

July 1, 1997

The Honorable Pete T. Cenarrusa
Secretary of State

HAND DELIVERED

Re: Certificate of Review
Initiative Regarding Radioactive Material

Dear Mr. Cenarrusa:

An initiative petition was filed with your office on June 6, 1997, concerning the handling of plutonium. 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

Enforcement Problems

As it is currently written, the proposed initiative contains a number of format problems that will make the initiative very difficult to either codify or implement. Without extensive revision, a court will probably rule that the proposed initiative is unenforceable and does not constitute valid law. As it is presently written, the proposed initiative does not so much propose a law as it does express the wishes of the sponsors.

The proposed initiative does not state where in the Idaho Code it will be contained upon codification. Generally, an initiative will either create a new section in the Idaho Code or amend or repeal an existing provision in the Idaho Code. The proposed initiative

should be re-written to specifically explain where in the Idaho Code it should be included upon codification.

Next, the proposed initiative is not divided into separate sections, despite the fact that it proposes to mandate a number of different things. This office has identified at least four different substantive requirements that would be created by the proposed initiative. The proposed initiative should be re-written in separate sections for greater ease of reference and implementation.

Lastly, much of the text of the proposed initiative does not consist of operative language requiring specific action or conduct. Instead, the text explains the intentions of the petitioners and the purpose of the legislation. Typically, a bill originating in the legislature will separate such explanatory material into a separate section dedicated to “legislative findings” or “statement of purpose.” This separation helps the public, and the courts, interpret the actual operative language without mistaking the explanatory language for operative language. The proposed initiative should be re-written to separate the explanatory language from the operative language.

Substantive Problems

There are a number of substantive problems with the proposed legislation. The fundamental problem that the entire proposed initiative suffers from is a lack of clarity. Basic elements of legislation, such as designating the entity or individual responsible for certain tasks, are not included in the proposed initiative. Indeed, it is difficult to determine with precision what duties the undesignated entity or individual is charged to perform. Without substantial revision, it will be impossible to develop accurate short and long ballot titles for the proposed initiative. Certainly, it will be impossible to either implement or enforce the proposed initiative if it is approved in its current form. This office has isolated several particular areas of concern as noted below.

1. Ban on Entering Plutonium-Related Agreements

The proposed initiative states that “no state employee, including the governor, is allowed to sign or agree to anything that allows the reburial of this plutonium in Idaho.” This requirement appears to refer to a number of matters that are not specifically incorporated into the proposed initiative. For example, the proposed initiative refers to the “reburial” of plutonium, not the burial of plutonium. Therefore, if the initiative is intended to regulate the burial of plutonium, it will not accomplish that goal. On the other hand, if the proposed initiative is oriented only towards “reburial” of plutonium, this office recommends that the petitioners develop some specific findings that will help the public understand the distinction between “burial” and “reburial” of plutonium.

Likewise, the proposed initiative refers to “this plutonium” without specifying what plutonium is subject to regulation.

Another problem that may stem from the proposed ban on entering into any plutonium-related agreement is that states only have regulatory authority over plutonium when those states have first entered into a management agreement with the United States Nuclear Regulatory Commission (NRC) for the management of “special nuclear materials,” pursuant to 42 U.S.C. § 2021(b)(4). Currently, there is no agreement in place between the State of Idaho and the NRC. Therefore, a reviewing court is likely to rule that the proposed initiative is preempted to the extent it attempts to address “reburial” of plutonium in a manner that differs from the NRC’s program. See Boundary Backpackers v. Boundary County, 128 Idaho 371, 913 P.2d 1141 (1996) (state and local laws that specifically conflict with federal laws are invalid).

2. Written Accident Analysis

The proposed initiative next purports to require “written accident analysis” for every air quality permit issued by the state. Implicit in this requirement is that only those air quality permits related to plutonium would necessitate “written accident analysis.” If the drafter’s intention is to limit the new analysis to plutonium-related air quality permits, that intention should be explicitly incorporated into the proposed initiative.

The “written accident analysis” anticipated by the proposed initiative requires an unidentified state entity to “calculate the doses of radiation they inflict on Idahoans.” The proposed initiative does not designate a state agency to carry out this requirement. Also, it is not clear whether the word “they” refers to air quality permits or other potential releases of plutonium. Since this phrase is a pivotal piece of operative language, it should clearly identify both what action is required and the entity required to perform the action.

The proposed initiative identifies a number of specific scenarios that must be incorporated into the “written accident analysis.” The analysis must consider the effects of radiation doses to pregnant women and their babies, worst weather and geological conditions (particularly earthquakes). This analysis must be conducted to consider the “lifetime of project and the lifetime of nuclear waste created.” The unidentified entity that would perform this proposed analysis is not given any criteria that would guide its procedures and findings. It is unclear from the proposed language whether the analyzing entity is evaluating the effects of air quality permits, other “projects” or nuclear waste itself. Without greater detail, it will be very difficult for a state agency to implement this provision. It will also be virtually impossible for a reviewing court to assess a state agency’s compliance during the judicial review process.

3. Construction With Other Laws

The proposed initiative contains a sentence describing how it should be interpreted with other existing laws. The last paragraph states that “[a]ll state laws and regulations will be corrected to comply with the spirit and letter of this initiative and no federal laws will be broken.” As it is written, this provision will be very difficult to implement.

The last paragraph proposes to change all state laws so they will “comply with the spirit and letter of this initiative.” This office assumes that the drafter’s goal is to ensure that when the proposed initiative’s requirements conflict with another statute, the provisions contained in the proposed initiative will govern. When the legislature intends for a bill to control against other potentially conflicting legislation, the bill will frequently begin with the phrase, “notwithstanding any other provision of law,” or a similar phrase. The use of this standard statutory language will eliminate the need for a court to engage in the difficult, and uncertain, task of determining both the “spirit and letter” of the proposed initiative.

The last clause of the final paragraph states that “no federal laws will be broken.” As a matter of federal supremacy, federal law will control over state law when the two are in direct conflict. *See, e.g., Boundary Backpackers v. Boundary County*, 128 Idaho 371, 913 P.2d 1141 (1996). This is particularly true in cases involving the management of plutonium where, absent a specific agreement, federal jurisdiction is exclusive. Therefore, a reviewing court probably would not interpret the proposed initiative as violating federal law. A court will most likely view the phrase, “no federal laws will be broken,” as a rule of statutory interpretation clarifying that the proposed initiative should be interpreted in a manner that is consistent with existing federal law. However, if the provision purporting to prohibit the state from entering into an agreement allowing the “reburial” of plutonium cannot be reconciled with federal law, a reviewing court will not re-write the provision simply because another section of the proposed initiative states that “no federal laws will be broken.” Instead, a court will most likely ignore the prohibition contained in the proposed initiative in favor of federal law.

CONCLUSION

The proposed initiative’s apparent intent is to direct some entity of state government to take some specified action when a decision involving plutonium is before that state agency. However, there is no language in the proposed initiative that specifies exactly what must be done or which agency is expected to do it. When these substantive problems are combined with the enforcement flaws identified above, this office must conclude that the proposed initiative cannot be implemented as it is currently written. Indeed, without substantial revision of the proposed initiative, this office will be unable to develop accurate long and short ballot titles, as is required by Idaho Code § 34-1804.

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 Peter Rickards by mailing him a copy of this certificate of review.

Sincerely,

ALAN G. LANCE
Attorney General

Analysis by:

MATTHEW J. MCKEOWN
Deputy Attorney General