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February 7, 1990

The Honorable Ann Rydalch
Idaho State Senate
STATEHOUSE MAIL

RE: CONSTITUTIONALITY OF A STATE ECONOMIC DEVELOPMENT FUND

Dear Senator Rydalch:

This is in response to your request that we review the proposal submitted by Allan Isen to establish a state economic development fund which would loan money to new businesses which are unable to obtain loans from banks.

In Village of Movie Springs v. Aurora Mfg. Co., 82 Idaho 337, 353 P.2d 767 (1960), the Idaho Supreme Court considered the constitutionality of a state statute authorizing municipalities to issue industrial revenue bonds. The court found the statute to be unconstitutional as a violation of several specific sections in the Idaho Constitution. The court also held the statute to be invalid on grounds that any incidental or indirect benefits to the public derived from such bonds could not "transform a private industrial enterprise into a public one, or imbue it with a public purpose." 82 Idaho at 346. The court went on to quote with approval from the language of a Florida case, State v. Town of North Miami, Fla., 59 S.2d 779, as follows:

Our organic law prohibits the expenditure of public money for a private purpose. It does not matter whether the money is derived by ad valorem taxes, by gift, or otherwise. It is public money and under our organic law public money cannot be appropriated for a private purpose or used for the purpose of acquiring property for the benefit of a private concern. It does not matter that such undertakings may be called or how

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worthwhile they may appear to be at the passing moment. The financing of private enterprises by means of public funds is entirely foreign to a proper concept of our constitutional system. Experience has shown that such encroachments will lead inevitably to the ultimate destruction of the private enterprise system.

Thus, the court appeared to agree that the financing of private enterprises by means of public funds is a concept foreign to our constitutional system. Subsequently, the Idaho Constitution was amended by the addition of art. 8, § 5, providing for industrial revenue bonding. However, that amendment is not broad enough to cover the type of proposal submitted to us. Consequently, the language of the Movie Springs case should still be considered.

In Nelson v. Marshall, 94 Idaho 726, 497 P.2d 47 (1972), the Idaho Supreme Court considered the constitutionality of a statute allowing the water resource board to make loans to individuals in special cases approved by the board for the purpose of financing irrigation projects. The court considered whether the statute violated Idaho Constitution, art. 8, § 2, which provides:

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.

The court held that the loaning of credit clause prohibits only the loaning of credit and does not prohibit the loaning of state funds. The court went on to quote with approval the case of Engelking v. Investment Bd., 93 Idaho 217, 458 P.2d 213 (1969), in pertinent part, as follows:

The credit clause of Idaho Const. art. 8, § 2, is intended to preclude only State action which principally aims to aid various private schemes. As the parties have noted, the loaning of funds by the State is always presumably of some benefit to the recipient of the funds. However, where such a benefit is merely an incidental consequence of efforts to effectuate a broad public purpose, then it cannot be said to violate the credit clause of Idaho Const. art. 8, § 2.

(Emphasis in original.)

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The court then held:

Since the credit clause does not prohibit the loaning of state funds, the loan challenged here does not offend that provision. Furthermore, this loan constitutes an effort to effectuate a broad public purpose; and, hence, for that reason also, it cannot be said to violate the credit clause.

The Nelson case indicates the court may have relaxed its attitude toward loans to private persons. However, the court continues to point out that the credit clause is intended to preclude state action which principally aims to aid various private schemes. Thus, it is quite possible the court would find that the proposed economic development fund is unconstitutional in furthering principally private as opposed to public purposes.

Consequently, if it is possible to do so, we would recommend that a proposal such as that submitted to us be proposed as a constitutional amendment rather than as a statute.

Sincerely,



DAVID G. HIGH
Deputy Attorney General
Chief, Business Regulation
and State Finance Division

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