

October 23, 1995

Honorable Ruby Stone  
Idaho House of Representatives  
6604 Holiday Drive  
Boise, ID 83709

Honorable Ralph Wheeler  
Idaho State Senate  
659 Gifford Avenue  
American Falls, ID 83211

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

Re: Optional Forms of County Government

Dear Representative Stone and Senator Wheeler:

You have requested that the Office of the Attorney General render an opinion on whether the legislature can provide that only one optional form of government at a time appear on the ballot, and whether counties can consolidate offices such as prosecutor or sheriff. For the reasons set forth below, it is the opinion of this office that the legislature can limit the number of optional forms which can appear on a ballot in a given election, and can allow counties to consolidate offices.

The draft legislation regarding optional forms of county government provides that an optional form may be proposed by resolution of the board of county commissioners or a petition of the voters meeting the requisite signature requirement. The draft legislation further requires that the question of adopting an optional form or retaining the existing form of county government must be submitted at a general election. Your question is:

May the legislature provide that only one optional form of government shall appear at a time on the ballot? And, if so, are there any legal limitations on the manner in which a determination is made as to which optional form will appear on the ballot if more than one petition or resolution proposing an optional form is eligible to appear on the ballot in the general election?

The constitutional provision allowing optional forms of county government does not prohibit the legislature from limiting the number of optional forms on the ballot. Art. 18, sec. 12 provides:

**§ 12. Optional forms of county government.** - The legislature by general law may provide for optional forms of county government for counties, which shall be the exclusive optional forms of county government. No optional form of county government shall be operative in any county until it has been submitted to and approved by a majority of the electors voting thereon in the county affected at a general or special election as provided by law. The electorate at said election shall be allowed to vote on whether they shall retain their present form of county government or adopt any of the optional forms of county government. In the event an optional form shall be adopted, the question whether to return to the original form or any other optional forms, may be placed at subsequent elections, but not more frequently than each four years. When an optional form of county government has been adopted, the provisions of this section supersede sections 5, 6, and 10 of this article and sections 16 and 18 of article V.

This provision simply mandates that any of the optional forms prescribed by the legislature and placed on the ballot run against the current form. Because there is no prohibition against limiting the number of optional forms which may appear on a ballot at any one time, the legislature is free to enact such a limitation.

How to limit the number of optional forms is clearly a legislative prerogative. It is hard to speculate on all of the various ways that the legislature could limit the number of optional forms on the ballot. Thus, this opinion necessarily speaks in generalities. However, there really are no legal restrictions on how the legislature could limit the amount of optional form(s) which will appear on the ballot. Obviously, the limitation can't be completely arbitrary in the sense that it is not reasonably related to the goals sought to be accomplished and it must be neutrally applied. Outside of these general restrictions, the legislature should be free to enact a limitation on the amount of optional forms which will appear on the ballot against the current form without legal ramifications: whether the limitation is a first-in-time restriction or holding a primary election between the competing optional forms.

Next, the draft legislation also provides for consolidation of offices between counties. Your question is:

What, if any, jurisdictional or other legal problems arise if the elected offices of sheriff or prosecuting attorney are consolidated between one or more counties, with one elected person to serve as sheriff or prosecuting attorney for each of those counties? Are there particular problems that

attach to the positions of prosecuting attorney or sheriff which do not apply when other elective offices are consolidated between counties?

Art. 18, sec. 12, provides: “[w]hen an optional form of county government has been adopted, the provisions of this section supersede sections 5, 6, and 10 of this article and sections 16 and 18 of article V.” Sections 5, 6 and 10 of art. 18 relate to: (1) the requirement of a commission form of government, (2) creation and duties of county row officers (not including prosecutor), and (3) election requirements of county commissioners. Sections 16 and 18 of article 5 set forth the qualifications and terms of office of the county clerk and prosecutor, respectively. All of these sections are superseded if an optional form of county government is adopted. Because these constitutional provisions which require each county to elect such officers, and that such officers be residents of those counties, are superseded, the impediment to consolidating county offices is removed. The remaining requirements that county officers must be electors of the county they are serving are statutory, and can be modified by the legislature in enacting legislation providing for optional forms of county government.

In essence, the two or more counties would constitute a “district” or “region” for which a prosecutor or sheriff or other county elected row officer would serve. The prosecutor would have to be an elector of that “district” or “region.” This is a basic concept, that the elected official be a resident and qualified elector of the geographical region which elects him or her. Of course, this all presumes that two or more counties have voted to combine these offices. It cannot be done unilaterally by one county. Two or more counties must go through the process of voting in favor of an optional form of county government. Moreover, the individual who receives the most votes will win, and it would not matter that County A casts a majority of its votes for Candidate A, and County B casts a majority of its votes for Candidate B. As long as Candidate A receives the most total votes out of all of the combined counties, he or she wins.

There are no particular legal problems that attach to the positions of prosecuting attorney or sheriff for each of those counties. However, there may be a practical problem if the two counties who consolidate the office of prosecuting attorney are engaged in litigation or other activities with each other. The prosecuting attorney is the representative of the county and legal advisor to the governing body of the county. If the two counties are involved in litigation the prosecutor would be in a conflict situation. However, this is not a major problem, since both counties have the ability to hire outside private counsel if such a situation occurs.

Consolidation of county offices should not apply to the governing body. As discussed in our earlier opinion regarding city/county consolidation, regulations passed pursuant to the police power provision of art. 12, sec. 2, can only be made and enforced within the respective boundaries of the individual counties and cities. A consolidated

governing body would face the same constitutional problems as a consolidated city/county. Thus, the consolidation of county offices provision should exclude consolidation of the governing body.

I hope this opinion is of assistance to you. If you have any questions, please feel free to contact me.

Very truly yours,

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