

**IDAHO
ATTORNEY
GENERAL'S
REPORT**

FOR FISCAL YEAR 1982
BEGINNING JULY 1, 1981
AND ENDING JUNE 30, 1982

AND

OPINIONS
FOR THE YEAR
1982

DAVID H. LEROY
Attorney General

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ATTORNEYS GENERAL OF IDAHO

GEORGE H. ROBERTS	1891-1892
GEORGE M. PARSONS	1893-1896
ROBERT McFARLAND	1897-1898
S. H. HAYS	1899-1900
FRANK MARTIN	1901-1902
JOHN A. BAGLEY	1903-1904
JOHN GUHEEN	1905-1908
D. C. McDOUGALL	1909-1912
JOSEPH H. PETERSON	1913-1916
T. A. WALTERS	1917-1918
ROY L. BLACK	1919-1922
A. H. CONNER	1923-1926
FRANK L. STEPHAN	1927-1928
W. D. GILLIS	1929-1930
FRED J. BABCOCK	1931-1932
BERT H. MILLER	1933-1936
J. W. TAYLOR	1937-1940
BERT H. MILLER	1941-1944
FRANK LANGLEY	1945-1946
ROBERT AILSHIE (Deceased November 16)	1947
ROBERT E. SMYLIE (Appointed November 24)	1947-1954
GRAYDON W. SMITH	1955-1958
FRANK L. BENSON	1959-1962
ALLAN G. SHEPARD	1963-1968
ROBERT M. ROBSON	1969
W. ANTHONY PARK	1970-1974
WAYNE L. KIDWELL	1975-1978
DAVID H. LEROY	1979-1982



DAVID H. LEROY
Attorney General



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

December 20, 1982

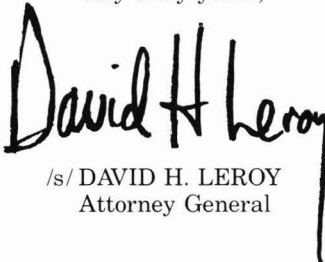
The Honorable John V. Evans
Governor of the State of Idaho
Idaho State Legislature

I am pleased to offer to you this report and opinion volume as my last duty upon leaving office.

The challenge given to anyone serving as Attorney General by the people of the State of Idaho is both difficult and exciting. I was able to bring to the state from both the private and public sectors highly talented legal and administrative minds. Working together we have developed and delivered the most modern law office management techniques and the best professional legal advice.

These tough economic times are an unusually heavy burden on this office in that a legal staff must cope with severe budgetary cutbacks in the face of increasing demands because the budget problems of our agency clients tend to create new legal issues and litigation. We have successfully met this demand as detailed in this volume. Thus, I conclude my term as 27th Attorney General of Idaho on a positive note of excellence and achievement in state government services.

Very truly yours,


/s/ DAVID H. LEROY
Attorney General

FISCAL YEAR 1982 ANNUAL REPORT
of the
ATTORNEY GENERAL
of
IDAHO



**For the period beginning July 1, 1981
and ending June 30, 1982**

DAVID H. LEROY
Attorney General

**OFFICE OF THE
ATTORNEY GENERAL**

Administrative

David H. Leroy — Attorney General
Larry K. Harvey — Chief Deputy
Tanya R. Rossum — Office Administrator
Lois Hurless — Administrative Assistant
Kathleen Haynes — Fiscal Officer

Division Chiefs

Kenneth R. McClure — Legislative/Administrative
Lynn Thomas — Appellate
John Sutton — Business Regulation
Michael Kennedy — Criminal Justice
Russell T. Reneau — Chief Investigator
Thomas Frost — Administrative Law & Litigation
Robie Russell — Local Government
John Sutton — State Finance
Donald Olowinski — Natural Resources
Michael Johnson — Health & Welfare

Deputy Attorneys General

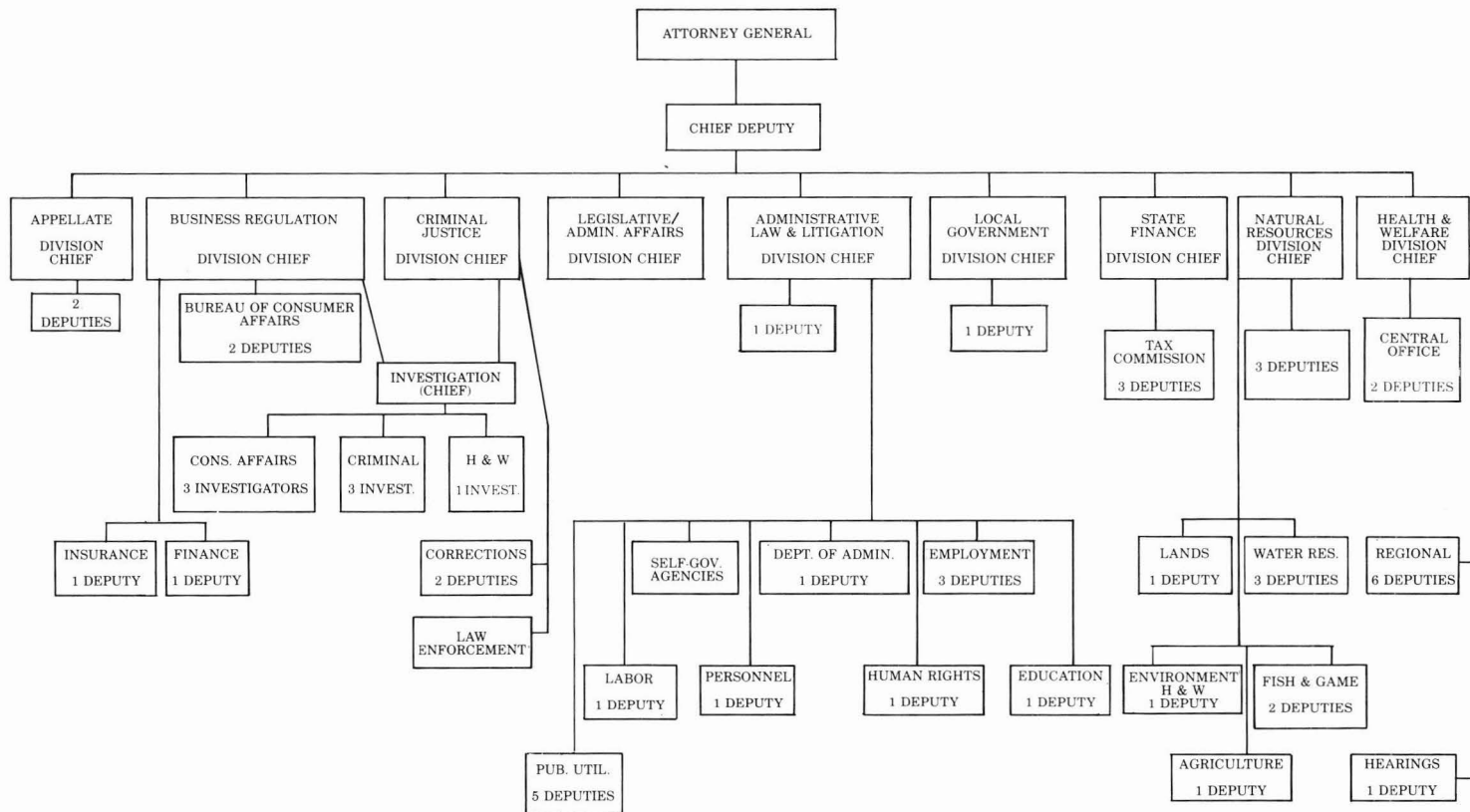
Dave Barber	C. Fred Goodenough	Phillip J. Rassier
Carol Brassey	Jeanne Goodenough	Mark Riddoch
Pat Clark	Brad Hall	Dick Russell
Pat Collins	Lloyd Haight	Robie Russell
Ginger DeMeyer	Dave High	Mark Shuster
Bill Dillon	Jack Hockberger	Marsha Smith
John Duke	Dean Kaplan	Ted Spangler
Patricia Stephen-	Larry Knudsen	Myrna Stahman
Fawcett	W. B. Latta, Jr.	Thomas Swinehart
Warren Felton	Andre L'Heureux	Becky Thomas
Darcy Frownfelter	Steve Lord	Stan Voyles
Robert Gates	Roger Martindale	Jim Wickham
Mike Gilmore	John McMahon	Scott Wolfley
Leslie Goddard	Steve Parry	Dave Wynkoop
Steve Goddard		

Legal Interns

Rockne Lammers
Mark Manweiler
Gary Quigley

Non-Legal Personnel

Clint Bays	Neal Custer	Mark Musick
Lisa Bivens	Mary Freece	Sigrid Obenchain
Lora T. Boone	Richard LeGall	Sandra Rich
Allen Ceriale	Teresa Lemmon	Neysa Tuttle
Pam Chaney	Trish Luginbill	Stephanie Wible
Barbara Cunningham	Warner Mills	



DAVID H. LEROY
ATTORNEY GENERAL

LEGISLATIVE/ADMINISTRATIVE/AFFAIRS DIVISION

Kenneth R. McClure, Division Chief

GOAL I: ACCOMPLISHED

“Develop complete attorney general legislative package by mid-November and have sponsors in line for early presentation.”

Eleven pieces of legislation were developed and ready for presentation to the Second Regular Session of the Forty-sixth Legislature. Those eleven draft proposals and the final action are as follows:

1. Insanity Defense Revisions/Law
2. Look-Alike Drugs/Law
3. Consolidated Theft Act Housekeeping Amendment/Law
4. Falsified Police Reports/Law
5. Child Protection Act Revision/Law
6. Open Meeting Law/Failed
7. Planning & Zoning Hearings/Law
8. Surface Mining Act Revisions/Failed
9. Dredge & Placer Mining Act/Failed
10. Pornography Law Amendments/Law
11. Criminal Solicitation/Law

The insanity defense revisions proposed by the Attorney General's Office were the first of their kind in the nation and caused significant nationwide interest, illustrated by major addresses on the subject before the American Bar Association, the United States Senate Judiciary Committee, and the National Conference of State Legislatures, among many others. The bill has been selected by the American Legislative Exchange Council for inclusion in its 1983 proposed uniform legislation.

GOAL II: ACCOMPLISHED

“Obtain necessary word-processing software for use in the attorney time keeping system. Target date April 1982.”

We were able to expand the capabilities of the IBM Displaywriter in the Administrative Division to provide for the rental of a Reportpack software program. Programming and programming design and implementation and testing were completed prior to the end of this fiscal year and official printouts began at the start of FY'83, July 1, 1982.

GOAL III: PARTIALLY ACCOMPLISHED

“Finalize on-line computer Attorney General Information System (AGIS) and move toward expanding tracking capability.”

The Attorney General Information System (AGIS) entry was completed and a system of keeping the cases current to within two weeks was established. Reports are being supplied to every attorney indicating the current status of his or her litigation every two weeks. Additional

computer time to include chronological docketing beyond our present capability of just immediate status has not yet been accomplished due to large cutbacks in appropriations.

GOAL IV: ACCOMPLISHED

“Continue to move through the courts the Idaho Legislature’s constitutional test case on the United States Constitution’s amendatory process.”

The United States District Court for the District of Idaho ruled in favor of the Arizona, Idaho, and Washington plaintiffs on December 23, 1981. An Order was issued by Judge Marion J. Callister denying the National Organization for Women’s (N.O.W.) motion to dismiss or in the alternative for summary judgment, and granting the State of Idaho’s request for summary declaratory judgment. Judge Callister’s decision was appealed to the United States Supreme Court in January, 1982, by the General Services Administrator and N.O.W. June 30, 1982, was the deadline for ratification of the Equal Rights Amendment. In July, the Department of Justice contended that the appeal and case had been mooted. Idaho submitted a brief in opposition to the suggestion of mootness on August 5, 1982, seeking a ruling on the important Constitutional questions raised by the “ERA case.” However, on October 4, 1982, the United States Supreme Court vacated the judgment of the United States District Court for the District of Idaho and remanded the case to the District Court with instructions to dismiss the complaints as moot.

GOAL V: NOT ACCOMPLISHED

“Continue with in-house CLE programs. Develop a program for mid-spring of 1982.”

Due to the revenue projections of the state funds during mid-spring of 1982, we were forced to abandon hopes of continuing this program.

GOAL VI: ACCOMPLISHED

“Continue working with legislature on reapportionment.”

Fiscal Year 1982 proved to be an especially busy legislative assistance year. In addition to the regular session, the legislature met for a special session early in FY’82 to address reapportionment. The division researched and prepared a white paper on reapportionment to give the legislature legal guidance concerning reapportionment law. After the governor’s veto of two bills, a bill was finally adopted and signed by the governor on March 24, 1982. Rising out of the passage of that bill, this division was faced with defending Secretary of State Pete Cenarrusa in a challenge to the reapportionment plan, *Hellar v. Cenarrusa, et al.*

During the 1982 session, the Idaho Attorney General’s Office provided one formal opinion, forty legal guidelines, drafted twelve bills for amendments, and testified before the house and senate a total of nine times. This is in addition to the one hundred sixty-nine other informal letters and verbal contacts.

APPELLATE DIVISION

Lynn Thomas, Solicitor General, Division Chief

GOAL I: PARTIALLY ACCOMPLISHED

"Create systematized method for sharing, among researchers, information developed in the process of researching appellate briefs. In order to avoid unnecessary duplication of effort, the system contemplates regular information to all division members about research being done by others. Initially, this goal will be accomplished by a periodic circular identifying issues currently being researched."

An experimental system was designed which contemplated keeping continuing records of pending issues being researched by each member of the division at any given time. However, it was found that the format experimental system devised would not be helpful. Thereafter, the division, through the efforts of Myrna Stahman, developed and prepared for publication, a simplified listing of cases and issues which will be distributed not only to division members and other interested persons within the office, but to prosecuting attorneys as well. Communication has begun in developing during the upcoming fiscal year enough computer time on the Supreme Court computer to provide simplified updating and continuation of the present hand-done system.

GOAL II: NOT COMPLETED

"Develop system for keeping track of criminal matters being handled by the attorney general's representative for the board of correction. A form will be provided for reporting cases and current status."

The present Attorney General Information System (AGIS) has lent a limited monitoring of criminal cases handled by this representative. However, due to large budget cutbacks during the latter part of FY'82 we were unable to expand as desired our monitoring abilities.

GOALS III & IV: ACCOMPLISHED

3. "Continue to improve speed of processing criminal appeals."
4. "Continue reduction of number of extension requests."

In spite of a substantial volume of appeals, and significant reductions in manpower, the division has continued to keep abreast of the workload with reasonable proficiency. In 1981, 78 appeal briefs had been received through November 8. In 1982, 76 appeal briefs had been received through November 8. Although the number of extensions requested in 1982 is up to 92, from 73 in 1981, that factor is attributable to a decrease in Appellate Division manpower and the fact that some of the more complex cases have been processed during 1982, including two of the capital penalty cases. From January through the first part of November, 1982, the Appellate Division processed 86 appeals through brief filings.

GOAL V: ACCOMPLISHED

"Prepare for handling cases generated by intermediate court of appeals."

The argument and travel schedule of the Court of Appeals placed a severe strain on the resources of the Appellate Division and on the travel budget of the office. The Court of Appeals has traveled to numerous locations throughout the state, and has heard a large number of cases. From January through November, 1982, the Supreme Court and the Court of Appeals together heard a total of 55 criminal cases in 11 Idaho cities. The Appellate Division has, with maximum effectiveness, managed to meet these schedules, often times by assigning a single attorney to handle a number of cases at each location to which the Court of Appeals and the Supreme Court have traveled.

INVESTIGATIVE DIVISION

Russ Reneau, Division Chief

GOAL I: ACCOMPLISHED

"Undertake and complete a minimum of five (5) targeted pro-active investigations of broad dimension in high priority areas, including organized crime."

During this fiscal year eleven (11) pro-active investigations were initiated by the Investigative Division. While some of these investigations targeted sophisticated fraud schemes, several were directed at public officials accepting kickbacks in return for authorizing government purchases of products at highly inflated prices. In one such case, a foreign corporation was targeted and a highly perfected operation involving the systematic bribery of public officials was detected. Two employees of the corporation were charged criminally and civil action against the corporation is pending. With seven (7) of these eleven (11) pro-active investigations completed, six (6) arrests have been made and the two adjudicated cases have resulted in convictions.

One (1) ongoing investigation targets a tightly knit organization involved in various levels of criminal enterprise. Local law enforcement agencies have been unsuccessful at attacking this organization due in part to leaks of confidential investigative information to members of the organization. The initial focus of our investigation is directed at halting the information leaks.

GOAL II: PARTIALLY ACCOMPLISHED

"Maintain regular joint staffing contacts with state and federal counterparts and sponsor a joint organized crime seminar with the Department of Law Enforcement for local officers in an area other than Boise."

Joint staffing contacts have been accomplished with the U.S. Attorney's Office and the Idaho Department of Law Enforcement. Regular, less formal contacts occur on a frequent basis with various federal, state, and local law enforcement agencies.

It was not possible to conduct a second Organized Crime Seminar this year for the following reasons:

1. Budget cutbacks and limitations on travel expenditures effectively rendered another seminar impossible.
2. Of the thirty-five (35) criminal investigations initiated during FY'82, thirty percent have resulted in the filing of criminal charges and subsequent preparation for and attendance at various court hearings. In addition, four (4) cases initiated during the previous year culminated in arrests occurring this year. As of June 30, 1982, the division has twelve (12) cases that are in various stages of court proceedings. As a result of the additional work created by these circumstances, it is doubtful that the division could have devoted the time necessary for the organization and presentation of a seminar even if the economic considerations had been favorable.

GOAL III: ACCOMPLISHED

"Identify a minimum of two (2) law enforcement problems that can be solved through legislation, draft appropriate bills, and work with the legislature to insure a passage of the bills."

Among the law enforcement problems identified, one involving look-alike drugs resulted in the initiation of a pro-active investigation. This investigation provided the basis for successful legislation banning the sale of look-alike drugs.

Input was also provided on two bills drafted by this office. One related to the elimination of the insanity defense and the other made it a crime to solicit criminal misconduct. While division personnel were available to testify concerning these bills, both were passed without that becoming necessary.

GOAL IV: ACCOMPLISHED

"Design and implement an intelligence filing system to consolidate existing systems and to provide increased security of sensitive intelligence information and a greater capability for data retrieval."

A new intelligence filing system has been designed and is in the process of being implemented. The system which utilizes numerical and alphabetical cross-indexing will, once fully implemented, provide substantially improved data retrieval capabilities. Color coded file folders for intelligence information will also provide easy identification of sensitive materials which require a higher level of security.

NATURAL RESOURCES DIVISION

Don Olowinski, Division Chief

GOAL I: ACCOMPLISHED

"Maintain and enhance high level of awareness and advocacy where state's rights and citizenship interests are affected by federal policy and practices."

This division has continued to monitor the actions and proposed actions taken by federal agencies and the federal government. Those agencies principally included the Bureau of Land Management, the Forest Service, the Federal Energy Regulatory Commission, the Environmental Protection Agency, the Department of Agriculture, and the Bureau of Reclamation. Through communication with such user groups as the Cattlemen's Association, the Wool Growers' Association, the Idaho Forestry Association, the Idaho Mining Association, the Idaho Conservation League, as well as with the respective federal agencies and the Idaho Congressional Delegation, the division has been able to maintain and contribute to the awareness and advocacy of the state's rights which are affected by federal policy and parties.

Over 10,800 acres of "lieu lands" were finally transferred to the state. The Attorney General and the division had a substantial positive impact on this transfer and continued to work for the transfer of the remaining lands, which include both mineral-in-character and non-mineral land entitlements.

The state's right to regulate dredge and placer mining on federal lands within the state was upheld in the decision of *State ex rel. Evans v. Click*, 102 Idaho 443, 631 P.2d 614 (1981), cert. denied 1982. Close working relationships with federal agencies and the U.S. Attorney's Office helped obtain non-judicial resolution of many conflicts, including disputes over ownership of beds and banks of navigable waters. The division also assisted the Attorney General in a successful effort to stop a drastic threat to state water rights by advocating overturning the federal government's position on non-reserved water rights before the solicitor for the Department of the Interior and the Office of Legal Counsel.

In addition, the division continued to advocate and monitor proposed federal land disposals in the state for compliance with federal statutes and consistency with state policy.

Partially through division input, proposed Forest Service planning regulation changes to decrease public input into the forest planning process were dropped and Bureau of Land Management environmental impact statements were amended to deal with public concerns.

GOAL II: PARTIALLY ACCOMPLISHED

"Work effectively with the Idaho Congressional Delegation on resolution of potential conflicts with state streambed ownership, Birds of Prey expansion, various wilderness proposals, Heyburn State Park, road building in national forests, and lieu lands."

While the Idaho Congressional Delegation was aware of the state interest concerning the above listed issues, no legislative resolution was accomplished. In addition, the division worked with the Delegation on such issues as Outfitters and Guides regulations, licensing exemption procedures under FERC, public lands disposal policies, and recreational user conflicts.

GOAL III: ACCOMPLISHED

“Convene Indian Issues Task Force as appropriate in developing, advising, and coordinating state legal policy.”

The Indian Law Task Force continued to meet as appropriate. Members provided advice to the legislature’s Interim Committee on Indian Affairs and analytical assistance in joining petitions for certiorari in *Arizona v. San Carlos Apache Tribe of Arizona* and the *Navajo Tribe of Indians*, *Montana v. Northern Cheyenne Tribe of the Northern Cheyenne Indian Reservation*, *Namen v. Confederated Salish and Kootenai Tribes*, and *Nevada v. United States, et al.*

GOAL IV: PARTIALLY ACCOMPLISHED

“Assist departments and Land Board in implementing lawful, modern, practical, and effective rules, regulations, and enforcement on surface mining, and in setting policy for rules or use impacted by federal studies or practices.”

For reasons of its own, the Department of Lands decided against attempting to promulgate rules and regulations for surface mining. This office attempted to amend the dredge and surface mining acts to implement procedural reforms. The legislature chose not to adopt those amendments.

Deputy attorneys general were instrumental in coordinating with the federal government the return to Idaho jurisdiction over air quality and assuming jurisdiction for pesticides regulation.

Deputy attorneys general once again provided a broad range of drafting and advocacy assistance to various agency clients in dealing with legislative and regulatory enactments and amendments.

GOAL V: PARTIALLY ACCOMPLISHED

“Conduct successfully all natural resource litigations pending or filed on behalf of the state.”

Deputy attorneys general were involved in litigation in numerous matters on behalf of the state. A partial listing of the successes include:

1. *Heyburn State Park*. On remand from the Ninth Circuit, the district court held that the tribe had no standing to appeal.
2. *Click et al. v. State*. Regulation of dredge mining on federal lands upheld.
3. *State v. Cutler*. Jurisdiction of state over Indians hunting on state wildlife preserve upheld by Idaho District Court.

4. *Hidden Springs Trout Ranch, Inc. v. Allred et al.* Affirms Department of Water Resources decision that new local public interest criterion applies to water rights applications pending on effective date of the statutory amendment.

5. *Kootenai Environmental Alliance v. Panhandle Yacht Club.* Elaborates on scope of public trust doctrine in Idaho and upholds Land Board decision to permit construction of docks where there is no adverse environmental impact.

GOAL VI: ACCOMPLISHED

“Continue to coordinate legal activities of all agencies within the division to avoid conflicts and duplication.”

Agency conflicts were almost non-existent. Of particular note is the memorandum of agreement reached between the Department of Water Resources and the Oil and Gas Commission concerning regulation of underground injection wells. The division coordinated enforcement of violations of statutes under regulatory control of various state agencies in numerous law suits and negotiations.

In addition, the division provided assistance to agencies on complex matters and in instances where short term work load pressures required outside assistance.

ADMINISTRATIVE LAW & LITIGATION DIVISION

Tom Frost, Division Chief

GOAL I: ACCOMPLISHED

“Continued expansion of support and consultation role of the division among agency counsel on major and complicated cases.”

The division continues to consult with agency or central staff counsel, and in many cases share the actual litigation load in complicated cases. In addition to those cases described in the 1981 Annual Report, many of which are still ongoing, this division has been requested to participate as co-counsel in the legislative reapportionment suit, and has taken a lead role in *Risco v. Dept. of Health & Welfare* — a constructive eviction case arising from the presence of harmful chemicals in the walls and ventilation system of a state-leased building. As well, we have taken over cases where agency counsel has had conflicts of one kind or another.

Lastly, as pointed out in the 1981 Annual Report, we continue to assist the Administrative Office of the Courts and Bureau of Risk Management in handling cases where judicial officers, or the integrity of the judicial system, is the subject of a new law suit. We expect, in this connection, that the representation of judges in tort claim or civil rights suits may become more prevalent because of continuing assaults upon the doctrine of judicial immunity.

GOAL II: ACCOMPLISHED

“Develop listing of available ‘qualified’ hearing officers throughout the state for recommendation purposes to the various agencies.”

We are continuing to compile the names of those Idaho attorneys who have demonstrated a working knowledge of administrative law practice, particularly as may be governed by the Idaho Administrative Procedure Act. Our selections have been from former agency counsel who have high levels of experience in administrative practice as well as other members of the private bar throughout the state whom we regard as qualified through experience or training to handle administrative contested cases.

GOAL III: NOT ACCOMPLISHED

“Draft legislation requiring the publication of an administrative code similar to the federal system.”

A complete overhaul of the existing administrative system including a publication of the administrative code is not feasible until there is a uniformity in format and a standardized organization for administrative rules. The former requires time, and both require money. Because of the financial exigencies facing the state, it is unlikely such a publication will be possible for a number of years. The publication of an administrative code is also being studied by the Legislative Council. Consequently, because of financial uncertainty and the lack of any present need for legislation, none was drafted.

GOAL IV: PARTIALLY ACCOMPLISHED

“Initiate a study of the various state agencies to insure that the final orders, decisions and opinions of their office are available for public inspection. In addition, confirm that those agencies have rules of practice for controversies arising before them.”

We have surveyed those licensing boards under the Bureau of Occupational Licenses, and others including the Board of Pharmacy, from the standpoint of their compliance with the above requirements. Our survey resulted in the promulgation of rules by the Bureau of Occupational Licenses which brings that agency, and the boards under it, into compliance. We have as yet undertaken no such survey of the larger agencies with full-time counsel who have operated under the Administrative Procedure Act since its initial passage, presuming these entities are already in compliance.

LOCAL GOVERNMENT DIVISION

Robie Russell, Division Chief

GOAL I: ACCOMPLISHED

“Continue to provide competent legal advice to local and other public officials under appropriate guidelines on all matters pertaining to local government and local planning.”

The division continues to respond to all inquiries and requests for assistance by the legislature, local public officials, and state and federal agencies. During the legislative session, the division advised the Senate Local Government and Taxation Committee and the House Local Government Committee and appeared before those and other committees to offer legal advice on pending legislation when requested to do so. We also serve on the Attorney General's Legislative Committee, the Association of Idaho Cities Legislative Committee and provide advice to the Idaho Association of Counties Legislative Committee.

GOAL II: ACCOMPLISHED

"Continue participation in appropriate litigation, both trial and appellate, which has a statewide impact or which may help shape local government law."

The division continues to participate in the litigation process with emphasis on cases dealing with local government. We offer assistance to prosecuting attorneys and city attorneys when requested and are handling appeals in several areas including planning and zoning, county tax appraisals, annexation, and several cases from other divisions. Of particular note are the *V-I Oil* cases dealing with tax appraisals in fifteen counties and the *Langmeyer* case dealing with residency requirements for planning and zoning commissioners.

GOAL III: ACCOMPLISHED

"Coordinate efforts with natural resources on the Indian Law Task Force."

The division chairs the Indian Law Task Force and acts as a clearinghouse for inquiries about Indian matters. We also oversee amicus requests for participation in federal Indian cases by our sister states. We have participated in the meetings of the interim legislative committee on Indian affairs and continue to handle the Heyburn State Park case in which an Indian tribe is attempting to gain title to a state park.

GOAL IV: ACCOMPLISHED

"Continue emphasis upon preventative law and education by way of our newsletter and participation in seminars, public speaking, and other appropriate forums."

We continue to accomplish this goal by the publication of our "Local Government Legal News" in conjunction with the Association of Idaho Cities. We have also participated as a featured speaker before local government, educational, and civic groups and organizations including the Canyon County Fire Chiefs' Association Annual Meeting, Association of Idaho Cities Annual Convention, Idaho Association of Counties Annual Convention, Idaho City Clerks and Finance Officers Convention, Gem Boys State, and the University of Idaho, College of Forestry. We participated in many continuing legal education programs both as students

and speakers, including the annual meeting of the Idaho City Attorneys Association. We also offer educational assistance to students and the public at large through the materials and answers given in response to the numerous inquiries we receive.

GOAL V: ACCOMPLISHED

"Continue to operate as this office's disaster coordinator and as liaison with the state disaster planning unit."

The division acts as disaster coordinator for this office and acts as legal counsel to the State Disaster Planning Unit. That unit is responsible for dealing with all natural and man-caused disasters. We participate periodically with other state agencies in disaster drills.

BUSINESS REGULATIONS DIVISION

John Sutton, Division Chief

GOAL I: NOT ACCOMPLISHED

"Request legislative appropriation to re-establish consumer protection services within the Business Regulation Division."

During FY'82 two proposals were written and presented to the 1982 Session of the Idaho Legislature requesting an appropriation to reinstate consumer protection services under the Business Regulation Division. The first alternative called for full staffing and funding; the second alternative requested only a partial staff consisting of 1 attorney and 1 investigator. Both proposals were denied by the legislature.

GOAL II: PARTIALLY ACCOMPLISHED

"Further improve consumer protection enforcement by increased monitoring of assurance of voluntary compliance subjects, executing a minimum of two targeted industry investigations, and completion of a divisional policy and procedure manual."

As a result of a continuing monitoring of Assurances of Voluntary Compliance, the Business Regulation Division of the Attorney General's Office has filed a lawsuit against Master Distributors Inc. The Master Distributors case went to trial in FY'82 and judgment was ordered in favor of the plaintiff. The defendant has filed an appeal which is presently pending before the Supreme Court. The Appellate Division of the Attorney General's office will be handling this case on appeal. Concorde Enterprises, the defendant in a case which has been pending for some time, is currently making restitution to the State of Idaho. The State will be distributing the funds among the plaintiffs in the above case as appropriate.

The Division has not been able to carry out any additional targeted investigations nor has it completed the divisional policy and procedure manual due to funding and budget cuts in FY'82. An absence of funding by the legislature and concomitant lack of reinstatement of the divi-

sion's consumer protection activities has prevented the Division from taking on any new investigations or entering into any new litigation.

GOAL III: PARTIALLY ACCOMPLISHED

"Develop a comprehensive policy for the enforcement of state anti-trust laws and participate with the law foundation in developing a proposed statutory revision."

During FY'82 this division was limited to the monitoring of filings in the Fertilizer Antitrust litigation. At present date this case is set for trial in September, 1983, in Federal District Court in Spokane, Washington. Due to aforementioned budgetary and staff restraints, we were unable to become active any further in this field.

GOAL IV: ACCOMPLISHED

"Design a review program for charitable trusts and foundations, and implement initial stages thereof."

During FY'82 the review program for charitable trusts and foundations was completed. Charitable trust organizations continue to be monitored with the filing of Federal 990 PF and 990 AR forms through the Attorney General's office.

GOAL V: NOT ACCOMPLISHED

"Expand state client services continuing to present new legislation seminar to agency directors and staff."

This program is still in initial stages and remains yet to be completed due to a lack of staff to plan, organize, and direct this needed information service.

STATE FINANCE DIVISION

John Sutton, Division Chief

GOAL I: ACCOMPLISHED

"Continue to acquire in-house expertise and develop more sophisticated review procedures in municipal bond issuances.

During FY'82 this division was able to send a representative to a bond seminar on Municipal Financing where it acquired advanced skills in review and processing procedures in handling bond issuances. We continued to review all Idaho Housing Authority bond issuances. This division continued to provide legal counsel to the Idaho Superintendent of Education by reviewing bond issuances of local school districts and institutions of higher education who have sought review and approval by the Superintendent of Education. In addition our office has assisted local entities in formulating and adopting ordinances for effecting Industrial Revenue bond issuances as authorized by the Industrial Revenue Bond Constitutional Amendment which was ratified by the voters in November, 1982, and which our office was instrumental in drafting and reviewing.

GOAL II: ACCOMPLISHED

“Continue effective advice to the treasurer, auditor, secretary of state, board of examiners, and the retirement board and oversee proper and lawful implementation of state regulations on travel, moving and deferred compensation.”

This division has continued to provide legal counsel to the State Treasurer specifically in rendering legal assistance in the issuance, by the State Treasurer, of the State of Idaho’s one hundred six million dollar tax anticipation notes which were issued this year due to a shortfall.

This office provided legal assistance to the Secretary of State’s office in answering numerous inquiries and correspondence raised by virtue of the election questions attendant to the 1982 primary and general elections. In addition, this office has conducted numerous election recounts in Benewah, Canyon and Oneida Counties. This division has continued to monitor and assist the Secretary of State’s office in enforcement of its corporation and sunshine laws.

This division has provided legal counsel to the Board of Examiners in researching and providing legal opinions addressing many of the complex and varied issues and claims which have been presented before the Board. This division has acted as Chairman of the Board of Examiners subcommittee on moving and travel regulations and, in that capacity, has continued to promulgate rules and regulations for the Board’s approval dealing with moving and travel compensation rates given to state employees. In addition, this division has continued to act as legal counsel and member of the Board of Examiners Subcommittee on The Deferred Compensation Program.

GOAL III: ACCOMPLISHED

“Provide election assistance to local governmental entities during the upcoming elections in November.”

During the primary and general elections of 1982 this division continued to provide general election assistance to all local entities throughout the State of Idaho. This division attended numerous election workshops provided for county clerks and assisted the Secretary of State’s office in providing legal counsel to various city attorneys, county clerks, and county prosecuting attorneys throughout the state of Idaho. This division manned a twenty-four hour telephone line during the primary and general election days with which we answered numerous phone calls from various county clerks’ offices as well as sheriffs’ offices and various citizens who raised questions regarding election processes.

GOAL IV: ACCOMPLISHED

“Acquire professional expertise in administering and regulating the state’s deferred compensation program.”

This division has continued to act as legal counsel and member of the Board of Examiners Subcommittee on Deferred Compensation Program. In this capacity we have provided legal advice and leadership to Idaho Benefits, third party administrator of the State of Idaho's Deferred Program, in implementing and continuing to provide a Deferred Compensation Program to the State of Idaho employees.

CRIMINAL JUSTICE DIVISION

Mike Kennedy, Division Chief

GOAL I: ACCOMPLISHED

"Provide greater litigation assistance to prosecuting attorneys, with emphasis on major felonies pursuant to the Attorney General's Prosecutor Assistance Policy distributed to all prosecuting attorneys on March 12, 1979."

This goal was accomplished and remains an on-going process. The division chief participated, as a "Special Prosecutor," in three criminal homicide trials, viz: two murder trials and one voluntary manslaughter trial. The death penalty was sought and ordered by the sentencing court in one of the murder cases. Moreover, a variety of white-collar felonies were investigated/prosecuted through efforts of the division. Currently, the division chief is preparing for trial in another murder case (*State v. Dallas*) and will be trying a recently filed murder case (*State v. Carberry aka Pacino*). Finally, prosecutors are regularly requesting and receiving litigation assistance in the form of briefing, consultation and copies of materials unavailable to them through their local law libraries.

GOAL II: SEE BELOW, (a) THROUGH (d)

"Advocacy before the legislature of:

- a) Any needed 'housecleaning' of comprehensive theft statute."

ACCOMPLISHED — See House Bill No. 653, Chapter 273, Idaho Session Laws.

- b) "Insanity defense elimination or modification."

ACCOMPLISHED — See Senate Bill No. 1396, Chapter 368, Idaho Session Laws. This goal was accomplished largely through the joint efforts of several divisions, i.e. Appellate, Criminal, Health & Welfare, and Legislative. Advocacy before the legislature fell to the Appellate and Legislative Divisions because the Criminal Justice Chief was in eastern Idaho in a murder trial through a large portion of the legislative session.

- c) "Amendment of *Idaho Code* §19-853 to eliminate burdens upon the prosecution and state above and beyond the requirements of *Miranda* and/or eliminate the application of the exclusionary rule to a violation of the said statute."

NOT ACCOMPLISHED — The goal relating to *Idaho Code* §19-853 was not accomplished due to time constraints imposed by a trial schedule upon the division chief. The goal relating to the modification of the exclusionary rule was not attempted at the direction of the Legislative Division.

d) "The adoption of a general solicitation statute. This legislation would be in response to the case of *State v. Otto* (decided April 9, 1981) where the Idaho Supreme Court reversed an attempted first degree murder conviction because it was ruled that a solicitation to commit murder had been committed, not attempted murder. This ruling is peculiar since Idaho has no solicitation statute to cover the conduct involved."

ACCOMPLISHED — See House Bill No. 650, Chapter 270, Idaho Session Laws.

HEALTH & WELFARE DIVISION

Mike Johnson, Division Chief

GOAL I: ACCOMPLISHED

"The legal division will prepare a monthly summary of major legal issues being handled within the division for presentation to the State Board of Health and Welfare."

The legal division of Health and Welfare now submits a bi-monthly summary of major legal issues being handled within the division to the State Board of Health and Welfare. Sufficient interest in this bi-monthly summary of legal matters has expanded the distribution of this report to include the Director's Office, all regional services managers, the departmental office of public relations, and a copy is forwarded to the Attorney General's Office for review and update.

GOAL II: ACCOMPLISHED

"The legal division will seek to improve its services to the Department's Bureau of Personnel. Enhanced communication between the regional attorneys and the Bureau of Personnel concerning grievance matters will be stressed, and a periodic meeting between the Legal Division Chief and the Bureau Chief for Personnel will be conducted to review the ongoing changes in personnel policies as well as individual grievance matters having department-wide effect."

The legal division of Health and Welfare has established a new and closer working relationship with the department's Bureau of Personnel. As a result of budget cutbacks as well as statewide reclassifications of the secretarial and psychologist series, there has been a drastically increased number of personnel grievances filed with the department. The deputy attorney general to whom a grievance has been assigned now immediately contacts the Department of Personnel, renders necessary advice in all stages of the proceedings, and develops a solid background case file prior to a hearing before Paul Boyd for the Personnel Commission.

NEW CASES OPENED
FOR COURT LITIGATION

The Office of the Attorney General has opened the following cases for Fiscal Year 1982:

CASE NAME	TYPE OF ACTION	STATUS
State vs. Jack O. Harris	AL/Labor/Wage Claim	Closed
State vs. Michael Miller	AL/Labor/Wage Claim	Pending
State vs. Idaho Answering Exchange	AL/Labor/Wage Claim	Pending
State vs. KFLI Radio, Inc.	AL/Labor/Wage Claim	Closed
Francine Wood vs. State	HW/Miscellaneous	Closed
State vs. Russell Wiemers	HW/Miscellaneous	Closed
State vs. Randy Nelson	AP/Miscellaneous	Closed
SOI/Connie Marmon vs. William J. Buckley	HW/Miscellaneous	Closed
State vs. Randy D. Nelson	AP/Miscellaneous	Closed
In the Interest of: Ray Allen Tracy	HW/Miscellaneous	Closed
Helen Sanders vs. Id. Bd. of Med.	AL/Self-Governing	Pending
Mark Baum vs. Id. Bd. of Med.	AL/Self-Governing	Closed
State vs. Mitt Campbell	AL/Labor/Wage Claim	Pending
State vs. Robert Gindt	AL/Labor/Wage Claim	Closed
State vs. Russell Sanders	AL/Labor/Wage Claim	Closed
State vs. Ray Allen Wood	CJ/Corrections	Closed
Steven Wolf vs. Darrol Gardner	CJ/Corrections	Pending
In the Interest of: Gomez Children	HW/Child Protective Act	Closed
James Brownyard vs. SOI ET AL	CJ/Corrections	Pending
State vs. Earl Erdman	AL/Labor/Wage Claim	Closed
State vs. Commerce Journal	AL/Labor/Wage Claim	Pending
State vs. Robert Mallery	AP/Miscellaneous	Pending
State vs. Marvin and Marshall Wolfe	AP/Miscellaneous	Closed
State vs. Idaho Answering Exchange	AL/Labor/Wage Claim	Pending
State vs. American Testing Labs.	AL/Labor/Wage Claim	Pending
State vs. Aaron Davaz	AL/Labor/Wage Claim	Closed
State vs. James Hudson	AP/Miscellaneous	Closed
State vs. Charles Crabb	AP/Miscellaneous	Pending
Severt & Nancy Gallagher vs. H&W	HW/Miscellaneous	Closed
State vs. Timothy Gawron	AP/Miscellaneous	Pending
SOI/Carroll Homuth vs. William Stein	HW/Miscellaneous	Closed
State vs. Richard Gallatin	AP/Miscellaneous	Pending
SOI/Dorothy Thomas vs. Thomas Harold Thomas	HW/Miscellaneous	Closed
Petro et ux. vs. Corbin, et ux/et al.	NR/Lands	Pending
State vs. Joe Barker	AL/Labor/Wage Claim	Closed
State vs. Tony Dryden	AP/Miscellaneous	Pending
Massachusetts Gen. Life Ins. Co. vs. Ponderosa Inns, Inc. et al.	SF/Taxation	Pending
State vs. David Rossi	AP/Miscellaneous	Pending

SOI/Teresa Hoffman vs. Steve Stieger	HW/Miscellaneous	Closed
State vs. Treasa McCann	HW/Miscellaneous	Closed
State vs. Paul Jorden	HW/Miscellaneous	Closed
State vs. Colleen Prouty	HW/Miscellaneous	Closed
State vs. Royce Heckendorn	HW/Miscellaneous	Pending
Chrysler Corp. vs. Kelly Pearce	LA/Miscellaneous	Pending
Tom Filson vs. Darrol Gardner	CJ/Corrections	Pending
State Hospital North/H&W vs. Lester and Faye Reynolds	HW/Miscellaneous	Closed
State Hospital North/H&W vs. Richard Sterling	HW/Miscellaneous	Closed
In the Interest of: Jimmy Russell	HW/Miscellaneous	Closed
Spur Cattle Co. vs. Animal Industries/SOI	NR/Agriculture	Pending
Mark Cartwright vs. State	CJ/Corrections	Closed
Michael Phillips vs. State	CJ/Corrections	Closed
Dan Goodrick vs. State	CJ/Corrections	Pending
Paul McPherson vs. State	CJ/Corrections	Closed
Eugene Search vs. State	CJ/Corrections	Closed
State vs. Henrietta Ries	HW/Miscellaneous	Closed
State vs. Roberta Forgey	HW/Miscellaneous	Pending
State vs. Monte Greene	HW/Miscellaneous	Closed
In the Interest of: Melissa Becker	HW/Child Protective Act	Closed
State vs. Ambrose Baltes	AL/Labor/Wage Claim	Closed
State vs. Children Unlimited, Inc.	AL/Labor/Wage Claim	Closed
Edward Buffington vs. SOI ET AL	CJ/Corrections	Closed
State vs. Idaho Answering Exchange	AL/Labor/Wage Claim	Pending
State vs. Courtesy Chrysler/Plymouth	AL/Labor/Wage Claim	Pending
State vs. Killian Quarter Horses, Inc.	AL/Labor/Wage Claim	Pending
State vs. Zella Sweitzer	HW/Miscellaneous	Closed
In the Interest of: Mary Lou Erskine	HW/Child Protective Act	Closed
Seiu, Local 6, et al. vs. State	HW/Personnel	Closed
Barry Silverstein vs. Ronald Carlson, et al.	NR/Water Resources	Pending
Georgia Berglin vs. H&W	HW/Miscellaneous	Closed
F. E. Stalder vs. Dallas C. Dial	AP/Miscellaneous	Pending
State vs. Idaho Answering Exchange	AL/Labor/Wage Claim	Pending
State vs. Margaret Avery	AL/Labor/Wage Claim	Closed
State vs. Mike Perrigo	AL/Labor/Wage Claim	Pending
State vs. Donna Velvick	AL/Labor/Wage Claim	Closed
State vs. Ray Silva	AL/Labor/Wage Claim	Pending
State vs. Margaret Avery	AL/Labor/Wage Claim	Closed
SOL/Shirley Lamere vs. Wayne Fister, Sr.	HW/Miscellaneous	Closed
State vs. Dennis E. Reed	AP/Miscellaneous	Closed
State vs. Clifford Kay	AP/Miscellaneous	Pending
Jack Fries vs. Labor & Indust. Serv.	AL/Miscellaneous	Closed
State vs. Sterling Anderson	AP/Miscellaneous	Closed
Dennis Reed vs. State	CJ/Corrections	Closed
James Hudson vs. State	CJ/Corrections	Closed
Marvin Kay vs. State	CJ/Corrections	Closed
Ronnie Heck vs. State	CJ/Corrections	Closed

Edwin Gossett vs. State	CJ/Corrections	Closed
Bart Livingston vs. State	CJ/Corrections	Pending
State vs. Continental Minerals Corp.	AL/Labor/Wage Claim	Pending
In the Interest of: Trevor Hulse	HW/Child Protective Act	Closed
State vs. Richard Canterbury	AP/Miscellaneous	Pending
State vs. Lee Bretto, Brad Bivens	AL/Labor/Wage Claim	Pending
State vs. Ronnie Pierce	AP/Miscellaneous	Pending
State vs. Arthur Hoak	AP/Miscellaneous	Pending
In the Interest of: Pearson Children	HW/Child Protective Act	Closed
State vs. Roger Bolton	HW/Miscellaneous	Closed
State vs. David Bradley	AP/Miscellaneous	Pending
Ketola vs. Ketola	HW/Miscellaneous	Closed
Perry Thomas vs. State	CJ/Corrections	Closed
James Hudson vs. State	CJ/Corrections	Closed
Robert Mallery, et al. vs. G.D. Lewis, et al.	AP/Miscellaneous	Pending
State vs. Bradley Shafer	AP/Miscellaneous	Closed
State Hospital North/H&W vs. Calvin Shields	HW/Miscellaneous	Pending
State Hospital North/H&W vs. Patricia Byrd	HW/Miscellaneous	Closed
State Hospital North/H&W vs. Dan L. Byrd	HW/Miscellaneous	Closed
State vs. Walter Balla	AP/Miscellaneous	Closed
State vs. El Ranchito, Inc.	AL/Labor/Wage Claim	Pending
State vs. Bill Marcum	AL/Labor/Wage Claim	Closed
State vs. Ener-Con, Inc.	AL/Labor/Wage Claim	Pending
State vs. El Ranchito, Inc.	AL/Labor/Wage Claim	Pending
Francis Pat Mulvaney vs. Penny Lynn Mulvaney	HW/Miscellaneous	Closed
State vs. Alvin Carver	CJ/Corrections	Closed
In the Interest of: Jeremy Rose	HW/Miscellaneous	Closed
Shirley Maravilla vs. Michael Maravilla	HW/Miscellaneous	Closed
State vs. Thomas Brannon	AP/Miscellaneous	Pending
State vs. El Ranchito, Inc.	AL/Labor/Wage Claim	Pending
In the Interest of: Tawnya Fullmer	HW/Child Protective Act	Closed
U.S. Marketing, Inc. vs. David Leroy, et al.	AP/Miscellaneous	Closed
State vs. Wilford Stephens	AP/Miscellaneous	Closed
Brian Bundy vs. State	CJ/Corrections	Closed
James A. Hanson vs. State	CJ/Corrections	Closed
Ric Anderson vs. State	CJ/Corrections	Closed
Dan Goodrick vs. State	CJ/Corrections	Closed
State vs. Cary Burgess	AP/Miscellaneous	Pending
State vs. Samuel Bates	AP/Miscellaneous	Pending
State vs. Clifford Sage	AL/Labor/Wage Claim	Pending
State vs. Grampa Mayer's Inc.	AL/Labor/Wage Claim	Closed
Gem Health Assoc. vs. State	AL/Miscellaneous	Pending
In the Interest of: Baby Boy Fish	HW/Terminations	Closed

Randy A. Ziegler, pro se vs. State	CJ/Corrections	Closed
In the Interest of:	HW/Child Protective Act	Pending
Theodore Shands		
John M. Sorensen, Sr. vs.	CJ/Corrections	Pending
Darrol Gardner, et al.		
State vs. Thomas, Guadalupe &	AP/Miscellaneous	Pending
Julian Lopez		
In the Estate of:	HW/Miscellaneous	Closed
Benjamin Young		
State vs. Juanita Iwakiri	AP/Miscellaneous	Pending
In the Matter of:	HW/Miscellaneous	Closed
Poynter Brothers		
Thomas and Margaret Hale vs.	AL/Education	Pending
Myron Coulter, et al.		
State vs. Mac Everett	AL/Labor/Wage Claim	Closed
State vs. Prob., Inc.	AL/Labor/Wage Claim	Pending
State vs. Roger Dobbs	AL/Labor/Wage Claim	Pending
State vs. Summit Truck Lines, Inc.	AL/Labor/Wage Claim	Pending
In the Interest of:	HW/Child Protective Act	Pending
Amanda Jo Peron		
SOI/Regina Brown vs. Roger Carroll	HW/Miscellaneous	Closed
State vs. Carma Cagle	AL/Labor/Wage Claim	Closed
State vs. William Morriss	AL/Labor/Wage Claim	Closed
Max Dalton vs. Id. Dairy Prod.	AL/Self-Governing	Closed
Comm., et al.		
H&W vs. Dan Lee Neal	HW/Miscellaneous	Closed
State vs. Richard W. Goldman	AP/Miscellaneous	Pending
William Martin Nice vs. State	AP/Miscellaneous	Pending
World Travel Associates vs.	HW/Miscellaneous	Closed
SOI/Dan Paxton, et ux.		
State vs. Patricia Haight	HW/Mental Health	Closed
State vs. David Allen Osborn	AP/Miscellaneous	Pending
In the Interest of:	HW/Child Protective Act	Closed
Walden Children		
James Yazell vs. State	CJ/Corrections	Closed
Dean Schwartzmiller vs.	CJ/Corrections	Pending
Darrol Gardner/SOI		
State vs. Kenneth Huskey	AP/Miscellaneous	Closed
State vs. Merritt and Co., Inc.	AL/Labor/Wage Claim	Closed
State vs. Journal of Commerce, Inc.	AL/Labor/Wage Claim	Closed
Anthony Cootz, et al. vs. State	CJ/Corrections	Closed
Clyde Courtney vs. State	CJ/Corrections	Closed
Talmage & McKaugham vs. State	CJ/Corrections	Closed
State Hospital North/H&W vs.	HW/Miscellaneous	Closed
Kristi and John Rindal		
State vs. Harley L. Carringer	AP/Miscellaneous	Closed
State vs. Vernon Pugh	AP/Miscellaneous	Closed
Ray and Esther Keppner, et al. vs.	NR/Water Resources	Pending
Water Resources, et al.		
State vs. Dictaphone Corporation	AL/Labor/Wage Claim	Closed
Bureau of Supp. Enf./Glisson vs.	HW/Miscellaneous	Closed
Dale L. Glisson		
State vs. Gem Parks Development Co.	BR/Finance	Pending
State vs. Leonard Reinke	AP/Miscellaneous	Pending
Lewis Segelson, pro se vs. C. W. Crowl	CJ/Corrections	Pending

In the Interest of: Trudy Hansen	HW/Child Protective Act	Closed
In the Interest of: Tina Martinez	HW/Child Protective Act	Closed
SOI/Drenna Walker vs. Don Paul Waters	HW/Miscellaneous	Closed
Leroy Kary, pro se vs. State	CJ/Corrections	Closed
Tom De Journett, pro se vs. State	CJ/Corrections	Closed
Brian K. Bundy vs. State	CJ/Corrections	Closed
H&W vs. Craig Sinquefield	HW/Miscellaneous	Closed
In the Interest of: Baby Girl Olvera	HW/Miscellaneous	Closed
SOI/Brenda Loff vs. Lloyd Loff And in the Interest of	HW/Miscellaneous	Pending
Curtis Withington vs. Miller Crowl, et al.	CJ/Corrections	Pending
State vs. Dale I. Dalley	AP/Miscellaneous	Pending
State vs. Royal Crest Inns of America	AL/Labor/Wage Claim	Pending
H&W vs. Phyllis Thornton	HW/Miscellaneous	Pending
H&W vs. Bonnie Piercy	HW/Miscellaneous	Closed
State vs. Gary Alan Lang	AP/Miscellaneous	Pending
State vs. Sylvia Roland	CJ/Miscellaneous	Pending
H&W vs. Sandi Gorring	HW/Miscellaneous	Closed
H&W vs. Don Clegg	HW/Miscellaneous	Closed
H&W vs. Eugene H. Evans	HW/Miscellaneous	Pending
State vs. Dave Shovacki	AL/Labor/Wage Claim	Closed
State vs. McCartan's Sand & Gravel	AL/Labor/Wage Claim	Pending
State vs. Ron Budd	AL/Labor/Wage Claim	Closed
State vs. Kaye Owsley	AP/Miscellaneous	Pending
State vs. Elmer Manchester	AP/Search & Seizure	Closed
H&W vs. Douglas Price	HW/Miscellaneous	Closed
H&W/Tracy Mancias vs. James Pedersen	HW/Miscellaneous	Pending
H&W vs. Darwin and Gay Knopp	HW/Miscellaneous	Closed
State vs. Robert Molinelli	AP/Miscellaneous	Pending
In the Interest of: Steve Darling, Jr.	HW/Miscellaneous	Closed
Gary R. Graham, pro se vs. State	CJ/Corrections	Closed
Peck et al. vs. State	AP/Miscellaneous	Closed
State vs. Roland K. Colgate, Jr.	AP/Miscellaneous	Closed
Walter Balla, pro se vs. Darrol Gardner	CJ/Corrections	Closed
Chris Zavala vs. R.W. Glover et al.	HW/Miscellaneous	Closed
Billy, Jeri Jo & Gerald Madsen vs. Jim Kile, et al.	HW/Miscellaneous	Closed
State vs. Al Watts	AL/Labor/Wage Claim	Pending
State vs. Ener-Con., Inc.	AL/Labor/Wage Claim	Pending
State vs. Journal of Commerce	AL/Labor/Wage Claim	Closed
State vs. Jerry Roark	AL/Labor/Wage Claim	Pending
Richard Henrikson vs. State	CJ/Corrections	Closed
H&W/Terri Tudor vs. Terry Allen Olson	HW/Miscellaneous	Closed
State vs. National Autofinders	AL/Labor/Wage Claim	Pending
State vs. National Autofinders	AL/Labor/Wage Claim	Pending
State vs. Harvey Wright	AL/Labor/Wage Claim	Pending
State vs. Marla Hoop	AL/Labor/Wage Claim	Pending

State vs. Ted Grover	AL/Labor/Wage Claim	Closed
State vs. Danny Dean Miller	AP/Miscellaneous	Pending
H&W vs. Christy Reutzel	HW/Miscellaneous	Closed
State vs. Amer. Elec. Ener. Co.	AL/Labor/Wage Claim	Pending
State vs. Emerald Publishing Co.	AL/Labor/Wage Claim	Pending
Ricky Leems vs. State	CJ/Corrections	Closed
H&W vs. Jane M. Singer	HW/Miscellaneous	Closed
Walter Balla vs. State	CJ/Corrections	Closed
Anthony Cootz vs. State	CJ/Corrections	Pending
Billy Madsen, et al. vs.	AL/Miscellaneous	Closed
James Kile, et al/Kosonen		
State vs. Delbert and Barbara Wadsworth	SF/Taxation	Pending
State vs. Raymond T. Pettit	AP/Miscellaneous	Pending
H&W vs. Timothy Joel White	HW/Miscellaneous	Closed
State vs. James Curb	AL/Labor/Wage Claim	Closed
SOI/HW vs. Larry R. Teldeschi	HW/Miscellaneous	Closed
SOI/Patsy Sharp vs. Ralph James Pulver	HW/Miscellaneous	Pending
In the Interest of: Comiskey Children	HW/Miscellaneous	Closed
In the Interest of: Stacy Linn	HW/Miscellaneous	Closed
SOI/Brenda Jenkins vs. John James Monroe	HW/Miscellaneous	Closed
In the Interest of: Brian Cook	HW/Miscellaneous	Pending
In the Interest of: Christy Leigh Tabor	HW/Miscellaneous	Closed
In the Interest of: Leroy Goodrick	HW/Child Protective Act	Closed
In the Interest of: Julie Metzger	HW/Miscellaneous	Closed
George Rogers vs. State	CJ/Corrections	Closed
State vs. K-G Men's Store	AL/Labor/Wage Claim	Closed
In the Interest of: Bradley Birdsell	HW/Terminations	Closed
In the Interest of: Shade Hillyer	HW/Terminations	Closed
James Mason vs. Dept. of Law Enforcement	AP/Miscellaneous	Pending
State vs. Leroy N. Martin	AP/Miscellaneous	Pending
State vs. Ronnie Leroy Heck	AP/Miscellaneous	Pending
SOI/Patricia Shay vs. Ronald K. Shay	HW/Welfare	Closed
SOI/Patricia Shay vs. Ronald Shay	HW/Welfare	Closed
SOI/Nancy Grubbs vs. John S. Morrison	HW/Miscellaneous	Closed
In the Interest of: Forrest Sooter	HW/Child Protective Act	Closed
State vs. Glenda York	HW/Miscellaneous	Closed
SOI/Pam Pfost vs. Michael Pfost	HW/Welfare	Closed
State vs. Paul Jensen	AL/Labor/Wage Claim	Pending
State vs. John Zollinger	AL/Labor/Wage Claim	Closed
State vs. Clyde and Bette Denning	AL/Labor/Wage Claim	Pending
State vs. Royal Crest Inns of America	AL/Labor/Wage Claim	Pending

State vs. Richard Schmidt	AL/Labor/Wage Claim	Closed
James Hudson vs. State	CJ/Corrections	Closed
State vs. Harold C. Peterson	AL/Labor/Wage Claim	Closed
State vs. Trapper Bakery	AL/Labor/Wage Claim	Pending
Larry Dietz vs. D. Gardner, et al.	CJ/Corrections	Pending
In the Interest of: Ronald Hagerty	HW/Terminations	Closed
State vs. Joanne Moe	HW/Miscellaneous	Pending
Interwest Engineering, Inc. vs. SOI ET AL	NR/Miscellaneous	Pending
SOI/State Hospital North vs. Glenn & Marjorie Franks	HW/Miscellaneous	Closed
In the Interest of: Donald Hase	HW/Terminations	Closed
State vs. Elmer Murphy	AP/Miscellaneous	Closed
State vs. Children Unlimited, Inc.	AL/Labor/Wage Claim	Closed
State vs. Federated Security Network	AL/Labor/Wage Claim	Pending
State vs. Ken Messmer	AL/Labor/Wage Claim	Pending
State vs. Glenn Newton	AL/Labor/Wage Claim	Pending
State vs. Donald Short	AL/Labor/Wage Claim	Pending
State vs. Max Larsen	AL/Labor/Wage Claim	Closed
State vs. Elmer Miller	HW/Miscellaneous	Closed
State vs. Robert Lee Warner	HW/Miscellaneous	Closed
In the Interest of: Alfonzo Torrez	HW/Child Protective Act	Closed
Jan M. Caren vs. State	HW/Fair Hearing	Closed
Dennis Griffith vs. Hearing Aid Dealers & Fitters	AL/Self-Governing	Closed
SOI/Dawn Zavala vs. Chris Zavala	HW/Welfare	Closed
State vs. Floyd Weeks	HW/Mental Health	Closed
State vs. Jim Brown & Bob Orear	AL/Labor/Wage Claim	Pending
In the Interest of: Robert MacDonald	HW/Terminations	Closed
Marvin L. Kay vs. State	HW/Mental Health	Closed
State vs. Craig Wiggins	AP/Miscellaneous	Closed
State vs. Charlotte Wallin	HW/Welfare	Closed
State vs. Consuelo Correra	HW/Mental Health	Pending
State vs. Earl Ray Mooso	HW/Mental Health	Closed
State vs. Carolyn Hansen	HW/Mental Health	Closed
State vs. Larry and Betty Larson	HW/Mental Health	Closed
State vs. Janet Wood	HW/Mental Health	Pending
State vs. Darrell McCabe	HW/Mental Health	Closed
Dean Schwartzmiller vs. State	CJ/Corrections	Closed
Raymond W. Leeds vs. State	CJ/Corrections	Closed
Steve Graham vs. State	CJ/Corrections	Closed
Dan Goodrick vs. State	CJ/Corrections	Closed
In Matter of Acquisition by: George Washington Corp. etc.	BR/Miscellaneous	Closed
State vs. Bruce Grob	AP/Miscellaneous	Pending
State vs. Michael Stelling	HW/Welfare	Closed
SOI/Debbie Hislop vs. Tom J. Hislop	HW/Welfare	Closed
State vs. Mike A. Soto	HW/Welfare	Pending
Union Pacific Railroad vs. State	SF/Taxation	Pending
SOI/Jo Johnson vs. Bill Ron Johnson	HW/Welfare	Closed
State vs. Wilber Deford, Jr.	AP/Miscellaneous	Pending

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SOI/Nancy Gardener vs. Monty Kiser	HW/Welfare	Closed
Pamela Wadley/SOI vs. Jeffrey P. Wadley	HW/Miscellaneous	Closed
John Alden Life Ins. Co. vs. Trent Woods, et al.	BR/Miscellaneous	Closed
State vs. Bryan Spurgeon	AP/Miscellaneous	Pending
State vs. Bryan Spurgeon	AP/Miscellaneous	Pending
State vs. Ernest Grierson	AP/Miscellaneous	Pending
State vs. Brian E. Holderness	HW/Welfare	Closed
State vs. Judith Burpee	HW/Mental Health	Closed
State vs. Richard and Dianne Graham	HW/Mental Health	Pending
State vs. Valdi Jenkins	HW/Mental Health	Closed
SOI/Sherri Adcock vs. Danny Burrell	HW/Welfare	Closed
State vs. Michael and Pauline Jansen	HW/Welfare	Closed
State vs. Wayne D. Legg	NR/Fish & Game	Pending
State vs. Bryan Spurgeon	AP/Miscellaneous	Pending
State vs. Bryan Spurgeon	AP/Miscellaneous	Pending
In the Interest of: Charles Gibson	HW/Welfare	Closed
In the Interest of: Angela Miszezzenko	HW/Child Protective Act	Closed
State vs. John M. Hellberg	AP/Miscellaneous	Pending
State vs. Victor Wilde	AP/Miscellaneous	Pending
State vs. Ernest L. Hickman	HW/Welfare	Closed
State vs. Super Thrift Drugs, Inc.	AL/Labor/Wage Claim	Closed
In the Interest of: Charles Peoples	HW/Child Protective Act	Pending
State vs. Quality Building Mfg.	AL/Labor/Wage Claim	Pending
State vs. Thomas Henry Gibson	AP/Miscellaneous	Pending
State vs. Margaret Ladd Davis	HW/Welfare	Closed
Bethea Parsons vs. Judge Brower	AL/Judiciary	Closed
Continental Life vs. Trent Woods	BR/Miscellaneous	Closed
In the Interest of: Raymond Stehlick	HW/Terminations	Closed
State vs. Michael Wilson	AP/Miscellaneous	Pending
State vs. Donna J. Young	HW/Welfare	Closed
SOI/Pamela Hass vs. Marvin L. Hass	HW/Welfare	Closed
State vs. Sherry Magers	HW/Welfare	Closed
In the Interest of: Rhodes Children	HW/Child Protective Act	Closed
John Alden Life Ins. Co. vs. Trent Woods, David Leroy	BR/Miscellaneous	Closed
State vs. Rexburg Motor Co.	AL/Labor/Wage Claim	Closed
State vs. Terry L. Johns	HW/Welfare	Closed
State vs. Pioneer Indust. Prod., Inc.	AL/Labor/Wage Claim	Closed
State vs. Reuben Akre	AL/Labor/Wage Claim	Closed
State vs. William Morriss	AL/Labor/Wage Claim	Pending
State vs. John W. West	AL/Labor/Wage Claim	Closed
State vs. Ted Perry	AL/Labor/Wage Claim	Closed
In the Interest of: Danny Michel	HW/Child Protective Act	Closed
John Russell Dillon vs. State	CJ/Corrections	Closed
State vs. L and F Investment Co.	AL/Labor/Wage Claim	Closed
State vs. Merritt and Company, Inc.	AL/Labor/Wage Claim	Pending
SOI/Marie Darwish vs. Isa Musa Darwish	HW/Welfare	Closed

State vs. Raymond Peterson	HW/Miscellaneous	Pending
State vs. Robert Davis	AP/Miscellaneous	Pending
State vs. Lacey Sivak	AP/Miscellaneous	Pending
Kenneth and Betty Carlsted vs. State	NR/Lands	Closed
In the Interest of: Kalina McCowan	HW/Child Protective Act	Pending
Wilson/(Children) by Parents vs. Gulf Resources, et al.	HW/Health	Closed
In the Matter of Hospitalization of: Clothiel Butte	HW/Mental Health	Closed
Chris Foutch vs. State	CJ/Corrections	Closed
Kurt Hinson vs. State	CJ/Corrections	Closed
Leroy Kary vs. State	CJ/Corrections	Closed
Younger vs. Marshall et al.	SF/Taxation	Pending
State vs. Bronwyn Mytrysak	HW/Welfare	Pending
Steve Abel vs. State	CJ/Corrections	Closed
State vs. Billy G. Roth	HW/Mental Health	Closed
State vs. Lance Arnold	AL/Labor/Wage Claim	Closed
State vs. D & S Restaurants, Inc.	AL/Labor/Wage Claim	Closed
State vs. Pearl Smith	AL/Labor/Wage Claim	Pending
Thyne and Terry Murdock/H&W vs. State	NR/Lands	Pending
State vs. Pedro Munoz De La Paz	AP/Miscellaneous	Pending
Walter Balla vs. Darrol Gardner	CJ/Corrections	Closed
SOL/Sue Royball vs. Kevin Royball	HW/Welfare	Closed
In the Interest of: Baby Boy Latimer	HW/Terminations	Closed
Randy Ziegler vs. State	CJ/Corrections	Closed
In the Interest of: Donna McCarroll	HW/Child Protective Act	Pending
State vs. Kyle Fowler and Ronald Mayne	AP/Miscellaneous	Pending
State vs. Kenneth Huskey	AP/Miscellaneous	Pending
State vs. Vernon J. Shown	HW/Welfare	Closed
State vs. Timothy Harris	HW/Welfare	Closed
State vs. David Wilson	AP/Miscellaneous	Pending
Cyrus Maxfield vs. Lynn Thomas, et al.	AL/Miscellaneous	Pending
In the Interest of: Jessie Johnson	HW/Child Protective Act	Closed
SOI/Kathleen Short vs. Ronald Eugene Budd	HW/Welfare	Closed
State vs. Earl Bumgardner	AL/Labor/Wage Claim	Closed
State vs. Louise B. Jones	AL/Labor/Wage Claim	Pending
Leroy Kary vs. State	CJ/Corrections	Closed
State vs. Denise Kelley	HW/Welfare	Closed
State vs. Barbara Miller	HW/Welfare	Closed
State vs. Robert and Margo Brown	HW/Welfare	Closed
State vs. Lynette Goertzen	HW/Mental Health	Closed
State vs. Charles Perry	HW/Mental Health	Pending
State vs. Bob Patterson	HW/Mental Health	Closed
State vs. Ernest Ramos	HW/Welfare	Closed
State vs. Dee Whitaker	HW/Mental Health	Closed
State vs. Ronald Price	HW/Welfare	Closed

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State vs. Royal Crest Inns of America	AL/Labor/Wage Claim	Pending
SOI ET AL vs. Management Funding, Inc., et al.	BR/Finance	Pending
SOI/Floyd Hickman vs. Gail F. Hickman	HW/Welfare	Closed
In the Interest of: Guy Young	HW/Welfare	Closed
State vs. Kelly B. Wilson	AP/Miscellaneous	Pending
State vs. Wayne and Geraldine Sensenig	AP/Miscellaneous	Pending
State vs. Gerald Peterson	HW/Mental Health	Closed
State vs. Charles Brown	HW/Mental Health	Closed
State vs. Dallas and Sharleen Bodily	HW/Mental Health	Closed
State vs. Duran Construction, Inc.	AL/Labor/Wage Claim	Pending
State vs. Quinn McBride, Gordon Randall	AL/Labor/Wage Claim	Pending
State vs. Colton Beard	AL/Labor/Wage Claim	Closed
In the Interest of: Gypsy Lee Williams	HW/Child Protective Act	Closed
In the Interest of: Scott Cassell	HW/Child Protective Act	Closed
Jeffrey Ken Morrow vs. State	CJ/Corrections	Closed
Robert Barrows, et al. vs. Idaho Dept. of H&W	HW/Mental Health	Pending
Lux, Inc. vs. State	SF/Taxation	Pending
State vs. Roger Kent Moore	AP/Miscellaneous	Pending
State vs. Y.L. Cattle Trucking Co.	AL/Labor/Wage Claim	Closed
State vs. Pioneer Industrial Products, Inc.	AL/Labor/Wage Claim	Closed
State vs. Coeur D' Alene Surveying, Inc.	AL/Labor/Wage Claim	Pending
In the Interest of: Suzanne Peterson	HW/Child Protective Act	Pending
In the Matter of Estate of: Christine E. Cornwall	HW/Welfare	Pending
In Re Guardianship of: Dallas Eccleston	HW/Mental Health	Closed
Northwest Acceptance Corp. vs. Hunt Bros. Construc. et al.	SF/Taxation	Pending
State vs. James Batterton	AP/Miscellaneous	Closed
SOI/Mary Beth Lancaster vs. Randall Lancaster	HW/Welfare	Closed
SOI/Annette Shaffer vs. Raymond Shaffer	HW/Welfare	Closed
State vs. Corky Lindsay	HW/Welfare	Closed
State vs. Robert Garcia	HW/Miscellaneous	Closed
State vs. Woody Dean Hayes	AP/Miscellaneous	Closed
State vs. Thomas Creech	AP/Miscellaneous	Pending
State vs. Wayne W. Findlay	HW/Welfare	Pending
State vs. Bud Townsend	AL/Labor/Wage Claim	Pending
State vs. Jan McCoy	AL/Labor/Wage Claim	Pending
State vs. Skip Martin	AL/Labor/Wage Claim	Pending
James Hudson vs. State	CJ/Corrections	Closed
State vs. Kevin Schmadeka	HW/Welfare	Pending
Jody Kitchen vs. State	CJ/Corrections	Closed

In the Interest of:	HW/Welfare	Closed
Mary C. Smith		
SOI/Evelyn Carr vs. William Briscow	HW/Welfare	Closed
In the Interest of:	HW/Terminations	Closed
Melissa Povsha		
SOI/Jenea Hoover vs. W.M. Burns	HW/Welfare	Closed
State vs. Dale and Ruby Olson	HW/Welfare	Closed
State vs. Cotant, Grimes & Cotant, Inc.	AL/Labor/Wage Claim	Closed
State vs. Western States Service Corp.	AL/Labor/Wage Claim	Closed
State vs. Jose Runis Tapia	HW/Welfare	Closed
In the Interest of:	HW/Child Protective Act	Closed
Kenneth Jones		
Henry Mara vs. State	CJ/Corrections	Closed
Wilford Stephens vs. State	CJ/Corrections	Closed
State vs. Frank Lara	HW/Miscellaneous	Closed
State vs. Carmello Torrez	HW/Miscellaneous	Closed
State vs. Ron Carter	AL/Labor/Wage Claim	Pending
State vs. Michael M. Jones	AL/Labor/Wage Claim	Pending
In the Interest of:	HW/Child Protective Act	Pending
Jeanne Trent		
State vs. John Lamb, et al.	HW/Miscellaneous	Pending
K-Mart vs. State	SF/Taxation	Pending
SOI/Jodi Woolstenhulme vs. John Van Houten	HW/Welfare	Closed
SOI/Lauri Smith vs. Louis Romero	HW/Welfare	Closed
SOI/Gail Slane vs. Alfred Slane	HW/Welfare	Closed
State vs. Ray Cammack	AL/Labor/Wage Claim	Closed
State vs. B & D Elec. Contractors	AL/Labor/Wage Claim	Pending
State vs. Robert Patterson	AL/Labor/Wage Claim	Pending
M. Y. Rasheed, et al. vs. State	CJ/Corrections	Pending
State vs. Thomas D. Sanger	AP/Miscellaneous	Pending
James Olsen, et al. vs. State	CJ/Corrections	Closed
State vs. Laurene Penn	HW/Welfare	Closed
SOI/Connie Whittington vs. Frank Harmon	HW/Welfare	Closed
State vs. Craig and Eldon Kent	AL/Labor/Wage Claim	Closed
SOI/Stites vs. John David Van Slooten	HW/Welfare	Closed
SOI/Cari Hiner vs. Mc Cloud Ford	HW/Welfare	Pending
Strand vs. Martineau, et al.	SF/Taxation	Pending
State vs. Mary Jean Hebner	AP/Miscellaneous	Pending
SOI/Debbie Edwards vs. Michael Edwards	HW/Welfare	Closed
SOI/Particia Gee vs. Randall Gee	HW/Welfare	Closed
Earlene Ellen Burk vs. State	NR/Fish & Game	Closed
Jeffrey Morrow vs. State	CJ/Corrections	Closed
James Hudson vs. State	CJ/Corrections	Closed
SOI/Benilde Uranga vs. Richard Uranga	HW/Welfare	Closed
State vs. J.W. West	AL/Labor/Wage Claim	Pending
State vs. Emerald Publishing Co.	AL/Labor/Wage Claim	Pending
State vs. Ted Perry	AL/Labor/Wage Claim	Pending
State vs. William Morriss	AL/Labor/Wage Claim	Pending
State vs. William Morriss	AL/Labor/Wage Claim	Pending

In the Interest of: Trudy Hansen	HW/Terminations	Closed
In the Interest of: Stacy Sorrells	HW/Child Protective Act	Closed
John L. Ramsey vs. State	CJ/Corrections	Pending
State vs. Kelvin Pyne	HW/Welfare	Closed
SOI/Patricia McKibben vs. Harold McKibben	HW/Welfare	Closed
Zane Jack Fields vs. State	CJ/Corrections	Closed
In the Interest of: Walter Phippeny	HW/Mental Health	Closed
In the Interest of: John Cochran	HW/Mental Health	Closed
In the Interest of: Hardy Metcalf	HW/Mental Health	Closed
Marvin Roach vs. State	CJ/Corrections	Closed
John Ramsey vs. State	CJ/Corrections	Pending
Thomas McPhie vs. State	CJ/Corrections	Pending
Ricky Dean Leens vs. State	CJ/Corrections	Closed
State vs. Ken Houston	HW/Welfare	Pending
State vs. Anthony Mustafa	HW/Miscellaneous	Pending
State vs. Elizabeth Wright	HW/Miscellaneous	Pending
State vs. Lori Bowles	HW/Mental Health	Closed
State vs. Alan Fresh	AL/Labor/Wage Claim	Pending
State vs. Computer Company, Inc.	AL/Labor/Wage Claim	Pending
State vs. Doug Mayer	HW/Miscellaneous	Closed
State vs. Monte Hoisington	AP/Miscellaneous	Pending
State vs. Ruiz Elizaz/AKA Andy Ruiz	AP/Miscellaneous	Pending
State vs. James Kindelburger	HW/Mental Health	Closed
State vs. Thomas Griffith	HW/Mental Health	Closed
State vs. Walter Schwartz	HW/Mental Health	Pending
State vs. Charles H. Stewart	AP/Miscellaneous	Pending
State vs. Edward Jernberg	HW/Welfare	Closed
State vs. World Wide Achievements Corp.	AL/Labor/Wage Claim	Closed
State vs. Joseph Schank	AL/Labor/Wage Claim	Pending
State vs. Mike Bishop	AL/Labor/Wage Claim	Closed
State vs. Darrell E. Campbell	AP/Miscellaneous	Closed
SOI/Barbara Williams vs. Frank E. Williams	HW/Welfare	Closed
SOI/Mary Polisso vs. Salvador Polisso	HW/Welfare	Closed
State vs. Kerry King	AL/Employment	Closed
State vs. Randal Waters	AL/Employment	Pending
State vs. Creighton Cogdill	AL/Employment	Pending
State vs. Karen Spencer	AL/Employment	Pending
State vs. Lynn Williams	AL/Employment	Pending
In the Interest of: Baby Girl Grosch	HW/Terminations	Closed
State vs. Darwin Betterton	AL/Employment	Closed
State vs. Mrs. G. M. Giraud	AL/Employment	Closed
State vs. Lawrence Rincover	AL/Employment	Closed
Jesse Weeks & Sons vs. Ronald D. Carlson	NR/Water Resources	Pending
State vs. Kathy Needham	AL/Employment	Pending

State vs. Jesus Vela	AL/Employment	Pending
State vs. Bret Boren	AL/Employment	Pending
State vs. Floyd Hickman	AL/Employment	Pending
State vs. Royce Redd	AL/Employment	Pending
State vs. Paul McFarland	AL/Employment	Pending
State vs. James Monroe	AL/Employment	Pending
State vs. George Eisele	AP/Miscellaneous	Pending
State vs. Tony Gonzales	HW/Miscellaneous	Closed
In the Interest of: WM. Bourger	HW/Child Protective Act	Closed
James Hankins/John Lancaster vs. State	CJ/Corrections	Closed
James Hudson vs. State	CJ/Corrections	Closed
State vs. Patricia Paddock	AL/Employment	Closed
State vs. W. E. Bedal	AL/Employment	Closed
State vs. Marvin Dufvenberg	AL/Employment	Closed
Clifton Irrigating Co. vs. Russell Stoker/Watermaster	NR/Water Resources	Pending
State vs. Carl Pohl	AL/Employment	Pending
Tarbox (M&K Sales) vs. State	SF/Taxation	Pending
WM. D. Satterfield vs. Henry Risley, et al.	AL/Civil Rights	Pending
Cyrus Maxfield vs. Darrol Gardner	CJ/Corrections	Closed
State vs. Lloyd Gould	AL/Employment	Closed
State vs. D. L. Richardson	AL/Employment	Closed
State vs. John Shipp	AL/Employment	Pending
State vs. D. Fennern	AL/Employment	Pending
Del Monte Corp. vs. State	SF/Taxation	Pending
State vs. Quintin McBride/ Gordon Randall	AL/Labor/Wage Claim	Pending
State vs. Computer Company, Inc.	AL/Labor/Wage Claim	Pending
In the Matter of: Richard Salser	HW/Mental Health	Closed
SOI/Marilyn Schooler vs. Rodney Perry	HW/Welfare	Closed
SOI/Cheryl Wilhelm vs. Patrick Hughes	HW/Welfare	Closed
In the Interest of: Martinez and Spaulding Children	HW/Child Protective Act	Closed
Reed Budge, et al. vs. Pete T. Cenarrusa	LA/Legislative	Closed
Daniel Fowler vs. State	CJ/Corrections	Closed
In the Matter of: Mary Jacobs	HW/Mental Health	Closed
Petition for Reexamination of: Joe I. Bischoff	HW/Mental Health	Closed
Dun & Bradstreet, Inc. vs. Tom McEldowney	BR/Finance	Pending
Lacey Sivak vs. State	CJ/Corrections	Closed
State vs. Mark L. Fuller	HW/Welfare	Pending
State vs. Adolfo Garza, Jr.	HW/Welfare	Closed
State vs. Daniel L. Fowler	AP/Miscellaneous	Pending
In the Matter of: Wendell Spencer	HW/Mental Health	Closed
Steven M. Wolf vs. State	CJ/Corrections	Closed

SOI/Judy Poe vs. Steven P. Poe	HW/Welfare	Pending
State vs. William Morriss	AL/Labor/Wage Claim	Pending
State vs. Nick Lierman	AL/Labor/Wage Claim	Pending
In the Interest of: Gene Gilson	HW/Child Protective Act	Closed
State vs. Rupert Beaver Ranch, et al.	NR/Environment	Closed
State vs. Robert Maxwell	AL/Employment	Closed
State vs. Nick Rokich	AP/Miscellaneous	Closed
SOI/Fenley vs. Michael M. McCord	HW/Welfare	Closed
Dale E. Bryant vs. Darrol Gardner	CJ/Corrections	Pending
SOI/State Hospital North vs. David L. Falk	HW/Miscellaneous	Closed
SOI/State Hospital North vs. Jerald J. and Dwanna Andres	HW/Miscellaneous	Closed
SOI/State Hospital North vs. James E. Spencer	HW/Miscellaneous	Closed
Miller vs. Bryson et al.	SF/Taxation	Pending
SOI/Christine Chapa vs. Gilbert Chapa, Jr.	HW/Welfare	Closed
State vs. Charles J. Crabb	AP/Miscellaneous	Pending
McCartney & Buckley vs. Thomas Purce/H&W	HW/Fair Hearing	Pending
State vs. Michael D. Stelling	HW/Welfare	Closed
SOI/Jennifer Drewry vs. Charles Phillips	HW/Welfare	Closed
State vs. Rocky Dale Davis	HW/Welfare	Pending
In the Matter of: Brandy Sweet/Mary Ann Dutt	HW/Welfare	Closed
SOI/Tamatha Brown vs. David A. Hanthorn	HW/Welfare	Closed
Leonard Reinke vs. State	CJ/Corrections	Closed
State vs. Ruth Conrad	AP/Miscellaneous	Pending
State vs. Custom Wood Products, Inc.	AL/Labor/Wage Claim	Pending
State vs. World Wide Achievements Corp.	AL/Labor/Wage Claim	Closed
In the Interest of: Paul Winters	HW/Child Protective Act	Closed
Gabriel Thornock vs. Jerry Evans	AL/Miscellaneous	Pending
State vs. Ardee and Janis Gull	HW/Mental Health	Closed
William Hughes vs. State	CJ/Corrections	Pending
State vs. Ener-Safe, Inc.	AL/Labor/Wage Claim	Pending
In the Interest of: Bryant Williams	HW/Child Protective Act	Closed
In the Interest of: Cody and Shawn Walo	HW/Child Protective Act	Closed
In the Interest of: Jason A. Clifford	HW/Child Protective Act	Pending
Leonard Reinke vs. State	CJ/Corrections	Closed
Leonard Reinke vs. State	CJ/Corrections	Closed
Federal Land Bank of Spokane vs. Dance, et al.	SF/Taxation	Pending
State vs. Mark Miller	AL/Labor/Wage Claim	Pending
Rammell vs. Carlson, et al.	NR/Water Resources	Pending
Ronald Olsen vs. State	CJ/Corrections	Pending

State vs. Leroy Murray	AL/Employment	Closed
State vs. Randall Bainbridge	AP/Miscellaneous	Pending
State vs. Fidelity Trust Bldg., Inc.	AL/Labor/Wage Claim	Closed
James Hudson/Leonard Reinke vs. State	CJ/Corrections	Closed
Mills vs. State	SF/Taxation	Closed
Stein Distributing Co., Inc. vs. State	SF/Taxation	Pending
SOI/Brenda L. Mills vs. Harvey A. Mills	HW/Welfare	Closed
State vs. John Hobbs	AL/Employment	Closed
State vs. Terry Crisp	AL/Employment	Closed
State vs. B. R. Oldham	AL/Employment	Closed
State vs. R. Leatham	AL/Employment	Closed
State vs. T. V. Frasier	AL/Employment	Closed
State vs. Paula Hamilton	AL/Employment	Pending
State vs. M. P. Fischer	AL/Employment	Pending
State vs. T. P. Hoy	AL/Employment	Pending
State vs. John Shaffer	HW/Welfare	Closed
State vs. Kevin L. Sauer	HW/Welfare	Closed
SOI/Melanie Cravens vs. Robert F. Kitchen	HW/Welfare	Closed
SOI/Vanessa Jaynes vs. Edward Foote	HW/Welfare	Closed
William and Gretchen Hellar vs. John Evans, et al.	LA/Legislature	Closed
State vs. R. G. Anderson	AL/Employment	Closed
State vs. Mrs. R. M. Davis	AL/Employment	Closed
State vs. Robert Balcom	AL/Employment	Closed
State vs. Barbara McCurdy	AL/Employment	Closed
State vs. Rick Wheeler	AL/Employment	Pending
State vs. R. M. Black	AL/Employment	Pending
State vs. Alfaro Marcos	AL/Employment	Pending
Multistate Tax Comm. vs. U.S. Steel	SF/Taxation	Pending
State vs. Robert Torres	AP/Miscellaneous	Pending
John Massie vs. State	AL/Miscellaneous	Closed
In the Guardianship Proceeding of: Nicole Armstrong	HW/Mental Health	Closed
Lloyd Clawson vs. State	CJ/Corrections	Pending
In the Interest of: Naomi Beard	HW/Terminations	Closed
State vs. Robert Allen Howell	AP/Miscellaneous	Pending
Lori Newton, et al. vs. Darrol Gardner, et al.	CJ/Corrections	Pending
State vs. Richard Silcox	AL/Employment	Closed
State vs. William Burke	AL/Employment	Closed
State vs. Terri Allen	AL/Employment	Pending
State vs. Joe E. Queen	AL/Employment	Pending
State vs. Jean Dudley	AL/Employment	Pending
State vs. R. D. Lafay	AL/Employment	Pending
State vs. Mel Eggleston	AL/Employment	Pending
State vs. Carpenter/Desautels	AP/Miscellaneous	Closed
State vs. Guadalupe & Maria Reyes	HW/Welfare	Pending
State vs. Bryce Carrick	HW/Welfare	Pending
State vs. Radiant Life Bakery	AL/Labor/Wage Claim	Closed
State vs. Scrappy's West	AL/Labor/Wage Claim	Pending
State vs. Marvin Todd	BR/Consumer Protection	Pending

State vs. Donald Paradis	AP/Miscellaneous	Pending
State vs. Gary Lynn Barker	AP/Miscellaneous	Pending
Eddie Arellano vs. State	CJ/Corrections	Closed
In the Reccommitment of: Javier Solis	HW/Mental Health	Closed
In the Reccommitment of: Viola Middlebrook	HW/Mental Health	Closed
In the Reccommitment of: Wesley C. Harris	HW/Mental Health	Closed
In the Reccommitment of: Blanche Moore	HW/Mental Health	Closed
In the Reccommitment of: Betty H. Helton	HW/Mental Health	Closed
In Re: Denenny's Marina, Inc.	SF/Taxation	Pending
In Re: Cedar Ridge Logging	SF/Taxation	Pending
State vs. David Giese	AP/Miscellaneous	Pending
State vs. Randy L. McKinney	AP/Miscellaneous	Pending
State vs. Jack Warren Young	AP/Miscellaneous	Pending
Wm. and Gretchen Hellar, et al. vs. Pete T. Cenarrusa, et al.	LA/Miscellaneous	Pending
State vs. Don Hackworth	AL/Labor/Wage Claim	Pending
State vs. Larry and Larayne Dains	HW/Mental Health	Pending
State vs. Lugie Peterson	HW/Mental Health	Closed
Ralph Rankin vs. Habeas Corpus Application	HW/Mental Health	Closed
SOL/June E. Royster vs. Mark D. Royster	HW/Welfare	Closed
State vs. William Dodge	AL/Labor/Wage Claim	Pending
State vs. Big Horn Development (Everwell Bay)	NR/Lands	Pending
Stanley Rucker vs. State	HW/Fair Hearing	Pending
Larry L. Carlson vs. State	CJ/Corrections	Closed
James B. Hudson vs. Darrol Gardner, et al.	CJ/Corrections	Pending
In the Interest of: Tyler Woolstenhume	HW/Child Protective Act	Closed
SOL/Vicky Hosley vs. Daniel Katherman	HW/Welfare	Closed
Wayne E. Stevens vs. State	CJ/Corrections	Closed
Anthony Cootz vs. State	CJ/Corrections	Pending
Leonard Reinke vs. State	CJ/Corrections	Closed
Bob Wilson vs. State	CJ/Corrections	Closed
Karl Bassett vs. State	CJ/Corrections	Closed
SOL/Tina Mallory vs. James Mallory	HW/Welfare	Closed
State vs. Clinton J. Kerr	HW/Mental Health	Closed
In the Interest of: Michelle and Chris Cook	HW/Welfare	Closed
In the Interest of: Vicki Florez	HW/Terminations	Closed
State vs. Last Gasp Disco, Inc.	AL/Labor/Wage Claim	Pending
State vs. Robert Bingham	AL/Labor/Wage Claim	Pending
State vs. John Sanders	AL/Labor/Wage Claim	Closed
State vs. William L. and Delores M. Trout	AL/Labor/Wage Claim	Pending

In the Interest of:	HW/Terminations	Closed
Cassandra/AKA Menard C. Smith		
State vs. James Nettles	HW/Mental Health	Closed
Randy Ziegler vs. State	CJ/Corrections	Closed
Dean Schwartzmiller vs. State	CJ/Corrections	Closed
Lacey Sivak, et al. vs. State	CJ/Corrections	Closed
Chester Lewis vs. State	CJ/Corrections	Closed
State vs. Craig Lundbohm	AL/Labor/Wage Claim	Pending
State vs. Charles Flohr	AL/Employment	Closed
State vs. James T. Seever	HW/Welfare	Closed
State vs. Robert Lee Paul	HW/Welfare	Pending
State vs. M. Beveridge	AL/Labor/Wage Claim	Closed
State vs. James Mulkey	AL/Labor/Wage Claim	Pending
In the Interest of:	HW/Child Protective Act	Closed
Messinger Children		
State vs. Larry Busby	AP/Miscellaneous	Closed
State vs. C & C Air Freight, Inc.	AL/Labor/Wage Claim	Pending
State vs. Lifeguard Ambulance Service, Inc.	AL/Labor/Wage Claim	Pending
Blaine Larsen vs. State	AL/Employment	Pending
SOI/Rhea Sweatfield vs. Allen A. Anxo	HW/Welfare	Pending
In Re:	SF/Taxation	Pending
Donald Maurer (Business Auto.)		
Idaho Potato Commission vs. Parkes Sales Assoc.	NR/Agriculture	Pending
Keith Brown/D. and Thomas M. Fowler vs. State	CJ/Corrections	Pending
State vs. H.G. & Betito P. Randall	AL/Labor/Wage Claim	Pending
State vs. Charles Stanley	AL/Labor/Wage Claim	Pending
State vs. Robert W. Wilkinsen	AL/Labor/Wage Claim	Pending
Burghardt Co. vs. Black, et al.	NR/Water Resources	Pending
State vs. Joe Rocha	HW/Miscellaneous	Closed
Harris C. Boyer (Deceased) vs. Petit. for Ltr. of Admin.	HW/Welfare	Closed
State vs. David L. Trout	HW/Welfare	Pending
Dan Wolford vs. State	AP/Miscellaneous	Pending
SOI/Jawni J. Minatre vs. David M. Morrow	HW/Welfare	Pending
State vs. Rex Studiven	AL/Labor/Wage Claim	Closed
State vs. William Dodge	AL/Labor/Wage Claim	Pending
Delavega vs. J.R. Simplot Co., et al.	SF/Taxation	Pending
Humble vs. Bucyrus-Erie, et al.	SF/Taxation	Closed
State vs. David Biggs	AP/Miscellaneous	Pending
State vs. Tom and Donna Stuart	AL/Labor/Wage Claim	Closed
State vs. National Energy Savings Components	AL/Labor/Wage Claim	Closed
Randy Ziegler vs. State	CJ/Corrections	Closed
John R. Chambliss vs. State	CJ/Corrections	Closed
James Jeffrey vs. State	CJ/Corrections	Closed
Larry Smith vs. State	CJ/Corrections	Closed
In Re:	SF/Taxation	Pending
Plantation Trailer Supply		
State vs. Wayne Bailey, Jr.	AP/Miscellaneous	Closed
SOI/Teresa Taylor vs. Jefferson Pennell	HW/Welfare	Pending

State vs. Kristine Iverson	AL/Employment	Pending
In the Interest of:	HW/Welfare	Closed
James Sprague		
State vs. Carl A. Oseen	AL/Labor/Wage Claim	Closed
State vs. Spokane-St. Maries	AL/Labor/Wage Claim	Pending
Auto Freight		
State vs. Custom Wood	AL/Labor/Wage Claim	Pending
Products, Inc.		
Kenneth A. Dunn vs.	NR/Water Resources	Pending
George Ellsworth		
SOI/Theresa Davila vs.	HW/Welfare	Closed
Lloyd Blackburn		
SOI/Thippavanh Syhavong vs.	HW/Welfare	Closed
Phouthasine Kham-one		
In the Interest of:	HW/Terminations	Closed
Steven C. Preston		
State vs. Lonnie Riddle	AL/Labor/Wage Claim	Pending
State vs. Oleta Broadbent	AP/Miscellaneous	Pending
State vs. Tony Rendon	AP/Miscellaneous	Pending
State vs. Brian E. Holderness	HW/Welfare	Closed
State vs. Cotton Club	AL/Labor/Wage Claim	Closed
State vs. Toni L. Rinker	HW/Welfare	Pending
State vs. E. Joe Swisher	AP/Miscellaneous	Pending
State vs. Randy A. Ziegler	AP/Miscellaneous	Closed
In the Interest of:	HW/Terminations	Closed
Baby Girl Harkins		
State vs. Edward Bros., Inc.	AL/Labor/Wage Claim	Pending
State vs. David D. Jones	HW/Welfare	Closed
State vs. Jimlar, Inc.	AL/Labor/Wage Claim	Closed
State vs. Carl Harrison	AP/Miscellaneous	Pending
SOI/Edna Schumacher vs.	HW/Welfare	Pending
Melvin G. Schumacher		
SOI/Dalauna McKee vs.	HW/Welfare	Pending
Breck L. Orshal		
In the Interest of:	HW/Child Protective Act	Closed
Baby Girl Sarah Michelle		
State vs. Dale and Phyllis Jafek	HW/Health	Pending
SOI/State Hospital South vs.	HW/Mental Health	Closed
Thomas E. Sullivan		
In the Estate of:	HW/Mental Health	Closed
Antoinette A. Tripard		
In Re:	SF/Taxation	Pending
Bear Lake West		
Melvin McCabe vs. State	CJ/Corrections	Closed
Lacey Sivak vs. State	CJ/Corrections	Pending
State vs. Last Gasp Disco, Inc., et al.	AL/Labor/Wage Claim	Pending
State vs. The Computer Co., Inc.	AL/Labor/Wage Claim	Pending
State vs. Donald Fink	AP/Miscellaneous	Pending
State vs. Stephen Elkins	AP/Miscellaneous	Pending
State vs. Robert L. Bybee	AP/Miscellaneous	Pending
State vs. Don Rainey	AL/Labor/Wage Claim	Closed
In the Matter of:	HW/Mental Health	Closed
Leslie J. Sharp		
In the Matter of:	HW/Mental Health	Closed
Ray Leinum		

State vs. Idaho Properties Co.	NR/Lands	Pending
State vs. Arnold Lundstrom	AL/Employment	Pending
State vs. James Wallace	SF/Taxation	Closed
SOI/Virginia Watson vs. Tim Bowman	HW/Welfare	Closed
State vs. Cathy Jansson	HW/Mental Health	Pending
State vs. Rod Swenson	AL/Labor/Wage Claim	Pending
State vs. Ed Stephens	AL/Labor/Wage Claim	Pending
State vs. Robert Deshazo/Builder, Inc.	AL/Labor/Wage Claim	Pending
Nez Perce County vs. State	SF/Taxation	Pending
State vs. Robert Hancock	AL/Labor/Wage Claim	Pending
A. Kenneth Dunn vs. Dan Swain	NR/Water Resources	Pending
Russell M. Piper, et al. vs. State	CJ/Corrections	Pending
In the Matter of: David Francis Nichol	HW/Mental Health	Closed
State vs. James E. Hazen	HW/Miscellaneous	Pending
State vs. Alan E. Lindner	HW/Miscellaneous	Pending
State vs. Eugene Reynolds	HW/Miscellaneous	Pending
State vs. Robert Emehiser	AP/Miscellaneous	Pending
State vs. Arla Weight (Mann)	HW/Welfare	Closed
SOI/Nina Wade vs. Scott Conwell Wade	HW/Welfare	Pending
SOI/Angela Keene vs. Douglas R. Keene	HW/Welfare	Pending
In the Interest of: Larry Hampton	HW/Child Protective Act	Pending
State vs. Ronald Luras	SF/Taxation	Closed
Robert C. Montierth vs. State	CJ/Corrections	Pending
State vs. John Hall	AL/Labor/Wage Claim	Pending
State vs. Robert Deshazo	AL/Labor/Wage Claim	Pending
State vs. Northland Log Homes	AL/Labor/Wage Claim	Pending
Donald Cornwell vs. State	AL/Employment	Pending
SOI/State Hosp. North vs. Charles Cooney	HW/Mental Health	Closed
In the Guardianship of: Rebecca Jean Bulat	HW/Mental Health	Pending
In the Guardianship of: Genevieve Schermer	HW/Mental Health	Closed
SOI/Sheila Brink vs. Robert Jones	HW/Welfare	Pending
In the Interest of: Brittanee Chadwick	HW/Child Protective Act	Closed
Kenneth Walker vs. Susan Walker	HW/Welfare	Pending
State vs. Harold M. Whitley/ (AKA Michael)	HW/Mental Health	Closed
SOI/State Hosp. North vs. Harold and Mary Whitley	HW/Mental Health	Closed
SOI/Debbie Howell vs. Joseph B. Johnson	HW/Welfare	Pending
SOI/Vicki Sharp vs. Zelo D. Sharp	HW/Welfare	Closed
State vs. Dan Balch	AL/Labor/Wage Claim	Closed
National Farmers Assoc., et al. vs. Beans, Inc., et al.	NR/Agriculture	Closed
State vs. Howell Marketing, Inc.	AL/Employment	Pending
State vs. Ralph E. Lopez	AP/Miscellaneous	Pending
State vs. Fred Gernhart	AL/Labor/Wage Claim	Pending
Kevin Serratos vs. State	CJ/Corrections	Closed

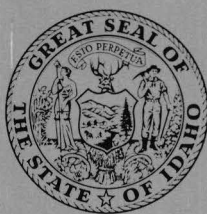
James B. Hudson vs. State	CJ/Corrections	Closed
Carl Emmett Pardee/ AKA J. L. Plumes vs. State	AP/Miscellaneous	Pending
Triumph Minerals, Inc. vs. SOI ET AL/Ramsey	NR/Lands	Pending
State vs. Mrs. Homer Barnes	AL/Employment	Pending
In Re: Max K. Lloyd Masonry	SF/Taxation	Pending
State vs. Wilbur Wright	AL/Employment	Pending
Alfred Jenks vs. Les Purce, et al.	HW/Welfare	Pending
State vs. Robert Steider	HW/Welfare	Closed
In the Interest of: Ashment Children	HW/Child Protective Act	Pending
David Davis vs. SOI/Ada County	CJ/Corrections	Closed
State vs. Ralph Storey	AL/Employment	Closed
In the Interest of: William O.F. Edwards	HW/Child Protective Act	Closed
State vs. Stanley Votava	AL/Labor/Wage Claim	Pending
State vs. J. R. Chapman	AL/Labor/Wage Claim	Pending
State vs. Kenneth Hathaway, et al.	AL/Labor/Wage Claim	Pending
State vs. Lonnie C. & Marvin V. Riddle	AL/Labor/Wage Claim	Pending
State vs. Johnny Estrada	AL/Employment	Pending
State vs. Hollis Beggs	AL/Labor/Wage Claim	Pending
SOI/Elmore County vs. United States of America	LA/Miscellaneous	Pending
Power Associates, Inc. vs. USA, ET AL	NR/Water Resources	Pending
SOI/H&W vs. Mike A. Miltimore	HW/Miscellaneous	Pending
State vs. Maurice Turner	AP/Miscellaneous	Pending
Margaret Stoneberg vs. State	AP/Miscellaneous	Pending
State vs. Charles Bailey	AL/Labor/Wage Claim	Pending
State vs. Terry Goicechea	AL/Employment	Pending
State vs. Robert Kaylor	AL/Employment	Pending
State vs. Norman McCann	AL/Employment	Pending
State vs. John Hirsbrunner	AP/Miscellaneous	Pending
State vs. Bergen McNeeley	AP/Miscellaneous	Closed
State vs. Rick William	AL/Employment	Closed
State vs. Eric Voss	AL/Employment	Closed

VOLUME STATISTICS FOR ATTORNEY GENERAL'S OFFICE

TOTAL FOR ADMINISTRATION 1979-1982

Official Opinions	87
Legal Guidelines	262
Legislative Assistance	697
Prosecutor Assistance	1,068
Court Cases Filed	2,631
Control No. Requests	5,589
General Info. Assistance	14,617
Consumer Complaints & Pamphlets Sent	1,491
Monies Recovered	\$127,095
Rental Pamphlet Requests	3,018
Extraditions Processed	725
Guest Book Signatures	3,844

**OFFICIAL OPINIONS
OF
THE ATTORNEY GENERAL
FOR
1982**



David H. Leroy
Attorney General
State of Idaho

ATTORNEY GENERAL OPINION NO. 82-A**ADDENDUM TO ATTORNEY GENERAL OPINION NO. 80-10****QUESTIONS PRESENTED:**

Attorney General Opinion 80-10 concluded that the amended scaling law required payment for all forest products by gross scale. The Opinion also emphasized that:

The mill owner is free to negotiate a fair price for forest products delivered for scaling . . . Also, mill owners may negotiate by contract for quality control, utilization, merchantability standards, and bonuses and penalties . . .

In light of this language, several questions have arisen concerning the propriety of certain methods of applying the gross scale law.

The questions are as follows:

1. Is a payment system using a category of "undesigned products" with a reduced price, legal?
2. Is it lawful for a mill to set different prices for logs which will be manufactured into different end products, such as sawlogs versus pulp logs, where logs are differentiated by estimated percentage of defect?
3. Are forest products, scaled by a federal agency but which are hauled to a mill by private haulers, exempt from the gross scale law under I.C. 38-1220?

CONCLUSIONS:

1. The "undesigned products" method is arguably legal. However, arguments can be articulated indicating either legality or illegality of this payment method. A binding decision can only be determined by a court. Other methods of payment may provide greater certainty for loggers and haulers and perhaps avoid the possibility of a court determination of legality. A system which requires payment by gross scale regardless of net measurement of defect or the intended end product would arguably comply more clearly with the intent of the gross scale law. Such a system could properly include contractual liquidated damages for noncompliance with merchantability standards set by contract assessed against the contractor.

2. The scaling law does not address the issue of different prices for logging and hauling services based upon different end products, and therefore the scaling law does not expressly prohibit such a practice but may arguably do so by implication.

3. No, the exemption in I.C. §38-1220 applies only to the sale of stumpage from federal lands by or for a federal agency and does not exempt from gross scale private logging or hauling agreements.

INTRODUCTION:

In 1979 the legislature amended *Idaho Code* §38-1202(c) as follows:

For the purpose of payment for logging or hauling logged forest products only, forest products shall be measured by gross weight or by gross volume converted to gross decimal "C".

Prior to this amendment, it was the common practice in the logging industry for the mill to pay for logging and hauling services by net scale, or in other words, by deducting defect from each log of a sample as the log was scaled. The amended law prohibits such a deduction for defect and requires payment by gross measurement. Since the amendment became effective, mills and loggers have grappled with its meaning. Attorney General Opinion No. 80-10, issued March 7, 1980, attempted to interpret legislative intent and to clarify the meaning of the gross scale law. Mills and loggers have had the opportunity in the ensuing months to implement the gross scaling requirement. Questions have arisen concerning the legality of specific contractual methods for effectuating the gross payment requirement, particularly the payment method used by Potlatch Forest Industries (hereinafter PFI) and others. Since this payment method affects a substantial number of loggers and haulers and because it may become a model for other mills in Idaho, it is important to consider the legality of PFI's payment method and PFI's treatment of cull logs, that is, logs failing to meet contractual specifications. This analysis will also consider the legality of different payments for logging and hauling services based upon the different end products intended for the logs, and the meaning of the exemption for timber scaled by or for a federal agency.

ANALYSIS:

1. The PFI logging contract and Exhibit C thereof set forth the price to be paid for logging and hauling. The contract which was examined by the Board of Scaling Practices in its meeting of October 28-29, 1981, set the prices as follows: \$14.50 per ton for sawlogs delivered to the Jaype Mill, \$14.50 per ton for cedar products delivered to the Jaype Mill, and \$.20 per ton for *undesignated products* delivered to the Jaype Mill. The term "undesignated products" is not defined in Exhibit "C" or in the contract itself. Exhibit "C", however, states:

The weight determination for material not designated for delivery shall be computed by multiplying the gross weight factor times the gross scale of material not designated.

This formula indicates payment by gross measurement. Exhibit B of the contract includes the general 33% soundness standard for various species of sawlogs and 50% soundness by cubic volume for pulp logs. PFI representatives stated to the Board of Scaling Practices that sawlogs which fail to meet the 33% standard for soundness are culls and are included in the category of undesignated products. Also included in this category are materials which do not meet other merchantability standards as set forth in the contract.

An analysis of this payment system in light of *Idaho Code* §38-1202(c) as amended, and Attorney General Opinion No. 80-10, discloses arguments pointing both to legality and illegality and reveals difficulties in interpreting the amended scaling law.

It can be argued that the PFI payment system is lawful. Arguably, it is a gross payment system because there is no deduction for defect from any given log or logs, and the actual amount paid for logging and hauling services is based upon a set rate times gross scale. The system involves the mill owner's right to negotiate and adjust the price it will pay for logging and hauling services. It is based on contractually agreed upon standards of merchantability, including a category for undesignated products. PFI pays on a gross measurement for both the designated and undesignated product categories. The system serves sound business purposes by encouraging compliance with contractual merchantability standards and by discouraging the delivery of culls and other nonmerchantable material.

Several arguments can also be marshalled questioning the legality of the PFI payment system. The purpose of the 1979 amendment to the scaling law was to reduce the alleged abuse resulting from the subjective deduction for defect, and substitute therefor the more objective gross scale to assure loggers and haulers more predictability in the basis for payment for their services, and to assure that loggers and haulers are paid for their efforts when bringing in a load of logs to the mill for scaling. The PFI system arguably is inconsistent with the intent of the amended language if in fact it uses measurement by net scale to separate cull logs into the category of undesignated products, which category receives a reduced level of payment. The result, arguably, would be an indirect payment by net scale. Further, loggers may not be persuaded by the contention that the system is consensual based upon the contract. The term "undesignated products" is undefined in the contract, so that a reader may not have comprehended its meaning when signing the contract. In addition, the price which a mill pays for the undesignated products is extremely low so that it amounts to a discouragement or disincentive to haul the products at all. Finally, the sanction of a category such as undesignated products determined by net scale could also tend to encourage the creation of other categories. A single category for logs less than 33% sound is arguably justifiable based upon a historically accepted standard of soundness. Nevertheless, if a category for logs which fall below the 33% soundness standard is legal, then so might categories for logs which fall below soundness standards of 40%, 50%, 60%, etc. In sum, this system could lead toward some of the same subjectivity which the gross scaling law was intended to remedy.

However, these concerns could be minimized by a renewed good faith effort by mill owners and loggers and haulers to work together in resolving disagreements and by reliance upon the check scaling services of the Board of Scaling Practices.¹ Moreover, the use of a single category for cull logs does not necessarily open the door to other categories. A single category for material less than 33% sound for sawlogs and 50% sound for pulp logs is arguably unique based upon a traditionally and universally accepted standard of soundness. For more than two decades, the 33-1/3% standard has been followed industry-wide and accepted as the point below which a log cannot be processed at a profit for the mill. This standard and its rationale have gained empirical credence as a result

¹It should be reiterated that the primary responsibilities of the Board are the services of licensing and check scaling. The scaling law makes it abundantly clear that the legislature intended the Board primarily to be concerned with licensing and check scaling matters as outlined in the law rather than function as an interpreter or arbiter of private contractual agreements. The latter should be resolved by lawful compromise or, if necessary, by a civil suit between the parties to the contract.

of studies performed by the United States Forest Service and others. This rationale simply would not apply to other categories which were based upon varying degrees of net defect or percent of soundness. (It should be noted that continually improving manufacturing methods may result in a modification of the traditional soundness standards. However, as long as the parties agree by contract to a single soundness standard for each end product, there would be no problem of multiple categories with varying degrees of defect.)

Furthermore, a literal interpretation of the gross measurement language, extended to an extreme construction, as it might be if applied to require full payment for a log 100% defective, fails to meet a test of reasonableness. For example, a forest product may be entirely or so substantially defective that it ceases to be a forest product. In such a case, it is conceivable that a judge would not require a mill owner to pay for the useless "product" by gross scale. In deciding between alternative interpretations of a statute, it is presumed that the legislature did not intend to work a hardship or to effect an oppressive result on any party. *Higgenson v. Westergard*, 100 Idaho 687, 604 P.2d 51 (1979). "It is a well established rule of statutory construction that a statute be read as a whole and construed so as to avoid absurd results." *Dover Ranch v. County of Yellowstone*, 609 P.2d 711 (Mont. 1980); *Mullet v. Clark Clinic Corp.*, 609 P.2d 934 (Ut. 1980).

These contrasting arguments concerning the PFI payment method demonstrate the ambiguity in the gross measurement language of §38-1202(c) and the difficult task of determining a lawful, practical application thereof. A binding, final decision concerning the legality of the PFI payment method can ultimately be achieved only by the courts. A lawful compromise between the parties would, of course, be preferable.

The gross payment law must be construed in light of the fundamental right of private parties to make agreements and enter into binding contracts. Mill owners and others must be able to set forth performance standards in logging contracts and be able to enforce these provisions. In the logging industry, a critical performance standard is the minimum net scale of logs which are to be removed from the forest. Logging contracts also typically provide for other performance or manufacturing standards such as minimum or maximum length, trim requirements, exclusion of certain species and others. While the legislature clearly mandated that gross scale be used in determining payment for logging and hauling services, the statute does not appear to prohibit the establishment by contract and enforcement of performance or merchantability standards.

It may be helpful to consider another payment system which requires compliance with contractual merchantability standards and which also makes payment for logging and hauling services by gross scale according to a price set by contract. For example, mill employees count the number of pieces in a load, including culls and other unmerchantable logs, which are determined by net scale and other contractual standards. If the number of culls and unmerchantable logs exceeds a specified percentage of the total pieces delivered under the contract, a contractual penalty in the amount of a percentage of the total payment due under the contract is assessed against the contractor, who is responsible for cutting and skidding. As the percentage of logs failing to meet the contract's specifications increases, the penalty percentage increases. In this manner, the mill discourages the delivery of culls and other unmerchantable logs by directly penalizing the party responsible for correcting the problem.

This system arguably has a proper legal basis. Payment for logging and hauling services is based on gross scale regardless of net measurement of defect

or the end product of the logs. Liquidated damages are assessed for failure to adhere to the contract's minimum merchantability specifications. Although the assessment of liquidated damages in some instances requires a determination of net scale in order to determine compliance with contractual merchantability standards, it does not frustrate the purposes of the gross scale law. All logs presented must be paid for at a uniform rate based upon the gross scale. The system avoids uncertainty by establishing a clear distinction between contractual provisions dealing with gross payment and those requiring liquidated damages for noncompliance with merchantability standards. It provides an incentive for contract compliance by penalizing directly the party in the field who has the opportunity to assure such compliance. This system also may avoid the possibility of a court determination of whether a contract lawfully provides for different categories for payment by gross scale or unlawfully provides for different rates of payment based upon net scale.

2. A related question involves variation in the amount paid for logging and hauling services for different end products. Within the forest products industry, logs may be processed into different end products with different market values. Mills often set varying prices for different end products, such as sawlogs, cedar products, pulp logs and others. Payment for logging and hauling all forest products, regardless of the intended use for the logs, must be based upon gross scale. Yet, Attorney General Opinion No. 80-10 emphasized that under the gross scale rule, mill owners can lawfully and freely negotiate the price for the logs they will receive. The scaling law contains no express prohibition for setting different prices for different end products.

However, a problem may arise when distinguishing between logs which will be manufactured into different end products by estimated percentage of defect. For instance, a contract could set the price for sawlogs at \$150.00 per thousand board feet and for pulp logs at \$50.00 per thousand board feet. A load of sawlogs delivered for scaling will yield a much reduced return to a logger if some of the sawlogs are designated pulp logs as determined by estimated percentage of defect. Because of the human scaling factor in determining into which category a particular log and its defect will fall, there is opportunity for either error or manipulation of categories of proposed end products to avoid the higher price of sawlogs. Nevertheless, pulp logs and pulp material are legitimate, useable, forest products. Of course, checkscaling can test the accuracy of scaling and species identification used to differentiate between the intended end products.

In the final analysis, the scaling law does not address the issue and thus does not clearly prohibit different prices for logging and hauling services based upon different end products so long as the determination process is not used to evade the gross scaling law as detailed above in answer to Question One. But because of the above analysis, it could be argued that it does so by implication. However, it should be noted that there are legal and economic difficulties in attempting to require by legislation a uniform price for forest products of greatly different market values. A statutory attempt to modify private contracts and private contractual rights, which are based upon historical precedence and a traditional free market involving numerous variables, should be discouraged. The industry should remain free to establish different prices for different end products according to values in the open market.

3. Another question is whether, under *Idaho Code* §38-1220, forest products scaled by a federal agency but which are hauled to the mill by private haulers,

are exempt from the gross payment provision in §38-1202(c). The exemption for a federal agency is found in the second and third sentences of §38-1220. The question asks the meaning of the second sentence which reads:

Forest products scaled or otherwise measured by or for any agency of the United States Government shall not be affected by this Act.

The function of this exemption is a recognition that federal interests, policy, and regulations govern the sale of forest products on or from federally owned land by a federal agency. Therefore, State scaling law should not, and likely could not, be imposed upon a federal agency unless it so elects (the third sentence of the same section stipulates that the licensing and bonding provisions of the scaling law are not applicable to a federal agency “. . . unless such agency so elects.”)

The meaning of this exemption, as applied to nonfederal parties such as mills or loggers, must be construed in the context of the entirety of §38-1220 and the gross measurement requirement within the same chapter. The first sentence of §38-1220 states:

All parties to any log scaling agreement, except logging and hauling agreements, may elect to scale as between themselves on the basis of the measurement criteria from the National Forest Log Scaling Handbook, whether or not such logs are produced from federal land or measured by employees of an agency of the United States Government.

Although this sentence was amended in 1979, the exemption for federal agencies was not modified and remains unchanged since its enactment in 1969. The last clause of the first sentence clarifies the meaning of the exemption in the second sentence. The clause allows the private parties to a log scaling agreement to elect to follow Forest Service scaling guidelines or rules of the Board of Scaling Practices “. . . whether or not such laws are produced from federal land or measured by employees of an agency of the United States Government.” This language clearly limits the exemption in the second sentence of §38-1220.

The legislature in 1979 also amended the first sentence of §38-1220. The following is the amended language pertinent to this analysis:

All parties to any log scaling agreement, *except logging and hauling agreements, may elect . . .*

The only logical meaning of the underscored language is a cross reference to the amendment in §38-1202(c) requiring payment by gross measurement. Hence, parties may elect to scale according to the National Forest Handbook or according to rules of the Board, except that private logging and hauling agreements must provide for payment according to gross measurement. Any other reading of this exception would entirely contradict the gross scaling requirement in §38-1202(c), enacted at the same time as the exception in the first sentence of §38-1220.

Legislative intent must be determined by construing all parts of an act in *pari materia* and attempting to reconcile, harmonize and effectuate the entire statute whenever reasonably possible. *Norton v. Department of Employment*, 94 Idaho 924, 500 P.2d 825(1975); *Nampa Lodge No. 1389 v. Smylie*, 71 Idaho 212, 229 P.2d 991 (1951); *Antwi v. C-E Indus. Group*, 612 P.2d 656 (Kan. App. 1980); *Ind. School Dist. v. Okl. City Fed. of Teachers*, 612 P.2d 719 (1980).

To extend the exemption for federal agencies to encompass private scaling agreements is plainly inconsistent with the amended language in §38-1202(c), which requires gross scale. A substantial proportion, perhaps fifty percent or more, of timber harvested in Idaho is cut from federal lands. The extended interpretation of this exemption would subject a substantial number of loggers and haulers to payment by net scale directly opposite to the 1979 amendment. Conversely, applying the exemption to federal agencies only for the sale of their stumpage is harmonious with both the gross measurement language in §38-1202(c) and the first sentence of §38-1220.

The Board of Scaling Practices has consistently adhered to the conclusion that the exemption for federal agencies does not include forest products scaled by the Forest Service which are hauled to the mill by private haulers. The Board reiterated this policy in "New Scaling Law — Guidelines" which was widely disseminated and thoroughly discussed by the Board in four public meetings after the 1979 amendments became effective. An interpretation of a statute by administrative officers of the state is entitled to great weight and will be adhered to by a court unless cogent reasons for holding otherwise are demonstrated. *Kopp v. State*, 100 Idaho 160, 595 P.2d 309(1979); *Onweiler v. U.S.*, 432 F. Supp. 1226 (D.C. Idaho 1977). Thus, the intent of this exemption is that the Idaho State Scaling Law does not apply to the selling of stumpage from federally owned land by a federal agency such as the U.S. Forest Service.

In summary, arguments can be articulated for either legality or illegality of the "undesignated products" payment method. A binding decision can only be determined by a court. It is clear that the legislature intended payment by gross scale for all forest products. However, *application* of the gross scale law reveals some ambiguity. Other methods of payment may provide greater certainty for loggers and haulers and perhaps avoid the possibility of a court determination of legality. A system which requires payment by gross scale regardless of net measurement of defect or the intended end product, with contractual liquidated damages for noncompliance with merchantability standards set by contract assessed against the contractor, would provide a direct incentive for compliance with contractual merchantability standards and comply more clearly with the gross scale law. The scaling law does not address the issue of different prices for different end products, and therefore the scaling law does not expressly prohibit such a practice but may arguably do so by implication. Finally, the exemption in I.C. 38-1220 applies only to the sale of stumpage from federal lands by or for a federal agency and does not exempt from gross scale private logging or hauling agreements. This addendum is intended to coincide with and supplement Opinion #80-10. However, in the event of any apparent or actual inconsistency between the two opinions, this addendum shall control.

AUTHORITIES CONSIDERED:

1. *Idaho Code*, title 38, chapter 12.
2. *Higgenson v. Westergard*, 100 Idaho 687, 604 P.2d 51 (1979).
3. *Dover Ranch v. County of Yellowstone*, 609 P.2d 711 (Mont. 1980).
4. *Mullet v. Clark Clinic Corp.*, 609 P.2d 934 (Ut 1980).

5. *Norton v. Department of Employment*, 94 Idaho 924, 500 P.2d 825 (1975).
6. *Nampa Lodge No. 1389 v. Smylie*, 71 Idaho 212, 229 P.2d 991 (1951).
7. *Antwi v. C-E Indus. Group*, 612 P.2d 656 (Kan. App. 1980).
8. *Ind. School Dist. v. Okl. City Fed. of Teachers*, 612 P.2d 719 (1980).
9. *Kopp v. State*, 100 Idaho 160, 595 P.2d 309 (1979).
10. *Onweiler v. U.S.*, 432 F. Supp. 1226 (D.C. Idaho 1977).

DATED this 8th day of March, 1982.

ATTORNEY GENERAL
State of Idaho
/s/ DAVID H. LEROY

ANALYSIS BY:

L. MARK RIDDOCH
Deputy Attorney General
Idaho Department of Lands

ATTORNEY GENERAL OPINION NO. 82-1

TO: The Honorable Joe R. Williams
 State Auditor of the State of Idaho
 Statehouse
 Boise, Idaho 83720

Per Request for Attorney General Opinion

QUESTIONS PRESENTED:

Do audits undertaken by the Office of Legislative Auditor impermissibly intrude or infringe upon constitutionally delegated authority, duty and power of the Office of State Auditor?

CONCLUSION:

Although the Office of State Auditor has wide constitutional duties, powers and authorities regarding the conduct of audits, there is no constitutional bar to legislatively created office conducting similar audits, so long as such do not infringe on, detract from or diminish the State Auditor's audit functions.

ANALYSIS:

Our analysis of the question presented here depends on the historical development of the constitutional Office of State Auditor. Article 4, Section 1, Idaho

Constitution lists the state auditor as an office in the executive department. In *Gilbert v. Moody*, 3 Idaho 3, 7, 25 P. 1092 (1891), our Supreme Court held: "The office of controller has not been abolished by the constitution — the name only has been changed to 'auditor'." That holding was expanded in *Wright v. Callahan*, 61 Idaho 167, 177-178, 99 P.2d 961 (1960), where our court announced that all of the powers and duties of the territorial controller's office, as enumerated in the 1887 Revised Statutes, were impliedly incorporated in Article 4, Section 1, as regards the state auditor. The creation of a statutory auditing agency was reviewed in *Smylie v. Williams*, 81 Idaho 335, 341 P.2d 451 (1959). The Idaho Supreme Court stated:

... if there exists among the powers and duties of the Office of State Auditor a duty and authority to perform an audit of the funds in the state treasury it would not necessarily follow that the duty and power provided ... [for the Bureau of Public Accounts] is repugnant to or in conflict with such power and duty of the State Auditor.

81 Idaho at 342. In very certain language, the court continued:

The legislature may authorize or direct audits to be made and reports to be furnished by any office created by it. It is conceivable that the legislature may deem it advisable and necessary to provide for an audit report from more than one source. The wisdom and propriety of such legislation is not of judicial concern so long as it does not conflict with the powers and duties conferred upon a constitutional officer or undertake to divest such officer of any power or duty conferred on him by the constitution.

Id. The court concluded that the legislation creating the Office of Bureau of Public Accounts did not violate the constitutional province of the State Auditor.

We assume that the Court, if faced with the question, would reach a similar conclusion regarding the Office of Legislative Auditor. Such a result would be consistent with *Smylie v. Williams*, and also consistent with the organizational scheme of the controller's office set forth in the 1887 Revised Statutes. Sections 215 through 218, 1887 Rev. Stats., make reference to the controller's duties to submit to audits and inspections by both legislative and executive officers. Section 219 requires the controller's books and records to be open to inspection by a committee or committees of the legislative branch, "who shall examine all the controller's accounts." Even the Revised Statutes of the Territory contemplated more than one source of audit information.

We agree that sections 10 and 14 of Section 205, 1887 Revised Statutes have not lost their effect as constitutional law even though omitted from subsequent statutes. Those sections state that it is the duty of the Controller:

* * *

10. To audit all claims against the Territory in cases where there are sufficient provisions of law for the payment thereof

* * *

14. In his discretion to inspect the books of any person charged with the receipt, safe keeping or disbursement of public moneys.

However, given our previous observations and the guidance of the Court in *Smylie v. Williams*, we cannot say that the implied constitutional scheme intended to repose all of the audit functions of state government in the State Auditor's office.

Your letter expresses a concern that the legislature may be using the appropriations process to infringe on the constitutional duties of the State Auditor's office. However, we have not been made aware that any of the constitutionally named duties of that office have been diminished or infringed, or that your office has been deprived of any of its authority, duty or power by virtue of the legislature's budgeting and appropriations processes. We are well aware that many executive department budgets are smaller than requested. All of us in the executive branch wish that we had more funds to better serve our state. However, limitations in the budget of a constitutional office do not necessarily evoke the spectre of unconstitutional conduct by the legislature. The prerogative to appropriate monies from the state treasury is exclusively vested with the legislative branch of government under Idaho Const., Art. 7, §13. While it would be possible to use the legislative appropriation process to produce an unconstitutional result, we are unaware of whether, or the extent to which, your office has been precluded from discharging its constitutionally mandated duties. For example, your request for this opinion has not specifically stated that the State Auditor has in any way been precluded from auditing "all claims against the Territory (State)," or that your office's discretionary power "to inspect the books of any person charged with" handling state funds has been unconstitutionally impaired.

Based on our information, the audits undertaken by the Office of Legislative Auditor are constitutionally permissible so long as they do not infringe on, detract from, or diminish the State Auditor's audit function.

AUTHORITIES CONSIDERED:

Idaho Const., Art. 4, §1

Idaho Const., Art. 7, §13

1887 Rev. Stats. §§205-222

Smylie v. Williams, 81 Idaho 335, 341 P.2d 451 (1959)

Wright v. Callahan, 61 Idaho 167, 99 P.2d 961 (1960)

Gilbert v. Moody, 3 Idaho 3, 25 P. 1092 (1891)

DATED this 5th day of January, 1982.

ATTORNEY GENERAL
State of Idaho
/s/ DAVID H. LEROY

ANALYSIS BY:

STEPHEN J. LORD
Deputy Attorney General

ATTORNEY GENERAL OPINION NO. 82-2

TO: The Honorable Joe R. Williams
State Auditor of the State of Idaho
Statehouse
Boise, Idaho 83720

Per Request for Attorney General Opinion

QUESTIONS PRESENTED:

Does *Idaho Code* §20-415, which grants to the correctional industries commission authority to implement separate and exclusive checking accounts for the prison industries betterment fund, conflict with the prescribed constitutional and statutory duties of the state auditor?

CONCLUSION:

The transfer of the prison industries betterment fund from the aegis of the state auditor to the separate and exclusive control of the correctional industries commission is a constitutionally impermissible violation of article IV, section 1, *Idaho Constitution*.

ANALYSIS:

The statute in question is *Idaho Code* §20-415, which states:

Correctional industries betterment fund — Transfer of funds. — Funds held by the Treasurer of the State of Idaho on the effective date (July 1, 1980) of this act in the "state penal betterment fund" shall be, and hereby are, transferred therefrom to the depository or depositories selected under this act by the Board of Corrections, and the Treasurer of the state of Idaho is hereby directed to transfer such funds, equipment, supplies and other personal property belonging to the state of Idaho presently being used by correctional industries and located at the Idaho state penitentiary on the effective date of this act (shall be, and hereby are, transferred) to the Board of Correction. *All state departments, agencies and offices affected by such transfer are authorized and directed to enter such transfer on their books, records and accounts.* (emphasis added).

This statute directs the state treasurer to transfer funds belonging to the state of Idaho to a depository selected by the Board of Corrections, and directs all affected state departments, agencies and offices including the state auditor, to enter such transfer on their books, records and accounts.

Our assessment of whether this statute is either a constitutionally or statutorily impermissible intrusion upon the duties of the state auditor is predicated upon a review of the history and authority of that office.

The state auditor is generally recognized as the accounting and fiscal officer of the state. He constitutes part of the executive power of the state and possesses only such powers and duties as are vested in him by the constitution or statutes, and must act in accordance with the law.

Where constitutional provisions create the office of auditor without defining its duties, the duties of the state auditor are those which a territorial auditor was performing at the time of adoption of the constitution.

A review of the duties of the territorial controller as defined in Sections 205-222, 1887 Revised Statutes of Idaho Territory, discloses that Section 205(6) prescribed the duty of the controller "to keep and state all accounts in which the territory is interested."

The framers of our constitution changed only the title of its former territorial controller to that of "auditor", *Gilbert v. Moody*, 3 Idaho 3, 7, 25 pac. 1092 (1891).

In the landmark case of *Wright v. Callahan*, 61 Idaho 167, 99 P.2d 961, (1940) our Supreme Court ruled that the framers of our constitution simply gave the office of territorial controller a new but synonymous name, "auditor," and lifted it out of the 1887 statute of Idaho Territory (secs. 205-222) together with its appurtenant powers and duties and placed the whole in article IV, section 1 of *Idaho Constitution* (1890), 61 Idaho at 177-78.

Article IV, section 1, *Idaho Constitution* provides:

§1. Executive officers listed — Term of Office — Place of residence — Duties. — The executive department shall consist of a governor, lieutenant governor, secretary of state, *state auditor*, state treasurer, attorney general and superintendent of public instruction, each of whom shall hold his office for four years beginning on the first Monday in January next after his election, commencing with those elected in the year 1946, except as otherwise provided in this Constitution. The officers of the executive department, excepting the lieutenant governor, shall, during their terms of office, reside within the county where the seat of government is located, there they shall keep the public records, books and papers. *They shall perform such duties as are prescribed by this Constitution and as may be prescribed by law.* (Emphasis Added).

Accordingly, it appears the framers of our constitution created two types of duties for the constitutional offices: (a) such duties "as are prescribed by this constitution," and (b) such duties "as may be prescribed by law."

In the latter category our legislature reiterated those duties of the auditor in *Idaho Code* §67-1001. Again, *Idaho Code* §67-1001(6), prescribes that it is the duty of the auditor "to keep and state all accounts in which the state is interested."

To the extent necessary, the legislature may carve out exceptions to the statutorily dictated prescribed duties of the state auditor. However, while statutes may enlarge, they may neither derogate from nor diminish any duties or responsibilities which a constitutional officer had at the time of the adoption of the constitution.

A review of the 1887 Revised Statutes also indicates that the fiscal responsibility for the territorial prison was within the office of the territorial controller. 1887 Rev. Stat. §§8500-8512. Insofar as the rule announced in *Gilbert v. Moody* and reiterated in *Wright v. Callahan* retains its validity, the duty to oversee prison accounts appears to be one of the powers impliedly vested in the office of the state auditor.

As a general rule, our courts have defined a constitutional duty of the state auditor to "keep and state all accounts in which the state is interested." This follows from the premise of *Gilbert*, and that explained in *Wright*, and seems to make good sense; for if more than one source of authority existed to issue warrants against the state treasury, it would raise the possibility that such additional authorities could overspend the treasury's funds, and violate the fundamental "pay-as-you-go" policy mandated by our constitution.

However, there are certain exceptions to the state auditor's exclusive control over state accounts, and these exist only where the constitution so provides. For example, the legislature "may prescribe any method of disbursement required to obtain the benefits of federal laws." In Attorney General Opinion No. 74-33, dated September 11, 1973, our office advised that this constitutional exception allowed for a separate account under the Department of Employment, for the purpose of obtaining unemployment compensation funds from the federal government under 42 U.S.C. §503.

We have no evidence to indicate that the Prison industries betterment fund falls within such an exception. Where the Legislature has directed all offices, including the state auditor's, to transfer funds belonging to the state from their books, records, and accounts, the statute in question, *Idaho Code* §20-415, invades the constitutional province of the state auditor and to that extent usurps his constitutional charge.

"When the constitution devolves a duty upon one officer the legislature cannot substitute another." *State v. Malcom*, 39 Idaho 185, 226 P. 1083 (1924).

"The legislature cannot take from a constitutional officer a portion of the characteristic duties belonging to that office, and devolve them upon an officer of its own creation" *Givens v. Carlson*, 29 Idaho 133, 157 P. 1120.

It is clear that the auditor at and prior to statehood drew all warrants upon the treasurer for expenditure of money in the state, including its prison. In following the reasoning of *Wright v. Callahan*, *supra*, to now take that function away from the state auditor is to detract from the constitutional role of his office.

While our office recognizes the transfer in question does not entirely deprive the auditor of his constitutional function as did the statute at issue in *Wright v. Callahan*, *supra*, and though we cannot say with certainty whether our high court will extend this anterior decision, in our judgment, *Wright v. Callahan*, continues to describe the law in Idaho.

We are therefore of the view that, among others, it is the duty of the state auditor to keep and state all accounts in which the state is interested which subsumes the correctional industries betterment fund.

Since it is the sole prerogative of the state auditor to draw all warrants for expenditures of state money, including the state prison and the correctional industries betterment fund, the state auditor may instruct the correctional industries commission to permit his office to keep and state the accounts of the prison industries betterment fund and the state auditor may require that only his office draft warrants for expenditures of that fund.

AUTHORITIES CONSIDERED:

Article IV, section 1, *Idaho Constitution* 1887 Rev. Stat. §§8500-8512.

Wright v. Callahan, 61 Idaho 167, 99 P.2d 961, (1940)

State v. Malcom, 39 Idaho 185, 226 P. 1083 (1924)

Givens v. Carlson, 29 Idaho 133, 157 P. 1120 (1916)

Gilbert v. Moody, 3 Idaho 3, 7, 25 Pac. 1092 (1891)

42 U.S.C. §503

Idaho Code §§20-415, 67-1001, 67-1001(6)

DATED this 6th day of January, 1982.

ATTORNEY GENERAL
State of Idaho
/s/ DAVID H. LEROY

ANALYSIS BY:

JOHN ERIC SUTTON
Deputy Attorney General

ATTORNEY GENERAL OPINION NO. 82-3

TO: State Board of Land Commissioners

Per Request for Attorney General Opinion

QUESTION PRESENTED:

Can the Idaho Fish and Game Commission exchange lands acquired and managed for fish and game purposes without obtaining the approval of the State Board of Land Commissioners?

SHORT ANSWER:

The Fish and Game Commission can probably make exchanges on its own authority although there is some uncertainty due to conflicting and vague cases and statutes.

FACTUAL BACKGROUND:

The Department of Fish and Game acquired approximately 4,300 acres of property southeast of St. Maries between 1941 and 1946. The land was acquired

from private parties and from the County of Benewah through tax sales. The deeds read in one of three ways: (1) "Idaho Department of Fish and Game"; (2) "State of Idaho"; (3) "State of Idaho, Department of Fish and Game." The majority of the acreage to be exchanged appears to be deeded to "Idaho Department of Fish and Game."

The land was acquired pursuant to the Pittman-Robertson Act, 16 U.S.C. §§669 et seq., and §§36-1801 to 36-1803 of the *Idaho Code* entitled "Federal Aid for Fish and Wildlife Restoration Projects." The Pittman-Robertson Act returns to the states some federal monies collected from taxes on firearms. The Act provides that the federal government will pay up to 75% of the cost of approved wildlife restoration projects:

A State may elect to avail itself of the benefits of this chapter by its State Fish and Game Department submitting to the Secretary of the Interior full and detailed statements of any wildlife-restoration project as proposed for that State. If the Secretary of the Interior finds that such project meets with the standards set by him and approves said project, the State Fish and Game Department shall furnish to him such surveys, plans, specifications, and estimates therefor as he may require. If the Secretary of the Interior approves the plans, specifications, and estimates for the project, he shall notify the State Fish and Game Department and immediately set aside so much of said fund as represents the share of the United States payable under this chapter on account of such project, which sum so set aside shall not exceed 75 per centum of the total estimated cost thereof. 16 U.S.C. §669 (e) (2).

In Idaho, the remaining funds come from monies of the Fish and Game Fund pursuant to *Idaho Code* §36-1803:

36-1803. Wildlife restoration project fund and fish restoration and management fund. — The commission shall budget from any of the moneys of the fish and game fund an amount requisite and necessary to meet and match cooperative grants of the federal government, which amounts so set aside shall be placed in two (2) separate funds to be known as the wildlife restoration project section and the fish restoration and management project section of the department of fish and game and which said moneys so set aside and placed in said project sections shall be used and expended by the commission, or under its direction and control, in cooperative activities in wildlife restoration projects and fish restoration and management projects under the provisions of sections 36-1801 and 36-1802, *Idaho Code*.

Since acquiring the land, the Fish and Game Department has administered it as the "St. Maries Wildlife Management Area." The area apparently supports deer and a small elk herd the year round and has traditionally received a high level of recreational use. The Department has also been allowing the removal of some timber in small clear cut blocks and burning to provide additional game forage. Timber sales have been made through the Department of Lands at the request of Fish and Game. All money received has gone to the Fish and Game Department, and the Department of Lands has assumed no administration responsibilities concerning the land.

The Department is now proposing to exchange a substantial portion of this land for approximately 12,000 acres of Burlington Northern land situated 20 miles southeast of Avery in Shoshone County. This land would be much more inaccessible than the Department's current holdings. The Department has secured an agreement with Burlington Northern to allow continued public access to the lands nearer St. Maries, but some of the local population is concerned to the point of contemplating litigation if the exchange occurs. Burlington Northern is interested in the state land because that land, while not managed for timber, apparently has valuable timber stands and because the state land is much more accessible. The land currently held by Burlington Northern apparently is prime elk habitat, is of sufficient size to be managed effectively for elk production, supports a sizeable herd of rocky mountain goats, and has high fisheries values.

CONSTITUTIONAL/LEGISLATIVE FRAMEWORK:

The State Board of Land Commissioners is created by art. 9, §7, of the Idaho Constitution which grants it powers over the "public lands" of the State:

§7. State board of land commissioners. — The governor, superintendent of public instruction, secretary of state, attorney general and state auditor shall constitute the state board of land commissioners who shall have the direction, control and disposition of the *public lands* of the state, under such regulations as may be prescribed by law. (emphasis added).

The powers of the board as to the location and disposition of public lands are further elaborated on in art. 9, §8,:

§8. Location and disposition of public lands. — It shall be the duty of state board of land commissioners to provide for the location, protection, sale or rental of *all the lands* heretofore, or which may hereafter be *granted* to the state *by the general government*, under such regulations as may be prescribed by law, and in such manner as will secure the maximum possible amount thereof; . . . The legislature shall, at the earliest practicable period, provide by law that the general grants of land made by congress to the state shall be judiciously located and carefully preserved and held in trust, subject to disposal at public auction for the use and benefit of the respective object for which said grants of land were made, and the legislature shall provide for the sale of said lands from time to time and for the sale of timber and all state lands and for the faithful application of the proceeds thereof in accordance with the terms of said grants . . . (emphasis added).

In chapter 36 of the *Idaho Code*, the legislature has granted extensive powers to the Fish and Game Commission in regard to acquiring property for fish and game purposes. In particular, *Idaho Code* §36-104 provides that the Fish and Game Commission can acquire property by any device for, inter alia, game restoration, propagation or protection:

Authorization for Commission Powers and Duties. For the purpose of administering the policy as declared in section 36-1003, *Idaho Code*, the commission is hereby authorized and empowered to:

7. Acquire for and on behalf of the State of Idaho, by purchase, condemnation, lease, agreement, gift, or *other device*, lands or waters suitable for the purposes hereinafter enumerated, and develop, operate, and maintain the same for said purposes, which are hereby declared a public use:

(A) For fish hatcheries, nursery ponds, or game animal or game bird farms;

(B) For game, bird, fish or fur-bearing animal restoration, propagation or protection;

(C) For public hunting, fishing or trapping areas to provide places where the public may fish, hunt, or trap in accordance with the provisions of law; or the regulation of the commission;

(D) *To extend and consolidate by exchange, lands or waters suitable for the above purposes.* (emphasis added).

In addition, §36-107 sets up a “fish and game fund” which is to be used for no purpose other than for those of the Idaho Fish and Game Code:

36-107. Fish and game account. — (a) Creation of Account. The Director shall promptly transmit to the State Treasurer all moneys received by him, from the sale of hunting, fishing and trapping licenses, tags and permits or from any other source connected with the administration of the provisions of the Idaho fish and game code or any law or regulation promulgated for the protection of wildlife and the State Treasurer shall deposit all such moneys in a special account to be known as the “fish and game account,” which is hereby established, reserved, set aside, appropriated, and made available until expended as may be directed by the Commission in carrying out the purposes of the Idaho fish and game code or any law or regulation promulgated for the protection of wildlife, and shall be used for no other purpose.

Idaho Code §§36-1801, et seq. provide legislative consent to the provisions of the Pittman-Robertson Act, set up a wildlife restoration fund, and allow the monies to be used in the selection, restoration, and improvement of areas of land suitable for wildlife:

36-1804. Manner of use and purposes of funds. — The amount of money so set aside and transferred shall be used by the commission in the selection, restoration, rehabilitation, and improvement of areas of land or water adaptable as feeding, resting, or breeding places for wildlife and fish, and the construction thereon or therein of such works as may be necessary to make them available and adequate for such purposes and, also, including such research into problems of wildlife management projects as may be necessary to efficient administration affecting wildlife and fish resources, and such preliminary or incidental costs and expenses as may be incurred in and about such wildlife projects and such fish restoration and management projects and in cooperation with the provisions of the Wildlife Restoration Projects Act and the Fish Restoration and Management Projects Act.

It would seem that there is a constitutional tension between §36-104 and art. 9, §7, if the definition of "public lands" includes all land owned by the State of Idaho or in the name of any of its agencies.

ANALYSIS:

CONSTITUTIONAL AUTHORITY OF THE LAND BOARD

The power of the State Land Board is derived both from the constitution and various legislation. Art. 9, §7 of the constitution gives it power over "public lands"; art. 9, §8, gives it power over "lands granted by the general government." Numerous statutes, to be described later, give the Board power over lands in addition to "public lands" and "granted lands."

The term "granted lands" seems adequately defined by art. 9, §8. Upon reading the proceedings of the constitutional convention, there seems no doubt that the term was intended to apply not only to school endowment lands, but also to other lands granted to the state by the federal government. See Constitutional Convention Proceedings, Vol. I, pp. 830-849.

The term "public lands" is not defined in the constitution. The term generally refers to lands of a state which are subject to sale or other disposal under general laws and are not held back or reserved for any special governmental or public purposes. See e.g., *Northern Pacific Railway Co. v. Hirzel*, 29 Idaho 438, 161 P. 854 (1916); *Lund v. Nichols*, 177 Okla. 65, 57 P.2d 592 (1936), *Application of Oklahoma Planning and Resources Board*, 201 Okla. 178, 203 P.2d 415 (1949); *Berry v. City of Chesapeake*, 209 Va. 525, 165 S.E.2d 291 (1969); *State ex rel. v. Holland*, 151 Fla. 806, 10 S.2d 577 (1942); *Thompson v. United States*, 308 F.2d 628 (9th Cir. 1962), 63 Am. Jur.2d, Public Lands, §1; 73 C.J.S.2d Public Lands, §1; See generally 35 Words and Phrases, Public Land.

For example, in *Northern Pacific Railway Co. v. Hirzel*, *supra*, one question was whether the beds of the navigable streams of the state came within the term "public lands." The court held that they did not:

"Public lands," such as are referred to in art. 9 of the state constitution, and which are subject to disposal by the state land board under the laws enacted or to be enacted by the legislature, do not include the beds of navigable waters or lands thereunder below high-water mark. *The rights of the state land board are confined to lands expressly granted by act of Congress and to such lands as are subject to settlement and sale.* 29 Idaho at 456, 457.¹ (emphasis added).

Sec. 4 of the Idaho admission bill is a grant of sections 16 and 36 in each township for the support of the common schools. Sec. 6 grants certain lands for the construction of public buildings. Sec. 10 grants 90,000 acres of land for an agricultural college, and sec. 11 is a grant of a designated number of acres for specific purposes, and *our constitutional provision granting to the state board of land commissioners control over and disposal of all public lands relates only to these lands*

¹The Land Board now has authority over beds of navigable waters pursuant to *Idaho Code* §58-104(8).

granted to the state by the act of Congress above mentioned, for specific purposes. (emphasis added).

And in *Lund v. Nichols*, *supra*, the court had to decide whether the commissioners of the Land Office or the State Board of Public Affairs had jurisdiction to lease the grounds of the capitol building and the executive mansion. The question turned upon whether those lands were considered "public lands." The court held that they were not and that therefore the Board of Public Affairs had the authority to lease them:

It is not all real estate owned by the state that comes under the classification of "public lands." That term is often used as synonymous with public domain, and, when so considered, its meaning is clear. *While other state-owned real estate which has been designated for use for some specific state governmental purposes, and occupied and used therefor, as, for instance, capitol building site and Executive Mansion site, is not a part of the public domain or public lands of the state within the meaning of section 32, article 6 of the Constitution.* We quote from 50 C.J. p. 886, as follows: "The term 'public lands' or 'public domain,' which are regarded as synonymous, are habitually used in the United States or of the states as are subject to sale or other disposal under general laws, and are not held back or reserved for any special governmental or public purpose.

... '57, P2d at 594 (emphasis added, citations omitted)

The only Idaho authority which we have been able to find at all contrary to the above line of decisions is dicta in *State Water Conservation Bd. v. Enking*, 56 Idaho 722, 58 P2d 779 (1936), overruled on other grounds, *State of Idaho Department of Parks v. Idaho Department of Water Administration*, 96 Idaho 440, 530 P2d 924 (1974). In that case, the court was considering the constitutionality of the State Water Conservation Board. The Board was empowered to sell property when the property was no longer needed for the purposes of the Board or to lease or rent that property. The court stated:

If it is intended that the property acquired by the Board acting as a "governmental function" shall become state property, then it may be said that the legislature has no power to divest the State Board of Land Commissioners of the "control and disposition of the public lands of the state" (§7, art. 9), or of the right of protection, sale, or rental" of state lands. 56 Idaho at 735 (citations omitted).

The court, however, did not analyze the definition of "public lands," nor did it distinguish or even cite the *Hirzel* case or the numerous similar authorities. Since it stands alone against a large amount of contrary authority and because the finding was not necessary to the disposition of the case, we believe that the correct interpretation of "public lands" is the one cited in *Hirzel* and the numerous other similar authorities.

In addition, a finding that *Enking* is controlling would mean that in all probability the numerous statutes, cited *infra*, giving disposition authority to state agencies would be unconstitutional. Such a result should be avoided unless absolutely necessary. Therefore, we conclude that there is no constitutional prohibition against the legislature's granting disposal authority over lands acquired for wildlife management purposes to the Fish and Game Commission.

STATUTORY POWERS OF STATE LAND BOARD:

Several statutes give the State Land Board powers in regard to state lands. Section 58-104 describes the general powers and duties of the Board. It provides in pertinent part:

The state board of land commissioners shall have power:

1. To exercise the general direction, control and disposition of the *public lands* of the state. (emphasis added).
8. To exchange any *public lands* of the state, over which the board has power of disposition and control *for lands* of equal value, *the title to which, or power of disposition*, belongs or *is vested in* the governing board or board of trustees of *any state governmental unit, agency* or institution (emphasis added).
9. To regulate and control the use or disposition of lands in the beds of navigable lakes, rivers and streams, to the natural or ordinary high water mark thereof, so as to provide for their commercial, navigational, recreational or other public use.

In *Idaho Code* §§58-304, 58-313, 58-138, and 58-132 the legislature has given the land board additional power to lease, sell, exchange, or classify state lands:

58-304. Leases. — The state board of land commissioners may lease *any portion of the land of the state*, at an annual rental the amount of which shall be fixed and determined by the state board, except as hereinbefore provided.

58-313. Sale of state land. — The state board of land commissioners may at any time direct the sale of *any state lands*, in such parcels as they shall deem for the best interests of the state.

58-138. Exchange of state land. — The state board of land commissioners may at its discretion, when in the state's best interest, exchange, and do all things necessary to exchange, *any of the state lands* now or hereafter *held and owned by this state* for similar lands of equal value public or private, so as to consolidate state lands or aid the state in the control and management or use of state lands.

58-132. Extension and declaration of powers and duties of state board of land commissioners. — In order that financial aid cooperation from the federal government, which is now and may hereafter become available may be taken advantage of, and that land in the state of Idaho be put to its best possible use, it shall be the duty of the state board of land commissioners *to integrate and unify the policy and administration of land use in the state, and to determine the best use or uses*, viewed from the standpoint of general welfare, *to be made of state land* now owned or hereafter acquired, including the determination of what land should be in county or state or federal ownership, and, in order to carry out the intentions of this chapter, the state board of land commissioners is hereby authorized and directed to classify state owned lands with respect to their value for forestry, reforestation, watershed protection and recreational purposes. (emphasis added).

Taken together, these statutes appear to provide a comprehensive grant of authority to the land board. But if they are meant to include those lands occupied by, administered by, or obtained by other state agencies, then they would conflict with many other grants of land disposal authority made by the legislature to state agencies. In addition, they would appear to conflict with several statutes delineating the powers of the land board. See discussion, *infra*, at 18-19.

The following examples of grants by the legislature of authority to buy, sell, or exchange land would be inconsistent with an interpretation of the land board's powers that would give it control over all state lands:

(1) In *Idaho Code* §42-1734, the Water Resources Board has been given the power to exchange land for use in water projects:

42-1734. Powers and duties. — The board shall have the following powers and duties:

(i) To acquire, purchase, lease, or exchange land, rights, water rights, easements, franchises and other property deemed necessary or proper for the construction, operation and maintenance of water projects;²

(2) *Idaho Code* §32-106 gives the Department of Health and Welfare the power to exchange property which is needed for the operation of its facilities and programs:

The department established by this act is empowered to acquire, by purchase or exchange, any property which in the judgment of the department is needful for the operation of the facilities and programs for which it is responsible and to dispose of by sale or exchange, any property which in the judgment of the department is not needful for the operation of the same.

(3) The Idaho Transportation Board is given powers of exchange for property necessary for state highway purposes and for aeronautical purposes. *Idaho Code* §21-142 deals with powers in regard to aeronautical facilities:

21-142. Powers and duties of board. — The Idaho transportation board shall be vested with the functions, powers and duties relating to the provisions of this act and shall have power to:

(5) Purchase, condemn or otherwise acquire, and exchange any real property, either in fee or in any lesser estate or interest, rights-of-way, easements and other rights together with rights of direct access from the property abutting aeronautical facilities, deemed necessary by the board for present or future aeronautical purposes. The order of the board that the land sought is necessary for such use shall be *prima facie* evidence of such fact.

....

²The Water Resources Board arguably may have constitutional authority to make such exchange pursuant to art. 15, §7 of the Idaho Constitution.

(14) Sell, exchange, or otherwise dispose of and convey, in accordance with law, any real or personal property, other than public lands which by the constitution and laws of the state of Idaho are placed under the jurisdiction of the state land board, or parts thereof, together with appurtenances, when in the opinion of the board, said real property and/or appurtenances are no longer needed for state aeronautical purposes, and also dispose of any surplus materials and by-products from such property and appurtenances.

(4) *Idaho Code* §40-120 gives it similar powers in regard to land to be used for highway purposes:

40-120. Duties and powers of the board. — The Idaho transportation board, subject to the right of protest hereinafter provided for, shall be vested with the functions, power and duties relating to the administration of this act and shall have power to:

....

(9) Purchase, condemn or otherwise acquire (including exchange), any real property, either in fee or in any lesser estate or interest, rights of way, easements and other rights and rights of direct access from the property abutting highways with controlled access, deemed necessary by the board for present or future state highway purposes. The order of the board that the land sought is necessary for such use shall be prima facie evidence of such fact.

....

(24) Sell, exchange, or otherwise dispose of and convey, in accordance with law, any real property, other than public lands which by the constitution and laws of the state of Idaho are placed under the jurisdiction of the state land board, or parts thereof, together with appurtenances, when in the opinion of the board, said real property and/or appurtenances, are no longer needed for state highway purposes, and also dispose of any surplus materials and by-products from such real property and appurtenances.

(5) The Department of Administration has been given the power to sublease office space constructed through the state building authority to various state agencies and to lease capitol mall real estate by *Idaho Code* §67-5708:

The department of administration shall manage multi-agency office space constructed through the state building authority as established in chapter 64, title 67, *Idaho Code*, and shall sublease such office space to various state departments, agencies, and institutions in the state of Idaho. The department of administration is directed to operate any property acquired for the state capitol mall and to enter into rental contracts and lease agreements not inconsistent with the use of such capitol mall real estate for state building purposes when so authorized.

The director may authorize and enter into lease of state capitol mall real estate and multi-agency office space constructed through the state

building authority, not needed for state building purposes, to other governmental entities or to nonprofit organizations upon such terms as are just and equitable.

A leasehold has traditionally been described as a real property interest, and thus this authority would conflict with an interpretation giving the land board exclusive jurisdiction over leases of state property.

(6) The division of public works has the power to allocate all space owned or leased in the city of Boise in the name of the state under *Idaho Code* §67-5706:

Allocation of office space. — The division of public works shall have the power and duty to allocate all space, owned or leased in the city of Boise in the name of the state, except as provided by section 67-5707, *Idaho Code*, for the occupancy of the various state departments, agencies and institutions.

(7) The Director of the Department of Agriculture has been given the power, inter alia, to lease, sell, and dispose of real property by *Idaho Code* §22-103 (19):

Duties of director. — The director of the department of agriculture shall execute the powers and discharge the duties vested by law in him or in the department, including, but not limited to, the following:

(19) Purchase, lease, hold, sell, and dispose of real and personal property of the department when, in the judgment of the director, such transactions promote the purposes for which the department is established.

(8) The State Board of Education has the power to dispose of real property pursuant to *Idaho Code* §33-107:

General powers and duties of the state board. — The state board shall have power to:

(2) acquire, hold and dispose of title, rights and interests in real and personal property;

(9) The Board of Trustees of Idaho State University has been given the power to acquire by purchase or exchange property necessary for the operation of the University in *Idaho Code* §33-3005:

The board of trustees is empowered to acquire, by purchase or exchange, any property which in the judgment of the board is needful for the operation of the Idaho State University, and to dispose of, by sale or exchange, any property which in the judgment of the board is not needful for the operation of the said university.

Similar powers of disposal and exchange have been given to the Boards of Trustees for Lewis and Clark College, *Idaho Code* §33-3104, the State Normal School, *Idaho Code* §33-3404, the Industrial Training School, *Idaho Code* §33-3504, and Boise State University, *Idaho Code* §33-4005. In addition, every institution of higher education is given the right to dispose of real property pursuant to *Idaho Code* §33-3804. The Board of Regents of the University of Idaho has apparently been using this provision, *Idaho Code* §33-2804, and the constitutional language in art. 9, §10, to make dispositions of land without the approval of the land board.

The statutes quoted above are not intended to be a comprehensive listing of every instance in which the legislature has apparently given authority to various state agencies, institutions, and boards to dispose of property belonging to the state of Idaho. They are merely meant to be examples of the breadth of the legislative scheme. Other examples may be found in *Idaho Code* §§70-1610, 70-1617, giving disposition authority to port districts; in *Idaho Code* §67-4227 to the park and recreation board; in *Idaho Code* §67-6409, giving disposition authority to the state building authority; in *Idaho Code* §72-912, giving limited disposition authority to the endowment fund investment board; in *Idaho Code* §33-2122, giving disposition authority to dormitory housing commissions; in *Idaho Code* §33-2107, giving authority to the boards of trustees of junior college districts; in *Idaho Code* §67-5740 (e) to the administrator of the division of purchasing (subject to approval of *state board of examiners*); in *Idaho Code* §40-1610, to highway districts; in *Idaho Code* §31-1417, to fire protection districts; in *Idaho Code* §67-6206, to the Idaho Housing Agency; in *Idaho Code* §33-601, to school districts; in *Idaho Code* §42-3115, to flood control districts; in *Idaho Code* §42-3708, to watershed improvement districts; and in *Idaho Code* §27-118, to cemetery maintenance districts.

When added to the similar powers given to the Fish and Game Commission, see 36-104, *supra*, this is a large body of law that would be meaningless and perhaps unconstitutional if the land board were the only body authorized to exchange state lands. It is a general rule of statutory construction that a statute should not be nullified or deprived of potency unless such a course is absolutely necessary. See, e.g., *Maguire v. Yanke*, 590 P.2d 85, 99 Idaho 829 (1978). And in construing statutes, it is generally presumed that legislative acts are constitutional; doubts concerning interpretation of statutes are to be resolved in favor of that interpretation rendering them constitutional. See e.g. *State v. Rawson*, 597 P.2d 31, 100 Idaho 308 (1979).

We have been advised orally that several of the above agencies have entered into some property transactions without land board approval. In particular, the Department of Transportation has entered into numerous agreements. If they have made such exchanges, the legality of all of them may be clouded by an opinion granting sole authority to the land board since the state might not be bound by actions of its employees beyond the scope of their authority. See, e.g., *State v. Fitzpatrick*, 5 Idaho 499, 51 P. 112 (1897); *Island-Gentry Joint Venture v. State of Hawaii*, 57 H. 259, 554 P.2d 761 (1976); *Bear River Sand and Gravel Corp. v. Placer County*, 118 CA.2d 684, 258 P.2d 543 (1953).

While comparisons with other states are of limited relevance due to differing constitutions and institutional arrangements, one still can note that many of the western states have granted authority to their equivalent of the fish and game commission to exchange property used for wildlife management purposes. See N.M. Stat. Ann. §17-4-3; Colo. Rev. Stat. §33-1-112(b); Wyo. Stat. §23-1-302; ORS 469.146(2); Wash. Rev. Code Ann. §77.12.200, §77.12.210, §77.12.220; Kan. Stat. §74-3302; and Okla. Stat. Ann. 29-3-103. Other states specifically provide that their equivalent of the fish and game commission can make exchanges only with the approval of the governor. See Ariz. Rev. Stat. §17-241; S.D. compiled laws Ann. §41-2-29.2 and §5-2-11; N.D. Cent. Code §20.12-02-05; Utah Code Ann. §65-7-9. There are no such express provisions in Idaho law mandating the fish and game commission to bring proposed exchanges before the land board. Montana authorizes its fish and game commission to make exchanges, but requires

approval of the state land commissioner when such an exchange involves more than one hundred acres or one hundred thousand dollars in value. See Mont. Rev. Code Ann. §87-1-209.

Other statutes delineating the powers of the land board also point to the conclusion that the Fish and Game Commission has the authority to make the exchange in question. As previously quoted, *Idaho Code* §58-104(8) gives the board power to exchange public lands with a state agency which has power of disposition over other lands:

To exchange any *public lands* of the state, over which the board has power of disposition and control *for lands of equal value, the title to which, or power of disposition, belongs or is vested in the governing board or board of trustees of any state governmental unit, agency or institution.* (emphasis added).

The Department of Lands under *Idaho Code* §58-119(3) has the power to organize a central land records unit for recording any instrument by which a state agency disposes of title to real property:

To organize a central land records unit within the department for the purpose of establishing and maintaining an inventory and plat of all lands owned, leased, or held in trust by the state or any of its agencies, departments, institutions or instrumentalities, and to require any such agency, department, institution or instrumentality to file with the unit for recordation and platting any instrument by which the state or any such agency, department, institution or instrumentality acquires or disposes of title to real property or an estate therein. (emphasis added).

Finally, *Idaho Code* §58-331 directs administrative agencies of the state to dispose of *surplus* property by transferring title to the land board:

58-331. Designation of surplus real property. — Real property of the state of Idaho, the use of which by any department, officer, board, commission or other administrative agency of the state shall be terminated by law, and real property in the custody and control of any such agency which the agency shall declare to be no longer useful to or usable by it, shall be deemed surplus, and custody and control thereof shall thereupon be vested in and title be transferred to the state board of land commissioners, subject to disposition by said board in accordance with the provisions of this act.

This paragraph implies that if the property is not surplus, the agency may dispose of the property itself if properly authorized by the legislature.

Our conclusion is thus that the legislature has carved specific exceptions out of its general grants of authority to the land board. It is a general rule of statutory interpretation that general enactments are controlled by specific enactments where there is a conflict. See, e.g., *Koelsch v. Girard*, 33 P.2d 816 54 Idaho 452 (1934).

In addition, this conclusion allows the harmonization of the numerous statutes previously cited with the constitution and with each other. This is another general rule of construction. See, e.g., *Sampson v. Layton*, 387 P.2d 883, 86 Idaho

453 (1963). While some may view this as an erosion of the powers of the land board, the board is bound by both the constitution and appropriate legislation. The board retains vast constitutional powers over “public lands” and “granted lands” and vast statutory powers over other state lands pursuant to the surplus property act and the other statutes quoted. To require every single lease, sublease, assignment or exchange involving real property owned by the state or its instrumentalities to be approved by the board could well work an impossible burden on it and the staff of the Department of Lands. Nor does this opinion purport to interpret statutes other than the ones authorizing the Fish and Game Commission to make exchanges. Those interpretations will await specific factual contexts. Finally, nothing in this opinion prevents voluntary submission of a transaction by an agency for the guidance and expertise of the land board and the Department of Lands.

CONCLUSION:

The Fish and Game Commission may exchange the lands in question, assuming such lands were acquired and managed for fish and game purposes, without obtaining land board approval.

AUTHORITIES CONSIDERED:

1. Idaho Statutes

- a. Art. 9, §7, Idaho Constitution.
- b. Art. 9, §8, Idaho Constitution.
- c. Art. 9, §10, Idaho Constitution.
- d. Art. 15, §7, Idaho Constitution.
- e. *Idaho Code*, §§21-142, 22-103(19), 27-118, 31-1417, 33-107, 33-601, 33-2107, 33-2122, 33-2804, 33-3005, 33-3104, 33-3404, 33-3504, 33-4005, 33-3804, 36-104, 36-107, 36-1801 to 36-1803, 40-120, 40-1610, 42-1734, 42-3115, 42-3708, 58-104, 58-104(8), 58-119(3), 58-132, 58-138, 58-304, 58-313, 58-331, 67-5706, 67-5708, 67-5740(e), 67-4227, 67-6206, 67-6409, 70-1610, 70-1617, 72-912.

2. Other Statutes

- a. Ariz. Rev. Stat. §17-241.
- b. Colo. Rev. Stat. §33-1-112(b).
- c. Kan. Stat. §74-3302.
- d. Mont. Rev. Code Ann. §87-1-209.
- e. N.D. Cent. Code §20.12-0205.
- f. N.M. Stat. Ann. §17-4-3.
- g. Okla. Stat. Ann. 29-3-103.

- h. ORS 496.146(2).
- i. S.D. compiled laws Ann. §41-2-29.2 and 5-2-11.
- j. Utah Code Ann. §65-7-9.
- k. Wash. Rev. Code Ann. §77.12.200, §77.12.210, §77.12.220.
- l. Wyo. Stat. §23-1-302.
- m. 16 U.S.C. §§669, et seq.

3. Idaho Cases

- a. *State v. Fitzpatrick*, 5 Idaho 499, 51 P.112 (1897).
- b. *Northern Pacific Railway Co. v. Hirzel*, 29 Idaho 438, 161 P. 854 (1916).
- c. *Koelsch v. Girard*, 54 Idaho 452, 33 P.2d 816 (1934).
- d. *State Water Conservation Bd. v. Enking*, 56 Idaho 722, 58 P.2d 779 (1936).
- e. *Sampson v. Layton*, 86 Idaho 453, 387 P.2d 883 (1963).
- f. *State of Idaho Department of Parks v. Idaho Department of Water Administration*, 96 Idaho 440, 530 P.2d 924 (1974).
- g. *Maguire v. Yanke*, 99 Idaho 829, 590 P.2d 85 (1978).
- h. *State v. Rawson*, 100 Idaho 308, 597 P.2d 31 (1979).

4. Other Cases

- a. *Bear River Sand and Gravel Corp. v. Placer County*, 118 CA.2d 684, 258 P.2d 543 (1953).
- b. *State ex rel. v. Holland*, 151 Fla. 806, 10 S.2d 577 (1942).
- c. *Island-Gentry Joint Venture v. State of Hawaii*, 57 H. 259, 554 P.2d 761 (1976).
- d. *Application of Oklahoma Planning and Resources Board*, 201 Okla. 178, 203 P.2d 415 (1949).
- e. *Lund v. Nichols*, 177 Okla. 65, 57 P.2d 592 (1936).
- f. *Berry v. City of Chesapeake*, 209 Va. 525, 165 S.E.2d 291 (1969).
- g. *Thompson v. United States*, 308 F.2d 628 (9th Cir. 192).

5. Other Authorities

- a. 63 Am. Jur.2d, Public Lands, §1.

- b. 73 C.J.S.2d Public Lands, §1.
- c. Constitutional Convention Proceedings, Vol. 1, pp. 830-849.

DATED this 26th day of February, 1982.

ATTORNEY GENERAL
State of Idaho
/s/ DAVID H. LEROY

ANALYSIS BY:

DON A. OLOWINSKI
Deputy Attorney General
Chief, Natural Resources Division

cc: Idaho Supreme Court
Idaho Supreme Court Law Library
Idaho State Library

ATTORNEY GENERAL OPINION NO. 82-4

TO: TOM D. McELDOWNEY
Director, Department of Finance

Per Request for Attorney General Opinion

QUESTION PRESENTED:

Does Idaho law authorize the state treasurer and local school districts or other depositing units subject to the Public Depository Law to enter into agreements whereby idle or surplus funds of the depositing units are transferred or delegated to the state treasurer for the purpose of investment?

CONCLUSION:

Based on our review of the Public Depository Law, the investment laws of various public depositing units, and the laws governing the authority and duty of public officers charged with controlling public deposits and investments, certain joint investments are permissible, subject to the strict terms of those laws, but transferring or delegating the depositing unit's power to the state treasurer is prohibited.

ANALYSIS:

It is our understanding that various school districts and the state treasurer have entered into agreements whereby the state treasurer invests the idle funds of the school district at the best rate available to the state treasurer at the time of the investment. The treasurer then makes these investments outside the local depository. In return for this service, the district is required to pay the state trea-

suror a fee in the amount of 1/4 of one percent of the interest earned, with a minimum charge of 50¢ per transaction. These agreements provide that they are made pursuant to the authority in *Idaho Code* §67-2328.

The scope of construction of the Public Depository Law was established by the Idaho Supreme Court in the case of *Oversmith v. Highway District No. 2*, 37 Idaho 752, 218 P. 361 (1923). That case involved an action by a taxpayer against the highway district to recover certain funds the highway district had allegedly invested in contravention of the Public Depository Law. In finding for the taxpayer, the Court stated:

This Act (the Public Depository Law) is complete within itself and is a limitation upon the power of the supervising board in the matter of the investment of public moneys and in order that a valid deposit be made, it must be strictly complied with . . . While it is quite proper in keeping with the statutes of this State governing the investment of public funds that the burden of the taxpayer should be lessened to the extent of all interest that may be earned by public funds collected or to be collected, the investment of such funds is controlled by statutory provisions which must be strictly followed even though the interest so earned is less than might be earned by speculative investments . . .

37 Idaho at 757.

It would appear from this pronouncement by the Supreme Court that at least two general principles should guide any interpretation of the Public Depository Law. These are:

1. The Public Depository Law is a complete statutory enactment with respect to public deposits and as such serves as a limitation upon the authority of depositing units subject to it.
2. The Public Depository Law governs the safekeeping of public moneys and even though a depositing unit may be able to obtain a greater return on public funds elsewhere, strict compliance is mandatory.

Against this general background, we turn first to an examination of the provisions of the Public Depository Law itself. *Idaho Code* §57-104 defines "depositing units" subject to the Public Depository Law and specifically includes school districts. Therefore, there is no question that school districts are subject to the provisions of the Public Depository Law. The requirements for those institutions eligible to receive public deposits from depositing units are set forth in *Idaho Code* §57-111, which states in part:

BANKS ELIGIBLE AS DEPOSITORIES — CERTAIN FUNDS OF IRRIGATION DISTRICTS UNDER SECTION 43-119 (43-118). Any national bank or any state bank or trust company other than those operating branches, and any banking office of any such bank or trust company operating branches at which offices deposits are received, complying with the provisions of section 57-128, and engaged in the business of a bank deposit in any depositing unit, may become a depository of the public funds of such depositing unit by making application therefor to its supervising board and may under the provisions of section 57-130 become the depository of other depositing units within the state . . .

It is important to note at the outset that only banks, trust companies and savings and loan associations (see *Idaho Code* §26-1919) are authorized to serve as public depositories. Nowhere does the Public Depository Law authorize the state treasurer to act as a public depository.

The primary duties of a treasurer of a public depositing unit are described in *Idaho Code* §§57-127 and 57-128. *Idaho Code* §57-127 states:

DEPOSIT OF PUBLIC FUNDS — DUTIES OF TREASURER AND SUPERVISING BOARD. — Except where the public moneys of a depositing unit in the custody of the treasurer at any one (1) time are less than one thousand dollars (\$1000), the treasurer shall deposit, and at all times keep on deposit, subject to the provisions of this law, in designated depositories, all public moneys coming into his hands, and it is hereby made the duty of said supervising board not less than once every six (6) months to certify to the treasurer the capital and surplus of each public depository, a copy of which certificate shall immediately be served on the treasurer by the supervising board or its clerk; provided, that with the approval of the supervising board of the depositing unit, the treasurer is authorized and empowered to invest surplus or idle funds of the depositing unit in investments permitted by section 67-1210, *Idaho Code*, and interest received on all such investments, unless otherwise required by law, shall be paid into the general fund of the depositing unit; and provided further, that as to all public moneys in the custody of the treasurer of a depositing unit for which there is no legal depository available under this chapter, it shall be the duty of the supervising board of the depositing unit to designate and place for the safe-keeping of such public moneys, and until such designation it shall be the duty of the treasurer to deposit such excess sums on special deposit in some bank or trust company and the expense of such service shall be borne by the depositing unit.

This section imposes a duty upon the treasurer of the depositing unit to deposit all moneys in designated depositories. The only exception to this general duty is the authorization, with supervising board approval, to invest surplus or idle funds of the depositing unit in investments permitted by *Idaho Code* §67-1210.

Idaho Code §57-127 was amended effective July 1, 1981, to grant such authorization, and although the amendment expanded the permitted investments for idle funds of the depositing unit, in our opinion, it did not repeal or alter the general purpose and intent of the Public Depository Law.

Oversmith, supra, instructs that the investment of public funds is controlled by statutory provisions which must be strictly followed even though the interest to be earned on deposited funds is less than might be earned by other investments.

Idaho Code §57-127 was last amended to allow treasurers of depositing units to invest their idle funds in the same investments permitted the state treasurer. (see §67-1210, *Idaho Code*). While this amendment expanded the recognized investments for idle funds of the depositing unit, it neither repealed nor altered the general purpose and intent of the Public Depository Law, nor did this remove the treasurers of local depositing units from the scope of the Public Depository Law.

Idaho Code §57-127 has not established the state treasurer as a “public depository” or an enumerated investment within the Public Depository Law. This law does not in any way relieve the treasurer of the depositing unit from the duty of depositing and investing funds in the manner prescribed by the Public Depository Law.

Several provisions throughout the Public Depository Law clearly indicate that it is the duty of the treasurer of the depositing unit to make deposits and investments. For example, in addition to the duties imposed by *Idaho Code* §§57-127 and 57-128, *Idaho Code* §57-134 requires the treasurer to obtain a monthly report from each depository showing the daily balance of all public moneys during the month. *Idaho Code* §57-135 requires the treasurer to certify monthly, “verified by his affidavit,” the amount of cash in the treasury and in what bank or banks it is deposited. These sections express an unequivocal intent by the legislature to impose upon the treasurer of the depositing unit the responsibility for the deposit and investment of public funds, a responsibility which cannot be delegated or transferred to the state treasurer.

Idaho Code §57-127 establishes limitations on what deposits and investments are permissible, and *Idaho Code* §57-128 directs where those deposits can be made. This latter section states in part:

DEPOSIT OF FUNDS — PREFERENCE AMONG DEPOSITORIES — CERTIFICATE OF DEPOSITORIES. Except where the funds of a depositing unit are less than \$5,000 the treasurer shall not give a preference to any one or more designated depositories in the amount he may deposit under the provisions of this law, but shall keep deposited with each designated depository in the depositing unit as nearly as practicable, such proportion of the total deposits as the capital and surplus of such depository bears to the total capital and surplus of all designated depositories, . . .

This provision prohibits the treasurer of a depositing unit from giving a preference among designated depositories and requires the keeping of public funds deposited in a depositing unit. These requirements have been interpreted by at least three separate Attorney General Opinions. In 1973, the attorney general concluded in Opinion No. 73-1, that public depositing units cannot disregard the requirements of *Idaho Code* §57-128, even for the purpose of federal moneys coming into the custody of the depositing unit. In 1975, the attorney general opined in Opinion No. 24-75 that the City of Chubbuck, pursuant to the requirements of the Public Depository Law, must deposit all its funds in one branch of a public depository in the City of Chubbuck and could not go outside the city to deposit additional funds. Again, in 1975, the attorney general concluded in Opinion No. 57-75 that a depositing unit must deposit funds in a depository in the unit even if the amount of the funds exceeds Federal Deposit Insurance Corporation insurance limits. *Idaho Code* §57-130 also makes it clear that the treasurer is not permitted to deposit funds outside the depositing unit unless:

1. There are no approved depositories in the depositing unit; or
2. The funds exceed the amount which designated depositories in the depositing unit are willing to accept.

If those express conditions are not met, the local treasurer is prohibited by law from depositing public funds of the depositing unit outside the depositing unit.

There are numerous Idaho cases which conclude that in construing a statute, a court is to do so in light of the purpose and intent of the legislature in enacting the statute. In *Messenger v. Burns*, 86 Idaho 26, 382 P.2d 913 (1963), the Idaho Supreme Court stated:

In construing a statute, it is the duty of this Court to ascertain legislative intent, and give effect thereto. In ascertaining this intent, not only must the literal wording of the statute be examined, but also account must be taken of other matters, i.e., such as the context, the object in view, the evils to be remedied, the history of the times and of the legislation upon the same subject, public policy, contemporaneous construction, and the like period. See also *Knight v. Employment Security Agency*, 88 Idaho 262, 398 P.2d 643; *Idaho Public Utilities Commission v. V-1 Oil Company*, 90 Idaho 415, 412 P.2d 581; *State of Idaho ex rel Andrus v. Kleppe*, 417 F.Supp. 273; *Keenan v. Price*, 68 Idaho 423, 195 P.2d 662.

Thus, in construing a statute, one must look at the purpose and effect of the law. Applying this principle to the Public Depository Law and considering the Attorney General Opinions interpreting this law it appears that in addition to safeguarding public funds, another purpose of the law is to insure that public funds of a depositing unit remain in local depositories within the depositing area. An obvious reason for this requirement is to encourage reinvestment of public deposits in the community from which the funds are derived in order to benefit the community as a whole. Furthermore, the local treasurer is prohibited from discriminating among banks or other designated depositories in the depositing unit. This being the case, it would appear that the Public Depository Law is frustrated by authorizing the treasurer of a depositing unit simply to turn over funds to the state treasurer. Pursuant to such an agreement, the state treasurer is not obligated to place funds in public depositories in the depositing area and, as a practical matter, generally invests these funds elsewhere to receive the greatest possible return. Such practice could effectively circumvent the purposes of the Public Depository Law.

Nonetheless, we cannot ignore the fact that *Idaho Code* §57-127 has been amended several times. For example, in 1925 the legislature saw fit to restrict the amount of money which depositing units could place in public depositories. 1925 Idaho Sess. Laws ch. 45, §10, p.63. This 1925 act allowed the supervising boards of depositing units to set maximum amounts which could be deposited in public depositories at any given time.

In 1961, the power to invest "idle or surplus funds" of the depositing unit was added to *Idaho Code* §57-127 by 1961 Idaho Sess. Laws ch. 148, §1, p.213. Such investments were limited to "short-term interest-bearing bonds or other evidences of indebtedness of the United States of America."

In 1969, the legislature abolished the authority of supervising boards to establish maximum amounts of deposited funds (which was granted in 1925), but also expanded the depositing units' investment authority to include "time certificates of deposit of designated public depositories." 1969 Idaho Sess. Laws ch. 142, §3, p.448.

In 1981, the legislature broadened the range of allowable investments to include all of those available for investment of the "idle moneys" of the state by the treasurer under *Idaho Code* §67-1210. 1981 Idaho Sess. Laws ch. 15, §1, p.26.

This raises the issue of what funds may be invested by treasurers of the depositing units and the state treasurer. A treasurer of a depositing unit subject to the Public Depository Law may invest "surplus or idle funds." These are defined as:

... the excess of available moneys in the public treasury, including the reasonably anticipated revenues, over and above the reasonably anticipated expenditures chargeable to those moneys, taking into account the dates at which such revenues and expenditures may be expected to occur, the charges of expenses to revenues being done in such a manner as to produce the maximum amount of excess.

Idaho Code §57-131, as amended by 1981 Idaho Sess. Laws ch. 2, §1, p.4.

Section 57-131 distinguishes the "idle funds" of depositing units from the "idle moneys" of the state, the latter being subject to investment by the state treasurer. *Idaho Code* §67-1210 defines "idle moneys" as:

... the balance of cash and other evidences of indebtedness which are accepted by banks as cash in the ordinary course of business, in demand deposits, after taking into consideration all deposits and withdrawals on a daily basis.

Accordingly, only those funds properly ascertained and accounted for as "surplus or idle funds" of the depositing unit or "idle moneys" of the state treasury may be invested by either. Since it is the safekeeping and prudent investment of various state and local public funds and moneys with which we are concerned, we note again the statement of policy of our Supreme Court in *Oversmith*, which is that depositing units must strictly comply with their duties under the Public Depository Law.

While the law has been amended, there are no amendments which would allow treasurers of depositing units to withdraw all of their deposited moneys for investment heedless of the accounting required by *Idaho Code* §57-131. Failure to ascertain the "surplus or idle funds" is a neglect of duty of the depositing unit's treasurer. *Idaho Code* §57-140.

The next part of our analysis centers upon the question: How may the funds or moneys available for investment be invested? Certainly, either a depositing unit treasurer or the state treasurer may invest independently the idle funds or moneys of the respective treasuries of each. But may they do so jointly? Under the Joint Exercise of Powers Act, *Idaho Code* §§67-2326 through 67-2333, the answer is a carefully qualified yes.

Under that act, the state treasurer and another public agency, including a depositing unit, may pool "idle moneys" and "surplus or idle funds" (after they have properly been ascertained to be such), and jointly invest them in the investments enumerated in *Idaho Code* §67-1210.

However, we find no authorization in the Joint Exercise of Powers Act, The Public Depository Laws, or the duties of the state treasurer at *Idaho Code* §§67-1201 through 67-1221 for the state treasurer to act solely as an agent for depositing units.

We find that this lack of authority exists even though the state treasurer, acting as an investment agent of the depositing unit, invests the depositing unit's "surplus or idle funds" in the otherwise allowable investments of *Idaho Code* §67-1210. Accordingly, where the state treasurer exercises all of the depositing unit treasurer's discretionary and ministerial power and authority to invest, the state treasurer commits an act *ultra vires*.

An unwarranted delegation of the depositing unit treasurer's powers and duties occurs where that treasurer fails to exercise any control over the investment or investments selected, over the means of transmittal from treasury to bank account to investment or elsewhere, or where, under the Joint Exercise of Powers Act, fails to act *jointly* with other treasurers in making such decisions and exercising such powers. Our conclusion is buttressed by *Oversmith's* admonition. It is also substantiated by the last section of the Joint Exercise of Powers Act, which states:

Nothing in this Act shall be interpreted to grant to any state or public agency thereof the power to *increase* or *diminish* the political or governmental power of the United States, the State of Idaho, a sister state, nor any public agency of any of them.

Idaho Code, §67-2333 (emphasis added).

By delegating its investment powers to the state treasurer, a depositing unit both diminishes its own political and governmental power and increases the powers of the state treasurer. We find that the current arrangement, whereby the state treasurer invests the depositing unit's funds, causes both of these prohibited consequences to happen. The local depositing unit's treasurer relinquishes control, power, and duty, while the state treasurer is given control, power and duty which are in excess of those granted by law.

The state treasurer's practice of charging 1/4 of 1 percent of the interest earned on investments of depositing units' funds illustrates this *ultra vires* problem. The enumerated duties and powers of the state treasurer omit any provision for charging a fee for services. Exercising the power to charge a fee for investment services increases the power of the state treasurer. Again, this is not warranted by *Idaho Code* §67-2331, which prohibits increasing or diminishing any powers of a public agency by a joint exercise of powers.

We are mindful of the advice given in 1977 in Attorney General's Opinion No. 77-18, which indicated that "there would seem to be no problem concerning the authority of a county or other political subdivision to agree to pay the State Treasurer for any services rendered." However, *Idaho Code* §67-2331 only allows public agencies to "appropriate funds . . . to the . . . legal or administrative entity created to operate the joint . . . undertaking by providing such . . . services therefor *as may be within its legal power to furnish*." (emphasis added).

We have already concluded that it is not within the power of the state treasurer to furnish services as an agent or broker with sole authority to make depositing unit investments. To the extent that Opinion No. 77-18 is inconsistent with our finding, it is superseded insofar as it seems to approve of allowing fees for such services.

In this opinion, we recognize that the Public Depository Law allows for investment of funds which can be accounted for as surplus or idle funds. We also recognize that a truly joint undertaking, and not a delegation of depositing unit power, between the state treasurer using "idle moneys" and depositing unit's treasurers using "surplus or idle funds" is permissible as a joint exercise of power. Exceeding the limitations of the laws discussed in this opinion may expose the officials involved to personal liability not otherwise covered by their official bonds. *Idaho Code* §§57-127A, 57-135, 57-139, 57-140, 57-145, 67-1220, 18-316.

Four points should be underscored here. First, where the funds of various state and local treasuries are concerned, Idaho law is to be strictly construed to protect such funds. Local depositing units must adhere strictly to the terms of the Public Depository Law. Second, local depositing units may not transfer or delegate their authorized investment function to the state treasurer. Third, the state treasurer may not act as a broker or agent for a local depositing unit under the terms of the Joint Exercise of Powers Act. Fourth, the terms of the current arrangements result in an increase of the state treasurer's power and authority and a diminution of local depositing units' power and authority.

In making our findings we acknowledge the existence of numerous conflicting public interests. We acknowledge also that this opinion may not definitively decide which of those interests should prevail. The local depositing units involved can no doubt achieve higher rates of return available in non-deposit types of investment. In today's economic environment this is a laudable goal. However, by withdrawing surplus or idle funds from deposit, the result is diminution in the amount of funds available by local financial institutions for re-use and reinvestment within Idaho. We are all aware of the great need for capital development and enhancement, and we are aware of the problems presented by the exodus from Idaho of money which could be used to fulfill capital needs here. Whether local governmental and quasi-governmental entities should be a greater source of capital for these purposes is a question which cannot be resolved by our legal opinion. Further resolution of these important interests should be accomplished, if at all, with remedial legislation.

AUTHORITIES CONSIDERED:

1. *Messenger v. Burns*, 86 Idaho 26, 382 P.2d 913 (1963)
2. *Oversmith v. Highway Dist. No. 2*, 37 Idaho 752, 218 P.361 (1923)
3. *Idaho Code* §§18-316, 26-1919, 57-104, 57-111, 57-127, 57-127A, 57-128, 57-130, 57-131, 57-134, 57-135, 57-139, 57-140, 57-145, 67-1201 through 67-1221, 67-1210, 67-1220, 67-2326 through 67-2333, 67-2328, 67-2331.
4. 1925 Idaho Sess. Laws, ch. 45, §10, p.63
5. 1961 Idaho Sess. Laws, ch. 148, §1, p.213.
6. 1969 Idaho Sess. Laws, ch. 142, §3, p.448.
7. 1981 Idaho Sess. Laws, ch. 15, §1, p.26.

8. Idaho Attorney General Opinions
Opinion No. 73-1 (1973)
Opinion No. 24-75 (1975)
Opinion No. 57-75 (1975)
Opinion No. 77-18 (1977) *Superseded*

DATED this 19th day of March, 1982.

ATTORNEY GENERAL
State of Idaho
/s/ DAVID H. LEROY

JES/prc

ANALYSIS BY:

JOHN ERIC SUTTON
STEPHEN J. LORD

ATTORNEY GENERAL OPINION NO. 82-5

TO: R. W. Underkoffler, P.E./L.S.
Executive Secretary
State of Idaho
Board of Professional Engineers and Land Surveyors
842 La Cassia Drive
Boise, ID 83705

QUESTIONS PRESENTED:

1. May a "record of survey" filed according to the requirements of chapter 19, title 55, *Idaho Code*, be substituted for a "subdivision plat" as required by chapter 13, title 50, *Idaho Code*.

2. More specifically, may a purveyor of land refer to a "record of survey" rather than a subdivision plat in title documents which purport to transfer ownership to parcels of real property by reference to parcel numbers contained within the record of survey.

ANSWER:

The "record of survey" statutes are *supplementary* to existing laws relating to surveys, subdivisions, platting and boundaries. Sales of lots must therefore comply with existing laws and may not circumvent the requirements of those laws by the use of a record of survey.

ANALYSIS:

Chapter 19, title 55, *Idaho Code*, entitled "Recording of Surveys" was enacted by the Second Regular Session of the Forty-fourth Idaho Legislature, Chapter 107, 1978 Session Laws.

As stated in *Idaho Code* §55-1901:

The purpose of this chapter is to provide a method for preserving evidence of land surveys by providing for a public record of surveys. *The provisions shall be deemed supplementary to existing laws relating to surveys, subdivisions, platting, and boundaries.* (emphasis added).

The word "shall" when used in a statute is mandatory. *Goff v. H.J.H. Co.*, 95 Idaho 837, 421 P.2d 661 (1974). The compulsory language in the statute which is underlined indicates the legislature's intent that existing laws should remain in force and that this chapter would not become a vehicle to circumvent the requirements of those laws.

Additional support for this conclusion is found in the definition of the term "supplementary." "Supplementary" means "added as a supplement, additional;" "Supplement" is defined as something that completes or makes an addition. *Webster's 7th New Collegiate Dictionary* (1971). A "supplemental statute" is defined as, "a statute intended to improve an existing statute by adding something thereto without changing the original text." *Ballantyne's Law Dictionary*, 3rd Edition (1969). Applying those definitions to these circumstances, it is clear that the legislature intended the chapter on recording of surveys to be used in addition to the existing laws, rather than in place of them. It would therefore be our opinion that chapter 19, title 55, *Idaho Code*, may be used in addition to existing laws, but may not be used in lieu of those laws.

As to the sale of parcels of land, *Idaho Code* §50-1302 requires that, "every owner proposing a subdivision as defined above shall cause the same to be surveyed and a plat made thereof . . . and shall record said plat." *Idaho Code* §50-1301(3) defines "subdivision" as "a tract of land divided into five or more lots, parcels, or sites for the purpose of sale or building development, whether immediate or future; . . ." The definition does not apply to a division or partition of agriculture lands for agriculture purposes. However, any agricultural division must be in lots of five acres or larger and the lands must continue to be used as agricultural land. The definition further provides that counties may adopt their own definition in lieu of the one contained in the statute. *Idaho Code* §50-1302 also goes on to discuss recorded plats for purposes other than subdivisions. It states in part that:

[T]his section is not intended to prevent the filing of other plats. Description of lots or parcels of land, according to the number and designation on such recorded plat, in conveyances or for the purposes of taxation, shall be deemed good and valid for all intents and purposes.

The language of the statute indicates that although plats may be filed for purposes other than subdivisions, land sold by reference to lot and block or parcel number should be sold in reference to a recorded plat.

Finally, the chapter on plats contains several key provisions which would militate against the use of a record of survey in lieu of a subdivision plat. *Idaho Code* §50-1314 requires the county recorder to prepare a plat and assess its cost against any person who sells five or more parcels from the same tract of land. *Idaho Code* §50-1316 provides penalties for the sale of unplatted lots. *Idaho Code* §50-1326 requires the satisfaction of sanitary restrictions by any party selling parcels of land smaller than five acres. Failure to comply is a misdemeanor.

Conveyance of lots or parcels based upon a record of survey would still have to satisfy the requirements of the sanitary restriction. Additionally, if five or

more parcels are conveyed, the county recorder must force a plat. It must be concluded therefore that any transfers of real property that come within the definitions of the chapter on plats and vacations must comply with the requirements therein. A record of survey will not satisfy those requirements.

It is our opinion that the purpose of the adoption of the record of survey chapter was to make provisions for the filing of surveys which did not fit within the definition of documents which could be recorded under the recording statutes. The statement of legislative intent contained within the chapter clearly indicates that the recording of survey statutes is supplemental to existing laws and is not to be used in lieu of those laws. Transfers of real property must therefore comply with existing statutes including those relating to plats and cannot rely upon property descriptions contained within records of surveys.

AUTHORITIES CONSIDERED:

Case

Goff v. H.J.H. Co., 95 Idaho 837, 421 P.2d 661 (1974)

Statutes

Idaho Code, chapter 19, title 55

Idaho Code, chapter 13, title 50

Idaho Code §50-1302

Idaho Code §50-1301(3)

Idaho Code §50-1314

Idaho Code §50-1316

Idaho Code §50-1326

Idaho Code §55-1901

Other

Webster's 7th New Collegiate Dictionary (1971)

Ballantyne's Law Dictionary, 3rd Edition (1969)

DATED this 27th day of April, 1982.

ATTORNEY GENERAL
State of Idaho
/s/ DAVID H. LEROY

RGR/tl

ANALYSIS BY:

ROBIE G. RUSSELL
Deputy Attorney General
Chief, Local Government Division

cc: Idaho Supreme Court
Idaho Supreme Court Law Library
Idaho State Library

ATTORNEY GENERAL OPINION NO. 82-6

TO:

Joseph L. Glaisyer
Mayor, City of Meridian
728 Meridian Street
Meridian, ID 83642

Per Request for Attorney General Opinion

QUESTIONS PRESENTED:

1. Does *Idaho Code* §67-6509 require two hearings at both the planning and zoning commission and city council levels where a material change has been made in the comprehensive plan?

2. What constitutes a “material change”?

3. Does *Idaho Code* §67-6525 require the city council to receive recommendations from the planning and zoning commission as to necessary changes in the comprehensive plan and zoning ordinance that arise as a result of annexation?

4. What procedures must be followed in amending the comprehensive plan as a result of annexation?

5. If the changes in the comprehensive plan are “material changes” must the procedure begin anew at the planning and zoning commission level or may the planning and zoning commission be bypassed since they have already made their recommended changes in the comprehensive plan and zoning ordinances as a result of the annexation?

6. If the necessary changes in the comprehensive plan that arise from the annexation are “material changes” must the planning and zoning commission hold two public hearings prior to making the required recommendations for the change in the comprehensive plan and zoning ordinance?

CONCLUSIONS:

1. An additional hearing at the planning and zoning commission level is only necessary if a “material change” is made in the plan. Absent a change, no additional hearing is necessary. The same is true for the city council.

2. A “material change” as contemplated by *Idaho Code* §67-6509(b) pertains to a change in the substance of the comprehensive plan rather than minor changes made to correct typographical errors, legal descriptions, or the like.

3. The council must receive recommendations from the planning and zoning commission prior to annexation.

4. The comprehensive plan should be amended in the manner provided for in *Idaho Code* §67-6509.

5. As long as the procedural requirements have been followed throughout, it is not necessary to begin the process anew.

6. In our opinion, additional hearings are only required when “material changes” are made in the matter after it was presented at a public hearing.

ANALYSIS:

Question 1. Must two hearings be held at each level?

Idaho Code §67-6509(a) states in part that:

Following the commission hearing, if the commission makes a material change in the plan, further notice and hearing shall be provided before the commission forwards the plan with its recommendation to the governing board.

Clearly, an additional hearing at the commission level is only necessary if a *material change* is made in the plan. Absent a change, no additional hearing is necessary.

Idaho Code §67-6509(b) provides in part that:

Following the hearing of the governing board, if the governing board makes a material change in the plan, further notice and hearing shall be provided before the governing board adopts the plan.

Again, an additional hearing at the governing board level is only required if a *material change* is made in the plan as presented at the hearing. Sans a change, no additional hearing is necessary.

Taking it one step further; suppose the governing board does make a material change: is an additional hearing also necessary before the planning and zoning commission? We believe not. The public hearing requirement is obviously in place to ensure public participation. One repeat hearing at either level satisfies that requirement. Additionally, the statute is drafted in such a manner as to segregate the hearing requirements at each level. If the governing board makes the change, it must conduct an additional hearing but need not return the plan to the planning and zoning commission.

Question 2. What is the definition of a material change as used in *Idaho Code §67-6509(b)*?

The word “material” when used as an adjective is defined as:

Important; relating to the substance rather than the form; going to the merit and essence.

Ballantyne’s Law Dictionary 781 (3d ed. 1969).

The term “material alteration” which is synonymous with “material change” is defined as “A change in the terms of a written instrument which gives a legal effect different from that which it originally had.” *Ballantyne’s, supra*.

In essence then, a material change is one which would change the substance of a comprehensive plan and therefore change the effect that it might have. Changes which amount to nothing more than corrections of typographical errors or grammatical errors and so forth probably do not rise to the level of material change. See also *Wanger v. Zeh*, 256 N.Y.S.2d 227, 45 Misc. 93 (1965); *Boys v. Long*, 268 P.2d 890, (Okla. 1954) *Strasser v. Ress*, 165 Neb. 858, 87 N.W.2d 619 (1958).

Question 3. Does *Idaho Code* §67-6525 require the governing board to receive recommendations from the planning and zoning commission as a result of an annexation?

Idaho Code §67-6525 states that:

Prior to annexation of an unincorporated area, a city council shall request and receive a recommendation from the planning and zoning commission, or the planning commission and the zoning commission, on the proposed plan and zoning ordinance changes for the unincorporated area.

The word "shall" when used in a statute is mandatory. *Goff v. H.J.H. Co.*, 95 Idaho 837, 421 P.2d 661 (1974). It must be concluded therefore that by using directory language the legislature intended to require city councils to request and receive recommendations from planning and zoning commissions prior to annexation of an incorporated area.

Once the council has received those recommendations it may go ahead and annex the property and make the necessary changes to the comprehensive plan and zoning ordinances as required by the Local Planning Act.

Question 4. What procedures should be followed in enacting changes in the comprehensive plan as a result of the annexation?

Idaho Code §67-6525 further states that "Each commission and the city council shall follow the notice and hearing procedures provided in §67-6509, *Idaho Code*" when discussing annexation. It must be reasoned that the procedures to be followed in making changes to the comprehensive plan resulting from an annexation are the same procedures that should be used when making any changes to the plan. Those procedures are outlined in *Idaho Code* §67-6509.

Question 5. If the changes as a result of the annexation are material changes, must the entire comprehensive plan amending process begin anew?

Although the question is complicated, the answer is relatively simple. Assuming that the correct procedures have been followed from the beginning, that is, that when the council anticipated annexation of an unincorporated area, it asked and received recommendations from the planning and zoning commission as to changes in zoning ordinances and the comprehensive plan and further that in formulating those recommendations the planning and zoning commission held the requisite hearings, it can only be concluded that the council and the planning and zoning commission have met all of the statutory requirements of the Local Planning Act. Because the proposed change is a material change (actually any substantive change in the comprehensive plan would be a material change), it does not invoke any special procedures different from those that are normally used when considering a change to the plan. If the planning and zoning

commission has considered the annexation and recommended changes to the plan and the requisite public hearing has been held, there is no need to start over again. Those recommendations are forwarded to the city council which concurrently or immediately after adoption of the annexation ordinance implements the changes to the comprehensive plan. This, of course, assumes that the council has also held the requisite public hearing regarding the material changes to be made to the plan.

The language of §67-6509 that pertains to additional hearings if material changes are made, speaks to changes made by the planning and zoning commission or the city council as a result of information received at a public hearing. These changes are changes made in the recommendations received from a planning and zoning commission. If no changes are made in those recommendations, no material changes have been made as a result of the public hearing and therefore additional hearings are unnecessary.

In summary, as long as the planning and zoning commission and the city council have held the required hearings in the initial process, there is no need to begin the process anew.

Question 6. If the changes in the comprehensive plan as a result of the annexation are material changes, must the planning and zoning commission hold two hearings?

Again, we refer to the language of *Idaho Code* §67-6509(a). It indicates that:

The planning and zoning commission, prior to recommending the plan, amendment or repeal of the plan to the governing board, shall conduct at least one (1) public hearing . . . Following the commission hearing, if the commission makes a *material change* in the plan further notice and hearing shall be provided before the commission forwards the plan with its recommendation to the governing board. (emphasis added)

Obviously, if no material changes are made, no further hearing is necessary. We must assume that any recommended change in the plan is a material change. That, after all, is the purpose of the initial public hearing — to allow public comment on any changes in the plan.

Idaho Code §67-6509(a) is arguably susceptible to two constructions. The first is that a second hearing is required even though the material change is precisely the subject matter of the notice for, and discussion at, the initial meeting. The second and better construction follows. If, after the hearing, the commission decides to make changes which were not addressed in the notice material of the hearing and they amount to a “material change,” then the commission must hold an additional hearing to give the public an opportunity to comment upon the new material. That is the only reason to have a second hearing. The initial proposals for changes in the comprehensive plan obviously have been discussed at the public hearing. If no changes have been made in those proposals, and those proposals are recommended to the governing board, there is no need to have an additional public hearing. Therefore, it is our opinion that the only time that an additional public hearing is necessary at the planning and zoning commission level is if the planning and zoning commission makes a material change in the proposals presented at the first public hearing. If no material changes are made, no additional hearing is necessary regardless of the nature of the original proposal.

The same holds true for the city council. Although the annexation may amount to a material change in the comprehensive plan, so long as those material changes were the subject of the initial hearing, the public had an opportunity to comment and no changes were made in the proposals after the first hearing, a second hearing is not necessary.

The principle of statutory construction commonly known as the rule of reasonable interpretation favors a rational and sensible result. Sutherland, *Statutory Construction* §45-12. The second interpretation offered is the more sensible result and should prevail. As there are no Idaho cases on point, this question of construction, however, can only be resolved with absolute certainty by a judicial determination.

AUTHORITIES CONSIDERED:

1. Case Law

Goff v. H.J.H. Co., 95 Idaho 837, 421 P.2d 661 (1974)

Strasser v. Ress, 165 Neb. 858, 87 N.W.2d 619 (1958)

Wanger v. Zeh, 265 N.Y.S.2d 227, 45 Misc. 93 (1965)

Boys v. Long, 268 P.2d 890 (Okl. 1954)

2. Statutes

Idaho Code §67-6509, et seq.

Idaho Code §67-6525

3. Other

Ballantyne's Law Dictionary 781 (3d ed. 1969)

Sutherland, *Statutory Construction* §45.12

DATED this 8th day of July, 1982.

ATTORNEY GENERAL
State of Idaho
/s/ DAVID H. LEROY

RGR/tl

ANALYSIS BY:

ROBIE G. RUSSELL
Deputy Attorney General
Chief, Local Government Division

cc: Idaho Supreme Court
Idaho Supreme Court Law Library
Idaho State Library

ATTORNEY GENERAL OPINION NO. 82-7

TO: Honorable John V. Evans
Governor of the State of Idaho
Statehouse
Boise, Idaho 83720

Per Request for Attorney General Opinion

QUESTION PRESENTED:

What is the permissible scope of investment for state funds generally, and specifically (1) pension funds, (2) endowment funds, (3) idle funds in the state treasury, and (4) the state insurance fund?

CONCLUSION:

The Prudent Man Investment Rule controls the investment of all assets held by the state in a fiduciary capacity. Specific statutes further limit discretion concerning the investment of each of the enumerated types of funds.

ANALYSIS:**THE PRUDENT MAN INVESTMENT RULE**

The Prudent Man Investment Rule, embodied in *Idaho Code* §68-502, states:

In acquiring, investing, reinvesting, exchanging, retaining, selling and managing property for the benefit of another, a fiduciary shall exercise the judgment and care under the circumstances then prevailing, which men of prudence, discretion and intelligence exercise in the management of their own affairs, not in regard to speculation but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of their capital. Within the limitations of the foregoing standard, a fiduciary is authorized to acquire and retain every kind of property, real, personal, or mixed, and every kind of investment, specifically including but not by way of limitation, bonds, debentures, and other corporate obligations, and stocks, preferred or common, which men of prudence, discretion and intelligence acquire or retain for their own account. Within the limitations of the foregoing standard, a fiduciary may retain property properly acquired without limitation as to time, when under the circumstances then prevailing which men of prudence, discretion and intelligence would take into consideration in deciding to retain or to dispose of such property, such retention is in the best interest of the trust.

Although this statute was enacted in 1949 (1949 Idaho Sess. Laws, Ch. 36 §2) it has not been construed by the Idaho Supreme Court.¹ Fortunately, the statement

¹In *Knudson v. Bank of Idaho*, 91 Idaho 923, 435 P2d 348 (1967) the Supreme Court used the statute without discussion to uphold the sale of an asset by a guardian. As the facts of that case are inapposite here, it offers no guidance on the question at hand.

of the Prudent Man Investment Rule in the Idaho Code is patterned after rules in other states which are virtually identical and have received judicial scrutiny.

The rule was first stated by the Massachusetts Supreme Court in *Harvard College v. Amory*, 26 Mass. (9 Pick) 446, 461 (1830):

All that can be required of a trustee is that he shall conduct himself faithfully and exercise sound discretion. He is to observe how men of prudence, discretion, and intelligence manage their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income, as well as the probable safety of the capital to be invested.

This basic concept was also adopted by the Commissioners on Uniform State Laws, when they drafted the Restatement (Second) of Trusts §227 (1979). Finally, the Idaho statute specifically appears to be patterned after the model investment statute proposed by the trust division of the American Bankers Association, first drafted in 1942. Shattuck, *Development of the Prudent Man Rule*, 12 Ohio S.L.J. 491 (1950). It is apparent, even on a casual reading of the statute, that it is intended to give guidance and direction concerning proper or permissible investments, with an eye to flexibility of portfolio management rather than concrete determinations of investment propriety. Indeed, as the pre-eminent authority on the subject has commented:

It is not possible . . . to state any definite rules as to what are proper trust investments . . . It is possible, however, to point out in a general way the principles upon which the courts act in determining whether an investment made by a trustee is or is not proper.

3 Scott on Trusts §227 (3rd Ed. 1969) at p. 1805.

The first general observation which should be made concerning the Prudent Man Investment Rule is the conservatism which it demands. While no type of investment is impermissible per se, the rule focuses on individual investment decisions² which are to be made in the manner:

. . . which men of prudence, discretion, and intelligence exercise in the management of their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of their capital.

While prudent men may purchase speculative investments in hope of "striking it rich", that is not the way they permanently dispose of their funds. Rather, the primary focus is one of caution with an eye to preservation of the trust fund. See, e.g., *Withers v. Teachers Retirement System of the City of New York*, 447 F.Supp. 1248 (S.D.N.Y. 1978); *Lockwood v. OFB Corp.*, 305 A.2d 636 (Del. 1973); and 3 Scott on Trusts §227.6 (3rd Ed. 1969).

²*Idaho Code* §68-502 states that an investment decision must be prudent "under the circumstances then prevailing." An investment is not imprudent merely because it performs poorly. See *Hartford National Bank & Trust Co. v. Donahue*, 35 Conn. Super. 194, 402 A.2d 1195 (1979) and Restatement (Second) of Trusts §227 (1979), Official Comment O.

As a means of ensuring security of a trust fund, the investments must be diversified to minimize risk of loss. See Restatement (Second) of Trusts §228; Blair & Heggstad, *The Prudent Man Rule and Preservation of Trust Principal*, 1 U. Ill. L. F. 79 (1978); and 83 Harv. L. Rev. 603 (1970). As Blair and Heggstad point out, diversification must take several forms. First, an investment portfolio must contain varying types of assets (e.g., stocks, bonds, treasury bills, mortgage participations, etc.). Second, the various investments must be chosen in such a manner that they respond differently to market stimuli. This means not only that a trustee should not concentrate investment in similar types of assets (e.g., stocks dependent on a single market for their value). Further, a portfolio must be regionally diversified so that factors which particularly affect a single geographical region will not unduly endanger the investment fund. Finally, investments must have diversified maturity dates sufficient to meet the liquidity needs of the fund.³

Although *Idaho Code* §68-502 requires the care of a prudent man, because the persons who direct the investment of the funds in question are professionals, they will be held to a higher standard of care — that of a prudent professional investment manager rather than simply a prudent man. See *In re Mendenhall*, 484 Pa. 77, 398 A.2d 951 (1979) and Restatement (Second) of Trusts §174 (1979). Accordingly, additional caution is required in the exercise of their investment discretion.

A major area of recent controversy regarding appropriate investment of trust funds concerns the "anti-netting rule". Stated simply, the rule provides that the prudence of acquiring or disposing of a particular asset is to be determined by an examination of that individual asset and the circumstances surrounding its acquisition or disposition, rather than considering its place in an entire portfolio. See Fleming, *Prudent Investments: The Varying Standards of Prudence*, 12 Real Prop. Prob. & Tr. J. 243, 248-49 (1977). It has been argued forcefully that the prudence of a particular investment ought to be determined in light of its addition to the investment portfolio, rather than by an inspection of the investment decision in the abstract. See Ravikoff and Curzan, *Social Responsibility in Investment Policy and the Prudent Man Rule*, 68 Calif. L. Rev. 518 (1980); H. Bines, *Modern Portfolio Theory and Investment Management Law*, 76 Colum. L. Rev. #5, 721 (1976), and note J. Rizzi, *Trustee Investment Powers: Imprudent Application of the Prudent Man Rule*, 50 Notre Dame Law. 519 (1975).

The effect of this rule on investment decision making is extremely important. If the anti-netting rule does not (or ought not) apply to trust investment, an investment manager may be freer to make investment decisions based upon secondary considerations. Specifically, for the question at hand, if the anti-netting rule does not apply, investments may be made which, though not yielding as high a rate of return, provide secondary benefits such as bolstering or stimulating the Idaho economy.

The courts, however, have not yet agreed with the writers' criticisms of the anti-netting rule. A case which should demonstrate that the rule has not been abandoned is *In re Bank of New York (Spitzer)*, 35 NY2d 512, 323 NE2d 700

³Obviously, the concepts of trust diversification are far more complex than this. See e.g., H. Bines, *Modern Portfolio Theory and Investment Management Law*, 76 Colum. L. Rev. #5, 721-798 (1976), and J. Langbein & R. Posner, *Social Investing and the Law of Trusts*, 79 Mich. L. Rev. 72 (1980).

(1974). In that case, plaintiffs challenged the propriety of a trust investment which resulted in a loss, contending that it was not prudent at the time it was made. The trustee defended itself on the basis that the overall trust portfolio had increased significantly under its management. The court, however, commented:

The fact that this portfolio showed substantial overall increase in total value during the accounting period does not insulate the trustee from responsibility for imprudence with respect to individual investments for which it would otherwise be surcharged . . . The record of any individual investment is not to be viewed exclusively, of course, as though it were in its own water-tight compartment, since to some extent individual investment decisions may properly be affected by considerations of the performance of the fund as an entity . . . The focus of inquiry, however, is nonetheless on the individual security as such and factors relating to the entire portfolio are to be weighed only along with others in reviewing the prudence of particular investment decisions.

323 NE2d at 703.

See also, *In re Morgan Guarantee Trust Co. of New York*, 89 Misc.2d 1088, 396 NYS2d 781 (1977). The Massachusetts Supreme Court recently has stated the rule in a similar fashion:

The trustee must exercise prudence in making or retaining each investment, and is chargeable with any loss by failing to do so . . . But, at least where the propriety of the investment presents a close question, we have considered whether the trust fund suffered by reason of the challenged feature of a particular investment . . . Moreover, in deciding what is prudent, the cases 'warrant some regard being had to the administration of the fund as a whole.'

Chase v. Pevear, _____ Mass. _____, 419 NE2d 1358, 1366 (1981).

Accordingly, although in a close case secondary factors may be relevant to the examination of the prudence of a particular investment decision the investment generally will be scrutinized according to its intrinsic merit.

The second general rule applicable to the question presented is that the trust fund must be invested solely for the benefit of the beneficiaries. See, e.g., Restatement (Second) of Trusts §170 (1979); *Blankenship v. Boyle*, 329 F.Supp. 1089 (D.D.C. 1971), and *King v. Talbot*, 40 N.Y. 76 (1869). This is an obvious complement to the general obligation a fiduciary owes to a beneficiary. Indeed, the Restatement is very clear that "the trustee is under a duty to the beneficiary in administering the trust not to be guided by the interest of any third person." Restatement (Second) of Trusts §170 (1979), Official Comment Q. See also §187, Official Comment G. This means, of course, that the funds which the State of Idaho holds in its fiduciary capacity must be invested *solely* for the benefit of the intended beneficiaries. This is not to say that secondary, corollary benefits may not be obtained by the investment of the funds. Rather, it is to indicate that the first and foremost duty of loyalty is to the beneficiaries.

Those who argue that the duty of loyalty has been modified refer to *Withers v. Teachers Retirement System of the City of New York*, 447 F.Supp 1248 (S.D.N.Y. 1978). In that case, the teachers retirement system, which provides retirement

benefits for public teachers of the City of New York, purchased \$2.53 billion of New York City bonds in 1975 when it appeared that the City of New York could go bankrupt. Because the court upheld the purchase, some commentators point to this decision in support of the argument that the rule has been discarded, at least in New York. See Ravikoff and Curzan, *supra*.

A careful consideration of *Withers*, however, leads to a different conclusion. It is a case which easily can be limited to its very unusual set of facts. Moreover, when those facts are known, it will be apparent that *Withers* is not at all a departure from traditional notions of a trustee's duty of loyalty. The teachers retirement system was dependent upon New York City's annual contributions for 62% of its annual income. Should the city's contribution have ceased, actuaries predicted the fund would be depleted in five to ten years. In analyzing their position should the city go bankrupt, the trustees determined:

... that essential services and bond holders would have a prior claim to the City's funds and that the City's annual payments to the TRS would cease. The conclusion ... was that there would not be sufficient cash flow for the City to be able to continue its contributions to the pension funds in bankruptcy ...

447 F.Supp. at 1252.

Accordingly, the court concluded:

... neither the protection of the jobs of the City's teachers nor the general public welfare were factors which motivated the trustees in their investment decision. The extension of aid to the City was simply a means — the only means in their assessment — to the legitimate end of preventing the exhaustion of the assets of the TRS in the interest of all the beneficiaries.

id. at 1256.

Finally, even though it was an investment which would not have been allowed in the abstract:

Their investment context was distinguishable from the normal one in which 'speculation' implies risking the corpus of the trust estate; in the case before them purchasing speculative obligations was a *sine qua non* of preserving the corpus.

id. at 1259.

It can be seen, therefore, that *Withers* is not authority for the proposition that a trustee may make investments with considerations other than the benefit and welfare of the beneficiaries of the fund.

A second case which underscores the courts' unwillingness to allow departure from a trustee's strict duty of loyalty is *Blankenship v. Boyle*, 329 F.Supp. 1089 (D.D.C. 1971). In that case, the United Mine Workers of America Welfare and Retirement Fund was deposited in a bank which was controlled by the United Mine Workers of America. During the years at issue in the case, between \$14 million and \$75 million was kept continually in a non-interest bearing

account at the bank. This represented between 14% and 44% of the fund's total assets at any given time. The trustees attempted to justify this on the grounds that the union ultimately benefited from the increased profits of the bank which resulted from the lack of need to pay interest on the retirement fund's deposits. The trustees also attempted to justify the deposits on the grounds that the money was used to buy stock in public utilities and otherwise influence them to use union-mined coal. Therefore, it was the trustees' position that the union benefited from the deposit of trust funds in its bank. The court concluded, however, that retirees and pensioners of the fund were the beneficiaries "and were in no way assisted by these cash accumulations, while the union and the bank profited." 329 F.Supp. at 1096. Even though the beneficiaries of the fund may have been union members, the court concluded that the fiduciary duty was owed to the workers who had a vested interest in the fund and retirees who were drawing a pension from the fund, rather than to the union.

SPECIFIC STATUTES

In addition to the Prudent Man Investment Rule, various statutes control the acquisition and disposition of assets held by the state in a fiduciary capacity. Various statutes further limit the ability of an investment trustee to select certain specified types of investments. The trustee of a fund which is so limited has the duty not only to invest in assets which are specifically allowed, but further has the duty to make a prudent selection among the various potential investments. As Restatement (Second) of Trusts §227 (1979), Official Comment O, states: "Although trustees may properly invest in a particular type of security, a trustee must use care and skill and caution in selecting an investment within the type." Following is a discussion of various statutes controlling the management of the four funds concerning which specific advice has been sought.

I. STATE INSURANCE FUND

The state insurance fund was established by *Idaho Code* §72-901 to provide insurance coverage for workmen's compensation claims. Section 72-911 gives the manager of the state insurance fund the duty to create a surplus which "shall be sufficiently large to cover the catastrophe, hazard, and all other anticipated losses." In addition, "the manager shall also set up and maintain a reserve adequate to meet anticipated losses and carry all claims and policies to maturity." *ibid.* *Idaho Code* §72-912 states in relevant portion:

The endowment fund investment board shall at the direction of the manager invest any of the surplus or reserve funds belonging to the state insurance fund in real estate and *the same securities and investments authorized for investments by insurance companies in Idaho* as shall be approved by the manager. (Emphasis added).

Finally, *Idaho Code* §72-910 provides, "the state treasurer may deposit any portion of the said fund not needed for immediate use in the matter and subject to all provisions of law respecting the deposit of other state funds by him."⁴

⁴As a practical matter, the fund contains nothing but surplus and reserve which is to be invested according to *Idaho Code* §72-912 rather than the general provisions of *Idaho Code* §72-910.

Title 41, ch. 7, *Idaho Code*, provides extensive regulation of the investment of insurance company assets. It is these requirements to which *Idaho Code* §72-912 refers. *Idaho Code* §41-702 states:

Insurers shall invest in or lend their funds on the security of, and shall hold as invested assets, only cash and eligible investments as prescribed in this chapter.

Idaho Code §41-703 requires all investments (with the exception of certain real property) to be income bearing or accrue interest or dividends. Accordingly, an asset which does not produce income or interest is not appropriate for investment, even though it may have excellent prospects for appreciation and capital gain.

Further, *Idaho Code* §41-706(1) states:

An insurer shall not, . . . have at any one (1) time any combination of investments in or loans upon the security of the obligations, property, or securities of any one (1) person, institution, corporation, or municipal corporation, aggregating an amount exceeding seven per cent (7%) of the insurer's assets.

This 7% limitation does not apply to funds which are "fully insured by the Federal Deposit Insurance Corporation or to general obligations of the United States of America or of any state . . ." Subsection (2) prohibits the insurance fund from "invest[ing] in or hold[ing] at any one (1) time more than ten per cent (10%) of the outstanding voting stock of any corporation . . ." Finally, subsection (3) requires the state insurance fund to keep a minimum investment in cash, certain public obligations (as defined by *Idaho Code* §41-707) or real estate mortgages as limited by *Idaho Code* §41-721.

Other sections allow investment in public obligations (*Idaho Code* §41-707); obligations or equity of certain federal agencies (*Idaho Code* §41-708); bonds issued by irrigation districts (*Idaho Code* §41-709); obligations issued by the World Bank (*Idaho Code* §41-710); obligations of a U.S. or Canadian corporation which has not been in default for the preceding five years (*Idaho Code* §41-711); preferred or guaranteed stocks (not to exceed 15% of the insurance fund's assets — *Idaho Code* §41-713); common stocks of a United States corporation or "a substantially owned or wholly owned subsidiary corporation" of such a corporation (subject to a limit of 15% of the insurance fund's aggregate assets — *Idaho Code* §41-714); open end investment trusts organized for at least ten years, with assets of at least \$25 million (subject to a 10% limitation of the funds assets — *Idaho Code* §41-716); equipment trust obligations (subject to a 10% limitation of the fund's assets — *Idaho Code* §41-717); "time certificates or share or savings accounts of banks, savings and loan associations and credit unions" (if the funds are to be placed in a savings and loan or a credit union they must be fully insured "by either the federal savings and loan insurance corporation or the national credit union insurance fund" — *Idaho Code* §41-720). Additionally, an insurer may make collateral loans on the security of any acceptable investment according to this chapter, which loans do not exceed 90% of the value of the security. *Idaho Code* §41-719.

The insurance fund may be invested in certain interests in, or obligations secured by, real property. *Idaho Code* §41-721. Subsection (1) allows investment in "bonds or evidences of debt which are secured by first mortgages or deeds or

trust on improved, unencumbered real property located in the United States." Subsection (2), however, limits the investment in such assets to 75% of the market value of the property. Moreover, the asset cannot exceed the greater of \$10,000 or the appropriate limitation of §41-706(1) or (2) (limitations of investments to 7% of the insurer's assets or 10% of the outstanding voting stock of a corporation.) In addition, this section allows investment in other bonds or notes which are secured by first mortgages or deeds of trust guaranteed by the Federal Housing Administration or the Veteran's Administration. The insurance fund may also invest in first mortgages or deeds of trust whether insured or not, which run "for a term of not less than fifteen years beyond the maturity of the loan as made or as extended, in improved real property, otherwise unencumbered, and if the mortgagee is entitled to be subrogated to all the rights under the leasehold." *Idaho Code* §41-722 limits the amount of a mortgage loan to "75% of the fair market value and limits the term of such loan to not more than thirty (30) years . . ."

Finally, *Idaho Code* §41-735(1) provides a catch-all limitation on investment to ensure proper diversification. This section states that the insurance fund:

. . . may loan or invest its funds in an aggregate amount not exceeding the lesser of the following sums: five per cent (5%) of its assets, or fifty per cent (50%) of its surplus over its capital and other liabilities . . . in kinds of loans or investments not otherwise specifically made eligible for investment and not specifically prohibited or made ineligible by this or other provisions of this code.

Subsection (3), however, further limits investment alternatives, stating: "no one such investment or loan shall exceed the amount specified in subsection (1) of this section or one per cent (1%) of the insurer's assets, whichever is the lesser."

As is very apparent from the foregoing, the permissible range of investments for the state insurance fund is substantially regulated by title 41, ch. 7, *Idaho Code*. Although *Idaho Code* §41-735 specifically gives the manager of the fund the ability to invest in any non-specified, unprohibited assets, their acquisition is limited so that the bulk of the fund's portfolio must contain the investments allowed by the cited sections of the *Idaho Code*. As stated previously, the nature and type of investments which may be made under title 41, ch. 7 *Idaho Code*, are subject to the limitations imposed by the Prudent Man Investment Rule.

II. PENSION FUNDS

Second, you have asked for specific advice concerning the proper investment of pension funds. The primary pension fund managed by the State of Idaho is the Public Employees Retirement System (PERS). See *Idaho Code* §59-1301, et. seq. This fund has incorporated the policemen's retirement fund (*Idaho Code* §59-1305), the firemen's retirement fund (*Idaho Code* §72-1401), and the teachers' retirement fund (*Idaho Code* §59-1337). (Although certain people were "grandfathered" when these three funds were merged with PERS, so that eligibility for benefits may vary depending on the date of an individual's first coverage, the assets of the funds are managed in a single unit with PERS. Therefore, a single set of investment criteria is maintained.) The only limitation on investment provided by *Idaho Code* concerning PERS is *Idaho Code* §59-1328, which incorporates the Prudent Man Rule, stating:

The funding agent, in acquiring, investing, reinvesting, exchanging, retaining, selling and managing the monies and properties of the system, shall be governed by the Prudent Man Investment Act, *Idaho Code* sections 68-501 to 68-506, inclusive; provided, however, that the board is hereby authorized and empowered, and in its sole discretion, to limit, control and designate the types, kinds and amounts of such investments.

Accordingly, absent limiting contrary direction from the retirement board, the investment of pension funds within PERS is subject only to the Prudent Man Investment Rule.⁵

It should be underscored at this point that the Prudent Man Investment Rule requires the pension fund be invested in such a manner as not to discriminate between persons already retired and those still working who have a vested interest in the fund. See *Withers v. Teachers Retirement System of the City of New York*, 447 F.Supp. 1248 (S.D.N.Y. 1978), and *Blankenship v. Boyle*, 329 F.Supp. 1089 (D.D.C. 1971). Accordingly, the investors of the fund have a significant duty to invest wisely with an eye to security, but also to produce sufficient income to insure its continued actuarial soundness.

In addition to PERS, at least two pension funds exist within state government. The retirement plan of the Idaho Department of Employment was created under the authority of *Idaho Code* §72-1335. That fund is administered for the benefit of certain employees of the Department of Employment. Section 72-1335, however, provides no limitation on the permissible investment or management of that fund. Therefore, just as with PERS, the Prudent Man Investment Rule applies.

Finally, the Judges' Retirement Fund is created by title 1, ch. 20, *Idaho Code*. *Idaho Code* §1-2008 states that the endowment investment board:

... shall at the direction of the Supreme Court invest and reinvest monies of the judges' retirement fund in the following manner and in the following investments or securities and none other:

- (1) United States treasury bills, United States treasury notes, or other United States governmental debt instruments.
- (2) United States, state, county, city, or school district bonds or state warrants.
- (3) Bonds, notes, or other obligations of the United States or those guaranteed by the United States or for which the credit of the United States is pledged for payment of the principal and interest or dividends thereof.
- (4) Bonds, notes, or other obligations of the state of Idaho and its political subdivisions, or bonds, notes and other obligations of other states and their political subdivisions, provided such bonds, notes or other obligations or the issuing agency for other than the state of Idaho and its political subdivisions have an AAA rating or higher by a commonly known rating service.

⁵Recent case law concerning pensions predominantly concerns provisions of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. 1101, et seq., 29 U.S.C. 1101 (a) and 1103 (b) exempt governmental plans from the requirements of ERISA. As the pension plans here in question are governmental plans within the definition of 29 U.S.C. §1002 (32), the substantial departures from common law embodied in ERISA do not affect them and will not be discussed.

- (5) Bonds or notes of any corporation organized, controlled and operating within the United States which have an AAA rating or higher by a commonly known rating service.
- (6) Corporate obligations designated as corporate convertible debt securities.
- (7) Obligations secured by mortgages constituting a first lien upon real property in the state of Idaho which are fully insured or guaranteed as to the payment of the principal by the government of the United States or any agency thereof.
- (8) Common or preferred stocks of corporations.

Of course selection of particular investments allowed by this section must also meet the requirements of the Prudent Man Investment Rule. A final note of caution should be added with reference to the management of the Judges' Retirement Fund. Care should be taken that the fund is invested in a manner which will avoid possible conflicts of interest. Obviously the safety or performance of the fund ought not be dependent on securities of corporations or entities which may be expected to come before the courts with any degree of regularity.

III. ENDOWMENT FUNDS

Third, you have asked for particular guidance concerning the proper scope of investment of endowment funds. Idaho Const. art. 9, §11 states:

The permanent endowment funds other than funds arising from the disposition of university lands belonging to the state, shall be loaned on United States, state, county, city, village, or school district bonds or state warrants or on such other investments as may be permitted by law under such regulations as the legislature may provide.

The legislature has so provided by enactment of *Idaho Code* §57-722, which requires the endowment investment board to:

... invest the permanent endowment funds of the State of Idaho in the following manner and in the following investment securities and none others:

- (1) For a period of two (2) years following the effective date of this act, March 25, 1969, not more than fifty per cent (50%) of the endowment funds as now invested can be reinvested otherwise than in United States treasury bills, United States treasury notes, or other United States governmental debt instruments.
- (2) United States, state, county, city, or school district bonds or state warrants.
- (3) Bonds, notes, or other obligations of the United States or those guaranteed by, or for which the credit of, the United States is pledged for payment of the principal and interest or dividends thereof.
- (4) Bonds, notes, or other obligations of the state of Idaho and its political subdivisions, or bonds, notes, and other obligations of other states and their political subdivisions, provided such bonds, notes or other obligations or the issuing agency for other than the state of Idaho and its political subdivisions have, at the time of their purchase, an AAA rating or higher by a commonly known rating service.
- (5) Bonds, debentures or notes of any corporation organized, controlled

and operating within the United States which have, at the time of their purchase, an A rating or higher by a commonly known rating service. Nothing in this subsection shall apply to the provisions of subsection (6) immediately following.

(6) Corporate obligations designated as corporate convertible debt securities which have, at the time of their purchase, a BBB rating or higher by a commonly known rating service, so long as the right of conversion is not exercised.

(7) Obligations secured by mortgages constituting a first lien upon real property in the state of Idaho which are fully insured or guaranteed as to the payment of the principal by the government of the United States or any agency thereof.

(8) Time certificates of deposit and savings accounts.

As the statute allows the endowment funds to be placed only in the investments listed above, the only further restriction is the Prudent Man Investment Rule, previously explained.

IV. FUNDS HELD IN THE STATE TREASURY

Finally you have asked for specific information concerning the proper investment of idle funds held in the state treasury. *Idaho Code* §67-1210 provides in part:

It shall be the duty of the state treasurer to invest idle moneys in the state treasury, other than moneys in public endowment funds, in any of the following:

(a) Bonds, treasury bills, interest-bearing notes, or other obligations of the United States, or those for which the faith and credit of the United States are pledged for the payment of principal and interest.

(b) General obligation bonds of this state or those for which the faith and credit of this state are pledged for the payment of principal and interest.

(c) General obligation bonds of any county, city, metropolitan water district, municipal utility district, school district or other taxing district of this state.

(d) Notes, bonds, debentures, or other similar obligations issued by the Farm Credit System or institutions forming a part thereof under the Farm Credit Act of 1971 [U.S.C., tit. 12, sections 2001-2559] and all Acts of Congress amendatory thereof or supplementary thereto; in bonds or debentures of the Federal Home Loan Bank Board established under the Federal Home Loan Bank Act. [U.S.C., tit. 12, sections 1421-1449]; in bonds, debentures and other obligations of the Federal National Mortgage Association established under the National Housing Act [U.S.C., tit. 12, sections 1701-1750g] as amended, and in the bonds of any federal home loan bank established under said act and in other obligations of federal agencies.

(e) Repurchase agreements covered by any legal investment for the state of Idaho.

(f) Tax anticipation notes and registered warrants of the state of Idaho.

(g) Time certificates of deposit and savings accounts in state depositories.

(h) Time certificates of deposit and passbook accounts of state or federal savings and loan associations located within the geographical boundaries of the state in amounts not to exceed the insurance provided by the Federal Savings and Loan Insurance Corporation.

This statute makes it the duty of the treasurer to invest in the enumerated investments. Accordingly, it should be construed as mandatory rather than permissive. See *Goff v. HJH. Co.*, 95 Idaho 837, 521 P.2d 661 (1974), and *Hollingsworth v. Koelsch*, 76 Idaho 203, 280 P.2d 415 (1955). Therefore, the treasurer can invest idle funds only in the enumerated investments which she deems also to be prudent.

V. MISCELLANEOUS STATUTES

The final statutes which possibly may limit or direct the investment of public funds are contained in *Idaho Code* title 68, ch. 4. Each section allows "trustees and other fiduciaries" to invest in specified assets. *Idaho Code* §68-401 allows the investment in obligations insured by the Federal Housing Administration. *Idaho Code* §68-402 allows investment in "notes or bonds secured by mortgage or deed of trust insured or debentures issued, by the Federal Housing Administrator, and in securities and stocks of national mortgage associations." *Idaho Code* §68-404 allows investment in obligations "guaranteed as to interest and principal by the United States" and bonds or debentures issued pursuant to the Federal Home Loan Bank Act or the Federal Savings and Loan Insurance Corporation and shares or accounts or any association insured by the F.S.L.I.C. *Idaho Code* §68-405 authorizes purchase of "any bonds or other obligations issued by a housing authority pursuant to the housing authority's law of this state, or issued by a public housing authority or agency in the United States, and . . . "if such obligations are insured "by the United States government or any agency thereof." *Idaho Code* §68-406 allows investment in "any life, endowment, or annuity contracts issued by any legal reserve insurance company authorized to do business in the state of Idaho . . ."

The effect of these sections on the scope of permissible investment dictated by other specific statutes is not entirely clear. As a practical matter, most of the investments allowed by this chapter are also allowed by the statutes controlling the investment of the insurance fund. Similarly, they are not per se imprudent and are therefore permissible investments for PERS. Although they may appear to conflict squarely with the investment pattern required for endowment funds, idle treasury funds and the Judges' Retirement Fund, a closer analysis indicates that they probably do not. To the extent they may conflict, however, the statutes relating to the particular fund quite probably control. This conclusion is reached for three reasons.

First, it is quite possible that the statutes do not apply at all to the funds in question. It should be noted that with the exception of *Idaho Code* §68-407, each section applies specifically only to private entities. The only rationale under which a state fund arguably could be brought within its purview would be by the use of its catch-all phrase "trustees and other fiduciaries." The doctrine of *ejusdem generis* properly should be invoked, however, to limit the meaning of the phrase "trustees and other fiduciaries" to private individuals or entities. As the Idaho Supreme Court has stated:

Where general words of a statute follow an enumeration of persons or things, such general words will be construed as meaning persons or things of a like or similar class or character to those specially enumerated.

Pepple v. Headrick, 64 Idaho 132, 141, 128 P.2d 757 (1942). See 2A Sands, Sutherland Statutory Construction §§47.17, 47.18 (4th Ed. 1973).

As the sections apply specifically only to private entities, the terms "trustees and other fiduciaries" accordingly should be so limited.

Second, even if the statutes do apply, it is a general rule of statutory construction that when two statutes conflict, the specific supersedes the general. See *Herrick v. Gallet*, 35 Idaho 13, 204 P.2d 477 (1922) and 1A Sands, Sutherland Statutory Construction §23.16 (4th Ed. 1972). The provisions of title 68, ch. 4, *Idaho Code*, refer specifically only to given assets. The statutes controlling the investments of the particular funds, however, (with the exception of PERS) apply not only to specific funds, but to specific assets in which those funds may be invested. It is clear, therefore, that those statutes are the more particular and therefore control.

Third, it is well established that when two statutes are inconsistent, the latter enactment will supersede the former. See *Paullus v. Liedkie*, 92 Idaho 323, 442 P.2d 733 (1968) and *Herrick v. Gallet*, *supra*. Title 68, ch. 4, *Idaho Code*, was originally enacted in 1935 with additions in 1937, 1939, and 1947. On the other hand, title 41, ch. 7, which controls the disposition of the management of the insurance fund was first enacted in 1961; *Idaho Code* §1-2101 controlling investment of the Judges Retirement Fund was first enacted in 1965; *Idaho Code* §57-722 controlling the investment of endowment funds was first enacted in 1969; and *Idaho Code* §67-1210 controlling disposition of idle treasury funds was first enacted in 1974. Accordingly, it can be seen that each statute concerning a particular fund is later in date than the general statutes of title 68, ch. 4, *Idaho Code*. Therefore, the provisions of that chapter must be subordinated to the more specific statutes which have been enacted at a later date in time.

Finally, *Idaho Code* §68-407 states in part:

... It shall be lawful for the state of Idaho and any of its departments, institutions and agencies, municipalities, districts and political subdivisions, and for any political or public corporation in the state, and for any ... trustee or other fiduciary, to invest its funds or the monies in its custody or possession eligible for investment, in any revenue bonds or warrants or general obligation bonds or general obligation refunding bonds issued by any port district of the state of Idaho.

This, again, would first appear to conflict with the statutes controlling the investment of particular funds. Although the rule of *ejusdem generis* does not operate to exclude application of this section to the various funds, in all instances discussed above the specific statutes should supersede this general section. Also, all of the statutes which might seem to conflict with the exception of the Judges' Retirement Fund, were enacted after this section. In any event port district bonds are bonds of a taxing district and therefore specifically permissible investments for idle treasury funds. *Idaho Code* §67-1210. It is possible that a court in the future might perceive no conflict between these sections by construing port district bonds to be obligations of a political subdivision and therefore permissible investments for the Judges' Retirement Fund and the endowment fund according to *Idaho Code* §§1-2008(4) and 57-722(4), although this question cannot be answered with certainty.

AUTHORITIES CONSIDERED:

1. Idaho Const. art. 9, §11.

2. *Idaho Code* §§: 1-2008(1)-(8), 1-2101, title 41, ch. 7, 41-702, 41-703, 71-706(1) (2) (3), 41-707, 41-708, 41-709, 41-710, 41-711, 41-713, 41-714, 41-716, 41-717, 41-719, 41-720, 41-721, 41-722, 41-735(1) (3), 57-722(1)-(8), 59-1305, 59-1328, 59-1337, 67-1210, 67-1210(a)-(h), title 68, ch. 4, 68-401, 68-402, 68-404, 68-405, 68-406, 68-407, 68-501, 68-502, 68-503, 68-504, 68-505, 68-506, 72-901, 72-910, 72-911, 72-912, 72-1335, 72-1401.

3. 1949 Idaho Sess. Laws, Ch. 36, §2.

4. Idaho Cases:

Goff v. H.J.H. Co., 95 Idaho 837, 521 P.2d 661 (1974)

Paullus v. Liedkie, 92 Idaho 323, 442 P.2d 733 (1968)

Hollingsworth v. Koelsch, 76 Idaho 203, 280 P.2d 415 (1955)

Pepple v. Headrick, 64 Idaho 132, 141, 128 P.2d 757 (1942)

Herrick v. Gallet, 35 Idaho 13, 204 P.2d 477 (1922)

5. Other Cases:

Withers v. Teachers Retirement System of the City of New York, 447 F.Supp. 1248 (S.D.N.Y. 1978)

Blankenship v. Boyle, 329 F.Supp. 1089 (D.D.C. 1971)

Hartford National Bank & Trust Co. v. Donahue, 35 Conn. Super. 194, 402 A.2d 1195 (1979)

Lockwood v. OFB Corp., 305 A.2d 636 (Del. 1973)

Chase v. Pevear, _____, Mass. _____, 419 NE2d 1358, 1366 (1981)

Harvard College v. Amory, 26 Mass. (9 Pick) 446, 461 (1830)

In re Morgan Guarantee Trust Co. of New York, 89 Misc. 2d 1088, 396 NYS2d 781 (1977)

In re Bank of New York (Spitzer), 35 NY2d 512, 232 NE2d 700 (1974)

King v. Talbot, 40 N.Y. 76 (1869)

In re Mendenhall, 484 Pa. 77, 398 A.2d 951 (1979)

6. Other Authorities:

Restatement (Second) of Trusts, §§170, 174, 187, 227, & 228 (1979)

1A Sands, Sutherland Statutory Construction §23.16 (4th Ed. 1972)

2A Sands, Sutherland Statutory Construction §47.17, 47.18 (4th Ed. 1973)

3 Scott on Trusts §§ 227 p.1805 and 227.6 (3rd Ed. 1969)

J. Rizzi, *Trustee Investment Powers: Imprudent Application of the Prudent Man Rule*, 50 Notre Dame Law. 519 (1975)

H. Bines, *Modern Portfolio Theory and Investment Management Law*, 76 Colum. L. Rev. #5, 721 (1976)

Blair & Heggstad, *The Prudent Man Rule and Preservation of Trust Principal*, 1 U. Ill. L. F. 79 (1978)

Fleming, *Prudent Investments: The Varying Standards of Prudence*, 12 Real Prop. Prob. & Tr. J. 243, 248-49 (1977)

Ravikoff and Curzan, *Social Responsibility in Investment Policy and the Prudent Man Rule*, 68 Calif. L. Rev. 518 (1980)

Shattuck, *Development of the Prudent Man Rule*, 12 Ohio S.L.J. 491 (1950)

DATED this 21st day of July, 1982.

ATTORNEY GENERAL
State of Idaho
/s/ DAVID H. LEROY

DHL/KRM/bc

ANALYSIS BY:

KENNETH R. McCLURE
Deputy Attorney General

cc: Idaho State Library
Idaho Supreme Court
Idaho Supreme Court Library

ATTORNEY GENERAL OPINION NO. 82-8

TO: A. Kenneth Dunn
Director, Department of Water Resources
Statehouse Mail

Per Request for Attorney General Opinion

QUESTION PRESENTED:

May the Department of Water Resources expend moneys from the continually appropriated Water Administration Fund, established by Idaho Code §42-238a, in excess of the specific annual appropriations to the fund by the Idaho Legislature?

CONCLUSION:

The Department of Water Resources may not expend moneys from the Water Administration Fund which are in excess of the specific annual appropriation made by the legislature.

The Water Administration Fund (Fund) is continuously appropriated by *Idaho Code* §42-238a (1977), thereby making all the money in the fund at any given time available for use by the Department of Water Resources (Department), absent other limitations. Additionally, the Fund is specifically appropriated each year by the legislature. Thus, the Fund is subject to a continuous and a specific appropriation simultaneously. The specific appropriation of the Fund while it is in effect suspends the operation of the continuous appropriation, thereby limiting the Department's expenditures from the Fund to the amount of the specific appropriation.

ANALYSIS:*I. Background:*

The genesis of the Water Administration Fund can be found in the 1953 Amendments to the Idaho Ground Water Act of 1951.¹ Ground Water Act Amendment of 1953, ch. 182, §10, 1953 Idaho Sess. Laws 291. Section 10 of the 1953 Amendments created the Ground Water Administration Fund in the state treasury. This fund received its moneys from groundwater appropriation fees and well driller license fees collected by the state reclamation engineer. The legislature made an appropriation of the funds for administering the Ground Water Act.

The fund was substantially amended in the Act of Feb. 15, 1968, ch. 25, §2, 1969 Idaho Sess. Laws (2nd E.S.) 49. The fund was renamed the Water Administration Fund. The source of revenue was enlarged to include all fees and moneys

¹The Act alone does not refer to itself as the groundwater act, however, case law refers to it as such. See, *Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 580, 513 P.2d 627 (1973).

received by the department of reclamation. The purposes for which the moneys could be expended were enlarged to cover those activities prescribed in Title 42, *Idaho Code*. The appropriation remained but was clarified as an appropriation to the state reclamation engineer.

The Fund was brought to its present form by technical amendments relating to name changes in the Department of Water Resources Organization Act, ch. 20, §2, 1974 Idaho Sess. Laws 540. (presently codified in *Idaho Code* §42-238a(1977)).²

As it presently operates, certain fees and moneys received by the Department of Water Resources are deposited in the state treasury for deposit in the Fund. The moneys providing revenue to the Fund are various filing fees for permits and licenses issued by the Department and penalties received for statutory violations.³ The Fund is appropriated up to the full amount of the fund by the terms of the statute itself. *Idaho Code* §42-238a (1977). This has been the case since the Fund's inception. *See*, 1953 Idaho Sess. Laws 291. Until 1965, this appropriation was the only legislative authority for expenditures from the Fund. Commencing with the 38th Regular Session (1965), however, the legislature began to specifically appropriate moneys from the Water Administration Fund. Act of Mar. 26, 1965, ch. 206, §1, 1965 Idaho Sess. Laws 475. This practice has continued to the present. *See, e.g.*, Act of Apr. 8, 1981, ch. 365, §2, 1981 Idaho Sess. Laws 749.

Moneys from the Fund may be disbursed for the administration of the entirety of Title 42, *Idaho Code*, upon proper certification by the director of the Department.

II. *The Need For An Appropriation:*

Any analysis of the Department's authority to expend moneys from a special fund reserved for its use which is in excess of the current year's appropriation must begin with the constitutional requirement of an appropriation.

²42-238a WATER ADMINISTRATION FUND – There is hereby created in the state treasury a special fund known as the water administration fund. All fees and other moneys collected by the director of the department of water resources pursuant to sections 42-221, 42-237g, 42-238, 42-1414, 42-1713, 42-3905, 42-4003, and 42-4011, *Idaho Code* shall be deposited in the water administration fund. All moneys deposited in the water administration fund are hereby appropriated to the director for the purpose of the administration of the provisions of title 42, *Idaho Code*, and no moneys received in the fund shall be disbursed by the state treasurer unless the voucher for such disbursement contains the certificate of the director that such voucher is for an expense incurred in the administration of the provisions of title 42, *Idaho Code*.

³The specific sources of revenues are filing fees for an application for a permit, change, exchange, extension to resume use, amendment of claim to use right, extension to submit proof of beneficial use; fees for readvertising various applications and other miscellaneous recordkeeping requests, *Idaho Code* §42-221 (Supp. 1982); penalties for violations of Ground Water Act, *id.* §42-237a (1977); license and renewal fee for well drillers permit, *id.* §42-238(2) (Supp. 1982); filing fee for notice of claim, *id.* §42-1414 (1977); fees for an enlargement, alteration or repair of an existing dam or mine tailings impoundment, *id.* §42-1713 (Supp. 1982); filing fees for waste disposal and injection well permit, *id.* §42-3905 (1977), and filing fees for geothermal resource well permit or amendment thereof, *id.* §§42-4003 (1977) and 42-4001 (1977).

Idaho Const. Art. VII, §13 provides as follows:

No money shall be drawn from the treasury, but in pursuance of appropriations made by law.

An appropriation is defined in Idaho as the "(1) authority from the legislature, (2) expressly given, (3) in legal form, (4) to proper officers, (5) to pay from public moneys, (6) a specified sum, and no more, and (7) for a specified purpose, and no other." *Leonardson v. Moon*, 92 Idaho 796, 804, 451 P.2d 542 (1969). An appropriation may be a specific sum for a certain period, usually a regular period fixed by the legislature. *Jeffreys v. Huston*, 23 Idaho 372, 380, 129 P.1065 (1913). It may also be an uncertain sum payable from a special fund for use in the future and usually referred to as a continuing appropriation. *McConnel v. Gallet*, 51 Idaho 386, 390, 6 P.2d 143 (1931). The failure to have an appropriation for a particular purpose precludes the state from disbursing or expending moneys from the state treasury for that purpose. *Eppeson v. Howell*, 28 Idaho 338, 344, 154 P.621 (1916); Idaho Const. art. VII, §13.

The Idaho Supreme Court has explained the appropriation power of the legislature using very strong language. In *Davis v. Moon*, 77 Idaho 146, 151, 289 P.2d 614 (1955), the Court said:

[T]he Legislature has absolute control over the finances of the state. The power of the legislature as to the creation of indebtedness or the expenditure of state funds, or making appropriations, is plenary, except only as limited by the state constitution. [Citations omitted].

With this background, there is one threshold issue that must be addressed before the legislature's broad appropriation power arises. The appropriation power applies only to money in the state treasury. Idaho Const. art. VII, §13. The state has a variety of ways of raising or receiving money. Some of these moneys go into the state treasury and others do not. Therefore, the first inquiry is whether or not the fees and other moneys deposited in the Water Administration Fund are in the state treasury within the meaning of article VII, §13.

One category of funds clearly is not within the state treasury subject to appropriation, — i.e., special custodial funds held in trust by the state. *State v. Musgrave*, 84 Idaho 77, 84-87, 370 P.2d 778 (1962). It is also arguable that moneys received by the executive branch from a purely federal source subject to expenditure limitations to accomplish specific federal objectives are not subject to appropriation. *Opinion of the Justices to the Senate*, Mass., 378 N.E.2d 433 (1978); *The Navajo Tribe v. Arizona Dept. of Administration*, 111 Ariz. 279, 528 P.2d 623 (1975); *State v. Kirkpatrick*, 86 N.M. 359, 524 P.2d 975 (1974); *MacManus v. Love*, 179 Colo. 218, 499 P.2d 609 (1972); and *Chez v. Utah State Bldg. Commission*, 93 Utah 538, 74 P.2d 687 (1937).⁴ The Supreme Court of Idaho has not decided whether such federal source moneys are subject to appropriation. Because the moneys in the Water Administration Fund are not derived from federal sources, it is unnecessary to discuss that issue.

⁴The rationale for this holding is that legislative appropriation violates the doctrine of the separation of powers, 378 N.E.2d at 436; 86 N.M. at 370, 524 P.2d at 986 and 179 Colo. at 222, 499 P.2d at 611 (the later two cases construed language identical to Idaho Const. art. II, §1, or 2) because the funds are custodial and impressed with a trust. 378 N.E.2d at 436, 528 P.2d at 624, and 499 P.2d at 610. Idaho case law is consistent with this holding. See, note 5, *supra*, and the cases cited therein.

In *Musgrave*, the court held that moneys in the state insurance fund were not state moneys even though deposited with the state treasurer, and therefore the fund could be drawn out of the treasury without an appropriation. 84 Idaho at 84, 370 P.2d at 782.⁵ The major consideration of the court in reaching this result was that the statutory language clearly showed that the state was to act as custodian of a fund which was to benefit a purpose other than funding of general state purposes. *Id.* at 84-85 and 87, 370 P.2d at 782-84. Also, considered persuasive was the method in which the moneys were raised. In *Musgrave*, the fund was raised from premiums paid on insurance policies rather than from taxes. *Id.* at 86-87, 370 P.2d 783-84.⁶

The statutory language found persuasive by the court was that the moneys "belong[ed] to the fund" and that the fund was administered "without liability on the part of the state beyond the amount of such fund." *Id.* at 87, 370 P.2d at 784. The statute also provided that "the state treasurer shall be the *custodian* of the state insurance fund." (emphasis added by the court). *Id.*

⁵Overruling *State v. Parsons*, 57 Idaho 775, 69 P.2d 778 (1937). See also, *Bd. of County Comm's. v. Idaho Health Facilities Authority*, 96 Idaho 498, 507, 531 P.2d 588 (1974) explaining *Musgrave* and citing it with approval. The court in *Musgrave* also held that the Board of Examiners had no jurisdiction to pass on the expenditures because the money was not state money and the claims against the fund were not claims against the state. 84 Idaho at 90, 370 P.2d at 786. The cases have drawn a correlation between funds subject to appropriation and claims against the state subject to board of examiners approval.

Musgrave is important from one other aspect. Prior to the decision in *Musgrave* the law in Idaho was that trust moneys received by the state were not subject to appropriation only if they were held in trust for a coequal, constitutionally created branch of government. In *State v. State Bd. of Educ.*, 37 Idaho 415, 427 and 429, 196 P.2d 191 (1948) the court held that proceeds of federal land grants, direct federal appropriations and private donations to the University Board of Regents of the University of Idaho are trust funds and need not be appropriated before the moneys are paid out of the state treasury. See also, *Evans v. Van Duesen*, 31 Idaho 614, 620, 174 P.2d 122 (1948), and *Melgard v. Eagleson*, 31 Idaho 411, 414, 172 P.2d 655 (1948). This result is consistent either with the custodial theory or the receipt of federal funds by the executive branch theory.

State Bd. of Educ. was explained in *State v. Robinson*, 59 Idaho 485, 492, 83 P.2d 983 (1938) where the court rejected a trust fund argument and held that claims against the unemployment compensation fund must be approved by the board of examiners prior to expenditure because the fund was state moneys. The Industrial Accident Board had cited *State Bd. of Educ.* as precedent for the proposition that expenditure of trust funds held by the state are not subject to approval by the board of examiners. Regarding this point the court said "There is nothing in *State v. State Board of Education*, *supra*, which indicates the court would have decided as it did merely on the grounds the funds there involved were trust funds, and if the State Board of Education had not been a constitutional board. The Industrial Accident Board is a statutory, not a constitutional body." 59 Idaho at 488-489, 83 P.2d at 984. See also, at 59 Idaho 495, 83 P.2d at 987. Thus, after *Robinson* the law was that funds held in trust for a constitutionally created state entity were not public moneys subject to appropriation.

After *Musgrave*, the *Robinson* limitation can have no further vitality. The State Insurance Fund and the office of the State Insurance manager are statutorily created. *Idaho Code* §§72-901 (1973) and 72-902 (Supp. 1982). Therefore, custodial funds may be administered by either constitutionally created or statutorily created bodies.

Robinson was distinguished from *Musgrave* on other grounds. See note 8, *infra*.

⁶The court not wanting to be bound by earlier precedent distinguished *State v. Robinson*, *infra* note 7 on the method in which the funds were raised. 84 Idaho at 87-88, 370 P.2d at 784. The fund in *Robinson* was raised by an excise tax on employers and therefore the moneys were state moneys. 59 Idaho at 489, 83 P.2d at 984. However, the statute creating the fund also required the fund be placed in the state treasury and the legislature proceeded to continuously appropriate the fund. This is an indication of legislative intent that the fund was state moneys. The court also considered whether the function performed was of a governmental or proprietary nature. 84 Idaho at 85, 370 P.2d at 782. The weight to be attached to this consideration, however, is unclear.

Past and subsequent Idaho case law is consistent with *Musgrave*. In *Idaho Water Resource Board v. Kramer*, 97 Idaho 535, 571, 548 P.2d 35 (1976), the court held that revenues derived from water projects financed by the Idaho Water Resource Board were not state moneys and that board of examiner approval is unnecessary for expenditure.⁷ The court cited *Musgrave* as controlling precedent.

In *Re Edwards*, 45 Idaho 676, 692, 266 P.665, 671 (1928) provides an example of particular relevance of when moneys are state funds. In *Edwards* the court held that attorney license fees were public moneys subject to appropriation. *Id.* at 692, 266 P. at 671.

The court was construing the Act of February 24, 1925, ch. 90, §1, 1925 Idaho Sess. Laws 128 (current version of *Idaho Code* §3-409 (Supp. 1981) which reads as follows:

Every person practicing . . . law . . . shall . . . pay into the State Treasury as a license fee the sum of five dollars, and the sums so paid, . . . shall constitute, and be held by the State Treasurer as a separate fund. . . All moneys . . . [coming] into said fund are hereby appropriated for the purpose of carrying out the objects of this Act, . . .

In response to the contention that the moneys received remained private the court said:

[L]icense moneys are the only moneys that are exacted to carry out the purposes of the act. Those moneys are paid into the state treasury, and when paid are no longer private funds, but become public funds subject to appropriation in the usual way.

45 Idaho at 692, 266 P. at 671.⁸

Application of the above discussed principles shows that the Water Administration Fund is not a trust fund. *Idaho Code* §42-238a (1977) declares that the Fund is created in the state treasury and that it is in fact appropriated. There is nothing at all to indicate that the state is to hold the fund as custodian.

⁷This decision suggests that the analysis in *Nelson v. Marshall*, 94 Idaho 726, 733, 497 P.2d 47 (1972) was far too hurried. In *Nelson*, the court held that the continuing appropriation of the Idaho Water Resource Board revolving account was sufficient to appropriate the fund under Idaho Const. art. III, §13. The court did not discuss the need for an appropriation though perhaps it should have. However, the case is not inconsistent with *Kramer*. *Nelson* illustrates that the method of raising funds is not a *sine quo non* for determining if the money is state money. In *Nelson* the legislature created the fund in the state treasury, defined the sources of revenue for the fund to be various revenues and fees from water projects, and continuously appropriated the moneys in the fund. See *Idaho Code* §§ 42-1752 and 42-1753 (1977). This evidenced sufficient legislative intent to treat the money as state money. In *Kramer* no such expressions of legislative intent regarding the status of the revenue received was manifested. The court could then determine that revenue raised in this manner, not being a tax, must be trust funds and not state moneys.

⁸See also, *Jackson v. Gallet*, 39 Idaho 382, 390, 228 P.1068 (1924), where the court states that license fees are major sources of revenue to the State.

Another notable decision is *Dahl v. Wright*, 65 Idaho 130, 139 P.2d 754 (1943) holding that the Dairy Inspection Account had been continuously appropriated. The court did not discuss the need for appropriation. However, a review of the statute creating the account shows the account was funded by fees charged dairy processors for inspections by the state and the moneys were to be placed in the general fund.

The various fees and penalties⁹ deposited in the Fund are conventional ways of raising state revenues. Moreover, the functions performed by the Department in expending the Fund moneys are typical governmental functions. The functions are inspections, reviews of permits, approval procedures, and general regulatory activities. The Fund consists of non-custodial state moneys subject to appropriation under the rule announced in *In Re Edwards* and Idaho Const. art. VII, §13.¹⁰

Therefore, the Department cannot expend money from the Fund without a valid appropriation authorizing the expenditure.

III. *Continuous Appropriations:*

There can be no doubt that a continuous appropriation of uncertain amounts from a special fund is constitutional. *Nelson v. Marshall*, 94 Idaho 726, 732-33, 497 P.2d 47 (1972); *McConnel v. Gallet*, 51 Idaho 386, 390, 6 P.2d 143 (1931); *Evans v. Huston*, 27 Idaho 559, 564, 150 P.14 (1915); and *Jeffreys v. Huston*, 23 Idaho 372, 379-80, 129 P.1065 (1913). Once the legislature has made a continuous appropriation of a special fund the affect is to appropriate all the moneys that at any time may be in the fund. *Dahl v. Wright*, 65 Idaho 130, 135, 139 P.2d 754 (1943); *McConnel*, 51 Idaho at 390, 6 P.2d at 144.

Whether or not a continuous appropriation has been made is controlled by legislative intent when creating the fund. *Dahl*, 65 Idaho at 135, 139 P.2d at 756. There is no magic language necessary to create a continuous appropriation. Statutes employing the words "continuously appropriate" obviously are sufficient. *Nelson*, 94 Idaho at 732, 497 P.2d at 53; *Jeffreys*, 23 Idaho at 375, 129 P. at 1066. "Perpetually appropriate" is satisfactory. *Evans*, 27 Idaho at 563, 150 P. at 15. An appropriation of "all moneys [in the fund] at any time." *McConnel*, 51 Idaho at 390, 6 P.2d at 144, and "five percent of the . . . fund," is adequate. *Leonardson*, 92 Idaho at 802-04, 451 P.2d at 548-50. Indeed, the court has found a continuous appropriation when the words "continuous" or "appropriation" were nowhere to be found in the statute creating the fund. *Musgrave*, 84 Idaho at 84, 370 P.2d at 782, and *Dahl*, 65 Idaho at 132-35, 139 P.2d at 755-56. This line of cases indicates the court's willingness to find a continuing appropriation if a special fund has been appropriated at all.

The appropriation of the Water Administration Fund is as follows:

[A]ll moneys deposited in the water administration fund are hereby appropriated to the director for the purpose of the administration of the provisions of Title 42, *Idaho Code*, . . .

Idaho Code §42-238a (1977).

⁹See note 5 *supra*.

¹⁰This conclusion is supported by *Idaho Code* §57-804(2) (Supp. 1982) which consolidates the Water Administration Fund into the state operating fund. The state operating fund is "used to account for moneys which are not necessarily restricted in use or purpose, and which are generally utilized to finance the ordinary functions of state government." *Id.* §57-803(1)(a) (Supp. 1982). This is an indication of legislative intent that the Water Administration Fund be subject to appropriation.

This language is sufficiently similar to fall under the holding of *McConnel*. Therefore, the Water Administration Fund has been continuously appropriated. Absent other limitations, the full sum of moneys at any given time in the Fund is available to the Department.

IV. *Expenditures from a Continuously Appropriated Fund Beyond the Amount Specifically Appropriated:*

Since 1965, the legislature has in its general appropriation bills specifically appropriated a definite amount from the Water Administration Fund.¹¹ This presents a question of whether or not a continuous appropriation and a specific appropriation covering the same fund can exist simultaneously. If so, the Department could make expenditures from the Fund based on the specific annual appropriation. Once that appropriation is exhausted it could proceed under the continuous appropriation.¹² The requirements of article VII, §13 would be met because an appropriation exists. Moreover, the prohibition against expenditure beyond the appropriation, *Idaho Code* §67-3516 (1980), would not be a problem because the continuous appropriation makes the full amount of the fund available. The answer to this question is found in the principles of statutory construction concerning statutes addressing the same object.

A continuing appropriation created by statute may be repealed, amended, or its operation suspended by subsequent legislation. *Evans*, 27 Idaho at 563, 150 P. at 15; *Jeffreys*, 23 Idaho at 379, 129 P. at 1067. Absent clear evidence of intent to repeal, the general rule, however, is that a continuous appropriation is suspended and becomes inoperative during the term of a subsequent specific appropriation. *Falk v. Houston*, 25 Idaho 26, 31, 135 P.745 (1913); 23 Idaho at 378, 129 P. at 1067.¹³ The subsequent specific appropriation marks the limit of expenditure of the fund by the agency. *State v. Taylor*, 58 Idaho 656, 667, 78 P.2d 125 (1938). The rationale for these decisions, notwithstanding two conflicting statutes on the same subject, is that the law strongly disfavors repealer by implication. *State v. Roderick*, 85 Idaho 80, 84, 375 P.2d 1005 (1962); *Storseth v. State*, 72 Idaho 49, 51, 236 P.2d 1004 (1951); *Jeffreys*, 23 Idaho at 378, 129 P. at 1067. Moreover, the subsequent appropriation controls because it is more minute and particularized. *Taylor*, 58 Idaho at 667, 78 P.2d at 130. The continuing appropriation is revived, however, for any period when superseding appropriations are not in effect. 23 Idaho at 380, 129 P. at 1068.

Applying these principles to the continuous appropriation of the Water Administration Fund, it can be repealed, amended or suspended because it is

¹¹ See p. 3 *supra*.

¹² This assumes the proper allotments have been made. Appropriated funds are available for expenditure only as they are allotted. *Idaho Code* §§67-3520 (Supp. 1982) and 67-3695 (1980). An allotment may be increased in emergencies if approved by the Board of Examiners. *Id.* §67-3522 (1980). But there must be an appropriation upon which to base the allotment. *Id.*

¹³ Suspension is not always the result. Two Idaho cases have found that a continuing appropriation and a general appropriation can coexist simultaneously. In *Evans v. Van Duesen*, note 5, *supra*, the general appropriation carefully avoided appropriating the fund. Therefore, there was no conflict at all to reconcile. In *Evans v. Huston*, page 9 *supra*, the legislature tailored the appropriations bill by considering the full amount necessary to operate the Albion Middle School and then reducing the amount by the amount expected to be in a fund subject to continuing appropriation. The facts presented by this opinion do not raise this issue.

statutorily created. The specific appropriations of the Fund moneys since 1965 do not evidence an intent to repeal or amend *Idaho Code* §42-238a (1977). Therefore, the policy against implied repeal controls and the operation of the continuous appropriation of the Fund is suspended. The Department is limited to the stated specific amount in the appropriation for each fiscal year. See *Taylor*, 58 Idaho 656, 78 P.2d 125. The continuous appropriation of the Fund, however, remains in existence and subject to revival.

Accordingly, the Department may not expend moneys from the Water Administration Fund for administration of Title 42, *Idaho Code*, which are in excess of the specific annual appropriations of the Fund made by the legislature.

AUTHORITIES CONSIDERED:

1. *Baker v. Ore-Idaho Foods, Inc.*, 95 Idaho 575, 513 P.2d 627 (1973).
2. *Board of County Commissioners v. Idaho Health Facilities Authority*, 96 Idaho 498, 531 P.2d 588 (1974).
3. *Chez v. Utah State Bldg. Commission*, 93 Utah 538, 74 P.2d 687 (1937).
4. *Dahl v. Wright*, 65 Idaho 130, 139 P.2d 754 (1943).
5. *Davis v. Moon*, 77 Idaho 146, 289 P.2d 614 (1955).
6. *Eppeson v. Howell*, 28 Idaho 338, 154 P.621 (1916).
7. *Evans v. Huston*, 27 Idaho 559, 150 P.14 (1915).
8. *Evans v. Van Duesen*, 31 Idaho 614, 174 P.122 (1918).
9. *Falk v. Houston*, 25 Idaho 26, 135 P.745 (1913).
10. *Idaho Water Resource Board v. Kramer*, 97 Idaho 535, 548 P.2d 35 (1976).
11. *In Re Edwards*, 45 Idaho 676, 266 P.2d 665 (1928).
12. *Jackson v. Gallet*, 39 Idaho 382, 228 P.1068 (1924).
13. *Jeffreys v. Huston*, 23 Idaho 372, 129 P.1065 (1913).
14. *Leonardson v. Moon*, 92 Idaho 796, 451 P.2d 542 (1969).
15. *MacManus v. Love*, 179 Colo. 218, 499 P.2d 609 (1972).
16. *McConnel v. Gallett*, 51 Idaho 386, 6 P.2d 143 (1931).
17. *Melgard v. Eagleson*, 31 Idaho 411, 172 P.655 (1918).
18. *Navajo Tribe, The v. Arizona Dept. of Administration*, 111 Ariz. 279, 528 P.2d 623 (1975).
19. *Nelson v. Marshall*, 94 Idaho 726, 497 P.2d 47 (1972).

20. *State v. Kirkpatrick*, 86 N.M. 359, 524 P.2d 975 (1974).
21. *State v. Musgrave*, 84 Idaho 77, 370 P.2d 778 (1962).
22. *State v. Parsons*, 57 Idaho 775, 69 P.2d 778 (1937).
23. *State v. Robinson*, 59 Idaho 485, 83 P.2d 983 (1938).
24. *State v. Roderick*, 85 Idaho 80, 375 P.2d 1005 (1962).
25. *State v. State Board of Education*, 37 Idaho 415, 196 P.201 (1921).
26. *State v. Taylor*, 58 Idaho 656, 78 P.2d 125 (1938).
27. *Storseth v. State*, 72 Idaho 49, 236 P.2d 1004 (1951).
28. *Idaho Code* §3-409 (Supp. 1982).
29. *Idaho Code* §42-221 (Supp. 1982).
30. *Idaho Code* §42-237a (1977).
31. *Idaho Code* §42-238(2) (Supp. 1982).
32. *Idaho Code* §42-238a (1977).
33. *Idaho Code* §42-1414 (1977).
34. *Idaho Code* §42-1713 (Supp. 1982).
35. *Idaho Code* §42-1752 (1977).
36. *Idaho Code* §42-1753 (1977).
37. *Idaho Code* §42-3905 (1977).
38. *Idaho Code* §42-4001 (1977).
39. *Idaho Code* §42-4003 (1977).
40. *Idaho Code* §57-803(1)(a) (Supp. 1982).
41. *Idaho Code* §57-804(2) (Supp. 1982).
42. *Idaho Code* §67-3516 (1980).
43. *Idaho Code* §67-3520 (Supp. 1981).
44. *Idaho Code* §67-3522 (1980).
45. *Idaho Code* §67-3605 (1980).
46. *Idaho Code* §72-901 (1973).

47. *Idaho Code* §72-902 (Supp. 1982).
48. Idaho Const. art. II, §1.
49. Idaho Const. art. VII, §13.
50. Act of Apr. 8, 1981, ch. 365, §2, 1981 Idaho Sess. Laws 749.
51. Department of Water Resources Organization Act, ch. 20, §2, 1974 Idaho Sess. Laws 540.
52. Act of Feb. 15, 1968, ch. 25, §2, 1969 Idaho Sess. Laws (2nd E.S.) 49.
53. Act of Mar. 26, 1965, ch. 206, §1, 1965 Idaho Sess. Laws 475.
54. Ground Water Act Amendments of 1953, ch. 182, §10, 1953 Idaho Sess. Laws 291.
55. Act of Feb. 24, 1925, ch. 90, §1, 1925 Idaho Sess. Laws 128.
56. Opinion of the Justices to the Senate, Mass., 378 N.E.2d 433 (1978).

DATED this 23rd day of July, 1982.

ATTORNEY GENERAL
State of Idaho
/s/ DAVID H. LEROY

DAF/jh

ANALYSIS BY:

DARCY ALAN FROWNFELTER
Deputy Attorney General

cc: Idaho Supreme Court
Idaho Supreme Court Law Library
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ATTORNEY GENERAL OPINION NO. 82-9

TO: Samuel Kaufman, Chairman
Commission for Pardons & Parole
P. O. Box 2773
Boise, Idaho 83701

Per Request for Attorney General Opinion

QUESTION PRESENTED:

When does a prisoner who has received a "fixed life" sentence under the fixed term sentencing statute, become eligible for parole?

CONCLUSION:

A prisoner serving a fixed life sentence does not become eligible for parole at any time while serving his sentence. The Idaho State Legislature has limited the Idaho Commission for Pardons and Parole (hereinafter Parole Commission) from granting paroles to any prisoner serving a fixed term sentence.

ANALYSIS:

The issue, in this opinion, concerns itself with the constitutionality and applicability of the fixed term sentencing statute, *Idaho Code* §19-2513A, and the parole eligibility statute, *Idaho Code* §20-223. Also called into question is the statutory construction of I.C. §19-2513A and its relationship to the parole eligibility statute, I.C. §20-223.

The fixed term sentencing statute, I.C. §19-2513A, has been held to be constitutional by the Idaho Supreme Court. *State v. Avery*, 100 Idaho 409, 599 P.2d 300 (1979) and *State v. Rawson*, 100 Idaho 308, 597 P.2d 31 (1979). *State v. Rawson* discussed the constitutionality of §19-2513A. However, in a concurring opinion, Justices Bakes and Donaldson thought the discussion of the constitutionality of §19-2513A in relationship to the constitutional authority of the Board of Correction, Art. II, §1 and implicitly Art. X, §5 of the Idaho Constitution, was just dicta. Fortunately, in the case of *State v. Avery*, the issue of the constitutionality of §19-2513A was presented directly to the Court. The Court decided that issue had been decided in *State v. Rawson* and affirmed the granting of an eight-year fixed term.

In *Rawson*, the Court first examined whether §19-2513A prohibited the Parole Commission from granting pardons or commutations to offenders sentenced to a fixed term. The Court found that Art. IV, §7 of the Idaho Constitution provided that the Commission for Pardons and Parole "... shall have the power to remit fines and forfeitures, and to grant commutations and pardons after conviction and judgment. . ." Thus, there has been no constitutional grant of the power to parole inmates to the Parole Commission. See *Standlee v. State*, 96 Idaho 849, 538 P.2d 778 (1975). The Idaho Supreme Court construed §19-2513A as continuing to allow the Parole Commission to grant pardons and commutations.

The Court, in interpreting §19-2513A, presumed that legislative acts are constitutional and the state legislature has acted within its constitutional powers. *Worthen v. State*, 96 Idaho 175, 525 P.2d 957 (1974). Doubts concerning the interpretation of statutes are to be resolved in favor of that which will render them constitutional. *State v. Wymore*, 98 Idaho 197, 560 P.2d 868 (1977). The powers of pardon and commutation are separate and distinct from the power to grant parole. Neither Art. IV, §7 nor any other provision of the Idaho Constitution grants the parole power. The power to parole is statutorily based. Section 19-2513A is intended solely to limit the power of parole and does not restrict either the power of pardon or commutation. The Court reasoned that if offenders were entitled to receive a pardon, commutation or parole regardless of whether the sentence was to an indeterminate or fixed term, §19-2513A would be a meaningless statute. The Court adhered to the general rule of statutory construction that a statutory provision will not be deprived of its potency if a reasonable alternative construction is possible. *Maguire v. Yanke*, 99 Idaho 829, 590 P.2d 85 (1978).

The Court also reasoned that the clear language of the statute indicated the legislature's intention to preclude an offender from obtaining parole when sentenced to a fixed term. Section 19-2513A provided that "... the Court, in its discretion, may sentence the offender to the custody of the State Board of Correction for a fixed period of time. ..." The Court found that the use of the word "custody" in light of the obvious legislative intent to create an alternative to indeterminate sentencing led to the conclusion that the legislature intended that an offender sentenced to a fixed term be held in confinement or imprisonment by the State Board of Correction for the duration of the fixed term sentence.

Buttressing this conclusion is the definition of the word "fix." The word fix means to determine, to assign precisely, to make definite and settled. *Woodcock v. Dick*, 36 Cal. 3rd 146, 222 P.2d 667 (1950). Additionally, fixed term sentencing is also called determinate sentencing. The word determinate, as used in the Good Time Law covering prisoners confined for a determinate term, specifies a definite number of years fixed by the court. *Hinkle v. Dowd*, 223 Ind. 91, 58 N.E. 2d 342 (1944). In contrast with an indeterminate sentence, a "determinate sentence" is one without stated minimum or maximum terms which results in a definite, actual term of imprisonment. *People v. Dye*, 45 Ill. App. 3rd 465, 359 N.E. 2d 1187 (1977).

In *Rawson* the appellant had also argued that §19-2513A unconstitutionally infringed upon the powers of the State Board of Correction. The Court found that Art. X, §5 of the Idaho Constitution did not give unfettered control, direction and management of the penitentiaries or adult probation and parole to the Board of Correction. The Board of Correction was simply charged with the power to implement laws enacted by the legislature regarding those functions.

Idaho Code §20-223 provides the circumstances under which parole may be granted, and it has been held to be constitutional by the Idaho Supreme Court. In *Standlee v. State*, 96 Idaho 849, 538 P.2d 778 (1975) the Court found that §20-223 did not violate the separation of powers provision of the Idaho Constitution on the grounds that Art. IV, §7 granted only the Board of Correction the power of determining parole. Art. IV, §7 of the Idaho Constitution was again found not to apply to the parole function but only to the functions of pardons and commutations. *Standlee* also addressed the issue of whether Art. X, §5 precluded the legislature from enacting legislation restricting the Board of Correction's power of parole. The Court held that the provisions of §20-223 which required certain

offenders to serve the lesser of one third or five years of their sentence prior to being eligible for parole was not in conflict with Art. X, §5 of the Idaho Constitution. Such a limitation on the parole function was within the authority of the legislature to prescribe the powers and duties of the State Board of Correction.

Idaho Code §20-223 applies only to the indeterminate sentencing statute *Idaho Code* §19-2513 and not to fixed term sentences. As is stated above, the power to parole offenders is limited by statute. The arguments stated above also apply to the question of whether someone given a fixed life sentence would ever be eligible for parole. Based on the decisions in *State v. Rawson* and *State v. Avery*, fixed life would be just that, an offender would have to spend the rest of his life in prison as there is no good time law applicable to life sentences. Further evidence that the legislature intended the law to operate this way is shown by the fact that the fixed term sentencing law was enacted after the indeterminate sentencing law. Furthermore, when the parole eligibility statute was amended in 1980, no mention of the fixed sentencing law was made. Also, the fixed sentencing law was not mentioned in *Idaho Code* §20-223 when amended in 1981 to include the provision that indeterminate sentences for 30 years or more are to be considered the same as life sentences for purposes of parole eligibility. That provision makes offenders serve ten years for a life sentence for murder before consideration for parole. Other offenders convicted of crimes listed in the statute may receive five years of the sentence.

Prior to the enactment of the fixed sentencing statute, the Supreme Court had held that for purposes of parole, indeterminate sentences of 30 years or more were to be considered as life sentences. The offender would then have to serve ten years of the sentence in order to become eligible for parole. See, *Pulver v. State*, 93 Idaho 687, 691 n.5, 471 P.2d 74 (1970) (75-year indeterminate sentence), *State v. Butler*, 93 Idaho 492, 464 P.2d 931 (1970) (75-year sentence held controlled by *King v. State*) and *King v. State*, 93 Idaho 87, 93 456 P.2d 254 (1969) (60-year indeterminate sentence).

AUTHORITIES CONSIDERED:

1. Id. Const. arts. II, §1; IV, §7; X, §5.
2. *Idaho Code* §§19-2513A, 20-223.
3. *State v. Avery*, 100 Idaho 409, 599 P.2d 300 (1979).
4. *State v. Rawson*, 100 Idaho 308, 597 P.2d 31 (1979).
5. *Standlee v. State*, 96 Idaho 849, 538 P.2d 778 (1975).
6. *Worthen v. State*, 96 Idaho 175, 525 P.2d 957 (1974).
7. *State v. Wymore*, 98 Idaho 197, 560 P.2d 868 (1977).
8. *Maguire v. Yanke*, 99 Idaho 829, 590 P.2d 85 (1978).
9. *Woodcock v. Dick*, 36 Cal. 3rd 146, 222 P.2d 667 (1950).
10. *Hinkle v. Dowd*, 223 Ind. 91, 58 N.E. 2d 342 (1944).

11. *People v. Dye*, 45 Ill. App. 3rd 465, 359 N.E. 2d 1187 (1977).
12. *Pulver v. State*, 93 Idaho 687, 691 n.5, 471 P.2d 74 (1970).
13. *State v. Butler*, 93 Idaho 492, 464 P.2d 931 (1970).
14. *King v. State*, 93 Idaho 87, 93 456 P.2d 254 (1969).

DATED this 4th day of September, 1982.

ATTORNEY GENERAL
State of Idaho
/s/ DAVID H. LEROY

DHL:RRG/js

ANALYSIS BY:

ROBERT R. GATES
Deputy Attorney General
State of Idaho

cc: Idaho State Library
Idaho Supreme Court
Idaho Supreme Court Library

ATTORNEY GENERAL OPINION NO. 82-10

TO: Mr. Gordon Trombley
Director
Department of Lands
Statehouse Mail

Per Request for Attorney General's Opinion

QUESTION PRESENTED:

May the Land Board make a direct sale of trust lands to a state agency without public notice and public auction?

CONCLUSION:

The Idaho Supreme Court has never addressed this issue. Analysis of United States Supreme Court opinions, opinions from other jurisdictions, and opinions in Idaho on related issues leads to conflicting conclusions. The Idaho Supreme Court could reasonably adopt an analysis that would permit direct sales to state agencies. We thus conclude that it would be reasonable for the land board, in its discretion, to sell directly to state agencies without public notice and public auction.

Factual Framework

Upon admission to the United States, Idaho was granted Sections 16 and 36, or their equivalent, for the support of the public schools. 26 Stat. L. 215, ch. 656,

§4. The admission bill further provided in §5 that "all lands herein granted for educational purposes shall be disposed of only at public sale. . ."

Art. 9, §8 of the Idaho Constitution states that the general grants of land made by congress are "subject to disposal *at public auction* for the use and benefit of the respective object for which said grants of land were made. . ."

In selling or leasing lands to private individuals, the state land board, through the Department of Lands, will first obtain an appraised value of the lands. The sale of the lands will then be advertised. If the appraised price is not bid, the lands will be withdrawn from sale. While there are times that the lands will sell for exactly the appraised value and times when the appraised value will not be bid, very often a bid higher than the appraised value will be received. There appears to be no accurate way to predict when this will occur or what defects, if any, in the appraisal caused it to be under the amount bid.

At least from the early 1900's, the state has granted easements directly to both state agencies and private parties without requiring a public auction. At least since 1973, the state land board has followed an administrative practice of making direct sales of state land to state agencies. In 1979, the legislature amended *Idaho Code* §58-138 to allow the land board to exchange state lands with state agencies or private individuals.

The main question should be broken down into two subsidiary questions: (1) can the state land board make direct sales of trust lands to state agencies consistent with the Idaho Admissions Bill; (2) can the state land board make direct sales of trust lands directly to state agencies consistent with art. 9, §8 of the Idaho Constitution?

The Idaho Admission Bill

The Idaho Admission Bill, in its public auction requirements, is similar to the bills admitting other western states to the Union. In *Lassen v. Arizona*, 385 U.S. 458, 17 L. Ed. 2d 515, 87 S. Ct. 584 (1967), the Court considered whether under Arizona's Admission Bill a similar public auction clause applied to Arizona when it granted easements across state land to its highway department. The Court held that it did not apply as long as the trust fund received the full appraised value for the easement. The court reasoned that:

The method of transfer and the transferee were material only so far as necessary to assure that the trust sought and obtained appropriate compensation.

385 U.S. at 463. The Court felt that these protections had been considered necessary by the draftsmen of the act only in the case of sale to private parties and that such restrictions were not necessary in dealing with state agencies:

We see no need to read the act to impose these restrictions on transfers in which the abuses they were intended to prevent are not likely to occur, and in which the trust may in another and more effective fashion be assured full compensation.

385 U.S. at 464.

The Court also reasoned that to require the state to follow the public sale provisions would be sanctioning an empty formality because the state agency could condemn any land which it had failed to purchase at an auction. The anticipation of condemnation could leave the auction without any real significance. The Court also concluded that there would not often be others to bid for the rights-of-way in question.

Lassen dealt only with the direct sale of easements to state agencies. The question before us is whether a direct sale of fee simple title to state agencies would be permissible under the rationale in *Lassen*. That precise issue was before the Arizona Supreme Court in three companion cases, *Gladden Farms, Inc. v. State*, 633 P.2d 325 (Ariz. 1981); *Arizona State Land Department v. Supreme Court, Inc.*, 633 P.2d 330 (Ariz. 1981); *City of Sierra Vista v. Babbitt*, 633 P.2d 333 (Ariz. 1981). The court held that school trust lands could not be sold without public auction to a state agency:

We do not read the United States Supreme Court decision [*Lassen*] that broadly. The United States Supreme Court held that for highway purposes, the state could obtain an easement or right-of-way without auction and sale. That is as far as the court went and no further. No cases have been cited to us and we have found none which hold that, as to the transfer of an interest in fee, the requirement of advertisement, auction and sale to the "highest and best bidder" is waived when the sale is to a state agency.

As noted above, one of the purposes of the specific language in the Enabling Act was to assure that the trust lands generated the appropriate if not maximum revenue for the support of the common schools. The fact that the sale is to another state agency does not necessarily provide the protection to the trust lands that Congress intended. For example, an appraisal could be fairly made and the price received for public sale might still be higher than the appraised value.

Gladden Farms, Inc. v. State, *supra*, at 328.

With all due respect to the Arizona court, however, we must respectfully conclude that another court could disagree with its decision. Virtually all of the reasons that the United States Supreme Court gave for interpreting the federal statute involved to allow direct sales of easements arguably apply to allowing direct sales of fee simple title. The transfer is still to another state agency so that the trust will not be exploited for private advantage. The trust will receive the appraised value of the land and thus "full fair compensation." Sale of the lands desired by a state agency to a private party could be circumvented or inhibited by the state agency's condemnation of the lands. In fact, Arizona tried to argue to the Court in *Lassen* that it did not have to compensate the trust for highway easements because it was disposing of less than fee simple title. The Court concluded that compensation was necessary regardless of the interest conveyed. *Lassen v. Arizona*, *supra*, at 519, fn. 6.

Nor did the Arizona Supreme Court undertake any analysis as to the difference between an easement and fee simple title as interests in real property. Fee simple title, of course, is the fullest property interest known to the law. An easement is defined as:

An easement is an interest in land in the possession of another which
(a) entitles the owner of such interest to a limited use or enjoyment of

- the land in which the interest exists;
- (b) entitles him to protection as against third persons from interference in such use or enjoyment;
- (c) is not subject to the will of the possessor of the land;
- (d) is not a normal incident of the possession of any land possessed by the owner of the interest, and
- (e) is capable of creation by conveyance.

Restatement of Property §450 (1944).

While it is beyond the scope of this analysis to go into a detailed exposition of the various features of easements, it should be noted that, under appropriate circumstances, they may last forever, be sold, and entitle the possessor to exclusive possession. See R. Powell, *Real Property*, §422 (P. Rohan rev. ed. 1981); Restatement of Property, §489, §510. As Justice Ailshie stated in *Idaho Fruit Land Co. v. Great Western Beet Sugar Co.*, 18 Idaho 1, 108 P. 989 (1910):

We are not unmindful of the distinction, as a legal proposition, that should and must be recognized and maintained between the absolute title and ownership of property itself and those contractual rights which arose out of mutual consent and give a contracting party certain privileges, easements or servitudes in and to the property of another, and which by their very nature impress themselves upon the property, either for a time or perpetually. In some cases, and this may be one of such cases, the practical and working effect may be and amount to the same whether the right be one or the other as above indicated.

18 Idaho at 9. Thus, sale of an easement can be a significant disposition of state property.

We have not been able to discover any relevant legislative history surrounding the passage of the Idaho Admission Bill and would therefore conclude that the rationale of the Supreme Court's decision in *Lassen* could also apply to any interpretation the Court would make to the Idaho Admission Bill. We therefore conclude that a court would have reasonable authority to hold that there would be no federal prohibition against direct sale of fee simple title to a state agency.

The Idaho Constitution

A review of the records of the Idaho constitutional convention has yielded nothing to assist in the interpretation of the language of art. 9, §8. While there was some discussion that sale of state lands had to be by public auction, no discussion has been discovered about whether such a requirement would apply to the agencies of the state. In all likelihood, the drafters did not consider the question, given the small size of state government at that time.

Nor have any Idaho court decisions been discovered which deal with direct sales to state agencies. The following decisions all have some relevance to the matter at hand, however.

The Condemnation Cases

In *Hollister v. State*, 9 Idaho 8, 71 P. 541 (1903), the court held that a private party could condemn trust lands for purposes of generation of electric power and

irrigation. The court reasoned that any other result would severely inhibit development of the state:

When Idaho became a state, it at once necessarily assumed the power of eminent domain, one of the inalienable rights of sovereignty; and that right, we take it, may be exercised over all property within its jurisdiction. . . (citations omitted). But even if Congress had the authority in granting these lands to the state, to restrict and prohibit the state in the exercise of the power of eminent domain, we do not think it was intended or attempted in the admission act. It was evidently the purpose of Congress in granting sections 16 and 36 in each township to the state for school purposes to provide that the revenue and income from all such lands should go to the school fund, and that when sold it should be at the highest market price. We cannot believe that Congress meant to admit into the Union a new state, and by that very act throttle the purposes and objects of statehood by placing a prohibition on its internal improvements. To prohibit the state the right of eminent domain over all the school lands granted would lock the wheels of progress, drive capital from our borders, and in many instances necessitate settlers who have taken homes in the arid portions of the state seeking livelihood elsewhere.

9 Idaho at 15.

In *Tobey v. Bridgewood*, 22 Idaho 566, 127 P. 172 (1912), the court held that the land board could not sell land to an individual for a reservoir site unless the public auction requirements of art. 9, §8 were satisfied.¹ In *Idaho-Iowa, etc. Co., Ltd. v. Fisher*, 27 Idaho 695, 151 P. 998 (1915), the Court overruled *Tobey v. Bridgewood* and explained *Hollister v. State*, *supra*. In *Idaho-Iowa*, the court held that a private party could obtain lands for a reservoir site *without paying any compensation* by construing art. 9, §8 so as not to apply to the granting of an easement:

By holding that said provisions of sec. 8 are applicable when the state parts with the fee and not where it grants an easement, the sections of the constitution in regard to the sale of school lands and of eminent domain can be made effective and harmonious, and the material development of the state not hampered or retarded in the reclamation of the land belonging to the state as well as other desert land within the state.

27 Idaho 705. The court did not discuss the differences between an easement and fee simple title, but it did acknowledge that use of the lands for reservoir sites could be perpetual. *Idaho-Iowa, supra* at 709. A dissenting opinion argued that granting of an easement was a disposal and therefore had to be at public auction.

The Exchange Cases

In *Rogers v. Hawley*, 19 Idaho 751, 115 P. 687 (1911), the court held that the land board had the authority to relinquish to the federal government unsur-

¹Review of the decision leaves some doubt as to what the exact holding of the Court was since it seems to make reference to condemnation as being permissible. See *Tobey v. Bridgewood, supra*, at 581, 585. In any event, the Court in *Idaho-Iowa, etc. Co., Ltd.*, *infra*, construed *Tobey v. Bridgewood*, as requiring sale at public auction.

veyed school sections in exchange for surveyed lands equal in value. Such an exchange was not a “disposal” of the land within the provisions of art. 9, §8 and thus a public auction was not necessary. However, in *Newton v. State Board of Land Commissioners*, 37 Idaho 58, 219 P. 1053 (1923), the court held that the exchange of surveyed school lands was improper under art. 9, §8 even though such exchanges were permissible under federal statutes. The court did not overrule *Rogers v. Hawley*, *supra*, but it instead attempted to distinguish it on the ground that it involved unsurveyed lands. The Idaho Constitution was then amended in 1935 to permit exchanges with the federal government. The exchange cases seem relevant because in a land exchange the land board has to rely on two appraisals as accurate — that of the land to be given up and that of the land to be acquired in return.

The condemnation cases appear to be consistent with a rationale that would permit direct sales to state agencies. The Court seemed to be struggling in these cases to allow the state flexibility in its handling of trust lands so as not to inhibit desired land uses within the state while at the same time insuring fair compensation for the trust. As the United States Supreme Court pointed out in *Lassen*, sale of an easement is just as much a disposition of land as is sale of fee simple title. To allow easements on trust lands to be condemned for public use without public sale gives the land board and the state legislature more flexibility.

The exchange cases are inconsistent with each other. If the Idaho Supreme Court were to follow *Newton*, it could likely interpret art. 9, §8 as prohibiting direct sales to state agencies since many of the arguments against allowing an exchange would seem to apply against allowing a direct sale. Recognizing that *Newton* is later than *Rogers* and distinguished it, we still conclude that because of the rationale of *Lassen* and the condemnation cases, today’s Idaho Supreme Court could interpret the constitution more in line with *Rogers v. Hawley* and hold that direct sales of trust land to state agencies is constitutionally permissible. Such an interpretation would allow the land board and the legislature more flexibility in dealing with state lands, c.f. *Idaho Code* §58-132, since sale to a state agency gives the land board some discretionary power as to how the land may be used, even though it would have to be assessed at its highest and best use. It must be remembered that this opinion is discussing discretionary sales by the state land board and that we are assuming the board is under no obligation whatsoever to sell to the state agency requesting it. The board is still obligated to obtain full compensation for the lands sold, if it does sell. *Lassen v. Arizona*, *supra*.

Such an interpretation would be consistent with the rationale in *Lassen* and avoid any problems which might be caused by state agencies bidding against private parties, a meaningless bid procedure, and condemnation by the state agency immediately after the sale. Finally, allowing direct sales would be consistent with the administrative practice of the land board and the Department of Lands over at least the past decade. Such an interpretation would also be more likely to uphold the constitutionality of *Idaho Code* §58-138 which allows exchanges with state agencies as well as the federal government and the constitutionality of *Idaho Code* §67-2402(1) which purports to allow public school districts to purchase state endowment land at appraised prices.

CONCLUSION:

As we have indicated, there are conflicting authorities and analyses of the question presented. Based on these authorities and using these analyses, the

Idaho Supreme Court could reasonably permit the direct sales of trust land to state agencies or prohibit such sales. Since there is reasonable authority to allow such sales, we conclude that the board may in its discretion choose to do so.

AUTHORITIES CONSIDERED:

A. Cases

1. *Arizona State Land Department v. Supreme Court, Inc.*, 633 P.2d 330 (Ariz. 1981).
2. *City of Sierra Vista v. Babbitt*, 633 P.2d 333 (Ariz. 1981).
3. *Gladden Farms, Inc. v. State*, 633 P.2d 325 (Ariz. 1981).
4. *Lassen v. Arizona*, 385 U.S. 458, L. Ed. 2d 515, 87 S. Ct. 584 (1967).
5. *Newton v. State Board of Land Commissioners*, 37 Idaho 58, 219 P. 1053 (1923).
6. *Idaho-Iowa, etc. Co., Ltd. v. Fisher*, 27 Idaho 685, 151 P. 998 (1915).
7. *Tobey v. Bridgewood*, 22 Idaho 566, 127 P. 172 (1912).
8. *Rogers v. Hawley*, 19 Idaho 751, 115 P. 687 (1911).
9. *Idaho Fruit Land Co. v. Great Western Beet Sugar Co.*, 18 Idaho 1, 108 P. 989 (1910).
10. *Hollister v. State*, 9 Idaho 8, 71 P. 541 (1903).

B. Codes

1. *Idaho Code* §58-132.
2. *Idaho Code* §58-138.
3. *Idaho Code* §67-2402.

C. Constitutions

1. Idaho Constitution art. 9, §8.

D. Statutes

1. 26 Stat. L. 215, ch. 656, §4.

E. Texts

1. R. Powell *Real Property*, §442 (P. Rohan rev. ed. 1981).
2. Restatement of Property §450 (1944).
3. Restatement of Property §489, §510.

DATED this 27th day of September, 1982.

ATTORNEY GENERAL
State of Idaho
/s/ DAVID H. LEROY

DO/tl

ANALYSIS BY:

DON A. OLOWINSKI
Deputy Attorney General
Chief, Natural Resources Division

cc: Idaho Supreme Court
Idaho Supreme Court Law Library
Idaho State Library

ATTORNEY GENERAL OPINION NO. 82-11

TO: Bruce Balderston
Legislative Auditor
Statehouse
Boise, ID 83720

Per Request for Attorney General Opinion

QUESTIONS PRESENTED:

1. What is the meaning of *Idaho Code* §59-1015 which prohibits "incurring any liability, moral, legal or otherwise, or at all, in excess of the appropriation made by law . . . "?
2. Does this prohibition extend to specific programs within a department or specific accounts within an appropriation bill?
3. Is it necessary that agencies of state government record in their financial record liabilities or accounts payable as they become determinable in order that compliance with *Idaho Code* §59-1015 might be demonstrated?

CONCLUSIONS:

1. Although the Idaho Supreme Court has not construed "liability" as used in §59-1015, *Idaho Code*, it has defined "liability" as a "responsibility; the state of one who is bound in law or justice to do something which may be enforced by action."
2. The prohibition against incurring liabilities beyond appropriation contained in *Idaho Code* §59-1015 applies to specific programs within a department and specific accounts within each program.

3. Although there is no specific statutory requirement that each department record its liabilities or accounts payable as they become determinable, each department ought to establish such a mechanism for its own protection.

ANALYSIS:

Idaho Code §59-1015 states:

Deficiencies — Creation prohibited — Exception. — No officer, employee or state board of the state of Idaho, or board of regents or board of trustees of any state institution, or any member, employee or agent thereof, shall enter, or attempt to offer to enter into any contract or agreement creating any expense, or incurring any liability, moral, legal or otherwise or at all, in excess of the appropriation made by law for the specific purpose or purposes for which such expenditure is to be made, or liability incurred, except in the case of insurrection, epidemic, invasion, riots, floods or fires.

In order for a financial transaction to be prohibited by this section, it must 1) be made by a person or entity covered by this section and 2) create an "expense" or 3) incur a "liability" which must 4) exceed the appropriation provided for the purpose for which the financial transaction was entered into unless the purpose is to respond to a statutorily enumerated emergency.

Before answering the question presented, two points should be addressed briefly. First, it is difficult to imagine any person or entity able to bind the state who is not an "officer, employee or state board of the state of Idaho, or board of regents or board of trustees of any state institution, or any member, employee or agent thereof." This is so sweeping and inclusive that anyone with color of authority to enter into a contract or agreement to bind the state would quite probably be included.

Second, the statute prohibits such persons from creating an "expense" in violation thereof. An expense is defined by *Webster's Third New International Dictionary Unabridged* 800 (1971): "The act or practice of expending money." Although expense has not been defined by the Idaho Supreme Court, "expenditure" has. In *Suppiger v. Enking*, 60 Idaho 292, 91 P.2d 362 (1939), the Idaho Supreme Court relied on Webster's to define "expenditure" as "the act of expending; a laying out of money; disbursement". 60 Idaho at 298. The court defined expenditure to distinguish it from appropriation which was defined: "to set apart for, or assign to, a particular person or use, in exclusion of all others." *id.* As Webster's treats the terms "expense" and "expenditure" as synonyms, it is quite likely that the Idaho Supreme Court would as well. Accordingly, the statute prohibits contracts or agreements which require spending money beyond the appropriation provided.

To address the specific question presented, the Idaho Supreme Court has not defined "liability" as it is used in *Idaho Code* §59-1015, but it has frequently defined "liability" in the context of the debt limitation provisions of the Idaho Constitution, art. VIII, §§1 and 3. Although those sections do not relate directly to the question presented, the definition of liability under them ought to be equally applicable under the expenditure limitations of *Idaho Code* §59-1015 as that section is a statutory complement to art. VIII, §§1 and 2.

Article, VIII, §3, ID. CONST. states in relevant portion:

No county, city, board of education, or school district, or other subdivision of the state shall incur any indebtedness, or liability, in any manner or for any purpose, exceeding in that year, the income and revenue provided for it for such year . . .

The court first defined "liability" as used in art. VIII, §3, in *Feil v. City of Coeur d'Alene*, 23 Idaho 32, 129 P643 (1912). In that case the city of Coeur d'Alene attempted to finance a municipal water works system by selling bonds which were to be retired by payments received from user fees. The city of Coeur d'Alene argued that this was not a liability because repayment would be secured by the revenue of the water works project. The court rejected this reasoning, noting at 23 Idaho 50:

Liability . . . is a much more sweeping and comprehensive term than the word indebtedness, . . .

The court went on to define "liability", relying on various law dictionaries, as: "Responsibility; the state of one who is bound in law or justice to do something which may be enforced by action," and "the state of being bound or obliged in law or justice to do, pay, or make good something; legal responsibility," and "the condition of being responsible for a possible or actual loss, penalty, evil, expense or burden." *id.* This definition has been followed and applied in *Boise Dev. Co., Ltd. v. Boise City*, 26 Idaho 347, 143 P531 (1914), *Boise-Payette Lumber Co. v. Challis Ind. School Dist. No.1*, 46 Idaho 403, 268 P26 (1928), *Williams v. City of Emmett*, 51 Idaho 500, 6 P2d 475 (1931), *Straughan v. City of Coeur d'Alene*, 53 Idaho 494, 24 P2d 321 (1932), *General Hospital, Inc. v. City of Grangeville*, 69 Idaho 6, 201 P2d 750 (1949), *O'Bryant v. City of Idaho Falls*, 78 Idaho 313, 303 P2d 672 (1956), and *Village of Moyie Springs v. Aurora Mfg. Co.*, 82 Idaho 337, 353 P2d 767 (1960).

In *School District No. 8 v. Twin Falls County Mutual Fire Ins. Co.*, 30 Idaho 400, 164 P. 1174 (1917), the court held that the potential liability of a school district which sought to join a mutual fire insurance company was prohibited, stating:

It may be that a postponed contingent liability is not an indebtedness within the meaning of [art. VII, §3] until the contingency has occurred, but it is a liability which may become an indebtedness upon the happening of the contingency.

30 Idaho at 405.

Similarly, in *Hansen v. City of Idaho Falls*, 92 Idaho 512, 514, 446 P2d 634 (1968), the Supreme Court held that the duty of the city of Idaho Falls to contribute to the policemen's retirement fund was a liability within the comprehension of art. VIII, §3, noting "[l]iability is a much more sweeping and comprehensive term than indebtedness . . . The fund must be financially sound. Such a right creates a concomitant duty which in turn is a liability enforceable against the city."

See also the dissenting opinion of Chief Justice McFadden in *City of Pocatello v. Peterson*, 93 Idaho 774, 780, 473 P2d 644 (1970) which recounts the development of the definition of liability as used in art. VIII, §3.

A distinct line of authority has developed concerning the proper interpretation of art. VIII, §1, of the Idaho Constitution which states: "The legislature shall not in any manner create any debt or debts, liability or liabilities . . ." In *Stein v. Morrison*, 9 Idaho 426, 75 P.246 (1904), the court first construed the limitation on debt or liability found in art. VIII, §1. In that case plaintiffs challenged several appropriations on the basis that they created an impermissible debt or liability. The court indicated that an appropriation did not create a debt within the contemplation of this section because revenue would be collected within the same fiscal year for the payment of the appropriation. Although the appropriation and the obligation for expenditure thereunder might appear to be a liability, according to the definition found in art. VIII, §3, thereby arguably falling within the prohibition of art. VIII, §1, the question was not addressed. Rather, the court simply stated that it was not a debt and therefore did not violate art. VIII, §1.

The reasoning applied by the court in *Stein* has created problems for the definitions of "debt" and "liability" under art. VIII, §1. In *Lewis v. Brady*, 17 Idaho 251, 104 P.900 (1909), the court held that a debt was created by passage of legislation authorizing the sale of bonds rather than by actual sale of the bonds. In its analysis of art. VIII, §1, the court commented:

The framers of the constitution in drafting this section evidently used the words "debt" and "liability" in the sense that they are "created" by the legislative act . . .

17 Idaho 256.

By construing the authorization for sale of bonds to be a "debt", the court precluded the finding of any "liability" under art. VIII, §1, as anything which would create a liability under the definition provided in art. VIII, §3 would, by definition, create a debt under *Lewis v. Brady*.

This creates confusion concerning the definition of "debt," as it seems to have absorbed "liability." Because *Idaho Code* §59-1015 is concerned with "liability," however, and any debt is also a liability by definition, the analytical inconsistency created by *Stein* and *Lewis* is of passing interest only.

In any event, apparently recognizing the logical inconsistency in the development of the definition of "liability" between art. VIII, §1 and art. VIII, §3, the Supreme Court seems to have "corrected" the *Stein* legacy in *Idaho Water Resources Bd. v. Kramer*, 97 Idaho 535, 548 P.2d 35 (1976). In that case the court was asked to review the validity of bonds issued by the plaintiff which would exceed the \$2 million debt limit contained in art. VIII, §1. Although the court premised its decision on the rationale that the bonds were not debts of the state and therefore not prohibited, it noted in passing:

As used in art. VIII, §1, of the state Constitution, a "debt" refers to an obligation incurred by the state which creates a legal duty on its part to pay from the general fund a sum of money to another, who occupies the position of creditor, and who has a lawful right to demand payment. It contemplates an obligation which is irrevocable and requires for its satisfaction levies beyond the appropriations made available by the legislature to meet the ordinary expenses of state government for a fiscal year. "Liability" as used within our Constitution, has been afforded a broader and more comprehensive definition. It refers to an obligation one is bound in law or justice to perform.

97 Idaho at 557 (footnotes omitted).

Although the court states that the definitions of “debt” and “liability” apply to art. VIII, §1, they in fact are taken from the cases construing art. VIII, §3. While this is clearly dictum in the case, it indicates a desire on the part of the court to depart from the *Stein* legacy.

Because of the rather strained reasoning engendered by *Stein v. Morrison*, a transaction permitted under art. VIII, §1 prior to *Kramer* should not be viewed as not a liability for the purposes of *Idaho Code* §59-1015. Rather, that definition which is found in art. VIII, §3 and apparently adopted by *Kramer* for art. VIII, §1 should control. As a practical matter the troublesome history of art. VIII, §1 should present few problems given the broader language of *Idaho Code* §59-1015 which prohibits not only liability but “liability, moral, legal or otherwise or at all.” It is hard to imagine a broader prohibition.

It is clear also that the cases construing art. VIII, §§1 and 3 look to the “creative act” to determine if a debt or liability is incurred. This is clearly consistent with and supports the reasoning of *State ex rel. Hansen v. Parsons*, 57 Idaho 775, 69 P.2d 788 (1937), which considered *Idaho Code* §59-1015. The case stemmed from the inability of the state insurance fund to operate within its appropriation. Rather than curtail expenditures, the managers of the fund chose to continue operations incurring obligations to be paid from later appropriations. The legislature met in special session and appropriated the necessary money for the continued operation of the insurance fund. The treasurer, however, refused to pay the warrants for the expenses already incurred. The plaintiffs then brought suit to compel payment and the court upheld the treasurer on the ground that the appropriation was invalid. The court reasoned that art. VII, §13 states, “No money shall be drawn from the treasury, but in pursuance of appropriations made by law.” The court then stated that the appropriation was not valid because art. IV, §18 states, “No claim against the state . . . shall be passed upon by the legislature without having first been considered and acted upon by [the board of examiners].” Because the board of examiners had not acted upon the claim, the legislature lacked the authority to appropriate for the claim. Further, the legislative act was invalid in light of art. III, §19 which states, “The legislature shall not pass any local or special laws . . . legalizing as against the state the unauthorized or invalid act of any officer.” The appropriation was then declared to be a nullity and the claim dismissed. In passing, however, the court commented:

It is urged by the plaintiff that there might be sufficient appropriation to pay a bill when the purchase is made and still, when the claim comes in for allowance and payment, the appropriation be exhausted; and that in such case the claim would be a just and lawful claim . . . When purchase orders exhaust the appropriation, no further orders are legal . . . The prohibitions of the statutes and the Constitution against creating any expense or incurring any liability against the state, in excess or existing appropriations therefor, *apply to the time of incurring the expense or liability rather than to the time the particular bill or claim is presented for payment.* The particular department issuing the requisition and the purchasing agent, in making the order, are restricted in the making of any purchase to the actual state of the fund as shown by record of outstanding orders at that time. If it were otherwise, the purchasing agent on requisition of a department might make a large num-

ber of orders in excess of the appropriation, as shown by his record of outstanding claims, and yet within the appropriations as shown by the auditor's books at the particular time. If such practice prevailed, it would often become a question of race between claimants, as to which could get his claim first presented to and allowed by the examining board and warrant issued.

57 Idaho at 789-790. (Emphasis added).

Accordingly a liability within the contemplation of *Idaho Code* §59-1015 is apparently created when the obligation is incurred rather than when the bill is actually presented for payment.

Second, you have asked whether the prohibition against incurring liability applies to specific programs and accounts of an appropriation bill. In other words, can money appropriated to a particular department specifically in furtherance of distinct programs and also allocated in the appropriation for personnel costs, operating expenditure and capital outlay be applied to a program or expense category distinct from that to which it is allocated by the appropriation bill? Stated conversely, can a department incur a liability in excess of the allocated portion of its appropriation for a program and within that program for operating expense while staying within the total amount of the appropriation for all programs or expense categories without violating *Idaho Code* §59-1015?

Idaho Code §59-1015 prohibits incurring any expense or liability "in excess of the appropriation made by law for the specific purpose or purposes for which such expenditure is to be made, or liability incurred . . ." In *University of Utah Hosp. and Medical Center v. Bethke*, 101 Idaho 245, 248, 611 P.2d 1030 (1980), the Idaho Supreme Court stated: "This Court is required to give effect to very [sic] word, clause, and sentence of a statute, where possible . . ." In support of this rule of statutory construction the Court cited *Messenger v. Burns*, 86 Idaho 26, 30, 382 P.2d 913, 915 (1963) and *State v. Alkire*, 79 Idaho 334, 338, 317 P.2d 341, 344 (1957). If meaning is to be given to the language in *Idaho Code* §59-1015 which speaks of "a specific purpose or purposes for which such expenditure is to be made" it must apply to the specific programs and categories of expenditure authorized in an appropriation bill. If the prohibition of *Idaho Code* §59-1015 applies only to the total of two or more programs or accounts, then reference to specific purpose or purposes would be superfluous to the statute, as incurring a liability in excess of the appropriation is prohibited by the previous clause of the statute. The legislature must have intended something more by the addition of the words "for the specific purpose or purposes." It should be clear, given the specificity of an appropriation bill, which allocates appropriation among various programs and particular classes of expenditure, that these programs and classes are the specific purpose or purposes referred to in *Idaho Code* §59-1015. Therefore, incurring a liability in excess of one of the programs or accounts even though the total appropriation for the department is not exceeded is probably prohibited by *Idaho Code* §59-1015.

As it applies to allocation among particular classes, this analysis is further bolstered by a careful scrutiny of *Idaho Code* §§67-3508 and 67-3511. Section 67-3508 states in part:

Excepting where the legislature expressly departs from the classification hereinafter set forth in any appropriation bill, all appropriations

made by the legislature, and all estimates hereafter made for budget purposes, and all expenditures hereinafter made from appropriations or funds received from other sources, shall be classified and standardized by items as follows:

A delineation of personnel costs, operating expenditures, capital outlay and trustee and benefit payments follows. *Idaho Code* §67-3511 states:

Transfer of appropriation. — (1) No appropriations . . . may be transferred from one class to another except with the consent of the state board of examiners . . . And no appropriation made for expenses other than personal services shall be expended for personal services of the particular department, office or institution for which it is appropriated.

(2) Appropriations may be transferred from one program to another . . . upon application duly made . . . provided the requested transfer is not more than ten per cent (10%) cumulative change from the appropriated program amount. Requests for transfers above ten per cent (10%) cumulative change must, in addition to the above, be approved by law.

(3) All moneys appropriated to any budgeted agency of the state of Idaho for the purpose of capital outlay shall be used for that purpose and not for any other purpose.

The above quoted section should leave no doubt concerning the specificity required by *Idaho Code* §59-1015. *Idaho Code* §67-3511 makes it clear that no money may be expended for personal services other than that specifically allocated in the appropriation bill. Further, it makes it clear that money appropriated for capital outlay may be used only for that purpose. Any request for transfer of expenditure within a program must be approved specifically in advance.

Finally, *Idaho Code* §67-3516 states: "Appropriation acts when passed by the legislature of the state of Idaho, . . . are fixed budgets beyond which state officers, departments, bureaus and institutions may not expend."

It should be apparent from a reading of *Idaho Code* §59-1015 and title 67, chapter 35, *Idaho Code*, that a department must adhere to the appropriation provided for each specific account except as *Idaho Code* §67-3511 allows reallocation. It seems clear, therefore, that expenditure beyond an amount specifically appropriated for a particular program or class creates a liability within the contemplation of *Idaho Code* §59-1015.

In answer to your third question, it would seem that some method of recognizing financial liabilities as they accrue would be required by *Idaho Code* §59-1015. Whether this be formal or informal it would nevertheless be necessary to apprise the directors of the various departments of the progressive allocation of their appropriation to various liabilities. This follows from the definition of liability as "the state of being bound or obliged in law or justice to do, pay, or make good something . . ." If a liability has accrued, even though payment is not currently due, a department director must have some method of ascertaining which portion of his appropriation is allocated to accrued liabilities. This was apparently the purpose of §65-1504 (*Idaho Code Ann.* 1932) which stated:

The state purchasing agent shall keep a complete system of books and accounts with each state department and institution, which shall show each appropriation made by the legislature for the support of said department or institution, every expenditure made on behalf of it, and every contract for supplies or other purposes made by said department, which books and records so far as same relate to contracts or supplies, shall be open to public inspection.

This section, however, was eliminated in 1939 when the duties and functions of the office of the state purchasing agent were abolished. Idaho Session Laws 1939, ch. 143, p. 261. This was the section referred to in *State ex rel. Hansen v. Parsons*, 57 Idaho 775, 69 P2d 788 (1937), in which the court distinguished at 57 Idaho 789-790, the function of the books kept by the state auditor and the books kept by the purchasing agent:

It should be noted that the books, which section 65-1504, *supra*, requires the state purchasing agent to keep in his office, are an entirely different and separate set of books from those . . . kept in the office of the state auditor. The state auditor's books might show funds on hand for a particular department and a special purpose, while, at the same time, the books in the office of the purchasing agent would show the fund exhausted.

Since §65-1504 (*Idaho Code Ann.* 1932) has been repealed, there is no statutory requirement that the various departments keep books to show the accruing liability towards their appropriation. From a practical standpoint, however, as *Idaho Code* §59-1017 makes it a misdemeanor for any state employee, officer, etc. to incur a liability beyond appropriation, it would behoove all department directors or the appropriate fiscal officers to create a mechanism whereby they can keep track of their accruing liabilities.

AUTHORITIES CONSIDERED:

1. Idaho Const. art. III, §19; art. IV, §18; art. VII, §13; Art. VIII, §1; art. VIII, §3.
2. *Idaho Code*: §59-1015, §59-1017, title 67, ch. 35, §67-3508, §67-3511 (1) (2) (3), 67-3516, 65-1504 (1932).
3. 1939 Idaho Sess. Laws, ch. 143, §20, p. 261.
4. Idaho Cases:

University of Utah Hosp. & Medical Center v. Bethke, 101 Idaho 245, 611 P2d 1030 (1981).

Idaho Water Resources Bd. v. Kramer, 97 Idaho 535, 548 P2d 35 (1976).

City of Pocatello v. Peterson, 93 Idaho 774, 780, 473 P2d 644 (1970).

Hansen v. City of Idaho Falls, 92 Idaho 512, 514, 446 P2d 634 (1968).

Messenger v. Burns, 86 Idaho 26, 382 P2d 913 (1963).

Village of Moyie Springs v. Aurora Mfg. Co., 82 Idaho 337, 353 P.2d 767 (1960).

State v. Alkire, 79 Idaho 334, 338, 317 P.2d 341, 344 (1957).

O'Bryant v. City of Idaho Falls, 78 Idaho 313, 303 P.2d 672 (1956).

General Hosp., Inc. v. City of Grangeville, 69 Idaho 6, 201 P.2d 750 (1949).

Suppiger v. Enking, 60 Idaho 292, 91 P.2d 362 (1939).

State ex rel. Hansen v. Parsons, 57 Idaho 775, 69 P.2d 788 (1937).

Straughan v. City of Coeur d'Alene, 53 Idaho 494, 24 P.2d 321 (1932).

Williams v. City of Emmett, 51 Idaho 500, 6 P.2d 475 (1931).

Boise-Payette Lumber Co. v. Challis Indep. School Dist. No. 1, 46 Idaho 403, 268 P. 26 (1928).

School Dist. No. 8 v. Twin Falls County Mutual Fire Ins. Co., 30 Idaho 400, 164 P. 1174 (1917).

Boise Dev. Co., Ltd. v. Boise City, 26 Idaho 347, 143 P. 531 (1914).

Feil v. City of Coeur d'Alene, 23 Idaho 32, 129 P. 643 (1912).

Lewis v. Brady, 17 Idaho 251, 104 P. 900 (1909).

Stein v. Morrison, 9 Idaho 426, 75 P. 246 (1904).

5. Other Authorities:

Webster's Third New International Dictionary Unabridged 800 (1971).

DATED this 29th day of September, 1982.

ATTORNEY GENERAL
State of Idaho
/s/ DAVID H. LEROY

KRM/bc

ANALYSIS BY:

KENNETH R. McCLURE
Deputy Attorney General
Chief, Legislative/Administrative Affairs

cc: Idaho Supreme Court
Idaho Supreme Court Law Library
Idaho State Library

ATTORNEY GENERAL OPINION NO. 82-12

TO: The Honorable W. Rusty Barlow
 Representative of District 35
 Idaho House of Representatives
 Route 1, Laughran
 Tyhee, ID 83201

Per Request for Attorney General Opinion

QUESTION PRESENTED:

“Is Article I Section 10, of the United States Constitution still binding on the State of Idaho?”

CONCLUSION:

Yes. However, the courts have consistently held that a state does not violate constitutional prohibitions against a state coining money or establishing legal tender when it accepts and pays out the legal tender established by the national Congress for use throughout the states. Congress has this authority.

ANALYSIS:

Prefatory to a legal discussion of this question and the legal issue it represents, we advise that we too have had an increasing number of inquiries from the public concerning the question you have asked about art. 1, §10 from the standpoint of the money making (legal tender) power of our state and national governments. We have attempted to be helpful because of the volume of these requests. Accordingly, we welcome the opportunity formally to answer this question through your good office with the hope it will help clarify an important question of interpretation of language found in the United States Constitution. Further, questions of this type are especially important to citizens during a time of national economic strain when federal monetary policies are subject to criticism.

Article 1, §10 of the United States Constitution imposes a number of limitations on the states. Clause 1 thereof provides in pertinent part:

§10. [Powers denied the states] — [1.] No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility.

This provision is binding on the states and their officers as the supreme law of the land. *McCulloch v. State of Maryland*, ____ U.S (4 Wheat.) 316 (1819). The answers to the questions you implicitly raise depend upon the meaning of this provision.

Congress is the instrumentality that establishes the legal tender of this country, its practice of so doing having been declared lawful in all respects by the

United States Supreme Court well before the turn of the century. In the *Legal Tender Cases*, 79 U.S. (12 Wall) 457, 545 (1871), the United States Supreme Court explained the purpose of art. 1, §10 in the following manner:

The Constitution was intended to frame a government as distinguished from a league or compact, a government supreme in some particulars over States and people. It was designed to provide the same currency, having a uniform legal value in all the States. It was for this reason the power to coin money and regulate its value was conferred upon the Federal government, while the same power as well as the power to emit bills of credit was withdrawn from the States. *The States can no longer declare what shall be money, or regulate its value. Whatever power there is over the currency is vested in Congress.*

(Emphasis added)

Some years later the Supreme Court reaffirmed its earlier pronouncements on the legal tender question in *Legal Tender Cases*, 110 U.S. 421 (1883).

A relatively recent state supreme court case on this subject with an interesting fact situation is *Chermack v. Bjornson*, 302 Minn. 213, 223 N.W.2d 659, 661 (1974). In that case a taxpayer contended that the State of Minnesota was required to pay his tax refund in gold or silver or otherwise it would be in violation of art. 1, §10. Pointing out that the state was not establishing legal tender in violation of that article by paying refunds in the traditional currency of the United States, the court stated:

The courts have consistently held that the Constitution leaves the power to declare what shall be legal tender for the payment of all debts to Congress. The mere utilization of a standard of legal tender prescribed by Congress is not state action as prohibited by U.S. Const., art. 1, §10, but rather an effectuation of validly exercised constitutional power of Congress under U.S. Const., art. 1, §8.

The power of this state in reference to the legal tender established by Congress was decided early in its history in the cases of *Haas v. Misner*, 1 Idaho 170 (1867), and *Crutcher v. Sterling*, 1 Idaho 306 (1869). In the *Haas* case, the territorial supreme court declared unconstitutional, as conflicting with the monetary laws of the United States, a territorial statute which required that taxes be paid in gold and silver. In reaching its conclusion, the Idaho court stated at page 183:

That the legislature cannot discriminate between the different kinds of money made a legal tender, with reference to the material out of which the tangible representation is made, I think too frivolous to require more than a passing notice. *In contemplation of law* the representative of a dollar made of one of the metals is of no more value than that composed of paper. The intrinsic value of the material entering into the composition of the tangible representation of these values forms no part of their *legal value* as a medium of commerce. *Plainly stated, a dollar in law is precisely the same whether composed of gold or of paper.*

(Emphasis added)

It then concluded at page 184:

I have, therefore, been conducted to the conclusion that it is not within the power of the legislature to require, nor in the officers of the law to enforce, the payment of taxes in anything but the legal currency as established by the various acts of Congress. That the obligation to pay taxes may be discharged by the payment of *any money recognized as a lawful tender of the payment of debts generally, without reference to the fact whether it be gold or silver coin or legal tender treasury notes.*

(Emphasis added)

Likewise, in the *Crutcher* case, *supra*, the territorial supreme court held that since the state treasurer must accept the currency established by Congress in payment of taxes, correspondingly, it must use this same currency to pay state indebtedness. The court said at page 309:

The plaintiff's counsel admit that by laws of this territory now in force, the collection of taxes in coin cannot be enforced, and that *the revenue of the territory can only be collected in the legal currency of the United States*, at its par value.

(Emphasis added)

Continuing at page 311:

By law the defendant has no alternative; he must pay over to the officer, person, or persons, entitled by the law of this territory to receive the same, such funds as he receives in collecting the territorial revenue.

In conclusion, Congress, not this state, has made our existing currency legal tender for payment of debts. Article 1, §10 reflects the intention of the framers of our United States Constitution that states are not to compete with the national government in establishing these currencies. Consequently, under both federal and state Supreme Court decisions, Idaho does not violate art. 1, §10 of the United States Constitution by using the currency or legal tender lawfully established by Congress. Indeed, it has the duty to do so.

We should add in closing that a Pocatello case before the Idaho Court of Appeals, namely *Herald v. State*, #14385, has as one of its issues the general topic of this opinion. That decision may, in the fall of 1983 or spring term of 1984, judicially resolve the matter in Idaho. Normally, our office does not issue an official opinion on an issue in litigation. This opinion was rendered because of the considerable time which will elapse before the decision is rendered, and doubt about whether the Court of Appeals will actually decide the precise issue covered by this opinion.

We hope this information will be helpful to you and your constituents.

AUTHORITIES CONSIDERED:

1. *Legal Tender Cases*, 110 U.S. 421 (1883).
2. *Legal Tender Cases*, 79 U.S. (12 Wall) 457, 545 (1871).
3. *McCulloch v. State of Maryland*, ____ U.S. (4 Wheat.) 316 (1819).

4. *Crutcher v. Sterling*, 1 Idaho 306 (1869).
5. *Haas v. Misner*, 1 Idaho 170 (1867).
6. *Chermack v. Bjornson*, 302 Minn. 213, N.W.2d 659 (1974).
7. U.S. Const., art. 1, §10.

DATED this 17th day of November, 1982.

ATTORNEY GENERAL
State of Idaho
/s/ DAVID H. LEROY

DHL/TCF/cd

ANALYSIS BY:

THOMAS C. FROST
Deputy Attorney General
Chief, Administrative Law and
Litigation Division

cc: Idaho Supreme Court
Supreme Court Law Library
Idaho State Library

ATTORNEY GENERAL OPINION NO. 82-13

TO: The Honorable Mack W. Neibaur
State of Idaho, House of Representatives
Route #1, Box 142
Paul, ID 83347

Per Request for Attorney General Opinion

QUESTION PRESENTED:

According to existing Idaho law, is a financial emergency caused by a reduction in the state appropriation to the public school foundation program justifiable cause for the trustees or administration to cancel or modify a teaching contract after that contract has been in force for any period of time?

CONCLUSIONS:

A school district should not rely upon either the emergency clause of *Idaho Code* §33-1276 or the "impossibility doctrine" as authority for avoiding current year contractual obligations to teachers in the event the deficiency levy statute

is repealed or the appropriation to public schools is reduced. In the event of such reduction in state funding, each school district would need to examine its own master agreement and individual agreements to determine whether specific authority for mid-year layoffs exists therein.

ANALYSIS:

Your question essentially concerns the contractual implications of, for example, mid-year discharge or reductions in salaries of teachers due to a lack of state funds. Does a lack of funds constitute "justifiable cause" for terminating a contract short of its natural expiration date, etc.?

Because the status of public school teachers in Idaho involves both statutory and contractual aspects, both areas must be examined in determining whether authority exists which would enable a school district to make mid-year modifications of contractual rights. Each individual school district will have to review its master agreement and individual contracts to determine whether express authority exists therein. See, *Kolp v. Board of Trustees of Butte County Joint School Dist. No. 111*, 102 Idaho 320, 629 P.2d 1153 (1982) (terms negotiated between teacher's professional association and board are incorporated into existing contracts).

Other than the "cause" statute set forth below, there is no specific statutory basis for terminating or modifying teacher contracts *during* a contractual term. *Idaho Code* §33-513(5) limits a local school board's authority to terminate certificated teachers *during a contract term* as follows:

To . . . discharge certificated professional personnel for continued violation of any lawful rules or regulations of the board of trustees or of the state board of education, or for any conduct which could constitute grounds for revocation of a teaching certificate. *No certificated professional employee, except the superintendent, shall be discharged during a contract term except under the following procedures . . .*

A shortage of funds would not constitute cause under the statutory definition, *i.e.*, it would not involve a continued violation of a local or state board rule, nor would it amount to "conduct which could constitute grounds for revocation of a teaching certificate." (See *Idaho Code* §33-1208 for the specific grounds for revocation). The general rule appears to be that a school board is limited to those grounds specified in the statutes in discharging employees covered by such statutes. 78 C.J.S., Schools and School Districts §201-202; *Downing v. Independent School Dist. No. 9, Itasca County*, 291 N.W. 613 (Minn. 1940); *Little v. Carter County Board of Education*, 146 S.W.2d 144 (Tenn. 1940).

As a general rule, a removal for cause not authorized by statute or contract and outside the discretionary power of the school authorities is invalid. Where the statute specifically enumerates the causes for which a teacher may be removed or dismissed, he cannot be removed or dismissed for any other cause, unless the intention of the legislature to the contrary is clearly expressed. The grounds for dismissal are not limited to those enumerated where the statute further provides that dismissal may be for any other good or just cause, but it has also been held that the cause must be of a character similar to those enumerated . . . Where the statute does not state the grounds for dismissal, or where the

grounds are not intended by the legislature to be exclusive of all others, a contract may provide for dismissal, and in such case the right to dismiss exists by virtue of the contract and not of a statute.

78 C.J.S., Schools and School Districts §202.

The Idaho discharge statute does not specify or imply that lack of funds constitutes cause, nor does it contain an “any other good or just cause” provision. The question does arise as to what effect, if any, a separate statute, *Idaho Code* §33-1276, would have on a district’s contractual obligations should a mid-year financial crisis occur due to a repeal of §33-1009 (4) or a reduction of the public school appropriation.

Section 33-1276 is part of the statute dealing with school districts’ negotiations with education associations. It states that:

Nothing contained herein is intended to or shall conflict with, or abrogate the powers or duties and responsibilities vested in the legislature, state board of education, and the board of trustees of school districts by the laws of the state of Idaho. Each school district board of trustees is entitled, without negotiation or reference to any negotiated agreement, to take action that may be necessary to carry out its responsibility due to situations of emergency or acts of God.

The court in *Robinson v. Joint School District #150*, 100 Idaho 263, 265, 596 P.2d 436 (1980) stated that “. . . it is axiomatic that extant law is written into and made a part of every written contract.” If *Idaho Code* §33-1276 is a part of every teacher’s contract, the question becomes simply whether that section would apply or not. For the reasons set forth below, I would not advise school districts to rely on the statute as authority for mid-year termination of contracts.

(1) While the second sentence of §33-1276 allows school districts to “take action” “without negotiation or reference to any negotiated agreement” in “situations of emergency or acts of God,” the first sentence declares that “nothing contained herein . . . shall conflict with, or abrogate the powers or duties and responsibilities vested in . . . the board of trustees of school districts by the laws of the state of Idaho.” Therefore, any action taken, while it might be done without reference to a negotiated agreement, may not conflict with other duties and responsibilities imposed upon the board by law. Mid-year terminations, based on financial difficulties, would be in apparent conflict with *Idaho Code* §33-513(5), as described earlier, as well as the procedures established in *Idaho Code* §33-1212 *et seq.*, (contract renewal and termination statute). In the case of *Robinson v. Joint School Dist. #150*, 100 Idaho 263, 266, 596 P.2d 436 (1980), the court, describing the contractual status of a “continuing contract” employee, states that “such contracts can only be terminated by the school district for cause.”

Another point regarding the effect of §33-1276 is that it apparently concerns master, or “negotiated” agreements, and does not purport to affect individual contracts. *Idaho Code* §33-1271 *et seq.*, is the law relating to contract negotiations between a school district and “the representative organization” of professional employees, and thus is a *collective bargaining* statute. It does not address the individual contract or individual bargaining.

(2) It is not clear that “situations of emergency,” as used in the statute, would include a financial shortage due to a repeal of the deficiency levy statute

or a reduction of the public school appropriation. A review of the available legislative history concerning the statute indicates only that the IEA was initially opposed to §33-1276, but agreed to accept it as a matter of compromise. There appears to have been no specific discussion of the meaning of "emergency" as used in the section. See, H.R. Educ. Comm. Minutes (Jan. 18, 26, Feb. 1, 10, 1971). "Emergency" has been defined by the courts as "a sudden unexpected happening; an unforeseen occurrence or condition," Black's Law Dictionary, (4th ed. rev. 1972); *Newark Teachers Ass'n. v. Board of Ed. of Newark*, 259 A.2d 742, 749 (N.J. 1969) (In a school case an emergency was defined as a sudden or unexpected occurrence or condition calling for immediate action).

Of course, each school district would have to evaluate the impact of a repeal of the deficiency statute or reduction of appropriation on its particular situation, but I am unable to locate a case where a court has excused a district from its *current* contractual obligations due to a lack of funds. The cases which have dealt with the lack of funds situation will be discussed in some detail below. A discussion of the "emergency" clause of the statute also tends to overlap the discussion of the "impossibility doctrine," *infra*.

(3) General contract law principles, applied either directly or by analogy, do not give a clear-cut excuse for non-performance in this case.

A Michigan court held that, while the state's tenure statute did allow a school district to reduce personnel due to financial problems by not offering *new contracts* for the upcoming year, the law "does not excuse a school district from honoring a valid [current] contract." *Bruinsma v. Wyoming Public Schools*, 197 N.W.2d 95, 97 (Mich. 1972).

In *Sessions v. Livingston Parish School Board*, 153 So. 484 (La. 1934), an assistant principal was discharged after five days service under the nine-month contract. The reason given for the termination was lack of funds. The court held that:

In this case the contract was entered into for the scholastic year by the superintendent and with full authority by the defendant school board. It was binding on defendant for nine months, the term of the agreement.

Plaintiff was perfectly willing to continue her work and able to render the services required of her under the agreement. She was dismissed without cause, and is entitled to recover her salary for nine months . . . with legal interest as demanded.

Id. at 485.

One commentator has stated, with respect to *non-tenured* employees:

If the contract is for a definite term, [the school board] would be free to terminate the position mid-term, but would be liable in damages for the contract price, less any sums that the employee had earned from other employment during the remainder of the term of the contract after termination.

Johnson, *The Problems of Contraction: Legal Considerations in University Retrenchment*, 10 J.L. & Educ. 269, 311-12 (1981); See, A. Corbin, *Contracts* §958

(one vol. ed. 1953). While the comment above was made with respect to non-tenured university employees, it would reflect, I believe, the prevailing view as to damages for termination of non-tenured public school teacher contracts also.

One case did allow a school district to escape damages for breach of contract when the school was closed by *judicial order*. In *Kuhl v. School District No. 76 of Wayne County*, 51 N.W.2d 746 (Neb. 1952), the school district was prevented, by injunction, from operating the school, *and* the teacher contracts contained a clause allowing termination “by the operation of law without penalty.” *Id.* at 751. The court, in discussing a limited exception to contractual liability, quoted 6 Corbin on Contracts, §1346:

Performance of a contract is sometimes prevented by judicial order or decree forbidding such performance or by a judicial seizure of subject matter or of the means necessary to performance. Some cases have held that this kind of prevention is not a good excuse for nonperformance. These holdings can be justified if the judicial action was brought about by reason of the defendant’s default in performance of some other legal duty, or if the defendant could have prevented such judicial action by diligent effort. The defendant owed a duty to the plaintiff to perform his contract; and this includes the duty of taking all steps that are necessary to such performance, even including the prevention of interference by third parties so far as possible by a reasonable degree of effort.

Prevention of performance by *judicial order or decree*, at the *instigation of third parties*, may properly be held to be a valid defense in an action for breach of contract, if it was not caused by the defendant’s own negligence or breach of duty to others and if no means of avoiding such interference with performance are reasonably available.

(Emphasis added.) *Id.* This excuse for nonperformance then, requires both a judicial order and that the action be instigated by third parties.

In *Ashby v. School Township of Liberty*, 98 N.W.2d 848 (Iowa 1959), plaintiff sought damages when her contract was terminated prior to the agreed upon date when the enrollment of the school dropped to four. The contract provided that “in case the enrollment of said school becomes less than six this contract becomes null and void.” *Id.* at 851.

Plaintiff argued that since the statute provided for teacher termination only upon certain conditions, a drop in enrollment not being among them, that such a contractual provision was void. The court, however, reasoning that the statute allowed inclusion in the contract of “such other matters as may be agreed upon,” *Id.* at 854, allowed the provision to stand and denied damages. *Cf., Public School Dist. No. 11 v. Holson*, 252 P. 509 (Ariz. 1927).

In *Carlson v. School District No. 6 of Maricopa County*, 468 P.2d 944 (Ariz. 1970), the court was called upon to interpret contractual rights of teachers in light of Arizona’s tenure statutes and the district’s budgetary constraints. The school board had already entered into contracts when it discovered that its budget exceeded statutory limits. It thereafter gave notice to teachers that their salaries would be reduced during the second half of the year. With respect to the effect of the tenure statutes, the court stated that:

... through the provision of A.R.S. §15-257 the legislature has made certain that the statutory tenure of *employment* (right to be re-employed for the ensuing school year) afforded by the provisions of the tenure act is not extended by the same statutes to an absolute right to have an unreduced salary for the ensuing school year. Subject to statutory restrictions . . . the school district is left free to work out by contract such salary arrangements with its teacher-employees as the parties may agree upon. *However, once such salary arrangements have been entered into, [the statute] does not purport to grant any subsequent power to the school district to unilaterally change its obligations thereunder.*

(Emphasis added). *Id.* at 948-49.

As to the school district's argument that it was prohibited from paying the full contractual salary amounts because of the statutory six per cent limitation on budget increases, the court held that *the statutory limits were directed at the overall budget — not at any individual teacher's salary*, and that therefore the operation of the statute did not render the performance of each contract impossible. *Id.* at 949-50.

While I am unable to find a case in which a court has applied the "impossibility" doctrine to the benefit of a school district, a discussion of that doctrine may be in order.

Simply stated, impossibility of performance occurs when (1) an unexpected and unforeseen contingency arises, (2) the risk of which is not allocated by agreement, and (3) the performance of which is rendered impracticable or impossible by such contingency. If the doctrine applies, performance is excused.

It is my opinion, for the reasons discussed below, that the impossibility doctrine would not be applicable to the scenario described in your letter.

First, while not dispositive, impossibility is normally applied in the commercial context, *e.g.*, *Transatlantic Fin. Corp. v. United States*, 363 F.2d 312 (D.C. Cir. 1966) (corporation was the promisor), and there are few, if any, cases in which a governmental entity, as a promisor, has been excused from performance under the doctrine.

Second, as to the applicability of the impossibility doctrine to financial difficulties of promisors, it has been stated that:

For impossibility or frustration to operate as an excuse, it must be objective rather than subjective. It is the difference between 'the thing cannot be done' and 'I cannot do it . . .

The primary application of this distinction is in cases where performance is impossible because of inability to pay money or render any other performance as a result of insolvency or other financial problems. Such inability is personal to the obligor and does not excuse performance.

Calamari & Perillo, *Contracts* §113-12 (2nd ed. 1977); also, *Christy v. Pilkinton*, 273 S.W.2d 533 (Ark. 1954); *Baldi Const. Eng., Inc. v. Wheel Awhile, Inc.*, 284 A.2d 248 (Md. 1971).

Third, the argument can be made that a school district which, according to the Supreme Court, is "an agency of the state," *Common School Dist. No. 61 v. Twin Falls Bank & Trust Co.*, 50 Idaho 711, 716, 4 P2d 342 (1931), should not be allowed to benefit from an impossibility created by itself — through the state legislature. That is, since the statutory mechanism to create the needed funds was in place at the time the contracts were entered into, wouldn't the state create the impossibility if it repealed that mechanism?

... if the promisor is in some respects responsible for the event which makes performance of his promise impossible, justice does not dictate that he be excused.

Calamari & Perillo, Contracts §13-13 (2d ed. 1977).

In addition, as to governmental actions affecting contractual rights, Calamari states:

... a non-judicial action by a governmental agency which affects a particular party rather than the public generally has been held to excuse performance; for example, the requisition of a factory for war production has been held to excuse performance of civilian contracts for production at the factory.

Calamari & Perillo, Contracts §13-4 (2d ed. 1977); see, *Israel v. Luckenbach S.S. Co.*, 6 F.2d 996 (2d Cir. 1925). It doesn't seem that a legislative repeal of §33-1009(4) or a reduction of the public school appropriation would be aimed at a particular party, but rather as a tax or revenue savings measure, would affect the "public generally" and would thus not qualify for the excuse.

AUTHORITIES CONSIDERED:

1. *Idaho Code* §33-513(5), §33-1009(4), §33-1212 *et seq.*, and §33-1276.
2. Idaho H.R. Educ. Comm. Minutes, (Jan. 18, 26, Feb. 1, 10, 1971).
3. Idaho Cases:

Kolp v. Board of Trustees of Butte County Joint School Dist. No. 111, 102 Idaho 320, 629 P.2d 1153 (1982).

Robinson v. Joint School District #150, 100 Idaho 263, 596 P.2d 436 (1980).

Common School Dist. No. 61 v. Twin Falls Bank & Trust Co., 50 Idaho 711, 4 P.2d 342 (1931).

4. Other Cases:

Transatlantic Fin. Corp. v. United States, 363 F.2d 312 (D.C. Cir. 1966).

Israel v. Luckenbach S.S. Co., 6 F.2d 996 (2d Cir. 1925).

Bruisma v. Wyoming Public Schools, 197 N.W.2d 95 (Mich. 1972).

Baldi Cons. Eng., Inc. v. Wheel Awhile, Inc. 284 A.2d 248 (Md. 1971).

Carlson v. School District No. 6 of Maricopa County, 468 P.2d 944 (Ariz. 1970).

Newark Teachers Ass'n. v. Board of Ed. of Newark, 259 A.2d 742 (N.J. 1969).

Ashby v. School Township of Liberty, 98 N.W.2d 848 (Iowa 1959).

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Kuhl v. School District No. 76 of Wayne County, 51 N.W.2d 746 (Neb. 1952).

Downing v. Independent School Dist. No. 9, Itasca County, 291 N.W. 613 (Minn. 1940).

Little v. Carter County Board of Education, 146 S.W.2d 144 (Tenn. 1940).

Sessions v. Livingston Parish School Board, 153 So. 484 (La. 1934).

Public School Dist. No. 11 v. Holson, 252 P.2d 509 (Ariz. 1927).

5. Other Authorities:

Johnson, *The Problems of Contraction: Legal Considerations in University Retrenchment*, 10 J.L. & Educ. 269 (1981).

Calamari & Perillo, *Contracts* §§13-4, 13-12, 13-13 (2d ed. 1977).

Black's Law Dictionary (4th ed. rev. 1972).

A. Corbin, *Contracts* §958 (one vol. ed. 1953).

78 C.J.S., *Schools & School Districts* §201-202.

DATED this 29th day of November, 1982.

ATTORNEY GENERAL
State of Idaho
/s/ DAVID H. LEROY

BHH/ms

ANALYSIS BY:

BRADLEY H. HALL
Deputy Attorney General
Education

cc: Idaho Supreme Court
Idaho Supreme Court Law Library
Idaho State Library

ATTORNEY GENERAL OPINION NO. 82-14

TO: Darwin L. Young
Commissioner
State Tax Commission

Per Request for Attorney General Opinion

QUESTIONS PRESENTED:

1. Are expenditures made by cities for repayment of tax anticipation notes or registered warrants or the interest thereon exempt from the property tax and budget freeze limitations provided by §§63-923 and 63-2220, *Idaho Code*?

2. Are city operating budget items that are paid with tax anticipation notes or registered warrants thereby removed from the restrictions imposed by §§63-923 and 63-2220, *Idaho Code*?

CONCLUSION:

1. No general conclusion can be derived about the effect of *Idaho Code* §§63-923 and 63-2220 on the use of city tax anticipation notes and registered warrants.

2. No. There is nothing to indicate that the legislature intended to exempt operating budget items paid by tax anticipation notes or registered warrants from the restrictions of *Idaho Code* §§63-923 and 63-2220.

ANALYSIS:

This opinion is applicable only to city finance instruments, which are provided for at *Idaho Code* §§50-1004 and 63-3101, *et seq.* County finance instruments are different, in part because they have a constitutional foundation in article 7, section 15, Idaho Constitution.

The city finance instruments here at issue are related to tax receipts by their use. Tax anticipation notes provide funds to pay bills which fall due before tax payments are received. Registered warrants allow cities to pay bills after tax revenues have been exhausted, which can happen where tax receipts fall below projections or there are unbudgeted or underbudgeted mandatory expenditures. These finance instruments are used to add flexibility to the use of tax receipts.

The budget freeze and levy limitations have an indirect effect on tax anticipation notes, registered warrants and tax receipt expenditures. Each "operating budget" item (as that term is used in *Idaho Code* §63-2220) paid with revenues derived from tax anticipation notes or tax receipts or with registered warrants is subject to the budget limitations of *Idaho Code* §63-2220 (the analysis of the second question presented concludes that the method of payment of "operating budget" items does not affect their classification within *Idaho Code* §63-2220). The tax receipts on hand to repay the tax anticipation notes were raised by levies subject to the levy limitations of *Idaho Code* §63-923. Direct limitations on these tax anticipation notes and registered warrants appear at *Idaho Code* §50-1001, *et seq.* and *Idaho Code* §63-3101, *et seq.*

It does not appear that the budget freeze and levy limitations directly restrict the use of tax anticipation notes and registered warrants. The budget freeze and levy limitations have not been construed to apply to the payment mechanisms. Thus, tax receipts for payment of operating budget items have not been segregated into a separate fund whose size is restricted. *The limitations apply at the levy and budget stages, not at the payment level.*

Whether interest on tax anticipation notes is subject to *Idaho Code* §63-2220 and whether the levy to repay registered warrants is subject to *Idaho Code* §63-923 are closer questions. It does not appear that interest on tax anticipation notes is an operating budget item, thereby falling within the restrictions of *Idaho Code* §63-2220. As a practical matter, including the interest expense within the operating budget restriction would lead to a restriction in the amount of tax anticipation notes available. As *Idaho Code* §63-3106 contains an express limitation on the amount of outstanding tax anticipation bonds or notes, construction of the budget limitations to add an additional implied restriction would not be favored. 1A Sutherland, *Statutory Construction* §23.09 (4th ed., 1972). 3 id. at §51.02. Also, reading the budget limitations statute to apply to tax anticipation notes interest would require that the aggregate amount of tax anticipation notes required for future use be predictable and determinable. This is not necessarily the case and is a further indication that the interest should be excluded. The next to last full paragraph of Idaho Attorney General Opinion No. 79-12 indicates that unpredictable mandatory expenditures are probably exempt from the budget freeze limitations.

The limitations expressed in *Idaho Code* §63-3106 buttress this conclusion. The legislature, in restricting the amount of tax anticipation notes available to the cities, expressed that limitation as a percentage of the amount of taxes levied rather than limiting the notes to some standard arising out of the budget process. The legislature chose, when expressly limiting the amount of tax anticipation notes available, to use a figure derived from the levy process, rather than the budget process. This explicit choice would seem to preclude reading the budget limits to create an indirect restraint.

The circumstances giving rise to the use of registered warrants indicate that the levy to pay registered warrants should be exempt from the levy limitations. Presuming that the levy limitations did apply could lead to a situation where the use of registered warrants was restricted, causing a city to be unable to pay mandated expenditures. In this instance, the city's creditors could sue and recover judgment. This judgment would then be handled in the manner set forth in *Idaho Code* §50-1006. The provisions of *Idaho Code* §50-1006 were amended in 1980 to remove them from the scope of the budget limitation and levy freeze. (Attorney General Opinion 79-12 states that these provisions were probably exempt before the 1980 amendment.) It does not appear logical to require the cities and their creditors to resort to the courts to secure payment of mandated expenditures.

2. The above discussion points to the conclusion that by funding operating budget items with tax anticipation notes or registered warrants, the budget items are not thereby removed from the restrictions of the budget and levy limitations. There are not express exceptions in the statutes for these items. The existence of implied exceptions is precluded by the listing of express exceptions. There is no statute or case authority that would indicate that the character of a budget item would be changed by the manner of its payment. It is therefore our

conclusion that the operating budget items which are paid with tax anticipation notes or registered warrants are not thereby removed from the operations of *Idaho Code* §§63-923 and 63-2220.

This conclusion is supported by the case law under article 8, section 3 of the Idaho Constitution. The courts have consistently determined what constitutes “ordinary and necessary” expenses by looking to the nature of the expense. The funding mechanism has not played a significant part in the determination.

AUTHORITIES CONSIDERED:

Idaho Code: §§50-1001, *et seq*; 63-923; 63-2220; 63-3101, *et seq*.

Article 7, section 15, Idaho Constitution

Article 8, section 3, Idaho Constitution

Attorney General Opinion No. 79-12

1A Sutherland, *Statutory Construction* §23.09 (4th ed., 1972). 3 id. at §51.02.

DATED this 20th day of December, 1982.

ATTORNEY GENERAL
State of Idaho
/s/ DAVID H. LEROY

ANALYSIS BY:

C.A. DAW
Deputy Attorney General
State of Idaho

cc: Idaho Supreme Court
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**ATTORNEY GENERAL'S
SELECTED LEGAL GUIDELINES
FOR THE YEAR 1982**



David H. Leroy
Attorney General

January 5, 1982

Mr. J. Douglas Mitchell
Office of General Counsel
330 South Third East
Salt Lake City, UT 84111

THIS IS NOT AN OFFICIAL OPINION
OF THE ATTORNEY GENERAL
AND IS SUBMITTED SOLELY FOR YOUR LEGAL GUIDANCE.

Dear Doug:

This letter is in response to your request for reconsideration, in light of additional information which you provided, of an opinion by the Department of Agriculture regarding the applicability of the egg assessment levy in section 37-1523A, *Idaho Code*, to eggs produced and distributed gratuitously through the L.D.S. Welfare Program.

As you are aware, that opinion was based upon the factual assumption that the distribution of eggs through the welfare program was based upon an exchange of labor for goods. However, you note in your letter of November 23, 1981, that:

Recipients of goods from the welfare program are not required to exchange labor for goods; rather they are merely encouraged to volunteer their services to the welfare farm or bishops' storehouse in order to maintain their self-respect and integrity; neither labor nor money is required in order for a recipient to obtain welfare assistance; the nature of the work performed, if any, is not determined by the amount of assistance given, but by the recipient's ability to work; and that the amount of assistance given is determined by the needs of the recipients not by his/her voluntary contribution of labor.

Given these facts, this program would not constitute intrastate commerce under §37-1520(l), *Idaho Code*, because the essential elements of a sale or wholesale or retail distribution, as defined in §37-1520(k), *Idaho Code*, are not present in this aspect of the egg distribution program. Thus, I conclude that eggs distributed gratuitously through the L.D.S. Welfare Program would not be subject to the egg assessment levy provided for in §37-1523A, *Idaho Code*.

However, as a corollary to that conclusion, any sale of surplus eggs from any welfare farm in Idaho, as distinguished from gratuitous distribution, is subject to the egg assessment levy because it would fall within the scope of the definitions in §§37-1520(l) and (k), *Idaho Code*.

Thank you for furnishing the additional information in conjunction with your request for reconsideration and the information regarding those issues as

requested by my staff. I am confident that future opinions will benefit from a similar informal exchange of information.

Sincerely,
/s/ DAVID H. LEROY
Attorney General

DHL/tl

cc: Patricia Stephan-Fawcett, Deputy Attorney General
Lane Joliffe, Chief, Bureau of Inspection and Compliance,
Department of Agriculture

January 11, 1982

Mr. Lynn Hossner
Prosecuting Attorney
Fremont County
Post Office Box 412
St. Anthony, ID 83445

THIS IS NOT AN OFFICIAL OPINION
OF THE ATTORNEY GENERAL
AND IS SUBMITTED SOLELY FOR YOUR LEGAL GUIDANCE.

RE: Recording of Surveys

Dear Mr. Hossner:

You have asked whether Chapter 19, Title 55, *Idaho Code*, which relates to recording of surveys replaces or is an alternative to the duty to record plats of subdivisions under §50-1302, *Idaho Code*.

Section 55-1901, *Idaho Code*, states that the provisions of Chapter 19, Title 55, *Idaho Code*, are *supplementary* to existing laws relating to platting, etc. Section 50-1302, *Idaho Code*, requires that proposed subdivisions are to be surveyed, platted, and the plats recorded. Section 50-1316, *Idaho Code*, sets out a civil penalty for selling unplatted lots and §50-1329 and §50-1314, *Idaho Code*, provide for county enforcement of the duty to plat subdivisions. Nothing in Title 55, Chapter 19, *Idaho Code*, repeals any of Title 50, Chapter 13, *Idaho Code*.

Since §55-1901, *Idaho Code*, states that it is supplementary to other laws on surveying and platting and since it does not attempt to amend or repeal the platting statutes as outlined above, we do not believe that the courts would construe Chapter 19, Title 55, *Idaho Code*, as replacing or providing an alternative to Chapter 13, Title, 50, *Idaho Code*. We are therefore of the opinion that the laws on platting of subdivisions, Chapter 13, Title 50, *Idaho Code*, are in full force and effect and must be complied with.

Sincerely,
/s/ ROBIE G. RUSSELL
Deputy Attorney General
Chief, Local Government Div.

RGR/tl

January 22, 1982

The Honorable Laird Noh
Senator, District 25
Capital Building
Boise, Idaho

THIS IS NOT AN OFFICIAL OPINION
OF THE ATTORNEY GENERAL
AND IS SUBMITTED SOLELY FOR YOUR LEGAL GUIDANCE.

Dear Senator Noh:

Your letter dated January 17, 1982 has been referred to me for response. You expressed interest in a legal analysis of a proposed Elderly Abuse Bill and particularly whether or not existing criminal statutes would be adequate to address the problem without the proposed legislation.

Upon review of the subject proposed legislation, it appears that it addresses problems that might not be adequately solved through the normal criminal prosecution process. The statute would set up a reporting and investigative process directed toward alleviating abuse or neglect of the elderly. In many family situations where an elderly person is under the care and supervision of a son, daughter or other relative, the police and other criminal authorities in some instances tend not to become involved in a "family dispute." Abuse or neglect within the family would, under this proposed act, be subject to investigation.

There are, of course, criminal statutes in the state of Idaho which prohibit the embezzlement of funds. However, in a situation where a niece or nephew, for instance, persuaded an older relative to "loan" money which the older person could not afford to part with, the crime of embezzlement would not have been committed, and yet the elderly party might suffer as a result.

Idaho Code Sections 18-401 through 18-405 provide criminal penalties for willful neglect. Willful neglect includes desertion, the willful failure to furnish necessary food, clothing, shelter, etc. However these criminal statutes merely apply to the neglect of one's wife or children. They would not apply to the elderly which are the subject of the proposed legislation.

Therefore I would be of the opinion that the proposed legislation would serve a purpose not entirely covered by Idaho criminal statutes.

One concern, however, I have with the wording of the proposed legislation, deals with the language in Section 39-5203. This section purports to *require* various enumerated parties to report abuse or neglect within five (5) days of observance of such activity. The proposed statute does not provide any penalty for failure to report this activity; and furthermore it is questionable in general whether failure to so report this type of observed activity would render one of the enumerated parties either criminally or civilly liable.

If I can be of any further assistance in this matter please feel free to contact me.

Sincerely yours,
/s/ MICHAEL E. JOHNSON
Chief, Legal Services Division
Department of Health and Welfare

MEJ:mf

January 25, 1982

The Honorable Vernon K. Brassey
Idaho State Senate
3200 Treasure Drive
Boise, ID 83703

THIS IS NOT AN OFFICIAL OPINION
OF THE ATTORNEY GENERAL
AND IS SUBMITTED SOLELY FOR YOUR LEGAL GUIDANCE.

Dear Senator Brassey:

Attorney General David Leroy has asked me to respond to your letter of January 6, 1982, in which you request legal guidance concerning the application of *Idaho Code* §33-3717(2) (g) which sets forth for purposes of payment of tuition at the state's public colleges' and universities' requirements for the establishment of residency for persons separated from the United States armed forces. You have specifically asked whether pursuant to such a provision a person separated from the armed forces after at least two years of service, who at the time of separation designates the state of Idaho as his intended domicile must also enter a college or university in the state within one year of the date of separation in order to be deemed a resident of Idaho for tuition purposes.

As you have noted in your letter, *Idaho Code* §33-3717(2) (g) provides that for tuition purposes a resident student is:

(g) A person separated, under honorable conditions, from the United States armed forces after at least two (2) years of service, who at the time of separation designates the state of Idaho as his intended domicile or who has Idaho as the home of record in service and enters a college or university in the state of Idaho within one (1) year of the date of separation.

It would appear that the language of this subsection is susceptible of two different constructions for each of which persuasive arguments could be developed. Arguably, as you have suggested the legislature could have intended by the use of such language that there should be two sets of circumstances under which a person so separated from the armed forces may be deemed a resident: (1) where the person upon separation designates the state of Idaho as his intended domicile; and (2) where the person has Idaho as the home of record in service and enters a college or university in the state within one year of the date of separation. However, in construing such language, *Idaho Code* §33-3717 must be read in its entirety and its meaning determined in light of the purpose and intent of the statute. In so doing, it is my conclusion that a different result should be reached. Indeed, I would suggest that *Idaho Code* §33-3717(2) (g) should be construed so as to require such persons in establishing residency either to have designated the state of Idaho as his intended domicile upon separation from the armed services or to have had the state as the home of record in service *and* in either event to have entered a college or university in the state of Idaho within one year of the date of separation.

Reference to well-recognized rules of statutory construction designed to aid in the determination of legislative intent provides solid support for such a con-

clusion. The Idaho Supreme Court has held that in construing a statute, not only must the literal wording be examined, but also account must be taken of other matters such as context, object in view, evils to be remedied, public policy, history of the time and, of course, the statute's legislative history. *Knight v. Employment Security Agency*, 88 Idaho 262, 398 P2d 643 (1965). With such a rule in mind, we are given guidance as to the intent of the legislature in adopting such language by considering the legislative history of *Idaho Code* §33-3717(2) (g). As you have noted in your letter, §33-3717(2) (g) prior to 1979 required that a person separated from the armed forces and desiring to establish residency status for tuition purposes designate at the time of separation the state of Idaho as his home of record and enter a college or university in the state within one year of the date of separation. It would appear that such a statutory scheme was designed to ensure that a person falling within its purview not only set forth the state of Idaho as his intended domicile but establish Idaho as his actual domicile within a reasonable period of time after separation from the armed services as reflected in the matriculation requirement referred to above. In 1979, however, the statute was amended to reflect its current form, i.e., to require such persons either at the time of separation to designate the state as the intended domicile or in the alternative to have had Idaho as the home of record in service. 1979 Idaho Session Laws Ch. 73. It would appear that such an amendment, in recognition of those special circumstances surrounding persons in the armed forces, reflected a legislative desire to provide two different means by which such persons could begin the process of establishing residency in this state for tuition purposes, i.e., the designation of the state as the intended domicile or in the alternative, the maintenance of Idaho as the home of record in service. Because the matriculation requirement, however, apparently serves a different purpose, namely to ensure that persons falling within the coverage of this provision establish Idaho as their actual domicile within a reasonable period of time as evidenced by their entrance into one of the state's colleges or universities, I would suggest that it was the intent of the legislature to require compliance with such a matriculation requirement regardless of whether a person has designated the state as his intended domicile or maintained Idaho as his home of record in service.

Other established rules of statutory construction provide further support for such a conclusion. The Idaho Supreme Court has held that a standard of reasonableness may be used in interpreting ambiguous language of a statute. *Summers v. Dooley*, 94 Idaho 87, 481 P2d 318 (1971). Furthermore, in construing a statute, it is necessary to consider the consequences that might flow from a particular interpretation. *Smith v. Department of Employment*, 100 Idaho 520, 602 P2d 18 (1979). A construction of the language in question in a manner which would require persons wishing to have in-state residency status and who have had the state of Idaho as their home of record in service to enter a state college or university within one year of the date of separation but not those persons who have designated upon separation the state of Idaho as their intended domicile simply would not appear to be reasonable interpretation of the statute in light of the inequitable results which could occur. For example, a member of the armed forces who had been domiciled in Idaho prior to entering the armed forces and has maintained the state as his home of record in service would be required to enter a college or university within one year of the date of separation while a person who has had no nexus with the state other than his declaration of intended domicile upon separation from the armed forces would not have to adhere to such a requirement. Such a result certainly would not appear to be one contemplated by the legislature in its enactment and amendment of *Idaho Code* §33-3717(2) (g) and argues strongly for an alternative construction. I, therefore,

would conclude that the legislature intended that the matriculation requirement of §37-3717(2)(g) be applied to all persons falling within the purview of that subsection whether it be due to their designation of Idaho as their intended domicile or their maintenance of the state as the home of record in service.

If you have any questions or if there is anything further I can do to assist you, please let me know.

Sincerely,
/s/ STEVEN W. BERENTER
Deputy Attorney General
Education

SWB:ms

January 28, 1982

The Honorable William F. Lytle
House of Representatives
State of Idaho
Statehouse Mail

THIS IS NOT AN OFFICIAL OPINION
OF THE ATTORNEY GENERAL
AND IS SUBMITTED SOLELY FOR YOUR LEGAL GUIDANCE.

Dear Representative Lytle:

This letter is in response to your question of January 21, 1982, concerning what effect House Bill 523, the Right-to-Work Bill, would have had on the recent negotiations for the purchase of Bunker Hill, had the Bill been enacted prior to the negotiations.

It is our impression that had House Bill 523 been enacted into law prior to the Bunker Hill purchase negotiations, it would have had little legal effect on the course of the purchase negotiations, nor would it have addressed or resolved the various legal issues that have arisen in the course of those negotiations.

As you know, the focus of a right-to-work bill is to allow individuals to work without being compelled to join a labor union. Employment of non-union members was not an issue in the recent purchase negotiations concerning Bunker Hill. Rather, the legal issues which were central to the negotiations concerned the right of a local union to execute or an international union to refuse to execute a labor agreement with a prospective purchaser of a company, when there is an existing labor agreement with the present owners. The obligation of a successor company to bargain either before or after purchase with the labor organization representing the employees would not be affected by the Right-to-Work Bill.

It is clear that House Bill 523 does not purport to address these issues. It is also clear that a state cannot enact legislation to limit the authority of a national union over its local affiliate. The authority for states to enact right-to-work laws is found in 29 U.S.C. §164(b). That section reads as follows:

Nothing in this act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any state or territory in which such execution or application is prohibited by state or territorial law.

The above section thus limits state jurisdiction in matters covered by federal labor laws to the prohibition of agreements requiring union membership as a condition of employment. The National Labor Relations Act effectively prevents attempts by states to enact a more pervasive scheme of labor regulation. See e.g., *Building Trades Council v. Garmon*, 45 Cal. 2d 657, 291 P.2d 1, *vacated*, 353 U.S. 951, on remand, 49 Cal. 2d 595, 320, P.2d 473, *rev'd*, 359 U.S. 236 (1959); *SeaPak v. Industrial Employees, National Maritime Union*, 300 F.Supp. 1197 (S.D. Ga. 1969), *aff'd per curiam*, 423 F.2d 1229, *aff'd per curiam*, 400 U.S. 985 (1971).

Accordingly, it is our impression that had Idaho enacted a right-to-work bill, it would have had no significant legal impact on the recent negotiations for the purchase of Bunker Hill. It might be noted, however, that had Idaho enacted a right-to-work bill some time ago, it is possible that over time a large body of non-union workers unaffected by the international union policies would have built itself into the Bunker Hill work force. If this had been the case, even though the purchasers would have had a duty to negotiate with the union, they might also have been able to secure sufficient non-union employees and flexibility to contribute to the success of the financial package they sought. This last point, however, must be recognized as purely speculative.

If you have any further questions on this matter, please contact me.

Sincerely,
/s/ LARRY K. HARVEY
Chief Deputy Attorney General

LKH/bc

February 1, 1982

John C. Andreason
Director
Legislative Fiscal Office
Statehouse Mail

THIS IS NOT AN OFFICIAL OPINION
OF THE ATTORNEY GENERAL
AND IS SUBMITTED SOLELY FOR YOUR LEGAL GUIDANCE.

Dear John:

You have inquired concerning the proper use and disposition of money received by the Joint Finance and appropriations Committee from members of the general public, pursuant to the Idaho Conservation League's "Quarters for Clean Air" program. Specifically you voiced concern whether the money received from the participants in this publicity campaign must be deposited in a special trust fund or whether it should be placed in the general account.

Idaho Code §67-1209 provides in part: "Any state officer, department, board or institution having or receiving money in trust or for safe keeping pending its final disposition or distribution shall deposit the same in the state treasury in a special suspense account . . ." *Idaho Code* §57-803 (c) states:

The trust and agency fund is hereby created and established in the state treasury. The trust and agency fund is to be used to account for money which the state administers as a trustee pursuant to law or trust agreement which restricts the use of money to a specified purpose, and for money which the state holds and disburses as an agent. The trust and agency fund shall also be used by state agencies to account for cash bonds, suspense type items, to hold money pending distribution to an individual, business or governmental agency, and to hold tax or other payments which are in dispute.

In order to determine whether these funds should be placed in a trust fund or a special account, therefore, it must be determined whether the money received is held in trust by the state.

The Idaho Supreme Court has stated: "An express trust is created only if the settlor manifests an intention to create a trust. This manifestation of intention requires no particular words or conduct; the settlor simply must evidence his intention, upon transferring the property, or res, to the trustee, that the trustee will hold the res for the benefit of a third person, the beneficiary." *Garner v. Andreassen*, 96 Idaho 306, 308, 527 P.2d 1264 (1974). The Court has also stated that: "A trust must be proven by clear and satisfactory, or clear and convincing evidence." *Vaughan v. First Federal Savings and Loan Assn.*, 85 Idaho 266, 276, 378 P.2d 820 (1963). As Ms. Renee A. Quick of the Idaho Conservation League has stated in a January 22, 1982, letter to Senator Little and Representative Gurnsey, "The purpose of the campaign is to demonstrate widespread support to reinstate Idaho's Air Quality Bureau . . . Everyone realizes that the quarters the Joint Committee will receive will not fund the Bureau, but we do hope they will impress you as to the widespread support in Idaho for the concept for taking care of our own problems." It cannot be said that there is clear and convincing evidence that the organizers of the Quarters for Clean Air campaign intend that the money which is sent to the legislature be spent for a particular purpose. It appears rather that their purpose is to convince the legislature that there exists broad-based support for funding for the Air Quality Bureau.

Idaho Code, §57-803(a):

The state operating fund is hereby created and established in the state treasury. The state operating fund is to be used to account for monies which are not necessarily restricted in use or purpose, and which are generally utilized to finance the ordinary functions of state government.

Also, *Idaho Code* §67-1205 states: "The general fund consists of money received into the treasury and not specially appropriated to any other fund." Because the use of the money received under the Quarters for Clean Air program is not restricted, it would appear that it should be placed in the general account of the state operating fund.

I hope this has answered your concerns. If you have further questions, please contact me.

Sincerely,
/s/ KENNETH R. McCLURE
Deputy Attorney General
Division Chief —
Legislative/Administrative Affairs

KRM/bc

February 8, 1982

The Honorable W. Rusty Barlow
House of Representatives
State of Idaho
Statehouse Mail

THIS IS NOT AN OFFICIAL OPINION
OF THE ATTORNEY GENERAL
AND IS SUBMITTED SOLELY FOR YOUR LEGAL GUIDANCE.

Dear Representative Barlow:

You have asked this office for advice concerning the constitutionality of House Bill 540, which provides a special tax for funding public T.V. Specifically, you have asked, "Is it constitutional to tax all of the people in the state for a service that they cannot receive? Many of the people in this state are unable to receive the signal but will be required to pay the tax."

The constitutionality of a taxing statute is not dependent on the ability of the taxpayers to receive equally the benefits procured by the payment of tax. According to 84 C.J.S. *Taxation*, §2:

The taxing power does not depend on the taxpayers' enjoyment of any special benefit from the use of funds raised by taxation. Rather, "Taxation proceeds on the theory that the existence of government is a necessity, that it cannot continue without means to pay its expenses, and that for those means it has the right to compel all citizens and property within its limits to contribute." Thus according to the general theory of taxation, a taxing statute is not invalid simply because people do not receive its benefits equally.

Although the Idaho Supreme Court has not addressed this issue, it is extremely likely that it would concur with the above analysis. Since *State v. Dolan*, 13 Idaho 693, 92 P.995 (1907), it has been repeatedly held that the Idaho Constitution is a limitation of the power of the legislature and that therefore if any act is not prohibited by the Idaho or U.S. Constitution, it must be held valid. See, e.g., *Leonardson v. Moon*, 92 Idaho 796, 451 P.2d 542, (1969); *Rich v. Williams*, 81 Idaho 311, 341 P.2d 432 (1959) and *Diefendorf v. Gallet*, 51 Idaho 619,

10 P.2d 307 (1932). As there is no prohibition against taxing individuals equally who will receive unequally the benefits of the revenue, House Bill 540 is not unconstitutional on those grounds.

Nor is House Bill 540 unconstitutional in that it discriminates between individuals and corporations by imposing a \$2.50 tax on individual returns and a \$25.00 tax on corporate returns. In *Diefendorf v. Gallet*, *supra*, the Idaho supreme Court stated that the provisions of article 7, §5, which require uniformity of taxation, do not apply to an excise tax (which the public T.V. tax would be).

Nor does House Bill 540 violate the right to equal protection of the Fourteenth Amendment of the United States Constitution. As stated in *Justus v. Board of Equalization of Kootenai Co.*, 101 Idaho 743, 620 P.2d 777 (1980):

Both article 7, §5 of the Idaho Constitution, and the federal equal protection clause proscribe unlawful discrimination by taxing authorities. While various standards have been articulated under either provision there is little practical distinction between the two . . . A taxing plan offensive to one also violates the other. (at p.746)

As explained by the United States Supreme Court in *Lehnhausen v. Lakeshore Auto Parts Co.*, 410 U.S. 356, 359 (1973):

The equal protection clause does not mean that a state may not draw lines that treat one class of individuals or entities differently from the others. The test is whether the difference in treatment is an invidious discrimination . . . Where taxation is concerned and no specific federal right, apart from equal protection, is imperilled, the states have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxations.

In *Lehnhausen*, the U.S. Supreme Court specifically approved of an Illinois statute which imposed personal property taxes on corporations but not on individuals. Because the distinction between corporations and individuals set forth in House Bill 540 does not constitute invidious discrimination it does not violate either the equal protection clause of the United States Constitution or article 7, §5 of the Idaho Constitution.

I hope that this has sufficiently answered your inquiry. There appear to be no other areas of concern regarding the validity of HB 540. If you have further comments or questions, please contact me.

Sincerely,
/s/ KENNETH R. McCLURE
Deputy Attorney General
Division Chief —
Legislative/Administrative Affairs

KRM/bc

February 8, 1982

Darrell V. Manning
Director
Department of Transportation
Statehouse Mail

THIS IS NOT AN OFFICIAL OPINION
OF THE ATTORNEY GENERAL
AND IS SUBMITTED SOLELY FOR YOUR LEGAL GUIDANCE.

Dear Mr. Manning:

You have sought this office's advice on the proper interpretation of article 7, §17 of the Idaho Constitution. Specifically, you have asked:

Can any of the direct or administrative costs of the Idaho Department of Law Enforcement concerning the Criminal Investigation Bureau, the Idaho State Horse Racing Commission or the Idaho State Brand Board be funded with highway user funds (funds derived from fuel tax and motor vehicle registration fees)?

Furthermore, you have noted that the Criminal Investigation Bureau "performs functions such as welfare fraud, liquor law enforcement and the enforcement of the narcotics laws."

Article 7, §17 of the Idaho Constitution states:

On and after July 1 of 1941, the proceeds from the imposition of any tax on gasoline and like motor vehicle fuels sold or used to propel motor vehicles upon the highways of this state and from any tax or fee for the registration of motor vehicles, in excess of the necessary costs of collection and administration and any refund or credits authorized by law, shall be used exclusively for the construction, repair, maintenance and traffic supervision of the public highways of this state and the payment of the interest and principal of obligations incurred for said purposes; and no part of such revenues shall, by transfer of funds or otherwise, be diverted to any other purposes whatsoever.

This section was first construed by the Idaho Supreme Court in *State, ex rel. Moon v. Jonasson*, 78 Idaho 205, 299 P2d 755 (1956). In that case the legislature had appropriated \$50,000 from the highway fund to be used for advertising to promote the state's tourism industry. Reading the section literally, the Court stated that no expenditure could be made unless it could be considered "administration" or "maintenance" of the public highways and accordingly found the appropriation to be unconstitutional.

The Court elaborated on what it considered to be administration in *Rich v. Williams*, 81 Idaho 311, 341 P2d 432 (1959), when it allowed use of the highway funds for construction of a building to house the Department of Highways and divisions of the Department of Law Enforcement supported by appropriations from the highway fund. In allowing the expenditure, the Court warned that the building could be used only for "the performance of the functions and duties within the purview of Idaho Constitution, article 7, §17." *Id.* at 323.

Finally, in *Williams v. Swenson*, 93 Idaho 542, 544, 467 P.2d 1 (1970), the Court reiterated:

The plain meaning of article 7, §17 of the Constitution is that all monies collected from the enumerated sources must be used for the designated purpose and may not be diverted therefrom . . . The only exception to that mandate is that the legislature may authorize the funds to also be used for refunds or credits or to defray the costs of collection and administration [of highway programs.]

Accordingly, unless the Criminal Investigation Bureau, the Idaho State Horse Racing Commission or the Idaho State Brand Board are engaged in "the construction, repair, maintenance and traffic supervision of the public highways of this state . . ." they may not be funded with highway user funds. Article 7, §17 of the Idaho Constitution is plain on its face and as interpreted by the Idaho Supreme Court will not allow expenditure of funds raised by "any tax on gasoline and like motor vehicle fuels . . ." to be used for any non-highway related purpose. As you have stated that entities do not perform highway-related services, they may not receive money from highway user funds.

I hope this satisfactorily answers your inquiry. If I can be of further service, please contact me.

Sincerely,
/s/ KENNETH R. McCLURE
Deputy Attorney General
Division Chief —
Legislative/Administrative Affairs

KRM/bc

February 10, 1982

The Honorable Reed W. Budge
President Pro Tempore
Senate, State of Idaho

The Honorable Ralph Olmstead
Speaker of the House
House of Representatives
State of Idaho
Statehouse Mail

THIS IS NOT AN OFFICIAL OPINION
OF THE ATTORNEY GENERAL
AND IS SUBMITTED SOLELY FOR YOUR LEGAL GUIDANCE.

Gentlemen:

You have asked, "Whether or not the new policies of the Water Resource Board concerning the state water plan are properly before the legislature at this

time.” Specifically, it is my understanding that you are concerned whether the proposals which have been submitted to the legislature are subject to the legislative review provided by *Idaho Code* §41-1736, which states:

The state water plan adopted by the Idaho Water Resource Board pursuant to the authority of §42-1734, *Idaho Code*, shall not become effective until it has been submitted to the legislature of the State of Idaho and has been affirmatively acted upon in the form of a concurrent resolution which may adopt, reject, amend or modify the same. Thereafter any changes in the state water plan shall be submitted in the same manner to the legislature prior to becoming effective.

The answer to your question lies in the proper interpretation of article 15, section 7 of the Idaho Constitution:

State water resource agency. — There shall be constituted a Water Resource Agency, composed as the Legislature may now or hereafter prescribe, which shall have power to formulate and implement a state water plan for optimum development of water resources in the public interest; to construct and operate water projects; to issue bonds, without state obligation, to be repaid from revenues of projects; to generate and wholesale hydroelectric power at the site of production; to appropriate public waters as trustee for Agency projects; to acquire, transfer and encumber title to real property for water projects and to have control and administrative authority over state lands required for water projects; all under such laws as may be prescribed by the Legislature.

As you both know, the question which you have asked is the ultimate question in pending litigation. After enactment of §42-1734 in 1977 the State Water Plan adopted by the Water Resource Board was submitted to the legislature pursuant to §42-1736. When the legislature modified the policies adopted by the Water Resource Board, Idaho Power Company brought an action against the State of Idaho to determine whether the Idaho Legislature had the constitutional power to modify the plan adopted by the Water Resources Board pursuant to §42-1734. Then Speaker of the House Allen Larsen and Senate President pro tem Phil Batt intervened as defendants on behalf of the Idaho Legislature. On January 8, 1979, District Judge Jesse Walters ruled that *Idaho Code* §42-1736 was unconstitutional, that a house concurrent resolution modifying the plan adopted by the Water Resources Board was unconstitutional, and further that the plan as originally adopted by the Water Resources Board had been in full force and effect since its promulgation by the Board. The judgment was appealed, however, and the briefing to the Idaho Supreme Court has been completed. It now appears that oral argument will not be heard until December, 1982. Accordingly, if the Court issues its opinion in the normal course of business, the decision will not be published for five to six months after argument.

Because Judge Walters' decision was not stayed, it appears that it is effective between the parties during the time the case is on appeal. Although there has been no direct ruling on this point by the Idaho Supreme Court, the great weight of authority supports it. See, *Malick v. Malick*, 271 Or. 183, 530 P.2d 1243 (1975); *Lay v. District Court in and for Jefferson County*, 171 Colo. 242, 468 P.2d 375 (1970); *Solarana v. Industrial Electronics Inc.*, 50 Hawaii 22, 428 P.2d 411 (1967); *Carp v. Superior Court in and for Maricopa County*, 84 Ariz. 161, 325 P.2d 413 (1958) and *First National Bank of Nevada v. Wolff*, 66 Nev. 51, 202 P.2d 878

(1949). This position has been adopted impliedly by the Idaho Supreme Court in *Roberts v. Hollandsworth*, 101 Idaho 522, 616 P.2d 1058 (1980). In that case, the court noted that the judgment of a federal court was binding between the parties even though it had been appealed, when no stay was sought.

As Judge Walters' decision that §42-1736 is unconstitutional is the definitive statement of the meaning of the law until and unless it is reversed by the Idaho Supreme Court, the legislature does not have the authority to consider the new policies of the Water Resources Board before they become effective. According to Judge Walters' interpretation of article 15, Section 7 of the Idaho Constitution and *Idaho Code* §§42-1734 and 42-1736, the new policies of the Water Resource Board are already valid and final and may not be affected by legislative action.

If I can provide additional clarification of this response or be of any further service to you on this or any other matter, please contact me.

Sincerely,
/s/ KENNETH R. McCLURE
Deputy Attorney General
Division Chief —
Legislative/Administrative Affairs

KRM/bc

February 10, 1982

The Honorable Robert C. Geddes
House of Representatives
Statehouse Mail

THIS IS NOT AN OFFICIAL OPINION
OF THE ATTORNEY GENERAL
AND IS SUBMITTED SOLELY FOR YOUR LEGAL GUIDANCE.

Dear Representative Geddes:

Following our recent discussions and your letter of January 20 requesting legal guidance, this office has researched the question of legislation to strengthen the bargaining position of surface right holders in negotiations with mineral right developers. The result of our efforts is summarized as follows.

QUESTION PRESENTED:

Can the State of Idaho enact legislation requiring that the developer of the severed mineral rights to a piece of property pay a royalty to the owner of the surface rights to the same piece of property?

CONCLUSION:

Probably not.

A bill that required the owner of preexisting mineral rights to pay a royalty to the owner of surface rights as a condition for exploiting the mineral rights

would be unconstitutional as unfair retroactive legislation in violation of the due process, equal protection, contract and, possibly, the commerce clauses of the U.S. Constitution.

ANALYSIS:

The owner of a piece of property may sever the mineral or oil and gas interests from the remainder of his interests in the property and dispose of these interests separately from the surface interest. In other words, a property owner can subdivide his estate horizontally as well as vertically, so that title to the surface vests in one set of grantees and title to the minerals vests in another set. 54 Am. Jur. 2d, Mines and Minerals, §103. Once a property owner has severed the mineral estate from the surface estate the owner of the surface estate no longer has any interest in the severed mineral estate. After a mineral severance two fee simple estates exist, one in the minerals and one in the surface. 1A G. Thompson, Commentaries on the Modern Law of Real Property § 160 (Replacement by J. Grimes, 1980). The mineral estate is a totally independent real property interest distinct from the surface interest. It can be separately sold, bequeathed, taxed and developed. A surface estate owner retains no more rights to severed minerals than a residential real estate developer does to subdivision lots.

Moreover, the common law view is that the mineral estate is dominant over the surface estate. The mineral estate carries with it such rights to the surface as may be necessarily incident to the exploitation of the minerals contained therein, because a grant or reservation of minerals should be wholly worthless if the grantee or reserver could not enter upon the land in order to explore for or extract the minerals in question. See, *Union Oil Company of California v. County of Ventura*, 41 Cal. App. 3d 432, 116 Cal. Rptr. 13 (1974). The dominance of mineral interests over surface interests grew out of nineteenth century favoritism for industrial development over other land use alternatives. Mines were needed to supply the raw materials for a growing industrial society. Allowing surface owners to veto mine development would have been contrary to accepted public policy. J. Dycus, *Legislative Clarification of the Correlative Rights of Surface and Mineral Owners*, 33 Vand. L. Rev., 871, at 872-886 (1980). Therefore, the doctrine of "reasonably necessary surface use" was developed to permit the mineral estate holder to use the surface area without liability for surface damages so long as such use and the manner of its exercise were reasonably necessary to effectuate the purpose for which the severance of the mineral estate was made. Annot., What constitutes reasonable use of the surface of the leasehold by a mineral owner, lessee, or driller under an oil and gas lease or drilling contract. 53 A.L.R.3d 16(1973).

As a practical matter the holders of mineral rights are usually willing to compensate the holders of surface rights in order to assure their cooperation. If a mineral interest is worth developing, it is usually worth something for the developer to avoid conflicts with the surface owner.

Legislation to exact a specified royalty from the developer of a mineral interest would encounter serious constitutional and practical problems.

The developer of an existing mineral estate has a property interest that is recognized and protected by the Fourteenth Amendment to the U.S. Constitution and by Article 1, Section 1, of the Idaho Constitution. If the developer owns the mineral estate outright, he has a real property interest; if he is leasing the

mineral estate, he has a contractual interest. In either case, the developer's interest cannot be tampered with unless the developer is afforded due process — notice of the state's action and opportunity for a hearing. The due process requirements would be particularly heavy where the legislation applied retroactively to mineral interests created before the legislation was enacted. *Texaco, Inc. v. Short*, 50 U.S.L.W. 4117, 4123 (1982) (White, J., dissenting).

In addition, retroactive legislation would constitute an impermissible taking of the mineral estate owner's property interest unless it could be shown to advance pressing and substantial public interests and did not result in any measurable unfairness. Note, *Nebraska Supreme Court Finds Retroactive Statutory Extinguishment of Outstanding Mineral Interests Unconstitutional*, 13 Creighton L. Rev. 687 at 690 (1979). A bill that awarded a windfall profit to surface owners does not appear to meet the requirements for retroactive legislation. A retroactive surface owners' royalty statute would impair the obligation of contract, see *Bickel v. Fairchild*, 83 Mich. App. 467, 268 N.W. 2d 881 (1978), and would benefit surface owners unfairly at the expense of mineral rights owners. The blatant transfer of wealth from mineral rights owners to surface owners could also amount to a violation of the U.S. Constitution's equal protection clause. *Department for Natural Resources and Environmental Protection v. No. 8 Limited of Va.*, 528 S.W. 2d 684 (Ky., 1975). If the royalty statute had the effect of discriminating against out-of-state mining or oil concerns, it could be struck down as a violation of the U.S. Constitution's commerce clause.

Despite the problems mentioned in the preceding paragraphs, a number of state legislatures have adopted statutes requiring the surface owner's consent before mining can take place. These statutes strengthen the hand of the surface owner in wresting concessions from the mineral owner. Because the statutes shift the balance of power in mineral rights negotiations in favor of the surface owner, they are subject to the challenges discussed previously. At least some commentators, however, think that such statutes can pass constitutional muster. J. Dycus, *op. cit. supra*; Note, *The Surface Owner's Estate Becomes Dominant: Wyoming's Surface Owner Consent Statute*, 16 Land and Water L. Rev. 541 (1981).

The drafting of a surface owner's consent statute that had a chance of being upheld would be a time consuming task requiring great precision. Dycus has prepared a model act that could serve as the template for legislation. However, even if a valid surface owner's consent statute could be written, there remains a serious question whether or not it should be written. To the extent that consent statutes complicate the development of resources by miners and drillers, the statutes reduce the incentive for exploration and the likelihood of exploitation.

Very truly yours,
 /s/ DON OLOWINSKI
 Chief, Natural Resources Division

DO:mf

February 17, 1982

Honorable Laird Noh
Idaho State Senator
Statehouse Mail

THIS IS NOT AN OFFICIAL OPINION
OF THE ATTORNEY GENERAL
AND IS SUBMITTED SOLELY FOR YOUR LEGAL GUIDANCE.

Dear Senator Noh:

As we understand it, you are concerned about situations in which grazing districts are located in more than one county. You inquired whether §10(a) of the Taylor Grazing Act, 43 U.S.C. §315(i), would prohibit distribution of monies received by the state pursuant to that section on the basis of the amount of funds a grazing district produces rather than on the basis of acreage within a district. As you are aware, *Idaho Code* §57-1201 currently provides for the latter in cases where grazing districts lie within more than one county.

Our conclusion is that the Grazing Act would prohibit distribution based upon amounts produced when grazing districts are located in more than one county. Section 315(i) is explicit on this point:

(a) 12½ per centum of the moneys collected as grazing fees under section 3 of this Act during any fiscal year shall be paid at the end thereof by the Secretary of the Treasury to the State in which the grazing districts producing such moneys are situated, to be expended as the State legislature of such State may prescribe for the benefit of the county or counties in which the grazing districts producing such moneys are situated: PROVIDED, *That if any grazing district is in more than one State or county, the distributive share to each from the proceeds of said district shall be proportional to its area in said district.* (emphasis added).

We have been unable to find any case law, regulation, or legislative history which would contradict the clear wording of the provision. While distribution of funds on the amount produced is certainly a rational allocation scheme, congress apparently has chosen another method.

We hope this answers your inquiry. If you have any further questions, please do not hesitate to communicate with us.

Sincerely,
/s/ DON OLOWINSKI
Deputy Attorney General
Chief, Natural Resources Division

February 19, 1982

The Honorable Ron J. Twilegar
Senator, State of Idaho
Statehouse
Boise, ID 83720

THIS IS NOT AN OFFICIAL OPINION
OF THE ATTORNEY GENERAL
AND IS SUBMITTED SOLELY FOR YOUR LEGAL GUIDANCE.

Dear Senator Twilegar:

You have sought this office's advice concerning the interrelationship between House Bill 523, the Right to Work bill, and Title 22, Chapter 41, *Idaho Code*. Specifically you have asked, "Is there a conflict between the provisions of House Bill 523, §44-2006, and the provisions of the *Idaho Code* §§22-4104 and 22-4106?" The proposed portion of HB 523 which you question, §44-2006, states in part:

It shall be unlawful to deduct from the wages, earnings, or compensation of an employee, any union dues, fees, assessments or other charges to be held for or paid over to a labor organization, *unless the employer has first received a written authorization therefor signed by the employee* . . . (Emphasis added)

Idaho Code §22-4104 which deals with agricultural employment, states:

Employees shall have the right to self organization, to form, join or assist labor organizations to bargain collectively through representatives of their own choosing, to be employed by any employer willing to employ them, and shall also have the right to refrain from any or all such activities *except to the extent that such right may be affected by an agreement requiring financial contributions to a labor organization as a condition of continued employment as authorized in subsection three of section 22-4106*. (Emphasis added)

Finally, *Idaho Code* §22-4106 states in part:

. . . in the event the labor organization is the duly certified representative of the employees, an employer may enter into a written agreement with such labor organization providing that after seven (7) days employment an employee shall make financial contributions toward the labor organization consisting of a sum not greater than the monthly dues of said labor organization and providing that an *employer shall terminate an employee upon request of the labor organization, if the employer has reasonable grounds for believing that said employee has not made or tendered said dues*; and provided further, that an employer shall not deduct such dues from an employee's earnings unless the employer has been presented with a written request therefor, signed by the employee personally. (Emphasis added)

It is my belief that there is indeed a conflict between HB 523 and §§22-4104 and 22-4106, *Idaho Code*. Although the employee's authorization is required under both §22-4106 and proposed §44-2006, current law allows the employer to contract with a labor organization to require all employees to make financial

contributions to that organization. Indeed, current law requires an employer who has entered such a contract to terminate an employee at the union's request, if that employee has failed to make the required contribution. On the other hand, the proposal of HB 523 would prohibit the requirement that individuals contribute to a labor organization as a condition of employment. The conflict appears to be inescapable.

I presume the thrust of your question, however, is what the effect of such a conflict would be. It is well settled in Idaho that when two statutes conflict, generally the more recently adopted statute will be implied to repeal the earlier statute to the extent they are inconsistent. See, e.g., *Knudson v. Bank of Idaho*, 91 Idaho 923, 435 P.2d 348 (1967) and *Little v. Nampa-Meridian Irr. Dist.*, 82 Idaho 167, 357 P.2d 740 (1960), which are illustrative of the numerous cases which have enunciated this principle. It is also clear that a statute will impliedly repeal a preexisting statute only to the extent that there is an irreconcilable conflict between the two. See, e.g., *Paullus V. Liedkie*, 92 Idaho 323, 442 P.2d 733 (1968) and *Herrick v. Gallet*, 35 Idaho 13, 204 P.477 (1922). Finally it should be noted that the implied repeal of an existing statute by a later enactment is not a favored construction of the later statute. See *Rydalch v. Glauner*, 83 Idaho 108, 357 P.2d 1094 (1961) and *State v. Davidson*, 78 Idaho 553, 309 P.2d 211 (1957). See also *Grindstone Butte Project v. Kleppe*, 638 F.2d 100 (9th Cir. 1981) and cases cited therein.

Given the principles stated above, it should be evident that the proposed §44-2006, *Idaho Code*, embodied in House Bill 523 would repeal any provision of §§22-4104 or 22-4106 which allows a labor organization to contract with an employer to require all employees to contribute to a labor organization as a condition of employment. Even though implied repeal usually is not a favored interpretation, in this circumstance it is compelling and appears to be the only logical means of reconciling the conflict which would be created. This is especially so given the stated intent of the proponents of HB 523.

I hope this has answered your concerns. If you have further questions or seek further clarification, please feel free to contact me.

Sincerely,
/s/ KENNETH R. McCLURE
Deputy Attorney General
Division Chief —
Legislative/Administrative Affairs

KRM/bc

February 22, 1982

Honorable Tom Boyd
Representative, District 5
Statehouse Mail

THIS IS NOT AN OFFICIAL OPINION
OF THE ATTORNEY GENERAL
AND IS SUBMITTED SOLELY FOR YOUR LEGAL GUIDANCE.

Dear Representative Boyd:

You have asked whether the county commissioners can pass ordinances that would be in conflict with the "Right to Farm Act," §§ 22-4501, et seq., *Idaho Code*.

In 1974 Lynn Thomas, Deputy Attorney General, reviewed the law at length and an opinion was issued (Opinion No. 75-51), copy enclosed, on the subject of conflicts between local ordinances and state law. In summary that opinion concluded that a local ordinance may be made which is the same or similar to a state law, but that a local ordinance cannot override or change a state law. It was also concluded that if the state law preempts the field, there can be no local ordinance.

In this case the state law directly sets out the terms within which it controls over any local ordinance or any nuisance action. It will thus control where it so states and will in other cases allow for local ordinances, §§22-4503 and 22-4504, *Idaho Code*.

In cases that may arise, the citizen may then claim the benefit of this law if he falls within its terms in the courts or outside the courts, as the case may be. And he personally may thus enforce this law even though the local ordinance may or may not be contrary to it.

If we can be of any further help to you on this matter, please let us know.

Sincerely,
/s/ WARREN FELTON
Deputy Attorney General
Local Government Division

WF/tl

Enclosure

February 22, 1982

The Honorable Peggy Bunting
House of Representatives
State of Idaho
Statehouse
Boise, ID 83720

THIS IS NOT AN OFFICIAL OPINION
OF THE ATTORNEY GENERAL
AND IS SUBMITTED SOLELY FOR YOUR LEGAL GUIDANCE.

Dear Representative Bunting:

You have asked this office for advice concerning House Bill 610 which clarifies the definition of non-residents for the purpose of issuance of driver's licenses. Specifically, you have asked, "Could you clarify for us the effect this legislation would achieve on immigrants in the United States, and make any comments on the other constitutional aspects of the bill." House Bill 610 amends §49-304, *Idaho Code*, to provide:

A non-resident is every person who is not a resident *or legal immigrant* of this state. A resident, for the purpose of this chapter, shall mean every person who has resided continuously *and legally* in the State of Idaho for a period of ninety (90) days.

It is not clear what purpose this bill would serve. It is also unclear what the drafters of the bill attempt to do by its enactment. Apparently, it attempts to distinguish between those persons who are legally and illegally in the state, and grant driver's licenses to the former but not the latter. Its effect, however, is quite different. Section 49-307 states:

No person, except those hereinafter expressly exempted, shall drive any motor vehicle upon a highway in this state unless such person has a valid license as an operator or chauffeur under the provisions of this act.

Section 49-308 provides:

The following persons are exempt from license hereunder: . . . (3) a non-resident who is at least sixteen (16) years of age and who has in his immediate possession a valid operator's license issued to him in his home state or country and may operate a motor vehicle in this state only as an operator . . . (5) Any non-resident who is at least eighteen (18) years of age, whose home state or country does not require the licensing of operators, may operate a motor vehicle as an operator only, for a period of not more than ninety (90) days in any calendar year, if the motor vehicle so operated is duly registered in the home state or country of such non-resident.

Finally, §49-309 provides which persons shall not be licensed. It is interesting to note that this section does not deal with a person's residence.

When the above sections are read together several observations may be made. First, a person who is a non-resident and at least sixteen years of age who

has a valid operator's license issued in another state or country does not need a driver's license at all to operate a vehicle in Idaho. Second, the only situation in which a non-resident may not operate a motor vehicle in Idaho is if his home state or country does not require driver's licenses and the vehicle which he wants to drive is not licensed in his home state or country, or if he seeks to drive that vehicle for more than ninety days. Third, if HB 610 is passed, any person who is illegally in this state will be considered a non-resident. Accordingly, if he is at least sixteen years of age and has a valid operator's license, he may remain in Idaho as long as he wants without the requirement of obtaining an Idaho operator's license, as §49-308 (3) specifically exempts him.

It might be well to point out that the term "legal immigrant" is not a defined term in the *Idaho Code*. It is extremely unclear what this language would include. Additionally, it is unclear what the language residing "continuously and legally" in this state would encompass. For example, it is unclear whether someone who is illegally cohabiting with another person in the State of Idaho would be a resident or non-resident for purposes of this section. This would be so because even though he may have resided continuously in this state for a period of ninety days, he would not have resided here legally. If you wish to distinguish between persons who are here legally according to the immigration laws of the United States, and those who are not, it would be much more clear to adopt language such as Colorado has adopted which denies a license to, "Any person whose presence in the United States is in violation of federal immigration laws."

In conclusion, if the purpose of this bill is to deny illegal aliens a driver's license, or to exempt them from the provisions of the driver's license act, language should be added which clearly states the legislature's intent. Additionally, I would strongly encourage you to consider language similar to Colorado's language so that it will be clear to whom the act applies.

If I can be of further assistance in this or any other matter, please contact me.

Sincerely,
/s/ KENNETH R. McCLURE
Deputy Attorney General
Division Chief —
Legislative/Administrative Affairs

KRM/bc

February 26, 1982

Marvin D. Gregersen, Chief
Bureau of Occupational Licenses
Statehouse Mail

Control #4827

THIS IS NOT AN OFFICIAL OPINION
OF THE ATTORNEY GENERAL
AND IS SUBMITTED SOLELY FOR YOUR LEGAL GUIDANCE.

Re: Mortician examinations

Dear Mr. Gregersen:

Your request for legal guidance dealt with the interpretation of *Idaho Code* §54-1108, and whether this statute requires the Board of Morticians to accept the results of "national conference examinations."

The statute reads as follows:

54-1108. Examination of applicants for license — Subjects — Special examinations for morticians of other states — Certification of results. — *The board of morticians shall have the sole power for determining the nature, type and extent of examinations to be taken by applicants for a mortician's license*, but such examinations shall include generally the following subjects: anatomy, chemistry, physiology, psychology, sanitary science, the care, disinfection, preservation, transportation of and burial, or other final disposition of dead human bodies, the law of the state of Idaho and the rules and regulations of the state department of health and welfare relating to infectious diseases and quarantine. *The board shall grade, or cause to have graded by licensed morticians, the examinations and shall determine whether the applicant has passed or failed such examination.* Examinations may be written or oral, or both, as determined in the discretion of the board, and shall be held at such times and at such places within the state of Idaho as determined by the board of morticians. *Provided, however, in the event any applicant for a mortician's license is a licensed mortician, or its equivalent, in any other state which has requirements at least equivalent to those in this act, or has passed the national conference examination which was taken at an accredited embalming college, the board of morticians shall prepare, conduct and grade a special examination for such applicant which shall deal only with the laws of the state of Idaho dealing with morticians and the department of health and welfare as it relates to morticians, and rules and regulations of the department of health and welfare relating to infectious diseases and quarantine and the transportation of dead human bodies. Upon the conclusion of grading any and all of the above examinations, the board of morticians shall certify the results listing each applicant as having failed or passed the examination, and such determination shall not be subject to review.* (emphasis added).

The statute contemplates three types of examinations which may lead to a mortician's license: (1) a general exam covering the broad area of the occupation,

(2) an exam relating only to laws applicable in the state, and (3) an exam given by embalming colleges and apparently graded by the "national conference." The first two exams mentioned are both composed and graded by the Board.

It is plainly apparent from the overall language of the section that, while the Board has discretion over the general and local law exams, it does not have the same discretion with regard to the national conference exam. The statute equates passage of this exam with licensure in another state, and provides that either licensure elsewhere or passage of the exam removes the need for testing other than on local law. The provision on being licensed elsewhere requires that the prior licensing state have as stringent standards as are found in Idaho. No such proviso is connected with the passage of the national conference exam. Language toward the end of the section appears to relate to the Board's certification of "any and all the above examinations." Besides not giving any indication what such certification means, this portion of the statute is, by its own terms, limited to the examinations graded by the Board, i.e., the general exam and the local law exam.

The Board rule, Idaho APA 24.09.9, is unclear in that it refers to "the examination" without any indication to which of the three types of examinations it is referring. An effort to impose the 70% minimum called for by this rule upon the national conference of morticians exam would be unwise without legislative clarification of *Idaho Code* §54-1108.

THE ABOVE CONCLUSIONS ARE SUBMITTED FOR YOUR LEGAL GUIDANCE. THEY DO NOT CONSTITUTE A FORMAL LEGAL OPINION OF THE ATTORNEY GENERAL BUT REPRESENT ONLY THE VIEWS OF THE UNDERSIGNED.

Sincerely,
/s/ FRED C. GOODENOUGH
Deputy Attorney General
Administrative Law and
Litigation Division

FCG/lb

March 1, 1982

Mr. Jay Bates
Legal Counsel
Department of Law Enforcement
Statehouse Mail

THIS IS NOT AN OFFICIAL OPINION
OF THE ATTORNEY GENERAL
AND IS SUBMITTED SOLELY FOR YOUR LEGAL GUIDANCE.

Re: Cooperative agreements with Indian tribes

Dear Jay:

Through the former Director of the Department of Law Enforcement, Kelly Pearce, you requested an opinion regarding the ability of the State of Idaho to enter into an agreement with an Indian tribe. Specifically, your question asked whether the State of Idaho or its political subdivisions could enter into cooperative agreements with the Shoshone-Bannock Tribes of the Fort Hall Reservation absent specific Congressional authorization.

Due to the nature of the request, it was necessary for us to consult with the Solicitor's Office of the Department of the Interior and seek amendments to certain Idaho statutes before we could provide an answer to your question. Quite some time passed before we received an answer to our inquiries from the Solicitor's Office. In the meantime, the events that prompted your request had passed. Thus, there appeared to be no need to issue an opinion about your questions. However, recent inquiries by John Traylor, Shoshone-Bannock Court Administrator, have prompted a reevaluation of your request and the subsequent issuance of this guideline.

ANALYSIS:

The question you presented involves two bodies of law, state and federal. While we feel reasonably confident in offering opinions as to the proper interpretation of state law, we generally refer questions on federal law to federal authorities. It is for that reason that we offer our opinion as to power of the State of Idaho in this matter and refer you to the accompanying opinion from the Office of the Solicitor, United States Department of the Interior, for the corresponding authority of a tribe.

Sections 67-2326 through 67-2333, *Idaho Code*, popularly known as the "Intergovernmental Cooperation Act," provide the statutory authority whereby the State of Idaho or its political subdivisions may enter into cooperative agreements among themselves, with other states, the federal government and its subdivisions, or Indian tribes.

The purpose of the act is set forth in §67-2326 wherein it is stated that:

It is the purpose of this act to permit the state and public agencies to make the most efficient use of their powers by enabling them to cooperate to their mutual advantage . . .

Section 67-2328 delineates what powers may be exercised by which units of government. Provisions therein specify the nature and terms of any agreement, how it is to be carried out, and from whom approval must be sought. The section also prohibits joint action by the state or its subdivisions unless the other governmental entity possesses similar authority to act in the particular circumstance under consideration.

Other statutes provide for filing of agreements with the Secretary of State, approval of appropriate state agencies and additional powers regarding personnel, funds, and property.

Section 67-2333 contains the major caveat in the act. It says:

Nothing in this act shall be interpreted to grant to any state or public agency thereof the power to increase or diminish the political or governmental power of the United States, the State of Idaho, a sister state nor any public agency of any of them.

Section 67-2327 defines "public agency" as:

Any agency of state government, any political subdivision of another state, or any *Indian Tribe*. (emphasis added).

Since the statute specifically authorizes the State of Idaho to enter into cooperative agreements with Indian tribes for the purposes outlined in the act and since Indian tribes are also defined as public agencies under the act, we believe that the State of Idaho or any of its political subdivisions may enter into cooperative agreements with Indian tribes for any lawful purpose.

Whether individual Indian tribes have corresponding powers to enter into agreements with the State of Idaho is a question which must be decided on a case by case basis. Additionally, as the introductory remarks to this letter indicated, the attached opinion from the Solicitor's Office of the Department of the Interior should be consulted regarding tribal authority and whether a particular tribe has specific authority to enter into an agreement. As you are aware from your long association with Indian law, although tribes are treated as sovereigns for some purposes, particular authority for a specific tribe cannot be ascertained without a thorough review of any statutes or treaties which deal with that tribe.

In summary, we believe that under Idaho law, the State of Idaho does have the authority to enter into agreements with other public agencies including Indian tribes, so long as those agencies have corresponding authority. The enclosed opinion of the Office of the Solicitor of the Department of the Interior should be referred to regarding the authority of Indian tribes.

If you have any additional questions on this or any other matter, please call upon us.

Sincerely,
/s/ ROBIE G. RUSSELL
Deputy Attorney General
Chief, Local Government Division

RR/tl

Enclosure
bcc: Mr. John Traylor

March 2, 1982

The Honorable Richard Adams
House of Representatives
State of Idaho
Statehouse Mail

THIS IS NOT AN OFFICIAL OPINION
OF THE ATTORNEY GENERAL
AND IS SUBMITTED SOLELY FOR YOUR LEGAL GUIDANCE.

Dear Representative Adams:

You have asked whether House Bill 736, which prohibits trespass by vehicles onto private land actively devoted to agriculture, is constitutional. Apparently you are concerned that the absence of a requirement for no trespassing signs would cause the bill to be invalid. It is my conclusion that the bill is constitutional.

Certainly if someone trespasses onto lands which they know to be private lands devoted to agriculture or which they would have reason to believe might be, they have either actual or constructive notice that they are committing a criminal trespass. The only difficulty with the statute is that it incorporates *Idaho Code* §63-112 for the definition of land actively devoted to agriculture. In this definition are included such lands as range lands and pasture lands. It may not be apparent to someone who is on the public domain range land just where the boundaries of private ownership are. Accordingly it is possible that a person could cross onto private land in violation of this act.

It is doubtful, however, that people who have neither actual nor constructive notice that the land is private land actively devoted to agriculture can be successfully prosecuted under this bill. Although courts have been known to apply strict liability interpretations on criminal laws similar to this (see e.g., *People v. Plywood Mfg's of California*, 291 P.2d 587, (1955)), this is usually done in statutes involving public health or safety. As the extant statute does not deal with public health or safety it is very unlikely the strict liability interpretation will be taken. Accordingly, for someone to be successfully prosecuted it would have to be shown that they both entered onto private land in violation of the act and that they knew or should have known that the land was private and actively devoted to agriculture. If someone does not know that the land is private and actively devoted to agriculture they would not be able to formulate the guilty intent required as an element of the offence.

The test for whether a statute such as this is void on its face, because it fails to provide adequate notice to persons who wish to comply with the law, is whether there is fair notice or warning to those persons so they may conform their conduct to the requirements of law. See e.g., *State v. Lopez*, 98 Idaho 581, 570 P.2d 259, (1976). Moreover the statute is not determined to be vague in the abstract but only as it applies to a particular set of facts. See e.g., *U.S. v. Broncheau*, 597 F.2d 1260, cert. denied, 444 U.S. 859 (9th Cir. 1979) and *State v. Carringer*, 95 Idaho 929, 523 P.2d 532, (1974).

Because the terms of the statute are clearly defined (there can be no question of what constitutes land which is actively devoted to agriculture) the only prob-

lem is with one of application as stated above. The statute is clearly valid where any person knows or has reason to know he is on agricultural land. That a person may not be successfully prosecuted if he has no reason to know he is on land actively devoted to agriculture (i.e. range land) does not cause the statute to be invalid.

For certainty and ease of administration, the legislature may wish to limit the statute to crop land or land which is in a rotation program or limit the prosecution of individuals who trespass on range land to those instances in which the trespassers have actual knowledge that the land is private and devoted to agriculture. As a practical matter, the court will make this last distinction in any event. If I can be of further service on this or any other matter please contact me.

Sincerely,
/s/ KENNETH R. McCLURE
Deputy Attorney General
Division Chief —
Legislative Administrative Affairs

KRM/tl

March 8, 1982

The Honorable Tom Stivers
House of Representatives
State of Idaho
Statehouse Mail

THIS IS NOT AN OFFICIAL OPINION
OF THE ATTORNEY GENERAL
AND IS SUBMITTED SOLELY FOR YOUR LEGAL GUIDANCE.

Dear Representative Stivers:

You have asked whether rights conferred by either the U.S. Constitution or Constitution of Idaho are violated by the elimination in certain circumstances of the right to a jury trial as proposed by HB 541.

Under the U.S. Constitution the question can surely and easily be disposed of in the negative. A statute which provides for the mere possible imposition of a \$100.00 fine is a petty offense and a trial by jury is not constitutionally required. See *Duncan v. Louisiana*, 391 U.S. 145 (1968) and *Cheff v. Schnackenberg*, 384 U.S. 373 (1966). Indeed misdemeanors, as punishable by §18-113, *Idaho Code*, (\$300 and/or six months) do not require a jury to meet the requirements of the U.S. Constitution. See *Schnackenberg*, *supra*.

However, the issue of whether an infraction as defined by the Act requires a jury under the Idaho Constitution is less clear. The proposed Traffic Infractions Act, H.B. 541, creates what is said to be a new category of offense which is

denominated an "infraction". To distinguish it from crimes, an "infraction" is punishable by a fine not to exceed \$100. There is no possibility of incarceration for violations, nor may one be arrested for such violations. Under this bill there is no right to a jury trial for charged "infractions." Such an infraction would be punishable only by a fine not to exceed \$100.

Art. I, §7 of the Idaho Constitution provides:

§7. Right to trial by jury. — The right of trial by jury shall remain inviolate; but in civil actions, three-fourths of the jury may render a verdict, and the legislature may provide that in all cases of misdemeanors five-sixths of the jury may render a verdict. A trial by jury may be waived in all criminal cases not amounting to felony, by the consent of both parties, expressed in open court, and in civil actions by the consent of the parties, signified in such manner as may be prescribed by law. In civil actions the jury may consist of twelve or of any number less than twelve upon which the parties may agree in open court. Provided, that in cases of misdemeanor and in civil actions within the jurisdiction of any court inferior to the district court, whether such case or action be tried in such inferior court or in district court, the jury shall consist of not more than six.

By the terms of this provision, a jury may not be waived in felony cases and may be dispensed with in misdemeanor cases only with the consent of the accused or by some act of waiver attributable to the accused. The Idaho Supreme Court has interpreted the Constitution in such fashion for a lengthy period of time. See, e.g., *State v. Scheminisky*, 31 Idaho 504, 174 P.611 (1918).

The meaning of the term "right to trial by jury" has generally been drawn from the meaning ascribed to the term at the time the Constitution was adopted. Accordingly, it has been held that the right to jury trial does not apply to actions unknown to the common law, *Brady v. Place*, 41 Idaho 747, 242 P.314, 243 P. 654 (1925), and that it does not apply to special proceedings created by statute and not in the nature of common law actions. See *Comish v. Smith*, 97 Idaho 89, 540 P.2d 274 (1975) and *Blue Note, Inc. v. Hopper*, 85 Idaho 152, 377 P.2d 373 (1962).

It has been argued that a traffic "infraction" is neither a felony nor a misdemeanor and is therefore a new class of offense not known to the common law. In the case of *People v. Oppenheimer*, Super., 116 Cal. Rptr. 795 (1974), an intermediate appeals court in California upheld a traffic infractions act (in the face of a similar constitutional provision), on the theory that certain petty offenses did not require jury trials when the state constitution was adopted, and thus were beyond the scope of the constitutional provision. The California court believed that minor traffic offenses not involving intentionally culpable conduct were petty offenses and did not require jury trial.

The *Oppenheimer* case, which is persuasive only and not controlling in Idaho, furnishes no specific test for defining a "petty" offense. The court stated that the offense was not one to which "social or moral opprobrium" attached and was not an offense requiring proof of a culpable state of mind. For U.S. constitutional purposes "petty offense" would probably be held to mean an offense subject to six months or less incarceration and/or a fine of \$500.00 or less. See *Duncan v. Schnakenberg*, *supra*.

There is some doubt whether the California approach to defining offenses would be accepted in Idaho courts. In *State v. Miles*, 43 Idaho 46, 49, 248 P.442 (1926), the Supreme Court held that:

The rule is well established that the guarantee of right of trial by jury serves that right as it existed under the common law *and territorial statutes in force at the date of the adoption of our constitution*. (emphasis added).

Thus, a "crime" which was defined as a misdemeanor by territorial statutes was recognized as one to which the right of jury trial attached.

When faced with the question of whether contempts could be tried and punished without a jury, however, the Idaho Supreme Court ruled that contempts are "not criminal actions," *McDougall v. Sheridan*, 23 Idaho 190 (1913), even though called misdemeanor by statute and punished as misdemeanors; and that art. I, §7 did not apply. *Dutton v. Dist. Ct.*, 95 Idaho 720, 518 P.2d 1182 (1974). Despite the constitutional and statutory language, the Court held that contempts which were punishable without a jury trial prior to the adoption of the constitutional and territorial statutes were still so punishable.

The present definition of misdemeanor offenses was in effect at the time the Idaho Constitution was adopted.

18-111. *Felony and misdemeanor defined*. A felony is a crime which is punishable by death or by imprisonment in the state prison. *Every other crime is a misdemeanor*. . . . [emphasis added]. Same as R.S. 6311, 1887.

Under this definition infractions and contempts both are crimes. Accordingly, the Idaho Constitutional requirement of a jury trial may or may not apply to "infractions." The debate becomes whether, because of their nature, "infractions" would be deemed "crimes" for right to jury purposes. If an infraction is a "crime," whether it is called an "infraction" or anything else, the jury trial requirement of the Constitution is probably applicable.

A factor mitigating against the "California" approach, is that Idaho's territorial laws defined crimes and offenses as follows:

A crime of *public offense* is an act committed or omitted in violation of a law forbidding or commanding it, and to which is annexed, upon conviction, any of the following punishments:

1. Death;
2. Imprisonment;
3. *Fine*;
4. Removal from office; or,
5. Disqualification to hold [office] . . .

R.S. 6309, 1887. [emphasis added]

Of course, conviction of a crime may have consequences ranging from grave to minor, but the distinction between serious and minor misdemeanors does not

appear in the state Constitution for purposes of determining the existence of a right to trial by jury. All penal provisions not amounting to felonies were considered misdemeanor offenses when the Constitution was adopted.

There can be no question that the Traffic Infractions Act is akin to a penal statute. The Act is enforced by police officers who issue summonses and complaints. The citation must contain a certification by the officer that he has reasonable ground to believe that the defendant committed what is referred to as an "offense" in violation of the law. I.C. §19-3901. Failure to appear can result in the issuance of a warrant for the violator's arrest. I.C. §19-3901. A fine of up to \$100 is possible. I.C. §19-1902.

However, one apparently may not be arrested for an infraction, as proposed,¹ nor may one be incarcerated upon adjudication. In this regard an infraction deviates sharply from all crimes known at the time the Constitution was adopted. For instance, for failure to sign a citation one arguably could not be jailed as is now the case. Perhaps the statute should specifically address this question.

There is no clear indication which way the Court might ultimately rule. While the territorial statutes defining crimes and art. I, §7, Idaho Constitution, may be applied, the Court might also rely on the *Oppenheimer* precedent following the logic of that Court and of the U.S. Supreme Court when it noted in *Duncan*:

. . . [T]he possible consequences to defendants from convictions for petty offenses have been thought insufficient to outweigh the benefits to efficient law enforcement and simplified judicial administration resulting from the availability of speedy and inexpensive nonjury adjudications . . .

There are two alternative actions which could be taken by the legislature to facilitate the implementation of the infraction act. The first would be to amend the licensing provisions of title 49, *Idaho Code*, to provide for a waiver of whatever right to a jury trial for traffic infractions might be claimed to exist by an "implied consent" notion as is now used for alcohol testing. It is unclear what effect, if any, this might have, but it could give a reviewing court an additional factor to rely upon in not applying article I, §7 to infractions. The second would be to propose an amendment to §7 of article I expressly declaring infractions to be a third category of crime and constitutionally eliminating the right to a jury trial for such infractions.

In summary, it is unclear how this bill would be reconciled with article I, §7, of the Idaho Constitution. Only the Idaho Supreme Court can make that determination with certainty. If you have further questions on this or any other matter, please contact this office.

Very truly yours,
/s/ DAVID H. LEROY
Attorney General

DHL/bc

¹The Idaho Criminal Rules Cases voted February 12, 1982, to provide no rule for arrest upon failure to sign the citation on an infraction, since arrest was inconsistent with the non-incarceration nature of an infraction.

March 25, 1982

Mr. Richard L. Barrett
State Personnel Director
Idaho Personnel Commission
Statehouse Mail

THIS IS NOT AN OFFICIAL OPINION
OF THE ATTORNEY GENERAL
AND IS SUBMITTED SOLELY FOR YOUR LEGAL GUIDANCE.

Dear Mr. Barrett:

Your letter of February 11, 1982, was assigned to me for disposition. However, before any action could take place, you requested that this office hold the letter in abeyance until the Idaho Legislature acted on SB 1404. Because the Second Regular Session of the 46th Idaho Legislature did not address the veterans preference question, an answer to your inquiry is now compelled.

You set out in your inquiry at the end of a lengthy explanation of the evolution of the current veterans preference: "Does the Personnel Commission have the authority to adopt a rule that gives more preference in retention to disabled war veterans than that accorded war veterans?"

While we would concur that the preference, as it is currently operated, may work a considerable hardship on a nonwar veteran, the U.S. Supreme Court has held that such an effect is not illegal.

"Veterans' hiring preferences represent an awkward — and, many argue, unfair — exception to the widely shared view that merit and merit alone should prevail in the employment policies of government. After a war, such laws have been enacted virtually without opposition. During peacetime they inevitably have come to be viewed in many quarters as undemocratic and unwise. Absolute and permanent preferences, as the troubled history of this law demonstrates, have always been subject to the objection that they give the veteran more than a square deal. "But the Fourteenth Amendment 'cannot be made a refuge from the ill-advised laws . . . ' *District of Columbia v. Brooke*, 214 U.S. 138, at 150. The substantial edge granted to veterans by [law] may reflect unwise policy. The Appellee, however, has simply failed to demonstrate that the law in any way reflects a purpose of discrimination on the basis of sex." *Personnel Administrator of Massachusetts v. Feeney*, _____ U.S. _____ (1980) 19 EPD, ¶ 9240.

In this case, the U.S. Supreme Court approved an absolute, lifetime preference for veterans in the Massachusetts Civil Service System. Your question is more narrow and will rely on the applicable *Idaho Code* sections.

The Personnel Commission does enjoy broad and considerable rule making authority under §67-5309, *Idaho Code*. With respect to veterans preference, however, the Personnel Commission is guided by statute: "Veterans preference as provided in Title 67, Chapter 53, *Idaho Code*, shall be observed." (§67-5312, *Idaho Code*.) As you noted, §65-503, *Idaho Code*, provides, in pertinent part, "... In any reduction in force, such war veterans shall be given preference for reten-

tion.” While this mandate is ambiguous with respect to what preference is to be given, it is specific because of the rules of statutory construction as to whom it applies: war veterans. As you explained, HB 559 (Chapter 51, 1972 Id. Sess. Laws, p. 90) struck the word “disabled” from its place as a modifier to the phrase, “disabled war veterans” in five of the six sections of the act. The last section of the act included the word “disabled” and established the merit system criteria which added five points to the scores of war veterans, and ten points and first place on the register to disabled war veterans. The plain inference derived from the words struck and added within the bill is that the Legislature intended to broaden certain protections to all war veterans and give greater employment opportunity to disabled war veterans. The Legislature has established its own rule for interpreting how the amendment process is to be handled:

“Where a section or part of the statute is amended, it is not to be considered as having been repealed and reenacted in the amended form; but the portions which are not altered are to be considered as having been the law from the time that they were enacted and the new provisions are to be considered as having been enacted at the time of the amendment.” (§67-511, *Idaho Code*)

With this section in mind, the bill can be read in the following manner: Prior to 1972, only disabled war veterans had a preference in a reduction in force and received ten points in addition to their scores on competitive examinations. After that date, war veterans were to be treated differently — five points were to be added to war veterans’ scores and 10 points to disabled war veterans’ scores. Additionally, while the disabled veterans went to the top of the registers, all war veterans were given the preference for retention.

The Legislature had the opportunity to treat war veterans and disabled war veterans differently, and they did so in how they were to be scored and ranked on registers of eligibles. The Legislature did not differentiate on how the large group of war veterans were to be treated in the reduction in force, and apparently chose to treat all of them the same. Therefore, there being no such distinction drawn, and the most recent action of the Legislature having been expansive, no contrary intent will be inferred. All war veterans, regardless of their disability, are to receive the same preference in retention in a reduction in force situation.

Since this is the clear import of the statute directly applicable to the Personnel Commission, the Commission’s general rule making authority must yield to the specific authority. The Commission could, therefore, not adopt a rule which would differentiate between war veterans and disabled war veterans in a reduction in force situation where the statute which controls that rule does not make such a differentiation.

I hope this will have been of some assistance to you.

Very truly yours,
/s/ W. B. LATTA, JR.
Deputy Attorney General

ct

April 2, 1982

Ted J. Martin
Executive Secretary
Idaho Horse Racing Commission
6445 Glenwood
Boise, ID 83702

THIS IS NOT AN OFFICIAL OPINION
OF THE ATTORNEY GENERAL
AND IS SUBMITTED SOLELY FOR YOUR LEGAL GUIDANCE.

Dear Mr. Martin:

I am in receipt of your letter of March 18, 1982 requesting legal guidance concerning the distribution of receipts collected by the Idaho Horse Racing Commission pursuant to §54-2513, *Idaho Code*. Specifically, you have asked whether the distribution required by §54-2513 (2) should be made according to the number of days which a racetrack is in operation during a calendar year or whether it should be made according to the number of races actually run during the calendar year. The relevant portion of the statute states:

One-half of one percent ($1/2\%$) of all gross receipts shall be paid to the Idaho state horse racing commission for distribution to certain Idaho racetracks, defined as follows: . . . (2) distributions to recipient tracks shall be weighted proportionately to those tracks which conduct the greater number of races during the year of distribution.

Please note that this distribution is to be made according to the "number of races". The crux of your question, therefore, is whether the term "races" should be interpreted as the number of days on which races are held or the number of actual races.

The statute gives very little guidance for making a determination of the proper interpretation of "races." As you have noted, §54-2513 was amended in 1980 (see Session Laws 1980, chapter 123) to include the questioned language. When the Idaho Horse Racing Act was passed in 1963, §54-2502 very carefully defined "race meet":

"Race meets" shall mean and include any exhibition of thoroughbred, purebred, and/or registered horse racing where the pari-mutuel system of wagering is used. Singular shall include the plural and plural shall include the singular;

From this definition it appears that a race meet contemplates the entire day's racing rather than simply one day.

It is interesting to note that the term "race" is nowhere defined in the original horse racing act. Section 54-2510, however, provides guidance for the distinction between the terms. That section states:

For the purpose of encouraging the breeding, within this state, of valuable thoroughbred, purebred and/or registered horses, at least one (1) race each day at each race meet shall be limited to Idaho bred horses . . .

The distinction in this section between race meets and races is clear. The term "race" refers to each individual race, while the term "race meet" contemplates a collection of races. Given this distinction, it appears clear that §54-2513(2) ought to be interpreted in such a manner that the distribution is made according to the number of races, rather than according to the number of racing days.

Chapter 123 of the 1980 Session Laws became effective on March 21, 1980. Accordingly, $\frac{1}{2}\%$ of all gross receipts from horse racing within the State of Idaho after that date ought to be distributed according to the number of races held rather than the number of racing days held at each track. To the extent the receipts were not distributed in this manner, the Horse Racing Commission may be liable to any track which received less than its allocable portion. Therefore I would urge you not only to redistribute the funds for the 1981 racing season, but, to the extent possible, you should attempt to do so for the 1980 racing season.

I hope that this has satisfactorily answered your concerns. If you have further questions, please contact me.

Sincerely,
/s/ KENNETH R. McCLURE
Deputy Attorney General
Division Chief —
Legislative/Administrative Affairs

KRM/bc

April 19, 1982

Mike E. McAllister, Director
State Liquor Dispensary
Statehouse Mail

THIS IS NOT AN OFFICIAL OPINION
OF THE ATTORNEY GENERAL
AND IS SUBMITTED SOLELY FOR YOUR LEGAL GUIDANCE.

Dear Director McAllister:

This letter is written to confirm the oral advice I previously rendered. Essentially, you have asked whether section 4 of House Bill 796, second regular session, forty-sixth legislature, subjects the liquor dispensary to the regular appropriation process for purchases of alcoholic liquor as well as for the expenses of administration and operation of the dispensary.

Section 4 of HB 796 enacts a new *Idaho Code* §23-404. New *Idaho Code* §23-404 (a), the portion pertinent to your question, clearly provides for the transfer or appropriation of monies from the liquor account for *two* purposes: (1) actual cost of purchase of liquor and (2) payment of administration and operation expenses. *Idaho Code* §23-404 (a) ends with the proviso that the amount so transferred or appropriated for administration and operation shall not exceed the amount set

by the regular appropriation authorization. It is my opinion that this proviso language on its face imposes the so-called regular appropriation authorization limitation only on one of the two purposes contemplated — i.e., transfers made for administration and operation.

Even if *Idaho Code* §23-404 (a) were thought to be ambiguous, application of the normal principles of statutory construction leads to the same conclusion that the proviso applies only to transfers for administration and operation expenses. Where there is doubt as to the extent of a restriction imposed by a proviso, the proviso is to be strictly construed. Sutherland, *Statutory Construction* §47.08. Moreover, the pertinent limitation is analogous to an exception to the transfers generally authorized in this new Code section. An enumeration of exceptions from the operation from a statute indicates that the principal statute should apply to all cases not *specifically* enumerated. Sutherland, *Statutory Construction* §47.11.

Consequently, it is my opinion that the proviso limiting transfers and appropriations from the fund to the amount set by the regular appropriation authorization was intended to relate to, and limit, only transfers or appropriations for the payment of administration and operation expenses.

If I can be of further assistance, please do not hesitate to contact me.

Sincerely,
/s/ LARRY K. HARVEY
Chief Deputy Attorney General

LKH/bc

June 2, 1982

Larry Kirk
Audit Supervisor
Office of the Legislative Auditor
Room 114
Statehouse Mail

THIS IS NOT AN OFFICIAL OPINION
OF THE ATTORNEY GENERAL
AND IS SUBMITTED SOLELY FOR YOUR LEGAL GUIDANCE.

Dear Larry:

You have asked for legal advice concerning the proper interpretation of *Idaho Code* §38-111. As you know, this section deals with the collection of fire protection fees from fire protective associations and districts. Specifically, you are concerned with the effect of Chapter 34, 1981 Session Laws, which amended §38-111, to increase the maximum assessment from twenty to thirty cents per acre per year. As there was no emergency clause attached to SB 1048 (Chapter 34) it went into effect on July 1, 1981. *Idaho Code* §67-510. The question then becomes: to what period does the increased assessment apply.

There is no clear indication whether the forest protective associations and forest protective districts are on a fiscal or calendar year. Section 38-111 simply states that the assessment shall be made "per year." Yet §38-112 allows delinquent assessments to be placed upon the county tax roles and collected through the normal ad valorem tax collection methods. This would seem to imply a fiscal year other than a calendar year. If the districts and associations are on a fiscal year which normally would begin on July 1st, then clearly the increased assessment may be made from July 1st forward. If, however, they are on a calendar year, there is a question of whether increased assessments may be made for the entire year, for the remaining six months of the year, or not until the following year begins.

That question is resolved, however, by a close reading of §38-111 which states in part:

In the event an assessment is made in an amount less than the maximum hereinbefore provided, and an actual loss occurs which exceeds the amount budgeted and for which assessments have been made, the Director of the Department of Lands with the approval of the board, may require an additional assessment to be made and paid, which together with the original assessment shall not exceed the maximum assessment set forth above.

The crucial language of this portion of §38-111 is "the maximum hereinbefore provided" and "the maximum assessment set forth above." The statute does not refer to the maximum amount which could have been assessed at the beginning of the year, whether fiscal or calendar. If the maximum amount which may be assessed is increased effective mid-year, the additional amount may be collected for the remainder of the year. Accordingly, as the maximum amount on July 1, 1982, is thirty cents per acre, if the districts and associations are on a calendar year, the additional assessment may be collected for that period from July 1 through December 31. Obviously if the associations and districts are on a fiscal year beginning July 1, there will be no question that the additional assessment can be collected.

The final question is whether the assessment may be collected for any period before July 1, 1981. According to *Engen v. James*, 92 Idaho 690, 694, 440 P.2d 977 (1969), a statute is retroactive if it changes the "rights, obligations, acts, transactions, and conditions which are performed or exist prior to the adoption of the statute," quoting *American States Water Service Co. of California v. Johnson*, 31 Cal. App. 2d 606, 88 P.2d 770 (1939). Additionally, *Ford v. City of Caldwell*, 79 Idaho 499, 508, 321 P.2d 589 (1958), states: "a statute will not be given a retroactive construction by which it will impose liabilities not existing at the time of its passage." Clearly the imposition of an increased assessment for any period before July 1, 1981, would result in the imposition of a liability which did not exist at the time of the passage of the statute. As there is no clear statement of intent to apply the statute retroactively, it must be construed to have prospective application only.

Accordingly, the additional assessment may be made for any period after July 1, 1981, but may not be made for any period before July 1, 1981. If the assessment is to be charged for a portion of the year after July 1, the additional amount due should be prorated for the portion of the year remaining. In other

words, if six months of the assessment year remain, the total assessment for that period may be no more than fifteen cents. An additional assessment may be made for any portion of the year after July 1, with the approval of the Land Board, according to §38-111, *Idaho Code*.

If you have further questions please contact me. I would be happy to address any comments you may have.

Sincerely,
/s/ KENNETH R. McCLURE
Deputy Attorney General
Division Chief —
Legislative/Administrative Affairs

KRM/bc

July 7, 1982

Bruce Balderston
Legislative Auditor
Statehouse Mail

THIS IS NOT AN OFFICIAL OPINION
OF THE ATTORNEY GENERAL
AND IS SUBMITTED SOLELY FOR YOUR LEGAL GUIDANCE.

Dear Bruce:

I have received your letter of June 16, 1982, requesting legal guidance concerning the possibility of auditing horse breeders associations which receive funds according to *Idaho Code* §54-2513. As you know, that section states in part:

One half of one percent ($\frac{1}{2}\%$) of all gross receipts generated by the mutuel handle shall be distributed by the licensee in proportion to the handle generated by each breed, to lawfully constituted representatives of each breed, to benefit owners and/or breeders of Idaho bred racing thoroughbreds, racing quarter horses, racing Appaloosas, racing paints and racing Arabians, subject to the approval of the commission.

You have indicated that the Horse Racing Commission has asked you to audit the associations which receive this money to ensure that it is used to benefit the breeders of each type of horse. Additionally you have stated that an audit of licensed race tracks may be appropriate as well.

The duties of the legislative auditor are defined by *Idaho Code* §67-445:

Upon the direction of the Joint Finance Appropriations Committee, the legislative auditor shall conduct financial and/or performance post audits, or furnish any other information that the Committee may desire concerning any branch, department, office, board, commission, agency, authority, or institution of this state.

Section 67-446 states that the legislative auditor may audit "a governmental unit". Section 67-450 states that the legislative auditor may audit "any state department, agency, division, or other institution of state government . . ." Finally, §67-449(4) provides specific authority for the legislative auditor to conduct audits of "the accounts of every private corporation, institution, association, or board receiving appropriations from the legislature or contracting for health and welfare services, within the State of Idaho."

It should be fairly clear that the horse breeding associations are not in any way governmental entities. Therefore, you would be unable to audit them under the authority granted to you by §§67-445, 446, or 450. The only prospect for audit would have to fall under §67-449 (4). Although it is clear that a horse breeding association is a "private corporation, institution, association, or board" it is much less clear that it receives "appropriations" from the state.

The term appropriation is well defined in Idaho law. That definition was summarized in *Leonardson v. Moon*, 92 Idaho 796, 451 P.2d 542 (1969). After reviewing several cases dealing with the definition of "appropriation" the court stated:

These cases define an appropriation as 1) authority from the legislature, 2) expressly given, 3) in legal form, 4) to proper officers, 5) to pay from public monies, 6) a specified sum, and no more, and 7) for a specified purpose, and no other. *Id.* at 804.

It was further stated that an appropriation was valid even though it did not state the amount of money to be appropriated so long as that amount was easily ascertainable and the appropriation did not come from the general fund. *Id.* See also *Nelson v. Marshall*, 94 Idaho 726, 497 P.2d 47 (1972) and cases cited therein. Accordingly the distribution of receipts by the licensee does not fail the *Leonardson* test for an appropriation on the basis that the sum is uncertain.

The crucial analysis of whether this distribution of receipts constitutes an appropriation lies in a determination of whether the receipts paid by the Horse Racing Commission are "public monies." Strangely, no Idaho case has discussed the definition of public monies in the context of an appropriation. Cases from other states, however, lead me to conclude that an Idaho court would not consider the funds in question to be public monies. In the case of *Finley v. McNair*, 37 Pa. 278, 176 A. 10, a city established a traction conference board in conjunction with a private traction company to oversee supervision and management of that transportation company. A question arose concerning the status of excess receipts collected by the traction company. The Pennsylvania Supreme Court said clearly that such funds were not public monies. In *State, ex rel. St. Louis Police Relief Association v. Igoe*, 340 Mo. 1166, 107 SW.2d 929, a fund was created for the benefit of the police relief association which was supported by the sale of unclaimed personal property and reward payments. Even though this fund was established by statute and was administered according to statutory authority, the Missouri Supreme Court indicated that such money was not public money. Finally, *Phelps v. Citizens Union National Bank*, 13 F.Supp. 623 (D. Ky.), held that money required to be paid into the court pursuant to a bankruptcy order was not public money even though it was collected and its payment was controlled by requirement of statute.

An examination of the present case should make it clear that the receipts distributed by the horse racing licensees are not public monies. There is no question that the legislature may exercise the state police power to restrict or prohibit pari mutuel wagering on horse racing within the state. Therefore, the state can place reasonable restrictions on horse racing supported by wagering as a condition of license. Section 54-2513 *Idaho Code* is such a reasonable restriction. As a condition of the license the state has required the licensee to distribute a portion of its receipts in a specified manner. This money is to be distributed directly by the licensee and does not enter the state treasury in any manner. Accordingly, it does not fall within the definition of "appropriation" in *Leonardson v. Moon*. That being the case, the legislative auditor has no authority to audit the various horse breeding associations by reason of §67-449(4) *Idaho Code*.

There does not appear to be any rational basis upon which to distinguish the result with respect to horse breeding associations from the proper rule regarding audit of licensed race tracks. A license is not a governmental entity. It is merely a private entity operating under a grant of authority from the state. (Of course, a license could be issued to a governmental entity in its own right. But nothing in the grant of a license confers governmental status on an otherwise private entity.) Nor does a licensee receive appropriations from the state to allow audit according to §67-449(4), as again, the funds do not constitute "public monies."

Because *Idaho Code* §54-2513 states that the Horse Racing Commission must approve the distribution of receipts, it clearly can require an audit of the association as a condition of approving distribution to prevent or discover any misuse of those funds. Likewise, under the general regulatory authority granted to the commission by §§54-2507 and 2508 *Idaho Code* it may require an audit of any licensee. It would appear, however, that the legislative auditor may not conduct these audits. The *Idaho Code* does not provide authority for the legislative auditor to conduct audits of private entities even if they consent to such audit. Specific duties and authorities provided to the legislative auditor by Title 67, Chapter 4. Because the type of audits here in question do not fall within any authorization provided by those sections, the legislative auditor is without authority to conduct the audits.

If you should have further questions regarding this advice or if you have any other comments or concerns on this matter, please feel free to contact me.

Sincerely,
/s/ KENNETH R. McCLURE
Deputy Attorney General
Division Chief —
Legislative/Administrative Affairs

KRM/bc

August 30, 1982

Bruce Balderston
Legislative Auditor
Statehouse Mail

Control #5407

THIS IS NOT AN OFFICIAL OPINION
OF THE ATTORNEY GENERAL
AND IS SUBMITTED SOLELY FOR YOUR LEGAL GUIDANCE.

Dear Bruce:

In your letter dated July 30, 1982, you have asked for legal guidance concerning the proper interpretation of *Idaho Code* §67-449 (8). As added by the 1982 legislature, 1982 Idaho Sess. Laws, ch. 223, subsection 8 gives the legislative auditor authority:

. . . to review or have reviewed the workpapers or other documentation utilized in the audit of a state department or public institution of the state and its political subdivisions, and to reject for filing in the official depository any report based upon unsatisfactory workpapers or inadequately supported documentation . . .

First you have asked whether review may be made of workpapers prepared prior to the enactment of the provision. According to *Idaho Code* §67-510 the above-quoted provision became effective July 1, 1982. Accordingly it gives you the authority to review the workpapers of any audit submitted to you on or after July 1, 1982. Even though workpapers may have been prepared before the effective date of the act, the statute does not address their preparation, but rather their review upon official submission to the legislative auditor in compliance with *Idaho Code* §67-449. Accordingly, any audit submitted after July 1 may be required to be supported by workpapers, without danger of retroactive effect. It should be clear from a reading of *Engen v. James*, 92 Idaho 690, 448 P.2d 977 (1969), that this is not a retroactive application of the statute which would be prohibited by law.

Second, you have asked whether you could turn your review work notes over to the state board of accountancy for use in professional review and possible punitive action. You further state that the board of accountancy does not now have such workpaper review authority. It is my conclusion that this may constitute an impermissible utilization of the workpapers you receive according to the authority granted in *Idaho Code* §67-449 (8).

Idaho Code §9-203A states:

Any licensed public accountant, or certified public accountant, cannot, without the consent of his client, be examined as a witness to any communication made by the client to him, or his advice given thereon in the course of professional employment.

Although the statute speaks to examining the accountant as a witness, it is identical to §9-203 (2) which creates an attorney/client privilege. That privilege has been interpreted by the Idaho Supreme Court to prevent not only the examination of an attorney as a witness, but also to protect from disclosure documents

prepared by the attorney. See, e.g., *In re Niday*, 15 Idaho 559, 98 P.845 (1908). It is probable therefore that a court would extend the same privilege to accountants' workpapers. The question would be whether §67-449 (8) would allow them to obtain access to the workpapers under the auspices of the legislative auditor's office. A proper interpretation of that section, however, will indicate that any privilege the client may have from compelled disclosure of an accountant's workpapers is limited only to the extent necessary to allow the review of the audit and its filing in the official depository. Given the general privilege and a specific exception, the legislative auditor cannot broaden the use of workpapers given by §67-449 (8) to abrogate privilege granted by §9-203A.

It should be noted that the privilege granted by §9-203A is a privilege of the client, not the auditor. If the client who is being audited consents to disclosure of the workpapers, the legislative auditor has the authority to transfer the review of workpapers to the board of accountancy by reason of *Idaho Code* §9-301, which provides that, "Every citizen has a right to inspect and take a copy of any public writing of the state, except as otherwise expressly provided by statute." Although "public writing" is a somewhat vague term, once the audits of the various state departments and political subdivisions are submitted to the legislative auditor's office, they are most likely "public writings" and therefore available to the public under §9-301. Accordingly, if the privilege is waived the information may be transmitted to the state board of accountancy. Conversely, if the privilege is not waived, the state board of accountancy has no right to receive such information. As a practical matter, probably the major reason the board cannot review workpapers is that it lacks the authority to compel their disclosure via subpoena. Once workpapers are made public by submission to the legislative auditor and waiver of the privilege, however, the board should have the right to inspect and use them for whatever purpose it deems appropriate.

Finally you have asked, "If the state board of accountancy hired an investigator, could I delegate to him the review authority or contract of the board for the service? In that case could they review the results for disciplinary purposes?" If the client (i.e., the state department or political subdivision) has waived the privilege you may enter into such an arrangement with the state board of accountancy. If not, however, such an arrangement would be prohibited. Under the answer to your second question presented above, however, such an arrangement would be unnecessary to allow the state board of accountancy to obtain and review notes, as their access to those notes is allowed directly.

I hope that this has answered your questions and concerns. If you need further information or if you have additional questions, of course feel free to contact me.

Sincerely,
/s/ KENNETH R. McCLURE
Deputy Attorney General
Division Chief —
Legislative/Administrative Affairs

KRM/bc

August 31, 1982

Darrell Manning, Director
Department of Transportation
P.O. Box 7129
Boise, ID 83707

THIS IS NOT AN OFFICIAL OPINION
OF THE ATTORNEY GENERAL
AND IS SUBMITTED SOLELY FOR YOUR LEGAL GUIDANCE.

Dear Mr. Manning:

You have asked for legal advice concerning the proper interpretation of *Idaho Code* §49-127(d) (7). Specifically, you are concerned about the proper computation of "maximum gross weight" upon which the use fee imposed by this section is to be paid.

The relevant portion of *Idaho Code* §49-127(d) (7) states:

In addition to the registration and license fees hereinbefore provided, there shall be paid on all commercial vehicles having a maximum gross weight in excess of sixty thousand (60,000) pounds, a use fee in accordance with the schedule hereinafter set forth, provided, that if any such commercial vehicle is a combination of vehicles, said use fee shall be paid only on the self-propelled motor vehicle in the combination, but *the maximum gross weight thereof shall be deemed to be the maximum gross weight of all vehicles in the combination* for the purpose of determining said use fee. The use fees herein provided for shall be *based on mills per mile of operation . . .* (Emphasis added.)

First, the tax must be paid on all "commercial vehicles" as defined by *Idaho Code* §49-127(d) (1) which have a maximum gross weight in excess of 60,000 pounds. Maximum gross weight is defined by *Idaho Code* §49-101(f) which states:

The term "maximum gross weight" shall be the scale weight of a vehicle, equipped for operation, to which shall be added the maximum load to be carried thereon as declared by the owner in making application for registration.

Application of this section to any single vehicle in excess of 60,000 pounds therefore would be very straightforward.

The confusion, however, arises from the manner of computation of the maximum gross weight of a combination of vehicles. "Vehicle" is defined by *Idaho Code* §49-101(a) as, "every device in, upon, or by which any person or property is or may be transported or drawn upon a public highway . . ." *Idaho Code* §49-101(g) (h) define "trailer" and "semi-trailer" as types of vehicles. When trailers and semi-trailers are used with a motor vehicle (which is simply a self-propelled vehicle, see §49-101(b)) a combination of vehicles is created. Such a combination would typically be constituted of a motor vehicle and one or more semi-trailers or trailers. Because the trailers and semi-trailers are detachable and discrete entities, each time they are changed, a distinct combination results. Although the maximum gross weights of many combinations may be the same, due to stand-

ardized sizes of many trailers and semi-trailers, nevertheless each time separate "vehicles" are attached, a separate combination results. Accordingly, each combination has a maximum gross weight upon which the use fee is to be assessed. When the maximum gross weight of a combination changes, therefore, so does the computation of use fee due.

Finally, the use fee imposed by *Idaho Code* §49-127(d) (7) is assessed according to "mills per mile of operation". This lends further weight to the above analysis that each combination must be assessed separately. As a particular mile may be traveled only by one combination, the maximum gross weight of that combination is the determining factor of the amount of use fee due on the travel of that particular mile. Accordingly, each combination shall pay a use fee based on mills per mile of operation to be determined by reference to the schedule contained in *Idaho Code* §49-127(d) (7).

Therefore, in answer to your question, the use fee assessed by *Idaho Code* §49-127(d) (7) is to be computed according to the maximum gross weight of a particular combination of vehicles. When a power unit pulls three trailers, it must pay a use fee based upon the maximum gross weight of the three trailers plus the motor vehicle. When the same motor vehicle pulls only two trailers, however, the use fee must be assessed according to the maximum gross weight of the motor vehicle plus two trailers.

I hope that this has satisfactorily answered your concerns. If you have further questions please contact me.

Sincerely,
/s/ KENNETH R. McCLURE
Deputy Attorney General
Division Chief —
Legislative/Administrative Affairs

KRM/bc

September 3, 1982

Ted J. Martin
Executive Secretary
Idaho Horse Racing Commission
6445 Glenwood
Boise, ID 83702

THIS IS NOT AN OFFICIAL OPINION
OF THE ATTORNEY GENERAL
AND IS SUBMITTED SOLELY FOR YOUR LEGAL GUIDANCE.

Dear Mr. Martin:

You have asked whether it is "permissible and within the intent of chapter 25 of title 54 of the *Idaho Code* for the Idaho State Horse Racing Commission to pay for the making of a documentary on the horse racing industry in the State of Idaho in an attempt to educate the public and to promote the industry?"

LEGAL GUIDELINES OF THE ATTORNEY GENERAL

The authority and duties of the Horse Racing Commission are set forth in *Idaho Code* §54-2507 as follows:

The commission created by this act is hereby authorized and it shall be its duty to license, regulate, and supervise all race meets held in this state under the terms of this act, and to cause the various places where race meets are held to be visited and inspected at least once a year.

Any act which the Horse Racing Commission undertakes must derive its legitimacy from the foregoing section. It does not appear that the making of a documentary to promote the horse racing industry or to educate the public falls within its duties to license, regulate, and supervise race meets. The promotion of the industry is not the function of the Horse Racing Commission.

Therefore, it is quite probable that the making of such a documentary would be impermissible.

If you have any further questions or comments regarding this matter, feel free to contact me.

Sincerely,
/s/ KENNETH R. McCLURE
Deputy Attorney General
Division Chief —
Legislative/Administrative Affairs

KRM/bc

September 13, 1982

Ms. Vivian E. O'Loughlin
Registrar
Public Works Contractors License Board
Statehouse Mail

THIS IS NOT AN OFFICIAL OPINION
OF THE ATTORNEY GENERAL
AND IS SUBMITTED SOLELY FOR YOUR LEGAL GUIDANCE.

Dear Ms. O'Loughlin:

You have asked our office for legal guidance regarding the question: "Can the 30-day waiting period or any portion thereof, specified in Section 54-1911, *Idaho Code*, be waived."

In connection with this question, you have furnished us with the Board's "Revised Rules of Practice and Procedure, 1980," wherein at Art. E, Sec. 4, p. 8, the Board has regulated in the form of waiver as to certain situations.

In addition, you have also advised us that under Art. 13, Sec. 2, p. 2, of said rules, the Board meets monthly between the first and fifteenth, and that it is the policy of the Board that an application which is received by its meeting date in

one month will be reviewed on its meeting date for the ensuing month. This, as you point out, means the Board reviews applications in less than 30 days in those instances where the span of time between meeting dates is less than 30 days. You cite as an example that an application received by September 13, 1982, will be reviewed on October 4, 1982.

In analyzing this question the statute's legislative history is helpful, especially from the standpoint of for whose benefit the 30-day period was enacted, which we feel is important in determining whether the Board, in its sound discretion and provided certain conditions are present, may shorten it.

As first enacted in 1941, the predecessor to §54-1911, namely 1941 Idaho S.L., Chap. 115, §11, read in pertinent part:

Sec. 11. ISSUANCE AND DENIAL OF LICENSES. — *Upon receipt of said application and fee, and after such examination and investigation as the Board may require in accordance with the provisions of this Act, if no valid reason exists for further investigation of applicant, the Board shall forthwith and within ten (10) days issue a license to applicant permitting him to engage in business as a contractor under the terms of this Act for the balance of the year following the approval of the application . . .*

While perhaps only amounting to an ambiguity, arguably the highlighted language could be interpreted to mean that the Board was at liberty to investigate in accordance with its usual procedures, only so long as a valid reason existed for its continuance, otherwise it had to issue the license "forthwith" (immediately), *but in any event*, no longer than ten days from the date of the application. This kind of interpretation is fortified to some extent or another because the statute did not specify the time and place where the Board was to consider the application.

Whatever the impetus, the legislature amended Section 11 (§54-1911) in the 1955 Idaho S.L., Chap. 223, §6, by giving the Board more flexibility through removing the 10-day provision and giving the Board until its next board meeting to issue the license, unless a valid reason exists for further investigation.

As additional clarity it further brought to the procedure a specific time period (30 days) which the Board has, if needed, to examine the matter, which is keyed to its meeting date, which of course is when the Board must consider the application in the typical situation. This expanded time is for the benefit of the Board, however, and, as it has previously done, either de facto or by its administrative fiat, may be waived by it, "if no valid reason exists for further investigation."

As a matter of comparison, the 1955 amendment within the new language underlined, is set out below:

54-1911. FILING, ISSUANCE AND DENIAL OF LICENSES — JOINT VENTURE APPLICATIONS. — *Applications for original licenses, together with the fees therefor, shall be filed with the board at least thirty days prior to consideration thereof by the board. * * ** After such examination and investigation as the board may require in accordance with the provisions of this act, if no valid reason exists for further investigation of applicant, the board shall * * * at the next meeting fixed by it for

the consideration of applications for original licenses, issue a license to applicant permitting him to engage in business as a contractor under the terms of this act for the balance of the year following the approval of the application. If the information brought to the attention of the board concerning the character and integrity of an applicant is such that it would appear proper to deny the application, the applicant shall be notified by registered mail or personal service, to show cause within such time, not less than five (5) days, nor more than thirty (30) days, why the application should not be denied.

The board is authorized to waive the thirty (30) day filing period on an application for a license for a joint venture, where all of the joint venture parties have complied with and are licensed public works contractors under all the provisions of this act.

Applications for original licenses filed in accordance with the provisions of this act shall be considered by the board at the four regular meetings of the board provided for in this act and at such special or regular monthly meetings as the board may determine . . .

A possible source of confusion which to some might cast a shadow on the ability of the Board to waive the 30 days is the provision calling for waiver in joint venture situations. While it may have been put in clearer terms, this provision is more of an exception to the 30-day rule which is to apply on that precise fact situation. We do not believe it forecloses the general authority of the Board to waive in other situations according to its sound discretion and wisdom.

Accordingly, since the interpretation previously placed on the 30-day provision in favor of waiver by allowing a shorter time is to be accorded great weight and presumed to be correct, we believe that the Board does indeed have that sound discretion and may expand upon it.

THE ABOVE CONCLUSIONS ARE SUBMITTED FOR YOUR LEGAL GUIDANCE. THEY DO NOT CONSTITUTE A FORMAL LEGAL OPINION OF THE ATTORNEY GENERAL, BUT REPRESENT THE VIEWS OF THE UNDERSIGNED.

Very truly yours,
/s/ THOMAS C. FROST
Deputy Attorney General
Chief, Administrative Law and
Litigation Division

TCF/lb

September 16, 1982

Mike McAllister
Superintendent
Liquor Dispensary
State of Idaho
P.O. Box 59
Boise, ID 83707

Control #05287

THIS IS NOT AN OFFICIAL OPINION
OF THE ATTORNEY GENERAL
AND IS SUBMITTED SOLELY FOR YOUR LEGAL GUIDANCE.

Dear Mr. McAllister:

You have asked for legal guidance concerning the proper interpretation of House Bill 796, 1982 Session Laws, chapter 255. Among other things, that bill altered the distribution of funds collected by the State Liquor Dispensary. Specifically you are concerned with §§23-404(1)(c) & (d) which state that no city or county "shall be entitled to an amount less than that county (city) received in distributions from the liquor account during the state's fiscal year 1981." The questions you have asked deal with the proper method of determining a city or county's share of the fiscal 1983 liquor revenues.

First you have asked how money paid to the junior college districts under *Idaho Code* §23-404 (which was repealed by House Bill 796) should be treated. That section, before repeal, provided that revenue was:

... to be distributed on an annual basis as follows: Fifty percent (50%) to the various counties of the state in the same proportion as the population of said counties bears to the total population of the state as shown by the last federal census, provided, however, that fifty percent (50%) of all the money apportioned to the county embracing all or any part of a junior college district shall be distributed and paid to the treasurer of such junior college district ...

The question you have posed is whether this fifty percent of the county's money ought to be included in the county's 1981 base for determining the minimum distribution under *Idaho Code* §23-404(1)(c). Close scrutiny of the above quoted language from §23-404, *Idaho Code* (repealed), indicates that the money paid to the junior college districts was not treated as distributed to the county. This conclusion is clear from the language which states that fifty percent of the money *apportioned* to a county shall be *distributed* to the junior college district.

Further, House Bill 796 re-enacted *Idaho Code* §23-404(1)(b)(5) placing \$300,000 per year into the junior college account in the state treasury. Under the old method of apportioning liquor revenues no money at all was paid to the junior college account. This corresponds with \$230,500 which was paid to the junior college districts from liquor revenues in 1981. This evidences the legislature's intent to shift the payment of liquor revenues to the junior college districts from a county basis to a state-wide basis. To allow the counties encompassing junior college districts the money they received and also the money paid on their behalf to the junior college districts would give them a windfall to which they are not entitled.

Second, you have asked how to compute the 1981 base of a county which did not encompass a junior college district. Specifically you have asked whether the tuition of an out-of-district Idaho student should be deducted from the county's 1981 base. In determining the 1981 base for a county which does not encompass a junior college district, the amount the county paid in tuition to junior colleges should not be deducted from its 1981 share of liquor revenues. This conclusion is supported for two reasons. First, House Bill 796 does not remove the county's liability to pay tuition to the junior college on behalf of its residents who enroll in a junior college located in a junior college district of which the county is not a part. Indeed, §7 of the bill amended *Idaho Code* §33-2110A to increase allowable tuition from \$312.50 to \$500.00 per semester. This demonstrates the legislature's continued reliance on a county's funds to pay the tuition of its residents who attend junior colleges in junior college districts which do not encompass the county. This conclusion is also supported by the fact that the county's duty to pay tuition was not provided for in the section distributing the liquor funds. Accordingly, change in the distribution of those funds does not affect the duty of the county to pay tuition, as the change in distribution affected the method of payments to the junior college districts directly from liquor funds. Counties which are not part of a junior college district, therefore, should receive at least as much as they received in distributions during FY 1981.

Finally, you have asked for similar advice concerning *Idaho Code* §23-404(1)(d) which provides the minimum amount of distribution to each city. You of course have records concerning the amounts you paid directly to each city pursuant to *Idaho Code* §23-404 (repealed). You do not, however, have information concerning the payments made by counties to cities according to *Idaho Code* §23-405, (also repealed). Under that section, fifty percent of the liquor funds each county received were to be distributed:

to incorporated and specially chartered cities and villages situate therein in such proportion as the population of each bears to the total population of all cities and villages in the county, as shown by the last federal census or any subsequent special census conducted by the United States Bureau of the Census . . .

You are concerned how to establish this distribution base. Apparently counties used various methods of determining the population upon which distributions were to be based. The counties should have used the 1970 census (as the 1980 census was not yet complete) or any subsequent special census. Estimation of population or use of projections was not authorized by §23-405, *Idaho Code* (repealed).

In determining the minimum distribution to cities, according to House Bill 796, the distribution required by §23-405, *Idaho Code* (repealed), should be computed by the liquor dispensary according to the latest complete population data which was available for FY 1981. You should not use the figures which indicate the cities' actual receipt of liquor funds if they relied on an incorrect population base. Although §23-404(1)(d) states the minimum amount is the amount "received" rather than the amount "which should have been received" had the distribution according to §23-405, *Idaho Code* (repealed), been correct it must be presumed that the legislature intended the 1981 distributions to be made according to law. A contrary interpretation would allow noncompliance with the stat-

ute in 1981 to entitle a city to revenue in 1983 in excess of that allowed by statute. It would be untenable to assert that an error in distribution of 1981 receipts could inflate the minimum distribution for 1983 and thereby entitle a city to more money than actually provided by statute.

I hope that this has satisfactorily answered your questions and concerns. If you have further need for clarification please contact me.

Sincerely,
/s/ KENNETH R. McCCLURE
Deputy Attorney General
Division Chief —
Legislative/Administrative Affairs

KRM/tl

September 22, 1982

Senator Vearl Crystal
Idaho State Senate
Route 6, Box 232
Idaho Falls, ID 83401

Re: Department of Law Enforcement deputizations

THIS IS NOT AN OFFICIAL OPINION
OF THE ATTORNEY GENERAL
AND IS SUBMITTED SOLELY FOR YOUR LEGAL GUIDANCE.

Dear Senator:

Apparently your question is whether the Department of Law Enforcement must promulgate an administrative rule each time that agency commissions a "special deputy" to work for the Department of Transportation at a port of entry.

The Department of Law Enforcement's form included with your inquiry spells out in detail the conditions and limitations of such a commission. It also includes places for the individual deputy and department director to sign. It is clear that each commission applies to only one individual even though as a standard form it could be used for any number of deputies.

It is necessary to turn to the Administrative Procedure Act (Chapter 52, Title 67, *Idaho Code*), to determine if commissions must be accomplished through the "rulemaking" process in order to be valid. *Idaho Code* §67-5201(7) defines "rule," in part, as ". . . each agency statement of *general applicability* that implements, interprets, or prescribes law or policy . . ." (emphasis added).

Because each commission is completed on an individual basis they are therefore not of "general applicability." As a result, it is apparent that governmental operations of this nature were not intended to come within the definition of "rule." For this reason no rulemaking process is necessary in order for any one deputization process to be valid, assuming the agency has the necessary authority to begin with.

THE ABOVE CONCLUSIONS ARE SUBMITTED FOR YOUR LEGAL GUIDANCE. THEY DO NOT CONSTITUTE A FORMAL LEGAL OPINION OF THE ATTORNEY GENERAL BUT REPRESENT THE VIEWS OF THE UNDERSIGNED.

Sincerely,
/s/ FRED C. GOODENOUGH
Deputy Attorney General
Administrative Law and
Litigation Division

FCG/lb

October 20, 1982

Dale Christiansen
Director
Parks and Recreation
2177 Warm Springs Avenue
Boise, ID 83720

THIS IS NOT AN OFFICIAL OPINION
OF THE ATTORNEY GENERAL
AND IS SUBMITTED SOLELY FOR YOUR LEGAL GUIDANCE.

Dear Dale:

Our office is in receipt of your letter dated October 13, 1982, requesting legal guidance on the question of what impact the adoption of H.J.R. 18 would have on Idaho state parks and their management. H.J.R. 18 will probably have no impact on state parks or their management.

House Joint Resolution No. 18 (H.J.R. 18) is a proposed state constitutional amendment to article 9, section 8 of the Idaho Constitution. Section 8, as it now exists, provides that the State Board of Land Commissioners manage all lands "granted" to the state by the federal government in such a manner as to secure the "maximum possible amount thereof".

H.J.R. 18 broadens the scope of section 8 to include "acquired" lands and amends the section's mandate to read "maximum long term financial return".

Neither H.J.R. 18 or section 8 will probably be interpreted to apply to park lands. Although, by its literal terms the existing section 8 could conceivably be construed to encompass state parks, this position has never been taken in any court case, nor has any court so construed the section.

The history of section 8 does not suggest that it was intended to encompass "granted" state parks. Rather the history of section 8 indicates that it was to apply to land granted for income generation such as agricultural, irrigation, school, and university lands. Idaho Constitutional Convention Vol. I, pg. 830-849. There have apparently been no judicial, administrative, or legislative attempts to construe it to apply to park lands.

Moreover, H.J.R. 18 does not broaden the lands encompassed by section 8, except to include "acquired lands". Because of the historical interpretation and application of section 8 to only income-generating lands, a court would likely conclude that "acquired lands" is intended to refer only to lands "acquired" for those purposes. A legislature is presumed to be aware of prior interpretation of a constitutional provision or statute in drafting amendments. *Lincoln Bank and Trust Company v. Exchange National Bank and Trust Company*, 383 F.2d 694 (10th cir. 1967); c.f. *Toilet Goods Association v. Gardner*, 278 F.Supp. 786 (1968); *Forsman Real Estate Company, Inc. v. Hatch*, 97 Idaho 511, 547 P.2d 1116, (1976). A much clearer statement of intention would thus be necessary if H.J.R. 18 were to add park lands to the coverage of section 8.

Nor does the legislative history of H.J.R. 18 suggest the scope of this amendment is intended to encompass state parks. The Legislative Council's Statement of Meaning and Purpose of H.J.R. 18 states:

This amendment will formally spell out in the State Constitution a management practice that the State Board of Land Commissioners uses in managing the State's *endowment lands*. The State Board of Land Commissioners manages the *endowment lands* to receive the maximum long-term financial return instead of the short-term benefit. (emphasis added).

"[E]ndowment lands" refers to those lands whose object is income generation. This conclusion is further supported by the Legislative Council's Statement Against the Proposed Amendment, paragraph 2, which begins,

While not the intent of the amendment, the wording of this proposed amendment could possibly endanger certain existing state parks and wildlife refuges . . .

Literature and statements concerning the question of whether or not people should support a proposed amendment is relevant legislative history for purposes of statutory interpretation. *Anthony v. Veatch*, 189 Ore. 462, 220 P.2d 493 (1950); *Eugene School District No. 4 v. Fisk*, 159 Ore. 245, 79 P.2d 262 (1938).

The maxim *noscitur a sociis* further suggests the conclusion that neither section 8 nor H.J.R. 18 includes state parks. This doctrine states that, if the legislative intent of a statute is ambiguous, the meaning of a doubtful word or phrase may be gleaned from its association with other words or phrases. Southerland, *Statutory Construction*, §47.16, pg. 101; see e.g., *United States v. Sumitomo Shoji, New York, Inc.*, 534 F.2d 320 (U.S. Cust. & Pat. App. 1976) Thus, the conclusion that "granted" or "acquired" lands is referring to income producing lands is further suggested by specific provisions of section 8 and H.J.R. 18, such as those referring to "financial" returns, the annual sales of state lands, and minimum prices for state lands sold.

Finally, it should be noted that many parks granted to the state by the federal government were based upon the pledge that Idaho maintain these parks for park purposes. Deviations by the state from this pledge could possibly result in the forfeiture of these lands. A court in construing section 8 and H.J.R. 18 would be cognizant of the possibility of forfeitures and, thus, would be more inclined to adopt the position urged in this opinion.

Therefore, to the extent H.J.R. 18 is perceived as a shift in policy to now include state parks within the maximization provisions of section 8 or to its amendment, this view is incorrect.

Sincerely,
/s/ NEIL TILLQUIST
Deputy Attorney General

NT/tl

October 28, 1982

State Board of Land Commissioners
Statehouse Mail

THIS IS NOT AN OFFICIAL OPINION
OF THE ATTORNEY GENERAL
AND IS SUBMITTED SOLELY FOR YOUR LEGAL GUIDANCE.

Re: Barber Flats Land Sale Proposal

Dear Sirs:

Idaho Power Company has requested that the Land Board sell school endowment land known as Barber Flats for use as a pumped storage site for a possible future hydro-electric project. The company would like to have the site available as an option for future construction, but apparently is not definitely committed to such construction. The board has expressed a willingness to sell the land to the company (assuming it is the highest bidder); but a subcommittee has recommended that the site should be appraised as a hydro-electric site rather than as grazing land, the present use of the land. It also has recommended that this sale should include a term that requires Idaho Power to pay to the state a percentage of gross revenues realized from the sale of power from the facilities constructed on the site. The company has objected to both the method of appraisal and the payment of a percentage of the gross, but it is particularly upset with the latter idea. Logan Lanham, company vice president, in a letter to Governor Evans has questioned the board's legal authority under *Idaho Code* §58-314 to sell the land for any terms other than cash or twenty annual installments.

Constitutional and Statutory Framework

Article 9 §7 of the constitution provides as follows:

State board of land commissioners. — The governor, superintendent of public instruction, secretary of state, attorney general and state auditor shall constitute the state board of land commissioners, who shall have the direction, control and disposition of the public lands of the state, *under such regulations as may be prescribed by law.* (emphasis added).

Article 9 §8 further provides in pertinent part:

Location and disposition of public lands. — It shall be the duty of state board of land commissions [sic] to provide for the location, protection,

sale or rental of all the lands heretofore, or which may hereafter be granted to the state by the general government, *under such regulations as may be prescribed by law, and in such manner as will secure the maximum possible amount* therefore; provided, that no school lands shall be sold for less than ten dollars (\$10) per acre (emphasis added).

The legislature is thus allowed to regulate the land board in some manner. As is typical in this area, there are few decisions directly on point. What decisions there are, are relatively old. One detects an analytical tension between limiting discretion of a constitutional board and the provisions giving the legislature regulatory authority.

Idaho Code §58-313 provides in pertinent part:

Sale of state land. — The state board of land commissioners may at any time direct the sale of any state lands, in such parcels as they shall deem for the best interests of the state . . . The advertisement shall state the time, place and terms of sale, a description of the land and value of the improvements, if any, thereon, and the *minimum price per acre of each parcel as fixed by the board*, below which no bid shall be received (emphasis added).

Finally, *Idaho Code* §58-314 provides for the terms of sale:

Terms of payment *shall* be as follows: Timber lands and lands chiefly valuable for timber, cash on day of sale, or on instalments as provided in section 58-411, *Idaho Code*; lands acquired by sheriff's deed or deed taken in satisfaction of mortgage securing loan of state funds, cash on the day of sale or on such other terms and conditions as the state board of land commissioners may direct; on all other lands, except those mentioned in section 58-315, *Idaho Code*, ten per cent (10%) of the purchase money on the day of the sale and the balance in twenty (20) annual payments with interest at the rate per annum set by the state board of land commissioners on all deferred payments (emphasis added).

Statutory Analysis

Assuming that §58-314 is constitutional as applied to this situation, Idaho Power has a colorable argument that the statute requires only a cash-on-sale payment. The statute states that "terms of payment *shall* be as follows . . ." It has been part of the *Idaho Code* since 1905 in essentially the same form, previous versions of the statute differing in the amount of years over which payment could be made (40) and some attempting to set forth the interest rate which could be charged.

On the other hand, the board could argue that *Idaho Code* §58-313 gives it the power to set a minimum price per acre. A price requiring a fixed payment and a percentage of the gross would be within the terms of that provision and in addition satisfy the board's constitutional mandate to obtain the maximum amount from the management of endowment lands.

The board could also argue that the legislature never considered a transaction such as this in drafting I.C. §58-314 and that the provision was meant to limit the board's discretion to sell on credit. This would not be a sale on credit

since the board would be passing title according to I.C. §58-314. The percentage of gross provision would apply only if a storage site were built; payment of those fees would be according to §58-314; and the state would have a reversionary interest if the payments were not made.

These arguments sit somewhat uneasily, however. Because of the vacuum in Idaho's legislative history, one could argue as easily that *Idaho Code* §58-314 was intended to negate arrangements similar to the one proposed, such as crop sharing, as a method of payment.

Constitutional Analysis

Initially, it should be noted that the "under such regulations as may be prescribed by law" proviso in article 9 §8 comes *before* the language in that section mandating that the land board manage the lands "in such manner as will secure the maximum possible amount therefore . . ." We could thus argue that the legislature has no authority to limit the discretion of the board in determining the maximum amount obtainable for endowment lands. Decisions from other jurisdictions would both support and oppose this argument.

In *Fox v. Kneip*, 260 N.W.2d 371 (S.D. 1977), the court faced a situation in which the South Dakota legislature had set a minimum grazing lease fee that the state's commissioner of school and public lands determined was too low. He thus set his own. The court resolved the conflict by deciding that the legislature could set a minimum fee but that the commissioner did not have to accept leases bid at that rate. The court went on to state that if the legislature had purported to set market value then it "would seriously have to consider the constitutionality of the statutory formula . . ." And in *State Land Department v. Tucson Rock and Sand Company*, 107 Arizona 74, 481 P.2d 867 (1971), the court held that it was unconstitutional for the legislature to set a limit on mineral lease royalties that would be less than the full appraised value.

But in *State v. State Board of Land Commissioners*, 131 Montana 65, 307 P.2d 234 (1957), the court held that it was improper for the board to enter into mineral leases other than on terms set forth by the legislature. The legislature had required that the royalty to the state be 12 $\frac{1}{2}$ %. The board was faced with two bidders, one that bid a bonus of \$39,000 and a royalty of 16 $\frac{2}{3}$ % and another that bid a bonus of \$68,000 and the statutory royalty of 12 $\frac{1}{2}$ %. The board had felt that the higher royalty would bring a greater return to the state. The court reasoned that the legislature had made a determination of value and its determination was controlling. While it should be noted that Montana's constitutional provision differs from Idaho by providing in pertinent part that lands should be managed to obtain "full market value . . . to be ascertained . . . as may be provided by law," the decision still indicates a preference for legislative regulation.

Finally, the decision of the Nebraska Supreme Court in *State ex rel Belker v. Board of Education Lands and Funds*, 184 Nebraska 621, 171 N.W.2d 156 (1969) on rehearing, 185 Nebraska 270, 175 N.W.2d 63 (1970) should be noted. In *Belker*, the court was faced with the constitutionality of a statute that directed the sale of all endowment lands when the leases currently in effect for those lands expired. In a three-to-four decision (Nebraska has a constitutional provision stating that it takes five votes to declare a statute unconstitutional), the court upheld the constitutionality of the statute. The minority/controllering opinion found the possibility of a gutted land market too remote to consider at

present and left open the possibility of a challenge to each individual sale as not bringing a fair return. The majority/dissenting opinion, while recognizing legislative authority, basically held that the legislature could not limit the discretion of the board "this much." The majority felt that the board had to have discretion to sell or not to sell since even though "fair market value" was obtained, it might not be in the best long term interest of the trust to sell in a depressed market, i.e. a prudent man would not sell at that time. The majority/dissenting opinion in that case would lend support to a greater amount of land board discretion. The discretion of the board would arguably be strengthened if the proposed constitutional amendment (H.J.R. 18) to article 9 section 8 passes and requires the board to manage for "maximum long term financial gain."

Idaho decisions are typically cryptic on this issue. In *Balderston v. Brady*, 17 Idaho 567, 107 P. 493 (1910), the court considered the effect of a House Joint Resolution that required the land board to relinquish state title to endowment lands claimed by settlers. The court held that the resolution, not being a law of the state, was not binding on the board. The court went on to say that even if the resolution were a law, it probably was unconstitutional:

If this were a legislative enactment in the form of a law, it would still be a serious question if the legislative department of the state could either authorize or direct the land board to part with the state's title and right to school or other lands for less than the constitutional minimum price or without a sale at public auction.

While this supports the principle that the legislature cannot interfere with their constitutional mandate or discretion of the board, it does not really help in answering the question of whether a legislative directive to sell only on certain terms is valid.

In *State v. State Board of Education*, 33 Idaho 415, 196 P.201 (1921), the court considered the constitutional authority of the Board of Regents of the University of Idaho. In generally upholding the independence of the board from following procurement procedures and board of examiners procedures, the court stated that:

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 character to interfere essentially with the constitutional discretion of the board, under the authority granted by the constitution.

The most recent decision of the Idaho Supreme Court touching this area is *Allen v. Smylie*, 92 Idaho 846, 452 P.2d. 343 (1969). In *Allen v. Smylie*, the validity of certain phosphate mineral leases issued to Monsanto was questioned. The plaintiff contended that the leases were void and that the board was required to lease to him. The court held that absent arbitrary or capricious action, the board was to determine the validity of the Monsanto leases and whether or not to lease to plaintiff. But in dicta in several places, the court mentioned that the board was subject to legislative regulation, e.g., "In the absence of statutory prohibition, the board's determination of lease terms will not be disturbed by the court unless clearly discriminatory, capricious or unreasonable." *Id.*, at 852. The court in *Allen v. Smylie* also lent some support to the independent powers of the board. It referred to article 9 section 8 as enjoining "a duty upon the board to lease for maximum return under procedural regulation of the legislature" (emphasis added).

The conclusion from these ambiguous statements by the court appears to be that the court would be more likely to uphold land board imposition of percentage of gross payments if there is a strong showing of greater return to the state with the inclusion of a percentage of the gross as a term.

CONCLUSION

There is uncertainty as to the scope of the legislature's authority in limiting land board discretion in managing lands and as to the meaning of the current statutes. I would conclude that under a statutory or constitutional analysis, there is enough authority for the board to require payment of a percentage of the gross.

But there is also a reasonable possibility that in a law suit Idaho Power could prevail. The bottom line is, of course, that the board has discretion not limited by statute to sell or not to sell particular parcels of land. Another solution could be to grant Idaho Power an easement for hydro-electric purposes, but the company has expressed opposition to that also.

Sincerely,
/s/ DON A. OLOWINSKI
Deputy Attorney General
Chief, Natural Resources Division

December 9, 1982

The Honorable Vernon T. Lannen
Senator, State of Idaho
District 4
P.O. Box 1052
Pinehurst, ID 83850

THIS IS NOT AN OFFICIAL OPINION
OF THE ATTORNEY GENERAL
AND IS SUBMITTED SOLELY FOR YOUR LEGAL GUIDANCE.

Dear Senator Lannen:

In response to your phone call last week, I have had the opportunity to research the Idaho statutes on nepotism. You were concerned about the qualification of your daughter to serve as an intern in the House of Representative. *Idaho Code* §59-701, a copy of which I have enclosed for your convenience, would appear to prohibit such an arrangement. In relevant portion, that statute states that a legislative officer:

... who appoints or votes for the appointment of any person related to him or to any of his associates in office by affinity or consanguinity within the second degree ... when the salary ... is to be paid out of public funds ... is guilty of a misdemeanor involving official misconduct ...

Thus, the question becomes whether members of the House who vote on the appointment of your daughter are your "associates in office." The Idaho case of *Barton v. Alexander*, 27 Idaho 286, 294, 148 P 471 (1915) defines associate in office as:

One who shares the office or position of authority or responsibility . . . who are united in action; who have a common purpose; and who share responsibility or authority and among whom is reasonable equality; those who are authorized by law to perform duties jointly or as a body.

At 27 Idaho 295, the court gave further elaboration:

The phrase "associates in office" as used in said act, refers to officers who are required under the law to act together, for instance, as a board or city council, each having substantially equal authority in matters coming before them as a board or council under the law, and said act was intended to and does prohibit such officers or boards or councils from appointing anyone to office related within the prohibited degree to either or any of such offices who are members of such board or council. But such officers who have independent duties to perform, aside from those coming before them as members of a board or council, are not "associates in office" in the performance of those independent duties.

Because you as a Senator must act in concert with members of the House you would probably be considered associates in office. Whether you agree or disagree with the action members of the House take is irrelevant, as you must pass judgment on the same issues. Further, this logic is bolstered by the fact that even though the House pages are hired by action of the House Chamber without concurrence of the Senate, the appropriation bill which provides pay for those individuals must be passed upon by the Senate. It is my belief that this is the type of concurrence required by the court in *Barton v. Alexander*, which makes two individuals "associates in office."

It would appear, therefore, that your daughter may not be hired as a page in the House of Representatives. Of course nothing would prohibit her serving without pay in these positions should that be agreeable to the hiring authority and to her.

Sincerely,
/s/ KENNETH R. McCLURE
Deputy Attorney General
Division Chief —
Legislative/Administrative Affairs

KRM/bc
Enclosure

December 10, 1982

Bruce Balderston
Legislative Auditor
Statehouse Mail

THIS IS NOT AN OFFICIAL OPINION
OF THE ATTORNEY GENERAL
AND IS SUBMITTED SOLELY FOR YOUR LEGAL GUIDANCE.

Dear Bruce:

You have asked this office for legal guidance concerning the proper treatment of interest accredited to the State Historical Society on investment of assets in its agency asset account and from the sale of miscellaneous items including territorial centennial medals. Additionally, you have asked whether the management of the fund is subject to the State Auditor's general account service fee.

Idaho Code §67-1210 gives the state treasurer the duty to "invest idle monies in the state treasury, other than monies in public endowment funds . . ." By definition, the money in the historical society foundation account upon which interest is earned is idle money. Accordingly, *Idaho Code* §67-1210 requires that "the interest received on all such investments, unless otherwise specifically required by law, shall be paid into the general fund of the State of Idaho." Thus, unless the idle money in the historical society's account is "public endowment funds" the interest earned thereon must be credited to the general fund.

To determine what a "public endowment fund" is, one must refer to *Idaho Code* §57-803. That section states in part:

For all budget, accounting, appropriation, allotment, audit, and other financial report purposes, the following funds, and none other, are recognized and confirmed in existence or are established.

The only endowment funds which are authorized by that section are "the institutions' endowment fund" (*subsection h*) and the "endowment earnings fund" (*subsection i*). The institutions' endowment fund is to be used as the fund:

. . . to account for the proceeds from the sale of such lands as have heretofore been granted, or may hereafter be granted, to the state by the federal government . . . to account for the proceeds from the sale of timber growing on such lands; to account for the proceeds of royalties arising from the extraction of minerals on such lands; and to account for such other proceeds and avails as are required by law of the federal government or of the State of Idaho to be made a part of the institutions' endowment fund. (emphasis added)

Obviously, this is not the kind of endowment fund into which donations to the Idaho Historical Society may be placed, as it does not expressly include the historical society and no other statute operates to require such inclusion.

The only other type of endowment fund is found in *subsection (i)* of *Idaho Code* §57-803, which is the endowment earnings fund. According to that subsection the fund:

. . . is to be used to account for the income from investments of the agricultural college fund, the university fund, and the institutions' endowment fund; to account for any and all monies which may be received on

account of rentals of the land specified in . . . the Idaho Admission Act; and to account for any and all monies which may be received on account of any interest charged upon deferred payments on such of the lands . . .

Clearly this also is not a fund into which donations to the historical society may be placed. Neither can the income on the investment of those donations be placed in such a fund. Accordingly, as the previously quoted *Idaho Code* §57-803 states that no other funds are recognized, the exception in *Idaho Code* §67-1210 for public endowment funds can include only the endowment funds created by subsections h and i of *Idaho Code* §57-803, or as otherwise *specifically* provided by law. As neither *Idaho Code* §§57-807 nor 57-808 provide other specific additions to the endowment earnings fund and the institutions' endowment fund and no other sections place the historical society's account within this category, the money received by the historical society may not be placed in an "endowment fund." Accordingly, *Idaho Code* §67-1210 requires that the earnings on the investment of such funds be paid to the general fund.

Similarly, *Idaho Code* §67-3524 authorizes a service fee for the management of "the special operating funds existing in the state treasury, except endowment funds, endowment income funds, retirement funds, or any cooperative welfare funds . . ." Because the historical society foundation account is an agency asset account and not one of the specifically exempted accounts, it cannot escape the management fee imposed by *Idaho Code* §67-3524.

The donations received by the historical society must be placed in the historical society foundation account and the interest thereon paid to the general fund. The state's accounting system, at this time, does not appear to allow the historical society to accept funds which are specifically intended as "endowment" type gifts. In other words, the historical society lacks the ability to invest a sum of money as a trust corpus, and utilize the income it produces for its own purposes. Should such a gift be made to the historical society, it would probably have to ask the donor to change the terms of the gift or provide a private trust for the benefit of the historical society. There is a slight possibility that under operation of law the doctrine of *cy pres* would allow the expenditure of an endowment fund on a non-endowment basis, although this is fairly speculative.

The historical society may wish to seek the creation of an endowment fund. An account within either the institutions' endowment fund or the endowment earnings fund by the terms of *Idaho Code* §§57-807 and 57-808 may be created "only by law or by order of the state auditor." Accordingly, the appropriate legislation or an order from the state auditor would be required to allow money prospectively to be held by the historical society in an endowment status. It is fairly clear, however, that the money already in the historical society account does not qualify for such treatment. Therefore, the interest earned on the investment of the funds in that account must be credited to the general fund and the account must be charged the state auditor's general account service fee.

I hope that this has satisfactorily answered your inquiry. If you have further questions on this matter, please contact me.

Sincerely,
/s/ KENNETH R. McCLURE
Deputy Attorney General
Division Chief —
Legislative/Administrative Affairs

KRM/bc

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