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The Honorable Mark Ricks
Senate Majority Leader
Idaho State Senate
STATEHOUSE MAIL

THIS IS NOT AN OFFICIAL ATTORNEY GENERAL OPINION
AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE

Dear Senator Ricks:

In your letter of January 8 you pose the two following questions regarding the Farm Foreclosure Review Board recently established by the Governor:

1. What is the statutory basis for this program?
2. Can the farm foreclosure board take effective action to avert or prevent foreclosure proceedings?

The Farm Foreclosure Review Board was created by Executive Order No. 85-28, a copy of which is attached. The executive order does not specify any statutory basis for the establishment of this board. A review of the statutes pertaining to agriculture and foreclosure proceedings fails to identify any specific statutory basis for creation of the board. However, because it appears from the executive order that the board has very limited authority and cannot affect the rights of third parties, acting essentially in an advisory capacity, there is probably sufficient authority for establishment of such board.

Idaho Code § 68-802 sets out the authority of the Governor to issue executive orders. It provides in pertinent part, as follows:

The supreme executive power of the state is vested by section 5, article IV, of the constitution of the state of Idaho, in the governor, who is expressly charged with the duty of seeing that the laws are faithfully executed. In order that he may exercise a portion of the authority so vested, the governor is authorized and empowered to implement and exercise those powers and perform those duties by issuing

executive orders from time to time which shall have the force and effect of law when issued in accordance with this section and within the limits imposed by the constitution and laws of this state.

The statutory authorization to issue executive orders is stated in general terms. The statute authorizes the governor to issue executive orders "in order that he may exercise a portion of the authority so vested" by Idaho Const., art. IV, § 5. That constitutional section provides:

The supreme executive power of the state is vested in the governor, who shall see that the laws are faithfully executed.

The statute authorizes issuance of executive orders "to implement and exercise those powers."

All of the authorization language in the statute relates to exercise of the executive power. Thus, the governor may utilize executive orders to aid in carrying out constitutional or statutory duties of the executive branch. When so used, and when not in conflict with the constitution or statutes, executive orders have the force and effect of law for two years.

The fact that executive orders have the force and effect of law does not mean that they could be used to infringe upon legislative or judicial functions. Rather, they are limited to use in carrying out executive duties.

Executive Order 85-28 does not identify the specific statutory duties which are being carried out by the executive order. However, implementation of the executive order was delegated to the Department of Agriculture and presumably it was intended to aid in carrying out the executive duties of that department.

In this connection, Idaho Code § 22-103 imposes various duties upon the director of the department. For example, the following subsections of that section empower the director to:

- (4) Encourage and promote in every practical manner, the interests of agriculture, horticulture, apiculture, aquaculture, the livestock industries, poultry, and fowl raising, wool and fur-bearing animals and their allied industries.

...

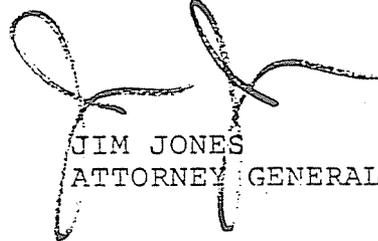
- (21) Assist in the improvement of country life, farm occupations, and to cooperate in effectuating equality of opportunity of those employed in agricultural pursuits in the state of Idaho.

While Executive Order 85-28 does not specifically identify the statutory authority upon which it is based, it is arguable that the order can be characterized as implementing the executive duties imposed by Idaho Code § 22-103. If the order purported to confer substantive authority to the Farm Foreclosure Review Board, including the ability to impact third persons who are not a part of state government, it would likely be held to be an impermissible exercise of executive power. See, for instance, Buettell v. Walker, 59 Ill. 2d 146, 319 N.E.2d 502, 506. Since participation in board proceedings is strictly voluntary on the part of all parties and since the board's recommendations are not binding but merely advisory, it does not appear that establishment of the board is an impermissible exercise of executive power. Although it would be preferable for the order to identify the statutory authorization on which it is purportedly based, the order could be characterized as implementing the executive duties imposed by Idaho Code § 22-103.

The second question which you have proposed, i.e. whether the board can take effective action to avert or prevent foreclosure proceedings, has basically been answered above. The very factor which probably keeps the board from being an impermissible exercise of executive power--the fact that participation is voluntary and that the board has no power to affect the rights of third parties--prevents it from being able to take effective action to avert or prevent foreclosure proceedings. If a lender does participate in a mediation proceeding which results in a recommendation to pursue a course other than foreclosure, the board has no power to impose its recommendation and the lender has

no obligation to accept it. While there may be merit in attempting to mediate such disputes, it should be made clear to parties seeking assistance from the board that its authority is so limited. Were it to be billed as a means of preventing or averting farm foreclosures, it could have the counterproductive effect of raising false hopes in those who desperately need assistance. If the idea were fostered that the board could take effective action to prevent foreclosures, those in danger of foreclosure might fail to take other actions, such as seeking the advice of legal counsel, which could be more effective in resolving their dilemma. Therefore, it should be made clear that the board's function is merely a mediation role.

Sincerely,



JIM JONES
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JTJ/tg