IDAHO ATTORNEY GENERAL'S ANNUAL REPORT

OPINIONS

CERTIFICATES OF REVIEW

AND

SELECTED ADVISORY LETTERS

FOR THE YEAR

2018

Lawrence G. Wasden
Attorney General

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Similarly, the Certificate of Review of January 12, 2018 is found at:

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The Advisory Letter of January 9, 2018 is found at:

2018 Idaho Att'y Gen. Ann. Rpt. 43

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Lawrence G. Wasden
Attorney General

INTRODUCTION

My Fellow Idahoans:

2018 marked another successful year in the Office of the Attorney General. Once again, as has been the case during my four terms as Attorney General, the guiding principal behind my office's work was to provide accurate and objective legal advice that defends Idaho's laws and sovereignty, while adhering to the Rule of Law. In November 2018, Idaho voters entrusted in me a fifth term. Over the next four years, I pledge to continue making this principle central to my office's mission.

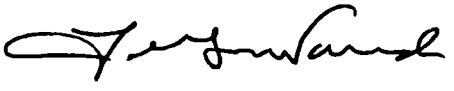
My efforts to help educate Idaho residents, public officials and journalists on the state's open meeting and public records laws continued. My staff and I partnered with Idahoans for Openness in Government, as well as several news outlets, for three spring seminars in Moscow, Lewiston and Coeur d'Alene. Since 2004, we've conducted 43 such trainings around the state.

The office also launched an updated and newly organized website designed to increase transparency and enhance communication with constituents. The new user-friendly portal includes easy-to-use forms, access to numerous office manuals and a searchable database of past opinions and historical office documents.

These accomplishments were in addition to the steady, principled and sage legal counsel dozens of dedicated deputy attorneys general provided to offices, agencies and boards throughout Idaho state government.

I encourage everyone to visit my website at www.ag.idaho.gov to learn more about the office, the work being done, the resources available for consumers, and other legal matters.

Thank you for your interest in Idaho's legal affairs.



LAWRENCE G. WASDEN
Attorney General

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2018
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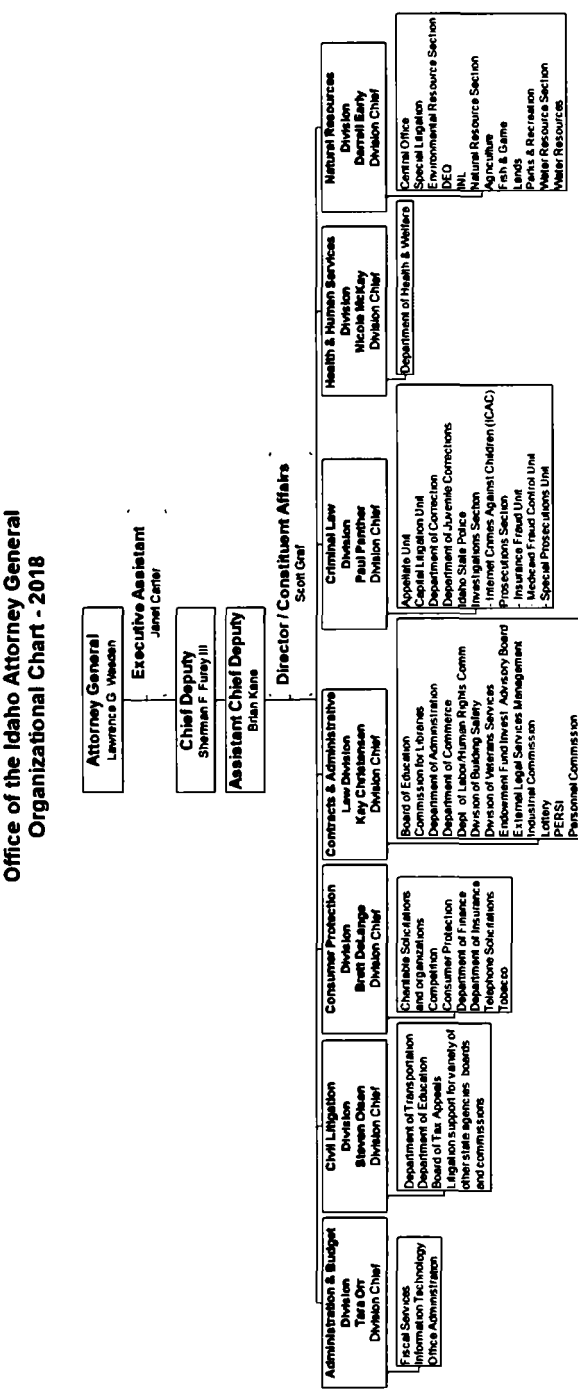
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OFFICIAL OPINIONS
OF
THE ATTORNEY GENERAL
FOR THE YEAR 2018

LAWRENCE G. WASDEN

ATTORNEY GENERAL
STATE OF IDAHO

ATTORNEY GENERAL OPINION NO. 18-01

TO: The Honorable Rick D. Youngblood
Idaho State Representative
12612 Smith Avenue
Nampa, ID 83651

Pursuant to your request, the Office of the Attorney General has prepared the following opinion in response to the questions presented in your July 18, 2018 correspondence.

QUESTIONS PRESENTED

1. Does the decision in the Trinity Lutheran case alter in any way the meaning or application of Idaho's Blaine Amendment, and if so, how?

2. Idaho's Blaine Amendment appears to be inconsistent with the other three constitutional sections cited [art. I, § 4, art. XXI, § 19, and art. XXI, § 20].[1] Do those other sections limit or alter the meaning, construction or application of Idaho's Blaine Amendment in any way, and if so, how?

3. Does the decision in the Trinity Lutheran case alter in any way the meaning or application of past Idaho Attorney General opinions involving Idaho's Blaine Amendment, and if so, how?

4. Do the other three Idaho Constitution sections cited above alter in any way the meaning or application of past Idaho Attorney General opinions involving Idaho's Blaine Amendment, and if so, how?

5. Considering the decision in the Trinity Lutheran case and the four Idaho Constitutional sections cited, including, but not limited to, Idaho's Blaine

Amendment, may "any school, academy, seminary, college, university or other literary or scientific institution, controlled by any church, sectarian or religious denomination whatsoever," including Northwest Nazarene University, legally and constitutionally either participate in or be excluded from participation in, the following state activities: (1) on-campus Idaho work study programs, (2) the issuance of tax-free bonds through the Idaho Housing and Finance Association, (3) participation of their students in Title IV-E contracts and grants, and (4) any other activities involving state moneys that work to benefit students of the referenced institutions?

CONCLUSIONS

1. The decision in Trinity Lutheran Church of Columbia, Inc. v. Comer, – U.S. –, 137 S. Ct. 2012, 198 L. Ed. 2d 551 (2017), will likely have some limiting effect on the application of article IX, section 5 of Idaho's Constitution (the "Blaine Amendment"). Like the Missouri Constitution, which was at issue in Trinity Lutheran, Idaho's Constitution provides for greater separation of church and state than what is already ensured by the Establishment Clause in the First Amendment of the United States Constitution, as it contains a so-called "no aid" provision which is commonly referred to as a Blaine Amendment.

In Trinity Lutheran, the United States Supreme Court found that Missouri's policy of strictly adhering to such an amendment – resulting in the denial of a grant to a church to make safety improvements to the playground of a preschool it operated – imposed a penalty on the free exercise of religion that triggered the strict scrutiny review. The Supreme Court found that Missouri's "policy preference for skating as far as possible from religious establishment concerns" did not meet that standard and that the exclusion of Trinity Lutheran from a public benefit for which it was otherwise qualified solely because it is a school affiliated with a church could not stand as it violated the right to the free exercise of religion.

In light of the Court's reasoning, the practice of outright denying an otherwise publicly available benefit to a religiously affiliated applicant solely because of who or what the applicant is (i.e., a church, religiously affiliated university, etc.), as opposed to how the applicant will put the benefit to use (i.e., direct religious use versus resurfacing a playground to ensure safety of children), has been called into question. While this case confirms that "there is 'play in the joints' between what the Establishment Clause permits and the Free Exercise Clause compels," the amount of "play" is still in question, especially given that the Supreme Court included language that suggests the opinion should be limited to the facts of the case.

2. A well-established canon of statutory construction is that statutes are to be construed together and harmonized to the extent possible. The constitutional provisions identified in your letter (art. IX, § 5; art. I, § 4; art. XXI, § 19; and art. XXI, § 20) are capable of being harmonized, as they generally are establishment and free exercise clauses, and such clauses have a long history of co-existing. However, such clauses do act as limits upon one another.

3. There are few prior opinions issued by the Attorney General involving the application of art. IX, sec. 5 of the Idaho Constitution. One such Attorney General Guideline is from February 7, 1992 regarding "potential church/state constitutional issues associated with an income tax credit for tuition payments to private schools for children ages K-12." That opinion found that tuition tax credits for private schools are probably unconstitutional under art. IX, sec. 5 of the Idaho Constitution. 1992 Idaho Att'y Gen. Ann. Rpt. 54. The Trinity Lutheran decision likely supersedes the analysis in that Guideline.

4. Art. I, sec. 4, art. XXI, sec. 19, and art. XXI, sec. 20 of the Idaho Constitution do not alter any past opinions of the Attorney General involving the Blaine Amendment.

5. Determining whether it is legal and constitutional to either allow a religiously affiliated institution to participate in, or be excluded from, state programs likely depends on a few key factors, including, but not limited to: (1) whether the program is publicly available; (2) whether a religiously affiliated applicant is being excluded categorically because of who or what they are, as opposed to how the

funds will be used; (3) whether the program provides direct or indirect aid to the institution; and (4) whether the student is the primary intended beneficiary of the benefit provided by the program.

ANALYSIS

1. Does the decision in the Trinity Lutheran case alter in any way the meaning or application of Idaho's Blaine Amendment, and if so, how?

Art. IX, § 5 of the Idaho Constitution provides in pertinent part as follows:

> Neither the legislature nor any county, city, town, township, school district, or other public corporation, shall ever make any appropriation, or pay from any public fund or moneys whatever, anything in aid of any church or sectarian or religious society, or for any sectarian or religious purpose, or to help support or sustain any school, academy, seminary, college, university or other literary or scientific institution, controlled by any church, sectarian or religious denomination whatsoever . . . .

This type of provision is what is commonly referred to as a Blaine Amendment. The term Blaine Amendment dates back to the 1870s when a congressman named James Blaine sought to amend the United States Constitution to provide that no public funds should ever be distributed to any religious sects. That effort narrowly failed, however, a majority of states amended or drafted their constitutions to include variations of the Blaine Amendment.

Missouri also has a Blaine Amendment which provides as follows:

> That no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such; and that no preference shall be given to nor any discrimination

> made against any church, sect or creed of religion, or any form of religious faith or worship.

V.A.M.S. Const., art. I, § 7. In accordance with this provision, the Missouri Department of Natural Resources had a policy of categorically disqualifying churches and other religious organizations from receiving grants. Trinity Lutheran, 137 S. Ct. at 2017.

Trinity Lutheran Church runs a preschool and daycare called the Child Learning Center (the "Center") in Boone County, Missouri. *Id.* The Center has a playground that is used by its daycare students and by children of the surrounding community. *Id.*

In 2012, the Center applied to a program operated by Missouri's Department of Natural Resources for a grant to replace the gravel surface of its playground with a safer surface made from recycled tires. *Id.* The Center met the neutral requirements for obtaining a grant and scored well in comparison with other applicants, ranking 5th out of the 44 applicants. *Id.* at 2018. While the state awarded 14 grants, it denied the Center's application for a grant based on its policy of deeming religious institutions categorically ineligible to receive grants. *Id.* The Center filed suit claiming that Missouri's policy of denying a generally available public benefit to religious institutions solely on the basis of their status as a religious institution violated the Free Exercise Clause of the First Amendment of the United States Constitution. *Id.*

The Supreme Court found that "denying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion that can be justified only by a state interest 'of the highest order.'" *Id.* at 2019. The state interest asserted to justify the policy was achieving greater separation of church and state than what is already ensured by the Establishment Clause in the First Amendment of the United States Constitution. *Id.* at 2024. The Supreme Court found that such an interest was not sufficient to withstand the strictest scrutiny. *Id.*

In so finding, the Supreme Court distinguished prior precedent that permitted a state to withhold a benefit that was going to be put to religious use on the grounds that Trinity Lutheran was not being denied an otherwise publicly available benefit because of how it planned to use

the grant, but rather because of what it was. *Id.* at 2023. More specifically, the Supreme Court distinguished this case from Locke v. Davey, 540 U.S. 712, 124 S. Ct. 1307, 158 L. Ed. 2d 1 (2004), on the grounds that the plaintiff there "was not denied a scholarship because of who he *was*; he was denied a scholarship because of what he proposed *to do*—use the funds to prepare for the ministry. Here there is no question that Trinity Lutheran was denied a grant simply because of what it is—a church." 137 S. Ct. at 2023 (emphasis in original).

The Supreme Court further distinguished Locke on the grounds that in that case the plaintiff sought the funding for an "essentially religious endeavor" and that the state had a strong "antiestablishment interest in not using taxpayer funds to pay for the training of clergy." *Id.* However, "nothing of the sort can be said about a program to use recycled tires to resurface playgrounds." *Id.*

In light of the Supreme Court's decision, the practice of outright denying an otherwise publicly available benefit to a religiously affiliated applicant solely because of who or what the applicant is, as opposed to how the applicant will put the benefit to use, has been called into question. *See, e.g.*, The Hon. Michael P. Mullin, 2018 WL 1127735 (Va. Att'y Gen. Op. February 15, 2018) ("In light of *Trinity Lutheran*, [Virginia Code] § 15.2-953 likely would run afoul of the Free Exercise Clause if it required a locality to deny generally available public benefits to qualifying churches or sectarian organizations solely upon the basis of religious status, when such benefits are expended for non-religious purposes.").

Trinity Lutheran confirms that "there is 'play in the joints' between what the Establishment Clause permits and the Free Exercise Clause compels." 137 S. Ct. at 2019. The amount of "play" is still in question given that the Supreme Court included language in a footnote that suggests the opinion should be limited to the facts of the case. 137 S. Ct. at 2024, n.3. However, multiple Justices did not join in that footnote, and Justice Gorsuch noted that such a limited reading of the opinion would be unreasonable. *Id.* at 2025-26. Moreover, other states have relied on the reasoning in Trinity Lutheran to assess whether their Blaine Amendments prevent sectarian institutions from enjoying publicly available benefits extending beyond playground resurfacing. *See, e.g.*, Steve Emmons, 2018 WL 1663640 at *4-6 (Okla. Att'y Gen.

Op. March 30, 2018) (discussing Trinity Lutheran in concluding that Oklahoma's Blaine Amendment could not be held to prevent the state from providing free training to campus police commissioned by a private school solely on the basis that the commissioning entity is of a sectarian nature.).

2. Idaho's Blaine Amendment appears to be inconsistent with the other three constitutional sections cited [art. I, § 4, art. XXI, § 19, and art. XXI, § 20]. Do those other sections limit or alter the meaning, construction or application of Idaho's Blaine Amendment in any way, and if so, how?

"[A]s a general rule, the usual principles governing the construction of statutes apply also to the construction of constitutions." 16 C.J.S. *Constitutional Law* § 82 (Westlaw 2018). "Statutes that relate to the same subject matter 'are to be construed in harmony, if reasonably possible.'" State v. Thiel, 158 Idaho 103, 109, 343 P.3d 1110, 1116 (2015); State v. Seamons, 126 Idaho 809, 811-12, 892 P.2d 484, 486-87 (Ct. App. 1995) ("When construing two separate statutes that deal with the same subject matter, the statutes should be construed harmoniously, if at all possible, so as to further the legislative intent.").

Art. IX, sec. 5 of the Idaho Constitution can and should be interpreted in a manner that does not render it inconsistent with other provisions of the Idaho Constitution. Art. IX, sec. 5 prohibits specified governmental entities from making any appropriation of public funds to religious institutions and their affiliates. It is essentially a no establishment of religion clause, but is stricter than what is provided in the First Amendment of the United States Constitution. Art. I, sec. 4 and art. XXI, sec. 19 of the Idaho Constitution guarantee religious liberty and prohibit the denial of personal rights and privileges based on one's religious beliefs. They are essentially clauses designed to ensure the free exercise of religion.

Establishment and free exercise clauses have co-existed throughout this nation's history. As was noted by the United States Supreme Court, "there is 'play in the joints' between what the Establishment Clause permits and the Free Exercise Clause compels." Trinity Lutheran, 137 S. Ct. at 2019. So such clauses co-exist, but also act as limits upon one another.

With respect to art. XXI, sec. 20 of the Idaho Constitution, it simply confirms that Idaho adopts the United States Constitution.

3. Does the decision in the Trinity Lutheran case alter in any way the meaning or application of past Idaho Attorney General opinions involving Idaho's Blaine Amendment, and if so, how?

There are few prior opinions issued by the Attorney General involving the application of art. IX, sec. 5 of the Idaho Constitution. One such opinion is from February 7, 1992 regarding "potential church/state constitutional issues associated with an income tax credit for tuition payments to private schools for children ages K-12." 1992 Idaho Att'y Gen. Ann. Rpt. 54. That opinion found that tuition tax credits for private schools are probably unconstitutional under art. IX, sec. 5 of the Idaho Constitution. The Trinity Lutheran decision supersedes the analysis in that opinion. This office will review and recommends that other entities review application of art. IX, sec. 5 based upon the reasoning of the Trinity Lutheran decision and any additional interpretative case law moving forward.

Under such a tax credit system, any aid to religiously affiliated schools would be indirect as the benefit would go to the parents of the children attending such schools. Accordingly, it would likely be permitted under the United States Constitution in light of Zelman v. Simmons-Harris, 536 U.S. 639, 652, 122 S. Ct. 2460, 2467, 153 L. Ed. 2d 604 (2002) ("where a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause."). So, the question becomes whether those who attend religiously affiliated schools can be excluded from such a program based on Idaho's Blaine Amendment. Based on the Supreme Court's reasoning in Trinity Lutheran, if those who attended private religiously affiliated schools were not allowed to participate in that program, such an exclusion would need to be evaluated to determine if it was being excluded for "who" is participating (religious school students) versus the purpose of the assistance, student education. Based upon the reasoning in Trinity Lutheran, it is likely that absent a finding that the

purpose of the benefit was the furtherance of religion, the exclusion would be constitutionally suspect.

A recent case from Colorado presents an analogous situation. In Taxpayers for Pub. Educ. v. Douglass Cty. Sch. Dist., 351 P.3d 461 (Colo. 2015), the Colorado Supreme Court found that a scholarship program that provided tax-payer funded scholarships to qualifying elementary, middle and high schools students to attend private schools, including religiously affiliated schools, violated the Blaine Amendment in Colorado's Constitution. *Id.* at 470-75. The United States Supreme Court granted certiorari and, the day after the Trinity Lutheran decision, the Supreme Court vacated the judgment and remanded the case to the Colorado Supreme Court for further consideration in light of Trinity Lutheran. Colo. State Bd. of Educ. v. Taxpayers for Pub. Educ., — U. S. —, 137 S. Ct. 2325, 198 L. Ed. 2d 753 (2017). A new school board rescinded the program so the case was dismissed as moot. However, given that the Supreme Court granted certiorari, vacated the judgment, and remanded the case for further consideration in light of the Trinity Lutheran decision, it seems the Supreme Court is signaling that Trinity Lutheran might apply to these types of programs.

4. Do the other three Idaho Constitution sections cited above alter in any way the meaning or application of past Idaho Attorney General opinions involving Idaho's Blaine Amendment, and if so, how?

Art. I, sec. 4, art. XXI, sec. 19, and art. XXI, sec. 20 of the Idaho Constitution do not alter any past opinions of the Attorney General involving the Blaine Amendment.

5. Considering the decision in the Trinity Lutheran case and the four Idaho Constitutional sections cited, including, but not limited to, Idaho's Blaine Amendment, may "any school, academy, seminary, college, university or other literary or scientific institution, controlled by any church, sectarian or religious denomination whatsoever," including Northwest Nazarene University, legally and constitutionally either participate in or be excluded from participation in, the following state activities: (1) on-campus Idaho work study programs, (2) the issuance of

tax-free bonds through the Idaho Housing and Finance Association, (3) participation of their students in Title IV-E contracts and grants, and (4) any other activities involving state moneys that work to benefit students of the referenced institutions?

Determining whether it is legal and constitutional to either allow a religiously affiliated institution to participate in, or be excluded from, state programs likely depends on a few key factors, including but not limited to: (1) whether the program is publicly available; (2) whether a religiously affiliated applicant is being excluded categorically because of who or what they are, as opposed to how the funds will be used; (3) whether the program provides direct or indirect aid to the institution; and (4) whether the student is the primary intended beneficiary of the benefit provided by the program.

With respect to work study programs, there are generally available programs that are meant to assist students in obtaining jobs they can work to assist them in paying their educational expenses. Such programs are meant to benefit the student and any benefit to a religiously affiliated institution is indirect. Excluding religiously affiliated institutions from such programs would likely be seen as a punishment based on what the institution is and not on what it plans to do with the benefit. Accordingly, religiously affiliated institutions would likely be permitted to participate in such programs.

With respect to tax-free bond programs, they would provide a direct benefit to a religiously affiliated institution and would be meant to primarily benefit the institution, as opposed to the students. The aid provided could be used to further the religious objectives of the institution. In light of the foregoing, it is likely both legal and constitutional to exclude religiously affiliated institutions from participating in such programs, especially if such grants appear to further the institution's religious mission. *See* Freedom From Religion Found. v. Morris Cty. Bd. of Chosen Freeholders, 181 A.3d 992, 1009-12 (N.J. 2018) (finding that county's award of historic preservation grants to churches with active congregations to fund repairs to facilities used to hold religious services violated the Religious Aid Clause of New Jersey's Constitution, and that excluding churches from that program did not violate the Free Exercise Clause of the United States

Constitution because of what the churches planned to do with the funds: "use public funds to repair church buildings so that religious worship services can be held there").

With respect to participation in Title IV-E contracts and grants, these are generally for programs that provide stipends to social work students committed to practicing in the field of child welfare. To the extent that religiously affiliated institutions are being denied the opportunity to apply to participate in such programs *solely* because they are religiously affiliated, an argument can be made that such a blanket exclusion of religiously affiliated institutions violates their right to the free exercise of religion given that: the exclusion is based on what the institution is as opposed to how the funds will be used; the funds are likely not being used to further any religious mission of the institution; and the stipends primarily benefit the students as opposed to the institution.

AUTHORITIES CONSIDERED

1. Idaho Constitution:

Art. I, § 4.
Art. IX, § 5.
Art. XXI, § 19.
Art. XXI, § 20.

2. U.S. Supreme Court Cases:

Colo. State Bd. of Educ. v. Taxpayers for Pub. Educ., — U. S. —, 137 S. Ct. 2325, 198 L. Ed. 2d 753 (2017).
Locke v. Davey, 540 U.S. 712, 124 S. Ct. 1307, 158 L. Ed. 2d 1 (2004).
Trinity Lutheran Church of Columbia, Inc. v. Comer, — U.S. —, 137 S. Ct. 2012, 198 L. Ed. 2d 551 (2017).
Zelman v. Simmons-Harris, 536 U.S. 639, 122 S. Ct. 2460, 153 L. Ed. 2d 604 (2002).

3. Idaho Cases:

State v. Seamons, 126 Idaho 809, 892 P.2d 484 (Ct. App. 1995).
State v. Thiel, 158 Idaho 103, 343 P.3d 1110 (2015).

4. Other Cases:

Freedom From Religion Found. v. Morris Cty. Bd. of Chosen Freeholders, 181 A.3d 992 (N.J. 2018).
Taxpayers for Pub. Educ. v. Douglass Cty. Sch. Dist., 351 P.3d 461 (Colo. 2015).

5. Other State Constitutions:
V.A.M.S. Const., art. I, § 7 (Mo. Const.).

6. Other Authorities:

1992 Idaho Att'y Gen. Ann. Rpt. 54.

Steve Emmons, 2018 WL 1663640 at *4-6 (Okla. Att'y Gen. Op. March 30, 2018).

The Hon. Michael P. Mullin, 2018 WL 1127735 (Va. Att'y Gen. Op. February 15, 2018).

16 C.J.S. *Constitutional Law* § 82 (Westlaw 2018).

Dated this 12th day of September, 2018.

LAWRENCE G. WASDEN
Attorney General

Analysis by:

PETER WUCETICH
Deputy Attorney General

STEVEN OLSEN
Deputy Attorney General

BRIAN P. KANE
Assistant Chief Deputy Attorney General

[1] This statement was included as part of the question presented and is not meant to reflect the opinion of the Attorney General

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ATTORNEY GENERAL'S CERTIFICATES OF REVIEW FOR THE YEAR 2018

LAWRENCE G. WASDEN

ATTORNEY GENERAL
STATE OF IDAHO

January 12, 2018

The Honorable Lawerence Denney
Idaho Secretary of State
Statehouse
VIA HAND DELIVERY

RE: Certificate of Review
Proposed Initiative Amending Title 54, Chapter 25 Idaho Code, to Authorize Historical Horse Racing as a Form of Pari-Mutuel Betting

Dear Secretary of State Denney:

An initiative petition was filed on January 3, 2018 proposing to amend title 54, chapter 25 of the Idaho Code through the addition of the Save the Horse Racing in Idaho Act ("Act"). Pursuant to Idaho Code § 34-1809, this office has reviewed the petition and prepared the following advisory comments. Given the strict statutory timeframe within which this office must review the petition, our review can only isolate areas of concern and cannot provide in-depth analysis of each issue that may present problems. Further, under the review statute, the Attorney General's recommendations are "advisory only." The petitioners are free to "accept them in whole or in part." This office offers no opinion with regard to the policy issues raised by the proposed initiative or the potential revenue impact to the state budget from likely litigation over the initiative's validity.

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 titles for the initiative, petitioners may submit proposed titles for consideration. Any proposed titles should be consistent with the standard set forth above.

MATTER OF FORM

Sections 1 and 2 of the proposed initiative contain, respectively, the law's title and its findings and purposes. As this office understands these sections, they will not be codified in the Idaho Code. Section 3 is in proper legislative format for showing new statutory provisions.

SUMMARY OF INITIATIVE AND MATTERS OF SUBSTANTIVE IMPORT

I. Summary of Proposed Initiative

The proposed initiative adds three sections to title 54, chapter 25, Idaho Code that authorize wagering through the use of "historical horse race terminals." The first section, to be codified as Idaho Code § 54-2512A, derives in part from the similarly-numbered provision repealed in 2015. 2016 Idaho Sess. Laws 3. The Idaho Supreme Court found the Governor's veto of the repealing legislation untimely and therefore ineffective. Coeur d'Alene Tribe v. Denney, 161 Idaho 508, 387 P.3d 761 (2015). The other two sections, to be codified as Idaho Code §§ 54-2512B and 54-2512C, have no counterparts in the repealed legislation.

A. Section 54-2512A. The proposed initiative makes three significant changes to the repealed provision.

1. Subsection (1) authorizes the operation of historical horse race terminals at facilities where (a) live and/or simulcast horse racing is conducted and where live horse racing occurs at least eight days per year or (b) where the simulcast facility is subject to Idaho Code § 54-2514(A)(1). The repealed § 54-2512A(1) deemed historical horse race wagering "within the scope of a license that authorizes a live race meet licensee to conduct and supervise the use of the pari-mutuel wagering simulcast and/or televised races" and further authorized such wagering "at any facility authorized to conduct and supervise to conduct and supervise wagering on simulcast and/or televised races." This change presumably alters the scope of facilities where historical horse race wagering will be permissible from that of the repealed provision. *E.g.*, Pearl v. Bd. of Prof'l Discipline, 137 Idaho 107, 113-14, 44 P.3d

1162, 1168-69 (2002). The precise effect on the number of potentially authorized facilities, however, is unclear.

2. Subsections (2) and (3) are new and largely replicate Idaho Code § 67-429B. Subsection (2) identifies the only functions that historical horse race video terminals may perform. Subsection (3) declares the terminals are neither slot machines nor electronic or electromechanical imitation or simulation of casino gambling.

3. Subsection (4) deals with the allocation of daily receipts generated by historical horse race wagering. It increases the amount reserved for distribution to winning wagers from 89 percent to 90 percent; reduces the amount reserved to the Commission for specified public uses from 1.5 percent to 1.0 percent; and increases the amount paid to the licensee from 9.5 percent to 10 percent.

4. As under the repealed law, subsection (5) requires licensees to enter into an agreement with a horsemen's group, as defined in Idaho Code § 54-2502(4), establishing "the percentage of the historical horse race handle that is dedicated to the live horse race purse structure" and that must be paid into the "historical horse race purse moneys fund" created under subsection (6). Subsection (7) grants rule-making authority to the Idaho Racing Commission ("Commission") to implement the section's provisions.

B. Section 54-2512B. This section provides that the Act becomes effective upon voter approval and completion of the canvass by the Board of Canvassers. It expressly states that no further executive or legislative action is required for the Act's implementation.

C. Section 54-2512C. This section is titled "Severability" and includes standard statutory severability language; i.e., judicial invalidation of any term or provision in the Act that does not affect the validity or enforceability of the remaining provisions. However, it further states: "It is intent of the voters, that, to the extent any term or provision is declared to be illegal, void, or unenforceable, the legislature shall take all available steps to enact such term or provision in a legal, valid, and enforceable manner, whether through a statute or a proposed constitutional amendment to restore live horse racing in Idaho through

the authorization of pari-mutuel wagering on historical horse races using video terminals."

Finally, the 2015 repeal of Idaho Code § 54-2512A left untouched the definition of "historical horse race" in Idaho Code § 54-2502(3). It provides: "'Historical horse race' means a race involving live horses that was conducted in the past and that is rebroadcast by electronic means and shown on a delayed or replayed basis for the purposes of wagering conducted at a facility that is authorized to show simulcast and/or televised races." A potential conflict between the definition and section 54-2512A(1) therefore exists that the proposed initiative sponsors may wish to address.

II. Substantive Analysis

A. The Status of Historical Horse Race Wagering as Pari-Mutuel Betting

Art. III, sec. 20 of the Idaho Constitution, as presently configured, generally prohibits gambling. However, it excepts three forms of gaming if conducted in conformity with enabling legislation: a state lottery, pari-mutuel betting, and bingo or raffle games "operated by qualified charitable organizations in pursuit of charitable purposes." This provision does not define the term "pari-mutuel." As explained in greater detail below, the status of historical horse racing as legally permissible pari-mutuel betting under art. III, sec. 20 is uncertain and likely to draw a legal challenge.

1. Pari-mutuel betting has a lengthy history in Idaho.

At the time of the 1992 amendments to the constitutional provision, there was nonetheless a general understanding of pari-mutuel wagering established with reference to live horse racing as a result of the decision in Oneida County Fair Bd. v. Smylie, 86 Idaho 341, 386 P.2d 374 (1963) ("Oneida County"). There, the Supreme Court issued a writ of mandate compelling the Governor to appoint members to the Idaho Racing Committee created under the Idaho Horse Racing Act adopted in 1963. 1963 Idaho Sess. Laws 246. The majority opinion rejected the contention that the new statute's authorization of pari-mutuel betting violated art. III, sec. 20 of the Idaho

Constitution. That provision, as then constituted, prohibited "any lottery or gift enterprise under any pretense of for any purpose whatever." The statute itself did not define "pari-mutuel," but the Court accepted the petitioners' description:

> The pari mutuel system is a term of art for the mathematical method by which the amounts to be paid to successful patrons are computed. All money paid into the system is paid out to the patrons except for a small percentage retained by the state and fair board pursuant to the act. Odds on a particular horse are determined only by the amount of money paid on such horse by patrons in comparison to other horses in the race.

86 Idaho at 345, 386 P.2d at 376. The majority opinion reviewed at length decisions from other states addressing the question whether pari-mutuel wagering on horse races embodied a constitutionally-proscribed lottery and, adopting the majority view, held that "the pari-mutuel system of wagering on horse racing meets, as provided [under the new statute], is not one solely based on chance, which constitutes an essential requisite of a lottery." *Id.* at 368, 386 P.2d at 391.

Several of the decisions reviewed in Oneida County commented on the nature of pari-mutuel betting. *See* 86 Idaho at 352, 386 P.2d at 380-81 ("'The pari-mutuel system of betting does not come within the definitions given above. While the amount of money to be divided is indefinite as to dollars and cents, it is definite in that the amount of money to be divided is the total stakes on the winning horse, less a given percentage to the management. The persons among whom the money is to be divided are not uncertain, as they are those who bet on the winning horse.'") (quoting People v. Monroe, 182 N.E. 439, 442 (Ill. 1932) (internal quotation marks omitted); *id.* at 356, 386 P.2d at 383 ("'Said dictionary defines pari-mutuel as a form of betting on horses in which those who bet on the winning horse share the total stakes, less a small per cent to the management. It describes a pari-mutuel machine as a machine for registering and indicating the number and nature of bets made on horse races, used in the pari-mutuel system of betting.'") (quoting Rohan v. Detroit Racing Ass'n, 22 N.W.2d 433, 438 (Mich. 1946) (internal quotation marks omitted). A key feature to pari-mutuel gambling is thus the existence of odds as determined by

the wagers placed on horses in a particular race or series of races that, collectively, are the "pool" to be shared by successful bettors. *Id.* at 371-72, 386 P.2d at 394 (Taylor, J., dissenting) ("'[u]nder this system the exact "odds" on a particular dog to "win, place or show" cannot be determined until the betting is closed and information regarding the number and amount of bets is tabulated by the pari-mutuel machine, which, in the last analysis, is simply a device for calculating the odds'") (quoting State ex rel. Moore v. Bissing, 283 P.2d 418, 423 (Kan. 1955)). In sum, a necessary element of pari-mutuel wagering, as traditionally understood, is the *competition* between pool participants with respect to the *same* race or group of races, whose differing views of likely outcomes give rise to the odds that determine eventual pool payouts. *See generally* Bennett Liebman, *Pari-Mutuels: What Do They Mean and What Is at Stake in the 21st Century?*, 27 Marq. Sports L. Rev. 45, 100-01 (2016) (identifying the "six core elements or attributes" of a pari-mutuel system as including, inter alia, "players wager[ing] against each other in the pool" with "[t]he actual return to the winning bettors . . . not known until after wagering on the pool has closed").

This traditional understanding of pari-mutuel wagering appears to be incorporated in the section 54-2502(8) definition of that term: "'Pari-mutuel' means any system whereby wagers with respect to the outcome of *a race* are placed with, or in, a wagering pool conducted by a person licensed or otherwise permitted to do so under state law, and in which the participants are wagering with each other and not against the operator." (Emphasis added.) The term "pool" is further defined as "the total sum of all moneys wagered *in each race* for each type of bet. Types of bets include win, place, show, quinella, daily double, exacta, trifecta, etc., and such other types as are approved by the commission from time to time." *Id.* Idaho Code § 54-2502(10) (emphasis added).

The proposed initiative does not define the nature of historical horse race wagering pools or whether pool participants compete against one another with respect to the outcome of the same race or series of races. It is also silent on whether any odds exist upon which pool distributions can be calculated. It is similarly silent on whether the entirety of a wager is placed into the pool from which the payouts will be made; i.e., whether bettors or the "house" is responsible for ensuring that a sufficient corpus exists in the pool to make the required payouts.

2. Equating historical horse racing wagering to pari-mutuel betting may be legally vulnerable.

The operational nature of historical horse race gambling in other states, though, has been examined, and it appears probable that the same type of video terminals will be used if the proposed initiative is approved. The Nebraska Attorney General has explained succinctly how historical horse racing, also known as "instant racing," wagering functions:

> The wagering on "historic horseraces" which would be authorized under LB 1102 thus appears to refer to the patented wagering system known as "Instant Racing." "Instant Racing" was developed as a joint venture between Amtote International and RaceTech, LLC. The "Instant Racing" system allows bettors to wager on the results of previously run or "historic" races through electronic "Instant Racing Terminals" ["IRTs"]. The machines reportedly can access over 200,000 historic races. Wagers are made by coin or currency. Players can utilize limited Daily Racing Form past performance data (i.e. winning percentages, average earnings per start, trainer and jockey success, etc.) provided in graphic form before making their selections. The data is provided in such a way that bettors cannot identify the exact race. The machines contain a video screen which allows bettors to view the entire race after placing their wagers, or only a short clip of the stretch run of the race.
>
> Wagering generally is limited to selections involving the order of finish of the first three horses, such as selecting the first three finishers in order, the top two finishers, or the winner and any two of the top three finishers. Variations on such wagering are provided for under the Association of Racing Commissioners international Model Rules for Instant Racing. RaceTech promotes the product as a true parimutuel wagering system. The machines are connected to the same wagering pool and wagers are processed through a

> central totalisator. Unlike most parimutuel wagering, where many wagers are made on a single race, Instant Racing involves wagers on many different races. Winners receive graduated payoffs based on their correct selection of the order of finish. Payoffs are also determined by timing—the bettor who hits first receives the highest payoff.

Neb. Op. Att'y Gen. No. 10009, 2010 WL 1251447, at 1-2 (Mar. 29, 2010); *see also* Ariz. Att'y Gen. Op. No. I14-008, at 2 (Dec. 30, 2014) (describing operation of RaceTech, LLC, Instant Racing terminals); Ky. Op. Att'y Gen. No. 10-001, 2010 WL 81969, at 1-2 (Jan. 5, 2010) (same); 94 Md. Op. Att'y Gen. 32, 2009 WL 998670, at 1-2 (Mar. 17, 2009) (same). Whether "instant racing" wagering falls within the ordinary understanding of pari-mutuel betting presents a significant issue. The Wyoming Supreme Court has held that it does not. Wyo. Downs Rodeo Events, LLC v. State, 134 P.3d 1223, 1230 (Wyo. 2006) ("We agree with the district court's tacit conclusion that we are not dealing with a new technology here, we are dealing with a slot machine that attempts to mimic traditional pari-mutuel wagering. Although it may be a good try, we are not so easily beguiled.").

More recently, two state attorneys general have issued opinions explaining why they had grave doubts over the pari-mutuel status of instant racing wagering. The Nebraska Attorney General stated:

> [W]hile the Instant Racing system is promoted as a parimutuel wagering system, there is a question as to whether the manner in which "Instant Racing" would be conducted is truly "parimutuel" wagering. It may be true that "Instant Racing" can be said to involve parimutuel wagering in a broad sense, since there is a pooling of wagers and a distribution of amounts wagered to winners. There appears, however, to be a distinction between parimutuel wagering on traditional live and simulcast races, and Instant Racing. Unlike most parimutuel wagering on live and simulcast races, where many wagers are made on a single race or series of races, Instant Racing involves wagers on many different races. The pools also do not pertain to specific races. It

> is not clear that wagering on historic horseraces through IRTs is truly "parimutuel" in nature.

Neb. Op. Att'y Gen. No. 10009, 2010 WL 1251447, at 9 (footnote omitted). The Maryland Attorney General expressed similar concerns:

> In traditional pari-mutuel wagering, those who successfully bet on the same winning outcome share a betting pool. . . . This is not the case with Instant Racing. There, individual players — even those using machines in the same location — are each wagering on different races with different horses and different outcomes. A bettor who successfully chooses a winning horse can therefore never "share the mutuel pool" with another who has done the same, for the simple reason that *no one else is betting on the same race*. In traditional pari-mutuel wagering, only the same type of bets on the same race or series of races are pooled together. By contrast, with Instant Racing, wagers on completely different races are pooled together based only on the various types of "wins" available to the players. Instead of each betting pool being shared by all of those who selected the correct order of finish in a particular race, the Instant Racing winner takes all of the money that has accumulated in the applicable betting pool at the time of that person's successful bet. This may be pooled betting, but it is not pari-mutuel betting as contemplated in the Maryland Horse Racing Act.
>
> Furthermore, bettors in a traditional pari-mutuel system, through their differing opinions and the money wagered on such opinions, participate directly in setting the odds on the various possible outcomes of a given race. Typically, the bettors are the only determinant of what the odds will be. For obvious reasons, this *cannot* occur in Instant Racing because, as noted above, no two players are ever betting on the same race. To the extent the success or failure of other players, or other factors such as the timing of "wins," may influence the size of payouts available in Instant Racing, it does not occur

> through the same process which is at work in traditional pari-mutuel wagering. Indeed, from the materials provided, it is not always possible to determine what precise method, formula or procedure Race Tech will use to arrive at an appropriate payout in any given situation. What is clear, however, is that the method used is fundamentally different.

94 Md. Op. Att'y Gen. 32, 2009 WL 998670, at 4-5 (citation omitted). The Maryland opinion also pointed to a unique aspect of instant racing—seed pools—that are composed of a portion of all wagers to ensure that sufficient funds exist to pay successful players. *Id.* at 2 (explaining the creation and use of seed pools); 5 ("Instant Racing eliminates the potential for a minus pool by utilizing the seed pool, which is made up of monies wagered by the bettors, as opposed to money supplied by the race track owner."). Such deductions are foreign to traditional pari-mutuel wagering.

3. Absent a constitutional amendment, litigation likely appears the only means for resolving these issues under Idaho law.

There are, in sum, significant questions over whether the historical horse race wagering authorized under the proposed initiative—if similar to the instant racing betting analyzed in these attorney general opinions—constitutes pari-mutuel betting. *See generally*, Liebman, 27 Marq. Sports L. Rev. at 109-10 (concluding that instant racing wagering does not comport with traditional pari-mutuel betting). This office offers no recommendation concerning whether the proposed initiative's sponsors should consider pursuing an amendment to art. III, sec. 20 of the Idaho Constitution, but it does appear quite possible that the initiative's adoption will result in litigation over whether historical horse race wagering, if conducted on instant racing video terminals comparable to those discussed above, is pari-mutuel gambling exempted under the constitutional provision.

B. The Severability Section's Directive to Future Legislatures

The Idaho Supreme Court established long ago that "[a]

legislative session is not competent to deprive future sessions of powers conferred on them, or reserved to them, by the constitution." Johnson v. Diefendorf, 56 Idaho 620, 636, 57 P.2d 1068, 1075 (1936). So, too, it is settled that "once a law is enacted in the initiative process it is like any other law. It may be amended or repealed by the legislature or subsequent initiative." Gibbons v. Cenarrusa, 140 Idaho 316, 320, 92 P.3d 1063, 1067 (2002). These principles, taken together, render the second sentence of the proposed Idaho Code § 54-2512C hortatory and of no binding effect.

CERTIFICATION

I HEREBY CERTIFY that the enclosed measure has been reviewed for form, style, and matters of substantive import. The recommendations set forth above have been communicated to the Petitioner via copy of this Certificate of Review, deposited in the U.S. Mail to Benn Brocksome, 420 W. Main St., Ste. 205, Boise, Idaho 83702.

Sincerely,

LAWRENCE G. WASDEN
Attorney General

Analysis by:

Clay R. Smith
Deputy Attorney General

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ATTORNEY GENERAL'S SELECTED ADVISORY LETTERS FOR THE YEAR 2018

LAWRENCE G. WASDEN

ATTORNEY GENERAL
STATE OF IDAHO

January 9, 2018

The Honorable Scott Bedke
Speaker of the House
Idaho House of Representatives
Statehouse
VIA HAND DELIVERY

Re: Our File No. 18-60055 - Content of Legislative Newsletters Description

Dear Mr. Speaker:

This letter is in response to your recent inquiry regarding the content of legislative newsletters. Specifically, you have asked whether state resources such as the electronically generated legislative newsletter and group mailing features can be used to advertise for private businesses or to campaign for office. Idaho law prohibits the use of public resources to be used for private or personal interest.

Use of public resources for campaign purposes is impermissible.

This office has repeatedly advised that public funds cannot be used for campaign purposes or to further private interests. 1976 Idaho Att'y Gen. Ann. Rpt. 17 (Use of public funds in bond election for auditorium district), 1997 Idaho Att'y Gen. Ann. Rpt. 44 (Loaning of state employees for United Way fundraising); 1997 Idaho Att'y Gen. Ann. Rpt. 35 (Use of public funds to advocate for or against a candidate or ballot issue). In each of these analyses and numerous additional informal analyses, this office has concluded that the use of public funds or resources to advocate for or against a candidate or a matter coming up for a vote is prohibited by the public purpose doctrine. Since the issuance of these earlier analyses, the Idaho Supreme Court has addressed this issue and similarly concluded that public funds could not be used to influence a contested election. Ameritel Inns, Inc. v. Greater Boise Auditorium Dist., 141 Idaho 849, 855, 119 P.3d 624, 630 (2005). In every instance, the question has been whether public resources or funds can be used to influence a contested election, or provide resources to a private entity. The conclusion has been "no" every time.

The purpose of the newsletter is to advance partisan political campaigns.

It is this office's understanding that legislators are provided with a state issued laptop computer, access to e-mail accounts, and the ability to create legislative newsletters. All of these services are paid for with public funds. This office has reviewed a legislative newsletter dated January 2, 2018. The Newsletter is titled "Legislative Update," and contains the State Seal in the upper right corner. It purports to have been sent by the Idaho Legislature on behalf of Representative Heather Scott as an official communication of one or more Idaho legislators. Underneath the header is an announcement for a "2018 Legislative Preview," which will be conducted by a number of legislators. The boxed announcement goes beyond simply notifying recipients of a legislative event. It identifies the event as a partisan presentation with partisan objectives or goals with which the presenters presumably agree.

The partisan character of the posting is further reflected in portions of the text that follows the boxed announcement:

> It's a new year, and expectations are running high that limited-government ideas are spreading throughout Idaho and the country. **When President Trump took office, he promised to drain the Washington "swamp". Here in Idaho, I believe we owe it to our citizens to drain our own political swamps**.
>
> Liberty legislators are excited about our liberty agenda and our prospects during the upcoming session. **We expect challenges and hurdles from the establishment, but our numbers are growing and I believe the majority of Idaho citizens think like we do. I anticipate an increase in liberty legislator numbers after the May 2018 primary.**
>
> We are excited to kick off the 2018 legislative session with our first Annual Legislative Review hosted by liberty legislators from across the state. This event will be held in Meridian, Idaho at the Center at the Park (1920 N.

> Records Ave) on Thursday, January 4th at 7pm. It will also be live streamed to selected venues around the state and can be viewed live on Face Book at: https://www.facebook.com/RedoubtNews/.
>
> So, tune in and join us for this much anticipated event!

(Emphasis added). The text in bold above appears to be a call to action for supporters of specific candidates and political goals. These statements do not appear to convey legislative news to constituents as to what is occurring or likely to occur in the upcoming session, but instead appear to advocate for specific partisan goals and candidates (or types of candidates) in upcoming contested elections. Additionally, the image of the Idaho State Seal appears to give official state endorsement to the newsletter's electioneering.[1] But this newsletter is not an official communication of the State of Idaho. Use of this identifier implies that the State of Idaho endorses the campaign related statements within the newsletter. Taken as whole, the posting is a call for partisan political activity.

Strict separation of legislative and campaign activities should be observed.

The prohibition on using public funds on political campaigns recognizes the vast amount of money available to, as well as the power and prestige of, the state. Unchecked, governments or incumbents could use the resources available to them to control the outcome of elections. 1997 Idaho Att'y Gen. Ann. Rpt. 5. This office continues to recommend that legislators observe and implement a strict separation between legislative and campaign or partisan activities when using public funds and resources. Public resources should only be used to provide information about legislative business, while all campaign and partisan related activity should take place through non-public resources.

It is important to note that Idaho lacks an express statutory prohibition or remedy for conduct of this nature. This appears to be a gap that the Legislature is uniquely positioned to address. This office can assist in those efforts.

I hope that you find this analysis helpful.

Sincerely,

BRIAN KANE
Assistant Chief Deputy

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[1] The Idaho Secretary of State indicates that the State Seal should only be used for official state business, not campaign purposes because its use implies state endorsement.

January 12, 2018

The Honorable Sally Toone
Idaho State Representative
Statehouse
Email: stoone@house.idaho.gov
VIA STATEHOUSE MAIL AND ELECTRONIC MAIL

Re: Our File No. 18-60106 - Potential Updates to Idaho's Good Samaritan Law – Idaho Code § 5-330

Dear Representative Toone:

This letter is in response to your inquiry concerning potential updates to Idaho's Good Samaritan Law, Idaho Code § 5-330, specifically with regard to Idaho's use of the term "accident."

Idaho Code § 5-330 was enacted by the Legislature in 1965. Since that time there have been no amendments to section 5-330 and no reported Idaho cases pertaining to section 5-330. As a result, a review of Good Samaritan laws from other jurisdictions was necessary to respond to your inquiry. For purposes of this letter a Good Samaritan is considered a person immune from civil damages for providing emergency care to a person injured in an accident or emergency situation.

A review of Good Samaritan laws from other U.S. jurisdictions indicates a large majority of states use the term "emergency" when describing the setting or location in which a Good Samaritan providing care to an injured person is immune from civil liability. *See* 68 A.L.R.4th 294 (originally published in 1989). Similarly, most U.S. jurisdictions use the term "emergency" when describing the type of care or services provided by a Good Samaritan. *Id.* Some states provide definitions for "emergency" or "emergency care," but most states appear to leave emergency to its plain meaning. *Id.* Additionally, most U.S. jurisdictions also specifically require Good Samaritans to act "without compensation." *Id.*

A more focused review of jurisdictions in the Ninth Circuit Court of Appeals shows those states, with the exception of Idaho, use the term "emergency" to describe both the setting and type of care covered by their Good Samaritan laws.[1] Also, all the states in the Ninth Circuit, other than Idaho, require Good Samaritans to act "without compensation." *Id.* Notably, requiring Good Samaritans to act without compensation excludes certain first responders and other professionals who are paid a salary or wage for the services they provide to injured persons in accident or emergency situations. However, those first responders and other professionals are generally covered by other statutes with varying standards for immunity.

Based on the findings above, you may wish to consider the amendments set forth below to clarify the settings and types of services covered by Idaho Code § 5-330 and bring Idaho's Good Samaritan Law into alignment with other U.S. jurisdictions, particularly those within the Ninth Circuit.

> 5-330. IMMUNITY OF PERSONS GIVING EMERGENCY FIRST AID FROM DAMAGE CLAIM. That no action shall lie or be maintained for civil damages in any court of this state against any person or persons, or group of persons, who in good faith and without compensation, being at, or stopping at the scene of an accident or emergency, offers and administers emergency first aid or emergency medical attention to any person or persons injured in such accident or emergency unless it can be shown that the person or persons offering or administering emergency first aid or emergency medical attention, is guilty of gross negligence in the care or treatment of said injured person or persons or has treated them in a grossly negligent manner. The immunity described herein shall cease upon delivery of the injured person to either a generally recognized hospital for treatment of ill or injured persons, or upon assumption of treatment in the office or facility of any person undertaking to treat said injured person or persons, or upon delivery of said injured person or persons into custody of an ambulance attendant.

(Emphasis added.)

I hope you find this analysis helpful.

Sincerely,

ANDREW J. SNOOK
Deputy Attorney General
Contracts and Administrative Law Division

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[1] *See* Alaska (Alaska Stat. Ann. § 09.65.090); Arizona (Ariz. Rev. Stat. Ann. § 32-1471); California (Cal. Health & Safety Code § 1799.102); Hawaii (Haw. Rev. Stat. § 663-1.5); Montana (Mont. Code Ann. § 27-1-714); Nevada (Nev. Rev. Stat. Ann. § 41.500); Oregon (Or. Rev. Stat. Ann. § 30.800); and Washington (Wash. Rev. Code Ann. § 4.24.300).

January 26, 2018

Senator Maryanne Jordan
State Capitol
P.O. Box 83720
Boise, ID 83720-1352
VIA EMAIL: mjordan@senate.idaho.gov

Re: Our File No. 18-60151 – Idaho Fireworks Act

Dear Senator Jordan:

In your letter to our office of January 17, 2018, you posed three questions regarding the Idaho Fireworks Act, title 39, chapter 26, Idaho Code. I have taken the liberty of rephrasing those questions slightly in aid of addressing the issues that are of concern. Before proceeding to an analysis of the issues underlying your questions, however, there is one preliminary matter I must address.

Our office has received a number of requests to enforce Idaho fireworks law from constituents who believe those laws, particularly as they relate to "special fireworks," are not being enforced in their counties. This has led us to conclude that a number of Idahoans believe that our office has the power to enforce fireworks laws. We do not. By statute, the enforcement of Idaho's penal laws are committed primarily to county sheriffs and county prosecutors. Idaho Code § 31-2227. This office has no supervisory authority over these officials and they are not obligated to follow this office's guidance. Such matters as whether to initiate a criminal investigation or file charges in a given matter are committed to their discretion.

With this in mind, I will proceed to address your questions.

QUESTIONS PRESENTED

I. What was the legislative intent of Idaho Code § 39-2610(6)?

II. Does Idaho Code § 39-2610(6) render other requirements of the Idaho Fireworks Act inapplicable where fireworks are sold for export or for purposes of interstate commerce?

III. May wholesalers sell special fireworks to persons who do not have a permit pursuant to Idaho Code § 39-2605 if the purchaser provides an affidavit stating that he or she will not use those fireworks in Idaho?

BRIEF ANSWERS

I. Idaho Code § 39-2610(6) intends to except commercial transactions in which fireworks are exported from Idaho for sale in other states or transported from Idaho for other purposes of interstate commerce, from the other requirements of the Idaho Fireworks Act.

II. Yes. Idaho Code § 39-2610(6) does render the requirements of the Idaho Fireworks Act inapplicable to the commercial activities enumerated in that subsection, which include the importation, storage and sale of fireworks for export from Idaho and for transport from Idaho for purposes of interstate commerce.

III. No. A sale of special fireworks to a person who merely promises to take them to another state and use them there does not constitute an "export" of fireworks or "interstate commerce" as those terms are used in Idaho Code § 39-2610(6). Sale of special fireworks by a wholesaler, based solely on a purchaser's representation that he or she intends to take them to another state and use them there, is not permitted by section 39-2610(6) and is illegal. In addition, the transportation of special fireworks into another state and use of them

there, without the proper permits or licenses from that state, may violate the laws of that state as well as federal law.

ANALYSIS

I. What was the Legislative Intent of Idaho Code § 39-2610(6)?

In interpreting a statute, the Idaho Supreme Court has held that the statute's plain language has preeminent importance:

> Our objective when interpreting a statute is to derive the intent of the legislative body that adopted the act. Statutory interpretation begins with the statute's plain language. This Court considers the statute as a whole, and gives words their plain, usual, and ordinary meanings. When the statute's language is unambiguous, the legislature's clearly expressed intent must be given effect, and we do not need to go beyond the statute's plain language to consider other rules of statutory construction. State v. Taylor, 160 Idaho 381, 385, 373 P.3d 699, 703 (2016) (citing State v. Owens, 158 Idaho 1, 3, 343 P.3d 30, 32 (2015)) (internal citations and quotation marks omitted).

Salinas v. Bridgeview Estates, 162 Idaho 91, 93, 394 P.3d 793, 795 (2017). Thus, if possible, the intent of Idaho Code § 39-2610(6) must be determined from that provision's plain language.

Viewed in the context of the entire Act and the other provisions of Idaho Code § 39-2610, subsection (6) of section 39-2610 is not ambiguous. The Act as a whole sets forth a scheme for the importation, sale and use of fireworks in Idaho. Fireworks may only be delivered into Idaho by a person holding a valid wholesaler's or importer's license, and may only be sold, as set forth in Idaho Code § 39-2603(2)(a) and

(b), to retailers holding a valid sales tax seller's permit, and persons with a valid permit for use of fireworks in a public display.

Idaho Code § 39-2610 exempts certain persons and activities from the rest of the Act. Subsections (1) to (3) exempt certain uses from the operation of the Act, while subsections (4) to (6) exempt certain commercial activities, so that chapter 26 does not apply to or prohibit:

> (4) The continued use of existing facilities for long-term storage of fireworks by wholesalers;
> (5) Manufacturing of fireworks in this state; and
> (6) The importation, storage and sale of fireworks for export from this state, or interstate commerce in fireworks.

The terms "export" and "interstate commerce" are not defined in the Act, but neither are ambiguous. "Export" refers to the sending of goods or commodities to another place for sale there.[1]

"Interstate commerce" refers to commerce between states.[2] "Interstate commerce," for purposes of federal law governing fireworks, is defined in the Code of Federal Regulations as:

> Commerce between any place in a State and any place outside of that State, or within any possession of the United States or the District of Columbia, and commerce between places within the same State but through any place outside of that State.

27 C.F.R § 555.11.

The terms "export" and "interstate commerce," by their plain meaning, and in the context of Idaho Code § 39-2610(6), refer to commercial activity involving purchasers or users that are outside of

Idaho. This subsection thus creates an exception that allows for the importation, storage and sale of fireworks for the purposes of exporting them out of Idaho or engaging in interstate commerce, that is, commerce between parties in Idaho and parties in other states.

It is important to note, that this does not negate the duty of a wholesaler or importer to obtain a valid license to import fireworks into Idaho for sale here, pursuant to Idaho Code § 39-2603(2). Nor does it negate any other portions of the Act involving the sale or use of fireworks in Idaho. Idaho Code § 39-2610(6) applies only to the importation of fireworks into Idaho for purposes of export or interstate commerce.

II. Does Idaho Code § 39-2610(6) render other requirements of the Idaho Fireworks Act inapplicable where fireworks are sold for export or for purposes of interstate commerce?

Idaho Code § 39-2610(6) provides that provisions of title 39, chapter 26, Idaho Code, "do not apply to and shall not prohibit" the "importation, storage and sale of fireworks for export from this state, or interstate commerce in fireworks." The meanings of "export" and "interstate commerce" are discussed in the previous section. The "do not apply" language of this subsection would render the other requirements of the Act inapplicable to these specific enumerated activities.

III. May wholesalers sell special fireworks to persons who do not have a permit pursuant to Idaho Code § 39-2605 if the purchaser provides an affidavit stating that he or she will not use those fireworks in Idaho?

Idaho Code § 39-2602 contains three definitions relevant this query. First, Idaho Code § 39-2602(3) defines "Fireworks" as "any combustible or explosive composition, or any substance or combination of substances, or article prepared for the purpose of producing a visible

or audible effect by combustion, explosion, deflagration or detonation . . . ." This definition includes "items classified as common or special fireworks by the United States bureau of explosives or contained in the regulations of the United States department of transportation and designated as UN 0335 1.3G or UN 0336 1.4G." It excludes "any automotive safety flares, toy guns, toy cannons, caps or other items designed for use with toy guns or toy cannons, party poppers, pop-its or other devices which contain twenty-five hundredths (.25) of a grain or less of explosive substance."

Second, Idaho Code § 39-2602(6) defines "Nonaerial common fireworks" as

> any fireworks such as ground spinners, fountains, sparklers, smoke devices or snakes designed to remain on or near the ground and not to travel outside a fifteen (15) foot diameter circle or emit sparks or other burning material which land outside a twenty (20) foot diameter circle or above a height of twenty (20) feet. Nonaerial common fireworks do not include firecrackers, jumping jacks, or similar products.

Third, "Special fireworks" are defined in Idaho Code § 39-2602(8) as "any fireworks designed primarily for display and classified as special fireworks by the United States bureau of explosives or designated as UN 0335 1.3G."

Thus, the definition of "fireworks' in Idaho Code § 39-2602(3) encompasses both nonaerial common fireworks, as defined in subsection (6) of that statute, and special fireworks, as defined in subsection (8). Fireworks, in Idaho, are either nonaerial common fireworks or special fireworks.

The sale and use of special fireworks in Idaho, that is, all fireworks that are nonaerial common fireworks, is tightly restricted.

Such fireworks may not be sold to the general public by a wholesaler or retailer. They may be sold only by a person holding a wholesaler's or importer's license to a person possessing a permit issued pursuant to Idaho Code § 39-2605(2), unless the sale falls within the exception set forth in § 39-2610(6). Only a person holding a permit issued pursuant to Idaho Code § 39-2605 may use special fireworks in Idaho.

For purposes of brevity, I will not engage in an exhaustive review of the laws of other states, but it can be said that other states have laws requiring a permit for the importation of fireworks into those states, or laws prohibiting or restricting the possession and use of the type of fireworks termed "special fireworks" in Idaho law, or both.[3] Someone intending to legally import special fireworks into another state or use them there would have the requisite licenses or permits to do so and would be able to produce them at the time of purchase, and a wholesaler in Idaho should demand that documentation to ensure a sale falls within the exception of Idaho Code § 39-2610(6) and that Idaho law is not being violated.

In addition, a federal statute, 18 U.S.C. § 836, provides that it is a crime, punishable by a fine and up to a year in prison, or both, to transport or attempt to transport fireworks into any state in a manner or for use which is prohibited by the laws of that state. "Fireworks" are defined at 27 C.F.R. § 555.11 as

> Any composition or device designed to produce a visible or audible effect by combustion, deflagration, or detonation, and which meets the definition of "consumer fireworks" or "display fireworks" as defined in this section.

This definition is similar to the definition of "fireworks" at Idaho Code § 39-2602(3) and would include "special fireworks" as defined at Idaho Code § 39-2602(8).

The Idaho Legislature surely did not intend Idaho Code § 39-2610(6) to act as a means to circumvent the fireworks laws of other states or to violate federal law. A sale of special fireworks in Idaho to a purchaser who submits an affidavit stating an intention to take the fireworks to another state for use there is, without more, not a sale for export from Idaho or for interstate commerce. If the affiant in such a case is without a license or permit from the state to which the fireworks are to be transported,[4] he or she is not an exporter from Idaho nor an importer into another state nor engaging in interstate commerce. He or she is simply purchasing fireworks in Idaho and promising to use them elsewhere, in possible violation of that other, unspecified, state's law and federal law. A sale of special fireworks to such a purchaser by a wholesaler does not fall within the exception allowed by Idaho Code § 39-2610(6) and it violates Idaho Code § 39-2603(2)(b). It is, therefore, illegal.

CONCLUSION

The sale of special fireworks by a wholesaler for purposes other than for export for Idaho or interstate commerce, as those terms are discussed in this letter, is illegal. As such, a sale to a person who submits only an affidavit stating that he or she intends to take those fireworks out of state to use them there is illegal pursuant to Idaho Code § 39-2603(2)(b). Idaho Code § 39-2610(6) does not create an exception from the Idaho Fireworks Act for such an illegal sale.

The caution issued at the beginning of this letter bears repeating here. This office is not charged with enforcing Idaho's fireworks law. That responsibility lies with Idaho's county sheriffs and prosecutors, who are vested with the sole discretion to charge and prosecute criminal violations involving fireworks. Under current law, the sole remedy for constituents who believe those laws are not being enforced is the ballot box.

I hope you found this analysis helpful. If you have any questions, please feel free to contact this office.

Sincerely,

PAUL R. PANTHER
Chief, Criminal Law Division

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[1] *See*, Cambridge Dictionary, https://dictionarycambridge.org/us/dictionary/englis/export, "to send goods to another country for sale or use," "something sold and taken out of a country and into another;" Oxford Dictionary, https://en.oxforddictionaries.com/definition/export; "send (goods or services) to another country for sale," "a product or service sold abroad;" Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/export; "to carry away," "to carry or send (something as a commodity) to some other place (such as another country);" Dictionary.com, http://www.dictionary.com/browse/export, "to ship (commodities) to other countries of places for sale, exchange, etc."

[2] Black's Law Dictionary defines "interstate commerce as "Traffic, intercourse, commercial trading, or the transportation of persons or property between or among the several states of the Union, or from or between points in one state and points in another state; commerce between two states, or between places lying in different states (citations omitted). It comprehends all the component parts of commercial intercourse between different states." Black's Law Dictionary (6th ed. 1990).

[3] *See* for example, Revised Code of Washington §§ 70.77.255, 70.77.260 (prohibiting importation of fireworks and discharge of display fireworks without license or permit); Oregon Revised Statutes §§ 480.120, 480.130 (prohibiting possession or use of fireworks except as set forth therein, requiring permit for public display of fireworks); Montana Code § 50-37-107 (requiring permit for public display of fireworks); Wyoming Statutes § 35-10-203 (requiring permit for public fireworks displays); Nevada Revised Statutes § 477.033 (requiring license for commercial fireworks displays); Utah Code 1953 §§ 53-7-223, 53-7-224 (requiring license for public display of fireworks; requiring importer license).

[4] It is our understanding that the affidavits in question do not require the affiant to specify the state to which the fireworks are supposedly being transported.

January 30, 2018

Representative Lance W. Clow
Idaho House of Representatives
Capitol Building
Boise, ID 83720

Re: Our File No. 18-60274 – 2017 Utah Senate Bills 82 and 185

Dear Representative Clow:

You requested an analysis of two bills passed by the Utah Legislature in 2017, Senate Bills 82 and 185, dealing with different aspects of pornography and individuals accessing it on the Internet. This letter responds to your request, with an overview of the draft bills and a legal analysis of their effect and potential impact if adopted in Idaho.

Analysis of S.B. 82

The first bill, labeled Senate Bill (S.B.) 82 in the 2017 session of the Utah Legislature, modified an existing provision of Utah law to require public libraries receiving state funds to take measures to block or filter Internet access to child pornography and other visual depictions that are obscene or harmful to minors. This blocking or filtering of materials is required during any use of the Internet through a network provided by a public library, including a wireless network, and specifically including any such use by a minor. The blocking or filtering may be disabled at the request of an adult library patron or to enable research or another lawful purpose.

Current Idaho law closely resembles Utah law prior to the adoption of S.B. 82, with one significant distinction. Idaho Code § 33-2741(1)(a)(i) requires public libraries that receive public moneys and that offer use of the Internet or an online service to the public to "have in place a policy of internet safety for minors including the operation of a technology protection measure with respect to any publicly accessible computers with internet access and that protects against access

through such computers to visual depictions that are obscene or child pornography or harmful to minors." This "technology protection measure" must be enforced during the use of a computer by a minor. Idaho Code § 33-2741(1)(a)(ii). Public libraries must also have a similar policy on Internet safety in general and may enforce such policy during any use of a computer. Idaho Code § 33-2741(1)(b)(i)-(ii). Idaho law also permits the library to disable the "technology protection measure" at the request of a library patron for lawful purposes. Idaho Code § 33-2741(3).

Idaho law also mirrors the language of the Children's Internet Protection Act (CIPA), Pub. L. 106-554 (2000), codified at 20 U.S.C. § 9134(f) and 47 U.S.C. § 254(h)(6). CIPA requires that libraries use blocking or filtering software on any computers with Internet access and certify their compliance with this requirement in order to receive federal funding for internet service. Yet, Idaho law differs from both the Utah statute and CIPA by providing that public libraries "may enforce" the required policy, which "may include" blocking or filtering, when the Internet is being used by an adult. Thus, Idaho law makes the filtering of Internet access by adults permissive while the Utah provision and CIPA require use of the policy and require the policy to include blocking or filtering unless the filtering is disabled for research or another lawful purpose during use by an adult.

S.B. 82 thus departs from the CIPA filtering requirements by changing the focus from "publicly accessible computers" to library networks and any computer used to access them. Adopting a similar provision in Idaho would likewise change the focus of the Idaho statute and transform the filtering of Internet access by an adult from optional (at least under Idaho law) to mandatory. On this latter note, it bears observations that the permissive "may enforce" language was not included in the original bill proposed in the Idaho House of Representatives in 2011 and, instead, was added by an amendment initiated in the Idaho Senate. *See* House Bill No. 205 (2011).

As well, "technology protection measure" is currently not defined in Idaho law, or in the federal statute, so the adoption of the definition of that term contained in S.B. 82 would act to supplement the current Idaho provision. The definition for "technology protection

measure" in S.B. 82 does appear to be compatible with Idaho law, as the current statute requires that such a measure block or filter the same content as required by the Utah statute and CIPA.

Finally, any change to the Idaho statute could give rise to a legal challenge to the new law on First Amendment grounds. There have been numerous challenges to government efforts to limit access to content on the Internet. *See, e.g.*, Ashcroft v. Am. Civil Liberties Union, 542 U.S. 656, 124 S. Ct. 2783, 159 L. Ed. 2d 690 (2004). In U.S. v. Am. Library Ass'n, Inc., 539 U.S. 194, 123 S. Ct. 2297, 156 L. Ed. 2d 221 (2003), the United States Supreme Court upheld the constitutionality of CIPA, but at least two justices supporting this conclusion appeared to place great weight on the ability of an adult user to have the library unblock filtered material or disable the filter entirely without a significant delay. *Id.* at 214 (Kennedy, J., concurring); *Id.* at 219 (Breyer, J., concurring).

The United States Supreme Court observed in its recent decision in Packingham v. North Carolina that the most important forum for the exercise of First Amendment rights and the exchange of views is now the Internet, in particular through the use of social media. — U.S —, 137 S. Ct. 1730, 1735, 198 L. Ed. 2d 273 (2017). In its opinion, the Court recognized that the case was "one of the first this Court has taken to address the relationship between the First Amendment and the modern Internet." *Id.* at 1736. The Court further acknowledged that this area of law is far from settled, noting that:

> While we now may be coming to the realization that the Cyber Age is a revolution of historic proportions, we cannot appreciate yet its full dimensions and vast potential to alter how we think, express ourselves, and define who we want to be. The forces and directions of the Internet are so new, so protean, and so far reaching that courts must be conscious that what they say today might be obsolete tomorrow.

Id.

Therefore, no current authority appears to dictate that the

shift from blocking and filtering content on publicly accessible computers in the library to doing so for the library's network as a whole, including when accessed from a personal device, would impinge on First Amendment rights. Yet, this area of law should be viewed with caution and as susceptible to change as new technologies are developed or used in different ways.

Analysis of S.B. 185

The second bill, labeled Senate Bill (S.B.) 185 in the 2017 session of the Utah Legislature, created a new cause of action for minors who contend that they have suffered some physical, psychological, emotional, or medical harm as a result of viewing pornographic materials. "A person who predominately distributes or otherwise predominately provides pornographic material to consumers is liable" to a minor for such conduct if the pornographic material is "the proximate cause" for the minor suffering the types of harm just noted. Such person can avoid liability by providing a conspicuous warning before pornographic material can be accessed notifying the viewer of the potential harm the material may pose to minors and making a "good faith effort" to verify the age of the person accessing the material. A plaintiff who prevails on this claim may receive actual damages and punitive damages "if it is proven that the person targeted minors."

The law further defines relevant terms, including "pornographic material," and establishes exemptions for computer or telecommunications services, Internet service providers, and certain other entities who distribute pornographic materials only incidentally through their transmission of data or by providing a connection or data storage. These exemptions apply so long as the qualifying entities do not intentionally aid such distribution or knowingly profit by charging higher fees to persons distributing such material.

As an initial observation, the application and interpretation of the cause of action created by S.B. 185 are unclear. To date, Utah appears to be the only jurisdiction to have instituted such a cause of action. Interpretation of the term "predominantly" will play a significant role in determining the extent of the statute. It is unclear

whether "predominantly" refers to the principal person who distributes or provides the pornographic material, thus distinguishing such person from an exempt entity that only does so incidentally, or instead means a requirement that the distribution or provision of pornographic material be a principal activity of the person.

Further, it may be exceedingly difficult for a plaintiff to prevail on this cause of action by establishing that certain pornographic material was "the proximate cause" of the harm he or she suffered. Establishing proximate causation between pornographic material viewed by a minor from a specific distributor of pornographic material and some harm suffered by the minor would be a significant challenge. In particular, given the broad distribution and ready availability of pornography on the Internet, leading to the concerns that the preceding bill discussed, S.B. 82, seeks to address, it might fairly be questioned whether such causation may ever be established.

As well, it is not clear that this cause of action allows for greater recovery for damages by a plaintiff than is possible under existing law. The harm suffered by a potential plaintiff, if it is proximately caused by another person providing pornographic material, may be compensable under existing tort theories. For instance, the minor or a guardian could file a personal injury action to recover for any physical harm and medical expenses incurred as a result. Further, these and other harms might be compensable under claims for the intentional or negligent infliction of emotional distress or even under a general claim for negligence.

I hope you find this analysis useful. I also wish to thank Deputy Attorney General Greg LeDonne for his work on this response. If you should have any additional questions, please feel free to contact our office.

Sincerely,

PAUL R. PANTHER
Chief, Criminal Law Division

February 2, 2018

The Honorable Lance W. Clow
Idaho State Representative
Statehouse
VIA Email: lclow@house.idaho.gov

Re: Our File No. 18-60326 – Request for Assistance - Rejection of Final Rule

Dear Representative Clow:

Your recent request for assistance was forwarded to me for response. By law, the Idaho Legislature holds the power to review executive agency rules and, when it determines those rules are not consistent with legislative intent, to reject them in whole or in part. Idaho Code § 67-5291. As I understand it, you propose to strike two sections, 603.2 and 603.4.2, in their entirety, from the Idaho Plumbing Code as adopted in IDAPA 07.02.06.011.

Section 011 has two parts. The first part adopts the 2017 Idaho Plumbing Code (and its Appendices), incorporating the entire document by reference. The second part details the various amendments to the underlying code which the Plumbing Board has prescribed. Your proposal will change the underlying code as adopted, and appears to impact at least one of the current amendments (IDAPA 07.02.06.011.13) to that code.

Subsection 011.13 was adopted by the Plumbing Board. It incorporates certain changes to Table 603.2, Backflow Prevention Devices. It is unclear whether the concurrent resolution proposes to delete this table in its entirety or if it intends to leave the subsection as is.

In light of the current format of section 011, making deletions as you have proposed will entirely eliminate any approval of backflow devices or assemblies and any inspections of the installed devices. Removing these items from the underlying code deprives the Board of further jurisdiction over approval or inspection of backflow devices.

Lacking a technical understanding of the science of plumbing, it is impossible for this writer to know whether there might be any unintended consequence of these changes on other aspects of the code.

In order to avoid unintended consequences which might arise from the wholesale deletion of these two sections of the code, you might consider petitioning the Plumbing Board to promulgate rules addressing these topics. This would permit those with the relevant expertise to consider the implications and assure that the public health and safety were adequately protected. That said, and as indicated above, the legislature is certainly free to proceed to consider the concurrent resolution as drafted.

This analysis is provided to assist you. If you have any further questions in this regard, please feel free to contact the undersigned.

Sincerely,

S. KAY CHRISTENSEN
Division Chief
Contracts and Administrative Law Division

February 7, 2018

Senator Mark Nye
Idaho State Senate
State Capitol
P.O. Box 83720
Boise, ID 83720-0081
VIA EMAIL & STATEHOUSE MAIL: mnye@senate.idaho.gov

Re: Our File No. 18-60413 – HB 463 Inquiry

Dear Senator Nye:

This letter is in response to your inquiry of this office regarding House Bill No. 463 (HB 463). Specifically, you inquired whether HB 463 meets the "one-subject" requirement of art. III, sec. 16 of the Idaho Constitution. While it is impossible to predict with certainty how an Idaho appellate court would rule on this issue, a robust defense can be advanced that HB 463 meets the "one-subject" requirement.

The relevant part of art. III, sec. 16 of the Idaho Constitution provides: "§ 16. Unity of Subject and Title. Every act shall embrace but one subject and matters properly connected therewith . . . ." An act is in harmony with art. III, sec. 16, if it has but "one general subject, object, or purpose" and all of its provisions are "germane" to that general subject, and have "a necessary connection therewith." Cole v. Fruitland Canning Ass'n, 64 Idaho 505, 511, 134 P.2d 603, 606 (1943). Similarly, where all the provisions of an act are "related to and have a natural connection with the same subject, they may be united in one statute." Lyons v. Bottolfsen, 61 Idaho 281, 288-89, 101 P.2d 1, 4 (1940). The provisions of an act do not need to relate directly to the same subject. Rather, if the provisions relate "directly *or indirectly*" to the same subject, have a "natural connection" therewith, and are "not foreign to the subject expressed in the title," they may be united. Utah Power & Light Co. v. Pfost, 286 U.S. 165, 188, 52 S. Ct. 548, 554, 76 L. Ed. 1038 (1932) (emphasis added).

The purpose behind the "one-subject" requirement is "to prevent the inclusion in title and act of two or more subjects diverse in their

nature and having no necessary connection." Utah Power & Light Co., 286 U.S. at 188. Courts disregard "mere verbal inaccuracies, resolve doubts in favor of validity, and hold that, in order to warrant the setting aside of enactments for failure to comply with the rule, the violation must be substantial and plain." *Id.*, at 187 (internal citations omitted). The purpose of this rule is to "prevent the inclusion of incongruous and unrelated matters . . . and to guard against inadvertence, stealth and fraud in legislation." *Id.* at 187.[1]

A review of Idaho case law supports the conclusion that the great majority of all cases examining legislation and the "one-subject" requirement have upheld the enactment.

For example, in Sons & Daughters of Idaho, Inc. v Idaho Lottery Comm'n, 144 Idaho 23, 156 P.3d 524, (2007), the Court analyzed an act that purported to govern licensing procedures for operating bingo games. The complaint of the licensing procedure act was that it not only governed the licensing procedure, but that it also prohibited a bingo operator from contracting with a third-party to conduct the bingo sessions, and it also prohibited the licensee from paying its officers and directors compensation from bingo proceeds. The Court reasoned that "it is not at all unexpected that a statute governing 'licensing procedure' might specify some of the substantive *conditions* that must be satisfied in order for a license to issue. The derivative compensation and anti-outsourcing provisions, as conditions of licensure, are *sufficiently related* to licensing procedure to survive a constitutional challenge." *Id.* at 32 (emphasis added).

Likewise, in Achenbach v. Kincaid, 25 Idaho 768, 140 P. 529 (1914), the Court analyzed an act whose general purpose was the creation of a highway commission, together with its powers and duties. The complaint of the act was that it also provided for certain tax exemptions for certain motor vehicles and therefore violated the "one-subject" requirement. The Court conceded that the tax exemption provision did not directly have to do with the carrying out of the purposes of the act, but that it had an *indirect* connection with it, and held that the "one-subject" requirement was not violated. *Id.* at 769-70.

House Bill No. 463

Statutory interpretation begins with an examination of the language, giving a statute's words their plain and ordinary meaning. *State v. Hart*, 135 Idaho 827, 829, 25 P.3d 850, 852 (2001). HB 463 is described in its title as "AN ACT RELATING TO INCOME TAXES," and contains language to amend several provisions relating to Idaho's Income Tax Act.[2]

The various parts of HB 463 are as follows:

1. HB 463 updates Idaho Code § 63-3004 to bring Idaho's definition of "Internal Revenue Code" in conformity with all the amendments to the newly overhauled Internal Revenue Code.
2. HB 463 allows taxpayers to recognize a loss for certain loss amounts that will be limited by the newly amended section 461 of the Internal Revenue Code.
3. HB 463 eliminates language in Idaho law that referenced the federal election to forgo a carryback loss; the Internal Revenue Code no longer contains such an election.
4. HB 463 adds back into Idaho income certain deductions allowed under the new changes to the Internal Revenue Code for various forms of foreign income.
5. HB 463 reduces Idaho individual and corporate income tax rates.
6. HB 463 allows an income tax credit for each of a taxpayer's qualifying children.
7. HB 463 amends definitions in Idaho law regarding IDEAL 529 savings plans so that such plans can be used for paying primary and secondary school tuition and receive the same income tax benefits that have been available when an IDEAL 529 plan was used to pay for higher education expenses.

"But One Subject"

Art. III, sec. 16 of the Idaho Constitution requires "but one subject," but allows for "matters properly connected therewith." Here, six of the seven sections of HB 463 deal directly with one core subject: *income taxes*. The title and substance of the act cover various provisions affecting taxpayers' calculation of Idaho income tax, as well

as taxpayers' income tax burden. Six of the seven sections are obviously related to income taxes, the very description stated in the act's title.

One section of HB 463—the amendment to title 33 governing so-called IDEAL 529 higher education savings plans—seems to be only superficially connected to the subject of income tax. However, further inspection shows that this amendment, too, is germane to and properly connected with the subject of income tax.

The amendment to title 33 in HB 463 governing IDEAL 529 college savings plans is consistent with the majority of sections of HB 463: adjustment of income taxation in conformity with the federal taxation laws. In late 2017, the U.S. Congress passed the so-called Tax Cuts and Jobs Act, which effected a major revamping of the federal taxation scheme. One of the changes in the federal overhaul was to broaden the definition of "qualified higher education expenses" of 529 plans to allow taxpayers to make contributions for education expenses incurred during the primary and secondary education years (K-12) and including for public, private, and religious schools. Section 529 itself is a section of the Internal Revenue Code; it allows taxpayers to invest funds for education and gain certain federal income tax advantages. Idaho also grants Idaho taxpayers certain income tax advantages for participating in 529 plans. The Legislature housed the state-level college savings program in title 33; but its principal purpose is to provide income tax advantages. Because of the federal overhaul (specifically, the expansion of the definition of higher education expenses to include K-12 expenses), and because Idaho conforms to the federal taxation scheme, an amendment to title 33 is necessary. (Likewise, because there will now be two funds available (both K-12 and higher education expense), title 33's definition of "program" is amended to include a reference to both funds.) In sum, the amendment to title 33 has a natural connection with and is related to the "one-subject" of income taxes.

Thus, it appears that there are no provisions in HB 463 that do *not* affect income taxation. HB 463 seems to be in harmony with art. III, sec. 16 of the Idaho Constitution, in that all of its provisions are "germane" to the general subject of income taxes, and have "a

necessary connection therewith." Cole, 64 Idaho at 508, 134 P.2d at 606. The "one-subject" requirement seems satisfied here.

"Matters Properly Connected"

Art. III, sec. 16 of the Idaho Constitution allows for "matters properly connected" to the one required subject of any legislative act. All the amendments in HB 463 seem to fit within the stated description (as "an act relating to income taxes"). Even the amendment to title 33 and its effect are connected to the purpose of the legislation. HB 463 conforms to the recent amendments made to the Internal Revenue Code; in turn, every other provision of HB 463 is responding to those federal changes and the effect they will have on Idaho's income tax laws.

Conclusion

It appears that HB 463 does not violate the "one-subject" requirement of art. III, sec. 16, of the Idaho Constitution. The provisions of HB 463 are all directly or indirectly related to the one subject of "income taxes." The specific provisions of HB 463 seem to fit within the constitutional standard of being "matters properly connected" with the subject of income tax, and they seem to have a "natural connection" therewith. Likewise, the provisions seem to be "germane" to the subject expressed in the title of HB 463. Lyons, 61 Idaho at 284.

Although a challenge could be mounted to HB 463, this office could provide a robust defense under art. III, sec. 16 of the Idaho Constitution.

I hope that you find this analysis helpful.

Sincerely,

DAVID B. YOUNG
Deputy Attorney General

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[1] In Am. Fed'n of Labor v. Langley, 66 Idaho 763, 168 P.2d 831 (1946), the Idaho Supreme Court seemed to add another layer to this analysis.

In Langley, the Court held that an act cannot merely have something to do with a particular topic; the act must have a common or unified "purpose" to be accomplished. Langley, 66 Idaho at 769, 168 P.3d at 843. The various provisions the act reviewed in Langley impermissibly "revolve[d] in [their] own orbit," because the statute did not "disclose any *clear and unified scheme*." Langley, 66 Idaho at 769 (emphasis added). However, in the nearly 70 years since Langley was issued, the Idaho Supreme Court has never once cited to Langley or its particular standards regarding a central theme or a "clear and unified scheme." Langley, 66 Idaho at 769. Instead, the cases since then have continued to follow the more flexible standard requiring merely that an act's provisions be sufficiently "related" or "germane" to its subject. *See e.g.,* Sons & Daughters of Idaho, Inc. v. Idaho Lottery Comm'n, 144 Idaho 23, 32, 156 P.3d 524, 533 (2007).

[2] Although not the equivalent of the text of the act itself, HB 463's Statement of Purpose provides context for the discussion here. The Statement of Purpose recognizes that the act will conform the Idaho tax code "to changes made to the Internal Revenue Code (IRC) that affect the 2018 taxable year, . . ." STATEMENT OF PURPOSE RS25996 (H0463), 1. These federal changes include the elimination of the federal standard deduction increase, the elimination of the personal and dependent exemption, as well as various business income tax changes. *Id.* The Idaho income tax code "is based on using the federal taxable income as a starting point for both business and individual income tax returns." *Id.* Thus, the conclusion is that the changes at the federal level will have a direct effect on the Idaho income tax system.

February 21, 2018

Senator Jim Guthrie
Idaho State Senate
Idaho Statehouse
Via Hand Delivered

Re: Our File No. 18-60557 – Curtailment of Junior Water Diversions

Dear Senator Guthrie:

This letter responds to your question regarding curtailment of diversions of water under surface water rights and ground water rights of varying priorities. Your question raises an issue of water rights administration under the legal principles of Idaho's prior appropriation doctrine.

As the Idaho Supreme Court has recognized, prior appropriation principles are more easily stated than applied, and how these principles apply in any particular case depends upon the facts of the case.[1] Your question is general in nature, however, and therefore this letter focuses on the general legal principles relevant to curtailing diversions under Idaho's prior appropriation doctrine, rather than the application of prior appropriation principles in a particular case.

Our analysis begins with a statement of your question as we understand it, and a brief answer. The subsequent discussion sets forth a more detailed explanation of the issues.

QUESTION PRESENTED

When a senior priority surface water appropriator and junior priority ground water appropriators have entered into a settlement agreement that allows the ground water appropriators to avoid curtailment, does it violate Idaho's doctrine of prior appropriation to curtail junior surface water rights that are senior to the ground water rights covered by the settlement agreement?

BRIEF ANSWER

When curtailment of junior water rights is necessary to supply water to a senior water right, Idaho's prior appropriation doctrine requires that junior diversions must be curtailed in order of water right priorities. Under the Conjunctive Management Rules, however, junior ground water diversions may continue out-of-priority pursuant to an approved mitigation plan to which the senior appropriator and the junior appropriators have stipulated and agreed. This is consistent with Idaho's prior appropriation doctrine, and does not preclude the curtailment of surface water diversions senior to the ground water diversions that are allowed to continue under the stipulated mitigation plan.

DISCUSSION

Your question essentially asks whether it would violate Idaho's prior appropriation doctrine to curtail diversions under junior surface water rights when ground water users holding rights of even lesser priority continue to pump pursuant to a settlement agreement with the senior appropriator. Responding to this question requires a discussion of the general principles that govern administrative curtailment, followed by consideration of the question of conjunctively administering hydraulically interconnected surface water rights and ground water rights consistent with Idaho's prior appropriation doctrine. These matters are addressed in turn below.

I. Curtailment Must Be Consistent With Water Right Priorities.

Section 3 of article XV of the Idaho Constitution sets forth the constitutional basis of Idaho's prior appropriation doctrine. This section states, in part, that "[p]riority of appropriations shall give the better right as between those using the water[.]" Idaho Const. art. XV, § 3[2]; *see also* Idaho Code § 42-106 ("As between appropriators, the first in time is first in right."). The prior appropriation doctrine as established by Idaho law applies to both surface waters and ground waters.[3] Further, the Idaho Supreme Court has held that hydraulically interconnected surface waters and ground waters "must be managed conjunctively."

Clear Springs Foods, Inc. v. Spackman, 150 Idaho 790, 808, 252 P.3d 71, 89 (2011).

Under Idaho's prior appropriation doctrine, water must be distributed and diversions must be regulated in accordance with licensed and decreed water rights. Idaho Code §§ 42-220, 42-602, 42-607 and 42-1413(2). The Idaho Supreme Court has held that the Idaho Department of Water Resources ("IDWR") has a "clear legal duty" to distribute water and regulate diversions in accordance with water right decrees. City of Blackfoot v. Spackman, 162 Idaho 302, 309, 396 P.3d 1184, 1191 (2017).[4] Water right holders are entitled to presume that water is being distributed to them in compliance with the priorities defined in the governing decree. Almo Water Co. v. Darrington, 95 Idaho 16, 21, 501 P.2d 700, 705 (1972).

In times of scarcity, diversions under junior water rights are subject to curtailment if necessary to supply water to senior appropriators diverting from the same source. Idaho Code §§ 42-607 and 42-237a(g). Thus, when in times of shortage it is necessary to curtail junior diversions to supply water to a senior appropriator, the order or sequence of the curtailment of the junior diversions is governed by the licensed or decreed priorities of the junior water rights. That is, the most junior water right is curtailed first, followed by the next most junior water right, etc., until the senior appropriator has a sufficient supply of water.[5] *See, e.g.,* Idaho Code § 42-607 ("according to the prior rights of each"). As the Idaho Supreme Court has held:

> [I]t is obvious that in times of water shortage someone is not going to receive water. Under the appropriation system the right of priority is based on the date of one's appropriation, i.e. first in time is first in right. . . . [A] proper delivery can only be effected when the watermaster is guided by some specific schedule or list of water users and their priorities, amounts, and points of diversion.

Nettleton v. Higginson, 98 Idaho 87, 91, 558 P.2d 1048, 1052 (1977).

This is not the end of the inquiry, however, because your question pertains to conjunctive administration of hydraulically

interconnected surface water rights and ground water rights. In such cases, junior ground water appropriators may continue diverting out-of-priority if they are operating in conformity with a mitigation plan that has been approved under IDWR's "Rules for Conjunctive Management of Surface and Ground Water Resources" ("Conjunctive Management Rules"). This is explained in the following section.

II. Junior Ground Water Appropriators May Divert Out-Of-Priority Under A Mitigation Plan Approved Pursuant To The Conjunctive Management Rules.

The Conjunctive Management Rules prescribe procedures and standards for the Director of IDWR to respond to a delivery call by a senior surface water appropriator against junior ground water appropriators. IDAPA 37.03.11.001.[6] IDWR developed the Conjunctive Management Rules because surface water and ground water in Idaho historically had been administered separately, but in 1994 the Idaho Supreme Court held that the Director has a clear legal duty to administer junior ground water rights if they are injuring senior surface water rights. *See* Clear Springs Foods, Inc., 150 Idaho at 808, 252 P.3d at 89 (citing Musser v. Higginson, 125 Idaho 392, 395, 871 P.2d 809, 812 (1994)). The Conjunctive Management Rules "were approved by the Legislature" and went into effect in October of 1994. In the Matter of Distribution of Water to Various Water Rights Held By or For Ben. of A&B Irr. Dist., 155 Idaho 640, 650–51, 315 P.3d 828, 838–39 (2013).

Conjunctive administration of surface water rights and ground water rights under prior appropriation principles is more complex, both legally and factually, than traditional surface water-only administration. *See* Am. Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Res., 143 Idaho 862, 877, 154 P.3d 433, 448 (2007) (quoting Douglas L. Grant, *The Complexities of Managing Connected Surface and Ground Water Under the Appropriation Doctrine,* 22 Land & Water L. Rev. 63, 74 (1987)). Conjunctive administration "'requires knowledge by the IDWR of the relative priorities of the ground and surface water rights, how the various ground and surface water sources are interconnected, and how, when, where and to what extent the diversion and use of water from one source impacts the water flows in that source and other sources.'" *Id.* (citation omitted.) This complexity, the Idaho Supreme

Court has stated, "is precisely the reason for the [Conjunctive Management] Rules and the need for analysis and administration by the Director." *Id.*

Under the Conjunctive Management Rules, the Director has two options when junior ground water pumping is determined to be materially injuring the exercise of a senior surface water right. The Director must either: (1) curtail the ground water pumping "in accordance with the priorities of rights;" or (2) "[a]llow out-of-priority diversion of water by junior-priority ground water users pursuant to a mitigation plan that has been approved by the Director." IDAPA 37.03.11.040.01; *see also id.* 37.03.11.040.02.c ("If the holder of a junior-priority ground water right is a participant in such approved mitigation plan, and is operating in conformance therewith, the watermaster shall allow the ground water use to continue out of priority."); Rangen, Inc. v. Idaho Dep't of Water Res., 160 Idaho 251, 256, 371 P.3d 305, 310 (2016) (stating that the under the Conjunctive Management Rules the Director "must" either curtail junior priority ground water pumping or allow it to continue pursuant to a mitigation plan).

The Conjunctive Management Rules authorize stipulated mitigation plans resulting from "an agreement on an acceptable mitigation plan" between a senior surface water appropriator and junior ground water appropriators. IDAPA 37.03.11.043.03.o. Thus, if a senior surface appropriator and junior ground water appropriators agree to a stipulated mitigation plan, and the stipulated mitigation plan is approved by the Director, then junior ground water appropriators may continue their out-of-priority pumping of water.

Under such circumstances it might be perceived that junior ground water appropriators are being allowed to divert out-of-priority as a result of a private settlement agreement. But the legal authority for allowing ground water pumping to continue in such circumstances is not the settlement agreement, but rather an order issued by the Director approving a mitigation plan pursuant to the Conjunctive Management Rules. IDAPA 37.03.11.040.01-.02; *id.* 37.03.11.043.[7]

The Conjunctive Management Rules do not require the Director to approve a stipulated mitigation plan simply because the senior

appropriator and certain junior appropriators have reached an agreement. Further, not just any purely private settlement agreement can qualify as a "mitigation plan" under the Conjunctive Management Rules.

Rather, the Conjunctive Management Rules establish procedural and substantive requirements that must be satisfied to approve a proposed mitigation plan.[8] The Conjunctive Management Rules require the Director to provide notice and an opportunity to be heard on a proposed mitigation plan, and to follow the procedural provisions of Idaho Code § 42-222 in considering whether the mitigation plan will be approved.[9] IDAPA 37.03.11.043.02. The Conjunctive Management Rules also identify a number of substantive factors relevant to determining whether the proposed mitigation plan should be approved. IDAPA 37.03.11.043.03. Prominent among these factors is "[w]hether the mitigation plan will provide replacement water, at the time and place required by the senior-priority water right, sufficient to offset the depletive effect of ground water withdrawal on the water available in the surface or ground water source . . . ." IDAPA 37.03.11.043.03.b.

In addition, the mere approval of a stipulated mitigation plan does not immunize junior ground water diversions from curtailment. Following approval of a mitigation plan, junior ground appropriators must continue to participate in the mitigation plan and operate in conformance with it. If they do not, or if the mitigation plan is not operating effectively, the junior ground water appropriators are subject to curtailment. IDAPA 37.03.11.040.01-.02, 37.03.11.042.02; *see also* Rangen, Inc., 160 Idaho at 259, 371 P.3d at 313 ("Generally, the consequence of failing to operate in compliance with an approved mitigation plan is curtailment of junior-priority use.").

In short, senior surface water appropriators and junior ground water appropriators are free to negotiate stipulated mitigation plans that, if approved in conformance with the Conjunctive Management Rules and applicable holdings of the Idaho Supreme Court, would allow the junior ground water appropriators to avoid curtailment, provided they operate in conformance with the mitigation plan, and the plan itself operates effectively. The possibility of curtailment always remains, however. Junior ground water appropriators are subject to curtailment

if they do not operate in conformance with an approved mitigation plan, or if the plan does not operate effectively.

III. The Mitigation Plan Provisions of the Conjunctive Management Rules Are Consistent With Idaho's Prior Appropriation Doctrine.

The Idaho Supreme Court has not directly addressed the question of whether the Conjunctive Management Rules are contrary to the Idaho Constitution insofar as they allow junior ground water appropriators to avoid curtailment by operating pursuant to an approved mitigation plan.[10] The Court has recognized that this approach is fundamental to the administrative framework established by the Rules, however, and has not cast any doubt upon the constitutionality of that administrative framework. *See, e.g.,* In the Matter of Distribution of Water to Various Water Rights Held By or For Ben. of A&B Irr. Dist., 155 Idaho at 653, 315 P.3d at 841 ("The Conjunctive Management Rules require that out-of-priority diversions only be permitted pursuant to a properly enacted mitigation plan.") (bold font omitted).

If the Court were to address the question of whether the mitigation plan provisions of the Conjunctive Management Rules are contrary to the Idaho Constitution, the Court would begin with the language of the Idaho Constitution. The Idaho Constitution does not explicitly require that junior appropriators be curtailed in times of shortage. Rather, it states that "[p]riority of appropriations shall give the better right as between those using the water" without specifying the particular method of administration that must be used to protect senior water rights. Idaho Const. art. XV, § 3. Presumably, alternatives to curtailment are permissible if they adequately protect senior water rights from injury by junior diversions. This is what mitigation plans approved under the Conjunctive Management Rules are intended to do. *See, e.g.,* IDAPA 37.03.11.043.03.b. ("Whether the mitigation plan will provide replacement water, at the time and place required by the senior-priority water right, sufficient to offset the depletive effect of ground water withdrawal . . . .").

Further, senior surface water appropriators' rights are often protected more effectively by requiring mitigation than by curtailing

junior ground water diversions. This is because ground water moves much more slowly than surface water, and curtailing ground water appropriators many miles away from the river often will not provide timely relief to a senior surface water appropriator. *See* Clive J. Strong & Michael C. Orr, *Understanding the 1984 Swan Falls Settlement*, 52 Idaho L. Rev. 223, 284-85 (2016) ("'Curtailment of junior ground water pumping rights is inadequate to protect senior Snake River flow rights because of the time delay between reduced ground water pumping and the effect reaching the Snake River.'") (quoting IDWR's 1988 "Policy And Implementation Plan For Processing Water Right Filings In The Swan Falls Area"). Allowing ground water appropriators to provide mitigation in lieu of curtailment also avoids the need to curtail ground water diversions that irrigate many thousands of acres in order to provide a relatively miniscule amount of water to the senior appropriator. *See* Idaho Ground Water Ass'n v. Idaho Dep't of Water Res., 160 Idaho 119, 133, 369 P.3d 897, 911 (2016) ("it will not do to say that access to an entire aquifer may be foreclosed so as to cause 1.5 cfs to accrue to a single [senior surface water right] at a loss of enough water to irrigate 322,000 acres.").

It follows that the Conjunctive Management Rules are not likely contrary to the Idaho Constitution simply because they authorize mitigation in lieu of curtailment.[11] This conclusion is consistent with those reached by the appellate courts of other prior appropriation states.

For instance, in State v. Lewis, 150 P.3d 375 (N.M. Ct. App. 2006), the New Mexico Court of Appeals rejected arguments that a water conservation and augmentation plan[12] adopted pursuant to a settlement agreement between senior surface water appropriators and junior ground water appropriators violated the New Mexico Constitution and New Mexico statutes by not requiring strict priority enforcement and curtailment of juniors. *Id.* at 378-89.[13] The court stated it was "reasonable to construe these [constitutional and statutory] provisions to permit a certain flexibility within the prior appropriation doctrine in attempting to resolve the longstanding Pecos River water issues," and held the constitutional and statutory provisions "do not by their terms require strict priority enforcement through a priority call when senior water rights are supplied their adjudicated water entitlement by other reasonable and acceptable management methods." *Id.* at 386; *see*

also Bounds v. State, 252 P.3d 708, 719-22 (N.M. Ct. App. 2010) (quoting Lewis).

The Colorado Supreme Court also has held that allowing out-of-priority diversions in lieu of curtailment pursuant to "augmentation plans" and water "exchanges" is consistent with the prior appropriation doctrine. Empire Lodge Homeowners' Ass'n v. Moyer, 39 P.3d 1139, 1149-55 (Colo. 2001). The Colorado court has approved of statutes providing that "[w]hen a junior appropriator makes a sufficient substitute supply of water available to a senior appropriator, the junior may divert at its previously decreed point of diversion water that is otherwise bound for the senior's decreed point of diversion." *Id.* at 1155. The court held that the statutes were consistent with the court's longstanding recognition that "'implicit'" in Colorado's constitutional mandate that "[p]riority of appropriation shall give the better right as between those using the water for the same purpose"[14] is the principle "'that, along with vested rights, there shall be *maximum utilization* of the water of this state.'" *Id.* at 1150 (italics in original) (citation omitted). The court also concluded that the statutes authorizing "augmentation plans" contained sufficient procedural and substantive safeguards to "allow diversions of water 'out-of-priority while ensuring the protection of senior water rights,'" and thus "[d]ecreed water rights receive a replacement water supply that offsets the out-of-priority depletions." *Id.* (citation omitted.)

Certain legal principles the Idaho Supreme Court has held to be implicit in Idaho's prior appropriation doctrine are the same or very similar to those recognized in these New Mexico and Colorado decisions. The Idaho Supreme Court has long held that "'[t]he policy of the law of this State is to secure the maximum use and benefit, and least wasteful use, of its water resources.'" IGWA, 160 Idaho at 131, 369 P.3d at 909 (citation omitted). The Idaho Supreme Court has also held that Idaho's prior appropriation doctrine "sanctifies priority of right, but subject to the limitations imposed by beneficial use." *Id.* at 132, 369 P.3d at 910 (footnote omitted).

The Conjunctive Management Rules explicitly incorporate these principles. *Id.* at 132, 369 P.3d at 910; IDAPA 37.03.11.020. By establishing a framework for junior ground water appropriators to divert out-of-priority when they mitigate injury to senior priority surface water

appropriators, the Conjunctive Management Rules ensure that senior water rights are protected, but in a manner consistent with securing the maximum beneficial use and benefit, and least wasteful use, of Idaho's water resources. The mitigation plan provisions of the Conjunctive Management Rules are therefore consistent with the Idaho Supreme Court's holding that "Idaho law contemplates a balance between the 'bedrock principles' of priority of right and beneficial use." IGWA, 160 Idaho at 132, 369 P.3d at 910 (citation omitted).

For all of these reasons, it is likely the Idaho Supreme Court would hold that the mitigation plan provisions of the Conjunctive Management Rules are consistent with the Idaho Constitution, Idaho statutes, and the Court's decisions. We therefore conclude that a court would likely hold that it does not violate the prior appropriation doctrine as established by Idaho law to allow junior ground water appropriators to divert out-of-priority so long as they are operating in conformance with an effectively operating mitigation plan that was approved by the Director under the Conjunctive Management Rules.

IV. Junior Surface Water Appropriators May Be Subject To Curtailment Even If Ground Water Appropriators Of Lesser Priority Continue To Divert Pursuant To An Approved Mitigation Plan.

The final issue raised by your question is whether it would be contrary to Idaho's prior appropriation doctrine to curtail surface water diversions senior to out-of-priority ground water diversions that have been allowed to continue pursuant to a mitigation plan approved under the Conjunctive Management Rules.

As previously discussed, junior surface water appropriators are subject to curtailment if necessary to supply water to a senior surface water appropriator. Idaho Code § 42-607. Some may perceive junior ground water appropriators diverting out-of-priority pursuant to a stipulated mitigation plan approved by IDWR under the Conjunctive Management Rules as escaping priority administration. But they are not. To the contrary, they are being actively administered under well-established prior appropriation principles. As previously discussed, junior ground water appropriators whose diversions are materially injuring the exercise of senior surface water rights are allowed to divert

out-of-priority only if they are operating in conformance with an approved mitigation plan that mitigates the injury to the senior appropriator. Further, the junior ground water appropriators will be curtailed if they do not operate in conformance with the mitigation plan, or if IDWR determines the mitigation plan is not operating effectively.

Nothing in the Conjunctive Management Rules removes the Director's duty to administer junior surface water appropriators simply because the ground water appropriators are providing mitigation in lieu of curtailment. When junior ground water appropriators are complying with their mitigation obligations under an order issued pursuant to the Conjunctive Management Rules, the prior appropriation doctrine as established by Idaho law does not preclude curtailment of surface water appropriators senior to the ground water appropriators, if necessary to provide water to the senior surface water appropriator.

It would be contrary to Idaho's prior appropriation doctrine to preclude curtailment of the junior surface water appropriators, because that would diminish the extent to which the priority of the senior surface water right could be exercised. *See* Clear Springs Foods, Inc., 150 Idaho at 797–98, 252 P.3d at 78–79 ("'Priority in time is an essential part of western water law and to diminish one's priority works an undeniable injury to that water right holder.'") (citation omitted). It also would have the effect of allowing junior surface appropriators to entirely escape priority administration.

We therefore conclude that a court would likely hold it does not violate Idaho's prior appropriation doctrine to curtail diversions under junior surface water rights when ground water users holding rights of even lesser priority continue to pump pursuant to a mitigation plan approved under the Conjunctive Management Rules. This is true even if it is a stipulated mitigation plan that resulted from "an agreement on an acceptable mitigation plan" between the senior surface water appropriator and junior ground water appropriators. IDAPA 37.03.11.043.03.o.

As previously discussed, this is a general legal conclusion based upon analysis of overarching principles of Idaho's prior appropriation doctrine and does not predict the outcome in any given case. The application of the principles of Idaho's prior appropriation

doctrine is "highly fact driven," Am. Falls Reservoir Dist. No. 2, 143 Idaho at 869, 154 P.3d at 440, and each case must be evaluated based on its particular facts.

We hope that this letter answers your question and explains the basis for our conclusions. Please do not hesitate to contact our office if you have additional questions. Thank you.

Sincerely,

DARRELL G. EARLY
Deputy Attorney General
Chief, Natural Resources

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[1] The Idaho Supreme Court stated as follows in a 2007 decision addressing water rights administration under Idaho's prior appropriation doctrine:

> While the Constitution, statutes and case law in Idaho set forth the principles of the prior appropriation doctrine, those principles are more easily stated than applied. These principles become even more difficult, and harsh, in their application in times of drought. Because of concepts like beneficial use, waste, reasonable means of diversion and full economic development, the decisions are highly fact driven and sometimes have unintended or unfortunate consequences.

Am. Falls Reservoir Dist. No. 2 v. IDWR, 143 Idaho 862, 869, 154 P.3d 433, 440 (2007).

[2] Section 3 of Article XV states in full as follows:

> The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied, except that the state may regulate and limit the use thereof for power purposes. Priority of appropriation shall give the better right as between those using the water; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall (subject to such limitations as may be prescribed by law) have the preference over those claiming for any other purpose; and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes. And in any organized mining district those using the water for mining

> purposes or milling purposes connected with mining, shall have preference over those using the same for manufacturing or agricultural purposes. But the usage by such subsequent appropriators shall be subject to such provisions of law regulating the taking of private property for public and private use, as referred to in section 14 of article I of this Constitution.

[3] The Idaho Supreme Court has held that "[t]he Idaho Constitution confirmed the doctrine of prior appropriation with respect to surface waters," but "the Constitution makes no mention of ground water rights." Clear Springs Foods, Inc. v. Spackman, 150 Idaho 790, 801, 252 P.3d 71, 82 (2011). The Court has also recognized, however, that the prior appropriation doctrine applies to ground water pursuant to the Court's decisions and the Idaho Code. *Id.* at 801-02, 252 P.3d at 82-83.

[4] The on-the-ground work of distributing water and regulating diversions is generally performed by watermasters. Watermasters are subject to the Director's direction and supervision for these purposes. Idaho Code § 42-602.

[5] Under Idaho law, all water rights are limited to the amount actually necessary to fulfill the authorized beneficial use, even if in some circumstances that amount is less than the full licensed or decreed quantity. In the Matter of Distribution of Water to Various Water Rights Held by or for the Benefit of A&B Irr. Dist., et al., 155 Idaho 640, 650-53, 315 P.3d 828, 838-41 (2013); Am. Falls Res. Dist. No. 2, 143 Idaho at 878-80, 154 P.3d at 449-51; *see also* Idaho Ground Water Ass'n v. Idaho Dep't of Water Res., 160 Idaho 119,133, 369 P.3d 897, 911 (2016) ("The extent of beneficial use [is] an inherent and necessary limitation upon the right to appropriate.") (brackets in original; internal quotation marks and citation omitted).

[6] Even in the absence of a delivery call, the Director has the authority (indeed the "clear legal duty") of distributing water and regulating diversions in accordance with water right decrees and licenses, and the prior appropriation doctrine as established by Idaho law. City of Blackfoot, 162 Idaho at 309, 396 P 3d at 1191; Idaho Code §§ 42-219, 42-602, 42-607 and 42-1413(2).

[7] An example of an order of the Director approving a mitigation plan is enclosed.

[8] The Idaho Supreme Court has addressed some of the procedural and requirements that must be satisfied to approve a proposed mitigation plan. Rangen, Inc., 160 Idaho at 256-61, 371 P.3d at 310-15; In the Matter of Distribution of Water to Various Water Rights Held by or for the Benefit of A&B Irr. Dist., et al., 155 Idaho at 650, 653-54, 315 P.3d at 838, 841-42.

[9] Idaho Code § 42-222 sets forth the procedures and standards applicable to applications for changes in the point of diversion, place of use, or nature of use of existing water rights.

[10] While this question has never been presented to the Idaho Supreme Court, the Court has considered and rejected constitutional

challenges to other aspects of the Conjunctive Management Rules. Am. Falls Res. Dist. No. 2, 143 Idaho at 862, 154 P.3d at 433.

[11] The question of whether a particular mitigation plan fails to pass constitutional muster is a separate matter that must be decided on the basis of the facts of the particular case. *See* Am. Falls Res. Dist. No. 2, 143 Idaho at 870-71, 154 P.3d at 441-42 (distinguishing "facial" and "as applied" constitutional challenges to the Conjunctive Management Rules).

[12] The water conservation and augmentation plan at issue contained terms, conditions, and requirements very similar to those of mitigation plans approved under the Conjunctive Management Rules *Compare id.* at 380-84 (quoting and describing the settlement agreement and the water conservation and augmentation plan) *with* IDAPA 37.03.11.043 ("Mitigation Plans").

[13] The applicable provision of the New Mexico Constitution uses the same language as the Idaho Constitution. As previously discussed, the Idaho Constitution provides that "[p]riority of appropriation shall give the better right as between those using the water[.]" The analogous provision of the New Mexico Constitution states that "[p]riority of appropriation shall give the better right." N.M. Const. art. 16, § 2.

[14] Colo. Const. art. XVI, § 6.

February 28, 2018

Representative Caroline Nilsson Troy
Idaho House of Representatives
Idaho State Legislature
cntroy@house.idaho.gov
VIA ELECTRONIC MAIL AND STATEHOUSE MAIL

Re: Our File No. 18-60631

Dear Representative Troy:

Your request to Brian Kane for comments on recreation district finance provisions was given to me for response. You ask two specific questions:

> 1. Can a district spend a fund balance that it has "saved up" over a period of years from an annual levy on capital projects (such as acquisition or construction of facilities)?
>
> 2. Wouldn't an election be required in order to prevent an "end run" around the election requirement for bonding/facilities reserve fund?

While there are no specific provisions of law precluding recreation districts from saving money gained from normal levies and using it later for capital expenditures, it likely goes against the intent of recreation district law when read as a single body of guidance.

BACKGROUND

Authority for recreation districts was first established by House Bill 571 in 1970, and is currently enumerated as title 31, chapter 43 of Idaho Code. That act, published as Chapter 212 of the 1970 Idaho Session Laws, allowed for the establishment of recreation districts for the express purpose of "acquiring, providing, maintaining and operating a public swimming facility and pool", a purpose which has subsequently been expanded to include other recreational opportunities. 1974 Idaho

Sess. Laws 605. The act had no provision for incurring debt, except for before making a tax levy during the year of establishment of the district. The inclusion of that provision was likely due to the delay in the time a levy is set and the eventual billing in arrears for that levy. The authority to levy property tax "for the uses and purposes of the district" was included in section 18 of HB 571, currently found in Idaho Code § 31-4318. Section 14 of the HB 571 also gave recreation districts the authority to invest funds not immediately required for district purposes, found currently in Idaho Code § 31-4317(o).

Recreation district law significantly changed in the year following its adoption with the inclusion of authority for districts to incur debt and to create reserve accounts to fund projects in Senate Bill 1015 from 1971. Currently, Idaho Code § 31-4322 empowers a recreation district board to issue bonds, and Idaho Code § 31-4323 authorizes the board, upon its own resolution, to submit to the voters a proposal to borrow money to fund described purposes. Similarly, Idaho Code § 31-4327 empowers a recreation district board to establish a reserve fund, and Idaho Code § 31-4328 authorizes all or a portion of the levy authorized in Idaho Code § 31-4318 be applied to the reserve fund with voter approval. Elections for bonding requirements, and the application of levies to a reserve fund, are controlled by the same election process, found in Idaho Code §§ 31-4324 through 31-4326.

There is no recorded case law in Idaho under title 31, chapter 43 of Idaho Code. There is also no legislative intent to be found in the committee notes for either House Bill 571 or Senate Bill 1015 that helps answer your questions.

ANALYSIS

When reading chapter 43 as a whole, it is logical to conclude that any reservation of amounts obtained under a recreation district's authority to levy property taxes to fund capital projects would require voter approval. Chapter 43 indicates two ways to fund projects that require expenditures above the amount legally levied in a year. A district can either: 1) borrow for a project and pay the debt off over time, pursuant to section 31-4323, or 2) save levy amounts over time in a reserve account under section 31-4327. Both methods require the same voter approval.

Only two provisions in chapter 43 possibly apply to the "saving" of levied amounts. Idaho Code § 31-4317 allows district funds "not then required" to be invested, and Idaho Code § 31-4328 authorizes the reserve fund. To read a district's general authority to invest funds under section 31-4317 as a way to save money for future projects would create an illogical ambiguity in the law. If a district could simply establish a levy under its own authority pursuant to Idaho Code § 31-4318 and then save a large portion of the revenue for future projects under section 31-4317, there would be no weight to the election provisions that require a vote to save levy amounts in a reserve fund found in section 31-4328. Those provisions could be bypassed with no penalty. Instead, it is logical to conclude that the authority to invest pursuant to section 31-4317 is merely authorization to open investment accounts to maximize revenue when holding significant amounts for any period of time, and any attempt to save revenue in order to fund projects over the long term must be authorized by the voters under section 31-4328.

CONCLUSION

The plain language of chapter 43 does not explicitly forbid recreation districts from leaving unspent tax revenue idle and using it to fund future capital projects. However, reading chapter 43 as a whole indicates a legislative intent to require voter approval for recreation districts to save or borrow money for expenditures above the yearly levy amount of the district.

I hope this responds to your question. If you have further questions or comments, please contact me at the number below.

Sincerely,

GEORGE R. BROWN
Deputy Attorney General

March 5, 2018

The Honorable Bert Brackett
Idaho State Senator
Statehouse
VIA HAND DELIVERY

Re: Our File No. 18-60744 – State Bonds

Dear Senator Brackett:

This letter is in response to your inquiry. Specifically, you asked four questions, each of which is answered in turn below.

1. May a state agency issue bonds without legislative authorization?

Generally, a state agency may not issue bonds without legislative approval. Art. VIII, sec. 1 of the Idaho Constitution provides for the mechanism by which the state may acquire debt, and an agency of the state would be required to follow that. Certain entities within the state are independent bodies corporate and politic. These entities are not state agencies and operate independently as instrumentalities of the state. Accordingly, bonds and debt issued by these entities are not bonds or debts of the state.

If an agency were to use a financing vehicle offered through one of the above mentioned entities, the agency would need legislative approval to do so in order to pay the annual service, lease payment or other structure necessary to comply with constitutional requirements. This legislative approval is constitutionally required by art. VII, sections 11 (Expenditure not to exceed appropriation) and 13 (Money-How drawn from treasury) of the Idaho Constitution.

2. May Transportation Expansion and Congestion Mitigation (TECM) funds be used to service debt issued by an entity?

It appears that TECM funds could be used with a corresponding

statutory authorization, and legislative appropriation authorizing the uses and expenditure of such funds. Money cannot be spent without an appropriation from the legislature. Idaho Const. art. VII, § 13; Standard Appropriations Act of 1945, title 67, chapter 36, Idaho Code. These provisions and requirements also require the use of non-appropriation clauses in most circumstances to insure that constitutional requirements are not violated. This process would be similar to the process used in the GARVEE financing.

3. Does the Department have authority to authorize TECM projects?

Under the existing statutory structure, Idaho Code § 40-720 instructs the Department of Transportation to evaluate the TECM projects, with the approval of such projects placed in the discretion of the Idaho Transportation Board. This structure is consistent with the statutory assignment of authority in Idaho Code § 40-314, and Idaho Code § 40-501, which establish the Board as the head of the Transportation Department.

4. Can the Legislature delay implementation of any authority discussed herein?

The effective date of legislation under art. III, sec. 22 of the Idaho Constitution takes effect 60 days from the end of the session unless an emergency is declared indicating a different effective date. Under this provision, the Legislature would need to declare an emergency and establish the effective date of the legislation. If the Legislature were to delay implementation to July 1, 2019 for example, it is possible that the next legislature could impact the legislation with new legislation that conflicts, amends, or extends legislation passed this session with a delayed effective date.

I hope you find this response helpful.

Sincerely,

BRIAN KANE
Assistant Chief Deputy

March 8, 2018

The Honorable Paul Shepherd
Idaho State Representative
Statehouse
VIA HAND DELIVERY

Re: Our File No. 18-60814 – Railroad Overpass in Ferdinand, Idaho

Dear Representative Shepherd:

This letter is in response to your recent inquiry regarding a railroad overpass in Ferdinand, Idaho. Specifically, you asked about the process to have the overpass removed with minimal financial exposure to the Highway District. This office cannot substitute its legal judgment for that of the attorney for the Highway District, and submits this response to you as an overview of the process. There are likely numerous facts unknown to this office that could change this analysis. For that reason, this analysis is only intended as informational to you.

The issue of easement ownership upon abandonment of a railroad right of way is discussed by the Supreme Court in Marvin M. Brandt Revocable Trust v. U.S., 572 U.S. 93, 134 S. Ct. 1257, 188 L. Ed. 2d 272 (2014) and Great N. Ry. Co. v. U.S., 315 U.S. 262, 62 S. Ct. 529, 86 L. Ed. 836 (1942). The Supreme Court has held that any interest held by the railroad companies reverts back to the servient owner upon abandonment and not the government. In other words, if the beneficiary of the easement (the railroad) abandons it, the easement disappears, and the landowner resumes his or her full and unencumbered interest in the land. In this case, it is likely that the Highway District would need to negotiate directly with the landowner with regard to removal of the overpass. There is a possibility that the Highway District is the owner of the overpass if it is passing over a Highway District road. This alternative should be investigated by the Highway District.[1]

Another possible avenue for a railroad that wants to take a track or line out of service is something called "railbanking" or more

commonly known as "Rails to Trails." "Railbanking," as defined by the National Trails System Act, 16 U.S.C. § 1247(d), is a voluntary agreement between a railroad company and a trail agency to use an out-of-service rail corridor as a trail until a railroad might need the corridor again for rail service. Because a railbanked corridor is not considered abandoned, it can be sold, leased or donated to a trail manager without reverting to adjacent landowners. Official negotiations with the railroad begin after the railroad submits an initial notification to abandon the line to the Surface Transportation Board (STB). Negotiations end with either railbanking or line abandonment.

In order to condemn the property, the Highway District would need to satisfy the criteria in Idaho Code § 7-704:

> (1) The proposed use after condemnation is authorized by law;
> (2) The taking of the subject property is necessary for such use; and
> (3) If already appropriated to some public purpose, that the proposed public use is a more necessary public use.

This last criteria would be especially difficult to meet if this overpass is "railbanked," rather than abandoned. Additionally, the Highway District would be required to compensate the property owner under the statutes. Given that the property owner wants a new overpass, the compensation could be significant.

I hope that you find this analysis helpful. I strongly encourage the Highway District to discuss these issues and any other alternatives with the attorney for the District.

Sincerely,

BRIAN KANE
Assistant Chief Deputy

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[1] Additionally, some railroad rights of ways are owned in fee simple. This would change the analysis because the railroad would still own the property at issue and would require negotiation directly with the railroad.

March 15, 2018

The Honorable Mathew Erpelding
Idaho House of Representatives
VIA EMAIL

Re: Our File No. 18-60897 – House Bill 603

Dear Representative Erpelding:

You have asked a series of questions regarding House Bill 603. The first question is whether a forfeited water right "revert[s] to the State" and if so, "does the state retain any water rights relative to these waters, or does the preexisting water right that is forfeited, effectively disappear?" If a water right is lost through forfeiture, the right to the use of that water reverts to the state and the water is either subject to further appropriation or serves to satisfy the rights of existing junior appropriators from the same water source. Jenkins v. State, Dep't of Water Res., 103 Idaho 384, 647 P.2d 1256 (1982). In effect, a forfeited water right disappears and the water becomes available to the next water right in priority.

Your second question is, "How does the forfeiture of these water rights impact the priority date for any subsequent water rights that landowners or ranchers may apply for to be used for stock watering on the same land?" Once a water right is removed from the system by forfeiture, the water then becomes available to the next water right in the system. In other words, any subsequent or junior water rights "move up the ladder" and they are entitled to the available water. The forfeiture of the federal stockwater water rights will not directly impact the priority of any subsequent water rights but will remove the federal stockwater water rights from the priority system and the water will be available to the next water right holder in line.

Your third question explores the legal basis for the federal stockwater rights. Your third question states:

> [T]he stock water rights targeted by [House Bill 603] were decreed to the US based on federal law; law which

> directs federal agencies to hold the water rights appurtenant to allotments for a rancher's stock to use. In short, Idaho law is changing, but federal law has not, therefore, are there federal supremacy issues raised by this proposed law? Further, if the section does not apply to stock water rights decreed to the US based on federal law, is the law applicable to these water rights?

In the Snake River Basin Adjudication ("SRBA"), the United States had the ability to claim and receive decreed water rights based on either state law or federal law. *See* U.S. v. City of Challis, 133 Idaho 525, 527, 988 P.2d 1199, 1201 (1999). The majority of the United States' decreed stockwater water rights were based on state law, not federal law. There is no exception under state or federal law that would prevent the United States' state based water rights from being subject to state forfeiture laws. Accordingly, there is no federal supremacy issue raised by the application of state forfeiture law to the state based water rights held by the United States. Furthermore, because House Bill 603 applies only to state based beneficial use water rights, House Bill 603 would be applicable to the majority of the stockwater water rights decreed in the SRBA to the United States.

I hope you find this analysis helpful.

Sincerely,

DARRELL G. EARLY
Deputy Attorney General
Chief, Natural Resources Division

May 14, 2018

The Honorable Lawerence Denney
Idaho Secretary of State
Statehouse
VIA HAND DELIVERY

Re: Our File No. 18-61527 – Request To Review *The Idahoan*

Dear Secretary of State Denney:

This letter is in response to your request of this office to review a publication entitled *The Idahoan*. Specifically, you have asked this office to review *The Idahoan* under Idaho's campaign finance laws to determine if it is an "electioneering communication" under Idaho Code § 67-6602. If this publication is an "electioneering communication," then its publisher is required to comply with the reporting requirements under Idaho's campaign finance laws. After reviewing *The Idahoan*, this office concludes that in the absence of an applicable exemption it would be an electioneering communication under Idaho Code § 67-6602(f)(1) because, among other things, it unambiguously refers to candidates and was part of a mass mailing to members of the electorate within thirty days of the primary election. However, the following exemptions found in Idaho Code § 67-6602(f)(2) apply to the definition found in subsection (f)(1):

> "Electioneering communication" does not include:
>
> (i) Any news articles, editorial endorsements, opinion or commentary, writings, or letter to the editor printed in a newspaper, magazine, or other periodical not owned or controlled by a candidate or political party;
> (ii) Any editorial endorsements or opinions aired by a broadcast facility not owned or controlled by a candidate or political party;
> (iii) Any communication by persons made in the regular course and scope of their business or any

> communication made by a membership organization solely to members of such organization and their families;
> (iv) Any communication which refers to any candidate only as part of the popular name of a bill or statute;
> (v) A communication which constitutes an expenditure or an independent expenditure under this chapter.

The Idahoan contains a series of news articles, editorial endorsements, and other writings printed in a newspaper, magazine, or other periodical that is not owned or controlled by a candidate or political party. Idaho law does not define the terms newspaper, magazine or other periodical. Idaho law does define what a newspaper is for purposes of qualifying to publish legal notices within Idaho Code § 60-106, but that definition only establishes what types of newspapers qualify for publication. It is inapplicable as a broad definition of newspaper.

But the test for the exemption is not solely content based, it also tests for ownership and control. A publication is exempt if it is not controlled by a candidate or a party.

Summary of *The Idahoan*

The Idahoan is a limited liability company registered to do business with the Idaho Secretary of State's Office as of April 18, 2018. It is governed by Patrick Malloy, who does not appear to be a candidate for office. *The Idahoan* does not appear to be controlled by a political party or candidate. According to its text, *The Idahoan* will be published up to three times a year, an edition prior to each election cycle (Primary/General) as well as a pre-legislative session publication. The current edition contains information on candidates of both parties in all statewide and legislative races, editorial endorsements of candidates, an explanation of the endorsement process, and news articles regarding: voting, President Trump's agenda, tax cuts, and urban renewal among other topics. Additionally, it appears that *The Idahoan* has sold advertising space

within its pages. *The Idahoan's* content at this point is provided free of charge in both printed and website form.

Legal Analysis

Under the exemption, the providers of *The Idahoan* must demonstrate two things:

(1) Is the entity a newspaper, magazine or other periodical; that
(2) Is not owned or controlled by a candidate or political party.

In evaluating an entity under this statutory exemption, the entity must be engaged in a press type of activity—meaning is the publication and its writings something that the press would ordinarily engage in?

Status as a newspaper, magazine, or other periodical.

Idaho Code § 67-6602(f)(2)'s exemption is clearly intended to respect the First Amendment freedom of the press. This exemption enables the press the unfettered ability to cover and comment on political campaigns. *The Idahoan's* publication and website provide election information on candidates of all parties, news content, and editorial endorsements. *The Idahoan* produces original content and retains editorial control of its content similar to the way that magazine and newspaper editors generate and manage the content of their publications.

Additionally, it appears that *The Idahoan* is performing a legitimate press function. Its content is available to the general public both in print and on its website. With regard to its website, any user may access the site and its content, there is no registration process, and it appears to be serving a legitimate press function. It is important to note that an entity otherwise eligible under the newspaper exemption would not lose its eligibility due to a lack of objectivity in its news stories, commentary, or editorial endorsements even if the news story, commentary, or editorial clearly advocates for the election or defeat of a candidate. It is

important to note that numerous newspapers across the State of Idaho engage in editorial endorsements advocating the election or defeat of clearly identified candidates for state, legislative, and local offices. Such conduct does not render the exemption inapplicable.

Not owned by a party, committee, or candidate.

The publication entity cannot be owned or controlled by a party or candidate. Based upon this office's knowledge, the entity is not owned by a party or a candidate. Based upon the Certificate of Organization for *The Idahoan*, the sole governor of the company is Patrick Malloy. The editors of *The Idahoan*, are listed as Patrick Malloy and Lou Esposito. This office recognizes that certain authors of the publication are members of political committees such as Idaho Chooses Life (David Ripley) and the Free Enterprise PAC (Lou Esposito). It appears that other political committees purchased advertising within *The Idahoan* including Idaho Chooses Life, Gun PAC, and Land PAC. Although it appears that *The Idahoan* is controlled by political committees, Idaho's law only tests for ownership and control by a candidate or a party. Nothing indicates such ownership and control to this office.

A note about Idaho Code § 67-6602(f)(2)(i).

Idaho law is narrower in its application than the federal law. Under the federal campaign finance law, the test for ownership and control includes candidates, parties, **and committees**. 52 U.S.C. § 30101(9)(B)(i). As explained below, although *The Idahoan* enjoys the reporting exemption provided under Idaho law, it may not be exempt under the federal law.

The publication is funded by investors and political action committees. Most notably, the Free Enterprise PAC, which is headed by Lou Esposito, appears to have funded $100,000 of costs of *The Idahoan*. According to Mr. Esposito, this funding is 1/3 or less of the total funding for *The Idahoan*. Based upon the information available, it does not appear that *The Idahoan* is owned by a candidate or a party. A closer question arises as to whether *The Idahoan* is controlled by a political committee.

Looking specifically at the front page of *The Idahoan*, Lou Esposito is listed as its publisher and editor along with Patrick Malloy. Within the capacities of publisher and editor, Mr. Esposito directly controls the content of the publication and website. More significantly, Mr. Esposito is the author of every single editorial endorsement within the publication. Additionally, one of the few articles within the publication is authored by Zach Brooks, a legislative candidate who received an endorsement from Mr. Esposito. Finally, there are a number of articles under a byline of "The Idahoan" which do not reflect an author. Although purporting to be a newspaper, *The Idahoan* appears to be a shill intended as cover for Mr. Esposito's political committees and their corresponding viewpoints.

Conclusion

Based upon the above, it appears that *The Idahoan* qualifies for the press exemption in Idaho Code § 67-6602(f). Recognizing the gap created through the omission of the term "committee" from the Idaho statute, the Secretary may want consider an amendment to Idaho Code § 67-6602(f)(2) if he believes the activity discussed in this analysis warrants oversight.

I hope you find this letter helpful.

Sincerely,

BRIAN KANE
Assistant Chief Deputy

September 25, 2018

The Honorable Priscilla Giddings
Idaho State Representative
P.O. Box 43
White Bird, ID 83554
pgiddings@house.idaho.gov
VIA U.S. MAIL AND EMAIL

Re: Our File No. 18-63002 – Inquiry regarding legality of inspection and videotaping of lateral sewer service lines under the City of Kellogg's Road and Sewer Rehabilitation and Replacement Project

Dear Representative Giddings:

This letter is in response to your inquiry regarding the legality of inspection and videotaping of lateral sewer service lines under the City of Kellogg's Road and Sewer Rehabilitation and Replacement Project. If the City entered and inspected homeowners' sewer lines without obtaining consent, securing an administrative warrant, or acting pursuant to an exception to the warrant requirement, the inspections were likely not legal under the United States Constitution.[1] Determination of the legal justification for the inspections should be discussed with the Kellogg City Attorney. This analysis should not be interpreted as a determination of the legality of the inspections, but provides an overview of this office's understanding of the inspections based upon the generally applicable law. If your constituents wish to challenge the inspection program and its demands, they should carefully discuss their situation with an attorney.

Under the City's Road and Sewer Rehabilitation and Replacement Project, "the lateral sewer service lines to most homes and businesses were inspected and videotaped to verify the condition of the lines." Letter from Rod Plank, Project Manager, City of Kellogg, to Prop. Owner (Sept. 10, 2018). The City conducted the inspections pursuant to the Kellogg City Code (K.C.C.), which requires sewer lines connected to the main sewer line to be dedicated to one structure and watertight. K.C.C. § 4-2-3 and -19.[2] The City required property owners

with sewer lines that did not meet these requirements to bring the sewer lines into compliance with the current K.C.C. within approximately two years of notification. Letter from Rod Plank, Project Manager, City of Kellogg, to Prop. Owner (Sept. 10, 2018). One such property owner complained that, without consent, the City had "used a scope to cross my private property line and video my sewer lines up to my house." Email from Prop. Owner to Priscilla Giddings, Rep., Idaho H.R. (Sept. 17, 2018). The property owner estimated that the repairs would cost $10,000. *Id.*

The K.C.C. allows the sewer inspector of the City, upon identification, to "enter any building or premises supplied with public water service or public sewer facilities for the purpose of inspecting and testing all plumbing, together with all form of clear water drainage, to ascertain quantity, quality and condition of sanitary and clear water sewerage facilities." K.C.C. § 4-2-15.

Inspections of sewer systems are also permitted pursuant to the 2017 Idaho State Plumbing Code (I.S.P.C.), which has been adopted by the City pursuant to Idaho Code § 54-2601(2). *See* K.C.C. § 4-2-2 (2006). The I.S.P.C. states, "Where it is necessary to make an inspection to enforce the provisions of this code, or where the Authority Having Jurisdiction has reasonable cause to believe that there exists in a building or upon a premises a condition or violation of this code that makes the building or premises unsafe, insanitary, dangerous, or hazardous, the Authority Having Jurisdiction shall be permitted to enter the building or premises at reasonable times to inspect or to perform the duties imposed upon the Authority Having Jurisdiction by this code." I.S.P.C. § 103.4 (2017). Before conducting such an inspection, the Authority Having Jurisdiction must obtain consent from the occupant, owner, or person having charge or control of the building or premises. *Id.* If entry is refused, "the Authority Having Jurisdiction has recourse to every remedy provided by law to secure entry," such as an "inspection warrant." *Id.*

Pursuant to Idaho Code §§ 6-202(7) and 18-7008(6), provisions such as the I.S.P.C. and K.C.C. provisions referenced above likely protect Idaho jurisdictions from trespass charges for inspections of homeowners' sewer lines. However, these provisions do not exempt

inspections of homeowners' sewer lines from the warrant requirement of the Fourth Amendment to the United States Constitution.

The Fourth Amendment prevents a jurisdiction from penalizing a homeowner who refuses entry to an inspector not equipped with an administrative warrant. Camara v. Mun. Court of City & Cty. of S.F., 387 U.S. 523, 540, 87 S. Ct. 1727, 1736, 18 L. Ed. 2d 930 (1967). The requirement of an administrative warrant applies equally to curtilage where sewer lines are located and in which a homeowner has a reasonable expectation of privacy. *See* U.S. v. Dunn, 480 U.S. 294, 107 S. Ct. 1134, 94 L. Ed. 2d 326 (1987). Inspections of private property may also be conducted pursuant to some exception to the warrant requirement, such as the existence of exigent circumstances. *See* Camara, 387 U.S. at 528–29; Michigan v. Tyler, 436 U.S. 499, 509–11, 98 S. Ct. 1942, 1950-51 (1978).

While a jurisdiction's inspection and videotaping of a sewer line is not a typical home inspection, if such an inspection crosses a homeowner's property line into the homeowner's curtilage, it must comply with standard administrative warrant requirements. If a jurisdiction enters and inspects a homeowner's sewer lines without obtaining consent, securing an administrative warrant, or acting pursuant to an exception to the warrant requirement, the inspection is not legal under the United States Constitution. Further, a jurisdiction may not penalize a homeowner with noncompliant sewer lines discovered through an unconstitutional inspection.

Although warrantless home inspections violate the United States Constitution, the standard for obtaining an administrative warrant is quite low. A jurisdiction must demonstrate probable cause to obtain an administrative warrant. Camara, 387 U.S. at 538. Probable cause can be established by showing that "reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling." *Id.* Relevant factors for evaluating probable cause include the passage of time since a prior inspection, the nature of the premises, and the condition of the general area. *Id.* Establishing probable cause does not "necessarily depend upon specific knowledge of the condition of the particular dwelling." *Id.*

Another basis for probable cause is a general administrative plan for the enforcement of an ordinance that is "derived from neutral sources." Marshall v. Barlow's, Inc., 436 U.S. 307, 321, 98 S. Ct. 1816, 1825, 56 L. Ed. 2d 305 (1978). For example, a property maintenance code with a general inspection schedule that clearly identifies districts of a city to be inspected, timelines for performing inspections of those areas, and a checklist of minimum standards to guide the inspections.

Another question implied by your inquiry is whether a jurisdiction may require homeowners to bring sewer lines that were installed and, presumably, inspected prior to adoption of the current code up to the standards of the current code. A jurisdiction may not do so under the I.S.P.C. unless the sewer line is hazardous to life, health, or property; added to; altered; renovated; or repaired. I.S.P.C. §§ 102.2 to .5 (2017).

Based upon the above analysis, there appear to be legal questions regarding the propriety of the inspection program used by the City. Your constituents may want to follow up with City Hall and the City Attorney to determine fully the legality of the actions undertaken. Your constituents may also want to discuss their situation with a private attorney to more adequately understand their rights and remedies (if any). As indicated above, this analysis is not a determination of legality but simply highlights the legal issues and requirements of inspections undertaken by governmental entities.

I hope that you find this content helpful.

Sincerely,

BRIAN KANE
Assistant Chief Deputy

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[1] This letter only references the United States Constitution, and not the Idaho Constitution, because a court would likely analyze the applicable provisions of the United States Constitution and Idaho Constitution similarly in this case. *See* CDA Dairy Queen, Inc. v. State Ins. Fund, 154 Idaho 379, 383–84, 299 P.3d 186, 190-91 (2013).

[2] Relevant provisions of both the Kellogg City Code and Idaho State Plumbing Code are excerpted and attached to this letter for your convenience.

Relevant Excerpts of Kellogg City Code

4-2-3: REQUIRED CONNECTION:
F. Any property with a shared/party line must cease such shared/party use upon any modification or upgrade to the shared service line. The requirement to cease use applies regardless of the need for the modification. (Ord. 579, 10-14-2015)

4-2-15: RIGHT OF ENTRY:
The sewer inspector of the city and/or his designees, upon identification, may enter any building or premises supplied with public water service or public sewer facilities for the purpose of inspecting and testing all plumbing, together with all form of clear water drainage, to ascertain quantity, quality and condition of sanitary and clear water sewerage facilities. (Ord. 521, 10-11-2006)

4-2-19: PROPERTY OWNER RESPONSIBILITY FOR MAINTENANCE:
It shall be the duty and responsibility of the property owner to install and maintain the service line which provides service to the property up to the point of connection to the city sewer collection system. The public sewer lines are generally located within the public right of way (street or alley); therefore the owner's responsibility includes the extension of the service line into said right of way. The service line shall be permanent and watertight to ensure that clear water including subsurface waters is not discharged into the city sewer collection system. (Ord. 521, 10-11-2006)

Relevant Excerpts of 2017 Idaho State Plumbing Code

102.2 Existing Installations. Plumbing systems lawfully in existence at the time of the adoption of this code shall be permitted to have their use, maintenance, or repair continued where the use, maintenance, or repair is in accordance with the original design and location and no hazard to life, health, or property has been created by such plumbing system.

102.3 Maintenance. The plumbing and drainage system, both existing and new, of a premises under the Authority Having Jurisdiction shall be maintained in a sanitary and safe operating condition. Devices or safeguards required by this code shall be maintained in accordance with the code edition under which installed. The owner or the owner's designated agent shall be responsible for maintenance of plumbing systems. To determine compliance with this subsection, the Authority Having Jurisdiction shall be permitted to cause a plumbing system to be reinspected.

102.4 Additions, Alterations, Renovations, or Repairs. Additions, alterations, renovations or repairs shall conform to that required for a new

system without requiring the existing plumbing system to be in accordance with the requirements of this code. Additions, alterations, renovations, or repairs shall not cause an existing system to become unsafe, insanitary, or overloaded. Additions, alterations, renovations, or repairs to existing plumbing installations shall comply with the provisions for new construction unless such deviations are found to be necessary and are first approved by the Authority Having Jurisdiction.

102.5 Health and Safety. Where compliance with the provisions of this code fail to eliminate or alleviate a nuisance, or other dangerous or insanitary condition that involves health or safety hazards, the owner or the owner's agent shall install such additional plumbing and drainage facilities or shall make such repairs or alterations as ordered by the Authority Having Jurisdiction.

103.4 Right of Entry. Where it is necessary to make an inspection to enforce the provisions of this code, or where the Authority Having Jurisdiction has reasonable cause to believe that there exists in a building or upon a premises a condition or violation of this code that makes the building or premises unsafe, insanitary, dangerous, or hazardous, the Authority Having Jurisdiction shall be permitted to enter the building or premises at reasonable times to inspect or to perform the duties imposed upon the Authority Having Jurisdiction by this code, provided that where such building or premises is occupied, the Authority Having Jurisdiction shall present credentials to the occupant and request entry. Where such building or premises is unoccupied, the Authority Having Jurisdiction shall first make a reasonable effort to locate the owner or other person having charge or control of the building or premises and request entry. Where entry is refused, the Authority Having Jurisdiction has recourse to every remedy provided by law to secure entry.

Where the Authority Having Jurisdiction shall have first obtained an inspection warrant or other remedy provided by law to secure entry, no owner, occupant, or person having charge, care, or control of a building or premises shall fail or neglect, after a request is made as herein provided, to promptly permit entry herein by the Authority Having Jurisdiction for the purpose of inspection and examination pursuant to this code.

October 22, 2018

The Honorable Megan C. Blanksma
Idaho State Representative
P.O. Box 83720
Boise, ID 83720-0038
Delivered by E-Mail

Re: Our File No. 18-63297 – Enhanced DMV Fees for Out-of-County Residents

Dear Representative Blanksma:

You have asked whether Owyhee County can charge out-of-county residents a higher or additional fee to discourage Ada and Canyon County residents from registering their vehicles at the Owyhee County DMV instead of their respective DMVs with longer wait times.

Short Answer:

Under the provisions of the Idaho Code set forth below, I do not believe that Owyhee County can charge non-county residents any higher fees than county residents for motor vehicle registrations or for issuing driver's licenses.

Analysis:

Idaho Code § 49-306 provides the amounts that shall be paid for Idaho driver's licenses. The fees paid under subsection 49-306(1), by every driver's license applicant, are then broken out in subsection (6), and provide that portions of the fees shall be retained by the county. This sub-section provides, in full:

> (6) When the fees required under this section are collected by a county officer, they shall be paid over to the county treasurer not less often than monthly, who shall immediately:
>
> (a) Deposit an amount equal to five dollars ($5.00) from each driver's license except an eight-year class

> D license, or any class D instruction permit application fees, application for a duplicate driver's license or permit, classification change, seasonal driver's license and additional endorsement, and ten dollars ($10.00) from each eight-year class D driver's license, in the current expense fund; and
> (b) Deposit two dollars and fifty cents ($2.50) from each motorcycle endorsement and motorcycle endorsement instruction permit fee in the current expense fund; and
> (c) Deposit an amount equal to three dollars ($3.00) from each fee for a knowledge test in the current expense fund; and
> (d) Deposit an amount up to twenty-five dollars ($25.00) from each fee for a motorcycle endorsement skills test in the current expense fund; provided however, if a contractor administers the skills test he shall be entitled to the entire fee; and
> (e) Remit the remainder to the state treasurer; and
> (f) Deposit up to twenty-eight dollars and fifty cents ($28.50) from each fee for a class D skills test into the county current expense fund, unless the test is administered by a department-approved contractor, in which case the contractor shall be entitled to up to twenty-eight dollars and fifty cents ($28.50) of each fee.

Idaho Code § 49-306(6).

Likewise, Idaho Code § 49-402 provides for specific fees to be collected for the annual registration of motor vehicles in the State of Idaho. These fees are then forwarded to the State Treasurer as required by Idaho Code § 40-706. A portion of the registration fees are then apportioned back to the counties via the Highway Distribution Account in Idaho Code § 40-701.

Given the specific fees for driver's licenses and vehicle registrations set forth by the Legislature in the Idaho Code, Idaho counties are not allowed to charge different fees for driver's license or vehicle registration issuance.

Additionally, as set out in Idaho Code § 49-206, the provisions and fees set forth in title 49 of the Idaho Code must be applied uniformly in every county in Idaho. "The provisions of this title shall be applicable and uniform throughout the state in all political subdivisions and municipalities and no local authority shall enact or enforce any ordinance on a matter covered by the provisions of this title unless expressly authorized."

Finally, Idaho Code § 31-870 provides that although Idaho counties may establish a fee for issuing vehicle registrations on behalf of the Idaho Transportation Department, the fees charged must be the same fees for all individuals registering at that county office. Section 31-870 provides, in pertinent part:

> FEES FOR COUNTY SERVICES. (1) Notwithstanding any other provision of law, a board of county commissioners may impose and collect fees for those services provided by the county which would otherwise be funded by ad valorem tax revenues. The fees collected pursuant to this section shall be reasonably related to, but shall not exceed, the actual cost of the service being rendered. Taxing districts other than counties may impose fees for services as provided in section 63-1311, Idaho Code.
>
> . . .
>
> (3) The administrative fee authorized under the provisions of this section and collected for issuance of motor vehicle registrations pursuant to chapter 4, title 49, Idaho Code, shall be the same for any registration issued pursuant to section 49-402B, Idaho Code, and may not be doubled or in any way increased solely because of registration under that section.

Idaho Code § 31-870 (emphasis added).

Conclusion:

Thus, pursuant to the statutory provisions set forth above, Owyhee County cannot charge non-county residents any additional

fees not set forth in the Idaho Code for supplying vehicle registrations or driver's licenses.

Sincerely,

J. TIM THOMAS
Deputy Attorney General
Idaho Transportation Department

October 30, 2018

The Honorable Mike Moyle
Majority Leader
Idaho House of Representatives
Statehouse Mail

Re: Our File No. 18-63396 – Local-Options Tax, Resort City Population Limit

Dear Representative Moyle:

This letter addresses your question of what happens to a local-options tax when a resort city's population exceeds 10,000.

QUESTION

Idaho law allows the voters of a resort city with population of 10,000 or less to authorize a local-option tax; is the city required to cease applying the tax if the city population grows to more than 10,000?

ANSWER

No, the city may continue applying its local-option tax until it expires. The population threshold is only required in order for the voters to authorize such a tax. There doesn't appear to be any consequence under the law if the city population grows to exceed 10,000.

However, when a city presents a local-options tax ordinance to be voted on, it must state the duration of the tax. That duration cannot be extended unless the voters of the city are presented again with another proposal. If a city's population grows to exceed 10,000, there appears to be no authority in the law to conduct a vote to reenact or extend the tax.

ANALYSIS

Idaho Code § 50-1044 provides if a city is a "resort city" and the city population is 10,000 or less, then the voters of the city can authorize

their city government to: adopt, implement, and collect a local-option nonproperty tax.

The language of the statute appears to say that the 10,000 population requirement only needs to be met in order for the voters to "authorize." Once the valid authorization has been given for the city to adopt, implement, and collect, then the local-option tax just stays in place even if the population rises.

However, Idaho Code § 50-1047, dictates that there must be a duration established for the tax when it is put up for a vote:

> In any election, the ordinance submitted to city voters shall: (a) state and define the specific tax to be approved; (b) state the exact rate of the tax to be assessed; (c) state the exact purpose or purposes for which the revenues derived from the tax shall be used; and (d) state the duration of the tax. No tax shall be redefined, no rate shall be increased, no purpose shall be modified, and no duration shall be extended without subsequent approval of city voters.

Once the established duration expires, the city would need to have another vote to reenact or extend the local option tax. If the population at that point in time has increased to exceed 10,000, the authority provided by Idaho Code § 50-1044 to conduct such a vote would no longer exist. The statute isn't perfectly clear that the population requirement applies when voting to extend the tax, but that is the most reasonable reading of the statute in my opinion.

Please let me know if you have any follow up questions or wish to discuss further. Also, see here on the City of Ketchum's website an example of the duration at play (Ketchum had a 15 year duration when first passed in 1997, then they brought a new vote in 2011 and the voters approved the tax for another 15 years): http://www.ketchumidaho.org/index.aspx?NID=440.

Regards,

PHIL SKINNER
Lead Deputy Attorney General

December 21, 2018

Danny J. Radakovich
Attorney at Law
1624 G Street
Lewiston, ID 83501

Re: Our File No. 18-63518 – Request for Attorney General's analysis regarding questions on violations of the Idaho Open Meeting Law

Dear Mr. Radakovich:

This letter is in response to your recent inquiry of this office regarding disclosure of executive session content by a city council member. Specifically, you have asked whether an unauthorized disclosure of the content of an executive session by an executive session participant would constitute a violation of the Idaho Open Meeting Law. Although this is an open question of law in Idaho, it appears that it is unlikely that such a disclosure would constitute a violation of the Idaho Open Meeting Law.

There is no express prohibition on disclosure of executive session content.

Executive sessions under Idaho's Open Meeting Laws are governed by Idaho Code § 74-206. Violations of the Open Meeting Law are enumerated by Idaho Code § 74-208(1):

> If an action, or any deliberation or decision-making that leads to an action, occurs at any meeting which fails to comply with the provisions of this chapter, such action shall be null and void.

Similarly, Idaho Code § 74-208(2-4) indicate a violation occurs if a member of a governing body participates or conducts a meeting in violation of the act, or violates the provisions of the act. In order for a violation to occur, the board member must violate a provision of the act, or participate in a meeting that violates the act. As explained below,

disclosure of executive session content would likely not be considered a violation of the act, or participating in a meeting violating the act. Executive sessions are permitted in certain circumstances with a supermajority approval by the entity. The permissible justifications for executive sessions are to be construed narrowly. Prohibitions on conduct involving executive sessions are limited. Changing the topic while in executive session to one not provided for in the motion, or to a topic for which an executive session is not permitted are prohibited by Idaho Code § 74-206(2). Additionally, Idaho Code § 74-206(3) prohibits the taking of any final action, or making a final decision in executive session. None of these prohibitions include discussion of executive session content by a board member outside of the executive session.

Proper conduct of an executive session requires limited disclosure.

Certain information regarding an executive session must be disclosed. For example, in order to enter into an executive session, a governing body must place the executive session item on the meeting agenda, which has been posted publicly in accordance with the law. Idaho Code § 74-204. In order to enter into an executive session, the governing body, within an open meeting, must make a motion that includes the specific subsection permitting the executive session along with a roll call vote to enter into the session. Idaho Code § 74-206(1). At the conclusion of the executive session, if action is required, such action must be taken within an open session. No final action may be taken or decision made in an executive session. Idaho Code § 74-206(3). Finally, minutes of the executive session are required to indicate the purpose for the executive session along with the specific exemption allowing for the executive session. Idaho Code § 74-205(2). In sum, the law recognizes that in order to comply with the law, disclosure of certain information related to executive sessions is mandatory.

There is no implicit prohibition on the disclosure of executive session content.

Idaho Code § 74-206(1) permits an executive session, but does not require one. "An executive session at which members of the public

are excluded **may** be held . . . ." (emphasis added). "An executive session **may** be held . . . ." (emphasis added). The statute then lists the criteria under which an executive session may be held. The requirements that must (shall) occur are within the motion, the roll call vote, and the authorization by 2/3 of the governing body. There is no requirement that the topics listed be addressed within an executive session, and if a governing body chose to do so, could address them in an open meeting. It is difficult to extrapolate from the permissive nature of an executive session, an implicit mandatory prohibition on disclosure.

Compliance with Idaho's Open Meeting Law depends on internal oversight and disclosure.

An implicit mandatory prohibition on disclosure likely runs counter to the overarching purpose of the act and its enforcement. Idaho Code § 74-201 declares:

> FORMATION OF PUBLIC POLICY AT OPEN MEETINGS. The people of the state of Idaho in creating the instruments of government that serve them, do not yield their sovereignty to the agencies so created. Therefore, the legislature finds and declares that it is the policy of this state that the formation of public policy is public business and shall not be conducted in secret.

Idaho Code § 74-206 includes several limitations on the conduct of executive sessions such as changing the topic, discussing topics not suitable for executive sessions, or reaching a final decision. In order to insure appropriate oversight of these limitations, it is more likely that disclosure is implicitly permitted to insure compliance with the law.[1] In other words, if participants were prohibited from disclosing the discussions within executive sessions, the limiting provisions regarding executive sessions would likely be unenforceable. The entire premise of the Open Meeting Law is to provide for accountability within the conduct of public business. Penalizing a board member who questions the necessity of an executive session, disagrees with the content of an executive session, or discloses the content of an executive session runs counter to the primary purpose of the Open Meeting Law.[2]

Based upon the above, this office cannot identify a violation of the Idaho Open Meeting Law based upon disclosure of executive session content.[3] It is important to note that executive sessions are permitted under the law to preserve confidentiality in an effort to legally protect governing bodies and their members. Efforts should be made to carefully balance the need for public oversight with the need for confidentiality in certain matters.

I hope that you find this analysis helpful.

Sincerely,

BRIAN KANE
Assistant Chief Deputy

cc: Jana Gomez, City Attorney, City of Lewiston
Justin Coleman, Prosecution Attorney, Nez Perce County

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[1] Recognition of the requirement for self-reporting is reinforced in title 6, chapter 21 of the Idaho Code in the Protection of Public Employees act. Idaho Code § 6-2104(1)(a) prohibits an employer from taking adverse action for the reporting of a violation or suspected violation of a law. Idaho Code § 6-2104(4) further prohibits the implementation of rules or policies that limit the ability to document violations or suspected violations of laws and rules.

[2] A statutory prohibition on disclosure of executive session content would have to survive review under the First Amendment of the U.S. Constitution, most likely as a content based restriction requiring strict scrutiny. Similarly, a challenge could be made under art. III, sec. 9 of the Idaho Constitution.

[3] Beyond the scope of this analysis is the potential for liability on the part of the board or even individually as a board member who shares confidential information. For example, a board member could subject himself or the board to liability for slander, libel, breach of contract, or another cause of action based upon a disclosure.

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