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February 8, 1988

The Honorable Dean Haagenson
Idaho State Representative
STATEHOUSE MAIL

THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE
ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE

Dear Representative Haagenson:

Your letter of January 20, 1988, asks our opinion as to how the floating golf green proposed by Hagadone Hospitality on Lake Coeur d'Alene may be impacted by Idaho Code § 67-4304. That statute was enacted in 1927 and authorizes the governor "to appropriate in trust for the people of the state of Idaho all the unappropriated water of Priest, Pend Oreille and Coeur d'Alene Lakes or so much thereof as may be necessary to preserve said lakes in their present condition." Specifically, you ask the following three questions:

- (1) What authority does the governor have under the 1927 statute and can the statute be used to affect the floating green proposal in any way?
- (2) In his comments the governor stated, "They (Hagadone Hospitality) need a water right to use the surface of that lake. . . .He [Hagadone] has yet to receive all the necessary approval." Can a valid argument be made that the water right of the people of the state of Idaho held in trust by the governor be used to control surface encroachments or imply authority over the lake bed?
- (3) Certain individuals have suggested that I have a conflict of interest because I have asked questions about the nature of this water right. Their allegations

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are premised upon the fact that a company in which I have an ownership interest, Contractors Northwest, has a construction contract with Coeur d'Alene Racing Limited in which Hagadone Hospitality is a partner. Does a conflict exist, and if so, what steps should I take in this matter?

In response to your inquiries, I have reviewed a memorandum from John W. Homan to R. Keith Higginson, dated January 4, 1987; the actual applications for, and permits issued by the state reclamation engineer; and newspaper articles from the Idaho Statesman dated June 24 and 25, 1927, concerning this matter. As outlined below, it is my conclusion that the statute in question was enacted to grant to the Governor an appropriative water right for the purpose of maintaining the water level in Lake Coeur d'Alene. The purpose in maintaining the water level was to prevent increases to or decreases from a certain level in the lake, thus disrupting beneficial uses expressly recognized by the Idaho Legislature in Idaho Code § 67-4304. The recognized beneficial uses were "scenic beauty, health, recreation, transportation and commercial purposes." As such, the water right granted to the Governor may only be used to prevent such interference with maintenance of the level of Lake Coeur d'Alene as would impact the recognized beneficial uses. Finally, it is my conclusion that you do not have a conflict of interest in this matter.

I.

My analysis begins with a review of the historical context within which the statute was passed. In the early 1920's, certain interests in the downriver states of Washington and Oregon conceived and began construction of the Columbia Basin project. A portion of the project contemplated utilizing Priest, Pend Oreille and Coeur d'Alene Lakes as large reservoirs for the storage of water. By turning the lakes into reservoirs, dramatic fluctuations in the lake levels would result. For example, the shoreline of Lake Pend Oreille would have fluctuated an additional 11 feet over its natural high and low water marks.

Idaho residents became greatly concerned that these fluctuations would destroy the scenic value of the shoreline. As stated at the time by Mr. E. F. Hitchner of Sandpoint, Idaho, who had travelled to Boise to testify about the proposal:

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Our shoreline is one of our greatest scenic assets and when the timber is gone from our mountains we shall have to rely on our scenic attractions. If Montana thought the plan was bad for that part of its state affected, and Mr. Swenson thinks it bad for the other two lakes, we are very sure it is bad for us, and we have come down to protest.

Idaho Statesman, June 24, 1927.

Responding to the challenge, the Idaho Legislature passed the statute in question in record time:

Idaho's legislature Monday approved inside three-quarters of an hour, a measure designed to lock up North Idaho's waters for Idaho's use. It was house bill No. 48, passed unanimously by the house and with only six dissenting votes in the senate.

Idaho Statesman, June 25, 1927. The governor signed the bill the same day.

Following the legislative action, then Governor Baldrige applied to the reclamation engineer for a water permit. The applications make clear that the purpose of the appropriation was to maintain the water surface elevation of each of the three lakes in question. In the application for Lake Coeur d'Alene it is stated:

[the] quantity of water claimed under this application is 1,000,000 acre-feet annually, the quantity necessary to protect and preserve Coeur d'Alene Lake for recreational purposes and that quantity necessary to provide for maintaining the lake water surface elevation at a point not higher than the natural high water level of the lake and at a point not lower in any season, than the lower water level of said Lake, the appropriation thus covering all of the water in the Lake below the natural low water

elevation, and sufficient of the water flowing into said Lake to maintain it at its natural level.

In the subsequent proof of application of water to beneficial use, a deposition filed by the governor acknowledged the appropriative nature of the water right for the purposes contemplated by the statute. In response to the question, "State for what purpose water is used and describe place of use," he answered: "Purpose of use is preservation of said waters in said lake in its present condition for scenic beauty, health and recreation purposes necessary and desirable for all the inhabitants of the state." The supporting depositions of the state game warden and the state land commissioner both indicated that the purpose of the appropriation was to preserve the shoreline of Lake Coeur d'Alene.

In short, the historical record clearly indicates that the statutory duty and fiduciary responsibility of the governor is to prevent any junior appropriation or construction of works that would lead to fluctuations in the lake level of Coeur d'Alene Lake beyond the natural and ordinary low and high water marks and that would consequently interfere with the statutorily recognized beneficial uses.

II.

The next issue to be considered is whether an appropriative water right may be asserted by the holder as a method of seeking regulatory or management responsibility over surface waters of Lake Coeur d'Alene. The answer to this question requires a brief review of water rights law and then an application of that law to this specific water right. We conclude that because of the appropriative nature of the water right issued here, no such authority was intended by the Idaho Legislature.

Before analyzing this issue, however, it is necessary to clarify a memorandum issued by Mr. John Homan. This one page document has been cited for the proposition that the statute in question confers upon the governor "an additional statutory and fiduciary responsibility as trustee for the citizens of Idaho to see that the trust water in Lake Coeur d'Alene is managed in accordance with Idaho law." Mr. Homan's analysis is as follows:

The water right is nonconsumptive and only contemplates maintaining the lake at a level above the natural low water stage. The purpose of the appropriation was to maintain a level of water in the lake to ensure the preservation of scenic beauty, health, recreation, transportation and commercial purposes necessary and desirable to all the people of Idaho. Under I.C. § 67-4304, the water appropriated to maintain this constant lake level was deemed to be beneficial use of the water.

The Governor holds the water in trust for the benefit of the people of Idaho. The trust relationship imposes upon the Governor a fiduciary responsibility to manage the water according to the original terms of the trust. Thus, the Governor has a duty to manage 1,000,000 a.f. of water in Coeur d'Alene Lake so as to preserve the scenic beauty, health, recreation, transportation and commercial purposes necessary and desirable for the people of Idaho.

Finally, I.C. § 67-4304 creates an express trust which appoints the Governor as trustee over the water for the benefit of the people of Idaho. The Governor's appointment as trustee carries with it all the powers necessary to carry out his fiduciary duty to manage the water within the original terms of the trust.

To the extent that Mr. Homan's analysis might be construed to imply that the holder of the water right can seek to manage surface activities that do not affect the level of the lake, it would be in error. The appropriative nature of this water right is explicit in the statute, Idaho Code § 67-4304, which states:

The governor is hereby authorized and directed to appropriate in trust for the people of the state of Idaho all the unappropriated water of Priest, Pend

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d'Oreille and Coeur d'Alene Lakes or so much thereof as may be necessary to preserve said lakes in their present condition. The preservation of said water in said lakes for scenic beauty, health, recreation, transportation and commercial purposes necessary and desirable for all the inhabitants of the state is hereby declared to be a beneficial use of such water.

As previously noted, the subsequent actions of the state in issuing the water right carried out the intent of the legislature.

An appropriative water right is not a typical type of real property right. It is not measured by a metes and bounds description as is most real property. An appropriative water right is defined by the following elements describing the right: priority, amount, season of use, purpose of use, point of diversion, place of use, source, annual volume of consumptive use, and the name of the claimant. Olson v. Idaho Department of Water Resources, 105 Idaho 98, 101, 666 P.2d 188 (1983); Idaho Code § 42-1411(2) (Supp. 1987). An injury to a water right occurs by an impairment of or interference with one or more of the elements of the right. An example would be an upstream junior appropriator who diverts water needed to satisfy a downstream senior appropriator. The senior appropriator may obtain damage relief for past injury to his water right and injunctive relief for future threatened injury. Nordick v. Sorenson, 81 Idaho 117, 338 P.2d 766 (1959); MacKinnon v. Black Pine Mining Co., 32 Idaho 228, 179 Pac. 951 (1919).

The assertion that an appropriative water right such as that authorized by Idaho Code § 67-4304 could be used to monopolize the development of future water rights, was expressly rejected by the Idaho Supreme Court in the Malad Canyon case. In that case, the Idaho Department of Parks had appropriated water under Idaho Code § 67-4307, a statute that parallels the language in the Coeur d'Alene appropriation statute. The Supreme Court addressed the fears of water users that the department's trustee status would serve to monopolize future water development:

I.C. § 67-4307, at issue herein, only authorizes the Department of Parks to appropriate, in trust for the public,

certain clearly designated waters for nonconsumptive use. We are of the opinion that the legislature in the instant case has not adopted an insidious scheme in an attempt to monopolize the state's unappropriated waters or to condemn already appropriated waters.

State Department of Parks v. Idaho Department of Water Administration, 96 Idaho 440, 443, 530 P.2d 924, 927 (1974).

The Malad Canyon case thus confirms our conclusion that the trustee of a minimum-stream or lake-level-maintenance water right has a fiduciary duty only to protect the stream or lake against junior appropriators who would interfere with the minimum streamflow or the lake level. In this case, no water right has been sought, nor could a case be reasonably made that an appropriative water right would be necessary, for the operation of the floating golf green. The Idaho Supreme Court has laid to rest the notion that the trustee has been granted expansive powers to regulate all future development of the resource.

Finally, a careful look at the nature of the assertion of authority in this instance demonstrates the unacceptable results of construing Idaho Code § 67-4304 broadly. If the governor had the authority to regulate non-appropriative uses of the lake, then dock-owners, marinas, log storage facilities, boaters, rafters, in short virtually any use of the lake, would come under his purview. It is quite obvious that this would lead to an unreasonable and duplicative result. The legislature has created the Lake Protection Act (Idaho Code § 58-142 et seq.) to regulate encroachments to surface waters, and the Safe Boating Act (Idaho Code § 67-7001 et seq.) to regulate other surface activities.

Here, it is our opinion that the governor, as a senior appropriator, would only have a cause of action to prevent a junior appropriator from taking action that would cause fluctuation in the level of Lake Coeur d'Alene beyond the natural and ordinary low and high water marks. The governor would have no authority as trustee under Idaho Code § 67-4304 to use the water right of the people of the state of Idaho to regulate, manage or control surface encroachments that do not impair this right. Finally, since the present project will not influence the level of

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Lake Coeur d'Alene, the governor has no authority under Idaho Code § 67-4304 to oppose the project.

III.

Your third question was whether you had a conflict of interest in this matter. Idaho Code § 59-201, which arguably is the only statute that could be applicable here, provides:

Officers not to be interested in contracts.
-- Members of the legislature, state, county, city, district and precinct officers, must not be interested in any contract made by them in their official capacity, or by any body or board of which they are members.

This office has previously issued two opinions, one guideline and several letters construing this section of the Code and article 7, § 10, of the Idaho Constitution which states:

Making profit from public money prohibited.
-- The making of profit, directly or indirectly, out of state, county, city, town, township or school district money, or using the same for any purpose not authorized by law, by any public officer, shall be deemed a felony, and shall be punished as provided by law.

I am enclosing copies of these earlier opinions for your review.

In general, a conflict of interest means a situation where a public official exercises discretion either by affirmative act or omission to act in the course of his official duties which may directly or indirectly result in economic gain for himself or a member of his household. It does not include the general public interest a public official has by virtue of his profession, trade or occupation where his interest is the same as all others similarly engaged in the profession, trade or occupation. Further, a conflict does not exist where a public official acts upon a revenue measure, appropriation measure or any measure imposing a tax when similarly situated members of the general public are affected by the outcome of the action in a

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substantially similar manner. The latest Idaho case discussing this issue is Manookian v. Blaine County, 112 Idaho 697, 735 P.2d 1008 (1987).

I first note that there is no contract involved nor any economic gain resulting to you from any legislative action you could take in this matter. As indicated in your letter, there is no contract between any governmental entity, which you could influence as a legislator, and Coeur d'Alene Racing Limited. The distinguishing factor to focus on is who the contracting parties are. If you as a legislator were to contract with the legislature itself, for example, to print the session laws, the contract would be void, no compensation could be paid and criminal sanctions could apply. That is, however, not the case here. You are not interested in a contract made by you in your official capacity or made by the body of which you are a member. Secondly, your interest here is substantially similar to the interest of other members of the general public. There would be a much closer judgment call to be made if a proposal to repeal the pari-mutuel dog racing legislation was to be considered. I hope that this information is helpful. If I can be of further assistance, please advise.

Very truly yours,



PATRICK J. KOLE
Chief, Legislative and
Public Affairs Division

PJK/tg

Enclosures