

May 10, 1996

The Honorable Mark D. Stubbs
1025 Sawtooth Boulevard
Twin Falls, ID 83301

The Honorable Robert E. Schaefer
P.O. Box 55
Nampa, ID 83653

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

Re: Applicability of Senate Bill 1545

Dear Representatives Stubbs and Schaefer:

1. Introduction

In March of this year you requested our advice with respect to S.B. 1545 which amends the Idaho Solid Waste Facilities Act. We responded to that request by a letter from David High dated March 14, 1996. The main issue addressed was whether S.B. 1545 was applicable to a commercial solid waste landfill proposed by Idaho Waste Systems, Inc. in Elmore County. At the time S.B. 1545 became effective, Idaho Waste Systems, Inc. was already in the process of obtaining the necessary approvals to construct and operate. In the March 14, 1996, letter, we advised that Idaho courts would most likely not apply S.B. 1545 to the Idaho Waste Systems, Inc. proposed facility. As stated in the letter, because of the need for a quick response, we did not conduct exhaustive research. Also, the opinion was prepared without the benefit of a subsequently drafted statement of legislative intent regarding S.B. 1545. The opinion was based solely upon facts as represented by counsel for Idaho Waste Systems, Inc.

After the enactment of S.B. 1545, on March 25, 1996, the law firm of Givens, Pursley & Huntley, representing Rabanco Companies, provided additional information to the Attorney General's Office and asked for a reconsideration of whether S.B. 1545 applies to Idaho Waste Systems, Inc.'s proposed facility. This letter presents the results of our reconsideration of this issue.

2. Facts

The Idaho Solid Waste Facilities Act (ISWFA) provides requirements for the location, design, operation and closure of municipal solid waste landfills (MSWLFs) in Idaho. In order to construct an MSWLF, an owner must obtain a site certification from

the Department of Health and Welfare, Division of Environmental Quality (DEQ), that the location of the proposed landfill meets certain critical location requirements. Idaho Code §§ 39-7407 and 39-7408. The owner must also obtain the approval from DEQ of a ground water monitoring and design plan for the facility. Idaho Code § 39-7411. In addition, the proponent of an MSWLF must comply with local planning and zoning requirements.

S.B. 1545 amended the ISWFA to provide that, in addition to obtaining site certification as provided in Idaho Code §§ 39-7407 and 39-7408, an owner of a proposed commercial solid waste facility must obtain a siting license before constructing or operating the facility.

In connection with the enactment of S.B. 1545, a statement of legislative intent was published by the Idaho Legislature. The statement indicates the legislature intended the amendment to apply to commercial landfills that had site certification, but had not yet been constructed or operated as of the effective date of S.B. 1545. *See* House Journal at 416 (March 14, 1996).

At the time S.B. 1545 was enacted, Idaho Waste Systems, Inc. was in the process of obtaining the necessary state and local approvals to construct a commercial solid waste facility in Elmore County. Idaho Waste Systems, Inc. had obtained conditional site certification from DEQ. The certification, issued on January 24, 1996, was conditioned “upon the receipt of a copy of the approved conditional use permit issued by Elmore County for the Simco Road Municipal Solid Waste Landfill.” *See* January 24, 1996, letter from DEQ enclosed. This condition was based upon Idaho Code § 39-7407(2)(d) of the ISWFA that prohibits the location of a facility “so as to be at variance with any locally adopted land use plan or zoning requirement unless otherwise provided by local law or ordinance”

On March 5, 1996, DEQ approved the design of the proposed Idaho Waste Systems, Inc. Facility. However, to date, Idaho Waste Systems, Inc. has not received a conditional use permit (CUP) from Elmore County.

3. Analysis

Whether S.B. 1545 is applicable to Idaho Waste Systems, Inc.’s proposed facility is, in the first instance, a question of legislative intent. The Idaho Supreme Court has consistently held that whether a state statute applies retroactively is a question of legislative intent and that a statute is not to be applied retroactively unless there is clear legislative intent to that effect. Gayley v. Jerome County, 113 Idaho 430, 432, 745 P.2d 1051, 1053 (1987) (“Whether a statute operates retroactively or prospectively only is a question of legislative intent”); Hidden Springs Trout Ranch, Inc. v. Allred, 102 Idaho 623, 636 P.2d 745 (1981); City of Garden City v. City of Boise, 104 Idaho 512, 660 P.2d

1355 (1983); Blankenship v. Myers, 97 Idaho 356, 544 P.2d 314 (1975); Edwards v. Walker, 95 Idaho 289, 507 P.2d 486 (1973); Kent v. Idaho Public Utilities Comm'n, 93 Idaho 618, 469 P.2d 745 (1970); Application of Forde L. Johnson Oil Co., Inc., 84 Idaho 288, 372 P.2d 135 (1962).

In Application of Forde L. Johnson Oil Co., Inc., the Idaho Supreme Court reviewed whether an amendment to the Idaho Code applied to a pending motor contract carrier permit before the Idaho Public Utilities Commission. The Idaho Supreme Court held that the application of the statute was answered by a review of legislative intent. The court found no intent on the part of the legislature to apply the statute retroactively and, therefore, held it was not applicable to the pending permit application. 84 Idaho at 297, 372 P.2d at 144.

The Idaho Supreme Court in Kent v. Idaho Public Utilities Comm'n was faced with a similar issue. In that case, Kent Brothers Transportation purchased a motor carrier permit from a bankrupt company and then filed an application with the Idaho Public Utilities Commission to transfer the permit. The Idaho Public Utilities Commission denied the application, relying in part upon a statutory amendment that was enacted after the issuance of the original permit but before the commission's decision on the application to transfer.

The Idaho Supreme Court in Kent reviewed whether the amended statute was applicable to the application for a transfer of the permit. The court began its analysis by reviewing the intent of the legislature. The court found that the language of the statute made it clear it was intended to apply to the transfer of permits which had been granted prior to the enactment, and thus was applicable to the pending application by Kent Brothers. 93 Idaho at 621, 469 P.2d at 748. The court stated the following:

We consider first whether the legislature intended the 1963 amendment of I.C. § 61-809 to apply retroactively. We agree that a statute should be applied retroactively only if the legislature has clearly expressed that intent or such intent is clearly implied by the language of the statute. *Application of Forde L. Johnson Oil Company*, [84 Idaho 288, 372 P.2d 135 (1962)]; 1 Sutherland Statutory Construction, § 1963. We find that the wording of I.C. § 61-809 makes clear that it is designed to apply to prospective transfer of permits which had been granted prior to the 1963 amendment.

Id.

While the Idaho Supreme Court has consistently looked to the intent of the legislature in determining whether a state statute should be applied retroactively, the court has taken a different approach with respect to the application of local zoning

ordinances to pending applications for building permits. The Idaho Supreme Court has, without reviewing what a local government intended with the ordinance, applied the rule that an application for a building permit is controlled by the ordinance in effect at the time the application was filed, not any amended ordinance subsequently effective. South Fork Coalition v. Board of Comm'rs of Bonneville County, 117 Idaho 857, 792 P.2d 882 (1990); Ready-To-Pour, Inc. v. McCoy, 95 Idaho 510, 511 P.2d 792 (1973); Ben Lomond, Inc. v. City of Idaho Falls, 92 Idaho 595, 448 P.2d 209 (1968).

The application of S.B. 1545 to the proposed Idaho Waste Systems, Inc. facility appears to be controlled by the Idaho cases in which the court has determined the applicability of a statutory amendment to a pending permit application by reference to legislative intent, rather than those Idaho cases dealing with local zoning ordinances and building permits. The Idaho Waste Systems, Inc. situation does not involve the amendment of a local ordinance. It also does not involve the application of a law dealing strictly with zoning. Instead, it involves the application of a state statute dealing with the protection of the environment through the regulation of the location, design, operation and closure of all commercial solid waste facilities in the state. Under these circumstances, the Idaho courts would most likely determine the application of S.B. 1545 by ascertaining whether the legislature intended S.B. 1545 to apply to facilities such as Idaho Waste Systems, Inc.'s proposed facility.

S.B. 1545 added section 39-7408A to the ISWFA. This section reads as follows:

SITE CERTIFICATION PROCEDURE FOR COMMERCIAL SOLID WASTE FACILITIES. In addition to obtaining site certification as provided in section 39-7408, Idaho Code, no owner or operator of a commercial solid waste facility shall construct, expand or enlarge such a facility without a siting license from the director. Commercial solid waste facilities constructed and in operation on the effective date of this section are not required to obtain a siting license except to expand or enlarge such facilities.

Idaho Code § 39-7408A makes it apparent that the law was intended to apply to any commercial solid waste facility that was not yet constructed and in operation on the date of enactment.

Any ambiguity in the language of S.B. 1545 regarding its application is resolved by the statement of legislative intent published by the legislature. This reads as follows:

It is the intent of the legislature that facilities that as of the effective date of S 1545 have site certification as provided in Idaho Code 39-7408 but have not yet constructed or started to operate shall be given leeway in fees charged under this new legislation, as allowed by current statute [*sic*],

and that the Director may allow and recommend reduction in the time for public notice and comment and time within which the panel and the Director must act as provided in sections 39-7408[(D)](4), (5), and (8) Idaho Code.

It is the intent of the legislature that this legislation does not apply to recycling businesses such as composting. House Journal at 416 (March 14, 1996).

Thus, it is clear the legislature intended S.B. 1545 to apply to those facilities, like the Idaho Waste Systems, Inc. facility, for which some of the approvals necessary to construct had been obtained, but which were not yet constructed or operated at the time the legislation was passed. It follows, then, that the Idaho courts would apply S.B. 1545 to Idaho Waste Systems, Inc. and its proposed facility in Elmore County.

4. Conclusion

The Idaho Legislature clearly intended S.B. 1545 to apply to facilities like the proposed Idaho Solid Waste Systems, Inc. facility. The Idaho courts would most likely defer to that legislative intent.

Yours very truly,

DOUGLAS M. CONDE
Deputy Attorney General