



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

LAWRENCE G. WASDEN

ATTORNEY GENERAL OPINION NO. 14-3

To: Kit Coffin
Risk Management Program Manager
Idaho Department of Administration
STATEHOUSE MAIL

Per Request for Attorney General's Opinion

You have requested an Attorney General's Opinion concerning whether the University of Idaho has any exemption from the requirement that it procure its insurance solely as prescribed by the Department of Administration. This opinion addresses the question you have presented.

QUESTION PRESENTED

Does the University of Idaho have any exemption from the requirement for sole provision of insurance by the State of Idaho Risk Management Program within the Department of Administration (other than group insurance for State employees)?

CONCLUSION

For the reasons stated below, the University of Idaho should not obtain its own risk (*i.e.*, liability) or property insurance unless it does so by paying premiums with moneys not derived in whole or in part from State funds. It may obtain its own risk or property insurance if it pays the premiums with money not obtained in whole or in part from State funds.

I reach these conclusions for the following reasons. There are two exceptions in title 67, chapter 57, Idaho Code, under which the University of Idaho may obtain insurance coverage in addition to that procured by the Director of the Department of Administration. The first is in Idaho Code sections 67-5765 and 67-5766, which are among the sections authorizing purchase of group insurance for life, medical and disability coverage. Group insurance was not within the scope of the Question Presented, so this exception is not relevant.

The second exception is implicit, not explicit. Idaho Code sections 67-5773 and 67-5775 give the Director authority to determine the nature and extent of insurance coverage for risk and property and to procure necessary insurance and/or not to insure according to the Director's determination of what is cost beneficial. However, there is an implicit exception to the

Director’s authority under Idaho Code section 67-5773(1)(a) — when premiums are not paid in whole or in part from State funds. Under section 67-5773(1)(a), it would appear that the University of Idaho could obtain risk or property insurance on its own if no State funds were involved. However, Idaho Code section 6-920 of the Idaho Tort Claims Act would preclude even that where liability insurance (what section 67-5773 calls risk insurance) is involved. Under these statutes, the only risk or property insurance that the University of Idaho may obtain on its own is property insurance paid with premiums not derived in whole or in part from State funds.

This statutory review does not complete the analysis, however. Idaho Constitution, art. IX, sec. 10, gives the University of Idaho’s Regents “general supervision of the university, and the control and direction of all the funds of, and appropriations to, the university, under such regulation as may be prescribed by law.” No Idaho Supreme Court case law has extended the Regents’ authority under this section to trump the statutes cited, although one cannot say with assurance that this could not happen. On the other hand, there is case law that the Legislature may not restrict the University’s use of funds other than State funds.

There is a presumption that statutes are constitutional. There is no existing case law holding that art. IX, sec. 10, overrides the Idaho Tort Claims Act or the Risk Management statutes. In the absence of precedent that construes art. IX, sec. 10, to the contrary, both the Department of Administration and the University of Idaho should follow the applicable statutes and the scant constitutional case law under art. IX, sec. 10, as follows: The University of Idaho cannot use appropriated funds to purchase its own risk or property insurance, but may use funds other than State funds to purchase whatever risk or property insurance it wishes.

ANALYSIS

This Opinion begins with a statutory analysis, then turns to a constitutional analysis under art. IX, sec. 10 of the Idaho Constitution.

A. Statutory Analysis

Title 67, chapter 57, Idaho Code, creates the Department of Administration and gives it authority to manage many programs for other agencies of State government. Chapter 57 is the starting point of this statutory analysis. After that, the Idaho Tort Claims Act, title 6, chapter 9, Idaho Code, is reviewed and tied back into Chapter 57.

1. The Structure of Title 67, Chapter 57, Idaho Code.

Chapter 57 is not explicitly organized into separate parts for the Department’s various functions. However, its sections may be catalogued as follows:

- [A] Sections 67-5701 through 67-5704. Creation of the Department and general provisions for accounting of funds.
- [B] Section 67-5705. Division of Public Works created.
- [B.1] Sections 67-5706 through 67-5709A. Division of Public Works — management of existing State facilities.

- [B.2] Sections 67-5710 through 67-5713. Division of Public Works — construction or retrofitting of State facilities.
 - [C] Sections 67-5714 through 67-5744. Division of Purchasing — purchasing and management of State property.
 - [D] Sections 67-5745 through 67-5745E. Idaho Education Network.
 - [E] Sections 67-5746 through 67-5759. Miscellaneous provisions and repealed sections.
 - [F] Section 67-5760. Insurance.
 - [F.1] Sections 67-5761 through 67-5772. Group insurance — life, medical and disability.
 - [F.2] Sections 67-5773 through 67-5778. Risk management — risk and property.
 - [G] Sections 67-5779 through 67-5782. Property records management.
2. The Department's Authority Over Risk and Property Insurance Is Unique — There Are No Explicit Statutory Exceptions From the Department's Authority.

In addition to risk management, which is the subject of this opinion, title 67, chapter 57's principal statutory authorities that authorize the Department to administer programs on behalf of other State agencies are:¹

- Office Space, Office Buildings and Related Facilities. The Department allocates office space for State agencies in Boise, leases space for multi-agency facilities elsewhere, controls parking at the Capitol Mall, prepares a statewide facilities needs plan, manages facilities in the Capitol Mall, and sells, transfers or disposes of certain administrative facilities. Idaho Code §§ 67-5706 through 67-5709A.
- Construction of Public Works. The Department's Division of Public Works and/or the Permanent Building Fund Advisory Council approve, contract for and/or build major public works. Idaho Code §§ 67-5710 through 67-5711D.
- Purchasing. The Department's Division of Purchasing purchases, acquires, trades, sells and disposes of State property and maintains adequate stocks of property. Idaho Code §§ 67-5714 through 67-5744.

¹ This Opinion does not comprehensively list every program in Chapter 57 that the Department administers for other State agencies lest it inadvertently omit one or more of them. Likewise, it does not comprehensively list every exception to the Department's authority in Chapter 57. Instead, it identifies the principal programs that the Department administers to show the kinds of exceptions that State agencies have from the Department's authority.

- Information and Communications Technology. The Department's Idaho Technology Authority reviews, plans, coordinates, approves and promotes information technology and telecommunications for State agencies. Idaho Code §§ 67-5745 through 67-6745E.
- Group Insurance. The Department procures life, medical and disability group insurance for State employees. Idaho Code §§ 67-5761 through 67-5772.
- Property Records. The Department controls and manages the State's integrated property management records. Idaho Code §§ 67-5779 through 57-5782.

There are numerous exceptions to the Department of Administration's authorities over other State agencies that are listed above. For example:

- Office Space, Office Buildings and Related Facilities. Legislative facilities are excepted from the Department's management of Capitol Mall facilities. Idaho Code § 67-5709(6). State institutions of higher learning are excepted from the Department's planning for facilities needs. Idaho Code § 67-5708B.
- Construction of Public Works. The Board of Regents of the University of Idaho and the Departments of Transportation, Fish and Game, Parks and Recreation, Lands and Water Resources are excepted from contracting for public works through the Department of Administration. Idaho Code § 67-5711.
- Purchasing. State institutions of higher learning, the legislative and judicial branches, and constitutional executive officers are excepted from using the Division of Purchasing when acquiring property. Idaho Code §§ 67-5716(14) and 67-5728.
- Information and Communications Technology. State institutions of higher learning are covered by Idaho Technology Authority sections, but constitutional executive officers are not. Idaho Code § 67-5745A(2). Constitutional officers and institutions of higher learning are not required to obtain Department approval for communications equipment and facilities, but are subject to Department coordination of their acquisition and installation of equipment and facilities. Idaho Code § 67-5747(1).
- Group Insurance. The Department's authority to obtain group insurance "is in addition to and not in derogation of" other governmental entities' (including universities') abilities to obtain group insurance. Idaho Code §§ 67-5765 and 67-5767.
- Property Records. Universities are among the State agencies for which the Department is in possession and control of their property records, but constitutional officers, the Legislature and the judiciary are not. Idaho Code § 67-5779(4).

In contrast to the statutes described above, many of which explicitly exclude or include colleges and universities, the risk management statutes that the Director administers have *no* explicit exceptions. Idaho Code § 67-5773 gives the Director decision-making authority over insurance coverage (other than coverage for life and disability insurance) if the premium is paid in whole or in part with State funds. Under section 67-5773, the Director may give due

consideration to the recommendations of other State institutions,² but in the end, the Director may “[d]etermine the nature and extent of needs for insurance coverages . . . as to risks and property of all . . . institutions . . . of the state” when the premiums are paid in whole or in part from State funds and “[d]etermine the character, terms, and amount of insurance coverages required by such needs”:

67-5773. Powers and duties — Risk management. — (1) The director of the department of administration shall:

- (a) *Determine the nature and extent of needs for insurance coverages of all kinds*, other than life and disability insurances, *as to risks and property 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.*

² The term “institution” is not defined every time it is used in Chapter 57. However, its use in Chapter 57 strongly suggests that colleges and universities, which are sometimes referred to as “institutions of higher education,” are institutions when that word is used elsewhere in Chapter 57 without a definition. For example:

- “State agency” is defined in section 67-5708B addressing facilities needs planning to include institutions in general, but explicitly excepts institutions of higher learning.
- “Agency” is defined in section 66-5716(14) of the purchasing statutes to include “officers, departments, divisions, bureaus, boards, commissions and institutions of the state,” which strongly suggests that colleges and universities would be included among the covered “institutions” if they were not explicitly excepted.
- “State institutions of higher learning” are defined in section 67-5728 in a manner that strongly suggests that State colleges and universities are a subset of State institutions.
- Section 67-5740(b) addressing the acquisition of surplus Federal property uses the word “institutions” in a manner that includes the State colleges and universities mentioned in subsection (a).
- “Agency” is defined in section 67-5745A(2) in the Idaho Technology Authority to include “institutions of higher education,” which suggests that colleges and universities are institutions.
- The group insurance statutes cover “offices, departments, divisions, boards, commissions, institutions, agencies,” *e.g.*, subsection 67-5761(1)(c), and refer to colleges and universities “and other institutions operated by the State,” section 67-5764, which also suggests that colleges and universities are State “institutions.”

Thus, when the word “institution” is used but not defined in the risk management statutes, it seems likely that colleges and universities are institutions covered by the statutes. *Cf. State ex rel. Miller v. State Bd. of Educ.*, 56 Idaho 210, 215, 52 P.2d 141, 143 (1935) (the University of Idaho Board of Regents are “the managers and corporate representative of an educational institution”). Moreover, the first example used in a dictionary definition of “institution” refers to a college as a kind of “institution”: “1. an organization, establishment, foundation, society, or the like, devoted to the promotion of a particular cause or program, especially one of a public, educational, or charitable character: ‘This college is the best institution of its kind.’” Dictionary-Reference.com (2014).

If that were not enough, the Idaho Tort Claims Act, which cross-references the risk management statutes, *see* sections 6-919 through 6-922, defines the State to include colleges and universities. Idaho Code § 6-902(1). It is doubtful that the Idaho Tort Claims Act would require colleges and universities to be part of the State for tort liability purposes, but not for risk management purposes, without spelling out such an exception. Finally, although a definition in the Education Title of the Idaho Code would not necessarily apply to title 67, chapter 57, Idaho Code, section 33-101 lists all of Idaho’s four-year State supported colleges and universities as among the “state educational institutions” subject to the State Board of Education’s control.

For all of these reasons, I conclude that the University of Idaho is a State institution within the meaning of the risk management statutes.

(b) *Determine the character, terms, and amounts of insurance coverages* required by such needs.

...

(d) *Administer all such coverages* on behalf of the insured, including making and settlement of loss claims arising thereunder. . . .

...

(2) As to all such needs and coverages, the director shall give due consideration to information furnished by and recommendations of any office, department, division, board, commission, institution or agency.

Idaho Code § 67-5773 (emphasis added).

Section 67-5773 does not explicitly state that the Director’s authority “over the character, terms and amounts of insurance coverages” for risk and property required by her determinations of need for insurance premiums paid in whole or in part from State funds is exclusive, but it does not vest authority in any other officers or agencies to determine insurance needs, to determine the character, terms and amounts of insurance coverages, or to administer insurance coverages. It would be inconsistent with the scheme of the Director’s determination of insurance needs and of the character, terms and amounts of insurance coverages to construe this statute to allow other agencies and institutions to make their own independent determinations of how the agency should or should not be insured for risk or property, at least with regard to premiums purchased in whole or in part with State funds.

Likewise, under Idaho Code section 67-5775, the Director determines the need for, form of, and amount of insurance for liability and property with the goal of overall savings to the State rather than to any one department or institution. Under that section, the Director also determines whether it is cost effective to insure certain risks and/or property or to leave them uninsured:

67-5775. Risk management guidelines. — *In determining need for, form and amount of, procuring and administering insurance coverages*, the director of the department of administration shall give due consideration to:

(1) *omission of insurance policy coverage as to property and risks as to which insurance and claim administration costs may be disproportionately great in reference to the amount of risk;*

(2) *ultimate economies possible through use of reasonable deductions;*

(3) use of comprehensive coverages and blanket coverages insuring property and risks of two (2) or more offices, departments, divisions, boards, commissions, institutions and agencies;

(4) reliability of and service provided by insurers to be selected as insurance carriers, as well as financial condition and competitive premium rate;

(5) means through which risks may be improved with ultimate savings to the state through reduction in insurance losses and costs.

Idaho Code § 67-5775 (emphasis added). Again, although this section does not explicitly state that the Director’s authority to “procur[e] and administer[] insurance coverages” is exclusive, it does not invest the authority to procure insurance in any other officer or agency.

The presence of exceptions from the Department’s authority over other State agencies and institutions in all of Chapter 57’s major programs but one is telling — the absence of exceptions for risk management indicates that there are no exceptions for risk management. KGF Dev., LLC v. City of Ketchum, 149 Idaho 524, 528, 263 P.3d 1284, 1288 (2010) (where a statute contains a specific and exhaustive list of interests that allow exercise of authority under the statute, that list is exclusive and does not include matters not listed).

3. Construing Sections According to Chapter 57’s Structure.

Chapter 57’s structure plays an important role in this analysis. In particular, one generally worded section must be placed in context. Idaho Code section 67-5766 states that the “authority hereby given shall be in addition to and not in derogation of any power existing in any . . . college, . . . university or other institution . . . supported in whole or in part by public funds.” This section does not explicitly state what power is given to whom or what power is not derogated. Read in isolation, this section might apply to all powers listed in Chapter 57.

Idaho Code sections 67-5762 through 67-5764 give the Department and other governmental entities the power to purchase group insurance. Idaho Code sections 67-5764 and 67-5766 include colleges and universities in nearly identical lists of government entities with those powers. Idaho Code section 67-5765 refers to existing contracts for group insurance for a similar list of government entities.

Thus, I conclude that the “power” referred to in Idaho Code section 67-5776 is the power of the Department and many other governmental agencies to purchase the types of group insurance listed in the preceding sections and not other powers listed elsewhere in Chapter 57. *See generally* State v. Hammersley, 134 Idaho 816, 821, 10 P.3d 1285, 1290 (2000) (“where a word is capable of many meanings,” “a word is known by the company it keeps”); State ex rel. Wasden v. Daicel Chemical Indus., Ltd., 141 Idaho 102, 109, 106 P.3d 428, 435 (2005) (“[w]here a statute contains specific terms followed by a general term the latter will typically be regarded as referring to things of a like class to those particularly described”).

This conclusion is supported by the legislative history. The Idaho Code sections now codified as 67-5763 through 67-5766 were sections one through four of 1959 Idaho Session Law, chapter 216. That session law dealt exclusively with group insurance and was codified as sections 59-1201 through 59-1204. 1980 Idaho Session Law, chapter 237, sections 12 through 15, redesignated these four sections as 67-5763 through 67-5766 without otherwise amending them and placed them amid other sections addressing group insurance. Thus, the legislative history supports the conclusion that Idaho Code section 67-5766’s broad language applies only to group insurance and not to other insurance.

4. The Idaho Tort Claims Act Explicitly Gives the Department Exclusive Authority Over Risk Insurance.

The Idaho Tort Claims Act (ITCA) includes State colleges and universities within its definition of the State. Idaho Code § 6-902(1). The ITCA subjects the State and its employees to liability under State tort law and commits the State to provide defenses to the State and its employees under both State and Federal tort law (with such exceptions as are contained in the Act). Idaho Code § 6-903(a)-(c). Idaho Code sections 67-5773's and 67-5775's centralization in the Department of decision-making authority over risk insurance is consistent with the ITCA, which places all decisions regarding acquisition of the State's liability insurance³ (or, in the alternative, use of the retained risk account) in the Department. ITCA sections 6-919 and 6-920 give the Department authority to procure liability insurance and the latter section gives the Department exclusive authority to obtain liability insurance:

6-919. Liability insurance for state — Comprehensive plan by division of insurance management. — The administrator of the division of insurance management in the department of administration shall provide a comprehensive liability plan which will cover and protect the state and its employees from claims and civil lawsuits. *He shall be responsible for the acquisition and administration of all liability insurance of the state or for the use of the retained risk account provided in section 67-5776, Idaho Code, to meet the obligations of the comprehensive liability plan.*

The administrator shall, after consultation with the departments, agencies, commissions, and other instrumentalities of the state, provide a comprehensive liability plan for the state providing liability coverage to the state and its employees in amounts not less than the minimum specified in section 6-924, Idaho Code. *He shall have the authority to use the retained risk account provided in section 67-5776, Idaho Code, or to purchase, renew, cancel and modify all policies according to the comprehensive liability plan.*

³ The Idaho Tort Claims Act refers to “liability” insurance and “liability” plans in sections 6-919 and 6-920; sections 67-5773 and 67-5775 refer to “risk management” and insurance for “risk.” This Opinion treats “risk” as including “liability” for the following reasons.

First, the Legislature placed risk management authority for the State in the Department of Administration 40 years ago. *See* 1974 Idaho Sess. Laws, chapter 252, sections 2 through 6, enacting sections 67-5773 through 67-5777. Sections 7 through 9 of that Session Law amended sections 6-919 through 6-921 of the Tort Claims Act to put the Department's Risk Manager (a statutory office that no longer exists) in charge of acquiring and administering “liability” insurance for the State. In the context of that Session Law, “risk” for tort and property purposes and “liability” under tort law and for loss of property appear to be the same thing or very closely related with regard to the State bearing financial uncertainty with regard to tort and property claims.

Second, the second dictionary definition of “risk,” which applies to insurance, associates risk with financial responsibility for loss: “2. Insurance. a. the hazard or chance of loss. b. the degree of probability of such loss. c. the amount that the insurance company may lose. d. a person or thing with reference to the hazard involved in insuring him, her, or it. e. the type of loss, as life, fire, marine disaster, or earthquake, against which an insurance policy is drawn.” Dictionary-Reference.com (2014). The meaning of “risk” in the insurance context is thus closely tied to liability (financial responsibility) in the tort or property context.

6-920. Liability insurance for state procured by division of insurance management. — *No state agency or institution other than the administrator of the division of insurance management in the department of administration may procure liability insurance under this act.* All state agencies and institutions shall comply with this act and the comprehensive liability plan developed by the administrator of the division.

Idaho Code §§ 6-919 and 6-920 (emphasis added).

Thus, I conclude that Idaho statutes do not allow the University to obtain its own liability insurance except as provided by the Department (Idaho Code §§ 6-919, 6-920, 67-5773 and 67-5775) unless the premiums are not paid in whole or in part with State funds. Further, although the Idaho statutes are not explicit with regard to property insurance, I further conclude that they do not allow the University of Idaho to separately insure its property, unless the premiums are not paid in whole or in part with State funds (Idaho Code §§ 67-5773(1)(a) and 67-5775).

This conclusion is bolstered by State v. Continental Cas. Co., 126 Idaho 178, 879 P.2d 1111 (1994) (Continental II). Continental II followed State v. Continental Cas. Co., 121 Idaho 938, 829 P.2d 528 (1992) (Continental I), in which the Idaho Supreme Court held that Idaho State University's statutory authority as a legal entity was similar to the University of Idaho's constitutional authority as a legal entity, that under the statutes ISU was a legal entity separate from the State of Idaho, and that the State was not a named insured on ISU's insurance policy. 121 Idaho at 940, 829 P.2d at 530.

Nevertheless, just two years later in Continental II, the Court equated ISU with the State for economic, tort, insurance and self-insurance purposes. Acknowledging that the Legislature created ISU as "a body politic and corporate . . . having power to sue and be sued in its own name, . . . the focus of our inquiry is not so much on the legal-political relationship between ISU and the State, but on the economic relationship between the State, ISU and BRM [the Bureau of Risk Management, which was then a statutorily-created Bureau in the Department]." 126 Idaho at 183, 879 P.2d at 1116. The Court reviewed Idaho Code §§ 67-5773 and 67-5775 and related sections dealing with the BRM's program of retained risk management and purchase of insurance, including BRM's option "not to procure insurance to cover those risks, but to manage those risks through a program of 'retention' or 'self-insurance.'" *Id.*

Continental II explained that Idaho Code sections 67-5773 and 67-5775 are part of a larger scheme directly tied to State funding and State appropriations:

These code sections make it clear that the State funds its risk management program through mandatory assessments to the various state agencies. The State, through the BRM, assesses the risk exposure of the various agencies, *determines what risks to insure*, negotiates the purchase of insurance, and charges the agencies proportionately to pay for the insurance and to fund a reserve account to pay for those losses which are not insured. *Thus, at the same time the State funds its various agencies, it also requires those agencies to remit a portion of those state funds to the retained risk account to finance the State's risk management program. Because the State is ultimately liable for those uninsured losses*

incurred by agencies as a result of claims brought under the ITCA, the State is essentially requiring agencies to use their state appropriated money to fund a reserve account to pay losses for which the State is ultimately liable.

126 Idaho at 184, 879 P.2d at 1117 (emphasis added).

We conclude that the economic family concept is applicable to the facts of this case. The State, ISU and BRM represent one “economic family.” The State, in funding ISU, and requiring ISU to remit funds into the retained risk account, has done nothing other than move assets among separate members of the same economic family. It is actually the State who is funding the retained risk account, and it is the State which bears the ultimate economic burden of loss. *The State required ISU, as well as its other agencies, to contribute to the retained risk account, out of funds appropriated to these agencies by the state legislature.* The retained risk program and payments made thereto by ISU did not shift any risk of loss from ISU to the State. The State established and mandated agency participation in the retained risk program in order to create reserves from which the State could pay for losses for which the State would be ultimately liable.

126 Idaho at 185, 879 P.2d at 1118 (emphasis added).

The statutes regarding the Department’s authority to decide what to insure and what not to insure are still like they were when Continental II was decided. Continental II did not erode Continental I’s observation that ISU’s statutory authority was like the University of Idaho’s constitutional authority in the sense that both were legally distinct from the State. Thus, the “economic family” analysis would also apply to the State, the Department of Administration and the University of Idaho like it applied to the State, BRM and ISU. Because the State ultimately bears losses associated with the University of Idaho’s tort liability or property loss, the State and the University are one economic family for such purposes under Continental II. These observations are important elements in construing the University of Idaho’s constitutional authority.

A. Constitutional Analysis

1. Origin of Art. IX, Sec. 10 of the Idaho Constitution.

Art. IX, sec. 10 of the Idaho Constitution addresses the University of Idaho. It was amended during the Idaho Constitutional Convention to reduce the Board of Regents’ authority over appropriated funds. As first taken up during the convention, art. IX, sec. 10 (which was then sec. 14 of the draft of art. IX) gave the University of Idaho Board of Regents *exclusive* control over funds appropriated to the University. The motion to adopt this section proposed the following language:

The location of the university of Idaho, as established by existing laws, is hereby confirmed. All the rights, immunities, franchises and endowments heretofore granted by the territory of Idaho are hereby perpetuated unto the said university. The regents shall have the general supervision of the university and *exclusive* control and direction of all the funds of, and appropriations to the university, under such regulations as may be prescribed by law.

Proceedings and Debates of the Constitutional Convention of Idaho 1889 (1912), p. 766 (emphasis added) (Constitutional Debates).

The motion to adopt this section prompted a debate, in Delegate Claggett’s words, over the wisdom of “taking the whole subject of the control of the university and university funds away from the legislature and away from any and every other authority.” Constitutional Debates, p. 766. After a discussion about whether the words “under such regulations as may be prescribed by law” preserved a legislative role for oversight of university funds, *id.* at 766-772, the delegates resolved the issue by agreeing to strike the word “exclusive” from what was then the final sentence of the section and adopting it with that amendment. *Id.* at 772. The section was later amended to add a sentence concerning sale of the University’s endowment land, *id.* at 850-861, and adopted as it appeared in the original Idaho Constitution, *id.* at 1450-1452:

§ 10. State University — Location, regents, tuition, fees and lands — The location of the University of Idaho, as established by existing laws, is hereby confirmed. All the rights, immunities, franchises, and endowments, heretofore granted thereto by the territory of Idaho are hereby perpetuated unto the said university. *The regents shall have the general supervision of the university, and the control and direction of all the funds of, and appropriations to, the university, under such regulations as may be prescribed by law.* No university lands shall be sold for less than ten dollars per acre, and in subdivisions not to exceed one hundred and sixty acres, to any one person, company or corporation.

(Emphasis added). In 2010, this section was amended to insert the following sentence authorizing tuition before the last sentence: “The regents may impose rates of tuition and fees on all students enrolled in the university as authorized by law.” The amendment authorizing tuition does not address the subject matter of the bolded, italicized sentence above and should not change the application of the case law decided under art. IX, sec. 10.

Art. IX, sec. 10 has an unresolved tension between the regents’ “general supervision of the university, and the control and direction of all funds of, and appropriations to, the university,” and the extent to which those funds are subject to “such regulations as may be prescribed by law.” The case law does not resolve this tension with regard to risk and property insurance.

2. The Supreme Court of Idaho’s Construction of Art. IX, Sec. 10 of the Idaho Constitution and Related Laws.

The Supreme Court of Idaho has interpreted art. IX, sec. 10, and statutory provisions relating to the University of Idaho several times. This section of the opinion reviews those cases.

Roach v. Gooding, 11 Idaho 244, 81 P. 642 (1905), construed section 8 of the Idaho Admissions Act, which included the phrase “university purposes.” Section 8 provided:

§ 8. University land grant. — The lands granted to the territory of Idaho by the Act ... entitled, “An act to grant lands to . . . Idaho . . . for university purposes,” are hereby vested in the state of Idaho . . . and the proceeds [from sale of university lands] shall constitute a permanent fund . . . the income thereof to be used exclusively for *university purposes*. . . .

Idaho Admissions Act, ch. 656, § 8, 26 Stat. L. 15 (emphasis added).

In Roach, the issue was whether the Legislature could use income from the endowment fund established under section 8 of the Idaho Admission Act to pay for bonds for the construction and equipment of a science building at the University of Idaho. The answer was a resounding “no” because the construction of campus buildings was not a “university purpose”:

Counsel for plaintiffs further contend that the words “university purposes,” as used in section 8 of the admission act, include the erection of buildings. We cannot agree with that contention, as the provisions of that section must be construed in connection with the other provisions of said act, taking them all together. It is clear that it was not intended to permit the interest or income from such funds to be used in the erection or equipment of buildings. As we view it, *the “purpose” of the university is not in any sense the erection or equipment of buildings therefor.*

11 Idaho at 251, 81 P. at 644-645 (emphasis added).

Roach held under the Idaho Admissions Act that providing buildings for the University of Idaho was a State responsibility separate from “university” or “educational” purposes: “[T]he general attitude and policy of Congress has been to provide an endowment fund for educational purposes; the income thereof only to be used to support the institution, leaving the people of the state to furnish the buildings.” 11 Idaho at 251-252, 81 P. at 645. Thus, Roach drew a line between the use of endowment funds for university purposes and for the construction of buildings. Under Roach, to the extent the Regents of the University of Idaho have constitutional authority over certain funds under art. IX, sec. 10, it would seem likely that their authority is at its weakest for funds not associated with “university purposes”; and funds related to buildings or equipment of buildings fall outside of “university purposes.” Although Roach does not address this issue, the general tenor of its analysis also suggests that tort liability or property insurance would similarly fall outside of “university purposes.”

Idaho Revised Political and Civil Code § 491 (1908) authorized the Board of Regents to spend certain funds on the construction of buildings. Consistent with Roach’s treatment of such funds as distinct from funds for educational purposes, those funds were subject to claims arising from the construction project (even if general university funds or the State Treasury was not) even though § 491 contained no explicit authorization for making construction-related claims.

. . . The Board of Regents should make payment accordingly out of any funds that they have in their hands for the erection of said foundation [for the building]. If they have not sufficient funds for that purpose, they ought to make said payments out of the first money coming into their hands for the erection and construction of said Administration Building. . . .

. . . They have no authority whatever to incur any indebtedness against the state, directly or indirectly, in the erection of university buildings for which they have no funds to pay. . . .

Moscow Hardware Co. v. Regents of Univ. of Idaho, 19 Idaho 420, 431-432, 113 P. 731, 734 (1911). From this, I conclude that when the Legislature authorizes the University of Idaho to spend funds for a specific purpose, those funds are subject to the ordinary rules of law that apply to funds associated with the purpose — in Moscow Hardware's case to claims associated with a construction project. Putting Roach and Moscow Hardware together, it seems likely that the non-“university” business side of managing property (or, by analogy, liability regarding property) with appropriated funds would be subject to “such regulations as may be prescribed by law.”

State ex rel. Black v. State Bd. of Educ., 33 Idaho 415, 196 P. 201 (1921), involved a direct confrontation between the authority of the Board of Regents and the Executive Branch. The Regents asserted the right to retain proceeds from the sale of a University boiler rather than give the proceeds to the State Treasurer; to pay claims against the University without submitting them to the Board of Examiners; to purchase supplies and to enter into printing contracts without using the Department of Administration's predecessor, the Commissioner of Public Works; and to employ attorneys without going through the Attorney General. 33 Idaho at 424-425, 196 P. at 203. After quoting art. IX, sec. 10 of the Idaho Constitution, the Court explained that the “regulations as may be prescribed by law” under that section are those dealing with “methods and rules for the conduct of business” that do not interfere with the “constitutional discretion” of the Regents:

The regulations which may be prescribed by law, and which must be observed by the regents in their supervision of the University, and the control and direction of its funds, refer to methods and rules for the conduct of its business and accounting to authorized officers. Such regulations must not be of a character to interfere essentially with the constitutional discretion of the board, under the authority granted by the Constitution.

33 Idaho at 427, 196 P. at 204. Thus, “[i]f a claim against the regents is a claim against the state, it must be presented to the Board of Examiners for approval,” *id.*, *i.e.*, when the State is also subject to a claim against the University, the normal rules that apply to all State entities apply to the University. As the Court elaborated, when appropriated funds are coupled with certain conditions, the Regents must abide by them; but the Regents need not comply with the conditions of appropriation if the funds spent are not State funds:

When an appropriation of public funds is made to the University, the Legislature may impose such conditions and limitations as in its wisdom it may deem proper. If accepted by the regents, it is coupled with the conditions, and can be expended only for the purposes and at the time and in the manner prescribed, and can be withdrawn from the state treasury only as provided by law.

....

If the regents have funds available for the purpose of making purchases of supplies, they may do so without requisition upon and without the consent of the Commissioner of Public Works, and if they have money which is available for the

purchase of land, or the payment of counsel fees, or to employ accountants and auditors, other than state accountants and auditors, we know of no valid reason why they should not do so. This in no way would involve the power of the Legislature to provide that the accounts and records of the regents shall also be examined and audited by regular accountants and auditors of the state.

In the absence of conditions contained in an appropriation which, by being accepted, raised an implied contract on the part of the Board of Regents, there is no obligation resting upon them to pay to the State Treasurer the proceeds of the sale of property belonging to the University. The same may be paid to the treasurer of the University.

33 Idaho at 430, 196 P. at 205 (emphasis added).

Under Black, the Legislature may attach conditions to the use of appropriated funds with which the University must comply, at least with regard to matters that do not interfere “with the constitutional discretion of the board.” However, the Legislature cannot similarly restrict the University’s use of other funds. Roach and Moscow Hardware both suggest that the Legislature may attach conditions to the funding of University buildings and equipment and that those conditions do not interfere with the constitutional discretion of the Board of Regents. Although there is no case law to that effect, analogous reasoning would also apply to tort liability, which, like buildings, would not seem to be part of the Regents’ constitutional discretion for matters that would pertain to education.

Thus, when the University of Idaho wished to construct an infirmary on campus with a grant of Federal funds and a Federal loan, it was within the Regents’ power to do so only so long as no appropriated funds (which would be subject to art. VIII, sec. 3’s provisions on debt limitations) would be used to repay the loan; only net income from the infirmary and from a residence hall could be used to repay the loan. State ex rel. Miller v. State Bd. of Educ., 56 Idaho 210, 215-216, 52 P.2d 141, 143 (1935). In Miller, the line continued to be clear: appropriated funds were subject to legislative or constitutional terms; other funds were not.

The final case to be reviewed is Dreps v. Bd. of Regents of Univ. of Idaho, 65 Idaho 88, 139 P.2d 467 (1943). Dreps presented the question of whether an anti-nepotism statute applied to the University of Idaho, and, if so, whether it was unconstitutional to apply it to the University. *Id.* at 89, 139 P.2d at 467.

Only four of the five justices of the Idaho Supreme Court participated in the Dreps hearing and opinion. 65 Idaho at 101, 139 P.2d at 474. Two of the five justices joined an opinion that held that an anti-nepotism statute did not apply to the University of Idaho because it would be unconstitutional for it to apply. *Id.* at 89-101, 139 P.2d at 467-473. Their plurality opinion appeared first in the Idaho Reports. The remaining two justices held that the anti-nepotism law was not intended to apply to the University of Idaho and declined to reach the constitutional issues because it was unnecessary to do so. *Id.* at 100-101, 139 P.2d at 473-474. Their opinion followed the first plurality.

The first plurality's broad view of the University of Idaho's constitutional prerogatives, based in part upon the Constitutional Debates earlier reviewed, appeared to state on the one hand that any interference with the Regents' constitutional discretion was unconstitutional, *id.* at 96-97, 139 P.2d at 471, while acknowledging on the other hand while quoting from a Michigan case that "[i]n making appropriations for its support, the Legislature may attach any conditions it may deem expedient and wise, and the Regents cannot receive the appropriation without complying with the conditions. This has been done in several instances." *Id.* at 98-99, 139 P.2d at 472.

Whatever else can be said of Dreps, the first plurality's ambiguous discussion of art. IX, sec. 10, did not command a majority of the Court and is not precedent.⁴ Gonzalez v. Thacker, 148 Idaho 879, 881, 231 P.3d 524, 526 (2009), citing Osick v. Pub. Employee Ret. System of Idaho, 122 Idaho 457, 460, 835 P.2d 1268, 1271 (1992). As Osick summarized: "The provisions of art. 5, § 6 of our constitution . . . lead us to conclude that where the third vote necessary to pronounce a decision is by a justice who concurs in the result only, the rationale contained in the opinion is not a decision of the Court and is not controlling in other cases," and, "the opinion is interesting, but not controlling." *Id.* When there are two different two-Justice pluralities, as there were in Dreps, then there is no basis for elevating the discussion of one opinion over the other. Thus, in the end, Dreps does not bear on this analysis. Thus, Roach, Moscow Hardware, Black and Miller provide whatever guidance there is.

3. Applying the Statutes in Light of Art. IX, Sec. 10.

The Idaho Supreme Court has not construed art. IX, sec. 10 of the Idaho Constitution to determine whether the Legislature may constitutionally put conditions on the University of Idaho's procurement of insurance for risks and/or property. As a result, this opinion's analysis must acknowledge that uncertainty.

The Legislature appropriates general fund moneys to the University of Idaho. *E.g.*, 2014 Idaho Sess. Laws 307, page 763, section 1, part III (\$79,155,000 of general funds appropriated to the University of Idaho for fiscal year 2015). Appropriation bills are ordinarily silent regarding risk management and insurance, as they are on other provisions of State law, as well.

However, the Department of Administration is authorized by statute to "charge each office, department, division, board, commission, institution, agency and operation for which the department provides insurance coverage and receive payment in advance for the reasonably apportioned share of the cost incurred." Idaho Code § 67-5777(1). Those moneys are deposited into the retained risk account, section 67-5776(2)(a), which "shall be used solely for payment of premiums, costs of maintaining the operation of the risk management office, or upon losses not otherwise insured and suffered by the state as to property and risks," section 67-5776(1).

The amounts that the Department of Administration can charge "shall not exceed the current appropriation or funds available for the purpose of the affected office, department, division, board, commission, institution, agency or operation." Idaho Code § 67-5777(2). If an agency refuses to pay what the Department charges, the Department may certify the delinquency

⁴ 1977 Idaho Attorney General Opinion No. 17 cites the first Dreps plurality as though it were a majority opinion without qualifying that there was no majority.

to the State Treasurer, and the State Controller may draw a warrant on the agency's funds in the State Treasury for the Department's benefit. Idaho Code § 67-5778. Thus, every legislative appropriation of funds to the University of Idaho (as well as every other appropriation to a State agency) is subject to the condition that the appropriation may be charged by the Department for risk management purposes and may be intercepted by the Department if not paid over as charged.

“It is generally presumed that legislative acts are constitutional, that the state legislature has acted within its constitutional powers, and any doubt concerning interpretation of a statute is to be resolved in favor of that which will render the statute constitutional.” Med. Recovery Services, LLC v. Strawn, 156 Idaho 153, 159, 321 P.3d 703, 709 (2014), quoting Olsen v. J.A. Freeman Co., 117 Idaho 706, 709, 791 P.2d 1285, 1288 (1990). Given (1) the statutory scheme that provides that the Department shall procure such risk or property insurance as the Director determines is necessary, and that gives exclusive authority to the Department to procure liability insurance for the State, and (2) the Court's decision in Moscow Hardware that University funds for the construction of a building are subject to the normal rules of law associated for claims against such funds and its *dicta* in Black that the Legislature may impose conditions and limitations that it deems wise on funds appropriated to the University of Idaho, there is a sound, defensible argument to be made that the University of Idaho cannot spend appropriated funds to procure risk or property insurance in addition to that obtained by the Department.

Given the availability of this sound, defensible argument and the presumption of constitutionality that every statute enjoys, I conclude that the Department of Administration and the University of Idaho should comply with the statutory provisions giving the Department and only the Department authority to spend appropriated funds to pay premiums for risk or property insurance, unless and until a court of competent jurisdiction declares otherwise.

However, this opinion must acknowledge that some language in Black suggests otherwise. In particular, Black twice explained how the Legislature may regulate the University: “When an appropriation of public funds is made to the University, the Legislature may impose such conditions and limitations as in its wisdom it may deem proper,” and, “In the absence of conditions contained in an appropriation which, by being accepted, raised an implied contract on the part of the Board of Regents, there is no obligation resting upon them to pay to the State Treasurer the proceeds of the sale of property belonging to the University.” 33 Idaho at 430, 196 P. at 205.

These two statements of the principle that the Legislature may impose conditions on the University make sense in context: If the Legislature expects to claw back to the Treasury some of the funds that it appropriates to the University, which was an issue in Black, it must say so in the appropriation itself. But neither statement is tied to the more general language of art. IX, sec. 10, of the Idaho Constitution concerning the regents' “control and direction of all the funds of, and appropriations to, the university, under such regulations as may be prescribed by law.” And neither statement discusses the other side of the coin discussed in Black: “If a claim against the regents is a claim against the state, it must be presented to the Board of Examiners.” 33 Idaho at 427, 196 P. at 204.

Continental II made it clear that risk management claims against a University (in that case ISU) are claims against the State. Continental II extensively discussed the regulations concerning risk management funds that are prescribed by law, none of which were contained in an appropriation bill, but which are of general applicability to State agencies and institutions.

The University of Idaho might argue in court that once it pays to the Department the portion of its appropriated funds necessary to finance the University's share of the retained risk account, then any further interference with the Regents' decision on how to spend its remaining appropriated funds is an unconstitutional interference with the Regent's control and direction of those funds. Such an argument would not be frivolous and would present an unanswered question of constitutional law to the Idaho courts. However, the answer to that question cannot be predicted with any certainty from the existing case law. Unless and until an Idaho court rules to the contrary, as said before, both the Department and the University should abide by the existing statutes with regard to appropriated funds.

However, given Miller's clear holding that the University of Idaho is not legislatively constrained in how it spends funds that are not derived from appropriation, and the implicit exception in Idaho Code § 67-5773(1)(a) to the Department's authority when insurance premiums are not paid in whole or in part with State funds, I conclude that the University of Idaho is free to spend funds not derived in whole or in part from appropriated funds for risk or property insurance, even if Idaho Code § 6-920 would otherwise apply with regard to liability insurance and would otherwise prohibit the University from doing so.

AUTHORITIES CONSIDERED

1. Idaho Constitution:

Art. V, § 6.
Art. VIII, § 3.
Art. IX, § 10.

2. Idaho Code:

Idaho Revised Political and Civil Code § 491 (1908).
§ 6-902(1).
§ 6-903(a)-(c).
§ 6-919.
§§ 6-919 through 922.
§ 6-920.
§ 33-101.
Title 67, Chapter 57.
§ 67-5701 through 67-5704.
§ 67-5705.
§ 67-5706 through 67-5709A.
§ 67-5708B.
§ 67-5709(6).
§ 67-5710 through 67-5711D.

§ 67-5710 through 67-5713.
§ 67-5711.
§ 67-5714 through 67-5744.
§ 67-5716(14).
§ 67-5728.
§ 67-5740(b).
§ 67-5745 through 67-5745E.
§ 67-5745A(2).
§ 67-5746 through 67-5759.
§ 67-5747(1).
§ 67-5760.
§ 67-5761 through 67-5772.
§ 67-5761(1)(c).
§ 67-5762 through 67-5764.
§ 67-5763 through 67-5766 (former § 59-1201 through 59-1204).
§ 67-5764.
§ 67-5765.
§ 67-5766.
§ 67-5767.
§ 67-5773.
§ 67-5773 through 67-5778.
§ 67-5773(1)(a).
§ 67-5775.
§ 67-5776.
§ 67-5776(1).
§ 67-5776(2)(a).
§ 67-5777.
§ 67-5777(1).
§ 67-5777(2).
§ 67-5778.
§ 67-5779 through 67-5782.
§ 67-5779(4).

3. Session Laws:

1959 Idaho Sess. Laws 471.
1974 Idaho Sess. Laws 1647.
1980 Idaho Sess. Laws 525.
2014 Idaho Sess. Laws 763.

4. Idaho Cases:

Dreps v. Bd. of Regents of Univ. of Idaho, 65 Idaho 88, 139 P.2d 467 (1943).

Gonzalez v. Thacker, 148 Idaho 879, 231 P.3d 524 (2009).

KGF Dev., LLC. v. City of Ketchum, 149 Idaho 524, 263 P.3d 1284 (2010).
Med. Recovery Services, LLC v. Strawn, 156 Idaho 153, 321 P.3d 703 (2014).
Moscow Hardware Co. v. Regents of Univ. of Idaho, 19 Idaho 420, 113 P. 731 (1911).
Olsen v. J.A. Freeman Co., 117 Idaho 706, 791 P.2d 1285 (1990).
Osick v. Pub. Employee Ret. System of Idaho, 122 Idaho 457, 835 P.2d 1268 (1992).
Roach v. Gooding, 11 Idaho 244, 81 P. 642 (1905).
State v. Continental Cas. Co., 121 Idaho 938, 829 P.2d 528 (1992).
State v. Continental Cas. Co., 126 Idaho 178, 879 P.2d 1111 (1994).
State v. Hammersley, 134 Idaho 816, 10 P.3d 1285 (2000).
State ex rel. Black v State Bd. of Educ., 33 Idaho 415, 196 P. 201 (1921).
State ex rel. Miller v. State Bd. of Educ., 56 Idaho 210, 52 P.2d 141 (1935).
State ex rel. Wasden v. Daicel Chemical Indus., Ltd., 141 Idaho 102, 106 P.3d 428 (2005).

5. Other Authorities:

Proceedings and Debates of the Constitutional Convention of Idaho 1889 (1912).
Idaho Admissions Act, ch. 656, § 8, 26 Stat. L. 215.
1977 Idaho Att’y Gen. Ann. Rpt. 129.
Dictionary-Reference.com.

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