, would continue to adopt the approach set forth in California.

The court in Nash was not faced with the question at hand. Rather, they were faced with an effect of legislation on earned and accrued benefits. Obviously, if Idaho courts continue to follow the California approach, the

employees of withdrawing governmental entities would have a right to future accrual of benefits. Who might be liable for violating such a right, if recognized, is the subject of your final question, discussed below. However, McNichols v. Public Employee Retirement System of Idaho, 114 Idaho 247, 755 P.2d 1285 (1988), strongly suggests that Idaho does not recognize a right to future accrual of benefits at the current time.

In McNichols, the plaintiffs had been classified by their respective employers as police officers. This classification entitled the plaintiffs to participate in the portion of PERSI which applies to police officer members. This section requires a police officer member to contribute more of his or her salary to the pension fund than a general member; however, police officer members are eligible for earlier retirement.

In 1985 the legislature enacted a new section, effective July 1, 1985, which specifically delineated various employee positions to be included within police officer status. Neither of the plaintiffs' positions were included in the statutory definition of police officer. The court in McNichols framed the issue as "whether the legislature can prospectively reduce the rate at which public employees earn retirement benefits." 114 Idaho at 248. The district court had held that the decision in Nash v. Boise City Fire Department, *supra*, prohibited such a modification. The Idaho Supreme Court reversed this decision and held that the legislature does have the ability to prospectively limit the rate at which members of PERSI earn retirement benefits.

The McNichols decision is important for several different reasons, including the court's characterization of the Nash decision. The court stated that the "3% cap could not be applied to Nash because the legislature cannot limit previously earned benefits." 114 Idaho at 249, 755 P.2d at 1287 (emphasis added). The court went on to state that the issue of "whether the state can reduce the rate at which the employees *earn* retirement benefits" was not addressed in Nash. 114 Idaho at 250, 755 P.2d at 1288. It is also important to note that Justice Huntley, who authored the Nash opinion, dissented in McNichols, stating that the holding of the court conflicted with the Nash v. Boise City Fire Department decision.

The McNichols opinion refuses to extend the Nash decision to the future rights of employees in PERSI. The Nash decision requires an analysis

of whether the modifications to the plan are reasonable and necessary to protect its integrity if such modifications impair the vested rights of the plan members. However, the McNichols court did not engage in any such analysis, but summarily stated that the legislature has the right to limit the rate at which employees earn future benefits. This strongly suggests that the court did not view a public employee's right to future pension benefits as vested. Rather, the legislature is free to diminish those future benefits as it deems appropriate. Otherwise, the court would have engaged in the analysis enunciated in Nash, because the modification in McNichols, at the very least, diminished the future benefits necessitating such an analysis.

The holding in McNichols puts Idaho in direct conflict with Pasadena Police Officers Association, *supra*, and United Fire Fighters of Los Angeles City, *supra*, which clearly held that the impairment must pass the reasonableness test regardless of whether it is purported to be prospective only. Such a distinction is a good indicator that Idaho is unwilling to extend the contract approach adopted in Nash as far as California did. Instead, the McNichols decision appears to be more in line with a federal district court decision in Maryland State Teachers Association v. Hughes, 594 F. Supp. 1353 (D. Md. 1984), wherein the court stated:

> A very important prerequisite to the applicability of the contract clause at all to an asserted impairment of a contract by state legislative action is that the challenged law operate with retrospective, not prospective, effect. No Supreme Court decision has been found in this court's research which has invalidated a non-retroactive state statute on the basis of the contract clause.

Id. at 1360-61.

Examining the challenged modification under the federal contracts clause, the court in Maryland State Teachers Association stated that the challenged legislation did not operate to deny vested (which they relate to retirees) or merely earned pension rights retroactively. *Id.* at 1363. The court, after quoting a Maryland statute (similar to Idaho's) which stated that a member of their retirement system who has rendered five or more years of creditable service has a vested right to pension benefits upon retirement, held:

> That is not to say that the entitlement to a specific dollar amount of pension benefits vests in the employee, but rather that the right to some benefits vest as they are proratedly earned. As demonstrated in *C. Frederick v. Quinn*, 35 Md. App. 626, 371 A.2d 724 (1977), the State has no "right to withdraw retroactively the pro rata pension benefits that have accrued" but the State may modify prospectively the amount of benefits.

Id. at 1363, n.6 (emphasis added).

The Maryland State Teachers Association case, which appears to reflect the holding in McNichols, was distinguished from the California approach in United Fire Fighters of Los Angeles City, *supra.* In United Fire Fighters, the defendant relied heavily on Maryland State Teachers Association in arguing that the vested rights of the plaintiffs were not impaired. The court stated, "under Maryland law, future pension benefits vest as they are proratedly earned. This is contrary to California law.' *Id.* at 76 (emphasis added).

The court in United Fire Fighters also quoted the Maryland State Teachers Association holding that "the challenged legislation does not operate to deny vested or merely earned pension rights retroactively." In reply, the court held, "[a]gain, this is contrary to California law." *Id.* at 76. This characterization by the California courts of Maryland State Teachers Association is instructive on Idaho law because of the similar holding of McNichols.

Also significant is the decision in Public Employees Retirement Board v. Washoe County, 615 P.2d 972 (Nev. 1980), which is factually similar to McNichols. The Nevada legislature had removed certain positions from the definition of police officer, eliminating plaintiffs from the class allowed to participate in the police officer member portion of their public employee retirement system. The Nevada court reiterated its adoption of the "California approach." The court then held that such a modification was an unconstitutional impairment of the contract with those employees, contrary to the holding in McNichols.

Underlying both the McNichols and Maryland State Teachers Association decisions is the rationale that future pension benefits vest as they

are proratedly earned. Otherwise, the McNichols court, under the requirements of Nash, would not have been able to arrive at its conclusion. Such a holding is a significant departure from the "California approach" that a public employee has a vested right in a pension the same as or equivalent to the one in effect as soon as he or she commences employment. Based on McNichols, it would appear that Idaho does not recognize a right of a public employee of a withdrawing governmental entity to future accrual of benefits.

However, we recognize that there is a difference between the ability to prospectively reduce the rate at which an employee earns retirement benefits and the elimination of any right to earn future retirement benefits. The Idaho courts may distinguish the legislature's ability to limit future benefits from the ability to eliminate future benefits. We also recognize that the employees in McNichols were improperly categorized as police officers in the first instance, as opposed to the employees in Washoe County. Although this fact is not relevant to the court's analysis of whether employees have a constitutional right to future benefit accruals, it could nonetheless have bolstered the apparent reasonableness of the changes to the plan. Similarly, although not determinative from a purely legal perspective, withdrawal legislation that is substantially equitable to participating employees may make the amended statutes less likely to be voided by the courts.

Certainly, under McNichols, it appears that if the local governmental entity is allowed to withdraw, that entity could prospectively limit the rate at which employees earn pension benefits, *i.e.*, provide a pension plan with less generous benefits, while protecting those benefits which have been earned and accrued under the PERSI system. We would, however, caution local governmental entities who may withdraw under future legislation that refusing to have a pension system in place upon withdrawal is risky, both because Idaho courts have not definitively addressed this issue and for the reason stated above.

In conclusion, it is the opinion of this office that Idaho courts do not currently recognize a public employee's right to future accrual of benefits. Given the Idaho Supreme Court's unwillingness to extend Nash in the McNichols decision, it would appear that the court would not adopt the approach by the California court in regard to future accrual of benefits.[1]

Question No. 3

As discussed below, it is the opinion of this office that PERSI does not have a fiduciary duty to challenge the proposed statute. However, because PERSI would be charged with the responsibility of allowing political subdivisions to withdraw from the system, PERSI would nonetheless have standing to challenge the validity of any statute requiring that it allow such withdrawal. PERSI would therefore have standing to bring a declaratory judgment action seeking a judicial declaration of the validity of the statute before allowing any political subdivisions to withdraw from the system. Because the validity of the type of statute proposed has never been directly addressed by the Idaho courts, such an action may be the most prudent way to insure that such a withdrawal would be permitted by the Idaho courts prior to actually allowing employers to withdraw. It is also possible that PERSI could bring an original action in the Idaho Supreme Court seeking such a declaration.

The PERSI board has been vested with the "powers and privileges of a corporation, including the right to sue and be sued in its own name as such board." Idaho Code § 59-1305(1). Those powers and privileges are granted to the board as fiduciaries of the retirement fund with the obligation to "discharge their duties with respect to the fund solely in the interest of members and their beneficiaries." Idaho Code § 59-1301(2). Specifically, the board is to exercise its powers for the exclusive purposes of providing benefits to members and their beneficiaries and defraying reasonable expenses of administering the retirement system. Idaho Code § 59-1301(2)(a)(i)-(ii).

The scope and extent of any fiduciary responsibility on the part of PERSI to its members depends, in part, on the provisions of the retirement system, as provided by the legislature, then in place. *See* McNichols, 114 Idaho at 247, 775 P.2d at 1289. Idaho Code § 59-1302(d) specifically includes among PERSI's fiduciary duties "the responsibility to administer the retirement system in accordance with the provisions of the Idaho Code governing the system."

Although the Idaho courts have not addressed this issue, there is some authority for the proposition that PERSI's fiduciary responsibility to the system's beneficiaries includes the responsibility to challenge invalid statutes enacted by the legislature. In Wisconsin Retired Teachers Ass'n, Inc. v.

Employee Trust Funds Board, 537 N.W.2d 400 (Wis. Ct. App. 1995), the Wisconsin Court of Appeals recognized that the trustees of a public retirement plan may have a fiduciary duty to the members of the plan to challenge an invalid statute that interferes with the members' benefits. *Id.* at 414-15. The court reasoned that, although the board has the duty to administer the trust account according to the terms of the statutes governing the plan, enactment of invalid legislation places this duty in conflict with the trustees' responsibility to administer the plan for the benefit of its members.

However, the proposed changes to title 59, chapter 13, are distinguishable from all of the legislation that has been held invalid as an impairment of contract, discussed above, or otherwise unconstitutional or invalid as a breach of contract or governmental taking. In all of those cases, the statute enacted had a direct effect on the benefits of the plan members. The legislation at issue here would not, itself, directly affect any existing or future rights. The proposed changes would provide a mechanism for political subdivisions to elect to withdraw from the system in the future. No existing or future benefits are affected by the passage of such legislation. Even if the Idaho courts were to recognize a right to future benefit accruals, the enactment of the proposed legislation would not substantially impair that right. Such a right to future benefit accruals could not be substantially impaired until: (1) an employer actually withdraws from the system, and (2) that employer fails to provide a comparable pension system to its employees.[2]

In order to state an actionable cause of action for breach of a fiduciary duty against PERSI, an employee must establish not only that a right to accrue future benefits exists and that PERSI is obligated to safeguard that right, but also that PERSI breached that obligation and the employee has suffered actual damages as a result of PERSI's failure to discharge its duty. Jordan v. Hunter, 124 Idaho 899, 907, 865 P.2d 998, 1006 (Ct. App. 1993) (holding that damages are an essential element of action for breach of fiduciary duty). Similarly, under contracts clause analysis, the employee would be required to prove that an existing right of that employee has been substantially impaired by the passage of the legislation. *See* National Education Ass'n—Rhode Island v. Retirement Board of the Rhode Island Employees' Retirement System, 890 F. Supp. 1143, 1150 (D. R.I. 1995) ("If the contractual right has been impaired, the court must next determine whether that impairment has been substantial. If the impairment is not significant, the court's inquiry ends.").

Assuming that employees have a prospective right to continue earning retirement benefits that are comparable to those the employee received through PERSI, and further assuming that PERSI is obligated to protect that right, there could be no actionable breach of PERSI's duty until an employer actually withdrew from PERSI and the employee's prospective retirement rights were substantially damaged by the retirement system established by that employer. If the employer's ability to withdraw were conditioned on having a comparable retirement system in place or if employees were allowed to elect to remain members of PERSI, no such violation could take place. It would also be within the power of the legislature to place the burden of providing an adequate pension plan on the withdrawing employer.

Although PERSI would not be the breaching party in an action challenging the withdrawal of an employer, PERSI nonetheless would be the party charged by statute with allowing the employer to withdraw. As discussed above, although it is the opinion of this office that the proposed legislation would be upheld by the Idaho courts, this is a question of first impression, and there is a chance that the Idaho courts could hold that the proposed legislation is invalid. It may therefore be advisable for PERSI to seek, through a declaratory judgment action, a ruling that the statute is valid, and PERSI is therefore required to allow qualified employers to withdraw. By obtaining such a declaration prior to actually allowing employers to withdraw, PERSI could avoid the logistical problems that could be created if the statute were declared invalid after a number of employers had already withdrawn from the system.

The Uniform Declaratory Judgment Act provides that the courts of this state have the authority to issue declarations of rights, status or other legal relationships, and further provides that declarations may be either affirmative or negative in form and effect. Idaho Code § 10-1201. Because several parties' rights would be determined by the ruling in the underlying declaratory proceeding, and the affect on those rights and obligations under the pension plan would be identical, this would be a proper case in which to seek a declaratory judgment. Idaho Mutual Ben. Ass'n v. Robison, 65 Idaho 793, 154 P.2d 156 (1945) (holding that district court had authority to pass on the constitutionality of the unemployment compensation statute under Uniform Declaratory Judgment Act).

Because of the nature of the declaration sought by PERSI, it is also possible that the action could be brought as an original proceeding in the Idaho

Supreme Court under Idaho Appellate Rules 5 and 43. Under IAR 5, "[a]ny person may apply to the Idaho Supreme Court for the issuance of any extraordinary writ of other proceeding over which the Supreme Court has original jurisdiction . . . ." IAR 43 provides that the Supreme Court has original jurisdiction to issue "extraordinary writs." Under the Idaho Supreme Court's interpretation of IAR 43, the declaratory relief that PERSI would seek in an action brought under the amended statute would likely constitute an "extraordinary writ."

In Mead v. Arnell, 117 Idaho 660, 791 P.2d 410 (1990), the Idaho Supreme Court held that it had original jurisdiction, under art. 5, § 9 of the Idaho Constitution, to exercise original jurisdiction in a declaratory proceeding regarding the validity of a legislative repeal of certain rules issued under the Idaho Administrative Procedure Act. The court held that the nature of the relief sought by the plaintiffs established jurisdiction under the Idaho Constitution and the Idaho Appellate Rules, stating:

> In the instant case, the Board is requesting that the writ of prohibition be issued to nullify the legislative action taken pursuant to I.C. § 67-5218, and that the writ of mandate be issued to District VII. Our disposition of the constitutionality of I.C. § 67-5218 will be limited to a simple declaration of its constitutionality or lack thereof.

Id. at 664, 791 P.2d at 414. It is therefore possible that this action could be brought as an original proceeding before the Idaho Supreme Court, seeking a writ of prohibition enjoining implementation of the proposed withdrawal legislation and challenging its validity on the grounds discussed above. Although it is the opinion of this office that such legislation would not be declared invalid, this is clearly an unsettled issue under Idaho law.

If the Idaho Supreme Court were to decline to hear the declaratory action as an original proceeding, the complications inherent in waiting for an employee to challenge the validity of the amended statute would nonetheless be avoided by bringing a declaratory judgment action in district court prior to allowing any political subdivisions to withdraw under the proposed legislation.

AUTHORITIES CONSIDERED

1. United States Constitution:

Art. I, § 10.

2. Idaho Constitution:

Art. 1, § 16.
Art. 5, § 9.

3. Idaho Code:

§ 10-1201.
§ 59-1301(2).
§ 59-1301(2)(a)(i)-(ii).
§ 59-1302(d).
§ 59-1305(1).
§ 59-1326.

4. Idaho Court Rules:

Idaho Appellate Rule 5.
Idaho Appellate Rule 43.

5. Idaho Cases:

Hanson v. City of Idaho Falls, 92 Idaho 512, 446 P.2d 684 (1968).

Idaho Mutual Ben. Ass'n v. Robison, 65 Idaho 793, 154 P.2d 156 (1945).

Jordan v. Hunter, 124 Idaho 899, 865 P.2d 998 (Ct. App. 1993).

Mead v. Arnell, 117 Idaho 660, 791 P.2d 410 (1990).

McNichols v. Public Employee Retirement System of Idaho, 114 Idaho 247, 755 P.2d 1285 (1988).

Nash v. Boise City Fire Department, 104 Idaho 803, 663 P.2d 1105 (1983).

6. Other Cases:

Abbott v. City of San Diego, 332 P.2d 324 (Cal. Ct. App. 1958).

Allen v. City of Long Beach, 287 P.2d 765 (Cal. 1955).

Betts v. Board of Admin. of Public Employee Retirement System, 582 P.2d 614 (Cal. 1978).

Christensen v. Minneapolis Municipal Employees Retirement Board, 331 N.W.2d 740 (Minn. 1983).

Dullea v. Massachusetts Bay Transportation Authority, 421 N.E.2d 1228 (Mass. Ct. App. 1981).

Kern v. City of Long Beach, 179 P.2d 799 (Cal. 1947).

Maryland State Teachers Association v. Hughes, 594 F. Supp. 1353 (D. Md. 1984).

National Education Ass'n—Rhode Island v. Retirement Board of the Rhode Island Employees' Retirement System, 890 F. Supp. 1143 (D.R.I. 1995).

Pasadena Police Officers Association v. City of Pasadena, 195 Cal. Rptr. 339 (Cal. Ct. App. 1983).

Pineman v. Oechslin, 488 A.2d 803 (Conn. 1985).

Public Employees Retirement Board v. Washoe County, 615 P.2d 972 (Nev. 1980).

Spiller v. Main, 627 A.2d 513 (Maine 1993).

State of California v. Eu, 816 P.2d 1309 (Cal. 1991).

United Firefighters of Los Angeles City v. City of Los Angeles, 259 Cal. Rptr. 65 (Cal. Ct. App. 1989).

Wisconsin Retired Teachers Ass'n, Inc. v. Employee Trust Funds Board, 537 N.W.2d 400 (Wis. App. 1995).

7. Other Authorities:

Cohn, Public Employee Retirement Plans - The Nature of the Employees' Rights, University of Illinois Law Forum 32 (1968).

Note, Public Employee Pensions in Times of Fiscal Distress, 90 Harvard Law Review 992 (1977).

DATED this 26th day of January, 1996.

ALAN G. LANCE
Attorney General

Analysis by:

THOMAS F. GRATTON
MICHAEL MCDONAGH
Deputy Attorneys General

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[1] As stated above, other courts have adopted theories outside of the contractual approach to describe the public employee's rights to pension benefits, i.e., the property and promissory estoppel approaches. Although one or both of these approaches may be superior to the contracts approach, there is no sign that the Idaho courts will adopt one of these approaches.

[2] Even if the Idaho courts were to hold that there is a right to future benefit accruals and that the proposed legislation would substantially impair that right, it is not clear the PERSI's fiduciary responsibilities would require PERSI to intervene on behalf of employees to protect that right. Such an implied right is not part of the trust that PERSI is charged with administering under statute, and insuring future benefit accruals is not an element of PERSI's fiduciary responsibility under the statute.

ATTORNEY GENERAL OPINION NO. 96-2

To: Ms. Laurine Nightingale
Lewis County Commissioner
Route 2, Box 1M
Reubens, ID 83548

Per Request for Attorney General's Opinion

QUESTION PRESENTED

Whether lands within the boundaries of an Indian Reservation owned by Indians are exempt from *ad valorem* taxation by the county.

CONCLUSION

We conclude that lands within the boundaries of an Indian reservation, owned by Indians, are subject to *ad valorem* taxation by county governments, unless such lands are held in trust by the federal government or otherwise subject to restrictions on alienation.

ANALYSIS

As originally established, all lands within Indian reservations were held in common for the use of all tribal members, with legal title to the lands being held by the United States, as trustee for the tribe. In the mid-nineteenth century, however, the federal government began to "allot" reservation lands to tribal members, so that each Indian family would own an individual farm. Conference of Western Attorneys General, American Indian Law Deskbook 16 (1993). This policy was embodied in the General Allotment Act, enacted on February 8, 1887. 24 Stat. 388. The United States was to hold allotted lands in trust for a period of at least 25 years. *Id.* at 389. At the end of the 25-year period, the allottee could receive a patent to the land, and become subject to the laws of the state. *Id.* at 390. The policy of issuing patents to allottees continued until 1934, when the Indian Reorganization Act was enacted. Act of June 18, 1934, 48 Stat. 984. The Act ended the practice of issuing patents to allottees, but did not rescind patents issued prior to 1934.

As a result of the General Allotment Act and related statutes, tribal members acquired fee title to many lands within Indian reservations. Nonmember Indians have since acquired some of these lands through sale and devise. Such lands are not held in trust, and are therefore freely alienable.

Another method by which lands came to be patented to member and nonmember Indians was through surplus land acts. Congressional policy in the latter part of the nineteenth century and early twentieth century was to do away with the reservation system by allotting reservation lands and selling the remaining or "surplus" lands to non-Indians. It was thought that such policies would hasten the integration of tribal members into "traditional American society." Solem v. Bartlett, 465 U.S. 463, 468 (1984). Some of the lands patented to non-Indians have since been acquired by member and nonmember Indians.

The taxation of lands patented to tribal members under the General Allotment Act was the subject of a recent Supreme Court opinion, County of Yakima v. Yakima Indian Nation, 112 S. Ct. 683 (1992). The Court first reiterated the general principle that "[a]bsent cession of jurisdiction or other federal statutes permitting it," states are "without power to tax reservation lands and reservations *[sic]* Indians." *Id.* at 688, quoting Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148 (1973). It then undertook a detailed examination of the General Allotment Act to determine if the Act embodied an intent to allow taxation of allotted lands.

The Court first examined section 6 of the General Allotment Act, which provides that Indians receiving patents for land are thereafter "subject to the laws, both civil and criminal, of the State or Territory in which they may reside." 24 Stat. at 390. The Court concluded, however, that the *in personam* jurisdiction imposed by section 6 applied only to the original allottee of the land. Subsequent Indian owners are not automatically subject to state jurisdiction. 112 S. Ct. at 690.

The Court then examined section 5 of the General Allotment Act, which provides in part as follows:

> That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to

> issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made . . . and that at the expiration of said period the United States shall convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or encumbrance whatsoever . . . .

24 Stat. at 389. The Court found that in providing for the issuance of fee patents to Indian allottees Congress impliedly subjected such lands to assessment and taxation by state authorities. The Court referred back to its earlier decision in Goudy v. Meath, 203 U.S. 146 (1906), wherein the Court stated as follows:

> That Congress may grant the power of voluntary sale while withholding the land from taxation on forced alienation may be conceded. . . . But while Congress may make such provision, its intent to do so should be clearly manifested, for the purpose of the restriction upon voluntary alienation is protection of the Indian from the cunning and rapacity of his white neighbors, and it would seem strange to withdraw this protection and permit the Indian to dispose of his lands as he pleases, while at the same time releasing it from taxation,—-in other words, that the officers of a state enforcing its laws cannot be trusted to do justice, although each and every individual acting for himself may be so trusted.

203 U.S. at 149.

The Court found confirmation for its conclusions in the Burke Act, which amended section 6 of the General Allotment Act to allow the Secretary of the Interior to issue patents to allottees before the expiration of the 25-year trust period. Act of May 8, 1906, 34 Stat. 182 (codified at 25 U.S.C. § 349). The "premature" patents authorized by the Burke Act did not expressly subject the allottee to plenary state jurisdiction. They did, however, remove "all restrictions as to sale, encumbrance, or taxation of said land," implying that

such taxation was independent of the general jurisdictional grant found in section 6 of the General Allotment Act. The Court interpreted this as reaffirming "for 'prematurely' patented land what § 5 of the General Allotment Act implied with respect to patented land generally: subjection to state real estate taxes." 112 S. Ct. at 691.

The one question left open by the Yakima decision was whether lands patented pursuant to statutes other than the General Allotment Act are also subject to *ad valorem* taxes. 112 S. Ct. at 694. This question was answered by the Ninth Circuit Court of Appeals in Lummi Indian Tribe v. Whatcom County, 5 F.3d 1355 (9th Cir. 1993). The court concluded that the key factor permitting taxation of reservation land patented in fee was not the jurisdictional provisions of the General Allotment Act, but the parcel's status as alienable or inalienable. *Id.* at 1357. Once restraints against alienability are lifted, lands are *per se* taxable because Indians holding lands in fee must "accept the burdens as well as the benefits of land ownership." *Id.* at 1358.

Other courts examining the issue have also concluded that so long as a parcel within an Indian reservation is alienable, the state may tax it, regardless of whether the owner is a member of the tribe, or even the tribe itself. United States v. Michigan, 882 F. Supp. 659 (E.D. Mich. 1995); Leech Lake Band of Chippewa Indians v. Cass County, 908 F. Supp. 689 (D. Minn. 1995). The only reported decision to the contrary is Southern Ute Indian Tribe v. Bd. of County Comm'rs, 855 F. Supp. 1194 (D. Colo. 1994). We do not, however, find its reasoning persuasive. The court in Southern Ute believed that allotments made pursuant to acts other than the General Allotment Act must contain some expression of intent other than the removal of restrictions on alienability to make such lands liable to taxation. Such a holding, however, imposes a standard much stricter than that employed in Yakima where the Court found the dispositive language was section 5 of the General Allotment Act, which simply conveys the patent to the Indian allottee "in fee, discharged of said trust and free of all charge or encumbrance whatsoever." 25 U.S.C. § 348 (1988). This language, although "reaffirmed" by other statutes, was deemed sufficient to imply an intent to render such lands taxable. It thus follows that all similar conveyances of fee patents to members of Indian tribes imply an intent to allow taxation of the patented lands.

Further, the *in rem* nature of *ad valorem* taxation implies that alienability is the key feature distinguishing taxable and nontaxable lands. As the Supreme Court noted in Yakima, liability for *ad valorem* taxes "flows exclusively from ownership of realty" and such a tax "creates a burden on the property alone." 112 S. Ct. at 692. With the removal of federal restrictions on alienation, federal interests in the land itself are minimized, if not altogether eliminated. Thus, state taxation of the land does not thwart federal interests and is not preempted.

Although federal law does not prohibit states from imposing *ad valorem* taxes on reservation lands owned in fee by individual Indians, it is necessary to examine Idaho law to determine whether it embodies an independent barrier to taxation of lands owned in fee by Indians. Article 21, section 19 of the Idaho Constitution (the "disclaimer clause"), provides in part as follows:

> [T]he people of the state of Idaho do agree and declare that we forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indians or Indian tribes; and until the title thereto shall have been extinguished by the United States, the same shall be subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States . . . . That no taxes shall be imposed by the state on the lands or property therein belonging to, or which may hereafter be purchased by, the United States, or reserved for its use.

The disclaimer clause presents two potential barriers to state taxation of reservation lands: the recognition that Indian lands are under the "absolute control and jurisdiction of the United States," and the prohibition on taxation of property belonging to the United States or reserved for its use. Neither barrier withstands scrutiny. In State v. Marek, 112 Idaho 860, 736 P.2d 1314 (1987), the Idaho Supreme Court found that the disclaimer clause could not prevent Congress from ceding control and jurisdiction over Indian lands to the state. *Id.* at 866, 736 P.2d at 1320. Such cession is found in the General Allotment Act and other acts providing for the conveyance of fee patents to Indian lands. As the Supreme Court found in Yakima, the removal of restric-

tions on alienation is sufficient indication of Congress' intent to cede to the states taxation authority over such lands.

Likewise, the disclaimer clause's prohibition on taxation of lands owned by the United States or reserved for its use has no application to *ad valorem* taxation of fee patented lands. By issuing a fee patent to lands, the United States disclaims all interests in such lands. Even where fee lands remain within the boundaries of an Indian reservation, they are not specifically reserved for the use of the United States, and therefore may be taxed.

A search of the Idaho Code does not disclose any statutory barriers to state taxation of lands held in fee by Indians. In 1963, Idaho, pursuant to Public Law 280, 67 Stat. 588, (1953), assumed civil and criminal jurisdiction over certain matters within Indian reservations. Idaho Code § 67-5101 (1995).[1] The statute specifically disclaims, however, any authority to tax "any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States." Idaho Code § 67-5103 (1995) (emphasis added). The prohibition on taxation is limited to those lands for which alienability is restricted. Thus, it does not affect the ability of the state to tax reservation lands held in fee by Indians.[2]

The only other state statute addressing taxation of Indian lands is Idaho Code § 63-1223 (1989), which provides as follows:

> All taxable improvements on government, Indian, state, county, municipal, or other lands exempt from taxation, and all improvements on all railroad rights of way owned separately from the ownership of the rights of way upon which the same stands or in which nonexempt persons have possessory interests shall be assessed as personal property and entered upon the personal property assessment roll.

The statute addresses the taxation of improvements on "Indian lands . . . exempt from taxation." Nothing in the section implies what land may or may not be taxable or exempt. Absent a statute specifically broadening the tax exemption of Indian lands beyond that required by federal law, it must be assumed that the legislature intended to recognize the tax-exempt status of Indian lands only to the extent required by federal treaties and statutes.

Thus, we conclude that counties may impose *ad valorem* taxes on real property owned in fee by individual Indians, regardless of whether such property is within the boundaries of a federally recognized Indian reservation.

AUTHORITIES CONSIDERED

1. Idaho Constitution:

Art. 21, § 19.

2. Idaho Code:

§ 63-1223 (1989).
§ 67-5101 (1995).
§ 67-5103 (1995).

3. Idaho Cases:

State v. Marek, 112 Idaho 860, 736 P.2d 1314 (1987).

4. Federal Cases:

Bryan v. Itasca County, 426 U.S. 373 (1976).

County of Yakima v. Yakima Indian Nation, 112 S. Ct. 683 (1992).

Goudy v. Meath, 203 U.S. 146 (1906).

Leech Lake Band of Chippewa Indians v. Cass County, 908 F. Supp. 689 (D. Minn. 1995).

Lummi Indian Tribe v. Whatcom County, 5 F.3d 1355 (9th Cir. 1993).

Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973).

Southern Ute Indian Tribe v. Bd. Of County Comm'rs, 855 F. Supp. 1194 (D. Colo. 1994).

United States v. Michigan, 882 F. Supp. 659 (E.D. Mich. 1995).

5. Other Authorities:

25 U.S.C. § 348 (1988).

25 U.S.C. § 1323(b) (1988).

Act of February 8, 1887, 24 Stat. 388 (codified at 25 U.S.C. § 331 *et seq.*).

Act of June 18, 1934, 48 Stat. 984 (codified at 25 U.S.C. § 461 *et seq.*).

Act of May 8, 1906, 34 Stat. 182 (codified at 25 U.S.C. § 349).

American Indian Law Deskbook (1993).

Public Law 280, 67 Stat. 588 (1953).

DATED this 18th day of April, 1996.

ALAN G. LANCE
Attorney General

Analysis by:

STEVEN W. STRACK
Deputy Attorney General

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[1] The provisions of Public Law 280 allowing states to assume jurisdiction over Indians within Indian reservations were repealed in 1968, but such repeal did not affect jurisdiction assumed prior to that time. 25 U.S.C. § 1323(b) (1988).

[2] It should be noted that Public Law 280 cannot be used as an independent source of authority for states to tax Indians or Indian property on reservations. Bryan v. Itasca County, 426 U.S. 373, 381 (1976).

ATTORNEY GENERAL OPINION NO. 96-3

To: Honorable Hal Bunderson
Idaho State Senate
P.O. Box 52
Meridian, ID 83680

Per request for Attorney General's Opinion

BACKGROUND

In November 1996 the voters will have the opportunity to vote on the proposed One Percent Initiative ("Initiative"), which would limit property taxes. Recently, you asked seven questions of the Attorney General's Office concerning the meaning of some of the terms in the Initiative and what effect the Initiative might have upon the Idaho property tax structure.

This is not the first time that such an initiative has been before Idaho voters. Idaho passed an earlier version of this Initiative in 1978. In addition, this is not the first time that the Attorney General's Office has been asked to give its opinion on a property tax initiative. This opinion refers to Attorney General Opinion 91-9, which reviewed an earlier version of this Initiative. A more complete understanding of this opinion might be gained from a reading of Attorney General Opinion 91-9.

QUESTIONS PRESENTED

You requested an Attorney General Opinion regarding the proposed One Percent Initiative. Specifically, you ask the following questions:

1. Section 5 of the Initiative emphasizes that "the legislature will fund *all* public education exclusively from the general fund and other state and federal revenue sources, by an amount necessary to replace *all* property tax revenue funding of *all* public education."

    a. Does the Initiative requirement that "the legislature will fund all public education" include funding for school plant facilities? Also, please provide your opinion about section 1.4 regarding the status of other (non-school) existing and new voter-approved issues, other than bonds.

b. If the state issues bonds exclusively to finance public school plant facilities, does the substance of that action fall under the two-thirds majority vote requirement of art. 8, sec. 3 of the Idaho Constitution?

2. The "Petition Summary" states that the Initiative removes maintenance and operation funding of community colleges from property tax, yet does not use the term "community colleges" in the text. Are community colleges properly defined as public education?

3. Do the opinions and conclusions set forth in Attorney General Opinion 91-9 have applicability to this Initiative? Specifically, section 1.1 of the current Initiative states: "The one percent (1%) shall be collected by the counties and apportioned according to law to the taxing districts within the counties." The 1991 Attorney General Opinion concluded that the initiative failed to "provide any entity with authority to adjust tax levies" and that there was no "procedural mechanism" provided to carry out the requirement. Does the current Initiative suffer from the same defect?

4. Section 1.2 of the Initiative speaks to the "annual budget." Is the annual budget of cities, counties and taxing districts the entire budget regardless of source of funds?

5. Section 6 of the Initiative ostensibly repeals Idaho Code § 63-923 which provides and refers to Idaho Code § 63-2220A (the 1995 3% budget cap law of HB 156). Would Idaho Code § 63-2220A and its companion, Idaho Code § 63-2220B (new construction roll, HB 649 of 1996), both be repealed and replaced by the new Idaho Code § 63-923 found in the current Initiative?

6. How would judicial confirmation obligations for "ordinary and necessary" expenses or urban renewal bonds not requiring voter approval be affected by the Initiative?

7. Does the Initiative apply to charter school districts in the same fashion as other school districts?

CONCLUSIONS

1. Public education includes funding for school plant facilities. Although school districts might decide not to incur any future debt for school plant facilities, the Initiative may not prohibit school districts from incurring future debt. If the state should issue bonds to pay for school plant facilities, the state's bonded indebtedness would not be subject to art. 8, sec. 3, and its requirement for a two-thirds majority vote to approve such debt, but the state's indebtedness would be subject to art. 8, sec. 1, and its requirement for a majority vote for approval of state debt exceeding $2 million.

2. Community colleges are not included within the definition of public education.

3. The provisions of the 1996 version of the Initiative concerning the collection and apportionment of taxes do not meaningfully differ from the version previously addressed in Attorney General Opinion 91-9. Therefore, the conclusion reached in that opinion remains valid, to wit: "The requirement in section 1 of the One Percent Initiative that taxes 'shall be collected by the counties and apportioned according to law to the taxing districts within the counties' is inoperable because, under existing law, counties have no authority to adjust taxes imposed by taxing districts within their counties." 1991 Idaho Att'y Gen. Ann. Rpt. 98, 99.

4. When the Initiative refers to the "annual budget," it refers to the entire annual budget regardless of source of funding.

5. The Initiative is not in conflict with Idaho Code §§ 63-923, 63-2220A or 63-2220B. It is, however, in conflict with the property tax code taken as a body of law and may also be in conflict with other code provisions, for example, certain provisions of chapter 17, title 50, Idaho Code.

6. Ordinary and necessary expenses are not subject to voter approval requirements and are not covered by the Initiative's exception from the property tax limitations for existing or subsequent indebtedness. The Initiative may have a serious impact on the ability to repay urban

renewal bonds issued prior to the effective date of the Initiative. With regards to future issuance of urban renewal bonds, the reduction in funds available to finance the issuance of the bonds will have the effect of reducing the number of bonds issued and, thus, the number of urban renewal projects.

7. The Initiative will apply to charter school districts the same as other school districts.

ANALYSIS

1. "Public Education" Includes Funding for School Plant Facilities

Part (a) of question 1 raises several issues. The first is whether the Initiative's requirement that "the legislature will fund all public education" includes funding for school plant facilities? It appears that it does.

The reference to "all public education" comes from subsection 1 of section 5 of the Initiative, which states:

> The Constitution of the State of Idaho provides, "The stability of a republican form of government depending mainly upon the intelligence of the people, it shall be the duty of the Legislature of Idaho to establish and maintain a general uniform and thorough system of public, free common schools."
>
> To more fully comply with that constitutional mandate, the state legislature shall fund all public education exclusively from general fund and other state and federal revenue sources, by an amount necessary to replace all property tax revenue funding of all public education.[1]

Art. 9 is the public education article of the Idaho Constitution. It is written in general terms and does not explicitly refer to school facilities or school buildings. However, from a historical perspective, there is little basis to argue that the provision of school facilities is not part of the "system of public, free common schools." Quite the contrary, when the Idaho Supreme Court construed this constitutional provision in Idaho Schools for Equal Educational

Opportunity v. Evans, 123 Idaho 573, 850 P.2d 724 (1993) (ISEEO I), it held that the requirements of the chapter of the State Board of Education Rules and Regulations for Public Schools K-12 addressing school facilities was one of three chapters of the regulations that was consistent with the constitutional requirement of thoroughness. 123 Idaho at 583, 850 P.2d at 734.[2] Given this holding and the State Board of Education's historical role in prescribing standards for school plant facilities, it can be concluded that funding for "all public education" includes funding for school plant facilities.

Provisions of the Initiative exempt existing bonded indebtedness[3] and subsequent indebtedness[4] approved by a two-thirds majority vote, but it does not require school districts to finance their own facilities. Your letter observes: "Presumably under the 1% Initiative, school districts would have no further reason to issue any more debt,[5] that funding obligation having passed to the state under section 5."

You also raise questions regarding section 1.4 of the Initiative regarding the status of "other (non-school) existing and new voter approved issues other than bonds."

Section 1.4 of the Initiative, set forth in note 2, explicitly exempts "the interest and redemption charges on any indebtedness or school plant facilities levies approved by the voters prior to the time this section becomes effective." Section 3, set out in note 4, allows new taxes to be imposed by a two-thirds majority of those voting in an election called for that purpose.

It is a rule of statutory construction that courts "must construe statutory terms according to their plain, obvious, and rational meanings." Nelson by and Through Nelson v. City of Rupert, — Idaho —, —, 911 P.2d 1111, 1113 (1996). The plain, obvious and rational meaning of section 1.4 of the Initiative is that its "property tax limitations . . . shall not apply . . . on any indebtedness . . . approved by the voters prior to the time this section becomes effective or any subsequent indebtedness approved pursuant to art. 8, sec. 3, of the Idaho Constitution relating to bonds." Section 1.4's disjunctive, *i.e.*, its exemption from the general 1% limitations for "any indebtedness or school plant facilities levies," means that any indebtedness approved by the voters before the section becomes effective is exempt from the 1% limitation. Likewise, under section 1.4, any future indebtedness unrelated to school plant facilities approved for bonds according to art. 8, sec. 3 of the Idaho Constitution will

also be exempt.[6] And finally, under section 3 of the Initiative, a taxing district can continue to incur indebtedness or liability exceeding the income and revenue for one year upon approval by two-thirds of the qualified electors voting in an election for that purpose. Thus, this opinion concludes that the Initiative will not affect indebtedness paid from property taxes previously approved by the voters or future indebtedness or bonds approved according to art. 8, sec. 3.

Most likely Section 1.4 and Section 5 of this Initiative will be read to permit local school districts to incur bonded indebtedness to fund additional facilities not provided by the state. It is possible, however, that a court might reach a different interpretation. A court, for instance, might conclude that the Initiative does not permit a local school district to incur bonded indebtedness and to use bond proceeds to fund facilities not provided by the state. The mere possibility that a court might rule in this way may, as a practical matter, limit the ability to issue bonds. Investors may be unwilling to purchase bonds if bond counsel is unwilling to confirm the authority of districts to issue bonds. If the Initiative passes, the authority to issue bonds should be clarified.

In part (b) of question 1, you ask whether the state's power to issue bonds is affected by the two-thirds majority vote requirement of art. 8, sec. 3 of the Idaho Constitution. Alternatively, you ask whether a 50 percent majority is all that is required.

Art. 8, sec. 3, is nearly intractable. It consists of a catchline, a 123-word sentence and a 406-word sentence, the latter of which is partially reproduced in note 6. Fortunately, since your question focuses on the state's issuance of bonds and this section deals with county and municipal indebtedness, the section need not be reviewed at length. The section by its own term applies only to "county, city, board of education, or school district, or other subdivision of the state . . . indebtedness, or liability . . . exceeding in that year, the income and revenue provided for it for such year . . . ."

The Idaho Supreme Court held that this section does not apply to the state in the case of State *ex rel.* Miller v. State Board of Education, 56 Idaho 210, 52 P.2d 141 (1935). In that case, Attorney General Miller sought a declaratory judgment that the regents of the University of Idaho were subject to the limitations of art. 8, sec. 3, when they proposed to issue 30-year bonds to pay for the construction of an infirmary at the University of Idaho. Among other things, the court said:

> Had it been intended by the framers of the Constitution to place the same limitations and restriction on "the Regents of the University of Idaho" as a corporation that were placed on counties, cities, towns and other municipal corporations by sec. 3, art. 8, they would have undoubtedly incorporated in this section (sec. 3, art. 8) the name of the Regents of the University, and placed the Board of Regents among the inhibited classes specified.

56 Idaho at 215. This analysis concludes that the state itself is not subject to the restrictions of art. 8, sec. 3.

That is not, however, the end of the analysis. Art. 8, sec. 1, addresses state indebtedness. It provides:

> § **1. Limitation on public indebtedness.**—The legislature shall not in any manner create any debt or debts, liability or liabilities, which shall singly or in the aggregate . . . exceed in the aggregate the sum of two million dollars ($2,000,000), except in case of war, to repel an invasion, or suppress an insurrection, unless the same shall be authorized by law, for some single object or work, to be distinctly specified therein, which law shall provide ways and means, exclusive of loans, for the payment of the interest on such debt or liability as it falls due, and also for the payment and discharge of the principal of such debt or liability within twenty (20) years of the time of the contracting thereof, and shall be irrepealable until the principal and interest thereon shall be paid and discharged. But no such law shall take effect until at a general election it shall have been submitted to the people, and shall have received a majority of all the votes cast for or against it at such election, and all moneys raised by the authority of such law shall be applied only to specified objects therein stated or to the payment of the debt thereby created . . . .

A simple majority may approve indebtedness under this section. Thus, if the state were to issue bonds to finance public school plant facilities, those bonds will be subject to this constitutional limitation, assuming that their aggregate obligation exceeded $2 million.

In addition, art. 8, sec. 2, provides:

> **§ 2. Loan of state's credit prohibited—Holding stock in corporation prohibited—Development of water power.**—The credit of the state shall not, in any manner, be given, or loaned to, or in aid of any individual, association, municipality or corporation; nor shall the state directly or indirectly, become a stockholder in any association or corporation, provided, that the state itself may control and promote the development of the unused water power within this state.

In the case of Davis v. Moon, 77 Idaho 146, 289 P.2d 614 (1955), the Idaho Supreme Court addressed the question of whether the legislature could by statute authorize the State Board of Education to issue bonds for the construction of dormitories for Northern Idaho College of Education, which had been renamed Lewis-Clark Normal School by the time the case was decided. The court upheld the act against a constitutional challenge under art. 8, sec. 2:

> Moreover, the appropriation act here under consideration is safe from conflict with Idaho Const. art. VIII, sec. 2, providing that, "The credit of the state shall not, in any manner, be given, or loaned to, or in aid of any individual, association, municipality or corporation . . ." by the fact that such enactment is for a public purpose. *Newland v. Child*, 73 Idaho 530, 254 P.2d 1066 [1953]. Further, the enactment is not invalidated, in light of its public purpose, merely because the obligation of the state in relation to the subject matter of such legislation is a moral rather than a mandatory one, nor by the fact that a private individual or organization may benefit thereby.

77 Idaho at 153-54, 289 P.2d at 618-19 (citations omitted). There is no doubt that education in Idaho is a public purpose, because art. 9, sec. 1 of the Idaho Constitution obligates the legislature "to establish and maintain a general, uniform, and thorough system of public, free common schools." The logical conclusion of the Davis rationale is that the extension of the state's credit to financing of public school facilities would not violate art. 8, sec. 2.

2. Community Colleges are not Included Within the Definition of "Public Education"

Question 2 observes that the summary of the petition states that the Initiative removes all maintenance and operation funding of community colleges from the property tax, but further observes that the term "community college" is not used in the text of the Initiative. Following this observation, you pose the question: "Are community colleges defined as public education?" The answer is no.

In terms of art. 8, the public indebtedness and subsidies article of the Idaho Constitution, although there is no authority directly on point, the likely extension of the Miller and Davis cases would be a holding that state support of community colleges would be an allowable public purpose for the use of state moneys under those articles. But, with regard to the specific question whether community colleges are public education under section 5.1 of the Initiative, which in the Initiative as written can fairly be equated to the question whether community colleges are public education under art. 9, sec. 1, the most likely answer is no. Davis cited both art. 9, sec. 1, and art. 10, sec. 1, for the proposition that educational institutions such as Northern Idaho College of Education (renamed Lewis-Clark Normal School at the time the decision was entered) are "established for no personal profit and serve only the public benefit." 77 Idaho at 153, 289 P.2d at 618. However, in context, it does not appear that the court was thereby deciding that post-secondary education such as community colleges were part of the "general, uniform and thorough system of public, free common schools" that the legislature is obligated to establish and maintain under art. 9, sec. 1. Instead, it appears that the court concludes that the state is authorized to establish post-secondary education such as normal schools under art. 10, sec. 1:

> **§ 1. State to establish and support institutions.—** Educational, reformatory, and penal institutions, and those for the benefit of the insane, blind, deaf and dumb, and such other institutions as the public good may require, shall be established and supported by the state in such a manner as may be prescribed by law.

Although there is no case law specifically addressing the issue, history suggests that the system of public education contemplated by art. 9, sec. 1,

which presumably is the same system addressed by section 5.1 of the Initiative, includes only elementary and secondary education, not post-secondary education such as community colleges. *Cf.* ISEEO I, which held that the State Board of Education Rules and Regulations for Public Schools K-12 were consistent with the court's view of thoroughness. 123 Idaho at 583, 850 P.2d at 734. If community colleges were included within the constitutional requirement of public education, it is doubtful that state board rules for K-12 would have been adequate to provide for thoroughness. *See also*, Paulson v. Minidoka County School District No. 331, 93 Idaho 469, 471-72, n.3, 463 P.2d 935, 937-38, n.3 (1970) (high schools as well as elementary schools were within the contemplation of a system of common schools at the time of adoption of the Idaho Constitution, so high schools are part of system of schools referred to in art. 9, sec. 1). Similarly, the legislature's appropriation of funds dedicated to public schools established by art. 9, secs. 3 and 4, has been to elementary and secondary schools, not to community colleges. *E.g.*, 1995 Sess. Laws, ch. 85. History suggests that if community colleges were part of the constitutionally required system of public education, the legislature would have been forced to appropriate money to community colleges from the dedicated school funds, but it has not done so.

Additionally, elementary, secondary and university educations were all known while Idaho was a territory and were within the contemplation of Idaho's constitutional convention and the populace that approved the Idaho Constitution. It appeared to be the contemporary understanding of those persons that elementary and secondary education was public education within the meaning of art. 9, sec. 1, but it does not appear that post-secondary education such as universities or community colleges were within the contemplation of art. 9, sec. 1. In fact, the University of Idaho was given a separate constitutional provision, art. 9, sec. 10, which strongly suggests that post-secondary education was not within the contemplation of "general, uniform and thorough system of public, free common schools" that the legislature is obligated to establish and maintain under art. 9, sec. 1. Moreover, community colleges were not authorized or established until years after statehood. From this one concludes that the courts will not construe section 5.1 of the Initiative to apply to community colleges.

3. The Initiative's Requirement That Taxes Be Collected by Counties and Apportioned According to Law to Taxing Districts Within the Counties is Inoperable

Section 1.1 of the Initiative states:

> The maximum amount of tax on all property subject to assessment and taxation within the state of Idaho shall not exceed one percent (1%) of the assessed value of such property, after all statutory exemptions applying to such property have been applied. The one percent (1%) shall be collected by the counties and apportioned according to law to the taxing districts within the counties.[7]

You ask how, under the Initiative, counties will collect and apportion taxes "according to law"? To address this question, one must first review how the tax collection system will work under law beginning January 1, 1997. Effective January 1, 1997, the governing property tax statutes will be as recodified by 1996 Session Laws, ch. 98 (H.B. 783).

a. Distribution of Revenues Under Law Effective January 1, 1997

Although each city, county or other authorized taxing district levies a discrete tax, the districts do not "set levies." Instead, each district develops a budget that determines how much revenue from property taxes the district will need during its next fiscal year. Each taxing district then "certifies" this dollar amount to the board of county commissioners of the county in which the district exists. If the district is a multi-county district (if its boundaries overlap county boundaries), it apportions the total amount of revenue required from property taxes between the counties, based on the percentage of the taxing district's taxable value in each county. *See* Idaho Code § 63-803 (effective 1/1/97).

After receiving the certified budget, the board of county commissioners will calculate the tax levy which, when applied to the tax rolls, will meet the budget requirements certified by the taxing districts. *Id.*

The board's clerk must deliver one copy of the record of all levies to the State Tax Commission. Idaho Code § 63-808 (effective 1/1/97). The State Tax Commission must "carefully examine" this report to determine if any county has fixed a levy for any purpose not authorized by law or greater than the maximums provided by law. Idaho Code § 63-809 (effective 1/1/97). If

the State Tax Commission finds any unauthorized or excessive levies, these must be reported to the prosecuting attorney (in the case of levies other than those imposed by the county) or to the attorney general (in the case of county levies). The prosecutor or the attorney general, as the case may be, is obligated to bring suit to have such levies set aside as unlawful. *Id.*

When these levies are approved, the auditor delivers the tax rolls with the tax computations to the county treasurer. Idaho Code § 63-811 (effective 1/1/97). The treasurer prepares tax notices and mails them to taxpayers by the fourth Monday of November. Idaho Code § 63-902 (effective 1/1/97). The notice must separately state the exact amount of tax due for each taxing district levying on the property to which the notice relates. *Id.*

All taxes collected by the treasurer are deposited into the county treasury and then are "apportioned" from the county treasury to each taxing district. Idaho Code §§ 63-903 and 63-1201 (effective 1/1/97). Because the tax bill displays how much the tax is for taxing district, each taxing district's apportioned share is simply the total amount collected for that district.

b. How the Initiative Would Affect the Levy, Collection and Apportionment of Taxes

It appears that section 6 of the Initiative intends to repeal existing laws that conflict with the Initiative's provisions. Further, the current version of the Initiative contains a limitation on the "annual budgets of cities, counties, and taxing districts." Subject to certain exceptions, these budgets may not grow by an amount "more than the increase in the cost of Social Security benefits for the budget year."[8]

In this regard, the current version differs from the 1991 version of the initiative, which contained neither repeal language nor a budget limitation. However, the current version of the Initiative does not provide any new or changed duties of the county auditor, the board of county commissioners or the State Tax Commission. These differences in the current version do not correct the basic flaw found in the version addressed in Attorney General Opinion 91-9. That is, neither existing law nor the Initiative itself contains any provision by which the requirement that taxes "be collected by the counties and apportioned according to law to the taxing districts within the counties" could be carried out. Attorney General Opinion 91-9 considered and rejected possibil-

ities about what law to which the phrase "according to law" might refer. These included referring the collection and apportionment of taxes to the courts pursuant to Idaho Code § 63-917 (Idaho Code § 63-809 after 1/1/97) or that some official or board (described in Attorney General Opinion 91-9 as a "tax czar") may have legal authority to require cities, counties and taxing districts to reduce or eliminate budgets and levies to comply with the 1% limitation. Attorney General Opinion 91-9 concluded that neither option was a procedure available "according to law." 1991 Idaho Att'y Gen. Ann. Rpt. at 108. We continue to hold to the conclusion expressed then:

> The basic problem here is that the drafters of the proposed One Percent Initiative frame a standard that is, at bottom, only a slogan: "taxation within the State of Idaho shall not exceed one percent (1%) of the actual market value of such property." However, they fail to provide any entity with authority to adjust tax levies to meet this standard. They also fail to provide any procedural mechanism to carry out their proposal.
>
> We conclude that neither the existing statutes nor any provision of the One Percent Initiative expressly grants authority to the State Tax Commission to adjust levies and apportion taxes. Neither the Idaho Constitution nor the Idaho Code would permit imposition of such a duty on the courts. Finally, any attempt to centralize such authority in the boards of county commissioners would make the boards into local taxing czars and virtually destroy all the other independent taxing districts that now answer to the local electorate.
>
> It follows that the One Percent Initiative cannot be implemented as written. It is our opinion that a reviewing court faced with the options of striking down the One Percent Initiative or upholding the initiative by creating from whole cloth a new tax apportionment system for the State of Idaho would choose the former option.
>
> Courts are driven to the extreme measure of striking down a statute only when "it is so unclear or confused as to be wholly beyond reason, or inoperable . . . ." *Gord v. Salt Lake*

> *City*, 434 P.2d 449, 451 (Utah 1967). The One Percent Initiative fits these criteria. There is no possible means to implement it "according to law." Consequently, a reviewing court would strike it down.

1991 Idaho Att'y Gen. Ann. Rpt. at 107-08. That conclusion is equally valid for the present version of the Initiative. Section 1.1 of the Initiative is not self-executing. If the Initiative passes, the implementation requires that the legislature extensively revise its text, the existing property tax laws, or both. Any legislative revision must also conform with other provisions of the Idaho Constitution, most notably art. 7, sec. 2 and sec. 5.[9] These sections require that property taxes be levied in proportion to the value of the property and uniformly on all property in the jurisdiction of the taxing district. These sections limit the legislature's choices for implementing the Initiative. Attorney General Opinion 91-9 illustrated the difficulties created by the combined effects of the Initiative and art. 7, sec. 5. It concluded that "the inevitable result [is] that property taxes in each taxing district will bear no rational relation to the needs of that district or to the wishes of the taxpayers of that district." Legislative implementation of the Initiative must resolve these problems.

4. The "Annual Budget" is the Entire Annual Budget Regardless of Source of Funding

Section 1.2 of the Initiative reads:

> The annual budget of cities counties and taxing districts may not be increased in any budget year by more than the increase in the cost of living index used for computing Social Security benefits for such budget year, unless authorized by a majority of the voters in such city, county or taxing district, voting in an election held for the purpose. Revenues generated by taxes on new construction and annexation are exempt from this limit.

Statutes enacted by Initiative have the same force and effect as statutes enacted by the legislature. Westerberg v. Andrus, 114 Idaho 401, 757 P.2d 664 (1988); Luker v. Curtis, 64 Idaho 703, 136 P.2d 978 (1943). This being the case, it is reasonable to assume that the rules of statutory construction apply to

Initiative construction as well. The first principle of statutory construction is that where the language of the statute is unambiguous, that language must be given effect and there is no occasion for construction. Church of Jesus Christ of Latter Day Saints v. Ada County, 123 Idaho 410, 849 P.2d 83 (1993); Otteson v. Board of Commrs of Madison County, 107 Idaho 1099, 695 P.2d 1238 (1985).

The Initiative clearly limits increases in the "annual budget of cities counties and taxing districts." This language is plain and unambiguous. "The annual budget" cannot be taken to mean "a portion of the annual budget."

If any further indication is needed that "annual budget" does not mean a part of the annual budget, note that statutes intended to apply only to that part of the budget funded by *ad valorem* taxes specifically so state. Idaho Code § 63-2220A, for example, reads:

> (1) Except as provided in subsection (2) of this section for tax year 1995, and each year thereafter, no taxing district shall certify a budget request to finance the ad valorem portion of its annual budget that exceeds the greater of: . . . .

(Emphasis added.)

The Initiative limits growth in the entire budget of a city, county or other taxing district, not a portion of the budget.

Those portions of the budget funded by fees, grants, gifts, federal payments in lieu of taxes, other tax revenues, revenue sharing, and any other source of funding are also affected. This limitation can have a significant impact. A library district, for example, may depend on grant money to upgrade its facilities or services. It is difficult, if not impossible, to budget for grant money since obtaining it is fraught with uncertainty. If grant money which has not been budgeted becomes available, however, it cannot be spent if spending the grant means the growth limitation in the Initiative is exceeded. The Initiative constrains a taxing district's entire budget.

5. The Initiative Conflicts With Property Tax Statutes and Possibly Other Statutes

Section 6 of the Initiative states:

> This law shall take effect for the year beginning January 1, 1997, any laws in conflict with this new section (63-923) are hereby repealed.

As noted above, statutes enacted through initiatives and statutes enacted by the legislature enjoy equal dignity. It is the law in Idaho that a statute providing for repeal of all inconsistent laws is effective to accomplish such repeal. State v. Davidson, 78 Idaho 553, 309 P.2d 211 (1957). This doctrine is known as "repeal by implication." It is not favored and will not be indulged if there is any other reasonable construction. State v. Martinez, 43 Idaho 180, 250 P. 239 (1926). Statutes, although in apparent conflict, are construed to be in harmony if reasonably possible. Cox v. Mueller, 125 Idaho 734, 874 P.2d 545 (1994). Only that part of an existing statute actually in conflict with a subsequent statute is repealed by implication. State v. Davidson, 78 Idaho 553, 309 P.2d 211 (1957) (holding that enactment of negligent homicide statute repealed the earlier voluntary manslaughter statute to the extent the earlier statute included homicide resulting from the improper operation of motor vehicles).

The conflict section of the Initiative does not expressly repeal existing Idaho Code § 63-923. The language of the preamble leaves no doubt it is the drafters' intent that existing Idaho Code § 63-923 be repealed and replaced by the language of the Initiative, but the Initiative does not expressly accomplish this purpose. Since the Initiative does not expressly repeal existing Idaho Code § 63-923, only those portions of the existing statute in irreconcilable conflict with the Initiative will be repealed by implication. The legislature, of course, could expressly repeal the existing section, thereby solving this problem.

The Initiative will not repeal Idaho Code § 63-2220A by implication. The principle feature of Idaho Code § 63-2220A is the three percent budget growth limitation placed on that portion of a taxing district's budget funded by *ad valorem* taxes. The Initiative limits growth in the entire annual budget to the cost of living index used to compute Social Security benefits. These provisions can be reconciled. If the cost of living index is under three percent, the Initiative provides the tight constraint. If the cost of living index exceeds three percent, Idaho Code § 63-2220A provides the tight constraint. Initiative and code sections may be regarded as complementary rather than in conflict.

Both the Initiative and Idaho Code § 63-2220A provided for an exception to the budget limitation for new construction. These provisions are not in conflict. Since Idaho Code § 63-2220B provides only for the creation of a new construction role, it is not in conflict with the Initiative.

In a greater sense, however, the Initiative may be read as conflicting with the principles of the entire property tax code. It is the opinion of this office that this Initiative, like its predecessor as reviewed in Attorney General Opinion 91-9, is unimplementable. It is unimplementable because it is in conflict with the basic principles of Idaho's property tax structure. Given a choice between effectively repealing Idaho's property tax code or holding that an initiative which ostensibly attempts only to modify a portion of that code cannot be implemented, a court is most apt to find the Initiative unimplementable.

The repeal provision in the Initiative may affect statutes other than the property tax code. Chapter 17, title 50, for example, permits local improvement districts to issue bonds which are then repaid by collecting "special assessments" levied against the property lying within the local improvement district. (*See, e.g.*, Idaho Code § 50-1721A for use of the phrase "special assessment.") Bonds issued by local improvement districts are not effected by the provisions of art. 8, sec. 3 of the Idaho Constitution. Byrns v. City of Moscow, 21 Idaho 398, 121 P. 1034 (1912). Section 1.4 of the Initiative prohibits "special assessments" to repay indebtedness not approved pursuant to "art. 8, sec. 3 of the Idaho Constitution relating to bonds." Art. 8, sec. 3, requires that bonds for indebtedness be approved by a two-thirds vote of those persons living in the taxing district, unless the indebtedness is for "ordinary and necessary" expenses. It is likely, then, that bonds of local improvement districts issued after January 1, 1997, the effective date of the Initiative, will have to be approved by a two-thirds vote when neither the local improvement district code nor the Idaho Constitution require such a vote now.[10] The legislature, of course, may address this problem by amending affected statutes, the Initiative, or both.

6. Ordinary and Necessary Expenses are not Subject to Voter Approval Requirements

Attorney General Opinion 91-9 addresses the affect of the Initiative on urban renewal bonds. Rather than just refer to that portion of Attorney General

Opinion 91-9, its language has been reproduced with appropriate modifications relevant to the current version of the Initiative.

Chapter 29, title 50, Idaho Code, known as the Local Economic Development Act, gives certain municipalities the authority to issue bonds. These bonds are repaid using a device commonly known as tax increment financing. The Initiative will have a serious impact on the ability to repay such bonds issued prior to the effective date of the Initiative.

Under the tax increment financing law, a municipality first creates an urban renewal agency which exercises authority over a given geographical area of a city. Idaho Code §§ 50-2005 through 50-2007, 50-2903 and 50-2904. The agency then issues bonds, the proceeds of which are used for urban renewal projects within the agency's geographic area. Idaho Code § 50-2909. The bonds issued represent a limited obligation of the agency, not the municipality. Idaho Code § 50-2910. Bonds issued pursuant to chapter 29, title 50, are repaid solely from a special fund established for the purpose. Idaho Code § 50-2909. The income stream used to replenish the special fund is generated mainly by dedicating property taxes above a certain base level to the fund. Idaho Code § 50-2908. The rationale is that the investment of the redevelopment agency in its geographic area encourages further development, thus raising tax revenues within the entire area. The tax upon the difference between the assessed value at the time the bonds were issued and subsequent years is applied to repayment of the bonds. Idaho Code §§ 50-2903(4) and 50-2908.

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

Bondholders of tax increment financing bonds would likely challenge the Initiative on grounds it impairs the obligation of contracts under the principles laid down by the United States Supreme Court in United States Trust Co. v. New Jersey, 431 U.S. 1, 97 S. Ct. 1505, 52 L. Ed. 2d 92 (1977), and Energy Reserves Group v. Kansas Power and Light, 459 U.S. 400, 103 S. Ct. 697, 74 L. Ed. 2d 569 (1983).

On the other hand, we note that the California Supreme Court, in Amador Valley Joint Union High School District v. State Board of Equalization, 583 P.2d 1281 (Cal. 1978), upheld that state's one percent law, Proposition 13, against a challenge that it unconstitutionally impaired contractual obligations. The Amador court found that although there was a possibility of default on bonds, the default was not "inevitable" and new revenues might be found from other sources, such as legislative enactments, to prevent default. 583 P.2d at 1297. Amador seems to require actual default rather than merely "substantial impairment" as discussed in United States Trust Co. and Energy Reserves Group. Thus, if the Idaho Supreme Court were to find a substantial impairment but adopt the reasoning of the California Supreme Court in Amador, it would not find that the Initiative impaired the obligation of contracts, at least until actual default became inevitable. Rather, it would wait to see if other revenue became available such as through new legislation. This would leave open the possibility of future legislation to authorize some additional tax to repay existing bondholders. Indeed, this is what occurred in California following the adoption of Proposition 13. The immediate impact of Proposition 13 on existing projects financed by the issuance of bonds was severe. Schuster, Tax Allocation Bonds in California After Proposition 13, 14 Pac. L. J. 159, 177 (1983). Sixty-two percent of the projects supporting bond issues were unable to generate sufficient tax revenues to meet debt service on the bonds in the fiscal year following the effective date of Proposition 13. *Id.* Thus, those projects were forced to turn to other available revenues. For projects which were still experiencing hardship, the Local Agency Indebtedness Fund provided low-interest loans. The fund was established by the California Legislature to provide assistance to projects severely affected by Proposition 13. *Id.*

As to future tax increment financing, the Initiative would create uncertainty as to future tax revenues and, thus, the ability to repay the bonds. The practical effect would be the reduction of tax increment financing, since investors would presumably be reluctant to buy bonds which might not be repaid. However, it must be noted that in California after the passage of Proposition 13, bonds issued after the effective date did not experience the same difficulty in generating sufficient tax increments to meet annual debt service as those issued before Proposition 13; the effects of which are described above. *Id.* at 178. Certainly, Proposition 13 reduced the amount of tax increments that a given redevelopment project can generate and, accordingly, has reduced the amount of bonds that can be issued in reliance thereon. However,

tax increment financing has not been rendered obsolete in California. *Id.* It appears that the same would be the case in Idaho if the Initiative passes. There will certainly be a reduction in the number of urban renewal projects because of the lack of funds to pay the bonded indebtedness. Thus, tax increment financing will probably be still available, but to a limited extent.

The remainder of question 6 concerns the effect of the Initiative on judicially confirmed obligations which have been deemed by the court to be "ordinary and necessary" expenses. As you know, expenses which are deemed "ordinary and necessary" are excepted from the voter approval requirements of art. 8, sec. 3, Idaho Constitution. The Initiative states:

> The property tax limitations provided for in Section 1. No. 1 shall not apply to ad valorem taxes, or special assessments to pay the interest and redemption charges on any indebtedness or school plant facilities levies approved by the voters prior to the time this section becomes effective or any subsequent indebtedness approved pursuant to Article 8 Section 3 of the Idaho Constitution relating to bonds.

Because "ordinary and necessary" expenses are not subject to voter approval, they are not covered by the Initiative's exception for existing indebtedness. With regard to the Initiative's exception for subsequently approved indebtedness, the wording of the Initiative is somewhat ambiguous. Subsequent indebtedness is excepted from the property tax limitations if "approved" pursuant to art. 8, sec. 3, Idaho Constitution. One could argue that judicially confirmed "ordinary and necessary" expenses have been approved pursuant to art. 8, sec. 3, because they are excepted from that provision's requirements. However, it would appear that the drafters of the Initiative intended "approval" to mean "voter approval." Thus, subsequent indebtedness which is properly classified as "ordinary and necessary" expenses may not be covered by the Initiative's exception for subsequent indebtedness, because they are not subject to voter approval.

7. The Initiative Will Apply to Charter School Districts the Same as Other School Districts

Your final question is about the Initiative's application to charter school districts. The Idaho Supreme Court's holdings and dicta concerning

charter school districts (and their close relatives, charter cities) have addressed related issues over the years. In Howard v. Independent School District No. 1, 17 Idaho 537, 106 P. 692 (1910), the plaintiff taxpayer challenged the constitutionality of the Lewiston Independent School District. The Lewiston district had been created by an act of the territorial legislature and its charter had been amended by both the territorial and the state legislature. 17 Idaho at 539. The taxpayer contended, among other things, that the special charter creating Independent School District No. 1 of Nez Perce County (which is now commonly called the Lewiston Independent School District) was inconsistent with art. 9, sec. 1 of the Idaho Constitution. The court determined there was nothing in the organization or existence of an independent school district chartered by the territorial legislature that was in conflict with either the letter or the spirit of art. 9, sec. 1. 17 Idaho at 541-42. The court also observed that under art. 11, sec. 2, which prohibits special charters, except for municipal, charitable, educational, penal or reformatory corporations that are or may be under the control of the state, "the constitution recognizes the right of the legislature to extend, change and amend by special law the charter of educational corporations that were in existence at the time of the adoption of the constitution." 17 Idaho at 541.

In Common School District No. 2 of Nez Perce County v. District No. 1 of Nez Perce County, 71 Idaho 192, 227 P.2d 947 (1951), the court considered the question whether a special legislative act amending the Lewiston district's charter with regard to its annexation powers and annexation elections was unconstitutional. The challenge was brought under art. 3, sec. 19 of the Idaho Constitution, which prohibits the legislature from passing local or special laws in thirty-two subject matter areas, including: "providing for and conducting elections, or designating a place of voting." The court began its discussion of the constitutionality of the special legislation with this statement:

> Special charters of cities and school districts ante-dating the constitution survived it, and such political entities since its adoption have constitutionally and legally operated thereunder, and amendment of such charters may be made only by local and special laws which are not inhibited by Art. 3, Sec. 19.

71 Idaho at 195, 227 P.2d at 948. The court upheld the amendment to the district's charter against constitutional challenge as special legislation. It is clear

from these two cases that charter districts' charters may be amended by local or special statutes so long as those statutes do not contravene a specific prohibition of art. 3, sec. 9, but cannot be amended by laws of general application. But this rule of law requiring that a charter be amended by special act does not answer the question whether a provision in a charter district's charter may be overridden by an inconsistent provision of general statutory law.

In Independent School District of Boise City v. Callister, 97 Idaho 59, 539 P.2d 987 (1975), the court considered a charter school district's claim that the Idaho Tort Claims Act did not apply to it because its special charter had not been amended to that effect. The court rejected this argument:

> Plaintiff below argues first that because the Independent School District of Boise operates by virtue of a charter from the Idaho territorial legislature it is not subject to the notice of claim requirement of the Idaho Tort Claims Act because such is general legislation and only special legislation affects the said independent school district. *Bagley v. Gilbert*, 63 Idaho 494, 122 P.2d 227 (1942). *Bagley*, however, provides that the provisions of a special charter supersede and prevail over any inconsistent provisions contained in general law pertaining to matters of a local concern. We find no provision of the tort claims act to be inconsistent with any provision of the special charter of the school district. The legislature included all public corporations within the definition of a "political subdivision" for purposes of the Idaho Tort Claims Act. Therefore, we hold that the statutory notice of claim requirement does apply to the Boise Independent School District.

97 Idaho at 61-62, 539 P.2d at 989-90.

Bagley v. Gilbert, 63 Idaho 494, 122 P.2d 227 (1942), which the court cited in Independent School District of Boise City, involved inconsistencies between the general laws and the charter for Boise City:

> First, the charter provides that Ada County shall pay over to Boise City all city tax moneys as fast as the same are collected, whereas the general law provides that Ada County shall

> apportion the monies so collected once a month to the various tax units. Second, the charter as amended . . . provides that Boise City shall pay to Ada County *one-half of one per cent* of the amount of city taxes collected and such payment shall be in full for services rendered by the county officials, whereas the general law provides that the county shall retain *one and one-half per cent*, and apportion such sum to the county current expense fund.

63 Idaho at 499. The court further observed that the general acts at issue in that case did not specifically refer to the Boise City Charter. 63 Idaho at 499-500. After noting that the Boise City Charter can be amended only by a special act of the legislature specifically referring to the charter both in the title and in the body of the act, the court set forth the following rulings of law:

> The rule would seem to be well settled in this jurisdiction that the provisions of a special charter such as granted to the city of Boise supersede and prevail over any inconsistent provisions contained in the general law pertaining to matters of a local concern. The distinction between the two cases, *In re Ridenbaugh*, 5 Idaho 371, 374, 49 Pac. 12 [1897], and *Boise City Nat. Bank v. Boise City*, [15 Idaho 792, 100 Pac. 93 (1909)], lay in the fact that by one act, the legislature declared the subject matter of the act to be one of state concern and declared a policy of the state with respect thereto which withdrew subject matter from the province of local administration, and the other act merely related to local administration and delegated the determination of local questions to local authorities. When the legislature declares a matter to be of general state concern and declares a public policy with respect thereto, such general state law will prevail over any special city charter provisions to the contrary.

63 Idaho at 500 (citations omitted). The court applied these principles in Bagley by holding that the legislature had not expressed a general public policy to require charter cities to conform to the general law with regard to counties turning over tax receipts to cities, and the courts would not require a general law inconsistent with the charter to supersede the charter provisions.

The two cases that Bagley contrasted were In re Ridenbaugh, 5 Idaho 371, 49 P. 12 (1897), and Boise City Nat. Bank v. Boise City, 15 Idaho 792, 100 P. 93 (1909). In Ridenbaugh, the trial court had convicted Ridenbaugh of the crime of conducting a gambling game, in violation of a state criminal statute. Ridenbaugh petitioned the Idaho Supreme Court for *habeas corpus*. contending that he was legally conducting his gambling game under a license issued by the Boise City Clerk because Boise City's territorial charter authorized the city to license and regulate gambling houses. The court framed the issue as follows:

> It is conceded by counsel that the decision of this case depends upon the provisions of the constitution and laws of this commonwealth. The city of Boise was incorporated by a special act of the legislature, [which] . . . empowered [the city] to license gambling-houses . . . . The authority of the city council, by ordinance, to license gambling-houses continued, at least, to the eighth day of May, 1897, at which date a general law prohibiting gambling went into effect. Said act prohibiting gambling . . . expressly repeals all acts or parts of acts inconsistent with the provisions of said act . . . . It is also conceded that the only question for decision in this case is: Did the general law prohibiting gambling repeal that provision of the city charter empowering the city council to license gambling?

5 Idaho at 374.

The court concluded that the general law, although inconsistent with the Boise City Charter, prevailed over the Boise City Charter for the following reasons:

> But the legislature did not intend that said anti-gambling act should apply only to part of the state. It was intended as general law applying equally to the entire state . . . . The act amending sections 3, 5 and 11 of the charter of Boise City, approved March 12, 1897, provides that the city council may pass ordinances not repugnant to the constitution and laws of the United States, or the laws of this state necessary or convenient for carrying the powers and authority granted into effect.

> . . . Thus, it is shown by the original charter of Boise City, also by section 2 of article 12 of the constitution, and the act amending the charter of Boise City, that it was not the intention of the legislature or the framers of the constitution to empower the council of incorporated cities and towns to pass ordinances in conflict with the general laws of the state. . . . It was not the intention to permit or authorize the councils of incorporated cities to legalize, by ordinance, acts prohibited as criminal by the general criminal laws of the state, or to enforce ordinances in conflict with the general law. In case of a conflict the ordinance must give way. The ordinances authorized by the charter of Boise City must be in harmony with the general laws of the state. . . . The judgment of this court is that the discharge of the petitioner is denied, and he is remanded to the custody of the sheriff of Ada County.

5 Idaho at 375-76. Accordingly, the court concluded that Boise City's specific charter provision authorizing licensing of gambling houses fell to a general statutory provision prohibiting gambling, even though the general statutory provision did not refer to charter cities in any regard, in part because the general provision expressly repealed all inconsistent acts or parts of acts.

In contrast, in Boise City National Bank the court considered a test challenge to the validity of sewer improvement bonds that the city intended to issue. The issue before the court was whether bonds could be issued solely under the provisions of a 1907 amendment to the Boise City Charter or whether a general 1905 law would supplement the terms of the 1907 amendment to the city charter. 15 Idaho at 797. The court ruled:

> We think it clear that the powers of Boise City in regard to creating indebtedness and paying the same must be determined by the provisions of its charter, and not by the provisions of said bonding act of 1905, which is a general law applicable to all cities incorporated under the general law for incorporating towns and cities.

15 Idaho at 799. The court observed that the 1907 amendment of the Boise City Charter was complete in itself, 15 Idaho at 800, that the state constitution contemplated that special charters will be amended by special acts only, not

general laws, 15 Idaho at 801, and that there is nothing in the 1905 general act indicating that it was proposed to affect or amend the Boise City Charter, 15 Idaho at 804.

The sum of Ridenbaugh and Boise City National Bank is that a general statute that expressly provides that inconsistent laws are repealed will govern and override specific provisions of territorial charters to the contrary, but a statute less strongly worded as a statement of public policy will probably not override inconsistent provisions of charter cities or school districts.

Section 6 of the Initiative provides: "This law shall take effect for the year beginning January 1, 1997, any laws in conflict with this new section (63-923) are hereby repealed." The Initiative has a clear policy statement that all inconsistent laws are to be repealed. The Ridenbaugh rule, which was cited in Bagley, and Bagley, which was in turn cited in Independent School District of Boise City, should still be good law and should be applied.

Therefore, although under Common School District No. 2 and earlier cases it is the law that a school district charter can be amended only by special law, under Ridenbaugh, Bagley and Independent School District of Boise City it is the law that a general law supersedes and prevails over inconsistent special charter provisions contained when the general law addresses matters of more than local concern and when the general law expresses an intention to repeal other laws in conflict. The Initiative addresses property taxes, indebtedness, etc., throughout the state and for "all public education" and repeals "any laws in conflict . . . ." That being the case, special charter provisions inconsistent with the Initiative should yield to the Initiative under the Ridenbaugh-Bagley-Independent School District of Boise City precedents. It is most likely that the courts will hold that the Initiative applies to charter school districts (and also to charter cities), notwithstanding any contrary provisions of their charters.

AUTHORITIES CONSIDERED

1. United States Constitution:

Art. I, sec. 10.

2. Idaho Constitution:

Art. 3, sec. 9.
Art. 3, sec. 19.
Art. 7, sec. 2.
Art. 7, sec. 5.
Art. 8, sec. 1.
Art. 8, sec. 2.
Art. 8, sec. 3.
Art. 9.
Art. 9, sec. 1.
Art. 9, sec. 3.
Art. 9, sec. 4.
Art. 9, sec. 10.
Art. 10, sec. 1.

3. Idaho Code:

§ 50-1721A.
§ 50-2005.
§ 50-2006.
§ 50-2007.
§ 50-2903.
§ 50-2904.
§ 50-2908.
§ 50-2909.
§ 50-2910.
§ 63-803.
§ 63-808.
§ 63-809.
§ 63-811.
§ 63-902.
§ 63-903.
§ 63-917.
§ 63-923.
§ 63-1201.
§ 63-2220A.
§ 63-2220B.

4. Idaho Cases:

Bagley v. Gilbert, 63 Idaho 494, 122 P.2d 227 (1942).

Boise City Nat. Bank v. Boise City, 15 Idaho 792, 100 P. 93 (1909).

Byrns v. City of Moscow, 21 Idaho 398, 121 P. 1034 (1912).

Church of Jesus Christ of Latter Day Saints v. Ada County, 123 Idaho 410, 849 P.2d 83 (1993).

Common School District No. 2 of Nez Perce County v. District No. 1 of Nez Perce County, 71 Idaho 192, 227 P.2d 947 (1951).

Cox v. Mueller, 125 Idaho 734, 874 P.2d 545 (1994).

Davis v. Moon, 77 Idaho 146, 289 P.2d 614 (1955).

Howard v. Independent School District No. 1, 17 Idaho 537, 106 P. 692 (1910).

Idaho Schools for Equal Educational Opportunity v. Evans, 123 Idaho 573, 850 P.2d 724 (1993).

In re Ridenbaugh, 5 Idaho 371, 49 P. 12 (1897).

Independent School District of Boise City v. Callister, 97 Idaho 59, 539 P.2d 987 (1975).

Luker v. Curtis, 64 Idaho 703, 136 P.2d 978 (1943).

Nelson by and Through Nelson v. City of Rupert, — Idaho —, 911 P.2d 1111 (1996).

Newland v. Child, 73 Idaho 530, 254 P.2d 1066 (1953).

Otteson v. Board of Commrs. of Madison County, 107 Idaho 1099, 695 P.2d 1238 (1985).

Paulson v. Minidoka County School District No. 311, 93 Idaho 469, 463 P.2d 935 (1970).

State v. Davidson, 78 Idaho 553, 309 P.2d 211 (1957).

State v. Martinez, 43 Idaho 180, 250 P. 239 (1926).

State *ex rel.* Miller v. State Board of Education, 56 Idaho 210, 52 P.2d 141 (1935).

Westerberg v. Andrus, 114 Idaho 401, 757 P.2d 664 (1988).

5. Other Cases:

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

Energy Reserves Group v. Kansas Power and Light, 459 U.S. 400, 103 S. Ct. 697, 74 L. Ed. 2d 569 (1983).

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

United States Trust Co. v. New Jersey, 431 U.S. 1, 97 S. Ct. 1505, 52 L. Ed. 2d 92 (1977).

6. Other Authorities:

1991 Idaho Att'y Gen. Ann. Rpt. 98.

1995 Sess. Laws, ch. 85.

1996 Sess. Laws, ch. 98 (H.B. 783).

Schuster, Tax Allocation Bonds in California After Proposition 13, 14 Pac. L. J. 159 (1983).

DATED this 16th day of May, 1996.

ALAN G. LANCE
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Analysis by:

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[1] In many respects this Initiative is not self-executing. It neither identifies the source of funding nor does it appropriate any money to replace local property tax revenues for schools. Determining the source of funding and appropriating money is properly the role of the legislature. It is also worth noting that this Initiative may not guarantee current funding levels for any particular school district or current statewide funding levels.

[2] The other two chapters were those addressing (1) instructional programs and textbooks and (2) transportation.

[3] Section 1.4 of the Initiative provides: "The property tax limitations provided for in Section 1 No. 1 shall not apply to ad valorem taxes, or special assessments to pay the interest and redemption charges on any indebtedness or school plant facilities levies approved by the voters prior to the time this section becomes effective or any subsequent indebtedness approved pursuant to art. 8, sec. 3, of the Idaho Constitution relating to bonds."

[4] Section 3 of the Initiative provides: "Cities, counties and taxing districts may impose special taxes in excess of the one percent (1%) on such cities, counties and taxing districts by a two-thirds (2/3) vote of those voting in an election called for that purpose."

[5] If the Initiative passes, it may be school districts' local political decision not to issue debt in the future. However, although the Initiative is ambiguous on this issue, it does not appear to prohibit school districts from issuing debt in the future, even if funding for school facilities shifted to the state. For example, districts could issue debt for facilities not covered by state funding if they received the necessary two-thirds majority required by art. 8, sec. 3.

[6] Art. 8, sec. 3, has three provisions addressing bonds:

(1) "[A]ny city may own, purchase, construct, extend, or equip . . . off street parking facilities, public recreation facilities, and air navigation facilities, and for the purpose of paying the cost thereof, may, . . . with the assent of two thirds (2/3) of the qualified voters voting at an election for that purpose, issue revenue bonds therefor, the principal and interest of which

to be paid solely from revenue derived from rates and charges for the use of, and the service rendered by, such facilities as may be prescribed by law . . . ."

(2) "[A]ny city or other political subdivision of the state may own, purchase, construct, extend, or equip . . . water systems, sewage collection systems, water treatment plants, sewage treatment plants, and may rehabilitate existing electrical generating facilities, and for the purposes of paying the cost thereof, may . . . with the assent of a majority of the qualified electors voting at an election to be held for that purpose, issue revenue bonds therefor, the principal and interest thereof to be paid solely from revenue derived from rates and charges for the use of, and the service rendered by such system, plants, and facilities, as may be prescribed by law . . . ."

(3) "[A]ny port district . . . may contract indebtedness and issue revenue bonds evidencing such indebtedness, without the necessity of the voters of the port district authorizing the same, the revenue bonds to be payable solely from all or such part of the revenues of the port district derived from any source whatsoever excepting only those revenues derived from ad valorem taxes . . . and such revenue bonds not to be in any manner or to any extent a general obligation of the port district . . ., nor a charge upon the ad valorem tax revenue of such port district."

[7] This language differs slightly from the language of the version of the 1% Initiative that was addressed in Attorney General Opinion No. 91-9. The language then said: "The maximum amount of all ad valorem tax on property subject to assessment and taxation within the State of Idaho shall not exceed one percent (1%) of the actual market value of such property. The one percent (1%) shall be collected by the counties and apportioned."

[8] See Sections 4 and 5 of this opinion for a discussion of these points.

[9] Art. 7, sec. 2, states:

> The legislature shall provide such revenue as may be needful, by levying a tax by valuation, so that every person or corporation shall pay a tax in proportion to the value of his, her, or its property, except as in this article hereinafter otherwise provided. The legislature may also impose a license tax, both upon natural persons and upon corporations, other than municipal, doing business in this state; also a per capita tax: provided, the legislature may exempt a limited amount of improvements upon land from taxation.

Art. 7, sec. 5, states:

> All taxes shall be uniform upon the same class of subjects within the territorial limits, of the authority levying the tax, and shall be levied and collected under general laws, which shall prescribe such regulations as shall secure a just valuation for taxation of all property, real and personal: provided, that the legislature may allow such exemptions from taxation from time to time as shall seem necessary and just, and all existing exemptions provided by the laws of the territory, shall continue until changed by the legislature of the state: provided further, that duplicate taxation of property for the same purpose during the same year, is hereby prohibited.

[10] Note that a similar analysis may apply to some funding for other types of districts as well. Drainage districts, for example, may be affected.

ATTORNEY GENERAL OPINION NO. 96-4

TO: Mr. Monte Q. Later, Chairman
Idaho Park and Recreation Board
P. O. Box 83720
Boise, ID 83720-0065

Per Request for Attorney General's Opinion

QUESTIONS PRESENTED

1. May fees collected pursuant to Idaho Code §§ 67-7013, 67-7014, 67-7106, 67-7118 and 67-7126 be used to offset the general administrative overhead costs of the Idaho Department of Parks and Recreation in operating the respective recreation programs? General administrative overhead costs would include factors such as fiscal, personnel, and legal support, office space rental, utilities use, etc.

2. May gas tax revenues allocated to the [Idaho Department of Parks and Recreation] pursuant to Idaho Code § 63-2412(1)(e)(1-3) be used to offset the general administrative overhead costs of operating the respective recreation programs?

3. Is the allocation of road and bridge improvement moneys within the capital improvement account (Idaho Code §§ 57-1801 and 63-2412(1)(e)(3)) within the discretion of the Idaho Park and Recreation Board? What is the legislative direction in regard to distribution of these funds?

4. Is the allocation of capital improvement account funds (Idaho Code § 57-1801) within the discretion of the Board? Please outline the process used to allocate these funds including a description of the roles and responsibilities of the Joint Committee on Finance and Appropriations, the Legislature, the Division of Financial Management, and the Governor's Office.

5. Is the allocation of $25,000 from the [recreational vehicle] fund (Idaho Code §§ 49-448 and 67-4223(e)) for the support of gateway visitor information centers within the discretion of the Board? Is this alloca-

tion the result of legislative direction which can only be changed by the legislature?

CONCLUSION

1. The fees described in Idaho Code §§ 67-7013, 67-7014, 67-7106, 67-7118 and 67-7126 are of two different types: "Vendor" or "handling" fees (hereafter referred to in the collective as vendor fees), which the Idaho Department of Parks and Recreation (IDPR) collects when it acts as a vendor of recreational registrations, and administrative funds which are allocated to IDPR as a percentage of recreational registration revenue. Vendor fees should be used to offset expenses attributable to the department's registration functions. Excess vendor fees may be expended at the agency's discretion. Administrative funds may be expended to cover the direct costs of administering the respective recreational programs, and may, in addition, be used to cover a proportionate share of general administrative costs.

2. A portion of fuel tax revenues allocated to IDPR pursuant to Idaho Code § 63-2412(1)(e)(1-3) may be used to offset the general administrative costs of operating the respective recreation programs.

3. The allocation of road and bridge improvement moneys within the capital improvement account (Idaho Code §§ 57-1801 and 63-2412(1)(e)(3)) is within the discretion of the board. The legislature has directed that these road and bridge improvement moneys be "used solely to improve roads and bridges within and leading to parks and recreation areas of the state." Idaho Code § 63-2412(1)(e)(3).

4. The legislature has made a determination (Idaho Code § 63-2412(1)(e)(1-3)) that a percentage of fuel tax revenue generated statewide shall be allocated to the park and recreation capital improvement account established pursuant to Idaho Code § 57-1801. The expenditure of capital improvement funds is left to the discretion of the board. The board's discretion remains subject to the legislative and budgetary process.

5. The board could not unilaterally allocate $25,000 from the recreational vehicle (RV) fund for the support of gateway visitor information

centers. Approval of a qualified grant application for such purposes would be within the board's discretion. In this instance, the transfer of $25,000 from the RV fund to gateway visitor information centers was a legislative act over which the board has no discretion.

ANALYSIS

I.

DISTINCTION BETWEEN FEES AND TAXES

For purposes of this analysis, vendor fees collected by IDPR in its capacity as a recreational registration vendor are assumed to be "fees," while administrative funds and revenues generated by taxes on the sale of motor fuels are assumed to be "taxes." This analysis does not address the validity of the imposition or the collection of these revenue generating mechanisms. Rather, this analysis examines whether the existing expenditure of these funds complies with all pertinent constitutional and statutory requirements. In addition, this analysis will identify where use of these funds is discretionary and with whom the discretion lies.

In any analysis regarding the expenditure of fees or taxes it is important to distinguish between the two. Fees and taxes differ in a variety of ways, including how they are imposed and how they may be spent. "In a general sense a fee is a charge for a direct public service rendered to the particular consumer, while a tax is a forced contribution by the public at large to meet public needs." Brewster v. City of Pocatello, 115 Idaho 502, 505, 768 P.2d 765, 768 (1988). Because of the nature of fees, it has generally been held that the amount collected must bear a reasonable relationship to the service provided. *See* V-1 Oil Company v. Idaho Petroleum Clean Water Trust Fund, 96.14 ISCR 633 (July 2, 1996); Kootenai County Property Association v. Kootenai County, 115 Idaho 676, 680, 769 P.2d 553, 557 (1989). The requirement that a fee be related to the cost or value of the benefit it provides will necessarily narrow the permissible use of fee-generated revenue.

II.

USE OF VENDOR FEES AND ADMINISTRATIVE REVENUES FROM THE SALE OF RECREATIONAL REGISTRATIONS

The Idaho Department of Parks and Recreation is designated by statute to operate a registration system for certain recreational activities. Various statutes require the registration of vessels, snowmobiles, off-highway motorbikes and ATVs, and the issuance of permits for winter recreational parking (Park N' Ski). Vendors of the various registrations and permits are allowed to retain a portion of the moneys collected for having handled the transaction (vendor fees). In addition, a portion of the recreational registration revenue (15%) is statutorily allocated to IDPR to cover administrative expenses (administrative funds). Your first question concerns whether either of these sources of revenue may permissibly be spent on general administrative overhead.

A. Vendor Fees Should Be Used To Offset The Costs Of Selling Recreational Registrations

A review of the statutory provisions which established vendor fees reveals a fairly consistent statutory scheme, although the wording varies slightly. Vendors of vessel registrations may set an "administrative fee" of not more than $1.50 (Idaho Code § 67-7014(1)). The "fee shall be used to defray related administrative costs." (Idaho Code § 67-7014(3)). Vendors of snowmobile registrations may "charge an additional one dollar and fifty cents ($1.50) handling fee per registration for the distribution of certificates of number." (Idaho Code § 67-7106(4)). Sellers of Park N' Ski permits are "entitled to receive a commission of one dollar ($1.00) on each permit sold, which sum may be retained as compensation for the sale of the permit." (Idaho Code § 67-7118(1)). Finally, vendors of motorbike and ATV registrations are mandated to charge a $1.50 handling fee (Idaho Code § 67-7126(1)).

While the language of each statute varies, the vendor fees are intended to compensate the vendor for the cost of issuing the recreational registration. The language in the Park N' Ski statute most clearly states this intent. The use of the term "compensation" suggests the legislature intended to create a "handling fee" or "administrative fee." Compensation usually implies that the entity receiving the compensation is free to spend or save the amount

received. While it can be argued that the absence of this language from the other statutes suggests the legislature intended to limit the vendor fee to actual cost of the service, the de minimus nature of the vendor fee leads to the opposite conclusion. Since there are numerous vendors, the more likely conclusion is that the legislature intended to establish a cap for vendors providing the service but did not restrict the use of the funds beyond ensuring that the service was provided.

In summary, when IDPR acts as the vendor and collects the vendor fee, it should use those funds for the direct maintenance, operation, and enhancement of the registration program; however, to the extent excess funds exist, they may be used for other departmental programs.

B. Administrative Revenues May Be Used To Offset The Cost Of Selling Recreational Registrations, Together With A Proportionate Share Of General Administrative Overhead Costs

The bulk of the revenue from the sale of the various recreational registrations (85%) is dedicated to the provision of facilities and services for the particular users who generated the revenue. The remaining 15% is apportioned to IDPR to cover the "administrative costs" of operating the respective recreation programs. With two exceptions, the statutes require that unexpended administrative funds be returned to the respective fund to provide more facilities and services to users. This statutory scheme suggests that the legislature intended to limit the amount of money expended on administration and maximize the amount of money expended to provide user facilities and services.

1. Administrative Costs

The Idaho Code provides no guidance on what constitutes "administrative costs." Neither does the phrase have a particular meaning within the field of accounting professionals. *Black's Law Dictionary* suggests that "administrative costs" may be synonymous with "overhead," which is defined as:

> All administrative or executive costs incident to the management, supervision, or conduct of the capital outlay, or business; distinguished from "operating charges," or those

> items that are inseparably connected with the productive end and may be seen as the work progresses, and are the subject of knowledge from observation. Continuous expenses of a business; the expenses and obligations incurred in connection with operation; expenses necessarily incurred in organization, office expenses, engineering, inspection, supervision, and management during construction; and general expenditures in financial or industrial enterprise which cannot be attributed to any one department or product, excluding cost of materials, labor, and selling. . . .
>
> Any cost not specifically or directly associated with the production of identifiable goods and services. Sometimes called "burden" or "indirect costs" . . . .

Black's Law Dictionary 1103 (6th ed. 1990) (emphasis added; citations omitted).

Even within state government there is substantial diversity in what are considered administrative costs. In the Attorney General Guideline dated April 5, 1988, this office discussed administrative costs or "expenses" as distinguished from "investment expenses" as they related to PERSI operations. It was the recommendation of this office that PERSI adopt guidelines distinguishing between investment and administrative expenses, stating: "It would seem that it is not as important precisely where the lines are drawn as that there be consistency in the process. With defined administrative versus investment expenses, the legislature can appropriate administrative funds in a manner which it considers proper." 1988 Idaho Att'y Gen. Ann. Rpt. 94, 97. This advice seems as appropriate today for IDPR as it did in 1988 for PERSI.

In Chairman Later's request for guidance, he identified "fiscal, personnel, and legal support, office space rental, utilities use . . ." as items of general administrative cost. This enumeration appears reasonable so far as it goes. There may be additional costs which can reasonably be considered within this category. At some point, however, the costs become so remote and unrelated that it would be inappropriate to include them as general administrative costs. For example, there should be little dispute that the salary of the agency head is a general administrative cost. Conversely, there should be little dispute that the salary of a seasonal aide who collects fees at Hells Gate

State Park should not be considered a general administrative cost. Somewhere between these two extremes lies a grand ambiguity. By establishing policies or guidelines defining what items are appropriate for inclusion as administrative costs, and formulating a methodology to fairly apportion the administrative costs, the department and the board could bring some consistency to this issue and reduce the ambiguity and the opportunity for controversy and criticism.

2. Boating Program

Idaho Code § 67-7013(4) specifies the uses of administrative funds generated by the vessel registration program:

> (4) All moneys deposited to the park and recreation account are to be appropriated for the purpose of defraying the expenses, debts and costs incurred in carrying out the powers and duties of the department as provided in this chapter and for defraying administrative expenses of the department, including salaries and wages of employees of the department, expenses for traveling, supplies, equipment and other necessary expenses of the department as they relate to administration of this chapter. . . . Should the related administrative costs of the department amount to less than the moneys apportioned to the park and recreation account for such purposes, the difference shall be remitted to the state vessel account . . . .

(Emphasis added.)

These provisions are among the most liberal of the recreational registration programs. According to Idaho Code § 67-7013, these funds may be used to cover both the direct costs and the general administrative costs relating to the Idaho Safe Boating Act (title 67, chapter 70, Idaho Code). Thus, in addition to paying direct costs such as salaries and equipment, it is appropriate that these administrative funds be used to cover a proportionate share of general administrative costs. Such costs might include, but are not limited to, administrative, fiscal, secretarial, legal and personnel support, a portion of office space rental and utilities, etc.

Any unused administrative funds must be returned to the state vessel account where they would be used to provide boating enhancements for the benefit of boaters. This preference for tangible boater benefits makes it clear that these administrative funds should not be used to pay for other department programs. It would be inappropriate, for example, to use administrative funds from the boating program to pay the operating expenses of Land of the Yankee Fork State Park.

3. Snowmobile Program

The statutory scheme for distribution of fees for snowmobiles is found at Idaho Code § 67-7106(3), which provides:

> (3) Up to fifteen percent (15%) of the statewide snowmobile account generated each year may be used by the department to defray administrative costs. Any moneys unused at the end of the fiscal year shall be returned to the state treasurer for deposit in the state snowmobile account.

This section varies slightly from the provisions for vessel registration in that it provides no elucidation of what constitutes "administrative costs." Unlike the Idaho Safe Boating Act, which confers upon the department comprehensive responsibility for many aspects of boating, the statutory provisions concerning snowmobiles relate primarily to the department's obligations with regard to registration of snowmobiles. This difference leads to the conclusion that the use of administrative fees available to the department from snowmobile registration may be used to cover the direct costs of the registration program together with a proportionate share of general administrative costs.

4. Park N' Ski

The distribution of fees for the Park N' Ski program is similar to that for snowmobiles:

> (2) Fifteen percent (15%) shall be allotted to the department for the production of the parking permits and necessary administration expenses incurred by the department in carrying out the provisions of section 67-7115(3), Idaho Code, which moneys shall be placed in the park and recreation account.

Idaho Code § 67-7118 (emphasis added). This section specifically delineates how the administrative funds may be spent. The department can expend these funds on the production and, implicitly, distribution of the permits and in carrying out the provisions of Idaho Code § 67-7115(3). That section deals only with the enforcement of the requirement that a vehicle parked in a winter recreational parking area must have a permit. It appears that acceptable expenditures of Park N' Ski administrative funds is registration and enforcement related. This would include direct costs attributable to the Park N' Ski registration program, enforcement of the Park N' Ski permit requirements, and a proportionate share of general administrative costs. While there is no explicit requirement that unused Park N' Ski administrative funds be returned to the state treasury, the limitation on permissible uses implies that unused funds should be returned to the cross country skiing recreation account.

5. Motorbikes and ATVs

The distribution of fees collected on the sale of motorbike and ATV registrations is established at Idaho Code § 67-7126(2):

> (2) Up to fifteen percent (15%) shall be allotted to the department for administration and for the production of registration stickers, which moneys shall be placed in the motorbike recreation account.

This provision is virtually identical to the provision governing distribution of the snowmobile-generated revenues. The only difference is that this section does not require the return to the state treasury of unused administrative fees at the close of the year. As with the Park N 'Ski program, however, return of unused administrative funds to the motorbike recreation account is implicit. The provisions of section 67-7126(2) should be interpreted consistently with those of the snowmobile program: The use of administrative funds available to the department from motorbike and ATV registration may be used to cover the direct costs of the registration program together with a proportionate share of general administrative costs.

III.

USE OF GAS TAX REVENUES

In 1983, the legislature directed that Idaho Code § 63-2412 be amended so that a portion of motor fuel tax revenue would be allocated to the water-

ways improvement fund (Idaho Code § 57-1501) and the off-road motor vehicle account (Idaho Code § 57-1901). According to the minutes of the March 8, 1983, House Transportation Committee, this apportionment was a recognition of the fact that a portion of motor fuels is sold for off-highway use, including use by off-road motorcycles, ATVs, snowmobiles and boats. In 1988, Idaho Code § 63-2412 was amended to allow for the distribution of a portion of the off-highway motor fuels tax revenue to the park and recreation capital improvement account. While the distribution formula for these off-highway motor fuels taxes has been changed a number of times, all three accounts currently receive off-highway gas tax revenues. In 1993, the legislature once again amended the distribution formula to provide that a portion of the gas tax revenues distributed to the park and recreation capital improvement account be dedicated specifically to the improvement of roads and bridges within and leading to state park and recreation areas (hereafter road and bridge funds) (Idaho Code § 63-2412(1)(e)(3)).

Idaho Code § 63-2412(1)(e)(1) and (2) specifically provides that with respect to the waterways improvement fund and the off-road motor vehicle account, "[u]p to twenty per cent (20%) of the moneys distributed . . . may be used by the department of parks and recreation to defray administrative costs. Any moneys unused at the end of the fiscal year by the department of parks and recreation shall be returned to the state treasurer for deposit in the [waterways improvement account or off-road motor vehicle account]." Idaho Code § 63-2412(1)(e) does not address any apportionment of park and recreation capital improvement funds, including road and bridge funds, between administrative and other uses.

A second series of questions concerns whether gas tax revenues distributed to the waterways improvement fund, the off-road motorized vehicle account, the park and recreational capital improvement account, and the road and bridge account may be used to off-set the general administrative overhead costs of the department.

A. Waterways Improvement Fund and Off-Road Motorized Vehicle Account

The gas tax distribution provisions expressly provide that up to 20% of the waterways improvement moneys and off-road motorized vehicle moneys may be spent to "defray administrative costs." As discussed elsewhere in this opinion, there is no statutory provision enumerating those expenses which

are "administrative costs." For that reason, it is important for agencies to develop guidelines which assist in segregating administrative costs and then utilize a consistent methodology for apportioning those administrative costs among their program budgets.

B. Capital Improvement Account and Road and Bridge Moneys

Unlike the waterways improvement fund and the off-road motorized vehicle account, there is no mention of administrative costs in the distribution formula for the capital improvement account or the portion of the account dedicated to road and bridge improvements. Idaho Code § 57-1801, however, provides guidance concerning the capital improvement account:

> The purposes for which moneys in the account may be used shall be to acquire, purchase, maintain, improve, repair, furnish, and equip parks and recreation facilities and sites in the state of Idaho. The park and recreation board is charged with the administration of the account for the purposes specified herein. . . . All claims against the account shall be examined, audited and allowed in the same manner now or hereafter provided by law for claims against the state.

The permissible uses of the portion of the capital improvement account which is dedicated to road and bridge improvements are set out at section 63-2412(1)(e)(3). These funds are "to be used solely to improve roads and bridges within and leading to parks and recreation areas of the state." A review of the legislative history concerning the capital improvement account and its road and bridge component reveals nothing relevant to the issue of administrative costs. The statement of purpose for H.B. 185 (1993 Idaho Sess. Laws 1116) which concerned the road and bridge funds noted that, "[h]ighways have received significant increases in revenue due to gas tax increases while park and recreation areas have increased in demand and use without the benefit of increased revenue."

There are two reasonable approaches to determining whether it is appropriate to expend a portion of these funds on general administrative overhead. One approach would be to take the position that since the statute does not address administrative costs, no administrative costs should be allowed. Since the legislature knew how to allow for administrative costs (as in the

waterways improvement fund and the off-road motorized vehicle fund), it could be argued that the fact it did not do so here is significant.

However, this office has had an opportunity to consider a similar question regarding administration of state lands and has taken a different approach. In Attorney General Opinion No. 81-14, the attorney general was reviewing the legality and constitutionality of utilizing the "ten per cent fund" established by Idaho Code § 58-140 to fund the general operating expenses of the department of lands. In reaching the conclusion that the ten per cent fund could not be used for general operating expenses without violating the constitution and the terms of the statute, the attorney general noted that the ten per cent fund could only be expended on capital projects. However, the attorney general's opinion stated: "These capital expenditures have included monies for contracting, salaries, and administrative services necessary to implement specific projects of capital improvements. . . ." 1981 Idaho Att'y Gen. Ann. Rpt. 154, 155.

The analysis used in Attorney General Opinion 81-14 is consistent with the analysis applied in similar situations involving the administration of trusts. Capital improvement and road and bridge funds are similar to trust funds in that they are held and administered by the Idaho Park and Recreation Board for particular and limited purposes. The management and expenditure of trust funds is closely controlled, yet the existing body of trust law recognizes that the costs of administering the trust should be paid out of the trust. 76 Am. Jur. 2d *Trusts* § 462 (1992).

Capital projects don't happen without support from fiscal, purchasing, legal and management information systems. It is consistent with trust law and with prior attorney general opinions to allow for a reasonable expenditure of capital funds for these administrative costs, so long as these costs are incurred in furtherance of the capital projects funded by the fuel tax.

Again, it is important for the board to develop guidelines or policies which address the types of expenditures which will be included as legitimate administrative expenses for capital projects. In addition, the board may wish to establish a cap on the portion of capital improvement funds which may be used for administrative expenses. Consistency will be the best protection that the board can have in answering questions raised by auditors or the public concerning its administration of these capital funds.

C. Summary

Gas tax revenues allocated to the Idaho Department of Parks and Recreation, including waterways improvement funds, off-road motorized vehicle moneys, capital improvement funds and its component road and bridge funds, may be spent on reasonable general administrative costs. Such expenditures may not exceed 20% of the waterways improvement fund or the off-road motorized vehicle account. The Idaho Park and Recreation Board should consider setting policies or guidelines which identify what expenses will be considered appropriate "administrative costs." In addition, the board may wish to consider a policy limiting the percentage of capital improvement account moneys (including road and bridge moneys) that may be allocated to general administrative costs.

IV.

ALLOCATION OF CAPITAL IMPROVEMENT AND ROAD AND BRIDGE MONEYS

The capital improvement moneys allocated to IDPR by Idaho Code § 63-2412(1)(e) and (1)(e)(3) are to be placed in the capital improvement account established by Idaho Code § 57-1801. As noted previously, section 57-1801 places responsibility for administration of these funds with the Idaho Park and Recreation Board.

> The very essence of a discretionary power is that the person or persons exercising it may choose which of several courses will be followed. . . . Administrative agencies generally have wide discretion in selecting the means to fulfill the legislature's goals.

2 Am. Jur. 2d *Administrative Law* § 63 (1994). The board's discretion is circumscribed by its statutory authority. 2 Am. Jur. 2d *Administrative Law* § 64 (1994). In this case, the board must expend the funds as required by Idaho Code §§ 57-1801 and 63-2412(1)(e)(3). So long as the board expends the capital improvement funds, including road and bridge funds, in compliance with its statutory authority, it is within the board's discretion where and how it spends the funds.

The legislature appropriates spending authority for capital improvement funds after the board's budget proposal is reviewed and modified by the division of financial management, the governor's office, the legislative budget office and the joint finance and appropriations committee. If, as a result of the budgetary and legislative process, additional restrictions are placed on the use of capital improvement funds, the board would be obligated to administer those funds in accordance with the legislative directive.

V.

USE OF RV FUNDS

Beginning with the 1995 fiscal year budget and continuing in subsequent fiscal year appropriations, the legislature began appropriating the sum of $25,000 per year from the recreational vehicle fund to the park and recreation fund in order to provide a portion of the annual funding for operation of the state's gateway visitor centers. 1994 Idaho Sess. Laws 627. This fund transfer and the legislative directive concerning its expenditure are binding on the board. Transfer of these funds from the recreational vehicle account to the park and recreation fund for use in operating gateway visitor centers can only be changed by legislative directive in a subsequent appropriations bill or by statute.

CONCLUSION

Vendor fees collected by the department when it acts as a vendor of recreational registrations should be used first to offset expenses directly attributable to the department's registration functions. Excess vendor moneys may be used at the discretion of the department. Administrative funds which are allocated to the department as a percentage of recreational registration revenue may be expended to cover the direct costs of administering the respective recreational programs, and may, in addition, be used to cover a proportionate share of general administrative costs.

Fuel tax revenues allocated to the department pursuant to Idaho Code § 63-2412(1)(e)(1-3) may be used to offset the general administrative overhead costs of operating the respective recreation programs.

The legislature has made a determination (Idaho Code §§ 57-1801 and 63-2412(1)(e)(1-3)) that a percentage of fuel tax revenue generated statewide shall be allocated to the park and recreation capital improvement account established pursuant to Idaho Code § 57-1801. The expenditure of these funds is left to the discretion of the Idaho Park and Recreation Board and the legislature through the budgetary process.

The legislature, starting in 1994 and continuing in subsequent years, has transferred moneys from the recreational vehicle fund to the park and recreation fund to support gateway visitor centers. Such a fund transfer is not within the discretion of the Idaho Park and Recreation Board. Approval of a qualified grant application for such purposes would be within the board's discretion. In this instance, the transfer of $25,000 from the recreational vehicle fund to gateway visitor information centers was a legislative act which is binding on the board.

AUTHORITIES CONSIDERED

1. Idaho Code:

§ 49-448.
§ 57-1501.
§ 57-1801.
§ 57-1901.
§ 58-140.
§ 63-2412.
§ 63-2412(1)(e).
§ 63-2412(1)(e)(1).
§ 63-2412(1)(e)(2).
§ 63-2412(1)(e)(3).
§ 67-4223(e).
§ 67-7013.
§ 67-7013(4).
§ 67-7014.
§ 67-7014(1).
§ 67-7014(3).
§ 67-7106.
§ 67-7106(3).
§ 67-7106(4).

§ 67-7115(3).
§ 67-7118.
§ 67-7118(1).
§ 67-7126.
§ 67-7126(1).
§ 67-7126(2).

2. Idaho Cases:

Brewster v. City of Pocatello, 115 Idaho 502, 768 P.2d 765 (1988).

Kootenai County Property Association v. Kootenai County, 115 Idaho 676, 769 P.2d 553 (1989).

V-1 Oil Company v. Idaho Petroleum Clean Water Trust Fund, 96.14 ISCR 633 (July 2, 1996).

3. Other Authorities:

1981 Idaho Att'y Gen. Ann. Rpt. 154.

1988 Idaho Att'y Gen. Ann. Rpt. 94.

1993 Idaho Sess. Laws 1116.

1994 Idaho Sess. Laws 627.

2 Am. Jur. 2d *Administrative Law* § 63 (1994).

2 Am. Jur. 2d *Administrative Law* § 64 (1994).

76 Am. Jur. 2d *Trusts* § 462 (1992).
Black's Law Dictionary (6th ed. 1990).

DATED this 23rd day of September, 1996.

ALAN G. LANCE
Attorney General

Analysis by:

CLIVE J. STRONG
Deputy Attorney General
Chief, Natural Resources Division

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ATTORNEY GENERAL'S SELECTED INFORMAL GUIDELINES FOR THE YEAR 1996

ALAN G. LANCE
ATTORNEY GENERAL
STATE OF IDAHO

January 2, 1996

Ms. Lydia G. Guerra
Idaho Commission on Hispanic Affairs
5460 West Franklin Road, Suite B
Boise, ID 83705

THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE

Re: State Employee's Activities in Political Organizations

Dear Ms. Guerra:

Your letter of December 7, 1995, requests an opinion of the Attorney General regarding a state employee's activity in political organizations. You pose the question separately with regard to classified and non-classified state employees in specific situations. I will address each of your inquiries in turn.

I.

ANALYSIS

A. Classified State Employees

The political activity of classified employees is governed by Idaho Code § 67-5311, a copy of which is enclosed.[1] Idaho Code § 67-5311(1) prohibits classified employees from political activity in three specific areas: (1) using the employee's official authority or influence to interfere with elections or nominations to office; (2) coercing any other state officer or employee to contribute in any way to political organizations; (3) being a candidate for, or holding, elective partisan offices.

Idaho Code § 67-5311(2) enumerates rights retained by classified state employees. The list contains 14 retained rights, the last of which includes the right to "otherwise participate fully in public affairs, except as prohibited by law, in a manner which does not materially compromise the neutrality, efficiency, or integrity of the employee's administration of state functions." Idaho Code § 67-5311(2)(n).

1. May Classified State Employees Participate in Politically Oriented Organizations?

The answer to your question is yes, classified state employees may participate in politically oriented organizations. In your example, you reference participation in the Idaho Hispanic Caucus as a political organization. A classified state employee has the right to "be a member of a political party or other political organization and participate in its activities; . . . ." Idaho Code § 67-5311(2)(e). Thus, a classified state employee may be a member of the Idaho Hispanic Caucus and participate in the political activities enumerated in Idaho Code § 67-5311(2), but must not violate the prohibitions of Idaho Code §§ 67-5311(1) or 67-5311(2)(n).

2. May Classified State Employees Attend Politically Oriented Meetings During Normal Work Hours?

Classified state employees may attend politically oriented activities during normal work hours if they have obtained the necessary leave from supervisors and record the time as vacation, compensatory time, leave without pay or other appropriate time coding. In addition, if the Commission on Hispanic Affairs sends an employee to a political organization's meeting to represent the Commission then such political activity could be within the course and scope of the employment.

B. Non-Classified State Employees

Idaho Code § 67-5311 applies only to classified state employees. Non-classified state employees are not specifically prohibited by statute from participation in politically oriented organizations. Generally, non-classified state employees are at-will employees and have no protectable property interest in maintaining their status as a state employee. Thus, they can be removed without cause.[2]

1. May a Commissioner Appointed by the Governor Participate in Politically Oriented Organizations?

The Idaho Commission on Hispanic Affairs is created by Idaho Code § 67-7201. Of the nine members, five are appointed by the Governor, two by the Speaker of the House of Representatives, and two by the President Pro

Tempore of the Senate. All commissioners are non-classified state employees, and each commissioner is removable at the will of the appointing authority.

Generally, a non-classified state employee may participate in politically oriented organizations as he or she sees fit. If a commissioner becomes politically active, then the appointing official may take that activity into account with regard to the commissioner's continued at-will employment. Thus, the answer to your question is personal to the commissioner more than it is legal. The legal answer to your inquiry is that the commissioner has no statutory prohibition from engaging in political activity.

2. May Commissioners Attend Political Meetings During Normal Work Hours?

Since a commissioner is compensated pursuant to Idaho Code § 59-509(g), he or she is only compensated when acting in the actual performance of his or her duties as a commissioner. Thus, the question is not whether a commissioner is attending a political activity during normal work hours but whether the attendance involves the actual performance of his or her duties as a commissioner. If the commissioner attends such political activities on behalf of the commission and thereby exercises of the powers and duties of the commission as set forth in Idaho Code § 67-7205, then the commissioner should be paid for such activity. However, if the political activity is of a personal nature and not on behalf of the commission and in the actual performance of duties as a commissioner, then no compensation should be given.

3. Termination Based on Political Activity

An employer terminating a non-classified employee by reason of the employee's political activity should be wary of potential consequences. A cause of action for interference with the freedom of speech or the right of association potentially exists for the employee in conjunction with a wrongful termination or breach of contract suit. We do not opine on the validity of such causes of action but note only that such have been raised by terminated employees in other jurisdictions.

C. Constitutional Limitation on State Employee's Political Activity

An additional applicable limitation on state employee political activities is that such activity, if during time compensated by state funds, must not personally benefit a public officer. Article 7, section 10 of the Idaho Constitution prohibits a public officer from profiting from public resources. Thus, it is inappropriate to compensate a state employee from public funds for performing non-official, personal or campaign-related tasks that benefit public officers. Further, over time this provision has been interpreted to mean that state time or resources (including but not limited to use of the telephones, fax machines, photocopiers, state mail system, etc.) may not be used for political or campaign-related activity.

CONCLUSION

Political activity of classified state employees is governed by Idaho Code § 67-5311. Statutorily authorized activity conducted by the employee on his or her own time is proper as part of classified state employment. Attendance at such activities during work hours is improper unless authorized as time away from work or if the activity falls within the course and scope of the classified employment. Non-classified state employees, such as Commissioners of the Idaho Commission on Hispanic Affairs, are not statutorily prohibited from participating in political activity. However, as non-classified state employees, they serve at the pleasure of the appointing authority who may take account of an appointee's political activities when considering continuation in at-will employment. Finally, any use of state funds, time or resources for political or campaign related activity is prohibited.

I hope this letter adequately addresses your inquiry. If you have any further questions regarding this, please do not hesitate to contact me.

Very truly yours,

KEVIN D. SATTERLEE
Deputy Attorney General
Contracts & Administrative
Law Division

[1] Note that the general prohibition of article 7, section 10 of the Idaho Constitution also applies and is discussed later in further detail.

[2] The doctrine of at-will employment for non-classified employees can have limitations on causes for termination based on express or implied contracts of employment. Each situation requires a case-by-case analysis

January 23, 1996

Leola Daniels, M.S., R.N.
Executive Director
Board of Nursing
280 N. 8th Street, Suite 210
Boise, ID 83720-0061

THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE

Re: Proposed IDAPA 23.01.01.400.03 and .04

Dear Ms. Daniels:

This letter is in response to your January 2, 1996, inquiry in which you ask:

> Are proposed IDAPA 23.01.01.400.03 and .04 within the proper authority of the Idaho Board of Nursing to regulate nurses in relation to delegation of nursing functions to unlicensed assistive personnel?

These rules address the relationship of the nursing profession to "Technician/Tech-nologists," "Monitor Technicians," and "Unlicensed Assistive Personnel." We conclude that the rules admit of a reading that falls within the proper authority of the Idaho Board of Nursing.

Objections of the Idaho Board of Medicine

The Idaho Board of Medicine has objected to these rules on the ground that they "attempt to regulate non-licensed personnel working for or under the direction of physicians." (Comments to Proposed Rules, January 9, 1996.)[1] The Board of Medicine points to the informal guideline issued by this office on January 13, 1993, regarding the authority of physicians to delegate medical or nursing functions. The opinion concludes that "physicians may direct a non-licensed person to administer a remedy, diagnostic procedure or advice, pursuant to Idaho Code 54-1804(1)(g)." 1993 Idaho Att'y Gen. Ann. Rpt. 180.

It follows that any restriction adopted by the Board of Nursing regarding the practice of nursing can have no effect on the authority of physicians to delegate medical procedures to non-licensed personnel subject to their supervision. In other words, although a person might otherwise be unlawfully engaging in the practice of nursing, as defined by the Nursing Practice Act or rules promulgated by the Board of Nursing, such practice is nonetheless proper if engaged in pursuant to delegation by a physician.

While it might have been better to state so explicitly, the rules as we read them do not impinge on the authority of physicians to delegate medical procedures to the non-licensed personnel they supervise. Thus, the rules do not violate Idaho Code § 54-1804(1)(g) and do not, on that score, exceed the authority of the Board of Nursing.

Objections of the Idaho Department of Health and Welfare

The Idaho Department of Health and Welfare (the Department) likewise objected to the Board of Nursing rules during the public hearings devoted to their promulgation. The Department asserted that the rules would have major policy and budgetary impacts on three community based programs: Personal Care Services, Adult Residential Care Facilities, and Residential Habilitation. The Department read proposed Section 400.04 to mandate that providers cannot assist clients with activities of daily living unless the providers have completed Board training courses and are supervised by a registered nurse.

The Department's concerns were echoed by the Board of Medicine and are part of that Board's more comprehensive objection to the rules:

> [A]ll of the provisions of Sections 400.03 and .04 purporting to grant the Board of Nursing authority to regulate the practice of technicians/technologists and unlicensed assistive personnel exceed the statutory authorization granted to regulate nursing. . . . These rules also purport to dictate who institutions may hire, how the institutions operate and how medical functions can be delegated.

We do not read the proposed rules so broadly. The rules repeatedly emphasize that they apply in the context of delegation of nursing responsibil-

ity by nurses in typical nursing settings. For example, the rules dealing with "technicians/technologists" address the situation where such professionals are "providing basic nursing care services on an organized nursing unit in an institutional setting . . . under the supervision of a licensed professional nurse." Similarly, the provisions of the rules dealing with "unlicensed assistive personnel" state on four separate occasions that they deal with the functions that "may be delegated" (presumably, by nurses) to such personnel.[2]

Thus, it seems clear that these rules are not attempting to reach out and regulate other health care professionals. Rather, they are providing direction to nurses themselves on how to exercise the powers of delegation that are clearly theirs pursuant to Idaho Code §§ 54-1402(b)(1)g and (2)g of the Nursing Practice Act. As the Hearing Officer noted, this statute has long specified that licensed professional nurses (registered nurses) and licensed practical nurses may authorize or delegate nursing interventions to be performed by others and such delegations do not conflict with the Nursing Practice Act.

Furthermore, section 54-2404(3) of the Nursing Practice Act authorizes the Board of Nursing to establish standards of conduct and practice. Since 1974, the Nursing Practice Rules have included provisions directing nurses in the authorization or delegation of functions to auxiliary personnel. Indeed, many of these proposed rules are mere rewrites of rules that are currently in effect. As the Hearing Officer noted:

> These rules restrict the nurses' authority to delegate to those settings in which the nurse has delegation/supervision authorization for nursing care services.

(Emphasis added.) It is our understanding that the concerns of the Department have been successfully addressed by the Board of Nursing through the above comments, by various revisions to the proposed rules and at a meeting between the Department and the Board to clarify the intent of the rules.

The intent of the Board of Nursing was repeated in its transmittal letter to Attorney General Lance on December 15, 1995:

> The purpose of the proposed rules is to clarify the authority and responsibility of licensed nurses for nursing care functions that they may delegate to non-licensed personnel. The

> Board of Nursing does not believe that the proposed language of the rules implies or asserts any regulatory authority over any person who is not a licensed nurse in this state. Many technicians and other non-nurses perform technical or other skilled health care services without supervision or delegation of licensed nurses.

(Emphasis added.) It is true that some provisions of the rules, taken separately and out of context, may appear ambiguous. Whatever ambiguities exist in the rules must be read against this clear statement of intent by the Board of Nursing that has promulgated them that the rules do not attempt to assert regulatory authority over anyone who is not a licensed nurse in the State of Idaho.

CONCLUSION

It is our conclusion that the proposed rules do not exceed the statutory authority of the Board of Nursing. The rules do not interfere with the authority of physicians to delegate medical procedures to non-licensed personnel subject to their supervision. Nor do the rules attempt to regulate the practice of non-nurses, or to dictate to hospitals whom they may hire or how such institutions must be run. The sole purpose of these rules is to regulate nurses in relation to their delegation of nursing functions to non-nurse assistive personnel.

Very truly yours,

JOHN J. MCMAHON
Division Chief
Contracts & Administrative
Law Division

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[1] The Idaho Board of Medicine, on January 18, 1996. submitted its own request for an Attorney General's opinion regarding these Board of Nursing rules. The request arrived too late to be included in this opinion. It is our understanding that the Board of Medicine will make its concerns known this week to the germane committees during the legislative rule review process. Thus, this office will not respond to that letter.

[2] The use of the passive voice makes it ambiguous who is doing the delegating. In context, the only correct reading is that the rules apply in situations where nurses are delegating authority to non-nurse personnel whom they supervise.

February 2, 1996

Joe Hunter, Director
Idaho Electrical Board
Department of Labor and Industrial Services
STATEHOUSE MAIL

THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE

Re: Installation of Communication Circuits

Dear Mr. Hunter:

Your letter of January 10, 1996, requests an Attorney General's opinion on the question whether the Idaho Electrical Board (the "Board") has authority to promulgate rules regulating the installation of communication circuits in the State of Idaho. We conclude that communication circuits, as defined by section 800-1 of the National Electrical Code, are exempt from Board regulation pursuant to Idaho Code § 54-1016 and that the Board's attempt to regulate communication circuits through IDAPA 07.01.04.014.05 in large part exceeds the Board's statutory authority.

BACKGROUND

It is our understanding that this question of the Board's authority to regulate communication circuits arose at a recent Board meeting and that the deputy attorney general in attendance at the meeting voiced his oral opinion that Idaho Code § 54-1016 prohibits Board regulation in this area. Presently, the Board, in the exercise of its rulemaking powers pursuant to Idaho Code § 54-1006, requires a "limited energy electrical license" for "any person who installs, maintains, replaces, or repairs" limited energy electrical products such as:

> electric or electronic organs, landscape sprinkler control, security, power limited fire alarms, audio-visual, sound and intercom, data processing, and non-utility owned communications systems: *i.e.*, telephone, radio, television, master antenna television, and community antenna television.

IDAPA 07.01.04.014.05(a) and (b). Persons subject to this rule must obtain a license, pay permit fees and submit to inspections.

Your letter of January 10, 1996, points to an opinion letter of October 8, 1992, by Special Deputy Attorney General Mike Burkett concluding that the Board has authority to promulgate and enforce this rule. You have requested a written opinion on the matter.

STATUTORY ANALYSIS: THE FACT OF AN EXEMPTION

The argument that communications circuits are exempt from Board regulation relies upon Idaho Code § 54-1016. That section states: "Nothing in this act shall be deemed to apply to the installation or maintenance of communication circuits, wires and apparatus; . . . ."

The fundamental principle of statutory construction is that the language of a statute will be given its plain, ordinary meaning if it is not otherwise ambiguous. In re Guardianship of Copenhaver, 124 Idaho 888, 865 P.2d 979 (1993). Where a statute is clear and unambiguous, the clear and express intent of the legislature must be given effect. Cameron v. Minidoka Cnty. Hwy. Dist., 125 Idaho 801, 874 P.2d 1108 (1994).

We conclude that section 54-1016 is clear and unambiguous in its statement that, "Nothing in this act shall be deemed to apply to the installation and maintenance of communication circuits, wires and apparatus; . . . ." (Emphasis added.) The "act" referred to is chapter 10 of title 54 governing "Electrical Contractors and Journeymen." Section 54-1016 comes after fifteen prior sections dealing with such matters as the powers and duties and rule-making authority of the Idaho Electrical Board; the requirement of licensing; the duration, revocation and renewal of licenses; inspection of electrical installations; and similar matters. The nature of the exemptions found in section 54-1016 is therefore spelled out by the fifteen prior sections in the act: None of those sections is to apply to communication circuits, wires and apparatus.

We therefore reject any suggestion that the exemption for the communication circuits found in Idaho Code § 54-1016 is somehow negated by Idaho's adoption of the National Electrical Code (NEC) in Idaho Code § 54-1001. To the contrary, the express language of the latter statute anticipates statutory exemptions:

> [A]ll installations in the state of Idaho of wires and equipment to convey electric current and installations of apparatus to be operated by such current, except as hereinafter provided, shall be made substantially in accord with the National Electrical Code . . . .

Idaho Code § 54-1001 (emphasis added).

We likewise reject any suggestion that the Board may partially regulate in this area by virtue of its "limited energy electrical license" regulatory framework. If the area of communication circuits is exempt, then it cannot be regulated at all.

THE SCOPE OF THE EXEMPTION

This is not the end of the inquiry. We must next determine the scope of the exemption accorded to "communication circuits, wires and apparatus." In the context of this act, it would not be reasonable to turn to a dictionary to define these terms. Instead, it is reasonable to assume that the Idaho Legislature intended the National Electrical Code to serve as the source for defining such technical terms. Section 800-1 of the NEC defines "communication circuits" as:

> telephone, telegraph (except radio), outside wiring for fire alarm and burglar alarm, and similar central station systems; and telephone systems not connected to a central station system but using similar types of equipment, methods of installation, and maintenance.

Thus, the exemption for "communication circuits" in Idaho Code § 54-1016 applies to telephone and telegraph equipment that transmits communications through a central station. Mr. Burkett's letter focused on this portion of the NEC definition and concluded that the Idaho Legislature's exemption of communication circuits extends only to central station switchboards or switching stations as are "typically operated by U. S. West or other telephone companies." In short, Mr. Burkett read the exemption for communication circuits as exempting only Idaho's telephone utilities.

We disagree. The NEC definition, on its face, has several additional categories that go beyond telephone/telegraph central station systems, namely:

1. Outside wiring for fire alarm systems;

2. Outside wiring for burglar alarm systems;

3. Other similar central station systems; and

4. Telephone systems not connected to a central station system but using similar types of equipment, methods of installation, and maintenance.

Thus, the exemption of Idaho Code § 54-1016, fed through the definitional prism of NEC section 800-1, at a minimum also extends to telephone systems such as private branch exchanges (PBX's) not owned by or connected to local telephone companies' central station systems, but which are stand-alones or satellite-connected to other systems.

In addition, the exemption is not limited to central station telephone systems, but extends to fire alarms, burglar alarms and other similar central station systems. Thus, by the express terms of the NEC definition, connections of a local area network computer system to the Internet or of television sets to cable TV would also likely fall within the exemption.

The more difficult question is whether a reviewing court would extend the broad statutory language of Idaho Code § 54-1016 to exempt still further instances of limited energy equipment. The reviewing court will give deference to the Idaho Electrical Board's interpretation of its own statute and to the rules that implement that statute. *See* J. R. Simplot Co., Inc. v. Idaho State Tax Commission, 120 Idaho 849, 820 P.2d 1206 (1991). Nonetheless, a reviewing court might be troubled by a regulatory framework that relies upon an understanding of the term "communication circuits" that was adopted in 1947 and has remained unchanged for nearly five decades. In 1947, it is likely that the Idaho Legislature was primarily concerned to exempt from regulation the work done by telephone companies. At the time, those companies controlled all installation, maintenance and repair work on virtually the entire universe of communications circuitry.

That was a generation before the breakup of AT&T, and long before the average residence had access to cable television, fiber optic data transmission systems, closed-circuit television, complex home entertainment systems, free-standing security and fire alarm systems, intercom systems, remote-control overhead doors and a host of other inventions.

We believe it is entirely possible that a reviewing court would construe "communication circuits" to include the broad present-day spectrum of low electrical energy communications equipment and wiring within the statutory exemption.

CONCLUSION

We conclude that the statutory exemption for "communication circuits" includes more than telephone systems linked to central station switchboards or switching stations operated by telephone utilities. It includes, in addition, a wide variety of communication technologies that link to central stations. It includes, as well, a wide variety of free-standing communication technologies. Finally, it is possible that a reviewing court would extend the exemption still further to include the full spectrum of low energy electrical communication circuits. Under any interpretation, it follows that the Idaho Electrical Board's rule requiring a "limited energy electrical license" for any person who installs, maintains, replaces or repairs limited energy electrical products is in large part unenforceable. The precise line to be drawn in such matters is beyond the technical expertise of this office. It is clear, however, that technology appears to have passed by the current statutory and regulatory framework and that the matter should be revisited by the Board and, if need be, by the Idaho Legislature.

Sincerely,

JOHN J. MCMAHON
Division Chief
Contracts & Administrative
Law Division

February 12, 1996

Ms. Olivia Craven
Executive Director
Commission of Pardons and Parole
STATEHOUSE MAIL

THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE

Re: Request Regarding Voting by the Executive Director

Dear Ms. Craven:

This is in response to your questions regarding the ability of the Executive Director for the Commission of Pardons and Parole (the Commission) to vote on matters brought before the Commission. You state that during a July 1995 meeting of the Board of Corrections (the Board), the Board granted the executive director the authority to vote with the Commission under the following circumstances:

1. When a majority of the Commission (three) cannot be present at a hearing session.

2. When there are three members present, but they cannot reach a consensus or when one member present has to disqualify himself.

Your concern is that, absent an ability by the executive director to vote in these situations, hearings will have to be continued, the Commission's workload will increase and certain prisoner releases will be delayed. With this understanding of the facts, we make the following comments.

Under Idaho Code § 20-210, the members of the Commission are appointed by the Board, subject to the advice and consent of the Idaho State Senate. This statute further provides that the Commission will be comprised of five (5) members, no more than three (3) of whom shall be of the same political party. In selecting members of the Commission, the legislature required that the Board give due consideration to "their experience, knowledge and

interest in sociology, psychology, rehabilitative services and similar pertinent disciplines." In accordance with Idaho Code § 20-210, the Commission was given all rights, powers and authority of the board of pardons under art. 4, sec. 7 of the Idaho Constitution and was also charged with acting as the advisory commission to the Board on issues of adult probation and parole.

Prior to 1994, Idaho Code § 20-210 provided that each year the members of the Commission were to select a chairman and a vice-chairman. However, in that year the legislature amended the statute to delete any references to a chairman or vice-chairman and to add language expressly recognizing the office of executive director for the Commission. 1994 Idaho Sess. Laws 382. As amended, Idaho Code § 20-210 specified that the executive director would be appointed by the Board, be a full-time employee and would report to, and serve at the pleasure of, the Board. The executive director was designated the official representative of the Commission and was given the authority and responsibility of managing and administering the daily activity of the Commission and scheduling Commission hearings. The statute empowered the executive director to designate any Commission member as the presiding officer for any given Commission hearing. In addition, as amended, Idaho Code § 20-210 allowed the executive director to have such other duties and responsibilities as the board chose to assign to the office.

You indicate in your letter that at some prior point in time the office of executive director was titled executive secretary and that the person occupying the office was a member (presumably a voting member) of the Commission. Apparently, such a situation existed under a Board rule or informal arrangement since, in researching the legislative history of applicable provisions of title 20, chapter 2, Idaho Code, I was unable to locate any statutory reference to an executive secretary or the scenario you mention. Of course, if such a situation had been established by legislation, the legislature's 1994 amendment of Idaho Code § 20-210 to provide for the position of executive director without expressly making such person a member of the Commission would be strong evidence that the legislature did not intend for the executive director to be a member of the Commission or be entitled to exercise any right to vote as a commissioner.

In granting the executive director the authority to vote at Commission hearings under the circumstances you specify in your letter, the Board pre-

sumably relied upon the language of section 20-210 which states that: "The executive director shall also have such other duties and responsibilities as the board shall assign." While the Board may have broad discretion in utilizing this language to empower the executive director with wide latitude in carrying out various Commission matters, the language cannot be used to usurp the authority of the Commission or to ignore clear statutory provisions and justify the appointment of the executive director to what amounts to being a de facto member of the Commission. *See* Mellinger v. Idaho Dept. of Corrections, 114 Idaho 494, 500, 757 P.2d 1213, 1219 (Ct. App. 1988) (executive director not a member of Commission but is Commission's spokesperson and may be delegated authority to approve, on behalf of Commission, Board-recommended parole conditions).

While members of the Commission are appointed by the Board, by law each appointment is subject to the advice and consent of the senate. Furthermore, the legislature has clearly provided that there are to be exactly five (5) members of the Commission, no more than three (3) of whom can be from any one political party. Finally, each member must possess certain experience, knowledge or interests as specified in Idaho Code § 20-210. If the Board is allowed to, in effect, appoint a sixth member to the Commission in the form of the executive director, who could vote as a tie-breaker or in situations where a quorum is lacking or a disqualification has occurred, these statutory requirements would be thwarted. There would be no senate oversight on the selection of this sixth Commission "member" nor would there be any guarantee that the statutory limitation on party affiliation was complied with or that the executive director met the other qualifications for commissioners imposed by Idaho Code § 20-210.

The executive director's proper function is in facilitating Commission hearings and other business and in implementing decisions of the Commission. In this capacity, the executive director acts solely in an administrative role. While the executive director may, and should, attend meetings and hearings of the Commission (Idaho Code § 20-213A(4)), only Commission members duly appointed and confirmed pursuant to section 20-210 have the lawful authority to vote on matters brought before the Commission.

While we understand that allowing the executive director the power to vote under the circumstances outlined in your letter would perhaps expedite

and facilitate Commission hearings, the current statutory scheme does not permit such an arrangement. If such an arrangement would be beneficial, legislation should be requested authorizing it.

Very truly yours,

Roger L. Gabel
Deputy Attorney General
Civil Litigation Division

March 6, 1996

Dr. Richard L. Bowen, President
Idaho State University
Campus Box 8310
Pocatello, ID 83209-8310

THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE

Re: Use of State Property for Personal Gain or Political Use

Dear Dr. Bowen:

This letter is in response to your request of February 14, 1996, in which you ask for guidance regarding University faculty members' use of computer Internet facilities for political purposes or personal gain.

Section A. May State Property Be Used for Personal Gain?

Article 7, section 10 of the Idaho Constitution reads as follows:

> The making of profit, directly or indirectly, out of state, county, city, town, township or school district money, or using the same for any purpose not authorized by law, by any public officer, shall be deemed a felony, and shall be punished as provided by law.

This section prohibits a public officer from profiting from public resources.

Although the term "public officer" is not defined in the Idaho Constitution, it is generally considered to include not only appointed or elected officials, but all state employees.[1] Thus, state employees are public officers for purposes of article 7, section 10 of the Idaho Constitution.

As public officers, no state employee shall, directly or indirectly, make a profit out of state funds. Over time, this provision has been interpreted to mean that state time, resources and funds (including but not limited to the use

of telephones, fax machines, photocopiers, state mail system, etc.) may not be used by state employees for pecuniary gain.

Thus, we conclude that state employees may not use the Internet or any other state property or resources for economic gain.

Section B. May State Employees Use the Internet for Political Purposes?

Once again, article 7, section 10 of the Idaho Constitution is the operative provision to answer this question. State employees may not use state time or resources for any purpose not authorized by law and certainly not for use in political or campaign-related activity. Thus, as with the prohibitions above, it is illegal to for a state employee use state resources, such as the computer and the state's Internet services, for political or campaign-related purposes.

CONCLUSION

Article 7, section 10 of the Idaho Constitution prohibits public officers and state employees from using state time, money or resources for making a profit or for other purposes not authorized by law. The use of state resources for economic gain and for political activity is a prohibited use of state property. Thus, state employees with access to state-owned Internet services cannot use those services for personal pecuniary benefit or political or campaign-related activities.

I trust this letter answers your inquiry. If you have any further questions regarding this please do not hesitate to contact me.

Very truly yours,

KEVIN D. SATTERLEE
Deputy Attorney General
Contracts & Administrative
Law Division

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[1] See Idaho Code § 59-703(10) regarding definition of public official, Idaho Code § 59-802(6) regarding definition of public official or employee, and Idaho Code § 67-301 regarding classification of public officers, to include ministerial officers.

March 7, 1996

Carmen Westberg, Chief
Bureau of Occupational Licenses
1109 Main Street, Suite 220
Boise, ID 83702-5642

THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE

Re: Draft Minutes of State Regulatory Board Meetings

Dear Ms. Westberg:

QUESTIONS PRESENTED

1. Are draft minutes of state regulatory board meetings "public records" and are they available for public inspection and copying under the provisions of the Idaho Public Records Law, Idaho Code §§ 9-337 through 9-348?

2. If so, how soon after a board meeting must draft minutes be made available to the public?

3. Are tape recordings of board meetings "public records" and are they available for inspection and copying under the provisions of the Idaho Public Records Law?

4. May a state regulatory board adopt a protocol whereby draft minutes are withheld until after the draft is circulated to the board members for their approval by mail?

CONCLUSION

State agencies may not deny otherwise appropriate public requests for access to draft minutes and tape recordings of the meetings of public agencies. Draft minutes of meetings of state regulatory boards are "public records" as defined by the Idaho Public Records Law. Tape recordings of the meetings of regulatory boards are also "public records."

Draft minutes must be made available for public inspection within a reasonable time after the board meeting. A reasonable time would be that time reasonably necessary to fulfill the clerical function of preparing the draft. Board approval of the draft minutes is not a prerequisite to public availability.

A state agency may not adopt a protocol whereby otherwise available draft minutes are withheld from public inspection until such time as the board completes an informal review and ballot approving the draft minutes.

DISCUSSION

The Public Records Law clarifies the obligations of state agencies with respect to any information the agency produces, holds, uses or maintains as a part of the agencies' conduct of the public's business. This law is founded on the premise that "every person has a right to examine and take a copy of any public record of this state." Idaho Code § 9-338(1). It includes the presumption that "all public records in Idaho are open at all reasonable times for inspection except as otherwise expressly provided by statute." *Id.* State regulatory boards are "state" agencies for purposes of the Public Records Law. Idaho Code §§ 9-337(11) and 67-2341(4)(a). As such, boards are required by law to make available for inspection, public records. Idaho Code §§ 9-338 and 9-339.

State regulatory agencies are also obliged by law to "provide for the taking of written minutes of all of [their] meetings." Idaho Code § 67-2344(1). While a complete transcript of the proceedings is not required, the law is clear that minutes "shall be made available to the public within a reasonable time after the meeting." *Id.*

Board minutes are public documents which are intended to be available to the public under the Public Records Law. The issue here, however, concerns "draft" minutes which have not become a part of a board's permanent record.

In Fox v. Estep, 118 Idaho 454, 797 P.2d 854 (1990), the Idaho Supreme Court held that the handwritten notes taken by the Clerk of the Boundary County Commissioners could constitute public writings, available for purposes of public inspection and copying. A private citizen sought access to the handwritten notes of the Boundary County Clerk and Clerk of the

Commissioners. These notes were taken during the meetings of the Board. The clerk refused, arguing that the handwritten notes or "raw minutes" were "transitional" or "working papers" which were not included within the then existing "public writing" provisions of the public records law. *Id.*

The court rejected the clerk's contention that only final or "approved" minutes adopted by the commissioners and signed by the chairman of the Board of County Commissioners were subject to public inspection. This decision was premised on the court's rationale that if the "raw" notes were "an act undertaken pursuant to a statutory directive in fulfilling the function of the Clerk of Boundary County," they would be potentially within the disclosure provision which existed at the time of the initial request. 118 Idaho at 455, 797 P.2d at 855.

The Estep decision was entered on August 29, 1990, and involved a public writings provision which has been subsequently amended by the Idaho Legislature. The same conclusion is dictated by the Public Records Law as it now exists.

Minutes of public meetings fall clearly within the definition of "public records." They are writings "containing information relating to the conduct or administration of the public's business" prepared by any state agency "regardless of physical form or characteristics." Idaho Code § 9-337(10). The term "public record" is also defined to include handwriting, printing, typewriting, and "every means of recording . . . sounds," Idaho Code § 9-337(12). Thus, the definition extends to tape recordings of the meetings as well.[1]

There are specific exemptions from the disclosure requirement, codified at Idaho Code § 9-340. These exemptions, unlike the public records laws in some other states, do not include any reference to "draft" minutes or other similar "transitional" or "working" papers. When combined with the rationale of the Estep court, this rationale provides clear direction.

Boards are required by law to meet in public, to reach decisions in public, and to memorialize both meetings and decisions in minutes. Draft minutes are prepared pursuant to the statutory directive to provide for contemporaneous minutes. Draft minutes are not exempted from the provisions of the Public Records Law and must, therefore, be made available for inspection, within a reasonable time.

In this context, "reasonable" means as soon as possible after the meeting. This definition of the term specifically requires that the time spent in preparing the draft not exceed the amount of time reasonably necessary to fulfill the clerical function.

Audio tapes of the proceedings constitute "public records." Such tapes are available immediately after a meeting; thus, there can be no justification for a different substantive result when a writing is involved.

A protocol that would delay release of prepared draft minutes until such time as the draft has been circulated and approved by the members of the board would violate the Public Records Law. The law does not include any requirement of board approval of minutes as a prerequisite to public access. The concern that the public not be confused can be met by placing a disclaimer or other warning on the draft indicating it does not contain final or approved board minutes.

Very truly yours,

JOHN J. MCMAHON
Division Chief
Contracts & Administrative
Law Division

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[1] The question whether tape recordings must be made available to the public is distinct from the question of how long such tape recordings must be retained. The former is a Public Records Law question; the latter is a records retention question. It is commonplace for governmental entities in Idaho to reuse tapes. Nothing in the Public Records Law prohibits them from doing so or requires them to purchase new tapes for every recording. On the other hand, it would be censurable conduct if the governmental entity were to erase or reuse tapes knowing that the decision is likely to be appealed, or if it is likely that the public will request access to the tapes. Such conduct would be equivalent to shredding important documents. A public entity should establish a formal policy regarding record retention to avoid inadvertent loss of records. In addition, the governmental entity may take whatever precautions are reasonably necessary to safeguard the integrity of the tape while assuring public access to it.

March 20, 1996

Ms. Margot H. Knight, Executive Director
Idaho Commission on the Arts
The Alexander House
304 W. State Street
Boise, ID 83720

THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE

Re: Request for Opinion

Dear Ms. Knight:

This letter is in response to your inquiry in which you ask a series of questions related to personnel issues.

CONFLICT OF INTEREST

Your first four questions deal generally with conflict of interest and nepotism concerns. Specifically, you set forth the following four questions:

1a. Is it permissible for the Commission to hire spouses or other family members of current employees? Could you clarify state law on this issue?

1b. Is it permissible for the Commission to contract with spouses or other family members of employees for short-term periods? Would the situation be different for family members of Commissioners? If permissible in either case, what documentation ought to be in our files?

1c. Should the legal guidance given to us May 30, 1989, by Patrick J. Kole, Chief of Legislative and Public Affairs Division, continue to serve as our guideline regarding grants to spouses of employees and Commissioners?

Id. Is it a conflict of interest for the Idaho Commission on the Arts to purchase questions on the Boise State University Annual Public Policy Survey? (The Director of the Social Science Research Center [my spouse] is a salaried employee of BSU; his pay is unaffected by the purchase of questions. We do not work directly together on the project—my contact is with two of his employees.)

1. General Background

This area of law is governed by the Ethics in Government Act of 1990, codified as Idaho Code §§ 59-701 *et seq.*, by the Bribery and Corrupt Influence Act, codified as Idaho Code §§ 18-1359 through 18-1362, and by Idaho Code § 59-201.

a. Ethics in Government Act

The Ethics in Government Act provides that "a public official shall not take any official action or make a formal decision or formal recommendation concerning any matter where he has a conflict of interest and has failed to disclose such conflict as provided in this section." Idaho Code § 59-704. "Public official" includes all state officials from elected public officers to state employees. Idaho Code § 59-703(10). A "conflict of interest" occurs when "any official action or any decision or recommendation by a person acting in a capacity as a public official, the effect of which would be to the private pecuniary benefit of the person or a member of the person's household . . . ." Idaho Code § 59-703(4). The definition of "members of the household" includes spouses, dependent children and any persons whom the public official is legally obligated to support. Idaho Code § 59-703(7).

In the event an appointed or employed state public official has a conflict of interest, he or she "shall prepare a written statement describing the matter to be acted upon and the nature of the potential conflict, and shall deliver the statement to his appointing authority." Idaho Code § 59-704(3). Then, if the appointing authority feels it necessary, it may seek advice of legal counsel and act on such advice.

The key to compliance with the Ethics in Government Act is full disclosure. If the public official fully discloses the nature and extent of the con-

flict of interest to his or her appointing authority, then the public official has satisfied the requirements of this act.

b. The Bribery and Corrupt Influence Act

Idaho Code §§ 18-1359 through 18-1362 put further limits on the activities of public servants.

(1) No public servant shall:

(a) Without the specific authorization of the governmental entity for which he serves, use public funds or property to obtain a pecuniary benefit for himself.

(b) Solicit, accept or receive a pecuniary benefit for services, advice, assistance or conduct customarily exercised in the course of his official duties. This prohibition shall not include trivial benefits not to exceed a value of fifty dollars ($50) incidental to personal, professional or business contacts and involving no substantial risk of undermining official impartiality.

(c) Use or disclose confidential information . . . with intent to obtain a pecuniary benefit for himself or any other person or entity in whose welfare he is interested . . . .

(d) Be interested in any contract made by him in his official capacity, or by any body or board of which he is a member, except as provided in § 18-1361, Idaho Code.

(e) Appoint or vote for the appointment of any person related to him by blood or marriage within the second degree, to any clerkship, office, position, employment or duty, when the salary, wages, pay or compensation of such appointee is to be paid out of public funds or fees of office, or appoint or furnish employment to any person whose wage, salary, pay or compensation is to be paid out of public funds or fees of office, and who is related by either blood or marriage within the second degree to any other public servant when such appointment is made on the agreement or promise

> of such other public servant or any other public servant to appoint or furnish employment to anyone so related to the public servant making or voting for such appointment. Any public servant who pays out of any public funds under his control or who draws or authorizes the drawing of any warrant or authority for the payment out of any public fund of the salary, wages, pay or compensation of such ineligible person, knowing him to be ineligible, is guilty of a misdemeanor and shall be punished as provided in this chapter.

Idaho Code § 18-1359.[1]

Under these sections, it is unlawful for public servants to use public funds for private gain, to solicit personal pecuniary benefit, to use any official information for his or her own pecuniary benefit, to be interested in any contract made in his or her official capacity and to employ any person related within the second degree for any public employment.

c. Idaho Code § 59-201

Idaho Code § 59-201 provides that state officers "must not be interested in any contract made by them in their official capacity, or by any body or board of which they are members." As this office has noted in the past, "the Idaho case law dealing with Idaho Code § 59-201 is absolute in enforcing the prohibition. There is simply no room for compromise or attempted justification." 1991 Idaho Att'y Gen. Ann. Rpt. 202.

With this statutory background in mind, I will address each of your questions in turn.

2. Hiring Spouses of Current Employees

Your first question, 1a., is whether the Commission may hire spouses or family members of current employees. The answer to your question depends on whose spouse is the prospective employee. Since, under Idaho Code § 18-1359(1)(e), it is unlawful for any person to appoint, or vote for the appointment, of his or her spouse, the spouses of anyone having the authority to employ, or vote for employment, would be ineligible as employees. Thus, the spouses of the Commissioners are ineligible for employment. Further,

under Idaho Code § 67-5604, the Executive Director of the Commission has the authority to "employ and remove any consultants, experts or other employees as may be needed." Thus, the spouse of the Executive Director is also ineligible for employment. If, under the Commission's rules or operating procedures, any other person has the authority to appoint employees or vote for an employee's appointment, then the spouse of that person would also be ineligible.

Moreover, since an employment relationship in Idaho is contractual in nature, the prohibition regarding interests in contracts, as related below, may also apply.

3. Contracts with Family Members

Your next question, 1b., asks whether the Commission may contract with family members of employees for short term projects.[2]

First, under Idaho Code § 18-1359(1)(d) a public official may not be interested in the contract if made in his or her official capacity or by the body of which he or she is a member. Thus, the Commissioners and the Executive Director are prohibited from being interested in such contracts. Idaho Code § 18-1360 provides criminal penalties for such contracts, and Idaho Code § 59-201 provides a civil prohibition for such contracts and renders the contracts voidable.

Idaho Code §§ 32-901 *et seq.* set forth the Idaho community property laws which state generally that the income to one spouse is the community property of both spouses.[3] Thus, if a Commissioner's spouse, or the Executive Director's spouse, has a contract with the Commission, both spouses would be interested in the contract as defined under Idaho Code § 18-1359(1)(d). Thus, unless the very narrow exception provided for in Idaho Code § 18-1361 applies, no spouse of a Commissioner or of the Executive Director, or of any other person who has decision making authority or influence for contracts with the Commission, may be awarded a contract with the Commission.[4] If such exception applies, the public officer must still comply with the requirements of the Ethics in Government Act.

4. Grants to Family Members

Your third question, 1c., deals with grants to spouses of employees and Commissioners and the informal guideline issued to you on May 30, 1989.

The Ethics in Government Act was passed by the Idaho Legislature in 1990. Also, former Idaho Code §§ 59-701 *et seq.* were reformed and codified as the Bribery and Corrupt Influence Act, Idaho Code §§ 18-1359 through 18-1362 in 1990. Thus, the guideline issued to you on May 30, 1989, was based on prior law.

To comply with the current statutes, when granting public funds to family members of Commissioners or the Commission's employees, the Commission should follow the same guidelines as set forth above in answer to your question 1b. regarding contracts. Any time the Commission is paying public funds to any person, compliance with Idaho Code § 18-1359 and the Ethics in Government Act is required.

5. Contract for Public Policy Survey Questions

Your fourth question, Id., is whether the Commission's purchase of questions from the Boise State University Annual Public Policy Survey constitutes a conflict of interest. The facts, as you related them to me, include that the Director of the Social Science Research Center is your spouse, and he receives no compensation from the purchase of the questions.

Idaho Code § 18-1359(1)(d) does not provide a definition for the term "interested." In interpreting this section, we must give force and effect to the legislature's intent and purpose. Davaz v. Priest River Glass Company, Inc. 125 Idaho 333, 870 P.2d 1292 (1994). The express purpose of Idaho Code § 18-1359 was to prohibit "use of government property for private gain." House Bill 881, Statement of Purpose, 1990. Thus, the term "interested" means that your husband must receive some private gain from the contract. Also, under Idaho Code § 59-203(4), a conflict of interest would occur if your decision to purchase the questions created a private pecuniary benefit to your husband.

Since your husband receives no monetary gain from the purchase of the questions,[5] there is no statutory violation by purchasing questions on the survey. The fact that the Commission purchases questions on an annual pub-

lic policy survey does not appear to have any effect on the impartiality of your service as a public official nor does the situation fit within the definition of conflict of interest.[6] Thus, no violation of Idaho Code § 18-1359(d) occurs based on your fact situation.[7]

PERSONNEL PRACTICES

The second section of your letter requests information regarding the Idaho Code § 67-5604 staff-related powers of the Executive Director. You have stated that the general practice is for the Executive Director to "hire, fire and set compensation levels for employees under the general direction of the Commission. In FY96, the Commission adopted the Hay Plan. Each year the Executive Director sets staff compensation levels, shares them with the Executive Committee and the whole Commission approves of the Commission's budget (including the personnel line) for the coming year." You then ask "is our practice in conformance with the Code or is it necessary for the Code (or our practice) to be changed?"

Idaho Code § 67-5604 provides that the Commission chairman "shall, subject to the approval of the Commission, set the compensation for all exempt employees, within the amounts available for such purposes." The same statute provides that the Executive Director "may, subject to the approval of the Commission, employ and remove any consultants, experts or other employees as may be needed." Thus, while the Executive Director has the authority to hire and fire employees, such power is subject to the approval of the Commission. Further, the compensation for exempt employees is set by the chairman and is also subject to the approval of the Commission.

All employees of the Commission are non-classified employees.[8] As non-classified employees, the employees' salaries are not set by the Idaho Personnel Commission. Thus, it is up to the Commission to set its employees' salaries. According to the information you provided, in prior years the Executive Director has set the staff compensation in the budget for the Commission's approval. This practice is in compliance with Idaho Code § 67-5604. It is proper for the Executive Director to do the administrative work of setting the salaries and then have the same approved by the Chairman and the Commission. However, this should be properly documented to show compliance with the statute. In other words, the Chairman should specifically approve of the annual salaries and the Commission should note its assent. If

the full Commission does not approve, it may overrule the Chairman's decision.

However, in fiscal year 1996, the Commission adopted the Hay Plan. Under the Hay Plan, the salaries of the Commission's employees are set in the same manner as classified state employees. The Hay Plan adoption is also in compliance with Idaho Code § 67-5604. If properly adopted by the Chairman, and approved by the full Commission, then the use of the Hay Plan is in compliance with the statute. Note, however, that nothing prohibits the Chairman from changing the decision to use the Hay Plan except that his or her decision is subject to the approval of the full Commission. In other words, the Chairman, and the Commission, can change the salaries of the Commission's employees at any time.

This issue also arises in the Administrative Rules of the Commission on the Arts published at IDAPA 40.01.01.300.02. This rule states that "salaries of all other employees of the Commission shall be established by the Executive Director and shall, in general, be in accordance with those set in the classification and pay plan under the State of Idaho merit system law." With this rule, the Commission has set compensation for the Commission's employees by ordering the Executive Director to pay employees according to the Hay Plan classifications. This is not contradictory to Idaho Code § 67-5604. Thus, the Chairman and the Commission have chosen the method for setting the compensation for the Commission's employees.

Finally, the Commission's ultimate power in this area is the fact that the Executive Director serves at the pleasure of the Commission and can be removed at the will of the Commission.

CONCLUSION

As related above, there are many concerns regarding the Commission's employment of family members, contracting with family members and related activity. Strict compliance with the Bribery and Corrupt Influence Act, Idaho Code §§ 18-1359 through 18-1362, and compliance with the Ethics in Government Act is required in such situations. As to compensation for employees of the Commission on the Arts, the ultimate authority for setting such compensation rests with the Chairman, subject to the approval of the Commission. However, the Commission has broad discretion in choosing

the method of setting such compensation. Thus, adopting the Hay Plan, allowing the Executive Director to set salaries, or setting the compensation directly by the Commission are all acceptable methods for compliance with the statutory directive.

I trust this letter answers your inquiries. If you have any further questions regarding this, please do not hesitate to contact me.

Very truly yours,

KEVIN D. SATTERLEE
Deputy Attorney General
Contracts & Administrative
Law Division

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[1] The very narrow exception to self interested contracts is contained in Idaho Code § 18-1361 which states that if there are less than three (3) suppliers of the good or service within a fifteen (15) mile radius, it is not a violation for a public servant to contract with the public body of which he is a member if it is necessary to respond to disaster or if four provisions have been followed. First, the contract must be competitively bid and the public servant has submitted the low bid. Second, the public servant must take no part in the preparation of the contract, bid specifications or voting for approval of the contract or bid specifications. Third, the public servant must make full disclosure, in writing, to the governing body of his interest and intent to bid. Fourth, a public servant cannot violate any provision of Idaho law pertaining to bidding or the improper solicitation of business. Idaho Code § 18-1361.

[2] In addition to any other requirements, you must also insure that you are fully in compliance with Idaho's statutory purchasing requirements. Idaho Code § 67-5718 and related statutes. You should contact the Division of Purchasing regarding your authority in this area.

[3] See Suter v. Suter, 97 Idaho 461, 546 P.2d 1169 (1976), and Houska v. Houska, 95 Idaho 568, 512 P.2d 1317 (1973) holding that income and property earned by either spouse is community property, and Hansen v. Blevins, 84 Idaho 49, 367 P.2d 758 (1962), holding that each spouse has a vested interest in the community estate.

[4] Note, there is an apparent conflict between the absolute prohibition of Idaho Code § 59-201 and the exception found in § 18-1361. Since § 18-1361 was enacted in 1990 and amended in 1991, the legislature enacted it with full knowledge of § 59-201, and the case law interpreting such section. Watkins v. Family Messenger, 118 Idaho 537, 799 P.2d 1355 (1990). Thus, § 18-1361 provides a very narrow exception to § 18-1359(1)(d) and § 59-201.

[5] Although there is some argument that your husband receives some minimal personal benefit through purchase of the questions, as a salaried state employee such benefit, if any, is too remote to qualify as a pecuniary interest.

[6] A conflict of interest can also exist if a member of the public official's household is associated with a "business" which receives pecuniary benefit from the contract. Under Idaho Code § 59-703(2) a business is defined as an undertaking operated for economic gain. Since Boise State University is not operated for economic gain, and is in fact another state entity, no conflict of interest under the Ethics in Government Act appears to exist

[7] However, as noted above, this does not relieve the Commission of any public bidding requirements as required by the Division of Purchasing.

[8] See Idaho Code § 67-5303(c), which makes all employees under the Office of the Secretary of State non-classified, and Idaho Code § 67-5602, which creates the Commission within the Office of the Secretary of State.

March 20, 1996

Ms. Cathy Hart
State Ombudsman for the Elderly
Idaho Commission on Aging
STATEHOUSE MAIL

THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE

Re: Advance Directives

Dear Ms. Hart:

This letter is in response to your request regarding the relationship between guardianships and advance directives. In your letter you asked for an opinion regarding three issues which I will address in turn.

Certain items require clarification prior to answering your questions. First, any judicially imposed limits upon a guardianship would control over general statements of law contained in this letter. In other words, if the judge imposes restrictions on a guardian—for example, that the guardian may not withhold consent for resuscitation orders—then such judicially imposed conditions on the guardianship must be followed. Second, in referring to guardians generally, I am referring to a guardianship established under the Uniform Probate Code, Idaho Code §§ 15-5-301 *et seq.* Guardianships for the developmentally disabled pursuant to Idaho Code §§ 66-401 *et seq.* have separate procedures and separate substantive powers. In particular, such guardians cannot, without a separate proceeding and court order, withhold consent for lifesaving treatments, or consent to experimental surgeries, or delegate any of the powers granted in the order. Idaho Code § 66-405(7). Therefore, if a guardianship is granted pursuant to the developmentally disabled guardianship statutes, certain portions of this analysis will not apply due to the inherent limitations on the powers of such guardians.

SECTION I

DOES A GUARDIAN HAVE THE POWER TO CHANGE A WARD'S ADVANCE DIRECTIVE?

A. The Agent Exercising a Durable Power of Attorney for Health Care Must Carry Out the Terms of the Living Will

In order to answer this question, a review of Idaho's statutes regarding the creation of an advance directive is required. Idaho Code § 39-4504 sets forth the statutory form for a living will. In a living will, a person states generally what directives should be followed in the event such person suffers from an incurable illness and death is imminent. In conjunction with the living will, under Idaho Code § 39-4505 a person can create a durable power of attorney for health care. The express statutory purpose of the durable power of attorney for health care is to "implement the general desires of a person as expressed in the 'living will.'" With the durable power of attorney for health care, the person granted such power (the agent) may make those health care decisions delineated in the living will when the person who granted the power (the principal) is "unable to communicate rationally." The agent may make the decisions to the same extent and with the same effect as if the principal made such decisions. The agent exercising a durable power of attorney for health care has been appointed precisely to carry out the terms of the advance directive (the living will) and cannot change its terms.

B. A Guardian Must Follow a Ward's Advance Directive in a Living Will and Durable Power of Attorney for Health Care

Your question is whether a person's living will, as their advance directive, may be changed by a later appointed guardian. Idaho Code § 15-5-312 sets forth the general powers and duties of a guardian, one of which is the power to give "any consents or approvals that may be necessary to enable the ward to receive medical or other professional care, counsel, treatment or service." Therefore, a person appointed guardian has the power to make all health care decisions for the ward. The essence of your question becomes, how does such guardianship act in conjunction with a ward who has left an advance directive through a living will and durable power of attorney?

In the event a ward has executed a living will and durable power of attorney for health care, such directive and decisions should control as to the ward's health care. Idaho Code §§ 39-4501 *et seq.* are collectively entitled the Natural Death Act. Idaho Code § 39-4502 contains the statement of policy for the Natural Death Act as "the right of a competent person to have his wishes for medical treatment and for the withdrawal of artificial life sustaining proce-

dures carried out even though that person is no longer able to communicate with the physician." This section further states that the legislature, by enacting the Natural Death Act, intends "to establish an effective means for such communication." Although the living will and durable power of attorney for health care are not the only means of providing such communication, they are currently the only statutory means. The Idaho Legislature chose to use the living will and durable power of attorney for health care as the method for expressing advance directives. These specific statutes should control over the general guardianship statutes in the area of health care decisions that fall within the scope of the living will. Ausman v. State, 124 Idaho 839, 864 P.2d 1126 (1993).[1] Most importantly, since the ward was competent at the time of executing the living will and durable power of attorney for health care, such directive should be honored by a future guardian.

Some states prohibit the appointment of a guardian, or limit the guardian's power in health care decisions, when a principal has executed a living will and durable power of attorney for health care. In the Matter of the Guardianship of Standel, 1995 WL 655934 (Ohio App. 1995); Matter of Guardianship of L. W., 482 N.W.2d 60 (Wis. 1992). New York has statutorily prohibited guardians from changing, revoking or altering advance directives. *See* Matter of Kern, 627 N.Y.S.2d 257 (N.Y. Sup. Ct. 1995). Thus, in those states that have expressly addressed this question, the existence of a living will and durable power of attorney for health care takes precedence over a guardian's authority to make health care decisions for the ward.

We conclude that if a person has executed a valid living will and durable power of attorney for health care, such directives should be followed by the guardian.

C. A Guardian Should Follow the Directive in a Ward's Living Will Unless a Court Approves Otherwise

However, in the event a ward has executed a living will without a durable power of attorney for health care, or if the durable power of attorney for health care has lapsed due to inability or unwillingness of the agent to so act, the question becomes more complicated. As noted, a guardian generally has the authority to make all health care decisions outside the scope of the living will. Idaho Code § 15-5-312(3). Decisions of the guardian regarding items governed by the living will are proper if consistent with the living will. If the

guardian's decision is different from that expressed in the advance directive the guardian should seek court approval prior to making such decision.[2] A court petition by the guardian seeking approval for changing the ward's advance directive, or making a decision adverse to the advance directive, is proper to protect the interests of the guardian, the ward, and all other interested parties.

Many other factual situations may arise with combinations of the existence or absence of living wills, durable powers of attorney for health care, general durable powers of attorney and guardianships. Accompanying these situations will undoubtedly be varying factual backgrounds which may affect the situation. A guardian should approach such decisions cautiously to ensure that he or she does not incur liability for breach of his or her duty as guardian. However, certain factual situations, as related above, are clear and a few general rules can be stated.

If a ward has executed a living will and durable power of attorney for health care, a duly appointed guardian should defer to the duly appointed agent for decisions within the scope of the living will and should not make decisions contrary to the terms of the advance directive. If an advance directive is made but no health care agent is available to make such decisions, the guardian can make decisions consistent with the advance directive but should seek court approval prior to acting contrary to the living will. For medical decisions outside the scope of the living will, the guardian's decision should control.[3]

SECTION II

CAN AN AGENT GRANTED A DURABLE POWER OF ATTORNEY EXECUTE A LIVING WILL FOR THE PRINCIPAL?

The answer to your question requires some analysis of the difference between a general durable power of attorney and a durable power of attorney for health care.[4]

As stated above, a durable power of attorney for health care under Idaho Code § 39-4505 is specifically created "to implement the general desires of a person as expressed in the 'living will.'" Further, under the approved language for a durable power of attorney for health care, the agent has the power to make health care decisions and to carry out the ward's

"desires concerning obtaining or refusing or withdrawing life prolonging care, treatment, services, and procedures." Thus, neither a statutory framework nor the approved language creating a durable power of attorney for health care permits the agent to execute a living will for the principal.

Idaho Code §§ 15-5-501 *et seq.* cover general durable powers of attorney. Under Idaho Code § 15-5-502, "all acts done by an attorney in fact pursuant to a durable power of attorney during any period of disability or incapacity of the principal have the same effect and inure to the benefit of and bind the principal and his successors in interest as if the principal were competent and not disabled." Thus, if the agent is specifically authorized pursuant to the general durable power of attorney, the agent could theoretically execute a living will for the principal. However, most general durable powers of attorney concern financial and business activities and do not include the execution of living wills. The best choice for a person in this situation is for the principal, instead of granting such authority to the agent, to simply execute his or her own living will.

SECTION III

CAN A PERSON BE A PETITIONER IN A GUARDIANSHIP PROCEEDING AND ALSO PERFORM CASE VISITOR FUNCTIONS FOR THE SAME INDIVIDUAL?

This issue was addressed in the letter issued to your office from the Attorney General's Office on April 5, 1991. Specifically, under Idaho Code § 15-5-308, a visitor in a guardianship proceeding is required to have "no personal interest in the proceedings." If the person acting as a visitor has also filed the petition for guardianship, then, as petitioner, the visitor has some interest or personal concern regarding the outcome of the proceedings. Therefore, it would be improper for a person to be both a petitioner and visitor in the same guardianship proceeding.

I hope this letter adequately answers your inquiries. If you have any further questions, please do not hesitate to contact me.

Very truly yours,

KEVIN D. SATTERLEE
Deputy Attorney General
Contracts & Administrative
Law Division

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[1] Note that the guardian's power to make health care decisions regarding matters outside the scope of the living will and durable power of attorney for health care, if any, will control. For example, decisions regarding the ward's daily care, physical therapy, personal hygiene, pain medication, alternative treatments or other similar matters.

[2] Note, however, that Idaho Code § 39-4303 gives priority for medical consent to a "[P]arent, spouse or guardian." Thus, if the parent or spouse of the person does not agree with the guardian's decisions, the guardian should seek court approval prior to acting.

[3] Once again subject to the potential interaction with Idaho Code § 39-4303.

[4] It should be noted that a general power of attorney could never constitute authority for such decisions because such non-durable powers of attorney lapse on the incapacity of the principal.

April 9, 1996

Jeffrey A. Jones, City Attorney
City of Coeur d'Alene
P.O. Box 489
710 E. Mullan
Coeur d'Alene, ID 83816-0489

THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE

Re: Local Government Adoption of Building Codes

Dear Mr. Jones:

Michael Jacobs of the Coeur d'Alene Building Department has requested an opinion from the Office of the Attorney General regarding whether local governments must adopt the same provisions, sections and appendices of the Uniform Building Code, and other uniform codes, as the State of Idaho itself adopts. For the reasons set forth herein, it is the opinion of this office that local governments have the ability to adopt or not adopt any codes of their choice.[1]

The Idaho Building Code Advisory Act ("Act"), chapter 41, title 39, Idaho Code, was adopted to provide uniform adoption and interpretation of building and safety codes in the State of Idaho. Idaho Code § 39-4101. To accomplish this goal, Idaho Code § 39-4116, as originally adopted, provided in relevant part:

> Local governments shall, effective January 1, 1976, comply with the codes enumerated in this act, and such codes, rules and regulations promulgated pursuant to this act, and such inspection and enforcement may be provided by the local government, or shall be provided by the department if such local government opts not to provide such inspection and enforcement, except that the department shall retain jurisdiction of inspection and enforcement of construction standards enumerated in Section 39-4109(1), Idaho Code, for mobile homes and recreational vehicles, and for inspection and

> enforcement of construction standards for manufactured buildings and commercial coaches.

(Emphasis added.) Thus, local governments were originally required to adopt and comply with the codes enumerated in the Act. However, they were given the option to provide the inspection and enforcement under such codes.

In 1977 the legislature amended § 39-4116 to provide that the adoption and compliance with the enumerated codes by local governments was optional rather than mandatory. This amendment was rushed through both houses of the Idaho Legislature during the last days of the 1977 session, and there is no legislative history which would provide any insight into the intent behind the amendment.[2] As amended, § 39-4116 now provides in relevant part:

> Local governments may, effective July 1 of any year, by affirmative action by resolution or ordinance taken by the governing board of a local government, prior to December 31 of the previous year, comply with the codes enumerated in this chapter, and codes, rules and regulations promulgated pursuant to this chapter, and inspection and enforcement may be provided by the local government, or may be provided by the department if such local government opts to comply with the provisions of this chapter but not to provide inspection and enforcement. . . .Any decision to comply with the provisions of this chapter must be communicated to the director in writing, and compliance must be for an entire year commencing July 1. The minimum codes a local government must adopt in order to opt into this chapter are the latest editions of the Uniform Building Code and the Uniform Mechanical Code. Except as listed in subsection (2) of this section, the remaining codes enumerated in the act are optional as to whether or not the local government wishes to adopt them.

(Emphasis added.)

Apparently, there has been some confusion with the language of the statute as to whether local governments are still required to adopt the latest editions of the Uniform Building Code and the Uniform Mechanical Code. However, based upon this amendment, it is the opinion of this office that local

governments have the option of adopting and complying with the codes enumerated in the Building Code Advisory Act. If the local government wishes to adopt and comply with any codes enumerated in the Act, it must pass an ordinance to that effect. However, it is no longer required to adopt and comply with such codes. If the local government adopts a code(s) it can provide the relevant inspection and enforcement. If the local government opts to comply with the provisions of the Act, but does not wish to perform the inspection and enforcement, such activities can be provided by the Department of Labor and Industrial Services ("Department"). However, in order to opt into compliance with the Act, the local government must perform the steps set forth in § 39-4116 as well as adopt the latest editions of the Uniform Building Code and Uniform Mechanical Code.[3] If the local government fails to accomplish these steps, according to the statute it has not opted to comply with the Act, and, thus, is not required to adopt the latest editions of the Uniform Building Code and Uniform Mechanical Code or, for that matter, any code.

To interpret the statute differently would neglect established maxims of statutory construction. When a statute is clear, we must follow the law as written, and, thus, when language is unambiguous, there is no occasion for application of rules of construction. Sweeney v. Otter, 119 Idaho 135, 804 P.2d 308 (1990). The plain language of the statute (through the use of the word "may" as well as the requirement of affirmative action to "opt in" to the state system) provides local governments with the ability to adopt or not adopt any of the enumerated code provisions. Further, when the legislature amends a statute, it is deemed, absent express indication to the contrary, to be indicative of changed legislative intent. In other words, it is presumed that the legislature intended the statute to have a different meaning. Nebeker v. Piper Aircraft Corp., 113 Idaho 609, 747 P.2d 18 (1987). If the present § 39-4116 were interpreted to require the local governments to adopt the latest edition of the Uniform Building Code or Uniform Mechanical Code, absent affirmative action to opt into compliance with the Act, the 1977 amendment would be rendered superfluous. Changing the word "shall" to "may" evidences legislative intent to make adoption and compliance with certain enumerated codes optional rather than mandatory. If the local government must still adopt the latest edition of the Uniform Building Code or Uniform Mechanical Code, what is the purpose of the requirement of an ordinance and annual notification to the Department?

Although the 1977 amendment to § 39-4116 does not seem to comport with the earlier stated legislative intent in providing uniformity, such stated intent was enacted prior to the 1977 amendment and must give way to such later enactment. Presumably, in 1977 the legislature balanced the interests of local governments, industry, and the statewide uniformity goal and made the decision that uniformity throughout all levels of government was not as important as providing local governments with flexibility in adopting (or not adopting) relevant building codes.[4]

It should be noted that § 39-4116, as amended, has never been interpreted by the Department and local governments of Idaho as requiring local governments to adopt the latest edition of the Uniform Building Code or Uniform Mechanical Code, or other enumerated code provisions. According to the Department, no local government has attempted to opt into compliance with the Act in the required manner, including the City of Coeur d'Alene. Thus, it would appear that no local government is required to adopt the latest edition of the Uniform Building Code or Uniform Mechanical Code. In a recent statewide survey conducted in February 1995 by the Department, only approximately fifty percent (50%) of Idaho cities have even adopted a Uniform Building Code. Of those cities that have adopted the Uniform Building Code, 32 have adopted the 1994 edition, 50 have adopted the 1991 edition, 8 have adopted the 1988 edition, 3 have adopted the 1985 edition, 1 has adopted the 1982 edition, 3 have adopted the 1976 edition, and 1 has adopted the 1957 edition.[5]

In conclusion, local governments in Idaho are not required to adopt the latest edition of the enumerated codes in the Building Code Advisory Act. The 1977 amendment to § 39-4116 allows local governments the option of adopting such codes and, if they desire, opt into compliance with the Building Code Advisory Act. However, certain steps must be accomplished to opt into compliance.[6] Absent such action local governments are free to adopt or not adopt any of such codes.

I hope this letter is of assistance to you. If you have any questions, please feel free to contact me.

Very truly yours,

THOMAS F. GRATTON
Deputy Attorney General
Intergovernmental & Fiscal
Law Division

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[1] This does not include the National Electric Code and Uniform Plumbing Code, which must be adopted to some extent by local governments. See Idaho Code §§ 54-1001B and 54-2601. In addition, there are certain federal guidelines which must be adopted regardless of whether the local government opts to comply with the Building Code Advisory Act.

[2] It is my understanding in talking with Jack Raynor of the Idaho Department of Labor and Industrial Services that the amendment arose out of a dispute regarding a state inspector's attempting to enforce certain codes against the builder of a log home.

[3] In 1981 this office issued Attorney General Opinion 81-5 which interpreted § 39-4116, as amended. 1981 Idaho Att'y Gen. Ann. Rpt. 73. In particular, Opinion 81-5 discussed the requirements necessary to opt into the state program, which would require the local government to adopt certain codes. Specifically, the local government must (1) adopt by December 31 of the previous year an ordinance or resolution providing for such compliance, (2) its ordinance must provide for compliance for a one-year period commencing July 1 of the year after the ordinance is adopted, and (3) the Director of the Department of Labor and Industrial Services must be notified of the election to comply. Id. at 74-75. As more fully discussed below, no local government has elected to opt into the state program in the required manner.

[4] Your letter references State v. Gage, 123 Idaho 875, 853 P.2d 620 (1993). In Gage, the court, citing § 39-4116, stated that local governments may opt local ordinances "incorporating and supplementing the latest mandatory provisions of the Uniform Building Code." Id. at 878. The court further provided that the Uniform Building Code had been adopted in Idaho. This language is not in conflict with this opinion, but specifically recognizes the ability of local governments to adopt the latest provision of the Uniform Building Code. In any event, the language is dicta as the court was not addressing the specific issue discussed in this opinion.

[5] In addition, only approximately fifty percent (50%) of Idaho counties have adopted a Uniform Building Code. Of that number 9 have adopted the 1994 edition, 10 have adopted the 1991 edition, 2 have adopted the 1988 edition, 1 has adopted the 1985 edition, and 1 has adopted the 1976 edition.

[6] While the legislature has given local governments the option of whether to adopt certain uniform codes, neither such enactment nor this opinion should be read as support for not adopting a Uniform Building Code or Uniform Mechanical Code. The adoption and enforcement of such codes provides a valuable service to our communities.

April 12, 1996

Senator Evan Frasure
Idaho State Senator
2950 Trevor
Pocatello, ID 83201

THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE

Re: SB 1514; Amendments to the Idaho Charitable Solicitation Act

Dear Senator Frasure:

You have asked for legal guidance concerning the constitutionality of SB 1514. This legislation amends the Idaho Charitable Solicitation Act (CSA).[1] In our opinion, SB 1514 probably is constitutional.

SB 1514 adds new definitions to Idaho Code § 48-1202 of the CSA for the terms "container" and "disclosure label." It defines a "container" as a box, carton, package, receptacle, canister, jar, dispenser or machine that offers a product for sale or distribution as part of a charitable solicitation. SB 1514 defines "disclosure label" as a printed or typed notice that is affixed to a container and which informs the public of the following: (1) the approximate annual percentage paid to any individual to maintain, service or collect the contribution raised by the solicitation; (2) the net percentage paid to the specific charitable purpose in the most recent calendar year; and (3) whether the maintenance, service or collection from the container is performed by volunteers or paid individuals. In addition to the two new definitions, SB 1514 adds a new subsection to 48-1203 of the CSA, making it an unlawful act for a charitable organization to use a container to solicit contributions by offering a product for sale "knowing the container does not have a disclosure label affixed to it."[2]

The United States Supreme Court has consistently held that the solicitation of money by charities is fully protected by the First Amendment as the dissemination of ideas. Riley v. National Federation of the Blind of N.C., 487 U.S. 781, 787-89, 108 S. Ct. 2667, 2672-73 (1988); Secretary of State of

Maryland v. Joseph H. Munson Co., 467 U.S. 947, 959-61, 104 S. Ct. 2839, 2848-49 (1984). As such, any governmental restriction on the solicitation is subject to strict scrutiny analysis under the First Amendment. Riley, 487 U.S. at 787-88, 108 S. Ct. at 2672-73. This is a difficult hurdle to overcome.

In Riley, the Court held unconstitutional a North Carolina requirement that professional fund raisers disclose to potential donors the percentage of charitable contributions collected during the previous year which were actually turned over to the charitable cause. 487 U.S. at 796-802, 108 S. Ct. at 2677-81. The Court was not persuaded by the state's argument that the disclosure mandated by the North Carolina law was merely compelled commercial speech, which, under existing United States Supreme Court precedent, is entitled to a lower standard of constitutional protection. Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456, 98 S. Ct. 1912, 1918 (1978). The Riley Court stated that if the compelled disclosure were commercial speech, it was "inextricably intertwined with otherwise fully protected speech," and that First Amendment protection is determined by "the nature of the speech taken as a whole and the effect of the compelled statement thereon." 487 U.S. at 796, 108 S. Ct. at 2677.

Riley's scope was discussed by the United States Supreme Court in Board of Trustees of State University of New York v. Fox, 492 U.S. 469, 109 S. Ct. 3028 (1989). In Fox, students and a corporation brought an action seeking declaratory and injunctive relief against the Board of Trustees of the State University of New York based upon the university system's refusal to allow the corporation to conduct product demonstrations in campus dormitory rooms. In a 6-3 decision, the Court held that the speech in question was commercial in nature and, applying the analysis applicable for First Amendment challenges to governmental restriction of commercial speech, upheld the university's action.

Of relevance to this analysis is the Fox Court's discussion of Riley. In arguing their point, the students asserted that their product demonstrations contained not just a proposal for a commercial transaction, but also touched on other subjects as well, such as how to be financially responsible and how to run an efficient home. They argued, citing to Riley, that the commercial and non-commercial aspects of their product demonstrations are "inextricably intertwined"; therefore, the students asserted, their presentations must be classified

as noncommercial speech and entitled to heightened protection. Fox, 492 U.S. at 473-74, 109 S. Ct. at 3031.

The Fox Court disagreed. The Court noted that the compelled speech, even if it were commercial speech, was "inextricably intertwined because the state law required it to be included." 492 U.S. at 474, 109 S. Ct. at 3031 (emphasis added). By contrast, however, in Fox, the university decision to ban commercial presentations on university property does not prevent the speaker from conveying noncommercial messages, and "nothing in the nature of things requires them to be combined with commercial messages." *Id.* The Court stated that plaintiffs' including home economic elements to the commercial presentation no more converted their "presentation into educational speech, than opening sales presentations with a prayer or a Pledge of Allegiance would convert them into religious or political speech." 492 U.S. at 475, 109 S. Ct. at 3031-32; *accord* Bolger v. Young Drug Products Corp., 463 U.S. 60, 67-68, 103 S. Ct. 2875, 2880-81 (1983) (communications can be classified as commercial speech even if they contain discussions of important public issues).

Whether SB 1514 is constitutional depends upon whether it is classified as commercial or noncommercial speech. If the solicitation on a container is deemed not to be commercial speech, it is clear, under Riley, that the first two disclosure requirements of SB 1514 are unconstitutional. They are the type of disclosure requirements expressly struck down by the Riley Court. We note, however, that the third disclosure requirement—a statement indicating whether the maintenance of the container is performed by volunteers or paid individuals—would probably be constitutional even if the solicitation is found to constitute noncommercial speech. In Riley, the Supreme Court, in a footnote, stated:

> [N]othing in this opinion should be taken to suggest that the State may not require a fund-raiser to disclose unambiguously his or her professional status. On the contrary, such a narrowly tailored requirement would withstand First Amendment scrutiny.

487 U.S. at 799, n.11, 108 S. Ct. at 2679, n.11; *see also* American Ass'n of State Troopers, Inc. v. Preate, 825 F. Supp. 1228 (M.D. Penn. 1993) (section of Pennsylvania law that required professional telemarketers soliciting funds on behalf of charitable organizations to disclose the name of the solicitor, the

charity for which solicitation was made, and the professional status of solicitor was narrowly tailored to achieve state's compelling interest in preventing fraud, and did not violate telemarketers' free speech rights). The third disclosure does no more than that permitted by the Riley Court in footnote 11.

In our view, the type of solicitation that SB 1514 seeks to regulate is probably commercial speech. Applying the test for analyzing government restrictions of commercial speech, we believe that SB 1514's disclosure requirements pass constitutional muster.

As noted above, SB 1514 defines a container as a receptacle that "offers a product for sale or distribution as part of a charitable solicitation." In essence, the containers seek to "propose a commercial transaction," Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 762, 96 S. Ct. 1817, 1825 (1976), which, according to the Fox Court, is "the test for identifying commercial speech." Fox, 492 U.S. at 473-74, 109 S. Ct. at 3031; *see also* Bolger, 463 U.S. at 66-68, 103 S. Ct. at 2880-81 (commercial speech has several identifying characteristics, including its advertising format, its reference to a specific product and the underlying economic motive of the speaker). The fact that the container makes a charitable pitch should no more cloak the commercial solicitation with the full First Amendment protection given charitable speech than, as the Fox Court noted, "opening sales presentations with a prayer or a Pledge of Allegiance would convert them into religious or political speech." 492 U.S. at 475, 109 S. Ct. at 3031-32.

First Amendment scrutiny of commercial speech restrictions is "more relaxed" than restrictions governing political, religious or charitable speech. Association of Nat'l Advertisers, Inc. v. Lungren, 809 F. Supp. 747 (N.D. Cal. 1992), *aff'd*, 44 F.3d 726 (1994). This is because "commercial speech [has] a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values." Ohralik, 436 U.S. at 456, 98 S. Ct. at 1918. Accordingly, it is subject to "modes of regulation that might be impermissible in the realm of noncommercial expression." *Id.*

The test for analyzing government restriction of commercial speech under the First Amendment is set forth in the seminal case of Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York, 447 U.S. 557, 100 U.S. 2343 (1980). There the Court stated that regulation of commercial speech must directly advance a substantial governmental interest in a manner

that forms a "reasonable fit" with the interest. 447 U.S. at 566, 100 S. Ct. at 2351; Fox, 492 U.S. at 480, 109 S. Ct. at 3034; *accord* City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 416, 113 S. Ct. 1505, 1510 (1993). The burden is on the government to demonstrate the reasonable fit. Fox, 492 U.S. at 480, 109 S. Ct. at 3034. The government's burden "is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restrictions will in fact alleviate them to a material degree." Edenfield v. Fane, 507 U.S. 761, 770, 113 S. Ct. 1792, 1800 (1993).

Idaho's interest in requiring the disclosures on containers, as defined by SB 1514, is substantial. Idaho has a valid interest in seeing that its citizens are informed about a commercial transaction so that they can decide whether the proposed transaction is worth entering into. Accordingly, Idaho has enacted laws that prohibit omitting material or relevant facts relating to the sale of any good or service. Idaho Code § 48-603(17); Rule 30, Idaho Rules of Consumer Protection, codified at IDAPA 04.02.01030.

The marketplace works best when full and truthful information is disseminated. This is an important state interest. Mourning v. Family Publications Service, Inc., 411 U.S. 363, 364, 93 S. Ct. 1652, 1658 (United States Supreme Court cites with approval comments by Joseph Barr, Under Secretary of the Treasury, that blind economic activity is inconsistent with the efficient functioning of a free economic system). Accordingly, in a number of situations Idaho has mandated the disclosure of various types of information in the context of a proposed commercial transaction. *See, e.g.*, Idaho Code § 48-603A (solicitor, at other than appropriate trade premises, must identify self, purpose of contact and business on whose behalf solicitor is contacting the consumer); Idaho Code § 48-1004 (telephone solicitor must advise purchaser of right to cancel); Idaho Code § 48-1103 (information provider for pay-per-telephone service must include at the beginning of its service a preamble message detailing the cost of the call); Rule 81, Idaho Rules of Consumer Protection, codified at IDAPA 04.02.01081 (sweepstakes promoter must make disclosure about promotion, including the odds of receiving any one of the offered prizes, the actual value of the prizes offered, and the rules of the promotion); Rule 170, Idaho Rules of Consumer Protection, codified at IDAPA 04.02.01170 (seller, in door-to-door solicitation, must inform consumer of his or her door-to-door cancellation rights); Rule 210, Idaho Rules of Consumer Protection, codified at IDAPA 04.02.01210 (consumer credit contracts must

contain specified holder-in-due course notice); Rule 233, Idaho Rules of Consumer Protection, codified at IDAPA 04.02.01234 (automobile dealers must make a variety of disclosures to consumers depending upon the type of advertisement disseminated).

Idaho also has a significant interest in encouraging private charitable contributions. The burden the state bears to provide for its needy citizens is great and, to the degree that burden is lessened by private action, the state benefits. Idaho's citizens are more likely to agree to commercial transactions that result in a large contribution to the proposed charitable cause than one in which the charitable contribution is pennies on the dollar.

The disclosure requirements of SB 1514 reasonably fit Idaho's interest in passing SB 1514. There is no ban on any applicable solicitation, disclosures are made at the point of sale, and there is no need to make repeated disclosures. Further, the information can easily be placed on the applicable containers. In our experience, the containers, as defined by SB 1514, are not owned by the property owner of the location where the containers are located. These property or store owners do not have the information needed to answer consumers' inquiries about the items of information that SB 1514 mandates being disclosed. Accordingly, absent the mandated disclosures, interested consumers could not obtain the information provided for by SB 1514.

In our opinion, SB 1514 does not violate the First Amendment to the United States Constitution.[3]

If you have questions or comments, please do not hesitate to contact me.

Very truly yours,

BRETT T. DELANGE
Deputy Attorney General
Civil Litigation Division

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[1] Idaho's Charitable Solicitation Act, Idaho Code §§ 48-120 et seq., was enacted in 1993. Idaho Code § 48-1203 prohibits, in pertinent part, any person in the planning, conduct or execution of any charitable solicitation, to utilize any unfair, false, deceptive, misleading or unconscionable act or practice. The Act grants private parties, the attorney general, and the district court the same powers, remedies and rights as are granted by Idaho's Consumer Protection Act. Idaho Code §§ 48-1204 and 48-1205.

[2] The requirement does not apply if the container generates less than a gross amount of one hundred dollars ($100), the charitable organization generates less than five hundred dollars ($500), or one hundred percent of the proceeds generated by the container go to the designated charitable organization.

[3] We note briefly that the state constitutional provision protecting free speech, art. 1, § 8 of the Idaho Constitution, could be construed differently from the federal Constitution. In State v. Newman, 108 Idaho 5, 696 P.2d 856 (1985), the Idaho Supreme Court reviewed, in part, a First Amendment constitutional challenge to Idaho's Drug Paraphernalia Act, codified at Idaho Code §§ 37-2701(bb), 37-2734A, 37-2734B and 37-2774(a)(7). The court rejected the defendant's First Amendment argument. 108 Idaho at 16, 696 P.2d at 867. In doing so, the court held that the speech involved was commercial speech, and that such speech is subject to less protection than that afforded to noncommercial speech. Id. The court noted that the defendants did not raise any constitutional challenge under article 1, § 9 of the Idaho Constitution. The court noted that the wording of article 1, § 9, is different from that found in the First Amendment. Accordingly, the court stated that it would "leave for another case, with the appropriately raised issues, the task of determining if the First Amendment of the United States Constitution and art. 1, § 9 of the Idaho Constitution compel different analytical methodologies with outcomes necessarily different in some cases." 108 Idaho at 15-16, n.25, 696 P.2d at 866-67 n.25.

May 3, 1996

John Cline, Director
Bureau of Disaster Services
Building 600
4040 Guard Street
Boise, ID 83705-5004

THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE

Re: Disaster Preparedness Act

Dear Mr. Cline:

You have requested an opinion from the Office of the Attorney General regarding several issues relating to local disaster emergencies. I will attempt to answer your questions in the order in which they were set forth in your letter.

1. What is the length of a local disaster emergency declaration?

Your first question concerns the period of time a local disaster declaration is valid when the declaration has been consented to by the governing body of the local political subdivision. Idaho Code § 46-1011(1) provides in relevant part:

> A local disaster emergency may be declared only by a mayor or chairman of the county commissioners within their respective apolitical subdivisions. It shall not be continued or renewed for a period in excess of seven (7) days except by or with the consent of the governing board of the political subdivision.

It is the opinion of this office that Idaho Code § 46-1011(1) requires the mayor or chairman of the county commissioners to make the local disaster emergency declaration. This declaration cannot continue, be continued or be renewed for a period in excess of seven (7) days without the consent of the governing board. If the governing board consents, there does not appear to be

a limit on the length of time the declaration can be continued. The time restraints are merely restrictions on the ability of the individual mayor or chairman of the board of commissioners to issue or renew a declaration in excess of seven (7) days without the consent of the governing board. Obviously, the declaration cannot be in effect indefinitely. At all times the declaration is in effect, the local government entity must be able to demonstrate that there exists a local disaster emergency. The terms "disaster" and "emergency" are defined in Idaho Code § 46-1002. Although such definitions may relate more to a state level declaration, they can certainly be modified to provide general guidance as to when a local disaster emergency occurs.

2. Is there a requirement that a local disaster emergency declaration be maintained or continued during a state disaster emergency declaration?

Second, you ask whether a local disaster emergency declaration should be continued or maintained when a state disaster emergency has been declared by the governor. Legally, the local governmental entity may not be required to continue or maintain a local disaster emergency declaration. However, it would be wise for it to do so, because of ambiguity in the statute, as well as for practical reasons. Idaho Code § 46-1008 allows the governor to issue executive orders or a proclamation declaring a disaster emergency when he finds a disaster has occurred or that the occurrence or the threat thereof is imminent. The state disaster emergency declaration lasts for thirty (30) days unless the governor continues it for another thirty (30) days. The effect of the state disaster emergency declaration is to "activate the disaster response and recovery aspects of the state, local and intergovernmental disaster emergency plans applicable to the political subdivision or area in question." Idaho Code § 46-1008(3).

The effect of a state disaster emergency declaration on the local level and that of the local disaster emergency declaration are one and the same. The effect of a local disaster emergency declaration is to activate the response and recovery aspects of any and all applicable local or intergovernmental disaster emergency plans. Idaho Code § 46-1011(2). Because the effect of both declarations is the same on the local level, there appears to be no legal requirement for a local disaster emergency declaration to be continued or maintained during the duration of a state disaster declaration. However, Idaho Code § 46-1017 immunizes governmental entities against claims for personal injury or

property damage when these agencies are engaging in disaster relief activities and are "acting under a declaration by proper authority." In one sense, because the effect of the state declaration is essentially the same as the local declaration, one could argue that a state declaration alone would be a "declaration by proper authority" to successfully provide immunity to the local governmental entity. The argument could also be made that "proper authority" for local governmental action would be the mayor or chairman of the board of county commissioners. Because of this ambiguity in relation to the immunity statute, it would be advisable for local governmental units to maintain or continue their declarations to ensure that their immunity remains intact.

For practical reasons, a local governmental entity may wish to maintain or continue such local disaster emergency declaration. First, as explained above, the duration of the two separate declarations (state vs. local) are different. Second, the level of disaster to trigger the state declaration is different from that of the local declaration. The state disaster emergency declaration is generally triggered when the resources and efforts of the local area need to be supplemented by state resources. Idaho Code § 46-1002(4). However, the local disaster emergency declaration is not necessarily premised upon the inability of the local jurisdiction to handle the disaster emergency. Rather, the local disaster emergency declaration is issued to activate the local response and recovery plans in order to properly respond to the disaster emergency. Thus, while a state disaster declaration may be terminated at some point, there still may exist a local disaster emergency which is now capable of being adequately handled by the resources of the local jurisdiction. Therefore, local jurisdiction may want to continue the local declaration for the reasons set forth above.

3. What is the authority, potential liability or immunity therefrom, of local government officials and employees acting solely under a state disaster emergency declaration?

Third, you ask about the authority, potential liability or immunity therefrom on the part of local government officials or employees acting solely under a state disaster emergency declaration. Because the effect of the state disaster emergency declaration is the same as a local disaster emergency declaration on the local level, local government officials or employees have the same authority as if they were acting only under a local disaster emergency declaration or both a state and local disaster emergency declaration. In essence, they have the powers which may be given to them by the Disaster

Preparedness Act and the local disaster emergency plans in place in their jurisdiction. Thus, if a local jurisdiction needed to remove a house in responding to a disaster emergency, they would not lose that authority solely under a state disaster emergency declaration, since the state disaster emergency declaration operates to activate the local disaster emergency plans in that jurisdiction.

Unless there is willful misconduct, local government officials or employees are cloaked with immunity against personal injury or property damage complaints when engaged in disaster relief activities. The same is true for private entities under contract with the local governmental entity who are providing disaster relief, unless there is willful misconduct or gross negligence. Such immunity is set forth in Idaho Code § 46-1017, which provides:

> Neither the state nor any political subdivision thereof nor other agencies, nor, except in cases of willful misconduct, the agents, employees or representatives of any of them engaged in any civil defense or disaster relief activities, acting under a declaration by proper authority nor, except in cases of willful misconduct or gross negligence, any person, firm, corporation or entity under contract with them to provide equipment or work on a cost basis to be used in disaster relief, while complying with or attempting to comply with this act or any rule or regulation promulgated pursuant to the provisions of the act, shall be liable for the death of or any injury to persons or damage to property as a result of such activity. The provisions of this section shall not affect the right of any person to receive benefits to which he would otherwise be entitled under this act or under the workmen's compensation law or under any pension law, nor the right of any such person to receive any benefits or compensation under any act of congress.

Thus, a local government and its officials or employees are not liable absent willful misconduct, the application of workers' compensation law, or another section of the Disaster Preparedness Act. There are no other sections of the Disaster Preparedness Act which would take away from the immunity enjoyed by local governments. However, there is a section which would require the state to pay for certain damages. Idaho Code § 46-1012 provides in part that "[c]ompensation for property shall be only if the property was commandeered or otherwise used in coping with a disaster emergency and its use

or destruction was ordered by the governor or his representative." Idaho Code § 46-1012(3). A claim for such property is filed with the Bureau of Disaster Services. Idaho Code § 46-1012(3). Because the use or destruction of the property must be ordered by the governor or his representative and the claim is handled by a state agency, *i.e.*, the Bureau of Disaster Services, it would appear that the state is the only entity which falls under Idaho Code § 46-1012. There is no language that would suggest that the local governmental entity would have any liability for the payment of property damage. Even in the case of a local government official, who is the express authorized representative of the governor and who ordered the use or destruction of private property, it appears that the state would still be the entity which would be liable, because the claim is filed and handled via a state agency. Further, this statute is written in the context of state-declared disaster emergencies.

4. Is a mayor or chairman of the board of county commissioners an authorized representative of the governor?

Your final question asks whether the mayor or chairman of the board of county commissioners is considered an authorized representative of the governor, as set forth in Idaho Code § 46-1012(3), regarding decisions on the use of private property, which is discussed above. Generally, the answer is "no," they would not be authorized representatives. In Marty v. State, 117 Idaho 133, 786 P.2d 524 (1990), the Idaho Supreme Court addressed a similar issue. In Marty, certain landowners filed claims against governmental entities, including the State of Idaho, regarding damage caused by flooding. The plaintiffs argued that actions taken by the governmental entities in a local and state-declared flooding disaster emergency were responsible for the flooding on the property owned by the landowners. The supreme court disallowed the inverse condemnation claim of the landowners against the state. The court recognized that under Idaho Code § 46-1012(4), the state could be liable in an inverse condemnation action relating to property taken during disaster relief activities if "ordered by the governor or his representative." The Idaho Supreme Court held that the actions taken by the Idaho Department of Water Resources were not ordered by the governor or his authorized representative:

> However, the statute does not provide for compensation unless the use or destruction of the property was ordered by the governor or his representative. The declaration of a state of emergency by the governor on June 14, 1984, did not refer

> to the use or destruction of the landowners' property. Neither IDWR nor any of the other governmental agencies is properly characterized as the "representative" of the governor in responding to the emergency. There is no evidence here that the governor designated any of the governmental agencies as his representative. Therefore, we hold that the landowners were not required to exhaust the remedy provided by I.C. § 46-1012, since that statute did not provide them with a remedy under the circumstances here.[1]

117 Idaho at 142, 786 P.2d at 533.

It does not appear that the mayor or county commissioner would be an authorized representative of the governor, unless expressly so appointed. Therefore, any use or destruction of property authorized by them as part of disaster relief activities would not be "authorized by the governor or his representative." This merely means that compensation for such use or destruction is not allowed under Idaho Code § 49-1012. It does not mean that the governmental entity does not have the authority to make such decisions.

I hope this letter is of assistance to you. If you have any questions, please feel free to contact me.

Very truly yours,

THOMAS F. GRATTON
Deputy Attorney General
Intergovernmental & Fiscal
Law Division

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[1] The other governmental entities involved in the suit were a flood control district and a water district.

May 10, 1996

The Honorable Mark D. Stubbs
1025 Sawtooth Boulevard
Twin Falls, ID 83301

The Honorable Robert E. Schaefer
P.O. Box 55
Nampa, ID 83653

THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE

Re: Applicability of Senate Bill 1545

Dear Representatives Stubbs and Schaefer:

1. Introduction

In March of this year you requested our advice with respect to S.B. 1545 which amends the Idaho Solid Waste Facilities Act. We responded to that request by a letter from David High dated March 14, 1996. The main issue addressed was whether S.B. 1545 was applicable to a commercial solid waste landfill proposed by Idaho Waste Systems, Inc. in Elmore County. At the time S.B. 1545 became effective, Idaho Waste Systems, Inc. was already in the process of obtaining the necessary approvals to construct and operate. In the March 14, 1996, letter, we advised that Idaho courts would most likely not apply S.B. 1545 to the Idaho Waste Systems, Inc. proposed facility. As stated in the letter, because of the need for a quick response, we did not conduct exhaustive research. Also, the opinion was prepared without the benefit of a subsequently drafted statement of legislative intent regarding S.B. 1545. The opinion was based solely upon facts as represented by counsel for Idaho Waste Systems, Inc.

After the enactment of S.B. 1545, on March 25, 1996, the law firm of Givens, Pursley & Huntley, representing Rabanco Companies, provided additional information to the Attorney General's Office and asked for a reconsideration of whether S.B. 1545 applies to Idaho Waste Systems, Inc.'s proposed facility. This letter presents the results of our reconsideration of this issue.

2. Facts

The Idaho Solid Waste Facilities Act (ISWFA) provides requirements for the location, design, operation and closure of municipal solid waste landfills (MSWLFs) in Idaho. In order to construct an MSWLF, an owner must obtain a site certification from the Department of Health and Welfare, Division of Environmental Quality (DEQ), that the location of the proposed landfill meets certain critical location requirements. Idaho Code §§ 39-7407 and 39-7408. The owner must also obtain the approval from DEQ of a ground water monitoring and design plan for the facility. Idaho Code § 39-7411. In addition, the proponent of an MSWLF must comply with local planning and zoning requirements.

S.B. 1545 amended the ISWFA to provide that, in addition to obtaining site certification as provided in Idaho Code §§ 39-7407 and 39-7408, an owner of a proposed commercial solid waste facility must obtain a siting license before constructing or operating the facility.

In connection with the enactment of S.B. 1545, a statement of legislative intent was published by the Idaho Legislature. The statement indicates the legislature intended the amendment to apply to commercial landfills that had site certification, but had not yet been constructed or operated as of the effective date of S.B. 1545. *See* House Journal at 416 (March 14, 1996).

At the time S.B. 1545 was enacted, Idaho Waste Systems, Inc. was in the process of obtaining the necessary state and local approvals to construct a commercial solid waste facility in Elmore County. Idaho Waste Systems, Inc. had obtained conditional site certification from DEQ. The certification, issued on January 24, 1996, was conditioned "upon the receipt of a copy of the approved conditional use permit issued by Elmore County for the Simco Road Municipal Solid Waste Landfill." *See* January 24, 1996, letter from DEQ enclosed. This condition was based upon Idaho Code § 39-7407(2)(d) of the ISWFA that prohibits the location of a facility "so as to be at variance with any locally adopted land use plan or zoning requirement unless otherwise provided by local law or ordinance . . . ."

On March 5, 1996, DEQ approved the design of the proposed Idaho Waste Systems, Inc. Facility. However, to date, Idaho Waste Systems, Inc. has not received a conditional use permit (CUP) from Elmore County.

3. Analysis

Whether S.B. 1545 is applicable to Idaho Waste Systems, Inc.'s proposed facility is, in the first instance, a question of legislative intent. The Idaho Supreme Court has consistently held that whether a state statute applies retroactively is a question of legislative intent and that a statute is not to be applied retroactively unless there is clear legislative intent to that effect. Gailey v. Jerome County, 113 Idaho 430, 432, 745 P.2d 1051, 1053 (1987) ("Whether a statute operates retroactively or prospectively only is a question of legislative intent"); Hidden Springs Trout Ranch, Inc. v. Allred, 102 Idaho 623, 636 P.2d 745 (1981); City of Garden City v. City of Boise, 104 Idaho 512, 660 P.2d 1355 (1983); Blankenship v. Myers, 97 Idaho 356, 544 P.2d 314 (1975); Edwards v. Walker, 95 Idaho 289, 507 P.2d 486 (1973); Kent v. Idaho Public Utilities Comm'n, 93 Idaho 618, 469 P.2d 745 (1970); Application of Forde L. Johnson Oil Co., Inc., 84 Idaho 288, 372 P.2d 135 (1962).

In Application of Forde L. Johnson Oil Co., Inc., the Idaho Supreme Court reviewed whether an amendment to the Idaho Code applied to a pending motor contract carrier permit before the Idaho Public Utilities Commission. The Idaho Supreme Court held that the application of the statute was answered by a review of legislative intent. The court found no intent on the part of the legislature to apply the statute retroactively and, therefore, held it was not applicable to the pending permit application. 84 Idaho at 297, 372 P.2d at 144.

The Idaho Supreme Court in Kent v. Idaho Public Utilities Comm'n was faced with a similar issue. In that case, Kent Brothers Transportation purchased a motor carrier permit from a bankrupt company and then filed an application with the Idaho Public Utilities Commission to transfer the permit. The Idaho Public Utilities Commission denied the application, relying in part upon a statutory amendment that was enacted after the issuance of the original permit but before the commission's decision on the application to transfer.

The Idaho Supreme Court in Kent reviewed whether the amended statute was applicable to the application for a transfer of the permit. The court began its analysis by reviewing the intent of the legislature. The court found that the language of the statute made it clear it was intended to apply to the

transfer of permits which had been granted prior to the enactment, and thus was applicable to the pending application by Kent Brothers. 93 Idaho at 621, 469 P.2d at 748. The court stated the following:

> We consider first whether the legislature intended the 1963 amendment of I.C. § 61-809 to apply retroactively. We agree that a statute should be applied retroactively only if the legislature has clearly expressed that intent or such intent is clearly implied by the language of the statute. *Application of Forde L. Johnson Oil Company*, [84 Idaho 288, 372 P.2d 135 (1962)]; I Sutherland Statutory Construction, § 1963. We find that the wording of I.C. § 61-809 makes clear that it is designed to apply to prospective transfer of permits which had been granted prior to the 1963 amendment.

Id.

While the Idaho Supreme Court has consistently looked to the intent of the legislature in determining whether a state statute should be applied retroactively, the court has taken a different approach with respect to the application of local zoning ordinances to pending applications for building permits. The Idaho Supreme Court has, without reviewing what a local government intended with the ordinance, applied the rule that an application for a building permit is controlled by the ordinance in effect at the time the application was filed, not any amended ordinance subsequently effective. South Fork Coalition v. Board of Comm'rs of Bonneville County, 117 Idaho 857, 792 P.2d 882 (1990); Ready-To-Pour, Inc. v. McCoy, 95 Idaho 510, 511 P.2d 792 (1973); Ben Lomond, Inc. v. City of Idaho Falls, 92 Idaho 595, 448 P.2d 209 (1968).

The application of S.B. 1545 to the proposed Idaho Waste Systems, Inc. facility appears to be controlled by the Idaho cases in which the court has determined the applicability of a statutory amendment to a pending permit application by reference to legislative intent, rather than those Idaho cases dealing with local zoning ordinances and building permits. The Idaho Waste Systems, Inc. situation does not involve the amendment of a local ordinance. It also does not involve the application of a law dealing strictly with zoning. Instead, it involves the application of a state statute dealing with the protection of the environment through the regulation of the location, design, operation

and closure of all commercial solid waste facilities in the state. Under these circumstances, the Idaho courts would most likely determine the application of S.B. 1545 by ascertaining whether the legislature intended S.B. 1545 to apply to facilities such as Idaho Waste Systems, Inc.'s proposed facility.

S.B. 1545 added section 39-7408A to the ISWFA. This section reads as follows:

> SITE CERTIFICATION PROCEDURE FOR COMMERCIAL SOLID WASTE FACILITIES. In addition to obtaining site certification as provided in section 39-7408, Idaho Code, no owner or operator of a commercial solid waste facility shall construct, expand or enlarge such a facility without a siting license from the director. Commercial solid waste facilities constructed and in operation on the effective date of this section are not required to obtain a siting license except to expand or enlarge such facilities.

Idaho Code § 39-7408A makes it apparent that the law was intended to apply to any commercial solid waste facility that was not yet constructed and in operation on the date of enactment.

Any ambiguity in the language of S.B. 1545 regarding its application is resolved by the statement of legislative intent published by the legislature. This reads as follows:

> It is the intent of the legislature that facilities that as of the effective date of S 1545 have site certification as provided in Idaho Code 39-7408 but have not yet constructed or started to operate shall be given leeway in fees charged under this new legislation, as allowed by current statue [*sic*], and that the Director may allow and recommend reduction in the time for public notice and comment and time within which the panel and the Director must act as provided in sections 39-7408[(D)](4), (5), and (8) Idaho Code.
>
> It is the intent of the legislature that this legislation does not apply to recycling businesses such as composting. House Journal at 416 (March 14, 1996).

Thus, it is clear the legislature intended S.B. 1545 to apply to those facilities, like the Idaho Waste Systems, Inc. facility, for which some of the approvals necessary to construct had been obtained, but which were not yet constructed or operated at the time the legislation was passed. It follows, then, that the Idaho courts would apply S.B. 1545 to Idaho Waste Systems, Inc. and its proposed facility in Elmore County.

4. Conclusion

The Idaho Legislature clearly intended S.B. 1545 to apply to facilities like the proposed Idaho Solid Waste Systems, Inc. facility. The Idaho courts would most likely defer to that legislative intent.

Yours very truly,

DOUGLAS M. CONDE
Deputy Attorney General
Natural Resources Division

May 24, 1996

Tim D. McGreevy, Administrator
Idaho Pea and Lentil Commission
5071 Highway 8 West
Moscow, ID 83843

THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE

Re: Qualification of Commission Member

Dear Mr. McGreevy:

This letter is in response to your April 29, 1996, request in which you ask whether a particular individual "is eligible to run for the vacant position on the Commission's Board of Directors." The answer to your inquiry is that, under the facts given, the person is qualified to serve as a commissioner in a "dealer or processor" capacity. In addition, the commission, within reasonable and statutory boundaries, has the authority to determine such qualifications of its commission members within the requirements set by law.

I.

BACKGROUND

The background to this request is an individual who is seeking a vacant position on the commission as a "dealer or processor." The facts, as you relate them, are as follows:

> The individual in question satisfies the qualifications stated in Idaho Code § 22-3505, except that the processing plant in which he is a partner is physically in the State of Washington, approximately 400 yards from the Washington/Idaho border. Fifty percent of the processing plant's business is done with Idaho growers and pulses grown in Idaho. He has substantial ownership in an Idaho-based farm which serves as a receiving station for the processing plant, trucks containers and bulk

lentils in Idaho, and raises 6,000 acres of wheat, lentils and chickpeas.

In addition, based on our telephone conversation in response to my request for additional information, you related the following facts: The individual sells, markets, warehouses and distributes dry peas and lentils within the State of Idaho; the individual's Idaho operations are conducted by a partnership in which the individual is a partner; and the individual's Idaho-based businesses constitute "first purchasers" pursuant to Idaho Code § 22-3503(4), in which the business pays the assessments required by Idaho Code §§ 22-3515 and 22-3517.

II.

ANALYSIS

A. Requirements for Dealer or Processor Commission Membership

Idaho Code § 22-3502 creates the Idaho Pea and Lentil Commission with seven members. Five members are growers whose qualifications are set forth in Idaho Code §§ 22-3503(5) and 22-3504, and two "members shall be processors or dealers." Idaho Code § 22-3502. The qualifications for processor or dealer membership are found in Idaho Code §§ 22-3503(8) and (9) and Idaho Code § 22-3505.

Idaho Code § 22-3503 defines the terms "dealer" and "processor" as follows:

> (8) "Dealer" means any person, group, association, partnership or corporation which acts as principal or agent or otherwise in selling, marketing, warehousing, or distributing dry peas or lentils not produced by such person, group, association, partnership or corporation.
>
> (9) "Processor" means any person, group, association, partnership or corporation which acts as principal or agent or otherwise in processing dry peas or lentils not produced by such person, group, association, partnership or corporation.

Thus, a "dealer" sells, markets, warehouses or distributes peas and lentils not produced by him or her and a "processor" processes peas or lentils not produced by him or her.[1]

Idaho Code § 22-3505 sets forth the qualifications of dealer and processor members as follows:

> Dealer and processor members of the commission shall be residents of the state of Idaho and be selected because of their ability and disposition to serve the state's interest and for knowledge of the state's natural resources. They shall be practical dealers or processors of dry peas or lentils and shall be citizens over twenty-five (25) years of age and who have been, either individually or as officers or employees of a corporation, firm, partnership, association, or other business having a place of business within the state of Idaho and actually engaged in the processing, selling, marketing or distributing of dry peas or lentils within the state of Idaho for a period of five (5) years and has during that period derived a substantial portion of its income therefrom.

This code section can be broken down into both objective and subjective criteria. The criteria for dealer and processor membership, with explanation in parentheses, are as follows:

- A resident of the State of Idaho.
- Ability and disposition to serve the state's interest (as opposed to the interests of the member or another entity).
- Knowledge of the state's natural resources.
- A practical processor or dealer of dry peas or lentils (meaning that the person must actually work as dealer or processor, and not be a former or non-working dealer or processor).
- Over the age of 25.
- Work with a business having a place of business within Idaho.
- Be actually engaged in processing, selling, marketing or distributing dry peas or lentils within the State of Idaho for a period of five years.
- For the last five years has derived a substantial portion of the business's income from such activity.

This list represents the qualifications for a dealer or processor member of the commission.

B. The Commission's Authority to Determine Qualifications of its Members

The Idaho Pea and Lentil Commission has the authority and duty to preliminarily determine the qualifications of its members pursuant to Idaho Code § 22-3506, which provides the process for selecting commission members. Subsection (1)(a) provides that the grower, "dealer and processor shall nominate from among themselves, by petition, at least two (2) names for each position to be filled on the commission." Subsection (1)(c) provides that "petitions for dealer or processor members shall be signed by not less than eight (8) qualified processors or dealers." (Emphasis added.) The petitions are filed with the Pea and Lentil Commission which assures their compliance with the statute. The names are then forwarded to the governor who appoints the dealer or processor member based upon the nominee petitions. In the event of any vacancies on the commission, Idaho Code § 22-3506(3) requires the "Idaho pea and lentil growers association to submit to the governor at least two (2) qualified names for each vacancy supported by the proper nominating petitions." (Emphasis added.) Thus, the commission must make a determination as to qualifications of a potential member.[2]

C. Qualifications of the Individual in Question

The commission must apply the qualifications to the individual in question based on the facts. First, your letter states that "the individual in question satisfies the qualifications stated in Idaho Code § 22-3505 . . . ." From that we assume that the person is a resident of the State of Idaho, has the ability and disposition to serve the state's interests, is knowledgeable of the state's natural resources, is a practical dealer or processor, is over 25 years of age, has been actively involved in processing, selling, marketing or distributing dry peas and lentils for five years and during such time has derived a substantial portion of business income therefrom.

Your letter states that the issue arises from the location of the actual processing plant which is in Washington. Thus, the remaining issues are whether such person (1) is involved in a business having a place of business

within the State of Idaho and (2) is actually engaged in processing, selling, marketing, or distributing dry peas or lentils in Idaho.

From your letter, the person has substantial ownership in an Idaho-based firm that raises 6,000 acres of wheat, lentils and chickpeas.[3] You also note that the farm serves as the "receiving station for the processing plant, [and he or she] trucks containers and bulk lentils in Idaho . . . ." In our telephone conversation following my request for additional information, you stated that, although the individual does not process dry peas or lentils in Idaho, he or she does sell, market, warehouse and distribute dry peas and lentils in Idaho. Such operation is conducted by an Idaho partnership in which the individual is a partner. Further, the Idaho business makes purchases of dry peas and lentils from growers in Idaho that constitute "first purchases" pursuant to Idaho Code § 22-3503(4).

Since the statutory requirement is that the person be "engaged in the processing, selling, marketing or distributing of dry peas or lentils within the State of Idaho," such qualification is met by the candidate. Also, since the partnership is an Idaho partnership operating within the state, then such person is involved in a business within Idaho that qualifies under the statute. Although the person may not fit the definition of a "processor" in Idaho, such person does fit the definition of a "dealer" in Idaho. Since the membership seat for a dealer or processor member of the commission may be filled by either a dealer or a processor, such person is qualified to be a dealer or processor member of the commission.

III.

CONCLUSION

The Idaho Pea and Lentil Commission has the authority to reasonably determine the qualifications of commission members. On the facts presented to us, the candidate in question qualifies as a dealer or processor member of the commission. If you require further analysis or interpretation, please do not hesitate to contact me.

Very truly yours,

KEVIN D. SATTERLEE
Deputy Attorney General
Contracts & Administrative
Law Division

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[1] Thus, the member can be qualified as either a dealer or a processor and as long as the qualifications of one or the other, or both, are present. Although Idaho Code § 22-3505 speaks to "dealer and processor" members, a thorough review of the act finds that the two (2) allotted seats on the commission may be filled with either dealers or processors or both.

[2] Decisions of the commission are reviewable through Idaho Code §§ 67-5201 et seq., and through the courts on appeal of administrative decisions.

[3] Such may qualify the person as a grower member. However, that is not the question presented for this opinion and is irrelevant since the seat for which the person is being considered is a dealer or processor seat.

June 10, 1996

Mr. Charles G. Saums
Investment Manager
Endowment Fund Investment Board
P. O. Box 83720
Boise, ID 83720-0046

THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE

Re: Request for Attorney General Opinion
Regarding Proposed Security Lending Agreement

Dear Mr. Saums:

QUESTION PRESENTED

In 1988, the Endowment Fund Investment Board (the "Board") sought the advice of the Attorney General on the question of whether the Board could enter into securities lending agreements under article 9, section 11 of the Idaho Constitution. In Attorney General Opinion No. 88-1, the Attorney General stated that the use of security lending agreements would not violate the constitution, provided legislation was enacted permitting such transactions. Legislation was enacted, and the Board is authorized by Idaho Code§ 57-722 to enter into security lending agreements.

The issue presented by your request for an Attorney Generalís opinion is whether the Board complies with the Idaho Constitution and Idaho Code if it does not require the custodian bank to indemnify the Endowment Fund for losses that may occur while investing the collateral received as part of the securities lending transaction.

Your question arises from the holding of the leading case construing the constitutional limitations upon investments. The Idaho Supreme Court, in Engelking v. Investment Board, 93 Idaho 217, 458 P.2d 213 (1969), held that the term "loan" must not be loosely construed to include all types of investments. The court held there must be an unconditional promise to repay the principal lent as well as interest. 93 Idaho at 223, 458 P.2d at 219.

CONCLUSION

A securities lending agreement is an approved investment that, in the final analysis, is nothing more than a purchase, sale and repurchase of certain securities. The risk of investment loss to the state is virtually the same as if the state were buying the underlying securities. It makes good business sense to require an indemnification from the custodian bank. However, the customary practice in securities lending transactions may not provide for a broad indemnification for investment losses. Securities lending transactions are not speculative investments, provided the custodian bank unconditionally promises to transfer the full value of the "loaned" securities to the Endowment Fund.

ANALYSIS

1. Authority of Board

The Board has the authority to acquire certain investments described in Idaho Code§ 57-722. Idaho Code§ 57-722(10) authorizes the Board to loan securities owned by the Endowment Fund to any state or federally regulated institution. The Boardís inherent authority to invest in authorized securities includes the authority to sell or exchange those securities. *See* 1979 Idaho Attíy Gen. Ann. Rpt. 48.

The Board has, for several years, participated in securities lending agreements similar to that described in Attorney General Opinion No. 88-1. These agreements have provided that the custodian banks indemnify the Endowment Fund against loss in such securities lending transactions. The Board is negotiating the renewal of its current securities lending agreement. The custodian bank raised the issue concerning the extent of the bankís indemnification. A closer look at securities lending transactions is important to understand the potential risk of exposure to the Endowment Fund.

2. Overview of Securities Lending

Attorney General Opinion No. 88-1 provided a brief overview of securities lending transactions. Todayís business setting is more complicated than that described in the 1988 opinion.

Securities lending provides a method of matching the supply of available securities with a specific demand for such securities. This demand usually stems from a need to settle investment transactions, and the most frequent borrowers are brokers-dealers and commercial banks. Most of the securities loaned are held in institutional investment portfolios. Most loans of securities are short-term, and participation in the securities lending program depends upon a variety of factors such as the borrower and the types of security and collateral.

The securities lending agreement is similar to what is commonly known as a "repurchase agreement" or "reverse repurchase agreement.[1] It involves two parties, one of whom is deemed the "Borrower" (here, the broker-dealer or commercial bank) and the other is the "Lender" (here, the Endowment Fund Investment Board). From the borrowerís perspective, the Borrower is obtaining a secured loan from the Lender of the securities. The Lender, in turn, requires collateral during the period the securities loan is outstanding. The most common form of collateral provided in a securities lending transaction is cash, but other forms of collateral, including other securities, are also accepted.

Each securities lending agreement may also be viewed as comprising two distinguishable transactions which, although agreed upon simultaneously, are performed at different times:

1. The Lender agrees to "sell," and the Borrower agrees to buy, upon immediate payment and delivery, specified securities at a specified price; and

2. The Lender agrees to "buy back" and the Borrower agrees to sell, with payment and delivery at a specified future date, or, if the agreement is "open," on demand the same securities for the same price plus an interest charge. The Borrower transfers cash or other securities as collateral to secure the return of the loaned securities to Lender.

The parties customarily provide that any interest accruing on the securities between the dates of the initial purchase and the subsequent "repurchase" remains the Lenderís property. The Lender is authorized to invest the cash collateral in certain approved investments. From a purely economic perspective,

therefore, a repurchase is essentially a short-term collateralized loan, and the parties to these transactions tend to perceive them as such. The element of the transaction over which the most bargaining occurs is the interest rate.

The Board has historically used a bank as the middleman to match a Borrower with the Board as the Lender. The bankís responsibility includes the safeguarding and investing of the collateral, establishing collateral requirements and monitoring collateral levels on a regular basis. A Borrower provides the Lender with collateral at least equal to the market values of the securities. Collateral adequacy is maintained by means of a daily adjustment process referred to as "marked-to-market." If the market value of the loaned securities increases and the collateral does not increase equally, a Borrower is required to furnish additional collateral. On the other hand, if the market value of the loaned securities decreases and the collateral value exceeds that of the loaned securities, the Borrower can request the return of the excess collateral.

The role of the bank in monitoring levels of collateral is one of its primary responsibilities under the proposed securities lending agreement. An additional role is that the bank acts as an agent in investing the collateral. Typically, the collateral is held by the bank and is lent to the Lender of the securities as a short-term loan. The bank and the Lender of the securities obtain their profit or "interest" from the difference of the interest rates from lending the collateral versus the investment of the collateral. In the security lending document, the bank has security interest in the collateral which is perfected for the benefit of the Lender.

Generally speaking, in analyzing the potential risk to the Lender in a securities lending transaction, two broad categories of risk exist. The first is the risk of the failure of a Borrower to return the loaned securities or to adequately maintain collateral. The second risk, which is somewhat beyond the control of the Board, is the market risk that the value of the collateral may decline below the replacement cost of the loaned securities. Coupled with this second risk is the risk that the collateral earnings are less than the interest charged for the collateral.

The first risk is minimized by the adequacy of the collateral. Generally, the bank is not hesitant in guaranteeing the return of the borrowed securities. Typically, required collateral is at least 100%, and in some instances 102%, of the value of the loaned securities and is "marked-to-mar-

ket" on a daily basis. Thus, the risk of a fail is minimal since collateral should be adequate to cover the value of the loaned securities. Additionally, the quality of the financial soundness of both the Borrower and the bank is closely monitored.

The second risk, the decrease in the value of the collateral, is where the indemnification issue arises. The bank is reluctant to agree to an indemnification of the collateral because of the federal banking requirements. Apparently, if the bank were to agree to indemnify the Board for the investment losses to the collateral, the bank would then have to adjust its capital reserves. The practical effect would be that the amount the bank could loan to its customers would be decreased and the securities lending program would become unprofitable for the bank.

3. Speculative Investments are Prohibited

The Board is limited by Idaho Code ß 57-722 to certain types of investments. Moreover, the Board, pursuant to Idaho Code § 57-723, is subject to the Idaho Prudent Man Investment Act found at Idaho Code § 68-501 *et seq.* The Prudent Man Investment Act requires the exercise of prudence, discretion and intelligence in the management of financial affairs, without regard to "speculation." Idaho Code § 68-502.

While otherwise prudent investors may purchase speculative investments in hopes of "striking it rich," that is not the way they should permanently dispose of their assets. Rather, the primary focus is one of caution with an eye to preservation of the trust property. Withers v. Teachers Retirement System of the City of New York, 447 F. Supp. 1248 (S.D.N.Y. 1978).[2] The fund is a trust of the most sacred and highest order. Moon v. Bd. of Examiners, 104 Idaho 640, 642, 622 P.2d 221, 223 (1983). The Board has a statutory and fiduciary duty to preserve the trust property. Idaho Code § 68-501, *et seq.*, and Restatement (Second) of Trusts § 176 (1979). The Board, as trustee, has the duty to invest the fund to derive income in accordance with the objectives of the Endowment Fund. Idaho Code ßß 57-720, *et seq.*, and Restatement (Second) of Trusts § 181 (1979).

4. Investment Losses are Allowable

The Prudent Man Investment Act does not name prohibited investments. The act describes certain general principles of conservatism. However, it has long been recognized that "a loss is always possible, since in any investment there is some risk." Restatement (Second) of Trusts § 227, Comment e (1979). The Idaho Legislature recognized the possibility of a capital loss when enacting Idaho Code § 57-724, which authorizes the netting of capital gains and capital losses. The Idaho Supreme Court has construed that Idaho Code § 57-724 is constitutional in Moon v. Investment Board, 96 Idaho 140, 525 P.2d 335 (1974); and State ex rel. Moon v. State Bd. of Examiners, 104 Idaho 640, 662 P.2d 221 (1983). This means that merely having a loss is not a breach of duty, something else is required to constitute a breach.

Although there may be investment losses, the payment of the losses must be made in accordance with Idaho Code § 57-724. The principal and interest earnings of the endowment funds, particularly the public school fund, must remain intact. In other words, if the net earnings are inadequate then a special appropriation is required by the Idaho Legislature. The securities lending agreement must be carefully drafted to prevent creating a deficiency in violation of the Idaho Constitution and the provisions of Idaho Code § 59-1015.

CONCLUSION

The substance of the transaction cannot be overwhelmed by its form. The Board is selling securities and acquiring new securities and repurchasing the old securities, at an established price. The Board could enter into this type of transaction without calling it a securities lending transaction. What securities lending provides is the opportunity to increase a gain.

Other jurisdictions have reviewed whether securities lending and repurchase agreements are lawful investments. The Texas Court of Appeals found that repurchase agreements were lawful investments. Bache, Halsey, Stuart v. University of Houston, 638 S.W.2d 920 (Tex. Ct. App. 1982). The Washington Attorney General concluded that securities lending agreements are investments of funds and may be constitutionally entered on behalf of the permanent common school fund, public pension funds, and industrial insurance funds. Wash. Attíy Gen. Op. 1986 No. 5; *see* 44 Cal. Attíy Gen. Op. 140.

The securities lending agreement must overcome two prohibited obstacles. First, the Idaho Constitution, article 9, section 11, requires an unconditional promise to repay the principal lent as well as interest. Second, the Idaho Code, through the Prudent Man Investment Act, prohibits speculative investments.

The first obstacle is overcome by holding the loaned securities and collateral in securities or instruments that guarantee the repayment of principal and interest. The investments must be within the category of investments authorized by Idaho Code § 57-722. The securities lending agreement must require the posting of collateral at least in the amount of 100% of the market value of the loaned securities, subject to a "marked-to-market" requirement. Additionally, the bank has agreed to indemnify the Board for any failure to return the loaned securities. The only apparent risk to the principal and interest payment is the risk of a market decline, which is a normal risk.

The second obstacle is more difficult to fully overcome. There is a risk that the yield on the collateral will be less than the interest due under the terms of the securities lending agreement. Whether a court would view this as an acceptable risk is unknown. The answer will depend upon an analysis of the facts. It is our opinion that the risk is not "speculative" because the principal and interest on the underlying security is guaranteed and is secure (other than the market risk). The remaining risk can be minimized by carefully drafting the securities lending agreement and collateral investment guidelines. These documents should require the bank to match the collateral investment to that of the loaned securities, or even net the gains and any losses to assure a minimum return to the Endowment Fund. The Board should obtain the greatest indemnification possible from the bank.

The requirements of both the Idaho Constitution and Idaho Code are met even if there is no indemnification clause in the securities lending agreement, provided the principal and interest payment is guaranteed by the issuer. Care must be taken to negotiate and draft a favorable securities lending agreement.

Very truly yours,

MICHAEL R. JONES
Deputy Attorney General
Contracts & Administrative
Law Division

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[1] A detailed discussion of the nature of repurchase agreements is contained in the case of Securities & Exchange Commission v. Miller, 495 F. Supp. 465 (S.D.N.Y. 1980).

[2] See Attorney General Opinion No. 82-7 for a complete analysis of what is the permissible scope of state funds. 1982 Idaho Att'y Gen. Ann. Rpt. 82.

June 21, 1996

H. Ronald Bjorkman
Attorney at Law
P. O. Box 188
Emmett, ID 83617-0188

THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE

Re: Opinion Request City of Emmett Lease-Purchase Agreement

Dear Mr. Bjorkman:

QUESTION PRESENTED

I am responding to a request for an Attorney General's opinion regarding the City of Emmett's proposed acquisition of a new city hall by use of a lease-purchase arrangement. You have raised several questions concerning the legality of a lease-purchase arrangement. You also have questioned whether the public works requirements would apply to the construction of a facility built under a lease-purchase arrangement.

BACKGROUND

The city owns certain real property upon which the city wants to construct a new city hall. It has been suggested that the city utilize a lease-purchase financing arrangement for this project. The actual lease-purchase transaction is incomplete. No documents have been prepared, and the project is only in the concept stage. The current thinking is to have a facility built with financing provided by a third party with the city acquiring the property by lease-purchase from the third party. This transaction contemplates the city's acquiring an ownership interest in the building during the lease with the city owning the facilities at the end of the lease term.

ANALYSIS

1. Constitutional Requirements of Art. 8, Sec. 3 of the Idaho Constitution

a. Art. 8, sec. 3 of the Idaho Constitution

Idaho cities have the power to acquire and lease real property and erect buildings or structures of any kind for use by the city. Idaho Code § 50-301. This power is not unlimited. The state constitution limits the city's authority to incur indebtedness or other obligations.[1]

The Idaho Constitution, art. 8, sec. 3, states:

> No county, city . . . or school district . . . shall incur any indebtedness, or liability, in any manner, or for any purpose, exceeding in that year, the income and revenue provided for it for such year, without the assent of two-thirds of the qualified electors thereof.

b. Purpose of Debt Limitation

The Idaho Supreme Court has stated the purpose of art. 8, sec. 3, is to maintain the credit of the state and counties by keeping them on a cash basis, Ball v. Bannock County, 5 Idaho 602, 51 P. 454 (1897); to prevent indebtedness incurred in one year from being paid from the income and revenues of a future year, Theiss v. Hunter, 4 Idaho 788, 45 P. 2 (1896); and to preclude circuitous and evasive methods of incurring debts and obligations, Feil v. City of Coeur d'Alene, 23 Idaho 32, 129 P. 643 (1912).

c. Meaning of Indebtedness or Liability

What constitutes an "indebtedness or liability" has been a recurring subject of litigation over the last century. The Idaho Supreme Court has adopted a far more restrictive view of this term than courts from other jurisdictions. The court recognized that obligations payable from current year's revenues were exempt from the constitutional provision. Foster's, Inc. v. Boise City, 63 Idaho 201, 118 P.2d 721 (1941).

The Idaho Supreme Court has defined "debt" or "indebtedness" within the meaning of art. 8, sec. 3, as an obligation, incurred by the state or a municipality, which creates a legal duty on its part to pay from its general funds a sum of money to another, who occupies the position of a creditor, and who has a lawful right to demand payment. Idaho Water Resource Board v. Kramer, 97 Idaho 535, 548 P.2d 35 (1976). "Liability" has been given a broader and more comprehensive definition than "indebtedness." "Liability" refers to all kinds and characters of debts and obligations for which a municipality may become bound in law or equity to perform. Feil, 123 Idaho at 50-51. The court in Feil held that a voter approval requirement of art. 8, sec. 3, applied not only to general obligation debt payable from property taxes, but also indebtedness payable solely from revenues from "special funds." Some types of obligations are recognized by the court to not constitute "indebtedness or liability" within the constitutional provisions.

d. Debt Limitation Does not Apply to Ordinary and Necessary Expenses

Art. 8, sec. 3, does not apply to "ordinary and necessary" expenses. Hanson v. City of Idaho Falls, 92 Idaho 512, 446 P.2d 634 (1968). A thorough analysis of the meaning of "ordinary and necessary" expenses, as interpreted by the Idaho Supreme Court in Asson v. City of Burley, 105 Idaho 432, 670 P.2d 839 (1983), *cert. denied* 469 U.S. 870 (1984), is found in Attorney General Opinion No. 88-3, which states:

> Recent cases construing the "ordinary and necessary" clause, therefore, do not make a simple distinction of whether the project is a construction of a new building or the repair of an old one. Rather, the court will find an expense to be "ordinary and necessary" if a governmental entity has had a long-standing involvement in a given enterprise; if the existing facilities are obsolete and in need of repair, partial replacement or reconditioning; if failure to upgrade facilities would jeopardize the safety of the public; and if any failure to do so would create potential legal liability.

1988 Idaho Att'y Gen. Ann. Rpt. 21, 25.

The overarching issue is whether the "lease-purchase" payment is an ordinary and necessary expenditure. The determination of an ordinary and necessary expense is fact-specific. If the lease payments are an "ordinary and necessary" expense, then the city does not need to have voter approval. It is advisable for the city to seek a declaratory ruling by a court to determine if the final lease-purchase transaction is constitutional. Judicial confirmation may be required by the third-party financier.

e. Constitutional Debt Limitation Applies if Liability is Beyond Current Year

The city may also avoid the requirements of art. 8, sec. 3, if the lease-purchase agreement does not obligate the city beyond a current year's tax revenue. The lease-purchase agreement, to avoid the debt limitations of art. 8, sec. 3, must have a non-appropriation clause that simply reflects that the annual lease-purchase payments are subject to the annual availability of budgeted funds. Non-appropriation clauses subject to annual renewal are frequently included in contracts to avoid constitutional debt limitations. The effect is to obligate the city for no more than the current year's revenue and income. The lease is subject to an annual renewal. Thus, the obligation is only for a one-year period. The non-appropriation clause must provide that there is no penalty to the city for nonrenewal of the lease due to the lack of current funding. Of course, the lease would end and the city would have to vacate the premises if funds were inadequate and the city elected not to renew the lease.[2]

2. Constitutional Prohibition Against Pledge of Credit

a. Art. 8, sec. 4, of the Idaho Constitution

The Idaho Constitution prohibits indebtedness and subsidies to private individuals. Art. 8, sec. 4, states:

> No county, city, . . . shall lend, or pledge the credit or faith thereof directly or indirectly, in any manner, to or in aid of any individual, association or corporation, for any amount or for any purpose whatever, or become responsible for any debt, contract or liability of any individual, association or corporation in or out of this state.

The proposed financing transaction may require the city to encumber the municipal property by a deed of trust or mortgage. This encumbrance may conflict with art. 8, sec. 4, which prohibits lending or pledging the credit of the city to another. This constitutional provision has been interpreted by the Idaho Supreme Court to prohibit transactions creating the traditional relationship of borrower and lender. Bannock County v. Citizens Bank and Trust Company, 53 Idaho 159, 22 P.2d 674 (1933).

Additionally, liens and encumbrances placed upon the public property may violate art. 8, sec. 3 of the Idaho Constitution. *See* Feil, 123 Idaho at 51-56, and Boise Payette Lumber Company v. Challis Independent School District, 46 Idaho 403, 268 P. 26 (1928).

3. Public Works and Bid Laws Apply

Your second question is whether the public works statutes apply to the construction of the city hall acquired through a lease-purchase transaction. Based upon our review of Idaho Code, it appears that the construction of a city hall acquired by lease-purchase is a "public work" as defined by Idaho Code §§ 54-1901, *et seq.* Consequently, the contractor must be a licensed public works contractor, and payment performance bonds must be received in compliance with Idaho Code. Further, expenditure of public funds must occur in accordance with the competitive bid requirements set forth in Idaho Code § 50-341. *See* Swenson v. Buildings, Inc., 93 Idaho 466, 463 P.2d 932 (1970).

CONCLUSION

The acquisition of a new city hall through the use of a lease-purchase arrangement is no simple matter. The city must comply with the Idaho Constitution, particularly, art. 8, secs. 3 and 4. This requires voter approval of the debt, unless the transaction qualifies as an "ordinary and necessary" expense or does not obligate the city beyond the current year's revenue. This type of lease-purchase transaction is further complicated by the possible security interest in city property.

We suggest that you carefully follow the applicable statutes relating to the acquisition and disposal of property and the bidding of the project. Additionally, we suggest that you carefully draft any lease-purchase agreements to protect and limit the city from unlawful debt or prohibited liability.

Finally, because of the uncertainty on how the lease-purchase transaction will operate, and whether the project is an "ordinary and necessary" expense, it is advisable for the city to seek a declaratory judgment to judicially confirm the legality of the final lease-purchase arrangement.

Very truly yours,

MICHAEL R. JONES
Deputy Attorney General
Contracts & Administrative
Law Division

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[1] For authoritative discussion of art. 8, sec. 3, see Michael C. Moore, Constitutional Debt Limitations on Local Governments in Idaho, Article 8, Section 3, Idaho Constitution, 17 Idaho L. Rev. 55 (1980).

[2] Nonrenewal for lack of funding causes other problems for the city. The "equity" ownership in the building is a problem that must be addressed.

July 18, 1996

The Honorable JoAn Wood
The Honorable Hal Bunderson
Cochairs, Interim Committee on Ports of Entry
STATEHOUSE MAIL
Boise, ID 83720

THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE

Dear Representative Wood and Senator Bunderson:

As stated in your letter of July 9, 1996, your interim legislative committee is reviewing Ports of Entry operations. As part of its review, the committee is concerned that various state statutes "may no longer be in compliance with federal law" given the elimination of the Interstate Commerce Commission ("ICC"). This review is further prompted by national trends to deregulate various industries, including the motor transportation industry. Pursuant to this inquiry, the committee has requested that the Attorney General render an opinion on nine questions. Following the summary, the answers to all your questions are explained in greater detail.

SUMMARY OF QUESTIONS PRESENTED AND CONCLUSIONS

1. Do recent revisions of the federal Motor Carrier Act preempt the Idaho Public Utilities Commission and the Idaho Transportation Department from enforcing various provisions of Idaho Code relating to the regulation of motor carriers?

   Provisions of the federal Motor Carrier Act (revised and recodified in the ICC Termination Act of 1995) (the "Act") preempt state regulation of prices, routes and services for intrastate motor carriers of property. However, the Act also contains two "savings" clauses that allow states to exercise regulatory authority over motor carriers in areas not preempted by federal law. Areas not preempted by federal law include but are not limited to safety, vehicle size and weight, the transportation of hazardous cargo and highway route controls, finan-

cial responsibility related to insurance requirements, certain transportation practices, and registration.

2. If the federal Motor Carrier Act preempts the collection of state regulatory fees from motor carriers, should these fees be refunded?

Federal law has not preempted the collection of state regulatory fees from motor carriers. Consequently, there is no necessity to refund these fees.

3. Do Idaho statutes become "invalid" when they contain references to federal agencies that are subsequently abolished but the federal agencies' functions are transferred to other agencies?

It is the opinion of this office that statutes do not become invalid when references to federal agencies contained in the statutes are changed following enactment. Statutes should be construed to give effect to the intent of the legislature. Idaho courts avoid statutory interpretations that result in absurd or harsh results.

4. Is the Public Utilities Commission required to enforce motor carrier laws without regard to federal preemption until such time as the Idaho Legislature amends the Idaho Code to remove the preempted provisions?

No. Once it has been reasonably determined that a statute has been preempted by federal law, enforcement of that statute should be withheld. A statute which is federally preempted is deemed to be unconstitutional by operation of the Supremacy Clause of the U.S. Constitution. In essence, the statute is nullified.

5. Is the legislature in violation of federal law "for failing to remove" Idaho statutes which are subsequently preempted by federal law?

No. As a practical matter, the legislature is not always in session when statutes are found to be preempted. In a strict legal sense, a law which is federally preempted is unconstitutional and therefore is void and of no effect.

BACKGROUND

A. Federal Motor Carrier Act

In the past three years, Congress has twice exercised its authority under the United States Constitution's Commerce Clause to preempt state regulation of intrastate transportation. In 1994, Congress enacted section 601 of the Federal Aviation Administration ("FAA") Authorization Act, Pub. L. 103-305, 108 Stat. 1606 (1994) (amending 49 U.S.C. § 11501, subsequently recodified). Section 601 became effective January 1, 1995. Section 601 generally preempted a state from enacting or enforcing a law or regulation "related to a price, route, or service of any motor carrier . . . with respect to the transportation of property." Section 601(c)(2) permitted states to continue to exercise regulatory authority with respect to safety, highway route controls, vehicle size and weight restrictions, the transportation of hazardous materials, and financial responsibility insurance requirements. Pub. L. 103-305, 108 Stat. 1606 (formally codified at 49 U.S.C. § 11501(h)(2) (1994)).

In December 1995, Congress revised and recodified the federal Motor Carrier Act when it enacted and the President signed into law the ICC Termination Act of 1995. Pub. L. 104-88, 109 Stat. 803 (1995). The ICC Termination Act abolished the 108-year old Interstate Commerce Commission (ICC); eliminated unnecessary provisions and streamlined other provisions of the federal Motor Carrier Act; transferred many of the ICC's motor carrier functions to the U.S. Department of Transportation; and established the Surface Transportation Board within the Department. H. Rpt. No. 104-311, *reprinted in* 1995 U.S. Code Cong. & Admin. News, Vol. 2 at 796. The ICC Act became effective January 1, 1996. With minor exceptions, section 601(c) of the FAA Act was recodified as section 14501(c) of the ICC Termination Act.

In pertinent part, section 14501(c) provides:

> (c) Motor Carriers of Property.
>
> (1) General Rule. Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service, of any motor

carrier (other than a carrier affiliated with a direct air carrier . . .) or any motor private carrier, broker, or freight forwarder with respect to the transportation of property.

(2) Matters not covered. Paragraph (1) [above]

(A) shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization;

(B) does not apply to the transportation of household goods[1]; and

(C) does not apply to the authority of a State or political subdivision of a State to enact or enforce a law, regulation, or other provision relating to the price of for-hire motor vehicle transportation by a tow truck, if such transportation is performed without the prior consent or authority of the owner or operator of the motor vehicle.[2]

(3) State standard transportation practices.

(A) Continuation. Paragraph (1) shall not affect any authority of a State, political subdivision of a State, or political authority of 2 or more States to enact or enforce a law, regulation, or other provision, with respect to the intrastate transportation of property by motor carriers, related to

(i) uniform cargo liability rules,

(ii) uniform bills of lading or receipts for property being transported,

(iii) uniform cargo credit rules,

> (iv) antitrust immunity for joint line rates or routes, classifications and mileage guides, and pooling, or
>
> (v) antitrust immunity for agent-van line operations. . . . .
>
> if such law, regulation, or provision meets the requirements of subparagraph (B).
>
> (B) Requirements. A law, regulation, or provision of a State, political subdivision, or political authority meets the requirements of this subparagraph if
>
> (i) the law, regulation, or provision covers the same subject matter as, and compliance with such law, regulation, or provision is no more burdensome than compliance with, a provision of this part or regulation issued by the Secretary [of Transportation] or [Surface Transportation] Board under this part; and
>
> (ii) the law, regulation, or provision only applies to a carrier upon request of such carrier.

Pub. L. 104-88, 109 Stat. 899-900 (codified at 49 U.S.C. § 14501(c)) (emphasis and footnotes added). The Act did not preempt the regulation of intrastate passenger carriers operating entirely within Idaho. Section 14501(a) codified at 49 U.S.C. § 14501(a).

B. Idaho Motor Carrier Act

The Idaho Motor Carrier Act is found at Idaho Code §§ 61-801, *et seq.* The legislature enacted and recodified the Idaho Act in 1951, and it became effective January 1, 1952. 1951 Sess. Laws ch. 291. Under the present regulatory scheme, the legislature has vested the state's regulatory authority over motor carriers transporting passengers and property with the Public Utilities Commission. The commission was the equivalent state agency to the federal Interstate Commerce Commission ("ICC"). Under the Idaho Act, the Department of Law Enforcement and the Idaho Transportation Department are also vested with the authority to enforce provisions of the Act and rules promulgated pursuant to the Act. Idaho Code § 61-810.

Idaho rules governing intrastate motor carriers have generally mirrored rules promulgated by the ICC for interstate motor carriers. Following passage of the FAA Authorization Act in 1994, the Public Utilities Commission suspended its rules addressing the "prices, routes and services" of intrastate property carriers pending the outcome of a federal court challenge. IPUC Order No. 25847 (Jan. 11, 1995). In June 1995, the commission reduced the registration fee for interstate motor carriers to $1.00 per vehicle. IDAPA 31.61.01.051 (1995) T.

LEGAL ANALYSIS

The test for federal preemption has evolved in recent years into a two-stage inquiry. The first inquiry is to determine whether federal legislation at issue has been enacted pursuant to powers delegated to the federal government by the United States Constitution. United States v. Lopez, — U.S. —, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (1995) (possession of firearm in local school zone did not substantially affect interstate commerce and thus did not fall within gambit of Congressional authority afforded by Constitution's Commerce Clause). Once constitutional authority is evident, the second inquiry is to determine the scope of the intended federal preemption. Preemption may occur:

> (1) when Congress enacts federal statutes that express a clear intent to preempt state law; (2) when there is an outright or actual conflict between federal and state law; (3) when compliance with both federal and state law is in effect physically impossible; (4) where there is implicit in federal law a barrier to state regulation; (5) where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the states to supplement federal law; or (6) where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress.

Louisiana Public Service Comm'n v. FCC, 476 U.S. 355, 368-69, 106 S. Ct. 1890, 1898-99, 90 L. Ed. 2d 369 (1986) (citations and internal punctuation omitted).

A. Constitutional Delegation of Authority

The threshold question is whether the U.S. Constitution authorizes the federal government to enact statutes dealing with the intrastate regulation of motor carriers. The Constitution delegates to Congress the power "to regulate Commerce with foreign Nations, and among the several States and with the Indian Tribes." U.S. Constitution, Art. I, § 8, cl. 3; Lopez, 115 S. Ct. at 1626. In Lopez the United States Supreme Court identified three broad categories of activities that Congress may regulate under the Commerce Clause: (1) "the use of the channels of interstate commerce"; (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce"; and (3) "the activities that substantially affect interstate commerce." 115 S. Ct. at 1629-30; Kelley v. United States, 69 F.3d 1503, 1507 (10th Cir. 1995), *cert. denied* — U.S. —, 116 S. Ct. 1566, 134 L. Ed. 2d 665 (1996).

In Kelley, the Tenth Circuit Court of Appeals held that provisions of the federal Motor Carrier Act intended to preempt state regulation of intrastate motor carriers "fall squarely within the third category of [Commerce Clause] activities cited in *Lopez*." 69 F.3d at 1507. Thus, the Commerce Clause provides Congress with the requisite authority to enact statutes addressing state regulation of intrastate motor carriers. *See generally* Texas v. United States, 761 F.2d 211 (5th Cir. 1985) (preempting state regulation of intrastate bus rates); Texas v. United States, 730 F.2d 339 (5th Cir. 1984) (preempting intrastate rail rates is a valid exercise under the Commerce Clause).

B. The Scope of Federal Preemption

Idaho courts that have often been called upon to determine whether Idaho law is preempted through operation of the Supremacy Clause[3] of the United States Constitution. "We start with the assumption that the historic police powers of the states were not to be superseded by the federal Act unless that was the clear and manifest purpose of Congress." Dunbar v. United Steelworkers of America, 100 Idaho 523, 525, 602 P.2d 21, 23 (1979), *quoting* Ray v. Atlantic Richfield Co., 435 U.S. 151, 157, 98 S. Ct. 988, 994, 55 L. Ed. 2d 179 (1978); Afton Energy v. Idaho Power Company, 114 Idaho 852, 859 n.1, 761 P.2d 1204, 1211 n.1 (Bakes, J., specially concurring). Congressional intent to preempt state law may be evidenced either expressly or by implication. State *ex rel.* Andrus v. Click, 97 Idaho 791, 797, 554 P.2d 969, 975 (1976); Morales v. Trans World Airlines, Inc., 504 U.S. 374, 112 S.

Ct. 2031, 119 L. Ed. 2d 157 (1992). The critical question in any preemption analysis is whether Congress intended federal law to supersede state law. Louisiana Public Service Comm'n, 476 U.S. at 355. Preemption under the Supremacy Clause is a question of law which Idaho courts freely decide. Estate of Mundell, 124 Idaho 152, 857 P.2d 631 (1993).

In Opinion No. 77-2, the Idaho Attorney General observed that where Congress exercises its commerce power to regulate a particular field, and state regulation is expressly conflicted, then the state law becomes inoperative and the federal statute becomes exclusive in its application. Cloverleaf v. Patterson, 315 U.S. 148, 62 S. Ct. 491, 86 L. Ed. 754 (1942). However, when the preemption clause does not cover an entire field or simply covers a particular point, state action is permitted or expressly "saved." Florida Lime & Avocado Growers v. Paul, 373 U.S. 132, 142, 83 S. Ct. 1210, 10 L. Ed. 2d 1082 (1963). But where Congress attaches an express preemption clause to legislation, such a clause prohibits any concurrent or subsequent action by the state in that area of regulation. Chemical Specialties Mfrs. Ass'n v. Clark, 482 F.2d 325 (5th Cir. 1973). A narrow preemption section in a statute, especially one dealing with the area of state police power, shall be construed narrowly and preemption will not be presumed. Chrysler Corp. v. Tofany, 419 F.2d 499 (2d Cir. 1969) (citations omitted). 1977 Idaho Att'y Gen. Ann. Rpt. 68, 71.

In the present matter, section 601 (the predecessor of section 14501(c)) contains an explicit preemption clause but the preemption does not occupy the entire field of motor carrier regulation. Louisiana Public Service Comm'n, 467 U.S. at 368. Although not codified in the United States Code, Congress found and declared in section 601(a) of the FAA Authorization Act that:

> (1) the regulation of intrastate transportation of property by the states has
>
> (A) imposed an unreasonable burden on interstate commerce;
>
> (B) impeded the free flow of trade, traffic and transportation of interstate commerce; and
>
> (C) placed an unreasonable cost on the American consumers; and
>
> (2) certain aspects of the state regulatory process should be preempted.

Pub. L. 103-305, 108 Stat. 1605 (1994) (emphasis added). Consequently, the language of section 601(c) (recodified as section 14501(c)) was accompanied by an expressed preemption clause. We next examine the scope of the preemptive effect of section 14501(c)(1) and the savings clauses of section 14501(c)(2) and (3).

At this juncture, a review of Kelley, 69 F.3d at 1503, may be instructive. Following enactment of section 601 of the FAA Authorization Act, representatives of four states and others filed an action in federal court claiming that section 601 violated the Commerce Clause, the Tenth Amendment[4] or the Guarantee Clause and was, therefore, unconstitutional. The Tenth Circuit Court of Appeals affirmed the district court's denial of the claims.

Addressing the threshold constitutional issue, the Tenth Circuit noted that inquiry under the Commerce Clause and under the Tenth Amendment are mirror images of each other. Consequently, if the Constitution delegates authority to Congress, "the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress." Kelley, 69 F.3d at 1509, *quoting* New York v. United States, 505 U.S. 144, 155-56, 112 S. Ct. 2408, 2417, 120 L. Ed. 2d 120 (1992).

The primary thrust of the plaintiffs' argument in Kelley was that section 601 was overly broad and preempted not only state economic regulation of intrastate trucking but also a host of other state laws including tort law, antitrust law, consumer protection law, cargo loss and damage claim law, the uniform commercial codes, and laws governing the transportation of hazardous material. Kelley, 69 F.3d at 1508. The court ruled that section 601's preemption of state regulations pertaining to prices, routes or services was clearly within Congress's authority. In spite of the dire consequences to other state laws, the court noted that:

> [I]t is far from clear that [§ 601's] impact is as far-reaching as plaintiffs would have the court believe. In fact, as pointed out by the Department of Justice, many of the examples cited by the plaintiffs are purely speculative and are based upon an interpretation of § 601 not shared by the Department of Justice or the Department of Transportation.

Id. Although the court determined that section 601 (again, almost identical to the recodified language contained in section 14501) was constitutional, the court was not called upon to examine the relationship between the preempted areas of prices, routes or services and the regulatory activities specifically reserved to the states.

C. The Scope of Section 14501(c)'s Preemption Clause

Section 14501(c) of the ICC Act provides that states "may not enact or enforce a law [or regulation] . . . related to a price, route, or service of any motor carrier." In determining legislative intent and the scope of preemption, courts begin with the assumption that the ordinary meaning of the statutory language accurately expresses the legislative purpose. Morales, 112 S. Ct. at 236; State v. Lisby, 126 Idaho 776, 890 P.2d 727 (1995). By its terms, section 14501(c)(1) preempts state laws and regulations pertaining to the intrastate regulation of rates, routes, or services. Several courts have construed the meaning of "related to" in a broad fashion.

In Morales the U.S. Supreme Court noted that the ordinary meaning of the words "related to" is a broad one. 112 S. Ct. at 2037. In construing the preemptive language contained in the Airline Deregulation Act (ADA), the Court dismissed a claim that the ADA's remedial savings clause restricted the reach of the preemptive language. *Id.*; West v. Northwest Airlines, Inc., 995 F.2d 148 (9th Cir. 1993) (construing the ADA preemptive clause). Like the two previous cases, the Ninth Circuit in Federal Express Corporation v. California Public Utilities Commission, 936 F.2d 1075 (9th Cir. 1991), *cert. denied,* 504 U.S. 979, 112 S. Ct. 2956, 119 L. Ed. 2d 578 (1992), found that the preemptive language contained in the ADA preempted the California Public Utilities Commission's economic regulation of Federal Express because the carrier's motor carrier operation was an integral part of its air carrier operation. 936 F.2d at 1078. The court noted that "despite the very broad and apparently all-inclusive language of the [ADA preemption] statute, common sense and common practice have forbidden that the statute be taken literally and have restricted its range." *Id.*

Mindful of the courts' conclusions regarding the breath of preemptive language similar to that contained in section 14501, there are some distinguishing features between the cases set out above and this examination. In particular, the Morales, Federal Express and West cases were construing pre-

emption language under the ADA. The preemptive sweep of the ADA has been compared to the preemption provisions contained in the Employer Retirement Income Securities Act (ERISA) which preempts "all state laws 'in so far as they . . . relate to any employee benefit plan.'" Morales, 112 S. Ct. at 2037. The type of preemption incorporated in the ADA demonstrates Congress's intent to completely occupy a field of regulation, leaving no room for state participation. Louisiana Public Service Comm'n, 476 U.S. at 368. The other significant difference between the preemptive clauses of the ADA and the federal Motor Carrier Act is that the ADA did not have a substantive savings clause. By allowing states to exercise some jurisdiction in the field of motor carrier regulation, Congress envisioned a "dual" regulatory scheme in the Motor Carrier Act provided, however, that state regulatory activities not interfere with areas subject to federal preemption.

The savings clause of subparagraph (c)(2) provides that the federal preemption (applicable to intrastate prices, routes and service) does not restrict state regulatory authority in areas of safety, highway route controls, size or weight of motor vehicles, the regulation of hazardous cargo, or regulating the minimum amounts of financial responsibility relating to self-insurance. 49 U.S.C. § 14501(c)(2). Subparagraph (c)(3) also "saves" state authority to regulate standard transportation practices if motor carriers request that such regulation apply to them. 49 U.S.C. § 14501(c)(3).

The legislative history accompanying section 601 further indicates that Congress intended to preempt state regulation of prices, routes, and services but did not intend to preempt state regulation regarding safety, financial responsibility related to insurance, transportation of household goods, tow truck operations, vehicle size and weight, hazardous material routing. H. Conf. Rpt. No. 103-677, *reprinted in* 1994 U.S. Code Cong. & Admin. News, Vol. 4 at 1756. The House Conference Report further notes that this enumerated list of areas not preempted was not "intended to be all inclusive, but merely to specify some of the matters which are not "prices, rates or services" and which are therefore not preempted." *Id.* With this background, we now turn to an examination of motor carrier statutes embodied in the Idaho Motor Carrier Act, codified at Idaho Code §§ 61-801, *et seq.*, and the committee's questions.

EXAMINING THE IDAHO MOTOR CARRIER STATUTES

A. The Statutes

1. Idaho Code § 61-802

The committee first asks whether the "permit for intrastate operations required by the provisions of section 61-802, Idaho Code, [is] invalid, either in part or in whole?" In its entirety, Idaho Code § 61-802 provides:

> It shall be unlawful for any motor carrier, as the term is defined in this chapter, to operate any motor vehicle in motor transportation without first having obtained from the commission a permit covering such operation.
>
> A permit shall be issued to any qualified applicant authorizing the whole or any part of his operations covered by the application made to the commission in accordance with the provisions of this chapter, if it is found that the applicant is fit, willing and able properly to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules and regulations of the commission thereunder, and that the proposed service, to the extent authorized by the permit, is or will be required by the present or future public convenience and necessity.
>
> In considering public convenience and necessity the commission shall, prior to issuance of a permit, consider the effect of such proposed motor carrier operation upon the operations of any authorized common carrier then operating over the routes or in the territory sought. The mere existence of a common carrier in the territory sought who possesses authority similar to that sought shall be insufficient cause to deny the issuance of the permit...

This section of the Idaho Motor Carrier Act sets out the necessary requirements that the commission must consider when reviewing an application for an intrastate permit. The first paragraph of this section requires that a motor carrier obtain a permit before beginning operations within Idaho. The second and

third paragraphs of this section delineate the standards that the commission is to utilize when considering an application for a motor carrier permit. A permit "shall be issued" if the commission finds that the applicant is: (1) fit, willing, and able to perform the proposed service; (2) will conform to the provisions of the Motor Carrier Act and the requirements, rules and regulations of the commission; and (3) that the proposed service is or will be required by the present or future public convenience and necessity. The third paragraph requires the commission to consider the competitive effects of the applicant's proposed service on the operations of any existing common area operating "over the routes or in the territory sought" by the applicant.

In analyzing whether the statute is preempted in its entirety or in part, a court must determine whether state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Estate of Mundell, 124 Idaho at 154, 857 P.2d at 633, *quoting* Maryland v. Louisiana, 451 U.S. 725, 747, 101 S. Ct. 2114, 2129, 68 L. Ed. 2d 576 (1981). If Congress has preempted state regulation in a limited manner, preemption is not to be inferred unless state law "actually conflicts with federal law, . . . or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." Boundary Backpackers v. Boundary County, 128 Idaho 371, 376, 913 P.2d 1141, 1146 (1996), *quoting* California Coastal Comm'n v. Granite Rock Company, 480 U.S. 572, 581, 107 S. Ct. 1419, 1425, 94 L. Ed. 2d 577 (1987).

Turning to the permitting provision contained in the first paragraph of section 802, this paragraph is not preempted by federal law. Section 14501 specifically recognizes the state's right to continue regulating in some areas. The requirement that motor carriers obtain permits does not conflict with federal law, *i.e.*, it is possible to comply with state law without running afoul of federal preemption. Boundary County, 128 Idaho at 376, 913 P.2d at 1146; State *ex rel.* Andrus v. Click, 97 Idaho at 797-98, 554 P.2d at 975-76. Moreover, the House Conference Report accompanying section 601 stated that federal law would not "preempt the ability of a state to issue a certificate or other documentation (in written or electronic form) demonstrating that the carrier complies with state requirements which are not preempted by these sections . . . ." H. Conf. Rpt. No. 103-677, *reprinted in* 1994 U.S. Code Cong. & Admin. News., Vol. 4 at 1757. Likewise, the legislative history of the ICC Termination Act does not reveal any basis that would preempt Idaho from issuing permits to its intrastate motor carriers. *See* H. Rpt. No. 104-311, *reprint-*

ed in 1995 U.S. Code Cong. & Admin. News, Vol. 2 at 828; H. Conf. Rpt. No. 104-422, *reprinted in* 1995 U.S. Code Cong. & Admin. News, Vol. 2 at 899. Although mindful of the preemptive intent of section 14501 and yet recognizing that Congress did create a "dual" regulatory scheme, it is clear that a permitting process is not federally preempted.

Turning to the second paragraph of section 802, it appears that the commission's consideration of whether the proposed "service" is required by the public convenience and necessity does relate to "service" and is therefore preempted. Boundary Backpackers, 128 Idaho at 377, 913 P.2d at 1147; Kelley v. United States, 69 F.3d at 1508.

The requirement that the commission consider whether the applicant is "fit, willing and able to properly perform the service proposed" is a closer question. Although this clause refers to the proposed "service" of a motor carrier, it does not run afoul of the preemptive effect of federal law. More specifically, federal law recognizes that states may continue to regulate in specific areas affecting motor carriers. For example, an applicant for an intrastate motor carrier permit may legitimately be deemed to be unfit, unwilling, or unable to perform the proposed service because the applicant has failed to meet insurance requirements, applicable safety standards, or regulations pertaining to the transportation of hazardous materials. Section 13902 of the federal Motor Carrier Act states that the Secretary "shall register a person to provide transportation . . . if the Secretary finds that the person is willing and able to comply with federal laws and applicable regulations . . . ." 49 U.S.C. § 13902 (emphasis added). In this instance, it is not impossible for motor carriers to comply with both federal and state law. Boundary Backpackers, 128 Idaho at 377, 913 P.2d at 1147.

The third paragraph of section 802 is also preempted by federal law. The state law relating to the services (in this case the "operations") and the "routes" of carriers is clearly preempted. Morales, 112 S. Ct. at 2037; Kelley, 69 F.3d at 1508. The commission may not "bootstrap" regulatory authority over services or routes through the permitting or registration statutes.

2. Idaho Code § 61-802B

The committee's next question asks "[w]ith respect to interstate carriers, is the requirement to file operating authority with the P.U.C. pursuant to

the provisions of section 61-802B, Idaho Code, invalid." This section generally requires that interstate motor carriers must register their interstate operating authority or declare that they are exempt from the interstate registration system. In pertinent part, this section states that it shall be unlawful for any interstate carrier of persons or property to operate upon the public highways of this state without having registered with the Idaho public utilities commission his operating authority granted by the interstate commerce commission or an affidavit of exemption therefrom. Such registration shall be granted annually upon application, without hearing, upon payment of the filing fee prescribed in Idaho Code § 61-812, as amended.

Such registration shall be revoked by the Idaho Public Utilities Commission upon revocation of the operating authority by the Interstate Commerce Commission.

Registration of interstate carriers is not preempted by federal law. Section 14504 expressly authorizes states to register interstate carriers under the Single State Registration System ("SSRS"). 49 U.S.C. § 14504. This section authorizes the Public Utilities Commission to continue registering interstate motor carriers. The ICC Termination Act contemplates that the Secretary shall examine the various motor carrier registration systems in existence, but the Act continues the current registration systems for a period of 24 months while the Secretary conducts a rulemaking to study the consolidation of the various registration systems. H. Rpt. No. 104-311, *reprinted in* 1995 U.S. Code Cong. & Admin. News, Vol. 2 at 798-99. Although section 13908 permits the Secretary to "preempt States from imposing substantially similar requirements upon carriers," the Secretary cannot preempt registration systems until such time as he has finished the study. *Id.* at 828. In addition, "the Secretary can prevent States from requiring insurance filings and collecting fees only if the Secretary could insure that fees collected by the Secretary under the new registration system and distributed to the States will provide each State with at least as much revenue as that State received in fiscal year 1995 under the single-State registration system." H. Conf. Rpt. No. 104-422, *reprinted in* 1995 U.S. Code Cong. & Admin. News, Vol. 2 at 899 (emphasis added).[5] Taking into consideration the scope of the federal preemption and the legislative history outlined above, it is apparent that Idaho Code § 61-802 is not preempted.

3. Inapplicable Code References

In a related matter, the committee also asks what the legal effect is on agency operations when Idaho Code references to federal law are no longer applicable. As set out above, Idaho Code § 61-802B contains two references to the Interstate Commerce Commission. The ICC was abolished by section 101 of the ICC Termination Act, Pub. L. 104-88, 109 Stat. 803 (1995). However, most of the ICC's authority over the commercial operations of the motor carrier industry was transferred to the Department of Transportation. H. Rpt. No. 104-311, *reprinted in* 1995 U.S. Code Cong. & Admin. News., Vol. 2 at 797. If the Committee intended to ask whether the obsolete reference to the ICC "invalidates" this statute, we believe the answer is no.

Idaho Code § 73-102(1) provides that the statutes of this state are to be liberally construed, with the view to effect their objectives and to promote justice. As previously mentioned, most of the ICC functions were transferred to the Department of Transportation including "motor carrier registration and the setting and maintenance of the minimum levels of liability insurance." H. Rpt. No. 104-311, *reprinted in* 1995 U.S. Code Cong. & Admin. News, Vol. 2 at 796. Moreover, section 205 of the Act states that all references to the ICC in any federal law, rule, order, or any document is deemed to refer to the Secretary of the Department of Transportation or to the Surface Transportation Board. Pub. L. 104-88, 109 Stat. 943 (1995). In addition, section 204 provides that all orders, rules, regulations or other documents issued or promulgated by the ICC are to remain effective until modified, terminated, or revoked. Pub. L. 104-88, 109 Stat. 941-42 (1995); 61 Fed. Reg. 1842 (Jan. 24, 1996). Obsolete references in the Code of Federal Regulations will remain until the Code undergoes its annual reprinting.

When examining statutes, they should be construed to give effect to the intent of the legislature. By its own terms, Idaho Code § 61-802B embodies the legislature's intent that interstate carriers operating within Idaho register with the Public Utilities Commission. In Idaho, courts avoid statutory construction which lead to absurd or harsh results. George W. Watkins Family v. Messenger, 118 Idaho 537, 797 P.2d 1385 (1990).

4. Idaho Code § 61-805

This section provides:

> [I]t shall be unlawful for any common carrier or contract carrier as defined in this chapter to fail or refuse to operate on the whole of the route except in case of emergencies due to act of God or unavoidable accidents or casualties, or in case such route becomes impassable or in case it becomes necessary to make temporary detours.
>
> The failure of any common or contract carrier, as defined by this chapter, to register at least one (1) power unit required to be registered as provided in § 61-811, Idaho Code, and in any calendar year as a contract or common carrier, shall be prima facie evidence of a failure to operate for that calendar year.

Section 61-805 makes it unlawful for motor carriers to deviate from their routes. It is our opinion that the first paragraph of this section is federally preempted because it seeks to regulate in an area specifically preempted by section 14501(c).

The second paragraph of Idaho Code § 61-805 was added by the legislature in 1967. 1967 Sess. Laws, ch. 49. This paragraph creates a presumption that failure of a motor carrier to register one power unit (*i.e.*, vehicle) is evidence that the carrier did not operate for that calendar registration year. This paragraph does not affect the area of prices, routes or service but pertains to the registration procedures employed by the Public Utilities Commission. Consequently, it is our opinion that this paragraph is not preempted by federal law.

5. Idaho Code 61-806

This section addresses undue advantage or prohibited preference:

> a. Every contract carrier hereby is forbidden to give or cause any undue or unreasonable advantage or preference to those whom he serves as a compared with patrons of

> any common carrier or to subject the patrons of any common carrier to any undue or unreasonable discrimination or disadvantage or by unfair competition to destroy or impair the service or business of any common carrier or the integrity of the state's regulation of any such service or business.
>
> b. Every contract carrier, except carriers engaged exclusively in transporting logs, poles, piling or ore and concentrates shall file with the commission copies of his contract, immediately upon the making of said contract including the rates, fares, charges and practices called for or contemplated in the performance of the contract, for review, revision and approval and modification of the commission as to rates, fares, charges and practices; provided that no contract carrier, except as herein provided shall enter upon the performance of any contract contemplated by this section, until approval of such contract has been given by the commission.

Subsection (a) seeks to ensure that contract carriers do not unreasonably discriminate or disadvantage common carriers in a manner "to destroy or impair the service or business of any common carrier or the integrity of the State's regulation of any such service or business." Idaho Code § 61-806(a) (emphasis added). Subsection (b) requires that every contract carrier file copies of its contracts with the commission. Contracts by their very nature, and as pointed out in the statute, pertain to rates and the services that a carrier provides its shippers. Thus, this statute must give way to the preemptive reach of section 14501(c). Accord Federal Express Corp., 936 F.2d at 1078 (regulations regarding "discounts and promotional pricing" (*e.g.*, preferences) preempted by ADA).

6. Idaho Code § 61-807

This section is the commission's general grant of authority to establish rates, promulgate safety rules, require the filing of necessary reports and data, and regulate the relationship between carriers "and the traveling and shipping public." In its entirety, this section states:

> The commission is hereby vested with the power and authority, and it is hereby made its duty, to fix just, fair, rea-

> sonable and sufficient rates, fares, charges, and classifications, and to alter and amend the same, and to prescribe such rules and regulations for common carriers as may be necessary to provide for adequate service and safety of operation, and to require the filing of such reports and other data with the commission as may be necessary, and to adopt such other rules and regulations as may be necessary to govern the relationship between such common carriers and the traveling and shipping public; and also to prescribe such rules and regulations for contract carriers and private carriers as may be necessary to provide safety of operations. Such rules and regulations as may be adopted and promulgated by the said commission shall be adopted and promulgated by general order of such commission or otherwise.

This statute regulates matters which are both preempted and not preempted. In particular, the commission's authority to establish rates, fares and charges for intrastate property carriers is clearly preempted. At first blush, the reference to "adequate service" would appear to be preempted. However, section 14501(c)(3) allows the commission to continue regulating certain transportation practices (*i.e.*, uniform cargo liability and credit rules, uniform bills of lading, antitrust immunity, etc.), albeit within certain regulatory parameters. Consequently, the commission has residual authority to prescribe rules dealing with "specific services" not preempted by federal law. As the Idaho Court of Appeals stated in State v. Holden, a statute that abridges federal law "need not be stricken in its entirety. Rather, 'the statute may forthwith be declared invalid to the extent that it reaches too far, but otherwise left intact.'" 126 Idaho 755, 761, 890 P.2d 341, 347 (Ct. App. 1995), *quoting* Brockett v. Spokane Arcades, 472 U.S. 491, 504, 105 S. Ct. 2794, 2802, 86 L. Ed. 2d 394 (1985). Likewise, the filing of reports and other data is not necessarily preempted so long as the information requested is reasonably related to those regulatory areas not preempted by section 14501(c).

B. Regulatory Fees

The next area of inquiry concerns the imposition and collection of regulatory fees pursuant to various provisions of the Idaho Motor Carrier Act. More specifically, the committee asks:

> Whether section 601 of the FAA Authorization Act preempts the Public Utilities Commission and its agents, the Idaho Transportation Department and each county assessor, from collecting the intrastate regulatory fees set out in Idaho Code § 61-812(A)?
>
> Is the Idaho Transportation Department in violation of federal law by continuing to collect the PUC fee under the provisions of Idaho Code § 49-401B(3)?
>
> Has imposition of the regulatory fee under the provisions of Idaho Code §§ 61-811 and 61-812(b) been preempted by federal law? If so, should the PUC refund such fees collected subsequent to the enactment 47 U.S.C. § 14501 effective January 1, 1995?
>
> Is collection of the annual regulatory fees under the provisions of chapter 10, title 61, Idaho Code, invalid?

Idaho Code § 61-811 provides that motor carriers operating in Idaho shall pay a regulatory fee based on the number of power units registered in any given year. The regulatory fees applicable to interstate and intrastate motor carriers are set out in Idaho Code § 61-812. Idaho Code § 61-811A designates the Idaho Transportation Department ("ITD") and each county assessor as "agents of the public utilities commission for the purpose of collecting and remitting the regulatory fee provided for by section[s] 61-811. . . [and] section 61-812, Idaho Code. . . ." Idaho Code § 49-401B(3) addresses and implements the collection of the regulatory fees when motor carriers register their vehicles with ITD or with a county assessor. Once collected, the regulatory fees are deposited into the Public Utilities Commission Fund subject to legislative review. Idaho Code § 61-1001. During each regular session, the legislature determines the amount of money to be expended by the commission and appropriates such operating revenues from the Public Utilities Commission Fund. Idaho Code § 61-1002.

The interim committee asks whether federal law preempts the Public Utilities Commission or its agents from collecting the intrastate or interstate regulatory fees set out in Idaho Code § 61-812. Based upon our review of the federal Motor Carrier Act and the Idaho statutes, we conclude the regulatory

fees assessed interstate or intrastate motor carriers are not preempted. Indeed, section 14504 of the federal Motor Carrier Act continues the Single State Registration System (SSRS), including the fee system. 49 U.S.C. § 14504. This section permits participating states (including Idaho) to collect up to $10.00 per motor vehicle for filing proof of insurance. In conformance with this federal authority, Idaho Code § 61-812(b) authorizes the commission to collect no more than $10.00 for each motor vehicle operated by a motor carrier. This statute also grants the Public Utilities Commission discretion to reduce the per vehicle fee by rule. *Id.* Pursuant to this authority, the commission lowered the regulatory fee to $1.00 per vehicle for registrations occurring in calendar year 1996 and beyond. IDAPA 31.61.01.051.02 (1995) T.

A review of the federal Motor Carrier Act and its accompanying legislative history does not reveal any explicit preemption of states collecting fees to support those activities they may legally carry out under federal or state law. This issue was not squarely addressed in Kelley v. United States, 69 F.3d at 1503.

The office is aware of one unreported case (1993 W.L. 399380) where the California PUC was prohibited from collecting the regulatory fee from Federal Express following the Ninth Circuit's opinion in Federal Express v. California Public Utilities Commission, 936 F.2d at 1075. However, the holding in that unreported case is not dispositive on this question. As previously mentioned, the Federal Express case dealt with a broad preemptive statute under the Airline Deregulation Act. In addition, the regulatory fee scheme in California significantly differs from the regulatory fees assessed in Idaho. California's fee was based upon a percentage of Federal Express's gross operating revenues in California as compared to a prorated per vehicle fee in Idaho. Idaho Code §§ 61-812 and -812A. Based upon our review of the federal Motor Carrier Act and our statutes, we cannot find that the fee statutes are facially preempted. Consequently, it is unnecessary to address the committee's refund question.

C. Severability

Having determined that specific statutes or portions of statutes are preempted by federal law, the question arises whether the remaining statutes or portions of statutes are sufficiently independent from the stricken statutes to be effective after the unconstitutional provisions are severed. The Idaho Supreme

Court recently observed in Re SRBA Case No. 39576, 128 Idaho 246, 912 P.2d 614 (1995), that when part of a statute is determined to be unconstitutional "yet is not integral or indispensable part of the measure, the invalid portion may be stricken without affecting the remainder of the statute or ordinance." 128 Idaho at 263, 912 P.2d at 631, *quoting* Voyles v. City of Nampa, 97 Idaho 597, 600, 548 P.2d 1217, 1220 (1976). When examining severability issues, courts, when possible, will "recognize and give effect to the intent of the legislature as expressed through a severability clause in the statute." *Id.* at 264, 912 P.2d at 632, *citing* Lynn v. Kootenai Fire Protective Dist. No. 1, 97 Idaho 623, 627, 550 P.2d 126, 130 (1976).

The Idaho Motor Carrier Act does contain a severability clause. Idaho Code § 61-816 provides that "[i]f any section, subsection, sentence, clause or phrase of this chapter [8, title 61] is for any reason held by any court to be unconstitutional, such decision shall not affect the validity of or the constitutionality of any of the remaining portions of this chapter." Based upon a review of the preempted statutes and portions of other statutes, we find that the stricken portions do not prevent the remaining statutes from functioning as the legislature intended. Such a result is further supported by the fact that the federal Motor Carrier Act specifically recognizes that states retain regulatory authority over portions of the motor carrier industry. Consequently, this case is distinguishable from the recent decision in Boundary Backpackers, where the Idaho Supreme Court found that the preempted provisions contained in a county ordinance were "so integral and indispensable to the ordinance," that the entire ordinance must fall. 128 Idaho at 378, 913 P.2d at 1148.

OTHER QUESTIONS

The committee also asked two related questions. First, the committee asks whether the Public Utilities Commission is required to enforce motor carrier laws without regard to federal preemption until such time as the Idaho Legislature amends the Idaho Code to remove the preempted provisions. Second, the committee asks whether the Legislature is in violation of federal law for failing to remove from the Idaho Code statutes which provide for any economic regulation of intrastate motor carriers by the Public Utilities Commission. Each of these questions will be addressed in turn.

A. Enforcement of a Preempted Statute

Once it has been ascertained that a statute has been preempted by federal law, common sense would dictate that enforcement of the statute be withheld. Once a statute or regulation is determined to be federally preempted, it is then deemed to be unconstitutional by operation of the Supremacy Clause. Boundary Backpackers, 128 Idaho at 378, 913 P.2d at 1148. In essence, the statute is nullified. If the state were to attempt to enforce a statute or regulation known to be unconstitutional, an agency and possibly its employees might be liable under the civil rights statute, 42 U.S.C. § 1983. *See* Lubcke v. Boise City/Ada County Housing Authority, 124 Idaho 450, 860 P.2d 653 (1993); Owner-Operator Indept. Drivers Assoc. v. Idaho PUC, 125 Idaho 401, 871 P.2d 818 (1994).

B. Legislative Liability

Finally, we turn to the committee's last question asking whether the legislature is in violation of federal law when it fails to remove preempted statutes. The simple answer is no. As a practical matter, the legislature is not always in session when statutes are found to be preempted. In a strict legal sense, a law which is preempted is unconstitutional and therefore is void and of no effect. Reynoldsville Casket Co. v. Hyde, — U.S. —, —, 115 S. Ct. 1745, 1752, 131 L. Ed. 2d 820 (1995) (Scalia, J., concurring). As Justice Scalia pointed out, "an unconstitutional statute, . . . is not in itself a cognizable 'wrong.' (If it were, every citizen would have standing to challenge every law.) In fact, what a Court does with regard to an unconstitutional law is simply to ignore it." *Id. See also* Chicago, I. & L.R. Co. v. Hackett, 228 U.S. 559, 33 S. Ct. 581, 57 L. Ed. 966 (1913) (an unconstitutional act is inoperative "as if it had never been passed, for an unconstitutional act is not a law").

In conclusion, this office has reviewed provisions of the federal Motor Carrier Act and the statutes contained in the Idaho Motor Carrier Act. After reviewing the federal statutes, accompanying legislation and applicable case law, we have determined that some Idaho motor carrier statutes and portions of other motor carrier statutes are preempted by federal law. Although federal law preempts state regulation of intrastate property carriers concerning the areas of prices, routes and services, the federal "savings" clauses embodied in subsections 14501(c)(2) and (3) authorize Idaho to continue to exercise portions of its traditional regulatory authority.

If you have further questions, please contact me.

Sincerely,
DONALD L. HOWELL II
Deputy Attorney General
Contract & Administrative
Law Division

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[1] Idaho Code § 61-801(k)(12) exempts the intrastate transportation of household goods from regulation by the Public Utilities Commission.

[2] Idaho Code § 61-801(k)(13) exempts the intrastate operation of tow trucks from regulation by the Public Utilities Commission.

[3] "This Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding." U.S. Constitution, Art. VI, cl. 2.

[4] The Tenth Amendment provides that the "powers not delegated to the United States by the Constitution nor prohibited by it to the States, are reserved to States respectively, or to the people."

[5] Nothing in the federal Motor Carrier Act dictates that a particular state agency promulgate rules, participate in registration programs, or enforce motor carrier laws. This is a discretionary matter left to the states.

July 23, 1996

Honorable Gary J. Schroeder
Idaho State Senate
STATEHOUSE MAIL
Boise, ID 83720

Honorable Tom LeClaire
Moscow City Council
206 E. Third
Moscow, ID 83843

THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE

Re: Licensing Requirements for Electrical Installations

Dear Senator Schroeder and Councilman LeClaire:

The following is in response to your request for legal guidance relating to the licensing requirements for electrical installations.

QUESTION PRESENTED

Do local governments have authority to enforce local ordinances regulating who must be licensed to perform electrical installations if those ordinances conflict with the electrical licensing provisions of title 54, chapter 10, Idaho Code, and HRC 38?

CONCLUSION

No. Local ordinances regulating who must be licensed to perform electrical installations are preempted by state statute. The doctrine of state preemption over local ordinances applies where, despite the lack of specific statutory language preempting regulation by local governmental entities, the state has acted in the area in such a pervasive manner that it must be assumed that it intended to occupy the entire field of regulation.

ANALYSIS

Article 12, § 2 of the Idaho Constitution provides that local ordinances may not conflict with state statutes:

> **Local police regulations authorized.**—Any county or incorporated city or town may make and enforce, within its limits, all such local police, sanitary and other regulations as are not in conflict with its charter or with general laws.

In Envirosafe Serv. of Idaho v. County of Owhyee, 112 Idaho 687, 735 P.2d 998 (1987), the Idaho Supreme Court stated that the conflict prohibited by art. 12, § 2 of the Idaho Constitution could be either direct or implied. The court explained that the doctrine of implied preemption applied in situations where a statute did not expressly preempt local regulation, but acted in an area in such a pervasive manner that it must be assumed that the state had intended to occupy the entire field of regulation, or where uniform statewide regulations are called for because of the particular nature of the subject matter to be regulated. 112 Idaho at 689, 735 P.2d at 1000. *See also* Heck v. Commissioners of Canyon County, 123 Idaho 842, 853 P.2d 587 (Ct. App. 1992).

When it comes to regulating who must be licensed to make electrical installations in the State of Idaho, the statutory provisions of title 54, chapter 10, Idaho Code, leave little doubt that the legislature intended to occupy the entire field of regulation and intended to establish uniform statewide regulations regarding licensing. For example, I.C. § 54-1003A defines a journeyman electrician as "any person who personally performs or supervises the actual physical work of installing electrical wiring or equipment to convey electrical current, or apparatus to be operated by such current . . . ." I.C. § 54-1002(2) makes it "unlawful for any person to act as a journeyman electrician in this state until such person shall have received a license as a journeyman electrician . . . ." By applying the statutes to "any person" engaging in this statutorily defined activity, the legislature made clear its intent to occupy the field.

The legislature also made it clear that regulatory authority over who needed to be licensed to make electrical installations would not be shared. For example, I.C. § 54-1006 authorized the Idaho Electrical Board to promulgate

rules for the "examination and licensing of journeyman electricians." And, I.C. §§ 54-1005, 54-1007 and 54-1009 give authority to a state agency, the Division of Building Safety, to issue, revoke or suspend licenses. Moreover, I.C. § 54-1017 makes it a misdemeanor criminal offense for any person to:

> engage in the trade, business or calling of an electrical contractor or journeyman electrician, without a license as provided by this act, or who shall violate any of the provisions of this act, or the rules of the Idaho electrical board or of the administrator of the division of building safety herein provided for, or who shall refuse to perform any duty lawfully enjoined upon him by the administrator within the prescribed time; or who shall fail, neglect, or refuse to obey any lawful order given or made by the administrator . . . .

As a result of the statutory requirements of title 54, chapter 10, Idaho Code, local governments could not allow an unlicensed person to perform electrical work requiring a state license. To do so would be contrary to the provisions of I.C. § 54-1002(2) and the criminal provisions of I.C. § 54-1017. Likewise, a local government could not prohibit an individual from engaging in electrical work for which that individual was licensed. To do so would effectively nullify the state license and directly interfere with the authority of the Idaho Electrical Board and the Division of Building Safety to determine who must be licensed to conduct electrical work.

Further, the statutory authority of the Idaho Electrical Board and the Division of Building Safety to promulgate and enforce administrative rules would necessarily extend the state's preemption authority to any administrative rules implementing the electrical licensing statutes promulgated by the Idaho Electrical Board and to any amendments to those rules by the legislature. As provided by I.C. § 67-5291, the legislature may, by concurrent resolution, amend or modify an administrative rule, "where it is determined that the rule violates the legislative intent of the statute under which the rule was made." This is what the 1996 Idaho Legislature did when it passed HCR 38. The legislature made a specific finding that IDAPA 07.01.01.013.01 was not consistent with legislative intent and amended it to grant an exemption from the electrical licensing requirements to "persons making electrical installations on their own residential rental property or on their own primary or secondary residence and associated buildings." This legislative amendment to IDAPA

07.01.01.013.01 was promulgated by the Idaho Electrical Board and became effective on July 1, 1996.

From the foregoing, it is clear that the licensing requirements of title 54, chapter 10, Idaho Code and the administrative rules of the Idaho Electrical Board were intended to occupy the entire field and to create a uniform statewide system for regulating the licensing of individuals doing electrical work in the State of Idaho. Any conflicting local ordinance would be pre-empted by state law.

Sincerely,

CRAIG G. BLEDSOE
Deputy Attorney General
Civil Litigation Division

September 9, 1996

Mr. John Hayden, Chairman
Idaho State Board of Correction
P.O. Box 15619
Boise, ID 83715-5619

THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE

Dear Chairman Hayden:

You have requested an opinion from the Attorney General concerning the doctrine of at-will employment in the State of Idaho. There are four aspects to your inquiry: (1) the nature of at-will employment in Idaho; (2) how the courts have applied the at-will employment doctrine in the public sector; (3) the general nature of employment relationships in the Department of Correction; and (4) the various legal restrictions and other limitations applicable to dismissal (or other discipline) of an at-will employee. You will find each of these four areas discussed below.

A. The At-Will Employment Doctrine in Idaho

Idaho's courts have long recognized and followed the at-will employment doctrine: "the employment-at-will doctrine . . . has been adopted and approved by this Court in innumerable decisions . . . ." Metcalf v. Intermountain Gas Co., 116 Idaho 622, 623-24, 778 P.2d 744, 745-46 (1989). The Metcalf decision contains the following oft-cited and quoted statement of the at-will doctrine:

> As the result of numerous decisions of this Court in recent years, it is now settled law in this state that:
>
> > Unless an employee is hired pursuant to a contract which specifies the duration of the employment or limits the reasons for which an employee may be discharged, the employment is at the will of either party and the employer may terminate the relationship

> at any time for any reason without incurring liability.
>
> Thus, in the absence of an agreement between the employer and the employee limiting the employer's (or the employee's) right to terminate the contract at will, either party to the agreement may terminate the relationship at any time or for any reason without incurring liability. However, such a limitation on the right of the employer (or the employee) to terminate the employment relationship "can be express or implied."

116 Idaho at 624, 778 P.2d at 746 (citations omitted).

The employment-at-will doctrine, as explained in Metcalf, establishes a *presumption* that an employment relationship in Idaho is terminable at the will of either party, at any time, and with or without notice or cause assigned. Mitchell v. Zilog, Inc., 125 Idaho 709, 713, 874 P.2d 520, 524 (1994). The presumption can be rebutted if it is shown that the parties intended to alter the at-will relationship by: (1) specifying the duration of employment (*e.g.*, a one-year employment contract); and/or (2) limiting the reasons for which an employment relationship can be terminated (*e.g.*, terminable only for specific for-cause reasons).

B. The Nature of Public Employment Relationships in Idaho

Public employment with the state of Idaho is generally governed by statute. The Idaho Personnel System Act ("PSA"), Idaho Code §§ 67-5301 to 67-5342, establishes and governs the "classified" or "merit" system of employment. All employees in state government are classified employees unless specifically defined as nonclassified. Idaho Code § 67-5303.

Employees who are hired under the terms of the PSA are typically referred to as "classified state employees." Idaho's courts have held that classified state employees are not at-will employees because the PSA limits the reasons for which a classified employee may be terminated (or otherwise disciplined). Arnzen v. State, 123 Idaho 899, 904-05, 854 P.2d 242, 247-48 (1993), citing Harkness v. City of Burley, 110 Idaho 353, 715 P.2d 1283 (1986).[1] Classified state employees enjoy a property interest in continued employment; they may be dismissed (or disciplined) for limited, specific rea-

sons, and they are entitled to notice and an opportunity to be heard before the decision to dismiss (or discipline) is made.

Nonclassified state employees do not enjoy the statutory protections afforded by the PSA and, in the absence of a contract for term or other agreement limiting the reasons for which they may be dismissed, they are generally at-will employees. Garner v. Evans, 110 Idaho 925, 936-38, 719 P.2d 1185, 1196-98, *cert. denied*, 479 U.S. 1007, 107 S. Ct. 645, 93 L. Ed. 2d 701 (1986). To this end, nonclassified employees do not enjoy a property interest in continued employment. *Id.* They also do not have the right to file a grievance or appeal under the PSA. *Id. See* Idaho Code §§ 67-5315, 67-5316 (only classified employees may grieve and appeal to the Personnel Commission). In the absence of an agreement or understanding otherwise, an employment relationship between the state and a nonclassified employee is generally terminable at the will of either party at any time with or without notice or cause assigned.

C. The Employment Structure of the Idaho Department of Correction

This section discusses, in general terms, the classified and nonclassified (or at-will) employment structure of the Idaho Department of Correction ("DOC"). The first subsection below addresses the general DOC employment structure below the director level. The second subsection addresses the governing or policymaking entities above the director—the Board of Correction and the Commission on Pardons and Parole.

1. Employment Structure below the Director

The Idaho Department of Correction ("DOC") is an executive department of Idaho state government. Idaho Code § 67-2402(1). Executive department employees above the bureau chief level are generally nonclassified employees: The head of an executive department is the director, who is a nonclassified employee. Idaho Code §§ 20-217A, 67-2403, 67-2404. Directors may appoint deputy directors, who are nonclassified employees. Idaho Code § 67-2403(2). Below the director and deputy director(s) and above the bureau level, each department is divided into divisions, which are headed by nonclassified division administrators.[2] The director also has the power to declare one position in the department nonclassified. Idaho Code § 67-5303(d). Thus, other than the director, deputy director(s), division administrators, and the

declared exempt position, department employees are generally classified employees.

2. Employment Structure above the Director

The Board of Correction ("Board") is a constitutional entity above the DOC director which exercises "control, direction and management of the penitentiaries of the state, their employees and properties, and of adult probation and parole . . . ." Idaho Const. art. 10, § 5; Idaho Code §§ 20-201 to 20-249. Board members are appointed by the governor to six-year terms, Idaho Code § 20-201(1), and they are specifically defined as nonclassified employees, Idaho Code § 67-5303(b). However, unlike most nonclassified employees, Board members may only be removed for limited reasons:

> The governor may not remove any member of the board except for disability, inefficiency, neglect of duty or malfeasance in office. Before such removal the governor shall give such member a written copy of the charges against him and shall fix the time when he can be heard in his defense which shall not be less than ten (10) days thereafter. If such member shall be removed, the governor shall file, in the office of the secretary of state, a complete statement of all charges against such member and his findings thereon, with a record of the proceedings.

Idaho Code § 20-203. Board members are not, then, removable at-will, because the statute quoted above limits the reasons for which a Board member may be discharged.

The Commission of Pardons and Parole ("Commission") is another DOC entity above the director level, with the statutory directive to "act as the advisory commission to the board on matters of adult probation and parole and may exercise such powers and duties in this respect as are delegated to it by the board." Idaho Code § 20-210. The Commission is composed of five members who are appointed by the Board to serve terms of five years. Commission members "shall serve at the pleasure of the board." Idaho Code § 20-210.

Commission members, unlike Board members, are clearly removable at-will. Rather than being removable only after notice and for limited reasons,

Commission members "serve at the pleasure of the board." *Id.* This language establishes an at-will employment relationship. *See, e.g.*, Figuly v. City of Douglas, 76 F.3d 1137, 1142 (10th Cir. 1996) (city administrator was an at-will employee where, among other things, the city charter provided that the administrator served "at the pleasure of the Mayor and Council"); Garcia v. Reeves County, 32 F.3d 200, 203-04 (5th Cir. 1994) (deputy sheriffs were at-will employees where Texas state law provided that "[a] deputy serves at the pleasure of the sheriff"). Furthermore, the at-will relationship between the Board and Commission is not altered by the statutory term of five years—read together, the statutory language establishes an at-will relationship which is automatically, as a matter of law, terminated after five years. Put another way, while there must be an affirmative action (dismissal by Board or resignation by Commissioner) by either party *before* the employment relationship can end during the five-year term, there is no limitation on reasons for ending the employment relationship—all Commissioners serve at the pleasure of the Board for no more than five years. *See* Youngblood v. City of Galveston, 920 F. Supp. 103 (S.D. Tex. 1996) (municipal judge appointed under city charter for two (2) year term was an at-will employee because the charter also provided that the position served at the pleasure of the city council during the term).[3]

D. Limitations and Restrictions on Dismissing At-Will Employees

The final part of your inquiry deals with removal or dismissal of an at-will employee. Once it is established that an employee serves in an at-will capacity, the rule of law in Idaho is that the employee can be dismissed with or without notice or cause assigned. However, although reasons for dismissal are not limited and it is not necessary to assign cause in order to dismiss an at-will employee, there are a number of limitations (statutory and court-created) on an employer's right to dismiss an at-will employee. The subsections below discuss these limitations and the potential causes of action available to at-will employees.

1. Discrimination

Public employers are prohibited from discriminating against employees on the basis of various protected classifications. That is, a public employer cannot dismiss (or otherwise prejudice) an employee because of, either in whole or in part, that employee's membership in a protected class. With

respect to federal law, Title VII of the Civil Rights Act of 1964, as amended, prohibits public employers from dismissing or otherwise prejudicing employees on the basis of race, color, religion, national origin, and gender; the Age Discrimination in Employment Act protects individuals age forty and over from employment discrimination; and the Americans with Disabilities Act protects qualified individuals with a disability from employment discrimination. With respect to state law, the Idaho Human Rights Act protects individuals from employment discrimination based on race, color, religion, national origin, gender, age or disability. Public employers may not dismiss or otherwise prejudice at-will employees on the basis of any protected classification.

2. The Implied Covenant of Good Faith and Fair Dealing

The Idaho Supreme Court has recognized a "covenant of good faith and fair dealing," which is implied in every employment relationship. The court adopted the covenant of good faith and fair dealing in Metcalf, *supra*, and explained its application as follows:

> [T]he covenant protects the parties' benefits in their employment contract or relationship, and . . . any action which violates, nullifies or significantly impairs any benefit or right which either party has in the employment contract, whether express or implied, is a violation of the covenant which we adopt today.

116 Idaho at 627, 778 P.2d at 749. Thus, because the covenant does not add anything to an employment relationship (it only operates to protect other benefits and rights), the court carefully explained that it does not create a duty to dismiss an employee only for cause. *Id. See* Thompson v. City of Idaho Falls, 126 Idaho 587, 887 P.2d 1094 (Ct. App. 1994) (the covenant does not apply where the employer is simply exercising its right to dismiss an employee); Olson v. Idaho State Univ., 125 Idaho 177, 868 P.2d 505 (Ct. App. 1994), *rev. denied* (covenant cannot be used to attack merits of decision to not renew a contract of a nontenured teacher). The covenant of good faith and fair dealing does not alter the at-will relationship, but it does operate to protect any other rights or benefits enjoyed by the employee as part of the employment relationship.[4]

3. Public Policy

Idaho's courts have also applied another limitation to the doctrine of at-will employment—the public policy exception. In Watson v. Idaho Falls Consol. Hosp., Inc., 111 Idaho 44, 720 P.2d 632 (1986), the Idaho Supreme Court held that an "employee may claim damages for wrongful discharge when the motivation for discharge contravenes public policy." 111 Idaho at 49, 720 P.2d at 637, citing MacNeil v. Minidoka Hosp., 108 Idaho 588, 701 P.2d 208 (1985); Jackson v. Minidoka Irrigation Dist., 98 Idaho 330, 563 P.2d 54 (1977).

The public policy exception appears to apply when an employee is fired because of an action taken protected by a statute. That is, when a statute protects or otherwise provides for the taking of some action but does not create a cause of action for a person who suffers prejudice by taking such action, the courts have created a common law cause of action, the public policy exception to the employment-at-will doctrine. A very recent Idaho Supreme Court decision contains several examples of public policy violations from Idaho cases and other jurisdictions: (1) employee discharged for refusing to commit perjury; (2) employee fired for filing worker's compensation claim; (3) employee fired for serving on jury duty against the wishes of her employer; (4) employee fired for engaging in legal union activities; and (5) employee fired for reporting safety code violations to the state electrical engineer. Hummer v. Evans, No. 21796, 1996 WL 490675, at *5-6 (Idaho Aug. 29, 1996). In Hummer, the court affirmed the district court's judgment that the employer violated public policy by firing the employee for responding to a subpoena. *Id.* These examples illustrate how an action taken based upon statutory or other legal authority can support a public policy cause of action.

4. First Amendment Rights of Public Employees

Public employees may also bring a cause of action for wrongful discharge based upon protected speech. In Lockhart v. State, 127 Idaho 546, 903 P.2d 135 (Ct. App. 1995), the Idaho Court of Appeals set forth the elements of such a claim:

> Whether speech is constitutionally protected and precludes discipline of an employee involves a four-part test: First, the court must determine whether the speech may be

> fairly characterized as constituting speech on a matter of public concern. [Second,] if the speech involves a matter of public concern, then the court must balance the employee's interest in commenting upon matters of public concern against the interest of the state, as an employer, in promoting the efficiency of the public services it performs. Third, if the balance favors the employee, then the employee must show that the protected speech was a substantial or motivating factor in the detrimental employment decision. Finally, if the employee meets this burden, then the employer is required to show by a preponderance of the evidence that it would have reached the same decision even in the absence of the protected speech.

127 Idaho at 552, 903 P.2d at 141 (citations omitted). The Lockhart case involved comments made by an employee of the Idaho Department of Fish and Game—at a meeting with another department official and a newly elected female legislator, he commented that many of Idaho's female legislators were "airheads" or had "nothing between their ears." The court held that while the comment involved a matter of public concern, "comments regarding the intelligence of members of Idaho's legislature constitutes a matter of public concern,"[5] it did not merit First Amendment protection because the department's interests in maintaining good relations with the legislative branch and promoting the efficiency of the public services it performs outweighed the employee's interest in making the comment. 127 Idaho at 553, 903 P.2d at 142.

5. The Whistleblowing Law

The Idaho Protection of Public Employees Act ("the Whistleblowing Act"), Idaho Code §§ 6-2101 to 6-2109, protects public employees from adverse actions as a result of reporting waste and violations of a law, rule or regulation. In order to receive protection under the Whistleblowing Act, a public employee is obligated to report waste or violations in good faith. Idaho Code § 6-2104. An aggrieved employee may bring an action for damages, including attorneys' fees and costs, and injunctive relief, and a court may order reinstatement of the employee with lost wages and benefits and impose a $500.00 civil fine on the employer. Idaho Code §§ 6-2105, 6-2106.

E. Conclusion

An at-will employment relationship may be terminated by either party at any time, with or without notice or cause assigned. However, several exceptions and limitations apply: An at-will public employee is protected by all federal and state anti-discrimination laws; an employer may not dismiss an at-will employee in order to deprive the employee of an accrued benefit or right; an at-will employee cannot be dismissed on the basis of taking some action protected by public policy; an at-will employee cannot be dismissed based upon protected speech; and an at-will public employee cannot be dismissed for reporting, in good faith, government waste or violations of law.

I hope this guideline is responsive to your inquiry. If you require further assistance or information, please contact me.

Very truly yours,

THORPE P. ORTON
Deputy Attorney General
Contracts & Administrative
Law Division

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[1] The PSA and the Idaho Personnel Commission Rules list seventeen reasons for which a classified employee may be disciplined. "Discipline" is understood to mean dismissal, demotion, suspension, reduction in pay or involuntary transfer. Idaho Code § 67-5309(n); IDAPA 28.01.01.190.01.

[2] Some division administrators may be classified employees. If a division administrator held classified status prior to July 1, 1995 (the effective date of House Bill 299 (1995)), he or she retains that status so long as the position is held, i.e., until separation, promotion, demotion, position elimination, etc.

[3] The rationale and conclusion reached by the federal district court in Youngblood appears to be consistent with Idaho law. The district court recognized that in Texas, which is an at-will state, public employees are also at-will unless the legislature has abrogated its right to dismiss without cause. That is, unless the legislature has passed a law limiting reasons for which an employee may be discharged, the employee is an at-will employee without a property right in continued employment. The specific position at issue in Youngblood was created by statute and further defined by city charter. The Texas statute established a two year term for municipal judges, and prior Texas court opinions had interpreted the statute to permit a city to expressly provide for removal of a municipal judge. To this end, the Galveston city charter provided that a municipal judge served at the pleasure of the city council. The district court reasoned and concluded as follows:

> If a public employee serves at the pleasure of his superiors, the employment relationship is at-will, and the employee has no property interest in continued employment.
>
> . . . .
>
> Here, the Galveston City Charter specifically provides that the Municipal Judge serves at the pleasure of the City Council. Thus, notwithstanding the two-year term provided for by the Galveston City Charter and Tex. Gov't Code Ann. § 29.005, Youngblood was an at-will employee and could be terminated without cause and without a hearing. Youngblood, therefore, had no property interest in continued employment as a municipal judge.

Id. at 106.

[4] For example, in Metcalf, the court applied the covenant where the employee alleged she was fired because of the use of accumulated sick leave. The court also cited a Massachusetts case where the covenant was applied to an employee who was fired so that the employer would not have to pay earned sales commissions. Id., citing Fortune v. National Cash Register Co., 364 N.E.2d 1251 (Mass. 1977).

[5] The court noted that speech does not lose First Amendment protection simply because of an inappropriate or controversial character, and "'debate on public issues should be uninhibited, robust, and wide-open, and . . . may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.'" Id. at 552-53, 903 P.2d at 141-42, citing and quoting Rankin v. McPherson, 483 U.S. 378, 387, 107 S. Ct. 2891, 2898, 97 L. Ed. 2d 315 (1987); New York Times v. Sullivan, 376 U.S. 254, 270, 84 S. Ct. 710, 721, 11 L. Ed. 2d 686 (1964).

September 12, 1996

The Honorable Ron Schilling
District Court Judge
P. O. Box 896
Lewiston, ID 83501

THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE

Re: Idaho Certified Shorthand Reporters Board

Dear Judge Schilling:

This letter is in response to your September 6, 1996, inquiry regarding the investigative procedures of the Idaho Certified Shorthand Reporters Board (the "Board"). Your letter requests clarification of a potential conflict between the "investigation and hearing" procedure outlined in Idaho Code § 54-3113 and the "preliminary investigation" procedure referenced in Board Rule 500 (IDAPA 49.01.01.500). You have requested an opinion as to the propriety of the Board's methods "in responding to and processing a complaint against a certified shorthand reporter." The precise issue presented is whether the Board may conduct an informal investigation prior to a formal investigation or hearing which requires the Attorney General, or the Attorney General's designee, to sit as chairman of the hearing board?[1]

The answer to your inquiry is that the statutory procedures of Idaho Code § 54-3113 and the preliminary investigation procedure provided by Board Rule 500 are not in conflict but, rather, refer to the same formal proceedings. Prior informal procedures are also available to the Board and are encouraged by state law.

I.

IDAHO CODE § 54-3113 PROCEDURAL REQUIREMENTS

Idaho Code § 54-3113 sets forth certain procedural requirements for the Board when pursuing administrative discipline against its licensees. The statute authorizes the Board, upon proper verified complaint, to conduct inves-

tigations and to hold hearings. "For the purposes of such investigation and hearing, the attorney general of the state of Idaho, or one (1) of his assistants designated by him, shall sit with the board with all of the powers as a member of the board and shall act as chairman of the hearing board." *Id.* The statute further provides that "each member of the board is empowered to administer oaths and affirmations, subpoena witnesses, and hear and receive evidence anywhere in the state." *Id.* The statute empowers the Board to hold hearings and, upon conclusion of the hearings, to render its decision regarding the discipline of the licensee. Finally, the statute provides that all hearings and proceedings shall be governed by the Idaho Administrative Procedure Act.

II.

BOARD RULE 500

Board Rule 500 provides rules for the revocation, suspension or reinstatement of certified shorthand reporters' certificates. Under subsection .03, a preliminary investigation may begin upon the proper filing of a verified complaint. Board Rule 500.03.c provides that, "after a preliminary investigation has been initiated, the Attorney General or one of his assistants shall participate as a member and chairman of the board during the course of the investigation and any further proceedings." Such preliminary investigation is conducted by a person appointed by the Board and a written report of the investigation is furnished to the Board. Board Rule 500.03.d. Upon receipt of the preliminary report, the Board may make one of three determinations: (1) that the matter should be closed for lack of reasonable cause, (2) the matter should be closed upon informal admonition to the reporter, or (3) that formal proceedings should be instituted. Board Rule 500.03.f.

III.

ANALYSIS

A. The Statute and Rule are not in Conflict

Board Rule 500 provides for the preliminary investigation after the filing of a verified complaint, the same verified complaint referenced in Idaho Code § 54-3113. Board Rule 500.03.a. The statute and rule are consistent in requiring an investigation to gain information for the Board to determine if

cause exists for disciplinary action. The Board's rule provides that a representative of the Attorney General's Office "shall participate . . . during the course of the investigation and any further proceedings." Board Rule 500.03.c. Thus, the "preliminary investigation" conducted by the Board pursuant to Board Rule 500.03 is the formal "investigation" referred to in Idaho Code § 54-3113. This conforms to the statutory mandate.

B. Informal Procedures are Available to the Board

Idaho Code § 54-3113 provides that the Attorney General will sit as the Board's chair for "investigations and hearings." However, the only investigations mentioned in the code are those in which the Board is conducting formal proceedings. The statute does not enumerate any type of informal investigative actions, but does require compliance with the Idaho Administrative Procedure Act.

The Idaho Administrative Procedure Act (the "Act") is codified as Idaho Code § 67-5201 *et seq.* Idaho Code § 67-5241 is titled "Informal Disposition," and provides, in part, as follows:

> (1) Unless prohibited by other provisions of law:
>
> . . .
>
> (c) informal disposition may be made of any contested case by negotiation, stipulation, agreed settlement, or consent order. Informal settlement of matters is to be encouraged;
>
> . . .
>
> (4) The agency may not abdicate its responsibility for any informal disposition of a contested case. Disposition of a contested case as provided in this section is a final agency action.

The unofficial comment to this section provides that the:

> informal resolution of disputes is appropriate unless specifically precluded by other provisions of law . . . .
>
> In one recurrent situation, the agency has the burden of initiating the contested case. For example, an agency is informed of a potential violation by a person subject to its jurisdiction and initiates an investigation. If the investigation determines there was no violation, the agency may decline to initiate a contested case. If the investigation provides evidence of possible violation, the agency may informally resolve the problem or may file a contested case. . . . The regulation of holders of professional licenses is an example of this category of adjudicatory actions.

The Attorney General's Model Rules of Administrative Procedure are found at IDAPA 04.11.01.000 *et seq.*[2] Rule 100 provides that, "unless prohibited by statute, an agency may provide that informal proceedings may precede formal proceedings in the consideration of a . . . contested case." Rule 101 provides guidance as to informal procedure by stating:

> Statute authorizes and these rules encourage the use of informal proceedings to settle or determine contested cases. Unless prohibited by statute, the agency may provide for the use of informal procedure at any stage of a contested case. Informal procedure may include individual contacts by or with agency staff asking for information, advice or assistance from the agency staff, or proposing informal resolution of formal disputes under the law administered by the agency. Informal procedures may be conducted in writing, by telephone or television, or in person.[3]

Such informal proceedings are available to the Board since Idaho Code § 54-3113 does not specifically prohibit their use. Instead, this section requires compliance with the Administrative Procedure Act. The Act encourages, and specifically authorizes, informal proceedings. The Model Rules of the Attorney General's Office include in such proceedings contact with licensees by Board staff. Such informal investigations are not the type contemplated by Idaho Code § 54-3113. Thus, there is no requirement that the Attorney General participate in such proceedings. If the Board pursues formal

investigations or hearings, including the preliminary investigation found in Board Rule 500, or in any case where the Board is administering oaths, subpoenaing witnesses or taking testimony and evidence, then the involvement of the Attorney General as chairman of the Board is mandated by statute.

IV.

CONCLUSION

The APA allows the Board to conduct informal disposition procedures prior to an investigation and determination by the Board as to reasonable cause for discipline of its licensees. These informal dispositions, and other similar proceedings under the Act, are made without the involvement of the Attorney General. However, when any formal investigations or proceedings (even those designated by rule as "preliminary") are conducted by the Board, the involvement of the Attorney General is mandated by Idaho Code § 54-3113.

V.

RECOMMENDATION

Due to the cumbersome nature of the statutory requirements, this office recommends an amendment to Idaho Code § 54-3113, and the rules of the Board, to eliminate the Attorney General's involvement in Board proceedings. No other regulatory board has such requirement. Thus, we suggest the Board seek legislative action to adjust this procedure.

I hope this satisfactorily answers your inquiry. If you have any questions regarding this, please do not hesitate to contact me.

Very truly yours,

KEVIN D. SATTERLEE
Deputy Attorney General
Contracts & Administrative
Law Division

[1] It should be noted that the Attorney General is not a member of the Idaho Certified Shorthand Reporter's Board.

[2] Pursuant to Rule 001, the Attorney General's Model Rules apply to the Board since the Board has not affirmatively declined to adopt the rules.

[3] Model Rules 102 and 103 further state that if the statute provides specifically for formal proceedings, the party to the contested case must be allowed access to the required formal proceedings following informal proceedings. Further, informal proceedings do not exhaust administrative remedies unless all parties agree to the contrary in writing.

December 19, 1996

Honorable Dr. Anne Fox
Superintendent of Public Instruction
HAND DELIVERED

Michael Johnson, Director
Idaho Department of Juvenile Corrections
STATEHOUSE MAIL

Linda Caballero, Director
Idaho Department of Health and Welfare
STATEHOUSE MAIL

THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE

Re: Funding for Education of Juveniles placed in Private Residential Facilities[1]

Dear Superintendent Fox, Director Johnson and Director Caballero:

You have requested an opinion from the Office of the Attorney General on several questions. Those questions along with brief conclusions follow. However, because your questions are all related, we have not attempted to answer them separately and sequentially. Instead, this opinion will offer a comprehensive narrative analysis of this entire area of law.

QUESTIONS PRESENTED

1. Which state or local government entity has the responsibility to fund educational services for juveniles committed to the legal custody of the Department of Juvenile Corrections pursuant to the Juvenile Corrections Act or to the legal custody of the Department of Health and Welfare pursuant to the Child Protective Act and placed by said agencies in a private residential facility? Does the responsibility change depending on whether the student has a disability as defined by the Individuals with Disabilities Education Act (IDEA) or section 504 of the Rehabilitation Act of 1973?

2. Does the funding responsibility vary depending upon the residence of the juvenile? If so, what is the "residence" of a juvenile in the legal custody of and placed by either the Department of Juvenile Corrections or the Department of Health and Welfare in a private residential facility in the state of Idaho? Is "residence" defined differently for a student who has a disability?

3. Do the Department of Juvenile Corrections and the Department of Health and Welfare have the legal authority to contract with private residential facilities for placement of juveniles committed to their legal custody? If so, who has the legal decision making authority to decide where the juvenile actually receives educational services?

4. If the local school district or State Department of Education has the legal responsibility to fund educational services for these juveniles, does it have the legal authority to contract with a private residential facility to provide the required services? If so, are these juveniles in private residential facilities properly counted as part of the average daily attendance (ADA) for the purpose of education funding?

CONCLUSIONS

1. The Department of Juvenile Corrections and the Department of Health and Welfare have the responsibility to fund educational services for individuals committed to their legal custody where the juveniles are placed by said agencies in a private residential facility, and a decision is made by the departments that the individuals are to be educated at such private facility. If it is appropriate that the juveniles residing in the private residential facility are accepted into the public educational system, then the responsibility to fund the educational services shifts to the local school district and the public school appropriation. These conclusions are the same regardless of whether or not a juvenile is disabled.[2]

2. The funding responsibility is determined by the principles announced above and does not vary depending upon the residence of the juvenile. Idaho Code § 33-1404 allows juveniles placed pursuant to court order in a private residential facility to attend the public schools without payment of tuition in the school district where the facility is located.

Thus, those juveniles are treated similarly to children whose legal residence is in that particular district.

3. Both the Department of Juvenile Corrections and the Department of Health and Welfare have the authority to contract with private residential facilities for placement and education of juveniles committed to their legal custody. Because of the custodial status of these departments, they have the authority to require that a juvenile or child be educated at a private residential facility in appropriate circumstances.

4. Because the local school district does not have the legal responsibility to fund educational services for juveniles placed in and educated at a private residential facility pursuant to a determination by a state agency, its ability to contract with a private facility for such services is irrelevant. However, should the local school district choose to participate in the education of the individuals in the private residential facility, it may be able to contract with the private facility to take over and run the education program as a secondary or alternative site. Although the Department of Education does not have the legal responsibility to fund the education services for juveniles residing and educated at a private residential facility who are not disabled, the Department of Education does have some authority and responsibility as it pertains to juveniles with disabilities. Such responsibility can be fulfilled by operation of state statute, administrative rules or interagency agreements. As stated above, in the case of individuals educated at a private residential facility, current statutes place the burden to fund such education on the Department of Juvenile Corrections or the Department of Health and Welfare.

ANALYSIS

The Department of Juvenile Corrections has a significant role in the incarceration, treatment and protection of juveniles who have been committed to its custody. The Department of Juvenile Corrections derives its authority from the Juvenile Corrections Act, Idaho Code §§ 20-501, *et seq.* The Department of Health and Welfare's authority over juveniles relevant to this opinion comes from the Child Protective Act, Idaho Code §§ 16-1601, *et seq.* Both of these departments may have juveniles committed to their legal custody who may have disabilities. The education of individuals with disabilities is

primarily governed by federal law. Thus, both federal and state law must be considered to answer your questions.

A. Responsibilities of the Department of Juvenile Corrections ("DJC")

DJC was established in 1995 as a separate department of state government with its primary mission to administer the juvenile corrections system in Idaho. Prior to 1995, the Department of Health and Welfare had the responsibility to administer the state's juvenile justice system. In 1995, the legislature repealed the Youth Rehabilitation Act and replaced it with the Juvenile Corrections Act. Idaho Code § 20-502 provides definitions of terms used in the Juvenile Corrections Act which are relevant to this opinion. Because your question focuses on juveniles committed to the legal custody of DJC, the definitions of the terms "commit" and "legal custody" are instructive. "Commit" means "transfer legal custody." Idaho Code § 20-502(2). The term "legal custody" means "the relationship created by the court's decree which imposes upon the custodian responsibilities of physical possession of the juvenile, the duty to protect, train and discipline him and to provide him with food, shelter, education and ordinary medical care." Idaho Code § 20-502(14) (emphasis added). In essence, because DJC has legal custody of these juveniles, it must provide for their care and well-being. This includes a duty to provide the juvenile with education. While not defined, the term "provide" should include making such programs available and supporting those programs financially where appropriate. Such duty to provide for educational services does not depend upon whether the private facility can be deemed a "secure facility."

However, to the extent that a private residential facility can be deemed a "secure facility," it is even clearer under the Juvenile Corrections Act that DJC must provide or make available appropriate educational services. A "secure facility" is "any state-operated facility or facility operated under contract with the state which provides twenty-four (24) hour supervision and confinement for juvenile offenders committed to the custody of the department." Idaho Code § 20-502(17). Idaho Code § 20-531(2) provides that, "[t]he department shall provide or make available to juvenile offenders in secure facilities, instruction appropriate to the age, needs and range of abilities of the juveniles."[3]

In addition, DJC and the Idaho State Department of Education ("SDE") entered into a Memorandum of Agreement in August 1996 that relates to this issue. In that agreement, SDE agreed to distribute funds from the public school appropriation to school districts that have juveniles placed in private residential facilities by court order if the students are enrolled in and attend an approved educational program operated by and under the control of a public school district. Under the agreement, DJC agreed to provide educational programs using funds appropriated to DJC for students placed by court order into private residential facilities or work camps for secure confinement. It was further agreed by both departments that, "no provision in state law requires any school district to provide an educational program on the grounds of a private residential facility or work camp. If a private residential facility or work camp wishes to provide a private educational program, such a program will not be supported with funds from the public school appropriation."

Thus, DJC has the responsibility to fund the education services for juveniles committed to its legal custody and placed in a private residential facility where the education is required to be provided at the private facility, regardless of whether the juvenile is disabled. DJC has the authority to contract with a private residential facility for such placement and education pursuant to Idaho Code §§ 20-504(13), 20-531(3) and 20-536.

B. Responsibilities of the Department of Health and Welfare ("DHW")

DHW's authority over children committed to its custody is derived from the Child Protective Act. The Act defines "legal custody" to mean, "a relationship created by order of the court, which vests in a custodian the following duties and rights: . . . (3) to provide the child with care, education and discipline." Idaho Code § 16-1602(r) (emphasis added). Further, DHW has the authority to contract for the placement and education of children in a private residential facility pursuant to Idaho Code § 16-1623(a). Therefore, DHW must also provide for the education of children placed at a private residential facility where DHW makes a determination that the education should be provided at the private facility.

C. Responsibilities of Local Public School Districts

If the education can be provided in the public school system, the public school districts in Idaho are required to admit without the payment of tuition juveniles or children who are placed by court order and reside in licensed group homes, agencies and institutions in the school district. Therefore, the legal residency of such individuals is not relevant. Idaho Code § 33-1404 provides, "non resident pupils who are placed by court order under provisions of the Idaho youth rehabilitation [now known as Juvenile Corrections Act] or child protective acts and reside in licensed group homes, agencies and institutions shall be received and admitted by the school district in which the facility is located without payment of tuition." Thus, juveniles placed by DJC and DHW into a private residential facility located in a school district have a right to attend the public schools located in that district. This applies to both disabled and non-disabled juveniles. If certain juveniles are appropriately placed in public education and allowed into the public school system, then the responsibility for funding the educational services rests with the public school district and SDE through the public school appropriation, pursuant to Idaho Code § 33-1002B:[4]

> 1. Districts which educate pupils placed by Idaho court order in licensed group homes, agencies, institutions or juvenile detention facilities shall be eligible for an allowance equivalent to the previous year's certified local annual tuition rate per pupil. The district allowance shall be in addition to support unit funding and included in district apportionment payments, subject to approval of district applications by the state superintendent of public instruction.

DJC may determine that it is inappropriate for a particular juvenile to attend public school, because of a court order or safety concerns. Those individuals committed to the legal custody of DJC are juveniles who have committed crimes. Individuals committed to the legal custody of DHW are children who have been abandoned, abused or neglected and may be more appropriately placed in the public education system. In the event DJC or DHW determines that the educational program for a juvenile or child should be conducted by the private residential facility, the public school district is not responsible for funding the education of those juveniles or children at the private facility. Rather, because DJC and DHW have the duty to provide for the

education of such juveniles as a result of their custodial status, they have the responsibility to fund such education when a specific juvenile or child cannot properly attend the public school.

D. Juveniles with Disabilities

The answer to the question of who is responsible for funding the education of juveniles or children in the custody of DJC or DHW is the same regardless of whether the juvenile is disabled. Under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1401 et seq., and Section 504 of the Rehabilitation Act of 1973, each state and its local school districts must make a free appropriate public education (FAPE) available to all children with specified disabilities in mandated age ranges residing within the state. 20 U.S.C. § 1412(2). The state education agency (SEA) must exercise general supervisory authority over all education programs for children with disabilities administered within the state, including each program administered by any other public agency. 20 U.S.C. § 1412(6) and 34 CFR 300.600. In Idaho, this authority is exercised by SDE. This single line of responsibility for educating children with disabilities can be accomplished by several options, including state statutes, regulations and interagency agreements. 20 U.S.C. § 1413(13) and 34 CFR 300.600. While federal law requires such education to be "free," it leaves to each state the decision where responsibility for funding that education lies. 20 U.S.C. § 1412(2)(B); Ashland School District v. New Hampshire, 24 IDELR 165 (N.H. 1996).

This opinion has concluded that, in Idaho, the cost of educating juveniles or children in the legal custody of DJC or DHW who are placed in a private residential facility and who must be educated at the private facility remains the responsibility of DJC or DHW. Otherwise, the education would be provided by the local school district. There is nothing under federal law relating to students with disabilities that would necessitate a contrary answer for such students. As stated above, children with disabilities must be provided with FAPE in the least restrictive environment (LRE). Often this LRE requirement conflicts with other interests such as safety and penological interests. However, IDEA and section 504 cannot be used to escape incarceration. Thus, despite the LRE requirement, an individual committed to the custody of DJC or DHW could still be educated at the private residential facility if there are sufficient non-educational reasons. An individual education plan (IEP) would have to be developed which balances the juvenile's right to FAPE with

the security concerns. New Hampshire Dep't of Ed. v. City of Manchester, 23 IDELR 1057 (N.H. 1996). The particular educational program is determined under the normal special education regulations, e.g., child-study teams, surrogate parents, etc.

E. Authority to Contract for Educational Services

Because the local school district is not responsible to fund the educational services provided to juveniles committed to the legal custody of DJC and DHW and educated at such private facility, its authority to contract with a private facility to provide such services is not relevant.[5] However, should the school district wish to participate in the education of such individuals, the district may contract with the facility to take over and run the educational program at the private residential facility and treat such program as a secondary or alternative education setting.

It is true that although the SDE does not have the legal responsibility to fund the educational services for non-disabled juveniles residing and educated at a private residential facility, the SDE does have some authority and responsibility pertaining to juveniles with disabilities. Such responsibility can be fulfilled by operation of state statute, administrative rules or interagency agreements. However, in the case of individuals educated at the private residential facility pursuant to a decision by DJC or DHW, the statutes place the burden to fund such education on DJC or DHW.[6]

CONCLUSION

In conclusion, it is the opinion of this office that DJC and DHW have the responsibility to fund the educational services provided to juveniles who have been committed to the legal custody of these departments, where the departments have made the decision that such individuals should be educated at a private residential facility. Otherwise, if it is appropriate to place the individual in public education, the school district in which the private residential facility is located must make such public education available, including FAPE in the LRE for juveniles with disabilities. Because of these conclusions, the legal residence of such juveniles or the ability of the school districts to contract with private facilities is not relevant to this inquiry. DJC and DHW clearly have the authority to contract with a private residential facility for placement and education of juveniles committed to their legal custody.

Although current state statutes place the responsibility to fund the educational services for juveniles placed in and educated at a private residential facility on DJC or DHW, or on the public school districts if the individuals are enrolled therein, we encourage all of the agencies and other interested parties to work together on this issue. This is especially true as it pertains to juveniles who may be disabled and in need of special education. Although state statutes have identified the source of funding in the circumstances addressed in this opinion, SDE, DJC, DHW and the public school districts should be actively involved in the education of children with disabilities. In particular, SDE has the ultimate responsibility to ensure that FAPE is available to all children with disabilities. If those individuals with disabilities are not being properly identified, evaluated and educated, the potential liability for a violation of federal disability law by the State of Idaho is significantly increased.

Very truly yours,

THOMAS F. GRATTON
Deputy Attorney General
Contracts & Administrative
Law Division

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[1] The Superintendent of Public Instruction and Department of Juvenile Corrections submitted a joint opinion request. The Department of Health and Welfare submitted a separate letter with additional questions. Since the answers to the questions propounded by the Department of Health and Welfare will be answered in context of the questions raised by the joint opinion request, those questions have not been set out in this opinion.

[2] This opinion only addresses the responsibility for the provision of education services to juveniles or children committed to the legal custody of the departments of Juvenile Corrections and Health and Welfare. With respect to the conclusion of the funding responsibility of the departments of Juvenile Corrections and Health and Welfare, this opinion is limited to situations where the departments determine that the education should be provided at the private residential facility.

[3] DJC promulgated temporary administrative rules which went into effect July 1, 1996, establishing minimum standards for detention facilities. It appears from a reading of these rules that they apply to private residential facilities. See, IDAPA 05.01.01.000.02 and 05.01.01.010.15 and 16. These rules further provide in IDAPA 05.01.01.465 that such detention facilities must make available certain programs and services: "[t]hese programs and services shall include . . . educational programs according to the promulgated rules of the Idaho State Department of Education." However, according to DJC, these temporary rules were only intended to apply to county juvenile detention centers. Therefore, they will not be cited in support of the conclusions reached herein.

[4] Generally, the public school district must accept for enrollment those juveniles or children placed by DJC or DHW at a private residential facility. However, there may be some grounds for the school district to expel or deny enrollment to such individuals under Idaho Code § 33-205.

[5] It has been suggested that districts do have the authority to contract for the education of out-of-school youths, such as juvenile delinquents, pursuant to Idaho Code § 33-512(2), which provides that the local board of trustees has the power to "adopt and carry on, and provide for the financing of, a total educational program for the district. Such programs in other than elementary school districts may include education programs for out-of-school youth and adults . . . ." However, such authority should be further clarified by the legislature.

[6] We must note that with regard to juveniles with disabilities, the school districts have express authority under Idaho Code § 33-2004 to contract with private residential facilities and pay the education costs of educating students with disabilities. See also Idaho Code § 33-1002B(2).

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ATTORNEY GENERAL'S CERTIFICATES OF REVIEW FOR THE YEAR 1996

ALAN G. LANCE
ATTORNEY GENERAL
STATE OF IDAHO

March 19, 1996

Honorable Pete T. Cenarrusa
Secretary of State
HAND DELIVERED

Re: Certificate of Review;
Initiative Regarding Radioactive Waste

Dear Mr. Cenarrusa:

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

BALLOT TITLE

Following the filing of the proposed initiative, our office will prepare short and long ballot titles. The ballot titles should impartially and succinctly state the purpose of the measure without being argumentative and without creating prejudice for or against the measure. While our office prepares the titles, if petitioners would like to propose language with these standards in mind, we recommend that they do so and their proposed language will be considered.

MATTERS OF SUBSTANTIVE IMPORT

The proposed initiative concerns the authority of the State of Idaho and its executive and representatives to enter into agreements regarding the receipt and storage of additional radioactive waste in the State of Idaho. This initiative cannot give the legislature or the people of Idaho, through the initiative or referendum process, an independent ability to prohibit or otherwise limit the federal government's shipment of radioactive waste into Idaho. Only federal courts, through their equitable powers, Congress, through its legislative

powers (including waivers of sovereign immunity), and federal executive agencies (primarily the Department of Energy), through administrative action, accord or agreement, can limit the federal government's transportation, receipt and storage of radioactive waste in a particular state.

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

Section 1

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

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

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

From a legal standpoint, the most troubling aspect of section 1 is the voter approval requirement; specifically, the incorporation of the referendum statutes codified at Idaho Code § 34-1801 through 34-1822. The referendum has generally been referred to as the "veto power" of the public over legislative enactments. Idaho Water Resource Board v. Kramer, 97 Idaho 535, 548 P.2d 35 (1976). In order to exercise this "veto power," the required number of signatures within a prescribed period of time must be submitted to delay the effectiveness of the statute pending a vote by the people on whether to approve or reject the measure. Idaho Code § 34-1801 *et seq.*

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

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

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

(Emphasis added.)

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

If the intent of the drafters of the proposed initiative is to require an automatic submission of the legislation approving the agreement to the voters, then the incorporation of the referendum process should be deleted. The legality of such an automatic submission is not free from concern. While the issue of automatic submission has not been addressed by Idaho courts, the South Dakota Supreme Court, in Wyatt v. Kundert, 375 N.W.2d 186 (S.D. 1985), addressed such an issue in a similar context.

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

> In light of the foregoing constitutional provisions, legislative statutes and administrative rules, which dictate the

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

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

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

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

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

Section 2

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

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

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

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

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

Section 3

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

Section 4

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

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

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

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

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

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

Sincerely,

ALAN G. LANCE
Attorney General

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

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

April 1, 1996

Honorable Pete T. Cenarrusa
Secretary of State
HAND DELIVERED

Re: Certificate of Review;
Initiative Regarding Term Limits

Dear Mr. Cenarrusa:

An initiative petition was filed with your office on March 4, 1996. Pursuant to Idaho Code § 34-1809, this office has reviewed the petition and has prepared the following advisory comments. It must be stressed that, given the strict statutory time frame in which this office must respond and the complexity of the legal issues raised in this petition, our review can only isolate areas of concern and cannot provide in-depth analysis of each issue that may present problems. Further, under the review statute, the Attorney General's recommendations are "advisory only," and the petitioner is free to "accept or reject them in whole or in part."

BALLOT TITLE

Following the filing of the proposed initiative, our office will prepare short and long ballot titles. The ballot titles should impartially and succinctly state the purpose of the measure without being argumentative and without creating prejudice for or against the measure. While our office prepares the titles, if petitioner would like to propose language with these standards in mind, we recommend that she do so and her proposed language will be considered.

MATTERS OF SUBSTANTIVE IMPORT

The proposed initiative seeks to add a new section of Idaho Code which instructs the Idaho congressional delegation as well as state legislators and candidates for such offices to affirmatively support an amendment to the U.S. Constitution to impose term limits on members of Congress. If these elected officials or candidates for such offices engage in certain acts or omissions relating to said term limits amendment, certain language may be placed by their names on a ballot for their election or re-election.[1]

The proposed initiative instructs members of the Idaho congressional delegation to "use all of his or her delegated powers to pass a congressional term limits amendment, which would restrict U.S. Representatives from serving more than three (3) terms, and U.S. Senators from serving more than two (2) terms in Congress." If members of the Idaho congressional delegation do or fail to do certain acts specified in the initiative (for example, fail to vote in favor of a proposed congressional term limits amendment) the Secretary of State is required to print on the election ballot adjacent to such elected official's name the following: "DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS."

Next, the proposed initiative would allow non-incumbent candidates for the office of U.S. Representative, U.S. Senator, state representative or state senator the opportunity to sign a "Term Limits Pledge" each time he or she files as a candidate for such an office. The pledge states that the candidate supports the congressional term limits amendment and pledges to use all of his or her legislative powers to enact such an amendment. If the candidate fails to sign the pledge, the phrase, "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS" will appear adjacent to his or her name on the election ballot.

Further, the proposed initiative, through the enactment of a new section of the Idaho Code, instructs the state legislature to make application to Congress for a constitutional convention to propose amendments to the U.S. Constitution. If a legislator fails to take the actions listed in the proposed initiative, the phrase, "DISREGARDED VOTERS' INSTRUCTIONS ON TERM LIMITS" would appear adjacent to the name of such individual on all primary, special or general election ballots.

Finally, the proposed initiative mandates that the Secretary of State's Office is responsible for making an accurate determination regarding whether any of the above language should be printed on the ballot next to an individual's name. The proposed initiative incorporates a judicial review process initiated either by the individual by whose name the language would appear on the ballot, or by an elector if the secretary of state makes the determination that the language should not appear on the ballot.

The new section of the Idaho Code which would be enacted by the passage of the proposed initiative would automatically be repealed if the congressional term limits amendment sought in the initiative becomes law.

Further, no language would appear on the ballot regardless of the actions taken by the elected officials or candidates if such an amendment becomes law before the election.

Requiring the State of Idaho to print any of the above language on a ballot raises problems under several constitutional provisions including the freedom of speech, the Equal Protection Clause of the U.S. and Idaho Constitutions, and the right of suffrage provision contained in the Idaho Constitution.[2]

The form and content of a ballot for the election of state legislators or members of Congress is generally left up to the states. For example, in Rosen v. Brown, 970 F.2d 169 (6th Cir. 1992), the court held:

> An election ballot is a State-devised form through which candidates and voters are required to express themselves at the climactic moment of choice. The ballot is necessarily short; it does not allow for narrative statements by candidates and requires responses by the electors simple enough to be counted. Within these limitations, a State has discretion in prescribing the particular makeup of the ballot for its various elections; however, this discretion must be exercised in subordination to relevant constitutional guaranties.

Id. at 175 (citations omitted). *See also* Bachrach v. Secretary of the Commonwealth, 415 N.E.2d 832, 835 (Mass. 1981) ("[A]s soon as the State admits a particular subject to the ballot, and commences to manipulate the content, to legislate what shall and shall not appear, it must take account of the provisions of the Federal and State Constitutions regarding freedom of speech and association, together with the provisions assuring equal protection of the laws.").

Requiring the state to place pejorative comments adjacent to a candidate's name on the ballot essentially places the state in a position of endorsing certain candidates and issues in the political arena. While there are no cases directly on point, numerous cases involving the election process in general, some of which are specific to ballot access and placement on ballots, have invalidated actions which have a similar effect based upon the First Amendment and/or the Equal Protection Clause of the Fourteenth Amendment

of the United States Constitution. Some decisions focus upon the Equal Protection Clause and its established "right to equal treatment in the voting process." San Antonio Ind. School Dist. v. Rodriquez, 411 U.S. 1, 34, n.74, 93 S. Ct. 1278, 36 L. Ed. 2d 16 (1973). Other cases more directly address the First Amendment's protection of equal liberty of expression.[3]

Regardless of the exact interplay between the various provisions of the United States and Idaho Constitutions, it is not proper to place the state in the role of endorsing or certifying candidates and issues on the very instrument which has the most dramatic impact on such candidates and issues. "The core of the principle of equal liberty of expression is that government action may not favor or disfavor expression because of its content. Voting is political expression, not simply in the sense of choosing among candidates and policies, but also in the sense of making a statement about the public issues raised during a political campaign." Karst, Equality as a Central Principle in the First Amendment, 43 U. Chic. L. Rev. 20, 53 (1975).

By favoring candidates who support term limits, the government is supporting certain political expression because of its content. Regulating content of speech is normally reviewed under a strict scrutiny analysis under the First Amendment.[4] By placing unfavorable comments adjacent to certain individuals' names on the ballot, those candidates are denied an "equal chance" in violation of the Equal Protection Clause, which also necessitates heightened scrutiny. "In short, when the state is alleged to work against and make more difficult the election of certain candidates, the value of the vote of those supporting those candidates, in terms of their ability to affect the outcome of the election, is lessened." Chemerinsky, Protecting the Democratic Process: Voter Standing to Challenge Abuses of Incumbency, 49 Ohio St. L. J. 773, 788 (1988).

In Brown v. Hartlage, 456 U.S. 45, 60, 102 S. Ct. 1523, 71 L. Ed. 2d 732 (1982), the U.S. Supreme Court addressed Kentucky's ban on public statements with respect to the willingness of candidates to serve in public office without remuneration. The candidate in question promised during the campaign to reduce his salary if elected, but subsequently retracted his pledge. The U.S. Supreme Court, quoting Mills v. Alabama, 384 U.S. 214, 86 S. Ct. 1434, 16 L. Ed. 2d 484 (1966), held:

> Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes.

456 U.S. at 52-53. The Court further held, "[i]t is simply not the function of government to 'select which issues are worth discussing or debating' in the course of a political campaign." *Id.* at 60 (citation omitted). Similarly, the State of Idaho cannot select which issues should be promoted and supported by candidates for political office and accepted by the electorate.[5]

In Bachrach, *supra*, the court analyzed a Massachusetts law which proscribed the use of the term "independent" on the ballot. The Massachusetts law required the term "unenrolled" to be placed adjacent to a candidate's name who was not formally affiliated with any political party. The court held that "[e]xpression in the electoral context is 'at the heart of the First Amendment's protection.' The ballot itself partakes of this protection as representing the culmination of the electoral process." 415 N.E.2d at 835, n.9 (citation omitted). The court declared the law unconstitutional because of its less favorable treatment of candidates who were not affiliated with a political party. The court held that "the prohibition would be unlawful on much the same basis as a statute which might undertake to forbid political candidates in their campaigning to discuss a given subject, *e.g.*, religion or nuclear power . . . ." *Id.* at 836. The court further held:

> If the freedom of expression was impaired, so also would damage be done to associational rights, and thus to the right to vote. For example: Voters who during the campaign might have been favorably impressed with the candidate as an Independent, would be confronted on the ballot with a candidate who was called Unenrolled. Unenrolled is hardly a rallying cry: the Commonwealth in its brief appears to grant the possibility that the word would have a negative connotation for voters.

Id. (emphasis added; footnote omitted). Similarly, the proposed initiative treats candidates for office who do not subscribe to the exact constitutional term limits amendment sought in the initiative, differently and less favorably than other candidates. The proposed initiative places words beside the candidate's name which would have a negative connotation for many voters.

In Gould v. Grubb, 536 P.2d 1337 (Cal. 1975), the court addressed a city charter provision affording priority ballot listing for incumbents. The court held this provision as well as a provision for alphabetical order listing on the ballot was unconstitutional. The court stated that "all procedures used by a State as an integral part of the election process must pass muster against the charges of discrimination or of abridgment of the right to vote." *Id.* at 1342, *quoting* Moore v. Ogilvie, 394 U.S. 814, 818, 89 S. Ct. 1492, 23 L. Ed. 2d 1 (1969). The court reasoned that the "incumbent first" provision established two classifications of candidates for public office. Because the classification scheme directly impacted the electoral process and the fundamental nature of the right to vote, strict scrutiny analysis was required. The court held that the state failed to set forth a compelling reason to justify its use of such a process. At the heart of the court's decision was the holding, "[i]n our governmental system, the voters' selection must remain untainted by extraneous artificial advantages imposed by weighted procedures of the election process." 536 P.2d at 1348.

This is not to say that "government speech" has no role in our political culture. "Government has legitimate interests in informing, in educating, and in persuading, and it may add its voice to the marketplace of ideas on controversial topics. Nevertheless, it may not, in the guise of governmental speech, trammel the free speech rights of its citizens." Keller v. State Bar of California, 226 Cal. Rptr. 448, 462 (Cal. Ct. App. 1986) (citation omitted). Nor should governmental speech penalize the free speech rights of candidates for political office on issues which are of importance to the electorate, by penalizing those candidates by the placement of pejorative words adjacent to their names on a ballot.

Expanding on the ability of government to lend its voice to the political process as analyzed under federal and state constitutional provisions, one commentator has noted:

> Citizens are entitled to a government that is neutral in the process of selecting candidates. Whether or not the concept of self-government is "central" to the first amendment, it is undeniably an important first amendment value, and the integrity of the democratic process could rightly be questioned if government officially intervened in the political process to favor particular candidates. Whether or not the intervention was powerful, it would ipso facto disturb the first amendment equality principle. If *Barnettes'* fixed star guides navigation at all, it must lead us to the view that government speech in support of specific candidates cannot be reconciled with the first amendment.
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> . . . .
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> The issue is whether the government should be able to monopolize for itself the right to address the merits of an issue on the ballot or to call the voters' attention to issues which it and perhaps it alone wishes considered. It should not. Such a procedure violates the first amendment equality rights of proponents or opponents (depending on the particular position taken) and abuses the process of free and fair elections itself. Under an eclectic approach, government speech that threatens to dominate the elections marketplace and that undermines respect for the political process is highly suspect. Courts have already held that the allocation of preferred places on the ballot to incumbents and even the allocation of preferred places on the ballot on an alphabetical basis violates such rights. Governmental pronouncements appearing on the ballot going to the very merits of the issues are similarly infirm.

Shiffrin, Government Speech, 27 U.C.L.A. L. Rev. 565, 602, 639 (1980) (emphasis added).

The effect of the proposed initiative is two-fold. First, by placing unfavorable comments next to a candidate's name on the ballot, the state is effectively signaling to the electorate that this candidate is unworthy of their vote in contrast to other candidates.[6] Thus, the state is decreasing the chance that such individuals would be elected based upon their stand on a political

issue and, thus, decreasing the value of the votes of his or her supporter. As held in Anderson v. Celebrezze, 460 U.S. 780, 786, 103 S. Ct. 1564, 75 L. Ed. 2d 547 (1983), "the rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters." (Citation omitted.)

Second, the government is speaking in support of a constitutional term limits amendment, a political issue, best left to the political campaign rhetoric between the candidates and their supporters. Not only is the government speaking in support of one side on a controversial issue, it is lending its voice at the most crucial point in time in the relationship between the voters and candidates. Based upon the cases cited above, as well as numerous others not cited in this certificate of review, it is our opinion that the proposed initiative would be held unconstitutional.

An additional legal problem with the proposed initiative is its capacity for misleading the voters if it becomes law. As stated in Hampel v. Mitten, 278 N.W. 431, 435 (Wis. 1938), "[n]othing is more important in a democracy than the accurate recording of the untrammeled will of the electorate. Gravest danger to the state is present where this will does not find proper expression due to the fact that electors are corrupted or are misled." The proposed initiative uses the phrase "DISREGARDED VOTERS' INTENT ON TERM LIMITS." However, what is the voters' intent? While the proposed initiative may pass at one biennial election, who is to say that such a law would pass at the next biennial election at which the ballot language would have to appear. Would it still be the voters' intent to want a constitutional term limits amendment five or ten years in the future?

Moreover, unless the voter knows what the "voters' intent" is, the label may very well be misleading. An individual would enter the voting booth and see this language next to a candidate's name. Yet, how is that individual supposed to know that the "voters' intent on term limits" is that the voters are in favor of rather than opposed to a term limits amendment?

The following examples illustrate how misleading this initiative could be. Under the initiative, if a member of the congressional delegation "failed to vote in favor of all votes bringing the proposed Congressional Term Limits Amendment set forth above before any committee or subcommittee upon which he or she served in the respective house," the words "DISREGARDED

VOTERS' INSTRUCTIONS ON TERM LIMITS" would appear beside his or her name on the ballot. However, what if that member of Congress originally supported a different, and more stringent, constitutional term limits amendment and, thus, voted against the amendment sought in that committee? Subsequently, the member of Congress changed his or her mind and actually voted in favor of the constitutional term limits amendment sought by the sponsors of the proposed initiative when it arrived on the floor. What if the legislator was sick or absent when the vote was taken? Would he or she actually have "disregarded voters' instructions on term limits?"

In conclusion, in our opinion, the proposed initiative, if challenged, would be declared unconstitutional. The effect of placing unfavorable comments next to a candidate's name places the state in the role of endorsing candidates and issues in the course of a political campaign. While government is free to add its voice to the marketplace of ideas, it is highly doubtful the state can use its power to seek to manipulate election results by slanting what appears on the ballot. This initiative has the effect of praising one candidate and penalizing another based solely upon the political beliefs expressed by such individuals. Based upon the law cited above, such conduct on the part of the state is improper. Further, the potential is high for the voters to be misled by the placement of certain pejorative words adjacent to a candidate's name.

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

Sincerely,

ALAN G. LANCE
Attorney General

Analysis by:
THOMAS F. GRATTON
Deputy Attorney General

[1] There is historic precedence in Idaho for placing language on a ballot next to a candidate's name. Prior to 1913, U.S. Senators were chosen by state legislatures rather than by direct election. In 1909, the legislature passed a bill which provided for party voters to indicate their preference for U.S. Senator. Any candidates for the state legislature were given the opportunity to sign a pledge that they would always vote for the candidate for U.S. Senate who received a majority of the votes upon that candidate's party ticket at the special primary. If the candidate signed the pledge, below the primary ballot adjacent to the candidate's name would appear the phrase, "Pledged to vote for party choice for U.S. Senator." However, most of the cases which have developed and interpreted the First and Fourteenth amendments to the U.S. Constitution were decided after 1909.

[2] See U.S. Const. amends. I and XIV; Idaho Const. art. 1, §§ 2, 9 and 19.

[3] Although this right "has been explained largely as a derivation from the Equal Protection Clause, it rests just as soundly on the first amendment's principle of equal liberty of expression. Indeed, the first amendment demands an even greater degree of equality in the electoral process than does the equal protection clause." Karst, Equality as a Central Principle in the First Amendment, 43 U. Chic. L. Rev. 20, 53 (1975).

[4] See Police Department of the City of Chicago v. Mosley, 408 U.S. 92, 96, 92 S. Ct. 2286, 33 L. Ed. 2d 212 (1972) ("Necessarily, then, under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities. There is an 'equality of status in the field of ideas,' and government must afford all points of view an equal opportunity to be heard. Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone." (Footnote omitted.)).

[5] See Abood v. Detroit Bd. of Educ., 431 U.S. 209, 234-35, 97 S. Ct. 1782, 53 L. Ed. 2d 261 (1977) ("For at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State"); West Virginia Bd. of Ed. v. Barnette, 319 U.S. 624, 642, 63 S. Ct. 1178, 87 L. Ed. 2d 1628 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein").

[6] Such conduct, if engaged in by individuals, would constitute electioneering. Where engaged in by the state, it would assuredly be declared unconstitutional. Further, when assigning ballot titles to proposed initiatives, the Office of the Attorney General is required to be objective, non-prejudicial and non-argumentative. Idaho Code § 34-1809. Such requirement stems from legislative recognition that state government has no role in favoring or discouraging any one viewpoint on the ballot form.

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