IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

IDAHO SCHOOLS FOR EQUAL EDUCATIONAL OPPORTUNITY, MOSCOW SCHOOL DISTRICT #281, LAPWAI SCHOOL DISTRICT #341, MULLAN SCHOOL DISTRICT #392, POTLATCH SCHOOL DISTRICT #285, WHITEPINE JOINT SCHOOL DISTRICT #286, KENDRICK JOINT SCHOOL DISTRICT #283, CASCADE SCHOOL DISTRICT #422, ST. MARIES JOINT SCHOOL DISTRICT #41, OROFINO JOINT SCHOOL DISTRICT #171, CULDESAC JOINT SCHOOL DISTIRCT #342, GENESEE JOINT SCHOOL DISTRICT #282, HIGHLAND-CRAIGMONT JOINT SCHOOL DISTRICT #305, AMERICAN FALLS SCHOOL DISTRICT #381, ROCKLAND SCHOOL DISTRICT #382, VALLEY SCHOOL DISTRICT #262, CHALLIS JOINT SCHOOL DISTRICT #181, HORSESHOE BEND SCHOOL DISTRICT #73, RICHFIELD SCHOOL DISTRICT #316, BOUNDARY COUNTY DISTRICT #101, KAMIAH JOINT DISTRICT #304, WALLACE SCHOOL DISTRICT #393, NEZ PERCE DISTRICT #302, COTTONWOOD DISTRICT #242, MIDVALE SCHOOL DISTRICT #433, POST FALLS SCHOOL DISTRICT #272, and BONNER COUNTY SCHOOL DISTRICT #82, Plaintiffs/Counterdefendants, BRIAN SILFLOW and GANEL SILFLOW, by and through their parents, DALE and PATTI SILFLOW, Husband and Wife, DONALD PAUL CREA, by and through his father, GARY CREA, ANDY COOK, by and through his father, LARRY PRALLY, TAVIA GILBERT, by and through her parents, TERRY and CAROLYN GILBERT, GREGORY LAMM, by and through his mother, KATHY LAMM, SARA KAE GOMEZ, by and through her parents, KATHLEEN and JOSE GOMEZ, DIETRICH STELLA and JENNIFER STELLA, by and through their parents, CHARLES and REBECCA STELLA, GREGORY	CASE NO. 94008

DANIELS, by and through his mother, NANCY DANIELS, GINA M. DECKER, by and through her parents, GENE and LINDA DECKER, JENNIFER A. ALDER, by and through her parents, MAX and JUDY ALDER, ANGELA F. GERRARD, by and through her parents, ROGER and RHODA GERRARD, CATHERINE A. SPORLEDER, by and through her mother, JOANNE SPORLEDER, MORGAN ROUNDS and SETH ROUNDS, by and through their parents, IVAN ROUNDS and BRENDA ROUNDS, KELLI LONGETEIG, by and through her parents, WILLFRED LONGETEIG and BEVERLY LONGETEIG, DON HOFFER, by and through his mother KIT HOFFER, SARAH MALLOY, by and through her mother, SUSIE MALLOY, KORY TURNBOW, by and through his mother, DONAGENE TURNBOW, SHAWNA OLSEN, SHANNON OLSEN and RYAN OLSEN, by and through their mother, TERESA OLSEN, KRISTA ANN GOETZ, by and through her father, ALLEN J. GOETZ, CHAD KNEE by and through his parents, KELLY and KAREN KNEE, on behalf of themselves and all other school people of the State of Idaho similarly situated,

Plaintiffs,

vs.

THE STATE OF IDAHO,

Defendant-Counterclaimant.

DECISION ON THE CONSTITUTIONALITY OF HB 403

The limited question before this court in this Decision is the constitutionality of HB 403. The underlying action presented the question of whether the system of funding established by the Idaho legislature is satisfactory to meet the duty imposed upon it by the Idaho Constitution, Article IX § 1 . The Idaho Constitution places the ultimate responsibility for the system of public school funding on the legislature. The issue actually tried in this case was formulated and refined by the Idaho Supreme Court after

three separate appeals spanning a decade. A trial lasting several weeks was held on the issue whether the system of public school funding established by the legislature met a minimum constitutional requirement of providing safe school buildings.[1] After several weeks of trial, the court concluded that reliance on loans for school repair and construction repaid by local property taxes alone did not satisfy the legislature's duty to create a "thorough" system of public school funding. The Findings of Fact and Conclusions of Law concluding that the current system of funding is constitutionally deficient because of its exclusive reliance on property taxes to fund major repairs and replacement of dangerous structures was entered on February 5, 2001. The trial court refrained from addressing the complex question of the remedy which should be imposed as a result of the initial determination about the constitutionality of the system of funding in order to give the legislature ample time to address the issue. The court then proceeded in the remedy phase through a voluntary phase of information gathering, which presented a number of problems, multiple weeks of trial on specific problems and then into a phase where the court appointed a special master. The use of a special master was designed to drastically reduce the costs to both parties and to more rapidly address serious problems which threaten the safety of Idaho school children. In May, 2003, after the trial and after the finding that the reliance of Idaho's school funding system on property taxes as the only option for school construction is unconstitutional because it leaves the most disadvantaged districts unable to deal with major safety problems, the legislature passed

[1] No challenge was advanced by the plaintiffs to other aspects of the system of public school funding. In *Thompson v. Engelking*, 96 Idaho 793, 537 P.2d 635 (1975) the Idaho Supreme Court held that the uniformity requirement of the Constitution did not require equal per pupil expenditures "but a system administered with that degree of uniformity which enables a child to transfer from one district to another within the same grade without substantial loss of credit or standing and with access by each student of whatever grade to acquire those skills and training that are reasonably understood to be fundamental and basic to a sound education . . .." citing with approval *Northshore School District No. 417 v. Kinnear*, 84 Wash.2d 685, 530 P.2d 178 (1974).

HB 403. On June 19, 2003, the Idaho Supreme Court signed an order delegating "jurisdiction to the District Court to take the necessary action to decide all Motions regarding the constitutionality of House Bill 403 including a trial of the issues…." This issue is the sole focus of this Decision.

A briefing schedule was established and an evidentiary hearing was held on September 2nd and 3rd, 2003. An issue relating to a challenge by the State to an aspect of the evidence was resolved on October 16, 2003. Both sides have agreed that the entire record of these proceedings, including the trial and the evidentiary hearings held in the remedial phase, is relevant to the determination of the court and may be considered in addressing the issue referred to it. There are a number of factual findings, from the trial and the remedial phase, which are directly relevant to HB 403 which will be discussed in this decision.

I. PROCEDURAL HISTORY AND BACKGROUND.

Idaho Constitution
Article IX
§ 1. Legislature to establish system of free schools.

The stability of a republican form of government depending mainly upon the intelligence of the people, it shall be the duty of the legislature of Idaho, to establish and maintain a general, uniform and thorough system of public, free common schools.

The Idaho Constitution places the duty to establish and maintain a "general, uniform and thorough system" of public schools on the legislature of Idaho. The issue that was tried before this court was framed by the Idaho Supreme Court itself: whether the Idaho legislature met its constitutional responsibility to provide a system of public school funding which provided, at a minimum, safe school buildings. This case is in an unusual procedural posture as a result of three decisions over a decade by the Idaho

Supreme Court which have refined and clarified the focus of this case. In *Idaho Schools For Equal Educational Opportunity, et. al. v. Evans et. al*., 123 Idaho 573, 850 P.2d 724 (1993), the Idaho Supreme Court expressly held that the organization, Idaho Schools for Equal Educational Opportunity (ISEEO), and the school districts had standing to challenge the Legislature's performance of its responsibilities under Article IX § 1, Idaho's education clause. The Supreme Court reasoned that ISEEO, the school districts, and the parents of students attending schools, had standing to bring an action under Art. IX § 1 because they alleged a "distinct palpable injury" in that they were injured if, as a result of a failure of the system of public school funding to provide necessary funding, they could not give a thorough education to the students of their district. School districts had standing to sue because they were directly harmed by any failure of the legislature to establish an adequate system of public school financing.

In *Idaho Schools for Equal Educational Opportunity v. Idaho State Board. of Education*., 128 Idaho 276, 912 P.2d 644 (1996) (ISEEO II), the Supreme Court overturned the district court's dismissal of the action on the grounds of mootness because of changes in educational funding. In *Idaho Schools for Equal Educational Opportunity v. State*, 132 Idaho 559, 976 P.2d 913 (1999)(ISEEO III), the Supreme Court again overruled the district court's grant of the State's motion to dismiss and held that, at a minimum, Art. IX § 1 meant that the legislature had the duty to provide a means for school districts to fund facilities that offer a safe learning environment. ISEEO III also upheld the district court's refusal to allow the State to file a third party complaint against the school districts. The State had wanted to file a third party action based on its argument that any failure to provide a thorough education in safe facilities was due to the

school superintendents' discretionary decisions, mismanagement, failure to levy more property taxes, and to properly administer their districts. In upholding the denial of the State's attempt to name the school districts as third-party defendants, the Court held that such an amendment would be improper in light of the fact that the school districts could not be held responsible for the legislature's failure to establish an adequate school funding system. The Supreme Court then remanded the case to the district court with this instruction:

> We remand the case to the trial court. On remand, the trial court shall conduct a trial or other appropriate proceeding to determine whether the Legislature has provided a means to fund facilities that provide a safe environment that is conducive to learning. When the trial court has done so, it shall make its decision granting or denying relief. We do not express any opinion at this time about the appropriate relief that should be granted if the trial court decides that Plaintiffs are entitled to relief.

Id. at 568. The issue before this court on remand expressly involved whether the legislature had met its constitutional responsibility to provide a means to fund safe schools. After a trial which lasted several weeks, even though direct testimony was submitted in writing, this court concluded that the system of school funding provided by the legislature was not sufficient to meet its constitutional obligation because a reliance on local property taxes alone to pay for major repairs or the complete replacement of unsafe school buildings was inadequate for those districts with a low property tax base and low per capita income. The court initially deferred any remedial action to allow the legislature time to address its Findings. The legislature took no major action, therefore, the remedy phase commenced. In Spring, 2003, the legislature passed HB403 which established procedures for this particular case. HB 403 requires that plaintiff parents sue their school districts, it permits the state or the superintendent of public instruction to sue

the plaintiff districts, and provides for the state to dismiss those plaintiff districts which are not sued. HB 403 changes venue to the counties in which the principal places of business of the sued school districts are located and transfers the records of this case. HB 403 also provides for a judicially imposed unlimited local property tax to repair or replace dangerous school buildings. HB403, by pulling this case into the Constitutional Based Educational Claims Act (CBECA), I.C. § 6-2201 et. seq., seeks to limit the remedy available to the court system to a declaratory judgment if it concludes that the "system of public, free common schools established by law is unconstitutional" and expressly bars all other remedies against the state or the legislature.

It is the position of the State, as expressed at oral argument after the evidentiary proceeding held on September 2, 2003, that the district court and the Idaho Supreme Court have no power to enforce Article IX, § 1 of the Idaho Constitution beyond the entry of a declaratory judgment. It is also the position of the State that an unlimited educational necessity levy is the only method available under CBECA for a severely impoverished district, even though it is already taxing itself above the state minimum, to replace a dangerous building. An educational necessity levy is required by the statute if certain findings are made. Neither the court system nor the school district can avail itself of any other remedy, under the State's position, even if the result of the educational necessity levy is potentially crippling property taxes imposed upon the homeowners of a local school district through the mechanism of a property tax imposed without any vote from those obligated to pay the tax.

II. ANALYSIS

A. STANDARDS

The constitutionality of a statute is a question of law. *Lu Ranching Co. v. U.S.,* 138 Idaho 606, 608, 67 P.3d 85, 87 (2003) (citing *Goodman Oil Co. v. Idaho State Tax Comm'n*, 136 Idaho 53, 55, 28 P.3d 996 (2001)); *Osmunson v. State*, 135 Idaho 292, 294, 17 P.3d 236 (2000). The challenger must show the statute to be unconstitutional as a whole, without any valid application. *Lu Ranching,* 138 Idaho at 608 (citing *State v. Newman*, 108 Idaho 5, 11 n. 7, 696 P.2d 856 (1985)). The burden of establishing the unconstitutionality of a statutory provision rests upon the challenger. *Osmunson*, 135 Idaho at 294 (citing *State v. Nelson*, 119 Idaho 444, 447, 807 P.2d 1282 (Ct. App. 1991)). It is generally presumed that legislative acts are constitutional and that the state legislature has acted within its constitutional powers. Any doubt concerning interpretation of a statute is to be resolved in favor of an interpretation which will render the statute constitutional. *Olsen v. J.A. Freeman Co.*, 117 Idaho 706, 709, 791 P.2d 1285 (1990), *State v. Prather*, 135 Idaho 770, 772, 25 P.3d 83, 85 (2001); *State v. Cobb*, 132 Idaho 195, 197, 969 P.2d 244, 246 (1998); *State v. Ransom*, 137 Idaho 560, 564, 50 P.3d 1055 (Ct. App. 2002). However, it is a fundamental responsibility of the courts under our system of government to determine and pass on the constitutionality of statutory enactments. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803), *Miles v. Idaho Power Co*., 116 Idaho 635, 778 P.2d 757 (1989), *Idaho Schools For Equal Educational Opportunity, et. al. v. Evans et. al*., 123 Idaho 573, 850 P.2d 724 (1993).

B. HB 403 IS A VIOLATION OF THE IDAHO CONSTITUTION'S PROHIBITION AGAINST SPECIAL LAWS

HB 403 amends CBECA to apply directly to this case and creates a special procedure for this particular lawsuit in which proceedings are suspended, complaints are filed against the school district plaintiffs, venue is changed to the county where the school district maintains its principal office, the record is transferred, and plaintiff districts who are not sued, are dismissed. HB 403 is a direct violation of the Idaho Constitution's prohibition against special laws. Idaho Constitution Art. III § 19. Art. III § 19 prohibits the legislature from passing any "local or special" laws on a number of enumerated subjects including local or special laws regulating the practice of the courts and changing venue in civil or criminal actions. Idaho law has consistently held that a law is "local" if it is intended to apply only to one area. A law is "special" if it applies only to an individual or to a number of individuals selected out of the class to which they belong. E.g. *Mix v. Board of County Commrs.*, 18 Ida. 695, 112 P. 215 (1910) *Concerned Taxpayers of Kootenai County v. Kootenai County*, 137 Idaho 496, 50 P.3d 991 (2002). In *Concerned Taxpayers of Kootenai County v. Kootenai County,* the Supreme Court noted that, although there were similarities between an equal protection analysis and the analysis required to determine if legislation is unconstitutional special legislation:

> …the test for a local or special law remains a different analysis:
> the equal protection clause of the federal constitution and Art. III, § 19, of the Idaho Constitution, were adopted to serve distinctly different identifiable purposes. While it might be constitutional in the sense of equal protection for our legislature to single out persons or corporations for preferred treatment, such would nevertheless be regarded as in conflict with Art. III, § 19....

Id. at 991.

Obviously, HB 403 does not single out this one case for preferred treatment but substantially worse treatment by adopting unique procedures, applicable only to this case, which serve no useful or legally permissible purpose. This case involved the issue framed by the Idaho Supreme Court: whether the system of public school funding met the legislature's clear and explicit duty to establish and maintain a thorough system of public school funding. None of the procedures established by HB 403 address the legislature's duty under the Constitution nor does the purported remedy meet the legislature's express constitutional responsibility. HB 403 amends CBECA to include this case and applies the following procedures to this particular case, after suspending activity for fifty-six days:

1. all patrons who are parties plaintiff, if they wish to continue to challenge the constitutional adequacy of the legislature's system of public school financing, are required to file complaints under CBECA against their local school district;
2. venue for each separate complaint is placed in the county where the school district maintains its principal business office;
3. school districts which are not sued by their patrons for failing to live up to their duties are dismissed from this case;
4. the records of this case are transferred to any districts where separate complaints are pending.

The Supreme Court conducted a limited review of the earlier version of CBECA in *Osmunson v. State*, 135 Idaho 292, 17 P.3d 236 (2000). In its argument before the Supreme Court, the State took the position that CBECA created additional remedies for school patrons who challenge the sufficiency of the education provided by their local

school district and did not involve the system of public school financing established by the legislature because that case was in the Ada County District Court. The State took the position in its briefing before the Idaho Supreme Court that the issue involved in this particular case—the adequacy of the system of funding established by the legislature—was not addressed by CBECA but would be addressed by this case. *Osmunson* did not address the adequacy of remedies under CBECA nor any separation of powers questions. *Osmunson* held that it was not a violation of Art. IX § 1 for the legislature to delegate the primary responsibility for fulfilling the legislature's duty under the Idaho Constitution to local school districts. The addition of a new remedy for school district patrons, even if it involved somewhat cumbersome procedures, was also held not to deprive any patron of the right to a speedy remedy or to access to the courts under Art. 1 § 18 of the Idaho Constitution. However, the Supreme Court also noted that the "ultimate responsibility for fulfilling the legislature's constitutional duty cannot be delegated." *Id.* at 297.

There has never been any challenge, in this particular litigation, to the concept that school districts are also charged with the duty of making certain that their students receive the benefits of a "general, uniform and thorough" system of public schools. This case directly presented the issue of whether the system of school funding established by the legislature placed some school districts in a position where, in spite of their best efforts, they could not satisfy the educational requirements of a thorough system of public education in safe buildings because the funding system itself was inadequate for that purpose. Likewise, this case has never involved more abstract questions about what constituted the best possible education or the best possible facility. After a lengthy trial, this court concluded that the system of public school funding established by the

legislature was inadequate to meet its constitutional duty because the sole reliance on the imposition of local property taxes to fund major school repairs and to build new buildings to replace unsafe buildings left out those districts which suffered from an inadequate property tax base and low per capita income. The evidence established without any significant dispute that many rural districts are forced to house students in dangerously substandard buildings which present a genuine risk to their safety because they lack a property tax base sufficient to undertake massive repairs or major building replacement. The inadequacy of the system of school funding in the area of replacement or major repairs of unsafe buildings was made even greater by the necessity to meet super-majority requirements for the passage of bonds. The system also effectively created incentives to ignore critical problems with building safety because there were no feasible means to remedy them. The districts which are most sharply affected are those which are primarily in rural areas with a declining population, low per capita income, and low property values.

HB 403 applies to "any lawsuit pending on its effective date that has not proceeded to final judgment in the district court on the effective date of this amendment if the lawsuit presents constitutionally based educational claims."[2] While the court has declared that the system of school funding established by the legislature is unconstitutional insofar as it places the sole burden for major repairs or replacements on the property tax in every district, it is only the legislature which can change the system of funding. Art. IX § 1 squarely places the ultimate responsibility for the adequacy of the system of funding on the legislature. *Osmunson v. State*, 135 Idaho 295, 17 P.3d 239.

[2] It is interesting to note that CBECA, when it was enacted in 1996, expressly provided that it would not apply to this particular case unless the Idaho Constitution was amended. I.C. § 6-2215.

Until the legislature alters the system of funding, the case cannot be final even though the court system, as will be discussed later, has an obligation to ensure that the constitutional standard is being met in spite of legislative inaction. Since the case is pending, HB 403 imposes the outlined special procedures: a fifty-six day suspension of the case, the requirement that parents sue their local school district even though no local school district has any power to change the legislature's system of public school funding, authorization for suits against the plaintiff school districts by the legislature and the superintendent of public instruction, a change of venue to the local areas, the dismissal of all school districts who are not sued by their patrons, the legislature or the superintendent of public instruction, and transfer of the court records.

The Idaho Constitution expressly bars the legislature from passing local or special laws which regulate "the practice of the courts of justice," or which provide for "a change of venue in civil or criminal actions." Idaho Constitution Art. III § 19. In *Concerned Taxpayers of Kootenai County v. Kootenai County*, 137 Idaho 496, 50 P.3d 991 (2002), the Idaho Supreme Court underscored the continued vitality of the basic constitutional prohibition against the passage of special laws when it declared the Resort County Local Option Sales or Use Tax unconstitutional because it was designed for one place, Kootenai County. It emphasized the basic rule that: "a law "is not special when it treats all persons in similar situations alike," and it is not local "when it applies equally to all areas of the state." Citing, *Sun Valley Co. v. City of Sun Valley*, 109 Idaho 424, 429, 708 P.2d 147, 152 (1985).

The Idaho Constitution expressly prohibits the legislature from passing special laws changing venue in civil or criminal actions or regulating the practice of the courts of

justice. The legislature has the power, which it has exercised, to establish the proper venue for the bringing of any action. Thus, it places the venue for actions relating to real property in the county where the property is located. I.C. § 5-401. It establishes the place for commencing an action against a county. I.C. § 5-403. It places venue for most civil actions in the county of residence of one or more defendants. I.C. § 5-404. It establishes the place of venue for an action against a public officer. I.C. § 5-402.

Venue was already changed in this case, at the outset, in response to a motion by the State. This case began in Latah County. It was set for a six-week trial commencing in January, 1991. The State moved to change venue to Ada County. In its brief, the State noted that the "plaintiffs' claim is directed primarily at the Idaho Legislature for not providing sufficient funds to meet the educational needs of Idaho school children." State's Memorandum in Support of Motion for Change of Venue, pg. 2, lodged September 11, 1990. The State based its argument on I.C. § 5-402 which requires that actions against public officers, including the legislature, must be brought where the action arose. The State said:

> In the present case, Ada County is the only jurisdiction in which any activity relevant to the defendants' role in (sic) funding of Idaho's public school system has occurred. Although plaintiffs' complaint lists a number of public officers as defendants, the thrust of the action is against the Idaho Legislature. The gravamen of the plaintiffs' case is that the present level of funding of Idaho's public schools 'is inadequate to provide the constitutionally mandated "thorough education'…The Idaho Legislature is the only defendant whose actions are being challenged by the plaintiffs. It is only the Idaho Legislature that is mandated by Art. 9 §1 of the Idaho Constitution to provide a "thorough system of public, free common schools. Similarly, if a court were to grant the relief the plaintiffs seek, i.e., "substantially higher levels of funding," the only party that could effectively provide such relief is the Idaho Legislature…since the plaintiffs' cause of action arises directly from educational funding decisions made by the Idaho Legislature during official sessions held in Boise City, Ada County…venue cannot lie in any other county but Ada.

State's Memorandum in Support of Motion for Change of Venue, pg. 4-5 . The State also argued for a change of venue on the grounds of convenience of the witnesses asserting that the failure to transfer the case to Ada County would mean that the taxpayers of the state would be burdened with thousands of dollars wasted by trying the case in Latah County instead of Ada County where the attorneys, and the witnesses resided and where all of the state officers had their official residence. *Id.* Pg 13.

The procedures established by HB 403 also allow the State to raise the claim barred by Judge Eismann which was affirmed by the Idaho Supreme Court in ISEEO III. The State had sought previously to amend the pleadings to add a third party complaint against the school districts asserting that they were somehow responsible for any failure of their district to be able to offer a thorough and adequate education as required by the Idaho Constitution. Judge Eismann denied the motion reasoning that, in a case challenging the constitutionality of the legislature's system of public school funding, it was illogical to claim that any act of the school districts had any bearing on the legislature's failure to establish enact laws which directly funded schools or enabled districts to fund them through the passing of a bond. The Idaho Supreme Court in ISEEO III held that such an amendment would be improper in light of the fact that the school districts could not be held responsible for the legislature's failure to establish an adequate school funding system. *Idaho Schools for Equal Educational Opportunity v. State*, 132 Idaho 559, 976 P.2d 913 (1999). HB 403 establishes a direct procedure to do that which the Idaho Supreme Court has already expressly ruled is not proper in this case under the Idaho Rules of Civil Procedure.

It is also a somewhat puzzling procedure in that the utilization of district resources by local school districts was fully litigated at the trial because it was raised as a defense to the plaintiffs' claim. The Court's Findings of Fact and Conclusions of Law expressly addressed the State's defense and rejected it. The Court already held that there was no persuasive evidence that the school district plaintiffs were failing to use their resources wisely or were mismanaging their resources. On the contrary, the failure of the poorest districts to be able to meet their constitutional obligation to provide their students a thorough education in a safe building was found to be directly attributable to the insufficiency of the legislature's system for funding public school education. Since the issues have been resolved after full litigation between the same parties, it is somewhat pointless to transfer the case elsewhere. It is only the interim remedy which is currently in dispute.

The problem of special laws was addressed by a number of state constitutions. *See, generally*, A. Eaton, *Recent State Constitutions*, 6 Harv. L. Rev. 109 (1893). As the Kansas Supreme Court stated in *Anderson v. Board of Com'rs of Cloud County*, 77 Kan. 721, 95 P. 583 (Kan. 1908) addressing the Kansas Constitution's then recent amendment to prohibit special laws:

> The inherent vice of special laws is that they create preferences and establish irregularities. As an inevitable consequence, their enactment leads to improvident and ill-considered legislation. The members whose particular constituents are not affected by a proposed special law become indifferent to its passage. It is customary, on the plea of legislative courtesy, not to interfere with the local bill of another member; and members are elected, and re-elected, on account of their proficiency in procuring for their respective districts special privileges in the way of local or special laws… Meanwhile, in place of a symmetrical body of statutory law on subjects of general and common interest to the whole people, we have a wilderness of special provisions….

Id. at 586. Idaho, unlike some other states, did not bar special legislation entirely, only on the specific areas outlined in the Idaho Constitution. *Butler v. Lewiston*, 11 Idaho 393, 83 P. 234 (1905). As early as 1904, the Idaho Supreme Court invalidated a law which changed the procedures for the service of summons in a civil case for the determination of the water rights of users of one creek, on the grounds that it was an unconstitutional special law relating to the practice of the courts of justice. *Bear Lake County v. Budge,* 9 Idaho 703, 75 P. 614 (1904).

While the legislature is the primary source for the rules regarding the initial venue of a case, there is no power in the legislature to change venue for one particular case for arbitrary and capricious reasons. Change of venue is governed by I.R.C.P. 40(e). As will be discussed later, there are also separation of powers problems presented by the special procedures adopted by the legislature for this case.

The arbitrary and capricious nature of the special procedures adopted for this case in HB 403 are plainly revealed by the fact that they serve no useful purpose in resolving either the initial question defined by the Idaho Supreme Court on remand or the appropriate remedy. They do not aid the adoption of any interim remedy prior to action by the legislature nor do the procedures established by HB 403 increase the likelihood that the legislature will address its constitutional obligations. The initial question on remand was already answered by the court: the legislative system of funding contains a key weakness in its sole reliance on local property taxes to pay for major repairs or replacements of unsafe buildings. The system is defective because the poorest districts do not have the financial resources to undertake any further debt burden to be repaid by increased property taxes. Most of the poorest districts already tax themselves at a rate

higher than the state average property tax rate for education. With a low property value and a low per capita income, massive increases in property taxes are not a viable option even where there is no question at all that a building is so dangerous to students that it needs replacement. This case is about the system of funding. The Supreme Court in ISEEO III upheld Judge Eismann's denial of the state's motion to add a third party complaint to name school districts as parties defendant on its theory that any deficiency in providing a thorough education was the fault of local districts. The Supreme Court reiterated that school districts bear no responsibility for any ***legislative*** failure to provide adequate funding by establishing and maintaining a thorough system of public, free common schools. Since this case involved the question framed on remand by the Idaho Supreme Court itself, that is, whether the legislature has provided the means to fund facilities that provide a safe environment conducive to learning, no useful purpose would be served by changing venue. If CBECA is, as the *Osmunson* court accepted, an additional remedy for local school patrons to hold accountable a district which is failing to meet its responsibilities through its own mismanagement, then it offers no remedy for a case where the issue is the failure of the legislature itself to provide a means for the most disadvantaged districts, who are doing all they can with inadequate resources, to repair or replace seriously defective and dangerous buildings because the system of funding has a critical inadequacy. The only purpose of changing venue in this case is to further evade the legislature's duty imposed by the Idaho Constitution itself, while driving up costs unnecessarily in a futile proceeding. It is precisely this kind of arbitrary and capricious special legislation which the Idaho Constitution prohibits. Venue was properly changed to Ada County under I.C. § 5-402 because the only defendant with the

power to change the system of Idaho's public school funding is the legislature and, under long-standing Idaho law, venue belongs in Ada County. In fact, the State previously conceded that venue was proper in Ada County for precisely that reason.

Motions for change of venue asserting that the chosen venue is improper must be brought at the commencement of an action and prior to the filing of any other pleading. I.R.C.P. 12(b)(3). A delay in moving to change venue results in the objection being waived. *Rudd v. Rudd*, 105 Idaho 112, 666 P.2d 639 (1983). A change of venue, where venue is not improper in the county where the action has been brought or where the objection has not been waived, is governed by I.R.C.P. 40(e). The decision to change venue is committed to the court's discretion, not a party's.

In *State v. Horn*, 27 Idaho 782, 793, 152 P. 275, 279, (1915), the Idaho Supreme court said: "It is well settled that a law is not special in character 'if all persons subject to it are treated alike, under similar circumstances and conditions, in respect both of the privileges conferred and the liabilities imposed." A "special law" applies only to an individual or number of individuals out of a single class similarly situated and affected, or to a special locality." *Ada County v. Wright*, 60 Idaho 394, 92 P.2d 134 (1939). A law is not "special" simply because it may have only a local application or apply only to a special class, if it applies to all such classes, all similar localities and to all belonging to specified class to which law is made applicable. *Id*. A law "is not special when it treats all persons in similar situations alike," and it is not local "when it applies equally to all areas of the state." *Sun Valley Co. v. City of Sun Valley*, 109 Idaho 424, 429, 708 P.2d 147, 152 (1985). Laws that are targeted to address a particular problem but which affect

all similarly situated parties the same do not run afoul of the prohibition against special legislation. *Id.*

HB 403 also violates the prohibition against special laws relating to the practice of the courts. In *Bear Lake County v. Budge,* 9 Idaho 703, 75 P. 614 (1904), the Supreme Court invalidated a legislative departure from regular court rules involving the service of summons for the adjudication of water rights for one creek. While the legislature may pass general laws which establish procedures in the courts in those areas not already covered by existing court rules, it may not adopt a special law designed, as this one is, to thwart the litigants in one particular case. The Idaho Constitution expressly prohibits special laws governing the practice of the courts.

A broader legislative effort to deal with a class of cases is not involved as it was in *Boise City Irrigation & Land Co. v. Stewart,* 10 Idaho 38, 77 P. 25 (1904), where the Supreme Court upheld procedures to adjudicate the claims of all appropriators of the Boise River, (a proceeding which also utilized a master to assist the court), or in *Sun Valley Co. v. City of Sun Valley*, 109 Idaho 424, 429, 708 P.2d 147, 152 (1985) where the legislature dealt with the particular challenges faced by small resort communities with a law which applied to all small resort communities. Legislation dealing with a defined category of cases is a general law because it relates "to persons or things as a class" not to particular persons or things. However, a law is a special law when it applies to an individual or a number of individuals of out of a single class. *Ada County v. Wright*, 60 Idaho 394, 92 P.2d 134 (1939). Out of the thousands of cases in district court throughout the State, HB 403 arbitrarily applies to one case and to one small group of litigants and

subjects them to burdensome procedures which serve no useful purpose. As such, HB 403 is a blatant violation of Art. III § 19.

There are limits to the power of government to affect the rights of particular citizens or groups. The Idaho Constitution never envisaged a situation where the legislature could impose on one case and one group of litigants a procedure which is completely arbitrary. The Idaho Constitution limits, not grants, the power of the legislature in a number of specific ways. *Leonardson v. Moon*, 92 Idaho 796, 451 P.2d 542 (1969), *Idaho Telephone Company v. Baird*, 91 Idaho 425, 423 P.2d 337 (1967), *Eberle v. Neilson,* 78 Idaho 572, 306 P.2d 1083 (1957), *Quayle v. Glenn,* 6 Idaho 549, 57 P. 308 (1899). Unlike the federal constitution, the Idaho constitution is primarily a limitation on power. *Leonardson v. Moon*, 92 Idaho at 806. While the legislature possesses broad power, repeatedly the courts have noted that its power is not unlimited and must be used subject to the express limits placed upon the exercise of legislative power in the Idaho Constitution and those limitations which are inherent in our system of government. As Justice Ailshie once remarked in considering the constitutionality of a legislative attempt to abolish Kootenai County, which indirectly violated Art. III § 19: "the constitution is neither the production of the legislature nor the courts, and is as mandatory upon the one as the other. It emanated directly from the people, and its mandates are supreme and must be obeyed by every branch of the state government. We must apply it as we find it, and not as it might have been." *McDonald v. Doust*,11 Idaho 14; 81 P 60 (1905). HB 403 violates Art. III § 19 because it is a special law imposing special procedures, including changing venue, on one case and one group of litigants for the sole expressed reason that the case has been in the court a long time and that it is

likely to continue there until the legislature chooses to act. It has been in the courts a long time because of the legislature's own actions and ultimate inaction.

There could not be a graver challenge to the rights of the citizens of Idaho than the recognition of an unlimited power in the legislature to evade its duties under the Idaho Constitution and the express limits on its legislative power imposed by the Idaho Constitution itself. The founders of this state did not create a structure of unlimited government power. The foundation of Anglo-American law is that government cannot be unlimited in its power over its citizens. While deference is due to all proper exercises of legislative power, HB 403 is beyond the proper exercise of legislative power under the Idaho Constitution. It is a bald attempt to ignore the decisions of the Idaho Supreme Court, to evade the consequences of having neglected its constitutional duties, and to change the rules applicable to one particular case and one particular class of litigants who have raised a successful challenge to the legislature's performance of its constitutional duty.

C. HB 403 IS A VIOLATION OF THE DOCTRINE OF SEPARATION OF POWERS

The Idaho Constitution expressly recognizes the doctrine of separation of powers. Article II § 1 provides that:

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

Separation of powers under Idaho's constitutional structure is not a rigid separation. See, e.g., *Sweeney v. Otter*, 119 Idaho 135, 804 P.2d 308 (1990). The Constitution itself

grants limited authority to the legislature to establish "methods of proceeding" where there are no applicable court procedures. Art. V § 13 states that :

> The legislature shall have no power to deprive the judicial department of any power or jurisdiction which rightly pertains to it as a coordinate department of the government; but the legislature shall provide a proper system of appeals, and regulate by law, when necessary, the methods of proceeding in the exercise of their powers of all the courts below the Supreme Court, so far as the same may be done without conflict with this Constitution, provided, however, that the legislature can provide mandatory minimum sentences for any crimes, and any sentence imposed shall be not less than the mandatory minimum sentence so provided. Any mandatory minimum sentence so imposed shall not be reduced.

In *R.E.W. Construction Co. v. District Court*, 88 Idaho 426, 400 P. 2d 390 (1965), the Supreme Court observed that Art. V § 13 establishes a limited shared power to enact "methods of proceeding" in the district courts where none have already been established by the Supreme Court. In fact, the legislature's establishment of methods of proceeding in the Snake River Basin Adjudication in conjunction with court procedures established by the district court has been essential to the orderly resolution of thousands of claimed water rights because there was no "reasonable method of initiating the proceeding, providing notice to potential claimants, examining the Snake River Basin or preparing a report of that system, or means of objecting to that report or claimed water rights within that system" under the Idaho Rules of Civil Procedure. A general water adjudication required special procedures to bring all the claimants into court and begin the adjudication. *In Re SRBA 39576*, 128 Idaho 246, 255, 912 P.2d 614, 623 (1995), *In re Snake River Water Sys.*, 115 Idaho 1, 764 P.2d 78 (1988), cert. denied, 490 U.S. 1005, 109 S. Ct. 1639 (1989).

In Re SRBA 39576 sets out key principles applicable to this case. After the SRBA adjudication had commenced, a question arose about the role of the director of the Idaho

Department of Water Resources (IDWR). The previous statute had designated the director a "party" although, in fact, the director was not a claimant for the state. While the question was pending about the director's status in the district court, the legislature changed the statute to remove the designation of "party" from the director. The statute also purported to clarify the role of various state agencies which were asserting claims. Other changes were made which are not relevant to the instant case. However, the legislature also designated the director of the IDWR an "expert" and set forth a mandatory settlement conference procedure. The Idaho Supreme Court upheld the change in the statutory designation of the director as a "party," reasoning that since the designation was initially statutory and the director was not asserting any proprietary rights and no one else's substantive rights were affected, the legislature had the power to change the statute. However, it expressly rejected the legislative intrusion into the recognition and use of expert testimony which it held was governed entirely by Idaho Rule of Evidence 702 and the intrusion into settlement conferences which was governed by the Idaho Rules of Civil Procedure. The Court expressly held that Art. 5, § 13 grants only limited authority to the legislature to enter into the judicial field of rule-making. It held that the Constitution's use of the words "when necessary" refers solely to the situation "where the 'method of proceeding' has not otherwise been regulated or where changing time has required further or different regulation…." Id. at 253. Additional procedures are not rendered necessary under the Idaho Constitution because of a "change in the subjective beliefs" of the legislature. Id. at 257.

Even if HB 403 were not a special law prohibited by the Idaho Constitution, it would violate the doctrine of separation of powers. The procedures for a change of

venue, for the designation of parties and for the dismissal of actions are comprehensively addressed by the Idaho Rules of Civil Procedure.

Changing venue, as opposed to the initial determination about where a case may be commenced, is governed by Idaho Rule of Civil Procedure 40(e). The legislature has established the structure for determining where an action is to be commenced. I.C. § 5-401 et. seq. Thereafter, a change of venue from a court where venue is proper is governed solely by the Idaho Rules of Civil Procedure.

Likewise, the status of parties who are asserting claims of right is provided for by the Idaho Rules of Civil Procedure. E.g., I.R.C.P. 3(b). The school districts are "parties" in this case because they assert that their interests have been harmed by the failure of the legislature to live up to the duty imposed upon them by the Idaho Constitution Art. 9 § 1 "to establish and maintain a general, uniform and thorough" system of public school financing. They alleged a specific harm to their ability to provide their students the education required by the Idaho. They have prevailed on their claim. Their right to assert this claim was upheld by the Idaho Supreme Court in *Idaho Schools for Educational Opportunity v. Evans*, 123 Idaho 573, 850 P.2d 724 (1993). The Idaho Supreme Court has reaffirmed their right to raise their challenge to the legislature's system of public school funding every time it came before the Court. *Idaho Schools for Equal Educational Opportunity v. Idaho State Board. of Education*., 128 Idaho 276, 912 P.2d 644 (1996) (ISEEO II)*, Idaho Schools for Equal Educational Opportunity v. State*, 132 Idaho 559, 976 P.2d 913 (1999).

Under HB 403, a notice of dismissal was filed by the State purporting to dismiss the plaintiffs in this action who were not sued. The area of dismissal of actions is

completely and thoroughly covered by the Idaho Rules of Civil Procedure. I.R.C.P. 41(a)(1) gives the right to file a notice of dismissal to plaintiffs, not defendants, and then it may be filed only if the defendant has not filed an answer. There is, for obvious reasons, no right for a defendant to file a dismissal against a valid claim raised by a plaintiff to an action.

While a claim may be dismissed for a number of reasons, the fact that the legislature is tired of being sued is not one of them. Many defendants would love the opportunity to leave complex litigation if they could, particularly after they have been found liable and prior to any consequences flowing from that determination. The grounds for the dismissal of claims are laid out in the Idaho Rules of Civil Procedure. E.g. I.R.C.P. 12 (b).

There is no question that the legislature has broad authority insofar as a case may relate to a claim under the common law. The legislature may establish statutes of limitations, statutes of repose, create new causes of action, modify or abolish common law remedies. E.g. *Kirkland ex rel. Kirkland v. Blaine County Med. Ctr.,* 134 Idaho 464, 4 P.3d 1115 (2000). However, the legislature may not relieve itself of a duty imposed under the Idaho Constitution without doing the necessary work involved in amending the Constitution. A Constitution is not mere words. It is the structure of government itself. It sets the bounds of government and it cannot be disregarded without the gravest consequences for democracy itself. Long ago, Justice Huston of the Idaho Supreme Court observed, in resolving a dispute over whether the constitutional requirement for the reading of bills must be followed:

> But by what right shall anyone be permitted to say that any of the things required by the constitution to be done are "insignificant," and may therefore be

> omitted? Has anyone more right to say that one of the things required by the constitution is insignificant and may be omitted than he has to say that any other thing required is insignificant and may therefore be omitted? If the right to ignore one provision exists, the right to ignore all exists. If the court must wink at one violation of the constitution, it must wink at other violations of it. If the court must approve one violation of the constitution, it must, to be consistent, approve other violations of it. We must be subject to the constitution, or else subject to the whims of those individuals who treat the sanctity of the constitution as fictitious and its provisions as insignificant. We cannot serve both God and Mammon. We must travel either the one road or the other. We think that safety and security demand that we stick to the letter and spirit of the constitution, that we obey all of its mandates, until the people, the source of all power, who made it, change its provisions. Let us obey the constitution in all of its requirements, and treat all of its provisions as important.

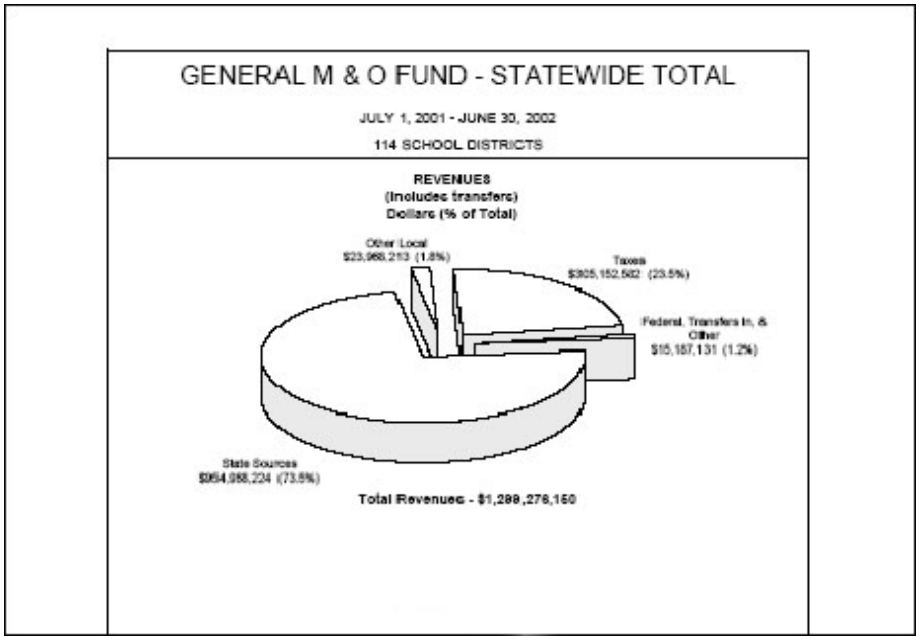
Cohn v. Kingsley, 5 Idaho 416, 49 P. 985 (1897).

C.

AN UNLIMITED PROPERTY TAX IMPOSED WITHOUT THE VOTE OF THE CITIZENS OF AN AREA IS NOT AN ADEQUATE REMEDY WHERE THE COURT HAS FOUND THAT THE SOLE RELIANCE ON LOCAL PROPERTY TAXES FOR THE REPLACEMENT AND MAJOR REPAIR OF DANGEROUS STRUCTURES IS THE FLAW IN THE LEGISLATURE'S SYSTEM OF PUBLIC SCHOOL FUNDING UNDER ART. IX § 1.

Idaho has 114 school districts and ten charter schools serving 246,521 students. National Center for State Education Statistics, *The Nation's Report Card*, Idaho State Profile, Financial Summaries for Idaho School Districts, 1999-2002, Idaho Department of Education. Idaho schools are funded through a combination of local, state and federal funds. Findings of Fact and Conclusions of Law, February 5, 2001, (hereinafter, Findings of Fact) pg. 30. Schools receive much of their operating funding from the state general fund through a formula which is based upon the calculation of the average daily attendance of students in the district, which is used in conjunction with information on the size of the school district to arrive at a "support unit." The number of support units forms the basis for determining the amount of state support a school district may receive.

The Department of Education's illustration of the multiple sources of school funding puts it clearly:



Financial Information 2001-02

	M & O Fund	%	All Funds	%
Revenues:				
Local Taxes	$305,152,582	23.56%	$416,501,368	24.20%
Other Sources	25,904,526	2.00%	167,921,656	9.76%
State	954,968,224	73.75%	995,901,277	57.87%
Federal	8,917,161	0.69%	140,645,174	8.17%
Total	$1,294,942,493	100.00%	$1,720,969,475	100.00%

Supplemental Information

Property Tax Replacement	$64,594,680
Lottery Revenues	$7,648,977
Technology Grant	$9,958,927

Expenditures:	Total	%	ADA	Rank
M & O Instruction	$821,361.3	63.70%		
M & O Support Services	460,516.4	35.71%		
M & O Other	7,599.7	0.59%		
Total M & O	$1,289,477.4	100.00%	$5,569	N/A
Total All Funds	$1,768,014.0	100.00%	$7,636	N/A

Tax Levies 3-1-2001	Total	Per ADA	Rank
Property Market Values	$65,275,459,432	$281,905	N/A
Total General M & O Levies	0.003456217		
Total District Levies	0.006252022		

Staff Data 2001-02

District Personnel:	FTE	ADA To FTE
Elementary Teachers	7,057.00	17
Secondary Teachers	6,750.80	17
Administrators	1,116.70	207
Other Certified Staff	1,300.50	176
Total Certified Staff	16,225.00	14
Total Non-Certified Staff	8,488.40	27

Teachers Salaries:		Rank
Beginning Salary on Schedule	$21,648	
Highest Salary on Schedule	$60,804	
Average Elementary Teacher's Salary	$39,314	N/A
Average Secondary Teacher's Salary	$39,027	N/A
Average Superintendent's Salary	$80,656	N/A

Source: Idaho Department of Education, Financial Summaries for Idaho School Districts, 1999-2002.

Of the general maintenance and operation funds provided to schools, over 85% of the money goes to salary and benefits. Schools also receive lottery funds, school lunch funds, and federal funds through various programs, and funds from local property taxes.

Schools are also affected by a variety of educational standards which they are required to meet. Idaho has established state standards for student academic achievement and is in the process of establishing statewide curriculum standards which will affect education from first grade through high school. Idaho State Department of Education, Roadmap for Implementing the State Achievement Standards Rubric, 2001-2002. The State has implemented the Idaho Standards Achievement Test to measure the academic progress of students from the second through ninth grades in math, language usage, and reading. Idaho has also adopted the High School Standards Achievement Test to determine if high school students have mastered a number of essential skills relating to reading language arts and math. Statewide academic criteria for graduation from high school is also being phased in. Academic assessment and accountability rules are being fine-tuned by the Board of Education.

In addition to the imposition of a variety of curriculum standards and requirements at the state level, school districts are also being affected by changes in federal law designed to improve the quality of instruction received by every student. The recent federal "No Child Left Behind Act of 2001" imposed federal requirements to ensure that all students, no matter where they lived, would receive the highest quality education possible. Congress has expressly noted the difficulties experienced by rural school districts in meeting the standards and competing with large school districts in the recruitment and retention of teachers, and offering programs which would allow them to

attain the highest levels of academic achievement. Senate Resolution 22, 108th Congress, January 16, 2003. Demands are placed on school districts from all directions: local, state and federal. Resources are also, for the most part, coming from multiple sources. However, in Idaho, there is only one resource for the replacement and major repair of unsafe school buildings for every district, no matter how well or how poorly situated—the local property tax.

It is important to emphasize that, because the issue on remand involved a question about the constitutional sufficiency of the system of public school funding, the Findings of Facts and Conclusions of Law dealt with the system rather than separate schools except insofar as they were illustrative of the problems experienced by all schools. The deficiency in the state's system of public funding was readily apparent and existed regardless of the region of the state in which the school was located. It also existed regardless of whether the local economy was based on timber resources or agriculture, since the defect exists when the local area does not have the local resources to engage in the most costly of options—the replacement of a seriously dangerous structure. The state has a substantial number of substandard buildings in rural areas. The combination of low per capita income and low property tax values has resulted in increasing major safety problems with a number of older buildings requiring major renovation or replacement. The evidence overwhelmingly established a pattern which revealed the critical defect in the funding system. The testimony at trial was uncontradicted that school districts with low per capita income and low property values could not feasibly engage in major repairs or building replacements under Idaho's current system of public school funding. As Dr. Nick Hallett pointed out in his trial testimony:

> "There are two primary detrimental effects when a state relies heavily upon local taxpayers to fund school facilities. High taxable value per pupil districts that enjoy at least average per capita income will find it relatively easy to provide the necessary facilities and equipment for a thorough education. These districts can do so with low taxpayer impact. On the other hand, low taxable value per pupil school districts that are also handicapped with low per capita income will find it difficult, as well as burdensome to taxpayers, to obtain minimal facilities to provide a thorough education. Some of these districts must also cope with the effects of high unemployment rate, a high percentage of minority disadvantaged student population, and a significant agribusiness component of the local economy. When a low tax base is characterized by a number of these additional factors, it will be extremely difficult to pass needed bond proposals. The effect of bond issue passage will be a very heavy financial burden upon property taxpayers.

Testimony of Superintendent Nick Hallett Ed.D., Trial Transcript. He illustrated the testimony with a comparison of the tax base for 1997-1998 between the Minidoka School District and Blaine County. The bond levy rate for Minidoka was .00256097. If it had the taxable value per pupil of Blaine County, then the bond levy rate would be .00026211. With the state average taxable value, the bond levy rate would have been .00162683. Thus, a property owner with a $100,000 taxable value would pay annually for the same twenty million dollar bond: $31.00 if he or she lived in Blaine County and $299.00 if he or she was a landowner in Minidoka County. The state average tax base would have resulted in a $190.00 annual payment.

As was noted previously, *Thompson v. Engelking*, 96 Idaho 793, 537 P.2d 635 (1975) held that the uniformity requirement of the Constitution did not require equal per pupil expenditures "but a system administered with that degree of uniformity which enables a child to transfer from one district to another within the same grade without substantial loss of credit or standing and with access by each student of whatever grade to acquire those skills and training that are reasonably understood to be fundamental and basic to a sound education . . .." citing with approval *Northshore School District No. 417*

v. Kinnear, 84 Wash.2d 685, 530 P.2d 178 (1974). The *Thompson v. Engelking* Court acknowledged that some districts have to pay more to achieve the same academic results because they may have a disadvantaged student population which requires more resources. The Idaho Supreme Court has endorsed a view of school funding which focuses on equality of educational opportunities, not mathematical exactitude in per pupil expenditures. Uniform per pupil expenditures are not required under the Idaho Constitution, however, the problem with the funding system is that poor districts with a low per capita income and low property values cannot generate enough money to fund major replacements or repairs because they simply do not have the resources.

The deficiency in the funding system is best illustrated by looking at the Lapwai school district testimony which has been offered in the remedy phase of these proceedings. Transcript of Proceeding beginning July 29, 2002-August 2, 2002 and continued November12-15, 2002 ; November 19th and 20th, 2002.[3] This example is to illustrate the common problems experienced by the type of district affected by the insufficiency of the funding system, it is not intended to modify the court's previous Findings of Fact or Conclusions of Law and it is not based on the long-rejected (by the Supreme Court) state's argument that only individual schools should be focused upon. The Constitution talks about the "system" of school funding. All three prior decisions by the Idaho Supreme Court directed the attention of the lower courts and the parties to an examination of the system.

Keeping in mind that the issues in the underlying case are focused upon the system itself, the problems experienced by the Lapwai school district illustrate the

[3] Page cites to the transcripts are normally from the official transcript, however, where the official transcript was unavailable, the reference is from the draft transcript so there may be some minor deviations on page numbers.

deficiency in the system of funding. It may be helpful to see how the deficiency affects a particular district.

The State has not disputed that Lapwai suffers from serious safety problems with their buildings. Lapwai serves about 550 students. It has a combined junior and senior high school. The building has a number of problems, including serious fire safety issues. There are problems with asbestos. The plumbing and electrical systems are seriously defective. There are real and significant problems with structural aspects of the building relating to seismic load because the roof system is not properly attached to the walls. A serious earthquake could cause the roof to fall in on students and teachers. There are problems with toxic molds which have caused health problems for the staff who work with special education students in one area of the building. The superintendent was forced to move his office elsewhere because the lack of adequate ventilation and the presence of molds was causing health problems for him also.[4] Leaks in the pipes for the steam heating system has created widespread mold in the crawl space of the building. Floors and subfloors have rotted. There is crumbling and decay of the foundation. There are dead-end corridors with no safe fire exiting. August 1, 2002, Testimony of Superintendent Harold Ott, Tr. Pg.s 430-517.

Most of the building was designed in 1941. It is outmoded. The school district commissioned an architectural plan for a new school, which it determined, based on standards established by the Council of Educational Facilities Planners, would cost $7.2 million dollars. A remodel of the building would cost about $9.4 million dollars

[4] In fact, the state inspector was unable to remain in the room when he visited the superintendent because he choked up due to the poor air quality. He left the room and supplied the superintendent with a mask. The district thereafter bought ten masks for the use of anyone who had to enter the district superintendent's office. Tr. August 1,2002.

according to the superintendent of the district, however, because the facility is in poor shape, a remodel makes less sense than a new construction. The bonding capacity of Lapwai is approximately $4.9 million dollars. November 14, 2002 Tr. 332, Exhibit 1110-1.

The assessed value of the district was $99.8 million dollars with a bonding capacity of $4,990,000. If a bond were to be passed in the amount of their bond capacity, with an amortization period of twenty years, then it would translate to a property tax of $3.76/$1,000. Exhibit 1110-1, Ch. 10, pg 6, Bates 019114. Costs go up for every year construction is delayed. Most of the land in the district is non-taxable reservation land. Local farmers would bear most of the cost of any bond. The amount of the bond would be insufficient to replace the building.

All resources currently available are focused on the students' direct educational needs. There are no additional funds of any significance available in the district which can be redirected towards building replacement. The superintendent detailed problems in educating students and attracting teachers in dilapidated, poorly ventilated buildings. In order to attract teachers in spite of the inadequate facilities, salaries are higher. Additionally, the student population has some special challenges educationally which require a more skilled teacher base.[5] It was the superintendent's conclusion, one which is supported by the evidence, that the Lapwai middle/senior high was not a building in which a safe environment conducive to learning could be supplied. Tr. August 1, 2002.

A figure in the $5-8 million dollar range for a new school is not atypical. The State Department of Administration used a new construction cost estimate of $95.00/sq.ft

[5] One of the reasons he lists for higher pay scales for his teachers is to entice them to work in an inadequate structure rather than in nearby competing areas like Lewiston or Clarkston.

in 2001. The cost estimate by the State for a new school for the Wallace School District was $6,053,011 in October, 2001. Exhibit 1109-32, Bates 020708. The Lapwai estimate is based on an $85.00 per square foot cost. The final cost of the replacement for the Lapwai Junior/Senior High has not been determined but the example of the deficiency in the system of public school funding as it affects low per capita income areas with aging buildings is illustrative of the very real and serious problems encountered by smaller, primarily rural districts, in replacing dangerous structures.

There is no evidence that the problems experienced by Lapwai are due to the mismanagement of available resources. The per capita income of the district is among the lowest in the state. The average income of Nez Perce tribal members was just over $11,000 per year. Tr. November 13-20, 2002, pg. 358. 73.98% of Lapwai students receive free or reduced student lunches. Pl.s Exh. 3070. The district contains a lot of students who come from backgrounds which are often deprived of reading material. The district receives federal Title One money which it puts largely towards helping elementary age school children acquire a solid base in reading, writing, and math so that they will be more successful as they move through school. Tr. November 13-20, 2002, pg.s 347-348. In particular, the money is used to hire math tutors and reading aides because focusing the federal money on those areas of study is likely to give the students the greatest chance of successfully completing their education. Approximately 84% of the students are Native American, so the district receives some additional federal funding through federal impact aid and a small contribution from the tribe. The district receives federal forest land impact aid and a small amount of federal aid for students with limited English proficiency. Federal impact aid replaces property taxes lost due to the federal

presence in a particular community, in the case of Lapwai, because of reservation lands. Tr. 351-354, November 13-20, 2002. The tribe also contributes to extracurricular activities. *Id.* pg. 355.

Like most districts, the district aims to keep a certain amount of funds in a reserve account. Throughout the testimony, at trial and in the remedial phase, districts have referred to the need to maintain a prudent level of reserves. The reserve accounts are particularly critical to meet emergency expenditures for repairs and also to meet contract obligations when state funding is reduced, for example, by a budget holdback. Because a district's contracts are already in place, if there is a state holdback of funds, the district has to meet its contract obligations from the reserve fund. Additionally, a prudent level of reserves enhances the district's ability to obtain better interest rates on bonds. Findings of Fact, 16, pg. 42. Lapwai has utilized part of its reserves to reduce class sizes. Lapwai has also used its federal impact aid money for meeting the serious educational needs of the students. The district does not have adequate funds to provide the thorough education it is required to provide to the students and repair or replace unsafe buildings. The reason Lapwai does not have sufficient funds to do both is that the mechanism for the replacement of a dangerous structure is based entirely on local property taxes. While it would probably remain a difficult balancing act even under a better system, the legislature's system for public school funding is constitutionally inadequate. There is no evidence that Lapwai is misdirecting or misusing funds. It is spending its funds as required under the Idaho Constitution to give its students a thorough education. It has had to hire more teachers than the minimum level because the test scores were so low that student achievement had to be raised. A failure to raise student achievement will

negatively affect funding for the district under the federal "No Child Left Behind" Act and may result in graduates who are unable to obtain high school degrees because they cannot meet state exiting standards.

It is not constitutionally satisfactory for a district to be forced to sacrifice its students' education or their safety because it cannot both provide a "thorough and adequate education" and provide it in a safe building. The dilemma caused by the inadequacy of the state's system of public school funding is best explained by Superintendent Ott:

> "We, given the demographics in our community, purposely have hired additional teachers. That's in essence what we use our impact aid money for. If you look at our cash flow for the last three or four years, you'll see that [the reserve balance] is going down now. And if we continue to staff at the same level that we have, by the end of next year, that figure will be down probably at the $200,000 to $300,000 level. And we can talk about building needs, we can talk about educational needs, we can talk about no child left behind. Given the demographics of the people that live in our community, two years ago the average income of Nez Perce tribal members was just over $11,100 per year. That means that parents in our community do not, generally speaking, have reading materials for their students. They often do not have much printed material at all for their students. That has improved a little bit with the use of the casino to employ people. But we have many single parents. We have many children that are raised by extended family. And our young people have tremendous needs. And with the work that we've done as far as class size, as far as using high performance research-based programs like Success for All Reading and Everyday Math, we have spent our money from impact aid on those programs, and the results have been astronomical. Our young people are above the state average in kindergarten and first grade reading, they're even with the state average in second grade, in the third grade they're just slightly below. It's taken a tremendous amount of money and people and energy to make that happen. So it's been my argument all along: How do we balance what we put in the facilities and what we put into people? Our decision has been throughout this to put it into young people, because their future is much more important than that building. Now as the building gets worse, how do we balance that out and what is fair?...".Tr. 358-359, November 13-20, 2002.

The Supreme Court itself, in rejecting the argument that the Idaho Constitution required equal per pupil expenditure under the uniformity provision, noted with approval a

Washington case which held that "ample provision for the education of all children, cannot be based upon exact equality of funding per child because it takes more money in some districts per child to provide about the same level of educational opportunity than it does in others." *Thompson v. Engelking*, 96 Idaho 793, 810, 537 P2d. 635, 653 (1975) citing *Northshore School District No. 417 v. Kinnear*, 84 Wash. 2d. 685, 530 P.2d 178 (1974). Idaho has adopted a more prudent test for expenditures under the Idaho Constitution than equal per pupil expenditure. The Idaho test is whether the educational requirements of students are being met in a system in which there is flexibility on per pupil expenditure to meet the particular needs and challenges of the students.

Although there was conflicting evidence, when weighed by this court, the overwhelming evidence clearly and convincingly establishes that Lapwai is using all of its available funds in the manner best suited to make sure that its students receive the education that they must to reach Idaho and federal achievement standards. There are no substantial resources available, because of the deficiency in the state's system of public school funding, which allow Lapwai, in spite of its best efforts, to provide an adequate education in safe buildings. Based upon the evidence already presented in this court in the remedy phase, the following conclusions can be made:

1. Lapwai suffers from low property tax values and low per capita income;
2. Lapwai applies its money from "discretionary sources" to meet the critical educational needs of its students and to comply with the school district's duty under the Idaho Constitution to provide a thorough and adequate education[6];

[6] 75% of Idaho school districts pay teaching and other staff more than the state allocates for that purpose. School districts are paying more in order to attract and retain qualified staff because it is necessary to provide an adequate education for the students. There was *no* evidence offered by the state that additional sums are not necessary to meet the constitutionally required educational needs of the students. It cannot be

3. There is no persuasive evidence that Lapwai has mismanaged or misused the resources available to it. On the contrary, Lapwai has struggled admirably to do as well as it has with a needy and deprived student population with real academic disadvantages and very limited resources; the fact that the students have done so well supports the district's decision to allocate resources in the manner in which it has;
4. There is likewise no persuasive evidence that Lapwai offers services which are not required to meet its constitutional obligation to provide students with a thorough and adequate education. In fact, it must make an extra effort to do so.
5. Lapwai has developed a prudent reserve which is not sufficient to address any major holdbacks in State funding but which would allow it to deal with smaller repairs and emergencies which may develop in the school year but which cannot prudently be reallocated solely to building reconstruction;
6. The Lapwai school district cannot offer state and federally mandated services and constitutionally required educational services, including the replacement of dangerous buildings, because the legislative system of school funding has no minimally adequate means for small districts with low property tax value and low per capita income to address major repairs or building replacement;

HB 403 creates a new "remedy" under CBECA. It creates an unlimited five year educational necessity levy. HB 403 states that, after findings like those relating to Lapwai, "[t]he district court shall approve an educational necessity levy if it finds that the

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fairly concluded that paying more is evidence of mismanagement. See, for example, testimony of Harold Ott, August, 2002. This testimony has been corroborated by the testimony of every other superintendent and educational expert who has testified in this case.

school district has no alternative sources of revenue to use to abate unsafe or unhealthy conditions that have been identified by findings of fact or judgment…The limitations of sections 6-2209 and 6-2210, Idaho Code, regarding the calculation of and the maximum amount of the educational necessity levy do not apply to an educational necessity levy imposed to abate unsafe or unhealthy conditions…" Regardless of whether the amount needed by Lapwai to replace a dangerous and defective building is the $7.2 million that their own architects have estimated or an undetermined lesser amount[7], the consequences of an unlimited educational necessity levy would be a crippling property tax burden on the property owners of the district.[8] The court clarified that this reading of the statute was correct at oral argument. Counsel for the state, responded to the court's questions as follows:

> The Court: Now, I had understood you there, but it looks like here [referring to HB 403] the levy that the court is required to impose has no limit as far as the average goes.
>
> Mr. Gilmore (for the State): It has no limit as far as the average—if I may—
>
> The Court: Because, in this area, the average doesn't apply. Right?
>
> Mr. Gilmore (for the State): The average does not apply.
>
> The Court: If you've gotten to this point [where imposing additional property taxes up to the state average of certain school property taxes is inadequate to make a school safe] it looks to me [that] this is mandatory language—that the

[7] The final cost to remedy Lapwai's problem has not been determined because of the need for the assistance of the special master in evaluating the options available and determining the most cost-efficient method of addressing the problem.

[8] Payments on a 20 year bond for $7.2 million translates to $360.70 per $100,000. (3.607 mills). For a 5 year bond -- $1442.88 per $100,000. (14.4288 mills)

court, if it makes the findings of facts, has no other option but to pass through the Legislature's unlimited property tax increase on the residents of the local school district if it has made the other findings.

Mr. Gilmore: If there are no other sources, for example, a good example would be districts that are getting unrestricted federal funds. You would not have to raise property taxes if you could marshal other sources of funds.

The Court: Say the court's redirected every penny that the district's got coming into it; it's not enough, then , then the court passes through this legislative property tax that basically the "sky is the limit."

Mr. Gilmore: It would just be like the judgment levies for tort claims, if you had two or three successive tort claims in small taxing district the court has an obligation to raise the property taxes.[9]

The Court: And this is without ever submitting this to the voters.

Mr. Gilmore: Yes, just like the tort claims.

The Court: Can the court—does the court have the power under this act to say that's not reasonable? …

It's crippling, it's arbitrary, it's capricious, the court's not going to do it.

Does the court have any power to say this remedy is so crippling that it isn't a remedy?

Mr. Gilmore: Under the statute, the court does not.

The Court: So that reading is a correct reading of the statute as it's written.

Mr. Gilmore: That is correct.

[9] Counsel clarified that this had never happened and that this statute had never been challenged.

Thus, in the Lapwai example, a $7.2 million dollar tax burden would be spread on people whose per capita income is among the lowest in the state over a period of five years.

Lapwai is not the only district left behind in the current system for the replacement of dangerous buildings. Other districts would face similar challenges. The highest market value per support unit is found in the Avery school district at $52,348,525. However, Avery also has the highest number of people in any school district, 92.31%, who qualify for free and reduced lunches because their incomes are so low. Exhibit 3070; Tr. September 2, 2003. The lowest market value per support unit is Ririe at $1,763,027. In Avery, a levy of $100 per $100,000 of market value per support unit equals a levy of $2,969 in Ririe. The highest per capita income in the state is found in Blaine County at $43,919. The lowest per capita income is in Madison county at $14,319.00. Exhibit 3070, Hearing September 2, 2003. The ability to pay property taxes is most directly related to per capita income rather than property value alone. Interestingly, the poorest districts frequently impose on themselves the highest property tax burden for support of education. For example, Mullan imposes tax levies of .015999438, Troy of .012481859; Whitepine of .008462864. In 2003, Boise's rate was .008137568; Meridian's was 0.006535121. In a district with a need to replace a building or engage in major repairs, the consequences of footing an additional property tax bill sufficient to pay a debt of $5-10 million in 5 years is enormous. If the expense were to be borne in a district like Cottonwood with an assessed taxable value of $106,201,762, for example, and assuming that the total amount financed would be $7 million, it would result in 13.1 mills or about $1,300 per $100,000. If the expense arose in an area where

the per capita income is among the lowest ten counties, thus an average of slightly over $16,000 per year, the burden would be heavy. This is not merely an academic consideration. The districts with the lowest per capita income have some of the oldest and most unsafe buildings and have been able to do the least amount of major maintenance. They are the districts most likely to face complete building replacement or major renovations. Moreover, as the superintendents have uniformly testified, when a heavy bond has passed, it affects the ability of the district to pass the other bonds which it also needs for other purposes such as supplemental levies. A heavy court-imposed local property tax, according to the testimony, will chill the ability of the districts to raise funds for purposes other than building repairs. Since those other purposes are the educational services provided by the district to its students, the effect of the property tax increase is to decrease the funds available for the districts and decrease their ability to provide constitutionally mandated educational services to their charges. The buildings improve while the quality of the education declines drastically.

An onerous, unlimited property tax imposed by judges with no discretion at all is not an adequate remedy and does not constitute the answer to the constitutional deficiency in the legislature's system of public school funding. Based upon the overwhelming factual evidence in the record at both the trial phase and remedy phase, HB 403 does not cure the problem of the deficiency in the legislature's system of public school funding—it exacerbates it. A crushing local property tax is not a minimally adequate remedy for the legislature's failure to establish a constitutionally adequate system of school funding which would allow the poorest school districts to educate their

students in a safe building at the academic level mandated by the State and Federal governments.

D. THE COURT'S HAVE THE INHERENT POWER TO FASHION AN ADEQUATE REMEDY FOR A CONSTITUTIONAL WRONG.

In ISEEO III, the trial court was instructed by the Idaho Supreme Court to determine if the legislature had provided "the means to fund facilities that provide a safe environment that is conducive to learning" and, after doing so to make its decision granting or denying relief. *Idaho Schools for Equal Educational Opportunity v. State*, 132 Idaho 559, 976 P.2d 913 (1999). Where constitutional rights are involved, it is the obligation of the judiciary to afford a remedy for the vindication of those rights. *Electors of Big Butte Area v. State Board of Education,* 78 Idaho 602, 308 P.2d 225 (1957). The Idaho Supreme Court acknowledged in *Osmunson v. State*, 135 Idaho 292, 17 P.3d 236 (2000), that the "ultimate remedy to which the plaintiffs are entitled under the Education Article is the provision of constitutionally required educational services." *Id.* at 295. Based upon this court's finding after trial that the system of public school funding did not meet the constitutional requirements of Art. IX § 1 because the sole reliance on property taxes for building construction left behind districts with low per capita income and low property tax values and made it impossible for those districts to provide an adequate and thorough education in safe buildings, this court initially deferred to the legislature for the creation of a funding mechanism which could address this particular deficiency in the state educational funding system. The legislature has had since February 5, 2001 to address the deficiency. It has not done so. If the constitutional mandate contained in Art. IX § 1 is to have any meaning, then it is the responsibility of the courts to ensure that the

buildings are safe until such time as the legislature either fulfills its constitutional responsibility or persuades the voters of the state to relieve them from that duty by passing an amendment to the Idaho Constitution.

Long ago, Alexander Hamilton observed that it seemed "scarcely to admit of controversy" that the judiciary had to have the power to act effectively to hold other branches of government to their duties. He wrote:

> The first point depends upon this obvious consideration, that there ought always to be a constitutional method of giving efficacy to constitutional provisions. What, for instance, would avail restrictions on the authority of State legislatures, without some constitutional mode of enforcing them?

THE FEDERALIST No. 80 (Alexander Hamilton)[10]. Justice Huston of the Idaho Supreme Court made a more impassioned remark in his decision in *Cohn v. Kingsley*, 5 Idaho 416, 49 P. 985 (1897) when he said: "[w]e think that safety and security demand that we stick to the letter and spirit of the constitution, that we obey all of its mandates, until the people, the source of all power, who made it, change its provisions. Let us obey the constitution in all of its requirements, and treat all of its provisions as important." The limitation of all remedies under HB 403 is an unconstitutional limitation on the power of the courts to fashion an effective remedy for the violation of a constitutional provision. The practical effect of HB 403 is to amend the Idaho Constitution to remove the duty which it places upon the legislature to create an adequate system of public school funding.

Idaho courts have long been required, in many contexts, to grant any relief to a party which the evidence demonstrates that party is entitled to receive. E.g., *Koluch v.*

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[10] THE FEDERALIST No. 80, at 235 (Alexander Hamilton, 43 GREAT BOOKS OF THE WESTERN WORLD (Robert M. Hutchins ed., 1952).

First Security Bank of Idaho, 128 Idaho 186, 911 P.2d 779 (Ct. App. 1996), *Barnard & Sons v. Akins*, 109 Idaho 466, 708 P.2d 871 (1985), *Kessler v. Tortoise Development, Inc.* 134 Idaho 264, 1 P.3d 292 (2000). The plaintiffs asked for equitable relief. As the Idaho Supreme Court said in *Barnard & Sons*:

> We agree with these comments of the trial judge regarding the equitable jurisdiction of the court, but deem a further maxim of equity to be applicable in the instant action, that being that once the equitable jurisdiction of the court has attached, the court should retain jurisdiction to resolve all portions of the dispute between the parties and render equity to all parties without regard to the technical niceties of pleading and procedure. Citing *Watkins v. Watkins*, 76 Idaho 316, 281 P.2d 1057 (1955); *Finlayson v. Waller*, 64 Idaho 618, 134 P.2d 1069 (1943). See I.R.C.P. 15(b), 54(c); *Cady v. Pitts*, 102 Idaho 86, 625 P.2d 1089 (1981).

Id. at 468. It is a fundamental and longstanding principle of the law of equity that courts are clothed with large discretion to mold appropriate relief to the needs of the particular case. E.g., McClintock, Equity (2d ed. 1948) § 30, Pomeroy, Equity Jurisprudence (5th ed. 1941) § 109.

Because of their flexibility, remedies in equity are uniquely well-suited to deal with unusual cases which require relief to be narrowly targeted. Obviously, no court can draft legislation. It seems imprudent to say, as the plaintiffs have requested, that some extraordinary sum be ordered deposited and disbursed in some unclear manner. There are a number of difficulties with a crude sort of lump sum approach to this problem. On the other hand, the court system cannot allow the Idaho Constitution to be ignored. It would be a grave dereliction of duty for a court to say that a direct duty imposed by the Idaho Constitution could be ignored. The State's assertion that, once a declaratory judgment is entered, no further action may be undertaken to enforce the judgment is simply extraordinary although that is the direct effect of placing this particular case under CBECA. If the trial court determines that local school districts are not complying

with their constitutional obligation to ensure that their students receive the educational services required by the Idaho constitution, not through fault of their own, in spite of their best efforts and the assumption of a high property tax burden, because of the inadequacy of the state's system of public school funding, CBECA requires that the court do nothing other than enter a declaratory judgment. I.C. § 6-2213. The statute bars the trial court from issuing "any other final judgments or orders against the state and/or legislature." I.C. § 6-2213. When *Osmunson* was before the Supreme Court, the State took the position that there was no reason to be concerned about this section because the *Osmunson* case did not address the system of public school funding, the case in Ada County district court did. Thus, the *Osmunson* court was never called upon to deal with I.C. § 6-2213. There had been no trial in *Osmunson* and the issue was not ripe. In this case, there has been a trial on the issue framed by the Idaho Supreme Court: whether the legislature's system of funding met the requirements of Art. IX § 1. There has been a finding, based upon substantial, competent and overwhelming evidence, that there is a critical deficiency in the legislature's system of public school funding for the replacement of dangerous buildings.

The State's position is that, ultimately, HB 403 limits the courts to simply declaring that the legislature's system of school funding is unconstitutional. The State's position is that, beyond this, the courts have no further power to address the failure of the legislature to meet its constitutional responsibilities. Obviously, if that is all that can be done, then it has been done: the system established by the legislature as it currently exists does not satisfy the legislature's duty under Art. IX § 1 of the Idaho Constitution. The court made this ruling on February 5, 2001.

The state has argued, somewhat confusingly, that the limitation of all remedies is somehow an extension of the doctrine of sovereign immunity. However, there is no "sovereign" under the Idaho Constitution which is freed from observing the limitations of the Constitution itself. It is precisely to limit the otherwise unlimited powers of government that states have adopted constitutions. Government does not have unlimited power. It is required to observe the limits of its founding documents. Under the Idaho Constitution, the legislature is barred from passing special laws. Under the doctrine of separation of powers, it is also limited in its ability to interfere with the proper exercise of the jurisdiction of the courts.

The Idaho Constitution Art. 5 § 13 expressly states that the legislature "shall have no power to deprive the judicial department of any power or jurisdiction which rightly pertains to it as a coordinate department of the government…." The limited power of the legislature to provide for methods of proceeding where none otherwise exist was previously addressed. Unlike federal courts who are of limited jurisdiction, the jurisdiction of the Supreme Courts and the district courts arises from the Idaho Constitution itself.[11] Art. V §§ 2, 9, 13, 20. The limitations of the constitution are binding on the legislature and cannot be nullified or avoided by the simple device of declaring them inapplicable. *Village of Moyie Springs Idaho v. Aurora Mfg. Co*., 82 Idaho 337, 348, 353 P.2d 767 (1960). Passing upon the constitutionality of statutes, is a fundamental responsibility of the courts and they are not "precluded from reviewing the constitutionality of a proposed course of action merely because both the executive and

[11] The jurisdiction of federal courts over actions based upon constitutional rights arises from statute and may thus be limited. Federal courts are courts of limited jurisdiction. Even in federal courts, prescribing a rule of decision in a pending case has been held to violate the doctrine of separation of powers. *United States v. Klein,* 80 U.S. 128 (1871). Because this case involves the Idaho Constitution, federal cases are of considerably limited value.

the legislative branches happen to concur in supporting it. Constitutional rights, as well as [the courts]duty to faithfully interpret our constitution…do not wane before united efforts of the legislature and the governor." *Miles v. Idaho Power*, 116 Idaho 635, 640, 778 P.2d 757, 762 (1989).

A constitutional conflict is never desirable. The Supreme Court and this court have repeatedly expressed the desire to avoid this conflict and the hope that the legislature will address the deficiency in the system of educational funding. However, when the legislature continues to fail to act, it becomes the responsibility of the courts to uphold the constitution and to see that the duties it imposes are met. The desire to avoid a constitutional conflict cannot be allowed to override the duty to see that it is obeyed. Government cannot allowed to be above the law. The Idaho legislature has power because it has been given to it by the Idaho Constitution. It also has duties imposed by that Constitution. It is the solemn obligation of the courts to see that the limits of the Constitution and the duties that it imposes, are observed.

A constitution has no meaning if the duties it imposes can be freely disregarded. If the State's position were correct then there would be no true limits on the power of the Idaho legislature in spite of a state Constitution which imposes a number of express and inherent limits. The State's position is incorrect. There are limits on the power of government.[12] HB 403 is an unconstitutional attempt to evade the duty imposed on the

[12] A word of caution is necessary: it will neither easy or quick for the court system to fashion a remedy which ensures that the standard established by Art. IX § 1 is met. The court cannot pass legislation which would improve the system of funding because this function belongs solely to the legislature. The court has aimed at a procedure designed to narrow the focus of any remedy to the most cost-effective, reasonable safety improvement. The purpose of the special remedial master is to aid the court in evaluating the type of technical testimony offered, for example, in conjunction with the Lapwai schools, getting a clear picture of the serious safety issues in the schools and the most efficient, cost-effective method of dealing with them and in then in structuring trial time so that it focuses on areas of genuine dispute. The benefit of a master, however, is that this method will be far cheaper, far more effective and far quicker than the traditional cost-

legislature by Art. IX § 1, to improperly interfere with the inherent power of the courts to fashion an adequate remedy, and is a violation of the express prohibition of the Idaho Constitution on special laws governing the procedures of the courts and changing venues.

E. Other Issues.

Because of the court's ruling on HB 403 on the grounds discussed in this Decision, the other constitutional objections raised by the plaintiffs will not be addressed. *Peck v. State*, 63 Idaho 375, 381-82, 120 P.2d 820 (1941). Additionally, because the issue before this court is focused solely on HB 403, the court will not address attorney fees and costs. The State's notice of dismissal of September 16, 2003 is invalid and is set aside.

F. Conclusion

The Idaho Constitution imposes a clear duty on the legislature to establish and maintain a general, thorough and adequate system of public schools. The current system fails to provide a minimally adequate means for struggling school districts in economically depressed areas to replace dangerous buildings. The system's sole reliance on property taxes for school construction leaves out the poorest districts who often have the oldest and most dangerous structures. Many of the poorest and most disadvantaged districts already tap every conceivable resource, including imposing much heavier

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intensive, time-consuming trial method with competing teams of experts hired by both sides and appeals of every decision on the way. It has the side benefit of allowing the legislature itself to see more accurately the nature of the problems and the costs involved in remedying them. Obviously, the payment method for the special remedial master has to be streamlined. However, the use of a master will, ultimately, allow the court to ensure that the constitutional mandate is satisfied until such time as the legislature decides to act either by improving the system or amending the Idaho Constitution.

property taxes on themselves, to provide their students with an education which will give them a chance to succeed in life.

HB 403 is an unconstitutional attempt by the Idaho legislature to evade its responsibilities under the Constitution by establishing pointless procedures which serve no useful or permissible purpose. The Idaho Constitution, Art. III § 19 expressly prohibits the passing of special laws designed to arbitrarily single out one case from all others for procedures which serve no useful purpose. The special procedures established by HB 403 also violate the doctrine of separation of powers.

The unlimited property tax imposed through the courts by HB 403 does not solve the problem, it worsens it. A crippling property tax imposed by court order on a district which already is devoting all of its resources to providing its students with a thorough education is not a minimally satisfactory remedy. It amounts to a "for sale" sign on rural Idaho where many people struggle to make ends meet as it is. HB 403 creates no viable remedy.

The legislature, having lost on the facts, decided to change the rules and declare that the case was over. It has not lived up to its duty under the Idaho Constitution—it has simply declared that it no longer wishes to hear about it.

The Idaho Constitution expressly forbids the kind of legislative action embodied in HB 403. The legislature's power is derived from the Idaho Constitution, it is subject to its limitations and it must live up to the duties imposed by the Constitution. The Constitution can be amended, it cannot be ignored. It is the obligation of the courts to ensure that the mandates of the Idaho Constitution are obeyed and to craft a remedy adequate for that purpose.

Government does not, in the American system and in the Idaho system, possess unlimited power. HB 403 is unconstitutional in its entirety and is void.

It is so ordered.

Dated this 27th day of October, 2003.

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Deborah A. Bail
District Judge