



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL  
BOISE 83720-1000

LARRY ECHOHAWK  
ATTORNEY GENERAL

TELEPHONE  
(208) 334-2400

TELECOPIER  
(208) 334-2530

NATURAL RESOURCES  
TELECOPIER  
(208) 334-2690

March 15, 1991

Lydia Justice Edwards  
Treasurer  
State of Idaho  
Statehouse  
Boise, Idaho 83720

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

Dear Ms. Edwards:

By letter dated March 13, 1991, you requested an opinion from this office regarding the constitutionality of HB 234. Pursuant to regulations promulgated by the Environmental Protection Agency petroleum retailers in Idaho must upgrade their underground fuel storage tanks. It is estimated that the average cost per petroleum retailer for this required fuel storage tank upgrading will be approximately \$40,000. (Statement of Purpose HB 234). HB 234 proposes financial assistance for these retailers by reducing the interest rate charged by private lenders on loans for tank upgrade projects. This reduction in the interest rate will be accomplished through the establishment of an underground storage tank (UST) Upgrade Assistance Account. The purpose of this account is to repurchase loans made by private lenders and guaranteed through the United States Small Business Administration (SBA). The portion of the actual loan repurchased will not exceed the amount guaranteed by the SBA; thus, there is no risk of loss to the state. (Statement of Purpose HB 234). In addition, in order to qualify for repurchase by the state the originating lender cannot charge more than 6% per annum on the original loan.

Your specific question is whether this proposed legislation would be contrary to Idaho Const., art. 8 § 2. For the reasons set forth below this office does not view the legislation as being contrary to the Idaho Constitution.

Art. 8, § 2 of the Idaho Constitution 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.

This constitutional provision was construed by the Idaho Supreme Court in Engelking v. Investment Board, 93 Idaho 217, 458 P.2d 213 (1969). In that case the State Superintendent of Public Instruction challenged the constitutionality of a state statute permitting the investment of state permanent endowment funds in certain bonds, notes, convertible debt securities and common or preferred stock of private corporations. In construing art. 8, § 2 of the Idaho Constitution the court stated:

[the loaning of credit clause of Idaho Const. art. 8, § 2,] prohibits only loaning of the State's credit. Idaho Const. art. 8, § 2, does not prohibit the loaning of State funds. The word "credit" as used in this provision implies the imposition of some new financial liability upon the State which in effect results in the creation of State debt for the benefit of private enterprises. This was the evil intended to be remedied by Idaho Const. art. 8, § 2, and similar provisions in other state constitutions. Yet that particular evil is not presented by the investment of existing funds of the State, for no new State debts are created by such action.

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.

93 Idaho at 221, 222.

More factually on point to the present matter is Nelson v. Marshall, 94 Idaho 726, 497 P.2d 47 (1972). In that case the appellant filed a writ of prohibition to prevent the Idaho Water Resources Board from loaning state money to individual farmers for the development of irrigation wells pursuant to I.C. §§ 42-1754(b) & 42-1756(a). In holding that the loans did not violate art. 8, § 2 of the Idaho Constitution the Idaho Supreme Court reaffirmed its holding in Engelking v. Investment Board, supra. The court also noted the "broad public purpose" effectuated by such loans in the development of agricultural land.

Finally, in Hansen v. Independent School District No. 1, 61 Idaho 109, 98 P.2d 959 (1939), dealing with Idaho Const. art. 8, § 4, which is an analogous provision prohibiting political subdivisions of the state from lending credit, the court stated "it is essential that there be an imposition of liability, directly or indirectly, on the political body. Unless the credit or faith of respondent [public body] is obligated there is no constitutional inhibition." (Emphasis original.) 61 Idaho at 114.

In creating the underground storage tank upgrade assistance account HB 234 does not expose the state to liability for nonpayment of the loans. The Small Business Administration shoulders this entire risk and the state's credit is not extended in any sense.

Further, the loan repurchase enabling the reduction of interest rates charged does have a public purpose.

A public purpose is an activity that serves to benefit the community as a whole and which is directly related to the functions of government.

Idaho Water Resources Board v. Kramer, 97 Idaho 535, 559, 548 P.2d 35 (1976). The community clearly benefits from upgrading underground fuel storage tanks by reducing the potential for serious soil contamination. The benefit derived by the petroleum

Lydia Justice Edwards  
March 15, 1991  
Page 4

retailers is almost incidental in comparison to the benefit to the public in reducing pollution risks. The assistance being provided is certainly a function of government in the sense that the mandatory investment being required of the retailers is imposed pursuant to federal regulation. This legislation serves to promote compliance by the retailers with federal regulations as well as to promote the state's policy of reducing health risks associated with serious soil contamination.

If I may be of further assistance to you in this matter, please do not hesitate to call.

Yours very truly,



FRANCIS P. WALKER  
Deputy Attorney General

FPW/pb

cc: Freeman B. Duncan

L031491A