March 10, 1998

Representative W. W. Deal
House of Representatives
State of Idaho
STATEHOUSE MAIL

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

Re: House Bill No. 774

Dear Representative Deal:

The Idaho Legislature is currently considering House Bill No. 774 (the "Bill"). The following responses are provided for your guidance in answer to the 14 legal questions you posed in your March 5, 1998 letter, which was received by this office on March 9, 1998. For purposes of these responses, I have assumed that the Bill will be enacted in its original form without amendments, additions or deletions. The responses herein do not deal with certain proposed amendments to the Bill in the Idaho House of Representatives that are set out in Exhibit A (attached). The proposed amendments raise additional serious legal ramifications that are not addressed herein.

ANALYSIS AND CONCLUSIONS

Question No. 1:

As an "independent body corporate politic," will the Fund still be considered an instrumentality of the state such that it will continue to be exempt from federal taxes on its income?

Response:

It is unclear whether the State Insurance Fund (the "Fund"), as an independent body corporate politic, would continue to be exempt from federal income taxes by the Internal Revenue Service ("IRS"). Absent a statutory mandate by the U.S. Congress, it is unlikely that the IRS will pursue the Fund for income taxes. From its inception, the Fund has never paid federal income tax on its earnings, nor has it ever been requested to pay tax by the IRS. The Fund has always assumed that it was exempt from federal income taxes because it was a state agency performing an essential government function. As an independent body corporate politic, the Fund might be regarded differently by the IRS. However, under the doctrine of "implied statutory immunity," it is unlikely that the IRS would pursue the Fund for income taxes in the future without a "plain statement" of the

U.S. Congress imposing such a tax. Should the IRS attempt to collect income taxes from the Fund, tax exempt status could be achieved by making the Fund the "insurer of last resort." The Bill does not make the Fund the "insurer of last resort." For further discussion of the import of the language "independent body corporate politic," and variations thereof, please see the response to Question No. 6, footnote 1, below.

Question No. 2:

Will the Fund, as restructured by the Bill, meet the requirements of art. 3, sec. 19, and art. 11, sec. 2 of the Idaho Constitution?

Response:

It is probable the Fund, as an independent body corporate politic, would be viewed by the courts as a permissible entity. Case law has held that the state may create independent bodies corporate politic which are neither prohibited corporations nor state agencies subject to all the restrictions of the Idaho Constitution. The Idaho Supreme Court, in State v. Musgrave, 84 Idaho 77, 370 P.2d 778 (1962), held the Fund, under existing law, to be an entity of this type. The court held that the Fund is not a corporation within the meaning of art. 3, sec. 19 of the Idaho Constitution, nor was it granted a charter under a special law in violation of art. 11, sec. 2. The Idaho Supreme Court also held, in Board of Commissioners v. Idaho Health Facilities Authority, 96 Idaho 498, 531 P.2d 588 (1975), that the main restrictions between a prohibited corporation and a permissible independent body corporate politic are: (1) the absence of control by private parties; and (2) the inability of private parties to change the fundamental structure and public purpose of the entity as set out in the law creating it.

Question No. 3:

Will property owned by the Fund be exempt from taxation?

Response:

Art. 7, sec. 4 of the Idaho Constitution provides that property of the state and other municipal corporations is exempt from taxation. As an independent body corporate politic, the Fund would not qualify as a municipal corporation exempt from taxation. Although the Musgrave court held the Fund to be a state agency, it is likely this Bill would alter that status to the extent Fund property would be subject to taxation. (The Fund presently pays property taxes on its Boise office building and Ada County is seeking to collect ad valorem property taxes on the building owned by the Fund located at 954 West Jefferson in Boise, which is currently occupied by the State of Idaho Department of Lands). Absent legislation setting forth a tax exempt status similar to those contained in the statutes creating the state housing authority and state building

authority, the Fund could well be liable for ad valorem property tax on its property.

Question No. 4:

Will the Bill have any impact on the ownership of real property by the Fund, such as the 954 Jefferson Street building?

Response:

The Fund presently owns the property it uses as its office building on State Street in Boise and maintains a leasehold interest in the property located at 954 West Jefferson. Under this Bill, the Fund, pursuant to Idaho Code § 72-912, would be allowed to invest its surplus and reserves in a manner similar to other insurers in this state. Idaho Code § 41-728 allows Idaho insurers to acquire, invest in, own, maintain, alter, furnish, improve, manage, lease, and convey land and buildings, so long as the real estate investments are limited to 10% of the insurer's assets for property used for its home office and accommodation, 5% of its assets for property held for production of income, and so long as the total real estate investments of the insurer do not exceed 20% of the insurer's assets. The Fund's current real estate investments appear to comply with Idaho Code § 41-728. Please see the response to Question No. 3, above, regarding taxability of the Fund's real property assets.

Question No. 5:

Will the Bill exempt the Fund from the public records and the open meeting laws of the State of Idaho?

Response:

Public Records Act

It is unclear what effect the Bill would have on the operation of the Public Records Act as it applies to the Fund. The law presumes that all public records are open for inspection at all reasonable times. Idaho Code § 9-338 provides that the public has a right to examine the records of this state unless otherwise exempted. As an independent body corporate politic, the Fund would be neither an agency of the state nor a political subdivision of the state. Idaho Code § 9-340(2)(g) makes it clear under current law that certain information contained within the underwriting and claims files maintained by the Fund are exempt from disclosure. This implies other Fund records are subject to public inspection now, and that would not change under the Bill.

Open Meetings

The Fund currently is not subject to the Open Meeting Law because it has no governing body that makes decisions on its behalf. The Open Meeting Law, Idaho Code § 67-2342, provides that all meetings of a governing body of a public agency are to be open to the public. Idaho Code § 67-2341(4) defines a public agency such that the board of directors of the Fund appears to fall within the definition of a public agency. Subject to the discussion of the meaning of "independent body corporate politic" in the response to Question No. 6, footnote 1, below, if the Bill passes, the meetings of the board of directors may well be subject to the state's open meeting laws.

Question No. 6:

Will the Bill entitle the Fund to the immunities and limitations of liability set forth in the Idaho Tort Claims Act?

Response:

A definite answer cannot be given. The Bill does not provide a clear answer and a court would be the final arbiter of the issue. However, the characteristics of the Fund, under the Bill, suggest that the Fund might not constitute a governmental entity afforded the immunities and liability limitations of the Tort Claims Act. Idaho Code § 6-901, *et seq*. Further, since one purpose of the Tort Claims Act is the protection of the public purse, and since the Fund, under the Bill, would not jeopardize the public purse, a major reason to afford Tort Claims Act protection is not present. It is also unclear whether the board of directors of the Fund would qualify as a board covered by the Tort Claims Act. However, to the extent that the board would be conducting the business of the Fund, if the Fund were not covered, there is an argument that the board would not be covered.

The Tort Claims Act applies to and provides certain immunities and limitations of liability to "governmental entities." "Governmental entities" include the "state" and "political subdivisions." The term "state" is defined to include "any office, department, agency, authority, commission, board, institution, hospital, college, university or other instrumentality thereof." The term "political subdivision" is defined to include "any county, city, municipal corporation, health district, school district, irrigation district, special improvement or taxing district or any other political subdivision or public corporation." Idaho Code § 6-902.

The Fund, under the Bill, does not fit squarely into any of the enumerated entities listed under the definition of "state" in the Tort Claims Act since it is not an office, department, agency, authority, commission, board, institution, hospital, college or university. The Fund could be entitled to Tort Claims Act protection if it were an "instrumentality" of the state. The term "instrumentality" is not defined. Alternatively, if the Fund were a "political subdivision," it could be afforded protection under the Tort Claims Act, but not through the state. The Fund, under the Bill, does not fit into any of

the enumerated entities in the definition of political subdivision. In particular, although it is a corporation, it is not a "public corporation" and thus appears not to be a political subdivision entitled to Tort Claims Act protection.

The leading case on "instrumentality" status is Duffin v. Idaho Crop Improvement Association, 126 Idaho 1002 (1995). In that case, the Idaho Supreme Court considered the term "instrumentality" in the Tort Claims Act. In Duffin, the court considered whether the Idaho Crop Improvement Association ("Association"), a private non-profit involved in seed certification, was entitled to Tort Claims Act protection as an "instrumentality" of the state. The court's focus for this determination was on the "nexus" between the state and the entity in question and "whether the entity truly operates independently of the state." In holding that the Association was not an instrumentality of the state, the court noted that the Association's directors were elected by its members; the state did not exercise control over day-to-day operations; the Association performed activities in addition to its purported state function of seed certification; the Association's employment decisions were not state supervised; and the Association had obtained its own liability insurance. *Id*. at 1009. *See also*, Bott v. State Building Authority, 122 Idaho 471, 479 (1992) (court will look beyond statutory denomination of a particular entity to powers given to it to determine if entity should benefit from a statutory definition).

In addition, however, and of some importance to the court, was the fact that the state did not appropriate any moneys to the Association and that the Association's revenues did not become part of the general fund. The court noted that "[b]ecause [the Association] receives no appropriations and does not contribute its revenues to the state, we are not compelled to deem it an 'instrumentality' in order to achieve" the preservation of the public purse, which is one of the purposes of the Tort Claims Act. Finally, the court noted that the mere fact that the Association performed a "governmental" activity was not enough to convert it into a governmental entity for purposes of the Tort Claims Act. Duffin, 126 Idaho at 1009.

The reasoning of the court in Duffin reflects that the court applied a balancing approach to the factors present to determine "instrumentality" status. However, the court did not provide a bright-line test as to what factors, if any, are dispositive. Thus, where a balancing approach is used, a clear resolution may not be readily apparent because the factors on each side may seem equal in number or significance.

Certainly, the Fund, under the Bill, has some characteristics that could support "instrumentality" status under Duffin. The Fund is a statutorily created entity, like many state agencies. Thus, it could be legislated out of existence. Its board members would be appointed by the governor, unlike the directors in Duffin, who were member-elected. However, these characteristics are relatively limited in number.

On the other hand, the balancing approach prescribed by Duffin reveals a number of characteristics in the Fund, under the Bill, to suggest a true independence from the state. The Fund, under the Bill, would be an independent body politic corporate. [1] The Bill specifically states that the Fund's board is to assure that the Fund is run as an "efficient insurance company." This independent status and analogy to an insurance company suggests a purposeful separation from the state. This separateness is reinforced by the fact that the Fund receives no state money and that the state has no liability for the Fund. In addition, the Fund serves a proprietary and not a governmental function. Musgrave, 84 Idaho at 85. Further, although a governmental function does not guarantee instrumentality status, the lack of a governmental function appears to further distance the Fund from instrumentality status.

To the extent it is possible to identify a factor of particular importance to the court in Duffin, it appears that the court would emphasize the purposes behind the Tort Claims Act and whether deeming an entity as an "instrumentality" promotes or undermines those purposes. The Fund's characteristics in this regard do not strongly support instrumentality status. The Fund's employees, under the Bill, would be outside the merit system, a fact that undermines Tort Claims Act coverage since one purpose of the Tort Claims Act is to enable persons to recover for the tortious acts of state employees. Sterling v. Bloom, 111 Idaho 211, 214 (1986) (purpose of Tort Claims Act is to provide relief to those suffering injury from negligence of government employees).

Further, the court in Duffin specifically noted that a purpose of the Tort Claims Act was the protection of the state purse. *See also,* Friel v. Boise City Housing Authority, 126 Idaho 484 (1994) (purpose of the Tort Claims Act is to save needless expense and litigation by providing opportunity for amicable resolution of the differences between parties, to allow authorities to conduct full investigation into the cause of an injury to determine the extent of the state's liability, if any, and to allow the state to prepare its defenses). The Bill provides that the Fund shall be administered "without liability on the part of the state." To the extent that the public purse is not put at risk by any act of the Fund, there is no compelling reason, under Duffin, to deem the Fund an instrumentality of the state. The Bill gives no specific insight into the limitation on state liability or whether the Bill intends that the Fund be protected by the Tort Claims Act.

Finally, it is not clear whether the board of directors of the Fund, separate from the Fund, would be entitled to Tort Claims Act protection. The Bill itself provides no insight. The term "board" is included in the itemized list of entities afforded protection under the Tort Claims Act. Arguably, however, that term applies to state boards included within the Executive Department of Self-Governing Agencies. Further, to the extent that the board is transacting the business of the Fund, if the Fund were not covered, there is an argument that the board would not be covered.

In sum, under the Bill, the Fund would have a limited number of characteristics

to suggest instrumentality status. However, under the Bill, the Fund's characteristics more strongly suggest an independence from the state. These characteristics could undermine instrumentality status and negate any claimed right to Tort Claims Act protection. However, as the Bill does not specifically address this matter, it would be one of statutory interpretation and a court would be the final arbiter of this issue.

Question No. 7:

Will the Fund be provided and entitled to risk management coverage through the Department of Administration, Office of Insurance Management?

Response:

A definite answer cannot be given. The Bill does not give a clear answer and a court would be the final arbiter of the issue. However, it appears that the Fund, under the Bill, may not constitute an entity that must be afforded risk coverage by the Department of Administration ("Department"). Whether the Fund's board of directors could be covered is also unclear. If the board is doing the business of the Fund and the Fund is not covered, there is at least an argument that the board also is not entitled to coverage.

The Department is obligated by the Tort Claims Act, Idaho Code § 6-919, and by Idaho Code § 67-5773, to determine the need for and to provide risk coverage to state departments, agencies, commissions, offices, divisions, boards, instrumentalities, and operations of the government and to consult with departments, agencies, commissions, and instrumentalities regarding comprehensive liability coverage.

The Fund, under the Bill, is not an office, department, agency, authority, commission, board, institution, hospital, college, university, division or board and would not be entitled to coverage as such. The Fund could be provided coverage by the Department if it were an "instrumentality" or "operation" of the state. *See* Bott, 122 Idaho at 479 (although the title "building authority" was not included in the descriptive terms chosen by the legislature to define agency for Idaho Code § 12-117, the court "must examine what powers have been bestowed on the Authority" to determine agency status or lack thereof). *But see* Brizendine v. Nampa Meridian Irrigation District, 97 Idaho 580, 588 (1976) (where the legislature has enumerated both generic and specific categories in the Tort Claims Act and irrigation districts were not included in either, the legislature must have intended not to include them within the Tort Claims Act).

Where an entity does not fit squarely into the enumerated categories, the balancing approach applied by the Idaho Supreme Court in Duffin to the "instrumentality" analysis probably requires a case by case determination since a particular entity would have individualized powers and characteristics affecting the analysis. As discussed above, the

instrumentality analysis is inconclusive, but there are a number of factors to suggest non-instrumentality status.

The term "operations" also is not defined. Research revealed no cases interpreting the phrase "operation of the state" as that phrase is used in Idaho Code § 67-5773 or in another context. A court would likely apply a balancing approach similar to that used in the instrumentality analysis of Duffin to determine whether an entity constitutes an "operation" of government. Assuming a balancing approach, the same characteristics weighing against instrumentality status would likely weigh against operation status. However, the term "operation" arguably connotes a closer relation than that of "instrumentality." It appears to assume more direct control over an entity than does the term "instrumentality," which seems to allow for some level of separation. Accepting this, the Fund's independent status and financial independence could undermine an argument that it is an "operation" of the state. In sum, whether the Fund would be an "operation" of the state for coverage purposes is not clear.

The issue is further muddied by the fact that Idaho Code § 67-5773, which imposes on the Department the obligation to determine the nature and extent of needs for risk coverage, is specifically limited to the risk needs of "all offices, departments, divisions, boards, commissions, institutions, agencies, and operations of the government of the state of Idaho the premiums on which are payable in whole or in part from funds of the state." (Emphasis added.) As discussed above, the Fund does not receive any state funds. Thus, under a strict interpretation of this language, the Fund cannot be included in the obligation imposed by that section because any premium the Fund would pay would not be payable in whole or part from state funds.[2]

The Bill also creates a board of directors to transact the business and exercise the powers and functions of the Fund. The term "board" is included in the itemized list of entities covered by the Tort Claims Act and risk management statutes. Whether the board, separate and apart from the Fund, could be covered is not clear. The Bill itself provides no insight. If the board is exercising the powers of the Fund and the Fund is not covered, there is at least an argument that the board is not covered.

In sum, there are factors present in the statutory make-up of the Fund under the Bill that suggest that the Fund is not an entity that the Department is obligated to cover as it may not be deemed an "instrumentality" or "operation" of the state. Whether the drafters of the Bill intended that the Fund or its board be afforded coverage by the Department is not clear from the language of the Bill. As such, a court would be the final arbiter of this issue.

Question No. 8:

Will the Fund be subject to the purchasing statutes of title 67, chapter 57, and the

rules promulgated pursuant thereto?

Response:

Most likely not, although the Bill does not provide a clear answer and a court would be the final arbiter of this issue.

The purchasing statutes and rules promulgated thereunder apply to the acquisition of property by state agencies. Idaho Code §§ 67-5714, *et seq*. Idaho Code § 67-5716(15) defines "agency" as "all officers, departments, divisions, bureaus, boards, commissions and institutions of the state, including the public utilities commission, but excluding other legislative and judicial branches of government, and excluding the governor, the lieutenant-governor, the secretary of state, the state controller, the state treasurer, the attorney general, and the superintendent of public instruction." By its terms, the Bill does not make the Fund an "office, department, division, bureau, board, commission or institution." Currently, the Department of Administration, Division of Purchasing ("Purchasing") does act as the statutory purchasing agent for the Fund, except in matters implicating the Fund's fiduciary duties.[3]

Research revealed no cases interpreting this definition of "agency." In Attorney General Opinion No. 77-17, the Attorney General stated that the University of Idaho was excluded from this definition of "agency." That opinion was based on Idaho Supreme Court cases holding that the university is a constitutional corporation of independent authority equal to that of the legislature and not generally subject to the control or supervision of any branch of state government. 1977 Idaho Att'y Gen. Ann. Rpt. 129, 134-35. The Fund is not a constitutional entity akin to the University of Idaho, and that analysis is not applicable to this question.

The Bill's Statement of Purpose specifically provides that the Bill will make the Fund an entity like the Idaho Housing Authority. The Housing Authority's statute specifically provides that it "is not, and has not been since its inception, a state or local agency for purposes of Idaho law . . . ." Idaho Code § 67-6226. The Housing Authority does not use Purchasing as its purchasing agent, nor does it operate under Purchasing's statutes or rules. The Bill contains no provision comparable to Idaho Code § 67-6226. However, to the extent that the Bill is intended to make the Fund an entity like the Housing Authority, it appears that the Bill is intended to deny the Fund agency status for any purpose of Idaho law. Assuming such intent, it seems probable that the Fund, under the Bill, would not be subject to the purchasing statutes and rules applicable to state agencies. However, as the Bill is silent on this specific issue, it would ultimately be an issue of statutory interpretation for a court to determine.

Assuming that the Fund, under the Bill, would not constitute a state agency for purposes of the purchasing statutes and rules, it seems probable that the Fund would not

constitute a "state agency" as that term is defined in Idaho Code § 67-5745, *et seq*., governing telecommunications and information, including acquisitions. Idaho Code § 67-5745C requires, among other things, that state agencies receive approval of the Information Technology Resource Management Council ("ITRMC") for large technology projects. ITRMC is also charged with reviewing and evaluating information technology and telecommunication systems presently used by state agencies. Idaho Code § 67-5745A defines "state agencies" as "all state agencies or departments, boards, commissions, councils and institutions of higher education, but shall not include the elected constitutional officers and their staffs, the legislature and its staffs or the judiciary." The Bill would appear to remove the Fund from any oversight or review by ITRMC.

Question No. 9:

Will the Fund be afforded group health insurance coverage for its employees through the Department of Administration, Office of Insurance Management?

Response:

A definite answer cannot be given. The Bill does not provide an explicit answer to this question and, as such, a court would be the final arbiter of the issue. However, it appears that the Fund may not constitute an entity that must be afforded group coverage. If the board is doing the business of the Fund and the Fund is not covered, there is at least an argument that the board is not covered.

Idaho Code § 67-5761 imposes on the Department of Administration the obligation to "determine the nature and extent of needs for group life insurance, group annuities, group disability insurance, and group health care service coverages with respect to personnel, including elected or appointed officers and employees, of all offices, departments, divisions, boards, commissions, institutions, agencies and operations of the government of the state of Idaho . . . ."

For the reasons set forth in the response to Question No. 8, above, there is a question as to whether the Fund and the board constitute an entity eligible for group coverage. In addition, the purpose of the group insurance coverage statutes is to cover state employees. *See also* Idaho Code §§ 67-5762, 67-5763, and 67-5768(1). Three of the board members would be from private industry and not state employees otherwise entitled to coverage. Without clear statutory direction, a court would have to interpret the applicable statutory provisions to determine this issue.

Question No. 10:

Does the Fund's current classified staff have property interests related to

employment which would preclude their removal from state service?

Response:

The nature of public employment relationships in Idaho is discussed in the Informal Guideline of September 9, 1996 (1996 Idaho Att'y Gen. Ann. Rpt. 203, 204). Generally, state employees fall into two categories: non-classified employees and classified employees. The Idaho Personnel System Act ("Act"), Idaho Code § 67-5301, *et seq.*, provides that all employees in state government are considered to be classified unless they are specifically listed as non-classified. Idaho Code § 67-5303. Non-classified employees are not subject to the provisions of the Act and in the absence of a contract or other agreement limiting the reasons for which they can be dismissed, are "at-will" employees. Classified employees are hired under the provisions of the Act and their employment relationship with the state is governed by its terms. By virtue of their classified status, these employees enjoy a property interest in their continued employment, and can only be dismissed or disciplined for specific, limited reasons. Further, classified employees are entitled to notice and an opportunity to be heard before a decision to dismiss or discipline them is made. Arnzen v. State, 123 Idaho 899, 904-05, 854 P.2d 242, 247-48, (1993), citing Harkness v. City of Burley, 110 Idaho 353, 715 P.2d 1283 (1986).

These property rights to continued employment are not absolute. These property interests cannot, and do not extend so far as to prevent the legislature from reorganizing a state department, or even abolishing it completely. Neither do they prevent an agency director from exercising the statutory authority to abolish positions, reorganize, and order reductions in force to properly manage an agency within the applicable fiscal restraints. This is recognized in the Act and the rules promulgated pursuant to it, which provide for "a system of service ratings and the use of such ratings by all departments in connection with promotions, demotions, retentions, *separations*, and reassignments." Idaho Code § 67-5309, IDAPA 28.01.01.140-147 (emphasis added).

The Bill proposes, in effect, to sever the Fund from state government. All reference to the Act is stricken from the text of the amended statute, and the bill provides an alternative personnel and compensation scheme in section 3:

> The personnel policies and compensation schedules for employees shall be adopted by the board of directors and shall be comparable in scope to other insurance companies doing business in the state and the region.

Removing the Fund from the umbrella of state government and the provisions of the Act will subject the Fund's classified employees to an involuntary, non-disciplinary separation from state employment. It is not unlike a layoff or reduction in force, except that it involves all of the agency employees. Such an involuntary, non-disciplinary

separation is not appealable under the Act. Idaho Code § 67-5316. Neither does it give rise to a right to notice and an opportunity to respond. Idaho Code § 67-5315.

In summary, while classified employees are offered certain protections by virtue of their property interest in their continued employment, those property interests are primarily aimed at ensuring fair and equal treatment of employees. They do not extend so far as to trump the ultimate authority of the legislature to define the shape of state government.

Question No. 11:

What rights or privileges, if any, will current classified staff have upon their involuntary non-disciplinary separation from state classified service?

Response:

As discussed above, upon enactment as written the current classified employees of the Fund will become former classified state employees. Former classified employees of the Fund would, in all respects, be treated as would any classified employee who voluntarily left state service in good standing. This includes the handling of benefits such as sick leave and accrued annual leave, deferred compensation, and medical benefits. This also includes eligibility for reinstatement as provided by IDAPA 28.01.01.125. In summary:

A. Former employees are eligible for reinstatement to a class in which they held permanent status, or to another class of equal or lower pay grade under the following conditions:

i. Reinstatement must occur within a period equal to the length of the employee's service;

ii. The former employee's separation must have been without prejudice;

iii. The former employee must meet the current minimum qualifications of the class to which reinstatement is desired.

B. Reinstatement is not allowed if there is a departmental layoff register for the class with eligibles who are willing to accept reemployment.

C. The state personnel director may require the former employee to pass an examination for the class to which reinstatement is desired.

D. Employees of the Fund may have certain additional rights under federal law. The Work Adjustment and Retraining Notification Act, 29 U.S.C. § 2101, *et seq.*, and the regulations at 20 CFR 639.3 define employer. This definition includes the state, if the state entity is engaging in a business activity and employs more than 100 employees. The Fund is providing a proprietary function (a business) according to the Musgrave court. It is our understanding the Fund has more than 100 employees.

Question No. 12:

Will the Bill impact existing contracts between the Fund and its insureds?

Response:

Idaho Code § 72-918 requires that every employer insuring in the Fund receive a contract or policy of insurance from the manager. The Idaho Constitution, art. 1, sec. 16, prohibits any law impairing the obligation of contracts. Adoption of the Bill can not legally negate or change any existing insurance policy.

However, adoption of the Bill creates a new legal entity as an independent body corporate politic. The Bill is silent on the transfer or assignment of assets and obligations. Thus, the new legal entity has not succeeded to the obligations or assets of the prior entity.

Administratively, the new independent body corporate politic would have to enter into novation agreements with the employers or accept an assignment of the policies, assuming the current policies allow for an assignment. Otherwise, the new body corporate politic would have to issue new policies of insurance.

Question No. 13:

Will the Fund be exempt from the legislative appropriation process?

Response:

The Idaho Supreme Court, in Musgrave, held that the revenue of the Fund was not the property of the state, nor monies constituting part of the general fund held within the state's treasury for purposes of the statutory provisions governing the appropriation and expenditure of state funds. The court had found that the language of Idaho Code §§ 72-901, 72-902 and 72-927 was sufficient to constitute a continuing appropriation for the payment of all compensation, expenses or other obligations incurred in carrying out the worker's compensation law.[4] The Bill amends Idaho Code §§ 72-901 and 72-902. The impact of the amendment is unknown. Arguably, the same rationale utilized by the court in Musgrave would apply. Therefore, the Fund would not need a legislative

appropriation because Idaho Code §§ 72-901, 72-902 and 72-927 would be considered a continuing appropriation.

However, Idaho Code § 72-910 remains unchanged by the Bill. Idaho Code § 72-910 requires the state treasurer to be the custodian of the state insurance fund. This section allows the state treasurer to deposit any portion of the fund not needed for immediate use, in the manner and subject to all the provisions of law respecting the deposit of "other state funds." (The holding and investment of the state insurance fund by the state treasurer is yet another factor to consider in determining whether the Fund is an "instrumentality of the state.")

Question No. 14:

The Bill also makes certain amendments to the Petroleum Clean Water Trust Fund ("PSTF") statutes, Idaho Code §§ 41-4901, *et seq.* Section 41-904(5) states that the PSTF personnel costs, operating expenditures, and capital outlay budget shall be subject to review and approval in the appropriation of the Fund. If there is no appropriation to the Fund, how can the PSTF budget be reviewed?

Response:

The Bill is silent as to any appropriation process required for the proposed new independent body corporate politic. As discussed in the response to Question No. 13 above, the holding in Musgrave may apply. The court in Musgrave found that Idaho Code §§ 72-901, 72-902 and 72-927 constituted a continuing appropriation. As a practical matter, if the new Fund's continuing appropriation is never reviewed by the legislature, then the legislature would never have an opportunity to set the budget for PSTF. Therefore, it seems appropriate to review this part of the Bill to make certain the legislative intent is clearly met. This is particularly true if it is the intent to transfer PSTF to the control of a new trustee. The duties of the new trustee should be clearly identified by the legislature.

I hope this letter adequately addresses your inquiry. If you have any further questions regarding this matter, please do not hesitate to contact me.

Sincerely,

TERRY E. COFFIN
Division Chief
Contracts & Administrative Law Division

[1] Research revealed no Idaho statute creating an "independent body politic corporate." There are a limited number of statutorily created entities denominated as an "independent public body corporate and politic." Only three are included in title 67 (State Government and State Affairs). These three are the Idaho Housing Association, the Idaho State Building Authority and the Food Quality Assurance Institute. The remaining entities created as "independent public bod(ies) corporate and politic" are found in the Idaho Code in title 31 (Counties), title 50 (Municipal Corporations), title 33 (Education—Junior Colleges) and title 41 (Insurance).

The Statement of Purpose for the Bill states that the Fund would become an entity like the Idaho Housing Authority. However, a review of the statutes and cases involving the Housing Authority and a comparison to the Fund do not provide much insight if the purpose of such is to determine whether the Fund is an "instrumentality" of the state in the context of the Tort Claims Act. The statutes and cases involving "independent public bodies corporate and politic" are not directly applicable to risk issues and do not provide an analysis readily applicable to this issue.

Idaho Code § 67-6226 specifically provides that the Housing Authority "is not, and has not been since its inception, a state or local agency for purposes of Idaho law including [the Public Records Act]." Research revealed no cases interpreting this provision. However, by its terms, it suggests an intent to deny agency status. *See* State *ex rel*. Warren v. Nusbaum, 208 N.W.2d 780, 801 (Wis. 1973) (the Wisconsin Housing Authority, denominated an independent public body corporate and politic, has the power to sue and be sued; to make contracts; to acquire real and personal property; and to disburse its own funds, all of which support the legislative declaration that the Authority is an independent entity. "To the extent that the words [independent public body corporate and politic] denote interdependence and a common identity, the Authority is neither an arm or agent of the State").

The Idaho Building Authority, created in Idaho Code § 67-6403, is another independent public body corporate and politic. The statute provides that the authority is "constituted a public instrumentality exercising public and essential governmental functions and the exercise by the authority of the powers conferred by this act shall be deemed and held to be the performance of an essential governmental function of the state." The Building Authority was found not to be a state agency for purposes of Idaho Code § 12-117(3) involving the award of attorneys' fees against a state agency. Bott v. Idaho State Building Authority, 122 Idaho 471, 479-80 (1992).

The Idaho Food Quality Assurance Institute was created by Idaho Code § 67-8301 as an independent public body corporate and politic. Recently, the Institute's status under the Tort Claims Act was analyzed and it was concluded that there was some question as to whether the Institute could be protected by the Tort Claims Act. The Institute is currently seeking legislation to clarify its right to such protection.

Research revealed one entity identified in Idaho statutes as a "public body politic and corporate." This entity is the Idaho Health Facilities Authority. In Board of County Commissioners of Twin Falls County v. Idaho Health Facilities Authority, 96 Idaho 498 (1974), the Idaho Supreme Court held that the Health Facilities Authority was not a constitutionally prohibited corporation. The court held that the state may create an entity that is neither a corporation nor a state agency subject to all restrictions of the Idaho Constitution. The case did not address whether the Health Facilities Authority was an instrumentality under the Tort Claims Act.

[2] The Department of Administration currently does provide risk coverage to the Fund. The Bill's Statement of Purpose provides that the Fund under the Bill will be like the Idaho Housing Authority. The Department of Administration does not currently provide risk coverage to the Idaho Housing Authority.

[3] Under the holding in State of Idaho v. Musgrave, 84 Idaho 77 (1962), the Fund is treated as a state agency.

[4] These sections of Idaho Code have remained unchanged since the Musgrave decision.