

INFORMAL GUIDELINES OF THE ATTORNEY GENERAL

December 30, 1986

William R. Meiners, Chairman  
Idaho Outfitters and Guides Board  
1365 N. Orchard, Room 372  
Boise, Idaho 83706

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

Dear Mr. Meiners:

QUESTION PRESENTED:

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Can an individual be criminally prosecuted for both outfitting without a license and guiding without a license in violation of title 36, chapter 21, Idaho Code, without violating constitutional or statutory provisions against double jeopardy?

### CONCLUSION:

Illegal outfitting and guiding appears to be one act so that double punishment is prevented by Idaho Code § 18-301. Because this statute provides a basis for resolving the double jeopardy issue, the question of constitutional double jeopardy is not analyzed.

### ANALYSIS:

A problem has arisen with the prosecution of individuals who are both outfitting and guiding without a license. It has been held in an Idaho district court that to convict a person of both outfitting and guiding, based on the same sequence of events, would subject a person to double jeopardy because the individual would be punished twice for what is essentially one crime. This problem arises because of the last sentence of the definition of a guide found in Idaho Code § 36-2102(c): "Any such person [who is guiding] must be employed by an outfitter and anyone offering or providing such [guiding] services who is not so employed shall be deemed to be an outfitter." This sentence seems to "telescope" the offenses together so that guiding and outfitting are the same offense.

Two aspects of the legal concept of "double jeopardy" must be reviewed. The first aspect is the constitutional one. The fifth amendment of the United States Constitution provides in relevant part that no "person [shall] be subject for the same offense to be twice put in jeopardy of life or limb. . . ." This clause prevents a person from being convicted twice for the same offense. *Brown v. Ohio*, 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977); *State v. Martinez*, 109 Idaho 61, 66, 704 P.2d 965 (1985). The double jeopardy clause of the fifth amendment has been made applicable to the states through the fourteenth amendment. *Benton v. Maryland*, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969). In determining what constitutes the "same offense," the United States Supreme Court has held that where the same act or transaction constitutes a violation of two distinct statutory provisions, it must be determined whether each crime requires proof of an additional fact which the other crime does not require. *Blockberger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932). Art. I, § 13, of the Idaho Constitution similarly states that "[n]o person shall be twice put in jeopardy for the same offense; . . ." In interpreting this provision, Idaho courts have followed the *Blockberger* ruling. *State v. Horn*, 101 Idaho 192, 610 P.2d 551 (1980).

The second aspect is the statutory one. The Idaho legislature has codified the constitutional protection against double jeopardy and expanded its protection. Idaho Code § 18-301 states:

An act or omission which is made punishable in different ways by different provisions of this code may be punished under either of such provisions, but in no case can it be punished under more than one; an acquittal or conviction

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and sentence under either one bars a prosecution for the same act or omission under any other.

The constitutional provisions discussed above refer to jeopardy for the "same offense" and do not prohibit convictions for multiple charges so long as each charge has at least one element not common to the others. *State v. Sensenig*, 110 Idaho 83, 714 P.2d 52, 53 (Ct. App. 1985). In contrast, Idaho Code § 18-301 refers to an "act or omission" and prohibits the multiple punishment of a defendant regarding crimes committed within the same act regardless of whether those crimes required proof of differing elements and therefore enlarges the scope of the constitutional provisions. *State v. Werneth*, 101 Idaho 241, 611 P.2d 1026 (1980). If a defendant's single action creates liability under two criminal statutes, that defendant can only be punished under one statute. *Horn*, 101 Idaho at 197.

It is necessary to understand the statutory distinction between a "guide" and an "outfitter" before applying the double jeopardy analysis. A guide is defined by Idaho Code § 36-2102(c) as:

[A]ny natural person who, for compensation or other gain or promise thereof, furnishes personal services for the conduct of outdoor recreational activities limited to the following: hunting animals or birds; float or power boating on Idaho rivers and streams; fishing; and hazardous mountain excursions, except any employee of the state of Idaho or the United States when acting in his official capacity. Any such person must be employed by an outfitter and anyone offering or providing such services who is not so employed shall be deemed to be an outfitter.

An outfitter is defined by Idaho Code § 36-2102(b) as:

[A]ny person who, in any manner, advertises or holds himself out to the public for hire providing facilities and services, for the conduct of outdoor recreational activities limited to the following: hunting animals or birds; float or power boating on Idaho rivers and streams; fishing; and hazardous mountain excursions and maintains, leases or otherwise uses equipment or accommodations for such purposes. Any firm, partnership, corporation or other organization or combination thereof operating as an outfitter shall designate one (1) or more individuals as agents who shall conduct its operations and who shall meet all of the qualifications of a licensed outfitter.

These definitions overlap to some degree. The distinction is that the guide is the person who provides the personal service for conduct of the outdoor recreational activity, i.e., the one who actually accompanies and directs the client during the hunting or boating trip; the outfitter is the person who obtains the client through advertising and provides the services for the recreation. The distinction between "services" in Idaho Code § 36-2102(b) and "personal services" in Idaho Code § 36-2102(c) is not clarified in the Act, presumably "services" would include "personal services" as well as other non-personal services.

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The conceptual distinction between outfitters and guides becomes blurred when one individual is acting as an outfitter and guide without a license and performs all of the activities required to provide a client with an outdoor recreational activity. It is difficult to segregate the different elements of outfitting and guiding in such a context, so that the entire sequence of events is viewed as "one act." Also, the last sentence of Idaho Code § 36-2102(c) seems to merge the two activities into one act. Therefore, attempting to punish an individual for both illegal outfitting and illegal guiding would be viewed as an attempt to punish an individual twice for the same act, in violation of Idaho Code § 18-301.

Since Idaho Code § 18-301 provides a basis for finding that prosecutions for illegal outfitting and guiding would present double jeopardy problems, constitutional double jeopardy will not be discussed.

Very truly yours,

STEVEN J. SCHUSTER  
Deputy Attorney General  
Natural Resources Division

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