

October 13, 1995

Honorable Pete T. Cenarrusa  
Secretary of State  
**HAND DELIVERED**

Re: Certificate of Review;  
Initiative Regarding Volunteer Militia Organizations

Dear Mr. Cenarrusa:

An initiative petition was filed with your office on September 18, 1995. Pursuant to Idaho Code § 34-1809, this office has reviewed the petition and has prepared the following advisory comments. It must be stressed that, given the strict statutory time frame in which this office must respond, and the complexity of the legal issues raised in this petition, our review can only isolate areas of concern and cannot provide an in-depth analysis of each issue that may present problems. Further, under the review statute, the Attorney General's recommendations are "advisory only," and the petitioners are free to "accept or reject them in whole or in part."

### **BALLOT TITLE**

Following the filing of the proposed initiative, our office will prepare short and long ballot titles. The ballot titles should impartially and succinctly state the purpose of the measure without being argumentative and without creating prejudice for or against the measure. While our office prepares the titles, if petitioners would like to propose language with these standards in mind, we would recommend that they do so and their proposed language will be considered.

### **MATTERS OF SUBSTANTIVE IMPORT**

The proposed initiative concerns the relationship and inclusion of volunteer organizations into the militia of the State of Idaho. The proposed initiative is based upon art. 14, sec. 2, Idaho Constitution, which states:

The legislature shall provide by law for the enrollment, equipment and discipline of the militia, to conform as nearly as practicable to the regulations for the government of the armies of the United States, and pass such laws to promote volunteer organizations as may afford them effectual encouragement.

The proposed initiative would repeal existing Idaho Code § 46-102 and add a new section which states:

46-102. State Militia. The militia of the state of Idaho shall consist of all able bodied citizens who have attained the age of eighteen (18) who are citizens of the United States, and a resident of the State of Idaho.

1. Volunteer Organizations in Article XIV, Section 2 of the state Constitution shall be deemed to be any organization which shall register with the County Commission of the county in which they reside, and with the Adjutant General's office of the State of Idaho, and the office of the Governor; and which organization shall adhere to the organizational structure and code of conduct as the "regulations for the . . . armies of the United States."

2. Proof of Enrollment shall be defined to mean that the volunteer organization shall provide a list of men so enrolled when called out for service in the State Militia by the Governor.

3. Effectual Encouragement mentioned in Article XIV, Section 2, shall be defined to mean that the State Legislature shall not pass any law which would inhibit any such volunteer organization from registering, enrolling citizens, training, or conducting any other activities normal to such volunteer organization or militia.

4. No discrimination may be made as to the size or composition of such volunteer organizations, or to its leaders, except when called to service by the Governor he shall approve the officers elected by such organization, or he may refuse to call the organization into the service of the state.

5. The Organized Militia referred to in Section 103, hereafter, shall be defined to mean the volunteer organizations as provided above, and such units comprised and ordered in to service by the governor in Section 106, which units shall co-exist with such volunteer organizations as provided above.

The Idaho Constitution, aside from art. 14, sec. 2, has several provisions which are relevant to the creation and regulation of the state militia. Art. 4, sec. 4, states:

**§ 4. Governor is commander of militia.**—The governor shall be commander-in-chief of the military forces of the state, except when they shall be called into actual service of the United States. He shall have power

to call out the militia to execute the laws, to suppress insurrection, or to repel invasion.

Article 14, secs. 1 & 3, are also relevant to the present inquiry.

**§ 1. Persons subject to military duty.**—All able-bodied male persons, residents of this state, between the ages of eighteen and forty-five years, shall be enrolled in the militia, and perform such military duty as may be required by law; but no person having conscientious scruples against bearing arms, shall be compelled to perform such duty in time of peace. Every person claiming such exemption from service, shall, in lieu thereof, pay in the school fund of the county of which he may be a resident, an equivalent in money, the amount and manner of payment to be fixed by law.

**§ 3. Selection and commission of officers.** - All militia officers shall be commissioned by the governor, the manner of their selection to be provided by law, and may hold their commissions for such period of time as the legislature may provide.

Presently, Idaho Code § 46-103 divides the militia (as defined in art. 14, sec. 1, and the current Idaho Code § 46-102) into three (3) classes, to wit:

The national guard, the organized militia, and the unorganized militia. The national guard shall consist of enlisted personnel between the ages of seventeen (17) and sixty-four (64), organized and equipped and armed as provided in the national defense act, and of commissioned officers between the ages of eighteen (18) and sixty-four (64) years, who shall be appointed and commissioned by the governor as commander-in-chief, in conformity with the provisions of the national defense act, the rules and regulations promulgated thereunder, and as authorized by the provisions of this act. The organized militia shall include any portion of the unorganized militia called into service by the governor, and not federally recognized. The unorganized militia shall include all of the militia of the state of Idaho not included in the national guard or the organized militia.

As set out above, the proposed initiative establishes a new Idaho Code § 46-102. The proposed initiative sets forth in the first section who comprises the state militia. However, the definition does not quite comport with art. 14, sec. 1, which sets out an exception from service based upon conscientious objection. The definition proposed by the initiative does not contain this exemption. While a court would read that exemption

into the new definition, it would be better to specifically include the conscientious objection exemption.

Next, the proposed initiative seeks to define the term “volunteer organization” set out in art. 14, sec. 2. Under the initiative such organizations must register with the county, governor, and adjutant general, and adhere to the organizational structure and code of conduct as set out in the regulations for the armies of the United States. In general, there is no constitutional problem with providing for the registration and organization of volunteer organizations which may be included in the militia. Nevada has a constitutional provision similar to art. 14, sec. 2 of the Idaho Constitution. The Nevada provision states, “[t]he legislature shall provide by law for organizing and disciplining the Militia of this State, for the effectual encouragement of Volunteer Corps and the safe keeping of the public arms.” Art. 12, sec. 1, Nevada Constitution. Nevada provides that such volunteer organizations are part of the Nevada militia, along with the national guard and the national guard reserve, which is essentially the unorganized militia in Idaho. Nev. Rev. Stat. Ann. § 412.026. Such volunteer organizations are licensed by the Governor in Nevada. Nev. Rev. Stat. Ann. § 412.126. Thus, the general concept of having volunteer militia organizations which are registered with a governmental entity under art. 14, sec. 2, or similar provision, is in accordance with Idaho’s Constitution.

However, there are a number of constitutional problems with the proposed initiative. First, the proposed initiative attempts to define “effectual encouragement” as set forth in art. 14, sec. 2, to mean “that the state Legislature shall not pass any law which would inhibit any such volunteer organization from registering, enrolling citizens, training, or conducting any other activities normal to such volunteer organization or militia.” As referred to in this subsection of the proposed initiative and subsection 5, the initiative defines “organized militia” to include volunteer organizations. Art. 14, sec. 2, states that the “legislature shall provide by law for the enrollment, equipment and discipline of the militia . . . .” Because these volunteer organizations are part of the militia under the initiative, they are subject to any laws passed by the legislature for the enrollment, equipment and discipline of the militia. To the extent that the proposed initiative seeks to prohibit the legislature from passing such laws under the auspices of defining “effectual encouragement,” it is unconstitutional.

Second, subsection 4 of the proposed initiative requires that “no discrimination may be made as to the size or composition of such volunteer organizations, or to its leaders, except when called to service by the governor he shall approve the officers elected by such organization, or he may refuse to call the organization into the service of the state.” Essentially, this provision mandates that these volunteer organizations have autonomy over their structure, organization and the selection of their leaders. If the governor seeks to call such volunteer organization into service, he must approve the officers elected or refuse to call the organization into service of the state. This provision

is clearly unconstitutional. As stated above, these volunteer organizations are part of the “organized militia” as defined in the proposed initiative. Thus, they must adhere to all of the constitutional provisions relating to the militia. Art. 14, sec. 3, states that “[a]ll militia officers shall be commissioned by the governor, the manner of their selection to be provided by law, and may hold their commissions for such period of time as the legislature may provide.” Thus, it is the governor who has the authority to commission the officers of the militia, including these volunteer organizations. Further, it is the legislature which provides the manner of their selection and the period of time they may hold their commissions.

In addition, art. 14, sec. 2, already authorizes the legislature to provide by law for the enrollment, equipment and discipline of the militia. All laws passed by the legislature under this authority must be adhered to by the volunteer organizations. Under this authority, the legislature certainly can pass laws which set forth how members are enrolled in the volunteer organizations, and their organizational structure, including the size and composition. By prohibiting “any discrimination” as to the size and composition of the volunteer organizations, the proposed initiative is really prohibiting the enactment of any law which might regulate such activity. This is clearly unconstitutional.

Under the proposed initiative, volunteer organizations would be able to organize and train as a military unit, yet not be subject to any governmental control until called into service by the governor. However, once the volunteer organizations are defined as part of the “organized militia” they are immediately subject to laws passed by the legislature. Moreover, art. 4, sec. 4 of the Idaho Constitution provides that the “governor shall be commander-in-chief of the military forces of the state, except when they shall be called into actual service of the United States. He shall have power to call out the militia to execute the laws, to suppress insurrection, or to repel invasion.” As commander-in-chief, the governor has the ability to provide such rules and regulations as may be thought necessary to govern the militia. It was not the intent of the framers of the Idaho Constitution to have militia organizations organizing and training without any oversight by the governor and legislature. This intent is clearly stated in art. 14, secs. 2 and 3, which includes oversight by both the governor and the legislature. *See Westerberg v. Andrus*, 114 Idaho 401, 757 P.2d 664 (1988) (legislative acts and legislation by initiative are on equal footing and both are subject to same constitutional limitations).

It should be noted that the legislature, in title 46, Idaho Code, has already passed a set of laws governing the militia. For example, Idaho Code § 46-111 states that the adjutant general is the commanding general of the military forces of the state. This includes the militia. Moreover, Idaho Code § 46-112 requires the adjutant general to be “the custodian of all military records and property of the national guard and organized militia.” Idaho Code § 45-112(2) (emphasis added). As these volunteer organizations are defined as part of the organized militia under subsection 5 of the proposed initiative, the

adjutant general would be the custodian of all property which is used for training and other activities. Further, Idaho Code § 46-112(9) states that it is the duty of the adjutant general to supervise the training of the national guard and the organized militia. Thus, the adjutant general is required to ensure that these volunteer organizations, as part of the organized militia, receive the proper training. Therefore, he has the implied authority to dictate what that training will entail. All of these statutes were passed under the authority given to the legislature under art. 14, sec. 2 of the Idaho Constitution. The initiative does not expressly address or repeal these sections, so presumably they would still be valid. *See Coeur d'Alene Indus. Park Property Owners Ass'n, Inc. v. City of Coeur d'Alene*, 108 Idaho 843, 702 P.2d 881 (Ct. App. 1985) (repeals or amendments of statutes by implication are disfavored in the law); *Greenwade v. Idaho State Tax Com'n*, 119 Idaho 501, 808 P.2d 420 (Ct. App. 1991) (only if new legislation is irreconcilable with and repugnant to preexisting statute may repeal of preexisting statute be implied). Even if the initiative would impliedly repeal the above sections, the legislature would still be free to enact these same laws under art. 14, sec. 2, Idaho Constitution. The proposed initiative could not tie the hands of future legislatures to enact laws they are constitutionally empowered to enact. *Wagner v. Secretary of State*, 663 A.2d 564 (Maine 1995); and *People's Advocate, Inc. v. Superior Court*, 226 Cal. Rptr 640 (Ct. App. 1986).

Outside these constitutional problems, there are a few miscellaneous items which deserve some discussion. First, although not stated in the initiative, members of the organized militia could not also be members of the national guard. Idaho Code § 46-103 provides that the unorganized militia includes all of the militia not included in the national guard and organized militia. It follows that members of the organized militia cannot include members of the national guard. Because the proposed initiative defines volunteer organizations as part of the organized militia, members of the national guard could not be members of such volunteer organizations.

Second, the proposed initiative sets out a registration requirement for volunteer militia organizations. However, a registration function is already provided for in Idaho Code § 46-104, which states:

**46-104. Enrollment of persons liable to service—Duty of county assessor—Penalty.**—Whenever the governor deems it necessary he may order a registration under such regulations as he may prescribe, to be made by the assessors of the various counties of this state, of all persons resident in their respective counties and liable to serve in the militia. Such registration shall be on blanks furnished by the adjutant general, and shall state the name, residence, age and occupation of the person registered and their military service.

If any assessor willfully refuses or neglects to perform any duty which may be required of him by the governor under the authority of this act, he shall be deemed guilty of a misdemeanor and, on conviction thereof, he shall be fined in a sum of not less than \$300 nor more than \$800.

If the registration provided for in the proposed initiative is intended to repeal or amend this registration function, it should be clearly stated. In addition, the proposed initiative attempts to define certain terms. Because Idaho Code § 46-101 is already set out as a definition section, it may be better organizationally to include definitions within that section rather than Idaho Code § 46-102.

In conclusion, as presently worded, the proposed initiative is unconstitutional. Under the proposed initiative, volunteer organizations would be able to organize and train without any oversight or interference from governmental authorities. However, the Idaho Constitution requires control of the state militia by the governor and through laws passed by the legislature.

I HEREBY CERTIFY that the enclosed measure has been reviewed for form, style and matters of substantive import and that the recommendations set forth above have been communicated to petitioner Chuck Dalton by deposit in the U.S. Mail of a copy of this certificate of review.

Sincerely,

ALAN G. LANCE  
ATTORNEY GENERAL

**Analysis by:**

THOMAS F. GRATTON  
Deputy Attorney General  
Intergovernmental and Fiscal Law Division