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September 24, 1986

The Honorable Denton Darrington  
State Senator, District 24  
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RE: TAX INCENTIVES FOR THE PRODUCTION OF GASOHOL,  
IDAHO CODE §§ 63-2401(7) AND 63-2405

THIS IS NOT AN OFFICIAL ATTORNEY GENERAL OPINION  
AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE

Dear Senator Darrington:

This is in response to your request for guidance, dated August 25, 1986. Specifically, you asked two questions concerning the constitutionality and applicability of the statutes. I will first discuss the constitutionality of the statutes and then the application of the statutes to out-of-state producers of gasohol.

QUESTIONS PRESENTED:

1. May Idaho constitutionally apply a reduced fuels tax to gasohol only if it is blended from alcohol manufactured in the State of Idaho from agricultural or forest products grown in the State of Idaho?
2. Assuming that Idaho Code §§ 63-2401(7) and 63-2405 are found by a court to be unconstitutional under the Commerce Clause, will the court invalidate the entire statute, thus eliminating the tax reduction for all producers of gasohol, or sever the unconstitutional language and extend the tax

reduction beyond Idaho's borders to all  
producers of gasohol?

CONCLUSIONS:

1. Idaho's fuels tax statutes which extend favorable tax treatment only to gasohol manufactured in Idaho from Idaho products would not withstand a challenge under the Commerce Clause of the United States Constitution.

2. It is our opinion that an Idaho court would likely remove the limitation of the availability of the favorable tax treatment as it applies to Idaho producers and extend the tax reduction to gasohol produced outside of the State of Idaho. While the possibility exists that the court could remove the favorable tax treatment entirely, this result is unlikely because it would not comport with the legislative intent of the Idaho legislature.

DISCUSSION:

Idaho Code § 63-2401(7) defines "gasohol" as a motor fuel containing a mixture of at least ten percent (10%) blend anhydrous ethynol manufactured in the State of Idaho from agricultural or forest products grown in the State of Idaho or wastes from those products. Idaho Code § 63-2405 provides that gasohol shall be taxed at \$0.04 per gallon less than the amount of the excise tax imposed on other fuels. The purpose of these two statutes clearly is to give an economic incentive to Idaho producers of gasohol and to open up additional markets for Idaho forest and agricultural products.

However, the United States Supreme Court consistently has ruled that under the Commerce Clause of the United States Constitution, no state may impose a tax which discriminates against interstate commerce by providing a direct commercial advantage to local business. Bacchus Imports, Ltd. v. Dias, 104 S.Ct. 3049 (1984). If a state law constitutes a simple economic protection measure, the Supreme Court will find that the statute per se is unconstitutional. Philadelphia v. New Jersey, 437 U.S. 617 (1978).

In Archer Daniels Midland Co. v. State, 315 N.W.2d, 597 (Minn. 1982), the Minnesota Supreme Court considered a statute substantially similar to the Idaho statutes. The Minnesota court found that the result of the statute was to tax gasohol produced in states other than Minnesota at a higher rate than gasohol

produced within the borders of Minnesota. As a result, the court ruled that the statute was invalid under the Commerce Clause because it represented "simple economic protectionism." A similar result can be expected if the Idaho statutes are challenged in court.

Your next question asks whether a court will extend the tax reduction provisions beyond Idaho's borders and apply the reduction to all producers of gasohol or rather would eliminate the reduction benefit entirely. Generally, Idaho courts follow the rules of construction favoring the validity of a statute and presume that the legislature intended to enact a constitutionally valid law. Thus, in some cases, the Idaho Supreme Court has chosen to extend the benefits of a statute to an improperly excluded class rather than deny the benefits to all classes. Murphy v. Murphy, 103 Idaho 720, 653 P.2d, 441 (1982). Further, the factor given the greatest weight in the court's view, is carrying out the intent of the legislature.

Here, contrary to the record before the Minnesota Supreme Court, in the Archer Daniels Midland Co. case where the court decided that legislative intent would be entirely frustrated by opening up the reduction to both interstate and intrastate producers of gasohol, history of Idaho's statute reveals a legislative intent to offer the tax reduction benefit to all producers of gasohol. In testimony presented to the Senate Transportation Committee on March 13, 1986, State officials acknowledged that the "home grown" rule was not being enforced and all gasohol is receiving the credit. See Minutes of Senate Transportation Committee, pg. 3.

While the original intent behind the 1981 enactment may have been to open up intrastate markets for only Idaho forest and agricultural products, subsequent legal developments and the legislative history regarding the extension of the reduction would likely preclude an Idaho court from invalidating the entire statute.

The legislature may want to consider clarifying this provision in the next session. Among other options, it could consider taking an approach similar to that found in the Colorado statutes. Prior to the Minnesota court case, Colorado had a statute substantially similar to both the Minnesota and Idaho tax reduction statutes. After consideration of the Minnesota Supreme Court's holding, Colorado redrafted its fuels tax statute to provide favorable tax treatment only to gasohol produced from facilities having a design production capacity of 17 million

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gallons or less per year. This revised statute was challenged in the case of Archer Daniels Midland Co. v. State, 690 P.2d, 177 (Colo. 1984). The revised statute was challenged on the grounds that all Colorado producers of gasohol had production capacities of less than 17 million gallons, while the majority of out-of-state producers had production capacity in excess of 17 million gallons. The Colorado statute narrowly survived a Commerce Clause challenge because the court found that it treated both in-state and out-of-state gasohol producers equally. However, the legislature should keep in mind that the United States Supreme Court has not yet addressed this specific question.

If we can be of further assistance concerning this matter, please do not hesitate to contact us.

Very truly yours,

*Patrick J. Kole*  
*by Daniel G. Whadwick*

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PJK/mkf

bcc: Ted Spangler  
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