



## STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

LAWRENCE G. WASDEN

### ATTORNEY GENERAL OPINION NO. 19-1

TO: Ed Schriever, Director  
Idaho Department of Fish and Game  
P.O. Box 25  
Boise, ID 83707

Per Request for Attorney General's Opinion

This letter responds to your questions concerning terms required by the U.S. Department of Agriculture (USDA) in permits for USDA sites. Specifically, the USDA has requested that the Idaho Department of Fish and Game (IDFG) indemnify the United States and that it provide commercial insurance policies naming the United States as an additional insured. Alternatively, the USDA has offered that it will accept a self-insurance program if the State of Idaho names the United States as an insured and the program provides coverage up to the limits of the required commercial insurance.

#### QUESTIONS PRESENTED

1. Can the State of Idaho contract to indemnify another party to an agreement?
2. Does the State of Idaho's self-insurance program offer status as an additional insured for a party to an agreement with the State of Idaho?
3. Is there a limit to payments under the State of Idaho's self-insurance program?

#### CONCLUSION

For the reasons discussed below, I conclude that the terms requested by the USDA are contrary to Idaho law. Unless funded by a specific appropriation, a

contractual indemnification obligation violates the Idaho Constitution and Idaho statutes based on the Constitution. Idaho law also does not establish a program of insurance for the State of Idaho with authority to name parties contracting with the state as additional insureds or provide specific limits of payment similar to private insurance coverage.

## ANALYSIS

### **A. A Contractual Indemnification Must be Funded by Legislative Appropriation**

An indemnification is a contractual promise to pay for and provide a legal defense for a claim related to the contract and made against another contracting party. In addition, an indemnification is a promise to pay any costs arising from the claim, such as costs imposed through a settlement or court judgement. When the promise will be called is indefinite. An indemnification obligation can arise during the current Idaho budget year or in a future budget year.

In Idaho Attorney General Opinion No. 79-13, the Attorney General opined that a contractual indemnity clause where a city and a county agreed to hold the federal government harmless from contingent or tort damages arising from the federal government's acts or omissions under the agreement would likely violate the Idaho Constitution's limit of indebtedness by local governments. 1979 Idaho Att'y Gen. Ann. Rpt. 77. Although the Attorney General has not issued a formal opinion concerning contractual indemnity terms for state agencies, it has consistently advised that such terms are in violation of Idaho law.

The Idaho Constitution contains a limitation on indebtedness by the State of Idaho that parallels the provision for local governments. Idaho Const. art. VIII, § 1. In addition, the Idaho Constitution provides that "[n]o money shall be drawn from the treasury, but in pursuance of appropriations made by law." Idaho Const. art. VII, § 13. The Idaho Legislature has further defined the limits established by the Idaho Constitution in statute. The following prohibition, first enacted in 1914, provides:

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.

Idaho Code § 59-1015; see 1982 Idaho Att'y Gen. Ann. Rpt. 117 (opining that Idaho Code section 59-1015 prohibits establishing a debt or liability in excess of an appropriation that is for the debt or liability and exists at the time the debt or liability is incurred). The two Idaho Code sections following this prohibition provide that any term in violation of the prohibition is void and penalize public officials who enter agreements with a term imposing an unappropriated expense. Idaho Code §§ 59-1016 and 59-1017. In 2015, the Idaho Legislature specifically affirmed in the Rules of the Division of Purchasing that terms imposing an indemnification obligation without a specific appropriation for the obligation are void under Idaho Code section 67-9213. IDAPA 38.05.01.112.02.a.

In limited circumstances, an indemnification obligation is authorized by the Idaho Legislature. See Idaho Code §§ 6-903 (providing for indemnification of public employees acting in the course and scope of employment), 14-520 (providing that the unclaimed property administrator shall indemnify and defend a holder delivering unclaimed property to the administrator in good faith against a claim for the property delivered). In the instances where indemnification is authorized in Idaho statute, a corresponding fund for payment of the resulting costs is also established. See Idaho Code §§ 6-919 (establishing the retained risk program funded by the retained risk account) and 14-523 (authorizing payments from the continuously appropriated unclaimed property account); see also, Idaho Code § 6-922 (limiting unfunded tort liability to payment from appropriations for such liability). Absent legislative authorization and corresponding appropriation, an indemnification violates article VII, section 13 and article VIII, section 1 of the Idaho Constitution; Idaho Code section 59-1015; and, where IDAPA 38.05.01.112.02.a. is applicable, Idaho Code section 67-9213.

Many states find the same prohibition in corresponding constitutional and statutory provisions.<sup>1</sup> Federal agencies are subject to a similar prohibition.

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<sup>1</sup> 2010 N.M. Att'y Gen. Inf. Op., 2010 WL 311646 (N.M.A.G.) (opining that indemnification obligations that require use of general revenues "can run afoul of the 'debt' provisions" of the constitution); 2006 Miss. Att'y Gen. Op. 610, 2006 WL 1900660 (Miss.A.G.); 2006 Okla. Att'y Gen. Op. 11, 2006 WL 1987826 (reviewing cases holding that a hold harmless provisions assuming the contingent liability of another is in violation of law); 2005 Alaska Att'y Gen. Inf. Op., 2005 WL 2098268 (Alaska A.G.); 1996 Ohio Att'y Gen. Op. 060, 1996 WL 708356; 1995 Fla. Att'y Gen. Op. 12, 1995 WL 66343 (opining that a state agency may not waive the defense of sovereign immunity or increase its liability through an indemnification clause); 1989 S.C. Att'y Gen. Op. 116, 1989 WL 406133 (extending prior opinions that agencies do not have authority to enter indemnification agreements to contracts with other government entities, including federal entities); 1989 Wis. Att'y Gen. Op. 1-89; 71 Md. Att'y Gen. Op. 274, 1986 WL 287651 (opining that indemnification is "flatly inconsistent with the public policy" in the constitutional and statutory limits on expenditure in excess

Indemnification Agreements & the Anti-Deficiency Act, 8 Op. O.L.C. 94, 1984 WL 178357 (1984) (discussing application of the anti-deficiency act to indemnification agreements); see also The Anti-Deficiency Act Implications of Consent by Gov't Employees to Online Terms of Serv. Agreements Containing Open-Ended Indemnification Clauses, 2012 WL 5885535 (O.L.C. Mar. 27, 2012) (reviewing the anti-deficiency act and indemnification agreements in online terms of service).

In correspondence to the Idaho Office of the Attorney General, the USDA provided excerpts from Forest Service guidance concerning "standard, nationally approved modified liability clauses for states." These standard terms provide an unqualified indemnification of the United States "subject to" the limits on the state party's liability in the state's tort claims act. Indemnification is an obligation assumed under a contract. The Idaho Tort Claims Act waives the state's sovereign immunity for claims arising in tort up to a statutory limit. The Act does not waive immunity related to or address claims arising in contract such as an indemnification agreement. As discussed above, an indemnification obligation in a state agency contract not funded by legislative appropriation is void and state agencies do not have authority to accept such an obligation. Conditioning a contractual indemnification obligation on the Idaho Tort Claims Act does not avoid the Idaho constitutional and statutory limits on the contractual obligation. See 1999 Miss. Att'y Gen. Op. 241, 1999 WL 535496 (Miss.A.G.) ("[T]he addition of the phrase 'to the extent permitted by Mississippi law' to the limitation of liability and to the indemnification and hold harmless language . . . , in our opinion, has no legal effect.").

**B. The Liability Terms Requested by the USDA Are Private Insurance Terms Not Authorized Under the State of Idaho's Self-Insurance Program**

The USDA has also requested that the Department of Fish and Game procure commercial general liability (CGL) insurance with a limit of one million dollars per incident and two million dollars in the aggregate naming the United

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of appropriation); 1982 Tenn. Att'y Gen. Op. U82-008; 1982 Tex. Att'y Gen. Op. MW-475, 1982 WL 173817; 2013 Wa. Att'y Gen. Op. 2, 2013 WL 4517409 (opining that in the absence of a specific grant of authority by the legislature, public entity lacks the power to indemnify); 2006 La. Att'y Gen. Op. 250, 2006 WL 3616638 (opining that Louisiana statute prohibits indemnification clauses except as between Louisiana government entities); 2008 Or. Att'y Gen. Op. 1, 2008 WL 1991485 (opining that indemnification obligations create contingent liabilities that must be funded under the Oregon Constitution); 1985-86 Va. Att'y Gen. Op. 36, 1986 WL 221191 (opining that indemnification agreements limited to the funds provided by the legislature also require case-by-case analysis to determine if they violate the Virginia Constitution's prohibitions on lending the credit of the state); 1980 Ga. Att'y Gen. Op. 141, 1980 WL 26351 (opining that indemnification agreement violates constitutional prohibitions on the lending of the state's credit and the sovereign immunity of the state).

States as an additional insured. Alternatively, the USDA has offered that it will accept a self-insurance program if the State of Idaho names the United States as an "additional insured" and provides "coverage" to the dollar limit provided by the requested private insurance.

Idaho law has not established a self-insurance program with authority to grant "additional insured" status or to provide specific dollar limit coverage as is provided under private insurance policies. Idaho law provides for a comprehensive liability plan known within Idaho State government as the "retained risk program." The retained risk program is to be provided by the Administrator of the Department of Administration's Division of Insurance Management (Risk). Idaho Code § 6-919. The retained risk program is not a policy of insurance under Idaho law because it is not a contract between the State of Idaho and any other party. See Idaho Code §§ 41-102 (definition of insurance) and 41-103 (definition of insurer).

The retained risk program is funded by the continuously appropriated retained risk account. Idaho Code § 67-5776. Idaho law provides that the retained risk account shall be used solely for the purposes set forth in Idaho Code section 67-5776, which include the costs of private insurance, the costs of maintaining the Risk office, and payment of losses "suffered by the state as to property and risks which at the time of the loss were eligible for such payment under guidelines theretofore issued by the director of the department of administration." Unlike an additional insured on a private insurance policy, a third party cannot make a claim against the retained risk account. Except as provided in the Idaho Tort Claims Act, there is no monetary limit to payment of losses within the retained risk program in Idaho law and nothing akin to the per occurrence or aggregate coverage of a private insurance policy.

If the USDA's terms are not adjusted to account for the nature of the retained risk program, the IDFG may request that the Director of the Department of Administration consider the purchase of private insurance policies providing the requested coverage. The Idaho Legislature has required the Director of the Department of Administration to determine the nature and extent of agency needs for private insurance coverages. Idaho Code § 67-5773. In addition, only the Risk Administrator is authorized to procure private liability insurance on behalf of the state. Idaho Code § 6-920. Absent the consent of the Director and the purchase by Risk, the IDFG is not authorized to provide a private policy of insurance for the benefit of the United States.

Even if the Director of the Department of Administration determines a private insurance policy is appropriate and the Risk Administrator is able to procure a policy, the inclusion of a third party as an additional insured on the policy could raise legal concerns. At least two state attorneys general have concluded that

doing so is equivalent to an agreement to indemnify a third party. 2007 Okla. Att'y Gen. Op. 41, 2007 WL 4699715; 2000 Fla. Att'y Gen. Op. 22, 2000 WL 347547 (opining that county was not authorized to "purchase insurance for the benefit of the other party to a contract, effectively providing for the indemnification of the other party.").

### **C. Template Idaho Terms**

Following the USDA's contact with IDFG, legal counsel for USDA contacted the Idaho Office of the Attorney General and requested that this Office provide a "template for the liability language in Idaho's permits." The information submitted with the request indicates that the permits at issue involve counties, cities, higher education institutions, school districts, and highway districts. The Idaho Office of the Attorney General does not represent these entities or negotiate contracts on their behalf.

Below I provide sample language the Idaho Office of the Attorney General has previously recommended for use by State of Idaho agencies in agreements with agencies of the United States.

Allocation of Risk. Federal Entity and Idaho Agency shall be responsible only for the acts, omissions or negligence of such party's own employees and agents. Nothing in this Agreement shall extend the tort responsibility or liability of the State of Idaho or the United States beyond that required by law, including for the State of Idaho the Idaho Tort Claims Act, Idaho Code section 6-901, *et seq.*

Each party shall be responsible for damage to property of the other party caused by its employees and agents in the performance of the Agreement. If a property claim or damage is not covered by the party's self-insurance or other property coverage, the responsible party shall pay the costs arising from such claim or damage to the extent funds are legally available therefor. If a claim or damage arises from more than one party's performance of the Agreement or is not allocable to any party, each party shall pay the costs to such party arising from the claim or damage.

Insurance. Insurance requirements in the Agreement may be evidenced by a Certificate of Financial Responsibility or other evidence of a self-insurance or a pooled or cooperative liability program for the State of Idaho or Federal Entities. If any coverage required by the Agreement is provided by private insurers or quasi-governmental entities regulated under applicable insurance codes or

laws, the insured party shall provide coverage and evidence of coverage as set forth in the Agreement.

Idaho higher education institutions and political subdivisions are governed by provisions in the Idaho Constitution, Idaho statutes, ordinances of the political subdivision, and policies of the higher education institution's regents or governing board imposing similar restrictions as those applicable to State of Idaho agencies. Political subdivisions and their legal counsel may find that the above terms require limited modification to meet the entity's requirements.

### **CONCLUSION**

The Idaho Constitution establishes the appropriation process to ensure both the Idaho legislative and executive branches approve the expenditure of public funds. A contractual indemnity not funded through the appropriation process is contrary to Idaho law and State of Idaho agencies do not have the authority to agree to an unfunded contractual indemnification term.

The State of Idaho retained risk program is not a policy of insurance regulated under the Idaho insurance code. The retained risk program cannot insure third parties, including the USDA. In addition, the only limits on the amount of a payment under the retained risk program in Idaho law are the Idaho Tort Claims Act and the statutory and constitutional limits on expenditures exceeding an appropriation.

### **AUTHORITIES CONSIDERED**

#### **1. Idaho Constitution**

Art. VII, § 13  
Art. VIII, § 1

#### **2. Idaho Code**

§ 6-901, *et seq.*  
§ 6-903  
§ 6-919  
§ 6-920  
§ 6-922  
§ 14-520  
§ 14-523  
§ 41-102  
§ 41-103

§ 59-1015  
§ 59-1016  
§ 59-1017  
§ 67-5773  
§ 67-5776  
§ 67-9213

### **3. Idaho Administrative Code**

IDAPA 38.05.01.112.02.a.

### **4. Other Authorities**

Agreements & the Anti-Deficiency Act, 8 Op. O.L.C. 94, 1984 WL 178357 (1984)  
The Anti-Deficiency Act Implications of Consent by Gov't Employees to Online  
Terms of Serv. Agreements Containing Open-Ended Indemnification Clauses,  
2012 WL 5885535 (O.L.C. Mar. 27, 2012)

1979 Idaho Att'y Gen. Ann. Rpt. 77  
1982 Idaho Att'y Gen. Ann. Rpt. 117

1980 Ga. Att'y Gen. Op. 141, 1980 WL 26351  
1982 Tenn. Att'y Gen. Op. U82-008  
1982 Tex. Att'y Gen. Op. MW-475, 1982 WL 173817  
71 Md. Att'y Gen. Op. 274, 1986 WL 287651  
1985-86 Va. Att'y Gen. Op. 36, 1986 WL 221191  
1989 S.C. Att'y Gen. Op. 116, 1989 WL 406133  
1989 Wis. Att'y Gen. Op. 1-89  
1995 Fla. Att'y Gen. Op. 12, 1995 WL 66343  
1996 Ohio Att'y Gen. Op. 060, 1996 WL 708356  
1999 Miss. Att'y Gen. Op. 241, 1999 WL 535496 (Miss.A.G.)  
2000 Fla. Att'y Gen. Op. 22, 2000 WL 347547  
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2006 Okla. Att'y Gen. Op. 11, 2006 WL 1987826  
2007 Okla. Att'y Gen. Op. 41, 2007 WL 4699715  
2008 Or. Att'y Gen. Op. 1, 2008 WL 1991485  
2010 N.M. Att'y Gen. Inf. Op., 2010 WL 311646 (N.M.A.G.)  
2013 Wa. Att'y Gen. Op. 2, 2013 WL 4517409



Ed Schriever  
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Dated this 30<sup>th</sup> day of September, 2019

A handwritten signature in blue ink, appearing to read "Lawrence G. Wasden". The signature is fluid and cursive, with a large initial "L" and "W".

LAWRENCE G. WASDEN  
Attorney General

**Analysis by:**

JULIE K. WEAVER  
Deputy Attorney General