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ATTORNEY GENERAL OPINION NO. 91-5

TO: Michael D. Crapo
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Tom Boyd
Speaker
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QUESTIONS PRESENTED:

- 1) Are the additions to the State Water Plan developed pursuant to Idaho Code Section 42-1734 et seq., such as the *Comprehensive State Water Plan: Payette River Reaches*, "changes" to the State Water Plan as contemplated by Article XV, Section 7 of the Idaho Constitution?
- 2) If the answer to question one above is yes, does the Legislature, during its current regular session have jurisdiction to review and approve, reject or amend the *Comprehensive State Plan: Payette River Reaches*?
- 3) If your answer to question one above is no, does the Legislature, during its current regular session, have jurisdiction pursuant to Idaho Code Section 42-1734B(6) to review and approve, reject or amend the *Comprehensive State Plan: Payette River Reaches*?

CONCLUSION:

1. No. The term "change" in section 7, art. 15 of the Idaho Constitution only refers to deletions or revisions to the existing State Water Plan. Since the *Comprehensive State Plan: Payette River Reaches* by the Idaho Water Resource Board is an addition of a new

component to the existing State Water Plan, it is not a change under section 7, art. 15 of the Idaho Constitution.

2. Not applicable.
3. Section 7, art. 15 of the Idaho Constitution does not prohibit legislative action on the Payette River Plan during the current legislative session. While Idaho Code § 42-1734B(6) provides for one method of legislative review of such river plans, it does not preclude the Legislature from enacting a specific law approving, amending or rejecting the *Comprehensive State Plan: Payette River Reaches*.

INTRODUCTION

The Idaho Water Resource Board (Water Board) adopted the *Comprehensive State Water Plan: Payette River Reaches*, (*Payette River Plan*), on February 1, 1991 and submitted it to the Legislature on the same day. The *Payette River Plan*, among other things, prohibits hydropower development within certain reaches of the Payette River. This provision has proven controversial because Gem Irrigation District (District) seeks to build a hydroelectric facility on the North Fork of the Payette River. The Federal Energy Regulatory Commission (FERC) issued to the District a preliminary permit for the North Fork Project, FERC Project No. 10396, 43 FERC ¶ 62,185. A preliminary permit preserves an applicant's priority to develop a project while the applicant investigates the feasibility of the project. The District's permit will expire no later than May 1, 1991. Thus, the District must submit an application for a license to the FERC by that date to preserve the right to develop the project. If the *Payette River Plan* is approved by the legislature, however, the state prohibition against construction of hydroelectric facilities on the Payette River will affect the District's ability to obtain a FERC license for the project because the Federal Power Act requires the FERC to consider state comprehensive water plans when issuing licenses. 16 U.S.C. § 803 (1988).

Gem Irrigation District contends on constitutional and statutory grounds that the Legislature does not have jurisdiction to act on the *Payette River Plan* during this session of the legislature. This opinion was requested to provide the Legislature guidance on these legal issues.

ANALYSIS:

Question No. 1

The first question raised turns upon the interpretation of section 7 of article 15 of the Idaho Constitution (section 7). This provision was added to the Idaho Constitution in 1964 and authorized the creation of a "Water Resource Agency . . . which shall have power to formulate and implement a state water plan for optimum development of water resources in the public interest . . ." *Id.* Subsequently, section 7 was amended to provide as follows:

[2] Additionally, the State Water Resource Agency shall have power to formulate and implement a state water plan for optimum development of water resources in the public interest. [3] The Legislature of the State of Idaho shall have the authority to amend or reject the state water plan in a manner provided by law. [4] Thereafter any change in the state water plan shall be submitted to the Legislature of the State of Idaho upon the first day of a regular session following the change and the change shall become effective unless amended or rejected by law within sixty days of its admission to the Legislature.¹

(Emphasis added).

Your first question concerns the meaning of this amendment. The District argues that the *Payette River Plan* constitutes a "change" to the State Water Plan within the meaning of the fourth sentence of section 7. Since the *Payette River Plan* was not submitted on the first legislative day, the District asserts that the constitution precludes legislative consideration of the *Payette River Plan* during this session of the legislature.

Whether the *Payette River Plan* is a change to the State Water Plan depends upon what is meant by the term "state water plan." In order to understand what this term means it is necessary to retrace the implementation of article 15, section 7.

Article 15, section 7 was added to the Idaho Constitution in 1964. The following year the Idaho Legislature implemented the

¹ For ease of reference, the quotation adds a numeric designation to the sentences in section 7. Since the quotation begins with the second sentence, the numeric designation begins with the numeral two.

new section of the Idaho Constitution by creating the "Water Board and by designating it as the "Water Resource Agency" contemplated by section 7. Act of March 30, 1965, ch. 320, 1965 Idaho Sess. L. 901. The Legislature directed the Water Board in section 4(c) of this act to "progressively formulate an integrated, coordinated program for conservation, development and use of all unappropriated water resources of this state" (Emphasis added).²

The Water Board in 1972 released the *Interim State Water Plan, Preliminary Report* ("Interim Plan") for review. This review process of public information meetings and formal hearings provided a forum for citizens to voice their opinions on what policies and goals the Water Board should include in the State Water Plan. The Water Board then adopted a report entitled *The Objectives, Part I of the State Water Plan* ("The Objectives") on March 8, 1974 and *The State Water Plan--Part Two* ("Part Two") on December 29, 1976.

The Objectives stated, in part, as follows:

The projects and programs necessary to implement the objectives will be identified and evaluated for each major river basin and presented in separate basin reports. Basin Reports will be prepared for the Panhandle basins, Snake River basins, and Bear River basins. These three major reports, to be completed by 1977, and *The Objectives*, will constitute the Idaho State Water Plan.

Id. at Foreword. Thus, from the outset the Legislature and the Water Board interpreted the term "state water plan" to be a series of documents that would be developed over time containing state wide policies and specific water basin plans. Moreover, in *Idaho Water Resource Board v. Kramer*, 97 Idaho 535, 548 P.2d 35 (1976), the Idaho Supreme Court adopted this interpretation of the language regarding "formulation" of the State Water Plan in section 7 and Idaho Code § 42-1734(b), now codified at Idaho Code § 42-1734A(1). The Court stated:

I.C. § 42-1734(b) requires that respondent ". . . progressively formulate an integrated, coordinated program for conservation, development and use of all unappropriated water resources of this state" [Emphasis supplied.] To progressively formulate a plan

² Section 4 of the Act of March 30, 1965 was codified at Idaho Code § 42-1734.

implies that the plan is to be adopted over a period of time, in stages, in a continuous step by step manner, and not in one complete act.

Id. 97 Idaho at 549, 548 P.2d at 49 (emphasis added). When the electorate approved the amended section 7, they approved of this prior interpretation of this language. See *Reynolds v. Continental Mortgage Co.*, 85 Idaho 172, 183, 377 P.2d 134, 141 (1962).

Since the State Water Plan is progressively formulated over time, the contents or required components of a State Water Plan will also change over time, as circumstances and experience may dictate. In other words, we view the process as a dynamic one. Thus, the fact that the Water Board and Legislature define the requisite components of a complete State Water Plan at one time does not prevent either body from redefining what the components of a State Water Plan should be in the future. Indeed, in 1988 the Idaho Legislature enacted substantial amendments to the statutory authority of the Water Board. Act of April 6, 1988, ch. 370, 1988 Idaho Sess. L. 1090. This act added a detailed procedure for the preparation of a comprehensive state water plan and for the protection of rivers as natural or recreational rivers and redefined, in part, the components of the State Water Plan.³ Specifically, Idaho Code § 42-1734A provided, in part, as follows:

(2) The board may develop a comprehensive state water plan in stages based upon waterways, river basins, drainage areas, river reaches, groundwater aquifers, or other geographic considerations. The component of the comprehensive state water plan prepared for particular water resources and waterways shall contain, among other things, the following:

(4) The comprehensive state water plan may designate protected rivers. Designations shall be based upon a determination by the board that the value of preserving a waterway for particular uses outweighs that of developing the waterway for other beneficial uses and shall specify whether a protected river is designated as a natural or recreational river.

³ The procedures for protection of rivers as natural or recreational rivers implemented Policy 2B of the amended Idaho State Water Plan dated December 12, 1986.

Id. (emphasis added). Based upon this expanded definition of what constitutes the State Water Plan, we now turn to the question of whether the *Payette River Plan* adopted by the Water Board constitutes a "change" to the State Water Plan.

What actions constitute "changes" to the State Water Plan within the meaning of the fourth sentence of section 7?

The fundamental goal in construing a constitutional provision is ascertaining the intent of the framers. *Engelking v. Investment Board*, 93 Idaho 217, 221, 458 P.2d 213, 217 (1969). The Idaho Supreme Court has applied ordinary rules of statutory construction to ascertain the intent of the framers of constitutional provisions. *Moon v. Investment Board*, 97 Idaho 595, 596, 548 P.2d 861, 862 (1976). If a statutory provision is clear, the statute must be read literally without any construction. *Ottesen v. Board of Comm'rs of Madison County*, 107 Idaho 1099, 1100, 695 P.2d 1238, 1239 (1985). If a statute is ambiguous, then we may go outside the statute to determine the legislative intent. *St. Benedict's Hospital v. County of Twin Falls*, 107 Idaho 143, 148, 686 P.2d 88, 93 (App. 1984). These rules of statutory construction apply to the present case.

The critical inquiry is determining the meaning of the term "change" in the fourth sentence. The ordinary meaning of the term "change" is that it refers to "the action of making something different in form, quality, or state: the fact of becoming different" Webster's Third New International Dictionary at 374 (1971). Under this broad definition, a deletion of language in the State Water Plan, a revision of language, or the addition of new language would all be a "change." However, such a broad interpretation of the term "change" is not consistent with the language of section 7 or with the legislative implementation of section 7.

The third and fourth sentences of section 7 provide for two different methods of legislative review. One method, stated in the third sentence, applies to the State Water Plan; the second method, stated in the fourth sentence, applies to "changes" to the State Water Plan. The first method gives the Legislature discretion to prescribe the method of review "in the manner provided by law." Art. 15, § 7. The second method provides a more limited degree of legislative review.

The two methods of legislative review apparently apply seriatim. The word "thereafter" at the beginning of the fourth sentence suggests that the review embodied in the third sentence will occur first. Thus, before the State Water Plan or a

component thereof undergoes review under the fourth sentence, it must undergo review under the third sentence. In other words, it is not until a component is added to and becomes part of the State Water Plan that it can "thereafter" be changed.

The question then becomes whether the *Payette River Plan* is an addition of a new component to the State Water Plan or a revision (a "change") to the State Water Plan as presently constituted. In 1988 the Legislature described the step by step development that the State Water Plan was to take. Specifically, Idaho Code § 42-1734A(2) provides that the comprehensive plan would be developed in stages, based upon geographical considerations. Because the *Payette River Plan* is a new plan for a specific geographical area, we consider it to be the addition of a new component of the State Water Plan and therefore, to be reviewed by the Legislature in accordance with sentence three of section 7. Any future revisions to the State Water Plan that affect this geographical component would be reviewed pursuant to sentence four.

Common sense supports this analysis of section 7. The need for legislative review is greater when the Legislature reviews a new component of the State Water Plan. The third sentence of section 7 provides that greater review by giving the Legislature discretion to prescribe the method of review "in the manner provided by law." Once a component has received comprehensive legislative review, there is a much lesser need for detailed legislative review when a "change" is made because of the prior comprehensive review of the plan or component of the plan by the legislature. The only question regarding changes to the plan is whether the legislature believes it to be an acceptable addition to the balance struck under the original plan. The fourth sentence provides that more limited degree of legislative review. Therefore, we interpret the term "change" in the fourth sentence of section 7 as including only deletions or revisions to the existing State Water Plan. The term "change" does not include the addition of new geographic components to the State Water Plan, such as the *Payette River Plan*, that are developed as a part of the progressive formulation of the State Water Plan.

This interpretation is consistent with the review provided by the Legislature in Idaho Code § 42-1734B(8), which states in part as follows: "A protected river shall not become a final part of the comprehensive state water plan until approved by law." Another well known rule of statutory construction requires a statutory provision be interpreted in a manner that makes it constitutional. *Nelson v. Marshall*, 94 Idaho 726, 730, 497 P.2d 47, 51 (1972). If the *Payette River Plan* were a "change" within

the meaning of the fourth sentence of section 7, then Idaho Code § 42-1734B(8) would be unconstitutional, because the fourth sentence of section 7 provides that "changes" may be approved in the absence of any affirmative action of the Legislature. In contrast, our interpretation results in the Legislative review under the third sentence of section 7, and this sentence provides the Legislature discretion to determine the manner of review in accordance with laws it enacts.

Question No. 2

Your second question asks, if the answer to question one is yes, whether the Legislature has jurisdiction, during its current regular session, to review and approve, reject or amend the *Payette River Plan*? Because the answer to question one is no, it is unnecessary to respond to question No. 2.

Question No. 3

Your third question asks whether the Legislature, during its current regular session, has jurisdiction pursuant to Idaho Code § 42-1734B(6) to review and approve, reject or amend the *Payette River Plan*? Subsection 6 of Idaho Code § 42-1734B provides, in part, as follows with respect to legislative review of a newly adopted plan or component thereof:

(6) The comprehensive state water plan and any component thereof developed for a particular waterway or waterways is subject to review and amendment by the legislature of the state of Idaho by law at the regular session immediately following the board's adoption of the comprehensive state water plan or component thereof.

(Emphasis added). This provision of Idaho Code § 42-1734B(6) is the current implementation by the Legislature of the following third sentence of section 7: "The Legislature of the State of Idaho shall have the authority to amend or reject the state water plan in a manner provided by law." (Emphasis added).

The Water Board adopted the *Payette River Plan* on February 1, 1991. The *Payette River Plan* designated several reaches of the Payette River as a recreational river and included a prohibition on the construction of hydropower projects for those reaches. The prohibition on hydropower construction is effective from its date of adoption by the Water Board, subject to being amended or rejected by the Legislature. Idaho Code § 42-1734A(7).

In accordance with the relevant provisions of Idaho Code § 42-1734B(6), the Water Board is required to submit the newly adopted plan to the Legislature for its review at the next regular session. Because the Water Board's adoption of the *Payette River Plan* occurred after the start of the 1991 legislative session, the Water Board was not required to submit the plan to the Legislature for its review until the 1992 legislative session. However, since the Water Board submitted the *Payette River Plan* to the Legislature immediately upon its adoption on February 1, 1991, the question arises as to the authority of the Legislature to take action on the plan during the current session. In other words, does Idaho Code § 42-1734B(6) preclude the Legislature from acting on the *Payette River Plan*?

The Legislature possesses all legislative power and authority except as restrained by the constitutions of the state or of the United States. Idaho Const., Art. 3, § 1; *Koelsch v. Girard*, 54 Idaho 452, 33 P.2d 816 (1934). Since the subject of your question is the limitation in another statute, Idaho Code § 42-1734B(6), the Legislature has the discretion to change the manner of review by enactment of a subsequent statute. Here, enactment of a law approving the *Payette River Plan* would be a specific implementation of the third sentence of section 7, and this subsequent enactment would take precedence over the provisions of Idaho Code § 42-1734B(6). Thus, Idaho Code § 42-1734B(6) does not preclude legislative action on the *Payette River Plan* during the current session.

AUTHORITIES CONSIDERED:

Idaho Constitutional Provisions

Article 3, § 1 of the Idaho Constitution.
Article 15, § 7 of the Idaho Constitution.

Idaho Statutes

Act of March 30, 1965, ch. 320, 1965 Idaho Sess. L. 901.
Act of April 6, 1988, ch. 370, 1988 Idaho Sess. L. 1090.
Idaho Code § 42-1734 (later amended by Act of April 6, 1988, ch. 370, 1988 Idaho Sess. L. 1090, 1093).
Idaho Code § 42-1734A
Idaho Code § 42-1734B

Idaho Cases

Engelking v. Investment Board, 93 Idaho 217, 458 P.2d 213 (1969).
Idaho Water Resource Board v. Kramer, 97 Idaho 535, 548 P.2d 35 (1976).
Koelsch v. Girard, 54 Idaho 452, 33 P.2d 816 (1934).
Moon v. Investment Board, 97 Idaho 595, 548 P.2d 861 (1976).
Nelson v. Marshall, 94 Idaho 726, 497 P.2d 47 (1972).
Ottesen v. Board of Comm'rs of Madison County, 107 Idaho 1099, 695 P.2d 1238 (1985).
Reynolds v. Continental Mortgage Co., 85 Idaho 172, 377 P.2d 134 (1962).
St. Benedict's Hospital v. County of Twin Falls, 107 Idaho 143, 686 P.2d 88 (App. 1984).

Other Statutes

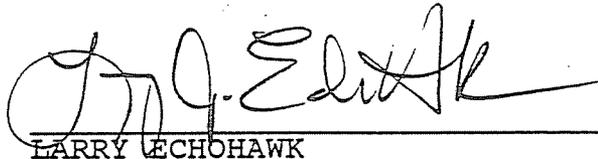
16 U.S.C. § 803 (1988).

Other Authorities

Webster's Third International Dictionary (1971).

DATED this 8th day of March, 1991.

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