

February 16, 1995

Mr. Stanley F. Hamilton, Director
Idaho Department of Lands
STATEHOUSE MAIL

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

Dear Director Hamilton:

QUESTION PRESENTED

You have asked the Attorney General's Office to provide legal guidance regarding the 1987 sale of two adjacent 320-acre parcels of state land to two wholly-owned subsidiaries of Idaho Power Company for use as a pump-storage generating plant consistent with art. 9, sec. 8 of the Idaho Constitution.

Our answer is that the 1987 sale of two adjacent 320-acre parcels of state land to two wholly-owned subsidiaries of Idaho Power for use as a pump-storage generating plant raises a constitutional question, but there is insufficient information to reach a conclusion.

DISCUSSION

Article 9, sec. 8 of the Idaho Constitution reads in relevant part:

provided, that not to exceed one hundred sections of state land shall be sold in any one year, and to be sold in subdivisions of not to exceed three hundred and twenty acres of land to any one individual, company or corporation.¹

(Emphasis added.) The question is whether this provision was violated by two 1987 sales of adjacent 320-acre parcels of state land to Idaho Utilities Products Company and Idaho Energy Resources, both wholly-owned subsidiaries of Idaho Power Company. The two parcels were to be used in combination for a 640-acre pump-storage generating plant.

There are two basic lines of inquiry that may be pursued in order to determine the constitutionality of the sales. First, are the wholly-owned subsidiaries distinct legal entities, such that they each satisfy the "one individual, company or corporation" criteria of the Idaho Constitution? Art. 9, sec. 8, Idaho Constitution. Second, even if they are separate legal entities, did the subsidiaries act together or with their common parent

corporation to evade the 320-acre constitutional limitation? *See O’Bryant v. City of Idaho Falls*, 78 Idaho 313, 303 P.2d 672 (1956); *Webster-Soule Farm v. Woodmansee*, 36 Idaho 520, 211 P. 1090 (1920).

Subsidiary corporations, even those wholly owned, are generally considered to be distinct legal entities in Idaho. *See, e.g.*, Idaho Code §§ 30-1-1 *et seq.*; *Ross v. Coleman*, 114 Idaho 817, 761 P.2d 1169 (1988); *Baker v. Kulczyk*, 112 Idaho 417, 732 P.2d 386 (Ct. App. 1987). The answer to whether the sister corporations in this case are distinct legal entities for purposes of art. 9, sec. 8 then depends on the relationship, in fact, between the wholly owned subsidiaries and between the subsidiaries and their parent corporation, Idaho Power Company.

It has been suggested in a prior opinion of the Idaho Attorney General’s Office that the “mere instrumentality” and alter ego concepts, which are used by courts to determine corporate liability, may be used to analyze the relationship between affiliated corporations for purposes of art. 9, sec. 8. Attorney General Opinion 75-56 (9/25/74). Relevant factors may include: (1) whether the subsidiary lacks substantial business contacts other than with the parent or sister subsidiary; (2) whether the subsidiary operates solely with capital furnished by the parent or sister subsidiary; (3) whether the subsidiary has officers and directors in common with the parent or sister subsidiary; (4) whether the subsidiary has an accounting and payroll system in common with the parent or sister subsidiary; and (5) whether there is commingling of funds between the subsidiary and the parent or sister subsidiary. *Id.* Other factors may also be helpful in the analysis. *See, e.g.*, *Baker v. Kulczyk*, 112 Idaho 417, 732 P.2d 386 (Ct. App. 1987).

In this case, insufficient information has been provided in the request for guidance to arrive at any conclusion as to whether or not the two wholly owned subsidiaries of Idaho Power are distinct legal entities.

Assuming the two wholly owned subsidiaries are separate entities, the second line of inquiry is whether the two sister corporations have acted together or with their common parent to evade the 320-acre limitation. The Idaho Supreme Court has interpreted art. 9, sec. 8 as prohibiting the purchase of more than 320 acres of state land by two or more individuals acting together to evade the constitutional limitation. *Webster-Soule Farm v. Woodmansee*, 36 Idaho 520, 211 P. 1090 (1920). In *Woodmansee* the court stated, with respect to the 320-acre constitutional limitation:

If the original purchase were made by the purchaser in good faith and for himself, there would be nothing unlawful in the subsequent sale of his interest to one who had already purchased by another transaction the acreage mentioned in the constitutional provision. On the other hand, if the original purchase were made by a nominal purchaser not on his own behalf,

but in the interest of another person, there being an agreement between them to evade the constitutional limitation, then such a transaction would be invalid.

36 Idaho at 524.

This is consistent with the intent of the framers of the Idaho Constitution. The framers specifically sought to prohibit the purchase of more than 320 acres by groups or associations of individuals acting in concert. *See Idaho Constitutional Convention, Proceedings and Debates*, vol. I, at 841 (1889). The framers believed that an acreage limitation was necessary so that “monied syndicates” and “monied men’s cattle ranches” would not be able to lock up large parcels of land and prevent population growth and settlement. *See Remarks of Mr. Ainslie, Idaho Constitutional Convention, Proceedings and Debates*, vol. I, at 840 (1889).

It follows that art. 9, sec. 8 would be violated if Idaho Power’s two wholly owned subsidiaries, in fact, acted on behalf of Idaho Power as nominal purchasers in an attempt to evade the constitutional limitation. Additionally, art. 9, sec. 8 would be violated if the two wholly owned subsidiaries were created by Idaho Power for the sole purpose of avoiding the acreage limitation. *O’Bryant v. City of Idaho Falls*, 78 Idaho 313, 303 P.2d 672 (1956). The Idaho Supreme Court has held “[t]hat which the constitution directly prohibits may not be done by indirection through a plan or instrumentality attempting to evade the constitutional prohibition.” 78 Idaho at 325, 303 P.2d at 678. Further factual investigation is necessary to definitively determine the intent of the purchasers.

Finally, any sale of state land made in violation of article 9, sec. 8 is *ultra vires* and void. *See Newton v. State Board of Land Commissioners*, 37 Idaho 58, 219 P. 1052 (1923); *Webster-Soule Farm v. Woodmansee*, 36 Idaho 520, 211 P. 1090 (1920).

Sincerely,

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¹ Originally, the Idaho Constitution limited purchases to 160 acres of school land. In a 1951 amendment, the acreage limitation was increased to 320 acres, and in 1982, the phrase “school lands” was amended to read “state lands.”