

**IDAHO  
ATTORNEY  
GENERAL'S  
ANNUAL REPORT**

**OPINIONS**

**SELECTED INFORMAL  
GUIDELINES**

**AND**

**CERTIFICATES OF REVIEW**

**FOR THE YEAR**

**2005**

**Lawrence G. Wasden  
Attorney General**



**IDAHO  
ATTORNEY  
GENERAL'S  
ANNUAL REPORT**

**OPINIONS**

**SELECTED INFORMAL  
GUIDELINES**

**AND**

**CERTIFICATES OF REVIEW**

**FOR THE YEAR**

**2005**

**Lawrence G. Wasden  
Attorney General**

Printed by The Caxton Printers, Ltd.  
Caldwell, Idaho

This volume should be cited as:  
2005 Idaho Att’y Gen. Ann. Rpt.

Thus, the Official Opinion 05-1 is found at:  
2005 Idaho Att’y Gen. Ann. Rpt. 5

Similarly, the Informal Guideline of June 15, 2005  
is found at:  
2005 Idaho Att’y Gen. Ann. Rpt. 31

The Certificate of Review of February 4, 2005  
is found at:  
2005 Idaho Att’y Gen. Ann. Rpt. 51

## CONTENTS

Roster of Attorneys General of Idaho .....	v
Introduction .....	vii
Roster of Staff of the Attorney General .....	1
Organizational Chart of the Office of the Attorney General .....	2
Official Opinions—2005 .....	5
Topic Index to Opinions .....	27
Table of Statutes Cited .....	27
Selected Informal Guidelines—2005 .....	31
Topic Index to Informal Guidelines .....	47
Table of Statutes Cited .....	47
Certificates of Review—2005 .....	51
Topic Index to Certificates of Review .....	85
Table of Statutes Cited .....	85



## ATTORNEYS GENERAL OF IDAHO

GEORGE H. ROBERTS	1891-1892
GEORGE M. PARSONS	1893-1896
ROBERT McFARLAND	1897-1898
S. H. HAYS	1899-1900
FRANK MARTIN	1901-1902
JOHN A. BAGLEY	1904-1904
JOHN GUHEEN	1905-1908
D. C. McDOUGALL	1909-1912
JOSEPH H. PETERSON	1913-1916
T. A. WALTERS	1917-1918
ROY L. BLACK	1919-1922
A. H. CONNER	1923-1926
FRANK L. STEPHAN	1927-1928
W. D. GILLIS	1929-1930
FRED J. BABCOCK	1931-1932
BERT H. MILLER	1933-1936
J. W. TAYLOR	1937-1940
BERT H. MILLER	1941-1944
FRANK LANGLEY	1945-1946
ROBERT AILSHIE (Deceased November 16)	1947
ROBERT E. SMYLIE (Appointed November 24)	1947-1954
GRAYDON W. SMITH	1955-1958
FRANK L. BENSON	1959-1962
ALLEN B. SHEPARD	1963-1968
ROBERT M. ROBSON	1969
W. ANTHONY PARK	1970-1974
WAYNE L. KIDWELL	1975-1978
DAVID H. LEROY	1979-1982
JIM JONES	1983-1990
LARRY ECHOHAWK	1991-1994
ALAN G. LANCE	1995-2002
LAWRENCE G. WARDEN	2003-



**Lawrence G. Wasden**  
**Attorney General**



---

## INTRODUCTION

Dear Fellow Idahoan:

The year 2005 has been active for the Office of the Attorney General. The Office successfully addressed rising caseloads in increasingly complex matters. Much of this success can be attributed to two factors: First, the quality of attorneys and staff within the Office of Attorney General, who are among the best in the State of Idaho; and, second, the Office is truly reaping the benefits of the consolidation of legal services, which occurred in 1995-1996.

By consolidating the legal services of the Office, the attorneys use their specialized areas of knowledge to create innovative problem-solving synergies. The Office is organized into seven divisions. Within each division, significant expertise is available for knowledge sharing across divisions to insure the clients of the Office of the Attorney General receive the most accurate, objective legal advice possible. Using these symbiotic areas of expertise has enabled the Office to keep up with the increasing demands for legal services in the State of Idaho, as well as addressing the increasing complexity of legal issues confronting the State.

This has been a successful year for the Office of the Attorney General in litigation. The Office continues to enjoy a success rate of over 90% in litigated cases. Caseloads also continue to climb. For example, the Criminal Appeals Unit topped 800 cases in the past year—a new high for that Unit. Even in the face of increasing caseloads, the Office has been able to maintain an excellent success rate. Some highlights of the past year include:

- The Office successfully enforced Idaho's Open Meeting Law in State of Idaho v. Ada County, thereby insuring that the use of executive sessions would not be abused.
- In Bingham County v. Ysursa, the Office successfully defended the work of the Citizen's Commission on Reapportionment, which was created by an amendment to Idaho's Constitution.
- The Office successfully defended the Legislature's constitutional ability to govern its own proceedings in Idaho Press Club v. The Legislature of the State of Idaho.
- The Office has continued to prosecute cases of public corruption around the state involving the misuse of public funds, abuses of position and power, and falsifying documents.

Our Consumer Protection Unit continues to be highly active. Last year, the Unit recovered more than \$600,000 for Idaho consumers. In 2005, the Consumer Protection Unit logged 7,111 entries of consumer assistance, 1,875 of which were consumer complaints. The Consumer Protection staff completed 22

enforcement actions last year, including significant Consumer Protection Act settlements with DirecTV, Blockbuster Inc., TAP Pharmaceutical Products, Inc., and State Farm Insurance. The Unit also resolved three lawsuits with drug manufacturers involving anti-competitive acts used to keep generic versions of the manufacturers' brand drugs off the market.

One of the Office's most significant public education projects in the past year was the creation of the ProtecTeens program. This program consists of a 22-minute video, a Family Contract for Internet Safety, a Parental Control Information Sheet, and the Office's Internet Safety Manual on a single compact disc. This program educates and highlights the dangers the Internet can pose to children who enter unmonitored chat rooms without the knowledge of their parents. This program increases the knowledge and awareness of both parents and students when it comes to Internet use. The program reinforces the historical message of "don't talk to strangers" by providing an updated look at the Internet. Almost 1 in 5 students are solicited over the Internet by a child sexual predator. To date, the Office has distributed over 15,000 copies of this program to parents and students around the State of Idaho.

The Office also provides significant support to the Legislature while it is in session. This past year, the Office assisted the Legislature by providing legal research and analysis on draft legislation that guided the Legislature in adopting an informed consent law for Idaho that should withstand constitutional scrutiny. The Intergovernmental and Fiscal Law Division handled 178 requests from legislators, generally providing them a written opinion within 48 hours. The Office also identified potential problem areas within existing law and brought forward recommendations for better laws in the areas of repeat sex offender sentencing, misuse of public funds, and end-of-life issues. The analysis and vigilance of the attorneys in the Office insures that Idaho's laws do not become outdated or irrelevant.

The Office of the Attorney General has enjoyed a year of success. Contained in this volume, you will find select opinions of this Office that have statewide significance. I also encourage you to visit the Office's website at <http://www.ag.idaho.gov>. On this page, you can find more details about the Office, as well as copies of all the Office's publications, including the Public Records Law Manual, the Open Meeting Law Manual, and the Ethics in Government Manual.

I wholeheartedly appreciate the opportunity to be your Attorney General, and on behalf of all the attorneys and staff in the Office, we look forward to continuing our successful representation of the State of Idaho.



LAWRENCE G. WASDEN  
Attorney General

# ANNUAL REPORT OF THE ATTORNEY GENERAL

## OFFICE OF THE ATTORNEY GENERAL LAWRENCE G. WASDEN ATTORNEY GENERAL 2005 STAFF ROSTER

### ADMINISTRATION

Sherman F. Furey III Chief Deputy	Brian Kane Assistant Chief Deputy	Janet Carter Executive Assistant	DeLayne Deck Secretary/Receptionist
--------------------------------------	--------------------------------------	-------------------------------------	--

### DIVISION CHIEFS

Tara Orr, Administration & Budget David High, Civil Litigation Terry Coffin, Contracts & Administrative Law Stephen Bywater, Criminal Law	Jeanne Goodenough, Human Services William vonTagen, Intergovernmental & Fiscal Law Clive Strong, Natural Resources
--	--

### DEPUTY ATTORNEYS GENERAL

Willard Abbott Lawrence Allen Stephanie Altig LaMont Anderson James Baird Kimberly Bailey David Barber Garrick Baxter B. Beehner-Kane Mary Jo Beig Brian Benjamin Nancy Bishop Craig Bledsoe Ralph Blount Jo-Ann Bowen Carol Brassey Chris Bromley Dallas Burkhalter Cheri Bush Scot Campbell Susan Campbell James Carlson Jody Carpenter	Corey Cartwright Carol Chaffee Jeremy Chou Kay Christensen Christopher Clark Doug Conde Rebekah Cude Timothy Davis Brett DeLange Thomas Donovan Darrell Early Stephanie Ebright Patrick Fanning Mary Feeny Lori Fleming Curt Fransen Roger Gabel Michael Gilmore Brad Goodsell Jennifer Grunke Joanna Guilfooy Stephanie Guyon	Susan Hamlin Harriet Hensley Kevin Hiatt Jane Hochberg John Homan Donald Howell J. Scott James Blair Jaynes Joseph Jones Kenneth Jorgensen Loma Jorgensen Emily Kane Brent King C. Nicholas Krema Chris Kronberg Lisa Kronberg Mark Kubinski Deena Layne Jerold Lee William Loomis Jessica Lorello Joseph Mallet	Rene Martin Candice McHugh Tim McNeese Michael McPeck Kathleen McRoberts Cheryl Meade Melissa Moody Kent Nelson Brian Nicholas Brian Oakey Carl Olsson Michael Orr Paul Panther Steve Parry Kira Pfisterer James Price Phillip Rassier Whitaker Riggs Kenneth Robins Jay Rosenthal Kristina Schindele Jeffrey Schrader	Steve Schuster Robert Schwarz Sandra Shaw Jason Siems Clay Smith Theodore Spangler Nicholas Spencer Marcy Spilker Dan Steckel Steve Strack Ken Stringfield Weldon Stutzman J. Ron Sutcliffe Evelyn Thomas Timothy Thomas Melissa Vandenberg Karl Vogt Donovan Walker Julie Weaver Peggy White Anne Baker Wilde Scott Woodbury Charles Zalesky
---	---	---	---	---

### INVESTIGATORS

Michael Dillon, Chief	Scott Birch	Jim Kouril	Scott Smith
-----------------------	-------------	------------	-------------

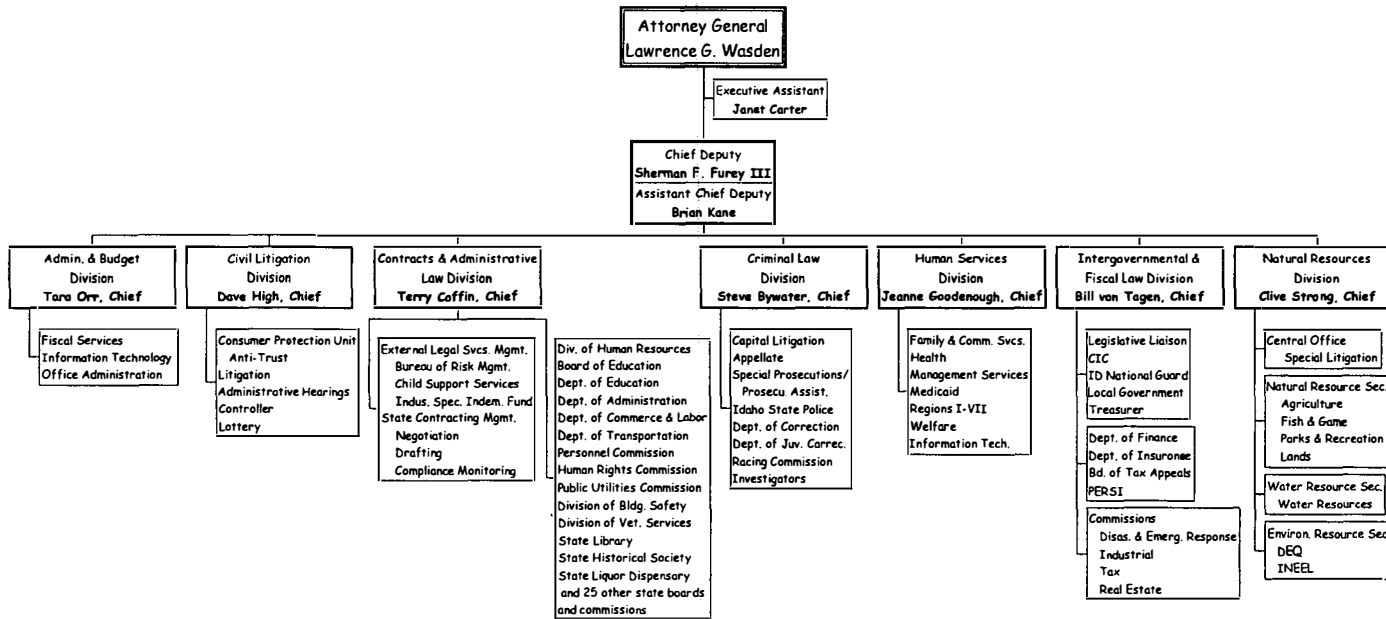
### PARALEGALS

Kathie Brack Lorraine Byerly Suzy Cooley Becky Harvey	Debbi Judd Vicki Kelly Marlene Klein Michelle MacKenzie	Bernice Myles Lori Peel Jean Rosenthal Tammy Swanson	Thomas Tharp Robert Wheeler Ray Williams Paula Wilson
--	--	---	--

### NON-LEGAL PERSONNEL

Jennifer Bithell Kriss Bivens Cloyd Patricia Boehm Karen Bolian Casey Boran Wanda Brock Robert Cooper Deborah Forgy	Marilyn Freeman Colleen Funk Rhonda Goade Leslie Gottsch Janene Hocking Trudy Jackson Eric Jensen	Cecil Jones Gerry Karpavich Beth Kittelmann Sheryl Spidell Leonard Patty McNeill Ronda Mein Jodi Miller Patricia Miller	Lynn Mize Rosean Newman Frances Nix Sharon Noice Angel O'Brien Rosie Panter Greg Rast	Micki Schlapia Aimee Stephenson Kali Steppe Jodie Stoddard Tamara Swanson Lonny Tutko Olga Valdivia Melissa Ward
--	---	--	---	---

Office of the Idaho Attorney General  
Organizational Chart - 2005



**OFFICIAL OPINIONS  
OF  
THE ATTORNEY GENERAL  
FOR THE YEAR 2005**

**LAWRENCE G. WASDEN**

**ATTORNEY GENERAL  
STATE OF IDAHO**



**ATTORNEY GENERAL OPINION NO. 05-1**

To: Mr. Gavin M. Gee, Director  
Idaho Department of Finance  
**STATEHOUSE MAIL**

Per Request for Attorney General's Opinion

**BACKGROUND**

The Equal Credit Opportunity Act (E.C.O.A.), 15 U.S.C. § 1691, *et seq.*, and its implementing regulation, Regulation B, 12 CFR § 202.1, *et seq.*, significantly limit the circumstances under which creditors may require a loan applicant's spouse or another person to sign the promissory note or loan contract in a credit transaction.

In view of Regulation B's spousal signature prohibitions, the basic question arising is whether creditors making loans to individual married loan applicants and strictly complying with Regulation B's spousal signature rules in the process, run the risk of not being able to collect on a loan in default if the married couple divorces and only the applicant spouse signed the promissory note or loan contract. Specifically, you requested an Attorney General Opinion regarding the following questions.

**QUESTIONS PRESENTED**

1.If a creditor receives an individual application for a loan from a married person residing in Idaho, in determining whether to require the signature of the non-applicant spouse on the promissory note or loan contract, does the creditor risk not being able to collect on the loan in the event of default if the creditor does not consider the possibility that the spouses may divorce?

2.If a creditor receives an individual application for a loan from a married person residing in Idaho, if the creditor will rely on both spouses' income to satisfy the loan in the event of default, can the creditor reach the income of the non-applicant spouse upon default of the loan after the parties divorce, if the non-applicant spouse has not signed the promissory note or loan contract?

3. If a creditor receives an individual application for a real property-secured loan from a married person residing in Idaho, will the creditor be able to reach the real property of the marital estate to satisfy the loan in the event of default if the non-applicant spouse signs a deed of trust or mortgage as to the subject real property but not the promissory note or loan contract?

4. If a creditor receives an individual application for an unsecured loan from a married person residing in Idaho, and if the creditor relies on community personal property to satisfy the loan in the event of default, will the creditor be able to reach the community personal property to satisfy the loan after the borrower divorces, if the non-applicant spouse has not signed the promissory note or loan contract?

5. Are other risks presented to creditors attempting to collect on loans in default, due to Idaho law's effect on spousal signatures on loan documents by married persons residing in Idaho?

### CONCLUSIONS

1. In the case of an individual application for a loan by a married person residing in Idaho, in determining which signatures should be required on the promissory note or loan contract, a creditor will incur significant risk in collecting on the loan in the event of default if the creditor does not consider the possibility of divorce.

2. In the case of an individual application for a loan by a married person residing in Idaho, even if a creditor relies on both spouses' income to satisfy the loan in the event of default, the creditor will not be able to reach the non-applicant spouse's income following divorce if that person has not signed the promissory note or loan contract.

3. In the case of an individual application for a community real property-secured loan by a married person residing in Idaho, the creditor should be able to reach the real property securing the loan following divorce, if the non-applicant spouse signs a deed of trust or mortgage to the subject property but not the promissory note or loan contract.



4. In the case of an individual application for an unsecured loan by a married person residing in Idaho, when the creditor relies on community personal property to satisfy the loan in the event of default, upon the borrower's divorce, the creditor may not be able to reach the non-applicant spouse's awarded share of community personal property, if the non-applicant spouse does not sign the promissory note or loan contract.

5. A creditor may be unable to collect on a loan in default in the event of the death of the signing spouse if the creditor relies on personal property of the spouses to satisfy an unsecured loan and the surviving spouse has not signed the promissory note or loan contract.

## ANALYSIS

### A. Statutory Authority

#### 1. Regulation B, 12 C.F.R. Part 202

The Equal Credit Opportunity Act (E.C.O.A.), 15 U.S.C. § 1691, *et seq.*, and its implementing regulation, Regulation B, 12 CFR § 202.1, *et seq.*, significantly limit the circumstances under which creditors may require a loan applicant's spouse or another person to sign the promissory note or loan contract in a credit transaction. Regulation B's signature rules are found at 12 CFR § 202.7(d). The general rule for signatures on loan documents appears in 12 CFR § 202.7(d)(1), which provides:

*Rule for qualified applicant.* Except as provided in this paragraph, a creditor shall not require the signature of an applicant's spouse or other person, other than a joint applicant, on any credit instrument if the applicant qualifies under the creditor's standards of creditworthiness for the amount and terms of the credit requested. A creditor shall not deem the submission of a joint financial statement or other evidence of jointly held assets as an application for joint credit.

Regulation B has special rules pertaining to unsecured credit, unsecured credit in community property states, and secured credit. Unsecured credit in community property states is governed by 12 CFR § 202.7(d)(3), which provides:

*Unsecured credit—community property states.* If a married applicant requests unsecured credit and resides in a community property state, or if the applicant is relying on property located in such a state, a creditor may require the signature of the spouse on any instrument necessary, or reasonably believed by the creditor to be necessary, under applicable state law to make the community property available to satisfy the debt in the event of default if:

(i) Applicable state law denies the applicant power to manage or control sufficient community property to qualify for the credit requested under the creditor's standards of creditworthiness; and

(ii) The applicant does not have sufficient separate property to qualify for the credit requested without regard to the community property.

In the case of secured credit, 12 CFR § 202.7(d)(4) provides:

*Secured credit.* If an applicant requests secured credit, a creditor may require the signature of the applicant's spouse or other person on any instrument necessary or reasonably believed by the creditor to be necessary, under applicable state law to make the property being offered as security available to satisfy the debt in the event of default, for example, an instrument to create a valid lien, pass clear title, waive inchoate rights, or assign earnings.

As will be noted from the discussion of relevant Idaho law appearing below, complying with Regulation B's signature rules in applications for unsecured credit by an individual married applicant is a difficult task for creditors in Idaho. To add to that difficulty, adherence to Regulation B's signature rules and the Official Staff Interpretations of the rules may reduce an Idaho creditor's prospects of successfully collecting on a loan in default.

## 2. Idaho Code

Certain Idaho statutes and case law construing those statutes affect a creditor's ability to pursue a debtor's former spouse or his or her property to satisfy a debt following divorce. The threshold issue in such circumstances is the characterization of property of the spouses as either separate property or community property.

For example, Idaho Code § 32-903 provides:

**Separate property of husband and wife.**—All property of either the husband or the wife owned by him or her before marriage, and that acquired afterward by either gift, bequest, devise, or descent, or that which either he or she shall acquire with the proceeds of his or her separate property, by way of moneys or other property, shall remain his or her sole and separate property.

Idaho Code §§ 32-910 and 32-911 provide that a spouse's separate property is not subject to the individual or separate debts of the other spouse.

Idaho Code § 32-912 provides that either spouse has the ability to manage and control community property and to bind and encumber community property, with the exception of community real property. This statute further provides that "any community obligation incurred by either the husband or the wife without the consent in writing of the other shall not obligate the separate property of the spouse who did not so consent . . . ."

These statutes suggest that one spouse can obligate the community property of the marital estate and make that property available to a creditor desiring to execute on that property in the event of loan default, in the case of an unsecured loan incurred without the signature of the other spouse to the promissory note or loan obligation. Cases construing these statutes, however, attach significant qualifications to this conclusion.

## B. **Case Law**

One of the more recent court decisions considering the liability of spouses and the availability of their property to creditors is *In re Hicks*, 300

B.R. 372 (Bankr. D. Idaho 2002). In Hicks, the Idaho Bankruptcy Court reviewed many of the Idaho community property rules pertaining to the debtor-creditor relationship. As to creditors' rights against separate and community property, the court noted:

The characterization of property as separate or community is important in determining creditors' rights of recourse against each type of property. As explained in *Twin Falls Bank & Trust Co. v. Holley*, 111 Idaho 349, 723 P.2d 893 (1986), "under the community property system . . . when either member of the community incurs a debt for the benefit of the community, the property held by the marital community becomes liable for such a debt and the creditor may seek satisfaction of his unpaid debt from such property." In addition, the separate property of the spouse who incurs an obligation, whether that obligation benefits the marital community or only the individual, is subject to the creditor's claim. *Id.* at 897; *Williams v. Paxton*, 98 Idaho 155, 559 P.2d 1123, 1132 (1976).

300 B.R. at 376.

Following its discussion of the ability of creditors to look to separate or community property to satisfy debts, the court noted limitations on that ability:

[A] spouse's separate property is not subject to seizure to satisfy a debt incurred by the other spouse acting alone. Specifically, Idaho Code § 32-910 provides that "[t]he separate property of the husband is not liable for the debts of the wife contracted before marriage." So, too, Idaho Code § 32-911 provides that "[t]he separate property of the wife is not liable for the debts of her husband, but is liable for her own debts contracted before or after marriage." Finally, Idaho Code § 32-912 states that "any community obligation incurred by either the husband or the wife without the consent in writing of the other shall not obligate the separate property of the spouse who did not so consent . . . ." *See also*

*Holley*, 723 P.2d at 897 (noting a bank would have a claim against a husband's separate property and any community property when borrowed funds benefited the marital community but only the husband signed a note).

300 B.R. at 376.

The Bankruptcy Court's survey of Idaho community property statutes and cases affecting creditors' rights in Hicks was not intended as an exhaustive listing of the limitations placed on those rights.

There is a rebuttable presumption in Idaho law that property acquired during the marriage is community property. *Simplot v. Simplot*, 96 Idaho 239, 246; 526 P.2d 844, 851 (1974). Determining whether property acquired on credit is community or separate is more difficult than in other forms of property acquisition. Winn v. Winn, 105 Idaho 811, 813, 673 P.2d 411, 413 (1983). Factors such as the character of any property given in exchange, the procurement of the loan, and the use of the loan proceeds are part of the inquiry. *Id.*, 673 P.2d at 413, 414.

A court analyzing whether the community is liable for a loan will consider factors such as the source of repayment and the basis of credit relied upon by the lender. Winn, 673 P.2d at 415. The intent of the spouses is a key factor in determining whether a loan is a separate or community obligation. Under the California Rule, the intent of the lender conclusively determines the nature of the loan. *Id.* The Idaho Supreme Court has rejected that approach and instead looks to the intent of the spouses. Factors such as the nature of the down payment, the names on the deed, and the party who signed the documents of indebtedness are considered by Idaho courts to be probative of intent. *Id.*

From a creditor's perspective, proving the intent of the borrowers at the time the loan was made may be difficult. The intent of the married borrowers as to the character of the loan might not be shared with the lender at the time the loan is made. Borrowers could very well change their view of whether an obligation was community or separate in the event of an action by a creditor to collect on a debt following divorce or the death of one of the spouses.

In First Idaho Corporation v. Davis, 867 F.2d 1241 (9th Cir. 1988), the creditor was not able to obtain a judgment against a surviving spouse for a loan in default, or reach the couple's community property to satisfy the loan, because only the deceased husband had signed the note, and the creditor did not allege in the suit that the loan was for the benefit of the community. The surviving spouse also claimed that the real property securing the loan belonged to her deceased husband. Davis, 867 F.2d at 1243.i

Under the authorities discussed above, even if it were proven that a loan obligation benefited the community, a creditor would not be able to collect from a spouse or his or her separate property in the event of loan default, if the spouse did not sign the promissory note. Hicks, 300 B.R. at 376 (citing Twin Falls Bank & Trust v. Holley, 723 P.2d at 897). The question then presented is whether a creditor can look to community assets distributed to a non-signing spouse in a divorce.

In Twin Falls Bank & Trust v. Holley, 111 Idaho 349, 723 P.2d 893 (1986), the husband, John Holley, was the only signer on a promissory note to the bank. The note was signed on June 26, 1981. At some point after the note was signed, the bank became aware of the fact that John and his wife Joan had filed for divorce. The divorce was granted on August 28, 1981. After the loan became due on September 28, 1981, the bank and Mr. Holley executed an "extension agreement" in which the bank agreed to extend the due date of the note until November 22, 1981. As with the promissory note, only John Holley signed the extension agreement. Holley, 723 P.2d at 895.

John Holley ultimately defaulted on the loan and filed for bankruptcy. After the bank liquidated some equipment that secured the loan, \$65,000 of the original principal balance of \$125,000 remained due and owing, along with more than \$50,000 in interest. *Id.*, 723 P.2d at 895. In an attempt to collect the loan balance, the bank brought suit against Joan Holley. The district court granted summary judgment in favor of Joan Holley, and the bank appealed.

On appeal, the Idaho Supreme Court noted that Joan Holley was not contractually liable for the debt. The court set forth some principles giving clarification to the rights of creditors and borrowers when the borrowers divorce. The court pointed out that the phrase "community debt" is imprecise and misleading:

The marital community is not a legal entity such as a business partnership or corporation (citations omitted). . . . To the extent a lending institution enters into a creditor-debtor relationship with either member of the marital community or with both members, it does so on a purely individual basis. Thus, the lending institution may have a creditor-debtor relationship with either spouse separately or with both jointly.

723 P.2d at 896.

The Idaho Supreme Court held in Holley that there is no such thing as a community obligation in the contractual sense. Spouses are liable to a creditor individually or jointly, depending on which spouse or spouses have signed the promissory note or loan contract.

As to the effect of spouses' co-equal management powers over community assets, the court stated:

[W]hen either member of the community incurs a debt for the benefit of the community, the property held by the marital community becomes liable for such a debt and the creditor may seek satisfaction of his unpaid debt from such property.

723 P.2d. at 897 (citations omitted).

The court then discussed the ability of creditors to look to community assets awarded to a non-signing spouse in a divorce, holding as follows:

Absent allegations of such contractual liability, a creditor may not, with one exception, proceed against community assets distributed to Mrs. Holley pursuant to a divorce decree. The sole exception to this rule was set forth in our case of *Spokane Merchants Ass'n v. Olmstead*, 80 Idaho 166, 327 P.2d 385 (1958). In that case, we held that where, pursuant to divorce proceedings, one member of the marital community is responsible for a community obligation

but is not awarded sufficient assets to satisfy such a debt, a creditor may properly seek satisfaction for the debt from community property distributed to the other spouse.

723 P.2d at 897.

The court noted that under the facts presented in *Holley*, for the bank “to avail itself of the exception set forth in the Olmstead case, it must allege and prove that Mr. Holley was not awarded sufficient community assets which would enable him to satisfy the community debt which he assumed pursuant to the property settlement agreement.” 723 P.2d at 897, 898.

It has been noted that the Idaho Supreme Court in *Holley* “significantly restricted creditors’ rights under a property settlement agreement by choosing not to follow the general rule adopted in other community property states.” Mont E. Tanner, *Twin Falls Bank & Trust v. Holley: Restricting Creditors’ Rights Under A Property Settlement Agreement—A Departure That Sets Idaho Apart*, 26 Idaho L. Rev. 595, 595 (1989/1990).

Case law in other community property jurisdictions clearly states that property acquired from community assets pursuant to a property settlement, contract, or gift becomes the spouse’s separate property and remains subject to the appropriate liability for debts of the community and of the other spouse which were incurred during marriage. The basis for the rule that spouses may not alter ownership rights between themselves in a manner which prejudices the rights of pre-existing creditors may have derived in part from the common law theory that “a divorce action . . . cannot adjudicate the rights of creditors who are not parties to the action.”

*Id.*, at 600 (citations omitted).

From the foregoing review of Idaho case law, one may conclude that a creditor may not normally look to community assets distributed to a non-signing spouse in a divorce to satisfy a community obligation incurred by the signing spouse. The only exception is when the signing spouse was not awarded sufficient community assets to satisfy the obligation. In such event, the creditor must allege and prove the insufficient award in order to reach



community assets in the hands of the non-signing divorced spouse. Holley, 723 P.2d at 897, 898. The result would not be changed if the community property distributed to the debtor spouse is no longer available or resalable by the creditor to satisfy the debt. Additionally, the creditor will need to allege and prove that the obligation was incurred for the benefit of the community. First Idaho Corporation v. Davis, 867 F.2d at 1243.

### C. Application of Authority to Questions Presented

#### 1. Spousal Loan Obligations and the Prospect of Divorce

Idaho courts have made it clear that if only one spouse signs a promissory note or loan obligation, the non-signing spouse is not personally liable for an obligation, even if the obligation benefited the community. Hicks, 300 B.R. at 376; Holley, 723 P.2d at 896. The non-signing spouse's separate property may not be looked to in satisfaction of the debt. Hicks, 300 B.R. at 376. Further, a creditor may not be able to look to community property awarded to a non-signing spouse in a divorce, unless the creditor alleges and proves that the obligated spouse was awarded insufficient community property to satisfy the debt. Holley, 723 P.2d at 897.

It has been recognized that Idaho law imposes a unique consequence upon creditors dealing with married borrowers:

Idaho case law and statutes have been construed by the Idaho Supreme Court to produce an anomaly within the community property jurisdictions. . . . The anomaly specifically is that Idaho takes a strict contractual approach and will not allow a creditor to pursue a nondebtor spouse's separate property, including the nondebtor spouse's separate property that was formerly community property before the divorce. With the exception of California, all other community property states provide some protection for the creditor upon divorce, possibly more than the creditor bargained for, by allowing the recently transmuted separate property to still be subject to execution and attachment.

Lamont C. Loo, *Contractual Creditor Rights Upon Dissolution of Marriage: Revisiting Twin Falls Bank & Trust v. Holley, Proposal: A Tripartite Analysis*, 30 Idaho L. Rev. 777, 782 (1994).

In view of the authorities discussed above, when a married person in Idaho applies individually for credit, a prudent creditor should consider the possibility of divorce in deciding whether to require both spouses to sign the promissory note or loan contract. Even though spouses in Idaho have co-management powers as to community property and the ability to bind and encumber community personal property (Idaho Code § 32-912), in attempting to satisfy a debt, a creditor might not be able to reach community property awarded to a non-signing spouse in a divorce, even if the debt benefited the community. Holley, 723 P.2d at 897.

Regulation B prohibits a creditor from considering the possibility of divorce when an applicant requests unsecured credit in a non-community property state and relies upon property owned jointly with another person to satisfy credit standards. The Official Staff Interpretation of Regulation B, Paragraph 7(d)(2)(1)(i), requires that the creditor's determination of the value of the applicant's interest in the jointly owned property be based on the existing form of ownership, and not on the possibility of subsequent change, including divorce. It is not clear from the language of Paragraph 7(d)(2)(1)(i) if the prohibition on considering divorce applies to the remainder of Regulation B. In Idaho, therefore, in evaluating an individual loan application made by a married person, a prudent lender should consider the possibility that community property may be transmuted into separate property of the non-applicant spouse following divorce.

## 2. Reliance on Spouse's Income

When a creditor is relying on both spouses' income in granting credit to a loan applicant, or the income of the non-applicant spouse, a prudent creditor would require both spouses to sign the promissory note or loan obligation. Non-signing spouses are not personally liable for a debt, even if the loan benefited the community. Hicks, 300 B.R. at 376; Holley, 723 P.2d at 896. Similarly, the separate property of a non-signing spouse cannot be reached to satisfy a debt, including a debt benefiting the community. Hicks, 300 B.R. at 376. The income of a formerly married person is that person's

separate property following the date of entry of a divorce decree. Shill v. Shill, 115 Idaho 115, 765 P.2d 140, 143-46 (1988).

In view of the fact that income of a married person residing in Idaho becomes separate property following a divorce, a creditor should require each person whose income is relied upon in making the loan to sign the promissory note or loan obligation. Failure to do so in the event of the borrower's divorce likely places the income of the non-signing spouse beyond the creditor's reach.

This result is contemplated in the commentary to Regulation B:

*Reliance on income of another person—individual credit.* An applicant who requests individual credit relying on the income of another person (including a spouse in a non-community property state) may be required to provide the signature of the other person to make the income available to pay the debt. In community property states, the signature of a spouse may be required if the applicant relies on the spouse's separate income. If the applicant relies on the spouse's future earnings that as a matter of state law cannot be characterized as community property until earned, the creditor may require the spouse's signature, but need not do so—even if it is the creditor's practice to require the signature when an applicant relies on the future earnings of a person other than a spouse. (See §202.6(c) on consideration of state property laws.)

Official Staff Interpretations to Regulation B, Paragraph 202.7(d)(5) (emphasis added).

3. Signatures of Spouses on Promissory Notes, Deeds of Trust, and Mortgages

Federal Reserve Board Regulation B contains a signature rule pertaining to applications for secured credit. 12 CFR § 202.7(d)(4) provides:

*Secured credit.* If an applicant requests secured credit, a creditor may require the signature of the applicant's

spouse or other person on any instrument necessary, or reasonably believed by the creditor to be necessary, under applicable state law to make the property offered as security available to satisfy the debt in the event of default, for example, an instrument to create a valid lien, pass clear title, waive inchoate rights, or assign earnings.

The Idaho statute relevant to 12 CFR § 202.7(d)(4) is Idaho Code § 32-912. It provides in pertinent part:

[N]either the husband nor wife may sell, convey, or encumber the community real estate unless the other joins in executing the sale agreement, deed, or other instrument of conveyance by which the real estate is sold, conveyed, or encumbered . . . .

The Idaho Supreme Court has considered the effect of a non-applicant spouse's signature on a mortgage or deed of trust but not the promissory note. In Pocatello Railroad Employees Federal Credit Union v. Galloway, 117 Idaho 739, 791 P.2d 1318 (1990), both spouses signed a deed of trust to their residence but only Mr. Galloway signed the promissory note. On appeal of a judgment of foreclosure on the property following the Galloways' default on the promissory note, the Galloways argued that Mrs. Galloway's lack of signature on the promissory note failed to meet the requirement of Idaho Code § 32-912 that both spouses join in encumbering community real property. The Idaho Supreme Court found that Mr. Galloway's signature on the note, accompanied by both spouses' signatures on the deed of trust, was sufficient to give force to the note and encumber the property. Pocatello Railroad Employees Federal Credit Union, 791 P.2d at 1321.

A married person's homestead claim under Idaho law cannot be posed as a bar to a real property foreclosure, if the person claiming the homestead has executed a deed of trust or mortgage, thereby giving a creditor a consensual lien on the property. Idaho's homestead law provides in pertinent part:

**55-1005. To what judgments subject**—The homestead is subject to execution or forced sale in satisfaction of judgments obtained:

....

(3) On debts secured by mortgages, deeds of trust or other consensual liens upon the premises, executed and acknowledged by the husband and wife or by an unmarried claimant.

In view of the foregoing authority, a non-applicant spouse would likely not be able to prevent a foreclosure on real property in the event of default, if the non-applicant spouse has signed the mortgage or deed of trust in the loan transaction, but not the promissory note or loan obligation.

One exception to the above general rules applies when a creditor acts in collusion with one spouse to hide an obligation from the other spouse. In that instance, the creditor's contract may not be enforceable against the innocent spouse. Smith v. Idaho State University Federal Credit Union, 114 Idaho 680, 760 P.2d 19 (1988). Although possible, it is unlikely that a non-applicant spouse was unaware of a loan if that spouse signed a mortgage or deed of trust to secure the loan with community real property.

In summary, absent collusion between the creditor and a spouse who is the sole signer on a promissory note, the non-obligated spouse's signature on a deed of trust or mortgage should be sufficient to make the real property available to satisfy a secured loan in the event of default.

#### 4. Unsecured Loans and Community Personal Property

As indicated previously, Regulation B has specific rules governing unsecured credit applications in community property states. 12 CFR § 202.7(d)(3) provides:

*Unsecured credit—community property states.* If a married applicant requests unsecured credit and resides in a community property state, or if the applicant is relying on

property located in such a state, a creditor may require the signature of the spouse on any instrument necessary, or reasonably believed by the creditor to be necessary, under applicable state law to make the community property available to satisfy the debt in the event of default if:

(i) Applicable state law denies the applicant power to manage or control sufficient community property to qualify for the credit requested under the creditor's standards of creditworthiness; and

(ii) The applicant does not have sufficient separate property to qualify for the credit requested without regard to the community property.

At first blush, Idaho Code § 32-912 appears to give each spouse the unfettered ability to manage, control, bind, and encumber community personal property. However, some of the cases discussed above, including Hicks, Holley, Davis, Olmstead, and Shill, suggest the conclusion that an individual spouse applying for unsecured credit may not have the power to manage or control all community property, due to the possibility of divorce.

As noted above, Idaho and California depart from the general rule that creditors can attach and execute upon community personal property that transmuted into separate property following divorce. The rule followed by Idaho courts is that creditors may not normally look to community personal property awarded to a spouse in a divorce if the spouse receiving that property did not sign the promissory note or loan contract. Holley, 723 P.2d at 897. This is true, even if the debt benefited the community. The only exception is when the creditor alleges and proves that the signing spouse was awarded insufficient community property to satisfy the debt and the spouses intended for the debt to be a community obligation. *Id.*, and Davis, 867 F.2d at 1243.

In light of the above-discussed court decisions, in Idaho, state law in effect denies an individual married loan applicant the power to manage and control sufficient community personal property to satisfy a creditor's standards of creditworthiness, within the meaning of 12 CFR § 202.7(d)(3)(i). This is the case when the creditor will rely on community personal property

to satisfy an unsecured loan in the event of default. If an Idaho applicant does not have sufficient separate property to qualify for the credit requested, a creditor may reasonably believe that the signature of the applicant's spouse is necessary on the promissory note or loan contract.

5. Risks Presented Under Idaho Probate Law

In the case of an individual application for an unsecured loan by a married person in Idaho, if the creditor relies on personal property belonging to the spouses to satisfy the loan in the event of default, and if the signing spouse dies, some or all of the personal property may be beyond the creditor's reach, due to provisions in Idaho probate law.

Idaho Code § 15-2-403 provides:

**Exempt property.**—In addition to any homestead allowance, the decedent's surviving spouse is entitled from the estate to value, not exceeding ten thousand dollars (\$10,000) in excess of any security interests therein, in household furniture, automobiles, furnishings, appliances and personal effects. If there is no surviving spouse, the decedent's children are entitled jointly to the same value unless the decedent's will provides otherwise. If encumbered chattels are selected and if the value in excess of security interests, plus that of other exempt property, is less than ten thousand dollars (\$10,000), or if there is not ten thousand dollars (\$10,000) worth of exempt property in the estate, the spouse or children are entitled to other assets of the estate, if any, to the extent necessary to make up the ten thousand dollar (\$10,000) value. Rights to exempt property and assets needed to make up a deficiency of exempt property have priority over all claims against the estate . . . .

(Emphasis added.) Under Idaho Code § 15-2-403, personal property belonging to the decedent at the time of death, up to the value of \$10,000, will be beyond the reach of a creditor if the surviving spouse did not sign the promissory note or loan contract and either the surviving spouse or the decedent's children assert their claim under this statute.

In addition to the exempt property claim given to a decedent's surviving spouse and children under Idaho Code § 15-2-403, Idaho Code § 15-2-404 gives the decedent's surviving spouse and minor children a reasonable allowance (family allowance) in money out of the estate for their maintenance, during the administration of the estate or for a period of one year if the estate is inadequate to discharge allowed claims. This allowance is in addition to the survivor's homestead allowance under Idaho Code § 15-2-402 and the exempt property allowance under Idaho Code § 15-2-403. In determining the amount of the family allowance under Idaho Code § 15-2-404, pursuant to Idaho Code § 15-2-405, the personal representative may pay the survivors a lump sum not exceeding eighteen thousand dollars (\$18,000) or periodic payments of one thousand five hundred dollars (\$1,500) monthly for a period of one year.

The combined effect of Idaho Code §§ 15-2-403, 15-2-404, and 15-2-405 likely puts personal property belonging to the signing spouse at the time of death, with a value of up to \$28,000, beyond a creditor's reach in the event of the death of the sole spouse who signed the promissory note or loan obligation.

### **SUMMARY**

In summary, creditors evaluating individual loan applications from married borrowers residing in Idaho diminish their prospects of collecting on the loan in the event of default if they do not consider the possibility that the borrower may divorce. If the non-applicant's spouse does not sign the promissory note or loan contract, the non-applicant spouse's income will be beyond the creditor's reach if the borrower divorces. In the case of an unsecured loan application by an individual married applicant in Idaho, if the creditor relies on community personal property to satisfy the loan in the event of default, some of that personal property may be beyond the creditor's reach in the case of divorce if the non-applicant spouse did not sign the promissory note or loan contract. In the event of the death of the signing spouse, if the creditor relies on personal property to satisfy an unsecured loan in the event of default, and the surviving spouse has not signed the promissory note or loan obligation, in attempting to satisfy the loan in default, the borrower's personal property may be beyond the creditor's reach.



---

**AUTHORITIES CONSIDERED****1. Idaho Statutes:**

Idaho Code § 15-2-402.  
Idaho Code § 15-2-403.  
Idaho Code § 15-2-404.  
Idaho Code § 15-2-405.  
Idaho Code § 32-903.  
Idaho Code § 32-910.  
Idaho Code § 32-911.  
Idaho Code § 32-912.  
Idaho Code § 55-1005.

**2. Federal Cases:**

First Idaho Corp. v. Davis, 867 F.2d 1241 (9th Cir. 1988).  
In re Hicks, 300 B.R. 372 (Bankr. D. Idaho 2003).

**3. Idaho Cases:**

Pocatello Railroad Employees Federal Credit Union v. Galloway,  
117 Idaho 739, 791 P.2d 1318 (1990).  
Shill v. Shill, 115 Idaho 115, 765 P.2d 140 (1988).  
Smith v. Idaho State University Federal Credit Union, 114 Idaho 680,  
760 P.2d 19 (1988).  
Twin Falls Bank & Trust Co. v. Holley, 111 Idaho 349, 723 P.2d 893  
(1986).  
Winn v. Winn, 105 Idaho 811, 673 P.2d 411 (1983).  
Williams v. Paxton, 98 Idaho 155, 559 P.2d 1123 (1976).  
Simplot v. Simplot, 96 Idaho 239, 526 P.2d 844 (1974).

**4. Federal Regulation:**

12 CFR 202.7 (2005) Federal Reserve Board Regulation B.  
12 CFR 202, Supp. I.

**5. Idaho Law Review:**

Lamont C. Loo, *Contractual Creditor Rights Upon Dissolution of Marriage: Revisiting Twin Falls Bank & Trust v. Holley, Proposal: A Tripartite Analysis*, 30 Idaho L. Rev. 777 (1994).

Mont E. Tanner, *Twin Falls Bank & Trust v. Holley: Restricting Creditors' Rights Under A Property Settlement Agreement — A Departure That Sets Idaho Apart*, 26 Idaho L. Rev. 595 (1989/1990).

Dated this 20th day of May, 2005.

LAWRENCE G. WASDEN  
Attorney General

**Analysis by:**

Joseph B. Jones  
Deputy Attorney General  
Intergovernmental & Fiscal Law Division

---

<sup>1</sup> In *Davis*, the Ninth Circuit did not discuss the presumption that property acquired during the marriage is community. Possibly, the surviving spouse's statement that the property belonged to her deceased husband, with nothing in the record to refute that assertion, overcame the presumption.

Topic Index  
and  
Tables of Citation  
OFFICIAL OPINIONS  
2005



2005 OFFICIAL OPINIONS INDEX

---

TOPIC	OPINION	PAGE
<b>FINANCE</b>		
Creditor evaluating individual loan application from married Idaho applicant incurs significant risk collecting on defaulted loan if creditor failed to consider possibility of divorce; if non-applicant spouse did not sign promissory note or loan contract, non-applicant spouse's income or share of community property may be beyond creditor's reach if borrower divorces . . . . .	05-1	5
Creditor may be unable to collect on defaulted loan to married Idaho applicant after death of signing spouse if creditor relied on personal property to satisfy unsecured loan and surviving spouse did not sign promissory note or loan obligation . . . . .	05-1	5

**UNITED STATES CODE CITATIONS**

SECTION	OPINION	PAGE
15 U.S.C. § 1691, et seq. . . . .	05-1	5

**IDAHO CODE CITATIONS**

SECTION	OPINION	PAGE
15-2-402 . . . . .	05-1	5
15-2-403 . . . . .	05-1	5
15-2-404 . . . . .	05-1	5
15-2-405 . . . . .	05-1	5
32-903 . . . . .	05-1	5
32-910 . . . . .	05-1	5
32-911 . . . . .	05-1	5
32-912 . . . . .	05-1	5
55-1005 . . . . .	05-1	5



**ATTORNEY GENERAL'S  
SELECTED  
INFORMAL GUIDELINES  
FOR THE YEAR 2005**

**LAWRENCE G. WASDEN**

**ATTORNEY GENERAL  
STATE OF IDAHO**





## INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

---

June 15, 2005

Mr. Cary Colaianni  
Boise City Attorney  
P.O. Box 500  
Boise, ID 83701-0500

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

Dear Mr. Colaianni:

#### **BACKGROUND**

The City of Boise (the “City”) is currently considering whether it may apply city ordinances to regulate the conduct of recreational floaters utilizing the navigable waters of the Boise River (the “River”). Traditionally, the City has not enforced its municipal code on the navigable waters of the River, based on the perception that law enforcement upon navigable waters falls within the jurisdiction of the Ada County Sheriff. Because the River winds through the heart of the City, and is bordered by the Boise Greenbelt and several City parks, there is an interest in ensuring that there is a consistent set of regulations governing conduct on both the water and the shores of the River. A particular focus is the consumption of alcohol by recreational users of the River. Existing city ordinances provide that, except as otherwise permitted by statute or ordinance, it shall be unlawful for any person to possess “any open container of any alcoholic beverage” or to “consume any alcoholic beverage . . . upon any public or private property open to the public.” Boise Municipal Code § 6-01-36.

#### **QUESTIONS PRESENTED**

- (1) Whether the City of Boise may enforce city ordinances upon the navigable waters of the Boise River.
- (2) Whether state laws preempt the City of Boise from prohibiting recreational users of the Boise River from possessing and consuming alcoholic beverages while floating the River.

## CONCLUSIONS

(1) The City of Boise may enforce city ordinances upon the navigable waters of the Boise River, provided it has taken the actions necessary to extend its corporate boundaries over the waters of the River.

(2) Because the State of Idaho has not undertaken to regulate consumption of alcoholic beverages by recreational floaters such as those on the Boise River, the City of Boise may undertake to do so consistent with the authority granted to municipalities in article XII, § 2 of the Idaho Constitution.

## ANALYSIS

The Idaho Constitution grants municipalities the “authority to make police regulations not in conflict with general laws, coequal with the authority of the legislature to pass general police laws.” Clyde Hess Distributing Co. v. Bonneville County, 69 Idaho 505, 512, 210 P.2d 798, 801 (1949). The specific constitutional provision provides as follows:

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 the general laws.

Idaho Const. art. XII, § 2. This provision, in combination with fundamental constitutional restrictions on the exercise of police powers, results in:

three general restrictions that apply to ordinances enacted under the authority conferred by this constitutional provision: “(1) the ordinance or regulation must be confined to the limits of the governmental body enacting the same, (2) it must not be in conflict with other general laws of the state, and (3) it must not be an unreasonable or arbitrary enactment.”

Hobbs v. Abrams, 104 Idaho 205, 207, 657 P.2d 1073, 1075 (1983), quoting State v. Clark, 88 Idaho 365, 374, 399 P.2d 955, 960 (1965). For purposes of

## INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

---

this analysis, we assume that any ordinances applied to users of the River, including a ban on public alcohol consumption, would be neither unreasonable nor arbitrary. Generally speaking, municipal police powers include the authority to prohibit or restrict the consumption of alcohol in public locations. 6A Eugene McQuillin, The Law of Municipal Corporations § 24.169 (3d ed. 1997).

Here, in determining the City's authority to regulate the conduct of recreational floaters on the Boise River, the threshold inquiry is whether "the ordinance or regulation [is] confined to the limits of the governmental body enacting the same." State v. Clark, 88 Idaho at 374, 399 P.2d at 960. The Legislature has granted cities limited authority to include navigable waterways within their limits:

Cities situated on navigable lakes and streams, when the corporate boundaries or limits of such cities extend to the shorelines of such lakes or streams, shall have power by ordinance to fix, determine or extend its corporate boundaries or limits over the waters of such lakes or streams for a distance of one fourth (1/4) of a mile from the low-water mark of such navigable lakes, and for a distance of seventy-five (75) feet from the low-water mark of such navigable streams.

Idaho Code § 50-221. In State v. Finney, 65 Idaho 630, 150 P.2d 130 (1944), the Idaho Supreme Court examined Idaho Code § 50-221 (then codified as 49-1149) in the context of a municipal ordinance that prohibited the mooring of residential houseboats offshore of the City of Coeur d'Alene. The court held:

It was undoubtedly the intention of the Legislature in thus expressly authorizing incorporated cities and villages situated on navigable streams and lakes, to include portions thereof within their respective boundaries, as authorized by the Act, for the purpose of enabling the municipalities to exercise control over this included and added territory, to the same extent and for the same purpose as it is generally empowered with respect to other territory within the corporate boundaries.

## INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

---

Finney, 65 Idaho at 634, 150 P.2d at 131. Because the portion of the Lake involved had been “taken into and made a part of the City of Coeur d’Alene by Ordinance,” *id.* at 633, 150 P.2d at 131, the court upheld the prohibition on houseboats as a proper exercise of the City’s police power.

Under Idaho Code § 50-221 and Finney, the threshold determination in any exercise of municipal jurisdiction over conduct on the Boise River is whether the City has taken affirmative action “to fix, determine or extend its corporate boundaries or limits over the waters of” such stream. If the City has failed to take such action, the inquiry is at an end.

We have not, for purposes of this opinion, undertaken the detailed analysis of City ordinances fixing and determining the boundaries of the City of Boise that would be necessary to determine which portions of the Boise River, if any, have been included within the limits of the City of Boise pursuant to Idaho Code § 50-221. Such an inquiry is best undertaken by the City itself. Rather, for purposes of analysis only, we assume that the City’s inquiry is limited to those portions of the River over which the City has extended its limits.

If, in fact, Boise has extended its corporate boundaries or limits over the waters of the Boise River, the sole remaining inquiry is whether prohibitions on the possession and consumption of intoxicating beverages are “in conflict with . . . the general laws” of the state addressing the use of navigable waterways. Conflict may arise in two circumstances. First, a conflict may be direct, “expressly allowing what the state disallows, and vice versa.” Envirosafe Services of Idaho v. County of Owyhee, 112 Idaho 687, 689, 735 P.2d 998, 1000 (1987); *see also* State v. Barsness, 102 Idaho 210, 628 P.2d 1044 (1981) (city ordinance requiring emergency vehicles to have *both* sirens and flashing lights preempted due to explicit conflict with statute requiring emergency vehicles to display *either* sirens *or* flashing lights). Second, a conflict may be implied where the state has fully occupied or preempted a particular area of regulation to the exclusion of local governmental entities. This doctrine of implied preemption applies when “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.” Envirosafe, 112 Idaho at 689, 735 P.2d at 1000; *see, e.g.*, Caesar v. State, 101 Idaho 158, 610 P.2d 517 (1980) (state’s comprehensive regulation of the safety of state-owned buildings preempted

## INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

---

application of Boise City Building Code to Bronco Stadium). Preemption may also be implied “where uniform statewide regulation is called for due to the particular nature of the subject matter to be regulated.” Envirosafe, 112 Idaho at 689, 735 P.2d at 1000.

The statutory provisions governing use of navigable waters for recreational purposes are found in Idaho Code § 36-1601, title 58 of the Idaho Code, and title 67, chapter 70, of the Idaho Code (“Idaho Safe Boating Act”). Section 36-1601 defines navigability and declares that navigable streams “shall be open to public use as a public highway for travel and passage, up or downstream, for business or pleasure, and to exercise the incidents of navigation—boating, swimming, fishing, hunting and all recreational purposes.”

A city ordinance banning consumption of alcohol while using a navigable stream does not appear to conflict or interfere with the incidents of navigation defined in Idaho Code § 36-1601. River users remain free to engage in the core recreational activities of boating, swimming and fishing. Thus, no actual conflict exists between a municipal ban on public consumption of alcohol and Idaho Code § 36-1601. And, since Idaho Code § 36-1601 provides no comprehensive regulatory scheme for the use of navigable waters, it cannot be interpreted as an attempt to occupy the field of permissible regulation of such uses.

Recreational uses of navigable waters are also addressed in title 58 of the Idaho Code. Idaho Code § 58-104 authorizes the State Board of Land Commissioners (“Land Board”) to “regulate and control the use or disposition of lands in the beds of navigable lakes, rivers and streams, to the natural or ordinary high water mark thereof, so as to provide for their commercial, navigational, recreational or other public use.” Idaho Code § 58-104(9). The Land Board’s primary responsibility, however, is regulation of encroachments upon the beds and banks of navigable waters in order to protect recreation, navigation, and other public interests. Idaho Code § 58-1301. Aside from regulating encroachments, the Land Board has not undertaken to regulate navigational or recreational uses of navigable waters.

A more comprehensive regulatory scheme governing public use of navigable waters appears in the Idaho Safe Boating Act, title 67, chapter 70, Idaho Code. The Safe Boating Act includes a broad array of regulations

## INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

---

intended to “improve boating safety [and] foster the greater development, use and enjoyment of the waters of this state by watercraft.” Idaho Code § 67-7001. As part of its scheme of regulating boating safety, the Act includes provisions addressing the use of alcohol while engaging in certain uses of navigable waters. Section 67-7034 makes it unlawful for any person with an alcohol concentration of 0.08 or more to “be in actual physical control of a vessel on the waters of the state of Idaho.” The reach of this statute, however, excludes many of the devices used by recreational floaters on the Boise River. The Act defines the term “vessel” to exclude “nonmotorized devices not designed or modified to be used as a means of transportation on the water, such as inflatable air mattresses, single inner tubes, and beach and water toys.” Idaho Code § 67-7003(22). As a result, much of the recreational use typical of the Boise River does not fall within the scope of the Safe Boating Act. For those recreational users not utilizing “vessels,” there is, by definition, no conflict between the Safe Boating Act and municipal ordinances governing recreational use of the River.

For those watercraft qualifying as “vessels,” such as canoes, kayaks and rafts, the analysis is necessarily more complex. Some may assert that a municipal ban on alcohol consumption would conflict with the provisions of Idaho Code § 67-7034, which explicitly allows operation of vessels while having “an alcohol concentration of less than 0.08,” unless under the additional influence of drugs or other intoxicants. *See* Idaho Code § 67-7034(2). While it is possible to read the cited subsection as impliedly allowing some level of imbibition while boating, it is more precise to state that it does not prohibit operation of vessels when blood alcohol levels are below the specified threshold. In short, the only alcohol regulated by the Safe Boating Act is the operator’s blood alcohol level, not the presence or consumption of alcoholic beverages on the vessel itself. For purposes of the Safe Boating Act, it is irrelevant whether the alcohol is consumed while on shore or on the water. As such, the Safe Boating Act is silent on the issue of the place and manner in which alcohol may be consumed while boating. In such circumstances, additional regulation by municipal ordinance is permissible, so long as it does not “prohibit that which the legislature has expressly sanctioned.” Gartland v. Talbott, 72 Idaho 125, 129, 237 P.2d 1067, 1069 (1951). If the ordinance “merely goes further and adds limitations to those contained in the statute, [it] is not necessarily in conflict with the statute.” *Id.* at 129-30, 237 P.2d at 1069; *see also* Benewah County Cattlemen’s Ass’n v. Bd. of County Comm’rs, 105

## INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

---

Idaho 209, 214, 668 P.2d 85, 90 (1983) (“local enactments which merely extend the state law by way of additional restrictions or limitations are not invalid”).

Given the lack of actual conflict between the Safe Boating Act and ordinances banning possession and consumption of alcoholic beverages on navigable streams, the remaining question is whether the Safe Boating Act occupies the field of permissible regulation. The fact that the Legislature has banned actual operation of watercraft while under the influence of alcohol does not imply an intent to occupy the entire field of regulation or preempt local ordinances addressing the use of alcohol while upon navigable waters. In order to infer intent to preempt local ordinances, the state regulatory scheme must be “pervasive,” Envirosafe, 112 Idaho at 689, 735 P.2d at 1000, or must “completely cover” the subject matter. Caesar, 101 Idaho at 161, 610 P.2d at 520. Implied preemption has been rarely found by the Idaho courts, even where the local ordinance covers the same subject matter as a general statute. A case in point with obvious analogies to the question at hand is State v. Poynter, 70 Idaho 438, 220 P.2d 386 (1950), where the court was asked to determine whether the City of Pocatello was preempted from enacting an ordinance prohibiting the driving of an automobile while under the influence of alcohol, given that the identical conduct was an offense under state law. The court held that the “mere fact that the state has legislated on a subject does not necessarily deprive a city of the power to deal with the subject by ordinance.” *Id.* at 441, 220 P. 2d at 389. Upon petition for rehearing, the court reiterated that cities may enact and enforce police regulations “that do not contravene any general law of the state,” so that “the fact that an ordinance covers the same offense as the state law does not make it inconsistent or in conflict therewith, or invalid for that reason.” *Id.* at 444, 446, 220 P.2d at 391-92 (quoting, in part, State v. Quong, 8 Idaho 191, 194, 67 P. 491, 492 (1902)).

Legislative intent to occupy a field of regulation is also rarely implied when the Legislature has explicitly made provision for additional municipal regulations. The court has often cited statutes allowing cities and counties to enact additional rules and regulations in finding a lack of preemptive intent. *See, e.g.*, Gartland, 72 Idaho at 129, 237 P.2d at 1069; Poynter, 70 Idaho at 441, 220 P.2d at 389; Clyde Hess, 69 Idaho at 510, 210 P.2d at 800. Here, the Safe Boating Act provides that:

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

---

Any political subdivision of the state of Idaho may at any time, but only after sufficient public notice is given, adopt local ordinances with reference to the operation of vessels on any waters within its territorial limits or with reference to swimming within areas of intense or hazardous vessel traffic, provided the ordinances are intended to promote or protect the health, safety and general welfare of its citizenry.

Idaho Code § 67-7031(3).

Given the limited scope of conduct regulated by Idaho Code § 67-7034 and the explicit authorization for municipal governments to adopt local ordinances addressing the subject of boating safety, the most logical inference is that the Legislature did not intend to preempt the field of potential regulation relating to possession and consumption of alcohol while upon navigable waters. This leaves municipal governments free to regulate the use of alcohol by recreational users of navigable streams when such streams are within the limits of the municipality.

Sincerely,

STEVEN W. STRACK  
Deputy Attorney General



## INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

---

November 29, 2005

The Honorable John W. Goedde  
Idaho State Senate  
525-B W. Harrison Ave.  
Coeur d'Alene, ID 83814

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

#### **QUESTION PRESENTED**

Is an administrative rule, which conflicts with a clear statement of legislative intent, valid if it is not in conflict with the language of the statute upon which the rule is based?

#### **SHORT ANSWER**

Legislative intent, even if it is in the form of a journal entry, does not have the force and effect of law. An administrative rule is not rendered invalid if it conflicts with legislative intent, provided it conforms to the language of the statute upon which the authority of the rule rests.

#### **ANALYSIS**

House Bill 331 ("H331"), after having first been passed by the Idaho House of Representatives, was passed by the Idaho State Senate on March 29, 2005. The bill passed unanimously. After passage of the bill, the Senate then granted, by unanimous consent, your request to spread upon the Senate Journal the following Statement of Legislative Intent for H331:

The current physician's reimbursement system employed by the Industrial Commission is seriously flawed. The Advisory Committee to the Industrial Commission has struggled unsuccessfully to correct the problem for over two years. H331 adopts a fee schedule and affords the Industrial Commission the authority to set conversion factors. It is understood that overall physician reimbursement may

## INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

---

decrease by 10% by taking into consideration current billings for services outside the norm. The Industrial Commission shall consider conversion factors employed by health insurers in Idaho as well as conversion factors employed by other states in our region when establishing the original conversion factors.

Additionally, when setting conversion factors, the Commission must be conscious of the need for access to services for injured workers. Should the Legislature find that the Commission has not exercised diligence and restraint, it is acknowledged that future legislatures may opt to establish said factors in statute.

This Statement of Legislative Intent does not have the force and effect of law. Nonetheless, it is an important tool in interpreting the Senate's intent in its passage of H331. Furthermore, as is discussed more fully below, a reviewing court may not even consider legislative intent or legislative history unless the language of the statute is found to be ambiguous.

It is important to note that the Statement of Legislative Intent is found in the pages of the Senate Journal. In addition, the Senate took up consideration of this bill only after the House had passed it. While the Statement of Purpose found in the Senate Journal is similar to statements made by you when the bill was presented to the House Commerce and Human Resources Committee, the entry in the journal is only evidence of the Senate's intent. It cannot be used in discerning the intent of the House.

My November 2, 2005, letter to Idaho Industrial Commission ("Commission") Chairman Limbaugh notes the statement contained in the bill's Statement of Purpose and also the conflicting testimony to the House committee. However, it failed to discuss the intent language in the Senate Journal. (A copy of my November 2 letter is enclosed.) If a court were to review this and arrive at the question of legislative intent, it would look to the Statement of Purpose in addition to the testimony before the House committee in attempting to discern legislative intent. The court would also note the Senate language. The fact that the journal entry was made contemporaneously with the passage of H331 by the Senate is strong evidence of legislative

## INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

---

intent with respect to Senate passage of the bill, but it does not help in determining the intent of the House. In this regard, it should be noted that the rule in Idaho for journal entries differs from the general rule concerning what properly goes into a journal entry. See, e.g., Statutes and Statutory Construction, J.B. Sutherland (updated by Norman J. Singer), §§ 8:1-8:2, p. 37, West Publishing Co. (2000).

Should it become necessary for a court to interpret H331, the goal of the court will be to determine the meaning of the statute. In so doing, the court will rely upon the language of the statute and will probably not even look at extraneous items, such as journal entries, unless it finds some ambiguity in the language of the statute itself. As noted in my November 2 letter, statutory interpretation begins with the words of the statute, and a court, in interpreting a statute, is to give the language of the statute its plain, obvious, and rational meaning. See Huyett v. Idaho State University, 140 Idaho 904, 104 P.3d 946 (2004). Similarly, if a statute is not ambiguous, a court does not construe it but simply follows the law as written. Huyett v. Idaho State University, supra. If the statutory language is unambiguous, the court merely applies the statute as written; if it is ambiguous, the court attempts to ascertain legislative intent. Sumpter v. Holland Realty, Inc., 140 Idaho 349, 93 P.3d 680 (2004). In other words, if statutory language is not ambiguous, it is the duty of the court to follow the law as written, and if it is socially or otherwise unsound, the power to correct is legislative, not judicial. Anstein v. Hawkins, 92 Idaho 561, 477 P.2d 677 (1968).

The language of Idaho Code § 72-803, as amended by H331, is not ambiguous. The language in question directs the Commission to adopt a fee schedule for reimbursement, and this the Commission has done. The Statement of Legislative Intent read into the Senate Journal states that there is an understanding that physician reimbursement may decrease by 10% by passage of the bill. This is a goal of the legislation, not a directive to the Commission. The directive to the Commission found in the legislative intent states:

The Industrial Commission shall consider conversion factors employed by health insurers in Idaho as well as conversion factors employed by other states in our region when establishing the original conversion factors.

## INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

---

Additionally, when setting conversion factors, the Commission must be conscious of the need for access to services for injured workers . . . .

2005 Idaho Senate Journal, p. 330.

In writing this opinion, I am assuming that the Commission did consider conversion factors employed by health insurers, as well as conversion factors employed by other states. If the Commission met this directive, then it may even be that the Statement of Legislative Intent was complied with. This question may ultimately have to be answered by a court.

The court that is applying the provisions of Idaho Code § 72-803, as modified by H331, will have, as its goal, determining the meaning of the statute. In other words, a court's purpose is not to determine legislative intent but to determine the meaning of the statute. Legislative intent is a tool, albeit a tool of paramount importance, in determining the meaning of the statute. However, as noted above, if the meaning of the statute is clear from the language of the statute, the court will venture no further in trying to determine what the legislature means.

Regarding the role of legislative intent, it has been stated:

Such a large number of judicial opinions in cases involving issues of statutory interpretation are written in the context of "legislative intent" that it is not unfair to suggest that many judges may be unaware of the existence of other relevant alternatives for decision-making. That there is, indeed, an alternative, as stated by Justice Holmes in his remark that, "We do not inquire what the legislature meant; we ask only what the statute means." His preference for the meaning of the statute over legislative intent as a criterion of interpretation has been expressly endorsed by Justices Jackson and Frankfurter, the latter of whom said that he even tried to avoid using the term "legislative intent." Courts have also supported the Holmes view. They have said inquiry begins not with conjecture about what Congress would have

## INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

---

liked to have said when it wrote the statute or with what Congress would say today given the chance, but rather what Congress indeed expressed in the statutory text.

Statutes and Statutory Construction, J.B. Sutherland (updated by Norman J. Singer), § 45:07, p. 37, West Publishing Co. (2000)

### CONCLUSION

Legislative intent, even if it is in the form of a journal entry, does not have the force and effect of law. This follows not only from the authority cited above but also from the Idaho Constitution, which requires that all amendments to the Idaho Code be set forth and published at length. Idaho Constitution article III, § 18, provides:

No act shall be revised or amended by mere reference to its title, but the section as amended shall be set forth and published at full length.

Although this section of the Constitution does not appear to be aimed at statements of intent, it would probably cover such statements and require that if they are to be given the force and effect of law, they must be published at full length in the bill itself.

I hope this opinion will be of some assistance to you. For your information and reference, in addition to my November 2 letter to the Industrial Commission, I have enclosed copies of some prior letters from our office addressing this subject. If you have any questions or would like to discuss this matter further, do not hesitate to call upon me.

Very truly yours,

WILLIAM A. VON TAGEN  
Deputy Attorney General  
Chief, Intergovernmental and  
Fiscal Law Division



# Topic Index

and

# Tables of Citation

SELECTED INFORMAL GUIDELINES  
2005





**2005 INFORMAL GUIDELINES INDEX**

<b>TOPIC</b>	<b>DATE</b>	<b>PAGE</b>
<b>ADMINISTRATIVE RULES</b>		
Administrative rule not rendered invalid if it conflicts with legislative intent provided rule conforms to language of statute upon which authority of rule rests .....	11/29/05	39

**CITIES**

City of Boise may enforce city ordinances upon navigable waters of Boise River after extending its corporate boundaries over waters of the river under authority granted to municipalities in art. XII, § 2, Idaho Constitution .....	6/15/05	31
---	---------	----

**IDAHO CONSTITUTION CITATIONS**

<b>ARTICLE</b>	<b>DATE</b>	<b>PAGE</b>
<b>ARTICLE III</b>		
§ 18 .....	11/29/05	39
<b>ARTICLE XII</b>		
§ 2 .....	6/15/05	31

**IDAHO CODE CITATIONS**

<b>SECTION</b>	<b>DATE</b>	<b>PAGE</b>
36-1601 .....	6/15/05	31
50-221 .....	6/15/05	31
58-104 .....	6/15/05	31
58-104(9) .....	6/15/05	31
58-1301 .....	6/15/05	31
67-7001 .....	6/15/05	31
67-7003(22) .....	6/15/05	31

2005 INFORMAL GUIDELINES INDEX

<b>SECTION</b>	<b>DATE</b>	<b>PAGE</b>
67-7031(3) .....	6/15/05	31
67-7034 .....	6/15/05	31
67-7034(2) .....	6/15/05	31
72-803 .....	11/29/05	39

**ATTORNEY GENERAL'S  
CERTIFICATES OF REVIEW  
FOR THE YEAR 2005**

**LAWRENCE G. WASDEN**

**ATTORNEY GENERAL  
STATE OF IDAHO**



**CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL**

---

February 4, 2005

The Honorable Ben Ysursa  
Idaho Secretary of State  
**HAND DELIVERED**

Re: Certificate of Review  
Idaho Judicial Accountability Act of 2006

Dear Secretary of State Ysursa:

An initiative petition was filed with your office on January 10, 2005. 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 timeframe in which this office must respond and the complexity of the legal issues raised in this petition, this office's 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, this 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 would recommend that they do so and their proposed language will be considered.

**MATTERS OF SUBSTANTIVE IMPORT**

**A. Introduction**

Entitled "The Idaho Judicial Accountability Act of 2006" ("IJAA"), petitioners have presented a petition that seeks to substantially alter the judicial branch and system of Idaho. Specifically, petitioners seek the following:

## CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

---

1. Abolishment of the Judicial Council;
2. Creation of the Idaho Judicial Accountability Commission, established to review any decision made in any court, review complaints of judicial misconduct, and empowered to appoint “special prosecutors”;
3. Repeal of chapter 1, title 1, Idaho Code;
4. Repeal of Idaho Code § 1-2003;
5. Impose limitations on judicial immunity;
6. Amendment of Idaho Code §§ 19-4201A, 19-4202, 19-3945, and 2-215; and
7. Procedures for the removal of judges.

Most of the provisions of this measure were reviewed within the Certificate of Review issued on June 4, 2003, and would likely be struck down by a reviewing court as unconstitutional and a violation of the separation of powers doctrine. This office notes that the initiative submitted on January 10, 2005, and the initiative submitted on May 7, 2003, are substantially similar in form, verbiage, and potential effect. In the interest of brevity, the June 4, 2003, Certificate of Review is adopted and incorporated into this certificate of review in its entirety and enclosed herewith for your convenience.

Although amended, the newest version of this initiative suffers from similar constitutional defects as prior versions.

### **B. The Proposed Initiative Likely Violates the Separation of Powers**

Article II, § 1 of the Idaho Constitution defines the departments of government and states the policy of separation of powers. Specifically, art. II, § 1, states:

Departments of government.—The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial; and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any powers properly belonging to either of the others, except as in this constitution expressly directed or permitted.

## CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

---

The most recent version of the Idaho Judicial Accountability Act of 2006 changes the name of the judicial accountability entity from that of a “Special Grand Jury” to the “Idaho Judicial Accountability Commission.” This “Commission” is created as an entity independent of the legislative, executive, or judicial branches of government; in essence, a fourth branch of government. This is patently unconstitutional. The branches of government are clearly delineated within art. II, § 1 of the Idaho Constitution. Any new branch of government must be outlined within art. II, § 1 of the Idaho Constitution. A change of this magnitude must be made through a constitutional amendment. A reviewing court would most likely find that the Idaho Judicial Accountability Act of 2006 is unconstitutional for this reason.

The initiative also empowers the Commission to exercise powers generally reserved to the legislature, the judiciary, and the executive. An initiative is an exercise of legislative power; therefore, the Commission can only exercise those powers that are provided for within article III of the Idaho Constitution. This initiative seeks to create a commission empowered with the authority to exercise both article IV and article V powers. Exercise of these powers is constitutionally offensive. The interference with and assumption of powers of coordinate branches of government by another is anathema to the basic concepts of Idaho’s constitutional representative democracy.

### **C. Article III, § 16, Prohibits Consideration of More than a Single Subject**

Reviewing the initiative, it is quite lengthy. This initiative comprises eight (8) pages of single-spaced text on 8½” by 14” paper. It considers myriad subjects ranging from creation of the Commission, to appropriations to the Commission, to procedures for the removal of judges, to criminal causes of action, to altering jurisdiction regarding habeas corpus actions, and changing payments to jurors to name a few. Additionally, the act amends or repeals no fewer than five (5) distinct titles and chapters of the Idaho Code within a single initiative.

Article III, § 16, states:

Unity of subject and title.— Every act shall embrace but one subject and matters properly connected therewith,

## CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

---

which subject shall be expressed in the title; but if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be embraced in the title.

This initiative appears to embrace many subjects within a single enactment. For example, this initiative contains sections appropriating monies (sections 2526, 2530, and 2531), which are considered distinct acts that should be separate from others. Hailey v. Huston, 25 Idaho 165, 136 P.2d 212 (1913). It appears likely that the breadth of the subjects, which should be set forth in distinct enactments (or initiatives), would provide an alternative basis for this initiative being found unconstitutional.

Also, unnecessary words are used to describe the United States Constitution and the Bill of Rights. For example, the U.S. Constitution is described as “the 1789 Constitution for the United States of America including the 1791 Bill of Rights.” These descriptive words are meaningless. The United States is governed by the Constitution as the supreme law of the land, which includes the Bill of Rights. M’Culloch v. State of Maryland, 17 U.S. 316, 360 (1819). Finally, the Declaration of Independence is referenced, but it must be noted that the Declaration of Independence has no force or effect of law.

### CONCLUSION

As noted in the June 4, 2003, Certificate of Review and the current certificate of review, the Idaho Judicial Accountability Act of 2006 contains constitutional infirmities, contradictions, and confusing terminology. It is beyond the scope of this review to definitively point out each and every transgression, but review of the June 4, 2003, Certificate of Review, which is adopted and incorporated herein, and this certificate of review reflect that upon review by a court of competent jurisdiction, the Idaho Judicial Accountability Act of 2006 will likely be found unconstitutional.

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 petitioners Norma Batt and Rose Johnson by deposit in the U.S. Mail of a copy of this certificate of review.



CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

---

Sincerely,

LAWRENCE G. WASDEN  
Attorney General

**Analysis by:**

BRIAN P. KANE  
Deputy Attorney General

CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

May 16, 2005

The Honorable Ben Ysursa  
Idaho Secretary of State  
Statehouse  
**HAND DELIVERED**

Re: Certificate of Review  
Proposed Initiative to Amend the Motor Vehicle Registration  
Law (Idaho Code § 49-445)

Dear Secretary of State Ysursa:

An initiative petition was filed with your office on April 18, 2005. Pursuant to Idaho Code § 34-1809, this office has reviewed the petition and prepared the following advisory comments. It must be stressed that, given the strict statutory timeframe in which this office must respond and the complexity of the legal issues raised in this petition, this office's 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." The petitioners are free to "accept or reject them in whole or in part." The opinions expressed in this review are only those which may affect the legality of the initiative. This office offers no opinion with regard to the policy issues raised by this proposed initiative.

**BALLOT TITLE**

Following the filing of the proposed initiative, this 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 would recommend that they do so and their proposed language will be considered.

CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

---

**MATTERS OF SUBSTANTIVE IMPORT**

Petitioner has submitted a proposed initiative seeking to amend Idaho Code § 49-445(2). As a series of legislative enactments, this code section is subject to amendment by the initiative power reserved to the people by the Idaho Constitution. Idaho Const. art. III, § 1.

Article III, § 1 of the Idaho Constitution vests the legislative power of the state in the Senate and House of Representatives, and in the people through the initiative process. Laws passed by initiative are on equal footing with legislation enacted by the Legislature, and the two must comply with the same constitutional requirements. Westerberg v. Andrus, 114 Idaho 401, 757 P.2d 664 (1984). As both the proposed initiative and the law it seeks to repeal are interpreted to be on “equal footing,” this proposed initiative does not appear to raise any significant legal issues.

**CONCLUSION**

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 Marse Shobe by deposit in the U.S. Mail of a copy of this certificate of review.

Sincerely,

LAWRENCE G. WASDEN  
Attorney General

**Analysis by:**

WILLIAM A. VON TAGEN  
Deputy Attorney General

## CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

---

September 14, 2005

The Honorable Ben Ysursa  
Idaho Secretary of State  
Statehouse

**HAND DELIVERED**

Re: Certificate of Review  
Proposed Initiative to Amend Provisions Relating to  
Property Tax (Idaho Code Title 63, Various Chapters  
1 through 40)

Dear Secretary of State Ysursa:

An initiative petition was filed with your office on August 18, 2005. Pursuant to Idaho Code § 34-1809, this office has reviewed the petition and prepared the following advisory comments. It must be stressed that, given the strict statutory timeframe in which this office must respond and the complexity of the legal issues raised in this petition, this office's 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." The petitioners are free to "accept or reject them in whole or in part." The opinions expressed in this review are only those that may affect the legality of the initiative. This office offers no opinion with regard to the policy issues raised by this proposed initiative.

### **BALLOT TITLE**

Following the filing of the proposed initiative, our office will prepare short and long 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. If petitioners would like to propose language with these standards in mind, we would recommend that they do so, and their proposed language will be considered in our preparation of the titles.

## MATTERS OF SUBSTANTIVE IMPORT

The petition, as submitted, amends, repeals, or adds several dozen sections of the Idaho Code and consists of over 6,500 lines of text. The text raises a number of issues of substantive import upon which Idaho Code § 34-1809 requires we comment. These issues are of varying significance and complexity. Thus, in the sections that follow, we have categorized our comments under two headings. The first, labeled “Overarching Issues,” addresses matters of potential constitutional concern or matters that render the initiative inoperable should it become law in its present form. The second, labeled “General Comments,” attempts to organize various concerns or recommendations into those applicable to the text as a whole or those from various parts of the initiative that are similar.

### A. Overarching Issues

1. One percent limitation. The initiative imposes, in three different proposed sections, a one percent limitation on the total annual amount of property tax imposed on property. These are proposed §§ 63-801,<sup>1</sup> 63-802,<sup>2</sup> and 63-1313,<sup>3</sup> Idaho Code. An initial problem is that these three sections do not express the same one percent limitation. In Idaho Code § 63-801, the limit is simply one percent of “Market Value.” The definition of “market value” in Section 63-201(11) limits that value to a value “as determined by the county commissioners sitting as a board of valuation during the last week of November 2004 through the first week of December 2005 and subsequently added to the tax rolls January 2005.” Idaho Code § 63-802 adopts a different definition of “market value” that is found in Idaho Code § 63-1313. That definition adds “the actual cost of all improvements,” which adds values not included under the one percent calculation in Idaho Code § 63-801 and requires that market value include “any exemption of a portion of such values from property taxation,” which also adds values not included under the one percent calculation in Idaho Code § 63-801. Further, proposed Section 63-1313(2) permits “property” (though not necessarily value) to increase up to eight-tenths of one percent annually, although what event or occurrence authorizes the increase is not stated. Finally, the limitation in proposed Idaho Code § 63-802 may be overridden by an election,<sup>4</sup> while the limitation in proposed Idaho Code § 63-801 cannot. These conflicting defini-

## CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

---

tions of “market value” create critical inconsistencies that we recommend be harmonized.

An even more serious problem is one previously discussed in opinions issued by this office in regard to other proposals to limit the total amount of property tax imposed on a single property. The Attorney General’s Office, under the administrations of three different Attorneys General, has issued three opinions addressing similar proposed limitations.<sup>5</sup> The conclusions expressed in those opinions concerning the previously proposed one percent limitations are equally applicable to the similar limitation in the currently proposed initiative. They conclude the requirement that property “tax shall not exceed 1% of Market Value” is inoperable because neither existing law nor the proposed initiative provide state or local governments with authority or instructions for adjusting the budget funded by property tax otherwise certified pursuant to statute to comply with the one percent limitation. The problem, as summarized in the 1991 opinion and reaffirmed in the 1996 opinion, is applicable to the current proposal:

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 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.<sup>6</sup>

## CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

---

Whatever method of implementing the one percent tax limitation the petitioners choose, the resulting tax levies must conform to the requirement of the Idaho Constitution that “All taxes shall be uniform upon the same class of subjects within the territorial limits, of the authority levying the tax, . . . .” This means that each taxing district’s levy (whether it is a levy by a county, city, school district, or other local government authorized to levy property taxes) must apply equally to all taxable property in each district. The tax owed is calculated by multiplying this uniform levy rate times the value of the individual property, however that value is determined. As explained by the Idaho Supreme Court:

A constitutional rule of uniform ad valorem taxation forbids legislative classifications of property for the purpose of imposing a greater burden of ad valorem taxation on one class than on another; that is, all property not exempt from taxation must be assessed at a uniform percentage of actual cash value, and a single fixed rate of taxation must apply against all taxable property.<sup>8</sup>

See the discussion under “Question 4” of Opinion 91-9 for one possible mechanism that is consistent with the requirement for a uniform levy.<sup>9</sup>

2. Limitations on value. The initiative as proposed attempts to limit the amount of value to which the levy rate is applied. Several sections have this effect. First, the definition of “market value” in proposed Idaho Code § 63-201(11) is amended.<sup>10</sup> (Our earlier comments about the inconsistencies about the definition of “market value” are also applicable here.) We understand the effect of this language to be that property present on the existent property tax rolls at the end of 2004 is to retain that value on future rolls unless other provisions of the initiative authorize a changed value.<sup>11</sup> Second, the initiative adds a new definition of “true market value” in proposed Idaho Code § 63-201(26).<sup>12</sup> There is a third proposed definition of “value” in proposed Idaho Code § 63-201(27).<sup>13</sup> Proposed Idaho Code § 63-803 provides that the levy rate is to be computed on “taxable value” which is defined using the terms similar to the definitions found in subsections (11) and (26) of proposed Section 63-201.<sup>14</sup> Throughout the initiative, numerous provisions relating to the equalization of property tax assessments are repealed. These changes appear to be intended to limit the taxable value on which property tax

## CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

---

levies are computed to the values on the property tax rolls as of January 1, 2005, or to the purchase price or construction cost of property purchased or constructed after that date.

The initiative process in Idaho is limited to proposing and adopting changes in statutory law.<sup>15</sup> Statutes adopted by initiative are subject to the same constitutional requirements and constraints as other statutes.<sup>16</sup> Thus, for the initiative to ultimately succeed in its goal of reforming the property tax, its provisions must comport with the provisions of the Idaho Constitution relating to property taxation. The Idaho Constitution, in art. VII, §§ 2<sup>17</sup> and 5,<sup>18</sup> requires that property taxes be uniform and in proportion to value. The Idaho Supreme Court has interpreted these provisions to mean the tax must be based on the property's current market value. Two examples illustrate the Court's understanding of these provisions:

In our opinion the valuation of taxable property for assessment purposes must reasonably approximate the fair market value of the property in order to effectuate the policy embodied in Id. Const. Art. VII, § 5. i.e., that each taxpayer's property bear the just proportion of the property tax burden . . . . Although different types of property are by their nature more amenable to valuation by one method of appraisal than another the touchstone in the appraisal of property for ad valorem tax purposes is the fair market value of that property, and fair market value must result from application of the chosen appraisal method. An arbitrary valuation is one that does not reflect the fair market value or full cash value of the property and cannot stand.<sup>19</sup>

We interpret the language of Art. VII, § 2 - 'every person \* \* \* shall pay a tax in proportion to the value of his, her, or its property \* \* \*' - as meaning that every property owner shall receive equal treatment under the ad valorem tax laws; for example, if owner A possesses \$100.00 of property which is taxed \$1.00, then owner B with \$400.00 of taxable property shall be taxed in the same proportion, or \$4.00.<sup>20</sup>



## CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

---

(Emphasis added.) The inevitable effect of the valuation system proposed by the initiative will be an impermissible discrimination in valuation between property subject to tax on its “market value” (based on the limited definition quoted above<sup>21</sup>) and property taxed based on its “true market value.”<sup>22</sup> This office has, in previous opinions about property tax initiatives, noted that value limitations similar to the limits in this proposal should be offered by means of a constitutional amendment, not by statutory changes. As a result, we advised that “[t]he only sensible and certain safeguard is that of deleting the distinction made in Section Two<sup>23</sup> of the initiative between property purchased, newly constructed or subjected to change of ownership on the one hand and property which has not experienced any of those circumstances on the other hand.”<sup>24</sup> Nothing in Idaho’s Constitution or in the development of our constitutional jurisprudence counsels any different recommendation today.

The initiative’s system can also result in property being valued and taxed in the future for amounts greater than would occur if the initiative were not enacted. Since the value of property is “as determined by the county commissioners sitting as a board of valuation during the last week of November 2004 through the first week of December 2005 and subsequently added to the tax rolls January 2005,”<sup>25</sup> there is no authorization for adjusting the value of property downward to reflect losses from depreciation, obsolescence, or damage. This systemic overvaluation of property may be as violative of the constitution as the valuation limitations discussed in this section.

In a separate letter addressed to the Attorney General, the petitioners take issue with our often-expressed constitutional conclusions that property taxes must be levied uniformly in proportion to value. The letter states, “We have heard from the press that our initiative may fail because of Constitutional problems with equal value. We take issue with that statement, because the Constitution does not define ‘value.’ The term ‘value’ will and should relate to any product and as such we have incorporated the standard term for ‘value’ into our changes to Title 63.” The difficulty with this position is that, as the foregoing discussion makes evident, the Idaho Supreme Court has defined “value” as that term is used in art. VII, §§ 2 and 5 of the Idaho Constitution. The Idaho Supreme Court is the “final arbiter” of the meaning of terms in the Constitution.<sup>26</sup>

**B. General Comments**

The comments and observations contained in the following sections of this certificate are offered despite the conclusions expressed in the previous section regarding the unimplementability and questionable constitutionality of the initiative and do not change those conclusions. The order in which our comments and observations are presented in this certificate has no implication about their relative importance.

1. The form of the petition is questionable in ways that may raise substantive problems. Idaho Code § 34-1801A contemplates that the text of the proposal is to be set out in the body of the petition. This petition includes in the body only a list of sections amended, repealed, or added. The text of the proposal is attached to the petition. If the listing of sections and the attachment are perfectly identical, this may (or may not) be harmless error. But if they are not identical, the differences raise potentially serious questions about exactly what has been enacted should the initiative become law.

2. For some code sections, the text used as the language from which amendments are proposed, is the statutory language as it existed in 2004. Sometimes, but not always, legislative actions taken to amend code sections in 2005 are not recognized. The initiative should amend the current statutory language. Especially significant are the legislative amendments made in 2005 to chapter 17, title 63, Idaho Code, regarding taxation of timberland.<sup>27</sup>

3. The initiative needs a specific effective date. Under current law, the annual property tax assessment and levy process begins in January and culminates in the collection of taxes in December of that year and June of the next year. If the initiative should become law as a result of the 2006 general election in November, it would be impossible to implement for taxes due in December 2006.

4. The proposed Section 63-802(7)<sup>28</sup> details the formula for computing each tax levy by taxing districts within the county based upon each district's budget. The initiative adds a sentence requiring "Any such tax must be approved by sixty-six and two thirds percent (66 2/3rds%) or more of those

## CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

---

voting on the question at an election called for that purpose and held on the May or November dates provided by law.” In 2004, more than 800 of Idaho’s more than 1,000 taxing districts actually imposed at least one property tax levy. This election requirement will require conducting an election each year to approve levies by each of these districts—regardless of whether the computed levy exceeds any of the initiative’s contemplated limitations. If the election fails the requisite majority, the district may levy no property tax for the year to which the election relates. If the petitioner’s intent is otherwise, such as elections to override one or more of the initiative’s limitations, this language needs revision.

5. The initiative deletes all references to the “county board of equalization” and to the “state board of equalization.” It substitutes a “county board of valuation” and a “state board of valuation” with limited duties. Provisions relating to the equalization of values for property tax (and school equalization) are deleted from title 63, Idaho Code.<sup>29</sup> However, both the county boards of equalization and the State Tax Commission’s role as the state board of equalization are constitutionally established.<sup>30</sup> Substituting boards of valuation for the constitutionally established boards of equalization and depriving the boards of the “duty . . . to equalize valuation for taxable property”<sup>31</sup> may violate not only art. VII, § 12, but also §§ 2 and 5, as well. The Legislature (and therefore proposals adopted by initiative<sup>32</sup>) may not prevent a constitutional officer from performing his constitutional duties.<sup>33</sup>

6. The initiative changes several of the dates by which events relating to the annual property tax process must be accomplished. Petitioners need to carefully review the sequence of events and required dates for each. In at least one instance, the draft requires acts be done before the necessary antecedent actions are completed.<sup>34</sup>

7. Throughout its text, the initiative changes the term “assess” or its various forms (e.g., “assessment”) to “value” or its forms (e.g., “valuation”), but some forms of the term “assess” still appear throughout the text of the proposal. Neither term is defined, so the presumed difference in meaning is undeterminable. In two instances,<sup>35</sup> the term “special assessment,” as used to describe charges against property that are not measured by the value of the property, is nevertheless changed to “special valuations.”

## CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

---

8. The initiative repeals Idaho Code § 63-301, which imposes on county assessors the fundamental duty to create and submit the annual property rolls. However, the initiative contains repeated references to the property rolls in its text. Without some replacement for the repealed section, no state or local official is expressly vested with the power or assigned the duty to prepare the property rolls.

9. Repealing Idaho Code § 63-301 also repeals the specific valuation and lien date for property tax assessment. That conflicts with other references in the statute to the valuation and lien date that are retained in the initiative. Lack of a clear valuation date is potentially prejudicial to other creditors of the property owner because it confuses the priority of secured debts—particularly under the federal Bankruptcy Code.

10. The initiative makes a number of changes in the property tax statutes in title 63, Idaho Code, that implicate statutes outside that title, but the initiative makes no effort to make the necessary coordinating changes. There are three particularly important examples:

- The Local Economic Development Act<sup>36</sup> provides for revenue allocation financing of activities within a revenue allocation area of an urban renewal project. The extensive changes made by the initiative sever many of the necessary connections between the Local Economic Development Act and the property tax laws. The initiative needs corresponding changes to that Act or it will not function properly, if at all.
- The initiative repeals Idaho Code § 63-315 requiring that the State Tax Commission conduct an annual ratio study of property by school district. Based on the results of this study, the State Tax Commission certifies equalized property values to the State Board of Education. These values are applied in accordance with the school financing provisions of title 33, chapter 10, Idaho Code. Lack of an amendment to Idaho Code § 33-802 means that the Department of Education remains mandated to assume that each school district levied its maintenance and operations levy at the currently author-

ized three tenths of one percent. Only some school districts may be able to do this (depending on the method of reducing overall levies to one percent) but others likely will not. Thus, there will be little or no connection between the amount of property tax the district can levy and the district's distribution of state aid. That chapter needs changes corresponding to those made by the initiative.<sup>37</sup>

- The authority of most taxing districts to levy taxes is granted, not in title 63, Idaho Code, but rather in the statute creating the type of district vested with the power to impose a property tax. For example, cities are authorized to “levy taxes for general revenue purposes not to exceed nine-tenths percent (.9%) of the market value for assessment purposes on all taxable property within the limits of the city . . . .”<sup>38</sup> The initiative's limited definition of “market value” applies only to the term when it is “used for property tax purposes in title 63, chapters 1 through 23, Idaho Code.”<sup>39</sup> Thus, the term “market value,” when used in the statutes governing cities' power to tax, appears to be unrestrained by the definition provided by the initiative. This leaves a city's authority to levy a tax essentially undeterminable. If the limit is 0.9% of the full market value, that number is unknowable due to the initiative's limited definition of “market value” in title 63, Idaho Code. If the definition in proposed Idaho Code § 63-201(11) is made to apply to the levy authority statute, then the taxable property not included within the limited definition, e.g., the property included in the initiative's definition of “true market value” in proposed Idaho Code § 63-201(26), is excluded from the measure of the city's levying authority. Which of these two results is applicable under the initiative is indeterminable. More than 125 separate Idaho Code sections authorize various property tax levies by counties, cities, and taxing districts. Only a half dozen of these appear in title 63, Idaho Code. All of the rest present the same or similar dilemma.

## CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

---

11. We strongly recommend a careful review of the entire text of the initiative by an independent proofreader. During our review, we noticed several apparently inadvertent errors of grammar, syntax, and numbering.<sup>40</sup> A proofreader should also check the correctness of every statutory cross-reference.<sup>41</sup> While undoubtedly inadvertent, such errors can create serious difficulties in the administration and enforcement of the tax. The proofreader should:

- Review for errors in syntax and grammar;
- Verify every cross-reference, both within and outside title 63, to and from sections amended, repealed; and
- Check for inconsistencies in numbering.

### CONCLUSION

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 the petitioner, Charles (Chuck) Cline, by deposit in the U.S. Mail of a copy of this certificate of review.

Sincerely,

LAWRENCE G. WASDEN  
Attorney General

#### **Analysis by:**

THEODORE V. SPANGLER, JR.  
Deputy Attorney General

---

<sup>1</sup> In the initiative the proposed section reads as follows:  
63-801. ANNUAL STATE PROPERTY TAX LEVY

(1) The county commissioners in each county in this state must meet on the second Monday of September in each year to ascertain the tax rate necessary to be levied on each dollar of the valuation of all the taxable property in the county for such year in order to raise the amount of state taxes apportioned to such county by the state tax commission. The total of all levies must be within the limits prescribed by the laws of this state.

(2) In any period during which a sales tax is in force in this state, there shall be no levy of the general state property tax permitted by section 9, article VII, of the constitution of the state of Idaho.

## CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

---

(3) Any period of the combined taxing districts and State Property tax shall not exceed 1% of Market Value.

<sup>2</sup> The proposed section provides:

(1) Taxing districts shall not certify a budget request to finance an annual budget that exceeds 1% of market value as defined in section 63-1313 Idaho Code:

<sup>3</sup> The proposed section provides:

63-1313. LIMITATION ON PROPERTY TAXES—VALUE OF REAL AND PERSONAL PROPERTY—SPECIAL TAX LEVIES

(1) (a) Except as provided in section 63-802, Idaho Code, during any one (1) tax year, the maximum amount of all property taxes from all sources on any property subject to appraisal, valuation, and property taxation within the state of Idaho shall not exceed one percent (1%) of the market value of such property, including the actual cost of all improvements, notwithstanding any exemption of a portion of such values from property taxation.

<sup>4</sup> See proposed § 63-802(5):

(5) All provisions of this section, for annual budgets, shall not exceed 1% of market value as detailed in section 63-1313, Idaho Code unless such increases are approved by sixty-six and two-thirds percent (66 2/3rds %) or more of those voting at the election.

<sup>5</sup> Two of these Opinions may be found on the Attorney General's website: See 1991 Idaho Attorney General's Opinion 91-9 at [http://www2.state.id.us/ag/ops\\_guide\\_cert/1991/op91-09.pdf](http://www2.state.id.us/ag/ops_guide_cert/1991/op91-09.pdf) and Idaho Attorney General's Opinion 96-3 at [http://www2.state.id.us/ag/ops\\_guide\\_cert/1996/op96-03.pdf](http://www2.state.id.us/ag/ops_guide_cert/1996/op96-03.pdf). See also Idaho Attorney General's Opinion 78-37 published in 1978. Idaho Attorney General's Annual Report, p. 148.

<sup>6</sup> See footnote 5.

<sup>7</sup> Art. VII, § 5, Idaho Constitution, see footnote 18.

<sup>8</sup> Idaho Telephone Co. v. Baird, 91 Idaho 425 (1967).

<sup>9</sup> See also 1995 Idaho Attorney General's Opinion 95-03 at [http://www2.state.id.us/ag/ops\\_guide\\_cert/1995/op95-03.pdf](http://www2.state.id.us/ag/ops_guide_cert/1995/op95-03.pdf).

<sup>10</sup> As amended the subsection would read:

(11) "Market value" means the amount of United States dollars or equivalent for which, in all probability, a property would exchange hands between a willing seller, under no compulsion to sell, and an informed, capable buyer, with a reasonable time allowed to consummate the sale, substantiated by a reasonable down or full cash payment. As determined by the county commissioners sitting as a board of valuation during the last week of November 2004 through the first week of December 2005 and subsequently added to the tax rolls January 2005. The tax rolls of January 2005 shall be the determining factor of all property within the state. New purchases, builds or improvements shall be considered at "true market value."

<sup>11</sup> Our understanding may or may not be correct. The fragmentary phrase beginning "As determined" is an incomplete sentence lacking a subject. Exactly what value is meant is ambiguous. For purposes of this discussion of the overarching issues related to limitations on values, we treat the language as if were effective to accomplish the petitions evident (but not unambiguous) intent.

Another issue relating to this definition is the fact that operating property (mostly property of public utilities and railroads) is not valued by county commissioners but by the State Tax Commission pursuant to chapter 4, title 63, Idaho Code. This definition appears to exclude operating property from the meaning of market value. The implications of this exclusion are unknown. It might result in the exemption of all operating property from tax or it may result in assessment of operating property at current market value—a result that at least in the case of railroads likely violates federal law. See 49 U.S.C.A. § 11501 (Prohibiting tax discrimination against rail transportation property).

<sup>12</sup> The proposed definition is:

"True market value" the sum at which a piece of property has changed hands or cost of building such property which includes the land that such building resides.

<sup>13</sup> It reads:

"Value" is the total of all considerations, expressed in dollars, which defines the price at which a willing seller and a willing buyer agree to transfer title.

## CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

---

<sup>14</sup> The initiative appears to omit a critical step in the valuation and levying process it describes. It repeals current § 63-301, Idaho Code, requiring the assessor to enter the market value of property on the county assessment roll. There appears to be no new equivalent to the repealed section that tells the assessor exactly what value is to be entered on the roll.

<sup>15</sup> See chapter 18, title 34, Idaho Code.

<sup>16</sup> Westerberg v. Andrus, 114 Idaho 401 (1988).

<sup>17</sup> Art. VII, § 2 provides:

Revenue to be provided by taxation. 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.

<sup>18</sup> Art. VII, § 5 provides:

Taxes to be uniform—Exemptions. 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.

<sup>19</sup> Merris v. Ada County, 100 Idaho 59, 63 (1979).

<sup>20</sup> Idaho Telephone Co. v. Baird, 91 Idaho 425 (1967).

<sup>21</sup> See footnote 10.

<sup>22</sup> See footnote 12.

<sup>23</sup> The reference is to section 2 of “Initiative 1” passed at the general election of November 7, 1978, “Restricting Governmental Ability to Change Property Valuations or Taxes” on file at the Office of the Idaho Secretary of State.

<sup>24</sup> AG Opinion 78-37, pg. 155, *supra* at footnote 5.

<sup>25</sup> See footnote 10.

<sup>26</sup> State, Dept. of Parks v. Idaho Dept. of Water Administration, 96 Idaho 440 (1974).

<sup>27</sup> See 2005 Idaho Session Laws 73.

<sup>28</sup> We note that the subsection is misnumbered since the section has two subsections numbered (5).

<sup>29</sup> “Equalization” refers to the processes by which, under current law, the State Tax Commission and county officials, especially the assessor and county commissioners, ensure property is assessed equally with other similar property to create uniform effective tax rates and proper distribution of public school funding. These processes are the methods of oversight and enforcement by which the constitutional mandates of art. VII, §§ 2 and 5, for uniform taxation in proportion to value are assured.

<sup>30</sup> Art. VII, § 12 of the Idaho Constitution provides in relevant part:

There shall be a state tax commission consisting of four (4) members . . . . The duties heretofore imposed upon the state board of equalization by the Constitution and laws of this state shall be performed by the state tax commission and said commission shall have such other powers and perform such other duties as may be prescribed by law, including the supervision and coordination of the work of the several county boards of equalization. The board of county commissioners for the several counties of the state, shall constitute boards of equalization for their respective counties, *whose duty it shall be to equalize the valuation of the taxable property in the county*, under such rules and regulations of the state tax commission as shall be prescribed by law. (Emphasis added.)

<sup>31</sup> *Id.*

<sup>32</sup> Westerberg v. Andrus, 114 Idaho 401 (1988), holding that initiative legislation is on equal footing with the legislation enacted by the state and must comply with the same constitutional requirements as legislation enacted by the Idaho Legislature.



## CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

---

<sup>33</sup> *Williams v. State Legislature of Idaho*, 111 Idaho 156 (1986). “The legislature may not usurp the power of a constitutionally created executive agency . . . .”

<sup>34</sup> Proposed Idaho Code § 63-308(4) requires that the subsequent property roll must be delivered to the county auditor by the last Monday in October; however proposed Idaho Code § 63-501(2) gives the board of valuation has until November 1 to finish appeals relating to values on that roll.

<sup>35</sup> Proposed Idaho Code §§ 63-201(21) and (28).

<sup>36</sup> Chapter 29, title 50, Idaho Code.

<sup>37</sup> We also note that any such changes must comport with the requirement of art. IX, § 1, Idaho Constitution. It provides:

Legislature to establish system of free schools. 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.

An opinion from this office in 1995, examining the effect of a similar limitation on property taxes, observes that the resulting “cut in school funding might well be found to violate the requirement in art. 9 sec. 5 of the Idaho Constitution that all Idaho students be provided a ‘uniform’ and ‘through’ education.” *Supra* at footnote 9.

<sup>38</sup> Idaho Code § 50-235.

<sup>39</sup> Quoted *supra* at footnote 10.

<sup>40</sup> For example, in the proposed Section 63-602CC(1), the second sentence of the current law reads:

This exemption shall be granted only if the list of all taxable personal property as described in section 63-302, Idaho Code, is submitted by the property owner or the agent thereof to the assessor not later than March 15 of each year.

The initiative amends the sentence to read:

This exemption shall be granted only if the property owner or the agent thereof to the assessor as described in section 63-302, Idaho Code, submits the list of all taxable personal property not later than March 15 of each year.

A more significant example is found in § 63-1313(c), Idaho Code, imposing a duty to report certain transactions to the county assessor. The section states:

Failure to report the transaction or to falsify such costs, which shall include any exchanges of property, will be considered a felony punishable by up to five (5) years in prison and fines not to exceed the actual value of the transaction.

Read literally this language means that only by submitting a false report may a person avoid a felony charge. (“Failure . . . to falsify” is a felony. Thus, a false report is not illegal.)

<sup>41</sup> For example, Idaho Code § 63-507(4) references Idaho Code § 63-201(22), which is a non-existent subsection due to a numbering error in the latter section.

CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

September 27, 2005

The Honorable Ben Ysursa  
Idaho Secretary of State  
Statehouse  
**HAND DELIVERED**

Re: Certificate of Review  
Proposed Initiative to Amend Idaho Code § 63-205 Relating  
to Property Tax

Dear Secretary of State Ysursa:

An initiative petition was filed with your office on August 30, 2005. Pursuant to Idaho Code § 34-1809, this office has reviewed the petition and prepared the following advisory comments. It must be stressed that given the strict statutory timeframe in which this office must respond and the complexity of the legal issues raised in this petition, this office's 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." The petitioners are free to "accept or reject them in whole or in part." The opinions expressed in this review are only those that may affect the legality of the initiative. This office offers no opinion with regard to the policy issues raised by this proposed initiative.

**BALLOT TITLE**

Following the filing of the proposed initiative, our office will prepare short and long 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. If petitioners wish to propose language with these standards in mind, we recommend that they do so. Their proposed language will be considered in our preparation of the titles.

## MATTERS OF SUBSTANTIVE IMPORT

The petition proposes to amend Idaho Code § 63-205 by the addition of six new subsections numbered (3) through (8). The amendments are entitled the “Residential Property Tax Relief and Bonding Act.” As currently composed, subsections (1) and (2) of Idaho Code § 63-205 address the subject of “Assessment—Market value for assessment purposes.” It provides the assessment date for property taxes and requires the property be assessed at market value as provided by statute and rules of the State Tax Commission.

### 1. One Percent Limitation

The proposed subsection (3) would limit to “one percent (1%) of the cash value” the total annual amount of property tax imposed on property “used as the primary residence of an Idaho resident. . .”. It goes on to provide that “[t]he one percent (1%) tax is to be collected by the counties and apportioned according to law to the districts within the counties.”<sup>1</sup>

The most serious problem with this proposal is one previously discussed in opinions issued by this office in regard to other proposals to limit the total amount of property tax imposed on a single property. The Attorney General’s Office, under the administrations of three different Attorneys General, has issued three opinions addressing similar proposed limitations.<sup>2</sup> The conclusions expressed in those opinions concerning the previously proposed one percent limitations are equally applicable to the similar limitation in the currently proposed initiative. They conclude the requirement that property “tax shall not exceed 1% of Market Value” is inoperable because neither existing law nor the proposed initiative provide state or local governments with authority or instructions for adjusting the budget funded by property tax otherwise certified pursuant to statute to comply with the one percent limitation. The problem, as summarized in the 1991 opinion and reaffirmed in the 1996 opinion, is applicable to the current proposal:

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.

Whatever method of implementing the one percent tax limitation the petitioners choose, the resulting tax levies must conform to the requirement of the Idaho Constitution that “All taxes shall be uniform upon the same class of subjects within the territorial limits, of the authority levying the tax, . . .”<sup>3</sup> This means that each taxing district’s levy (whether it is a levy by a county, city, school district, or other local government authorized to levy property taxes) must apply equally to all taxable property in each district. The tax owed is calculated by multiplying this uniform levy rate times the value of the individual property, however that value is determined. As explained by the Idaho Supreme Court:

A constitutional rule of uniform ad valorem taxation forbids legislative classifications of property for the purpose of imposing a greater burden of ad valorem taxation on one class than on another; that is, all property not exempt from taxation must be assessed at a uniform percentage of actual cash value, and a single fixed rate of taxation must apply against all taxable property.<sup>4</sup>

See the discussion under “Question 4” of Opinion 91-9 for one possible mechanism that is consistent with the requirement for a uniform levy.<sup>5</sup>

## **2. Limitations on Value**

The proposed subsection (4)(a) would establish a definition of the term “full cash value.”<sup>6</sup> The intent of this language appears to be that the one percent limitation of subsection (3) would apply to the taxable value of residential property as that value appeared on the assessment notice for either 2001 or 2002 (which is unclear) or its “appraised value” if the property is constructed, purchased, or changes ownership after 2002. In the event that property has not yet been assessed to the level appropriate for either 2001 or 2002, it may be reassessed to that level. Proposed subsection (4)(b) thereafter permits certain inflationary adjustments to the “fair market value base” not to exceed two percent.

Initially, there are several definitional and technical problems with this language. First, paragraph (a) defines the term “full cash value” while paragraph (b) uses the term fair “market value.” “Market value” is defined in Idaho Code § 63-201(10) inconsistently with the definition of “full cash value” in paragraph (a). This inconsistency is further confused by the introduction of the undefined term “appraised value.” Ordinarily, a change in wording in a statute implies a change of sense.<sup>7</sup> Although the rule is universal,<sup>8</sup> in this context whether “appraised value” is intended to mean “full cash value” or “market value” is unknown. Finally, Idaho Code § 63-308 requires the assessor deliver to taxpayers a “valuation assessment notice” each year no later than the first Monday of June. Thus, reference to the “2001-2002 Assessment Notice” leaves unclear which value is intended.

A more serious problem is that this value limitation conflicts with the requirements of the Idaho Constitution. The initiative process in Idaho is limited to proposing and adopting changes in statutory law.<sup>9</sup> Statutes adopted by initiative are subject to the same constitutional requirements and constraints as other statutes.<sup>10</sup> Thus, for the initiative to ultimately succeed in its goal of reforming the property tax, its provisions must comport with the provisions of the Idaho Constitution relating to property taxation. The Idaho Constitution, in art. VII, §§ 2<sup>11</sup> and 5,<sup>12</sup> requires that property taxes be uniform and in proportion to value. The Idaho Supreme Court has interpreted these

## CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

---

provisions to mean the tax must be based on the property's current market value. Two examples illustrate the Court's understanding of these provisions:

In our opinion the valuation of taxable property for assessment purposes must reasonably approximate the fair market value of the property in order to effectuate the policy embodied in Id. Const. Art. VII, § 5. i. e., that each taxpayer's property bear the just proportion of the property tax burden. . . . Although different types of property are by their nature more amenable to valuation by one method of appraisal than another, the touchstone in the appraisal of property for ad valorem tax purposes is the fair market value of that property, and fair market value must result from application of the chosen appraisal method. An arbitrary valuation is one that does not reflect the fair market value or full cash value of the property and cannot stand.<sup>13</sup>

We interpret the language of Art. VII, § 2 - 'every person \* \* \* shall pay a tax in proportion to the value of his, her, or its property \* \* \*' - as meaning that every property owner shall receive equal treatment under the ad valorem tax laws; for example, if owner A possesses \$100.00 of property which is taxed \$1.00, then owner B with \$400.00 of taxable property shall be taxed in the same proportion, or \$4.00.<sup>14</sup>

(Emphasis added.) The inevitable effect of the valuation system proposed by the initiative will be an impermissible discrimination in valuation between property subject to tax on its "full cash value" and property taxed on its value when "purchased, newly constructed, or a change in ownership has occurred after the 2002 assessment." This office noted in previous opinions about property tax initiatives that value limitations similar to the limits in this proposal should be offered by means of a constitutional amendment, not by statutory changes. As a result, we advised that "[t]he only sensible and certain safeguard is that of deleting the distinction made in Sect Two<sup>15</sup> of the initiative between property purchased, newly constructed, or subjected to change of ownership on the one hand and property which has not experienced any of those circumstances on the other hand."<sup>16</sup> Nothing in Idaho's Constitution or

in the development of our constitutional jurisprudence counsels any different recommendation today.

**3. Limitations on Legislative Enactments Increasing State Revenue**

The proposed subsection (5) would limit the ability of the Legislature to increase “revenues collected . . . by increased rates or changes of methods of computation” by requiring the Legislature to enact such changes by “two-thirds of all members elected to each of the two houses of the Legislature. . . .” It also prohibits the Legislature from enacting any “new ad valorem taxes on real property, or sales or transactional taxes on the sales of real property.”<sup>17</sup>

This section is of no legal effect. As noted earlier, the initiative process in Idaho is limited to proposing and adopting changes in statutory law.<sup>18</sup> Initiative legislation is on equal footing with the legislation enacted by the Idaho Legislature.<sup>19</sup> Like any other statute, a statute enacted by initiative may be repealed or amended by the Legislature.<sup>20</sup>

Furthermore, the quorum necessary for the Legislature to conduct business is established by art. III, § 10 of the Idaho Constitution as the “majority of each house.” A statutory attempt to require action by two-thirds of all members of each house deprives the Legislature of its constitutionally granted authority “to do business” based on a quorum of all legislators. A statute may not usurp a constitutionally granted power.<sup>21</sup> Thus, nothing prevents the Idaho Legislature from repealing, amending, or simply ignoring the provisions of subsection (5).<sup>22</sup>

The proposed subsection (5) may also be subject to challenge on another constitutional ground. While proposed subsections (3), (4), and (6) are limited to addressing issues of only local taxation, subsection (5) purports to limit the Legislature’s authority to increase revenues by changes in state taxes. This may contravene the constitution’s requirement that legislation “shall embrace but one subject.”<sup>23</sup> Because initiative legislation is on equal footing with the legislation enacted by the Legislature, it must comply with the same constitutional requirements as legislation enacted by the Idaho Legislature.<sup>24</sup> While the standard the Idaho Supreme Court applies to determine whether provisions of an enactment are sufficiently related is a liberal one,<sup>25</sup> the court will invalidate an enactment when it is unable to identify a purpose that sufficiently unites all of the provisions of the statute.<sup>26</sup>

The limitation on increases in state funding in the proposed subsection (5) may also impose impermissible restriction on duties constitutionally imposed on the Legislature. For example, the Idaho Constitution requires the Legislature “to establish and maintain a general, uniform and thorough system of public, free common schools.”<sup>27</sup>

#### **4. Authorization of “Special Taxes”**

The proposed subsection (6) would authorize the imposition of “special taxes” by a two-thirds votes of the “qualified electors” of a city, county, or “special district.” However, the authorization does not include ad valorem taxes on real property or transaction or sales taxes on real property.<sup>28</sup>

This office has previously addressed the difficulty of implementing a requirement that an election authorizing a tax be enacted by two-thirds votes of the “qualified electors” of the local government holding the election.<sup>29</sup> We said:

One problem with this super-majority requirement stems from the fact that it is impossible to identify the number of qualified electors in a given district on a particular date. Many special taxing districts—such as hospital districts, irrigation districts, fire protection districts, and recreation districts—base voter qualification upon residency within the district and do not require voter registration. In order to vote in these taxing districts, electors need only sign an oath form affirming their residency. The elector’s oath need not be signed until just before the elector enters the polling booth. For example, Idaho Code § 42-3202<sup>30</sup> establishes voter qualification for water and sewer district elections:

A “qualified elector” of a district, within the meaning of and entitled to vote under this act, unless otherwise specifically provided herein, is a person qualified to vote at general elections in this state, and who has been a bona fide resident of the district for at least thirty (30) days prior to any election in the district. No registration shall be required at any elec-



tion held pursuant to this act, but each voter shall be required to execute an oath of election attesting his qualification.

Under this electoral system, it is impossible to determine the number of “qualified electors” in the district. The number of qualified electors is constantly in flux and the required number of votes needed for approving a “special tax” changes every time someone moves into or out of the district.

The two-thirds super-majority voting requirement is likewise impossible to follow in districts that do have voter registration, such as counties, cities, and school districts.

No precise figures of qualified electors are available in these districts, either. If a registered voter moves from a county and the county clerk is not aware of the change, the voter’s registration at his or her former address will remain on the county rolls for up to four years. Idaho Code § 34-435. Thus, voter registration does not provide exact numbers of “qualified electors” within a county at any given time and cannot be relied upon to establish voter approval thresholds for “special tax” elections.

We therefore conclude, based on the practical problems facing the two-thirds super-majority voting requirement, that this provision of the One Percent Initiative cannot be enforced as written. The courts must either strike section 2 of the initiative in its entirety as inoperable (thus leaving no means for the public to exempt levies from the initiative) or interpret and apply section 2 in a manner at odds with its literal wording and the announced intent of its sponsors.

Regardless of the approach taken by the courts, in our opinion, the courts would not allow the two-thirds super-majority provision to stand as written. Requiring the approval of two-thirds of all qualified electors—whether

## CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

---

they vote or not—turns every non-vote into a “No” vote. It systematically frustrates those who do exercise the franchise and even takes away from those who choose to abstain the right not to have their votes counted.

This requirement of the One Percent Initiative violates the basic principle of participatory democracy guaranteed to every Idahoan by art VI, § 1, of the Idaho Constitution (“All elections by the people must be by ballot.”). A reviewing court would not allow such a requirement to stand.

The language of proposed subsection (6) presents some other difficulties. First, it authorizes the imposition of “special taxes” but the term is undefined except by exclusion. Special taxes are not ad valorem taxes on real property or transaction or sales taxes on real property. Standards and safeguards that are “built in” to the statute must accompany any delegation of authority to local governments.<sup>31</sup> Subsection (6) fails to explain the scope of delegation (e.g., could it include local income taxes?) or provide standards such as defining the incidence of the tax, setting forth applicable exemptions, setting the maximum amount which may be imposed, and delineating administration and collection provisions of the special tax that rulings of the Idaho Supreme Court have cited as necessary to such an enabling statute.<sup>32</sup>

Similarly, the term “special district” is not defined. The qualifier “special” implies not all taxing districts receive the authorization to impose “special taxes,” but which do and which do not is left unstated.

Paragraph (b) of subsection (6) contains a puzzling requirement that all bond elections must be held only at general elections. This is puzzling because elections under subsection (6) are specifically prohibited from imposing the ad valorem property taxes used to fund the issuance of bonds.

### CONCLUSION

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 the petitioner, Fritz R. Dixon, by deposit in the U.S. Mail of a copy of this certificate of review.

## CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

---

Sincerely,

LAWRENCE G. WASDEN  
Attorney General

### Analysis by:

THEODORE V. SPANGLER, JR.  
Deputy Attorney General

---

<sup>1</sup> The proposed subsection (3) states:

(a) The maximum amount of ad valorem tax on real property used as the primary residence of an Idaho residence shall not exceed one percent (1 %) of the cash value of such property. The one percent: (1%) tax is to be collected by the counties and apportioned according to law to the districts within the counties.

(b) The limitation provided for in subdivision (a) shall not apply to ad valorem taxes or special assessments to pay the interest and redemption charges on any indebtedness approved by the voters prior to the time this section becomes effective.

<sup>2</sup> Two of these Opinions may be found on the Attorney General's website: See 1991 Idaho Attorney General's Opinion 91-9 at [http://www2.state.id.us/ag/ops\\_guide\\_cert/1991/op91-09.pdf](http://www2.state.id.us/ag/ops_guide_cert/1991/op91-09.pdf) and Idaho Attorney General's Opinion 96-3 at [http://www2.state.id.us/ag/ops\\_guide\\_cert/1996/op96-03.pdf](http://www2.state.id.us/ag/ops_guide_cert/1996/op96-03.pdf). See also Idaho Attorney General's Opinion 78-37 Published in 1978 Idaho Attorney General's Annual Report, p. 148.

<sup>3</sup> Art. VII, § 5, Idaho Constitution, see footnote 12.

<sup>4</sup> Idaho Telephone Co. v. Baird, 91 Idaho 425 (1967)

<sup>5</sup> See also 1995 Idaho Attorney General's Opinion 95-03 at [http://www2.state.id.us/ag/ops\\_guide\\_cert/1995/op95-03.pdf](http://www2.state.id.us/ag/ops_guide_cert/1995/op95-03.pdf).

<sup>6</sup> The proposed language states:

The full cash value means the County Assessors valuation of real property as shown on the 2001-2002 Assessment Notice under "Net Taxable Property Value" after the homeowners exemption has been deducted, or thereafter, the appraised value of real property when purchased, newly constructed, or a change in ownership has occurred after the 2002 assessment. All real property not already assessed up to the 2001-2002 tax levels may be reassessed to reflect that valuation.

<sup>7</sup> United States Pacific Insurance Company v. Bakes, 57 Idaho 737 (1937).

<sup>8</sup> Penrod v. Cowley, 82 Idaho 511 (1960)

<sup>9</sup> See chapter 18, title 34, Idaho Code.

<sup>10</sup> Westerberg v. Andrus, 114 Idaho 401 (1988).

<sup>11</sup> Art. VII, § 2, provides:

Revenue to be provided by taxation. 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.

<sup>12</sup> Art. VII, § 5, provides:

Taxes to be uniform—Exemptions. 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

## CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

---

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.

<sup>13</sup> *Merris v. Ada County*, 100 Idaho 59, 63 (1979).

<sup>14</sup> *Idaho Telephone Co. v. Baird*, 91 Idaho 425 (1967).

<sup>15</sup> The reference is to section 2 of “Initiative 1” passed at the general election of November 7, 1978, “Restricting Governmental Ability to Change Property Valuations or Taxes” on file at the Office of the Idaho Secretary of State.

<sup>16</sup> AG Opinion 78-37, pg. 155, *supra* at footnote 2.

<sup>17</sup> The proposed subsection (5) provides:

From and after the effective date of this article, any changed in State taxes enacted for the purpose of increasing revenues collected pursuant thereto by increased rates or changes of methods of computation must be imposed by an Act passed by not less than two-thirds of all members elected to each of the two houses of the Legislature, not just those present and voting, except that no new ad valorem taxes on real property or sales or transaction taxes on the sales of real property may be imposed.

<sup>18</sup> See footnote 9.

<sup>19</sup> *Westerberg v. Andrus*, 114 Idaho 401 (1988).

<sup>20</sup> *Luker v. Curtis*, 64 Idaho 703 (1943); *Gibbons v. Cenarrusa*, 140 Idaho 316 (2002).

<sup>21</sup> *Williams v. State Legislature of Idaho*, 111 Idaho 156 (1986). “The legislature may not usurp the power of a constitutionally created executive agency . . .”

<sup>22</sup> A statute may be repealed by enactment of another statute that, by irreconcilable inconsistency with a prior statute, makes the legislature’s intent that the two statutes cannot operate contemporaneously clear. *Chapple v. Madison County Officials*, 132 Idaho 76 (1998).

<sup>23</sup> Idaho Constitution, art. III, § 16.

<sup>24</sup> *Westerberg v. Andrus*, *supra*, n.10.

<sup>25</sup> “[T]here must be a common object, and that all parts of a statute relate to and tend to support and accomplish the indicated object.” *American Federation of Labor v. Langley*, 66 Idaho 763 (1946).

<sup>26</sup> Two examples of cases in which the Idaho Supreme Court has invalidated a statute based on the single subject rule are *American Federation of Labor*, *supra*, n.25, and *State v. Banks*, 37 Idaho 27 (1923). The former case involved a statute with provisions that required labor unions to file income and expenditure statements, forbade labor union members from entering agricultural premises to collect fees or solicit memberships and prohibited picketing on certain agricultural premises. The court found the single subject provision was violated since the court was unable to identify a purpose that united all of the provisions of the statute. The latter invalidated a statute that authorized the use of money from the state’s general fund to pay the expenses of the negotiation and sale of both general fund treasury notes and refunding bonds. The court found there were two separate and distinct subjects, noting that general fund notes had nothing to do with the indebtedness of the state.

<sup>27</sup> Art IX, § 1, Idaho Constitution.

<sup>28</sup> The specific language is:

Cities, counties, and special districts, by a two-thirds vote of the qualified electors of such district, may impose special taxes on such district, except ad valorem taxes on real property or a transaction tax or sales taxes on the sale of real property within such City, County, or special district are prohibited.

<sup>29</sup> See AG Opinion 91-9, *supra*, n.2.

<sup>30</sup> Since AG Opinion was issued, this section of Idaho Code has been amended. However, we note that similar provisions currently appear in Idaho Code § 43-113.

<sup>31</sup> *Greater Boise Aud. v. Royal Inn of Boise*

Topic Index  
and  
Tables of Citation  
CERTIFICATES OF REVIEW  
2005



**CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL**

---

<b>CERTIFICATE TITLE/DESCRIPTION</b>	<b>DATE</b>	<b>PAGE</b>
“The Idaho Judicial Accountability Act of 2006” . . . .	2/4/05	51
Proposed Initiative to Amend Motor Vehicle Registration Law . . . . .	5/16/05	56
Proposed Initiative to Amend Provisions Relating to Property Tax . . . . .	9/14/05	58
Proposed Initiative to Amend Idaho Code § 63-205 Relating to Property Tax . . . . .	9/27/05	72

**IDAHO CONSTITUTION CITATIONS**

<b>ARTICLE &amp; SECTION</b>	<b>DATE</b>	<b>PAGE</b>
<b>ARTICLE II</b>		
§ 1 . . . . .	2/4/05	51
<b>ARTICLE III</b>		
§ 1 . . . . .	5/16/05	56
§ 10 . . . . .	9/27/05	72
§ 16 . . . . .	2/4/05	51
<b>ARTICLE VI</b>		
§ 1 . . . . .	9/27/05	72
<b>ARTICLE VII</b>		
§ 2 . . . . .	9/14/05	58
§ 2 . . . . .	9/27/05	72
§ 5 . . . . .	9/14/05	58
§ 5 . . . . .	9/27/05	72
§ 12 . . . . .	9/14/05	58
<b>ARTICLE IX</b>		
§ 1 . . . . .	9/14/05	58
§ 1 . . . . .	9/27/05	72

CERTIFICATES OF REVIEW OF THE ATTORNEY GENERAL

---

**IDAHO CODE CITATIONS**

<b>SECTION</b>	<b>DATE</b>	<b>PAGE</b>
1-2003 .....	2/4/05	51
2-215 .....	2/4/05	51
19-4201(A) .....	2/4/05	51
19-4202 .....	2/4/05	51
19-3945 .....	2/4/05	51
33-802 .....	9/14/05	58
34-1801(A) .....	9/14/05	58
34-1809 .....	2/4/05	51
34-1809 .....	5/16/05	56
34-1809 .....	9/14/05	58
34-1809 .....	9/27/05	72
34-435 .....	9/27/05	72
42-3202 .....	9/27/05	72
43-113 .....	9/27/05	72
49-445(2) .....	5/16/05	56
63-201 .....	9/14/05	58
63-201(10) .....	9/27/05	72
63-201(11) .....	9/14/05	58
63-201(26) .....	9/14/05	58
63-201(27) .....	9/14/05	58
63-205 .....	9/27/05	72
63-301 .....	9/14/05	58
63-308 .....	9/27/05	72
63-315 .....	9/14/05	58
Title 63 .....	9/14/05	58
63-801 .....	9/14/05	58
63-802 .....	9/14/05	58
63-803 .....	9/14/05	58
63-1313 .....	9/14/05	58
63-1313(2) .....	9/14/05	58
Title 63, chapter 17 .....	9/14/05	58