NIC's 499-Day "Lease" of 17 Acres of Bare Land
(The Long Version)

Question: In October 2009, why did taxpayers Larry Spencer, Tom Macy, and Bill McCrory (Plaintiffs) sue North Idaho College (NIC or College or Defendant) and the North Idaho College Foundation (Foundation or Defendant) over the method used to finance the acquisition of just under 17 acres of land adjacent to the existing downtown NIC campus in Coeur d'Alene, Idaho?

Answer: Because Plaintiffs believe the evidence shows the NIC Board of Trustees and the NIC Foundation intentionally avoided seeking the voter or judicial approval required by the Idaho Constitution, Article VIII, Section 3. Plaintiffs believe Defendants acted in open defiance of Idaho's Constitution and with disdain and disregard for the constitutional right of Idaho citizens to vote to accept or reject long-term debt or liabilities.

1. NIC's main campus is made up of approximately 46 acres of land bordered on the south by Lake Coeur d'Alene and on the west by the Spokane River. To the north is an industrial area containing the City of Coeur d'Alene's sewage treatment plant and what was formerly the 17-acre Stimson Mill site. The historic Fort Grounds residential neighborhood borders the campus on the east. Since before 2003 the NIC had been working with the owners (Stimson), the city, county, Bureau of Land Management, two railroads, and the University of Idaho to acquire the property for what they hoped would become an "educational corridor" between the Harbor Center office complex and NIC.[1]

2. The "Public Entities Memorandum of Understanding" in the North Idaho College Appendices for Self Study 2003[2] suggests the Parties[3] and Other Parties[4] to the document had sought to work out an orderly transfer of the 17 acres to NIC. The 17 acres is contiguous to both the main NIC campus and the City's sewage treatment plant.

3. The Stimson Mill closed down in late 2005.[5] The closure was rapid and apparently disruptive to the orderly transfer of the 17 acres to NIC. With the closure, Stimson sold approximately 106 acres of its land to The Mill Sites, LLC, one of developer Marshall Chesrown's companies.[6] Chesrown had not been one of the Parties or Other Parties

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1 North Idaho College, *Self Study 2003*, page 8-2

2 North Idaho College, *Appendices for Self Study 2003*, "Public Entities Memorandum of Understanding" pages 1-7

3 Parties: State of Idaho Department of Commerce, North Idaho College, City of Coeur d'Alene, University of Idaho, Lake City Development Corporation

4 Other Parties: Stimson Lumber Company, The Burlington Northern & Santa Fe Railway Company, Union Pacific Railroad Company, Bureau of Land Management, Riverstone, Lewis and Clark State College, North Idaho College Foundation

5 Hoover's Profile: Stimson Lumber Company, Inc. Retrieved 04-22-2010 from http://www.answers.com/topic/stimson-lumber-company-inc.

6 From court documents, case number CV 09-8934.

identified in the earlier planning. The 17 acres coveted by NIC was included in the 106 acres sold to Chesrown.

4. Sometime before late August 2008, **NIC's** attorney Marc Lyons hired Morse & Company, a Coeur d'Alene real estate appraiser, to prepare an appraisal report of the Mill Site property. The purpose of the appraisal was, "… to determine the Market Value of the subject property for **purchase** of the property." [7] [*emphasis added*] Morse's report was transmitted to Lyons on August 26, 2008. Morse's appraised prospective market value of the property of $13,250,000.00. Morse's report lists the highest and best use of the property as mixed use; residential and commercial. It also lists Extraordinary Assumptions & Hypothetical Conditions as: "Appraisal **assumes** annexation, rezoning, cleaning & clearing site, gain in size, and conditions as stated in the appraisal." [8] [*emphasis added*]

5. On September 15, 2008, NIC's student newspaper *The Sentinel Online* published an article headlined "Educational Corridor conflict continues." Writer Broderick Pellow reported, "Chesrown has offered the mill site to NIC for a flat $10 million, $3.2 million under the appraised value, as a contribution to higher education in Northern Idaho." [9] So the evidence shows that by September 15, 2008, the $10 million purchase price had been established.

6. On May 12, 2009, the Coeur d'Alene City Planning Commission held a public hearing on an application by the Foundation to zone the 17 acres C-17. C-17 is commercial zoning, the least restrictive and least protective zoning in the City. By contrast, the existing contiguous NIC campus is zoned R-17, residential. By all accounts NIC has been able to do everything an Idaho community college needed to do at that location with R-17 zoning and special use permits. C-17 zoning increases the property's value and therefore its cost to purchase. Yet testifying under oath and arguing for the Foundation's request for C-17 zoning, attorney Marc Lyons introduced himself as representing **both** NIC and the Foundation.

a. NIC and the Foundation would be using public money, tax dollars, to purchase the 17 acres. Yet Lyons and David Wold, then president of the Foundation, argued forcefully for C-17 zoning which would support a higher purchase price at greater cost to taxpayers. They argued the C-17 zoning was needed to give NIC "greater flexibility."

b. "Greater flexibility" to do what? We don't know, because an obedient and fawning Coeur d'Alene Planning Commission recommended approval of the C-17 zoning without asking. On June 16, 2009, the Coeur d'Alene City Council eagerly approved that.

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[7] Morse, Ed, *Appraisal report of DeArmond Millsite Property – File #08009.* Letter of transmittal dated August 26, 2008. Page 20. Ed Morse is a business partner in Meyer-Morse Ironwood Partners with Stephen F. Meyer who sits on both the NIC Foundation and Mountain West Bank boards and with Judith C. Meyer who is an elected NIC Trustee. See color chart "Who Is In The Mill Site Money Mix?" at page 9, *infra*.

[8] *ibid*, page VIII

[9] Pellow, Broderick. (2008, September 15). "Educational Corridor conflict continues," *The Sentinel Online*. Retrieved February 22, 2011, from http://media.www.nicsentinel.com/media/storage/paper1128/news/2008/09/15/News/Educational.Corridor.Conflict.Continues-3432374.shtml.

c. If you were going to use your own money to purchase an expensive piece of land for your long-term non-commercial use, would you beg the City to impose zoning conditions driving up the purchase price you would have to pay? Of course you wouldn't. But that is exactly what the NIC and the Foundation did. They needed the C-17 zoning to justify the $10 million Plaintiffs believe they had already agreed to pay to Chesrown.

7. According to NIC's Resolution No. 2009-01, NIC wants the 17 acres for future expansion of the existing campus [10] which is zoned R-17. Plaintiffs believe the C-17 zoning approved by the City Planning Commission and City Council shows that some of the 17 acres will be used for commercial development. Historically, C-17 zoning has not been essential for NIC to complete its vocational training and educational mission. However, it is essential for commercial development. The C-17 zoning also increases the land's exchange value so all or part of it can be more easily "swapped" when NIC decides to dispose of it rather than use it for "future expansion of the existing campus."

8. If NIC wanted and so desperately needed the 17 acres to fulfill its mission as an Idaho community college, why didn't NIC just buy it outright? Why involve the Foundation?

a. Here's why. NIC is a taxing entity and a political subdivision of the State of Idaho. Therefore, it is legally obligated to comply with the Idaho Constitution, Article VIII, Section 3. [11]

Article VIII, Section 3 was included by the Constitution's writers to explicitly and clearly prohibit public officials like NIC's Board of Trustees from incurring **any** manner of debt **or** liability beyond what can lawfully be appropriated and paid in one budget year unless the officials first get either approval of 2/3 of the voters in a special election or approval from a District Court judge in a public judicial confirmation hearing that the debt or liability was both ordinary and necessary.

b. Consequently, when NIC wanted to buy the 17 acres but didn't have the revenue and income to do it with one annual appropriation, it was **constitutionally required** to get either voter or judicial approval before it could agree to acquire the property.

9. So why didn't NIC simply follow the Idaho Constitution and either seek required voter approval or judicial confirmation? Plaintiffs believe that the NIC Board of Trustees was certain voters would not give the necessary approval by 2/3 of the voters in a special election, just as it was certain a District Court judge could not find the purchase of the Mill Site to be both ordinary and necessary as required by the Idaho Constitution. To achieve their purpose, ownership of the Mill site by NIC without either voter or District Court involvement, NIC and the Foundation entered into a "Lease Agreement." [12] In that

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[10] North Idaho College, *Resolution No. 2009-01*, July 21, 2009, page 1.

[11] *Wood v. Boise Junior College Dormitory Housing Commission*, 81 Idaho 379, 342 P.2d 700 (1959).

[12] North Idaho College and North Idaho College Foundation, *Lease Agreement*, signed and notarized July 21, 2009, effective July 23, 2009, attached and online at http://opencda.com/wp-content/uploads/2009/08/Lease-Agreement.pdf.

agreement, Plaintiffs believe the Foundation was a straw man [13] buyer using taxpayer dollars from NIC to buy the property from The Mill Sites, LLC, for $10 million plus interest. NIC would then "lease" the property from the Foundation. Plaintiffs believe the "lease" is and was an unconstitutional installment purchase agreement prohibited by the Idaho Constitution, Article VIII, Section 3.

10. What distinguishes the NIC and Foundation "Lease Agreement" from an unconstitutional installment purchase agreement? Plaintiffs believe the only distinction is using the words "Lease Agreement" at the top of the document's first page.

a. Merely titling the document "Lease Agreement" does not establish that it is a lease agreement rather than an installment purchase contract. As the US Supreme Court clearly explained in 1880: "What then is the true construction of the contract ["Lease Agreement"]? The answer to this question is not to be found in any name which the parties may have given to the instrument, not alone in any particular provisions it contains disconnected from all others, but in the ruling intention of the parties gathered from all of the language they have used. It is the legal effect of the whole which is to be sought for. The form of the instrument is of little account." [14]

b. One leases land to use it, not own it. This "Lease Agreement" on 17 acres of land was to run for a maximum of 4 years from July 2009 through August 2013. The typical ground lease is for 99 years, though Idaho law would limit this one to 30 years. Plaintiffs believe this distinction shows the atypical 4-year "Lease Agreement" was, in fact, an installment purchase contract.

c. Why was four years chosen as the term of the "Lease Agreement?" Plaintiffs believe the four-year (maximum) "lease" term was chosen so that voters would be unable to elect NIC Trustees who might block renewing the "Lease Agreement" before NIC took ownership. The NIC Trustees serve staggered terms of office. The "lease" would expire and NIC would own the land before enough Trustees could be elected to reject it.

d. The consequences of defaulting on the "Lease Agreement" would be the same as defaulting on an installment purchase agreement: Loss of use and loss of equity in the property. None of the "prepaid rent" would be refunded to NIC by the Foundation.

e. Plaintiffs believe the "Lease Agreement" was a scheme to use the Foundation to do indirectly that which Article VIII, Section 3 of the Idaho Constitution clearly prohibited NIC from doing directly. In 1956, the Idaho Supreme Court explicitly and clearly proscribed the act which NIC and the Foundation would do 53 years later in 2009. In 1956, the Court said, "What cannot be done directly … because of constitutional limitations cannot be done indirectly. That which the constitution directly prohibits may not be done by indirection through a plan or instrumentality attempting to evade the constitutional prohibition." [15] Plaintiffs believe the "Lease Agreement" between NIC and the Foundation was an instrumentality to evade the constitutional prohibition against NIC's incurring a long-term debt or liability without either voter approval or judicial confirmation.

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[13] *Black's Law Dictionary, 8th Edition*: "Straw man: A third party used in some transactions as a temporary transferee to allow the principal parties to accomplish something that is otherwise impermissible."

[14] *Heryford v. Davis*, 102 U.S. 235, 243-244 (1880)

[15] *O"Bryant v. City of Idaho Falls*, 73 Idaho 313 at 325, 303 P.2d 672 at 678.

f. The Internal Revenue Service (IRS) has issued a Revenue Ruling [16] which notes in section 4.01, "Whether an agreement, which in form is a lease, is in substance a conditional sales contract **depends upon the intent of the parties** as evidenced by the provisions of the agreement …" [*emphasis added*]

g. That same Revenue Ruling lists six criteria which, if any one or more are present, demonstrates, "… an intent warranting treatment of a transaction for tax purposes as a purchase and sale rather than as a lease or rental agreement …" [*emphasis added*] The six criteria which, according to the IRS, demonstrates a transaction is a **purchase rather than a lease** are:

(1) Portions of the periodic payments are made specifically applicable to an equity acquired by the lessee [NIC].

(2) The lessee [NIC] will acquire title upon the payment of a state amount of "rentals" which under the contract he is required to make.

(3) The total amount which the lessee [NIC] is required to pay for a relatively short period of use constitutions an inordinately large proportion of the total sum required to be paid to secure the transfer of title.

(4) The agreed "rental" payments materially exceed the current fair rental value. This may be indicative that the payments include an element other than compensation for use of the property.

(5) The property may be acquired under a purchase option at a price which is nominal in relation to the value of the property at the time when the option may be exercised, as determined at the time of entering into the original agreement, or which is a relatively small amount when compared with the total payments which are required to be made.

(6) Some portion of the periodic payments is specifically designated as interest or is otherwise readily recognizable as the equivalent of interest.

Please keep these criteria in mind. Later in this paper we will show exactly how Plaintiffs believe each criterion indicates the "Lease Agreement" between NIC and the Foundation was a purchase, not a lease.

11. After reading item 10, you might reasonably ask, "What does an IRS Revenue Ruling have to do with the acquisition of the Mill Site by the Foundation and NIC? Why would the IRS even care about this transaction? There isn't any IRS involvement here, is there?"

a. The answer to the last question is, "Yes, there is." To see it, the reader needs to understand how the purchase was financed and who profited from it.

b. To fund the $10 million purchase of the 17-acre Mill Site, NIC collected $2.4 million in foregone taxes from Kootenai County property owners. Then NIC added $1.6 million from NIC's fund balance (property tax money collected by NIC in excess of need). That provided the $4 million "prepaid rent" (down payment) paid up front, but it left $6 million still to be funded.

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[16] Internal Revenue Service, *Rev. Rul 55-540, 1955-2 CB 39, IRC Sec(s). 162* (Note: This Revenue Ruling pertains specifically to use and disposition of equipment, but Plaintiffs believe it is equally applicable to real property.)

Enter the North Idaho College Foundation, Inc., an Internal Revenue Code Section 501(c)(3) tax-exempt corporation. The Foundation issued a promissory note to Mountain West Bank for which the Foundation received a loan of $6 million. The Foundation was obligated to pay back the loan, plus interest, in five equal semiannual installments of $1,074,134.02. The sixth and final installment payment of $1,074,134.01 was to be paid back on August 1, 2012. After making the sixth and final payment, the Foundation was required under the terms of its "Lease Agreement" (page 7, paragraph 20) with NIC to transfer fee simple title of the property to NIC.

c. Under the terms of the loan, the Foundation was required to pay back Mountain West Bank approximately $2.15 million per year for three years (after the initial "prepaid rent" of about $4 million in July 2009). Yet according to the Foundation's IRS Form 990 filed on November 12, 2008, the Foundation's tax year 2007 annual income was only about $1.54 million. They why would Mountain West Bank make such a loan to the Foundation? Plaintiffs believe Mountain West Bank knew that NIC, not the Foundation, was the real source of the loan repayment money.

d. To sweeten the deal for Mountain West Bank and its Board of Directors to give a $6 million loan to the 501(c)(3) non-profit Foundation, NIC and the Foundation entered into a Tax Agreement Regarding Revenue Ruling. [17]

e. That Tax Agreement Regarding Revenue Ruling between NIC and the Foundation combines the College's borrowing power as a governmental unit with the Foundation's tax-exempt status as a 501(c)(3) corporation. The resulting alliance is often called a 63-20 corporation after the IRS Revenue Ruling which permits it. [18] A 63-20 corporation is formed under the state's nonprofit law for purposes of issuing obligations on behalf of a political subdivision [NIC]. Although the Foundation is not a political subdivision, its alliance with NIC in the 63-20 corporation allows the Foundation to issue tax-exempt bonds on behalf of NIC which is a political subdivision of the state. The result is that the lender, Mountain West Bank, was to be repaid its $6 million loan principal plus approximately $444,804.11 in federal tax exempt interest. [19]

(1) For this 63-20 corporation to be lawful, however, NIC "… must obtain full legal title to the property of the corporation with respect to which the indebtedness was incurred upon retirement of such indebtedness." [20] NIC had to get the title to the 17 acres when the debt (the loan from Mountain West Bank) was paid off in order for NIC to be able to use its borrowing power in combination with the Foundation's tax exempt status.

(2) Plaintiffs believe that NIC's agreeing on July 23, 2009, to become the owner of the property to help the Foundation secure the $6 million loan from Mountain

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[17] NIC and North Idaho College Foundation, *Tax Agreement Regarding Revenue Ruling*, dated and signed July 23, 2009, attached and online at http://opencda.com/wp-content/uploads/2010/04/NIC+IRS-63-20-agreement.pdf.

[18] National Association of Bond Lawyers, *Federal Taxation of Municipal Bonds Deskbook, 2nd Edition*. Edited by Martini, Antonio D., Bailey, Michael G., and Oswald, Edwin G. (Newark, NJ: LexisNexis/Matthew Bender, 2003), pages 1392-1404.

[19] *Amortization Schedule*, Account N515009, Borrower: North Idaho College Foundation, Inc., Lender: Mountain West Bank, Coeur d'Alene, ID, Loan Daate: 07-23-2009, Maturity: 08-01-2012.

[20] *Rev. Rul 63-20, supra*.

West Bank was either contrary to the Idaho Constitution, Article VIII, Section 3, or it was a misrepresentation of ownership intent to the IRS. Since NIC was obligated under that "Lease Agreement" to accept fee simple title to the property whenever the Foundation paid off the loan to Mountain West Bank [21], the Plaintiffs believe the "Lease Agreement" was clearly an installment purchase agreement with which NIC incurred a constitutionally prohibited liability.

12. A clearer illustration supporting the Plaintiffs' belief that the "Lease Agreement" was really an installment purchase agreement by NIC can be seen in a comparison of NIC's payment schedule to the Foundation with the Foundation's loan amortization schedule (the schedule of its paying back the loan and interest to the Mountain West Bank). Compare the amounts and dates in the tables below. Follow the money.

"Lease Agreement" Payment Schedule – NIC to Foundation [22]

Payment Date	Amount of This "Lease" Payment	Total Paid To Date	Comments
July 2009	$4,000,000.00	$4,000,000.00	$500K good faith deposit (earnest money) + $3.5 million "prepaid rent" (down payment) to Foundation
February 2010	$1,074,134.02	$5,074,134.02	
July 2010	$1,074,134.02	$6,148,268.04	
February 2011	$1,074,134.02	$7,222,402.06	
July 2011	$1,074,134.02	$8,296,536.08	
February 2012	$1,074,134.02	$9,370,670.10	
August 2012	$1,074,134.02	$10,444,804.12	

Loan Repayment Schedule – Foundation to Mountain West Bank [23]

Payment Due Date	Amount of This Payment	Principal Balance Remaining	Comments
February 2010	$1,074,134.02	$5,055,942.69	
August 2010	$1,074,134.02	$4,084,603.60	
February 2011	$1,074,134.02	$3,094,892.18	
August 2011	$1,074,134.02	$2,083,681.98	
February 2012	$1,074,134.02	$1,052,614.53	
August 2012	$1,074,134.01	$0.00	Total interest paid $444,804.11

[21] See *Lease Agreement, supra*, at page 7, paragraph 20.
[22] Calculated based on *Lease Agreement, supra*, page 2, paragraph 3.
[23] *Amortization Schedule, supra*.

13. Comparing the two preceding tables, one can easily see that the payments from NIC to the Foundation coincide almost perfectly in time and amount with the Foundation's loan repayment to Mountain West Bank. This supports the Plaintiffs' belief that the Foundation was a straw man purchaser on behalf of NIC.

14. The chart on the next page shows in tabular format the organizations and institutions most directly involved in the transaction to acquire the Mill Site property. The colors are included only for ease of comparison and association.

The superscripts by names in the table on the next page are explained by the notes below:

1/ Jon Hippler was scheduled to retire from the Mountain West Bank on December 31, 2010. He was scheduled to be replaced as CEO by Russ Porter. Rod Colwell will become the President and Chief Operating Officer of Mountain West Bank. [24]

2/ Ed Morse is a business partner with Steve and Judy Meyer in Meyer-Morse Ironwood Partners. Morse did the Mill Site purchase appraisal for NIC.

3/ Stephen F. (Steve) and Judith C. (Judy) Meyer are husband and wife. They are also principals in Parkwood Business Properties, LLC.

4/ Councilman Mike Kennedy is President of Intermax Networks, a DBA company within NewMax, Inc., owned by Steve Meyer.

5/ Jim English, Steve Meyer, and Charlie Nipp formed Boise-Eagle, LLC.

6/ Steve Meyer and Charlie Nipp are principals in several LLCs and corporations including Glacier 1250 Ironwood LLC, Glacier 2100 NW Blvd. Inc., Glacier 2100-350 LLC, Glacier 400 Wilbur LLC, Glacier 425 Wilbur LLC, Glacier 600 LLC, Glacier Government Way LLC, Glacier NW Blvd – Seltice LLC, Prairie Crossing Center LLC, Prairie Shopping Center LLC, and many more.

7/ On April 6, 2011, Charlie Nipp announced his retirement from the LCDC. The announcement did not state if his retirement is immediate or at a future date.

8/ On November 17, 2010, Ken Howard was sworn in as a new NIC Trustee replacing Rolly Williams. Williams, not Howard, was on the NIC Board of Trustees at most times relevant to the acquisition of the Mill Site property. However, the minutes of the November 17, 2010, meeting reflect that Howard was first sworn in and seated as a new Trustee. Thereafter, the vote was taken to amend the 2011 NIC budget, and the minutes reflect "unanimous" vote approval by all NIC Trustees.

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[24] IBR Staff (2010, November 2). Mountain West Bank CEO Hippler to retire. *Idaho Business Review*. Retrieved 12-24-2010 from http://idahobusinessreview.com/2010/11/02/mountain-west-bank-ceo-hippler-to-retire/.

Who Is In The Mill Site Money Mix?

	Mountain West Bank	NIC Foundation	NIC Admin. & Trustees	CdA Mayor & Council	LCDC
	Russ Porter	David Wold	Christie Wood	John Bruning	Tony Berns
	Carol Dorris	Timothy Komberec	Ron Vieselmeyer	Ron Edinger	Dennis Davis
	Ronn Rich	**Priscilla Bell**	**Priscilla Bell**	Woody McEvers	Jim Elder
	Jon Hippler [1/]	**Jon Hippler**	Ken Howard [8/]	**Al Hassell**	**Al Hassell**
	Dennis Downer	**Michael Armon**	**Michael Armon**	**Deanna Goodlander**	**Deanna Goodlander**
	Bradley Dugdale	**Bradley Dugdale**			Dave Patzer
	Tom Gibson	**Sandi Bloem**		**Sandi Bloem**	Scott Hoskins
	Jim English [5/]	CJ Buck			Brad Jordan
Ed Morse [2/]	**Steve Meyer** [3/, 6/]	**Steve Meyer** [3/, 6/]	**Judy Meyer** [3/]	**Mike Kennedy** [4/]	**Charlie Nipp** [6/,7/]
	Charlie Nipp [6/]	**Rayelle Anderson**	**Rayelle Anderzon**		
	Rod Colwell				**Rod Colwell**
	Mike Patano	Jody Azevedo			
	Don Shepherd	Mark Fisher			
	Steven Tester	Kimber G. Travis			
	Mick Blodnick	John Goedde			
		Michelle Haneline			
		Mike Chapman			
		Claudia Miewald			
		Ben Rolphe			
		C. Richard Sams			
		James Eisses			
		Susan Thilo			
		James Thorpe			
		Tom Torgerson			
		Marc Wallace			
		John Young			
		R. James Coleman			
		Art Elliott			

15. Now that you have a clearer understanding of some of the participants in the Mill Site acquisition, recall the list from item 10.g., *supra*, and apply the IRS's purchase versus lease

criteria (in "***bold italics***" below) specifically to the NIC and Foundation "Lease Agreement." Remember, it is likely a "purchase" and **not** a "lease" if only one or more of these criteria are met. You can decide for yourself if the deal between NIC and the Foundation was a "lease" or a "purchase."

a. According to the IRS, it is likely a purchase if: "***Portions of the periodic payments are made specifically applicable to an equity to be acquired by the lessee.***" Plaintiffs believe the payment charts show that NIC (the "lessee") acquired 40% equity with the $4 million paid in July 2009, and NIC acquires more equity with each semiannual payment to the Foundation. "Lessee" acquires 100% equity (ownership) after the Foundation has made the last loan payment. [or]

b. According to the IRS, it is likely a purchase if: "***The lessee will acquire title upon the payment of a stated amount of "rentals" which under the contract he is required to make.***" The "Lease Agreement" on page 7, paragraph 20, clearly mandates that the Foundation "shall" transfer title to NIC after the Foundation makes its last payment to the Bank. It further mandates that NIC "agrees" to accept title then. The "Lease Agreement" on page 2, paragraph 2.1, requires that NIC notify the Foundation within 10 days of each annual appropriation for the "lease" payment contained in the annual budget appropriation. This notification exercises the annual renewal option. The method and timing of payments by NIC to the Foundation are described in the "Lease Agreement" on page 2, paragraph 3 and are reflected by the chart titled "Lease Agreement" Payment Schedule – NIC to Foundation", *supra*. [or]

c. According to the IRS, it is likely a purchase if: "***The total amount which the lessee is required to pay for a relatively short period of use constitutes an inordinately large proportion of the total sum required to be paid to secure the transfer of title***." After each annual appropriation and in the aggregate, the lessee will have paid the lessor (Foundation) 100% of the purchase price, **plus the interest** on the Foundation's loan, for a "lease" which by its own terms [25] may not exist for more than four consecutive one-year terms. A typical ground lease is for 99 years though Idaho law limits them to 30 years. After the last payment has been made by the Foundation (or by NIC if NIC exercises the option to buy the property if the Foundation defaults on the loan [26]), NIC agrees to accept fee simple title from the Foundation. [or]

d. According to the IRS, it is likely a purchase if: "***The agreed 'rental' payments materially exceed the current fair rental value. This may be indicative that the payments include an element other than compensation for the use of the property***." Plaintiffs found no evidence thus far indicating that either NIC or the Foundation even tried to determine the property's "current fair rental value." Plaintiffs believe that the existence of Morse's appraisal report for the purchase of the property and the absence of a similar report determining fair rental value demonstrates the intent by NIC all along has been to buy the property, not truly lease or rent it. [or]

e. According to the IRS, it is likely a purchase if: "***The property may be acquired under a purchase option at a price which is nominal in relation to the value of the property at the time when the option may be exercised, as determined at the time of entering into the original agreement, or which is a relatively small amount when***

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[25] *Lease Agreement, supra*, page 2, paragraph 2.2.

[26] *ibid*, page 20, paragraph 21.

compared with the total payments which are required to be made." The only purchase option in the "Lease Agreement" allows NIC to pay the balance of the Foundation's loan only if the Foundation defaults on it (see footnote 26). There is no "purchase option price" because NIC has agreed to take fee simple title to the property after the Foundation makes its last payment to Mountain West Bank. Zero dollars is certainly "nominal" compared to the property's purchase price of $10 million plus approximately $444,804 in interest. [or]

f. According to the IRS, it is likely a purchase if: "***Some portion of the periodic payments is specifically designated as interest or is otherwise readily recognizable as the equivalent of interest***." The total amount of the "lease" payments from NIC to the Foundation equals the total amount of principal plus interest shown on the Mountain West Bank amortization table of the loan to the Foundation. Plaintiffs believe this is conclusive evidence that NIC's periodic payments include an amount that is the interest on the Foundation's loan from Mountain West Bank.

16. Plaintiffs believe that the information in item 15.a. through f. would lead a reasonable person to conclude that the "Lease Agreement" between NIC and the Foundation was an installment purchase contract, not a "lease" as NIC and the Foundation said. Here again is how Plaintiffs believe that runs afoul of the Idaho Constitution, Article VIII, Section 3.

a. Article VIII, Section 3 prohibits NIC from **incurring** any debt or liability which cannot be completely paid off in one annual appropriation unless NIC first gets voter or judicial approval. Plaintiffs believe the contractual liabilities in the "Lease Agreement" were incurred when the "Lease Agreement" was signed. [27] NIC had neither sought nor obtained either voter approval or a judicial confirmation hearing.

b. By the terms of the "Lease Agreement" (page 7, paragraph 20) Plaintiffs believe NIC **incurred** a prohibited liability in July 2009 when it agreed to accept title to the property after the Foundation makes the last payment. NIC could only acquire the property under the "Lease Agreement" if NIC obligated itself to incur the prohibited liability after the Foundation's loan was paid off.

c. By the terms of the "Lease Agreement" (page 2, paragraph 3) Plaintiffs believe NIC agreed and incurred an obligation to make semiannual payments extending beyond one year's annual appropriation. This prohibited liability becomes a debt with each of NIC's annual appropriations.

d. The "Lease Agreement" (page 2, paragraph 2.1) makes the annual lease renewal optional with NIC. That, however, only discharges the liability NIC incurred when it signed the "Lease Agreement." It does not un-incur the liability. NIC would still lose use of the property and the equity ($4 million down payment plus preceding semiannual payments of approximately $1.07 million each) if it fails to make its annual appropriation authorizing payment or if the Foundation defaulted on its loan and NIC failed to exercise the purchase option made available in the "Lease Agreement" (page 7, paragraph 21).

e. It is Plaintiffs' opinion based on analysis of available documents that NIC had no intention whatsoever of not making the installment payments to the Foundation. If it failed to make the installment payments, the tax exemption on the Foundation's interest payment to Mountain West Bank is voided, and the interest becomes taxable. NIC's actions at its regularly scheduled Board of Trustees meeting on November 17, 2010, clearly demonstrate

[27] *Boise Development Co. v. City of Boise*, 26 Idaho 347 at 361-362, 143 P.2d at 535.

NIC's intentions (see items 22 and 23, *infra*). This is further confirmed by the admission of NIC in a brief filed with the Court on February 14, 2011 (see item 33, *infra*).

17. Plaintiffs believe that if NIC and the Foundation were correct in asserting the "Lease Agreement" is not an installment purchase plan on a contract of sale, then they run afoul of the Internal Revenue Code. Unless an agreement is a conditional sale with periodic purchase payments on a contract of sale [not a lease], payments by local governments [NIC] cannot properly be construed as tax-exempt interest on local government obligations. [28]

18. It is Plaintiffs' opinion that the NIC Board of Trustees and the Foundation tried to have the best of two worlds. In one world, they called the agreement a "Lease Agreement" hoping to create the illusion of compliance with the Idaho Constitution, Article VIII, Section 3. In the other world they defined the agreement in terms clearly showing it was a contract of sale to satisfy the Internal Revenue Service and enrich Mountain West Bank by as much as $444,804.11 in tax-exempt interest.

19. On July 1, 2010, First District Court Judge John Mitchell granted the Defendants' motion for Summary Judgment in its entirety and dismissed on the merits and with prejudice and that this is a final determination of the rights of the parties. Mitchell refused to accept Plaintiff's proposition that whether the agreement was a lease or a contract of sale was a material issue of fact to be decided at trial. Mitchell's judgment declared that the agreement between NIC and the Foundation was a lease agreement not in violation of the Idaho Constitution.

20. On August 4, 2010, Plaintiffs' attorney Starr Kelso filed Plaintiffs' notice of appeal to the Idaho Supreme Court from the final judgment entered on July 1, 2010, by District Court Judge John Mitchell.

21. The award of Summary Judgment by First District Court Judge John Mitchell effectively blocked a public trial where evidence would have been presented. Plaintiffs believe that evidence presented at trial would have clearly demonstrated the "Lease Agreement" was in fact a prohibited installment purchase agreement in violation of the Idaho Constitution.

22. On November 17, 2010, the NIC Board of Trustees voted at its regularly scheduled meeting to reopen its fiscal year 2011 budget and approve an amendment which would allow NIC to reallocate funds and purchase the Mill site from the Foundation. [29] On November 18, 2010, NIC issued a press release titled "NIC to acquire mill site property" [30]. Plaintiffs believe that these actions, taken together, further demonstrate that the "Lease Agreement" was and is, in fact, a purchase agreement as alleged by the Plaintiff.

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[28] *Drew v. U.S.*, 551 F.2d 85 (5th Cir. 1977); *Cubic Corp. v U.S.,* 541 F.2d 829 (9th Cir. 1976)
[29] *NIC Board Book for Meeting of November 17, 2010, Tab 6*. Retrieved 11-19-2010 from http://www.nic.edu/board/books/1011.pdf.
[30] *NIC to acquire mill site property*. NIC press release. Retrieved 11-19-2010 from http://www.nic.edu.news/publicrelations/index.asp?details=1&id=2978.

23. Shortly after December 4, 2010, Plaintiffs learned for the first time that between November 17, 2010, and December 3, 2010, NIC had delivered a check for approximately $4.1 million to the Foundation. Plaintiffs also learned that immediately after receiving that check from NIC, the Foundation satisfied its debt to Mountain West Bank, and the deed of trust on the Mill Site was delivered to the Foundation. On that same day, a grant deed was executed by the Foundation, transferring the property to NIC. NIC attorney Lyons confirmed the delivery of the deed to NIC. [31]

23. On December 15, 2010, NIC attorney Marc A. Lyons filed a Motion to Dismiss Appeal as Moot and supporting documents with the Idaho Supreme Court. [32] Lyons assertion was that since the Foundation has paid off the Mountain West Bank note and the deed has been delivered to NIC, all issues in litigation are moot. Plaintiffs do not agree that all issues raised in their initial complaint would be moot by the transfer of ownership from the Foundation to NIC.

24. Plaintiffs do not concede that District Court Judge Mitchell's ruling on July 1, 2010, was correct. Plaintiffs believe strongly that the preceding information shows that the "Lease Agreement" was never anything other than a thinly disguised purchase agreement that violated the Idaho Constitution, Article VIII, Section 3. As stated succinctly in item 17, *supra*, the agreement had to be a conditional sales agreement, not a "Lease Agreement," for the interest on the loan to be tax exempt. However, Judge Mitchell ruled it was a lease.

25. On December 3, 2010, the Foundation elected to pay off the loan from Mountain West Bank. The Foundation had no obligation to either NIC or Mountain West Bank to pay off its loan to the Bank early. It had until August 2012 to make the last payment. However, under the terms of the "Lease Agreement" [33] between the Foundation and NIC, upon paying off the loan and receiving the deed to the property, the Foundation was obligated to deliver the deed to NIC, and NIC was obligated to accept it. Thus, on December 3, 2010, NIC became the owner of the Mill Site property.

26. The "Lease Agreement" between the Foundation and NIC, signed in July 2009 and approved in August 2009, had never been amended, nor had it been supplemented by any purchase agreement between the Foundation and NIC. Plaintiffs believe the "Lease Agreement" is the only relevant agreement in existence between the Foundation and NIC to cause ownership of the Mill Site property to be delivered to NIC as it was on December 3, 2010. Plaintiffs agree that as of December 3, 2010, NIC was the owner of the Mill Site property.

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[31] Affidavit of Marc A. Lyons in Support of Motion to Dismiss Appeal as Moot (December 15, 2010), Idaho Supreme Court Docket No. 37945-2010.

[32] Letter of Marc A. Lyons, Lyons & Ramsden LLP, to Clerk of the Idaho Supreme Court, *Re: Spencer, et al, v. North Idaho College, Docket No. 37945-2010*, (December 15, 2010), with enclosures.

[33] *Lease Agreement, supra*, page 7, paragraph 20.

27. Plaintiffs believe the "Lease Agreement" provided only one circumstance under which NIC could buy the Mill Site: If the Foundation defaulted on its loan to Mountain West Bank. The Foundation did not default on its loan to the Bank. Therefore, under the terms of the "Lease Agreement" affirmed and relied upon by Judge Mitchell, all payments of money from NIC to the Foundation could only have been lease rent payments. Although the "Lease Agreement" did not allow NIC to buy the property unless the Foundation defaulted on its loan, it did specifically allow for NIC to prepay rent. [34]

28. Here are the "rent" payments actually made by NIC to the Foundation:

Payment Date	Amount Paid	Comments
July 23, 2009	$4,000,000.00	"Prepaid rent"
February 1, 2010	$1,074,134.02	
August 1, 2010	$1,074,134.02	
December 3, 2010	$4,139,152.15	Final "rent" payment
	Total $10,287,420.19	Total "prepaid rent" paid for period July 23, 2009, through July 22, 2013.

It is very important that the reader understand that with the payments made as shown in the table above, NIC had prepaid rent through July 22, 2013, as provided in the "Lease Agreement," paragraphs 2, 2.1, and 3.

29. However, the Foundation paid off its loan to Mountain West Bank in December 2010, and on December 3, 2010, the Foundation delivered the deed to the Mill Site to NIC on that date. On December 3, 2010, NIC and not the Foundation owned the property. Plaintiffs believe NIC should not have paid rent on property it already owned.

But if the reader believes NIC "rented" the property only from July 23, 2009, until December 3, 2010, a total of 499 days including both dates, then based on the table above showing that NIC paid $10,287,420.19 in "rent", **NIC paid the Foundation $20,616.07 per day in "rent" for bare land.** Plaintiffs believe this absurdly large rental figure clearly shows that the document titled "Lease Agreement" was an installment purchase agreement created to give the illusion of compliance with the Idaho Constitution, Article VIII, Section 3.

And if, as District Court Judge John T. Mitchell ruled, the transaction really was only a lease and not a purchase, then Plaintiffs believe the Foundation owes NIC a refund of between $6 million and $7 million that was rent paid by NIC on land it already owned. The "Lease Agreement" does not explicitly state how much the annual lease rent is. The figures in the "Lease Agreement" echo the figures in the Foundation's amortization table, *supra*. The exact amount of the refund would have been calculated at trial had Judge Mitchell allowed the case to proceed to trial.

[34] *ibid,* page 2, paragraph 2.1.

The "Lease Agreement" did, however, specify the maximum term of the lease as four years (48 months). Since the total amount of rent to be paid by NIC equaled the amount to be repaid by the Foundation to the Bank was approximately $10,444, 804.11, dividing that figure by the 48-month maximum lease period gives the monthly rent as approximately $217,600.08. Using that approximate monthly rent, here is Plaintiffs' calculation of the refund the Foundation owes NIC:

Payment for This Period	Rent Prepaid for This Period
December 2010	$217,600.08
January 1, 2011 – July 22, 2011	$1,305,600.48
July 23, 2011 – July 22, 2012	$2,611,201.02
July 23, 2012 – July 22, 2013	$2,611,201.02
	Total Refund Due NIC $6,745,602.60

30. Plaintiffs believe that if the NIC Trustees do not act to recover the approximately $6.7 million owed NIC by the Foundation, the NIC Trustees will have converted public money to the use of the Foundation, a private corporation. Likewise, Plaintiffs believe that if the Foundation Board of Directors does not return the excess "prepaid rent" money it received, it will have converted to its own use public money entrusted to it by NIC when NIC wrongly prepaid rent on property it already owned.

31. On January 21, 2011, NIC President Dr. Priscilla Bell appeared personally before the Idaho Legislature's Joint Finance-Appropriations Committee to plead for more state money. She strongly suggested that Kootenai County property taxpayers will pay more if the state reduces community college funding. She did not reveal the overpayment of $6.7 million in "prepaid rent" the NIC Board of Trustees had approved paying to the Foundation. [35]

32. Plaintiffs' attorney Starr Kelso has filed numerous motions with the Idaho Supreme Court to try and get the Court to recognize that Judge Mitchell's decision awarding summary judgment to Defendants was wrong and contrary to Idaho law.

33. In response to one of the Plaintiffs' motions, defendant NIC filed a reply brief on February 14, 2011. In that reply brief, defendant NIC made this admission: "The College was always forthright in its ultimate goal of **acquiring** the Mill Site property. Media releases [from NIC] and announcements in public meetings made it clear that the **acquisition** would cost ten million dollars, **plus the interest** on the Foundation's debt." [36] [*emphasis added*]

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[35] Russell, B.Z. (2011, January 26). NIC President: State cuts could hike N. Idaho property taxes. *The Spokesman-Review*. Retrieved February 9, 2011, from http://www.spokesman.com/stories/2011/jan/26/nic-prez-state-cuts-could-hike-ni-property-taxes/ .

[36] Lyons, M. Defendant's Reply Brief On Standing, p. 5-6, February 14, 2011.

"Acquire" is defined: "1. To come into possession or ownership of; get as one's own: *to acquire property*." [37]

Plaintiffs believe Lyons' brief shows the clear and now admitted intent of defendant NIC has always been to own the property, not just lease it for use. And as noted in item 15.f., *supra*, defendant NIC now admits that its payments to the Foundation included interest payments clearly indicative of an installment purchase agreement, not a lease agreement.

Plaintiffs believe this entire admission by defendant NIC confirms what plaintiffs have asserted since the beginning: The "Lease Agreement" was a device to circumvent the Idaho Constitution, Article VIII, Section 3. The Foundation agreed to be a straw man purchaser of the property on behalf of the College. Plaintiffs believe this evasion was an effort by the College to do indirectly that which it believed it would be unable to do directly through either a vote of the electors or judicial confirmation required by the Idaho Constitution, Article VIII, Section 3.

34. The purpose of Plaintiffs' lawsuit was to get the North Idaho College Board of Trustees and the North Idaho College Foundation, Inc., Directors to comply with the Idaho Constitution and state law. NIC was spending the public's money, and NIC had an obligation to obey the Idaho Constitution in spending it.

35. The remaining unresolved issues in this case are still waiting to be scheduled for briefs and argument before the Idaho Supreme Court under docket number 38595-2011.

Plaintiffs believe that if the District Court and the Idaho Supreme Court agree that all issues in the lawsuit are now moot because the "lease" has been extinguished, then both courts will have tacitly approved NIC's proposition that an unconstitutional and unlawful act can be made constitutional and lawful by the successful completion of the unconstitutional and unlawful act.

The courts will further validate this proposition if the NIC Foundation is not ordered to repay the excess rent "prepaid" by NIC on property NIC already owned. If the District Court and the Idaho Supreme Court decide to not order the refund of excess "prepaid rent" because ownership was transferred to NIC as a result of the "Lease Agreement," then Plaintiffs believe it will be an explicit acknowledgement by both courts that the "rent" payments were, in fact, installment purchase payments as alleged by Plaintiffs and prohibited by the Idaho Constitution, Article VIII, Section 3.

Plaintiffs believe that such a determination by either or both courts would amount to judicial amendment of the Idaho Constitution, Article VIII, Section 3. This would be a usurpation of the authority constitutionally granted and limited to the legislature and qualified electors by the Idaho Constitution, Article XX.

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[37] Nichols, W.R. (Ed. Dir.), et al. *Random House Webster's Unabridged Dictionary* (2nd Ed.). New York. Random House.

36. In summary, Plaintiffs believe the evidence shows:

a. The "Lease Agreement" between NIC and the Foundation was, in fact, an installment purchase agreement which required either a 2/3 approval by voters in a special election or judicial confirmation to comply with the Idaho Constitution.

b. The NIC Board of Trustees intentionally avoided seeking either the required public vote or judicial confirmation. The NIC Trustees did not want to risk either voter rejection or a prohibitive judicial ruling.

c. District Court Judge John Mitchell erred in awarding summary judgment to Defendants NIC and the Foundation. Whether the "Lease Agreement" was in fact an installment purchase agreement was a material issue of fact to be decided at trial, not in a summary judgment hearing.

d. The "Lease Agreement" is the only relevant agreement in existence between the Foundation and NIC causing ownership of the Mill Site property to be delivered to NIC on December 3, 2010.

e. If the "Lease Agreement" really was a lease and not an installment purchase agreement, then all money paid by NIC to the Foundation was rent under the terms and period of the "Lease Agreement."

f. The Foundation had no obligation to either Mountain West Bank or to NIC to pay off its loan balance early on December 3, 2010.

g. When the Foundation chose to pay off its loan balance to Mountain West Bank on December 3, 2010, it was obligated by the "Lease Agreement" to deliver the deed of ownership on the Mill Site property to NIC. NIC was obligated by the "Lease Agreement" to accept the deed of ownership. On December 3, 2010, NIC became and is the owner of the Mill Site property.

h. By December 3, 2010, NIC had "prepaid rent" to the Foundation in the amount of approximately $10,287,420.19 for the period July 23, 2009, through July 22, 2013.

i. Since NIC owned the property after December 3, 2010, all "rent" prepaid to Foundation and covering the period December 4, 2010, through July 22, 2013, and including a portion of the $4 million "rent" prepaid on July 23, 2009, must be refunded by the Foundation to NIC. Plaintiffs' estimate the amount of refund due NIC to be approximately $6,745,602.60.

j. The actual calculation of the annual and monthly "rent" payments and therefore the "prepaid rent" to be refunded would have been made a trial. That District Court Judge John Mitchell has ruled there will be no trial does not change the Plaintiffs' belief that NIC is due and is obligated to seek millions of Kootenai County property taxpayers' dollars to be refunded from the Foundation.

k. If NIC refuses to seek the refund of public money it is due from the Foundation, Plaintiffs believe that the third cause of action in our original complaint (refund of rent) allows us to proceed to seek that refund on behalf of the taxpayers of Kootenai County.

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