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OFFICIAL OPINIONS OF THE STATE OF  
IDAHO ATTORNEY GENERAL  
W. ANTHONY PARK, ATTORNEY GENERAL

July 2, 1973-Dec. 31, 1973

1. 74-1 through 74-88

C.P.

July 2, 1973



Mr. Richard H. Seeley  
Attorney for Jerome  
Highway District  
221 South Lincoln Ave.  
Jerome, Idaho 83338

Dear Mr. Seeley,

We have your letter asking whether Chapter 269, Idaho Session Laws has application to the 1973 taxes and levies for highway districts. Section 5 of the act provides that the budget shall be completed and finalized not later than February 20th of the calendar year for which the budget is concerned. The act was approved by the Governor on March 17, 1973 and there is no provision as to when the act becomes effective. Thus, under Section 67-510, Idaho Code, the act does not become effective until July 1, 1973.

We agree with you that the act could not apply to 1973 since by its terms that could not be. Also, retroactive legislation is not favored by the courts or may be invalid. Winan v. Swisher, 68 Idaho 364, 195 P. 2d 357; Ford v. City of Caldwell, 75 Idaho 499, 321 P. 2d 589.

In answer to your second question concerning the applicability of the county bidding law to highway districts, please consider the following:

"31-4001: Applicability.--This act shall apply to all counties of the state of Idaho, but shall be subject to the provisions of any specific statute pertaining to the letting of any contract or the purchase or acquisition of any commodity or thing by any county by soliciting and receiving competitive bids therefor, and shall not be construed as modifying or amending the provisions of any such statute, nor preventing the county from doing any work by its own employees."



Mr. Richard H. Seeley  
July 2, 1973  
Page two

The highway districts are quasi-municipal corporations and are bodies politic and corporate. Stark v. McLaughlin, 45 Idaho 112, 261 P. 244. There must be compliance with the statutory provisions as to the particular manner in which contracts concerning highways are to be made. Bear River Sand and Gravel Corporation v. Placer County, 118 C.A. 2d 684, 258 P. 2d 543. Compliance pertains to laws that affect the highway district; the highway district commissioners have a duty to comply with the laws that the legislature made applicable to them. Section 40-1611, Idaho Code says in part that the commissioners of the highway districts:

"...shall have, in addition to the powers and duties conferred by this chapter, in respect to the highways within such district all of the powers and duties that would by law be vested in the county commissioners of the county and in the district road overseers if such highway district had not been organized; . . ."  
(Emphasis ours)

This appears to be a general reference statute making the laws which apply to counties in relation to highways applicable to highway districts and according to numerous cases, such as Nampa & Meridian Irrigation District v. Barker, 38 Idaho 529, 223 P. 529 and Boise City v. Baxter, 41 Idaho 368, 238 P. 1029 where laws are adopted by general reference the law is taken as it exists from time to time including all changes or the law is applied as it is at the time any particular exigency arises, to which the law is to be applied.

There is no mention of any sort in the highway district law or elsewhere as to the procedures for contracting or as to whether contracts must be let by bids or not. Also, the highway district commissioners are given the powers and duties of the county commissioners under the laws applicable to the county commissioners. Thus, since the time when the County Expenditure and Bidding Law was passed, (1963 Idaho Session Laws, Chapter 124), highway districts should have let all contracts for more than \$2,500.00 as provided by Section 31-4003, Idaho Code, under the provisions of Chapter 40, Title 31, Idaho Code. Where the provisions of the act require bids in a particular case the contract should be let on bids.

Also attached for your information is a recent opinion by Wayne Meuleman to the Commissioner of Labor relating to Chapter 40, Title 31, Idaho Code, which may be of interest to you.

Sincerely yours,

FOR THE ATTORNEY GENERAL

WARREN FELTON  
Deputy Attorney General

WF:sg



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83707

July 2, 1973

W. ANTHONY PARK  
ATTORNEY GENERAL

Dr. Lee W. Stokes  
Environmental Services  
Department of Environmental  
and Community Services  
Statehouse Mail

RE: Interpretation of Section  
50-1035, Idaho Code

Dear Dr. Stokes:

On May 22, 1973 you posed several questions concerning a proper interpretation of Section 50-1035, Idaho Code. This letter is a response to those inquiries.

Is it true that cities in Idaho cannot incur debt for more than a year to finance public works projects without a bond election? Does Idaho Code, Section 50-1035 say that?

No. Cities may incur debt beyond a one-year period in order to finance public works projects in three ways: (1) by issuance of revenue bonds by seeking and getting the assent of a majority of the qualified electors voting at an election to be held for the purpose of passing or rejecting a proposal to incur indebtedness beyond a year; (2) by issuance of general obligation bonds, in which case a two-thirds (2/3) vote of the qualified electors is required before indebtedness may be incurred beyond a year [it is doubtful that this type of bonding would be used for certain public works projects, such as sewer construction, since (a) a two-thirds vote is required; (b) a collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due is required; (c) revenue bonds are self-funding]; and (3) when the city is bank-rolled or funded by a philanthropist who expressly agrees to assume all payments owing on the public works project.

Any indebtedness or liability incurred contrary to the above three methods is permissible only if the indebtedness or liability incurred is for the ordinary and necessary expenses authorized by the general laws of the state (for example, general

Dr. Lee W. Stokes

July 2, 1973

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repair and maintenance of streets). Article Eight, Section Three of the Idaho Constitution is most clear in this regard.

Revenue bonding is not required by law but may be and usually is used as the best tool for financing public works projects. Revenue bonds are meant to provide a self-supporting foundation for public works. Sections 50-1032 and 1033, Idaho Code. The bonding process is one which anticipates the fact that in many cases municipal corporations will be unable to make immediate repayment of obligations. The reasons include: (a) revenue gained under the bonds may be slow in coming; and (b) conditions may specify repayment over a period of years for the benefit of the bondholders.

In Idaho, as in most other states, the issuance of bonds is discretionary with the municipality, and this discretion may not be controlled by the courts. Thus, if the authority given is either to levy taxes or to issue bonds, the discretion to issue bonds absent procedural violations cannot be reviewed after their issuance and purchase by bona fide bondholders. 15 McQuillin-Municipal Corporations § 4323 (1970 Rev. Vol.).

Can cities transfer funds from one budget or account to another to finance such projects?

Yes. The city council "may transfer an unexpended balance in one fund to the credit of another fund." Section 50-1014, Idaho Code. However, this does not mean that a city issuing revenue bonds for a public sewer district construction program can transfer the revenue therefrom to another city project. Revenue made by public works projects is meant to support the particular project and no other and is meant to repay the original bondholders.

Section 50-1014, Idaho Code, allows for transfer of monies from another city fund so that the same public works project can be financed by more than one source. This should not be interpreted to mean that Section 50-1014 can be used to escape municipal budget and appropriations laws. Monies from other funds must be unexpended before they may be transferred.

Local officials should and probably do have a working knowledge of the revenue bonding system. Corporate counsel for each of the Idaho cities are able to advise them on how to proceed in revenue bond matters.

If ~~you~~ need clarification, please feel free to contact this office.

Very truly yours,

FOR THE ATTORNEY GENERAL

Paul J. Buser  
Assistant Attorney General  
Department of Environmental  
and Community Services

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OPINION

OFFICIAL OPINION #74-3

July 3, 1973

Mr. Ralph Newberg  
Identifications Officer  
Idaho State Penitentiary  
2220 Warm Springs Ave.  
BUILDING MAIL

Opinion re: Interstate Agreement  
on Retainers, I.C.  
19-5001

Dear Ralph:

Pursuant to our telephone conversations of recent date concerning the question as to whether sentencing must be concurrent when it is imposed under Idaho Code 19-5001 through 19-5008, please consider the following:

Idaho Code §19-5001(c)(5) reads in pertinent part as follows:

Nothing in this paragraph shall prevent the imposition of a concurrent sentence if otherwise permitted by law.

This language indicates that concurrent sentences may be given if state law so provides.

Sentencing has always been within the court's discretion and nothing in Ch. 50, Title 19, Idaho Code, indicates that discretion in sentencing has been removed from the courts. The procedures of sentencing do vary from state to state and the laws of the state where the prisoner receives his sentence control. Thus, if another state forbids concurrent sentences, the prisoner will receive a consecutive sentence and when the prisoner's Idaho time has been fulfilled he must serve his other sentence in full without any credit for time served in Idaho.

Mr. Ralph Newberg  
July 3, 1973  
Page Two

Thus, sentencing is pursuant to the state law where the prisoner is sentenced and nothing in Idaho Code §19-5001 prohibits consecutive sentencing but it does permit concurrent sentences.

Sincerely yours,

FOR THE ATTORNEY GENERAL

WAYNE G. CROOKSTON, JR.  
Assistant Attorney General

WGC:cb

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July 3, 1973

Honorable Charles B. Kane  
Chairman  
Board of County Commissioners  
Lemhi County  
Salmon, Idaho 83467

Dear Commissioner Kane:

This letter is to confirm my telephone call to you of July 2, 1973, and is in answer to your telegram concerning the Lemhi County Sheriff.

You state that your sheriff says he will work only 40 hours a week, and will not be available at night because he has another job of driving truck or that he may become Salmon City Police Chief, if the City will appoint him to that position, as well as that of Sheriff.

There are a number of things you can do in a situation like this. You have the power under Section 31-802, Idaho Code to supervise the official conduct of all county officers and to see that they faithfully perform their duties. Under Section 31-2009, Idaho Code, it is up to the county commissioners to prescribe when the county offices shall be open and the rules for running the various offices, including the sheriff. Thus, it can be seen that you, as county commissioners, may make rules and regulations relating to the conduct of the affairs of the office of sheriff relating to: outside employment, hours of duty, when the sheriff or his deputies shall be on duty, etc. You, of course, must follow the law. Section 20-601, et. seq., Idaho Code, provides that the sheriff shall maintain a jail; Section 31-2202, Idaho Code, provides that the sheriff shall maintain the peace; arrest persons who commit, or attempt to commit crimes; prevent and suppress all affrays and breaches of the peace; attend all courts in the county; keep prisoners; etc. Obviously, these duties cannot be performed on a 40 hour a week basis. They necessitate that the sheriff and his deputies and the jailor be on duty 24 hours a day and 7 days a week. If necessary, you can pass regulations to this effect and insist that they be carried out. If they are not carried out, you could call for the sheriff's resignation or, if necessary, you could bring action to have him removed from office for failure



Honorable Charles B. Kane  
July 3, 1973  
Page two

to carry out his duties. He certainly cannot remain sheriff and work as a trucker, or just be sheriff 40 hours a week.

On the other side of the matter the sheriff is an elected official, he stood for election and he has taken an oath to carry out and enforce the law. The sheriff stood for election, and he was presumed to, and must know, what the salary of office was and that his responsibilities would be on a 24 hour a day basis. Knowing these facts he has taken an oath of office to uphold the law and enforce it.

You could, if you wish, allow him to take on the additional job of Police Chief of Salmon since nothing in the laws specifically prevents this. It would be up to you as county commissioners as to whether to allow this or not. Such situations have happened and in some cases they have worked. There is, however, always some objection to trying to do two jobs at once. But this matter would be up to you as county commissioners to regulate.

Why don't you have your county attorney help you put together regulations on this matter?

Sincerely yours,

FOR THE ATTORNEY GENERAL

WARREN FELTON  
Deputy Attorney General

WF:sg



## STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

W. ANTHONY PARK  
ATTORNEY GENERAL

July 9, 1973

John W. Swartley, M.D.  
President  
State Board of Education  
Office of Higher Education  
Building Mail

Re: Disposition of \$75,000 Received from Boise State  
College Foundation

Dear Dr. Swartley:

We wish to repond to your question regarding the disposition of the \$75,000 in state funds used as part of the purchase price of the Protest Avenue property, title to which is in the Boise State College Foundation. We do not believe it is necessary to recite the history of the transaction, except to point out that the origin of the \$75,000 was part of the general fund appropriations made by the Legislature to Boise State College for fiscal year 1970 with an internal College budgetary transfer of appropriated funds in fiscal year 1971. From the information you have relayed to us, it appears that the Boise State College Foundation is now preparing to return to the State Board \$75,000. The question you have presented is: What disposition is to be made of those funds?

We are of the opinion that the funds received should properly be returned to the general fund of the State of Idaho. This conclusion is based on Section 67-3604, Idaho Code. This section provides that the State Auditor shall close his accounts as to all appropriations on the day following the close of each fiscal year and transfer all balances, which are unencumbered on that day, to the funds from which such appropriations are severally made. This section requires that any agency which ends the fiscal year with any unexpended appropriation shall, by operation of law, have that unexpended amount revert to the fund from which the appropriation was initially made.

For purposes of this opinion, we are not concerned with the authority or lack of it for the expenditure of the \$75,000 initially. The important point is the disposition of the funds which are

John W. Swartley, M.D.  
July 9, 1973  
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returned. Had Boise State College completed that fiscal year with an unexpended \$75,000 general fund appropriation, there can be little question that it would have reverted to the general fund when the auditor closed all accounts. The money, on its return, is the same as an unexpended portion of an appropriation, and therefore should revert to the fund from which the appropriation came: the general fund.

This situation is analogous to the following hypothetical facts: In June, a general fund agency determines that it will purchase certain equipment. It contracts with a company for acquisition of that equipment. All proper bidding and purchase requirements have been observed and the company is paid prior to the close of the fiscal year. In July, the agency finds that the equipment for any one of a number of legitimate reasons does not meet its needs. It rescinds the contract, returns the equipment, and receives the purchase money from the seller. We believe that the returned funds should properly be regarded as having never been spent by the agency. Therefore, had the funds been in the agency's account on the day following the close of that the fiscal year, the auditor would have transferred that unexpended balance to the general fund of the state. For the same reasons, the return to the State of the \$75,000 should be treated as never having been expended as of the day following the close of the fiscal year for which the appropriation, which included the \$75,000, was made, regardless of when the money is actually received.

We do not know of any facts which give rise to the conclusion that the funds have been encumbered, as, in certain instances, is permitted by law. Section 63-3521, Idaho Code, imposes severe limitations on encumbering appropriations which would permit the agency to carry over an unexpended, but obligated, balance to the next fiscal year. The encumbrance must be made before the end of that current fiscal year in any event. There appears to be no encumbrance imposed on the \$75,000, for the obvious reason that Boise State College spent the money. Now that the money is being returned and treated as having never been spent, it could not have had an encumbrance placed against it prior to the close of the fiscal year in which the money was appropriated.

Therefore, we come to the inescapable conclusion that the \$75,000 received from the Foundation should be placed in the general fund of the state, there to be treated as all monies deposited in that fund.



John W. Swartley, M.D.  
July 9, 1973  
Page 3

X We trust we have been of service. If we can be of further assistance, please advise.

Very truly yours,

FOR THE ATTORNEY GENERAL

JAMES R. HARGIS  
Deputy Attorney General

JRH:lm

cc Governor Andrus  
Milton Small



## STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

W. ANTHONY PARK  
ATTORNEY GENERAL

July 9, 1973

Mr. Richard Barrett  
State Personnel Director  
State Personnel Commission  
Building

Dear Mr. Barrett:

We wish to respond to your request for our opinion on the determination of "officers and members of the teaching staffs of state institutions..." Specifically, the question has come up as to who makes the determination that a position is that of an officer or member of the teaching staff of a state institution.

Section 67-5303, Idaho Code, requires that all departments and all employees in such departments shall be subject to the system of personnel administration established by Chapter 53 of Title 67, Idaho Code, except those employees specifically exempt from the system. Among those specifically exempt are officers and members of the teaching staffs of state institutions. As an aside, these appear at this time to be the only ambiguous exemptions in the above cited section. All other exemptions are sufficiently described so that there should be little room for diverse interpretation.

While a member of a teaching staff can probably be determined with relative ease, an officer of a state institution is not so easily described. We wish to point out at this time that not all employees of state institutions are exempt. Further, for the purposes of this opinion, "state institution" includes only institutions of higher education.

The organization of these state institutions is a matter for the governing boards of those institutions to make. Staff requirements, including academic and administrative officers and employees necessary to fill organizational positions, are also matters initially to be made by the governing boards as the appointing authorities. Certain legal limitations and qualifications now come into play; classification of employees and the position central systems.

Mr. Richard Barrett  
July 9, 1973  
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The classification of positions under the personnel system extends to those positions not exempt by the statute above cited. Therefore, the issue still remains: who determines the officer positions which are exempt by law from the system of personnel administration established by the legislature?

It is of no value to maintain that all positions which are common to all institutions are under the classified service. All institutions of higher education have common positions which are not now nor have they ever been under the classified service: the presidents, vice presidents, bursars, registrars, to name just a few. For purposes of this opinion, we leave aside those academic positions such as deans and department chairmen, not because they are not officers, but rather because they are members of the teaching staffs. Therefore, we wish to direct our attention primarily to those positions in the administration of the institutions which are officer positions and the ultimate authority to declare a position exempt because it is a position of an officer.

We can only conclude that the determination that a position falls within the exemption is a determination to be made by the governing board of the institution. Unlike other state agencies, where the organization of that agency is described by law, the institutions and their governing boards establish their own organizations basically without legislative direction. Participation in the decision making process of the institution, as an element defining a position as an officer, would add to the weight of the conclusion that the boards make the determination. The boards know which positions in an institution contribute to the policy and other institutional decisions. Further, the importance, dignity, and independence of the position are added elements of the definition of officer. These elements, as minimum only, defining an officer, are also within the knowledge and control of the boards. Therefore, determination that a position is an officer position must rest with governing boards. Since the boards make the determination that a position is that of an officer, it must follow that once the determination is made, that officer position is exempt from the provisions of Chapter 53, Title 67, Idaho Code.

We are fully aware of the impact this opinion may have on the personnel system established by law. We would suggest that the governing boards of the institutions of higher education give serious consideration to officer positions. We are of the opinion that if a position is defined as an "officer" position, or the person holding the position is designated as an "officer," for the purpose of avoiding the valuable purposes of the personnel system and the Commission established by the legislature, would be in



Mr. Richard Barrett  
July 9, 1973  
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direct contravention of obvious legislative intent. In short, simply because a board or one of its institutions does not want to go through the personnel system to fill institutional staff positions is emphatically not a proper test for determining whether or not a person holding a certain position should be designated as an officer of the institution. The institution and the board are certainly required to demonstrate to the Commission that a particular position is exempt because it requires an "officer" to fill the position. However, should the occasion arise, hopefully very infrequently, where agreement cannot be reached between the appointing authority and the Commission, then for the foregoing reasons, the decision of the governing board or its delegated appointing authority should prevail.

We would also suggest that remedial legislative proposals be prepared to clarify these exempt officers.

Very truly yours,

FOR THE ATTORNEY GENERAL

JAMES R. HARGIS  
Deputy Attorney General

JRH:lm

July 9, 1973

M. S. Merrill  
Assistant Director  
Public Employee Retirement System  
Building Mail

Dear Mr. Merrill:

You have requested an opinion from this office as to whether PEP funded employees can be excluded from participation in the Public Employee Retirement System of the State of Idaho.

As you know, the Retirement System in the State of Idaho is a mandatory system both for employer and employee under the provisions of Title 59, Chapter 13, Idaho Code. As the Code itself does not specifically exempt or exclude PEP funded employees, it would be the opinion of this office that just because an employee is PEP funded, it would not necessarily mean that he is excluded from the Retirement System of the State of Idaho.

This is not to say however that a PEP funded employee is automatically included within the Retirement System. Title 59, Chapter 13, Idaho Code, sets forth the various criteria for employee inclusion as well as exclusion. Therefore, everything else being equal, if a PEP funded employee meets all other requirements as to inclusion within the retirement system, he would necessarily be included. If, on the other hand, the PEP funded employee does not meet the criteria set forth for inclusion or falls within one of the exclusions, he would, of course, be excluded from the Public Employee Retirement System of the State of Idaho.

✕ If we can be of further assistance, please advise.

Very truly yours,

FOR THE ATTORNEY GENERAL

JAMES G. REID  
Deputy Attorney General

JGR:cp

Opinion  
7/9/73

COPY



## STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

W. ANTHONY PARK  
ATTORNEY GENERAL

July 10, 1973

Mr. Gordon S. Thatcher  
Rigby & Thatcher  
Attorneys at Law  
P.O. Box 437  
Rexburg, Idaho 83440

*Legal Counsel  
Madison School District*

Re: School District No. 321, Madison County, Idaho -  
Borrowing for School Plant Facilities

Dear Mr. Thatcher:

We have reviewed with interest the proceedings had in School District No. 321, Madison County, on borrowing from commercial lending institutions with repayment of the loan from the plant facilities levy. The abstract you have forwarded to this office states that the district will issue its promissory notes as indicia of the indebtedness.

To our knowledge, this procedure used by your district is the first instance of such use in the State of Idaho. In our research on the authority of a district to borrow money, we can find no explicit authorization. However, Section 33-901, Idaho Code, provides that the monies which accumulate in the school plant facilities reserve fund may be used for any authorized purpose for which bonding funds may be used, and to repay loans from commercial lending institutions to pay for the construction school plant facilities (Emphasis Added). If monies from the fund can be used to repay commercial loans, the obvious conclusion is that a school district may borrow from commercial lending institutions.

We have examined the abstract and find no error in the

Mr. Gordon S. Thatcher  
July 10, 1973  
Page 2

proceedings which are contrary to the statutes of the State of Idaho or inconsistent with the Constitution thereof.

Very truly yours,

FOR THE ATTORNEY GENERAL

JAMES R. HARGIS  
Deputy Attorney General

JRH:lm

cc D.F. Engelking  
w/enclosure

P.S. We have forwarded the abstract to the State Superintendent of Public Instruction for filing.



## STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

W. ANTHONY PARK  
ATTORNEY GENERAL

July 13, 1973

Mr. Thomas C. Grismer  
Attorney at Law  
First Security Bank Building  
Kellogg, Idaho 83837

*Legal Counsel  
City of Pinehurst*

Dear Mr. Grismer:

I have been asked to answer your letter concerning Section 50-501, Idaho Code, as amended by Chapter 80 of the 1973 Idaho Session Laws. The question is whether or not cities now automatically have a referendum or initiative law or whether there must first be a petition and election to determine if the city shall have an initiative-referendum ordinance.

To us, in light of what was said in Anderson v. Boise City, 91 Idaho 527, it would seem quite clear that there must first be a petition and election to determine if the city needs an initiative-referendum ordinance and only after such election favoring such law is the city required to pass an initiative-referendum ordinance.

The section as amended states in pertinent part:

"The city council of each city shall provide for direct legislation by the people through the initiative or referendum, or both, when petitioned by. . . (20%) of the. . . electors, registered. . . If a majority. . . at such special election shall vote in favor thereof, then the city council must prepare and pass such ordinance. . ."

In the Anderson Case the previous section on the Initiative-Referendum Power was construed--the section was held to be mandatory and it was also said that until such provision had been "complied with, the city has no provisions for initiative or referendum." This was in a case where Boise had recently voted to become a first class city and give up its charter powers and it was held that the charter provisions as to initiative and referendum were no longer in force.

Mr. Thomas C. Grismer  
July 13, 1973  
Page two

Boise had not at that time as a first class city enacted an ordinance as to initiative or referendum.

We believe that the 1973 amendments to Section 50-501, Idaho Code, have not changed or in any way effected the holding of the Anderson Case.

You should be cautioned here that we are only dealing with the situation where the city does not yet have an initiative or referendum ordinance. We are not dealing with the question of whether or not the city could enact such an ordinance without the petition and election.

Sincerely yours,

FOR THE ATTORNEY GENERAL

A handwritten signature in cursive script that reads "Warren Felton".

WARREN FELTON  
Deputy Attorney General

WF:sg



STATE OF IDAHO<sup>o</sup>

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

W. ANTHONY PARK  
ATTORNEY GENERAL

July 23, 1973

Honorable Cecil D. Andrus  
Governor  
State of Idaho  
BUILDING MAIL

Dear Governor:

By letter dated June 1, 1973, you have requested our opinion regarding the management and disposition of so-called grant or endowment lands deemed valuable by other state agencies for fish and wildlife habitat, recreation, or public access needs. I am taking the liberty of addressing myself to your questions out of sequence.

You ask whether endowment lands can be disposed of to another state agency without a public sale. The Idaho Admissions Act, the Idaho Constitution and the statutes bearing upon the actions of the State Board of Land Commissioners must be considered.

You are, of course, aware of the trust created by the Idaho Admissions Act. Section 4 grants certain lands to the state for the support of common schools. Section 5 requires that these lands be disposed of only at public sale. Section 11 makes general land grants to the state for support of various state institutions other than common schools. Section 12 provides that these general grant lands "be held, appropriated and disposed of exclusively for the purpose herein mentioned in such manner as the legislature of the state may provide." You will note that the Idaho Admissions Act does not specifically mandate the public sale of non-school or general grant endowment lands. It is Article IX, Section 8 of the Idaho Constitution that requires these general grant lands to be disposed of at public auction.

The Supreme Court of the United States considered the trust created by the Arizona Admissions Act, a trust similar to our own, in Lassen v. Arizona, 385 U.S. 458, 17 L.Ed.2d 515 (1967). For purposes of this opinion letter, the only noteworthy

Governor Cecil D. Andrus  
July 23, 1973  
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exception between the Arizona Admissions Act and the Idaho Admissions Act is that the Arizona Act specifically mandates a public sale of all grant or endowment lands whereas the Idaho Act specifically mandates the sale of school lands and leaves the manner of disposition of general grant lands to the state.

The Arizona Land Commissioner, Obed Lassen, had promulgated rules and regulations which required the Arizona Highway Department to pay compensation for rights-of-way over endowment lands and for gravel sources. The Highway Department disputed this obligation. The Supreme Court did not distinguish between school lands and general grant lands under the Arizona Admissions Act. It stated generally that the public sale requirements of the trust were to protect the trust from unethical or less than arms length transactions involving private purchasers. The Court noted that the Arizona Admissions Act

does not directly refer to the conditions or consequences of the use by the State itself of the trust lands for purposes not designated in the grant. 17 L.Ed.2d at 518.

The Court felt that the likelihood of abuse that the public sale provisions of the Arizona Admissions Act sought to guard against were not likely to occur when the state itself was using the trust lands. The Supreme Court allowed Arizona to dispose of its trust lands to other state agencies on a negotiated basis upon the payment of full compensation to the trust.

The Court also observed that the Arizona Highway Department had the authority to condemn land. It would be a mere circuitry, the Court said, for Arizona to sell endowment land to the highest bidder at a public sale and the next day the Arizona Highway Department would use its condemnation authority to acquire the land.

In light of Lassen, I am of the opinion that the requirement of Section 5 of the Idaho Admissions Act, "that all lands herein granted for educational purposes shall be disposed of only at public sale," and the requirement of Article IX, Section 8 of the Idaho Constitution that all general grant lands be "held in trust, subject to disposal at public auction for the use and benefit of the respective object" of each general land grant do not apply to the sale of endowment lands to state agencies possessing condemnation authority. The statutory requirements of a public sale are a restatement of the Idaho



Governor Cecil D. Andrus  
July 23, 1973  
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Admissions Act and the Idaho Constitution subject to the same implied exception announced in Lassen. My opinion is consonant with the spirit manifest in the express exception to public sale when trading with the United States authorized by Art. IX, §8 of the Idaho Constitution.

Article IX, Section 8 of the Idaho Constitution also provides that

It shall be the duty of the State Board of Land Commissioners to provide for the location, protection, sale or rental of all lands heretofore, or which may hereafter be granted 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 therefor; provided that no school lands shall be sold for less than ten dollars per acre.

This is a general obligation of the trust to select, manage and dispose of trust lands for the highest return to the beneficiary fund or trust purpose. It does not specifically require a public sale of grant lands. That comes later in the section as to general grant lands. It is less strict toward school lands than the Idaho Admissions Act itself. What this part of Article IX, Section 8 does do is specifically broaden responsibility of the trustee to use due diligence and skill at all stages of trust matters, not just upon the disposition of trust property. It does not in my opinion add materially to the trust considered in Lassen. It does not mandate a public sale when the trust property is to be devoted to other state uses. It does mandate full value for trust properties used by the state. In other words, this part of Art. IX, §8 is a restatement of the Idaho Admissions Act trusts viewed in the light of Lassen.

The Fish and Game Commission has specific condemnation authority. I.C. §36-104(b)(5). The Park Board probably has condemnation authority for the public uses set out in Section 7-701 of the Code.

You have asked whether a state agency can participate in competitive bidding beyond the value placed upon the land by the Department of Public Lands. Our attention has been directed to I.C. §31-807 entitled "management of county property". One of the limits on the county purchase of real property is

... but no purchase of real property must be made unless the value of the same has been

Governor Cecil D. Andrus  
July 23, 1973  
Page Four

previously estimated by three (3) disinterested citizens of the county, appointed by them for that purpose, and no more than the appraised value must be paid therefore.

It is clear that this particular section applies only to county purchase of lands, and not to state agencies. There is no comparable statute limiting state agencies in the purchase of property to appraised value thereof.

Presently I know of no law limiting a state agency's ability to pay for land. This is not surprising. Opinions of fair market value differ. The Department of Public Lands may have a different opinion of value than the Fish and Game Commission. I do not believe other agencies are bound by the opinion of value of the Department of Public Lands. They could bid above the appraised value.

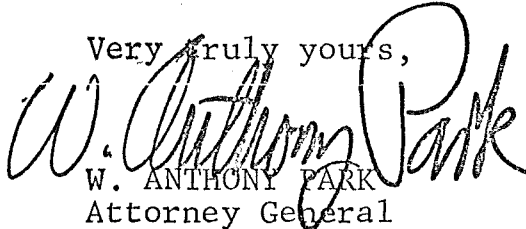
You have also asked about steps to preserve public access when state land to be sold to a private person borders a lake or stream. Can a public access requirement be a condition or a reservation in a sale or lease? The trust must be protected and "the State is required to provide full compensation for the land it uses." Lassen v. Arizona, supra at 520. The Land Board has clear authority under Idaho law including Pike v. State Board of Land Commissioners, 19 Idaho 268, 113 Pac. 447, and Barber Lumber Co. v. Gifford, 25 Idaho 654, 139 Pac. 557 to sell trust lands subject to other legal interests. If an easement is reserved to the State, however, upon disposition of trust lands, the trust must be fully compensated by the private purchaser and the State in combination.

Finally, you ask whether management agreements can be entered into between the Department of Public Lands and other state agencies to provide for fish and wildlife habitat, recreational or public access needs. The issue here is whether the Board has disposed of the lands or whether it is managing and holding them within the trust in this manner. To avoid disposition of the lands, any management agreement should be for an unspecified term or a specified term, subject to the authority of the Department of Public Lands unilaterally to cancel the contract. It would be prudent for the Land Board to go on record stating that the land subject to the management agreement is not ripe for sale or disposition at the time and that the management agreement would not adversely affect the land or otherwise diminish the trust.

Governor Cecil D. Andrus  
July 23, 1973  
Page Five

The use of a nominal rental lease to a state agency to accomplish management purposes should be avoided. The Board is obligated to lease grant lands for "the maximum possible amount". A nominal rental would probably not square with the Constitution.

Very truly yours,

  
W. ANTHONY PARK  
Attorney General

WAP:cb

cc: Gordon C. Trombley

9/20/73

July 23, 1973

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John Bender, Commissioner  
Department of Law Enforcement  
Building Mail

Re: Mobile Homes and Recreational Vehicles

Dear Commissioner Bender:

You have made a formal request for an opinion from this office in which you ask if mobile homes and recreational vehicles constructed within the State of Idaho for sale and use in states other than Idaho are required to bear the State insignia pursuant to Title 39, Chapter 40, Idaho Code.

Specifically, the section of the Idaho Code dealing with the State insignia is 39-4005 and reads as follows:

"ISSUANCE OF INSIGNIA—COST.—The commissioner of law enforcement shall issue insignia for mobile homes and recreational vehicles which meet the requirements of the rules and regulations promulgated by the commissioner of law enforcement. The cost of the insignia, if used, shall be included as a part of the fee schedule."

If a mobile home meets the requirements of the rules and regulations promulgated pursuant to Section 39-4003 of the Idaho Code dealing with minimum health and safety standards for plumbing, heat producing and electrical systems as well as standards for body and frame design, then such mobile home would be entitled, and in fact, the Commissioner of Law Enforcement is directed to issue the State insignia for such mobile home, whether or not the home is sold in Idaho or elsewhere.

The main issue then is whether or not the Commissioner of Law Enforcement has any means available to enforce the provisions of Section 39-4005, i.e., in the situation where a mobile home is constructed within the State of Idaho which does not meet the requirements set forth by the rules and regulations promulgated by the Commissioner but is sold outside of the State of Idaho. Section 39-4001, Idaho Code, provides that the Commissioner of Law Enforcement shall be charged with the responsibility of enforcing the various provisions of the Mobile Home Act. However, Section 39-4002, Idaho Code, provides as follows:

"COMPLIANCE WITH LAW REQUIRED.--It is unlawful for any person, firm, partnership, association or corporation to sell or offer for sale within this state any mobile home or recreational vehicle that is not manufactured in compliance with this act after its effective date." (Emphasis added)

Thus, while it is true that the Commissioner of Law Enforcement has the enforcement capabilities pursuant to Section 39-4001, these enforcement capabilities are limited by Section 39-4002 to homes that are constructed for sale within the State of Idaho only, as the legislature has provided that it is not in fact unlawful to violate the provisions of this act if the sale of mobile homes is to be made other than in the State of Idaho. Therefore, it would be the opinion of this office that mobile homes constructed within the State of Idaho for sale in a state other than Idaho would not be "required" to bear the State insignia pursuant to Section 39-4005 for the reason that the Commissioner of Law Enforcement would not have power to enforce the provisions of the Mobile Home Act in the event a manufacturer who sold outside the State did violate the rules and regulations promulgated by the Commissioner pursuant to the Act. If the mobile home in question, although sold outside the State of Idaho, meets the requirements set forth in the rules and regulations, it would certainly be entitled to receive the State insignia, even though the sale of such home was made outside the State of Idaho.

As a corollary issue to the question you raised, another problem presents itself in Section 39-4010 dealing with various manufacturer's warranties which reads in part as follows:

Commissioner Bender

Page 3

July 23, 1973

"Any person, firm, partnership, association or corporation constructing in whole or in part, a mobile home or recreational vehicle in this state, or constructing outside of this state but selling at retail in this state, shall issue a warranty in writing to the buyer containing the following terms:  
. . ."

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This section of the Mobile Home Act dealing with manufacturers' warranties does not contain a limiting provision to those homes sold in the State of Idaho but includes all mobile homes which are manufactured in whole or in part within the State wherever they may be sold. It would be the opinion of this office that the same problem would arise in construing this section as has arisen in the issue you raised. Although Section 39-4010 purportedly covers mobile homes that are manufactured within this State and sold outside of this State, Section 39-4002 again would limit the enforcement of a violation of the warranty provisions to those homes sold within the State of Idaho. Therefore, if mobile home manufacturers violated the warranty provisions of this act, unless the mobile home were sold within the State of Idaho the Commissioner of Law Enforcement would have no authority to enforce the provisions of the act pertaining to the violations.

Very truly yours,

FOR THE ATTORNEY GENERAL

JAMES G. REID  
Deputy Attorney General

JGR:cp



## STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83707

W. ANTHONY PARK  
ATTORNEY GENERAL

July 31, 1973

Victoria White  
Clerk of the District Court  
Auditor and Recorder  
Shoshone County  
Wallace, Idaho

Dear Mrs. White:

An opinion has been requested on the following questions:

1. "If a widow is not the title owner, the deed being held in escrow, but the widow does have equity in the real property, may the Commissioners grant said widow an exemption as provided in §63-105D, Idaho Code."
2. "If a man owns separate real property, marries and subsequently dies testate, may the surviving widow be granted an exemption prior to actual probate of the will under the same statutes?"
3. "If a husband applies for a veterans exemption, the property being community property and he subsequently dies in March, will such exemption be valid for the 1973 tax year?"

We assume that your first question relates to a widow purchasing real property under a real estate contract, which has been placed in escrow. Experience indicates that such contracts are commonly used throughout the State of Idaho for the purchase and sale of real property. §63-105D, Idaho Code, does not describe precisely what interest a widow must have in real property to claim an exemption, but does indicate the property must "belong to" the claimant or must be "owned by" the claimant. While legal title under such a contract ordinarily remains in the seller, under the doctrine of equitable conversion a purchaser may be treated as holding legal title for many purposes. These purposes have been interpreted by the Courts as including applying for an exemption. Hibbing v. Commissioner of Taxation, 14 N.W. 2d, 923, 156 A.L.R. 1294. (This opinion should not be interpreted as applying to the exemption provided by §63-117 et seq, Idaho Code. §63-123, Idaho Code, might change the opinion expressed herein as to the exemption provided for elderly persons and we express no opinion as to such exemption).

Victoria White  
July 31, 1973  
Page 2

In answer to your second question an exemption may be granted where property has passed by testate or intestate succession to a widow even though a formal probate of the property has not been undertaken or completed. The exemption provided by §63-105D for widows today effectively only operates on real property, which passes immediately upon death to the decedent's heirs or devisees. Probate serves to establish record proof of passage of title, but is not necessary to actually transfer ownership of real property.

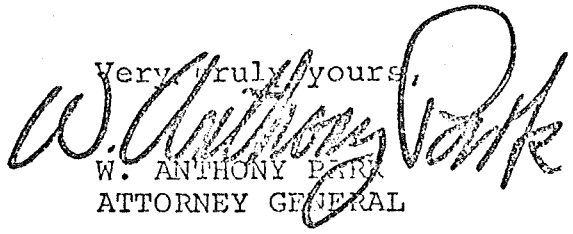
In both of the instances described in our response to your first and second questions, the claimant must establish that the property "belongs to" such claimant, just as the claimant must establish every other fact necessary for exemption of the property. Of course, in some instances this may create additional burdens upon the board of equalization, and the board may properly insist that the claimant furnish satisfactory proof of the existence and terms of any real estate contract or proof that such claimant has succeeded the property by testate or intestate succession.

In response to your third question, the exemption may properly be granted for the 1973 tax year. §63-107, Idaho Code, specifically provides for the situation you describe:

"Where a person entitled to exemption shall die after the first day of January in any year without having first made the annual sworn statement as to his financial status or where a person entitled to exemption shall be mentally incompetent or physically unable to make such sworn statement, his wife, widow, guardian or personal representative, or other person having knowledge of the facts, may make such sworn statement in his stead."

There would be no purpose in providing for such procedure if the death of the claimant after January 1 of the year terminated the right to exemption. Of course, if the person entitled to the exemption should die before the first day of January the property is not entitled to exemption.

Very truly yours,

  
W. ANTHONY PARK  
ATTORNEY GENERAL

RLM:WAP:blh



August 1, 1973

Mr. Glen W. Nichols  
Director  
Idaho State Planning and  
Community Affairs Agency  
STATEHOUSE MAIL

Dear Mr. Nichols:

By letter dated July 25, 1973, you have asked our opinion regarding certain agricultural exemptions within the Idaho Code and their legal effect upon zoning and platting of subdivisions. There is a growing practice within the state of dividing lands formerly used for agricultural purposes into five-acre parcels for sale and development as residential sites, "ranchettes" or "mini-farms". Like you, we have been receiving an increasing number of inquiries about the jurisdiction of cities and counties to regulate this kind of development.

The five-acre agricultural exemption appears in two places in the Idaho Code. One is under the enabling legislation for county zoning, and the other is found in that section of the Code which requires plat maps and other requirements from subdividers. Section 31-3803 which is found in the county zoning portion of the Idaho Code, states in pertinent part as follows:

Exemption of agricultural lands and certain industry sites. -- No power granted hereby shall be construed to empower the board of county commissioners to enact any ordinance or resolution which

(a) Deprives any owner of full and complete use of agricultural land for production of any agricultural product (agricultural land is herein defined as a tract of land containing not less than five (5) acres, including canal and railroad rights-of-way, used exclusively for agricultural purposes),...

Mr. Glen W. Nichols  
August 1, 1973  
Page Two

Idaho Code §50-1301, found in the plats and vacations section of the Idaho Code, states in pertinent part as follows:

Definitions. -- The following definition shall apply to terms used in Section 50-1301 through 50-1325. . .

(3) Subdivision: A Tract of land divided into five (5) or more lots, parcels, or sites for the purpose of sale or building development, whether immediate or future; provided that this definition shall not include a bona fide division or partition of agricultural land for agricultural purposes. A bona fide division or partition of agricultural land for agricultural purposes shall mean the division of land into lots, all of which are five (5) acres or larger, and maintained as agricultural lands. Cities or counties may adopt their own definition of subdivision in lieu of the above definition. . .

The more serious problem arises under the latter definition. Developers, desirous of subdividing highly demanded resort-type land at a substantial personal profit, and further desiring to minimize their costs in making these sales, attempt to avoid the requirements that they file a plat map and perform other work as a first step in the creation of their development. Heretofore, developers divided land into five-acre parcels, declared them to be "agricultural", and were thus without the requirements of Title 50, Ch. 13. This bold yet unimaginative avoidance of the law would not be a problem but for the acquiescence in the practice by local governments. I am of the opinion that a fair and rational reading and application of the statutes would eliminate the problem.

The sentence in Section 50-1301 beginning with "A bona fide division or partition of agricultural land for agricultural purposes shall mean. . ." is intended to modify the previous sentence which defines subdivision as being a division of land into five or more lots. The last sentence of that section states that cities or counties may adopt their own definition of subdivision. The agricultural exemption modifies the statutory definition, and not the "in lieu" definition which cities or counties may adopt on their own initiative. In other words, a city or county may adopt a definition of subdivision which in no way includes an agricultural exemption, and then require plat filings from all subdividers; this would even include a subdivider who is dividing lands for express and bona fide agricultural purposes.

Mr. Glen W. Nichols  
August 1, 1973  
Page Three

Even if the five-acre exemption were read to apply to an "in lieu" definition by a city or county, the exemption depends upon the good faith and actual intent of a subdivider to divide or partition agricultural lands for agricultural purposes. To date, counties and cities, perhaps from a lack of desire to become embroiled in disputes with developers, have regarded any five-acre subdivision as being for an agricultural purpose. This is not the intent of the exception. A city or county can, without any fear of avoiding the intent or spirit of Title 50, Ch. 13, read the exemption strictly, and find a bona fide agricultural division only in those cases where residences are not being constructed and are not intended to be constructed. In other words, a city or county can require and enforce through the courts, if necessary, plat filings from developers who are dividing lands for anything but a strictly agricultural purpose.

Generally, "agricultural purpose" has been defined as the art of production of plants and/or animals useful to man, including preparations of the products for man's use. See, People v. City of Joliet, 152 NE 159, 160, 321 Ill. 385.

"Agricultural purposes", means the using of the soil for planting seeds and raising and harvesting the crops, the rearing, feeding, and management of livestock; . . .  
Binzel v. Grogan, 29 NW 895, 67 Wis. 147, 150.

An agricultural purpose is not as easily found as the counties of Idaho believe it to be. The site of the tract of land involved is not the determining factor; rather, the determining factor is the use to which the land is put. And the use must be primarily agricultural. In Ryan v. Sioux Gun Club, 2 NW2d 681, 683, 68 S.D. 345, sheep were pastured on land leased to a gun club for the purpose of clearing the land of grass; the land was later sown to alfalfa, some of which was sold but not for profit, to provide a base for the fall targets of the gun club. The court held that the land was not used for an "agricultural purpose".

In State v. City of Madison, 198 NW2d 615, 619, 620, 55 Wis.2d 427, agricultural lands were defined as those which are either actually used in connection with raising crops or livestock, or being capable of being readily prepared for such use. The property must have as its primary use production of plants or livestock useful to man. This definition would clearly eliminate the residential subdivision.

Mr. Glen W. Nichols  
August 1, 1973  
Page Four

When a five-acre parcel of land is sold, and the primary intent of the buyer is to place a residence thereon, the fact that a Shetland pony, or three hunting dogs, or a garden is to be placed in the backyard would not support a finding that the land was being used for a bona fide agricultural purpose, or that the land was agricultural land.

In Farm Egg Products, Inc., v. Humboldt County, Iowa, 190 NW2d 454, 457, the raising of chickens from one day of age to twenty-two weeks of age prior to their transfer to an egg-laying house was held not to be an agricultural purpose within a statute exempting agricultural structures and operations from a county zoning regulations

There has been no useful statement by the Idaho Supreme Court regarding a definition of "agricultural purpose."

The cities and counties of Idaho have the burden of exacting plat requirements from subdividers who should legally be providing plat filings under Title 50, Ch. 13 of the Idaho Code. Simply stated, the procedure by which this might be done is to either:

1. Redefine "subdivision" as allowed by I.C. 50-1301(3) and do not include the agricultural exemption; or
2. Retain the agricultural exemption, but reasonably interpret and enforce the terms of 50-1301(3) so as to distinguish residential purposes from bona fide agricultural purposes.

Either of these methods would eliminate the abuses of the agricultural exemption under Title 50, Ch. 13 of the Idaho Code.

Under Title 31, Ch. 38 of the Idaho Code, dealing with county zoning, the agricultural exemption appears as a limitation on the county zoning power. No zoning regulation shall deprive any owner of full and complete use of agricultural land for exclusively agricultural purposes. It is difficult to conceive of any rational zoning regulation which would deprive any owner of full and complete use of agricultural land for exclusively agricultural purposes. For example, a less intensive use of the land may generally always be made of a particular parcel of land than that use for which the land is zoned, i.e., there can be a farm in a residential zone. Since agricultural uses

Mr. Glen W. Nichols  
August 1, 1973  
Page Five

are the least intensive uses of land, it would seem that no zoning ordinance, at least those which are cumulative in nature, would "deprive any owner of full and complete use of agricultural land".

In conclusion, it is clear that cities and counties have the present legal authority to adequately regulate subdivision development, through the tools of zoning, subdivision ordinances or plat filing requirements without running afoul of the agricultural exemptions in the Idaho Code.

Very truly yours,

FOR THE ATTORNEY GENERAL

JAMES C. WEAVER  
Assistant Attorney General

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## STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

W. ANTHONY PARK  
ATTORNEY GENERAL

August 2, 1973

Mr. Robert A. Bushnell, Jr.  
General Counsel  
Department of Environmental  
and Community Services  
STATEHOUSE MAIL

Dear Mr. Bushnell:

You have requested an Attorney General's opinion on the legal enforceability of the Plan for the Control of Air Pollution in the State of Idaho. As you have noted, legislation enacted during the 1972 and 1973 legislative sessions repealed, added to or changed the legal basis for enforcing the above plan. The Attorney General's opinion herein conforms the previous legal opinion contained in this plan to the present laws of the state of Idaho and to the rules and regulations promulgated by your department.

This opinion is written in conformance with §420.11, Volume 36, No. 158, Federal Register, August 14, 1971.

## 1. POLICY

In 1972, the Legislature of the State of Idaho expressed the state policy on environmental protection as follows:

It is hereby recognized by the legislature that the protection of the environment and the promotion of personal health are vital concerns and are therefore of great importance to the future welfare of this state. It is therefore declared to be the policy of the state to provide for the protection of the environment and the promotion of personal health and to thereby protect and promote the health, safety and general welfare of the people of this state.  
39-102, Idaho Code.

## 2. LEGAL AUTHORITY TO ADOPT EMISSION STANDARDS

The Environmental Protection and Health Act of 1972 grants the administrator authority to recommend for Board approval, regulatory standards relating to air pollution, including emission standards, by providing that:

The administrator shall ... recommend to the board, rules, regulations, codes and standards, as may be necessary to deal with problems related to ... air pollution ... which shall, upon adoption by the board, have the force of law relating to any purpose which may be necessary and feasible for enforcing the provisions of this act ... . 39-105, Idaho Code.

The Board has statutory authority to:

... adopt regulations, rules ... and standards  
... necessary ... to carry out the purposes ...  
of this act ...

The regulations, rules, and orders so adopted ... shall ... have the force and effect of law and may deal with matters deemed necessary and feasible for protecting the environment or the health of the state ... . 39-107(8), Idaho Code.

In the 1973 session of the Idaho Legislature, House Bill 149, as amended, was enacted. This law, Chapter 137, 1973 Idaho Session Laws, greatly increased the Department's legal authority to abate specific sources of air pollution. Chapter 137, supra, provides that:

The administrator shall have authority to prepare for board approval compliance schedule orders to any person who is the source of any ... air contaminant .. for which regulatory standards have been established ...

Any compliance schedule order when affirmed by the board ... shall become a final order.  
Chapter 139, 1973 Idaho Session Laws.

The expansive reach of the above statute is facilitated by defining "air contaminant" to mean:

... the presence in the outdoor atmosphere of any dust, fume, mist, smoke, vapor, gas or other gaseous fluid or particulate substance differing in composition from or

exceeding in concentration the natural components of the atmosphere. 39-107(5), Idaho Code.

3. LEGAL AUTHORITY TO ENFORCE LAWS, RULES AND REGULATIONS  
RELATING TO AIR POLLUTION

The statutes of the State of Idaho afford five enforceable actions for violations of air pollution rules and regulations and laws.

a. Civil Injunction

If ... corrective measures are not taken in accordance with the order of the board, the administrator may institute a civil action ... for injunctive or mandamus relief ... . 39-108(5), Idaho Code.

b. Civil Penalty

Any person determined ... to have violated ... this act or any rule or regulation ... shall be liable for a civil penalty not to exceed \$1,000.00 per day ... . 39-108(6), Idaho Code.

c. State Expenses In Bringing Action

... any person who violates this act shall be liable for any expense incurred by the state in enforcing the act ... . 39-108(7), Idaho Code.

d. Criminal Action: Misdemeanor

Any person who willfully or negligently violates any of the provisions of the ... environmental protection laws or ... any ... order, permit, standard, rule or regulation ... shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not more than three hundred dollars ... Chapter 137, 1973 Idaho Session Laws.

e. Actions For Nuisance

(1) Civil

Anything which is injurious to health or morals, or indecent, or offensive to the senses, or an obstruction to the free use



of property, is a nuisance and the subject of an action ... the action may be brought by any person whose property is injuriously affected, or whose personal enjoyment is lessened by the nuisance; and by the judgment the nuisance may be enjoined or abated, as well as damages recovered. 52-111, Idaho Code.

(2) Criminal

Anything which is injurious to health, or is indecent, or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property by an entire community or neighborhood, or by a considerable number of persons ... is a public nuisance. 18-5901, Idaho Code.

Every person who ... commits any public nuisance ... is guilty of a misdemeanor. 18-5903, Idaho Code.

4. LEGAL AUTHORITY TO ABATE POLLUTANT EMISSIONS DURING AN EMERGENCY

The county prosecuting attorney or the Attorney General may:

... in circumstances of emergency creating conditions of immediate danger to the public health ... institute a civil action for an immediate injunction to halt any ... emission or other activity in violation of provisions of this act or rules and regulations promulgated thereunder. In such action the court may issue an ex parte restraining order. 39-108(10), Idaho Code.

Summary power to abate air pollution arises if:

... a generalized condition of air pollution exists and that it creates an emergency requiring immediate action to protect human health or safety, the board, with the concurrence of the Governor as to the existence of such an emergency shall order persons causing or contributing to the air pollution to reduce or discontinue immediately the emission of air contaminants ... . 39-112, Idaho Code.

5. LEGAL AUTHORITY TO PREVENT CONSTRUCTION OR MODIFICATION OF STATIONARY SOURCES

Pursuant to administrative rule making authority delegated to the Board in 39-107(8), supra, the Board has promulgated, and has presently in effect, the following rules relative to stationary source construction:

- a. No owner or operator shall commence construction or modification of any stationary source ... without first obtaining a Permit to Construct from the department. § 3(B), Rules and Regulations for the Control of Air Pollution in Idaho. (hereinafter Rules.)
- b. No permit to construct or modify will be granted unless the applicant shows to the satisfaction of the department that: a) The source will operate without causing a violation of any local, state, or Federal air pollution control regulation. b) The source will not prevent or interfere with attainment or maintenance of any national standard. § 3(C) (1) (a) & (b), Rules.

#### 6. LEGAL AUTHORITY TO OBTAIN COMPLIANCE INFORMATION

The administrator has legal authority to:

... conduct a program of continuing surveillance and of regular or periodic inspection of actual or potential ... air contamination sources ... .  
39-108(2) (a), Idaho Code.

The administrator can also:

Enter at all reasonable times upon any private or public property for the purpose of inspecting or investigating to ascertain possible violations of this act or of rules, standards and regulations adopted and promulgated by the board. 39-108(2) (b), Idaho Code.

Furthermore, the administrator:

... may require a person engaged in an activity which may violate the Air Pollution Control Act ... to ... keep and maintain appropriate records ... to demonstrate compliance. § 4(A) (3), Rules.

#### 7. LEGAL AUTHORITY TO REQUIRE STATIONARY SOURCE MONITORING

Persons engaged in operations which may result in air pollution may be required to be registered by the Board and to file:

... reports ... relating to locations, size of outlet, height of outlet, rate and period of emission and composition of effluent, and such other information as the board shall prescribe relative to air pollution. 39-110, Idaho Code.

Registration of existing sources is mandatory pursuant to Section 3(A), Rules.

The Administrator can require persons to:

... monitor air contaminants at the source, in the ambient air, or in vegetation to demonstrate compliance [if said persons are] ... engaged in an activity which may violate ... air pollution laws or regulations of the state. § 4(A)(3), Rules.

#### 8. LEGAL AUTHORITY TO MAKE EMISSION DATA AVAILABLE TO THE PUBLIC

The only legal impediment to releasing emission data to the public is contained in 39-111, Idaho Code, which provides that:

Any records or other information furnished to the board ... concerning ... production or sales figures or ... processes ... which tend to affect adversely the competitive position of such owner ... shall be only for the confidential use of the board ... unless such owner ... shall expressly agree to their publication or availability to the general public ... .

All other emission data could be released to the public.

#### 9. CONCLUSION

Based upon the foregoing, the State of Idaho has legal authority to adopt emission standards; enforce applicable laws; regulations; and standards, and seek injunctive relief; abate pollutant emissions on an emergency basis; prevent construction, modification or operation of any stationary source; obtain information necessary to determine compliance with applicable laws, standards and regulations; and to require monitoring of stationary sources by the owner.

The legal authorities cited herein are in legal force and effect and are available to the State on this date.

FOR THE ATTORNEY GENERAL

Ron J. Twilegar  
Assistant Attorney General  
Environmental & Community Services

August 7, 1973

Mr. Lloyd G. Martinson  
Martinson & Gale  
Attorneys at Law  
P.O. Box 599  
Moscow, Idaho 83843

*Legal Counsel  
Moscow School Dist.*

Dear Lloyd:

I wish to respond to your letter of July 12, 1973, with enclosures, concerning the Plant Facilities Reserve Fund. I agree with your conclusion and hope that I have not muddled some already murky waters in your district.

Although I have had many discussions with various people concerning the fiscal matters of the Moscow district, my position has always been that there is cause for concern about the manner in which the trustees deposited the funds raised through M & O taxation into the plant facilities reserve fund. From the facts as represented to me, it appeared that the trustees simply dumped the money in that fund. Two points of law bother me about this practice. The first is that expenditure or transfer of general fund money must be budgeted. Section 33-801, Idaho Code. The second point is that while general fund money may be placed in the plant facilities reserve fund, the purpose must be for depreciation of plant facilities, a budgetary item, and the money must be appropriated from the general fund. Section 33-901, Idaho Code. Appropriation of moneys contemplates, it seems to me, some dollar amount and some prior budgetary transfer consideration by the trustees, rather than transferring surplus general fund money to the reserve fund when the surplus is realized. My only factual conclusion is that the transfer of the money to the plant facilities fund is questionable and gives rise to the concern I expressed to Marshall Keating and Dick Rogers. The legal issue, on which I tend to agree with you, is what effect does the transfer have if in fact the transfer was improper? I certainly have

Mr. Lloyd G. Martinson  
August 7, 1973  
Page 2

taken and will continue to take the position that a school district  
rely on its counsel, even where the opinion of this office may  
differ from that of counsel.

~~X~~ With best regards.

Very truly yours,

FOR THE ATTORNEY GENERAL

JAMES R. HARGIS  
Deputy Attorney General

JRH:lm

Enclosures

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August 7, 1973

Mr. Philip A. Stanley  
Superintendent  
School District No. 394  
Avery, Idaho 83802

Dear Mr. Stanley:

We wish to respond to your letter requesting our opinion on the expenditure of the funds raised from the sale of district bonds for purposes other than for the construction of a new district high school. We have read with interest your letter from Mr. Peacock of Kellogg and Mr. Holm of Chapman and Cutter, bond counsel in Chicago. We have also reviewed again the abstract of proceedings of the bond issue.

Although the question submitted to the electors of your district uses the statutory language for which bond proceeds may be used, from our understanding the issue the electors considered was whether or not the bond proceeds, if the electors approved the issuance of the bonds, would be used for the construction of a high school in your district. There can be little question that the construction of a new high school falls within the statutory purposes for which the bond proceeds may be expended. Since the election resulted in approval of the appropriation to issue general obligation bonds, may the district now expend the proceeds for other authorized purposes rather than to construct the proposed high school facility?

We are inclined to agree with both Mr. Peacock and Mr. Holm that the electors voted on a particular purpose, even though that purpose was not expressly stated on the ballot and that that purpose, or pre-election commitment, is the paramount use for which the proceeds may be expended.

The rationale for these recent court decisions seems to be a matter of keeping faith with the electors. We know as a matter of fact and practice that if a board of trustees proposes issuance of general obligation bonds through an election, stating only the statutory purposes to which the proceeds will be applied, the

Mr. Philip A. Stanley  
August 7, 1973  
Page 2

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the issue is doomed to failure. Before the trustees propose the election, they have spent long hours of consideration and planning to determine where the necessity to bond exists. The trustees thus reach a decision that a particular need exists to bond and that the proceeds shall be used for a particular purpose. In support of the purpose, the trustees, in pre-election information, so inform the electors of the district that the proceeds will be expended for the predetermined and particular purpose. This appears to be the practice even where the proposition on the ballot does not expressly state that particular purpose. In the absence of some emergency which would cause the trustees to reestablish priorities so that the educational process of the district could continue, the pre-election commitment would probably control the expenditure of the proceeds because approval of the issuance of the bonds is based on that commitment. To expend the funds for purposes other than the pre-election commitment, even though the other purposes are authorized and included in the election proposition, is certainly going to have an adverse effect on the electors.

We cannot state that the bond proceeds may not be used for any authorized purpose other than construction of the proposed high school. Such a conclusion can only be made by the court. However, from a purely legal point of consideration, we are of the opinion that the more prudent course of action may be for the district to use the proceeds for the construction of the new high school. A suit to stop the construction would probably be unsuccessful because the electors authorized the bonding for that purpose. However, a suit to block the expenditure of the proceeds for other purposes may be successful based on the foregoing discussion. We realize that the educational process should not be determined or controlled by any potential legal action. But at your request, we must conclude that strictly as a point of law, we are of the opinion that to use bond proceeds for other than the particular purpose authorized by the electors as described in the pre-election information, is a potentially hazardous course of action even where the other purposes may also be authorized by law. In short, then, pre-election purposes as presented to the electors are probably binding on the trustees.

We trust we have been of assistance.

Very truly yours,

FOR THE ATTORNEY GENERAL

JAMES R. HARGIS  
Deputy Attorney General



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

W. ANTHONY PARK  
ATTORNEY GENERAL

August 14, 1973

Mr. Ted C. Springer  
Custer County Prosecuting Attorney  
P.O. Box 409  
Challis, Idaho 83226

Dear Mr. Springer:

In regard to your question as to the requirements of plats, we do not believe that plats can be filed unless they comply with Chapter 13 of Title 50, Idaho Code. These sections, such as 50-1304, Idaho Code, clearly indicate that they are mandatory, e.g.:

"All plats offered for record in any county shall. . ."

and

"Every owner proposing a subdivision. . .shall. . ."

All of these sections are prefaced with words indicating that the chapter is mandatory.

There have, however, been considerable problems in enforcing this law. Envision the problems of forcing a non-complying subdivider to comply with this law. The agricultural exemption has caused many problems.

In checking back, this chapter has always been construed to be mandatory by this office and we doubt that there can be little or no doubt that it is so.

Sincerely yours,

FOR THE ATTORNEY GENERAL

*Warren Felton*

WARREN FELTON  
Deputy Attorney General

WF:sg



August 15, 1973

Mr. Ed Barker, Chief  
Solid Waste Management Section  
Department of Environmental  
and Community Services  
STATEHOUSE MAIL

Dear Mr. Barker:

You have asked for our opinion regarding alternative methods of financing solid waste collection systems by the counties of Idaho. Presently, solid waste disposal systems are generally funded by a one or two mill levy upon the assessed property within the county. Some counties have expressed concern that this method of financing, while legitimate, may be inequitable, since some of the land taxed is unimproved or unoccupied and does not directly benefit from the operation and maintenance of a solid waste disposal system. As an alternative to the mill levy, you have asked if a county may levy a special charge or assessment upon each household within the county. Furthermore, may this special charge or levy be paid with other county taxes?

Section 31-4404, Idaho Code, authorizes the boards of county commissioners to acquire sites, facilities, operate and/or maintain solid waste disposal systems using the following funding:

- (1) Levy a tax of not to exceed two (2) mills on the assessed value of property within the county, provided that property located within the corporate limits of any city that is operating and maintaining a solid waste disposal site shall not be levied against for the purposes of the county solid waste disposal system;
- or,

- (2) Collect fees from the users of the solid waste disposal facilities; or,
- (3) Finance the solid waste disposal facilities from current revenues; or
- (4) Receive and expend monies from any other source;
- (5) Establish solid waste collection systems where necessary or desirable and provide a method for collection of service fees, among which shall be certification of a special assessment on the property served;
- (6) Use any combination of subsections (1), (2), (3), (4), and (5) of this section.

Subsection (5) specifically provides for the kind of benefits-funding which some counties wish to consider. A special assessment on the property served by the solid waste collection system is specifically authorized. It is quite common within Idaho for special assessments upon property to be collected at the same time as the general ad valorem property tax. The manner of collecting the service fees or special assessment to finance solid waste collection systems rests very much within the discretion of the boards of county commissioners.

Also very much within their discretion is the designation of "the property served". Subsection (5) contemplates service fees or a special assessment upon less than all of the property in a county. To limit the services fees or special assessment to improved properties (your term "households") actually served by a solid waste collection system is certainly within the contemplation of the statute. The properties served would be obligated by a special assessment. Moreover, I hasten to add that it would be reasonable to consider improved properties as "served" by either a door-to-door collection system or a bulk containerized collection system.

Some incorporated cities, perhaps having been unduly benefitted by a county-wide 2 mill levy, may wonder if a county board of commissioners can mandate special fees or a special assessment upon improved properties within the city limits served by a county solid waste collection system. Clearly, it can.

Mr. Ed Barker  
August 3, 1973  
Page 3.

Title 31, Chapter 44 of the Idaho Code, is a strong declaration of legislative intent that fully integrated and effective solid waste disposal systems are to be established in each of the counties of Idaho. The boards of county commissioners are statutorily responsible for establishing "such solid waste disposal systems as are necessary and to provide reasonable and convenient access to such disposal systems by all the citizens of the county." Idaho Code §31-4402. The Board may accomplish this duty through its own employees, facilities, equipment and supplies. It may enter into contracts for operation and maintenance of the systems by private persons, by another unit of government, presumably a municipal corporation, by franchise or by any combination thereof. Idaho Code, §31-4403. The boards of county commissioners are to adopt necessary rules and regulations for the operation and maintenance of solid waste disposal systems. Idaho Code, §31-4406. They may sue to compel compliance with the act or any county ordinance promulgated thereunder. Idaho Code, §31-4406.

Municipalities may maintain and operate their own solid waste disposal systems but such systems must conform to state rules and regulations. Idaho Code, §31-4407. If a municipality does not establish its own conforming solid waste disposal system, including a collection system, and if the board of county commissioners finds it necessary or desirable to provide a solid waste collection system including the municipality in furtherance of the board's responsibilities under the Idaho Code, the board may impose service fees or a special assessment upon property within the municipality.

Very truly yours,

FOR THE ATTORNEY GENERAL

Matthew J. Mullaney, Jr.  
Deputy Attorney General

MJM:gmi

August 16, 1973

Dr. James A. Bax  
Administrator  
Department of Environmental  
and Community Services  
STATEHOUSE MAIL

Re: Idaho Law of Child Abuse and  
suggested guidelines

Dear Dr. Bax:

It has been requested that this office undertake to summarize and discuss the Idaho law relating to child abuse and its application to Department of Environmental and Community Services programs. Following is what I hope will be a workable guide for the Department.

I. IDAHO STATUTES DEFINING CHILD ABUSE

1. The Child Protective Act.

The Idaho Child Protective Act (hereinafter referred to as the "act") is found in Ch. 16, Title 16 of the Idaho Code. The act is designed to involve the courts of the State of Idaho in the child rearing process under certain circumstances. Generally, upon the filing of a petition by the Department of Environmental and Community Services through the prosecuting attorney of the county in which the child resides, and a finding that the child has been "abused" by either the child's parents or guardian, the court either temporarily or permanently severs the parental or guardian relationship, and places the responsibility for the child in the Department, which provides for the care of the child. This care usually takes the form of placement of the child with foster parents. Under certain circumstances, the child might be placed with an institution licensed by the Department of Environmental and Community Services, such as the Idaho Youth Ranch, or the Children's Home in either Lewiston or Boise.

The most recent and concise legislative definition of "abuse" is found in Section 16-1625(m) of the act which reads as follows:

"Abused" means any case in which a child exhibits evidence of skin bruising, bleeding, malnutrition, sexual molestation, burns, fracture of any bone, subdural hematomas, soft tissue swelling, failure to thrive or death, and such condition or death which is not justifiably explained, or where the history given concerning such condition or death is at variance with the degree or type of such condition or death, or the circumstances indicate that such condition or death, may not be the product of an accidental occurrence. (1973)

This definition has legal authority only when a court, acting on a petition under the act, is in the process of determining whether or not child abuse is present, and from that, whether the court has jurisdiction over the child. Once that finding is made under the petition, the child may be committed to the custody of the Department of Environmental and Community Services, which may in turn place the child in a foster home, in a licensed institution, or with some agency licensed by the Department to so place the child. The court retains jurisdiction over the child.

The definition of "abuse" contained in the act is helpful, not only for purposes of proceeding under the act, but also for purposes of formulating guidelines for the conduct of designated custodians to the extent that it indicates what the Legislature currently believes "abuse" to be.

## 2. The Termination of Parent-Child Relationship Act.

This act is virtually identical to the Child Protective Act, the only significant difference being in the amount of time during which the Department of Environmental and Community Services must have temporary custody of the child before the parent-child relationship is terminated. Under this act, the termination of the parent-child relationship may be immediate; under the Child Protective Act, the termination can occur only after the Department of Environmental and Community Services has had temporary custody of the child for a three-month period. Also, the 1973 Legislature did not alter the definition of "abuse" as found in the Termination of Parent and Child Relationship Act as it did in the Child Protective Act. Section 16-2002(e) defines "abuse" as follows:

"Abuse" used with respect to a child refers to those situations in which physical cruelty in excess of that required for reasonable disciplinary purposes has been inflicted by a parent or other person in whom legal custody of the child has been vested.

It can be seen that the definition found in Ch. 20 of the Idaho Code is broader than the definition found in Ch. 16 of the Idaho Code.

3. The criminal statutes.

There are two criminal sanctions relating to the treatment of children. Idaho Code §18-1501 reads in part as follows:

Cruel treatment or neglect of children. --  
Every person who shall willfully cause the life or health of any minor child to be endangered by abuse, neglect, torture, or torment, cruel punishment, injury or in any other manner, shall be guilty of a misdemeanor; . . .

As in many statutes which purport to define and then proscribe certain conduct, this law makes it difficult to formulate guidelines with a high degree of precision. There is a subjectivity built into this criminal statute which exists by virtue of the inherent differences in individual children. For example, "neglect" of a five year old girl would not necessarily be "neglect" of an eighteen year old boy.

The words found in the statute should be given a common, reasonable meaning, based on ordinary experience. The new definition of "abuse" found in Idaho Code §16-1625, as quoted above, would be a helpful guide in interpreting Section 18-1501 to the extent that the criminal statute refers to "abuse".

Idaho Code §18-401 states in part as follows:

Desertion and support of children or a wffe. --  
Every person who, . . .

(2) Willfully omits, without lawful excuse, to furnish necessary food, clothing, shelter, or medical assistance for his or her child or children, or ward or wards; . . . shall be guilty of a misdemeanor.

## II. SITUATIONS IN WHICH THE DEPARTMENT BECOMES INVOLVED WITH CHILDREN

### 1. Direct contacts.

From time to time employees of the Department of Environmental and Community Services find themselves working directly with children. These direct contacts may occur as the result of temporary custodial relationships brought about by the institution of petitions under either the Child Protective Act, or the Termination of Parent-Child Relationship Act; the administration of the Child Development center; or the administration of mental health programs. All employees of the Department who provide various services are likely to have direct contact with children. These would include maternal and infant care services, crippled children services, child health services, child welfare services, youth rehabilitation counselors, employees of the training school at St. Anthony and aid to dependent children household counselors.

### 2. Indirect contacts.

Indirect contacts are those which the Department has either through foster parents screened and selected by the Department, or contacts made through licensed private institutions. Private institutions would include the Idaho Youth Ranch, the children's homes in both Boise and Lewiston, and various day-care facilities throughout the state.

## III. SUGGESTED GUIDELINES FOR CONTROL OF CONDUCT OF DEPARTMENT OF ENVIRONMENTAL AND COMMUNITY SERVICES' EMPLOYEES AND OF OTHER DESIGNATED CUSTODIANS OF CHILDREN

These guidelines are suggested to apply to both employees of the Department of Environmental and Community Services, to foster parents, and to employees of private institutions licensed by the Department.

1. The Department should provide each employee charged with the care, custody and control of minor children, for however short a time, and in whatever capacity, with verbatim statutory definitions as quoted above. The employee's attention should be specifically drawn to the two criminal sections quoted above, and the employee should be made to understand clearly that those sections apply to him should he violate their sanctions.

2. All persons, agencies, or employees of licensed institutions who will potentially be designated by the Department as custodians of minor children should also be provided with verbatim

Dr. James A. Bax  
August 16, 1973  
Page Five

statutory definitions as quoted above. The potential custodians should be made to understand that the two criminal sections quoted above apply to them in the event of violations. The context in which this might be done could be by way of seminars or training sessions arranged by the Department, in which a dialogue is encouraged between employees of the Department having particular expertise in the area of child psychology, and the potential designated custodian. The custodians could be encouraged to define the terms of the statutes as they apply to their own concepts of discipline, and as they apply to particular children who may be placed in their custody. The potential custodian will (and should) use his own experiences and frame of reference in formulating these definitions. Potential problems with any or several potential custodians would hopefully surface as a result of this exchange. The dialogue should not end at the seminar, but rather should continue at periodic intervals during the existence of the custodial relationship. The Attorney General's office would be most willing to participate in such seminars to assist from the legal end.

3. Employees of the Department of Environmental and Community Services should be involved in a dialogue process also. Periodic meetings could be held with relevant employees; at those meetings, the employee would be encouraged to state his own concepts of child discipline. Again, potential problems might be discovered and headed off. Again, the Attorney General's office would be available for legal orientation.

4. It should be made clear to employees of the Department, and also to potential custodians, that in no case should a child be denied food, clothing, shelter, or medical assistance, either under the guise of discipline or for any other reason.

5. Specific ground rules regarding the use of corporal punishment, based on the statutory definitions discussed above should be promulgated with the aid of the Attorney General's office.

Very truly yours,

W. ANTHONY PARK  
Attorney General

WAP:cb



*Final opinion*

OFFICIAL OPINION #74-20

August 16, 1973

Mr. John Michael Brassey  
Deputy Administrator  
UNIFORM CONSUMER CREDIT CODE  
Department of Finance  
State of Idaho

Dear Mr. Brassey:

Your letter of June 1, 1973 requested an opinion as to whether rebates made on or after July 1, 1973 on sales or loans made prior to July 1, 1973 should be computed as provided in amendments to Sections 28-32-210 and 28-33-210 or as provided in the statute as it is presently worded.

It is my opinion that the legislature intended the amendments to these statutes to apply to sales or loans made after July 1, 1973 and that the rebates made after July 1, 1973 on sales or loans made prior to July 1, 1973 should be computed as provided in the statute before it was amended.

Very truly yours,

FOR THE ATTORNEY GENERAL

JAMES G. REID  
Deputy Attorney General

JGR/JWP/slg

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August 17, 1973

Major General George B. Bennett  
The Adjutant General, Idaho  
P.O. Box 1098  
Boise, Idaho 83701

Dear General Bennett:

The Attorney General's Office is in receipt of your letter dated July 3, 1973, requesting information concerning the liability of the State of Idaho, pilots and other personnel who respond to requests to provide medical evacuation for seriously injured people.

The Idaho Tort Claims Act, found in Sections 6-901 through 6-928 would govern the question of whether the State of Idaho can be held liable for the acts of pilots and other personnel who respond to requests to provide medical evacuation. Section 6-903 of the Idaho Code states regarding this matter that "every governmental entity is subject to liability for its torts and those of its employees acting within the scope of their employment or duties whether arising out of a governmental or proprietary function." No exceptions to this liability would be applicable in this situation.

An employee of the State, such as a pilot, is immune from liability if he is acting within the scope of his employment, or in other terms, working at what he was authorized to do. The only exception to this occurs when an employee is acting maliciously or doing a wrongful act without just cause or excuse, with an intent to inflict an injury.

As I have explained, there is no liability protection afforded to either the State of Idaho or, in a certain situation, an employee of the State when the employee commits a tort. However, the chance of such action occurring is small and in

Major General George B. Bennett  
August 17, 1973  
Page two

view of the importance of med-evac missions, it is my opinion  
these missions should continue.

Very truly yours,

FOR THE ATTORNEY GENERAL

JAMES G. REID  
Deputy Attorney General

JGR/JWP/slg

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August 17, 1973

Mr. Michael D. Kunz  
Franklin County Clerk  
Box 231  
Preston, Idaho 83263

Dear Mr. Kunz:

I am probably in about as good a position to tell you the meaning of Section 60-106, Idaho Code as anyone is. In 1968 or so, the statute read "printed and published in the county." I wrote that this meant that the newspaper had to be printed in the county. It turned out many papers are not printed in the counties where they thought they complied with Section 60-106, Idaho Code.

Thus, in 1969 this section was changed to delete the word "printed" and read as it now reads "published in the county" and also the last paragraph was added to the effect that many published notices violating the section because the newspaper was not "printed" in the county were excused. Thus, in Idaho "published" does not mean "printed". See the cases such as Wolfe v. County Liquor Disp. Assn. v. Ingram, 113 S.W.2d 839, 272 Ky. 38; Haban v. Suburban Home Mortgage Co., 57 N.E.2d 97, Ohio App.; Bardwell v. Town of Clinton, 180 So. 148, La.App.; 35A Words and Phrases 155-158.

"Publish" means to put in circulation or to issue or to make public. If the newspaper has an office in your town it may be published there, although this phrase "publish" usually refers to the home office of the newspaper, whether or not it is printed there. Madigan v. City of Onalaska, 41 N.W.2d 206, 256 Wis. 398. However, some cases even let the word "publish" include a newspaper from another town whose circulation is larger in the town in question than any local paper. Loos v. City of N.Y., 9 N.Y.2d 960 170 Misc. 14.

We believe the safer approach would be to "publish" in a paper carrying on its banner a place in your county such as

Mr. Michael D. Kunz  
August 17, 1973  
Page two

"The Preston Citizen" since we believe the important question is the name of the city and county carried on the newspaper's banner. This indicates the place of the home office.

Sincerely yours,

FOR THE ATTORNEY GENERAL

WARREN FELTON  
Deputy Attorney General

WF:sg

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STATE OF IDAHO  
OFFICE OF THE ATTORNEY GENERAL  
BOISE 83720

W. ANTHONY PARK  
ATTORNEY GENERAL

August 17, 1973

Mr. Roger B. McGinnis  
P.O. Box 714  
Boise, Idaho 83701

*Mayor Candidate*

Dear Mr. McGinnis:

You have asked as to whether or not state employees may participate in city elections and as to the extent of such participation.

The Personnel Commission has the power to make rules prohibiting participation in political activity, but to the best of my knowledge they have not done so. Check this with them to be certain.

Section 67-5311, Idaho Code reads as follows:

"67-5311. Limitation of political activity.--

(1) No employee of a state department covered by this act, except those hereinbefore exempt, shall:

(a) Use his official authority or influence for the purpose of interfering with an election to or a nomination for office, or affecting the result thereof, or

(b) Directly or indirectly coerce, attempt to coerce, command, or direct any other such officer or employee to pay, lend, or contribute any part of his salary or compensation or anything else of value to any party, committee, organization, agency, or person for political purposes.

(2) No such officer or employee shall take any active part in political organization management. All such employees shall retain the right to vote as they may choose and to express their opinions on all political subjects and candidates."

To the best of my knowledge this does not prohibit participation in city elections or even of a state employee running for a city office.

Mr. Roger B. McGinnis  
August 17, 1973  
Page two

Obviously a full time state employee cannot also hold a full time city office. Even though city elections are "non-partisan" there might be political objections as distinguished from legal objections to some situations that might thus arise.

There would, however, be no objections so far as I know to signing petitions or actively campaigning for a person for city office so long as Section 67-5311, Idaho Code is not violated.

Sincerely yours,

FOR THE ATTORNEY GENERAL

WARREN FELTON  
Deputy Attorney General

WF:sg

August 21, 1973

Mr. Glenn W. Nichols  
Director  
Idaho State Planning &  
Community Affairs Agency  
STATEHOUSE MAIL

Re: Step by step procedures and  
necessary precautions related  
to enactment of a subdivision  
or zoning ordinance

Dear Mr. Nichols:

In your letter of July 24, 1973, you asked this office to recommend a step by step procedure together with precautions which should be taken by local governments in setting up their zoning schemes.

Zoning ordinances usually do find their stumbling blocks in procedure. This letter attempts to smooth the road, and is divided into discussions of each of the following:

(1) The proper manner in which the legislative body (the city council or county board) is initially set up, administered and organized. Also included will be an outline of the statutory requirements pertaining to the conduct of these bodies generally.

(2) A discussion of the organization, administration, and conduct of the administrative body charged directly with matters of zoning. This body might be either a zoning commission, or a planning and zoning commission.

(3) A step by step procedure that must be followed whereby a proposed zoning ordinance begins, follows its way through the zoning commission or planning or zoning commission, goes to the board or council, and ends up as law.



I. THE ORGANIZATION, ADMINISTRATION, AND CONDUCT  
OF THE LEGISLATIVE BODY GENERALLY

A. The county board of commissioners.

At the regular January meeting of the county board, immediately following any general election, the board must divide the county into three districts, "as nearly equal in population as may be". I.C. 31-704. Each member of the board must be an elector of the district he represents. I.C. 31-702. Also at this meeting, a chairman must be elected. I.C. 31-704. The chairman presides at all meetings of the board. If he is unable, then members must "by order" select a temporary chairman from among themselves. I.C. 31-706. The county auditor is ex officio clerk of the board. All records of the board must be signed by the chairman and the clerk. I.C. 31-707.

The clerk is required to record all proceedings of the board. He is also required to record the vote of each member of the board on any question upon which there is a division, or at the request of any member present. I.C. 31-708. The board must keep a minute book, in which must be recorded all orders and decisions made by the board, together with the daily proceedings at all regular and special meetings. I.C. 31-709.

Regular meetings must be held at the county seat on the second Mondays of each month of the year. I.C. 31-710. If the business of the board cannot be completed at that meeting, an adjourned meeting may be provided for by an order duly entered of record in which must be specified the character of business to be transacted at the later date; also, none other than the specified business must be transacted at the later meeting. I.C. 31-711. The clerk of the board must give five days public notice of an adjourned meeting. Such notice must state the business to be transacted at that meeting. Three notices must be posted in conspicuous places, one of which being at the courthouse door. I.C. 31-713. If an adjourned meeting is called for the purpose of discussing or acting upon a zoning ordinance, it is extremely important that this procedure be followed.

If special business must be conducted after the regular meeting, a special meeting may be ordered by a majority of the board. The order must be entered of record, and five days notice must be given by the clerk to each member of the board who did not join in the order, either by his absence, or for some other reason. The order must specify the business to be transacted at the special meeting and none other than the specified business

Mr. Glenn W. Nichols  
August 21, 1973  
Page Three

must be transacted at that meeting. I.C. 31-712. Five days public notice of the special meeting in which is stated the business to be transacted at that meeting must be given to the general public by posting three notices in conspicuous places, one of which being at the courthouse door. I.C. 31-713. Again, it is very important to follow this procedure if a zoning ordinance is to be the subject of the special meeting.

All ordinances are required to have a specific heading. The form of this heading is as follows:

Be it ordained by the board of county  
commissioners of \_\_\_\_\_ County, Idaho.

All ordinances shall be headed in this manner. Within one month after the ordinance is passed, the ordinance must be published in at least one issue of the newspaper published in the county, and if no paper is published in the county, then the ordinance must be published in some paper having general circulation in the county. This requirement is not necessary in case of an emergency, or if the ordinance is merely a revision or codification of previous ordinances, provided that this revision is published in pamphlet form. The publication requirement also does not apply to codes such as sanitary codes, building codes, etc., when these are available for public inspection in the clerk's office, but it does apply to zoning ordinances. I.C. 31-715.

The board must cause to be published monthly statements which give clear notice to the public of all its acts and proceedings. Annually, a full statement of the financial conditions of the county must be made. Publication of these must be in one issue of any newspaper published or printed in the county as will most likely give notice to the general public. When no newspaper is published in the county, copies of the statement must be kept posted for at least twenty days in three places in the county, one being in a conspicuous place at the courthouse door. I.C. 31-819.

#### B. The City Council.

All boards, commissions and committees appointed by the council are advisory. This would include a zoning commission, or a planning and zoning commission. The responsibilities, duties and authority of such a board or commission must be given by ordinance and not otherwise. Appointments to boards, commissions, or committees shall be made by the mayor with the advice and approval of the city council, and members may be removed in the same manner. I.C. 50-210.

Mr. Glenn W. Nichols  
August 21, 1973  
Page Four

A special meeting may be called by one-half plus one of the members of the full council as well as by the mayor. The object of this special meeting shall be submitted to the council in writing. The call of the meeting and the object thereof, as well as the disposition of the meeting, shall be entered upon the journal by the clerk. Follow this requirement closely if the special meeting is for the purpose of discussing zoning. I.C. 50-604, I.C. 50-706.

There shall be monthly meetings of the council, at a place and time established by ordinance. At those meetings and all other meetings, a majority of the council constitutes a quorum. Regular or special meetings of the council may be recessed until further notice. I.C. 50-705.

A city ordinance shall be headed:

Be it ordained by the mayor and city  
council of the city of \_\_\_\_\_, Idaho.  
I.C. 50-901.

All ordinances of a general nature shall be published in at least one issue of the official paper of the city before they take effect, within one month after they are passed. Again, emergency provisions need not be published; nor do nationally recognized codes. I.C. 50-901.

An ordinance must be read on three different days, two readings of which may be by title only and one reading of which shall be in full, unless one-half plus one of the members of the full council shall dispense with the rule. I.C. 50-901. Passage or adoption of every ordinance and every resolution or order to pass an ordinance shall be by roll call of the council with the Yeah or Nay of each being recorded, and a majority shall be required. I.C. 50-901.

In the preparation, passage and publication of an ordinance, the title shall clearly express every subject which the ordinance covers. I.C. 50-901.

Permanent records shall be kept by the council, including proceedings of the council, ordinances, and resolutions. I.C. 50-907.

# # #

It might be felt that the preceding discussion is a little far removed from the actual promulgation of a zoning ordinance. However, I believe that attacks on ordinances could be validly

Mr. Glenn W. Nichols  
August 21, 1973  
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made on the grounds that one or several of the foregoing requirements were not met. The recent case of Burlington Northern, Inc. v. Kootenai County, decided by Judge Watt Prather in the First Judicial District, Nos. 28016, 28025 and 28061 (consolidated for purposes of trial) points out the necessity to strictly adhere to procedural requirements in the preparation and passage of a zoning ordinance or amendments thereto. In that case, the court found an extralegal adjourned meeting by the county commissioners, (discussed above), and neglect on the part of the commissioners to receive and act upon a report from the planning and zoning commission as required by Idaho Code §31-3804, (discussed below). The zoning ordinance of Kootenai County fell because of a failure to strictly follow procedural requirements.

## II. THE ZONING ADMINISTRATIVE BODY

Section 50-1210, Idaho Code, reads in pertinent part as follows:

Zoning Commission. -- In order to avail itself of the power conferred in sections 50-1201 through 50-1210, the city council shall appoint a commission to be known as the zoning commission to recommend the boundaries of the various districts and the regulations to be enforced therein. Such commission shall hold public hearings thereon before submitting its report; and the council shall not hold public hearings or take action until it has received the report of such commission. The council shall accept the recommendations of the commission report unless rejected by a vote of one-half (1/2) plus one (1) of the members of the full council. Where a city planning commission exists, it may be appointed as the zoning commission.

It should be noted that nothing is mentioned in this statute regarding the number of persons to be on the commission, the method under which the commission is to be set up, or any other matters pertaining to the, "hows, whys, and whens" of the commission. However, the last sentence of the above statute refers to the existence of a "city planning commission". Idaho Code §§50-1101, et seq. provides for the creation of a city (or county)

Mr. Glenn W. Nichols  
August 21, 1973  
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planning commission. Therein is a complete series of statutes covering details regarding the set up, administration, and duties and responsibilities of a planning commission.

It is clear that the city can set up the broadly outlined zoning commission as authorized by §50-1210, or can avail itself of a planning commission by way of §50-1101, et seq. A county must create, as its zoning commission, a planning commission, because the statute pertaining to counties which is analogous to I.C. §50-1210 requires this. See, I.C. §31-3804. If a city does not have a planning commission, but instead has a §50-1210 zoning commission, then the city council should be certain that the zoning commission has public hearings on proposed zoning ordinances and amendments thereto. Dates, notices, and other procedural matters should be formulated by the city council with the help of the city attorney such that a due process challenge could not successfully be made to ordinances. At least a 15-day notice of hearing should be provided for. It is recommended that a city elect to create a planning commission pursuant to 50-1101, et seq., since due process requirements are spelled out therein, together with detailed administrative requirements.

A planning commission is created in the case of cities by ordinance, and in the case of counties by resolution. It may consist of from six to twelve members to be appointed by the mayor or the chairman of the county board, and confirmed by the council or county board, as the case may be. The ordinance or resolution shall set forth the number of members to be appointed, not more than one-third of which may be ex officio members by virtue of public office or position held in the city or county for which the commission is created. One member may be a non-resident taxpayer. (It is unclear what type of "taxes" must be paid by this member; payment of property taxes would presumably be sufficient. A resolution of this problem could be had should the need arise.) The ex officio members of the commission should have a term of office which corresponds to their respective tenures of office. I.C. 50-1101.

The term of office for the first appointed members appointed to such commission shall be two, four and six years, to be determined by the drawing of lots. Thereafter, the term of office for each appointed officer shall be six years. Vacancies otherwise occurring shall be filled by the mayor or chairman of the county board, confirmed by the council or the county board as the case may be. Members may be removed by a majority vote of the body confirming the original appointment. I.C. 50-1101.

Mr. Glenn W. Nichols  
August 21, 1973  
Page Seven

The commission shall select its own chairman and create and fill such other offices as it may determine necessary. They must have one regular meeting each month for not less than nine months in each year. A majority of the members is sufficient to constitute a quorum. A written record of all meetings must be kept. These records and all meetings must be open to the public. I.C. 50-1102.

The commission can accept monies, either from the federal government or from the state. They also may hire employees and technical advisers as are deemed necessary for their work. I.C. 50-1103.

The commission has the authority to involve itself with all matters pertaining to land use and zoning in their area of concern. I.C. 50-1104.

The important points to remember procedurally regarding the actual functioning of the planning commission or zoning commission, as the case may be, are as follows:

1. The commission must submit a formal report to the city council or county board of commissioners after the zoning commission has studied the proposal and has had hearings thereon. This report should include the zoning commission's recommendations on the proposed ordinance.

Also, the zoning commission should from time to time review zoning ordinances generally, recommending changes as they might become needed.

2. The zoning commission should hold hearings on proposed ordinances or changes therein. These hearings must be held prior to the submission of the zoning commission's report to the city council or county board. ~~Sixteen~~-day notice of these hearings must be given. Posting of the time and place of the hearing with a brief statement of the matters to be discussed at the hearing must be done. In the case of cities, publication in the local newspaper is sufficient. In the case of counties, publication in a newspaper having general circulation in the county, posting of notice at the courthouse door, and posting in several other conspicuous places around the county would be sufficient.

III. STEP BY STEP PROCEDURE FOR ENACTMENT  
OF THE ZONING ORDINANCE

1. Make certain that the county board of commissioners or city council is properly set up, that records are being kept, and that all other requirements pertaining to administration of a board of county commissioners or city council, as outlined above, are being followed.

2. Make certain that the zoning body has been properly created, that its procedures are valid, as outlined above, and that the other requirements outlined above are being met.

3. Proposed zoning ordinances can arise either from members of the county board or city council, from members of the general public, or from any other source. Once the proposal has been made, the zoning body begins the task of evaluating the proposal and formulating the proposal for eventual presentation to the county board of commissioners or city council.

4. Once the proposed ordinance has taken sufficient shape, and is ready in the opinion of the zoning board to be submitted to the county board of commissioners or city council, a public hearing should be held on the proposed ordinance or amendment. At least fifteen days notice of the hearing should be given. Publication of the notice of hearing in the local newspaper, posting on the courthouse door, and posting at other conspicuous places around the county should be done. In the case of a city, publication in the newspaper is sufficient. At the hearing, all persons desiring to be heard should be given an opportunity to be heard.

5. The regulations (with possible changes resulting from the hearing) are then presented to the board of commissioners or city council.

6. The city council or county board of commissioners shall hold a public hearing prior to the passage of the ordinance. (The statutes are susceptible to the interpretation that the public hearing held by the zoning commission is sufficient; however, the interpretation can also be that hearings are required by both bodies. The prudent course is to hold hearings two times.) This hearing should follow the previously mentioned fifteen-day notice requirement.

# # #

In addition to the above step-by-step procedure, the following observations should be kept in mind:

Mr. Glenn W. Nichols  
August 21, 1973  
Page Nine

1. Changes or amendments to zoning ordinances are procedurally to be treated the same as the original ordinance.

2. The comprehensive plan should also be treated procedurally the same as the original ordinance.

3. All zoning ordinances should be passed in conformance with a comprehensive plan.

4. All zoning regulations must be for one of the following purposes (the purpose should be stated in the ordinance):

- a. To lessen congestion in the streets;
- b. To safeguard from fire, panic and other damages;
- c. To promote public health, safety, morals and the general welfare;
- d. To provide adequate light and air;
- e. To prevent the overcrowding of land;
- f. To avoid undue concentration of population;
- g. To facilitate the adequate provision of transportation, water, sewerage, schools, parks and other public requirements.

These are the verbatim requirements of Idaho Code §50-1203. It is wise to preface every zoning ordinance with a state purpose framed in the language of one or more or even all of the above. This will avoid an attack on the ordinance based upon the charge that the ordinance was not for a legitimate purpose.

A zoning ordinance can be passed for no other purpose. However, broad readings of the above would probably cover most contingencies.

5. It might be argued by a developer that a subdivision ordinance is a zoning ordinance, and therefore should be treated procedurally the same as a zoning ordinance. To avoid this possibility, it is suggested that a subdivision ordinance be treated the same as a zoning ordinance procedurally.

Very truly yours,

FOR THE ATTORNEY GENERAL

JAMES C. WEAVER  
Assistant Attorney General

JCW:cb

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## STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83707

W. ANTHONY PARK  
ATTORNEY GENERAL

August 21, 1973

Opinion  
9/20/73

Mr. Gary Haman  
Prosecuting Attorney  
P. O. Box 1148  
Coeur d'Alene, Idaho 83814

Dear Gary:

You have posed the following question for opinion:  
May a blood sample be taken from a person killed as a result of a motor vehicle accident upon order of the prosecuting attorney and use the information obtained therefrom in determining the responsibility for the cause of death without committing or causing to be committed a violation of any law or laws of the State of Idaho?

There are two Idaho Code sections germane to this opinion, being Idaho Code, Section 49-1016 as amended by the 1973 legislative session and Idaho Code, Section 19-4301B. Idaho Code, Section 49-1016, provides:

"TESTING BLOOD OF PERSONS KILLED IN ACCIDENTS.--The administrator of environmental protection and health, jointly with the various county coroners, shall provide a system and procedures whereby all morticians in the state of Idaho shall obtain blood samples from all pedestrians and motor vehicle operators who have died as a result of and contemporaneously with an accident involving a motor vehicle.

\* \* \*

The blood sample, with such information as may be required, will be delivered to the administrator of environmental protection and health or his designee. Upon receipt of such sample the administrator will cause

such tests as may be required to determine the amount of alcohol, narcotics and dangerous drugs contained in such sample.

The results of such tests shall be used exclusively for statistical purposes and the sample shall never be identified with the name of the deceased. Any person releasing or making public such information other than as herein prescribed, shall be guilty of a misdemeanor." Idaho Session Laws, Ch. 79 (1973).

The substantive change to this section provided that effective March 2, 1973, that, "Any person releasing or making public such information other than as herein prescribed, shall be guilty of a misdemeanor."

The above section must be read in light of Idaho Code, Section 19-4301B, which provides:

"PERFORMANCE OF AUTOPSIES.--The coroner may, in the performance of his duties under this chapter, summon a person authorized to practice medicine and surgery in the state of Idaho to inspect the body and give a professional opinion as to the cause of death. The coroner or the prosecuting attorney may order an autopsy performed if it is deemed necessary accurately and scientifically to determine the cause of death. When an autopsy has been performed, pursuant to an order of a coroner or a prosecuting attorney, no cause of action shall lie against any person, firm or corporation for participating in or requesting such autopsy."

In substance this section gives the coroner or prosecuting attorney authority to order an autopsy to determine the cause of death in appropriate circumstances. The information obtained from a blood sample taken as a part of such autopsy would not be subject to the provisions of Idaho Code, Section 49-1016.

Gary Haman  
August 21, 1973  
Page 3

In Idaho Code, Section 49-1016, it is the mortician who is required to obtain the blood sample, whereas in Idaho Code, Section 19-4301B, the autopsy must be conducted by a person authorized to practice medicine and surgery in the State of Idaho.

It would appear, then, that the prosecuting attorney may obtain a blood sample under the provisions of Idaho Code, Section 19-4301B, without subjecting himself or the person taking such blood sample to criminal prosecution, however, the prosecuting attorney would be proscribed from obtaining the results of the tests run on the blood sample taken by the mortician pursuant to Idaho Code, Section 49-1016.

Very truly yours,

FOR THE ATTORNEY GENERAL

A handwritten signature in dark ink, appearing to read "William F. Lee". The signature is fluid and cursive, with the first name "William" being the most prominent.

WILLIAM F. LEE  
Assistant Attorney General

WFL:cp



OFFICIAL OPINION #74-26

W. ANTHONY PARK  
ATTORNEY GENERAL

STATE OF IDAHO  
OFFICE OF THE ATTORNEY GENERAL  
BOISE 83720

August 22, 1973

Mr. J. D. Hancock  
Madison County Prosecuting Attorney  
30 South 2nd West  
Rexburg, Idaho 83440

Dear Mr. Hancock,

Like you I have not found much help from the statutes or case law relating to your question of how long the auditor or clerk should keep the paid claims and warrants.

The auditor is, of course, required to keep the warrants and warrant book under Section 31-709, Idaho Code.

Since there is little help in the statutes or case law on this matter, we have looked carefully at the various statutes of limitation that could apply to such matters. Quite a number of such sections relate to these matters such as: §31-1513 (6 months), §31-1509 (20 days after quarterly publication), §5-216 (5 years), §5-217 (4 years), §5-218 (3 years), §5-219 (2 years), §5-220 (1 year), §5-221 (6 months) and §5-224 (4 years). Since the longest of these statutes that could easily relate to matters dealt with in paid county claims and paid warrants is 5 years, we would suggest that these claims and warrants should be retained for at least 5 years after the claims are settled and paid.

We would also suggest that the county commissioners could, if they wished to do so, make regulations or an ordinance to take care of such matters since they generally supervise all county officers (§31-802, Idaho Code) and they audit county funds (§31-809, Idaho Code) and examine, settle and allow all claims (§31-810, Idaho Code).

Sincerely yours,

FOR THE ATTORNEY GENERAL

A handwritten signature in cursive script that reads "Warren Felton".

WARREN FELTON  
Deputy Attorney General

WF:sg



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

W. ANTHONY PARK  
ATTORNEY GENERAL

August 27, 1973

Mr. J. D. Hancock  
Madison County Prosecuting Attorney  
30 South 2nd West  
Rexburg, Idaho 83440

Dear Mr. Hancock,

In writing to you about destruction of county records, I failed to mention Section 67-4126, Idaho Code and the State Historical Society. They should be notified before any county records, even warrants, are destroyed.

Sincerely yours,

FOR THE ATTORNEY GENERAL

A handwritten signature in cursive script that reads "Warren Felton".

WARREN FELTON  
Deputy Attorney General

WF:sg



## STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83707

W. ANTHONY PARK  
ATTORNEY GENERAL

August 22, 1973

Honorable D.F. Engelking  
State Superintendent  
Department of Education  
Building Mail

Dear Mr. Engelking:

We wish to respond to your letter of recent date concerning the implementation of House Bill 23 enacted by the last session of the legislature. Specifically you asked two questions:

- "1. Are non-certified personnel entitled to the accumulation of sick leave to a maximum of 90 days similar to that of certified personnel?
2. If school districts have had a policy of sick leave for non-instructional personnel which provided for the accumulation of sick leave for such persons, may that accumulated sick leave be retained as part of the 90 days allowed?"

House Bill 23 ammended Section 33-1216, Idaho Code. The bill provides that each certificated and non-certificated employee of any school district shall be entitled to sick leave with full pay of one day for each month of service or major portion thereof. In answer to your question #1 then, it appears that the non-certificated personnel of a school district are entitled to the accumulation of sick leave and that accumulation shall be acquired at the same rate and on the same basis as the accumulation of sick leave for certificated personnel.

In answer to your question #2, if a school district had a policy of sick leave prior to the enactment of House Bill 23 for non-instructional personnel, we are of the opinion that that accumulation of sick leave should be retained to the credit of the non-certificated employee of the district. Prior to the enactment of House Bill 23, the accumulation of sick leave for the non-instructional personnel was an

Honorable D.F. Engelking  
August 22, 1973  
Page 2

element of the contract between that person and the district. House Bill 23 does nothing to interfere with the contractual benefits and obligations of a school district and its non-professional staff. It follows that the accumulation of sick leave by district policy prior to the enactment of House Bill 23 should be retained. The effect of House Bill 23 on any such district policy is to make the accumulation of sick leave uniform throughout the state. It does not alter the local district policy which may have been in existence prior to the enactment of House Bill 23. Therefore, in specific answer to your question, we are of the opinion that the accumulated sick leave acquired by a district policy of sick leave for non-instructional personnel should be retained as part of the 90 days allowed as the maximum to be accumulated by the non-certificated personnel. We trust we have been of some assistance.

Very truly yours,

FOR THE ATTORNEY GENERAL

JAMES R. HARGIS  
Deputy Attorney General

JRH:lm

UP  
9/20/73

August 29, 1973

Marjorie Ruth Moon  
State Treasurer  
Building Mail

Dear Miss Moon:

In your letter of August 3, 1973, you requested an opinion from this office as to whether or not all employees of the State Treasurer's Office must disclose to the Department of Finance any indebtedness they may have with a bank in the State of Idaho so as to allow the bank in question to remain or be eligible to become a state depository.

Idaho Code, Section 67-2726, deals with this problem and reads in part as follows:

"No bank is eligible to become or remain a state depository, to which the state treasurer, state auditor, or any deputy or [of] either then is directly indebted; unless the fact of such indebtedness is made known to the department of finance, . . ."

Based on the principle of ejusdem generis which simply means that in construction of laws where general words follow an enumeration of persons or things, such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned. Alekisch v. Industrial Accident Fund, 116 Mont. 169, 151 P.2d 1016, 1021. It is clear that the only people that the above referred to section of the Idaho Code would apply would be the State Treasurer, the State Auditor or one of their deputies, not all employees of the State Treasurer's Office.

If we can be of further assistance, please advise.

Very truly yours,  
FOR THE ATTORNEY GENERAL

JAMES G. REID  
Deputy Attorney General

JGR:cp



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forms  
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September 6, 1973

Mr. Arnold Putzier  
244 5th Avenue E  
Twin Falls, Idaho 83301

*State Employee*

Dear Mr. Putzier,

The limitation on political activity by a state employee is spelled out in Section 67-5311, Idaho Code which reads as follows:

"67-5311. Limitation of political activity.--

(1) No employee of a state department covered by this act, except those hereinbefore exempt, shall:

(a) Use his official authority or influence for the purpose of interfering with an election to or a nomination for office, or affecting the result thereof, or

(b) Directly or indirectly coerce, attempt to coerce, command, or direct any other such officer or employee to pay, lend, or contribute any part of his salary or compensation or anything else of value to any party, committee, organization, agency, or person for political purposes.

(2) No such officer or employee shall take any part in political organization management. All such employees shall retain the right to vote as they may choose and to express their opinions on all political subjects and candidates."

and by Section 67-5302(k) and (1), which reads as follows:

"67-5302. Definitions.--As used in this act, each of the terms defined in this section shall have the meaning given in this section unless a different meaning is clearly required by the context. Such terms and their definitions are: \* \* \*

(k) 'Political office' means a public office for which partisan politics is a basis for nomination, election or appointment.

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Mr. Arnold Putzier  
September 6, 1973  
Page two

(1) 'Political organization' means a party which sponsors candidates for election to political office."

The office of precinct committeeman is provided for by Section 34-624, Idaho Code which reads as follows:

"34-624. Election of precinct committeemen--  
Qualifications.--(1) At the primary election, 1972, and every alternate year thereafter, a precinct committeeman for each political party shall be elected in every voting precinct within each county.

(2) No person shall be elected to the office of precinct committeeman unless he has attained the age of eighteen (18) years at the time of his election, is a citizen of the United States and shall have resided within the voting precinct for a period of six (6) months next preceding his election.

(3) Each candidate shall file a declaration of candidacy with the county clerk. Each declaration shall have attached thereto a petition which contains the signatures of not less than five (5) nor more than ten (10) qualified electors from his precinct.

(4) No filing fee shall be charged any candidate at the time of his filing his declaration of candidacy."

The above sections would indicate that state employees covered by the Personnel System Law should not also hold a position as precinct committeeman.

You will notice that the employee cannot take part in the "management" of the "political organization". This does not say that you cannot be an active member of a political party but only that you cannot be part of the "management" of the party. That is to say, you may participate in political activity but you would be guilty of a misdemeanor as a state employee if you were to hold an office in a political party such as precinct committeeman.

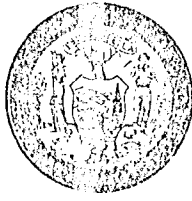
You may be interested to know that the federal Hatch Act is presently being reviewed by the United States Supreme Court and we expect that a decision in that matter should be handed down quite soon.

Sincerely yours,

FOR THE ATTORNEY GENERAL

WARREN FELTON  
Deputy Attorney General

WF:sg



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

W. ANTHONY PARK  
ATTORNEY GENERAL

September 7, 1973

Mr. Ted C. Springer  
Prosecuting Attorney  
Custer County  
P.O. Box 409  
Challis, Idaho 83226

Dear Mr. Springer,

You have asked some questions in relation to a vacancy in the office of County Assessor. First, you have asked what qualifications must a person meet if he or she is to be appointed county assessor. Must such a person qualify only as an elector under Sections 59-101 and 34-402, Idaho Code, or must such person meet the qualifications set out for a candidate for election to that office, set out in Section 34-621, Idaho Code?

The first thing to notice is that we are not speaking of the right to vote which is now controlled by the 26th Amendment to the federal Constitution and recent cases such as Dunn v. Blumstein, 405 U.S. 330, and see the annotation 31 L.Ed. 2d 861. And it would seem that the older cases will still remain the law. It has been said that:

"As there is no constitutional or inherent right to be elected or appointed to office or public position, it is competent for the appropriate law-making body to prescribe reasonable qualifications."  
3 McQuillan, Municipal Corporations, p. 262, ¶12.58.

The statutes and case law of Idaho do not answer your question so far as we can determine.

For present officers Section 34-621, Idaho Code (Ch. 140, Sec. 101, p. 387, 1970 Idaho Session Laws) which is in effect between 1972 and 1974 says in part:

"SECTION 101. (1) At the general election, 1972 [1974], and every alternate [four (4)] year[s] thereafter, a county assessor shall be elected in every county.

(2) No person shall be elected to the office of county assessor unless he has attained the age of twenty-one (21) years at the time of his election, is a citizen of the United States and shall have resided within the county one (1) year next preceding his election."

This section was again amended in 1971 (Ch. 193, Sec. 3, pp. 880-81, 1971 Idaho Session Laws). The only changes were to change the "1972" to "1974" and to change the word "alternate" to "four (4)". These changes have been indicated in the above quotation by the bracketed material and crossed out words. The crossed out words show how it reads as to the period before the 1974 election.

From this it should not be difficult to see that as of now the section is to be applied as it was read in 1970, but for the 1974 elections it is to be read as amended in 1971.

The requirements as to age and residence are the same before and after the amendment. It is only right to notice here that the section says, "No person shall be elected. . ." without the qualifications, e.g., twenty-one (21) years of age and one (1) year of residence in the county. This does not speak to the question of appointments.

We believe that Chapter 6 of Title 34 controls the 1974 elections as to qualifications. Each section of it relating to qualifications states that it applies either to 1972 and future elections or to 1974 and future elections.

Section 59-101, Idaho Code is a general section and would have general application but the sections of Chapter 6, Title 34 are specific sections and thus would control for the offices they relate to, In Re Drainage Dist. No. 3 of Ada Co. 40 Idaho 549, 235 P. 895 (1925). This should not be looked upon as a conflict, but rather as additional requirements wherever Chapter 6, Title 34 speaks in regard to any office.

While it is true that no particular section of the Idaho Code, and no particular case that we are acquainted with in Idaho, speak to the question of what qualifications are required of an appointee to public office in Idaho, Sections 59-906, 59-907, 59-913 and 59-914 spell out matters such as how and who appoints in regard to county offices. There is some law in other jurisdictions on this matter; a number of cases are collected in 3 McQuillan, Municipal Corporations, Sec. 12.58, p. 262, footnotes 95 and 96. I have read these cases and they indicate to me that the courts which have ruled on this matter have, in the absence of statutes specifying the qualifications of appointees to fill vacancies in elective offices, held that the appointee should have the same qualifications as are required of the officer to be elected to

Mr. Ted C. Springer  
September 7, 1973  
Page three

the post, at the time the appointee takes such office.  
Enclosed is a copy of this section of McQuillan.

Sincerely yours,

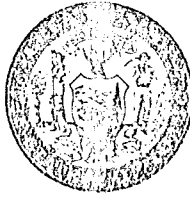
FOR THE ATTORNEY GENERAL

A handwritten signature in cursive script, reading "Warren Felton". The signature is written in dark ink and is positioned above the typed name.

WARREN FELTON  
Deputy Attorney General

WF:sg

Enclosure



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

W. ANTHONY PARK  
ATTORNEY GENERAL

September 10, 1973

Mr. H. Tom Davis  
Acting Regional Planning Director  
Ada Council of Governments  
525 West Jefferson  
Boise, Idaho 83702

Dear Mr. Davis:

This letter is in response to the question raised in your letter of September 6, 1973. The question presented was:

"Does an irrigation district or canal company have a responsibility to accept storm drainage water discharges in the portions of their irrigation system where natural water courses are utilized by the district or canal company to collect and convey irrigation water?"

We would direct your attention to two previous opinions of this office dated April 10, 1972 and September 13, 1972. These opinions were in response to similar questions from your office and held then that an irrigation district is not required to use its facilities to provide drainage, except for the irrigation water for which it is responsible. We still hold to that opinion.

It is immaterial to the question posed whether the burden imposed upon the irrigation district is in an area of natural drainage or not. The irrigation system, whether consisting entirely of concrete or with partial utilization of natural terrain, cannot be burdened by drainage water discharge without the consent of the irrigation district. The irrigation district is a private entity that has no obligation to carry those waters and has the right to be protected from interference with its rights to convey water for irrigation.

Mr. H. Tom Davis  
September 10, 1973  
Page 2

As you can readily understand, the water in the irrigation system must eventually discharge into a natural water course. Since the irrigation district would be responsible for discharging waters that meet environmental standards, the use of its system to carry off drainage waters would impose an additional burden and cost in meeting federal and state water quality standards. We know of no law that would compel an irrigation district to accept that responsibility. Additionally, it would also make no difference to this opinion whether the water was pure or not. In any event, the irrigation district system would be placed under a burden which its system was not designed to accept. Its property cannot be used without its prior consent.

Therefore, we are of the opinion that an irrigation district or canal company cannot be required to accept storm drainage water discharges.

Very truly yours,

FOR THE ATTORNEY GENERAL

MATTHEW J. MULLANEY, JR.  
Deputy Attorney General

MJM:cp



## STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83707

W. ANTHONY PARK  
ATTORNEY GENERAL

September 10, 1973

Mr. H. Tom Davis  
Wild and Scenic Rivers Coordinator  
Office of the Governor  
STATEHOUSE MAIL

Dear Mr. Davis:

This letter is in response to your request of August 10, 1973 regarding Indian Tribe ownership of a portion of the St. Joe River. You ask for our opinion regarding the Coeur d'Alene Indian Tribe claims on the St. Joe River.

The first question presented is whether the tribe owns portions of the bed of the St. Joe River that lies within the boundary of the reservation.

The U.S. Supreme Court held in Choctaw Nation -vs- Oklahoma, 397 U.S. 620 (1970), that any lands lying under navigable streams conveyed to the Indian tribes by treaty prior to statehood belongs to those tribes. It has always been undisputed that if title remained in the United States, it passed to the State upon admission to the Union. The question presented in the Choctaw case and here, is whether the United States intended to convey title to the bed of the St. Joe River, if in fact it is included within the legal description of the reservation. The answer to that question lies in the language of the treaty and the actual physical survey of the reservation boundaries. But if it was conveyed to the Indian tribe prior to Statehood, they and not the State of Idaho own the bed of that portion of the St. Joe River.

This, however, does not mean that the tribes have control of the water passing over those lands. It has long been



Mr. H. Tom Davis  
Page 2  
September 10, 1973

recognized that the waters of a navigable stream are subject to the control of the State, subject to the paramount rights of the United States for commercial purposes. Thus, the State of Idaho still retains control over the use of its water while flowing in the natural watercourse and such control is not subject to the desires of any owner of the stream bed or banks. Idaho does not recognize riparian water rights.

The tribe is not by virtue of mere ownership of the bed of the St. Joe entitled to protection and maintenance of the river in any given condition. This is a determination for the State of Idaho to make and is within the State's jurisdiction and control and not the tribes. The tribe has, at the very most, a cooperative "right" to determine the designation of the area within its boundaries.

Although the tribe has what is known as a reserved water right, that right exists only as is reasonably necessary for the purposes for which the reservation was established. Until such time as water from the St. Joe is diverted and applied to beneficial use on the reservation, no right exists in the tribe to say how much water should or should not flow in the St. Joe. The reserved right is a right to divert and use the water. If in fact the water has not or is not being diverted to the reservation lands, then the water is not necessary for the reservation and is not subject to the control of the tribe nor are there any right to quality and quantity that can be or are entitled to protection. The reserved right as recognized in Winters -vs- U.S., and subsequent cases, is the right to use the water for beneficial purpose. Until that occurs there is no right recognized by state law.

Therefore, the tribe, as any private owner can, has the right to make its feelings and desires known regarding the designation it desires be placed on the St. Joe. But, unless and until they have established diversions and uses of water for growing crops or domestic use, they have no rights entitled to protection from pollution or depletion in flow.

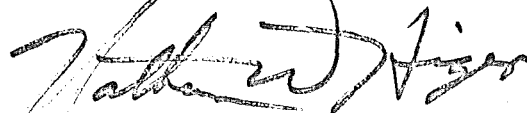
Mr. H. Tom Davis  
Page 3  
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The tribe asserts that it is the only entity entitled to make the designation on the lower portion of the St. Joe. However, the authority to make the designation rests with the Secretaries of Agriculture and Interior as spelled out in the Wild and Scenic Rivers Act. No other entity is given this authority. The act does recognize that State land can be acquired for the purpose of the act by donation and that lands owned by the Indian tribe can not be acquired if the tribe is following a plan for management and protection of the lands which is consistent with the act. 28 USC §1277(a) This indicates that the Indian tribe can, of course, make a plan of control, but the final determination still lies with the federal agency and not the Indian tribe. In addition, the fact that the tribe is following a plan only prevents acquisition of their lands by the federal government. It does not give them control and power to decide what the designation should or should not be. In fact as the legislation is written, the tribe has no authority to make that determination.

I trust this opinion answers your questions. If you need further clarification, please write again.

Very truly yours,

FOR THE ATTORNEY GENERAL

A handwritten signature in dark ink, appearing to read 'Nathan W. Higer', written over the typed name.

NATHAN W. HIGER  
Deputy Attorney General

NWH/slg



W. ANTHONY PARK  
ATTORNEY GENERAL

STATE OF IDAHO  
OFFICE OF THE ATTORNEY GENERAL  
BOISE 83720

September 11, 1973

Honorable Joe R. Williams  
State Auditor  
State of Idaho  
Statehouse

Dear Mr. Williams,

You have asked the following question of this office:

"Reference is made to that part of Idaho Code 72-1346 (c) which reads:

'All warrants issued for the payment of benefits and refunds shall bear the signature of the director or his duly authorized agent for that purpose.'

It appears that this language was added in 1947 to the original act which created the Industrial Accident Board, now the Department of Employment.

The Taylor vs. Robison case in 59 I 485 and the Gillum vs. Johnson case in 7 Cal. 2d 744 have come to my attention. In view of the decisions resulting from these cases, along with Wright vs. Callahan, it appears to me that the above mentioned language is in conflict with the constitutional duties of this office.

An opinion written in 1938, for the State Treasurer by J. W. Taylor, Attorney General and another opinion written in 1960, for a legislative committee of the Idaho Banker's Association by Ralph R. Breshears have come to my attention. They are attached.

Request is respectfully made for an opinion, at your earliest convenience, on whether the subject language referred to above is in conflict with the constitutional duties of the State Auditor."

In briefing this matter we find it much as your research indicated; however, the Constitution was amended in 1940 to provide for this method of handling these funds.

In reviewing the file of State v. Robison, 59 Idaho 485, 83 P.2d 983, we find that in 1938 the then Attorney General issued an opinion to the effect that these funds were state funds and had to be handled through State Auditor's warrants and the Board of Examiners. In October, 1938, he was upheld by the Supreme Court in the above-named case, where a preemptory writ of prohibition was issued in November, 1938 containing these words:

"...and that you are by these premises, prohibited and absolutely restrained from paying any moneys out of the State Treasury in the employment compensation fund, except upon warrants of the State Auditor on claims submitted to and approved by the Board of Examiners. . ."

Then in March, 1939, the Idaho Legislature passed a Joint Resolution (S.J.R. 7, Idaho Session Laws 1939, p. 671) which reads as follows:

(S.J.R. No. 7)

A JOINT RESOLUTION

PROPOSING AN AMENDMENT TO ARTICLE 4, SECTION 18  
OF THE CONSTITUTION PROVIDING THAT IN THE ADMINISTRATION OF MONEYS IN COOPERATION WITH THE FEDERAL GOVERNMENT THE LEGISLATURE MAY PRESCRIBE ANY METHOD OF DISBURSEMENT REQUIRED TO OBTAIN THE BENEFITS OF FEDERAL LAWS.

Be It Resolved by the Legislature of the State of Idaho:

SECTION 1. That Article 4, Section 18 of the Constitution of the State of Idaho be amended to read as follows:

"Section 18. BOARD OF PRISON COMMISSIONERS AND OF EXAMINERS.--The governor, secretary of state, and attorney general shall constitute a board of state prison commissioners, which board shall have such supervision of all matters connected with the state prison as may be prescribed by law. They shall also constitute a board of examiners, with power to examine all claims against the state, except salaries or compensation of officers fixed by law, and perform such other duties as may be prescribed by law: Provided, that in the administration of moneys in cooperation with the federal government the legislature

may prescribe any method of disbursement required to obtain the benefits of federal laws. And no claim against the state, except salaries and compensation of officers fixed by law, shall be passed upon by the legislature without first having been considered and acted upon by said board."

SECTION 2. The question to be submitted to the voters of the state at the next general election shall be:

"Shall Article 4, Section 18 of the Constitution of the state be amended to provide that in the administration of moneys in cooperation with the federal government, the legislature may prescribe any method of disbursement required to obtain the benefits of federal laws?"

SECTION 3. The secretary of state is hereby directed to publish this proposed Constitutional amendment for six consecutive weeks prior to the next general election in one newspaper of general circulation published in each county of the state.

Passed by the Senate March 2, 1939.

Passed by the House March 2, 1939.

In November, 1940, at a general election the above resolution to amend the state Constitution was approved by the electorate. The vote was 86,328 in favor of the amendment of the Constitution and 50,029 persons voted against the amendment of the Constitution.

We have done some research on the files in this matter, have read old newspaper items, have talked to Mr. Robison and we have learned that the constitutional amendment was made for this particular purpose. That is to say, this amendment was urged so that the State of Idaho could get unemployment compensation funds from the federal government under Section 42 U.S.C. 503 (Title III, §303 of the Federal Employment Tax Act). A copy of that section of law is attached hereto. Of particular pertinence are Sections (a) (1), (2), (3), (4) and (5). The federal government would not give such funds to the State of Idaho so long as they had to go through the Board of Examiners and the State Auditor.

As you can see, Article 4, Section 18 of the Idaho Constitution says in part that the Board of Examiners shall have power to examine all claims against the state except

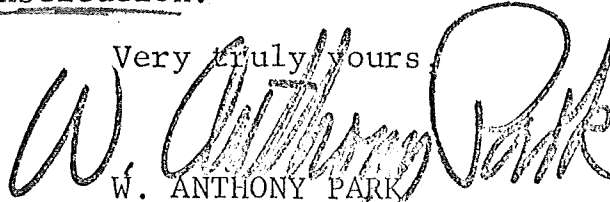
Honorable Joe R. Williams  
September 11, 1973  
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salaries or compensation of officers fixed by law, provided that:

" . . . in the administration of moneys in cooperation with the federal government the legislature may prescribe any method of disbursement required to obtain the benefits of federal laws. . ." (Emphasis added)

The Legislature has so provided by Sections 72-1346, 72-1347 and 72-1348. It thus appears that these three sections of Title 72, Idaho Code are a constitutional exercise of legislative authority within the above-cited exception to Article 4, Section 18, Idaho Constitution.

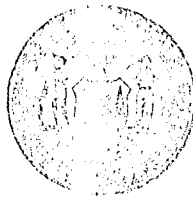
Very truly yours,



W. ANTHONY PARK  
Attorney General

WAP/WF/sg

Enclosure



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

September 14, 1973

W. ANTHONY PARK  
ATTORNEY GENERAL

Mr. Bill Webster  
Superintendent  
Liquor Dispensary  
BUILDING MAIL

Dear Mr. Webster:

You have requested an opinion from this office as to whether or not the Officers Open Mess, Non-Commissioned Officers Open Mess, and Airmans Annex to the Non-Commissioned Officers Club operating at Mountain Home Air Force Base should be allowed to purchase merchandise direct from a distiller or wholesaler, as the case may be, other than through the State of Idaho Liquor Dispensary. Secondly, in the event such direct purchases are not in violation of any law, you have asked whether or not the State of Idaho may assess its mark-up and taxes on said purchases.

It is the opinion of this office that the Superintendent of the Liquor Dispensary has the authority to prohibit any distiller from transporting merchandise to any entity other than the Dispensary. It is also the opinion of this office that if the State of Idaho Liquor Dispensary chooses not to prohibit purchases direct from the distillers or wholesalers, by entities other than the State Liquor Dispensary, the State Liquor Dispensary may nevertheless assess the Idaho tax and mark-ups on those purchases.

Section 2 of the Twenty-first Amendment to the United States Constitution states that the transportation or importation into any state, territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is prohibited. Pursuant to the passage of the Twenty-first Amendment to the United States Constitution, the State of Idaho enacted Article 3, Section 26 of its Constitution which provides as follows:

"Power and authority over intoxicating liquors.--From and after the thirty-first day of December in the year 1934, the

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legislature of the state of Idaho shall have full power and authority to permit, control and regulate or prohibit the manufacture, sale, keeping for sale, and transportation for sale, of intoxicating liquors for beverage purposes."

The Legislature, pursuant to the authority granted in Article 3, Section 26 of the Idaho Constitution enacted Section 23, Chapter 2 of the Idaho Code, which created the State Liquor Dispensary. The general powers and duties were outlined in Section 23-203, Idaho Code, which in part reads as follows:

"The dispensary shall have the following general powers and duties:  
(a) Regulation of Liquor Traffic.  
To permit, license, inspect, and regulate the manufacture, importation, storage, sale, and delivery of alcoholic liquor for purposes permitted by this act."

It thus becomes apparent that the Legislature of the State of Idaho, in accordance with the 21st Amendment to the United States Constitution, was granted the authority by Article 3, Section 26 of the Idaho Constitution for sole power over the regulation of intoxicating liquors within the State of Idaho, and by enacting Section 23, Chapter 2 of the Idaho Code delegated these powers to the State of Idaho Liquor Dispensary.

It is interesting to note at this point that the powers and duties of the Liquor Dispensary, insofar as they relate to the regulation of liquor traffic, include those regulatory powers affecting the sale and delivery of alcoholic liquor; but more importantly, they also include the power to regulate the importation and transportation of alcoholic liquor within the State of Idaho. It is clear by this express enumeration of regulatory powers concerning literally every facet in the production and sale of alcoholic liquor that the Legislature of the State of Idaho has indeed conferred upon the State Liquor Dispensary very broad authority in this area.

The question first posed presents a situation where this broad regulatory power of the State of Idaho (State Liquor Dispensary) is being directly challenged by the military at Mountain Home Air Force Base. Mountain Home Air Force Base



is asserting that the State has no right to preclude direct purchases by the military from out-of-state distributors and wholesalers. At the outset it must be noted that at no time since the installation of Mountain Home Air Force Base, and the various exchanges thereon, have any purchases of alcoholic beverages been made from any source except the Idaho State Liquor Dispensary. Such is the case today. Admittedly, during the interim period between your request for this opinion and the issuance thereof, the military has engaged in purchases outside of the State of Idaho from out-of-state distillers and wholesalers. These purchases, however, were authorized only until an official opinion from this office could be issued in response to the questions you have asked.

In answer to your first question, it is not necessary to discuss the mark-up or tax implications, as the question can be decided on other grounds. By virtue of the Twenty-first Amendment to the United States Constitution and Article 3, Section 26 of the Idaho Constitution it is the opinion of this office that the State Liquor Dispensary may require that all purchases of alcoholic beverages be made through the State of Idaho Liquor Dispensary. By so acting, the State Liquor Dispensary would clearly establish itself as the exclusive wholesaler of alcoholic beverages in the State of Idaho. This conclusion can be reached notwithstanding the recent decision in the case of United States v. State Tax Commission of Mississippi et al., U.S., 37 L.Ed.2d 1, 93 S.Ct. (1973). The preceding case can be distinguished from the factual situation in the State of Idaho for the reason that the State of Mississippi allowed the military bases within the State of Mississippi to purchase either from the State wholesalers or in the alternative, direct from distillers. Such is not the case in the State of Idaho. By virtue of the authority granted by the Twenty-first Amendment to the United States Constitution, Article 3, Section 26 of the Idaho Constitution, and Section 23 of the Idaho Code, it is within the permissible bounds of the state police power for the superintendent of the Liquor Dispensary to require that all shipments of distilled spirits into the State of Idaho by out-of-state distributors be made only to the State of Idaho Liquor Dispensary for further distribution. Should you decide to undertake this course of action, it would preclude any direct purchases of distilled spirits by any entity other than the State of Idaho Liquor Dispensary.

At this point, it is imperative that the following observation be made. The case of United States v. Mississippi Tax Commission et al., supra, is by no means finally decided. The case itself is currently on remand to the Federal District Judge Three Judge Panel for consideration of two primary issues. One involves the Buck Act, the other involves the Interstate Commerce Clause of the United States Constitution. As neither

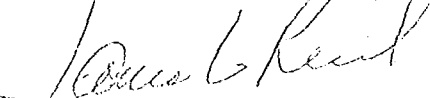
of these issues have been ultimately decided, in no event can the decision rendered by the U.S. Supreme Court in the Mississippi case be considered binding at this time.

In the event that the Superintendent of the Idaho Liquor Dispensary chooses not to adopt a regulation prohibiting transportation into the State of Idaho by out-of-state distillers of their merchandise, under the Buck Act, 61 Stat. 641, 4 U.S.C. Section 105 et seq., the State of Idaho would still be authorized to charge a tax upon the distillers on merchandise sold federal instrumentalities in the State of Idaho. This issue was raised in the Mississippi decision and upon appeal to the U.S. Supreme Court; the court did not issue a final decision regarding the Buck Act application. Until then, under the principle laid down in Alabama v. King and Boozer, 314 U.S. 1, 86 L.Ed. 3, 62 S.Ct. 43, 140 A.L.R. 615 (1941), it would be entirely permissible for the State of Idaho to levy a tax upon those people who do business with the Federal Government. In this case, the tax would be assessed against the distillers who do business with the military enclaves.

It is therefore the opinion of this office that:  
(1) the Superintendent of the State of Idaho Liquor Dispensary is entitled to adopt a regulation prohibiting the transportation of alcoholic beverages by various distillers and wholesalers to any entity except the Idaho State Liquor Dispensary, acting as the exclusive wholesaler within the State of Idaho for distribution purposes; or (2) if the Superintendent chooses not to adopt such a regulation, the State, through the Liquor Dispensary, still possesses the power to levy a tax pursuant to the provisions of the Buck Act upon any distiller or wholesaler doing business with the Federal Government.

Very truly yours,

FOR THE ATTORNEY GENERAL



JAMES G. REID  
Deputy Attorney General

JGR:cp



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

W. ANTHONY PARK  
ATTORNEY GENERAL

September 17, 1973

Honorable Cecil D. Andrus  
Governor, State of Idaho  
Statehouse  
Boise, Idaho 83720

Dear Governor Andrus:

In your letter of September 7, 1973, you requested a legal opinion on the following two questions:

- (1) In the event of an emergency electrical energy shortage in Idaho, would the Idaho Public Utilities Commission have authority to order electric utilities under its jurisdiction to curtail delivery of electrical power to users within the State?
- (2) If such mandatory curtailments were imposed, would the utilities involved be absolved from potential liability arising out of such curtailments?

It is a well established principle of law that a state may, in the legitimate exercise of its police power, enact legislation to provide for the health, safety and welfare of its citizens, and create and empower a special agency or commission to carry out the legislative intent. And where statutes so enacted come in conflict with the freedom of individuals to enter into contractual agreements, the police power of the state is paramount and must prevail. This principle is particularly applicable in the case of service contracts between regulated utilities and their customers.

In Miami Bridge Co. v. Railroad Commission, 20 So.2d 356 (1945), the Supreme Court of Florida made a cogent statement of the law on this point:

"It is established law that the inhibitions of the Constitution of the United States upon the impairment of the obligations of contracts, or the deprivation of property without due process, or the equal protection of the law by the States are not violated by the

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legitimate exercise of legislative power in securing the health, safety, morals and general welfare. \* \* \*

"Contracts by public service corporations for their services or products, because of the interest of the public therein, are not to be classed with personal and private contracts, the impairment of which is forbidden by constitutional provisions."

In City of Akron v. Public Utilities Commission et al, 74 PUR (NS) 81, 78 NE 2d 890 (1948), the Supreme Court of Ohio had before it the same issue which is the subject of this opinion. The State of Ohio was experiencing an emergency natural gas shortage, and the Ohio Public Utilities Commission had ordered East Ohio Gas Company to curtail delivery of gas to various users within the state, including the City of Akron. The City contended that the Commission did not have authority to interfere with the contract duly entered into between the City and the gas company for supply of gas to the City's residents. In upholding the action of the Commission, the Court said in part:

"Upon principle and authority, the rule has become firmly established that all contracts are subject to the police power of the state and that when in an emergency the public welfare requires the modification of contractual provisions, the primary question presented is not whether the power sought to be exercised, directly or indirectly, affects the contract, but whether the proposed action is reasonably essential in the interest of the public health, safety, morals or welfare."

The Court further pointed out:

"The authority of the state, with which we are dealing in this case, must be treated as an implied condition of any contract and as such it is as much a part of the contract as though written into it." (Emphasis added.)

The Court then concluded:

"Undoubtedly the legislative branch of the state government may confer upon the Public Utilities Commission the powers here sought to be exercised."

In view of the foregoing, and after a careful review of the Public Utility Law of Idaho, I am of the opinion that the Idaho Public Utilities Commission (hereinafter Commission) does have authority, in periods of emergency energy shortages, to order electric utilities under its jurisdiction to curtail delivery of electrical power to users within the State of Idaho.

The pertinent sections of the Idaho Code are the following:

Section 61-302. MAINTENANCE OF ADEQUATE SERVICE. --

Every public utility shall furnish, provide and maintain such service, instrumentalities, equipment and facilities as shall promote the safety, health, comfort and convenience of its patrons, employees and the public, and as shall be in all respects adequate, efficient, just and reasonable. (Emphasis added.)

Section 61-307. SCHEDULES--CHANGE IN RATE AND SERVICE.

Unless the commission otherwise orders, no change shall be made by any public utility in any rate, fare, toll, rental, charge or classification, or in any rule, regulation or contract relating to or affecting any rate, fare, toll, rental, charge, classification or service, or in any privilege or facility except after thirty days' notice to the commission and to the public as herein provided. Such notice shall be given by filing with the commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force, and the time when the change or changes will go into effect. The commission, for good cause shown, may allow changes without requiring the thirty days' notice herein provided for, by an order specifying the changes so to be made and the time when they shall take effect, and the manner in which they shall be filed and published. When any change is proposed in any rate, fare, toll, rental, charge or classification, or in any form of contract or agreement or in any rule, regulation or contract relating to or affecting any rate, fare, toll, rental, charge, classification or service, or in any privilege or facility, attention shall be directed to such change on the schedule filed with the commission by some character to be designated by the commission, immediately preceding or following the item. (Emphasis added.)

Section 61-501. INVESTMENT OF AUTHORITY.-- The public utilities commission is hereby vested with power and jurisdiction to supervise and regulate every public utility in the state and to do all things necessary to carry out the spirit and intent of the provisions of this act. (Emphasis added.)

Section 61-503. POWER TO INVESTIGATE AND FIX RATES AND REGULATIONS. -- The commission shall have power, upon a hearing, had upon its own motion or upon complaint, to investigate a single rate, fare, toll, rental, charge, classification, rule, regulation, contract or practice, or any number thereof, or the entire schedule or schedules of rates, fares, tolls, rentals, charges, classifications, rules, regulations, contracts or practices, or

any thereof, of any public utility, and to establish new rates, fares, tolls, rentals, charges, classifications, rules, regulations, contracts or practices or schedule or schedules in lieu thereof. (Emphasis added.)

Section 61-515. SAFETY REGULATIONS. -- The commission shall have the power, after a hearing had upon its own motion or upon complaint, by general or special orders, or regulations, or otherwise, to require every public utility to maintain and operate its line, plant, system, equipment, apparatus, tracks and premises in such manner as to promote and safeguard the health and safety of its employees, passengers, customers and the public, and to this end to prescribe, among other things, the installation, use, maintenance and operation of appropriate safety or other devices or appliances, including interlocking and other protective devices at grade crossings or junction and block or other systems or signaling, to establish uniform or other standards of equipment, and to require the performance of any other act which the health or safety of its employees, passengers, customers or the public may demand. (Emphasis added.)

Section 61-520. SERVICE OF ELECTRIC, GAS, AND WATER CORPORATIONS-- DETERMINATION OF STANDARDS.-- The commission shall have power, after hearing had upon its own motion or upon complaint, to ascertain and fix just and reasonable standards, classifications, regulations, practices, measurements or service to be furnished, imposed, observed and followed by all electrical, gas and water corporations; to ascertain and fix adequate and serviceable standards for the measurement of quantity, quality, pressure, initial voltage or other condition pertaining to the supply of the product, commodity or service furnished or rendered by any such public utility; to prescribe reasonable regulations for the examination and testing of such product, commodity or service and for the measurement thereof; to establish reasonable rules, regulations, specifications and standards to secure the accuracy of all meters and appliances for measurements; and to provide for the examination and testing of any and all appliances used for the measurement of any product, commodity or service of any such public utility. (Emphasis added.)

It is clear from the above referenced sections, that the legislature, in enacting the Public Utilities Law of Idaho, recognized that it could not foresee all of the contingencies that might arise over time in the process of regulating public utilities through a commission. Therefore, the legislature created a commission with special expertise and vested in that commission broad and wide ranging authority and discretionary

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powers so that it could effectively carry out its intended function. And while the statutes do not speak expressly in terms of curtailment of energy supplied to users during an emergency, such power is unmistakably vested in the Commission.

The Commission is expressly granted authority to "ascertain and fix \* \* \* service to be furnished by all electrical, gas and water corporations" (Section 61-520); to change any "regulation or contract relating to or affecting \* \* \* service, \* \* \* by an order specifying the changes so to be made and the time when they shall take effect" (Section 61-307); and "to investigate \* \* \* contracts or practices \* \* \* of any public utility, and to establish new \* \* \* contracts or practices \* \* \* in lieu thereof" (Section 61-503). The Commission is further expressly granted authority "to require every public utility to maintain and operate its \* \* \* system \* \* \* in such manner as to promote and safeguard the health and safety of \* \* \* the public, and to require the performance of any other act which the health or safety of \* \* \* the public may demand (Section 61-515); and finally, "to do all things necessary to carry out the spirit and intent of the" Public Utility Law of Idaho. (Section 61-501).

In placing such broad and sweeping language in the foregoing statutes, the legislature clearly intended to provide the Commission with the authority to invoke measures necessary to deal with the very kind of energy shortage emergency we are now facing.

The Commission has in fact, under authority of the above statutes, authorized discontinuance of service by an electric utility where such service had become highly unprofitable. See *Re Idaho Power Company*, Case F-449, Order No. 838, 1922 C PUR 45. In that case, the Commission held that a contract between an electric utility and a consumer to furnish electrical service for a period of years is subject to the proper exercise of the police power of the state and cannot abridge a commission power to authorize a discontinuance of such service in the interest of the public.

The conclusion that the Commission has authority to curtail service by electric utilities is the position consistently taken by commissions and courts in other jurisdictions.

In the case of *Re Missouri Power & Light Company*, Case No. 9357, 22 PUR (NS) 205, the Missouri Public Service Commission had before it the question of whether the Commission had jurisdiction to authorize the abandonment of an electric line. As in the instant case, the public utility laws of Missouri did not contain language dealing specifically with the problem before the Commission, but did have language very similar to that found in Section 61-501, *Idaho Code*, and other related sections. In reviewing such statutes, the Commission said:

"It is evident under those sections that the authority of the state to authorize an electric utility to or

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not to discontinue service if the facts may warrant has been delegated to this Commission, although no express provision in reference thereto exists in the law as such power is necessarily implied in the broad and comprehensive powers conferred upon the Commission over the rates and service of utilities. It certainly could not be said that the purpose of the general regulatory act was to merely authorize the Commission to enforce service on the part of the utility, but as well to relieve the utility of further service whenever the facts warrant. In other words the regulatory act certainly was designed to provide a complete rounded scheme for the regulation of public utilities of this state in such a manner as to safeguard the public interest on the one hand and to secure fairness and justice to the utilities on the other. (Citation of authorities) If the Commission as a regulatory body did not possess the jurisdiction to authorize the abandonment of service of a utility, it would necessarily mean that it would be hampered to properly function in the regulation of utilities.

Obviously it is true that W. Smith Jones had a contract with the predecessor of the applicant company, but regardless of that contract the legislative police power could not be abridged by the same."

A fact situation nearly identical to the electrical energy crisis currently confronting the State of Idaho was before the Wisconsin Public Service Commission in 1948. In that case, an electric power company was authorized to curtail service during a shortage of power supply where the hydroelectric system had suffered severely because of a general drought condition, where the company had been unable to install generating capacity during the war period because materials and labor had been allocated for other uses, where demands for service had greatly increased, and where a voluntary curtailment or shifting of electric loads to offpeak periods had not succeeded in completely correcting the situation. (The present energy shortage in Idaho arises out of a hydroelectric system suffering from a general drought condition, delays experienced by electric utilities in installing new generating capacity, greatly increasing demands for service, and the prospects that voluntary curtailment may not be sufficient to meet the emergency.)

The similarity of the two situations becomes even more apparent from the following language in the Commission's order:

"With the poor water conditions it is quite evident that a serious power shortage exists and will continue to exist for several months as any precipitation will soon be in the form of snow and therefore of no material aid until next spring.



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The applicant has indicated that it has and is continuing to relieve the power shortage by persuading customers and noncustomers to operate generating facilities which can increase the company's capacity. In addition it has requested voluntary curtailment or shifting of electric loads to off-peak periods. In the case of residential and farm service it has attempted to obtain the reduction by publicity. In the case of commercial service, it has met with various groups and through personal solicitation has asked customers to turn off all window-sign lighting and advertising lighting. In the case of power customers, the company has contacted various power users and has attempted to persuade them to shift their operations. It has also contacted utilities that purchase energy from it and asked them to institute voluntary reductions in their loads. The company reports that it has obtained cooperation from its customers, but it appears that voluntary cooperation may not be enough to avoid disconnection of certain loads during peak periods. It has therefore asked this Commission for authority to enforce certain reductions if its voluntary efforts fail to reduce the loads sufficiently. It should be pointed out that the deficiencies which are now anticipated will increase if any of the steam-driven generating units on the system fail or if steam-flow conditions deteriorate further."

In that instance, the Commission held that it had power to deal with emergencies affecting utility service and that an emergency order authorizing curtailments of service of electric utilities should be issued. Re Superior Water, Light & Power Company, 78 PUR (NS) 188. See also Re Consolidated Edison Company of New York, Inc., Case 25937, 89 PUR 3d 517.

In Re Commonwealth Edison Company et al, (Illinois Commerce Commission, 1946), 63 PUR (NS) 129, several electric utilities made application to the Commission for authority to curtail service because of a coal strike emergency. The Commission concluded:

"The above facts which the petitioners have presented to the Commission indicate the necessity of embarking upon an immediate program for curtailing electric service in order to conserve the remaining supply of coal on hand, so as to prolong so far as possible their ability to supply electric service essential to public health and safety and protection of property.

It is obvious that voluntary curtailments of use will not effectively relieve the situation and it is therefore imperative that curtailment be made in certain less essential uses of electricity in order to prolong so far as practicable the ability of the petitioners to

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supply electricity for uses essential to public health and safety and protection of property.

The evidence permits of no other conclusion than that steps should be taken immediately to curtail the use of electricity by all classes of customers."

The Commission then set forth a rather lengthy and detailed order invoking mandatory curtailment of energy usage by various classes or users throughout the state. See also Re Peoples Gas Light and Coke Company (Illinois Commerce Commission), 62 PUR (NS) 181; Automatic Firing Corporation v. Laclede Gas Light Company (Missouri Public Service Commission), Case No. 11155, 72 PUR (NS) 130; Re Michigan Consolidated Gas Company (Michigan Public Service Commission), Case No. D-3000, 74 PUR (NS) 406.

Finally with regard to the question of liability which utilities might incur, it seems clearly implied from the foregoing cases that utilities so ordered would be absolved from any liability to their customers for non-performance of contracts arising out of such curtailments. It necessarily follows that if the Commission can order curtailments, then utilities should not be liable; otherwise, the authority of the Commission to so order would be meaningless.

Furthermore, under the doctrine of impossibility of performance, where a shortage of power supply has arisen out of conditions beyond the control of the utility, and where the utility is ordered to curtail deliveries to both its interruptible and firm load customers by a lawful order of an administrative agency of state government, the utility would be excused from liability. Corbin On Contracts, Section 1346, Prevention By Order Or Decree Of A Court Or Administrative Officer, provides:

"The government through the action of its administrative officers, may make performance of a contract impossible, or unreasonably difficult and expensive, by priority orders and regulations as to the supply and use of specified objects and materials. Proof of such impossibility or difficulty and expense is a good defense in an action against the contractor for nonperformance of his contract. The statutes authorizing such administrative orders and regulations may expressly provide for such a defense; but even in the absence of such a provision, the court should recognize the defense. In these cases, there may be no direct 'requisition' of the contractor's property, as that term is generally understood; but the same reasoning applies and justice requires the same result." Corbin at pp. 433-34.

In F. A. Graham Gillies et al., v. LaMesa, Lemon Grove & Spring Valley Irrigation District et al., -Cal App(2d)-, 129 P(2d) 941, customers of an irrigation district sought damages for violation of a

Honorable Cecil D. Andrus

-9-

September 17, 1973

contract to furnish and deliver water at a certain price. The Court specifically held that violation of the terms of a contract fixing rates for water service could not furnish grounds for an action for damages where the rates fixed by the contract had been superceded by rates established by the proper regulatory commission.

The same rule should apply in the case of service contracts between electric utilities and their customers, when such contracts are superceded by an order of the Commission imposing mandatory curtailments on such service.

Therefore, I am of the opinion that where an emergency energy shortage clearly exists, the Idaho Public Utilities Commission has full authority, after a hearing, to order electric utilities under its jurisdiction to curtail delivery of both interruptible and firm load electrical energy to users in the State of Idaho, in such quantities and in such manner as the Commission determines to be necessary in the public interest.

Very truly yours,

W. ANTHONY PARK

WAP/glm/mw



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

W. ANTHONY PARK  
ATTORNEY GENERAL

September 19, 1973

Mr. Robert W. Galley  
Twin Falls County Prosecuting Attorney  
Judicial Building  
Twin Falls, Idaho 83301

Dear Mr. Galley,

Please consider the following in regard to your recent request for an opinion concerning the possibility of changing the salaries of county officers and employees at some time other than at the annual meeting of the county commissioners in April of each year.

Section 31-3106, Idaho Code, provides as follows:

"31-3106. Salaries of county officers.--It shall be the duty of the board of county commissioners of each county at its annual meeting in April of each year to fix the annual salaries of the several county officers, except county commissioners and prosecuting attorneys, as of and from the second Monday of January, for the next ensuing year."

The salaries of the county commissioners of each county and of the prosecuting attorneys of each county are set at specific amounts by Sections 31-3104 and 31-3113, Idaho Code, respectively.

Section 31-3107, Idaho Code, provides in part that deputies and clerical assistants for the sheriff, assessor, treasurer, tax collector, clerk of district court, auditor and recorder are to receive such remuneration as is fixed by the board of county commissioners. Article 18, Section 7 of the state Constitution provides, among other things, that county officers and deputies are to receive salaries to be paid monthly and Article 18, Section 8 of the state Constitution provides, among other things, that the compensation provided for in the last section shall be paid as provided for by law.

One other section of law relates directly to these questions, that is Section 31-1606, Idaho Code, which reads as follows:

"31-1606. Expenditure limited by appropriations-- Road and bridge appropriations--Increase of salaries.-- The estimates of expenditures as classified in each of the two (2) general classes, "Salaries and wages" and "Other expenses," required in section 31-1602, as finally fixed and adopted as the county budget by said board of county commissioners, shall constitute the appropriations for the county for the current fiscal year. Each and every county official or employee shall be limited in making expenditures or the incurring of liabilities to the respective amounts of such appropriations. Provided, in the case of road and bridge appropriations, other than "Salaries and wages," any lawful transfer deemed necessary may be made by resolution formally adopted by the board of county commissioners at a regular or special meeting thereof, which action must be entered upon the minutes of said board; provided, further, that no salary may be increased during the current year after the final budget is adopted, without resolution of the board of county commissioners, which resolution shall be entered upon their minutes." (Emphasis added.)

Bert Miller, who was Attorney General in 1944, dealt with a somewhat similar problem relating to Section 30-2606, Idaho Code Annotated which is now Section 31-3106, Idaho Code, as set forth in the attached opinion. It should be observed, however, that there is some difference between the amendment there dealt with and this case. That statute provided for changing the salaries of any county officer; Section 31-1606, Idaho Code, does not so provide.

In Stookey v. Board of Commrs., 6 Idaho 542 at 548, 57P312, the Court in 1899 said:

". . . There is nothing in our constitution, which, directly or indirectly sanctions the principle of a county officer fixing his own salary. On the other hand, the trend of our laws, both fundamental and statutory, and public policy, forbid the principle. We do not think that the legislature has authority to vest even a discretionary power in any officer to fix his own salary. Common honesty, public morals, and the protection of the individual citizen demands, pro bono publico, that such a practice should not be tolerated. It is a well-defined public policy in this state that no person acting in an official capacity shall fix the price of

materials furnished the public, or fix the compensation for services rendered or to be rendered by him for the public. The law wisely protects a public officer from the temptation of being too generous in the matter of fixing his own compensation. Our conclusion is that the act in question is valid, except that part thereof which attempts to authorize county commissioners to determine what amount of salary between \$150 and \$1,000 per annum they shall receive. Inasmuch as boards of county commissioners in the various counties of the state have already, by order, designated the salaries to be received by all county officers, we deem it best to suggest that the orders made by the boards of county commissioners, so far as their own compensation is concerned, are void, and that, until further legislation is had, county commissioners will receive the compensation now fixed by statute. . .".

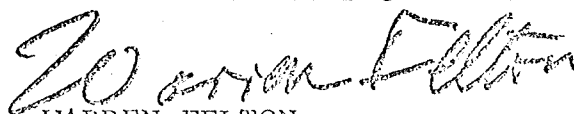
This would preclude the county commissioners from raising their own salaries. Also, such salaries are specifically set as to each county by statute, Section 31-3104, Idaho Code, without any indication in the section that they can be changed. The situation as to prosecuting attorneys is also similar. Their salaries are also specifically set as to each county.

It would therefore seem that the salaries of the county officers, deputies and employees other than county commissioners and prosecuting attorneys can be changed other than as provided for by Section 31-3106, Idaho Code. Probably the salaries of the county commissioners and prosecutors can only be changed by legislation. I believe Mr. Southcombe meant to say something similar in his opinion of February 2, 1965, which is attached. There is, however, another problem in respect to changing such salaries. That problem relates to the county budget law and the ability to change the county budget. That problem is dealt with by two enclosed opinions; Daniel A. Slavin's of September 3, 1968 and Thomas G. Nelson's of September 29, 1965.

The question of an emergency under Section 31-1608, Idaho Code, has been dealt with at length in the attached opinions and in the recent case of Reynolds Construction Co. v. Twin Falls County, 92 Idaho 61, 437 P.2d 14.

Sincerely yours,

FOR THE ATTORNEY GENERAL

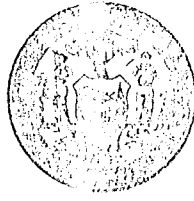


WARREN FELTON

Deputy Attorney General

WF:sg

Enclosures - 4



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OFFICIAL OPINION #74-37

STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

W. ANTHONY PARK  
ATTORNEY GENERAL

September 19, 1973

Robert S. West, M. D. F.A.C.S.  
Chairman  
Idaho Medical Association Committee  
Emergency Room Highway Safety &  
Disaster Planning  
920 Ironwood Drive  
Coeur d'Alene, Idaho 83814

Dear Doctor West,

You have asked us for an interpretation of Sections 31-3901 and 31-3906, Idaho Code. You wish to know whether these sections would allow a county to support more than one ambulance service.

Those sections read as follows:

"31-3901. Authorization to establish ambulance service--Special levy.--The boards of county commissioners in the several counties are hereby authorized, whenever existing ambulance service is not reasonably available to the inhabitants of the county or any portion thereof, to procure an ambulance and pay for the same out of any funds available and to establish an ambulance service to serve the areas, which do not have an existing ambulance service reasonably available, both within and outside the cities and villages in their respective counties, and to levy a special tax not to exceed one (1) mill to support the same."

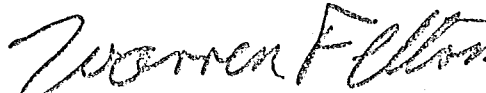
"31-3906. Ambulance service--Adjacent counties and/or private individuals and corporations may have cooperative agreement.--The board of county commissioners of any county wherein such ambulance service has been established is authorized in its discretion and under such terms and conditions as it deems appropriate to enter into a cooperative agreement with adjacent counties and for private individuals and corporations to provide ambulance service for such county or counties or a portion thereof. All cost of said service shall be apportioned equitably among the participating counties as determined by their respective boards of county commissioners."

Robert S. West, M. D. F.A.C.S.  
September 19, 1973  
Page two

You will find such phrases as "to serve the areas which do not have an existing ambulance service", "any portion thereof" and "a portion thereof" in these two sections. The tenor of these sections seems to be that whether or not there is an existing ambulance service in a county one can still be established in a portion of a county, a county or more than one county. These phrases and the idea behind this section only make sense if there can be more than one ambulance service in a county. Before these sections were amended in 1965, the law provided for establishment of "an ambulance service" for each county. The amendments were then made and provided for ambulance services to the areas not served; or allowed agreements to provide ambulance services for any county, counties or portion thereof. These changes would seem to clearly provide for more than one ambulance service in a county if the county commissioners so decide.

Sincerely yours,

FOR THE ATTORNEY GENERAL

A handwritten signature in cursive script, reading "Warren Felton".

WARREN FELTON  
Deputy Attorney General

WF:sg





OFFICIAL OPINION #74-38

W. ANTHONY PARK  
ATTORNEY GENERAL

STATE OF IDAHO  
OFFICE OF THE ATTORNEY GENERAL  
BOISE 83720

September 20, 1973

Mary Smith  
City Attorney  
30 South 2nd West  
Rexburg, Idaho 83440

Dear Ms. Smith,

You have asked about qualification of electors. The cause of the recent changes in this field is, of course, Dunn v. Blumstein, 405 U.S. 33, 31 L.Ed.2d 274, 92 S.Ct. 995.

Sections 50-411, 34-104 and 34-402, Idaho Code, have all been changed. They have been changed to delete durational residency requirements and require "bona fide residence". Residence is, of course, a mixed matter of intent and observable fact. The work, 37 Words & Phrases gives about 170 pages of cases defining reside, residence and other forms of this term. Most of the definitions are similar to the following:

"'Residence' is a favorite term employed by the American legislator to express the connection between person and place, its exact signification being left to construction to be determined from the context and the apparent object to be attained by the enactment. 'Residence' when used in statutes is generally construed to mean 'domicile.' In general, the term 'residence' implies the place of domicile, the place where a person has his home, and where he has gained a residence. The word 'residence' as used in the constitution has substantially the meaning of 'habitation' 'domicile' or place of abode. State ex rel. Kaplan v. Kuhn, 11 Ohio Dec. 321, 329, 8 Ohio N.P. 197."

"Although the expressions 'residence', 'place of abode' and 'domicile' have sometimes been said to be synonymous, yet etymologically the word 'residence' is probably the weakest and most general of all. In re Duren, 200 S.W.2d 343, 350, 355 Mo. 1222, 170 A.L.R. 391."

Mary Smith  
September 20, 1973  
Page two

"The word 'residence' means the place where one resides, or sits down or settles himself, and is largely a matter of intention not involving dominion over the particular spot or domicile. Nevertheless it ordinarily implies something of permanence or continuity at least for an indefinite period, to the exclusion of other contemporaneous residence. In re Duren, 200 S.W.2d 343, 350, 355 Mo. 1222, 170 A.L.R. 391."

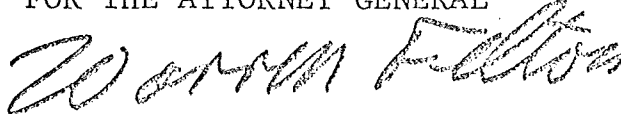
Local persons will, in most cases, know whether one lives in a given town.

The procedures for challenge and taking an oath are set out in the code, e.g., Sections 34-304, 34-1104 and 34-1111, Idaho Code.

Also included for your consideration is an opinion of John Croner's dated June 13, 1972, relating to durational residency requirements.

Sincerely yours,

FOR THE ATTORNEY GENERAL

A handwritten signature in dark ink, appearing to read "Warren Felton", written in a cursive style.

WARREN FELTON  
Deputy Attorney General

WF:sg

Enclosure

September 24, 1973

Mr. R. D. Frizzell  
President  
Nampa Police Protective Assn.  
Local No. 474  
Nampa City Hall  
Nampa, Idaho 83651

Dear Mr. Frizzell,

You have asked us whether the contract of a city, made with the city's present mayor, will be binding on the next mayor and the city if a new mayor and city council are elected.

The rule in this situation is that cities are bound by their contracts and must perform a valid contract just the same as any individual or corporation must perform their contracts. 10 McQuillin on Municipal Corporations, 569 §29.119, and see Grant Construction Co. v. Burns, 92 Idaho 408, 443 P.2d 1005 and Smith v. State, 93 Idaho 795, 473 P.2d 937, where the whole doctrine of liability of governmental agencies for their contracts and torts are dealt with at length and it is concluded that a state or other local government must perform its contracts or answer therefore in court and is liable for its torts if it acted in a proprietary capacity.

Sincerely yours,

FOR THE ATTORNEY GENERAL

WARREN FELTON  
Deputy Attorney General

WF:sg

September 25, 1973

C  
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Lieutenant Richard Burns  
Criminal Identification Division  
Idaho State Police  
P. O. Box 34  
Boise, Idaho 83707

Dear Mr. Burns:

Sometime ago you requested an opinion regarding the providing of background checks to various governmental agencies. You mentioned that Senate Bill 1579 (1972), now Idaho Code 67-2931, does allow background checks for certain governmental units. Idaho Code 67-2931 reads as follows:

67-2931. "Authority to submit fingerprints to state criminal identification division and federal bureau of investigation.--All units of state, city and local governments, as well as any agency in the state created by the legislature who require by statute, regulation, or, local or county ordinance, fingerprinting of applicants or licensees, are hereby authorized to submit fingerprints to the state criminal identification division, of the department of law enforcement, for examination and further submission, if necessary, to the federal bureau of investigation. Such identification records resulting from submission of fingerprints shall be used only for the official use of the requesting party."

As can be determined from a reading of the statute, it contains its own limitations. Before fingerprints can be submitted and background checks provided, the requesting governmental unit must be state, city, or local or have been created by the legislature and the unit must require, by statute, regulation, or local ordinance fingerprinting of

Lieutenant Richard Burns  
September 25, 1973  
Page 2

applicants or licensees. Until these two requirements have been fulfilled, the criminal identification division cannot provide background checks.

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You mentioned that background information would be helpful to other governmental units or agencies that do not, by statute, meet the requirements of Idaho Code, 67-2931. This, no doubt, is true, but until the legislature determines that fingerprinting is a requirement for applicants or licensees in that particular governmental area, the Criminal Identification Division of the Department of Law Enforcement cannot provide background information to the requesting unit.

I trust this answers your questions.

Sincerely,

FOR THE ATTORNEY GENERAL

WAYNE G. CROOKSTON, JR.  
Assistant Attorney General

WGC:cg



STATE OF IDAHO  
OFFICE OF THE ATTORNEY GENERAL  
BOISE 83720

W. ANTHONY PARK  
ATTORNEY GENERAL

September 26, 1973

Tom D. McEldowney  
Commissioner  
Department of Finance  
Building Mail

Re: Section 28-33-601, Idaho Code.

Dear Mr. McEldowney:

In your letter of September 18, 1973, you request an official opinion from this office as to whether any loan made by a lending institution to any person or organization for any purpose may be made subject to the provisions of the Uniform Consumer Credit Code by written agreement between the parties that the terms of the Uniform Consumer Credit Code will apply to the loan.

Section 28-33-601 of the Idaho Code provides as follows:

"Loans subject to act by agreement of parties.--The parties to a loan other than a consumer loan may agree in writing signed by the parties that the loan is subject to the provisions of this act applying to consumer loans. If the parties so agree, the loan is a consumer loan for the purposes of this act."

Under the above provision of the U.C.C.C., it would be possible for parties to enter into a loan agreement which, although ordinarily would not be subject to the terms and provisions of the U.C.C.C., by virtue of the agreement contemplated in Section 28-33-601, would necessarily bring the loan within the purview of the U.C.C.C.

In your letter, you expressed concern regarding the situation where the interest rates allowed by the U.C.C.C.

Tom D. McEldowney  
September 26, 1973  
Page 2

for a given loan would exceed those interest rates under the state usury statute found in 28-22-105, et seq., Idaho Code. Although there is a body of case law stating that parties to a loan agreement may not contract to avoid the usury provisions of state statutes, such cases were decided well before the Uniform Consumer Credit Code was adopted in the State of Idaho. To assume that parties who enter into an agreement to abide by the Uniform Consumer Credit Code respecting its provisions on consumer loans would in some manner be in violation of the state usury statute, would be akin to saying that the Uniform Consumer Credit Code itself is in violation of the state usury statute which obviously is not the case.

It is therefore the opinion of this office that pursuant to Section 28-33-601, Idaho Code, any two parties whether they be private or corporate, may enter into a loan agreement which is not otherwise considered a consumer loan under the U.C.C.C. and by such agreement provide that the terms and conditions of the loan contemplated shall become subject to the U.C.C.C. in each and every respect.

Very truly yours,

FOR THE ATTORNEY GENERAL

JAMES G. REID  
Deputy Attorney General

JGR:cp



## STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

W ANTHONY PARK  
ATTORNEY GENERAL

October 2, 1973

Honorable Cecil Andrus  
Governor of Idaho  
Statehouse  
Boise, Idaho 82720

Dear Governor Andrus:

Pursuant to Title 47, Chapter 16 of the Idaho Code, the State Board of Land Commissioners is instituting a geothermal resources leasing program. In its Proposed Rules and Regulations Governing the Issuance of Geothermal Resources leases, Rule 3 provides:

"The application for a Geothermal Resources lease shall be accompanied by a filing fee established and modified from time to time by the Department of Public Lands. Failure to deposit a sufficient filing fee shall constitute a defect in the lease not covered by Rule 7 and the application will not be considered properly filed until the correct filing fee is paid. A filing fee will be considered sufficient if it is within ten percent (10%) of the correct amount."

When we reviewed the rules and regulations with the Board on September 18, 1973, you raised the question whether the State Board of Land Commissioners or the Department of Public Lands enjoyed the discretion to set the application fee, or if the Board and the Department were bound by the provisions of Title 58, Chapter 1 of the Idaho Code. Specifically, Section 58-127 provides:

"The said Board shall collect the following fees:

For filing each application to lease or purchase, One Dollar (\$1.00)."

The predecessor statute to Section 58-127 was first enacted in 1905. It has been amended from time to time, most recently in 1955. Title 58 provides for the sale or lease of state lands or for a grant of right of way across



state lands. Prior to 1923, the Idaho statutes did not specifically distinguish between surface rights and subsurface rights in state lands. In 1923, Idaho enacted legislation separating surface rights and mineral rights. Title 47, Chapter 7. The Board was empowered to reserve mineral rights in all land sales and to lease mineral rights separately from surface rights. Section 47-710 provides:

"The board shall by rules and regulations prescribe the form of application, the form of lease, the amount of filing and recording fees, the annual rental, the amount of royalty, the basis upon which the royalty shall be computed, and such other details as it may deem necessary in the interest of the state, except as otherwise provided in this chapter." (Emphasis added.)

Section 47-710 is not carried forward verbatim in Title 47, Chapter 8, enacted in 1937, regarding leasing of oil and gas, nor in Title 47, Chapter 16, enacted in 1972, regarding leasing of geothermal resources. On the other hand, there is nothing in Chapters 8 and 16 expressly inconsistent with Section 47-710.

Section 47-802 provides:

"State board of land commissioners is hereby authorized and empowered to make and establish rules and regulations governing the issuance of oil and gas leases under the provisions of this act and covering the conduct of development and mining operations to be carried on thereunder."

Section 47-1603 provides:

"The state board of land commissioners is hereby authorized and empowered to adopt such rules and regulations governing the issuance of geothermal resource leases and governing the conduct of any operations thereunder."

In light of the differential treatment of surface and subsurface rights in state lands within the Idaho Code, and in light of the specific language of discretionary fee-setting in Title 47, Chapter 7, and the broad language in Title 47, Chapters 8 and 16, there is implicit in the authority of the Board to adopt rules and regulations governing


Honorable Cecil Andrus  
October 2, 1973  
Page 3

the issuance of oil and gas and geothermal resources leases the authority of the Board to adopt housekeeping rules such as the form of the lease application, number of copies, and application and recording fees. In the Board's discretion, it may delegate fee-setting to the Department of Public Lands. I.C. 58-119. The Board and the Department continue to be bound by the fees in Title 58, Chapter 1 for the sale or leasing of surface rights in state lands and the granting of rights of way.

Accordingly, I am of the opinion that Rule 3 of the Proposed Rules and Regulations Governing the Issuance of Geothermal Resources Leases is consistent with the Idaho Code.

Sincerely,

FOR THE ATTORNEY GENERAL

  
MATTHEW J. MULLANEY, JR.  
Deputy Attorney General

MJM:cg

October 4, 1973

Mr. Glen A. Coughlan  
Coughlan, Imhoff, Christensen & Lynch:  
Attorneys at Law  
608 Hays Street  
Boise, Idaho 83702

Re: West Mountain Sewer and Water District

Dear Mr. Coughlan:

This will supplement our earlier opinion of June 29, 1973. In that opinion we stated:

"The statutes are clear on their face. I would conclude that no person may participate in a water and sewer district election unless he affirmed or attested that he is a qualified elector of the state of Idaho, that he has been a bona fide resident of the district for more than thirty days prior to the date of the election; and that he is a taxpayer within the district."

The requirement within the statute that an elector on the issue of whether or not to form the water and sewer district be a taxpayer within the district was struck down in Clemens v. Pinehurst Water District, 81 Idaho 213, because it conflicted with the Idaho Constitution, Article 1, Section 20.

Whether the requirement that an elector in an indebtedness election in a water and sewer district be a taxpayer is valid and continues in effect, is uncertain. The Idaho Constitution, Article 1, Section 20, specifically authorizes a property qualification in "elections creating indebtedness." Yet, in Muench v. Paine, 94 Idaho 12, the Idaho Supreme Court said:

Mr. Glen A. Coughlan  
October 4, 1973  
Page 2

"General obligation bonding election statutes of this state which limit the franchise to real property owners must be considered as invalid under the pronouncement of the United States Supreme Court in Phoenix v. Kolodziejski." 94 Idaho at 14.

This broad dicta may be qualified by Salver Land Company v. Tulare Lake Basin Water Storage District, U.S. \_\_\_, 93 Supreme Court 1224 (1973). Other relevant cases are: Kramer v. Union Free School District, 395 U.S. 621 (1969), Cipriano v. City of Houma, 395 U.S. 701 (1969), and City of Phoenix v. Kolodziejski, 399 U.S. 204.

To assure sound financing of the water and sewer district, we suggest that you be guided by bond counsel in this matter or by a lender if you intend to borrow from an institution.

Very truly yours,

W. ANTHONY PARK  
Attorney General

WAP:cg

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## IDAHO PUBLIC UTILITIES COMMISSION

STATEHOUSE  
BOISE, IDAHO 83720  
384-3420

HARRY L. NOCK, *President*  
RALPH H. WICKBERG, *Commissioner*  
ROBERT LENAGHEN, *Commissioner*

MARILYN BOURNER, *Executive*  
*Assistant & Secretary*



CECIL D. ANDRUS  
*Governor*

RECEIVED

OCT 10 1973

October 9, 1973

OFFICE OF ATTORNEY GENERAL  
STATE OF IDAHO

COPY

Mr. Carl W. Warner  
Department of Education  
Len B. Jordan Office Building  
Boise, Idaho 83720

Dear Mr. Warner:

In your letter of October 3, 1973, you requested a written opinion of the following question:

When school buses, owned by a school district, are used to transport students to and from school connected activities, and such students are charged on a per student basis for the service, is such transportation exempt from regulation by this Commission:

The Motor Carrier Act provides in part "nothing in this Act shall be construed to include (1) motor vehicles employed solely in transporting school children and teachers to or from school or to and from approved school activities, when the motor vehicles are wholly owned and operated by such school." Section 61-801(k)(1), Idaho Code. The language of the statute is clear and unambiguous. Use of school buses for transportation is exempt from regulation by this Commission so long as the following elements are present:

- (1) The school buses are owned by the school district;
- (2) The activity is school related and approved by proper school authorities; and
- (3) Passengers are either students or teachers.

Such activities would clearly include athletic events. However, please note that parents or other persons not qualifying as "school children" or "teachers" could not be included.

Also, in light of the specific exemption contained in Section 61-801, Idaho Code, a charge on a per student basis

Mr. Carl W. Warner

-2-

October 9, 1973

for such transportation would be immaterial.

One further caution: Insurance policies for such buses should be carefully examined to make certain there is adequate insurance coverage while buses are being used for transportation to and from such activities.

Sincerely yours,

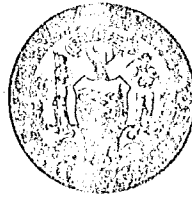
IDAHO PUBLIC UTILITIES COMMISSION

GARY L. MONTGOMERY  
Assistant Attorney General  
Assigned to the Idaho  
Public Utilities Commission

GLM:mw

cc: D. F. Engleking  
✓ W. Anthony Park  
Jim Hargus

COPY



W. ANTHONY PARK  
ATTORNEY GENERAL

STATE OF IDAHO  
OFFICE OF THE ATTORNEY GENERAL  
BOISE 83720

October 9, 1973

Honorable A. L. White  
Senator, District 7  
P.O. Box 2100  
Orofino, Idaho 83544

Dear Senator White:

You have asked the following question:

"whether a cable television system need acquire any franchise, permit, or other evidence of authority from the county commissioners, or any other body, for the installation and maintenance of cable television system outside the limits of an incorporated city."

So far as this writer can determine, there is absolutely no law on this subject as far as the State of Idaho is concerned. While it could be argued that counties can grant such franchises under Article 12, Section 2, Idaho Constitution, counties in Idaho do not grant franchises of any type that I have been able to learn about, except where specifically so provided by statute.

We therefore believe that a cable television system does not need a franchise permit or evidence of authority from a county in installing a cable television system in a county, and outside of cities. Nor do we believe that a city would have the ability to regulate such matters outside of the city under Section 50-329, Idaho Code.

Sincerely yours,

FOR THE ATTORNEY GENERAL

*Warren Felton*

WARREN FELTON  
Deputy Attorney General

WF:sg

cc: Mr. Mike McNichols, 227 College Ave., Orofino, Idaho, 83544



## STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

W. ANTHONY PARK  
ATTORNEY GENERAL

October 9, 1973

Mr. Glen W. Nichols  
Director  
State Planning and Community Affairs  
Building Mail

Re: Whether or not a city or county may legally adopt an interim or emergency zoning ordinance prior to the completion and adoption of a comprehensive plan?

Dear Mr. Nichols:

You have asked the office of the Attorney General for an opinion on whether or not a city or county may legally adopt an interim or emergency zoning ordinance prior to the completion and adoption of a comprehensive plan. To answer that question, this letter is divided into four parts.

First will be a discussion of the relevant Idaho statutes related to zoning. The discussion will focus on what is often referred to as the "zoning enabling act". This legislation is substantially identical to enabling legislation found in many other states.

There will follow a discussion of whether or not an interim zoning ordinance can be made operative without following certain requirements of the enabling legislation.

The alternative to interim zoning will then be briefly discussed. Generally, this involves the use of the building permit procedure as an interim land use planning tool.

Finally, there will be a discussion of the safe course to follow in Idaho. Included will be my recommendations as to how a local government should proceed in adopting stop-gap zoning pending the adoption of the ultimate comprehensive plan or ordinance.



I.

DISCUSSION OF IDAHO ZONING ENABLING LEGISLATION

1. The substantive problems.

Section 50-1203, Idaho Code states in pertinent part as follows:

"(Zoning) Regulations shall be made in  
accordance with a comprehensive plan,..."

This has been the briar patch in which a great many local governments in other states have become entangled in their attempt to pass an interim zoning ordinance. The local government, through its zoning commission, recognizes the need for zoning in an area, and proceeds to formulate a comprehensive plan. It is soon discovered that this is not an easy task, and cannot be completed in a short time.

Also, it is necessary to involve the public in the planning process. Generally, this is a statutory requirement. The public becomes aware of impending zoning and there is a "race for diligence" on the part of many developers in the area, seeking to acquire vested rights prior to the adoption of the ultimate ordinance. In order to protect against this, local governments pass an emergency or interim zoning ordinance. The interim ordinance is not in accordance with a comprehensive plan, since the comprehensive plan is still in the formulative stages. The result is self-evident. The interim or emergency ordinance is struck down by the courts.

Does the term "comprehensive plan" need to be defined in terms of "ultimate plan"? In Idaho this is an open question, since the Idaho Supreme Court has never defined "comprehensive plan".

"Local legislative bodies are clothed  
with a very liberal discretion as to  
what detail would be necessary to consti-  
tute an adequate comprehensive plan for  
a city or town."

Vol. 1, Yokley, Zoning Law and Practice, pg. 41 (pocket parts), (3rd. ed.); citing Lebanon vs. Woods, 215 A2d 112 (Connecticut, 1965).

As a starting point, the above statement is well and good; however, the question of what is a comprehensive plan is not answered by that statement. Yokley, in the above referred-to chapter and section, indicates that a comprehensive plan

is a general plan formulated to control and direct the use and development of property in an area, dividing that area into districts according to the present and potential use of the property. These district lines need not be drawn with accuracy. Also, he recognizes that in several jurisdictions, the comprehensive plan may be found within the framework of the ordinance itself, when read in conjunction with a zoning map. It would appear that the comprehensive plan is anything which shows that consideration has been given by the local government to an orderly, rational development of the area, and which provides direction towards that orderly and rational development. In other words, it is a statement of policy to be followed in developing the area in question.

The total area in question must be included in the plan; this, in order to avoid substantive discrimination often present in piece-meal or spot zoning. In other words, the statutory requirement of a comprehensive plan is an implementation of the constitutional requirement of substantive due process, that private property shall not be taken for a public use without just compensation. A comprehensive plan or overall zoning scheme is insurance against arbitrary and capricious zoning on a case by case basis which otherwise might be "taking" of property without due process.

A suggestion begins to emerge: Could not a local government put together a "comprehensive plan" in a relatively short period of time which would satisfy the requirement of Idaho Code, Section 50-1203?

Most Idaho counties, feeling the pressure from developers, are relatively unpopulated rural counties. They do not have large financial resources. A rational reading of Idaho Code, Section 50-1203 would distinguish between these counties with their limited financial and human resources, and the more wealthy and populated counties, in determining what constitutes a comprehensive plan. In other words, a comprehensive plan for Camas County (population 768) would be much different in substance than a comprehensive plan for Ada County. I am of the opinion that a bona fide attempt on the part of an Idaho county to devise a "comprehensive plan" within its financial and human resource capabilities would comport with Idaho law.

Specifically, a document in which is included observations of existing development trends, observations as to future trends, physical limitations on the land itself, and other apparent and easily determined factors related to development would be sufficient, when combined with a map showing the approximate areas in which development should be encouraged, and those areas in which development should be discouraged. The document and the map could be the result of the combined efforts of the Planning and Zoning Commission and the residents

of the area having particular knowledge of the area. Also included could be a statement regarding the type of development desired, and the locations thereof. Given sufficient energy and motivation, this plan could be devised in a relatively short period of time.

A comprehensive plan would then be in existence; a zoning ordinance adopted in accordance with such plan would be sufficient under Idaho Code, Section 50-1203.

Care should be taken, however, to avoid a possible tendency to regard the hastily enacted comprehensive plan as the final plan for the area in question. It should be stressed that this plan is merely a first step in what should ideally be an evolving process, in which the comprehensive plan becomes refined and honed to a sharp edge. As soon as the initial plan is drafted and made law, efforts should begin immediately towards this refining process.

## II.

### THE PROCEDURAL PROBLEMS

Often, the local government, in its zeal to see an interim ordinance rapidly enacted, will forego certain procedural requirements in passing its interim ordinance. Most often, this would take the form of an omission to hold public hearings on the proposed ordinance. I believe that in Idaho this would be fatal under existing legislation. For this reason, I would suggest that cities and counties follow procedural requirements in enactment of an interim ordinance. I would refer the reader to a previous letter written by myself to Mr. Nichols, dated August 21, 1973, for a discussion of those requirements.

## III.

### THE EXTREME: PASSING A ZONING ORDINANCE WITHOUT CONFORMING TO COMPREHENSIVE PLAN REQUIREMENTS AND PROCEDURAL REQUIREMENTS.

Only two states, amidst a rather large number of states which have considered the problem, have upheld an interim zoning ordinance which was passed without conformance to a comprehensive plan, and/or without conformance with certain procedural requirements, in the absence of legislation allowing for an interim ordinance. Basically, the argument runs as follows: Ultimate zoning cannot occur overnight. Enabling legislation recognizes that fact, and implied from that enabling legislation is the authority to adopt short term zoning, without following the requirements applicable to the ultimate zoning

plan. In other words, the power to zone must include the power to protect the goals of the planning and zoning philosophy of the area, which would be destroyed if, during the period of formulation, parties seeking to evade the ultimate zoning scheme could enter upon a course of action inimical to that ultimate plan.

Also, the Idaho Supreme Court has never handed down a decision favorable to the zoning body in cases in which an individual has questioned action by the particular zoning body. This would indicate bias in the Idaho Court against zoning, and would indicate that the Idaho court would probably follow the majority rule and strike down an interim zoning scheme which was not enacted in accordance with a comprehensive plan and/or not in accordance with certain procedural requirements. It is my opinion that this emergency type zoning ordinance would not stand up in Idaho.

#### IV.

##### OTHER ALTERNATIVES: CONTROL OF BUILDING PERMITS

Usually, this method takes the so-called "building moratorium". In an existing zoning system, short-term control of development is acquired simply by passing an ordinance which orders the building inspector to deny the issuance of a building permit to all developers. This method has value only where there is an existing zoning system, with a building permit system already in effect. It does not aid the local government which is setting up the zoning and attempting to formulate a comprehensive plan in the first instance.

Anderson, in Volumn 1 of the American Law of Zoning Chapter 5, Section 15, page 279, says:

"Where ordinances suspending or limiting the issuance of building permits are approved, the suspension or limitation may be imposed only for a reasonable time."

Also, the courts will scrutinize such schemes on a case by case basis, rendering their decision on the circumstances of each particular case. The schemes are more often than not declared invalid. In one case, the complexity of the comprehensive plan which would be required for the area allowed for the successful argument that a two-year moratorium was reasonable. Another case allowed a thirty-one month period. Other cases have disallowed schemes of longer than two years.

Mr. Glen W. Nichols  
October 9, 1973  
Page 6

Also, there is the possibility that the court will look at a moratorium scheme as being an attempt to circumvent the zoning enabling legislation; the court in that case would require the ordinance setting up the moratorium to be passed as a zoning ordinance. In this situation, of course, the advantage of the building moratorium as a land use planning tool loses its advantage over an interim zoning scheme.

In Idaho, the context in which the need for interim development controls arises does not lend itself to the use of the building moratorium scheme, since the area of concern is being studied for zoning for the first time. There is no building permit system which could be shut off. It is my opinion, therefore, that the building moratorium would not prove to be a useful tool in Idaho.

Another problem is that a building moratorium may be of questionable legality. An Idaho Court may view it as an attempt to circumvent the zoning-enabling legislation, or, as has been mentioned earlier in this letter, to be invalid when balanced with the right of the individual to use his property as he sees fit.

There is one administrative method which may be of some value to a local government seeking to control development for a short time pending a more substantial development control. This method entails the withholding of approval of a presented plat by the zoning commission pending the institution of a zoning scheme. In practice, this method would take the following form: a developer presents a plat of a subdivision to the Planning and Zoning Commission at a time when pending zoning was being discussed by the Commission. If the Planning and Zoning Commission felt that the proposed subdivision, as represented by the plat, did not comport with a likely or possible zoning designation for the area in question, then the Planning and Zoning Commission could advise the developer of that fact, and delay final approval of the plat until such time as the final zoning scheme could take effect.

Care should be taken that the operation of this method be fair, and limited only to a reasonable time. In other words, the method should be used only to protect an imminent zoning scheme.

## VI.

### THE SAFE COURSE IN IDAHO

A review of Idaho zoning cases reaching the State Supreme Court indicates that the Idaho Supreme Court sacrifices the

power and authority of local governments to zone to the traditionally strict concept of private property. In short, the presumption seems to be against government in the situation where a zoning ordinance is being challenged by a private individual. In light of this, the following procedure is recommended in the enactment of an interim zoning ordinance:

1. The local government should devise a comprehensive plan, in the nature of the relatively informal model discussed above. As long as a local government makes a good faith attempt at formulating a plan, and devotes a good deal of whatever energy it has at its disposal towards the formulation of this plan, the Idaho Courts would be more willing to accept the existence of the plan. Again included should be statements as to the apparent evolving development trends, expectations of those trends, physical limitations which are known or suspected which would act as impediments to development, best areas for development, and other related materials. Also, a map upon which are generally and approximately shown the boundaries of those areas which are to be subject to different policies should be prepared. The aid of local soil conservation experts, Forest Service or Bureau of Land Management employees, farmers, ranchers, and other residents will contribute to the formulation of a comprehensive plan.

2. It is virtually certain that the Idaho Supreme Court would require that procedural requirements be followed in the enactment of an interim zoning ordinance. These requirements would be identical to requirements for ordinances and zoning ordinances generally, and would include a public hearing by the zoning commission, as well as by the local governing body. I again refer the reader to a previously written letter by myself to Mr. Nichols, in which I discussed the procedural requirements.

3. A time limit for the ordinance to exist should be stated in the ordinance. There are cases upholding ordinances when such time limit is placed thereon. Also, this would lend weight to the reasonableness of the ordinance.

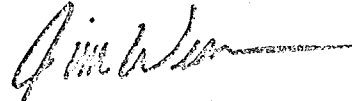
4. Most importantly, the equities should be kept on the side of the ordinance. Give notice to everyone, especially to feared developers, that permanent zoning is pending. If a developer were to come into court on a challenge to your ordinance, it would appear that he were trying to "beat the gun", so to speak, and defeat a rational plan for the area. He

Mr. Glen W. Nichols  
October 9, 1973

would not be able to say that he has been caught by the surprise, and is therefore being treated in an unfair manner.

Very truly yours,

FOR THE ATTORNEY GENERAL



JAMES C. WEAVER

Assistant Attorney General

JCW:lm

October 11, 1973

Mr. Richard L. Cade, Director  
Liquor Law & Criminal Investigation Division.  
Department of Law Enforcement  
P. O. Box 34  
Boise, Idaho 83731

Re: Section 23-806, Idaho Code  
Is The Liquor Law Enforcement Fund  
To Receive 1% of Gross Retail Sales  
of Liquor From State Liquor Dispensary

Dear Mr. Cade:

On September 23, 1973, you requested the method to be used in correctly ascertaining the 1% of the retail price of the alcoholic liquor sold from the state liquor dispensary for purposes of providing revenue for liquor law enforcement.

The retail sale price of liquor sold in the State Liquor Dispensary and its branches is calculated as follows: To the purchase price or cost of goods, is added the markup by the Dispensary, and pursuant to Title 23, Chapter 2, Section 17, Idaho Code, there is added a surcharge equalling 17 1/2% computed to the nearest multiple of 5¢. Of course, under Section 17 of this chapter, broken lots are calculated differently. To the sum total of the cost of the merchandise, plus markup and surcharge there is added 1% as provided in Title 23, Chapter 8, Section 6, Idaho Code.

It is my understanding that the State Liquor Dispensary has been deducting the surcharge before adding the 1% allocation by the legislature to provide for liquor law enforcement.

The crux of the entire question is how is the resale price of alcoholic liquor fixed as that term is used in Title 23, Ch. 8, Section 6, Idaho Code, to arrive at the resale price Title 23, Ch. 2, Section 17 and Title 23, Ch. 8, Section 6, Idaho Code, must be used. Thus, the formula used would be the cost of the goods from a wholesaler or dealer of liquor or wine to the State Liquor Dispensary plus



the markup allocated by the State Liquor Dispensary to the cost of the original product. To this (under Title 23, Ch. 2, Section 17) other things being equal--that is, no broken lots--there would be added a surcharge of 17 1/2% and to the total of those sums would be added the 1% of such total as provided in Title 23, Ch. 8, Section 6.

The opinion expressed by the personnel of the State Liquor Dispensary, Title 23, Ch. 2, Section 17, Idaho Code, being a later statute, causes an implied repeal of Title 23, Ch. 8, Section 6, Idaho Code, is an incorrect construction and inapposite to the question presented.

An examination of the language of Title 23, Ch. 8, Section 6, Idaho Code, indicates that this is the only consistent reasonable interpretation of the language in that section. That section provides: "To provide revenue for liquor law enforcement, the State Liquor Dispensary in fixing the resale price of all alcoholic liquor, shall add to the price otherwise fixed, an additional 1% of the retail price thereof thus fixed ...." Obviously, the retail price is fixed by taking the basic cost, adding the markup, further adding the surcharge as provided in Title 23, Ch. 2, Section 17, and then adding 1% of that total figure for the purpose of law enforcement. Any other interpretation would be nonsensical. For instance, had the legislature intended a price to be fixed at less than the cost plus surcharge, it would have been easy for the legislature so to say. The language in Title 23, Ch. 8, Section 6 "otherwise fixed" would otherwise be meaningless because it would then have simply read add 1% to the cost of the product to the dispensary or 1% of the costs plus markup. This interpretation would in fact do violence to the language in Title 23, Chapter 8, Section 6, Idaho Code, because the terms used as retail price otherwise fixed, which means that all figures must be totaled in order to arrive at 1 per centum to be allocated to provide for liquor law enforcement.

This denial to the liquor law division of a proper allocation of the retail price as determined by the statutes above set forth would simply mean that it would be necessary for the Department of Law Enforcement in its budgetary request to demand from the legislature additional funds to effectually carry out a law enforcement program as obviously was intended by the legislature.

The prior opinion that the later statute (Title 23, Chapter 2, Section 17) works an implied repeal of Title 23, Chapter 8, Section 6 as a method of statutory construction is inapposite.

Very truly yours,

FOR THE ATTORNEY GENERAL

JAY F. BATES, Assistant Attorney General  
State of Idaho, Assigned to the Department of Law Enforcement, State of Idaho

JFB/b

cc: John Bender, Commissioner



STATE OF IDAHO  
OFFICE OF THE ATTORNEY GENERAL  
BOISE 83707

W. ANTHONY PARK  
ATTORNEY GENERAL

October 19, 1973

*Superseded by  
opinion 8  
Oct 31, 1973*

Mr. Richard L. Cade, Director  
Liquor Law Enforcement Division  
Department of Law Enforcement  
BUILDING MAIL

Re: Lake Resorts - Liquor Licenses

Dear Mr. Cade:

I am in receipt of your request for an Opinion as to whether or not a liquor license could be issued under Section 23-948, Idaho Code, (Lake Resorts). The Opinion is being requested on the following assumptions of fact:

That there now exists upon the lake a resort which has a real property frontage upon the lake of at least 400' and an area of not less than 320 acres, and that the property has been used for a period exceeding 3 years as a resort, open to the public for the purpose of vacationing, boating and fishing, and having suitable docks and facilities caring for and accomodating not less than 50 people.

The question propounded is whether or not a premises such as is being described above could be divided into separate tracts with the owner leasing a parcel of land of not less than 160 acres and having not less than 200' of lake frontage and could meet the requirements of Section 23-948, Idaho Code. The entire property has been maintained and operated by the owner prior to the lease as a lake resort and the owner is qualified and licensed under Section 23-948, Idaho Code, to sell intoxicating liquor.

It is my opinion that the owner of such property can legally lease a part of the whole tract of land to a person desiring to make an application for an Idaho liquor license so long as the leased tract consists of 160 acres and has a lake frontage of not less than 200'.

In delivering this Opinion it must be assumed that the entire tract has been used as a resort open to the public for a period of not less than 3 years prior to the date of issuance of a liquor license and has suitable docks, facilities and accommodations for not less than 50 people.

The term "facilities", as used in the above quoted section, could include beaches, docks, rest-rooms, etc. The term "accommodations", as used in the above section, could be any inanimate object which would help or assist people using the facilities and does not necessitate cabins, rooms, etc.

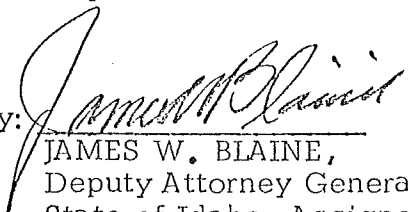
It is therefore the opinion of the undersigned that a lake resort licensed at the present time to sell intoxicating liquor and having not less than 320 acres of land with at least 400' of lake frontage could legally lease 160 acres of this property, which contains not less than 200' of lake frontage. Lessee in such case would then be in a position to make application for a lake resort liquor license open to the public under Section 23-948, Idaho Code. The lessee, however, would be required to construct suitable facilities for the accommodation of at least 50 people.

This Opinion is issued on the basis that the two liquor licenses would be operated separately and would comply with other applicable provisions of the Idaho retail sale of liquor by the drink act.

Very truly yours,

W. ANTHONY PARK,  
Attorney General of Idaho

By:

  
JAMES W. BLAINE,  
Deputy Attorney General  
State of Idaho, Assigned  
to the Department of Law  
Enforcement, State of Idaho

WAP/JWB/b

October 19, 1973

Ron Schilling, Prosecuting Attorney  
Clearwater County  
P. O. Box 1680  
Orofino, Idaho 83544

Re: Nez Perce Indian Marina-Dworshak Reservoir

Dear Mr. Schilling:

I regret that it has taken me this long to assemble the information necessary to answer your questions posed in your letter of July 19th.

I am confident you understand that the area of Indian law is one of the most unsettled areas existing in American jurisprudence. I want, therefore, to tender you what I believe to be a correct position to the following questions; and, making the assumption suggested in your second full paragraph, with complete answers to the additional questions posed:

1. Are boats owned by Nez Perce Indians, or the Nez Perce Tribe, required to number under the provisions of Idaho Code 39-2403, et seq., when using the waters of the reservoir?
2. Are boats owned by Nez Perce Indians or the Nez Perce Tribe required to be required to be licensed under the provisions of Idaho Code 49-217, et seq., when using the waters of the reservoir?
3. Are the boats owned by the tribe required to be numbered and/or licensed when rented to non Indians?
4. Will the Nez Perce Tribe be required to comply with state liquor and beer licensing and other regulations if alcoholic beverages are sold at the marina by the tribe?

The Federal and State governments' authority over Indian matters are derived from the Federal Constitution, the ceding of areas of jurisdiction to a State, and the acceptance of the State of such ceded jurisdiction through legislative action.

As indicated above, the Federal Constitution and the treaties with various tribes is the principal bar to a state exercising jurisdiction over matters within the exterior boundaries of Indian reservations. The areas in which states find themselves running contrary to the Federal Constitution and the various treaties are attempts to exercise jurisdiction within the exterior boundaries of the reservation without prior cession of jurisdiction or Federal statutes permitting an exercise of jurisdiction. This latter area has experienced assessment difficulty because an Indian tribe situate on a reservation is a nation within this nation regulating its own internal affairs. Most Federal agencies dealing with this problem are wise enough to recognize federal and state limitations.

One further area needs preliminary clarification. The U.S. Government has been inclined to treat the Indian as a ward, and that unfortunate language has been handed down through centuries of court decisions. The courts pay lip service to the term "sovereign power", but it must be held foremost in mind that the sovereign designation provides a definitive resumption of questions as to areas, and also a shield against which the applicable treaties and federal statutes must be read. It must be held that the Indian tribes of this country were, and are, independent sovereign nations, and their claim to such status long ante dates our own government's claim to sovereignty. This is true even though the Indians enjoy on the one hand a status of right equivalent to all American citizens, but also, if you will, the complexity of status as a member of the tribal nation. They are a separate people fixed with the power of regulating their internal and social relations.

Frequently, writers of legal opinions and "exports" in Indian affairs are prone to read treaties too literally. They must accept the responsibility of reading the treaties in the full spirit in which they were written, understanding that one party to that treaty was unlettered in the English language, the Indian terms of which were not translatable into the English language. In other words, the Indians have no written language of their own and the English language substitute was either inappropriate or far too inadequate. Thus it is that the words "hunt" or "fish" had been interchanged as were terms for gathering roots or any other harvesting process necessary to sustain the Indian as he was found in his aboriginal state. Tinno v. State of Idaho, 94 Ida. 759.

Notwithstanding the foregoing, there are permissible areas of a state's exercise of jurisdiction. However, in the enforcement of revenue laws against certain tribal or individual Indian commercial enterprises one cannot generalize. It can be stated that taxation of Indian reservation land or Indian income from activities carried on within the exterior boundaries of the reservation are not, absent congressional approval, subject to taxation. This is not true, however, of tribal or individual commercial ventures beyond the exterior boundaries of a reservation. In the latter, state authority over the Indians is more extensive, and so long as no discrimination is practiced Indians engaged in commercial activities are subject to state law otherwise applicable.

to all citizens of the state. This principal is as true as to the applicability of revenue producing laws as they are to state criminal laws.

One caveat is necessary at this point--that is the "instrumentality doctrine." Perhaps the most frequent reason stressed by the courts for the exemption of Indian property from state taxation is the Federal Instrumentality Doctrine. The doctrine in its application to Indians and Indian property is founded upon the premise that the power and duty of governing and protecting tribal Indians is primarily a federal function, and that a state cannot impose a tax which will substantially impede or burden the function of the federal government. United States v. Rickert, 188 U.S. 432 (1903).

The doctrine, however, is limited in its application to the property or functions of those Indians who are in some degree under federal control or supervision. Thus, it has afforded immunity to the property and functions of tribal Indians, whether residing on allotted or unallotted land. New York Indians, 5 Wall. (5 U.S.) 761 (1866).

The nature of the doctrine as well as its scope can be ascertained from the illuminating opinion of the Court of Appeals in the case of United States v. Thurston County, 143 Fed. 287 (1906) where the proceeds of the sale of restricted Indian lands were held exempt from state taxation. The court said:

" \* \* \* Every instrumentality lawfully employed by the United States to execute its Constitutional laws and to exercise its lawful governmental authority is necessarily exempt from state taxation and interference."  
(Citing cases)

"It is for this reason that the Supreme Court has decided that lands held by Indian allottees under the Act of February 8, 1887, 24 Stat. 389, Ch. 119, § 5, within 25 years after their allotment, houses and other permanent improvements thereon, and cattle, horses and other property of like character which had been issued to the allottees by the United States in which they were using upon their allotments, were exempt from state taxation, and declared that 'no authority exists for the state tax lands which are held in trust by the United States for the purpose of carrying out its policies in reference to these Indians.' " (Citing cases)

\* \* \*

" \* \* \* The proceeds of sale of these lands had been lawfully substituted for the lands themselves by the trustee. The substitutes partake of the nature of the originals and stand charged with the same trust. The lands and their proceeds so long as they are held or controlled by the United States, and the term of the trust has not expired, are like instrumentalities

employed by it in the lawful exercise of its powers of government to protect, support and instruct the Indians, for whose benefit the complainant holds them, and they are not subject to taxation by any state or county." (pp. 289-290, 292).

The congressional power to exempt Indian land from state taxation is limited only by the requirement that the property or function in question be reasonably considered incident to a federal function. When a tax immunity is offered to individual Indians by federal statute, or treaty, by way of inducement to a voluntary transaction, the courts have held that the immunity becomes contractual in the sense that the individual Indians may acquire a vested right to the exemption which is protected against Congress itself by the Fifth Amendment. Choate v. Trapp, 224 U.S. 665 (1912). The answer posed by your inquiry does rest upon the instrumentality doctrine, but at the same time is completely different from the ordinary instrumentality doctrine case. Stating at this moment a conclusion, the revenue derived by the Nez Perce tribe from the operation of the marina is not derived wholly from reservation sources, nor located upon tribal lands, and therefore their activity is not within this sphere of relevant treaties and statutes which leave the resolution of the question to the federal government and the Indians themselves.

Because of the ceding of jurisdictional areas to the state by the Nez Perce tribe and the acceptance thereof by the state, any broad assertion that the Federal government has exclusive jurisdiction over the tribe for all purposes, and that the state is therefore prohibited from enforcing its revenue laws against this tribal enterprise, particularly where the enterprise is not located within the exterior boundaries of the reservation, cannot be sustained. The crux of the question, and this reverts back to the instrumentality doctrine, is that even on reservations state laws may be applied unless their application would interfere with reservation self-government or would impair a right granted or reserved by federal law. See, for instance, Organized Village of Kake, 82 S.Ct. 570, Williams v. Lee, 358 U.S. 217; New York, ex rel. Ray v. Martin, 326 U.S. 496, 499; Draper v. United States, 164 U.S. 240.

Basically the holding in Kake, supra, is that absent express federal law to the contrary, Indians going beyond the exterior boundaries of a reservation generally have been held subject to nondiscriminatory law applicable to other citizens of the State. Puyallup Tribe v. Department of Fish & Game, 391 U.S. 392, 398.

The Constitution of the State of Idaho, Article 21, Sec. 19 thereof, provides in part: "[A]nd the people of the State of Idaho do agree and declare that we forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indians or Indian tribes; and until the title thereto shall have been extinguished by the United States,

the same shall be subject to the disposition of the United States, and said Indian land shall remain under the absolute jurisdiction and control of the Congress of the United States; .... " The key to this constitutional provision, insofar as revenue laws are concerned, is found under the provision of the jurisdictional control by the United States of the land so long as it is Indian land.

It may be argued, but not realistically, that the Indian Reorganization Act of 1934 covered all Indian tribe (or individual Indians) off-reservation operation of a business enterprise under the doctrine of the instrumentality theory which would be subject to the same immunity and constitutionally protected from state taxes of all sorts. It is true that this immunity doctrine consistently barred state taxation of Indian affairs whether the same were conducted on or off the reservation, in other words, within or without the exterior boundaries of an Indian Reservation. The theory was advanced that under the Federal Instrumentality Doctrine the tax would interfere with the Federal government's realizing a maximum return for the Indian people; however, this approach to the problem did not survive and illuminating discussions of this matter are found in Helvering v. Mountain Producers Corporation, 303 U.S. 376; Oklahoma Tax Commission v. United States, 319 U.S. 498; and Oklahoma Tax Commission v. Texas Company, 336 U.S. 342.

The Indian Reorganization Act of 1934 does not compel a recognition that a tribal or individual Indian business venture beyond the exterior boundaries of an Indian Reservation is protected as a federal instrumentality. In other words, there is no general and automatic immunity from state taxation. The crux of the Indian Reorganization Act of 1934 was a policy adopted by the federal government aimed to halt the loss of tribal lands through allotment. The Secretary of Interior was endowed with certain powers to create new reservations, and also to encourage the various Indian tribes under the theory of self-determination to revitalize the self-government through appropriate constitutions and by-laws, not excluding charter corporations, with power to conduct the business and economic affairs of the various Indian tribes. Thus, the tribe taking advantage of the Act could generate substantial revenue for the education, social and economic welfare of its people. So it is, that resort to interpretation of the various Indian treaties, as amended, must be had in order that an enterprise such as the marina on the Dworshak Dam Reservoir can be placed in its proper perspective. In one sense, such a business venture could serve as a federal function but not necessarily under the instrumentality doctrine. In other words, the mere fact that the property used to effectuate the purpose of self-determination or revitalization does not bring the venture within the shield of the instrumentality doctrine and therefore does not relieve such business from regulatory acts of the state.

An examination of the Nez Perce treaty, as amended, with the United States will reflect a gradual (but at the same time shocking) ceding of Indian tribal land to the United States as the treaty was amended. In other words, an aboriginal area of the Nez Perce tribe consisted of approximately thirteen million acres of land



was reduced under the 1855 treaty to a reservation of seven million, seven hundred thousand acres. The uprising of Joseph's band caused a further reduction of the reservation land to seven hundred and sixty-one thousand acres. It may candidly be said that the Nez Perce Indians were not consulted--they were told--that the amendment to the treaty would be made. Of course, the compensation to be paid therefor can be described as minimal at best.

Nevertheless, the Nez Perce Indian Tribe did cede to the United States certain land, and much of that land that was ceded to the United States has gone to patent. In 1893 certain lands were ceded in T. 37 N., R. 1 E. B. M., and at the same time the lands reserved unto the Nez Perce Tribe were described. The marina is located in T. 37 N., R. 1 E. B. M. as part of the Department of Army lease with the Nez Perce Tribe dated December 21, 1970. A copy of said agreement is attached hereto as Exhibit "A". The marina as located in Section 26 and 27 of said Township and Range lays in the ceded territory. There is no question that the marina is beyond the exterior boundaries of the Reservation. Thus it cannot be implied that there is an expansive immunity from the ordinary revenue raising procedures of the state through taxes that other businesses throughout the state are subject to. Equally, nothing in the treaty, as amended, nor the Indian Reorganization Act of 1934, recognizes a right in the Nez Perce Tribe to engage in this type of business venture under the federal instrumentality doctrine, thus avoiding state revenue taxes and licenses.

It is true that the business enterprise of the marina serves as a function of the federal government with respect to its role in Indian affairs. But the fact that the property is used by the United States as an instrument for effecting such a purpose does not relieve the Nez Perce from state taxation. Choctaw, Oklahoma and Gulf Railroad Company v. Mackey, 256 U. S. 531; Henderson Birch Company v. Kentucky, 166 U. S. 150. Within the full intent and purpose of the reorganization Act to rehabilitate the Indians economic life, and to give the Indian an opportunity for self-determination without governmental paternalism, such taxation or licensing does not frustrate the function.

It would be unrealistic to believe that the congress had, under the instrumentality doctrine, conceived that off-reservation tribal enterprises were an arm of the government.

#### CONCLUSION

A case nearly on all fours with the questioned case is Mescalero Apache Tribe v. Jones, 93 S. Ct. 1267 (1973). The Mescalero Apache Tribe operated a ski resort in the State of New Mexico on lands outside the exterior boundaries of the Tribe's reservation. In that case the state asserted the right to impose a tax on the gross receipts of the ski resort and a use tax on certain personalty purchased out of state and used in connection with the resort.

In Mescalero, the United States Supreme Court, as did the New Mexico Supreme Court, rejected out of hand the overly broad assertion that the federal government had exclusive jurisdiction over the tribe for all purposes, thus prohibiting the state from enforcing any revenue laws against any tribal enterprise whether the same was conducted on or off tribal land. In this respect this case differs from the recent Idaho Supreme Court case of Mahoney v. Idaho, (Oct. term 1972, filed September 5, 1973), as No. 11016. Mahoney involved a sale of cigarettes within the exterior boundaries of the Coeur d'Alene reservation, and the state's attempted imposition of a sales tax on the gross sales price of cigarettes was stricken by the Supreme Court - in what was basically a 3 to 2 decision. Tribal activities, according to the United States Supreme Court in Mescalero, conducted outside the reservation presents a different problem than exists in the Mahoney case. The United States Supreme Court said:

"State authority over Indians is yet more extensive over activities.... not on any reservation." (Citing cases)

Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state laws otherwise applicable to all citizens of the state. (Citing cases). That principle is as relevant to a state tax law as it is to state criminal laws.... and applies as much to tribal ski resorts as it does to fishing enterprises. (Citing cases)" The Supreme Court also rejected out of hand the Indian Reorganization Act of 1934 as it applied to off-reservation activities carried on by a tribe as being beyond the scope of the federal instrumentality doctrine constitutionally immune from state taxes. The Supreme Court went on to say: "The Indian Reorganization Act of 1934 neither required nor counsels us to recognize this tribal business venture as a federal instrumentality." .... "There is, therefore, no statutory invitation to consider projects undertaken pursuant to the Act as a federal instrumentality generally and automatically immune from state taxation. The Indian Reorganization Act of 1934, otherwise known as the Howard-Wheeler Act, was designed to rehabilitate the Indian's economic life and to give the Indians an opportunity to develop self determination and initiative destroyed by the oppression suffered by the Indians, after the arrival of what now constitutes the American people on the scene, and the paternalism shown to the Indians. The Supreme Court went on to say: "The Reorganization Act did not strip Indian tribes and their reservation lands of their historic immunities from state and local control, but in the context of the Reorganization Act, we think, it unrealistic to conclude that Congress intended to concede an 'off-reservation tribal enterprises' 'virtually as an arm of the government' ". (Citing cases). "On the contrary, the aim was to disentangle the tribes from the official bureaucracy. The Court's decision in Organized Village of Kake, supra, which involved tribes organized under the Reorganization Act, demonstrates that off-reservation activities are within the reach of state law." (Citing cases).

HOLDING

1. Are boats owned by Nez Perce Indians, or the Nez Perce Tribe, required to number under the provisions of Idaho Code 39-2403, et seq., when using the water of the reservoir? YES.
2. Are boats owned by Nez Perce Indians or the Nez Perce Tribe required to be licensed under the provisions of Idaho Code 49-217, et seq., when using the waters of the reservoir? YES.
3. Are the boats owned by the tribe required to be numbered and/or licensed when rented to non Indians? YES.
4. Will the Nez Perce Tribe be required to comply with state liquor and beer licensing and other regulations if alcoholic beverages are sold at the marina by the tribe? YES.

Respectfully submitted,

W. ANTHONY PARK,  
Attorney General of Idaho

By: 

JAY F. BATES, Assistant  
Attorney General of Idaho  
Assigned to the Department  
of Law Enforcement

WAP/JFB/b



## STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

W ANTHONY PARK  
ATTORNEY GENERAL

October 22, 1973

Mr. Milton Small  
Executive Director  
State Board of Education  
Office of Higher Education  
BUILDING MAIL

Dear Mr. Small:

You have requested an opinion on behalf of the State Board of Education, asking whether or not the Commissioner of the Big Sky Conference can as a matter of law receive the benefits incident to state employment.

FACTS

Sometime prior to April 1, 1971, the Big Sky Conference was organized and included, among other schools, the three principal institutions of higher education in the State of Idaho: The University of Idaho, Idaho State University, and Boise State College. The presidents of all institutions which are members form the governing board for the Big Sky Conference. When the Conference was organized, the presidents of those schools searched around for a commissioner for the Conference. They appointed Mr. John Roning, who at that time was the Director of Athletics at the University of South Dakota. The presidents of the institutions voted to have the office of the Big Sky Conference located in Boise, and office space was provided for Mr. Roning off the Boise State College campus so that he would remain an independent agent representing all the Big Sky schools.

At the State Board of Education meeting of April 1 - 3 of 1971, President John Barnes of Boise State College submitted a proposal to the State Board on behalf of the member schools of the Big Sky Conference. At this time President Barnes, with the concurrence apparently of President Hartung (University of Idaho) and President Davis (Idaho State University) and the other presidents of members schools, suggested to the State Board of Education that Mr. Roning be placed on the staff of Boise State College for the purpose of providing Mr. Roning with the benefits which the State of Idaho provides for its employees: retirement,

Mr. Milton Small  
October 22, 1973  
Page 2

health and accident insurance, and life insurance. The proposal included the financing of the benefits by the Big Sky Conference through payment to Boise State College of the salary and employer's costs.

When the proposal was presented to the State Board of Education, it held the proposal "pending legal determination", and it directed President Barnes to return with the information to the State Board of Education at the May meeting. In response to that directive from the State Board of Education, Dr. Barnes apparently discussed the proposal with Mr. Terrell, the Executive Director of the Public Employees Retirement System. Mr. Terrell wrote to President Barnes on April 26, 1971, stating that he had presented to the Retirement Board the proposal concerning Mr. John Roning and his eligibility for membership in the retirement system in a dual capacity as "Consultant to Athletics" for Boise State College and Commissioner of the Big Sky Conference. The Retirement Board apparently had held a discussion of considerable length and concluded that the responsibility for determining membership eligibility for retirement participation rested with the employer. The Retirement Board's opinion was that if President Barnes and the Board concluded that Mr. Roning met the eligibility requirements and followed the necessary enrollment procedures, he would be accepted as a member effective July 1, 1971, under the immediate membership provisions of the law.

On the basis of that letter, President Barnes wrote to President Davis, President Hartung, and President Robert Pantzer, who at that time was the president of the Big Sky Conference. In that letter President Barnes told of his dialogue with Mr. Terrell and enclosed a copy of the Terrell letter of April 26, 1971. President Barnes further stated that he would recommend the proposal to the State Board at its meeting on May 5, 1971, and would respond to the members and Mr. Roning of the Board's decision. He also outlined in that letter that this proposal was with the understanding that the Big Sky Conference would pay to Boise State College the amount of Mr. Roning's salary, the amount of the employer portion of the State Retirement Program, and the amount of the employer portion of the Health Benefit Program. President Barnes assured the members that the funds would be kept in a special account and stated, "In this manner he would be building up a retirement program in Idaho and would be covered under the standard health program of other employees." On the 6th of May of 1971, the Board approved the recommendation of Boise State College that Mr. John Roning be appointed as "Consultant in Athletics [to Boise State College] and Commissioner, Big Sky Athletic Conference, (salary, institutional retirement costs, and faculty fringe benefit costs to be paid to Boise State College by the Big Sky Conference)."

It is obvious that one of the purposes of having Mr. Roning listed as a staff member at Boise State College was to enroll him in the employment benefits of the State of Idaho. It is equally obvious from the record that Mr. Roning is not and cannot be an employee of the State of Idaho. If he were an employee of the State of Idaho, there would be an irreconcilable conflict of interest. As a matter of fact, this was recognized by all members of the Big Sky Conference because the proposal submitted to the State Board by the President of Boise State College also stated that office would be provided for Mr. Roning off the college campus so that he could remain an independent agent representing all the Big Sky schools.

#### PURPOSES

The underlying purposes for the artificial appointment of Mr. Roning as a "Consultant to Athletics" at Boise State College are readily apparent. Mr. Roning, as he considered the job, was undoubtedly concerned with the retirement and other benefits of employment that the Big Sky Conference could provide for that position. The Big Sky Conference is composed of small colleges and universities; with acceptance of this proposal, the Conference would not need an extensive administrative staff. To reduce administrative costs and still provide employment benefits to the position of Commissioner of the Big Sky, the member schools and the State Board of Education agreed that the Commissioner of the Big Sky Conference could be attached to a recognized system of employee benefits such as we have in the State of Idaho. The proposal as adopted by the State Board of Education would reduce the costs of administration to the Big Sky Conference, perform a service to the Conference of which the Idaho schools are members, improve interstate relationships, and provide the Commissioner of the Conference with legitimate benefits of employment.

We would emphasize at this point that there is no indication that the arrangement as it has existed in the past two years has cost the State of Idaho any time, money or other resources. The Big Sky Conference has in fact at all times paid to Boise State College all costs originally agreed upon in the initial arrangement in 1971. In essence, then, the State of Idaho houses the Commissioner of the Big Sky Conference and carries the Commissioner of the Big Sky Conference as an employee only to the extent that the Conference is able to provide its Commissioner with benefits on the same basis and programs that employees of the State of Idaho enjoy. Further, it is apparent from the record that this arrangement was arrived at in good faith by the members schools of the Big Sky Conference (particularly the Idaho members), the State Board of Education and Mr. Roning.

#### LEGAL CONCLUSIONS

If the proposal as adopted by the State Board of Education was reviewed by an attorney or an expression of the legality was issued by an attorney, that opinion was given by someone other than the Attorney General or his legal staff. The Office of the Attorney General had no knowledge of the proposal at the time it was adopted by the State Board of Education nor was the opinion of the Attorney General solicited by anyone prior to the action by the State Board of Education.

It must be recognized that the Big Sky Conference is not an agency of the State of Idaho. Its composition includes institutions of the State of Idaho (colleges and universities), but it is not a state agency as the college or university is. Since the Commissioner of the Big Sky Conference provides no services to either Boise State College or to the State of Idaho, and since he is an employee of the Big Sky Conference only, then as a matter of fact, Mr. Roning is not an employee of the State of Idaho. Because the relationship between the Big Sky Conference and the State of Idaho does not result in an employer-employee relationship, then as a matter of law, Mr. Roning is not an employee of the State of Idaho. The benefits accorded to Mr. Roning, such as retirement, life insurance, health and accident insurance, are benefits which are available exclusively to those persons who are employed in an agency of the State of Idaho. Mr. Roning does not fit either factually or legally into the definition of employee. Therefore, we must conclude that Mr. Roning is not entitled to the benefits otherwise accorded to an employee of the State of Idaho.

#### CONCLUSIONS AND RECOMMENDATIONS

In our research in this matter, we can find no indication or suggestion that an ulterior motive prompted the arrangement made between the State of Idaho and the Big Sky Conference. All parties and persons involved in this matter operated in good faith. The intent to provide a service to the Big Sky Conference to the end that the administrative costs of the Conference could be held to a minimum is laudable. The danger in such an arrangement, although the danger is non-existent here, is the abuse that could result. The benefits provided an employee of the State of Idaho are attractions to public employment. These benefits belong exclusively to the employees of the State of Idaho and are legally based upon a bona fide employer-employee relationship. The benefits are not available to those, regardless of how closely they work with the State of Idaho, who are not responsible and responsive to the functions of the State and who are not directly furthering the purposes of the State of Idaho.

The distressing element in this matter is not that the State of Idaho has been required to support through its benefit program

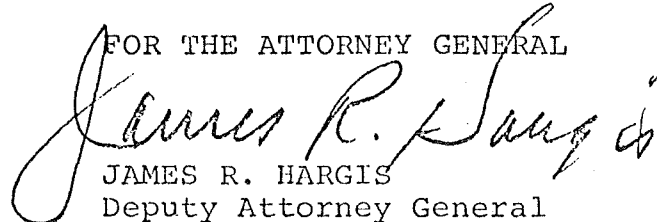
Mr. Milton Small  
October 22, 1973  
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a person not an employee of the State. As has been noted above, the cost to the State of Idaho at the present time is absolutely zero. Rather, it is distressing that Mr. Roning who entered into the arrangement in all good faith now finds himself a victim of the restrictions of public employment. It is our strong recommendation that the Big Sky Conference itself provide for benefits to Mr. Roning equal to the benefits that he has so far enjoyed under the arrangement with the State Board of Education and the State of Idaho. The monies paid by Mr. Roning to the Retirement System are refundable and should be refunded to him. The monies paid by the Big Sky Conference through Boise State College as the employer will require action by the Retirement Board. This office will work with the College and the Conference to determine if the employer's contribution is refundable. Further arrangements should be made with the other benefit carriers, such as Blue Cross and Continental Life and Accident to determine if conversion of Mr. Roning's interest in the group policy is possible.

We do not make these suggestions as any exclusive alternatives. But since we must conclude that the present arrangement must terminate, we believe it incumbent, as a matter of equity and justice, to strongly suggest to the Big Sky Conference and the State Board of Education that Mr. Roning not suffer because of circumstances over which he had no responsibility or control.

Very truly yours,

FOR THE ATTORNEY GENERAL

  
JAMES R. HARGIS  
Deputy Attorney General

JRH:cg

cc. President Hartung, University of Idaho  
President Barnes, Boise State College  
President Davis, Idaho State University  
President Rev. Richard E. Twoby, Gonzaga University  
President Carl W. McIntosh, Montana State University  
President Robert T. Pantzer, University of Montana  
President J. Laurence Walkup, Northern Arizona University  
President Joseph L. Bishop, Weber State College





STATE OF IDAHO  
OFFICE OF THE ATTORNEY GENERAL  
BOISE 83720

W. ANTHONY PARK  
ATTORNEY GENERAL

October 22, 1973

OFFICIAL OPINION

Mrs. Blanche Henderson  
Clifton City Clerk  
Box 26  
Clifton, Idaho 83228

Dear Mrs. Henderson,

We have been asked by the Secretary of State to answer your recent letter.

You have asked whether or not you have to hold a city election if no one is running for office.

The law states that an election shall be held in each city, Section 50-401, Idaho Code. The section reads as follows:

"50-401. General and special city elections--Hours of voting.--A general election shall be held in each city governed by this title, for officials as in this title provided, on the Tuesday following the first Monday of November, 1967, and biennially thereafter. All such officials shall be elected and hold their respective offices for the term specified and until their successors are elected and qualified. All other city elections that may be held under authority of general law shall be known as special city elections. At any general or special city election, the qualified voters may cast their ballots between the hours of twelve (12) o'clock noon and eight (8) o'clock P.M."

Since the law requires it, you should hold the election.

Sincerely yours,

FOR THE ATTORNEY GENERAL

WARREN FELTON  
Deputy Attorney General

WF:sg/cc: John Croner, Secretary of State's Office



## STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83707

W. ANTHONY PARK  
ATTORNEY GENERAL

October 23, 1973

Mr. Gary M. Haman  
Prosecuting Attorney, Kootenai County  
Box 1148  
Coeur d' Alene, Idaho 83814

Dear Mr. Haman:

You have requested an Attorney General's opinion answering the following question:

Is §40-2709, unconstitutional in that it provides for a tax levy by a highway district upon property within an incorporated city when the highway district performs no work within the boundaries of the incorporated city?

The legislature has greater latitude in determining who will bear the cost of public highways, and constitutionally may impose part of the cost of such highways adjacent to or surrounding a city upon property within the city when the legislature may reasonably conclude that the city or its residents are benefited from, or make use of such highways. Siegfried vs. Carbon County, 92 P.2d 301 (Mot., 1939); Sanders vs. Willmans, 254 S.W. 422 (Ark., 1923); Cummock vs. Alexander, 213 S.W. 767 (Ark., 1919); Moyle vs. Salt Lake County, 178 P. 918 (Utah, 1919). In our opinion §40-2709, Idaho Code, is constitutional.

Very truly yours,

A handwritten signature in cursive script, reading "W. Anthony Park", is written over the typed name and title.

W. ANTHONY PARK  
ATTORNEY GENERAL

RLM:WAP:blh



## STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83707

W. ANTHONY PARK  
ATTORNEY GENERAL

October 25, 1973

Miss Helen M. Miller  
State Librarian  
Idaho State Library  
BUILDING MAIL

Re: Elector Qualifications for Persons  
Signing Library District Petitions

Dear Miss Miller:

We wish to respond to your request for our opinion on various questions which you have asked.

1. To our knowledge, there is no list from which a county clerk can determine to accept or reject signatures on petitions for a library district. Under §33-2722 Idaho Code, the persons who may sign the petition to organize a library district are those who are qualified electors in the area of the county that is to be incorporated in the library district. Fifty-one percent of the number who voted for governor in 1970 from the proposed district must sign the petition. The only thing the clerk has to determine is whether or not the signator is in fact a resident of the area to be included in the library district. It is our opinion that the county clerk should use the same technique available to him as in all other elections which involve the county or which involve an area of the county such as a library district.

2. In order to make an exact computation of the number of signatures required to equal fifty-one percent of the number voting in the 1970 gubernatorial election, it might be very well necessary for the clerk to examine the poll books in the precincts which overlap both within and without the proposed district as you state. This is at least one source of determining whether or not fifty-one percent of the number voting in the 1970 gubernatorial election has been reached. We would not suggest however, that that is the only way in which the clerk can decide the percentage of the number signing the petition. We are of the opinion that any count is legitimate so long as the persons counted are included in the area of the proposed library district and that the percentage of those in the proposed library district equals fifty-one percent.

Miss Helen M. Miller  
October 25, 1973  
Page 2

3. If a signer of a petition is a property owner or has verified that the area is his legal residence, but he has gone to California for the winter, the clerk on that basis alone may not disallow the signature. One of the qualifications to vote is the person must be a legal resident. However, there need be no showing that the person is a property owner. A property owner alone does not make a person a resident. It is conceivable that property in the area in question is owned by someone who is not a resident. That person is not able to vote in the election, or to sign the petition simply because he is a property owner. Therefore, we would suggest that the clerk disregard the requirement of property ownership. We would caution the clerk not to use property ownership as a qualification to sign either the petition or to vote in the election. A person is not required to remain in his area of declared residency without ever leaving. This is obvious from the fact that our laws provide for absentee voting. If a person has declared the area his legal residence, but has gone to California for a period of time with the intent to return, the clerk may not disallow that signature.

We hope we have been of some assistance.

Very truly yours,

FOR THE ATTORNEY GENERAL

JAMES R. HARGIS  
Deputy Attorney General

JRH:cg

cl. 4  
comm

October 30, 1973

Mr. J. W. Crutcher  
Clerk of the District Court  
Valley County Courthouse  
Cascade, Idaho 83611

Dear Mr. Crutcher:

You have requested an opinion as to whether the certification of levies by school districts under sections such as 33-802, Idaho Code, and 33-904, Idaho Code shall be certified to the boards of county commissioners in mills or in dollars.

I believe in your letter you must have been referring to Sections 33-804 and 33-901, Idaho Code, when you spoke of the school plant facilities reserve fund, and that you did not mean Section 33-904, Idaho Code.

From reading Sections 63-621 through 63-626, Idaho Code, there can be no doubt that the answer to this question is that such levies are to be certified to the boards of county commissioners in dollars.

Section 63-621, Idaho Code, brings school districts within the definition of these sections. Section 63-622, Idaho Code, says in part that such certifications are to be made as provided in these sections, regardless of any other provision of law applicable to such districts. Section 63-624, Idaho Code, says in part that the districts are to certify such levies in dollars to the county commissioners by the second Monday in September and that the county commissioners are to make the levies in mills. Section 63-625, Idaho Code, says that it is the purpose of these sections to change and amend the laws of all taxing districts so that they certify their levies in dollars and not in mills to the county commissioners, and that the county commissioners then determine the levies in mills. Section 63-626 states that any act providing that levies of taxes by districts are to be certified to the county commissioners in mills or in a certain number of cents per hundred dollars of assessed valuation shall be construed to be amended by these sections, and that these sections shall control, but that this does not amend or repeal the part of any law which provides for petitions, public hearings and

Mr. J. W. Crutcher  
October 30, 1973  
Page 2

special elections regarding the amount of money that can be collected by a tax on property in the districts.

It can be seen that the drafters of this law feared that many of the districts would look at their sections and might think that they did not come within these sections. The law was thus drafted so that they closed every avenue of escape and, as you can see, they repeated over and over in every way possible that levies of taxes are to be certified by the districts in dollars and cents and not in mills.

This may involve more work for the districts, but it in no way lessens the amounts the districts may obtain through taxes. It was evidently decided that it was best to have every district actually figure out in dollars what funds it would need and be entitled to have. There could be a number of reasons for this.

There does not appear to be any reason why Section 63-621 to Sections 63-626, Idaho Code should not apply to both general school levies and school plant facilities reserve funds. These sections do not interfere with voted-in levies in excess of 27 mills as to general school levies or with plant facilities reserve levies in any way, as above stated. Both of these levies are created in the same way by special elections, and in either case, the districts are still entitled to the same amounts. They will, however, have to figure out the exact number of dollars. In the long run, this should actually prevent misunderstandings between the districts and the various county commissioners.

Enclosed are two previous opinions relative to the same subject, which are as follows:

1. Opinion dated September 16, 1970, to Mr. L. I. Passmore, State Tax Commission, from Walter H. Bithell, Assistant Attorney General.
2. Opinion dated October 17, 1969, to Mr. L. I. Passmore, State Tax Commission, from Thomas C. Frost, Assistant Attorney General.

Very truly yours,

FOR THE ATTORNEY GENERAL

WARREN FELTON  
Deputy Attorney General

October 31, 1973

Mr. Richard L. Cade, Director  
Liquor Law Enforcement Division  
Department of Law Enforcement  
BUILDING MAIL

RE: Lake Resorts - Liquor Licenses

Dear Mr. Cade:

I am in receipt of your request for an opinion as to whether or not a liquor license could be issued under Section 23-948, Idaho Code, (Lake Resorts). The opinion is being requested on the following assumptions of fact:

That there now exists upon the lake a resort which has a real property frontage upon the lake of at least 400' lake area of not less than 160 acres, and that the property has been used for a period exceeding 3 years as a resort, open to the public for the purpose of vacationing, boating and fishing and having suitable docks and facilities caring for and accomodating not less than 50 people.

The question propounded is whether or not a premises such as is being described above could be divided into separate tracts with the owner leasing a parcel of land having not less than 200' of lake frontage upon a lake of not less than 160 acres in area and could meet the requirements of Section 23-948, Idaho Code. The entire property has been maintained and operated by the owner prior to the lease as a lake resort and the owner is qualified and licensed under Section 23-948, Idaho Code, to sell intoxicating liquor.

It is my opinion that the owner of such property can legally lease a part of the whole tract of land to a person desiring to make an application for an Idaho liquor license so long as the leased tract has a lake frontage of not less than 200' and the lake is not less than 160 acres in area.

October 31, 1973

In delivering this opinion it must be assumed that the entire tract has been used as a resort open to the public for a period of not less than 3 years prior to the date of issuance of a liquor license and has suitable docks, facilities and accommodations for not less than 50 people.

The term "facilities", as used in the above quoted section, could include beaches, docks, rest-rooms, etc. The term "accommodations", as used in the above section, could be any inanimate object which would help or assist people using the facilities and does not necessitate cabins, rooms, etc.

It is therefore the opinion of the undersigned that a lake resort licensed at the present time to sell intoxicating liquor and having not less than 400' of lake frontage could legally lease a portion of this property so long as each parcel contains not less than 200' of lake frontage for each parcel to be licensed. Lessee in such case would then be in a position to make application for a lake resort liquor license open to the public under Section 23-948, Idaho Code. The lessee, however, would be required to construct suitable facilities for the accommodation of at least 50 people.

This opinion is issued on the basis that the two liquor licenses would be operated separately and would comply with other applicable provisions of the Idaho retail sale of liquor by the drink act.

Very truly yours,

FOR THE ATTORNEY GENERAL

By: \_\_\_\_\_

JAMES W. BLAINE,  
Deputy Attorney General  
State of Idaho, Assigned  
to the Department of Law  
Enforcement, State of Idaho

JWB/b



November 2, 1973

Mr. Robert J. Fanning  
Prosecuting Attorney  
P. O. Box 203  
Idaho Falls, Idaho 83401

Dear Mr. Fanning:

We have your letter regarding the question of whether the county commissioners can set and pay elected county officers expenses on a per diem basis.

We agree with you that Article 13, Sections 7 & 9, require that all actual and necessary expenses incurred by any county officer or his deputies shall be a legal charge against the county. We, like you, feel that this section provides the method and the framework for what amounts to expenses, that is, actual and necessary expenses incurred in their duty.

Although not exactly in point, the cases of Nez Perce County vs. Dent et al, 53 Idaho 787 and Eakin vs. Nez Perce County, 4 Idaho 131, indicate that the elective officers may not have a per diem expense account and cannot demand or receive a remuneration other than that prescribed for and provided for by law.

There do not seem to be any Idaho cases exactly on the point to your question, but between the Constitution and the above cases we believe it is safe to say that the county commissioners must reimburse the county officers for their actual and necessary expenses and cannot adopt any other plan.

Section 31-3101, Idaho Code should be construed within the framework of the constitutional sections above set forth as setting out what amounts to actual and necessary expenses. However,

Mr. Robert J. Fanning  
November 2, 1973  
Page 2

if in the future we find that it costs more than ten cents a mile to operate an automobile, the portion of this section providing for such expenses at a maximum of ten cents a mile might have to give way to the constitutional provision.

Very truly yours,

FOR THE ATTORNEY GENERAL

WARREN FELTON  
Deputy Attorney General

WF:cg

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O  
P  
Y

November 2, 1973

Viola P. Moore  
Village Clerk  
Clark Fork, Idaho 83811

Dear Mrs. Moore:

You have asked this office whether or not the city has a responsibility concerning law enforcement within your boundaries. You state that one of your councilmen thinks that the County Sheriff's Department should police your city or village and that your city attorney says otherwise.

I tend to agree with your city attorney. Section 19-220, Idaho Code reads as follows:

"The mayor or other officer having the direction of the police of a city or town, must order a force sufficient to preserve the peace to attend any public meeting, when he is satisfied that a breach of the peace is reasonably apprehended."

Also 50-302 makes it the duty of cities to take such actions as are necessary to promote and maintain the peace, good government and the welfare of the corporation, etc. For these reasons, we believe that it is a city's duty to maintain peace and carry on such other functions as are necessary in law enforcement within that city. This letter in no way concerns the Sheriff's duties. They may have concurrent duties relating to cities.

Sincerely yours,

FOR THE ATTORNEY GENERAL

WARREN FELTON  
Deputy Attorney General

WJF:lm



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83707

W. ANTHONY PARK  
ATTORNEY GENERAL

November 5, 1973

Mr. Peter G. Leriget  
Latah County Prosecutor  
316 South Washington  
Moscow, Idaho

Re: Idaho Code, Section 33-4201

Dear Pete:

You requested an opinion concerning the effect of Idaho Code, Section 33-4201, on the status of North Idaho College. The section reads as follows:

"That the educational institution located in Coeur d'Alene, Idaho, heretofore known as North Idaho Junior College, shall be known after the effective date of this act as North Idaho College; and wherever the name North Idaho Junior College shall appear in any statute, such statute hereby is amended to read North Idaho College as fully and completely as though the said name on said statute was specifically amended herein, and all such statutes shall be construed to refer to and mean North Idaho College."

As can be clearly seen from the statutory language, this section was intended only to change the name of the institution. The statute did not eliminate the junior college district nor the funding of that district by the counties within it.

Very truly yours,

FOR THE ATTORNEY GENERAL

*Wayne G. Crookston, Jr.*  
WAYNE G. CROOKSTON, JR.  
Assistant Attorney General

November 6, 1973

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Mr. Lary C. Walker  
Prosecuting Attorney  
P. O. Box 828  
Weiser, Idaho 83672

Re: County Funds - Strict Liability - Bad Checks

OFFICIAL OPINION

Dear Lary:

You have asked this office to give you an opinion as to the liability of a county officer where the officer receives an insufficient funds check in payment of a tax, license or fee. In such a case, can the officer account for the funds as uncollectable accounts without paying for them, or must the officer personally reimburse the county for these funds?

There is a great deal of law on this and related subjects throughout the country. The vast majority of the cases require strict accountability on the part of county and local officers. Any missing funds must be made up by the officer personally. The officer is liable for the loss of any such funds and could also possibly be guilty of a serious crime for failing to turn the funds in. This is regardless of fault or blame. Some few states say that a public officer who receives funds, receives them as a bailee and is only accountable for such funds as measured by the law of bailment. However, the constitutions and statutes of many states, including Idaho, require strict accountability. Article 18, Section 6 of the Idaho Constitution provides in part:

" . . . The legislature shall provide for the strict accountability of county, township, precinct and municipal officers for all fees which may be collected by them, and for all public and municipal money which may be paid to them, or officially come into their possession . . . "

Because of the above quoted provision and other provisions relating to state officers, it has been held in Idaho that such

Mr. Lary C. Walker  
November 6, 1973  
Page 2

officers must account for all funds regardless of how they are lost or what the reason was that the funds were not collected.

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In the case of Bonneville County v. Standard Accident Insurance Co., 57 Idaho 657, the county auditor had placed funds in a locked vault to be held over the weekend. A jail prisoner who was cleaning the courthouse broke into the vault and stole the funds. The auditor turned in his accounts listing the shortages for taxes, licenses, etc. as having been stolen. The court required his bonding company to make up the loss and, as I am sure you know, the principal or the person for whom a bond is obtained can be held personally liable for any item the bonding company has to pay. The principal generally agrees to this in writing. See Pocatello v. F. & D. Co., 41 Idaho 46. The above case of Bonneville County v. Standard Accident Insurance Co., supra, also indicates that it may take a constitutional amendment to change this in Idaho since the constitution of this state, rather than the courts, has required strict accountability of officers.

Payment of taxes is required by statute to be in lawful money of the United States, Section 63-1101, Idaho Code. It has been held in a number of Idaho cases that public officers are liable personally for bad checks or deposit certificates which have not been paid by the bank when such were accepted by the county officer for taxes, F. & D. Co. of Maryland v. Mason, 55 Idaho 397; Gray v. County of Boundary, 49 Idaho 589; Vial v. Paradis, 44 Idaho 157; Crutcher v. Sterling, 1 Idaho 306; Hass v. Misner, 1 Idaho 170.

Also, if a check is worthless or funds received in payment of taxes in any other form than lawful money of the United States are not recoverable by the county officer, it has been held in some of the above cited cases that the taxpayer has not paid his taxes and that the county or the receiving officer can take action to collect these taxes from the individual who owes them.

It should be noticed that clerks, sheriffs, and some other county officers are by law given direct execution for any fees due to them and not received. This is under Section 31-3215, Idaho Code. The public depository law, that is, Chapter 1, Title 57, Idaho Code, also gives some relief from the cases which held public officers liable personally if they have public funds deposited in a bank that fails. However, the public depository law must be strictly followed or the officer would still be liable even in such a case. See 93 A.L.R. 819 and 155 A.L.R. 436. Individuals owing fees or taxes to the state have in some cases been held liable where the county officers involved have not collected the whole fee or part of a fee provided for by law. Thus, in one

Mr. Lary C. Walker  
November 6, 1973  
Page 3

case, a county officer attempted to charge a smaller fee than was required by law. Later the county was allowed to recover this sum from the individual who should have paid the fee; the case also indicates that the county official could have been held liable. This is the case of Lincoln County v. Twin Falls Northside Land and Water Co., 23 Idaho 433. See also Naylor v. Vt. L. & T. Co., 6 Idaho 251.

In the case of State v. Taylor, 59 Idaho 724, it was held that a former Idaho Penitentiary Warden might be convicted of a felony for failing to pay over public funds under sections such as Sections 18-5702 and 18-5701, Idaho Code, where his chief deputy had taken the funds. In regard to this particular type of felony, all of the cases in Idaho indicate that no crime intent is necessary, and that the crime is committed when the officer fails to pay over the funds to the proper receiving official. State v. Browne, 4 Idaho 723, and State v. Taylor, supra.

From the standpoint of a public officer, the law on this subject obviously places a frightful burden on such officers. Not many persons pay the public in "lawful money" at present. Public officers must hire and have deputies and assistants in order to carry on their functions. The possibilities of liability in such situations under the Idaho cases and the cases throughout the nation are frightening. The question of amendment of the Constitution and/or laws in Idaho to correct this situation should be seriously considered.

Sincerely yours,

FOR THE ATTORNEY GENERAL

WARREN FELTON  
Deputy Attorney General

WF:cg

November 8, 1973

Mr. D.F. Engelking  
Superintendent of Public Instruction  
Len B. Jordan Office Bldg.  
Boise, Idaho 83702

Dear Mr. Engelking:

We wish to respond to your letter requesting our opinion on a situation in Blaine County School District No. 61 from the superintendent thereof, Mr. Wayne B. Fagg wherein he asks:

"What can be done in order to place a child in a special education program, if the parents are opposed to it?"

We can find nothing in the Title 33 of the Idaho Code which permits or even suggests that a school district has the authority to place a child in any program where it is known the parents are opposed to placing the child in that program. It must be remembered that the child belongs not<sup>to</sup> the school but to the parents, and the law presumes that the parents are permitted to determine what is best for the child. The school, on the other hand, is a service to the parents and children of the district, and even where the school may disagree with what is best for the child, the school must accede to the wishes of the parent. Therefore, in specific answer to the question presented by Mr. Fagg, we can find nothing which permits the school to place the child in a special education program where the school knows that the parents of the child are actively, actually and adamantly opposed to placing the child in that special education program.

As an aside, we understand from the facts in this situation that the child does need special education through the program already established in that district. We find it difficult to understand the parental opposition to this program. However, that is not for us to determine, nor, we suggest, is it for the school district to determine. It might very well be that some legislation in order to correct this problem should be

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Mr. D.F. Engelking  
Superintendent of Public Instruction  
November 8, 1973  
Page 2

considered by you and the Board. In the absence of legislation permitting the district to place a child where the district feels the program would benefit the child, then the decision of the parents must control. We hope we have been of assistance in this matter.

Very truly yours,

FOR THE ATTORNEY GENERAL

JAMES R. HARGIS  
Deputy Attorney General

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November 19, 1973

Mr. David L. Vhay  
Planning and Zoning Administrator  
Blaine County Planning and  
Zoning Commission  
P. O. Box 149  
Hailey, Idaho 83333

OFFICIAL OPINION

Dear Mr. Vhay:

You have asked this office some questions relating to whether or not roads shown on platted subdivisions can be anything but public roads. You refer particularly to Sections 50-1308 and 50-1312, Idaho Code, and then you ask the following questions:

"When a subdivision is approved by the county does the county automatically accept responsibility for such roads as public roads or can these roads remain private roads?

"Can the county under contracted agreement with a developer be released from future responsibility for roads and liability of public services or can the county be required to provide services to a taxpayer of the county at any future date on demand regardless of any prior agreement?"

Section 50-1313, Idaho Code states that no street or alley hereafter dedicated by the owner to the public shall be deemed a public street or alley, or be under the use and control of a city unless the dedication shall be accepted and confirmed by the city council. This, then, means that you do not need to accept dedications, and if you do not accept them, they will not be the liability of the city, at least, nor probably of the county.

Mr. David L. Vhay  
November 19, 1973  
Page 2

Although Section 50-1309, Idaho Code says in part that the plat maker is to . . . "make a dedication of all streets and alleys shown in said plat" . . . , 50-1312 says that the acknowledgement recording of a plat is equivalent to a deed to the portion of the premises platted as set apart for streets, alleys or other public use or dedicated to charitable or religious or educational purposes. If a road (such as a service road) is not dedicated to public purposes, the argument goes that it would remain private property and would not ever be the obligation of the city or county.

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I have included for your information a number of cases and a portion of some texts on the subject. Also of interest to you might be Chapter 33 of McQuillen on Municipal Corporations. This chapter is devoted to dedication and you will find it quite useful. I am sure that you should be able to find a copy of McQuillen in the office of some local attorney, so I have not included it for your use. You will notice from the included portions of the two chapters on dedication, that an essential to dedication is the intent by a person owning the property to give it to the public. Obviously, if a road in a plat is marked "private" there can be no intention to dedicate it. Nothing in this chapter actually requires a person to mark every road on a plat as a public road. We do not feel that Section 50-1309, Idaho Code says this nor does it mean this. What it does say is that every road or street or public place marked as such or obviously shown as such will become dedicated to the public after acceptance.

As to your second question, counties and cities can, of course, make certain agreements. Whether or not to make these agreements is a matter of policy. This office would only attempt to advise you as to whether any particular agreement was valid or invalid. The counties and cities must decide how to fulfill their functions.

Sincerely yours,

FOR THE ATTORNEY GENERAL

WARREN FELTON  
Deputy Attorney General

WF:cg

Enclosures

cc: Mr. Steve Bolar

November 19, 1973

Mr. Richard J. Hutchison  
Deputy Director  
Idaho Personnel Commission  
BUILDING MAIL

Dear Sir:

You have requested opinions on three points dealing with veterans' preference provisions in the Idaho Code.

Your first question asks whether the one year residency requirement of Title 55, Section 602 of the Idaho Code, the provision requiring the establishment of preference systems for veterans by public employers, applies to Title 67, Section 5309(e), the provision requiring in part for the Personnel Commission to add preference points to examination ratings held by veterans. Title 65, Section 515 resolves inconsistencies in other state laws dealing with veterans' rights in favor of the provisions of Title 65, Section 502 *et seq.* Thus, the requirement of Title 65, Section 502, that an individual who would come under the Idaho veterans' preference systems must "have had not less than one (1) years residence in the State of Idaho, immediately preceding the application for work or employment", must be incorporated into the provisions of Title 67, Section 5309(e).

Your second question asks what constitutes one year's residency in the State of Idaho within the meaning of Title 65, Section 502 of the Idaho Code. Definitions of residence differ radically with the statute in question. Title 65, Section 502 *et seq.* contains a residency requirement but, unlike some chapters of the code, provides no definition of "residence" for use in applying its requirement. Case law in the domestic relations area, however, is readily analogous.

Residency in Idaho for divorce purposes is established by a physical presence in Idaho for six weeks with the intention of remaining here indefinitely. *Snestad v. Snestad*, 94 Idaho 181 at 183, 484 P.2d 730 (1971); *Hampshire v. Hampshire*, 70 Idaho 522 at 524, 525, 223 P.2d 950 (1950).

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Article VI, Section 5 of the Idaho Constitution and Title 34, Section 405, Idaho Code, specifically provide that no persons shall be deemed to have gained or lost a residence merely by reason of his presence in or absence from Idaho while in the U. S. military service. This position has been adopted by the Idaho Supreme Court in the domestic relations area. See Hampshire v. Hampshire, supra, and Hawkins v. Winstead, 65 Idaho 12, 38 P.2d 972 (1943), which both held that a military man retains residence in his home state absent evidence of his actual presence in Idaho for the six weeks required by statute plus evidence of an intent to remain in the state indefinitely. Military personnel, in other words, can neither gain nor lose residence in Idaho by virtue of service travel or placement. In short, to conform with the law in applying the one year residency requirement of Title 65, Section 502, Idaho Code, first determine whether the individual in question was an Idaho or an out-of-state resident prior to his becoming a serviceman. If an Idaho resident, determine whether the individual has adopted the residence of another state by actual presence in that state coupled with an intent to remain there indefinitely. If the individual in question resided in another state prior to military service and now claims residency in Idaho, determine whether the individual has been physically present in Idaho for one year immediately prior to application for work or employment, and can evidence an intent to remain in the state indefinitely.

Your third question asks whether state employees who are also disabled war veterans may "open registers" for the purpose of promotion. Title 67, Section 5309(e) and Title 65, Section 502 requires a non-disabled veteran to apply for a state or local government employment examination within 120 days from separation from the service or service hospitalization. These statutes, however, allow a disabled veteran to take an examination and be placed on the respective register at any time. From the wording of the statute it appears that a disabled veteran can take examinations and maintain positions on a number of registers even after he has secured state or local governmental employment. It is also apparent that a non-disabled veteran is allowed to take numerous examinations and maintain positions on the respective registers while currently employed by a state or local government if he applies to take each examination in question within 120 days of separation from the service or service hospitalization. Your question as to whether preference points are allowed for promotional purposes is actually relevant to both groups.

Title 65, Section 506, Idaho Code, requires that preference points be given only for the purposes of initial employment, not for the purpose of promotion. As indicated above, Title 65, Section 515

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resolves inconsistencies among the state veterans benefits laws in favor of the provisions of Title 65, Section 502, et seq. Therefore, Title 67, Chapter 53, must incorporate the limitations contained in Title 65, Section 506 stated above. Depending upon the circumstances, the filing of an application for another position by a veteran already working for the state, county or city could be determined to be an attempt to obtain a promotion rather than an attempt to obtain another type of employment. To be within the confines of Title 65, Section 506, the Personnel Commission should deny preference points to a veteran whose application is, in reality, an application for promotion. The Personnel Commission would weigh the circumstances surrounding each application in making a determination as to whether it was promotional in nature or not.

A fourth question asks whether you are correct in your summation that the disabled veterans' preference points are meaningless considering the fact that Title 65, Section 506 provides the names of all ten point preference eligibles are to be placed at the top of the register above the names of all non-preference eligibles in accordance with their augmented rating. A reading of the language of Title 65, Section 506, indicates that you are correct in your conclusion.

Note that Title 65, Section 506 of the Idaho Code, as reported in the 1973 pocket part, varies from the same provisions as reported in the 1972 Session Laws regarding the non-disabled veterans' five point preference. A check of the original bill shows that the Session Law printing is correct. The Session Law and the original bill read as follows:

65-506. ADDITION OF POINTS TO COMPETITIVE EXAMINATION RATINGS.--"Five (5) points shall be added to the earned rating of any war veteran and the widow of any war veteran as long as she remains unmarried, when required to take competitive examination for any position in any state government, county or municipal government, which may now or which may hereafter require competitive examination under merit system or civil service plan of selecting employees. The names of all five (5) point preference eligibles resulting from any merit system or civil service examination shall be placed on the register in accordance with their augmented rating." (Emphasis Supplied)

Mr. Richard J. Hutchison  
November 19, 1973  
Page 4

The Idaho Code version of the same statute contains the words "at the top of the register" rather than "on the register". The Idaho Code Commission has been apprised of the discrepancy. Although your question regarding promotional preferences concerns the disabled veterans' ten point preference, I thought I should apprise you of the printing error since the Code incorrectly placed both types of veterans groups at the "top of the register". Your question would have applied to both groups equally had the Code version of Title 65, Section 502 been the correct version.

Very truly yours,

W. ANTHONY PARK  
Attorney General

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OPINION

November 23, 1973

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The Honorable Cecil D. Andrus  
Governor  
Statehouse  
BUILDING MAIL

Dear Governor Andrus:

We wish to respond to your request for our opinion, dated November 15, 1973, on the following two questions:

1. What age groups must be provided services with the use of three times average daily attendance (ADA) foundation money at the option of school districts?
2. What age groups must be provided services under the Exceptional Child Act under the mandatory provision of that Act?

Section 33-2001, Idaho Code, provides that each school district is responsible for and shall provide for the education of handicapped school age children resident therein. A school age child is defined in that section as any child between the ages of 6 and 21. Further, the Compulsory Attendance Statute, Section 33-201, Idaho Code, also states that school age is any person between the ages of 6 and 21. A child between the ages of 7 and 16 must attend school, either public, private or parochial, or be educated in some other comparable manner. Therefore, in answer to your first question, the persons who must be provided services with the use of three times the ADA monies at the option of the school district are those who are 6 through 21, inclusive.

Likewise, the age group which must be provided services under the Exceptional Child Act are ages 6 through 21. The issue of whether or not educational opportunity for the exceptional child is permissive or mandatory does not have anything to do with the age of the child. Every school district is required to provide for the education of the exceptional child between the ages of 6 and 21. However, the legislature has provided at least two ways in which the school district may exercise its responsibility.



The Honorable Cecil D. Andrus  
November 23, 1973  
Page 2

The first is to provide the exceptional child with an educational program within the district. This will be funded by the three times ADA foundation monies. The second method is to contract with another district, an approved private program or an approved public program outside of the school district. The district which is responsible for the education of that child will probably pay the entity which provides the actual education with its three times ADA funds.

We hope we have been of some assistance to you and the Planning and Advisory Council on Developmental Disabilities. If we can be of further service, please advise.

Respectfully yours,

FOR THE ATTORNEY GENERAL

JAMES R. HARGIS  
Deputy Attorney General

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December 28, 1973

Honorable D. F. Engelking  
State Superintendent of  
Public Instruction  
Len B. Jordan Office Bldg.  
BUILDING MAIL

Dear Mr. Engelking:

We wish to respond in part to your questions concerning the effect, if any, of Section 15-5-104, Idaho Code, relating to the use of a limited power of attorney, on Title 33, Chapter 14, Idaho Code, relating to the transfer of pupils to attend schools in other than their home district, where tuition charges may be or are being imposed.

We have been working on your specific question and the related issues raised thereby for quite some time. At this time we are not prepared to arrive at specific conclusions on your question on the effect of the use of the limited power of attorney, where the residency of the child is involved. However, we have arrived at conclusions on three related issues:

1. Who is liable for the payment of tuition charges, if imposed and authorized?
2. What legal actions are available to a district to collect the tuition charges?
3. May the prepayment of the tuition charges be imposed as a condition precedent to the child's admission to the school?

In answer to Question #1, Section 33-1406, Idaho Code, specifically provides that, except where the transfer of the student is by the action of the board of his home district, the bill for tuition shall be submitted to the non-resident parent or non-resident guardian of the student, "and such parent or guardian shall be liable for the payment of said tuition." It should be clear, then, who is to pay the bill for tuition. We would emphasize that the tuition bill is not to be submitted to the resident of the district with whom the student lives,

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nor is that resident legally liable for the payment of the tuition bill if the district submits it to him. Therefore, a district which is now submitting bills of tuition to residents of that district who have a student living with them and attending school in that district, but whose parent or guardian is not a resident of the district, should cease such practice immediately. That resident is not chargeable for such a bill and cannot be required to pay it. The bill must be submitted, if at all, to the non-resident parent or guardian as his or her contribution to the district which actually provides the educational opportunities for the student.

Section 33-1407, Idaho Code, provides the answer to Question #2. Where the non-resident parent or guardian does not pay the tuition charge when due, the creditor district may bring an action in the district court in and for the county in which the creditor district maintains its administrative offices, or in which such non-resident parent or guardian resides. This action is available even where the parent or guardian resides outside the State of Idaho. In that case, the district may bring an action in the state in which the parent or guardian does maintain his residency. Districts should consult with their legal counsel in matters such as this, because sufficient service of process may be a problem in certain instances. Also, we would advise caution on this issue of collecting tuition. It is on this point that your main question concerning the use of the limited power of attorney will have the greatest effect. If a non-resident parent or guardian issues his limited power of attorney to a resident of the district and the student actually takes up his abode in that district, does that action excuse the non-resident parent or guardian from paying the tuition? It is this issue on which we have not yet reached an opinion.

The answer to question number 2 suggests the answer to the third question. Article IX, Section 1 of the Idaho Constitution requires the legislature to establish and maintain a general, uniform and thorough system of public, free, schools. Article IX, Section 9 of the Constitution authorizes the legislature to require that every child shall attend school. This section does not state that every child who is a resident of his district shall attend school only in that district. Neither do the statutes enacted as permitted by that section. Title 33, Chapter 2, Idaho Code. Therefore, we have two constitutional sources which taken together state that the system of schools established by the legislature shall be public and free and that every child shall attend that public free school system unless educated by other means. In addition, the supreme court of this state held in Paulson v. Minidoka School District No. 331, 93 Idaho 496, 463 P.2d 935, that "free" as used in

Honorable D.F. Engeling  
December 28, 1973  
Page 3

Article IX, Section 1 means financially free and that the product of a student's education cannot be conditioned on the payment of a fee.

From all these sources, we are of the opinion that if the product of a child's education cannot be conditioned on the payment of a fee, then the opportunity to attend school and acquire an educational product cannot be conditioned upon the prepayment of tuition bills. We must admit to both surprise and distress when we were informed that a district, whose very purpose for existing is to provide educational opportunities, was denying admission to those very opportunities simply because a resident of the district was not paying the tuition charges for a non-resident student living in that district. Further, the child is required to go to school and the school itself must be public. By "public" we believe the framers of the Constitution meant "open to all," not just open to those students whose parents or guardians are residents of that district. Finally, the district has adequate legal recourse to collect tuition bills without using the educational process of the student, or the withholding thereof, as a sledge hammer over the heads of the district's own residents in order to extract money from them. We are, therefore, of the very strong opinion that the pre-payment of tuition cannot be a condition precedent to a student's admission to any public shcool in the State of Idaho.

We trust we have been of assistance, and if we can be of further service please advise.

Very truly yours,

FOR THE ATTORNEY GENERAL

JAMES R. HARGIS  
Deputy Attorney General

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December 31, 1973

Representative Bill Onweiler  
3710 Cabarton Lane  
Boise, Idaho 83704

Re: Opinion As To Whether Federal Or State  
Revenue Sharing Monies May Constitutionally  
Be Used To Build A Nondenominational Chapel  
At The New State Penitentiary

Dear Representative Onweiler:

The Idaho Constitution would not prohibit the use of state or federal revenue sharing monies for the construction of a nondenominational chapel at the Idaho State Penitentiary, but there is a question as to whether the United States Constitution would prohibit it. That question involves an interpretation of the two pinions of First Amendment freedom of religion: the "Establishment Clause" and the "Free Exercise Clause."

The "Establishment Clause" of the First Amendment prohibits the state from establishing or aiding the establishment of a religion. The argument might be raised by an anti-religious group, an organization of atheists for instance, that the state would be establishing or aiding religion by building a chapel. The fact that the chapel is to be nondenominational would be immaterial since the facility would still aid "religion" in general.

On the other hand, the Establishment Clause proscribes the establishment of secularism. If the inmates at the Idaho State Penitentiary have no opportunity to attend church services outside their prison walls, a counter argument could certainly be made that by refusing to build a place of worship secularism is receiving preferential treatment by the state.

The "Free Exercise" clause of the First Amendment prohibits the state from inhibiting the free exercise of a citizen's religion. In support of the building plan, it could be argued that a denial to the prisoners of a place of worship or

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Representative Bill Onweiler  
December 31, 1973  
Page 2

the opportunity to attend church outside the prison is a denial to the prisoners of the free exercise of their respective religions.

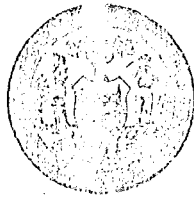
As you can see, the prisoners' incarceration is a critical factor in this constitutional problem. It has been widely held that the state may not maintain such nondenominational symbols of religion as crosses in city parks. But it is apparent that the building of a prison chapel poses a different question. Secularism is not really promoted in the case of the cross since the citizens may exercise religion in any number of other ways. But when a place of worship is not maintained in a prison, and the prisoners are not allowed to attend services outside the penitentiary, secularism does seem to obtain an advantage. The state would probably be more in violation of the Free Exercise Clause by failing to build the nondenominational place of worship than it would be by building it. Moreover, it is probable that by not building the nondenominational chapel while refusing to offer prisoners the opportunity to attend services in outside places of worship, the state is actually denying the prisoners their fundamental Constitutional right to free exercise of religion.

After consideration of the question and a research of applicable legal authority, it is my opinion that where the government regulates the temporal and geographic environment of individuals as thoroughly as it does to prisoners at the Idaho State Penitentiary, that unless it provides proper facilities for the prisoners to engage in the practice of their faith, the state would be in violation of both the Establishment and Free Exercise clauses of the First Amendment of the U.S. Constitution. Thus, it is my opinion that federal and state revenue sharing monies are a proper source of financing for a nondenominational chapel at the new Idaho State Penitentiary.

Very truly yours,

W. ANTHONY PARK  
Attorney General

WAP/JFG:lm



W. ANTHONY PARK  
ATTORNEY GENERAL

STATE OF IDAHO  
OFFICE OF THE ATTORNEY GENERAL  
BOISE 83720

November 26, 1973

Honorable Walter P. March, Mayor  
Placerville, Idaho 83666

Dear Mayor March:

I have considered your letter and conversation regarding making water system improvements to the new portion of your city and the methods you may use to do so.

Proceeds from townsite sales may be used by city officials to make public improvements. The statute reads as follows: (58-810, I. c.)

"The proceeds received from such sales shall be disposed of as follows:

1. They shall be applied to pay the expenses of the sale.
2. To discharge any outstanding claims incurred in entering the townsite of said town.
3. The surplus, if any, shall be a special fund to be held by such corporate authorities, to be used in making public improvements in such town."

Thus, this section says that after the sale of lots in a townsite, one first must use the funds gained from the sale to pay the expenses of the sale, and then to discharge outstanding claims incurred in entering the townsite. Then the balance of such funds may be used by the city officials for public improvements in the town. You will notice there is no requirement of an election. The town officials are empowered to use the funds to make the improvements as necessary.

Honorable Walter P. March, Mayor  
November 26, 1973  
Page 2

Next your attention should be called to Section 50-341, Idaho Code. A city must comply with this section in making improvements where it is applicable. A copy of this section is attached for your information.

You could require that the people to be benefited reimburse the city. However, you do not have to do this. This choice is up to the Mayor and Council of the City.

You could also proceed to form a local improvement district, bond and make the improvements that way if you desire. However, I assume that since you have funds available you may use the system I have outlined earlier in this letter.

Also a third method is possible for such improvements. That is, a water district could be formed. These districts are formed by making a petition to the local District Court.

If we can be of any further help to you, please let us know.

Very truly yours,

FOR THE ATTORNEY GENERAL

WARREN FELTON  
Deputy Attorney General

WF:lm





## STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

W. ANTHONY PARK  
ATTORNEY GENERAL

November 26, 1973

Mr. Robert N. Wise  
Acting Director  
State Planning and Community  
Affairs Agency  
Building Mail

Dear Mr. Wise:

You have asked the Office of the Attorney General for an opinion on the following:

What authority and responsibility does a highway district have as compared to city or county elected officials regarding the following:

1. Acceptance of street dedications for public maintenance and improvement; and
2. action of vacating public street rights-of-way?

I believe it best to begin by elaborating on the definitions of certain key words, and then proceed to a discussion of the relationships existing between city ~~councils~~ <sup>councils</sup>, county commissioners, and highway districts.

When we talk about "dedication" and "vacation" of public street rights-of-way, we are talking in essence about title. "Dedication" refers to the process whereby land is transferred to the public by a private owner, such transfer being made for a public purpose. The dedication becomes final in the case of cities upon acceptance of the dedication by way of approval of the plat by the city counsel followed by recordation of the plat. Idaho Code, 50-1312 and 50-1313. In the case of counties, a dedication becomes final when the plat is acknowledged by the county commissioners, and followed by a recording of the plat. Idaho Code 50-1312. In both cases, the affect of a dedication is to convey fee simple title to the government entity. Idaho Code 50-1312.

Also, recording of the plat gives the public the right to travel on the dedicated street or road. See Moshel v. Cleveland,

51 Idaho 468, 5 P.2d 549 (1930).

The term "vacation" in the case of both cities and counties is virtually a reverse of the above process to the extent that it relates to ownership of the property in question. Upon vacation, the local government loses title to the property. The procedure for vacation differs from that of dedication in that citizen action is required in the form of petitioning of a local government to trigger the vacation process. The county commissioners or the city council, as the case may be, then decides the petition. Idaho Code 50-1317.

In neither of the above processes is it required or indicated that the highway commissioners have anything to do with the proprietary function of acquiring title via dedication of streets, or, in relinquishing title to those streets via the vacation process.

In the case of counties, it is clear that highway districts have "exclusive jurisdiction" over established roads. Idaho Code 40-1611. In the case of cities, either the city government or the highway district, depending on certain circumstances which are explained in the next paragraph, has the same exclusive jurisdiction over established roads. Idaho Code 50-311 and 40-3001 et seq.

There are two types of highway districts possible in Idaho. One is formed under Title 40, Chapter 16 of the Idaho Code, and applies to all counties in the State of Idaho. The other might be formed pursuant to Title 40, Chapter 30, of the Idaho Code, and relates to counties with a population of more than 75,000. The latter highway district differs from the former only in that the latter highway district has jurisdiction over all roads in the county including those within the limits of an incorporated city. An established highway district has "exclusive general supervision and jurisdiction over all highways within its district, with full power to construct, maintain, repair and improve all highways within the district..." and, "in respect to the highways within such district all of the powers and duties that would by law be vested in the county commissioners of the county...if such highway district had not been organized". Idaho Code 40-1611, and 40-1613. This language applies to existing highways, and does not seem to include the highway district in the dedication or vacation process.

Confusion might enter the picture when one tries to reconcile the power of the highway commissioners to "abandon" an existing highway with the vacation process. The abandonment power of the highway commissioners is exclusive. See Mosman v. Mathison,

Mr. Robert N. Wise  
November 26, 1973  
Page 3

90 Idaho 76, 408 P.2d 450 (1965). However, the term, "abandonment" must be distinguished from the term, "vacation". Vacation deals with conveyance of title. Abandonment does not. If there has been a vacation by the county commissioners then there is no need for abandonment, since the county government no longer owns the street or highway. If, on the other hand, there is an "abandonment" by the highway commissioners, the county government still has title to the land in question.

It is my opinion that the highway commission has no official function in either the dedication or the vacation process. Once the dedication has been made, however, the highway commission has exclusive jurisdiction over the street or road. This includes the right to abandon the road. A vacation by the county commissioners, on the other hand, operates to relieve the highway of jurisdiction over the road, since the local government doesn't own it anymore.

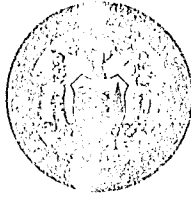
I would suggest that the <sup>existing</sup> statute is somewhat awkward, and would further suggest that county commissioners, city councils and highway commissions work together in the vacation and dedication process. Input from the highway commission could prove to be invaluable in those situations.

Very truly yours,

FOR THE ATTORNEY GENERAL

JAMES C. WEAVER  
Assistant Attorney General

JCW:lm



## STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

W. ANTHONY PARK  
ATTORNEY GENERAL

November 26, 1973

Ms. Linda Gonzales  
Administrative Director

and

Mr. Fred Grant  
Commission Counsel  
Idaho Commission on Human Rights  
Statehouse  
BUILDING MAIL

Dear Ms. Gonzales and Mr. Grant:

Your letter of November 16th, in which you request an opinion as to whether or not you might have your budget presented in a separate appropriations bill, has been referred to me for comment.

There is nothing in the Idaho Code which would prohibit the presentation of a separate appropriations bill to the legislature for your programs. I would, however, draw your attention to Idaho Code, Section 67-3514, entitled Appropriation Bills to be Prepared by Joint Committees. That section provides that the joint committees of the legislature in charge of appropriation measures shall prepare and introduce appropriate bills. As you are already probably aware, you should work closely with this committee in determining whether a separate appropriations bill is suitable. If the relevant committee has no objection to a separate appropriations bill, then there is nothing in the code which would prohibit it. And, I see no reason why the relevant committee would have any objection.

If you have any further questions, please feel free to contact me.

Very truly yours,

FOR THE ATTORNEY GENERAL

JAMES C. WEAVER  
Assistant Attorney General

JCW:cg

November 28, 1973

Mr. L. Gorrone  
Attorney at Law  
105 North Hayes  
P. O. Box 637  
Emmett, Idaho 83617

*Gen  
Cn  
PA's Office*

OFFICIAL OPINION

Dear Mr. Gorrone:

In your letter of October 22, 1973, you posed for opinion the questions: "Is a policeman entitled to a witness fee the same as any other witness?" and "Is it mandatory under I.C. 19-4301 to have a coroner's inquest?".

In response to the first question regarding witness fees for policemen, if the State is a party in a criminal or civil matter, then no witness fees would be recoverable since it is his duty to go to court and testify on behalf of the state. Ordinarily, the policemen will attend to their courtroom duties during their normal working hours as it is part of their responsibilities as policemen. If their shift happens to fall at some time other than normal working hours, then the police force may make arrangements to juggle his shift with another man or they may grant him compensatory time or overtime, depending on their needs and budget.

Civil matters between two private parties not connected with the state present a different situation. In that circumstance, the policeman is a citizen like all the rest of the people, and should be treated as such.

In response to the second question, I feel that corrective legislation would be the best answer rather than an Attorney General's opinion. This office is considering the appropriate measures to alleviate the problem.

Very truly yours,

FOR THE ATTORNEY GENERAL

JAMES P. KAUFMAN  
Assistant Attorney General

COPY



## STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

W. ANTHONY PARK  
ATTORNEY GENERAL

November 29, 1973

Mr. Tom Morris  
Prosecuting Attorney  
Benewah County  
Saint Maries, Idaho 83861

Dear Mr. Morris:

We have had an opportunity to review your letter of October 15th, in which you seek advice from this office regarding boating regulations on the St. Joe River, and also in which you pose certain questions regarding the jurisdiction to pass regulations concerning the waters in Benewah County generally. The discussion which follows should, we would hope, tend to answer those questions.

At the outset, I would like to call your attention to the enclosed Law Review article from the Wisconsin Law Review. It appears to discuss in a comprehensive manner the state of the law generally in regard to your problem, and I hope you find it useful.

It is our opinion that the regulations which you mention could be promulgated by the Benewah County Commissioners. There are some obstacles to overcome along the way, however.

We feel that the regulations could be passed under the authority of the Idaho Constitution in Article 12, Section 2 which reads as follows:

"Local police regulations authorized.--  
Any county or incorporated city or town may make and enforce, within its limits, all such local police, sanitary and other regulations as are not in conflict with its charter or with the general laws."

The cases which are outlined under this provision indicate that broad powers exist in local governments in Idaho to pass police power regulations. However, the qualification found in the quoted constitutional provision that requires consistency "with the general laws" will present somewhat of a problem

Mr. Tom Morris  
November 29, 1973  
Page 2

in light of Idaho Code, Section 39-2528, which is found in that portion of the Code dealing with "Speed Equipment and Traffic Regulations for Boats and Watercraft," and reads in pertinent part as follows:

"(a) The provisions of this act, and of other applicable laws of this state, shall govern the operation, equipment, numbering and all other matters relating thereto whenever any vessel shall be operated on the waters of this state, or when any activity regulated by this act shall take place thereon; . . ."

(b) Any subdivision of this state may, at any time, but only after public notice, make formal application to the department for special rules and regulations with reference to the operation of vessels on any waters within its territorial limits and shall set forth therein the reasons which make such special rules or regulations necessary or appropriate. (Emphasis added)

It there is a conflict with the "general laws", it will be a conflict with this provision, and with no others, in the opinion of this office.

It might be possible to distinguish the type of regulation you propose from the regulation referred to in title 39-2528 of the Idaho Code. If you believe this to be a possible alternative, then I urge you to take this course. On the other hand, Idaho Code, Section 39-2528 in sub-section (b), allows for application by local government to the Department of Law Enforcement for the promulgation of regulations broader in application than those found in the Idaho Code. At first glance, I can see no difficulty in obtaining a grant of permission from law enforcement to promulgate your <sup>regulations</sup> ~~regulations~~, if your reasons are adequately presented to the Department. The enclosed Law Review Article suggests several policy arguments which would make your reasons more acceptable to the Department. Upon obtaining permission from the Department, there would be no problem of conflict "with the general laws".

Mr. Tom Morris  
November 29, 1973  
Page 3

I would also draw your attention to those methods suggested in the Law Review Article to accomplish the end sought which would not be in conflict with Idaho Code, Section 39-~~2978~~-25-28. The present zoning enabling legislation does give local governments authority to zone lands. The enclosed Law Review Article suggests various methods which could be used under this enabling legislation, such as shore zoning, regulation of commercial enterprises, and other methods of traditional zoning which would tend to have an effect on the use of power boats.

The article also points out the problems and the challenge of providing for adequate enforcement of the regulations once they are promulgated. A good deal of thought should be given to possible efficient administration and enforcement methods in the drafting of the regulations.

I would also like to suggest that traditionally, police power regulations which are based on a nuisance theory are often easily upheld; accordingly, the purpose of the ordinance should be stated as being for the control of a defined nuisance. Also, and as you know, police power regulations are invariably subjected to a "reasonableness" test. In addition to the defined purpose of the ordinance, a strong foundation should be laid for the reasonableness of those regulations, such foundation being stated within the ordinance itself. Also, discriminatory purpose and effect should be closely guarded against.

A jurisdictional problem may exist also. The cities, of course, have authority to act within their limits; I would suggest that you work closely with cities falling in this category in adopting the proposed ordinance.

I hope that this answers your question in regard to the regulation of boats on the St. Joe River, and also on those other bodies of water located in Benewah County. As far as jurisdiction generally over those bodies of water is concerned, it would appear that whether the local government has jurisdiction would depend upon the conduct sought to be regulated. In the absence of an express federal or state law which would be in conflict with a proposed local ordinance, then I would opine that the State Constitution provision found in Article 12, Section 2 would allow local government to promulgate a regulation.



Mr. Tom Morris  
November 29, 1973  
Page 4

I hope that we have answered your question. If you have any further questions, please feel free to contact us.

Very truly yours,

FOR THE ATTORNEY GENERAL

JAMES C. WEAVER  
Assistant Attorney General

JCW:lm

Open 10/1

December 3, 1973

Mr. Milton Small  
Executive Director  
Office of Higher Education  
BUILDING MAIL

Re: Proposed Idaho State Scholarship Program

Dear Mr. Small:

We wish to provide our opinion to your request on the issue of whether or not Idaho can provide a statewide scholarship program funded through appropriated funds and administered by the State Board of Education. The second question that you have asked is whether or not students, otherwise eligible, who attend the non-public, private and religiously oriented institutions of higher education may participate in such a program.

We can find nothing in either the Constitution or the statutes of the State of Idaho which prohibit the legislature from appropriating funds from whatever source to the State Board of Education to be used under guidelines established by the legislature for scholarships to eligible individual recipients as outlined in the draft copy of the scholarship program. Therefore, we would assume that a program using state funds for scholarship purposes is a valid and proper use of state funds.

The second question which you have asked us is whether or not these scholarship funds, if provided for, can be awarded to a recipient who attends an institution of higher education in the State of Idaho which is non-public and which may also be religiously oriented.

We have very serious reservations about the use of public funds that eventually find their way into the treasury of non-public and particularly religious institutions. Article 9, Section 5 of the Constitution of the State of Idaho prohibits the legislature or other public corporation from making any appropriation or paying from any public funds or monies whatever, anything in aid of any church or sectarian or religious society, or for a

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Mr. Milton Small  
December 3, 1973  
Page 2

sectarian or religious purpose, or helping support or sustain any school, academy, college, university or other literary or scientific institution, controlled by any church, sectarian or religious denomination whatsoever; nor shall any grant or donation of land, money or other personal property ever be made by the state, or any such public corporation, to any church or any sectarian or religious purpose.

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There have been in the recent past; a number of cases in State Supreme Courts and the Supreme Court of the United States on the issue of the separation of church and state, where either the Congress of the United States or a state legislature has attempted to provide some financial support directly or indirectly to private and sectarian schools, colleges or universities. These cases are split in the final holding as to whether or not such acts of the state legislatures or the Congress do, as a matter of law, violate the doctrine of separation of church and state. The State of Idaho has had very little experience on this issue. However, we do have a rather definitive case entitled Epeldi v. Engelking, 94 Idaho 390, 488 P.2d 860, which had to do with the financial support from the state to local school districts which transported students who attend private parochial schools. In that particular case, the Supreme Court of the State of Idaho stated that such financial support violated Article 9, Section 5 of the Constitution. It should be noted that that case had to do with the support of bussing to private and parochial elementary and secondary schools in the State of Idaho. It did not have anything to do with the distribution of state scholarship funds to an individual who attends a private or parochial college or university. However, we have an idea of how our court might rule if the issue of the State Scholarship Fund as presently proposed came before it.

In our research, we have found that the states are almost evenly split on the issue of public transportation, providing text books, supplementing teachers' salaries, and other matters where the state appears to support either directly or indirectly a private or parochial school. Therefore, we cannot give you a definitive answer that the proposal is within the constitutional permission or that it is a practice which the Constitution bans. We can only suggest that there is a problem here. Whether the State Board wishes to test this matter by encouraging the legislation and then challenging or having the legislation challenged is a matter of policy for the Board.

We realize that we have been less than explicit and firm in our opinion herein. However, the issue of constitutionality of

Mr. Milton Small  
December 3, 1973  
Page 3

a proposed piece of legislation cannot be firmly established until the Supreme Court of the State of Idaho speaks on the issue. Our purpose here is only to inform you that there is, as we view it, a very real question as to the constitutionality of this proposal, which includes students as recipients of state scholarship funds who attend private institutions in the State of Idaho. However, this does not mean that we are of the opinion that such a program is absolutely banned by the Constitution. Therefore, we will be of whatever service you may direct in determining the issue.

Very truly yours,

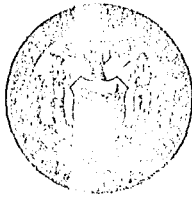
FOR THE ATTORNEY GENERAL

JAMES R. HARGIS  
Deputy Attorney General

JRH:cg

cc: Hon. Percival A. Wesche  
Dr. James E. Todd

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STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

W. ANTHONY PARK  
ATTORNEY GENERAL

December 7, 1973

Mr. E. L. Scott  
City Attorney  
City of Malad  
P. O. Box 145  
Malad City, Idaho 83252

Dear Mr. Scott:

Your letter of November 20th in which you request an opinion regarding Idaho Code, Sections 50-1403 and 50-1405, has been given to me for comment.

I believe that 50-1403 would require a public hearing whenever a tract of land is to be "sold, conveyed or exchanged" by the city. I further believe that if the council is going to convey that real property to any of those institutions or entities designated in 50-1405 of the Idaho Code, then such a hearing would not be required. I base this belief on the language of 50-1405 which states that for any of the referred to entities, a conveyance may be made "aside from the provisions of Section 50-1403". To me, this would indicate that the referred to entities are excepted from the hearing requirement. However, the conveyance still must be done by ordinance according to the terms of 50-1405.

To summarize, I believe that if the exchange to which you refer is to be made with any person or entity other than those persons or entities listed in 50-1405, then 50-1403 requires a hearing.

I hope that this letter answers your questions. If you have any further comments or questions, please feel free to contact this office.

Very truly yours,

FOR THE ATTORNEY GENERAL,

JAMES C. WEAVER  
Assistant Attorney General

JCW:cg

*Letter  
Opinion*

December 10, 1973

Hon. Wilson Kellogg  
Commissioner  
Department of Agriculture  
State of Idaho  
BUILDING MAIL

Dear Commissioner Kellogg:

In your letter of November 2, 1973, you request an opinion relative to the propriety of payments by your department of professional license fees of various departmental employees. We conclude that a payment of such expenses by your department is proper and we give the following rationale.

A professional employee is, notwithstanding the fact that he is a professional, an employee. This premise is established initially because an employee must be differentiated from an independent contractor. With an independent contractor, you bid for a result and you have no right of control of the methods by which the result is reached. An employee occupies a different position, as you know, and you contract to reach possibly the same result but through your own direction and control of the employee.

If you were to employ an independent contractor to perform the services your veterinarians and other professional employees provide, there would be little question but that those independent contractors must bring with them tools of their trade, i.e., professional licenses among other things. With an independent contractor you would just as surely pay for his professional license but it would be in the form of the negotiated total contract price. When a professional, such as a veterinarian comes on your staff as an employee, there is no legal prohibition from your furnishing him with all required licenses and permits just as there is no legal prohibition from your furnishing him the other tools with which he is required to work, such as medical supplies. With an attorney you furnish him an office, a secretary, a typewriter and all supplies necessary to enable the lawyer to reach the desired result. If you were to hire an independent contractor

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Hon. Wilson Kellogg  
December 10, 1973  
Page 2

for the same result, you would pay him a flat rate and he would then provide his own pencils and paper, etc. The license to practice, just like the typewriter, is furnished by you to your employees in order to enable you to reach a desired result.

One caveat in your letter was that your professional people engage in no private activities of their own, but devote their full time to the duties of your department. Under such circumstances to require an employee to furnish his own professional license is no different, it seems to us, than to require an employee to furnish his own office or his own supplies that he must use in connection with his employment.

We express no opinion on what our conclusion might be if the professionals on your staff were allowed to practice privately outside and in <sup>addition</sup> to employment with your department.

If this letter does not sufficiently clarify the subject matter of your inquiry, we would be happy to furnish whatever other assistance you desire on request.

Very truly yours,

FOR THE ATTORNEY GENERAL

CLARENCE D. SUITER  
Chief Deputy Attorney General

CDS:cg

74-7-

December 11, 1973

Mr. John F. Croner  
Chief Deputy Secretary of State  
State of Idaho  
BUILDING MAIL

Dear Mr. Croner:

You have requested an Attorney General's opinion as to whether the Idaho People's Party will enjoy ballot status for the 1974 general election.

Title 34, Section 501, Idaho Code, which defines procedures for the creation of political parties, reads in pertinent part as follows:

"(1) A 'political party' within the meaning of this act, shall be deemed as an organization of electors under a given name. A political party shall be deemed created and qualified to participate in elections in any of the three (3) ways:

(a) By having three (3) or more candidates for state or national office listed under the party name at the last general election

...

The Peace and Freedom Party, now the Idaho People's Party by virtue of a formal name change, qualifies for ballot status by virtue of the above statute. The Peace and Freedom Party ran three candidates for state and national office in the 1972 general election. Those candidates were: Dr. Benjamin Spock, who ran for U. S. President, Mr. Julius Hobson, who ran for U. S. Vice President, and Ms. Geraldine Tipton, who ran for State Representative from Idaho's 18th legislative district.

There is no question that the office of state legislator is a state office within the meaning of Section 34-501, Idaho Code. Likewise, there is no question that the office of President of



Mr. John F. Croner  
December 11, 1973  
Page 2

the United States is a national office within the meaning of Section 34-501, Idaho Code. It is my opinion that the office of Vice President of the United States is also a national office within the meaning of Section 34-501, Idaho Code. In view of this opinion, the Peace and Freedom Party did, in fact, have three candidates for state or national office listed under the party name at the last general election and is thus qualified, under its newly adopted name, for ballot status in the 1974 general election.

Very truly yours,

W. ANTHONY PARK  
Attorney General

WAP:JFG:cq

cc: Mr. Jon Robertson  
2820 Clark Street  
Boise, Idaho 83705

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December 11, 1973

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Mr. Thomas B. Campion, Esq.  
Kneeland, Laggis, Korb  
Attorneys at Law  
Saddle Road  
Big Wood  
Ketchum, Idaho 83340

Re: Carey Water and Sewer District

Dear Mr. Campion:

In your recent letter to John Croner of the Secretary of State's Office you allege that there was not proper notice for the hearing to establish the Carey Water and Sewer District as follows:

"The hearing on the establishment of said district was held in District Court in Hailey on March 29, 1973. Notice of that hearing was published in the Big Wood River Journal on March 15 and 29, 1973. I.C., Section 42-3202, 42-3206 require publication for three consecutive weeks prior to the hearing. The citizens of Carey did not receive the Wood River Journal until Friday, March 30, 1973."

According to your letter the above mistake in noticing up the hearing is the only error you claim in this matter. You do not claim any error in the subsequent election.

It should first be noted that the next to the last section of the Idaho Water and Sewer District Law provides as follows:

"42-3226. CORRECTION OF FAULTY NOTICES.--

In any and every case where a notice is provided for in this act, if the court finds for any reason that due notice was not given, the court shall not thereby lose jurisdiction, and the proceeding in question shall not thereby be void or be abaited,

Mr. Thomas B. Campion  
December 11, 1973  
Page 2

but the court shall in that case order due notice to be given, and shall continue the hearing until such time as notice shall be properly given, and thereupon shall proceed as though notice had been properly given in the first instance."

As we understand the situation, the attorney for the Water District claims that the last paragraph of Section 42-3207 effectively cures any failure of notice in the hearing. That paragraph reads as follows:

" . . . If an order be entered establishing the district, such order shall be deemed final and no appeal or writ of error shall lie therefrom, and the entry of such order shall finally and conclusively establish the regular organization of said district against all persons except the state of Idaho, in an action in the nature of quo warranto, commenced by the attorney-general within thirty days after said decree declaring such district organized as herein provided, and not otherwise. The organization of said district shall not be directly or collaterally questioned in any suit, action or proceeding except as herein expressly authorized."

You will notice that the above provisions appear to bar any action in appeal or by writ in relation to such a matter. And they say that the order establishing the district shall be conclusive and final and that the action of the district cannot be directly or collaterally attacked in any other suit, action or proceeding. However, if there were no jurisdiction in the district court to organize the district, it is extremely doubtful such sections of law could withstand constitutional attack through some appropriate remedy such as a writ of review or a writ of prohibition. It would appear that if such sections actually mean to attempt to stop review where the court lacks jurisdiction they would probably be held invalid under the State and Federal Constitutions, particularly Article 1, Sections 1 and 10 of the Idaho Constitution and the Fourteenth Amendment of the U.S. Constitution. It has often been held in Idaho that actions of a court which are invalid because of lack of jurisdiction can be prohibited, Spivey v. District Court, 37 Idaho 774, Evans v. District Court, 47 Idaho 267, In Re Hultner-Wallner, 48 Idaho 507, Coeur d'Alene Turf Club v. Cogswell, 93 Idaho 324. There is also good authority that an invalid election can be prohibited by a writ of prohibition. Baker v. Gooding County, 25 Idaho 506.

Mr. Thomas B. Campion  
December 11, 1973  
Page 3

Obviously, it could be argued that if there was failure to give notice as provided for by Sections 42-3206 and 42-3202, Idaho Code, the court lacked jurisdiction to hold the subsequent election to form the district or a later bond election. Wuchter v. Puzutti, 276 U.S. 13, McDonald v. Mabee, 243 U.S. 90, Mullane v. Central Hanover Bank and Trust Co. 339 U.S. 306, Walker v. City of Hutchinson, 352 U.S. 112.

On the other hand in Idaho there is a line of cases to the effect that failure to give proper notice in the case of a special election is only jurisdictional if the persons objecting to the election take action before the election is held. If they wait until after the election is held, the notice sections are only directory. This has been held even in cases involving bond issues. Keys v. Class B School District, etc. 74 Idaho 314, Boise City v. Better Homes Inc., 72 Idaho 441, Lewis v. Woodall, 72 Idaho 13, Harrison v. Board of County Commissioners, 68 Idaho 473, King v. I.S.B., 46 Idaho 800, Sizmore v. Board of County Commissioners, 36 Idaho 184, Weisgurber v. N.P. Company, 33 Idaho 670. These last cases are at least indicative of the fact that if one intends to do something about a special election it should in all cases be done before the election or the courts are likely to ignore it.

To us, the most serious problem in this matter is the fact that the actions of the Water and Sewer Board and a subsequent bond election might be void because of this failure of notice. In such a case there could be liability on the part of the Board and it might be exceedingly difficult to sell a bond issue of the district. We are confident that anyone involved in such an organization would certainly want to avoid such problems.

For these reasons, we would suggest that just as soon as possible this matter should be called to the attention of the District Court and/or a writ as above suggested might be taken to the Supreme Court.

Very truly yours,

FOR THE ATTORNEY GENERAL

WARREN FELTON  
Deputy Attorney general

WF:lm

cc John A Doerr  
Attorney at Law  
Twin Falls, Idaho 83301

cc John Croner  
Office of the  
Secretary of State

74-74

December 11, 1973

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Mr. Thomas W. Feeney  
Attorney at Law  
Blake, Feeney & Mosman  
1901 Idaho Street  
Lewiston, Idaho 83501

Dear Mr. Feeney:

You have asked this office to give you an opinion relating to tort liability for the Lewiston Port District. You asked, (1) Whether the Attorney General's Office would be able to provide a defense for the commissioners against tort liability.; (2) Can port funds raised by the port's tax levy be used to pay for such defense against tort claims?; and (3) Whether port commission taxes could be used to satisfy judgments against the port district and/or to procure liability insurance coverage for its commissioners.

Section 6-902(2) & (3), Idaho Code, read as follows:

"(2) 'Political subdivision' means any county, city, municipal corporation, school district, special improvement or taxing district, or any other political subdivision or public corporation.

"(3) 'Governmental entity' means and includes the state and political subdivisions as herein defined . . ."

Section 6-903, Idaho Code, reads as follows:

"Except as otherwise provided in this act, every governmental entity is subject to liability for its torts and those of its employees acting within the scope of their employment or duties whether arising out of a governmental or proprietary function."

Mr. Thomas W. Feeney  
December 11, 1973  
Page 2

With certain exceptions as set forth in 6-904, Idaho Code, all governmental entities are liable for their torts under this law. Section 6-923, Idaho Code, reads as follows:

"All political subdivisions of the state shall have the authority to purchase the necessary liability insurance."

Section 6-927, Idaho Code, reads as follows:

"Notwithstanding any provisions of law to the contrary, all political subdivisions shall have authority to levy an annual property tax in the amount necessary to pay the premium for insurance as herein authorized, even though as a result of such levy the maximum levy otherwise restricted by law is exceeded thereby; provided, that the revenues derived therefrom may not be used for any other purpose."

These sections then seem to provide that any political subdivision may obtain tort insurance and may tax therefore. Section 6-928, Idaho Code, also provides that a political subdivision may levy a tax to pay a judgment against it for a tort claim.

The term "taxing district" has been defined to be a new and separate territory within which a special assessment may be levied and collected on an ad-valorem basis on taxable property within the district for the purpose of providing funds to pay for local public improvements which are not political or governmental in nature and which have been determined by the legislature to be of special benefit to the people and property within that territory. Archer v. City of Indianapolis, 122 N.E.2d 607, 233 Ind. 640.

The works to be undertaken by the port district within its law are certainly improvements and should qualify under Chapter 9 of Title 6, Idaho Code. For instance, building of shiplocks has been held to be a public improvement. Building of docks and piers have been held to be public improvements; building of wharfs, piers and landings have been held to be a public improvement; building of causeways and embankments have been held to be public improvements and building of many types of structures have been held to be public improvements. See, for instance, West Virginia Pulp and Paper Company v. Peck, 171 N.Y.S. 1065, 104 Misc. 174;

Mr. Thomas W. Feeney  
December 11, 1973  
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Western Maryland P & R Company v. Baltimore, 68 A. 6, 106 Md. 561;  
Hess v. Muir, 5 A. 540, 65 Md. 586; U.S. v. 220 Acres of Land,  
More or Less, 306 F.Supp. 138; Application of Port Authority Trans-  
Hudson Corporation, 265 N.Y.S. 2d 925.

Thus, we believe that the courts would hold that a port district is a special improvement or taxing district and that Chapter 9, Title 6, Idaho Code, would apply to a port district. A port district would thus have tort liability. It could take out insurance for that liability and it could tax to pay for that insurance or to pay for tort liability, all as provided for by said Chapter 9, Title 6, Idaho Code.

Finally, this office could not represent the district in such a suit (see Section 67-1401, Idaho Code).

Very truly yours,

FOR THE ATTORNEY GENERAL

WARREN FELTON  
Deputy Attorney General

WF:cg

Opinion

74-75

December 12, 1973

Mr. Robert N. Wise  
Acting Director  
Planning and Community Affairs  
BUILDING MAIL

Dear Mr. Wise:

You have asked this office to respond to the following question: Does the language of Idaho Code, Section 50-1306A to the effect that, "when any person, persons, firm, association or corporation may desire to vacate a plat or any part thereof . . ." limit the filing of petitions to vacate solely to persons that own the platted land?

At the outset, I would like to point out that there is an apparent overlap in the terms of Idaho Code, Section 50-1306A with the terms of Idaho Code, Section 50-1317. The former statute was enacted in 1971, while the latter was enacted in 1967. Both seem to dictate the procedure to be followed in vacating property in counties. The inconsistency between the two statutes is found in the procedures to be followed in setting up a public hearing under the vacation procedure. The statutes are not at all inconsistent in regard to the question here presented, however, since both statutes refer to "any person, persons, firm, association or corporation". To the extent the two statutes are inconsistent, there would probably be a question of whether the later statute implicitly repealed the former; but, as stated above, this question of implicit repeal would not apply to the question presented. The sole question presented in this opinion is one of standing, and asks: who can bring a petition to vacate? The answer to this question applies to both statutes.

To repeat, both code sections state that "any person, persons, firm, association or corporation" may petition for vacation of a previously platted subdivision. It is a generally recognized rule of statutory construction that where the language of a statute is plain on its face and admits of no more than one meaning the duty of interpretation does not arise and the rules which are to aid doubtful meanings need not be applied. The rules of statutory construction include those rules dealing with speculation as to the intent of the legislature in enacting the statute. If the

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Mr. Robert M. Wise  
December 12, 1973  
Page 2

statute does not, on its face, admit to more than one meaning, then there is no need, according to the rule, to invoke any rules of statutory construction, including those which deal with speculative legislative intent.

One must be careful to distinguish between the statutory meaning and statutory interpretation. The need to interpret a statute does not arise at all unless there is an ambiguity on the face of the statute. The United States Supreme Court, in Caminetti v. United States, 242 U.S. 470, 61 L.Ed. 442 37 S.Ct. 192 (1917), states the proposition as follows:

"The meaning of the statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, . . . the sole function of the courts is to enforce it according to its terms."

The Idaho Supreme Court has recognized this principle on numerous occasions. For an example, see Peterson v. State, 87 Idaho 361, 393 P.2d 585 (1965).

The rule is commonly stated as the "plain meaning rule", and is stated succinctly in Volume IV, Sutherland, Statutory Construction, at page 49:

"One who contends that a provision of an act must not be applied according to the natural or customary purport of its language must show either that some other section of the act expands or restricts its meaning, that the provision itself is repugnant to the general purview of the act, or that the act considered in pari materia with other acts, or with the legislative history of the subject matter, imports a different meaning. If the language is plain, unambiguous and uncontrolled by other parts of the act or other acts upon the same subject the court cannot give it a different meaning. But the customary meaning of words will be disregarded when it is obvious from the act itself that the

Mr. Robert W. Wise  
December 12, 1973  
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legislature intended that it be used  
in a different sense than its common  
meaning." (Emphasis Added)

The statutory language of the statutes in question is plain, clear, and unambiguous. The State of Idaho keeps no formal legislative history. There is nothing in the rest of the act, or in any of the statutes of the State of Idaho which would indicate that a meaning other than the plain meaning of the statute was intended. In light of these elements, it appears clear that the statutes in question mean what they say. If the statutes are intended to apply to only those persons owning platted land, then the legislature has the opportunity to change the wording of the statutes to so apply.

It is therefore the opinion of this office that any person, persons, firm, association or corporation may, on its own volition, petition a city counsel, or the county commissioners, as the case may be, to vacate a particular previously platted subdivision. Upon receiving the petition, the county commissioners shall provide for notice and hearing, and shall proceed to a hearing on the petition.

Very truly yours,

FOR THE ATTORNEY GENERAL

JAMES C. WEAVER  
Assistant Attorney General

JCW:cg



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

W. ANTHONY PARK  
ATTORNEY GENERAL

December 13, 1973

Mr. Gordon C. Trombley  
Commissioner  
Department of Public Lands  
Building Mail

Re: Proposed Exchange of Timber on Fish  
and Game Lands for Fee Interest  
In Private Land

Dear Mr. Trombley:

You have requested an Attorney General's opinion on three legal issues centering around a proposed exchange of timber on fish and game land for a fee interest in private land.

The questions put forth in your letter of September 12, 1973 are:

1. Can the fish and game legally exchange timber for private lands?
2. If this is possible, what procedure should they follow?
3. Could they use the services of an outside appraiser?

Section 36-114, Idaho Code, authorizes the Director of the Department of Fish and Game to ". . . acquire by any means which he deems expedient, property for the purposes of propagation, cultivation and distribution of game or game birds . . ." The Director is the head of the Fish and Game Department. However, Section 36-102, Idaho Code, dictates that "[T]he Fish and Game Department . . . is . . . under the supervision, management and control of the Idaho Fish and Game Commission." The Director, therefore, may not have any powers which are superior to those enjoyed by the Commission.

There is no question that the Fish and Game Commission may obtain land for certain purposes. Section 36-104(b)(5), Idaho

Mr. Gordon C. Trombley  
December 13, 1973  
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Code, reads in part as follows:

"5. Said commission shall have the power to acquire for and on behalf of the State of Idaho, by purchase, condemnation, lease, agreement, gift or devise, lands . . . suitable for [Fish and Game Purposes] . . ."

Nowhere in Section 36-104(b)(5) is acquisition of land by "exchange" expressly authorized. The only possible area that could authorize an exchange is found in the word "agreement" contained in that statute. It is the opinion of the Attorney General that neither Section 36-104(b)(5), Idaho Code, generally, nor the word "agreement" therein, authorizes the Fish and Game Commission to obtain private land by exchange for standing timber. It follows that if the Fish and Game Commission does not have the power to exchange timber on state owned land for fee interest in private lands that the Director of the Fish and Game Department does not enjoy this power.

"Exchange" of lands is specifically mentioned in Section 58-104(8), Idaho Code, which empowers the State Land Board:

"8. To exchange any public lands of the state, over which the Board has powers of disposition and control, for lands of equal value, the title to which, or power of disposition, belongs or is vested in the governing body or board of trustees of any state governmental unit, agency or institution." (Emphasis Added)

The statute only authorizes the State Land Board to exchange state owned land for other land controlled by the state. It in no way authorizes the exchange of state property, i.e., timber, for private property. Nowhere does authorization of like nature exist giving the Fish and Game Commission the power to exchange Fish and Game timber or land for other state land let alone to exchange timber for private land. The Fish and Game Commission does not have the power to exchange lands and since it "controls" the Fish and Game Department, the Director of the Department cannot have the power either. For this reason the words "by any means which he deems expedient" found in Section 36-114, Idaho Code, are qualified and limited.

Mr. Gordon C. Trombley  
December 13, 1973  
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The procedures for disposition of timber on State owned land are specifically covered in Chapter 4, Title 58, Idaho Code, as amended. Section 58-403 authorizes the State Land Board to offer state timber for sale on application from interested parties or upon its own motion. That section also mandates that the State Land Board require that any timber sold from state land be processed within the State of Idaho except in the case of timber to be utilized for production of wood pulp. In the case of exchange as is proposed here, no statutory assurance exists that the Idaho lumber would be processed in Idaho.

Section 58-404, Idaho Code, directs the State Land Board to notify the Administrator of the Department of Water Administration of any proposed sale of state owned timber. After notice, the Administrator has ten days to object on the grounds that the cutting of the timber in question would endanger the watershed involved. In an exchange situation no assurance exists that the Department of Water Administration would be entitled to notice or actually receive notice of an impending sale. Even if notice were to be given to the Department of Water Administration, the effect of any objection interposed by the Administrator would be in question since it is not statutorily sanctioned.

The most persuasive argument against the validity of the proposed exchange is found in Section 58-406, Idaho Code. This section provides for disposition of timber on state owned lands by means of bid sales after notice. The sales themselves must be open to public bidding and notice of said sales must be published once per week for four consecutive weeks in the newspaper or newspapers designated by the Land Board. In the proposed exchange, no open bidding would be had, thereby placing Potlatch Forest Industries at a distinct advantage when compared to other interested parties. In a "bid sale" situation another prospective purchaser could conceivably submit a bid in excess of that which Potlatch Forest Industries would submit. Further, public notice of the prospective transaction would not be given. Chapter 4 of Title 58, Idaho Code, shows an obvious concern on the part of our legislature that any disposition of state owned timber should be fair beyond reproach.

If the Fish and Game Department exchanges the timber as is contemplated, the end result would be the same as if the Fish and Game Department had sold timber to Potlatch Forest Industries and

Mr. Gordon C. Trombley  
December 13, 1973  
Page 4

then purchased the private land with the timber proceeds. Such a sale would have to be public and with notice as statutorily mandated. Avoidance of these requirements by "exchange" cannot be allowed. In light of the foregoing, it is unnecessary to deal with questions 2 and 3.

Very truly yours,

FOR THE ATTORNEY GENERAL

TERRY E. COFFIN  
Assistant Attorney General

TEC:cg

December 13, 1973

Mr. W. George Moody  
County Commissioner  
Benewah County Courthouse  
St. Maries, Idaho

Dear Mr. Moody:

I understand that some concern as to nepotism has been expressed since Sheriff Baltz married the juvenile probation officer in Benewah County, who was at that time working out of his office. We understand that since that time the juvenile probation officer has been transferred to the District Court and is now under the control and jurisdiction of the local District Judge.

Section 59-701, Idaho Code, reads as follows:

"An executive, legislative, judicial, ministerial, or other officer of this state or of any district, county, city or other municipal subdivision of the state, including road districts, 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, to any clerkship, office, position, employment, or duty, when the salary, wages, pay or compensation of such appointee is to be paid out of public funds or fees of office, or who appoints or furnishes employment to any person whose salary, wages, pay, or compensation is to be paid out of public funds or fees of office, and who is related by either blood or marriage within the second degree to any other executive, legislative, judicial, ministerial, or public officer when such appointment is made on the agreement or promise of such other officer or any other public officer to appoint or furnish employment to any one so related to the

Mr. W. George Moody  
December 13, 1973  
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officer making or voting for such appointment, is guilty of a misdemeanor involving official misconduct and upon conviction thereof shall be punished by fine of not less than ten dollars (\$10.00) or more than \$1000, and such officer making such appointment shall forfeit his office and be ineligible for appointment to such office for one (1) year thereafter."

As we understand the situation, since Mrs. Baltz has been transferred to the District Court and is now employed by the District Judge, and since her salary comes from Law Enforcement Planning Agency and the Sheriff is not now her employer, nor does the Sheriff's office pay her salary, no question of nepotism could arise in this case.

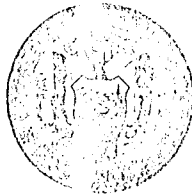
Very truly yours,

FOR THE ATTORNEY GENERAL

WARREN FELTON  
Deputy Attorney General

WF:cg





STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

W. ANTHONY PARK  
ATTORNEY GENERAL

December 17, 1973

Mr. Michael C. Moore  
Attorney at Law  
Weisgerber Building  
P.O. Box 942  
Lewiston, Idaho 83501

Re: Agreement between City of Lewiston, Idaho  
and Whitman County Washington Port District

Dear Mr. Moore:

We have received and examined your proposed agreement between the Whitman County Port District and the City of Lewiston, Idaho as to the portion of the "Down River Road" which is in the City of Lewiston. Section 67-2329, Idaho Code, requires that this office give its opinions as to the validity of such an agreement.

As we understand it, the Washington State Port District wishes to rebuild said road which is in Lewiston, Idaho and perhaps relocate some portions of it, purchase the property necessary, and make the new property part of the road. The Port District wishes to have jurisdiction over the road to do these things, after Lewiston wishes to grant the jurisdiction and after the road would be rebuilt, Lewiston would claim title to the road and maintain it in the improved condition.

Under such an agreement you and this office have discussed Section 67-2328(d)(1), Idaho Code, and the necessity of a provision for the administration of the agreement. The section speaks in terms of "if the agreement does not establish a separate legal entity to conduct the joint or cooperative undertaking . . . provision for an administrator or a joint board responsible for administering the joint or cooperative undertaking. . .", (shall be established). You have argued and with justification that under the agreement the Port is responsible for the project during the building or rebuilding of the road and then the city is responsible for maintaining the road after its completion. You may well be right in this,

Mr. Michael C. Moore  
December 17, 1973  
Page 2

however, due to the fact that this provision is couched in mandatory terms, it would appear to us that it would be wise to make provision for an administrator as required by the statute.

The above facts give rise to another question which is quite serious. Under such an agreement if the Idaho city did not maintain the road after it was rebuilt the Washington Port District could sue under the contract for damages. The Washington Port District would by such a contract acquire contract rights to have this road maintained at a certain standard. Also under the proposed agreement the Washington Port District would have actual physical control of the road and the ability to acquire new properties to be added to this road during the reconstruction period. And the City of Lewiston would also agree to vacate unused portions of the old road.

Article 1, Section 10, Clause 3 of the Constitution of the United States so far as pertinent here, requires that "no state shall, without the consent of Congress, . . . enter into any agreement or compact with another state, . . ." Cities and port districts both exercise a portion of the sovereignty of the state they represent and we believe that they would be covered by this clause of the Federal Constitution.

There are a number of cases that indicate that the proposed agreement would require the consent of Congress. See Duncan v. Smith, (Ky. 1953) 262 S.W.2d, 373 42 A.L.R.2d, 754, Landes v. Landes (1956) 153 N.Y.S.2d 14, 135 N.E.2d 562, Virginia v. Tennessee (1893) 148 U.S. 503, 37 L.Ed. 537, 13 S.Ct. 728, Louisiana v. Texas (1900) 176 U.S. 17, 44 L.Ed. 347, 20 S.Ct. 251. There are a few cases such as McHenry Country v. Brady, (1917) 37 N.D. 59, 163 N.W. 540, and Virginia v. Tennessee, supra, that indicate that possibly such an agreement as this would get by without Congressional consent, however. They are not actually in point to this case and their application to this situation is doubtful. Therefore, we are inclined to believe that such an agreement should have congressional consent.

We have looked for any federal statute giving consent of Congress to such an agreement and have been unable to find any such enactment. Do you know of any such enactment? We have also discussed this matter with Mr. Reinbold at the Regional Office of the Corps of Engineers in Walla Walla. I would suggest that it might be helpful to contact the Corps of Engineers about it.

Mr. Michael C. Moore  
December 17, 1973  
Page 3

We are not prepared to state as an opinion of this office whether or not such an agreement requires the consent of Congress. This may or may not be advisable. We will leave that up to you to decide. On the other hand we do believe that under Idaho law we believe that Section 67-2328 (d)(1), Idaho Code, as above discussed should be followed. Some administrative officer or board should be set up to see that the agreement is properly administered.

Very truly yours,

FOR THE ATTORNEY GENERAL

A handwritten signature in cursive script, appearing to read "Warren Felton".

WARREN FELTON  
Deputy Attorney General

WF:lm

cc Secretary of State



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

W. ANTHONY PARK  
ATTORNEY GENERAL

December 17, 1973

Mr. Bob Wise, Director  
State Planning and Community  
Affairs Agency  
Building Mail

Dear Mr. Wise:

You have asked this office to respond to your question regarding the legal significance of a "comprehensive plan" as that term is used in the Idaho zoning enabling legislation. The need for such a response arises from the current controversy surrounding the Daum Development proposed for a certain parcel of land west of the City of Boise. The controversy turns on the question of whether or not a change in the zoning of the property in question should be brought about in order to allow the development to proceed. The public hearings on the rezoning proposal have brought forth a multitude of opinions. The question of whether or not the zoning change should be allowed has as one of its central elements a question of interpretation of a particular portion of Idaho law. That portion of Idaho law reads in pertinent part as follows:

50-1203. Regulations--Purposes in view.--  
Such regulations shall be made in accordance with a comprehensive plan . . .

The "regulations" referred to are zoning regulations.

It is apparent that the zoning change necessary for the Daum Development to proceed must be made "in accordance with a comprehensive plan". That much is simple. However, the answer to the question, "what is a comprehensive plan", is not so simple. No Idaho Court has found it necessary to interpret the referred-to statute, and therefore, no court sanctioned definition of "comprehensive plan" exists in Idaho.

The decisional law in other states is, to say the least, less than definitive. However, a certain thread runs through virtually all of those decisions. That thread is the proposition that a comprehensive plan is at least more than the bare

Mr. Bob Wise  
December 17, 1973  
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bones of the zoning ordinance itself.

The case generally recognized by authorities as the leading case in the area is Udell v. Haas, 21 N.Y.2d 463, 235 N.E.2d 897 (1968). In that case, certain parcels of real property were rezoned from business use to residential use. The rezoning was attacked on the grounds that the rezoning was "not in accordance with a comprehensive plan". The New York court was thus faced with the issue as it appears to be presented in Idaho relative to the Daum Development.

The New York court felt that the rezoning was improper, thus agreeing with the challengers to the ordinance. The court felt that the root cause of the failure to follow sound zoning principles in the case was "a misunderstanding of the nature of zoning, and, even more importantly, of its relationship to the statutory requirement that it be 'in accordance with the comprehensive plan'". At 235 N.E.2d, pg. 900.

The court had to come up with a definition of "comprehensive plan". They found it to be:

"...not a mere technicality which serves only as an obstacle course for public officials to overcome in carrying out their duties. Rather, the comprehensive plan is the essence of zoning. Without it, there can be no rational allocation of land use. It is the insurance that the public welfare is being served in that zoning does not become nothing (sic) more than just a Gallup Poll." (Emphasis added.) At 235 N.E.2d, pg. 900 through 901.

The court found the comprehensive plan to be a standard, defined as clearly as possible, such that government could not act in an arbitrary and discriminatory fashion. Without a comprehensive plan, the court noted that official action could become subject to corruption, and could be based upon the whim or or caprice of the zoning officials:

"The more clarity and specificity required in the articulation of the premises upon which a particular zoning regulation is based, the more effectively will courts

be able to review the regulation, declaring it ultra vires if it is not in reality 'in accordance with a comprehensive plan'. [Citing Haar "In Accordance With a Comprehensive Plan", 68 Harv. L. Rev., 1154, 1157-1158.]

"As Professor Haar points out, zoning may easily degenerate into a talismanic word, like the 'police power', to excuse all sorts of arbitrary infringements on the property rights of the landowner. To assure that this does not happen, our courts must require local zoning authorities to pay more than mock obeisance to the statutory mandate that zoning be 'in accordance with the comprehensive plan'". 235 N.E.2d 897 at 901.

As to the physical existence of a comprehensive plan, the courts in other states are again less than definitive. Professor Haar, in an article entitled, "In Accordance with a Comprehensive Plan", 68 Harv. L. Rev. 1154, states the following:

"The city master plan is a long term, general outline of projected development; zoning is but one of the many tools which may be used to implement the plan. Warnings have constantly emanated from the planners that the two must not be confused. 'Instead of being itself the city plan, for which unfortunately it is often mistaken,' says one of the early standard works in the field, 'zoning is but one of the devices for giving affect to it'". (Citing Segoe, Local Planning Administration, 44 (1941).)

And a recent text cautions:

"The danger is that it (zoning) may be considered a substitute for city planning and that, a zoning plan having been adopted, enthusiasm and interest may die out. Zoning is not a substitute for a city

Mr. Bob Wise  
December 17, 1973  
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plan. . ." 1 Lewis, Planning the Modern City, 261 (rev. ed., 1949).

Great care must be taken to distinguish the "comprehensive plan" from a "master plan". The cases all seem to indicate that the master plan is the actual physical document which manifests zoning policy. The comprehensive plan is generally regarded as being at least the master plan, and most frequently, more than the mere master plan. Professor Haar, generally regarded by other legal scholars as having produced the most well reasoned of the comments on this issue, believes the comprehensive plan to be a statement of policy which is to be followed in the enactment of all zoning regulations and amendments thereto. Without the existence of a comprehensive plan, Professor Haar believes that:

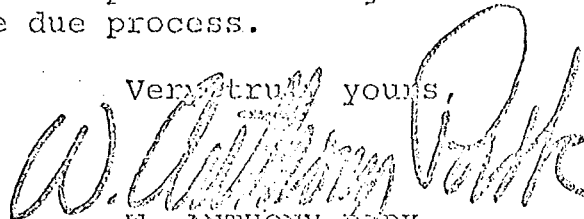
"There is a danger that zoning, considered as a self contained activity rather than as a means to a broader end, may tyrannize individual property owners. Exercise of the legislative power to zone should be governed by rules and standards as clearly defined as possible, so that it can not operate in an arbitrary and discriminatory fashion and it will actually be directed to the health, safety, welfare, and morals of the community. The more clarity and specificity required in articulation of the premises upon which a particular zoning regulation is based, the more effectively will courts be able to review the regulation, declaring it ultra vires if it is not in reality 'in accordance with a comprehensive plan'". 68 Harv. L. Rev. at 158.

The comprehensive plan, then is a totality of the statements of policy to be found in the zoning ordinance, the master plan, and other plans or manifestations of policy existing in the locale. It is more than a document to be occasionally looked at in determining the course that land development should take in the area. It is that standard by which all land use decisions within its jurisdictional area are to be measured. It is the constitution of zoning; it is that

Mr. Bob Wise  
December 17, 1973  
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which protects individual property owners from arbitrary and discriminatory action on the part of zoning officials, a guarantee of substantive due process.

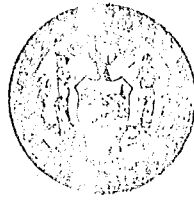
Very truly yours,



W. ANTHONY PARK  
Attorney General

WAP:lm





STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

W. ANTHONY PARK  
ATTORNEY GENERAL

December 17, 1973

Dr. David Sanford, PhD.  
Acting Director of Idaho Security  
Treatment Facility  
P. O. Box 7309  
Boise, Idaho 83707 ;

Dear Dr. Sanford:

You asked for an opinion on whether tranquilizing medication may be forced on an inmate at the Idaho State Penitentiary.

As you know, there are no Idaho statutes or caselaw in point. The national caselaw is quite sparse and not entirely consistent. The competing legal principles involve the reluctance of courts to interfere with prison administration and the reasonable medical care given prisoners, with the constitutional right of all persons to freedom from cruel and unusual punishment or procedural unfairness.

Peek v. Ciccone, 288 F. Supp. 329 (W. D. Mo., 1968), is the leading case on the subject. A prisoner at the federal medical center at Springfield, Missouri, Peek, brought a writ of habeas corpus to challenge as cruel and unusual punishment a forced injection of a tranquilizer. The court found that Peek's tranquilizers were prescribed by a physician to reduce his "anxiety and hostility." Peek was prescribed the drug Permitil to be taken orally, and was told that if he refused to take the oral medication, he would be restrained and given an intramuscular injection of Thorazine. Peek refused the oral medication and without undue force was given the injection of Thorazine by a medical center officer competent to give intramuscular injections. The court specifically found that the injection was not given to punish or harm the petitioner, and concluded that:

"Under these circumstances, it cannot be said that Petitioner was subjected to cruel or unusual treatment with the prohibition of the Eighth Amendment, nor was

he treated in an invidiously discriminatory manner by such administration of medication." 288 F. Supp at 337.

There was testimony in the Peek case by a physician that the tranquilizers administered were non-narcotic and not habit forming, that the medication was prescribed by a physician, that the treatment of petitioner was reasonable and ordinary, and that force as a matter of policy was used only as a last resort.

Another important case in this area is Nelson v. Heyne, 355 F. Supp. 451 (N.D. Indiana, 1972), in which tranquilizing drugs were found to be improperly administered. The drugs were administered to inmates of an Indiana boys reformatory "for the purpose of controlling excited behavior rather than as part of an ongoing, psycho-therapeutic program." The drugs were major tranquilizers with potentially serious medical side effects, and were prescribed by nurses upon recommendation of the custodial staff of the reformatory. The inmates to whom the drugs were administered were not given the choice of oral medication first, and there was no provision for medically competent evaluation of the inmate either before or after the intramuscular injections. The federal court condemned this practice.

"While the court believes that these drugs may be used occasionally to calm states of excitation which are found to be potentially dangerous to life and property, the Defendants' policies are far afield of minimal medical and constitutional standards. Accordingly the Court orders the immediate cessation of tranquilizing drugs which are administered without the specific authorization of a physician. In addition, no drug may be administered inter-muscularly without first attempting oral medication, unless ordered otherwise by a physician in each case. It is further ordered that defendants prepare and submit for the Court's evaluation a formalized policy governing use of tranquilizing drugs. The proposal must include detailed provisions governing the prescription of drugs, the administration of drugs, and procedures to insure psychological and medical evaluation of those to whom drugs are given."

In Haughey v. Rhay, 300 F. Supp. 490 (E. D. Wash., 1969), the petitioner brought a writ of habeas corpus to complain in part about inadequate medical placement and treatment. Haughey had requested a "light relaxer" and said that he was given Thorazine to be taken by himself and which caused him to act as if he were a "zombie". Haughey complained that he was placed for a day in what he called the "insane ward" of the prison hospital and threatened with transfer to the state mental hospital, and that this was done to thwart his legal actions.

The court found that there was no showing of unreasonableness or abuse of discretion as to the medical environs placement or medical treatment of Haughey. The court also stated that:

"The law of the Ninth Circuit as to prison authorities' federal duties toward the medical care of the prisoners, as it applies here, is set forth in Darey v. Sandritter, 355 F.2d 22 (1965):

'Whether a prisoner, during (presumptively) lawful term, should or should not receive medical treatment in suitable environs, must ordinarily be determined by custodial authorities in the proper exercise of sound discretion.' "

In Darey, the petitioner brought a writ of habeas corpus in his unsuccessful challenge to involuntary transfer from a California prison to a California state hospital for treatment.

While Haughey and Darey are Ninth Circuit cases, and suggest a relaxed judicial attitude toward medical treatment of prisoners one would be imprudent to rely on their extension to forced injection of tranquilizers. The natural distaste for hypodermic injection as a painful experience combined with the more serious potential for mental disorientation would probably cause Idaho and federal courts to adopt the guidelines presented in Peek v. Ciccone and Nelson v. Heyne. These two cases suggest the following concomitants to the use of involuntary injections of tranquilizing drugs on prison inmates:

1. The drug and dosage must be reasonable in kind and amount and must be prescribed by a physician.

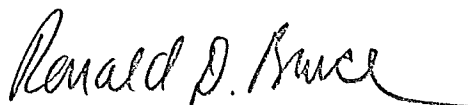
Dr. David Sanford, PhD.  
December 17, 1973  
Page 4

2. The drug should not routinely be used to calm excited behavior which does not pose a threat to life or property, but should be used as part of a psycho-therapeutic program designed for the individual inmate.
3. The inmate must be given the choice of oral administration in preference to injection where the drug or a reasonable substitute is available in oral form.
4. The drug must be administered by personnel medically competent to give intramuscular injections.
5. There must be competent evaluation of the effect of the drug on the inmate after it is administered.

These standards would seem to afford prisoners protection from arbitrary or medically unsound treatment with involuntary injected tranquilizers without unreasonably hampering the medical program or the mission of the Idaho State Penitentiary and are recommended for your adoption.

Very truly yours,

FOR THE ATTORNEY GENERAL



RONALD D. BRUCE  
Assistant Attorney General

RDB:cg



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

December 18, 1973

W. ANTHONY PARK  
ATTORNEY GENERAL

Tom D. McEldowney  
Commissioner of Finance  
Department of Finance  
Building Mail

Dear Commissioner McEldowney:

By letter of December 5, 1973, you have requested an opinion from this office regarding whether the Department of Finance may issue a trust company charter to a trust company which is a foreign corporation and, if so, what conditions must be met prior to issuing such a charter. Your request arises from an apparent conflict between the language of Section 26-102, Idaho Code, and that of Section 26-105, Idaho Code; each section pertaining to the qualifications that trust companies must meet to conduct business in the State of Idaho.

To resolve an apparent conflict in language contained in two separate statutes pertaining to the same subject, it is necessary to read the statutes together in light of the legislative intent existing at the date of enactment of the respective statutes. Section 26-102, Idaho Code, defines the word bank as regulated by this act:

". . . to mean any incorporated bank or institution (except national banks) which shall have been incorporated to conduct the business of receiving money on deposit, or transacting a trust business as herein defined, and shall be construed to include any individual, co-partnership, or unincorporated association engaged in the banking business as herein defined on the date this act becomes effective."

Such section continues:

"And it shall also be unlawful and subject to the penalties provided in this act, for any corporation to transact in this state the business of a trust company, or of acting as trustee for any of the purposes specified in section 26-105, except on a compliance with all the terms and provisions of this chapter. . . , as amended, relating to trust companies; provided, that corporations not created under the laws of this state but subject to examination by the commissioner of banks, the bank examiner, or a corresponding official in the jurisdiction where created, and being in good standing in such jurisdiction and permitted under the laws thereof to hold property in trusts, on complying with the laws of the state of Idaho relating to foreign corporations doing business in this state, may take and hold property situated in the state of Idaho in trust under deeds of trust, mortgages and for any and all proper purposes while so complying with the foreign corporation laws of this state and while in good standing and authorized to transact such business in the jurisdiction where incorporated."  
(Emphasis added)

The clear intent of Section 26-102 is to acknowledge that trust companies which are incorporated in foreign states may conduct business in the state of Idaho as if it had been incorporated in this state upon the condition that it maintain its good standing in the foreign jurisdiction as well as complying with the laws of the State of Idaho.

Section 26-105, Idaho Code, defines the term trust company as:

" . . . a corporation, incorporated under the laws of this state, and doing a trust business which is hereby defined as the acting as trustee for any and all purposes permitted by law, . . . ." (Emphasis added)

The act continues to specify those particular activities which are included within the definition of conducting a trust business. The apparent confusion arising from language of this statute centers upon language which defines a trust company as a corporation "incorporated under the laws of this state." However, this language when read in light of the legislative intent underlying Section 26-102, Idaho Code, should not be read so as to limit the operation of a trust business only to those corporations which are incorporated in this state.

Further support for the conclusion that conducting a trust business in Idaho is not strictly limited to corporations incorporated in Idaho is found in Chapter 5, Title 30, Idaho Code. As referred to above, Section 26-105, Idaho Code, defines specifically those acts considered as conducting a trust business, including:

"g. To act under order or appointment of any court of record as guardian, receiver or trustee of the estate of a minor. . . ." and

"k. To act as executor under the last will or administrator of the estate of any deceased person, or as guardian or any infant, insane person, idiot or habitual drunkard, or trustee for any convict in the penitentiary under appointment of any court of record having jurisdiction of the estate of such deceased person, infant, insane person, idiot, habitual drunkard or convict."

In conjunction, Sections 30-511 and 30-512, Idaho Code, as amended in 1971, provide:

"30-511. APPOINTMENT AS PERSONAL REPRESENTATIVE PROHIBITED.—It shall be unlawful for any foreign corporation not authorized to do business in this state to be appointed or to act as personal representative of any estate in the state of Idaho, under the laws of the state of Idaho."

"30-512. APPOINTMENT AS GUARDIAN PROHIBITED.--It shall be unlawful for any foreign corporation that is not qualified to do business in this state to be appointed guardian or to act as guardian of any minor, incapacitated or protected person."

Prior to the 1971 amendments to the above-quoted sections, the same statutes were absolutely prohibitive stating:

"30-511. APPOINTMENT AS ADMINISTRATOR OR EXECUTOR PROHIBITED.--It shall be unlawful for any foreign corporation to be appointed or to act as administrator or executor of any estate in the state of Idaho, under the laws of the state of Idaho."

"30-512. APPOINTMENT AS GUARDIAN PROHIBITED.--It shall be unlawful for any foreign corporation to be appointed guardian or to act as guardian of any minor, or any insane or of any incompetent person."

In light of the amended language in Sections 30-511 and 30-512, Idaho Code, the legislature further acknowledges the right of a foreign corporation to conduct a trust business in Idaho so long as such foreign corporation qualifies to do business in this state. Accord: Re McGill, 52 Nev. 35, 280 P.2d 321, 65 ALR 1232.

The conclusion that foreign trust corporations may conduct business in Idaho if qualified raises the question of what requirements must be met to qualify to do business as a foreign in this state. It is fundamental that a state may impose restrictions upon foreign corporations conducting business in that state. Ashley v. Ryan, 153 U.S. 436, 38 L.Ed. 773, 14 S.Ct. 865. Thus, it must be determined what restrictions, if any, exist in Idaho against foreign trust corporations.

As quoted above, Section 26-102, Idaho Code, provides that foreign corporations may undertake the business of a trust company upon the following conditions:



December 18, 1973

Page 5

1. That such foreign trust company must be subject to examination by the commissioner of banks, the bank examiner, or a corresponding official in the jurisdiction where incorporated;
2. Such foreign trust company must be in good standing in the jurisdiction where in incorporated and must qualify in that jurisdiction to hold property in trust pursuant to that state's regulation; and
3. The foreign trust company must comply with the laws of the State of Idaho, specifically Chapters 5 and 6, Title 30, Idaho Code, relating to foreign corporations doing business in this state.

In respect to paragraph 3, above, it should be specifically noted that Section 30-510, Idaho Code, reads:

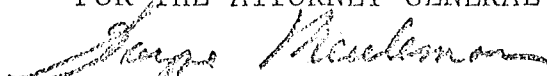
"EFFECT OF COMPLIANCE.—Foreign corporations complying with the provisions of this chapter shall have all the rights and privileges of like domestic corporations, ... and shall be subject to the laws of the state applicable to like domestic corporations." (Emphasis added)

This provision requires that a foreign corporation must comply with Idaho law governing domestic trust corporations as well as the provisions peculiar to foreign corporations in order to qualify to conduct a trust business in Idaho.

I will not attempt to discuss at length the particular provisions of Idaho law relating to trust corporations; rather, it is generally concluded that a foreign corporation must not only comply with provisions governing domestic trust corporations but with the laws of the state of incorporation and maintain its good standing in that state as well.

The foreign trust company may conduct a trust business in the state of Idaho so long as it continues in compliance with the laws of this state and maintains good standing and authorization to transact a trust business in the jurisdiction where incorporated. The Department of Finance may therefore issue a trust company charter to any foreign trust company who has met the conditions set out above. Such is in accordance with the intention of Chapter 1, Title 26, Idaho Code.

Very truly yours,  
FOR THE ATTORNEY GENERAL



WAYNE MEULEMAN

Deputy Attorney General

December 18, 1973

Mr. Gordon C. Trombley, Chairman  
Board of Scaling Practices  
517 Paine Road  
Lewiston, Idaho 83501

Re: "Prize Logs"

Dear Mr. Trombley:

You have requested an Attorney General's opinion on four legal questions involving "prize logs". Four questions will be discussed separately in the course of this opinion.

1. Do sunken logs come under the purview of the act insofar as delivery to and sale by the State Board of Scaling Practices?

Section 38-809, Idaho Code, applies to logs" . . . placed afloat on a water way, or permitted to be afloat upon any of the public waters of this state, not confined in booms or rafts, . . ." This statute does not require that the logs, once placed afloat, or permitted to be afloat, must subsequently remain afloat. It is the opinion of this office that Section 38-809, Idaho Code, applies to "sunken" logs. It must be presumed that sunken logs were at one time "placed afloat", or "permitted to be afloat" as required by this statute.

2. Session Laws 1967, Chapter 328, repealed 38-901 through 38-913. The repeal of these sections of the code eliminated log brands, lumber inspectors, etc. Therefore, log brands ceased to have legal status until the matter was re-established by Chapter 199, Session Laws 1973. Therefore, do sunken logs bearing a brand previously recorded (38-901 through 39-913, repealed) still belong to the person, parties or corporation claiming title to the previously recorded brand?

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Mr. Gordon C. Trombley  
December 18, 1973  
Page 2

Section 38-809, Idaho Code, deals with logs that bear or do not bear "a legally recorded mark or marks". Before the passage of Senate Bill No. 1185, Chapter 198, 1973 Session Laws, there was, for several years, no legal requirement of recording log marks. Therefore, ownership of any marked logs placed afloat or permitted to be afloat during the period of time when no legal requirements for marking existed must be decided on the basis of common law. Sections 38-808 and 38-809, Idaho Code, cannot be interpreted to have a retroactive affect.

The Idaho Supreme Court has held that logs which can be identified by marks on them, even though such marks are not recorded in the office of the "lumber inspector", are not prize logs. Norman v. Roselake Lumber Co., 22 Idaho 711, 128 Pac. 85 (1912).

The following quote is found at 54 Corpus Juris Secundum, Logs and Logging, Section 3, pg. 678, (1948):

". . . [T]he failure to record the log mark merely deprives the owner of the statutory presumption of ownership, and does not deprive him of his property in the logs.\* Evidence is admissible as to the log mark although it is not recorded,\* and ownership may be proved by an unrecorded mark.\*"

It appears that where a mark is not recorded, even when a statute requires recordation, logs marked with a brand are not prize logs. This interpretation would apply prior to passage of Section 38-809, Idaho Code. Section 38-809 does make such logs "prize logs", but it is not applicable to the logs in question. During the period of time when no recordation of marks was required, any marked logs placed afloat or permitted to be afloat cannot be prize logs under Section 38-809, Idaho Code. Evidence may be introduced by any person claiming ownership as to his interest in such logs, as well as to logs with no markings, that were placed or permitted to be afloat during the period of time between the repeal of Section 38-910 in 1967 and the enactment of Section 38-808 and 38-809 in 1973.

Mr. Gordon C. Trembley  
December 18, 1973  
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The defense of abandonment could, of course, be used by anyone salvaging such logs when challenged by the purported original owner. It should be pointed out that anyone, not only the State Board of Sealing Practices, hereinafter "The Board", could salvage such logs and defend a property right in them on the basis of abandonment or any other legal defense available. Section 38-809, mandating that such logs be turned over to the Board, cannot be applied retroactively to these logs. In other words, any logs placed or permitted to be afloat between 1967 and 1973 would belong to the person salvaging them subject to evidence of log mark used, abandonment, etc. A salvager would not have any duty to turn such logs over to the Board. Any legal action instituted would be between the salvager of said logs and the persons claiming the marked or unmarked logs as being originally their property at the time they were placed or permitted to be afloat.

3. May an independent salvage operator remove sunken material and sell or market it to his own account, regardless of what brand may exist on the log, if any?

Any logs placed or permitted to be afloat prior to the passage of Sections 38-808 and 38-809, Idaho Code, which have subsequently sunk, may be retrieved by independent operators subject to challenge by a person or persons claiming title to or interest in the marked or unmarked logs. The salvage operator would expose himself to a civil lawsuit for conversion or possibly criminal charges for larceny. Liability, guilt, and/or ownership would be established by the decision of the court based on the evidence introduced. As to marked or unmarked logs placed or permitted afloat after the passage of 38-808 and 38-809, Idaho Code, the statute is clear. Sunken logs "not bearing a legally recorded mark or marks" and logs "bearing a legally recorded mark or marks, not claimed within one year after being placed . . . afloat shall be prize logs, and no evidence of any private ownership thereof shall be admissible in any proceeding."

The statute further provides that "prize logs shall be sold by or under the direction of the [Board]." Section 38-809 provides also that "[I]t shall be the duty of every person having custody or possession of prize logs to deliver them to the [Board] upon demand." It appears, therefore, that

Mr. Gordon C. Trembley  
December 18, 1973  
Page 4

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an independent salvage operator may retrieve such logs but that upon demand by the Board, he must turn them over to the Board. The statute is mandatory in nature when it states that the logs "shall be sold by or under the direction of the [Board]." The Board, then, has a statutory mandate to sell the logs, and the salvager has a mandate to turn the logs over to the Board.

Section 38-809, Idaho Code, requires that " . . . the proceeds of such sale, after deducting the expense of the sale and transportation or other charges incurred in getting said logs to the sale site shall go into this state scaling fund." This clause would eliminate the possibility of an independent salvage operator marketing prize logs to his own account. If he sold the logs under the direction of the Board, he would be entitled to keep only his expenditures of sale, retrieval and transportation. The remaining portion of the proceeds must go to the state scaling fund.

It is the opinion of this office that no independent salvage operator may market prize logs to his own account except under the direction of the Board. Further, no salvage operator so marketing logs may retain any proceeds over the cost of retrieval, transportation and the sale of such logs. This, of course, would be subject to the right of the Board to contract with such independent salvage operators as will be discussed further in answer to question four.

4. May the State Board of Scaling Practices enter into agreements with such organizations as the Coeur d'Alene Log Owners Co-op Association for the removal of such sunken material from the beds of the lakes and rivers requiring no remuneration to the State Scaling Fund in the interest of the public benefits which accrue from the removal of this foreign material from the beds of our public waters?

Section 38-809, Idaho Code, is mandatory in nature and provides little room for the injection of discretionary acts. The statute provides that "[P]rize logs shall be sold by or under the direction of the [Board], and the proceeds of such sale, after deducting the expense of the sale, and transportation or other charges incurred in getting said logs to the sale site shall go into the State Scaling Fund." Further, the statute provides that the sale of such logs "shall be at public auction after . . . notice . . . ."

Mr. Gordon C. Trombley  
December 18, 1973  
Page 5

It is the opinion of the Attorney General that Section 39-809 does not allow the Board to enter into an agreement with independent contractors, log owners association, etc. for removal of such logs where the Board forgoes its right to the "proceeds".

However, the Board may deduct from the proceeds "the expense of the sale, transportation or other charges incurred in getting said logs to the sale site . . . ." This appears to leave room for the Board to contract with an independent contractor, log owners association, etc. for the removal of the logs for a fee involving a profit. It is the opinion of the Attorney General that the Board may contract to have prize logs removed from the waterways, transported to the sale site and sold if all of this is done under the Board's supervision and direction. All required legal notices must be given, the sale must be a "public" sale, and the proceeds minus transportation costs, sale costs and "other charges incurred in getting said logs to the sale site shall go into the State Scaling Fund."

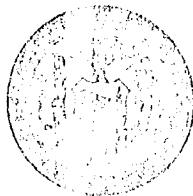
This method will follow the mandate of the statute while ridding the state's waterways of the foreign matter objected to. The supervision and direction of these operations by the Board will serve to protect the waterways from damage during the removal process. Any removal of such logs would have to conform to the provision of 42-38-1 et seq., Idaho Code forbidding stream channel alteration.

Very truly yours,

FOR THE ATTORNEY GENERAL

TERRY E. COFFIN  
Assistant Attorney General

TEC:lm



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

W. ANTHONY PARK  
ATTORNEY GENERAL

December 20, 1973

Mr. Gordon C. Trombley  
Commissioner  
Department of Public Lands  
Building Mail

Re: Proposed Exchange of Timber on Fish  
and Game Lands for Fee Interest  
In Private Land

Dear Mr. Trombley:

You have requested an Attorney General's opinion on three legal issues centering around the proposed exchange of timber on fish and game land for a fee interest in private land.

The questions put forth in your letter of September 12, 1973, are:

1. Can the fish and game legally exchange timber for private lands?
2. If this is possible, what procedure should they follow?
3. Could they use the services of an outside appraiser?

There is no question that the Fish and Game Commission may obtain land for certain purposes using certain methods. Section 36-114, Idaho Code, authorizes the Director of the Department of Fish and Game to ". . . acquire by any means which he deems expedient, property for the purposes for propagation, cultivation and distribution of game or game birds. . . ."

Section 36-104 (b) 5, Idaho Code, reads in part as follows:

"5. Said commission shall have the power to acquire for and on behalf of the state of Idaho, by purchase, condemnation, lease, agreement, gift, or devise, 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:"

Idaho Code, 36-104 (b) 5 (d), puts forth one of the "purposes enumerated" referred to in subsection 5. 36-104 (b) 5 (d) reads as follows:

"(d) To extend and consolidate by exchange, lands or waters suitable for [fish and game] purposes."

Therefore, the Fish and Game Commission is authorized to exchange lands or waters owned by the State for lands which are privately owned. However, no authorization is given by the statute to exchange timber on state owned lands for land in private hands.

The disposal of timber on state lands is specifically covered by Chapter 4, Title 58, Idaho Code, as amended. Section 58-403 authorizes the State Land Board to offer state timber for sale on application from interested parties or upon its own motion. That section also mandates that the State Land Board require that any timber sold from state land be processed within the State of Idaho except in the case of timber to be utilized for production of wood pulp. In the case of exchange as is proposed here, no statutory assurance exists that the Idaho lumber would be processed in Idaho.

Section 58-404, Idaho Code, directs the State Land Board to notify the Administrator of the Department of Water Administration of any proposed sale of state owned timber. After notice, the Administrator has ten days to object on the grounds that the cutting of the timber in question would endanger the watershed involved. In an exchange situation no assurance exists that the Department of Water Administration would be entitled to notice or actually receive notice of an impending sale. Even if notice were to be given to the Department of Water Administration, the effect of any objection interposed



Mr. Gordon C. Trombley  
December 20, 1973  
Page 3

by the Administrator would be in question since it is not statutorily sanctioned.

The most persuasive argument against the validity of the proposed exchange is found in Section 58-406, Idaho Code. This section provides for disposition of timber on state owned lands by means of bid sales after notice. The sales themselves must be open to public bidding and notice and said sales must be published once per week for four consecutive weeks in the newspaper or newspapers designated by the Land Board. In the proposed exchange, no open bidding would be had, thereby placing Potlatch Forest Industries at a distinct advantage when compared to other interested parties. In a "bid sale" situation another prospective purchaser could conceivably submit a bid in excess of that which Potlatch Forest Industries would submit. Further, public notice of the prospective transaction would not be given. Chapter 4 of Title 58, Idaho Code, shows an obvious concern on the part of our legislature that any disposition of state owned timber should be fair beyond reproach.

If the Fish and Game Department exchanges the timber as is contemplated, the end result would be the same as if the Fish and Game Department had sold timber to Potlatch Forest Industries and then purchased the private land with the timber proceeds. Such a sale would have to be public and with notice as statutorily mandated. Avoidance of these requirements by "exchange" cannot be allowed. In light of the foregoing, it is unnecessary to deal with questions 2 and 3.

Very truly yours,

FOR THE ATTORNEY GENERAL



TERRY E. COFFIN  
Assistant Attorney General

TEC:lm



OFFICIAL OPINION NO. 74-84

STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL  
BOISE 83707

W. ANTHONY PARK  
ATTORNEY GENERAL

December 20, 1973

Mr. Michael C. Moore  
Attorney at Law  
P. O. Box 942  
Lewiston, Idaho 83501

Dear Mike:

This is in response to your request for an opinion concerning the application of Section 19-5115, Idaho Code, to law enforcement personnel hired before January 1, 1974.

It is the opinion of this office that such provision does apply to law enforcement personnel hired before January 1, 1974. This construction is reached from a reading of Section 19-5115, Idaho Code, in conjunction with Section 19-5116, Idaho Code.

In Section 19-5115, Idaho Code, it is provided in part that:

"...From and after January 1, 1974, any law enforcement personnel employed by the state of Idaho or any political subdivision thereof shall be certified by the Police Officers Standards and Training Academy within one (1) year after first being employed. ..."

The introductory phrase "From and after January 1, 1974," modifies the balance of the sentence, thus lending itself to a construction that the Legislature intended that law enforcement personnel be certified after that date. Had the Legislature intended this section to apply only to law enforcement personnel employed after January 1, 1974, it would have been a simple matter to have placed that modifying phrase

Mr. Michael C. Moore

December 20, 1973

after "law enforcement personnel employed by the state of Idaho or any political subdivision thereof". This construction is consistent with the language in Section 19-5116, Idaho Code, which says "Adherence to the provisions of section 19-5115, Idaho Code, shall commence January 1, 1974." This section does not provide any exception for law enforcement personnel employed prior to January 1, 1974. Had this been the Legislature's intention, it could have been so stated in this section.

In conclusion, then, the construction placed on this section appears reasonable in light of the language of the statute itself and the legislative intention that is gleaned therefrom.

Very truly yours,

FOR THE ATTORNEY GENERAL

WILLIAM F. LEE  
Deputy Attorney General  
Chief, Criminal Division

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December 26, 1973

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Mr. Dwight C. Stone  
Clerk of the District Court  
Teton County  
Driggs, Idaho 83422

Dear Mr. Stone:

You have asked whether boards of county commissioners have the power to declare a holiday or not.

There seems to be little law on this subject. The statements from 40 C.J.S. Holidays P410 are that holidays are generally created by legislative act or executive proclamation and may be created by public acceptance.

Since the legislature has spoken on the subject, county commissioners certainly could not change those holidays set forth in Section 73-108, Idaho Code.

The section also defines certain holidays and makes the following statement about holidays other than the specifically named ones:

"Every day appointed by the President of the United States, or by the governor of this state, for a public fast, thanksgiving, or holiday."

As you pointed out, Section 31-2009, Idaho Code, provides, in part, that county officers must keep their offices open for the transactions of business on such days and during such hours as the boards of county commissioners may prescribe. Also, Article 12, Section 2 of the Idaho Constitution, provides, in part, that counties may make and enforce such police, sanitary and other regulations as are not in conflict with general law.

Often in such cases when the law is not plain, maxims of law are used as construction aids; such as, "the expression of one thing excludes the other", or "a more specific law will control a general law." These aids to construction could be used to deny

Mr. Dwight C. Stone  
December 26, 1973  
Page two

a county the right to set holidays. However, they are to be used with caution. This power, if it exists, definitely could not be used to change one of the existing, specifically named holidays. Also, if such power is exercised by a county, we believe that it would be illegal to set a different date for a holiday than that declared by the President of the United States or the Governor of the State since they have specific power to set holidays.

If a local holiday were set by the county commissioners which complied with the above restrictions, we can see no particular reason why the courts would not uphold the action since the statutes and constitution, at least impliedly, grant such power. Such a declaration of a holiday would, of course, only apply to the local county offices.

Sincerely yours,

FOR THE ATTORNEY GENERAL

WARREN FELTON  
Deputy Attorney General

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December 27, 1973

Mr. Wallace M. Transtrum  
Prosecuting Attorney  
Caribou County  
159 South Main  
Soda Springs, Idaho 83276

Dear Mr. Transtrum:

We have received your recent letter concerning servicemen's memorials and whether such funds can be used to improve an American Legion building.

We are in general agreement with your letter. Public funds cannot be used to improve privately owned buildings even though the owner is an organization such as the American Legion and such funds as those provided for by Sections 65-103 and 65-104, Idaho Code, cannot be used for any purpose except the purposes specified by the statutes creating them.

There are a number of things, however, that we wish to point out to you on this matter. Section 65-103, Idaho Code, sets up a fund for the repair and maintenance of a serviceman's memorial. The monies provided for by this law can be used for that purpose only. Section 65-104, Idaho Code, sets up a fund for construction of servicemen's memorials. This fund, again, can be used for that purpose only. These two funds should not be confused or co-mingled.

We know of no law providing for special districts to assess for a serviceman's memorial. The only law we are familiar with are the two sections cited above. The funds set up by these sections are set up on a county-wide basis by these laws on a district basis.

We might make a suggestion that has worked in some other counties. There is one method that has been used in such

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Mr. Wallace M. Transtrum  
December 27, 1973  
Page 2

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cases. It would be possible for the American Legion or some such organization to donate their building to the public as a war memorial. The county commissioners could accept a building as a war memorial and, from the time they accepted it, could use the funds provided for by Section 65-103, Idaho Code, to maintain and repair such building. Also, the use of the building would then come under the direct supervision and control of the county commissioners.

Very truly yours,

FOR THE ATTORNEY GENERAL

WARREN FELTON  
Deputy Attorney General

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OFFICIAL OPINIONS OF THE STATE OF  
IDAHO ATTORNEY GENERAL  
W. ANTHONY PARK, ATTORNEY GENERAL

January 8, 1974-June 19, 1974

2. 74-89 through 74-193

C.P.



74 89

*Handwritten:*  
Boise State &  
Statel

January 31, 1974



Dr. John B. Barnes  
President  
Boise State College  
1907 College Blvd.  
Boise, Idaho

Dear Dr. Barnes:

We have examined the statutes of the State of Idaho and we can find no prohibition which would prevent Boise State College from being the lessee of federal lands for geothermal study.

Therefore, we are of the opinion that since the Board of Trustees and the College have the authority to acquire, hold, and dispose of real property and to acquire interest, including possessory interest, in real property, that the college, then, may acquire and be the lessee of a geothermal lease granted by an agency of the federal government.

Very truly yours,

W. ANTHONY PARK  
Attorney General

WAP:JRM:cg

cc: John Swartley, M.D.  
Milt Small

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STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83707

W. ANTHONY PARK  
ATTORNEY GENERAL

January 8, 1974

The Honorable Cecil D. Andrus  
Governor, State of Idaho  
Statehouse  
Boise, Idaho

Re: Maximum Highway Speed Limit

Dear Governor Andrus:

I have reviewed Mr. Risch's letter addressed to you under date of January 4, 1974.

Mr. Risch is correct that the provisions of Title 49, Chapter 7, Sections 1, 2, 3 and 4 are basic rule prima facie speed limits. State v. Trimming, 89 Idaho 440, holds squarely on that point.

Idaho's basic rule and prima facie speed limit rather than a fixed speed limit simply means that a speed in excess of the posted limit is not, per se, unreasonable or imprudent. However, it is a strong link in the chain of evidence of a violation of law. Excessive speed is a rebuttal presumption of a criminal act. If road conditions or other hazards exist what otherwise might be reasonable and prudent speed could be a violation of law.

To state as an abstract question of law that Idaho lacks a fixed speed limit fails to answer the critical questions confronting this state and nation. It has been uniformly recognized that speed is a critical force in the spiraling accident statistics. In the year 1972 control statistics, in Idaho, show a total of 39,740 vehicles involved in accidents. Of that total 20,010, or nearly 51% had, as a contributing factor, speeding. In addition to the incredible property dollar damage, 177 fatalities and 6,365 personal injuries resulted from those speed contributed accidents. For the first 6 months of 1973, 16,227 vehicles were involved in accidents and speeding was a contributing factor in 7,821 such accidents, 73 fatalities and 2,459 personal injuries resulted from those accidents.

January 8, 1974

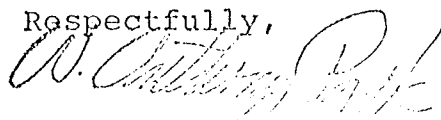
Improved highway conditions in the state, at first blush, would appear to make the Idaho basic rule or prima facie speed limit the most viable statute for regulating vehicular speed. The opposite has proven to be true. In the year 1972, 9,940 of the motor vehicles involved in accidents, in which speed was a contributing factor, occurred in rural areas. The percentages are approximately the same for the first 6 months of the year 1973.

Pursuant to statute and prior to the enactment of the National Emergency Highway Energy Conservation Act the Idaho Board of Highway Directors, under your direction, recognizing the national crisis, and the responsibility to find and declare a more reasonable and safe prima facie speed limits in order to curtail the spiraling accident rate, reduced the speed limit on all state highways in the State of Idaho 10 miles per hour. Viability in that action was in-built by providing that such speed limits were to be effective unless a lower speed limit was posted on the state highway system.

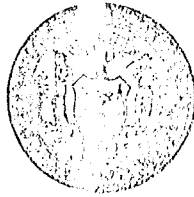
Subsequently the United States Congress enacted the National Emergency Highway Energy Conservation Act effective the 4th day of March, 1974. That act in substance provides that, after the effective date of the act, no highway project will be approved by the United States Secretary of Transportation in any state which has a maximum speed limit on any public highway within its jurisdiction in excess of 55 miles per hour. As the act indicates, this is an emergency measure to conserve fuel in a national crisis, but it also has produced a beneficial side effect of reducing accidents by reason of lowered speed limits. Surely Mr. Risch should not complain that the lowering of speed limits with its attendant reduction of accidents and loss of life and property damage is unjustified, even in the absence of critical national problem.

It is respectfully suggested that appropriate legislation be immediately drafted and submitted to the legislature to repeal the existing basic rule prima facie speed law and to enact legislation fixing a maximum speed within the State of Idaho. Such legislation should also empower the governor or appropriate administrative agencies to lower such maximum speed limit when conditions warrant. The National Emergency Highway Energy Conservation Act leaves to each state the right to fix its maximum speed limit in excess of 55 miles per hour. However, states cannot do so with impunity. Failure to comply with the requirements will result in the loss of federal matching funds under Title 23, USCA.

Respectfully,



W. ANTHONY PARK  
Attorney General  
State of Idaho



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

W. ANTHONY PARK  
ATTORNEY GENERAL

January 10, 1974

Mr. H. A. Lancaster  
County Clerk  
Twin Falls County  
Twin Falls, Idaho 83301

Re: Opinion as to Whether a County Clerk  
May Lawfully Utilize Voting Machines  
In Conducting a County Bond Election

Dear Mr. Lancaster:

You have asked for an opinion as to whether you, as Twin Falls County Clerk in charge of administering a hospital bond election, can ignore the provisions of Section 31-1908, Idaho Code, which section requires the use of paper balloting in county bond elections, and instead conduct the election with voting machines as authorized for "all" elections by Section 34-2402, Idaho Code. It is my opinion that you can.

Section 31-1908, Idaho Code, provides that county bond elections "shall be by ballot." (Emphasis supplied) The said section then describes the physical properties of a valid paper ballot.

Section 31-1906, Idaho Code, provides that county bond elections "shall be held in all respects in conformity with the general election laws so far as the same may be applicable, except as herein provided [in Section 31-1901 et seq., Idaho Code]." (Emphasis supplied)

On the other hand, Section 34-2402, Idaho Code, provides that "At all elections, ballots or votes may be cast, registered, recorded and counted by means of voting machines or vote tally systems as provided." (Emphasis supplied) Section 34-2401, Idaho Code, defines "elections" as "all state, county, city, district and other political subdivision elections."

Mr. H. A. Lancaster  
January 10, 1974  
Page 2

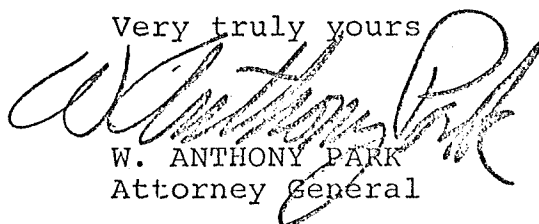
The issue at the root of your question is whether the legislature has intended Sections 31-1906 and 31-1908 to prohibit a county from utilizing voting machines in a county bond election, in spite of the fact the legislature has recently enacted laws that seem to authorize voting machines for all elections.

Section 31-1906 was re-enacted in 1969 and the statute that it appears to protect, Section 31-1908, has remained unaltered since 1925. The voting machine act, Section 34-2401 et seq., Idaho Code, was enacted in 1970. In my opinion the legislature clearly intended the latter act to supersede the former where voting machines were desired by an election jurisdiction. It is unreasonable to suggest that the legislature would authorize voting machines for the election of their own members and for every other purpose yet require paper balloting for county bond elections. There is no distinction between county bond elections and other kinds of elections which might motivate the legislature to distinguish between methods of voting in such elections.

Taking into further consideration that voting by machines, as opposed to voting by paper ballot, allows substantial monetary savings in the conduct of elections, it seems inconceivable that the legislature did not intend the provisions of the later voting machine act to modify the provisions for paper balloting contained in Section 31-1908, where an election jurisdiction chooses to utilize machines. Although the courts are slow to hold that one statute has repealed another by implication, the courts will adopt such statutory construction when a legislative intent that one statute supersede another "clearly and plainly appears." John Hancock Mutual Life Insurance Co. v. Haworth, 68 Idaho 185, 191 P.2d 359 (1948) (dicta).

It is my determination that the legislative intent outlined above meets the test required by the Idaho Supreme Court in Haworth so as to effect modification by implication in this case. Consequently, it is my opinion that you may lawfully ignore the provisions of Section 31-1908, Idaho Code, and proceed to utilize voting machines in your upcoming county bond election.

Very truly yours



W. ANTHONY PARK  
Attorney General

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Opinion  
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January 11, 1974

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Mr. Joseph C. Greenley  
Director  
Idaho Fish & Game Department  
600 South Walnut Street  
Boise, Idaho 83707

Re: Purchase of School and University Lands

Dear Mr. Greenley:

Your letter of October 23, 1973, has been referred to me for response. You requested an Attorney General's opinion on the following legal questions:

1. Do the acreage limitations found in Sections 8 and 10 of Article 9, Idaho Constitution, apply to purchases by state agencies?

2. If so, would those limitations prohibit the Idaho Fish and Game Department from purchasing two adjoining (or separate) 320 or 160 acre tracts at the same sale?

3. Would those limitations prohibit the Idaho Fish and Game Department from buying a 320 acre parcel of public school lands and a 160 acre parcel of university lands at the same time?

4. Is the 320 acre limitation a "life-time" restriction?

It is the opinion of the Attorney General that the acreage limitations found in Article 9, Sections 8 and 10, Idaho Constitution, do not apply to purchases by state agencies.

Section 8 of Article 9, reads, in relevant part:

" . . . provided, that not to exceed 100 sections of school lands shall be sold in any one year, and to be sold in subdivisions of not to exceed 320 acres of land to any one individual, company or corporation." (Emphasis added)

Mr. Joseph C. Greenley  
January 11, 1974  
Page 2

Section 10 of Article 9, Idaho Constitution, reads, in pertinent part:

" . . . No university lands shall be sold for less than \$10.00 per acre, and in subdivisions not to exceed 160 acres, to any one person, company or corporation." (Emphasis added)

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Nowhere in Section 8 or Section 10 is any mention made of the acreage limitations applying to agencies of the State. It is the opinion of the Attorney General that the words ". . . to any person, company or corporation" found in those sections are exclusive lists of entities affected by the limitations.

The reports of the Idaho Constitutional Convention indicate that the members were concerned with precluding the possibility of "moneyed syndicates" purchasing vast amounts of school lands and fencing out population and growth. The Convention was concerned with not allowing Idaho lands to become "moneyed mens' cattle ranches" which would retard settlement of the infant state.

The Idaho Fish and Game Department is accorded condemnation power under Section 36-104(b)(5), Idaho Code. It would be absurd to suppose that the Department is limited in the number of acres which it can purchase when it can obtain unlimited lands by use of condemnation power. If the purchase limitations applied to state agencies, such state agencies could not purchase more than 320 or 160 acres. However, the agency could simply wait until the lands were sold to a private purchaser, then condemn the lands, thereby skirting any possible acreage limitation. Our opinion makes such an absurd exercise in circuitous action unnecessary.

The Idaho Fish and Game Department may make a negotiated purchase of public school and university lands without regard to acreage limitations. Public sale in such a case is not required. (See attached Opinion of the Attorney General, dated July 23, 1973)

However, the State Board of Land Commissioners must maximize the proceeds from the lands regardless of the method of disposition. Any negotiated purchase of such lands by the Fish and Game Department, as in cases where the Department exercises its condemnation power, must be for the fair market value of said lands.

Mr. Joseph C. Greenley  
January 11, 1974  
Page 3

In light of the foregoing, it becomes unnecessary to deal  
with Questions 2 through 4.

Very truly yours,

FOR THE ATTORNEY GENERAL

Terry E. Coffin  
Assistant Attorney General

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STATE OF IDAHO  
OFFICE OF THE ATTORNEY GENERAL  
BOISE 83720

W. ANTHONY PARK  
ATTORNEY GENERAL

JAN 18 1974

STATE OF IDAHO  
Dept. of Insurance

RECEIVED

January 14, 1974

JAN 21 1974

Mr. Monroe C. Gollaher  
Commissioner of Insurance  
Department of Insurance  
B U I L D I N G

OFFICE OF ATTORNEY GENERAL  
STATE OF IDAHO

Dear Commissioner Gollaher:

By letter dated November 30, 1973, you requested an Attorney General's opinion as to whether certain plans of reinsurance are in violation of the Idaho Code. The plans concerned are those by which an insurance company admitted to do business in Idaho reinsures in an insurance company that does not have the necessary capital funds to qualify for admission. Stock in the non-admitted company is acquired by the agents or insureds of the admitted company. You asked if such plans are in violation of Idaho Code, Sections 41-341, 41-511, 41-512, 41-1302, 41-1314 or any other sections.

Section 41-341 of the Idaho Code was adopted in 1969 to provide for regulation of insurance holding companies in transactions between "parent, subsidiary, and affiliated corporations where an insurer is involved". (Comments to Section 6 of Proposed Amendments to the Idaho Insurance Code, Preliminary Draft, November, 1968) Regulation of insurance holding companies systems, subsidiaries, and affiliates was more fully developed by Chapter 38 of Title 41 of the code, but Section 41-3814 specifically states that Chapter 38 shall not be deemed to suspend or modify any provision of Section 41-341.

In order for Section 41-341 to apply to the situation in question, there must be a relationship between some parties involved that amounts to a parent/subsidiary relationship or to an affiliation. "Subsidiary" and "affiliated person" are specifically defined by Subsection (3) as follows:

"(3) For the purposes of this section a 'subsidiary' is a person of which either the insurer and/or the parent corporation holds practical control, and an 'affiliated person' is a person controlled by any combination of the insurer, the parent corporation, a subsidiary, or the

January 14, 1974

principal stockholders or officers or directors of any of the foregoing."

As long as there is total independence between the admitted and non-admitted company, there is no affiliation. But if the admitted company holds practical control of the non-admitted company, or if the non-admitted reinsurance company is controlled by the admitted company or by its officers or directors, then there is an affiliation and Section 41-341 applies.

Some of the reinsurance plans, where either agents or insureds of the admitted company are the stockholders in the non-admitted company, include a contract or other agreement by which the admitted insurance company or its officers manages the non-admitted company. Such an arrangement is logical since the non-admitted company's stockholders, and the members of the board of directors that come from within their number, are not necessarily versed in the management of an insurance company. For example, in some situations, the stockholders are automobile dealers or members of a trade association.

If the management of the non-admitted company or its officers amounts to control, then such management would result in an affiliation as defined in Section 41-341. It is difficult to imagine a circumstance where a manager would not have some control. The word "manage" denotes control. A manager is an officer who superintends the affairs of the corporation. (Gillan v. Consolidated Foods Corporation, 424 Pa. 407, 227 A.2d 858; Morpul Research Corporation v. Westover Hardware, Inc., 263 N.C. 718, 140 S.E.2d 416, 418; 19 C.J.S. Section 1002) Management is synonymous with control. (Black's Law Dictionary, Revised 4th Edition, Page 399; State v. Kamper, Tex. Civ. App., 261 S.W.2d 465, 468; Pacific Employer's Insurance Co. v. Hartford Accident and Indemnity Co., 228 F.2d 365, 368)

Because management involves control, those plans that include management of the non-admitted insurance company by the admitted company would be required to comply with Section 41-341. It would not matter whether the non-admitted company stock was held by the agents or by the insureds of the admitted company.

If a plan is regulated under Section 41-341, then the involved persons must comply with Subsections (1) and (2). Nothing in the plans in question indicates any non-compliance with Subsections (1) (a) through (1)(f) or with Subsection (2). However, there is some question as to whether Subsection (1)(g) would not be violated. Section 41-341(1)(g) reads as follows:

January 14, 1974

"(1) No insurer shall engage directly or indirectly in any transaction or agreement with its parent corporation, or with any subsidiary or affiliated person which shall result or tend to result in:

(g) Payment by the insurer for services, facilities, supplies, or reinsurance not reasonably needed by the insurer."

- Reinsurance that is not reasonably needed by the ceding company is prohibited. The usual purpose of reinsurance is to protect the ceding company by distributing the risk it has insured to avoid the likelihood of a loss so large that it would endanger the solvency of the ceding company. (Vance on Insurance, 3rd Edition (1951) Pages 65,1066) Although it would appear to be unusual in light of this purpose, a company with substantial reserves and assets could reinsure in a company with less reserves and assets. Conceivably, the more substantial company might need to reinsure the amount of business that the less substantial company could assume.

In the plans in question, it would not appear that the primary purpose of the reinsurance agreement is to reinsure the risk of the admitted company. The purpose seems to be to provide business for the non-admitted company and profits to the stockholders of that company. Idaho residents that are insured by, or are the agents for, an insurance company admitted to Idaho may plan to arrange acquisition of stock in a company that lacks the capital necessary for admittance to Idaho. The admitted company could then cede part of its insured risk to the non-admitted company. The non-admitted company would likely have little or no other business than that ceded by the admitted company. The persons who are agents or insureds of the admitted company would acquire stock in, and plan to receive dividends from, the non-admitted company.

The reinsurance in such a plan is unnecessary to protect the interest of the admitted company, unless there is an actual reliance on the non-admitted company for the reinsurance of the risk ceded. In those plans where the reinsurance treaty is primarily for the purpose of providing business for a non-admitted company so that dividends can be realized by the stockholders of the non-admitted company, and a reduction of the admitted company's risk is only incidental, the reinsurance is unnecessary. If affiliates as described above are involved, then such a plan would be in violation of Section 41-341(1)(g).

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By the inclusion of Section 41-511 in the Idaho Insurance Code, the state legislature has endeavored to prevent Idaho insurers from

acting as "fronts" for non-admitted companies. Subsection (2) of this section states:

"(2) Except as provided in sections 41-512, 41-2856 (mergers and consolidations of stock insurers) and 41-2858 (bulk reinsurance, mutual insurers), an insurer may reinsure all or any part of any particular Idaho risk with an insurer authorized to transact such insurance in this state, or in any other solvent insurer approved or accepted by the commissioner for the purpose of such reinsurance. The commissioner shall not so approve or accept any such reinsurance by a ceding domestic insurer in an unauthorized insurer which he finds for good cause would be contrary to the interests of the policyholders or stockholders of such domestic insurer."

The draftsman of the 1961 revision of the Idaho Insurance Code, Mr. Robert D. Williams, stated the following in his comments to this section (Comment (2) Section 120, Page 2 of the Proposed Insurance Code for the STATE OF IDAHO, INITIAL STUDY DRAFT, dated February, 1960):

"Under (2), the Commissioner has some control over reinsurance by domestic insurers in unauthorized insurers. This is advisable to prevent domestic insurers either being used as a 'front' by unauthorized insurers, or from being preyed upon by 'fast operators' working behind the shield of reinsurance."

The word "front", as Mr. Williams uses it, does not have a formal definition in insurance law. However, it is used in the insurance community to designate a certain type of reinsurance agreement. A company that is admitted to a particular state reinsures with a company that cannot qualify in the state. Usually, the reinsurer cannot qualify because it lacks the required capital funds. (See Pennsylvania Bulletin, Vol. 3, No. 46-Saturday, October 27, 1973)

Reinsurance in an insurer that cannot qualify would allow limited capital companies to share in the insuring of risks in states where the company is not considered to have the capital funds necessary to insure risks. Fronting arrangements can result in a concentration of business in a few fronting companies, and may cause the fronting companies to obtain unneeded reinsurance. For example, insured persons, or insurance agents/auto dealers, could form a limited capital company admitted in a foreign state. They would then insure in, or act as agents for, only those companies that agree to reinsure in their limited capital company. The admitted companies would be forced to act as fronts and to purchase reinsurance that may not be needed and may not be beneficial.

Mr. Monroe C. Gollaher

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Some states have specifically disallowed reinsurance in insurers that cannot meet state requirements. (Pennsylvania Insurance Company Law, Section 319(b), (40 P.U.S. Section 442); Arizona Insurance Code, Section 20-261) Idaho Code Section 41-511(2) allows reinsurance in any solvent insurer approved or accepted by the Commissioner of Insurance. Although Mr. Williams' comments to this subsection mention only reinsurance of domestic insurers, the sanctions of the first sentence of the subsection are not limited to domestic insurers. It is no more acceptable to allow foreign, admitted insurers to act as fronts in Idaho than it is to allow domestic insurers to do so.

It should be noted that as a part of his comment to the 1960 draft of the Idaho Insurance Code, Mr. Williams stated the following:

"My notes show notations in Mr. Albertson's copy of the Idaho Code to the effect that as to reinsurance of foreign insurers, if the home state permits unauthorized reinsurance, Idaho will follow; and that as to domestic insurers, 'If we find the unlicensed reinsurer is solvent, we would approve, except that in case of a Lloyd's contract, we would require that the reinsurance premiums (unearned) would be held by the company.' The proposed provision appears to be consistent with the present practice as just stated."

The Mr. Albertson referred to is apparently Mr. B. J. Albertson who was then an insurance examiner for the State of Idaho. The "Idaho Code" referred to was evidently Section 41-801 of the 1953 version of the Idaho Code which was in effect at the time of Mr. Williams' comment. Section 41-801 of the 1953 law reads as follows:

"41-801. Reinsurance of risks. -- Any insurance company licensed to transact business in this state, may reinsure the whole or any part of any policy obligation in any solvent and responsible insurance company. Every insurance company doing business in this state shall be required to furnish the department of insurance with a list of its reinsuring companies, giving the name and amount and premiums affected in each company."

The first few lines in Mr. Williams' comment on Mr. Albertson's notation are apparently concerned with reinsurance of a foreign insurer by an Idaho insurer, and are not a part of the situation considered by this opinion.

The part of Mr. Albertson's notation that Mr. Williams quotes apparently means that when a domestic insurer reinsures with a

January 14, 1974

foreign insurer, the Idaho Commissioner would approve the reinsurance (except that additional requirements are required where Lloyds' contracts are concerned) if the foreign reinsurer is solvent. Mr. Albertson's notation does not apply to the present statute, however. It was made in reference to the 1953 law. His notation clearly reflected the situation under Section 41-801 of the 1953 law. The only qualification the reinsurer had to have under that law was that the reinsurer be solvent. Despite Mr. Williams' statement that the new provision "appears to be consistent with the [then] present practice", the new provision is not consistent. Section 41-511 gives the Commissioner a power he did not have under the 1953 law. The 1953 law allowed any solvent insurer to reinsure companies admitted in Idaho. The present statute has the additional requirement of approval by the Commissioner.

Idaho Code Section 41-511(2) and the comment to the initial draft of this subsection make it clear that the subsection was intended to give the Commissioner the power to prevent admitted companies, foreign or domestic, from acting as "fronts" for limited capital companies. In order to fulfill the purpose of this section of the Idaho Code, the Insurance Commissioner would be required to withhold the approval or acceptance of reinsurance of Idaho risks in insurers that do not meet the capital requirements of the Idaho Code.

Section 41-512 of the Idaho Code applies to reinsurance of companies that are impaired, insolvent, or are withdrawing from business in Idaho, and to reinsurance in domestic insurers. The plans proposed do not contemplate any of these situations. This section of the code would apply only if one of the companies involved became insolvent.

Idaho Code Section 41-1302 is a general provision that prohibits unfair competition and unfair acts as are defined in Chapter 13 of the Idaho Insurance Code. This section does not prohibit any acts that are not elsewhere prohibited in Chapter 13.

Although the plans described in the request for this opinion are very similar, there is one factor which divides them into two basically different types of groups. One type plan is that where those that acquire the stock of the non-admitted reinsuring company are the insureds of the ceding, admitted company. The other is that whereby those that acquire such stock are the agents of the ceding, admitted company.

January 14, 1974

The first type plan, involving insureds acquiring stock in the reinsurer, comes within the scope of an Idaho Attorney General's opinion dated November 22, 1971. That opinion clearly states that Idaho Code Section 41-1314 prohibits "any person from offering, selling or arranging or allowing the acquisition of securities in connection with or as an inducement for any contract of insurance". (Page 4, Paragraph 3, Idaho Attorney General's opinion dated November 22, 1971) If persons sell insurance in a domestic insurer as a part of the same transaction in which they sell stock in a non-admitted insurer, they will be in violation of Idaho Code Section 41-1314.

Should the insureds organize their own reinsurance company, a slightly different situation would be presented. In this event, there would not be an outright purchase of securities from anyone and there would be no violation of Section 41-1314. But if the arrangements for the organization of the limited capital reinsurance company were made by the agents of those who sell insurance to the stockholders of this reinsurance company, there would be a violation of Section 41-1314. Acquisition of securities would have been made in connection with, or as an inducement for, an insurance contract.

There would be no violation of Section 41-1314 if the agents of the admitted insurer either purchase stock in the reinsurance company, or organize their own company. The intent of this code section, and the Attorney General's opinion concerning it, is to prevent securities from being offered to persons as an inducement to purchase insurance. Where the securities are acquired by the selling agents, there is no more inducement for people to purchase insurance from such agents than there would be to purchase it from non-stockholding agents receiving regular commissions.

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#### CONCLUSIONS:

The types of plans here discussed would be in violation of Section 41-341 of the Idaho Code if the reinsurance purchased by the admitted insurer is unnecessary and is purchased from an affiliate of the insurer. The reinsurer is an affiliate if it is managed by the admitted insurer or by agents or officers of the admitted insurer.

Idaho Code Section 41-511 prohibits the admitted insurers from reinsuring in non-admitted companies that are insolvent or are not approved or accepted by the Commissioner of Insurance. The purpose of requiring the Commissioner to approve reinsurance in non-admitted insurers is to prevent admitted insurers from reinsuring in companies that cannot meet the capital requirements established by the Idaho Code.

Mr. Monroe C. Gollaher

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January 14, 1974

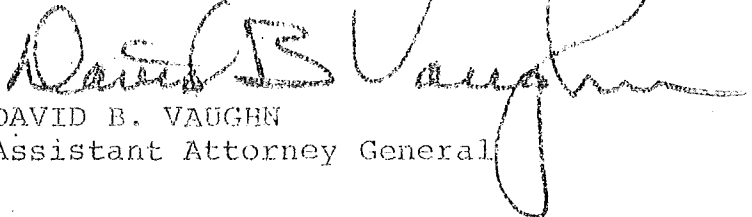
The plans, as they are proposed, do not contemplate the situations regulated by Section 41-512 of the Idaho Code. As long as all insurers involved remain solvent and the admitted insurers are not withdrawing from the state, this section would not apply.

Idaho Code Section 41-1302 provides for regulation of unfair trade practices specified in Chapter 13 of the Idaho Insurance Code. As long as these practices are not used, there is no violation of Section 41-1302.

The purpose of Section 41-1314 is to prevent certain inducements for the purchase of insurance. There is a violation where the insureds purchase both insurance and securities and such purchases are in connection with one another. If the insureds set up their own limited capital reinsurance company and then purchase insurance from an admitted company, there is no violation of Section 41-1314. Nor is there a violation if the sale of securities is made to insurance company agents as an inducement to sell insurance since Section 41-1314 only covers inducements to buy.

Very truly yours,

FOR THE ATTORNEY GENERAL



DAVID B. VAUGHN  
Assistant Attorney General

DBV:pr



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JAN 15 1974

OFFICE OF ATTORNEY GENERAL  
STATE OF IDAHO

January 16, 1974

Colonel L. Clark Hand  
Superintendent, Idaho State Police  
P. O. Box 34  
Boise, Id 83731

Attorney General's Opinion - Immunity of Legislators From Arrest

Dear Col. Hand:

On January 2, 1974, you requested guidelines as to the scope of immunity a legislator has during a regular or special session of the legislature, specifically requesting information as to immunity from traffic offenses and/or driving while intoxicated.

The Idaho Constitution in Article 3, Section 7, provides: "Senators and representatives in all cases, except for treason, felony or breach of the peace, shall be privileged from arrest during the session of the legislature, and in going to and returning from the same, and shall not be liable to any civil process during the session of the legislature nor during the ten days next before the commencement thereof; nor shall a member for words uttered in debate in either house be questioned in any other place."

The United States Constitution in Article I, Section 6(1), provides in part: "...they shall in all cases, except treason, felony and breach of peace, be privileged from arrest during their attendance at the session of their respective houses, and in going to and returning from the same..."

The principle difference between the Federal Constitution and the Idaho Constitution is the freedom from civil process during a session of the United States Congress. Comparable constitutional provisions as found in the Idaho Constitution are found in the Arizona, California, Colorado, Montana, New Mexico, Oklahoma, Oregon, Utah, Washington and Wyoming constitutions.

The United States Supreme Court, in the landmark case of Williamson vs. United States, 207 U.S. 425, construed the immunity provision. That opinion took up and traced the entire history of the immunity, and determined that the immunity applied only to civil cases and not to criminal charges. The United States Supreme Court determined that the framers of the Constitution intended to incorporate the same interpretation of the words "treason, felony and breach of peace" as had attached thereto by common law.

A legislator, by either house, is not privileged from arrest for commission of a criminal offense. The constitutional privilege extends only in civil cases, and no exception for the privilege is comprehended in criminal law. This was the construction of the words "treason, felony and breach of peace" in England, and the "carry-over" of the words into the United States and State Constitutions of the identical words also carries over the meaning of such words in the same sense that they had become settled to mean in England.

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In 1 A.L.R. 1156, there is an extended discussion of this privilege. That discussion accords it the same construction above given, and it was there stated that the object was not to create privileges which did not exist at common law, but rather to confine them in narrow limits. "As the object was to limit the privilege from arrest then enjoyed by members of the British Parliament, and as the same language is employed as had been adopted in England to express the offenses for which members of Parliament could be arrested, to wit: 'treason, felony and breaches of the peace' it follows that all offenses in England comprehended in the words breach of peace are excepted from the privilege from arrest."

There is no question that traffic offenses, and particularly driving while under the influence of intoxicants are breaches of the peace. Violations of the traffic laws and ordinances could, and do, to a large measure lead to disorder and impair personal peace and security.

The guidelines for your people in the field should reflect that legislators should receive the same courteous treatment as any other citizen, and, at the same time, if they are found violating the criminal law, appropriate action should be taken. In fact, an officer is charged with the responsibility of taking the appropriate action when observing a criminal offense occurring in his presence.

Very truly yours,

FOR THE ATTORNEY GENERAL,

JAY F. BATES,  
Deputy Attorney General  
Assigned to the Department  
of Law Enforcement

JFB/b

cc: John Bender, Commissioner  
W. Anthony Park, Attorney General ✓

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STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

W. ANTHONY PARK  
ATTORNEY GENERAL

January 21, 1974

Mr. Quentin F. Harden  
Boundary County Prosecuting Attorney  
Bonners Ferry, Idaho 83805

Dear Mr. Harden:

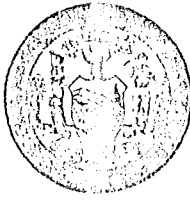
You have asked for an opinion as to whether an original petition for the recall of a county officer, which petition has failed the " cursory examination " provided for in Section 34-1706(1) and which hence has been returned by the county clerk to the person attempting to file it, is or is not a matter of public record. It is my opinion that such petition is not a matter of public record.

Until the petition meets the requirements of Section 34-1706(1) the county clerk is not able to file the petition and is required by Section 34-1706(1) to return the petition to the person attempting to file it. Because an unfiled petition cannot be the basis of any official governmental action with respect to it, I am of the opinion that such petition is not a matter of public record.

Very truly yours,

*W. Anthony Park*  
W. ANTHONY PARK  
Attorney General

WAP:JFG:cg



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

W. ANTHONY PARK  
ATTORNEY GENERAL

January 23, 1974

Mr. Jerry Hill  
Deputy Secretary of State  
Statehouse  
Boise, Idaho 83720

Dear Jerry:

You have asked whether there are any legal prohibitions which might conflict with the enactment of new, more stringent requirements in the areas of party formation and retention of ballot status. It is my opinion that one will have a difficult, though not insurmountable, constitutional hurdle in drafting such legislation.

First of all, it would be helpful to outline current Idaho law on the subject. According to the provisions of Section 34-501, Idaho Code, to obtain ballot status, a political party must file a petition with the Secretary of State thirty days before the last day provided by law for the holding of state party conventions. The petition asks for official recognition as a political party, and must be signed by fifteen hundred electors. At the time the party submits the petition it must intend to name at least three candidates for state or national office.

According to the provisions of Section 34-501, Idaho Code, to retain ballot status, a political party must have had three or more candidates for state or national office during the last general election, or one of its candidates for state or national office during the last general election must have polled at least 3% of the aggregate votes cast for the office of governor.

A recent Idaho Supreme Court case touched on the constitutionality of tightening the ballot status law. In American Independent Party in Idaho, Inc. v. Cenarrusa, 92 Idaho 356, 442 P.2d 766 (1968), the Court ruled unconstitutional an Idaho statute which required that any party which wished to obtain initial ballot status must have run a candidate in

Mr. Jerry Hill  
January 23, 1974  
Page 2

the previous general election, which candidate must have polled a certain quantum of votes in that election. Such a statute, said the Court, denied the political party and its members of an effective right of suffrage guaranteed them under Article 1, Section 19 of the Idaho Constitution. It did so because it made it a "practical impossibility" for the political party in question to gain ballot status. It made it too difficult, in other words, for a party to obtain ballot status for the first time.

It is clear from the American Independent Party case that the Court would not countenance a complete removal of the petition process for initially obtaining ballot status and allow it to be replaced by a scheme whereby the political party is required to make a showing that it accumulated a certain percentage of votes in the previous general election.

Should such legislation to increase the number of petitioners be considered, however, it is important to remember that the Court will not permit an interference with the right of suffrage. A reasonable increase, then, might be tolerated, but I am sure you can see that if a statute required an excessive number of petitioners on the qualifying petition, the Court would probably rule the statute in violation of Article 1, Chapter 19 of the Idaho Constitution.

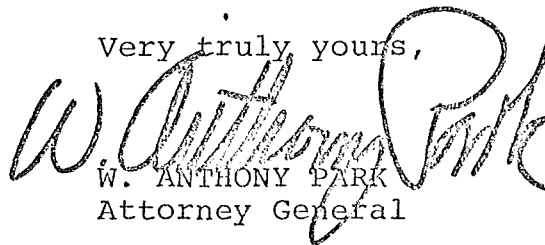
Retaining ballot status is a different matter than obtaining ballot status. More stringent requirements for a party to retain status would probably not violate Article 1, Section 19 of the Idaho Constitution unless these requirements were unreasonable enough to frustrate the party's right to suffrage. For example, I would imagine that to require a party to have run candidates for every office on the ballot in the previous general election or require that one of that party's candidates have compiled 90 percent of the aggregate vote cast for the office of governor in the previous general election would be to require the unreasonable. On the other hand, to require four rather than three national or statewide candidates, or to require one of those candidates to have compiled 5 percent rather than 3 percent of the aggregate vote for governor in the last general election, the current statutory yardstick, might not be unreasonable.

Mr. Jerry Hill  
January 23, 1974  
Page 3

Considering the holding in the American Independent Party case, and keeping in mind that this case dealt with obtaining rather than retaining status, I would offer this advice: When drafting legislation in this area, remember that the standard of constitutionality of a ballot status law in light of the American Independent Party case, is going to be whether a statute interferes with or prevents the lawful exercise of the right of suffrage by unreasonably hindering the right of citizens to organize, and give expression to their political aspirations. The American Independent Party case prohibits a statute which "would make it a practical impossibility to form a new political party". It is my opinion that the same case would prohibit a statute which would make it a practical impossibility to retain ballot status.

How much room exists between making it "difficult" for a political party to obtain or retain ballot status, and making it a "practical impossibility" is problematical - a "matter of degree," as lawyers like to say. In favor of stricter ballot status legislation, it can certainly be argued that the constitutional right of suffrage should be balanced against the financial burden to the State of placing and keeping splinter parties on the ballot. I would refer to this consideration in a statement of legislative purpose.

Very truly yours,

  
W. ANTHONY PARK  
Attorney General

WAP:JFG:cg

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January 24, 1974

OFFICE OF GENERAL

Mr. Mort Curtis, Superintendent  
Council School District No. 13  
Adams County  
P. O. Drawer No. 468  
Council, Idaho 83612

OPINION: At What Age May Either a Girl or Boy  
Own an Automobile in Their Own Name

Dear Superintendent Curtis:

Your letter of January 8, 1974, has been handed to me  
for answer.

Please be advised that pursuant to Title 32, Chapter 1,  
Idaho Code, minors are defined as both male and female under  
eighteen years of age; having reached their majority, a male or  
female may enter into a written contract.

Contracts entered into by minors under the age of  
eighteen years may be disaffirmed prior to reaching majority or  
within a reasonable time thereafter. There are two exceptions to  
disaffirmance of contracts by a minor: (1) If the contract made  
by a minor is for necessities, Title 32, Chapter 1, Section 4, Id-  
aho Code, and (2) A contract which a minor is entitled to enter  
specifically by statute, Title 32, Chapter 1, Section 5, Idaho Code.

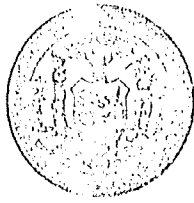
Very truly yours,

JAY F. BATES,  
Deputy Attorney General  
Assigned to the Department  
of Law Enforcement

JFB/b  
cc: John Bender, Commissioner  
W. Anthony Park, Attorney General ✓  
Jack Farley, Director, MVD

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STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

W. ANTHONY PARK  
ATTORNEY GENERAL

January 25, 1974

Rep. John O. Sessions  
House of Representatives  
State of Idaho  
BUILDING MAIL

Dear Rep. Sessions:

You have asked whether it is permissible under the Constitution of the State of Idaho for the legislature to vote an appropriation to provide financial assistance to counties, cities, and road districts in certain flood-devastated areas of northern Idaho.

Two constitutional provisions are relevant. Article 8, Section 2, reads as follows:

"The credit of the state shall not, in any manner, be given, or loaned to, or in aid of any individual, association, municipality or corporation . . ."

Article 8, Section 3, reads as follows:

"No county, city, town, township, 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, without the assent of two-thirds of the qualified electors thereof voting at an election to be held for that purpose, nor unless, before or at the time of incurring such indebtedness, provisions shall be made for the collection of an annual tax sufficient to pay the interest on said indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof, within thirty years of the time of contracting the same. Any indebtedness or liability incurred contrary to this provision shall be void: . . ."



Your plan of assistance, as outlined in the draft that you submitted to me on January 23, 1974, does not involve a "lending of credit" as that phrase is defined by Idaho case law. Your plan guarantees reimbursement in the form of deductions by the State of federal monies forwarded through the State to those areas designated as national disaster areas by the federal government. Because of this guaranteed reimbursement feature of your plan, the assistance may be properly characterized as either a "loan of funds" or an "advancement". Either characterization would prevent the state from violating Article 8, Section 2 of the Idaho Constitution and the counties, cities, or road districts receiving such assistance from violating Article 8, Section 3 of the Idaho Constitution.

I  
LOAN OF FUNDS

The Idaho Supreme Court has distinguished between a loan of credit and a loan of funds. The chief point of distinction is the certainty of reimbursement of monies loaned. In Engelking v. Investment Board, 93 Idaho 217, 458 P.2d 213 (1969), the Court ruled that the investment of certain permanent endowment funds in bonds or notes of private corporations is constitutional since repayment of principal can be guaranteed. Investing in the stock of private corporations, on the other hand, was determined to be unconstitutional in Engelking since the guarantee of return is uncertain. Investment in convertible bonds was held to be constitutional, although the exercise of the conversion privilege was held to be unconstitutional.

Since the enactment of your bill is strictly contingent upon the declaration of the areas in question as national disaster areas, and since you have incorporated into your plan a system of automatic reimbursement, it is my opinion that the State financial assistance in this instance can be properly characterized as a "loan of funds" with the certain guarantee of repayment. Under the Engelking interpretation of "loan of funds", the enactment of your appropriation will not place the State in violation of Article 8, Section 2 of the Idaho Constitution. Furthermore, because of the inclusion of the automatic repayment scheme and the certain receipt of federal "national disaster" monies, the counties, cities, and highway districts making use of your emergency funds would not be in violation of Article 8, Section 3 of the Idaho Constitution by incurring any indebtedness beyond their respective incomes.

II  
ADVANCEMENT

Your plan of assistance, as outlined in the draft, can be characterized as an "advancement". Upon the declaration of a national disaster in these areas, federal financial assistance is assured. Thus, State emergency funds granted to national disaster areas in the manner your plan has outlined are really no more than an advancement of federal monies certain to be received in the future.

Although there is no Idaho case directly in point with the facts of the present situation, the constitutionality of a revolving fund statute was upheld by the Idaho Supreme Court on theories readily applicable to the matter at hand. In Suppinger v. Enking, 60 Idaho 292, 91 P.2d 362 (1939), a disbursement under a revolving fund was held not to be a loan of money to the recipient, but an advancement of money that the recipient would have eventually received from the State treasury anyway, provided that the recipient had used the money in performing duties for which the reimbursing appropriation was created. The Court could perceive no extension of credit in such a scheme. Likewise, I can perceive no extension of credit in your plan.

It is my opinion that you are within constitutional bounds in enacting your emergency flood appropriation bill if you retain your safeguards of reimbursement. Proceeding under the "loan of funds" or "advancement" theories, the key to constitutionality is certainly of reimbursement. Your plan, as drafted, assures full reimbursement by providing that advanced State monies will be deducted from federal disaster assistance funds received by the State from the federal government as either an advance or final payment. Your plan's condition that the funds advanced will be used solely for the work being requested in the project applications for federal disaster assistance is a necessary condition. Great care should be taken to administer advanced State funds only to the counties, cities, and road districts included in those areas designated as national disaster areas by the federal government.

Very truly yours,

W. ANTHONY PARK  
Attorney General

74-99

January 28, 1974

Mr. Paul L. Blanton  
Secretary  
Idaho State Board  
of Architectural Examiners  
BUILDING MAIL

Dear Mr. Blanton:

This office is in receipt of your letter dated December 13, 1973, wherein you request an opinion as to whether local building authorities may issue building permits to persons whose building construction documents are prepared by out-of-state architects not licensed to practice in the State of Idaho.

In order to engage in the practice of architecture in the State of Idaho, it is necessary to obtain a license by meeting certain qualifications. Section 54-301, Idaho Code. An architectural license is issued to persons qualifying after examination by the State Board of Architectural Examiners and to those persons who are granted reciprocal privileges to licenses pursuant to Section 54-302, Idaho Code. A person acting as an architect in the State of Idaho who is not licensed pursuant to the provisions of the above cited statutes is guilty of a misdemeanor. Section 54-310, Idaho Code.

Further, it is the general rule in this State that a person who contracts to engage in architectural work in the State of Idaho who is not licensed in accordance with State law cannot recover under the terms of the contract and the contract is totally void. Johnson v. Delane, 77 Idaho 172, (1955).

There appears to be no prohibition against local building authorities issuing building permits to persons who have retained the services of an unlicensed architect to prepare the construction documents. The general purpose of local building permit ordinances is to obtain compliance with the codes and ordinances governing the erection of new buildings

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Opinion

Mr. Paul L. Blanton  
January 28, 1974  
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or the material alteration or addition to existing building. Walker v. North Carolina, 262 F.Supp. 102. Building permit ordinances must be drawn with these purposes in mind and must treat all applicants alike. Grandville v. Cross, 228 NYS 204. It can generally be concluded that local officials charged with the responsibility of granting or denying building permits must exercise their discretion within the standards established by local legislation. In this respect, it would appear that where local ordinances provide no prohibition against employment of unlicensed architects, the fact that construction design is prepared by an unlicensed architect is not grounds for denying a building permit.

It should be noted, however, that a building permit granted by a local building authority cannot condone or afford immunity to violation of State law. Ex Parte Ruppe, 252 P. 746. Thus, the issuance of a building permit does not authorize or afford immunity to an architect who violates State licensing provisions of State law. I must conclude, therefore, that local building authorities may issue building permits to persons who have engaged unlicensed architects in the preparation of construction documents. However, I do advise that enforcement of the licensing provisions may be obtained by seeking prosecution of unlicensed architects as constituting a misdemeanor within the State.

Secondly, you have asked for the advice of this office with regard to the desirability of revising current statutes defining the respective professions of architecture and professional engineering. I am apprised of the litigated cases ruling that the practices of architecture and engineering are somewhat overlapping. Johnson v. Delane, 77 Idaho 172 (1955). If this Supreme Court ruling is causing confusion in enforcement of the respective statutes relating to architecture and engineering, I would suggest then that some revision in present law may be appropriate. Absent legislative change, the Supreme Court ruling with regard to the overlapping functions of architects and engineers will remain in full force and effect and cannot be altered by an opinion from this office.

If you have further questions regarding the matters you have presented to this office, please feel free to contact me.

Very truly yours,  
FOR THE ATTORNEY GENERAL

WAYNE V. MEULEMAN  
Deputy Attorney General

OPINION



74-100

STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

W ANTHONY PARK  
ATTORNEY GENERAL

January 29, 1974

Mr. D. F. Engelking  
State Superintendent of Public Instruction  
State Department of Education  
BUILDING MAIL

Dear Mr. Engelking:

We wish to respond to your request for our opinion on the question submitted to you by Lloyd L. Sorensen, Superintendent of School District #351 in Malad.

Mr. Sorensen's concern is with Section 33-701, Idaho Code, which provides in part, "that teacher salaries may be reported in gross amount, showing the number of teachers paid at each of the several stated gross salary levels in effect in the district, but without naming the individual recipients of teacher salary payments." He specifically asked the question of whether or not, in light of the above cited section, is the salary of an individual teacher or other employee of the district available for public information. Apparently, the issue in that district is whether or not the school may be required, upon request, to supply information on particular salaries of particular employees of the district.

Section 33-701, Idaho Code, relates primarily to the reporting of the fiscal summaries and operations of a school district which must be published annually in a paper of general circulation within the district. This section does not require the school to identify by name and amount the employee and the salary individually within that district in the summary to be published. The law permits the summary to combine salaries and wages for the employees of the district. However, this does not prevent a school district from more particularly itemizing its salaries and wages for the summary to be published. It is only the minimum requirement that permits the district to combine salaries and wages. If a school wished to itemize with particularity each salary of each employee of the district within that summary, it is certainly free to do so.

Mr. D. F. Engelking  
January 29, 1974  
Page 2

The question of whether or not the district has to divulge the information on particular salaries of particular individuals within the district upon request from news media or other interested persons including the professional personnel of the district has nothing to do with Section 33-701. However, we are of the opinion that the information is public. The school district is not required to do its own research and development of the number of the individuals and the salaries paid by the district; but upon request, it must make that information available to the person who requests it. Section 33-701, Idaho Code, does not in any way prevent or prohibit the district from divulging salaries and wages of its individual employees upon request of patrons of the district.

Therefore, in specific answer to Mr. Sorensen's question, ". . . is the salary of an individual teacher or other employee available for public information?", the answer is yes, upon request of a member of the public.

We hope we have been of some assistance in this matter.

Very truly yours,

FOR THE ATTORNEY GENERAL

JAMES R. HARGIS  
Deputy Attorney General

JRH:cg



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

W. ANTHONY PARK  
ATTORNEY GENERAL

January 30, 1974

Mr. D. F. Engelking  
State Superintendent of Public Instruction  
Department of Education  
BUILDING MAIL

Dear Mr. Engelking:

We wish to respond to your request for our opinion on Section 33-513, Idaho Code, as it relates to teachers attending meetings called by the state teachers association. Apparently the question is based on administrative decisions in certain districts where the teacher who attends the meetings must pay for a substitute teacher in that teacher's absence or where the teacher's salary is reduced, probably to the point to cover the cost of a substitute, during the teacher's absence.

The pertinent parts of the above cited section provide:

"It (the Board of Trustees) shall not contract to require any teacher to make up time in attending any meeting called by the State Board of Education or by the State Superintendent of Public Instruction; nor while attending regularly scheduled official meetings of the state teachers association; nor while school is closed as provided in Section 33-1001, Idaho Code, as now appearing or as it may be amended;"

Teachers' contracts provide that the teachers will provide educational services for a certain number of days of the academic year as consideration for a certain number of dollars. Failure on the part of the teacher to provide those services for the requisite number of days perhaps can bring about a

Mr. D. F. Engelking  
January 30, 1974  
Page 2

reduction in the number of dollars paid by the district. However, the legislature has provided certain limitations on the freedom of a district to contract with its professional personnel. Teachers are excused from performing the number of days specified in the contract due to illness, Section 33-1216, et seq., Idaho Code. Teachers are excused from providing educational services to the students for the contract number of days where a meeting of teachers has been called by the State Board or the State Superintendent on an otherwise school day. Teachers are excused from the performance of their duties when the schools are closed on otherwise school days, pursuant to Section 33-1001 and Section 33-512, Idaho Code. And, teachers are excused from providing their contracted services on those days where the state teachers association has called a regularly scheduled official meeting of that association. Section 33-513, Idaho Code.

Since a school district cannot contract to require a teacher to make up the time missed for any of the above reasons in order to provide the district with performance for the contracted number of days, then it hardly seems consistent to state that a district can impose the financial burden on the teacher for not performing on a school day for any of the reasons above stated. It seems strange and inconsistent to us that districts don't impose this financial burden on a teacher who is ill or who attends the teachers' institute or when the school is closed. Yet the question arises where a teacher attends a regularly scheduled official meeting of the state teachers association. If the district can't require the teacher to make up the time spent at a regularly scheduled official meeting of the state teachers association in order to receive the full contract salary, then we cannot see where the district can withhold the teacher's salary or reduce it, or require the teacher to pay the substitute. If a district cannot require the time to be made up, it certainly can't require the teacher to forego financial consideration for being excused from performing the contracted duties by law.

Therefore, we are of the opinion that a district may not impose the financial burden on its teachers or otherwise require them to make up time where the teacher attends a regularly scheduled official meeting of the state teachers association.



Mr. D. F. Engelking  
January 30, 1974  
Page 3

If the teacher is excused by law from performing his or her duties to attend such meetings, then the district may not interfere in such a way as to deter the teacher from attending. We hope we have been of assistance.

Very truly yours,

FOR THE ATTORNEY GENERAL

JAMES R. HARGIS  
Deputy Attorney General

JRH:cg

January 25, 1974

Mr. Gordon C. Trombley  
Commissioner  
Department of Public Lands  
BUILDING MAIL

Dear Mr. Trombley:

This is in response to your request for an opinion regarding the applicable rules to determine a conflict or the absence of a conflict under Title 58, Chapter 3 of the Idaho Code under the following circumstances. In your request, you raise the following questions:

1. What are the preferential rights of the present lessee?
2. If two or more applicants, one being the present lessee, file prior to November 30 of the year in which the lease expires, must the lease go to conflict, and is the bidding limited to only those applicants?
3. Is an application received before November 30, from the present lessee, awarded to the applicant if his is the only application filed?
4. Is an application received before November 30, but not from present lessee, awarded to the applicant if his is the only application filed?
5. Do all applications, including those from present lessee if he has not filed before November 30, remain open until expiration of the lease on December 31 and then go to auction if more than one application exists?

It may be helpful at the outset to put these questions into a typical fact pattern: A lease of surface rights is to expire on December 31. Written notice of expiration is forwarded to the lessee along with an application to renew the

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lease. The lessee's attention is invited to a November 30 deadline under Section 58-307 to file an application to renew a lease. The lessee neglected to file by November 30. He files for renewal during December. A stranger to the land files for a lease on the land before November 30. Another stranger to the land files to lease the land during December.

The State Board of Land Commissioners is charged with the duty, inter alia, of renting the grant lands of the State "under such regulations as may be prescribed by law, and in such manner as will secure the maximum possible amount therefore." Article IX, Section 8, Idaho Constitution.

In 1905, the Idaho legislature adopted a comprehensive set of laws defining the powers and duties of the State Board of Land Commissioners in regulating the location, appraisal, sale, leasing and general management of the public lands of Idaho. 1905 Session Laws, Page 131.

Section 15 of that Act provided as follows:

"No lease of State lands shall be for a longer term than five years. When any lease expires by limitation, the holder thereof may renew the same in manner as follows: At any time within the thirty days next preceding the expiration of the lease, the lessee, or his assigns, shall notify the register of his desire to renew said lease. If the lessee and State Board agree as to the valuation of the land, a new lease may be issued bearing even date with the expiration of the old one and upon like conditions."

Section 15 gave an unqualified preference to the holder of the lease. If the lessee made known his desire to renew the lease, the lands would be leased to him on a negotiated basis, and he was not exposed to a conflict auction.

Section 18 of the Act of 1905 provided, on the other hand, in pertinent part:

"When two or more persons apply to lease the same land, then, in such cases, the register shall, at a stated time, at his office in the capitol building, auction

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Mr. Gordon C. Trombley  
January 25, 1974  
Page 3

off and lease said land to the applicant  
who will pay the highest annual rental  
therefor: \* \* \* ."

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In 1905 and in succeeding years, much of the State land would not have been under lease. Apparently mindful of the obligation to maximize income, the legislature provided that with respect to land not under lease, conflicting applications for the same land would be resolved at public auction. No period of time is provided during which applications being received could be considered in conflict. No obligation to hold a lease for new land for a period of time to allow for a conflict application to be filed is provided. These matters are left to the sound discretion of the Board.

By amendment to Section 15 in 1915, (then known as Section 1574, Revised Code of Idaho), a lessee seeking to renew his lease was for the first time exposed to auction bidding in the event of conflict. Ch. 167, 1915 Session Laws, Page 376.

Section 58-307, Idaho Code, the successor law to Section 15 of the 1905 Act, was brought substantially into its present form in 1921. Ch. 28, 1921 Session Laws, Page 36. It provided in pertinent part:

"\* \* \* All applications to lease or to renew a lease which expires December 31 of any year, shall be filed in the office of the State Land Commissioner between the first day of October and the thirtieth day of November preceding the date of such expiration. Such applications will be considered by the State Land Board after January first following and be disposed of in the manner provided by law. Where conflicts appear such application filed between said dates shall be considered as having been filed simultaneously. However, nothing herein shall be construed to prevent the State Board of Land Commissioners from accepting and considering applications for new leases at any time. \* \* \* "

The companion statute, originally Section 18 of the Act of 1905, and now Idaho Code, Section 58-310, was amended in 1921 to expand upon the procedures for resolving conflicting

Mr. Gordon C. Trombley  
January 25, 1974  
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applications for theretofore unleased lands. The amendment also vested the State Land Commissioner with the discretion to grant a lease without competitive bidding to the adjacent land owner even if there were a conflict. Ch. 18, 1921 Session Laws, Page 26. It is noteworthy that East Side Assoc. v. State Board of Land Commissioners, 34 Idaho 807 (1921), was in the courts at the time this amendment was enacted. This same statute was amended two years later to extend the State Land Commissioner's discretion to grant a lease without competitive bidding to the owner of the expiring lease. Ch. 117, 1923 Session Laws, Page 149.

In 1951, the discretionary preferences found in Section 58-310, for the adjacent owner and the former lessee were stricken so as to require competitive bidding for conflicting leases on the same land in all instances. Ch. 73, 1951 Session Laws, Page 114. Section 58-310 has not been amended since 1951.

Section 58-307 was amended in 1970 to broaden the application period from between October 1 and November 30, to between January 1 and November 30 of the year in which a lease is expiring, presumably to foster or encourage conflicts on State lands under lease in order to maximize income. Ch. 10, 1970 Session Laws, Page 17. Other amendments to Section 58-307 in 1941 and 1972 are not remarkable.

Taken as a whole, the amendments to Sections 58-307 and 58-310 over the life span of the State of Idaho have tended toward encouraging competitive bidding and have tended away from preferences, discretionary or statutory.

The laws or regulations for leasing of State lands should be considered as a totality and interpreted in light of the Land Board's constitutional obligation to maximize income to the several endowments. They should also be interpreted in light of the general legislative trend to encourage conflicts and to minimize preferences. In particular, Sections 58-307 and 58-310 of the Idaho Code, which were born together and have co-existed since 1905 should be considered together here.

Broadly speaking, Section 58-307 and its predecessors have enunciated the leasing procedures for State lands currently under lease, whereas Section 58-310 and its predecessors address leasing procedures upon lands not under lease or not subject to a renewal application. Section

58-307 defines a conflict in the context of renewals of outstanding leases and then looks to 58-310 for resolution of the conflict by competitive bidding. Section 58-310 contains no real definition of conflict, or more particularly, the period of time during which conflicts may arise, but leaves such matters to the sound discretion of the Land Board. Section 58-310 does provide for competitive bidding in the event of conflict.

Section 58-307 serves a two-fold purpose. It gives a measure of assurance to the lessee. It also gives notice to the world how a person may create a conflict with an outstanding lease. The lessee is assured by the statute that if his application for renewal is timely filed, he will (1) be issued a new lease if no conflicting application is filed by November 30, if he is otherwise qualified, if the land is available for lease, if his application is in order, and if valuation of the new lease is agreed upon by the lessee and the Department; or (2) he will only have to bid against those persons filing conflicting applications before November 30.

Section 58-307 assures a person interested in State land presently under lease to another that if his application is filed before November 30, the land will not be leased to the former lessee or to another without competitive bidding in which the applicant may participate. It does not, however, give that applicant a preference in the event the former lessee does not file a timely application for renewal. If the lessee does not file an application for renewal by November 30, his last right or vestige of preference in the State land, save one month's occupancy and a right in the improvements, is extinguished, and it is as if the property were never under lease. Accordingly, the presence or absence of a conflict should be determined under the same administrative practice or procedure that is applicable to Section 58-310. The sole exception to that rule is that applications for land presently under lease and not the subject of a timely renewal application will be received until January 1, after which "such applications will be considered by the State Land Board." I.C. 58-307. This is consistent with the termination date of the outstanding lease, and with the fact that access or occupancy of agricultural or grazing lands is generally not necessary for some time after January 1.

As further evidence of the legislative intent that Section 58-307 applies to land under existing lease and not to land free of a leasehold interest, the drafters found it necessary to add the proviso that, "However, nothing herein

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Mr. Gordon C. Trombley  
January 25, 1974  
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shall be construed to prevent the State Board of Land Commissioners from accepting and considering applications for new leases at any time." This proviso was necessary to make it clear that the period from October 1 to November 30 for accepting "All applications to lease or to renew a lease which expires December 31 of any year" applied to applications for land presently under lease only, and that applications for land not under lease would be received at any time during the year. In other words, the proviso helps to make it clear that the phrase "which expires December 31 of any year" modifies "applications to lease" as well as "to renew a lease" in Section 58-307.

In light of the foregoing, it is our opinion that a lease application filed by a person other than the former lessee before November 30 is not entitled to a preference. Since no application for renewal was filed by the former lessee before November 30, all applications to lease received before January 1 are in conflict and should be resolved under Section 58-310.

By way of illustrating the soundness of this opinion, consider this hypothetical situation: a lease upon state lands is about to expire and the former lessee expresses no interest at all either before November 30 or after November 30 to lease the property again. One person, a stranger to the land, files an application to lease the land on November 29. Another person, also a stranger to the land, files an application to lease the property on December 1. No other applications are received before January 1. This opinion would hold that the mere coincidence that the property was presently under lease did not entitle an applicant filing on November 29 to any preference over the applicant filing December 1. Instead, the situation is essentially as if the land were not under lease, and it is quite clear that under these circumstances applied to land not under lease, no preference at all is granted by the statutes, and none should be granted here.

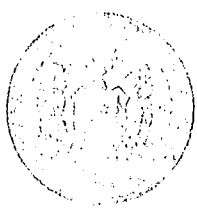
Very truly yours,

W. ANTHONY PARK  
Attorney General

WAP:MJM:cg

OPINION

74-103



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

W. ANTHONY PARK  
ATTORNEY GENERAL

February 5, 1974

Mr. D. F. Engelking  
State Superintendent of  
Public Instruction  
State Department of Education  
BUILDING MAIL

Dear Mr. Engelking:

We wish to inform you that we have sent a copy of our opinion to a Mr. Curtis Dirks, Chairman of Ministers of the Church of God in Christ (Mennonite), in Bonners Ferry to the effect that the children of parents who are members of his congregation are exempt from Section 33-202, Idaho Code. Basically, we held that those children need not attend school after they have graduated from the eighth grade. That decision in vast part was based on the case of Yoder v. Wisconsin, a United States Supreme Court decision in 1972.

We wish to explain to you more fully of our opinion. We realize the arguments for and against granting the exception to those students. There are two persuasive arguments in opposition to granting exemptions. The first is that the granting of the exemption may disrupt the entire regulatory scheme, may entail substantial expense, or may place an undue administrative burden on your office, the State Board of Education, and local districts who are responsible for enforcing the compulsory school attendance law. However, the United States Supreme Court and the Supreme Court of the State of Idaho have both recently been unreceptive where allegations of a compelling State interest are based on administrative convenience or fiscal savings. Allowing the Mennonite children of high school age to be exempt from statutory requirements would not, in all probability, disrupt the overall uniformity of the State's educational scheme, anyway.

The exemption provided to these children involves only a small number, and should not seriously disrupt the educational program. Also, it is unlikely that our opinion and the Yoder decision will cause or in fact have caused the State to be



Mr. D. F. Engelking

February 5, 1974

Page 2

flooded by a multitude of requests for exemption from the educational program. The position of both the Amish and the Mennonite is isolated and unique and probably cannot be claimed by other religious minority groups. Even if the Yoder decision and our opinion should result in a deluge of requests for educational exemptions, we do not believe this is sufficient reason to disregard the decision of the United States Supreme Court. The cost of determining who is entitled to an exemption is not the compelling State interest that can justify deprivation of constitutional rights, nor is the need for a simple procedure for eliminating insincere applicants. Only if you, the Board and local districts are unable to distinguish between sincere and insincere applications by any feasible means, should religious exemption be denied for administrative reasons. It is doubtful that the State will have difficulty in determining which groups or individuals, if any, are entitled to a religious exemption.

The second and most appealing policy argument for not granting an exemption is based on the welfare of the child. It is argued that the Mennonite youth will have less chance for success if he is denied public school education and later decides to leave the community to compete in the larger society. Further, the Mennonite youth will not be introduced to any elements of life outside the limited experience of his Mennonite upbringing.

The Supreme Court in the Yoder opinion discussed the issue of balancing between the states interest in compulsory education and the freedom to exercise that person's religion. The balancing here in this particular fact situation is that the Mennonite child will lose the fruits of a well-rounded education, or the Mennonite parents will lose their freedom to rear their children according to the tenets of their religion. The Mennonite child, practically speaking, loses his freedom of choice in any event, for whether or not he will receive a public education and whether or not he will be able to retain his uncomplicated religious faith are decisions that will be made for him, before he reaches maturity.

There is also one other consideration to be made here and that is the ease with which the Mennonite child may enter into the society. Although we know of no study which determines the exact number or percentage of children who leave the Mennonite community upon reaching majority, it is possible that those Mennonite children who ultimately leave their close

Mr. D. F. Engelking

February 5, 1974

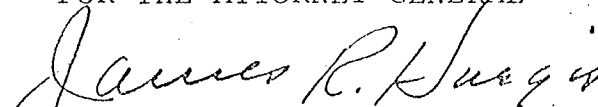
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community may make the transition out of the Mennonite community more easily than those who have been compelled to learn conventional social values are able to re-enter the rather narrowly focused Mennonite lifestyle. The Yoder court assumed that the Amish received an education adequate to meet the demands of adult life in the Amish community. We are satisfied that the Mennonites who have graduated from the eighth grade will also receive an adequate education to meet the demands of adult life in the Mennonite community. We further conclude that the State cannot use this protective rationale discussed above to abridge the natural parents' right to rear and teach their children according to their religion. Otherwise, the State destroys the child's choice upon reaching majority to choose his religion for himself. This matter is not like the matters of child labor and child health where the State interference with parental prerogatives may at times be necessary to protect the welfare of both the child and society. The State can achieve the aims of compulsory education without forcing the Mennonites to attend public schools or comparable private institutions. Society's real concern should be with those Mennonite children who may wish to retain their heritage and with their parents who want the opportunity to offer it to their descendants. The first amendment demands at least an attempt to protect that freedom.

We hope we have provided greater clarity in this matter.

Very truly yours,

FOR THE ATTORNEY GENERAL

  
JAMES R. HARGIS  
Deputy Attorney General

JRH:cg

cc: D. F. Engelking  
Sen. John Barker  
Rep. Marion Davidson  
Richard D. Haworth  
Quentin Haworth

January 30, 1974

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Mr. Curtis Dirks  
Chairman of Ministers  
Church of God in Christ (Mennonite)  
P. O. Box 487  
Bonners Ferry, Idaho 83805

Dear Mr. Dirks:

We wish to inform you that we have issued an opinion to D. F. Engelking, Superintendent of Public Instruction on whether or not the school age children of your church between the ages of the ninth grader and sixteen may be exempt from the compulsory attendance statute of the State of Idaho, Section 33-202, Idaho Code.

By way of explanation of our delay in issuing that opinion, we wish to point out that your question raises involved legal and policy issues not easily resolved. We have done extended and extensive research as to these issues and conclude that children who have completed the eighth grade, but have not attained the age of sixteen and whose parents are members of your congregation are exempt from the operation of Section 33-202, Idaho Code. However, this conclusion is not be construed as prohibiting those students who wish to continue in public school from doing so. Nor may the schools prohibit those children who wish to continue to attend the schools from doing so.

This conclusion in no way suggests that compulsory school attendance, as set out in Section 33-202, Idaho Code, is not generally applicable, valid and enforceable. While the implications of this conclusion may be very broad, the conclusion at this time applies only to the narrow issue of whether or not the children of parents who are members of your congregation can be compelled to attend school beyond the eighth grade.

We have based our conclusion in large part on Yoder v. Wisconsin, 404 U.S. 205, 32 L.Ed.2d 15, 92 S.Ct. 1526 (1972). Yoder and others were members of the Old Order Amish religion

Mr. Curtis Dirks  
January 30, 1974  
Page 2

and the Conservative Amish Mennonite Church, who were convicted of violating Wisconsin's compulsory school attendance law by declining to send their children to school after those children had been graduated from the eighth grade. (Wisconsin's law, like Idaho's, requires school attendance until age sixteen, unless educated by other comparable means.) The Wisconsin Supreme Court reversed the conviction and the United States Supreme Court, on certiorari, affirmed that decision.

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Basically, the U. S. Supreme Court held that there must be a balancing between a State's valid responsibility for the education of its citizens and its interests in universal education when those interests and responsibilities impinge on other fundamental rights and interests of the individual, namely, the free exercise of religion. Further, the Court drew a distinction between the objection to compulsory education because it interfered with the free exercise of religion and the objection to policies, practices and activities in particular schools and districts because those policies, practices and activities conflicted with religious doctrines held by certain patrons of the district. The Court did not even suggest that compulsory attendance statutes were unconstitutional. It held that the statutes had no application to and enforceability against the children and those parents because the concept of required public education was contrary to their sincerely held and practiced religious doctrines.

Further, the Supreme Court restricted the application of its decision to the Old Order Amish and the Conservative Amish Mennonite Church and others similarly situated. Therefore, the Yoder decision does not apply to singly held religious beliefs, regardless of how sincerely held, where those beliefs are not supported by some recognized and recognizable doctrine held by some historically established order. Our opinion holds that your congregation is sufficiently similar so that the Yoder decision applies to your fact situation.

We trust we have been of service.

Very truly yours,

FOR THE ATTORNEY GENERAL

JAMES R. HARGIS  
Deputy Attorney General

JRH:cg  
cc: D. F. Engelking  
Sen. John Barker  
Rep. Marion Davidson  
Richard D. Haworth  
*Quentin Hadden*

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February 5, 1974

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Mr. Arthur J. Robinson  
City Clerk  
Hauser, Idaho

Re: Detachment of Land Annexed  
September 12, 1973, to City  
of Hauser, County of Kootenai  
State of Idaho

Dear Mr. Robinson:

Your request for a legal opinion dated October 25, 1973,  
has been referred to me for answer.

Paraphrasing your statement of facts, the City Council  
of Hauser, upon petition thereto, adopted Ordinance No. 26  
annexing certain described property to the City of Hauser on the  
17th day of September, 1973. That ordinance was signed by the  
Honorable Albert Auckerman, Mayor, and attested by yourself as  
City Clerk. The ordinance was filed for record in the records of  
Kootenai County on the 26th day of September, 1973, as Instru-  
ment No. 634745.

Under the facts submitted by you, the party seeking  
detachment does not reside in the newly annexed property. De-  
tachment proceedings are usually initiated by a person residing  
in the annexed portion principally because an annexation serves  
no principal business or function of a city other than to provide  
additional revenue without any corresponding benefits to the res-  
idents of the annexed territory.

The beer and liquor license questions aside, inhabitants  
of the annexed property would be the proper parties to raise the  
question of detachment. The purpose of a detachment proceeding  
is to grant relief to the residents of the area sought to be attach-  
ed. If the land is reasonably necessary for residential purposes  
and likely to be so used, or if it is necessary to retain the prop-  
erty for municipal purposes, detachment should not be granted.

In the absence of any facts to the contrary, it is presumed that the city annexed the described land in strict compliance with the statutes in such cases made and provided.

You pose four questions which are set forth in this opinion as follows:

1. In accordance with Title 50, Chapter 5, Section 1, Idaho Code, must the City Council pass a specific ordinance when petitioned by the people, allowing them the right of initiative or referendum, or is that a discretionary function?
2. Is detachment, when lawfully requested by a property owner, not residing within the annexed territory, assuming legal annexation, the proper subject matter for a referendum after the fact of annexation?
3. Does a party owning property within the corporate limits of a city have the right to initiate and circulate a petition if in fact he or she is not a resident of that city nor a qualified elector?
4. If the City annexes property at a property owner's request and transfers the Beer License held by such person, at his request, to the annexed property, can the City be held liable for the loss of this license and any loss of income if the people demand that Ordinance 26 (Annexation) be revoked? In short, can the annexation of property and transfer of the license by the City of Hauser in any way be construed to imply the right or guarantee to operate a business?

#### OPINION

Detachment proceedings are initiated by petition and should follow the same strict statutory requirements as for annexation. Alexander v. Trustees of Village of Middleton, 92 Ida 823, 454 P2nd 50. The present attack on Ordinance No. 26 is a collateral attack on a valid annexation. Collateral attacks are not permissible for that purpose. Hatch v. Consumers Co. 17 Ida 204, 104 P. 670, Aff. 224 U.S. 148. The party seeking to detach the newly annexed area should have raised the question by appealing from the original annexation action by the City Council. A party, within the proper time frame, might have, through an extra-ordinary writ, waged a direct attack which would have opened the avenues of appeals to respective courts of competent jurisdiction.

Additionally, those residents of the annexed territory, if detachment was now granted, would be deprived of the rights or benefits of municipal services. This would be inequitable and unjust because they are apparently well satisfied with the annexation.

Question No. 1, requires a two part answer. The City Council, on the facts presented, need not pass a special ordinance detaching annexed areas. The people, however, do have a right to initiate a petition calling for a referendum; however, that right is a political right and the petition may not be utilized to deprive persons within the annexed territory of property or rights without just compensation.

The answer to Question No. 2 is that annexation is not the proper subject of referendum but rather petition, and the same applies to detachment proceedings.

The answer to Question No. 3 is Yes.

The answer to Question No. 4 depends upon facts not presented. To clearly answer this question those facts would have to be made available, and to assume such facts would be presumptuous. It may generally be said that the licensing to sell alcoholic beverages, although a property right, cannot be construed as a guarantee on the part of the City of Hauser of a right to such licensee to operate a licensed business. Some element of estoppel or contractual right may or may not be present and without some more detailed facts this question is unanswerable.

#### CONCLUSION

A test case can be made if the petitioners call for referendum by refusing to call such referendum on the issue raised. If the party initiating the petition so desires, he may seek an Order of Court directing the City to either accept the petition and call an election or show cause why this should not be done. The City would be in a position then to argue the question of the standing of the petitioner to call for such a referendum and whether or not if such a cause is proscribed by Federal and State Constitutions.

I would respectfully suggest that you submit these questions to your City Attorney for his opinion and follow his guidance.

Respectfully yours,

FOR THE ATTORNEY GENERAL

JAY F. BATES,  
Deputy Attorney General  
Assigned to the Department  
of Law Enforcement

JFB/b

cc: W. Anthony Park ✓  
Attorney General of Idaho

STATE OF IDAHO

BOISE, IDAHO

February 7, 1974

Honorable M. L. Clements  
State Representative  
State of Idaho  
Statehouse Mail

Dear Representative Clements:

In response to your letter of February 4, 1974, regarding the Joint Resolution to amend Section 3 of Article III of the Constitution of the State of Idaho, we would offer our opinion as follows:

It is our opinion that the amendment as presently constituted will not serve to prevent an individual from serving more than three consecutive terms in the legislature regardless of whether in the Senate or House in the way you contemplate. The language of the amendment is so ambiguous that it is our conclusion that the Supreme Court would not sustain the amendment in all circumstances. That is to say, if a person served two terms in the Senate and one term in the House of Representatives or any combination of three terms in the two houses, in our opinion he would not be prohibited by the language of your amendment from continuing to seek election and serve so long as he continued to switch from House to Senate and vice versa before serving three consecutive terms in any one house.

In circumstances where a person served three terms consecutively in the House or three terms consecutively in the Senate, he would then be proscribed by the amendment from seeking another term until after the two year waiting period, but by switching from House to Senate or vice versa, short of the consecutive terms, it is our firm conclusion that your proposed amendment would not keep him from seeking a fourth term.

If we can be of further assistance, please advise.

Very truly yours,

FOR THE ATTORNEY GENERAL

Clarence D. Fisher  
Chief Deputy Attorney General





STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

W. ANTHONY PARK  
ATTORNEY GENERAL

BOISE 83707

February 7, 1974

Representative Lloyd Dunn  
House of Representatives  
Statehouse

Dear Representative Dunn:

After our discussion concerning possible amendments to §63-202, Idaho Code, which are attached to this letter, I and my staff have reviewed the possible amendments.

The Idaho Supreme Court, in Boise Community Hotel, Inc. vs. Board of Equalization, 87 Idaho 152, held:

"In assessing property an assessor should consider earning power and all other factors known or available to his knowledge which affect market value."

In Abbott vs. State Tax Commission, 88 Idaho 200, the Idaho Supreme Court held:

"This court has consistently held that the only criteria for determining value of property for ad valorem tax purposes is the full cash or market value."

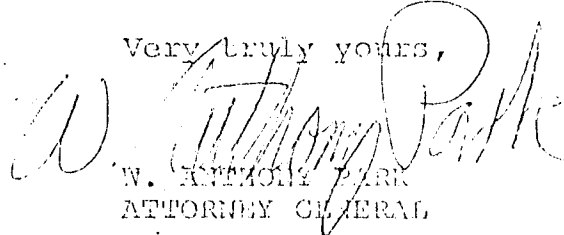
Taken as a whole, the Idaho Court's decisions seem to indicate that the legislature has a substantial latitude in prescribing standards to be used for determining value of various types of property. In general, of course, it would be assumed that any particular method of determining value, correctly applied, would approximate the result reached by other correctly applied techniques. The difficulty arises in situations in which a required technique reaches a value that is clearly incorrect. The proposal contained in RS 0950 would require an assessor to use as an exclusive consideration of value the actual use of the property even though such use justified a value either far in excess of the actual value of the property or far under the actual value of the property.

Representative Lloyd Dunn  
February 7, 1974  
Page 2

The same problem is presented in the second proposed amendment we discussed, which would consist of changing the words "a major consideration" to "the major consideration". In the great majority of instances, the use of an actual and functional use basis would produce the same value as would other techniques. However, in instances in which it produced a result that does not approximate a value determined at arm's length between buyer and seller, the assessor would be directed to manually use as the major factor, a factor which did not produce an accurate result.

Of course, existing problems would still continue in determining whether property was in fact "agricultural property" or "commercial property" and either amendment would only apply if the property in fact was agricultural or commercial. In particular, RE 0950 does not automatically clarify every parcel of five acres or more as "agricultural property"; apparently, existing State Tax Commission regulations would continue to apply in determining whether such parcels were in fact "agricultural property".

Very truly yours,

  
W. ANTHONY PARK  
ATTORNEY GENERAL

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*Card made &  
Filed*

February 11, 1974

Senator H. Dean Summers  
Chairman, State Affairs Committee  
Statehouse Mail

Dear Senator Summers:

This is in response to your letter of February 1, 1974, asking for my opinion concerning the legality of the lease agreements which are proposed to be entered into by the Department of Administrative Services and the State Insurance Fund.

The entire transaction is handled in two documents. One agreement provides that the State will lease to the Insurance Fund the land upon which the proposed building is to be constructed. Such lease is for a term of 20 years at which time the land and all permanent improvements revert to the State as sole title holder. The rental amount on the land is \$1.00 per year. A second lease agreement proposes to lease to the State from the Insurance Fund the land and a building constructed thereon. The building shall be constructed under the direction of the Department of Public Works and the rental amount shall be amortized over 20 years equally construction cost, interest at 7-1/2% and incidental costs including such items as fire and title insurance. The second lease also expires at the end of 20 years whereby the building and other permanent improvements revert to the State. In anticipation of the possible creation of a building authority at some time during the rental period, an option to purchase may be arranged whereby the building and improvements could be purchased before the end of the 20 year lease period. Such purchase price would equal any unpaid investment capital and interest at the date of exercising such option.

I would like you to know that these lease agreements had earlier been examined by my staff and, in fact, we had a considerable hand in preparing them. In our opinion, the agreements are perfectly valid and

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Senator H. Dean Summers  
February 11, 1974  
Page 2.

legal in all respects. As a matter of fact, in order to insure that the proposed arrangement was in compliance with Idaho law, a Declaratory Judgment action was initiated in 4th Judicial Court last year. The Court found that the proposal was proper in a judgment entered October 17, 1973. Pursuant to that decision, the subject agreements were drafted and will be executed by the respective agencies.

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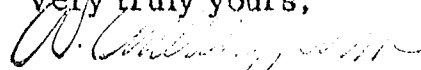
You have also asked for my view of proposed legislation which would create an "Idaho State Building Fund Authority". The legislation would enable such an Authority to issue revenue bonds for the construction of state buildings without incurring any indebtedness to the State. Both Governor Andrus and I are of the firm opinion that such legislation is necessary and would provide a valuable means to the State to assist it in the resolution of the building needs which are so obvious. As I am sure you are aware, the State is presently paying an exorbitant amount of money for rental of needed office space. The savings which will result from providing the State a capability to house its own employees in its own buildings, rent-free, have been detailed over and over again.

So, in terms of long range needs of the State, the creation of an Idaho State Building Authority would be most advantageous. However, this is not to say that the agreements with the State Insurance Fund for the construction and lease of one sorely needed state office building should be vitiated, notwithstanding the passage of the Building Authority legislation. The construction of the new state office building must begin in the near future. Time is of the essence and, since the proposal is legally and fiscally sound, there really seems to be no reason to subject it to any more delay.

I have conferred with Governor Andrus on these matters and he has advised me that he shares the above views.

If there is any further assistance that I can render to the Committee, please do not hesitate to call upon me.

Very truly yours,



W. ANTHONY PARK  
Attorney General

WAP:gml

cc: Governor Cecil D. Andrus  
Lt. Governor Jack Murphy

February 11, 1974

Marjorie E. Schlotterbeck, R.N.  
Board of Nursing  
2404 Bank Drive  
Room 308  
Boise, Idaho 83705

Dear Mrs. Schlotterbeck:

This is in response to your letter of January 28, 1974, inquiring whether a once convicted felon could be licensed as a registered nurse or a licensed practical nurse.

The nurses are licensed by the State; Idaho Code, 54-1416, Idaho Code, 54-1418, and Idaho Code, 54-1422 are the applicable statutes. A reading of them reveals that an applicant for a license must be of good moral character and that the commissioner shall have the power to deny a license to any applicant who has been convicted of a crime involving a moral turpitude.

It thus appears from the law that the final decision is with the Commissioner. A person who has served his punishment for a felony conviction has certainly met his obligation. However, under the statute cited there are other considerations to make. A good moral character is one consideration that should be considered in light of a previous felony conviction or convictions. There is no law that flatly prevents a felon from ever obtaining a nursing license.

The law places discretion with the Commissioner to make the final decision for he is given the power to decide but not directed how to use it.

Very truly yours,

FOR THE ATTORNEY GENERAL

JAMES P. KAUFMAN  
Assistant Attorney General

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February 12, 1974

Mr. Peter G. Leriget  
Latah County Prosecuting Attorney  
316 South Washington  
Moscow, Idaho 83843

Dear Sir:

This is in response to your request for an Attorney General's Opinion regarding the matter of taped telephone conversations.

Briefly, the situation involves the Sheriff of Latah County. There are two main phone lines into his office. Attached to these lines is a device that automatically records all incoming and outgoing phone calls. There is one line in the office that the machine is not attached to. The machine has two reels that work twenty-four hours a day. One of the reels is attached to a clock. All the sheriff's personnel need do is note the time of an incoming call and later if information is needed, the machine can replay that call. The purpose of the system is for an instant recall of all phone conversations. For example, if an emergency call comes in the office and the person receiving the call does not get the information straight, the problem can be solved by the instant recall.

Another feature of the recording system is that it records all messages to and from the squad cars. The purpose again is the instant recall of all the messages. In a situation where it is necessary to know the exact wording of a message, the instant recall feature of the machine is a valuable tool.

The Sheriff's Office has only a limited supply of the tapes, so approximately every ten days they are erased and reused. They are not used for a storage bank of information and they are not used to gather information of the courtroom.

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Mr. Peter G. Leriget  
February 12, 1974  
Page 2

When a person in custody makes a private call he uses the line to which the machine is not attached. Any person seeking a private conversation with the Sheriff's Office may use the non-attached line for his incoming call.

The question is whether this recording system is legal. Idaho Code, 18-6705 is the Idaho statute to be considered in this situation. It renders it illegal for anyone to willfully and maliciously tap a phone line in any unauthorized manner. It does not appear from the circumstances, however, that the sheriff is acting maliciously; there are no ill willed intentions. The phone lines belong to the sheriff; the system does not go out and gather information and it reaches to no one's home and it does not spy on anybody. What this system does is place on tape information coming into the sheriff's office. There is nothing placed on the tapes but calls/messages coming into and leaving a public building, to and from public officers.

The above-cited statute does not intend to prohibit a system such as this but rather to prevent an unreasonable intrusion into a person's area of expected privacy, whether it be business or social. The statute does not intend to prohibit the public officer recording calls over his own public line or anyone for that matter. It was designed to protect the individual, including businesses, from an unauthorized tap on their phone lines.

Applying the law to the present situation, I find the system to be basically legal, but it must be used in a manner to insure that the individual rights are not encroached upon. To be sure that no one's expected privacy is violated, notice should be published to the effect that the recording system is operating and that callers may expect their calls and messages to be recorded for informational purposes. Once taking this action the populace would not be surprised by the system and their privacy would not be invaded.

An example similar to this situation is the use of recording devices by professional people to receive phone messages for them. In that circumstance the people are notified that they may leave a message if they stay on the line which of course is not practical with a sheriff's office, especially with an emergency call. The element of notice though can be

Mr. Peter G. Leriget  
February 12, 1974  
Page 3

published letting the people know their calls are being recorded and the same effect of recorded calls may be attained without invading anyone's privacy. In my opinion the above discussed system, used as described, with notice published, is not clandestine, and it is not illegal.

A recording system that is found to be legal though does not mean that all uses of it are legal. The use of the system as previously described is proper as it infringes on the rights of no one. It would be possible to use such a system in an illegal manner: to gather evidence for court use, to infringe on the attorney-client relationship, invasion of privacy in the Katz v. U.S., 389 U.S. 347, type of situation, etc.

It is possible to conjure up many uses of this system which would be illegal, but that in itself does not render the system illegal. The system itself is basically legal and the present use as herein described, modified with notice, is legal.

The economic feasibility and the political desirability of the system are questions which cannot be answered by a legal opinion; therefore this opinion does not address itself to those questions.

Very truly yours,

FOR THE ATTORNEY GENERAL

JAMES P. KAUFMAN  
Assistant Attorney General

JPK:lm

cc Sheriff Ed Pierson  
Latah County Sheriff



February 13, 1974

Mr. Milt Small  
Executive Director  
Office of Higher Education  
Building Mail

Dear Mr. Small:

We wish to respond to your request for our opinion on whether or not State Board of Education policy comes within the requirements of the Administrative Procedures Act, Chapter 52, Title 67, Idaho Code. Particularly, you have asked whether or not the Board's policy statement on faculty members who are elected or appointed to the legislature, and their pay and faculty duties, in connection therewith, is controlled by the A.P.A. The question you have asked requires an interpretation of the word "rule" as defined in Section 67-5201 (7), Idaho Code.

The above-cited section of the Code defines rule as:

" . . . each agency statement of general applicability that implements, interprets, or prescribes law or policy, or describes the organization, procedure, or practice requirements of any agency. The term includes the amendment or repeal of a prior rule, but does not include (A) statements concerning only the internal management of any agency and not affecting private rights or procedures available to the public, or (B) declaratory rulings issued pursuant to section 67-5208, or (C) intra-agency memoranda.

There have been few significant court decisions interpreting the statutory definitions of rule. It has been held however that agency statements applicable only to a limited number of persons who are either named or whose identity is well established were not "rules" because of lack of "general applicability".

Mr. Milt Small  
February 13, 1974  
Page 2

Sun Oil Company v. Railroad Commissioner, 311 S.W.2d. 235  
(1958). Faulkner v. California Toll Bridge Authority, 253  
P.2d. 659.

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We are of the opinion that the policy statement of the Board regarding faculty members of the institutions who serve in the legislature is not a "rule" within the meaning of the Administrative Procedures Act. The number of persons involved is extremely small and the identity of each is so well described that, if necessary, names could be put to the applicable faculty members. Therefore, we believe that this policy statement does not have general applicability, and accordingly cannot be defined as a "rule". At this time we do not wish to construe the general and numerous policy statements that the Board has expressed over the years and the effect of the Administrative Procedures Act on those policy statements for the reasons that: We don't know what those statements consist of. Therefore, we would be unable at this time of determining the applicability of the Administrative Procedures Act as it relates to all State Board policies. We would suggest that as the question arises on each policy statement now established or established in the future that the decision be made at that time.

Very truly yours,

FOR THE ATTORNEY GENERAL

JAMES R. HARGIS  
Deputy Attorney General

JRH:lm

14-1

February 13, 1974

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Ms. Gail E. Loynd  
Secretary/Treasurer  
Jefferson Soil and Water  
Conservation District  
Route 2, Box 324  
Rigby, Idaho 83442

Dear Ms. Loynd:

To the best of my remembrance, there have been no opinions rendered in relation to the soil and water conservation district. You might check this matter with Doyle Scott.

You have asked us to tell you whether or not a soil and water conservation district can donate funds to groups such as the Boy Scouts and Little League, etc. Article 8, of the Idaho Constitution, Sections 1, 2, 3 and 4, relate to public indebtedness. They basically say that public agencies shall not give or loan to private groups any funds at all. A general statement on this same subject is found at 81 C.J.S. 1147, which reads as follows: "Generally under expressed or implied constitutional limitations public funds may be used only for public purposes." It has generally been held that private organizations, whether they are charitable or not, cannot qualify as carrying on a public purpose. Also, see State ex rel H.S. Walton et al v. Parsons, 58 Idaho 787, 80 P.2d 20 (1938).

Very truly yours,

FOR THE ATTORNEY GENERAL

WARREN FELTON  
Deputy Attorney General

WF:cg

February 13, 1974

Mr. Gary M. Haman  
Kootenai County Prosecutor  
Courthouse  
Coeur d'Alene, Idaho 83814

Dear Mr. Haman:

We have received your letter and the attached letter of James E. McKinnon in regard to whether or not Idaho law permits water and sewer district officials to legally initiate and establish local improvement districts.

It would seem to us that the plain wording of the first paragraph of Section 50-1702 clearly indicates that water and sewer districts may form local improvement districts. Water and sewer districts are dealt with in Title 42 of Chapter 32, Idaho Code. The first paragraph of Section 50-1702, Idaho Code states that whenever the word municipality is used in relation to local improvement districts it shall be construed to mean and include counties, water or sewer districts organized pursuant to the provisions of Chapter 32, Title 42, Idaho Code. What could be clearer.

Also Section 50-1706, Idaho Code, in speaking of local improvement districts says that municipalities are authorized and empowered to create local improvement districts within the boundaries of the municipality. I am truly curious as to what bonding counsel has questioned whether or not a water and sewer district can form a local improvement district.

I can see how you might question whether there would be any special requirements as to a local improvement district formed in a water and sewer district since the notice and bonding provisions for water and sewer districts are,

Mr. Gary M. Haman  
February 13, 1974  
Page 2

in some cases, quite different than those for other municipalities. We would, however, feel that if a water and sewer district is proceeding as a local improvement district, it should follow that law exclusively and not the water and sewer district law.

On the other hand, if it is proceeding as a water and sewer district, it should follow the water and sewer district law exclusively. We do not believe any problems will be encountered that cannot be handled as long as this suggestion is followed.

Very truly yours,

FOR THE ATTORNEY GENERAL

WARREN FELTON  
Deputy Attorney General

WF:cg

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STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

W. ANTHONY PARK  
ATTORNEY GENERAL

February 19, 1974

Mr. Peter G. Leriget  
Latah County Prosecutor  
Courthouse  
Moscow, Idaho 83843

Dear Mr. Leriget:

In regard to your letter and the attached letter of Dwight Strong, your County Assessor, regarding the possibility of assessment of a leasehold interest of a developer of a proposed shopping mall which is being placed on University of Idaho lands, please refer to Section 63-1223 which provides as follows:

"All improvements on government, Indian or state land and all improvements on all railroad rights of way owned separately from the ownerships of the rights of way upon which the same stands or in which non-exempt persons have possessory interest shall be assessed as personal property and entered upon the personal property assessment rolls.

Thus, such interests are to be assessed as personal property.

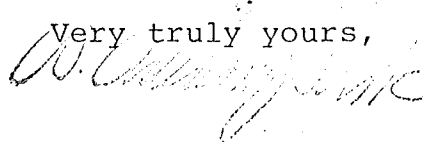
You should, however, look at the factual situation in this matter. If it is similar to the case of Russett Potato Co. v. The Board of Equalization of Bingham County, 93 Idaho 501, 465 P.2d 625, you should be cautious in applying this section.

In this case, the building by the terms of a lease agreement was the property of the federal government and it was held that it thus belonged to the federal government and could not be taxed. Idaho Constitution, Article 7, Section 4

Mr. Peter G. Leriget  
February 19, 1974  
Page 2

and Article 21, Section 19. In your case, if the agreement read that the buildings belong to the University or would belong to the University at the end of the lease, they could not be assessed at all.

Very truly yours,



W. ANTHONY PARK  
Attorney General

WAP:WF:cg



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

W. ANTHONY PARK  
ATTORNEY GENERAL

February 19, 1974

Mr. Lary C. Walker  
Washington County Prosecutor  
Walker & Sanders  
Attorneys at Law  
P. O. Box 828  
Weiser, Idaho 83672

Dear Lary:

We have your recent letter concerning the problem between your county clerk-auditor, county treasurer and some of the cities.

Sections 63-2103, 63-2104, 63-2106 and 63-2107, provide that the county tax collector is to settle with and pay over to the county auditor all monies collected on the first Monday of each month and that the county auditor is to transmit to the clerks of the incorporated cities in the county, school districts, etc. all funds so received on the second Monday of each month. Inherent within these sections, however, is the fact that both the tax collector and county auditor are given a grace period of ten days after the dates set for these duties. Thus, you have the situation that has arisen in Washington County where the tax collector may not transmit the money until the last or next to last day of the grace period and the auditor and clerk, on the other hand, transmits her monies to the various cities and taxing districts promptly on the second Monday or soon thereafter, and thus, these taxing units might not receive tax funds for some time after they are received by the county treasurer.

This type of situation is quite unfortunate; however, in such a situation, it appears to us that both the county treasurer and county clerk or assessor are well within their rights and within the law. This situation would seem to call for joint cooperation between the two offices and we do



Mr. Lary C. Walker  
February 19, 1974  
Page 2

not feel that any legal action would be effective in changing the situation. What is needed is to develop cooperation and communication among the offices so that the cities and other taxing districts involved do not suffer.

Very truly yours,

A handwritten signature in dark ink, appearing to read "W. Anthony Park", written in a cursive style.

W. ANTHONY PARK  
Attorney General

WAP:WF:cg

74-11  
February 21, 1974

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Mr. Joe R. Williams  
State Auditor  
STATEHOUSE MAIL

Dear Joe:

We have your recent letter and the attached letter from Public Accountants Walston, Wilford and Spackman, asking whether assessors and sheriffs can have checking accounts.

I refer you to Sections 57-132 and 57-145, Idaho Code, which are both part of the State Public Depository Law. These sections indicate the possibility of bank accounts in certain situations. It must be noted, however, that any bank accounts relating to public funds must strictly adhere to the Public Depository Law and this law should be looked at in total as to such deposits and as to what can be done in relation to them.

I further refer you to an opinion issued by myself on November 6, 1973, to Lary C. Walker in relation to the liability of county officials. It should be remarked that liability of county officials is very great in relation to bank deposits unless the Idaho Public Depository Law, Chapter 1 of Title 57 is strictly followed.

Any inquiry into this subject must be approached with caution. Section 14, Article 7 of the Idaho Constitution says that no money shall be drawn from county treasuries except upon the warrant of a duly authorized officer in the manner prescribed by law. It has been held, however, that money in the county treasury obtained from licenses for motor vehicles may be paid to the State without a warrant. State v. Cleland, 42 Idaho 803, 248 P. 813.

You should also notice that the constitutional section above cited only relates to monies in county treasuries. Section 15, Article 7 Idaho Constitution gives the legislature the power to provide for a system of county finances.

Mr. Joe R. Williams  
February 21, 1974  
Page 2

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Some money in the county treasuries does not belong to the counties. See State v. Cleland, supra. This money need not be transferred by warrant. Also, the constitution does not require that all funds coming into the hands of county officers go to the county treasury. Under Section 31-3101, Idaho Code, an officer may retain actual and necessary expenses out of the funds belonging to the county and in his hands. The officer must account for all other "fees from whatever source" received at the end of each quarter to the county treasurer.

Thus, it can be seen that, if done properly, certain funds in the hands of a county officer do not have to be disbursed by warrant.

Very truly yours,

FOR THE ATTORNEY GENERAL

WARREN FELTON  
Deputy Attorney General

WF:cg

Enclosures

February 21, 1974

Representative Bill Onweiler  
District #16  
Statehouse Mail

Re: Opinion as to whether federal or state revenue sharing monies may be constitutionally appropriated to build a nondenominational chapel at the new Idaho State Penitentiary

Dear Representative Onweiler:

You have asked whether federal or state revenue sharing monies may be constitutionally appropriated by the Idaho legislature to build a nondenominational chapel at the new Idaho State Penitentiary. There are constitutional problems which, while not insurmountable, must be carefully considered by the legislature in making such an appropriation. The physical nature of any "chapel" constructed with government funds must be strictly nondenominational and, in fact, must not reflect the influence of any particular religious ethic, i.e., Judaeo-Christianity.

Although I addressed this matter in an earlier opinion dated December 31, 1973, I have since become more aware of possible architectural designs for the proposed chapel. Consequently, I feel that an amplification of my former opinion is necessary in view of the importance of designing a place of worship which will pass constitutional muster. I also believe it desirable to clarify my position on the applicability of Article IX, Section 5 of the Idaho Constitution on the proposed state funding.

Two constitutional provisions appear to categorically prohibit the governmental construction of a religious facility:

(1) The First Amendment of the United States Constitution, states that "Congress shall make no law respecting an establishment of religion." (Emphasis supplied) The well known

Representative Bill Onweiler  
February 21, 1974  
Page 2

"Establishment Clause" applies, of course, to state action by operation of the Fourteenth Amendment, which prohibits any state from making or enforcing laws which deprive any person of "life, liberty or property, without due process of law."

(2) The Idaho Constitution presents the second hurdle. Article IX, Section 5 reads as follows:

"Neither the legislature nor any county [or other local government] shall ever make any appropriation . . . in aid of any church or sectarian or religious society, or for any sectarian or religious purpose."

The two constitutional provision quoted above manifest the fundamental American notion that there must be a separation of church and state.

On the other hand, another fundamental American notion - that men should be allowed to worship as they please, without obstruction from their government - is expressed in another part of the First Amendment of the United States Constitution which states that "Congress shall make no law . . . prohibiting the free exercise [of religion]." (Emphasis supplied)

The "Free Exercise Clause" also applies to state action by operation of the Fourteenth Amendment.

Although the Idaho Constitution contains no express provision for the free exercise of religion, any Idaho Constitutional provision or statute in direct conflict with the "Free Exercise Clause" would become inoperative by virtue of Article VI, Section 2 of the United States Constitution - the "Supremacy Clause." Whether or not federal law will directly contradict and thus preempt state law in a possible judicial determination of the prison chapel question is a basic issue in your inquiry. Upon a thorough review of constitutional doctrines and applicable statutes, it is my opinion that such a preemption is unavoidable in this particular case.

Whenever the state affords even an indirect advantage to a particular religion, or religion in general, the Establishment Clause and the Free Exercise Clause often come in for a delicate balancing. The reason that they do is because these two clauses are inherently contrapositive. To refrain from protecting religion while insuring free exercise is a tug of war with the government on both sides.

Representative Bill Onweiler  
February 21, 1974  
Page 3

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A classic Establishment Clause - free exercise clause problem is apparent in the prison chapel plan where the government may be required to take some affirmative action toward religion in order to keep from violating the prisoners' right to free exercise. But even though, and in a sense because the arguments on both sides are so close, I am able to make a threshold disposition of the effect of Article IX, Section 5 of the Idaho Constitution in regard to the question. That state provision must be read to create no greater restriction on state action respecting religion than the "Establishment Clause" of the United States Constitution. Although it is proper for a state to extend or embellish federal constitutional mandates, it is not proper for a state to restrict or contract federal laws. It is my opinion that the latter would be the case should the State of Idaho constrict the free exercise of religion. There is no Idaho case law balancing the two great pinions of freedom of religion, because, after all, there is no Idaho counterpart to the "Free Exercise Clause." Nonetheless, a plethora of federal case law exists on the subject. It is my determination that such case law will control on the question at hand.

To put it another way, it is my opinion that the framers of Article IX, Section 5 did not, and could not, extend the effect of that section's provisions beyond those of the "Establishment Clause" of the First Amendment of the United States Constitution. I equate the effect of Article IX, Section 5 of the Idaho Constitution with the effect of the Establishment Clause of the United States Constitution. A determination of the constitutionality of the prison chapel appropriation vis-a-vis the Establishment Clause is a determination of any question arising under Article IX, Section 5. To put it most simply, a determination of the federal constitutional question resolves the state constitutional question in this particular case.

Now, it becomes necessary to resolve the federal question by analyzing the United States Constitution with regard to the building of a prison chapel with state funds. From a research of applicable First Amendment case law and other materials, I conclude that the State of Idaho is not prohibited from providing a place of worship at the new Idaho State Penitentiary. More probably, it is obligated to do so. When the state regulates the temporal and geographic environment of a group of individuals to the extent that it does at the Idaho State Penitentiary, the State may well be in

Representative Bill Onweiler  
February 21, 1974  
Page 4

violation of the "Free Exercise Clause" of the First Amendment of the United States Constitution by failing to provide some place of worship for the prisoners incarcerated there. Dicta in a recent United States Supreme Court decision, Cruz v. Beto, 405 U.S. 319 (1972), suggests that the state must provide prisoners incarcerated in state institutions a "reasonable opportunity" for free exercise of religion. See Gittlemaker v. Presse, 428 F.2d 1 (3rd Cir. 1970).

An exhaustive work on prison reform entitled Corrections, published by the National Advisory Commission on Criminal Justice Standards and Goals in January, 1973, echos the courts. "Standard 11.7" enunciated in this work reads as follows.

"Each institution should immediately adopt policies and practices to insure the development of a full range of religious programs."

In light of the above cited authority, it is my opinion that the State of Idaho is probably under some obligation to take affirmative action for providing reasonable facilities for the free exercise of religion at the new Idaho State Penitentiary.

At this point, the question shifts from whether the state ought to take action, to what action ought the state take? What is a "reasonable opportunity"? To merely set aside certain areas or buildings in the prison yard for religious services is not, in my opinion, providing a reasonable means for the free exercise of religion. I think that a separate facility is needed. Nonetheless, the architecture of such a facility is of great concern.

The physical characteristics of the facility, if it is to be constructed and maintained with government funds, must be strictly nondenominational in character. Indeed, in order to escape the strictures of the Establishment Clause of the United States Constitution and Article IX, Section 5 of the Idaho Constitution, the physical nature of such a facility must reflect no specific religious ethic at all. For example, not only must Catholicism and Presbyterianism be treated equally, but Christianity, Islam and other sects must also be put on equal footing.

Chaplain Fred R. Silber, former Director of Chapel and Services for the Federal Bureau of Prisons, shed light on

Representative Bill Onweiler  
February 21, 1974  
Page 5

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what might be an acceptable approach to this problem. According to Chaplain Silber, the federal system, in recent years, has constructed multi-purpose buildings which may be used for secular activities, such as meetings of "great book" clubs, as well as religious activities. Although religious groups are allowed to set up movable accoutrements for services, permanent trappings of particular religious denominations or ethics are avoided. Stained glass windows, steeples and permanent crosses are not part of the construction. Such buildings provide a separate facility for virtually any religious group or even non-religious groups.

Such an approach has served a two-fold purpose. It has assured that the federal prison system provides incarcerated individuals under its control with a reasonable means of "free exercise" of their respective religions. Secondly, it has minimized the possibility of an "Establishment Clause" attack on "chapel" construction schemes by insuring that no architectural or related advantage is obtained by one religious denomination or ethic over another or by religion over non-religion.

In conclusion, it is my opinion that an appropriation of funds to build a multi-purpose building which could be used for any religious service is not violative of the "Establishment Clause" of the First Amendment of the United States Constitution or Article IX, Section 5 of the Idaho Constitution. Moreover, such a building would effectively eliminate any possibility of a violation of the "Free Exercise Clause" of the First Amendment to the United States Constitution.

Very truly yours,

W. ANTHONY PARK  
Attorney General

WAP:JFG:cg



2/21/74

OPINION

74-17



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL  
BOISE 83720

W ANTHONY PARK  
ATTORNEY GENERAL

February 21, 1974

Mr. Clyde Likes  
Mobile Home, Recreational Vehicle  
and Manufactured Housing Division  
Department of Law Enforcement  
BUILDING MAIL

Dear Mr. Likes:

This is in response to your inquiry of February 4, 1974, regarding the authority of your department in processing complaints.

I have reviewed Chapter 40, Title 39, Idaho Code, regarding your question. I conclude that you may properly investigate and perform appropriate inspections pursuant to complaints regardless of the source of such complaints. Nothing statutorily limits your proceedings to any particular source of information.

I certainly can understand that particular mobile home owners may cause difficulties to the dealer or manufacturer in their efforts to perform corrections. Owner resistance to corrective actions should be given reasonable consideration by your department as is now the case. This however does not inhibit your authority to perform inspection duties.

Very truly yours,

FOR THE ATTORNEY GENERAL

  
WAYNE MEULEMAN

Deputy Attorney General

WM:cp



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83707

W. ANTHONY PARK  
ATTORNEY GENERAL

February 21, 1974

Honorable Cecil D. Andrus  
Governor of Idaho  
B U I L D I N G

Dear Governor:

You have requested my office's opinion on the following questions in connection with property tax exemption of fraternal organizations practicing racially discriminatory membership policies:

1. The effect of the elimination of the word "white" as a requirement for membership in a fraternal organization.
2. The authority of the Tax Commission to order tax assessment of exempt property.

Our opinion of February 13, 1973 did not address itself to the policy of any particular group or organization. We understand the group described in your request has changed its Constitution, and no longer excludes members on racial grounds. If this is so, the State is not prohibited by the Fourteenth Amendment to the United States Constitution from extending the benefits of a tax exemption to such organizations.

We, of course, assume that the change in the organization's Constitution amounts to a substantive change in the organization's actual membership policies. Our earlier opinion was not limited to situations in which written racially restrictive membership qualifications were imposed; it applied to all circumstances in which an organization, as an organizational or institutional policy, systematically excludes applicants on racial grounds.

We are not certain we fully understand your second question. We assume your question concerns whether the State Tax Commission can instruct county assessors to tax property apparently described as exempt under Idaho tax exemption statutes, where the state is prohibited from extending such exemption under the Fourteenth Amendment to the United States Constitution.

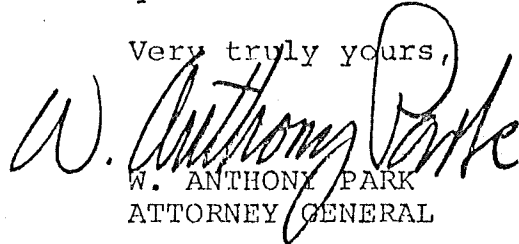
Governor Andrus  
February 21, 1974  
Page 2

An action is now pending before the Courts in which the organization that has contacted you is directly challenging the authority of the State Tax Commission to direct local officials to tax property apparently described in §63-105C, Idaho Code. My office is counsel for Defendants in that suit and I believe it would be improper for me to issue an opinion on exactly the same issue as is now pending before the Courts.

My office has long declined to issue opinions as to the merits of pending litigations in which we represent a party except where the clearest and most compelling need for such an opinion exists. In the present situation the State Tax Commission has acted with regard to 1973 and my opinion at this time will not affect such action. Taxes imposed for 1974 will be determined by the action of county boards of equalization in June; by that time pending litigation should provide judicial guidance.

Because of the foregoing I believe it would be improper for my office to issue an opinion on the second question at this time.

Very truly yours,

  
W. ANTHONY PARK  
ATTORNEY GENERAL

RLM:WAP:blh



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

W. ANTHONY PARK  
ATTORNEY GENERAL

February 22, 1974

Honorable John M. Barker  
Senator  
District #24  
Building Mail

Re: Liquor Fund Surplus and Boise Junior College  
District

Dear Senator Barker:

We wish to respond to your request for our opinion on whether or not Boise Junior College District will continue to receive its percentage share of the surplus liquor funds. You have stated that you have been informed that by 1975 the District will have enough funds from the percentage of the surplus to retire all outstanding indebtedness of the district, even though the schedule for retirement does not provide for final redemption until 1984 at the latest.

Section 23-404, Idaho Code establishes the formula for the distribution of the surplus of the liquor fund. This section provides that 50 percent of the surplus apportioned to a county embracing all or part of a junior college district shall be paid to the treasurer of said district. Section 33-4006, Idaho Code provides that the Boise Junior College district shall continue in existence for the sole purpose of retiring the existing indebtedness. Therefore, as a matter of both fact and law, there is a junior college district totally embraced by Ada County. Since the district does exist, albeit for a limited purpose, we are of the opinion that the distribution of the surplus as provided for in Section 23-404, Idaho Code is still proper until the district is automatically dissolved pursuant to Section 33-406,

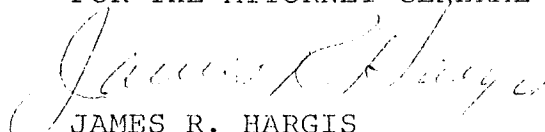
Honorable John M. Barker  
February 22, 1974  
Page 2

Idaho Code, or legislative action is taken to remove Boise  
Junior College District from the operation of Section 23-404,  
Idaho Code.

We trust we have been of assistance.

Very truly yours,

FOR THE ATTORNEY GENERAL



JAMES R. HARGIS

Deputy Attorney General

JRH:lm



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL  
BOISE 83720

W. ANTHONY PARK  
ATTORNEY GENERAL

February 25, 1974

Honorable Monroe C. Gollaheer  
Commissioner of Insurance  
Department of Insurance  
B U I L D I N G

Dear Commissioner Gollaheer:

You have requested an official Attorney General's opinion on the following questions regarding House Bill No. 417:

1. Are Federal land banks included by the term "bank" in Line 22 on Page 1 of H.B. 417?
2. Does SECTION 1 of H.B. 417 provide that a bank holding company would be in violation of the proposed law if a controlled subsidiary of the holding company is licensed as an insurance agency?
3. H.B. 417 proposes to limit banks and bank holding companies from being licensed as insurance agents except as provided in Idaho Code Section 41-1045 (as amended by H.B. 417). Is this limitation constitutional?

The term "bank" lacks a strict definition. Generally, a bank is an institution, usually incorporated that has the statutory power to receive deposits of money and to make loans upon which interest is collected; but banks are not limited to these two activities. They may also, when empowered by statute, discount foreign and domestic notes, make collections for owners of negotiable paper, deal in the exchange of bullion, coin, paper money, and bills of exchange, cash checks or drafts, conduct a trust business, and issue bank notes. (Black's Law Dictionary, Rev. 4th Edition, Page 143; 9 C.J.S. Section 1.a.; In re Prudence Co. D.C.N.Y., 10 F.Supp. 33; Wells, Fargo & Company v. Northern Pacific Ry. Co., C.C.Or., 23 F. 469, 471; 12 U.S.C.A. 1841 (c))

Idaho Code Section 26-102, which is concerned with the regulation of state banks, defines banks as institutions incorporated to conduct the business of receiving deposits of money, conducting trusts, and engaging in "banking business". Savings banks, commercial banks, and trust companies are described as banks.

However, non-banks can also perform some of the functions that banks perform. A credit union that received deposits and made loans was not a bank. (197 N.Y.S. 785, 786, 102 Misc. 79) An express company that drew drafts and bills of exchange, and bought and sold such drafts and bills was not a bank. (Wells, Fargo & Company v. Northern Pacific Ry. Co., C.C.Or., 23 F. 469, 479)

Federal Land Banks do not conduct all the types of business that banks are allowed to conduct. For example, they do not provide checking accounts for their customers, nor do they serve as depositors for the money of private citizens. However, they do perform many of the functions of a bank. They make loans, hold deposits made by land bank associations, and discount certain types of commercial paper. (12 U.S.C.A. 2014) In addition, Federal Land Banks are referred to as banks throughout Chapter 23 of Title 12 of the United States Code.

Federal Land Banks do not function as banks whose services are available to all members of the general public. The loans made by these banks are long term loans and are made only on rural real estate. (12 U.S.C.A. 2012) But because these banks perform many of the functions that banks perform, and because they are referred to as banks by the statutes that regulate them, Federal Land Banks are included by the term "bank" in Line 22 on Page 1 of H.B. 417.

The second question asked is whether there would be a violation of the proposed law if the controlled subsidiary of a bank holding company were licensed as an insurance agency. The definition of a bank holding company in Section 2 of the amended 1956 Bank Holding Company Act does not include the subsidiaries of the holding company. (12 U.S.C.A. 1841)

The question remains whether or not a bank holding company is "indirectly" licensed (Line 25, Page 1 of H.B. 417) if a controlled subsidiary of the holding company is licensed.

February 25, 1974

A subsidiary corporation has been held not to be an agent of the parent for tax purposes. (National Carbide Corporation v. Commissioner of Internal Revenue, 69 S.Ct. 726, 734, 336 U.S. 422, 10 A.L.R.2d. 566) Nor have controlled subsidiaries of corporations been held liable on contracts of their parent corporations where there was a distinct identity attributed to both parent and subsidiary. But when the affairs of a subsidiary are conducted in such a manner as to make it merely an instrumentality of the parent, the legal fiction of the distinct corporate existence will be disregarded. (Roof v. Conway, C.C.A. Ohio, 133 F.2d. 819, 823; Dregne v. Five Cent Cab Co., 313 Ill.App. 539, 40 N.E.2d. 739, 744; Pittsburg & Buffalo Co. v. Duncan, 6 Cir., 232 F. 584, 587) In Dregne versus Five Cent Cab Company (Ibid), the court found that the subsidiary taxi cab company held itself out to be a separate entity. There was no confusion on the part of customers that the services of the parent company were being offered. Therefore, the subsidiary was held not to be an agent of the parent.

Subsidiaries are not considered agents of their parent corporations where the subsidiaries hold themselves out to be separate entities. If, however, a controlled subsidiary has a name, logo, or place of business, similar to that of its parent, and in these or any other ways conducted its business in such a manner as to cause customers to believe it was acting for the parent, then the subsidiary would be deemed an agent of the parent. If such a controlled subsidiary as last described were to be licensed as an insurance agency, that licensing would amount to the indirect licensing of the parent bank holding company that controlled the subsidiary.

The third question is whether the limitation that would be placed on banks and bank holding companies is constitutional. The bill would restrict banks and bank holding companies from being licensed as insurance agents, except for certain types of insurance.

The 10th amendment to the United States Constitution allows States the Police Power to make regulations for the welfare of their citizens. There seems to be no question that states can constitutionally regulate banks and insurers. Titles 26 and 41 of the Idaho Code are entirely devoted to such regulation. The question, therefore, is whether banks can constitutionally be allowed to conduct certain types of insurance business but not others.



Honorable Monroe C. Gollaher  
Page 4  
February 25, 1974


This question has been answered where it considers national banks. United States Code, Title 12, Section 92, allows national banks to act as insurance agents in places of less than five thousand population. It has been held that this U.S.C. section means that national banks cannot act as agents in communities of five thousand or more population. (Saxon v. Georgia Association of Independent Insurance Agents 399 F.2d. 1010; C.I.R. v. First National Bank of Utah 92 S.Ct. 1085, 405 U.S. 394, 31 L.Ed.2d. 318) Title 12 of U.S.C. Section 1843 limits the types of insurance business in which bank holding companies can become involved. The constitutionality of these statutes was not questioned in either of these court cases.

The rationale behind such laws as 12 U.S.C. 92 and 12 U.S.C. 1843, is that banks should be allowed to conduct insurance business under circumstances where insurance service to the community might not otherwise be adequate, but that banks and bank holding companies should be limited in their insurance business activities where such activities could result in an undue concentration of the economic power or where such activities restrict fair and open competition. (RECOMMENDED DECISION of PAUL N. PFEIFFER, Administrative Law Judge, to Federal Reserve Board, Regarding Worcester Bancorporation Inc., served September 7, 1973) H.B. 417 is based on the same public interest rationale.

When it is in the public interest to limit banks and bank holding companies from conducting certain kinds of insurance business, but allowing them to conduct other kinds of insurance business, legislation making such limitations and allowances is constitutional under the Police Power allowed the several states by the 10th amendment to the Constitution of the United States.

Very truly yours,

FOR THE ATTORNEY GENERAL

  
DAVID B. VAUGHN  
Assistant Attorney General

DBV:gc

OK'd by WPP.  
2-26-74



## STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

W. ANTHONY PARK  
ATTORNEY GENERAL

February 26, 1974

Dr. James A. Bax  
Administrator  
Department of Environmental  
and Community Services  
State Office Building  
BUILDING MAIL

Dear Dr. Bax:

You have requested our opinion regarding the compatibility of the antidegradation rule promulgated by the Board of Environmental and Community Services on June 28, 1973, and the prior utterances of the Department of Environmental and Community Services with respect to the allowable wastewater discharges into the Big Wood River System in Blaine County, Idaho.

ISSUE

The issue is whether the policy announced in a letter to the Blaine County Board of Commissioners on May 3, 1973, wherein your Department stated:

"No more than 1,000 pounds of organic material measured as five-day, 20° Biochemical Oxygen Demand may be discharged to the Big Wood River system in Blaine County without violating the Idaho water quality standards for dissolved oxygen."

is consistent with the antidegradation rule promulgated subsequent to this policy announcement. The antidegradation rule provides:

"Waters whose existing quality is better than the established standards as of the date on which such standards become effective will be maintained at

their existing high quality. These and other waters of Idaho will not be lowered in quality unless and until it has been affirmatively demonstrated to the Department and the Federal Environmental Protection Agency that such change is justifiable as a result of necessary economic or social development and will not interfere with or become injurious to any assigned uses made of, or presently possible in, such waters. This will require that any industrial, public or private project or development which would constitute a new source of water pollution or an increased source of water pollution to high quality waters will be required, as part of the initial project design, to provide the highest and best degree of wastewater treatment available under existing technology, and, since there are also Federal standards, these wastewater treatment requirements will be developed cooperatively."

Rule III (D), Water Quality Standards and Wastewater Treatment Requirements, (hereinafter Rules).

#### BACKGROUND AND DEFINITION

The Idaho legislature has declared that the State policy is " . . . to enhance and preserve the quality and value of the water resources of the state of Idaho and to assist in the prevention, control, and abatement of water pollution. . . . " Section 39-3601, Idaho Code, (emphasis added). Furthermore, rules and regulations may be adopted by the Board of Environmental and Community Services relating to any purpose which may be necessary for " . . . the prevention, control or abatement of environmental pollution or degradation . . . " Section 39-105(2), Idaho Code, (emphasis added).

All the states have adopted antidegradation statements, statutes or rules and regulations. A perusal of all 50 states' antidegradation provisions shows that a substantial majority of the states have adopted an antidegradation law similar to Idaho's by requiring the following:

1. Waters whose existing quality is higher than the established standards are protected from degradation.
2. The water quality of these high-quality waters will be lowered only when an affirmative demonstration has been made that the lowering of quality is justified by necessary economic or social development.
3. If any degradation is permitted, it must be minimized by application of a very high degree of wastewater treatment.

The primary purpose of Idaho's antidegradation rule is to maintain high quality waters at their existing high quality. Degrade or degradation is not defined in the Rules, but water pollution is defined in Section 39-103(8), Idaho Code, as:

"... such alteration of the physical, thermal, chemical, biological or radioactive properties of any waters of the state, or such discharge of any contaminant into the waters of the state as will or is likely to create a nuisance or render such waters harmful or detrimental or injurious to public health, safety or welfare or to domestic, commercial, industrial, recreational, esthetic or other legitimate uses or to livestock, wild animals, birds, fish or other aquatic life."

"Degrade", as defined in Webster's Third New International Dictionary, means "to lower or impair in respect to some physical property" and "to lower from a superior to an inferior level." See also, Allied Telephone Company v. Arkansas Public Service Commission, 393 S.W.2d 206 (Ark. 1965).

In light of the above, we are of the opinion that any discharge into existing high quality waters of the State of Idaho that causes water pollution as defined by Section 39-103(8), Idaho Code, degrades those waters. It is extremely important in the administration of this rule that you be mindful of the burden of proof that the person seeking to degrade existing high quality waters has in this matter. Great emphasis must be placed upon sound administration of this rule.

ADMINISTERING THE RULE

It is the nearly universal experience of man that wastewater discharges are harmful to the public health, safety or welfare. This, coupled with the announced public policy of the State of Idaho to enhance and preserve water quality, leads naturally to a presumption that all wastewater discharges into the waters of the State will have a harmful effect upon the public health, safety or welfare. Given man's lack of foresight or knowledge to perceive the ultimate impact of wastewater discharges, you should be extremely cautious in approving any discharge as nondegrading when your mind rests in a state of doubt as to whether or not the discharge will or is likely to create a nuisance or render such waters harmful or detrimental or injurious to public health, safety or welfare or to domestic, commercial, industrial, recreational, aesthetic, or other legitimate uses or to livestock, wild animals, birds, fish or other aquatic life.

A sufficient quantum of doubt arises when there is ". . . a want of settled conviction or opinion on a proposition considered. It is that state of mind in which [you] hesitate as to two contradictory conclusions." Smith v. Missouri Pacific Ry. Co., 44 S.W. 718 (Mo. 1898). ALL DOUBT SHOULD BE RESOLVED IN FAVOR OF PROTECTING THE ENVIRONMENT.

The burden of going forward and the burden of ultimately proving that a discharge will not degrade or pollute the waters of Idaho rests upon the party seeking permission to discharge. The leading writer on state administrative law supports this allocation of the burden by stating that:

"The state courts quite uniformly impose on agencies the customary common law rule that the moving party has the burden of proof, including not only the burden of going forward, but also the burden of persuasion. This means, of course, that when an applicant appears before an agency seeking to establish a claim or obtain a license, the burden is on him." Cooper, State Administrative Law, Page 355.

To the same effect, the Main Site Location Law (38 M.R.S.A. §481, et seq., Env. Rptr., 1196:2141) which places the burden upon a developer to affirmatively demonstrate "no adverse

affect on the natural environment", has been sustained by the Maine Supreme Court. In the Matter of Maine Clean Fuels, Inc., 310 A.2d 736 (1973).

The burdens of proof, heretofore established, apply to the applicant for a wastewater discharge permit at both procedural stages. The first stage requires the applicant to prove beyond the quantum of doubt expressed, that the discharge will not degrade high quality waters. If the applicant offers sufficient evidence to negate the presumption, he should receive a permit if he otherwise qualifies. On the other hand, if the applicant fails to provide evidence sufficient to overcome the operation of the presumption, his application may not be granted. If he desires, the applicant may advance to the second procedural stage by requesting approval of the discharge notwithstanding that it degrades high quality waters. To facilitate processing, these two stages may be combined into a single proceeding if the Department sees fit.

To gain approval for a polluting discharge into high quality waters all the following criteria must be "affirmatively demonstrated" to the Department of Environmental and Community Services and to the Federal Environmental Protection Agency:

1. The discharge is "justifiable as a result of necessary economic or social development."
2. No presently assigned or possible uses will be interfered with or injured by the discharge.
3. The "highest and best degree of wastewater treatment available under existing technology" must be used by the applicant.

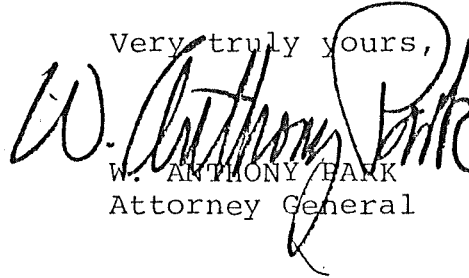
#### CONCLUSION

We are advised that water quality data collected by your Department demonstrates that the water quality of the Big Wood River System is higher than the established water quality standards of the State of Idaho. Hence, the Big Wood River System must receive the protection of the antidegradation rule. Moreover, we understand that the discharge into the Big Wood River System is now substantially less than 1,000 pounds biochemical oxygen demand per day. Further discharge into the

Dr. James A. Bax  
February 26, 1974  
Page 6

Big Wood River System or other high quality waters of Idaho can be allowed only after exhaustion of the procedures outlined above.

Very truly yours,

A handwritten signature in dark ink, appearing to read "W. Anthony Park". The signature is written in a cursive, flowing style. The "W" is large and prominent, followed by "Anthony" and "Park". The signature is positioned over the typed name and title.

W. ANTHONY PARK  
Attorney General

WAP:MJM:cg

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March 5, 1974

FORMAL OPINION #74-122

Honorable Leon H. Swenson  
Chairman, Agricultural Affairs Committee  
Idaho State Senate  
Building Mail

Dear Senator Swenson:

This is in response to your recent letter concerning R. S. 1550, which would provide for producer referendums on the continued existence of commodity commissions. You asked in essence, whether the legislature may delegate this power to the producers. In this connection, it might be well to quote here a portion of Article 3, Section 1 of the Idaho Constitution which reads as follows:

The legislative power of the state shall be vested in a senate and house of representatives. The acting clause of every bill shall be as follows: "Be it enacted by the Legislature of the State of Idaho."

The people reserve to themselves the power to approve or reject at the polls any act or measure passed by the legislature. This power is known as the referendum, and legal voters may, under such conditions and in such manner as may be provided by acts of the legislature, demand a referendum vote on any act or measure passed by the legislature and cause the same to be submitted to a vote of the people for their approval or rejection. . .

It would appear then that the bill in question is not inconsistent with the philosophy expressed in Article 3, Section 1. Also, the case of Johnson v. Diefendorf, 56 Idaho 620, states that this section makes every act of the legislature subject to referendum.

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Senator Leon H. Swenson  
March 5, 1974  
Page 2.

It should also be noted that it is the legislature itself that would be providing the referendum procedure. In other words, the referendum would only be the tool designated by the legislature for discontinuing any particular commission. Such an approach is not new. Indeed, the present referendum and initiative laws provide authority for the repeal of existing legislation by vote of the people; after such repeal, nothing more to effecutuate it need be done by the legislature.

Certainly we see nothing in this bill which differs from the principle contained in those laws. The referendum, of course, is limited to those persons who pay the taxes for the support of the commissions; however, we do not regard that as being constitutionally objectionable.

I trust this is the information you desired.

Very truly yours,

FOR THE ATTORNEY GENERAL

WARREN FELTON  
Deputy Attorney General

WF:gmi



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

W. ANTHONY PARK  
ATTORNEY GENERAL

March 5, 1974

Mr. Milton Small  
Executive Director for  
Higher Education  
State Board of Education  
Building Mail

*Official Opinion 74-123*

Dear Mr. Small:

We wish to respond to your letter of February 26, 1974, wherein you requested our opinion on the following issue: "(W)hether the Board's policy 511.7 (vacation leave) is consistent with state statutes, or whether the policies prescribed in Idaho Code 67-2507 and 67-53334 apply to all employees in agencies and institutions under the governance of the State Board of Education."

Section 67-2507, Idaho Code in pertinent part provides:

"67-2507. Vacation leave.--Each employee of the state of Idaho shall be entitled to vacation leave with pay as follows:

"Vacation leave shall accrue at the rate of one (1) day for each full month of service during the first five (5) years of continuous employment; one and one-fourth (1 1/4) days for each full month during the next five (5) years of continuous employment; and one and one-half (1 1/2) days for each full month during the third consecutive five (5) years of continuous employment, and one and three-quarters (1 3/4) days for each full month of continuous employment thereafter. Provided, however, that an employee must have worked for at least six (6) full months before being eligible to take vacation leave with pay.

"A day of such vacation leave shall be considered as a day of leave on what

Mr. Milton Small  
March 5, 1974  
Page 2

would otherwise be an ordinary working day and shall be in addition to sick leave, compensatory leave, regular days off and holidays. Vacation leave shall not accrue beyond a total of thirty (30) days without written authorization of the appointing authority."

Section 67-5334, Idaho Code provides:

"67-5334. Vacation time computation.-- The rate at which vacation leave shall accrue to employees shall be as follows: one (1) day for each full month of service during the first five (5) years of the employee's continuous employment; one and one-fourth (1 1/4) days for each full month during the next five (5) years of continuous employment; one and one-half (1 1/2) days for each full month during the third consecutive five (5) years of continuous employment, and one and three-quarters (1 3/4) days for each full month of continuous employment thereafter."

The policy of the Board, 511.7, provides that certain employees of the institutions shall be awarded annual leave at a rate of 2 days per month. Apparently this rate of accumulation is based on the position held, rather than on length of service in that position. So an employee who is employed for one fiscal year accumulates annual leave at the same rate as an employee who has served for twenty years. However, the treatment of employees with differing lengths of employment is not the legal issue which causes the primary concern.

The policy under discussion, 511.7, provides:

"Vacation leave for all faculty and other exempt employees who are employed on a fiscal year basis shall be two days per month with a maximum accumulation of 30 days. Further, any employees at the University of Idaho who have accumulated in excess of 30 days of vacation leave by October 31, 1972, shall be allowed to take such excess leave prior to June 30, 1974."

Mr. Milton Small  
March 5, 1974  
Page 3

That policy statement was approved by the board on October 19, 1972. By "exempt" as used in the policy, we assume the State Board means those employees who are exempt from the system of personnel administration established by Chapter 53, Title 67, Idaho Code. However, we do not believe that Chapter 53 of Title 67 applies only to classified employees. It would, therefore, be a mistake to assume that the administration of exempt personnel can be established with total disregard for the provisions of the Personnel Act.

Particularly we would point out, as example only, that Sections 67-5327(d) and 67-5336, Idaho Code, on enumerated and paid holidays, apply to the exempt employee as equally as to the classified employee. Further, we are of the opinion that 67-5334, Idaho Code, entitled Vacation Leave Computation, applies to all state employees, without regard to the exempt-classified status of an employee. This section provides for the rate at which an employee shall accrue annual leave: 1 day per month for the first five years of service; 1 1/4 days per month for the next five years service; 1 1/2 days per month for the next five years of employment; and 1 3/4 days per month thereafter.

Even if we are in error as to the application of Section 67-5334 to exempt personnel, then Section 67-2507, Idaho Code, most certainly governs the exempt employees. This section of the code establishes a rate and use of vacation leave identical to the legislative expression set out in Section 67-5334. Therefore, we believe there is clear authority to the effect that all employees of the State of Idaho are to be treated equally and with due regard for length of service by the establishment of the rates by which annual leave may be accumulated. Further, the rates apply to all state employees throughout the State and without regard to the appointing authority. In short, we are of the opinion that the legislature has preempted the area of annual leave and the accumulation thereof, thereby making administrative decisions on those issues unnecessary. Policy statements issued by administrative agencies must be measured against statutes which speak to the same subject. Where conflict exists between the two, the statute, of course, must control.

We can find no authority which would indicate to us that any different theory would apply to faculty and other exempt employees simply because they may be employed on a fiscal

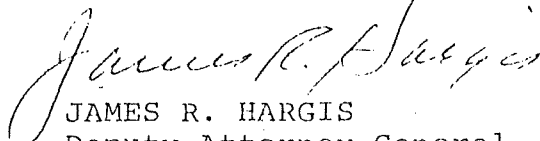
Mr. Milton Small  
March 5, 1974  
Page 4

year basis at our institutions of higher education. The fact that the employee is exempt because he is faculty or because he is an officer employed on a fiscal year basis does not alter the fact that the person is still an employee of the State of Idaho who is entitled to accumulate annual leave. But the employee is entitled to accumulate annual leave at the rate the legislature has prescribed. The faculty and other exempt employees of the Board are no more or less employees of the State of Idaho than are other exempt employees of the Board, who acquire leave rights and rates according to the statutory formula. Nor can we find any authority, statutory or otherwise, which could lead to the conclusion that some exempt employees acquire leave rates from one source while other exempt employees acquire leave rates from another source. We are of the opinion that all employees, classified and exempt acquire leave rights and rates from only one source, the legislature. Therefore, to the extent that Board Policy 511.7, entitled vacation leave, is in conflict with Sections 67-2507 and 67-5334, Idaho Code, we are of the opinion that that Board policy statement should be revised.

We trust we have been of assistance.

Very truly yours,

FOR THE ATTORNEY GENERAL

  
JAMES R. HARGIS  
Deputy Attorney General

JRH:lm

March 6, 1974

Mr. Roy Archer  
Zoning Administrator  
Minidoka County Zoning Office      OFFICIAL OPINION 74-124  
646 Freemont Avenue  
Rupert, Idaho 83350

Dear Mr. Archer:

Your letter of January 25, 1974, has been received by this office.

Your problem appears to involve an interpretation of certain sections of the "Plats and Vacations" portion of the Idaho Code, Section 50-1301 et seq. And since your prosecuting attorney has raised an issue under your county zoning ordinance, there is a question of interpretation of that ordinance, also.

The essential question involved in your problem is whether or not the two-way split of an original lot in the existing Valley Realty Subdivision is a new subdivision or an amendment to an existing subdivision, such that the provisions of Idaho Code, Section 50-1301 et seq. dealing with plat requirements for subdivisions, and/or certain provisions of the Minidoka County Zoning Ordinance should apply.

A review of the Minidoka County Zoning Ordinance shows that the word "subdivision" is not defined in that ordinance. Idaho Code, Section 50-1301, defines it as being "a tract of land divided into five (5) or more lots. . .". But, this definition is modified by the following proviso:

"Cities or counties may adopt their own definitions of subdivision in lieu of the above definition."

Since Minidoka County has not elected to define this term, the Idaho Code definition applies. The lot split in question here is clearly not a subdivision under Idaho Code provisions requiring a plat. No new plat is required at this time from the owners of the split lots. Nor does the Idaho Code require any amendment to the existing plat as a result of the lot split.

Mr. Roy Archer  
March 6, 1974  
Page 2

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Your prosecuting attorney, in his letter to you of November 29, 1973, refers to Section 4-25-2-B of the Minidoka County Zoning Ordinance. He relies on this section to support his belief that your granting of the building permit in this situation was erroneous. It should be noticed that this particular section refers to amendments to plans for planned dwelling groups, and not to plats of subdivisions generally. The procedures for obtaining a building permit for a "planned dwelling group" are specified in detail in the ordinance. If a change in the plan is proposed, then certain procedures must be followed.

However, the Valley Realty Subdivision is not a "planned dwelling group" in any sense of the term. It is a subdivision of land only, and the individual lot owner seeks his own building permit; this is contrasted to the "planned dwelling group" situation, where the developer plans the division of land and the construction of buildings as a unit. In short, there is no "plan" to be amended, since this is not a "planned dwelling group". In our view, Section 4-25-2-B should not be read to apply to changes in plats.

To sum up: the division of the lot in question, in the opinion of this office, does not violate Idaho law. The "Plats and Vacations" section of the Idaho Code does not require the owner of the original lot to do or perform any acts precedent to his selling of the one lot. And, the Minidoka County Ordinance does not require an amendment of any plan or plat precedent to the granting of a building permit in this situation. This office concludes that the Office of the Minidoka County Zoning Administrator properly granted the building permit in question.

I hope that our response is of benefit to you. If you should have further questions, please do not hesitate to contact us.

Very truly yours,

W. ANTHONY PARK  
Attorney General

WAP/JCW:lm



*Civil Def &  
Dis Rel*

STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

W. ANTHONY PARK  
ATTORNEY GENERAL

March 6, 1974

State Dep't of Disaster Relief  
and Civil Defense  
Room B17  
650 West State Street  
Building Mail  
Attention: Tom Goerke

OFFICIAL OPINION #74-<sup>125</sup>175

Re: Disaster Relief due to recent flooding.

Dear Mr. Goerke:

This is in response to your request for an opinion interpreting the Disaster Relief Act of 1970, P.L. 90-606. In essence, you have asked this office to help you determine whether certain applicants for federal assistance fall within the definition of "local government" under the above federal law.

Section 102 (5) of the above referred to federal law defines "local government" as follows:

"Any county, city, village, town, district or other political subdivision of any state, and includes any rural community or unincorporated town or village for which an application for assistance is made by a state or political subdivision thereof. . ."

Under the above definition we feel that there is no question that the following named applicants are "local governments". For Adams County, the county itself and the City of New Meadows; for Benewah County, Benewah County itself, the Cities of St. Maries and Plummer, Drainage District 1, 5 and 7; for Bonner County, Bonner County itself, the Cities of Hope, Priest River, the unincorporated town of Ponderay, Sandpoint, North Side Water Users Association, the Syringa Heights Water Users Association,



March 6, 1974

Page 2

West Bonner Water District #1; for Boundary County, the county itself, the City of Bonners Ferry and Twenty-Mile Water Creek Association; for Kootenai County, Eastside Highway District, Lake Highway District, Rathdrum, Worley Highway District, Kootenai County itself, Post Falls Highway District, Kootenai Drainage District, the City of Harrison, the City of Coeur d'Alene; for Shoshone County, Shoshone County itself, Cataldo Water District, the City of Mullan, the City of Osburn, City of Pinehurst, the S.F.C.D.A. Sewer District, Cities of Wallace, Wardner, Smelterville and Kellogg, Pinehurst Water District-- (you've referred to it as Pinehurst Water System, but it is Pinehurst Water District,) Kingston Water District #1, and the Wier Gulch Water Association; for the County of Latah, Latah County itself, the Cities of Juliaetta, Kendrick, Moscow, Potlatch, Troy and Deary, North Latah County Highway District, South Latah Highway District and the University of Idaho; for Washington County, Washington County itself, the Cities of Cambridge and Weiser, Weiser Irrigation District and Flood Control District #3.

In regard to Washington County, you have also asked whether the Middle Valley Ditch Corporation is a "local government". The Middle Valley Ditch Corporation is a licensed Idaho corporation. It is licensed under the Idaho Business Corporation Act. Article 2 of its Articles of Incorporation states that the corporation is to be operated at cost and not to make or declare or pay dividends or profits. It is very similar to the Water Users Associations which I feel do qualify under the definition of "local government" as being "rural communities" or unincorporated towns or villages. Community has been defined a good number of times by case law. See 8 Words and Phrases, page 205 through 209. It has often been held that the words neighborhood or vicinity or locality are synonymous and have approximately the same meaning as community and quite generally, the definitions in the above cited article appear to state that a community consists of people who reside in a locality in more or less proximity. Gilbert v. Town of Hamden, 68 A.2d., 157, 135 Conn., 630. "Rural", of course means "of the county" as distinguished from the city or town. There would appear to this writer to be a good deal of similarity between the Local Water Users Associations, the local water districts, and some of the other districts which would fall within this definition of local government and the Middle Valley Ditch Corporation. In this case, however, it has been formed as a business corporation. Notwithstanding that technical difference, if the members of the corporation meet the other criteria of a "community" as I set them out above, it is our opinion the Middle Valley Ditch Corporation would also qualify for assistance.

March 6, 1974

Page 3

I am sending along copies of its Articles of Incorporation, Amendments thereto and the filing card of the corporation. The claims of the applicants you have named to me do meet the requirement of being a "local government"; perhaps you should seek an additional opinion from someone who has authority to determine the meaning of the federal law as to the Middle Valley group. I would suggest one of the Federal Soliciter's offices.

Very truly yours,

FOR THE ATTORNEY GENERAL

A handwritten signature in cursive script that reads "Warren Felton".

WARREN FELTON

Deputy Attorney General

WF:lm

Enclosure

*Opinion*



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

W. ANTHONY PARK  
ATTORNEY GENERAL

March 6, 1974

Carl C. Moore  
Chairman  
Idaho Board of Highway Director  
Department of Highways  
P.O. Box 7129  
Boise, Idaho 83707

OFFICIAL OPINION #74-126

Dear Mr. Moore:

Some weeks ago you inquired of this office relative to a proposed coordinate project in our state parks between the State Highway Department and the Parks Department. You asked whether state highway funds or sources could be expended on highways within state parks in view of the fact that those particular highways are not part of the state highway system.

After a thorough review of all applicable law relating to this matter, we are constrained to conclude that state highway resources may not be used on roads or highways within state parks. The only legal method in our opinion of accomplishing the result of joint contribution for improvement of state parks' roads with the Parks Department would be for the Highway Department to put the parks' roads in the highway system. The Highway Board does have the authority to place any roads they deem desirable into the state highway system; therefore, it would seem to us, other considerations permitting, that this would be a convenient way to accomplish your purpose.

If we can be of further assistance in this area, please advise.

Very truly yours,

FOR THE ATTORNEY GENERAL

CLARENCE D. SUITER  
Chief Deputy Attorney General

CDS:lm  
cc Vic Richardson  
Faber Tway  
Steven Bly

March 6, 1974

Honorable Cecil D. Andrus  
Governor of the State of Idaho  
BUILDING MAIL

OFFICIAL OPINION #74-127

Re: Small Claims Court Jurisdiction

Dear Governor Andrus:

You have asked whether the assignee of a small claim may prosecute the same to judgment in the small claims division of our magistrates' court. Idaho Code, Section 1-2307 provides:

" . . . All claims must be verified by the real claimant, and no claim shall be filed or prosecuted in such department by the assignee of such claim."

Based on the foregoing statutory provision, we are of the opinion that a claim can only be brought in our small claims court by the real claimant and not by an assignee of the claim. Although an argument could be made that an assignee becomes the "real claimant" by virtue of the assignment, nevertheless, in view of the clear language prohibiting the assignee from filing and prosecuting the claim, we believe that the courts would hold that only the original claimant can prosecute a claim in our small claims court.

If further assistance in this area can be provided by this office, we will be most happy to comply.

Very truly yours,

FOR THE ATTORNEY GENERAL

CLARENCE D. SUTTER  
Chief Deputy Attorney General

CDS:lm

COPY



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL  
BOISE 83720

W. ANTHONY PARK  
ATTORNEY GENERAL

March 6, 1974

Peter J. Leriget  
Latah County Prosecutor  
Latah County Courthouse  
Moscow, Idaho 83843

OFFICIAL OPINION #74-128

Dear Mr. Leriget:

On February 19, 1974, I wrote to you concerning taxation of a building being built by a private interest on University Land. It appears that there have been two opinions written from this office on the same subject. The other one was written by Deputy Attorney General Matthew Mullaney in February, 1973, and is a correct statement of the law. Accordingly, it is necessary to amend the letter to you of February 19, 1974 by striking the last sentence which stated:

"In your case if the agreement reads that the buildings belong to the University or would belong to the University at the end of the lease, they could not be assessed at all."

It appears that the Idaho statute, Section 63-1223, Idaho Code, has been recently amended to provide that all improvements on government, Indian or State land and all improvements on all railroad rights of way owned separately from the ownership of the rights of way upon which the same stands or in which non-exempt persons have possessory interests, shall be assessed as personal property and entered upon the personal property assessment rolls. In other words, this statute taxes, separately from the governmental land, all buildings owned by private individuals and all buildings in which private individuals have possessory interests. In Russett Potato Company v. The Board of Equalization of Bingham County, 93 Idaho 501, 465 P.2d 625 (1970), the Supreme Court stated that if Idaho had had then a statute which reads as it does now, the possessory interest, leasehold interest or building ownership of the lessee could have been taxed. The quotation from that case is as follows:

"There are also three other United States Supreme Court cases which are similar to Offutt Housing Co. v. County of Sarpy, supra. See United States v. City of Detroit, 355 U.S. 466, 78 S.Ct. 474, 2 L.Ed.2d 424 (1958); United States v. Township of Muskegon, 355 U.S. 484, 78 S.Ct. 483, 2 L.Ed.2d 436 (1958); City of Detroit v. The Murray Corp. of America, 355 U.S. 489, 78 S.Ct 458, 2 L.Ed.2d 441 (1958). Like Offutt Housing Co. v. County of Sarpy, supra, however, none of these cases is authority for taxing the lessee of federal property as the owner of the property. In each of these cases the taxpayer held a possessory interest in property, the technical title to which was in the federal government. The state levied a tax upon the possessory interest, which action was upheld by the United States Supreme Court.

"The key distinction between all of these cases and the case at bar is that, unlike Nebraska and Michigan, at the time the present action arose, Idaho had no statute permitting the taxation of leaseholds or possessory interests. The Michigan statute, on the other hand, provided that

"When any real property which for any reason is exempt from taxation is leased, loaned or otherwise made available to and used by a private individual, association or corporation in connection with a business conducted for profit \* \* \* the lessees or users thereof shall be subject to taxation in the same amount and to the same extent as though the lessee or user were the owner of such property."

Michigan Compiled Laws § 211.181.

The 1969 Idaho legislature, however, amended I.C. § 63-1223 to read as follows:

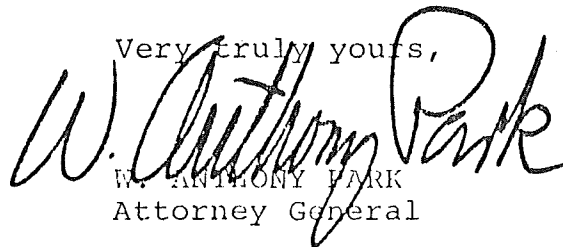
"All improvements on government, Indian or state land \* \* \* in which non-exempt persons have possessory interests shall be assessed as personal property and entered upon the personal property assessment roll." (1969 S.L. Ch. 455 § 44, p. 1241)

Peter J. Leriget  
March 6, 1974  
Page 3

"If the present case had arisen after the amendment of this statute, there would be no doubt that the situation would then be parallel to the situation in the above cited United States Supreme Court decisions. It has been held, however, that in the absence of a statute authorizing the taxation of leasehold or possessory interests, such interests are not taxable. *Maricopa County v. Fox Riverside Theatre Corp.*, 60 Ariz. 260, 135 P.2d 513 (1943). See also *Douglas Aircraft Co., Inc. v. Byram*, 57 Cal.App.2d 311, 134 P.2d 15 (1943); *City of Oakland v. Albers Bros. Milling Co.*, 43 Cal.App. 191, 184 P. 868 (1919). There is, then, no authority for taxing the appellant as the owner of the building involved here, and there was no Idaho statute providing for the taxation of appellant's leasehold interest in the building."

Thus, the Idaho Supreme Court has clearly indicated that Idaho with its present statute may tax individuals where they own, lease or have a possessory interest in a building which is on public property notwithstanding ultimate reversion of the improvements to the State or the fact that technical title to the improvements remain in the State.

Very truly yours,

  
W. ANTHONY PARK  
Attorney General

WAP/WF:lm



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

W. ANTHONY PARK  
ATTORNEY GENERAL

March 8, 1974

Representative Rudy A. Andersen  
Chairman of the House Health &  
Welfare Committee  
State of Idaho  
House of Representatives  
BUILDING MAIL

OFFICIAL OPINION 74-129

Re: Request for Attorney General's Opinion on  
Health Maintenance Organizations  
(House Bill #394)

Dear Chairman Andersen:

You have asked Attorney General Park for an opinion on  
the following question:

"Can a Health Maintenance Organization operate in the State of Idaho if it does not comply with Chapter 34, Title 41, of the Idaho Code (hospital and medical services), and if no Health Maintenance Organization enabling legislation is passed?"

It is the opinion of the Attorney General that if a Health Maintenance Organization (HMO) cannot qualify under Chapter 34, Title 41 of the Idaho Code, it cannot operate in the State of Idaho unless enabling legislation is passed. Public Law 93-222, passed by the 93rd Congress December 29, 1973, applies only to Health Maintenance Organizations which have received grants, loans, or loan guarantees from the federal government or have entered into a contract with the federal government. Mr. Kohler, a representative of the Seattle office of the Department of Health, Education and Welfare, has informed us that the purpose of Public Law 92-222 is to promote the inception or continuance of HMO's and does not attempt to regulate them. If a Health Maintenance Organization is federally funded, the



Representative Rudy A. Andersen  
March 8, 1974  
Page 2

federal government can regulate and intends to regulate to a certain degree. However, these regulations are not expected to be comprehensive. As a result, any Health Maintenance Organization which does not receive federal aid in the above mentioned ways, is not affected by the federal act. Further, even Health Maintenance Organizations which do receive federal aid will be regulated only minimally. Such minimal regulations are not at present promulgated.

Section 1311 of Public Law 93-222 does provide for pre-emption of state statutes that would restrict HMO's in certain specified ways. There are no restrictions in the proposed Idaho statute or in Idaho laws that now exist that would be covered by Section 1311.

At the present time, Chapter 34, Title 41, Idaho Code is the only possible legislation which could regulate this type of an organization. HMO's, as generally conceived, would necessarily be regulated under Chapter 34 because they fit the definition of a health care service (Idaho Code, Section 41-3401(1) and Section 41-3403(1)).

In order to qualify under Chapter 34, Title 41, however, the Health Maintenance Organization must be a non-profit corporation. Health Maintenance Organizations are capable of being both profit making and non-profit making; therefore, the profit making HMO's could not qualify under Chapter 34 and would be forced to operate illegally within the State, if at all, unless appropriate enabling legislation was passed.

Health Maintenance Organizations differ from hospital service corporations in that they may be for profit, provide preventive care and hire health care facilities and physicians rather than pay for their services on a fee-for-service basis.

It is the opinion of the Office of the Attorney General that, at the present time, Chapter 34, Title 41 does not adequately cover Health Maintenance Organizations. Accordingly, it is our further opinion that additional legislation dealing with and regulating HMO's will be necessary.

Very truly yours,

FOR THE ATTORNEY GENERAL

TERRY E. COFFIN  
Assistant Attorney General

March 11, 1974

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Honorable Mike P. Mitchell  
State Senator, District #6  
BUILDING MAIL

OFFICIAL OPINION #74-130

Dear Senator Mitchell:

Senate Bill 1394 adds a proposed new section, Idaho Code, 49-1102A, which would establish a new crime, i.e., to be in control of a vehicle while having a blood alcohol content of .08% or greater.

The legislature does have the power to establish what crimes shall exist in the State and what the punishment shall be for those crimes. This particular proposal, however, does have some problems. First of all, it is in conflict with Idaho Code, 49-1102(b), because that section states that a .08% blood alcohol content shall not give rise to any presumption of intoxication.

Secondly, there is no mandatory requirement that a driver submit to a test to determine the blood alcohol content. Idaho Code, 49-352, asks for a voluntary submission, and provides a penalty for refusing to submit to the test; however, there is no requirement to submit, as that would be in violation of a person's right to be free from unreasonable searches and seizures. Therefore, Senate Bill 1394 would be rendered ineffective by a refusal to take the test. It would, in fact, encourage a person to refuse the test altogether, which places this proposal in direct conflict with Idaho Code, 49-352, which strongly encourages drivers to submit to the test.

Lastly, as a criminal statute, it is hopelessly vague and would be unconstitutional on that ground. A criminal statute must proscribe the forbidden conduct so that a person may be given notice of exactly what the crime is. A person must be given the chance to know when he is or is about to do something

Honorable Mike P. Mitchell  
March 11, 1974  
Page 2

in violation of the law. It would be impossible for a person to know what his blood alcohol content is without a complete laboratory analysis which is a highly impractical procedure for a person to follow after consuming an intoxicating beverage. There can be no average consumption rate established as each beverage and person differ considerably; which renders that approach unavailable.

This proposed new section to the Idaho Code would make it unreasonably difficult for a person to determine if he is or is about to be in violation of the statute. It is thus unreasonably vague and would be found unconstitutional for that reason.

Very truly yours,

FOR THE ATTORNEY GENERAL

JAMES P. KAUFMAN  
Assistant Attorney General

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March 11, 1974

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Honorable Mike P. Mitchell  
State Senator, District #6  
BUILDING MAIL

OFFICIAL OPINION #74-131

Dear Senator Mitchell:

Senate Bill 1395, changing Idaho Code, 49-352, provides what may be determined to be a punishment for anyone found to be driving with a blood alcohol content of .08% or more, to-wit: a requirement to participate in a driver rehabilitation and improvement program.

Idaho Code, 49-1102(b)(1), says that a .08% weight of alcohol in a driver's blood does not give rise to any presumption of intoxication. Idaho Code, 49-1102(b)(2), creates a presumption that the driver is in violation of the statute if the weight of alcohol is more than .08%. Neither one of these sections establish "beyond a reasonable doubt" that the driver is guilty of violating the statute. The presumption created in Idaho Code, 49-1102(b)(2), is an evidentiary matter; it is not absolute proof of guilt and may be rebutted by the defendant; the ultimate decision rests with a jury.

The proposed change to Idaho Code, 49-352, imposes this punishment on a person without taking into consideration whether or not that person was ever found guilty of a crime. As the law stands now, when a person is stopped and asked to take the test, he has two choices: (1) to refuse the test and suffer the loss of his driving privilege for 90 days; or (2) to take the test and defend any action brought in court. If the latter course of action is taken, the State must prove through the due process of law that the person was guilty of violating the statute before punishment may be imposed.

The proposed change would alter the situation. After being stopped with a blood alcohol content of .08% or more, a

Honorable Mike P. Mitchell  
March 11, 1974  
Page 2

person would be punished as a matter of law regardless of the alternative action he chose. He would either lose his driving privilege for 90 days or be required to participate in a driver rehabilitation and improvement program. He would be punished either way and neither way provides that the driver must first be found guilty of violating the statute after having been granted due process of law.

The above described proposed change is the establishment of guilt as a matter of law. It would be in violation of Article 1, Section 13 of the Constitution of the State of Idaho and the Fourteenth Amendment to the United States Constitution, as it does not provide for the due process of law before the imposition of punishment.

Very truly yours,

FOR THE ATTORNEY GENERAL

JAMES P. KAUFMAN  
Assistant Attorney General

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STATE OF IDAHO  
OFFICE OF THE ATTORNEY GENERAL  
BOISE 83720

W. ANTHONY PARK  
ATTORNEY GENERAL

OK'd by  
WAP.  
3-14-74

March 12, 1974

Mr. R. Keith Higginson  
Director, Idaho Department  
of Water Administration  
Statehouse - Annex 2  
Boise, Idaho 83720

OFFICIAL OPINION #74-132

RE: ONEAL-TAMMANY CREEK WATER RIGHT

Dear Mr. Higginson:

You have requested the opinion of the Attorney General's Office regarding the transfer of a water right from lands which have previously been condemned by the United States Government. The question being whether such a transfer is valid?

It has long been the holding in Idaho that a water right, although an appurtenance of the land, can be sold separate and apart from the land to which it is appurtenant. The transfer would, of course, be subject to the condition that no other appropriators are injured thereby. It is also the general rule that a water right as an appurtenance of the land passes with the land. The only means of preventing the passage of the water right is a specific reservation of the right or evidence that clearly shows that both parties knew or did not intend for the water rights to be conveyed.

The crucial fact in this case is whether, in condemning the fee title interest in the Oneal property, the United States also intended to acquire all appurtenances. The complaint filed in that matter reveals that the United States wanted and acquired the fee title. Based upon this, it would be hard to conclude that the government clearly did not intend to acquire the appurtenant water rights.

Mr. R. Keith Higginson

Page 2

March 12, 1974

Thus, there having been no reservation of the water right nor any clear showing (thus far) that the government did not intend to acquire the water rights, the law presumes that the rights went with the fee title and there is nothing left to transfer.

If evidence was presented, in the form of affidavits or otherwise, that the government did not intend to acquire and the Oneals did not intend to convey the water right, then it could be transferred.

Very truly yours,

FOR THE ATTORNEY GENERAL

NATHAN W. HIGER  
Deputy Attorney General

NWH/slg

February 22, 1974

OFFICIAL OPINION #74-133

Honorable John M. Barker  
Senator  
District #24  
Building Mail

Re: Liquor Fund Surplus and Boise Junior College  
District

Dear Senator Barker:

We wish to respond to your request for our opinion on whether or not Boise Junior College District will continue to receive its percentage share of the surplus liquor funds. You have stated that you have been informed that by 1975 the District will have enough funds from the percentage of the surplus to retire all outstanding indebtedness of the district, even though the schedule for retirement does not provide for final redemption until 1984 at the latest.

Section 23-404, Idaho Code establishes the formula for the distribution of the surplus of the liquor fund. This section provides that 50 percent of the surplus apportioned to a county embracing all or part of a junior college district shall be paid to the treasurer of said district. Section 33-4006, Idaho Code provides that the Boise Junior College district shall continue in existence for the sole purpose of retiring the existing indebtedness. Therefore, as a matter of both fact and law, there is a junior college district totally embraced by Ada County. Since the district does exist, albeit for a limited purpose, we are of the opinion that the distribution of the surplus as provided for in Section 23-404, Idaho Code is still proper until the district is automatically dissolved pursuant to Section 33-406,



Honorable John M. Barker  
February 22, 1974  
Page 2

Idaho Code, or legislative action is taken to remove Boise  
Junior College District from the operation of Section 23-404,  
Idaho Code.

We trust we have been of assistance.

Very truly yours,

FOR THE ATTORNEY GENERAL

JAMES R. HARGIS  
Deputy Attorney General

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STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

W. ANTHONY PARK  
ATTORNEY GENERAL

February 28, 1974

Mr. Ted C. Springer  
Prosecuting Attorney  
Office of the Prosecuting Attorney  
Custer County  
P.O. Box 409  
Challis, ID 83226

OFFICIAL OPINION #74-134

RE: CHAPTER 6, TITLE 42, IDAHO CODE

Dear Ted:

This letter is in response to your request that I review and place in writing my opinion regarding the watermaster budget.

Idaho Code, §42-610 provides that the watermaster "shall make up a sworn statement which shall be approved by the Department of Water Administration and show" the total number of days the watermaster and his assistants have devoted to distribution, and the total amount of water distributed. This section clearly requires the filing of a year-end (irrigation season) report of the watermaster's activities and approval by the Department of Water Administration of the expenses incurred. The act reasonably anticipates a one-time only billing process by the watermaster and approval by the Department. However, when the expenses are submitted on a monthly or day-to-day basis, the Department does not have to approve each submission to the county. But the Department of Water Administration will approve and should authorize the county to pay any voucher submitted, as long as the watermaster and county do not exceed the budgeted amount as adopted by the water users for any given category. Thus, claims for expenses that are found by the county to be within the water user's adopted budget for that particular category of expense (salary, consultant fees, other miscellaneous expenses, etc.) may be paid up to the amount of the adopted budget for that county.

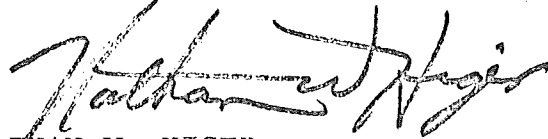
Mr. Ted C. Springer  
Page 2  
February 28, 1974

When a water district lies in more than one county the budget shall show the amount to be collected in each county (42-613) and how much for each category of expense against which the county is authorized to pay claims. The county commissioners are not authorized to pay claims in excess of the portion of the watermaster budget which is designated for collection in their county even though the total budget for the two counties is not exceeded. If a county paid claims from the water district funds that exceeded the amount adopted for that county by the water users, the excess would not be a proper charge against the water users.

I trust that this opinion answers your question. If you need further clarification, please write again.

Very truly yours,

FOR THE ATTORNEY GENERAL

A handwritten signature in dark ink, appearing to read 'Nathan W. Higer', written in a cursive style.

NATHAN W. HIGER  
Deputy Attorney General

NWH/slg

CC: R. Keith Higginson  
Norm Young



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83707

W. ANTHONY PARK  
ATTORNEY GENERAL

February 15, 1974

The Hon. Warren H. Brown  
State Senator District 9  
Senate Chambers  
Capitol Building  
Boise, Idaho

OFFICIAL OPINION #74-135

Dear Senator Brown:

You have requested an opinion on the following question:

Will all property owners within a county which operates and maintains, under the provisions of Title 31, Chapters 35 and 36, Idaho Code, a county-wide hospital continue to be subject to taxation for the support of said hospital after the creation, under the provisions of §§39-1318 through 1353, Idaho Code, of a hospital district, the boundaries of which include only a portion of land within the county?

It is our opinion that all property owners within the county will continue to be subject to taxation for the support of the county-wide hospital, for the following reasons.

The power of the Board of County Commissioners to levy ad valorem taxes for the support of county-wide hospitals is provided for in §31-3501, Idaho Code, and its three subsections. The first subsection authorizes a levy for the care and maintenance of indigents and dependents of the county; the second subsection authorizes a levy for the purpose of building, purchasing, leasing, acquiring, maintaining and improving hospital facilities "for the county and others"; and the third subsection authorizes a levy for the purpose of creating a sinking fund with which to make improvements and betterments to existing hospital facilities. Each of these levies is required to be made upon "all taxable property in the county." Persons who reside "from out of the county" are required to be charged a higher rate for the use and service of a county-wide hospital than that charged to persons who live in the county. The purpose of the higher charge, as stated by the statute, is "to

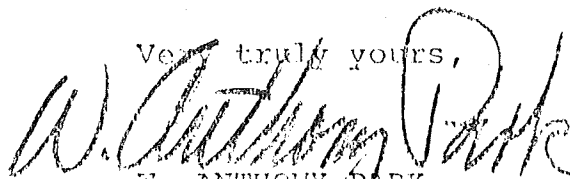
The Hon. Warren E. Brown  
February 15, 1974  
Page 2

compel persons living out of the county where such hospital is located . . . to bear a just burden of the cost of construction and maintaince of such hospital." §31-3503, Idaho Code. All persons who live in the county, including those who live within the boundaries of a hospital district located in the county are entitled to the use and services of the county-wide hospital at the lowest rate charged by it.

The constitution gives the legislature authority to vest in the counties by general laws the power to levy, assess and collect taxes for county purposes. Idaho Constitution, Articles 7, Section 6; Eenton vs. Board of Commissioners of Ada County, 20 Idaho 392, 119 Pac. 41 (1911). The legislature in turn has vested the power to levy, assess and collect taxes for the purpose of acquiring, maintaining and operating a county-wide hospital solely in the county commissioners. Larbing vs. Board of County Commissioners, 45 Idaho 468, 263 Pac. 992 (1928); Sections 31-3501 through 35-3503, Idaho Code; Section 31-3613, Idaho Code. In assessing and collecting such taxes, the commissioners are required to follow the mandatory provisions of the law which vests them with the power; they are not free to exercise discretion where none is given to them. See: Conger vs. Board of Commissioners of Latah County, 4 Idaho 740, 48 Pac. 1064 (1896); Prothero vs. Board of Commissioners of Twin Falls County, 22 Idaho 598, 127 Pac. 175 (1912); Shillingford vs. Benewah County, 48 Idaho 447, 282 Pac. 864 (1929); Idaho Constitution, Article 18, Section 11.

As noted above, Section 31-3501, Idaho Code, requires the County Commissioners to levy the ad valorem tax upon "all taxable property in the county." Therefore, with respect to the question of what property can or should be levied upon, the county commissioners have no discretion. If the county commissioners elect to levy on behalf of a county-wide hospital, they must levy upon all taxable property within the county.

Very truly yours,

  
W. ANTHONY PARK  
ATTORNEY GENERAL

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March 14, 1974

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Honorable Norma Dobler  
Representative  
District #5  
House of Representatives  
Legislature  
Building Mail

OFFICIAL OPINION #74-136

Dear Mrs. Dobler:

We wish to respond to your letter of March 8, 1974, wherein you enclosed a copy of R.S. 1592 and ask for an opinion from this office "with regards to the constitutionality of funding kindergartens." We assume that your request goes to the funding of kindergartens from the State level.

We are of the opinion that there is no constitutional ban, express or implied, which prevents the State from establishing or authorizing kindergartens and funding the same. The constitution requires the legislature to establish and maintain a general, uniform and thorough system of public, free common schools. Article IX, Section 1, Constitution of the State of Idaho. Therefore, there is a strong existing requirement that educational services be provided to the people of this State. There is nothing in the Constitution which even remotely suggests that educational services cannot include kindergartens. Nor is there anything which suggests that the State may not fund the educational services which includes, by law, kindergarten programs. Such State funding, would in fact, require legislative action however. The only constitutionally impermissible area, we conclude, would be if any kindergarten legislation included a compulsory attendance provision. Article IX, Section 9, Constitution of the State of Idaho.

Honorable Norma Dobler  
March 14, 1974  
Page 2

It is our earnest hope that the constitutionality of state-wide kindergarten programs funded in whole or in part by State funds can finally be put to rest. We trust we have been of assistance.

Very truly yours,

FOR THE ATTORNEY GENERAL

JAMES R. HARGIS  
Deputy Attorney General

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STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83707

W. ANTHONY PARK  
ATTORNEY GENERAL

March 11, 1974

Don C. Loveland, Chairman  
Idaho State Tax Commission  
317 Main Street  
Boise, Idaho 83722

OFFICIAL OPINION # 74-137

Dear Mr. Loveland:

Your office has requested an opinion concerning the method of computation by county commissioners of disbursements required to be made to intracounty taxing authorities from the state sales tax fund by county treasurers under §§63-3638(g) and 63-3638(f), Idaho Code. These disbursements are intended to replace revenue lost at the local level by reason of the exemption of business inventory from the ad valorem tax. Specifically, you seek an opinion on the following two questions:

1. Which one of the following two sets of levies should be used by the county commissioners as factors in the formula for determining, under §63-3638(g)(1), Idaho Code, each intracounty taxing authority's proportionate share of state sales tax collected and deposited in the state sales tax fund for the third quarter, of any given calendar year (July 1 -- September 30)?

(a) The current year levies of intracounty taxing authorities fixed in September of the current calendar year or,

(b) The prior year levies of intracounty taxing authorities, fixed in September of the previous calendar year.

2. May an intracounty taxing authority which is created on or after January 1, 1968, that is, created after the expiration of the base period years of 1965 through 1967, and which imposes a levy during a current calendar year, lawfully receive benefits from the sales tax fund during that calendar year under §63-3638(g)(1), Idaho Code? If so, how should this be accomplished?



This opinion answers the above questions in the order in which they are stated.

In 1967, the legislature provided for the exemption of business inventory from property taxation. §63-105Y, Idaho Code; S.L. 1967, Ch. 116, pp. 229-233. For the purpose of replacing revenue lost by county taxing authorities by reason of such exemption, the legislature provided in the same act for an appropriation from the "sales tax fund" to be distributed by the state treasurer no less frequently than quarterly to each county treasurer. Such distributions to counties were, and are now, required to be re-distributed by each county treasurer to each intracounty taxing authority, entitled under the act to disbursements, no less frequently than quarterly. §§63-3638(f) and (g), Idaho Code; S.L. 1967, Ch. 116, pp. 229-233, as amended by S.L. 1970, Ch. 183, pp. 531-532.

This opinion deals only with such redistributions.

The 1967 act provides a formula, recomputed annually, to be applied by the county commissioners of each county to determine the proportionate share of state sales tax fund monies to be disbursed by the county treasurer to each taxing authority within a county. Two of the factors in the formula are the individual levies of each intracounty taxing authority and the total of such levies within a county. For the purpose of this opinion, "intracounty" includes the county itself.

The first distributions under the 1967 act were required to be made from sales taxes collected and deposited in the state sales tax fund for the period commencing on July 1, 1968, the beginning of the third quarter of the calendar year 1968. The amount of sales tax collected and paid into the sales tax fund for the third quarter of the calendar year 1968 was required to be divided by the State Tax Commission and state treasurer (under a formula not relevant here) and then paid to the county treasurers for redistribution as authorized and determined by County Commissioners to intracounty taxing authorities as soon as practical following the close of the third quarter of calendar year 1968, i.e., shortly after September 30, 1968.

The levies applied in the formula by county commissioners under §63-3638(g)(1) are not used in the manner or for the purpose they are ordinarily used, that is, in an assessment process. They are only used as factors in the formula to determine the proportionate share of sales tax fund monies to be redistributed to intracounty taxing authorities. It is contrary to common sense to believe that the legislature intended counties to use in the formula levies which have been superceded by new levies. It is our opinion

the legislature intended that the most current available levies be used by the counties in apportioning current revenue received as distributions from the state sales tax fund. This conclusion begs another question: What are "the most current available levies"?

As noted above, the statutes require that such sums collected and deposited by the state in the sales tax fund must be paid over to each intracounty taxing authority by state and county officials at least quarterly if not more frequently than quarterly. §§63-3638(e), (f) and (g)(1), Idaho Code. The first of such disbursements were required to be made after the close of the third quarter of calendar year 1968, in October, 1968, or as soon thereafter as possible. Levies for all taxing authorities within a county as well as for the county itself were then (in 1968) and are now required to be set, determined and finalized no later than the second Monday of September of each year. §63-901 et seq., Idaho Code. Each county certifies these levies to the Idaho State Tax Commission no later than the third Monday of September of each year. §63-915, Idaho Code. Therefore, counties have knowledge of all county and intracounty levies three weeks or more prior to receipt by them from the state treasurer of the county's proportionate share of the state sales tax fund collected and deposited during the third quarter of each calendar year. This is sufficient time for county commissioners to determine, under §63-3638(g)(1), Idaho Code, the percentage of state sales tax fund monies to be disbursed to each intracounty taxing authority prior to receipt of the disbursement by the state treasurer of collection of sales tax for the third quarter of a calendar year. For these reasons, we are of the opinion that the intracounty levies fixed in September of the current calendar year are the levies which should be used by the county commissioners in the formula for determining, under §63-3638(g)(1), Idaho Code, each county and intracounty taxing authority's proportionate share of state sales tax fund monies disbursed by the state treasurer to the counties as their proportionate share of sums collected and paid into the state sales tax fund for the third and fourth quarters of each current calendar year and for the first and second quarters of each subsequent calendar year.

Since intracounty taxing authority levies change each year, the county commissioners are required to recompute, on or soon after the third Monday of September of each calendar year, the percentages of sales tax fund monies to be disbursed to taxing authorities within their county so that the levies which are set in September will be used as factors in the formula for disbursing state sales tax fund monies which are collected by the state during the third and fourth quarters of the current calendar year and during the first and second quarters of the subsequent calendar year.

Answering the second question, it is our opinion that a newly created taxing authority must share in benefits from the sales tax fund along with other county taxing authorities which impose a current calendar year levy.

Since June 30, 1971, the date of the complete phaseout of the ad valorem tax on business inventory, twenty percent (20%) of all sales taxes collected have been paid into the state sales tax fund and appropriated by the state and disbursed to counties for the purpose of replacing county business inventory tax receipts. §63-3638(f)(4), Idaho Code. Each county's proportionate share is divided by the county among those intracounty taxing authorities which, by application of a statutory formula, are shown to be entitled to share. §63-3638(g)(1), Idaho Code; S.L. 1967, Ch. 116, pp. 229-233, as amended by S.L. 1970, Ch. 183, pp. 531-532. The formula does not expressly refer to how existing or dissolved taxing authorities which impose no levy for a current year but which have base period business inventory should be taken into account. Similarly, the formula does not expressly provide for taking into account a taxing authority created after the base period years of 1965 through 1967 which does impose a levy. The latter hiatus is the subject of the balance of this opinion.

Section 63-3638(g)(1), Idaho Code, is set forth immediately below in both its 1967 and 1970 form. Those words and phrases which are underlined were added by the 1970 legislature and those words which are stricken were deleted by the 1970 legislature.

(1) The county commissioners in each county shall compute the percentage that the average amount of taxes collected from assessments for the years 1965, 1966 and 1967 on the personal property described as business inventory in section 63-105Y, Idaho Code, for each taxing district in the county bears to the average total amount of taxes collected from assessments for said years on the personal property described as business inventory in section 63-105Y, Idaho Code, for all taxing districts in said county. ~~Such~~ The percentage ~~so~~ thus determined for each taxing district in the county shall be adjusted to reflect increases and decreases in levies which vary from the average levy by each such district in the period above described and, as adjusted, applied to the county's proportionate share of said sales tax fund and the resulting amount shall be distributed to each taxing district in the county periodically but not less frequently than quarterly by the county auditor and applied by such taxing districts in the same manner and in the same proportions as revenues from ad valorem taxation. (Idaho S.L. 1970, Ch. 183 at p. 532)

Although as originally enacted in 1967, §63-3638(g)(1), Idaho Code, supra. [in 1967 this Code section was designated §63-3638(1)(1)], does not expressly make provision for, i.e., refer to dissolved districts, districts which do not impose levies each year and newly created districts, the purpose of providing for distributions from the state sales tax fund to local taxing authorities was to replace the local business inventory tax receipts of local taxing authorities which could not be collected by reason of the exemption of business inventory from the ad valorem tax. Those taxing authorities which were in existence during the base period years but which thereafter imposed no levy during a given year have no business inventory tax receipts to replace for a period of one year. We are of the opinion the legislature intended that taxing authorities which impose no levy should not receive a distribution from state sales tax fund monies. Therefore, taxing authorities dissolved after January 1, 1968, would not be entitled to receive distributions from state sales tax fund monies. Taxing authorities which remain viable but do not impose a levy every year would not be entitled to distributions from collections of state sales tax made during the last two quarters of the calendar year in which no levy is imposed and during the first two quarters of the subsequent calendar year. These conclusions support our view that newly created taxing authorities are entitled to benefits from the sales tax fund. Just as dissolved districts have no theoretical business inventory tax receipts to replace, newly created districts do have theoretical business inventory tax receipts to replace. In other words, the uncertainty created by the statute as originally enacted in 1967 disappears in the fact of choosing between two alternative interpretations, one which is acceptable and the other unacceptable. If, at the time of enactment of the statute in 1967, the legislature intended that a fixed percentage determined for each intracounty taxing district should be applied each year and not be adjusted annually, then we must also assume that the legislature intended that disbursements from the sales tax fund should be made to non-existent taxing authorities and to taxing authorities which impose no current levy. We prefer the contrary view: the legislature intended that each local taxing authority's percentage of state sales tax fund monies be annually adjusted so as to take into account (1) dissolved districts, (2) districts which impose no levy during a current year but which are still in existence and (3) newly created districts which impose a current levy but which were not in existence during the base period years of 1965 through 1967. The 1970 amendment confirms this conclusion.

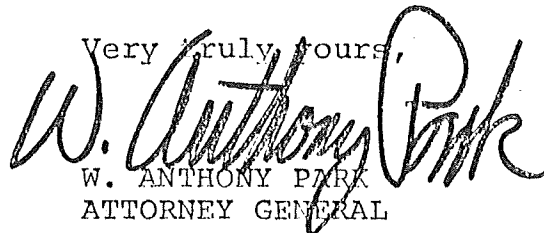
The addition in 1970 of the language requiring the percentage to be ". . . adjusted to reflect increases and decreases in levies . . ." presumes that each intracounty taxing authority's percentage of sales tax fund monies should be adjusted by the county commissioners and should not be a fixed percentage for all time. S.L. 1970,

Don C. Loveland, Chairman  
March 11, 1974.  
Page 6

Ch. 183, pp. 531-532. Since levies increase and decrease annually, the added language presumes that such adjustment shall be made annually. The adjustments are made by applying the new levies to the assessed value of business inventory located within the taxing authority during the base period years. In the case of a taxing authority created after the base period years of 1965 through 1967, the counties must compute the assessed value of business inventory within the boundaries of that authority during the base period years.

In conclusion, it is our opinion (1) the intracounty levies fixed in September of the current calendar year are the levies which should be used by the county commissioners in the formula for determining, under §63-3638(g)(1), Idaho Code, each county and intracounty taxing authority's proportionate share of state sales tax fund monies disbursed by the state treasurer to the counties as their proportionate share of sums collected and paid into the state sales tax fund for the third and fourth quarters of each current calendar year and for the first and second quarters of the subsequent calendar year and (2) that any intracounty taxing authority created on or after January 1, 1968, which imposes a levy for a current calendar year is entitled to receive benefits from the sales tax fund as a replacement for tax receipts lost by reason of the exemption of business inventory from ad valorem tax. This should be accomplished by computing the base period average amount of assessed value of business inventory which would have been within the boundaries of the newly created district had it been in existence during the base period of January 1, 1965 through December 31, 1967.

Very truly yours,

  
W. ANTHONY PARK  
ATTORNEY GENERAL

WMCD:WAP:ji



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

W. ANTHONY PARK  
ATTORNEY GENERAL

March 15, 1974

Honorable Richard S. High  
Chairman  
Senate Finance Committee

OFFICIAL OPINION #74-138

Honorable William Roberts  
Chairman  
House Appropriations Committee

Re: Funding of Bureau of Narcotics

Gentlemen:

In response to your letter of March 13, 1974, wherein you request our opinion relative to the legality of funding the Bureau of Narcotics from State Highway funds we would advise that it is our opinion that such a source of funding the Bureau of Narcotics would be illegal and unconstitutional.

Article VII, Section 17 of the Constitution of the State of Idaho provides in part:

"... the imposition of any tax on gasoline  
... and from any tax or fee for the registration of motor vehicles ... shall be used exclusively for the construction, repair, maintenance and traffic supervision of the public highways of this state ... and no part of such revenues shall, by transfer of funds or otherwise, be diverted to any purposes whatsoever."

Among the duties of the Idaho State Police as enumerated in Idaho Code, Section 19-4804 are the following obligations:

"d. safeguard and protect the surface and other physical portions of the state highways and enforce any laws for highway safety;"

and subsection f of 19-4804 provides:

"f. regulate traffic on all highways and roads in the state;"

Honorable Richard S. High  
Honorable William Roberts  
March 15, 1974  
Page 2

Idaho Code, Section 19-4811 provides in part:

"All salaries, costs of equipment, and expense of maintaining and operating the Idaho state police shall be paid from the motor vehicle fund and such other funds as are or may hereafter be appropriated for the purpose of operating and maintaining the Idaho state police."

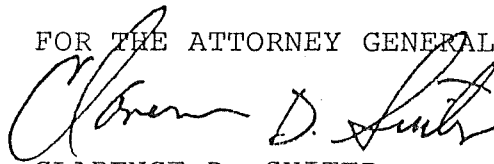
Read together, the forgoing statutes and the Constitutional provision authorizes funding of State Police activities from highway funds. Any other expenditures of highway funds are prohibited by the Constitution with the exception of some areas not here applicable. Accordingly, it is our opinion that the Bureau may not be funded from highway monies.

As far as motor vehicle funds are concerned, please see the attached opinion from this office that was issued to the Department of Law Enforcement on March 4, 1971. In essence, the opinion states that the use of motor vehicle funds would be permissible.

If further information is required, please advise.

Very truly yours,

FOR THE ATTORNEY GENERAL



CLARENCE D. SUITER  
Chief Deputy Attorney General

CDS:lm

March 21, 1974

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Y  
Miss Marjorie Schlotterbeck  
Executive Director  
State Board of Nursing  
Statehouse Mail

OFFICIAL OPINION #74-139

Dear Miss Schlotterbeck:

You requested, on March 13, 1974, a legal opinion on the policy of one nurse administering medication prepared by a second nurse. The problem is compounded in that the administration of the medication may, upon many occasions, be dispensed on a subsequent shift when the nurse preparing the medication is no longer present.

The welfare of a patient is placed in jeopardy by such procedure. Medications poured, and setting out for a period of time, can be, and frequently are, spilled, replaced, deteriorate or altered. Adding to the problem is that orders for medications may be cancelled between shifts giving rise to the possibility of medication error.

The legal responsibility of nurses who prepare medication and administer medication are clearly defined. A nurse pouring medication is charged with the legal responsibility for ascertainment of correct dosage and also the responsibility of determining that medication poured is administered to the patient for whom it was intended. A nurse administering medication is charged with the legal responsibility of administering the right medication, in the correct dosage and to the correct patient. Any nurse who administers medication which she does not pour assumes full legal responsibility for spillage, replacement, deterioration, alteration and administration to the correct patient even though she does verify the medication charts that current orders are in existence and that the medication so administered is correct and in the proper dosage.

To preclude the possibility of malpractice, the nurse requested to pour medication that she is not going to administer, or any nurse who administers medication which she does not pour, has the full legal right, and patient responsibility, to refuse to carry out



such function. It must be remembered that the welfare and safety of the patient is of paramount importance and anything which endangers such patient calls for independent exercise of judgment and discretion on the part of a nurse be she registered nurse or licensed practical nurse.

Respectfully yours,

FOR THE ATTORNEY GENERAL

JAY F. BATES,  
Deputy Attorney General  
Assigned to the Department  
of Law Enforcement

JFB/b

cc: W. Anthony Park, Attorney General  
John Bender, Commissioner

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STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL  
BOISE 83720

W. ANTHONY PARK  
ATTORNEY GENERAL

March 19, 1974

Mr. Tom D. McEldowney .  
Commissioner of Finance  
Department of Finance  
BUILDING MAIL

OFFICIAL OPINION #74-140

Re: Foreign Savings and Loan By-Law Amendments

Dear Commissioner McEldowney:

Your letter of January 30, 1974, requesting an opinion regarding by-law amendments proposed by Equitable Savings and Loan Association (hereinafter referred to as "Equitable") has been forwarded to me for reply. Your specific question was whether the proposed amendment to Article III of Equitable's by-laws, quoted within, conflicts with Section 26-1827, Idaho Code, and if so, whether you, as Commissioner of Finance, may approve such an inconsistent by-law provision.

It is the opinion of the Attorney General's Office that the proposed amendment is in conflict with Section 26-1827, Idaho Code, and, therefore, cannot be approved by the Commissioner of Finance.

All foreign savings and loan associations must comply with the Idaho Savings and Loan Act of 1967, Chapter 18, Title 26, Idaho Code, (hereinafter referred to as the "1967 Act"). A specific section of the 1967 Act provides one limited exception to foreign associations from compliance with the Act. Section 26-1814, Idaho Code, reads in pertinent part as follows:

"26-1814. FOREIGN ASSOCIATIONS.-- . . .  
With respect to any such foreign association [referring to those foreign associations doing business in Idaho prior to the effective date of the 1967 Act.] the provisions of section 26-1822 requiring that a majority of the board of directors must be Idaho residents shall not be applicable."

Under the statutory construction rule of "express mention and implied exclusion", the express mention of one matter excludes other similar matters not mentioned. Peck v. State, 63 Idaho 375, 120 P.2d 820 (1941). Applying this rule, the language of Section 26-1814, Idaho Code, should be construed to mean that Section 26-1822 specifically excepts foreign associations from complying with residency requirements of its board of directors, while leaving applicable other sections of the 1967 Act to foreign associations.

The conclusion that generally foreign associations must comply with the 1967 Act is supported by the law relating to all foreign corporations conducting business in Idaho. Section 30-510, Idaho Code, reads in pertinent part as follows:

"30-510. EFFECT OF COMPLIANCE.--Foreign corporations complying with the provisions of this chapter shall have all the rights and privileges of like domestic corporations, . . . and shall be subject to the laws of the state applicable to like domestic corporations." (Emphasis added)

In light of this conclusion, it becomes necessary to compare the proposed by-laws amendment of Equitable Savings and Loan with the applicable provisions of the 1967 Act; more specifically Sections 26-1827 and 26-1803(18), Idaho Code.

The proposed Article III amendment to the by-laws reads as follows:

"Section 1. Any person who is a borrower, savings investor or depositor in this Association, or the owner of reserve fund stock, shall be a member of and governed by the Articles of Incorporation and By-Laws and all rules and regulations of the Association. For the purposes of these By-Laws, the term 'borrower' shall be limited to mortgagees under a real property first mortgage and grantors under a first deed of trust. Each borrower shall be entitled to one vote. Each reserve fund stock holder shall be entitled to one vote for each share of stock owned by him. Each savings investor or depositor shall be entitled to one vote for each \$4.00 invested or deposited in the Association. For the purpose of determining the number of votes to which a savings investor or depositor shall be entitled, fractional amounts, will not be considered."

Mr. Tom D. McEldowney  
March 19, 1974  
Page 3

Idaho Code, Sections 26-1803(18) and 26-1827, read in pertinent part as follows:

"26-1803(18). 'Member' shall mean a person holding a savings account in an association, or borrowing from or assuming or obligated upon a loan in which an association has an interest, or owning property which secures a loan in which an association has an interest."

"26-1827. MEETINGS OF MEMBERS--VOTING RIGHTS.--. . . In the determination of all questions requiring action by the members, each member shall be entitled to cast one (1) vote by virtue of his membership, plus an additional vote for each share of the capital stock of the association, if any, owned by such member, and an additional vote for each \$100 or fraction thereof of the withdrawal value of savings accounts, if any, held by such member. No member, however, shall cast more than 100 votes. . . ."

A close reading of the proposed by-law and the applicable provisions of the 1967 Act indicate the following inconsistencies:

1. The by-law provides that a savings depositor or investor be allowed one vote for each \$4.00 on deposit invested, while Section 26-1827 allows one vote by virtue of membership regardless of amount on deposit plus an additional vote for each \$100 or fraction thereof on deposit.

2. While both the by-law and the statutes provide that a borrower is a member of the association, the by-law provision restricts the definition of borrow to "mortgagees under a real property first mortgage and grantors under a first deed of trust". By this provision, the by-law actually restricts voting membership to savings investors and depositors, owners of reserve fund stock, mortgagees under a real property first mortgage and grantors under a first deed of trust. This restricted membership conflicts with the definition of "member" contained in Section 26-1803(18), Idaho Code. The proposed amendment to the by-laws thereby deprives certain "members", as defined by Section 26-1803(18), Idaho Code, of their statutory voting rights. It should be noted that both statutes defining membership and voting rights employ the word "shall". "Shall" in the context of the statutes is mandatory and declares the legislative intent. Voting rights are significant to persons having a financial interest in savings and loan associations and, for

Mr. Tom D. McEldowney  
March 19, 1974  
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this reason, the legislature carefully defined "member" and "voting rights" to insure that all persons interested be entitled to exercise some influence. Certainly an association cannot restrict or limit this legislative intent by amending its by-laws.

I must also point out that the term "mortgagees" used in the sentence of amended Article III defining "borrower" must be a misprint. Were the mortgagee to be classed as a borrower and thus a member, the association would itself be a member and have voting rights.

The foregoing amendment to Article III of the by-laws is not in compliance with the Idaho Savings and Loan Act of 1967. Thus, the remaining question is whether you, as Commissioner, may approve such an inconsistent by-law provision.

Section 26-1813, Idaho Code, of the 1967 Act provides that amended by-laws "shall be subject to the same procedure for approval, rejection and appeal as provided for the original by-laws." Section 26-1805, Idaho Code, provides that original by-laws "shall conform to the requirements of the general corporation laws of the State of Idaho."

Idaho Code, Section 30-132(1) of the general business corporation laws reads as follows:

"30-132. BY-LAWS.--Every corporation formed under this act must within thirty (30) days after the issuance of its certificate of incorporation adopt a code of by-laws for its government not inconsistent with the laws of this state."  
(Emphasis added).

Review of the cited statutes, in conjunction with the conclusion that foreign savings and loan associations must comply with the 1967 Act and other related Code provisions, compel the conclusion that a foreign association's by-laws cannot be inconsistent with Idaho law and, therefore, cannot be approved by the Commissioner of Finance.

It may be argued that inconsistencies between by-laws and the 1967 Act are allowed under Section 26-1853, Idaho Code. This is true in the event the inconsistencies were present at the effective date of the 1967 Act. Amendments to by-laws after the passage of the 1967 Act must comply with the Idaho Savings and Loan Act of 1967. Section 26-1853,

Mr. Tom D. McEldowney  
March 19, 1974  
Page 5

Idaho Code, only allows inconsistent by-laws that were created by the passage of the 1967 Act.

I sincerely trust your questions are answered in this opinion.

Very truly yours,

FOR THE ATTORNEY GENERAL

WAYNE G. CROOKSTON, JR.  
Assistant Attorney General

WGC:cg



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

March 19, 1974

W. ANTHONY PARK  
ATTORNEY GENERAL

Mr. William Jones, Jr.  
Chairman of the Board of Trustees  
School District #394  
P.O. Box 478  
Calder, Idaho 83808

OFFICIAL OPINION #74-141

Dear Mr. Jones:

We wish to respond to your letter of March 2, 1974, and our subsequent telephone conversation, wherein you requested an explanation of Article VI, Section 2 of the State Constitution and its application to school district elections as set out in Section 33-404, Idaho Code.

As we view your request, we believe there are two issues:  
1) What persons are counted to determine the population of the trustee zone; 2) who may vote in the election called to determine trustee zones.

Since the durational residency requirement of six months in the State and 30 days in the county found in Article VI, Section 2 of the Idaho Constitution was declared unconstitutional by the U.S. Supreme Court in Dunn v. Blumstein, and since school elections do not provide for prior registration, we are of the opinion that in order to determine population of trustee zones should be counted who assert that they are bona fide residents of the district.

Further, all persons who are willing to sign the elector's oath that they are 18 years of age, bona fide residents of the district and zone, and who have not voted before in the same election are entitled to vote on the rezoning proposition. We hope we have been of assistance in this matter.

Very truly yours,

FOR THE ATTORNEY GENERAL

JAMES R. HARGIS  
Deputy Attorney General

JRH:lm

March 26, 1974

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Ms. Lynda Wagner  
Administrative Assistant  
Department of Administrative Services  
State of Idaho  
BUILDING MAIL

OFFICIAL OPINION # 74-142

Dear Ms. Wagner:

Mr. Park has referred your letter of February 27, 1973, requesting an Attorney General's opinion, to me for response.

You have asked whether or not confidential materials can be disposed of through a recycling program or center. The Idaho Code is laced with statutes mandating confidentiality of certain materials and information. The reasons for requiring confidentiality vary with the circumstances and the agency involved.

The requirement of confidentiality in any context is designed to protect either the person giving the material or information to the agency or to protect the recipient of such material or information. If the material or records are physically altered through such means as burning or shredding, to the point where no confidential information may be gleaned from them in their altered form, the confidentiality remains inviolate.

It is the opinion of the Attorney General that confidential materials and records of a State agency may be disposed of through a recycling center, if, they are first physically altered by that agency by shredding to the point where the material or records are not capable of transmitting "confidential information" to a third party.

Very truly yours,

FOR THE ATTORNEY GENERAL

TERRY E. COFFIN  
Assistant Attorney General





STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

W. ANTHONY PARK  
ATTORNEY GENERAL

March 28, 1974

C.E. Barnett, R.P.H., J.D.  
Executive Secretary  
Idaho Board of Pharmacy  
Suite 3  
Imperial Plaza  
200 North 3rd Street  
Boise, Idaho 83702

OFFICIAL OPINION #74-143

Dear Sir:

This official opinion is written in response to your request: Are pharmacists specifically exempt from jury duty by Section 54-1719 of the Idaho Code?

There are two statutes directly related to this question. The first one is Idaho Code, 54-1719 which specifically exempts all persons licensed under Chapter 17 of Title 54 who are pharmacists and who are actively engaged in a profession. The last action taken on this statute was in 1965 which gives it a date of 1965. This statute would apparently exempt pharmacists from jury duty.

However in 1971, the legislature had enacted Idaho Code 2-211, which says:

"No qualified prospective juror is exempt from jury service."

We thus have two statutes which are irreconcilable and inconsistent and that one specifically exempts pharmacists from jury duty and the other plainly states there are no exemptions.

The courts have spoken to this question in the past. The rule of law is well established in this area: When two statutes are irreconcilable and inconsistent the later one repeals the

C.E. Barnett, R.P.H., J.D.  
March 28, 1974  
Page 2


earlier one. It may be termed a repeal by implication; that is, the inconsistency is such that the legislature could not have intended the two statutes to be contemporaneously operative so it is implied that the earlier act was repealed.

The situation presented by your request and the statute cited appears to present an irreconcilable inconsistency between the two statutes which triggers the operation of the above stated rule of law. Idaho Code, 54-1719 is not operable against Idaho Code 2-211 for the later enacted law prevails.

The answer to your question is no. Pharmacists are not specifically exempted from jury duty by Section 54-1719, Idaho Code because Section 2-211 has repealed it by implication.

Very truly yours,

FOR THE ATTORNEY GENERAL

  
JAMES P. KAUFMAN  
Assistant Attorney General

JPK:lm



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STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

W. ANTHONY PARK  
ATTORNEY GENERAL

April 1, 1974

Mr. Jerry Hill  
Deputy Secretary of State  
Building Mail

OFFICIAL OPINION 74-144

Déar Mr. Hill:

You have asked whether there is any constitutional or statutory mechanism for placing advisory questions on resolutions on the Idaho election ballot. You have indicated that the initiative process has been suggested as such a mechanism.

It is my opinion that advisory questions or resolutions are not proper subjects for the initiative process in Idaho.

The language of Article III, Section 1 of the Idaho Constitution reads as follows:

"The people reserve to themselves the power to propose laws, and enact the same at the polls independent of the legislature. This power is known as the initiative, and legal voters may, under such conditions and in such manner as may be provided by acts of the legislature, initiate any desired legislation and cause the same to be submitted to the vote of the people at a general election for their approval or rejection provided that legislation thus submitted shall require the approval of a number of voters equal to a majority of the aggregate vote cast for the office of governor at such general election to be adopted." (emphasis supplied)

Like the constitutional provision for initiative quoted above, the machinery for the operation of the initiative, Section 34-1801 et seq., Idaho Code, speaks only to the creation of legislation, not to the passage of resolutions. A resolution is

not a "law" or "ordinance" but merely the form in which a legislative body expresses a determination or directs a particular action. A law or ordinance prescribes a permanent rule for conduct of government, while a resolution is of special or temporary character. State v. Highway Patrol Board, 140 Mont. 383, 372 P.2d 930, at 945 (1962); Kalamazoo Municipal Utilities Association v. City of Kalamazoo, 345 Mich. 318, 76 N.W. 2d. 1 at 5 (1956).

There is some precedent for utilizing the initiative as a public opinion poll. In 1967, the City of San Francisco was allowed to place an advisory matter involving a Vietnam cease fire on the city election ballot. See Farley v. Healey, 62 Cal. Rptr. 26, 431 P.2d 650 (1967). But, in that case the city charter specifically provided that "declarations of policy" could be submitted to the voters. Much emphasis was placed on the liberality of the charter's language with respect to the initiative. Such breadth of language does not appear in the Idaho initiative law.

A vigorous dissent in Farley mounts persuasive arguments against allowing election machinery to be used for opinion polling. In view of the aforementioned contrast between the statute at issue in Farley and the Idaho initiative laws, I find two of these arguments convincing.

First of all, it is evident that the use of election machinery for any purpose involves a substantial expenditure of money whether or not a special election is held or the initiative issue is merely placed on the general election ballot. In an era when tax revenues are all too often wasted or put to questionable use, Justice Burke's comments are sobering:

"In dealing with measures calling for the expenditure of public monies we must be mindful of their nature. Monies raised through the power of taxation are impressed with a public trust to be used for lawful purposes. They are extracted from rich and poor alike and often painfully from those scarcely able to pay but doing so under the penalty of loss of property through tax sale. Farley v. Healey, supra, (Burke, J., dissenting at 431 P.2d 657)

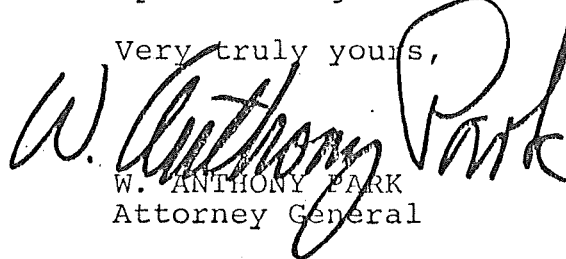
A related consideration raised by Justice Burke has further led me to the conclusion that the use of the initiative for opinion polling is improper. The widespread abuse of the initiative as a poll taking device could cause the people, in recoiling from the resulting expense, to drastically curtail the use

Mr. Jerry Hill  
April 1, 1974  
Page 3

of the initiative. Abuse is by no means certain but there are interest groups in every community espousing causes of all kinds. History has demonstrated that signatures to petitions can be obtained for almost any conceivable purpose. It takes little imagination to name issues which one or another group might desire to force to a vote should the initiative be allowed to be used as a poll taking device. Of course, I do not mean to imply that the issue giving rise to your inquiry, whatever it may be, represents an abuse of the initiative process. Rather, I have concluded that to allow any matter in the form of a resolution to be the subject of an initiative election would open the door to possible abuse. Initiative and referendum are indispensable to our democratic way of political life. To threaten their existence by allowing their possible abuse would be unwise.

For the reasons outlined above, it is my opinion that neither the letter of the Idaho initiative law, nor common sense, permits the use of the initiative as a poll taking device.

Very truly yours,

  
W. ANTHONY PARK  
Attorney General

WAP/JFG:lm



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL  
BOISE 83720

W. ANTHONY PARK  
ATTORNEY GENERAL

April 2, 1974

Tom D. McEldowney  
Commissioner of Finance  
State of Idaho Dep't. of Finance  
Building Mail

OFFICIAL OPINION #74-145

Dear Commissioner McEldowney:

I am in receipt of your opinion request of March 4, 1974, regarding electronically operated bank tellers, specifically "Ida", the Bank of Idaho automated teller. Your request was two-fold:

- 1) Whether automated tellers, since they can operate 365 days a year, are in violation of Idaho Code, 26-1002, and
- 2) Whether such machines, with such varied and multiple bank functions, are in reality a branch bank.

Please be advised that it is the opinion of the Attorney General's Office that automated tellers are in violation of Idaho Code, 26-1002 when they are operated on Saturday or Sunday. It is also the Attorney General's opinion that such machines are branch banks where they are located off the premises of an authorized branch or main office bank.

In your letter you enclosed a newspaper advertisement placed by the Bank of Idaho pertaining to "Ida". The script therein describes the function, operation, and capabilities of electronically automated bank teller machines and reads in pertinent part as follows:

"Ida is Bank of Idaho's Day and Night Teller.  
She works 24 hours a day, 365 days a year.  
She does everything you need; just like any other teller.  
Ida is an electronically automated machine of many talents. She will take deposits and

payments. She'll give you cash from your checking account or savings account. She'll transfer funds from your checking account to your savings account or vice versa."

The definition of doing a banking business is set out in the Idaho Code and has been laid down in case law. The following indicates what functions have been determined to be the carrying on of a banking business:

"26-102. Definition of bank--Classes of banks.--. . . The soliciting, receiving or accepting of money or its equivalent on deposit as a regular business shall be deemed to be doing a banking business, whether such deposit is made subject to check, or is evidenced by a certificate of deposit, a passbook, a note, a receipt, or other writing; . . ."

"Having a place of business where deposits are received and paid out on checks, . . . is the substance of the business of 'banking'.  
State of Kansas ex rel. Bognton v. Hayes,  
C.C.A. Kan. 62 F.2d 297, 600" 5 Words and  
Phrases, 185, Functions of banking business.

Applying the above-quoted definitions to the operations and functions of "Ida" or any electronically operated teller leads to the obvious conclusion that such machines conduct a banking business. Therefore, they are subject to the same statutes, regulations, and constraints as all Idaho banks.

In answer to your first specific question, please note that Idaho Code, Section 26-1002 reads in pertinent part as follows:

"26-1002. Transactions on holidays and Saturdays.--. . . provided, that no bank in this state shall keep open for transaction of business, or perform any of the acts or transactions aforesaid [bank transactions] on any Saturday or on any legal holiday. . ."

It must be noted that Idaho Code, Section 73-108 includes Sunday as a legal holiday. Therefore, it is the opinion of the Attorney General's Office that electronic tellers conduct a

banking business and, if they function on Saturday or Sunday they are being operated in violation of Idaho Code, Section 26-1002.

Turning now to your question of whether an electronically operated teller machine is in reality a branch bank, it must be noted that the term "branch bank" is not defined in the statutes pertaining to branches nor has it been defined in Idaho case law. The definition contained in the National Banking Act, 12 U.S.C. 36(f), reads, in pertinent part, as follows:

"(f) the term 'branch' as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business . . . at which deposits are received, or checks paid, or money lent."

This referral to the National Banking Act definition is justified due to the fact that the National Banking Act, Sections 36(c) & (d) are cited in 26-1001, Idaho Code as a guide to capital requirements for branches. Such referral indicates the legislature was aware of and, approved by implication, the provisions contained in the National Act. Further, a check of comparable state legislation discloses that the States' statutes either contain this definition, one very similar, or none at all.

This definition has been used to decide several bank cases which are pertinent to our issue of whether an automated teller machine can, under appropriate circumstances, be deemed to be a branch bank. In First National Bank of Logan v. Walker Bank & Trust Co., 425 P.2d. 414, 19 Utah 2d. 18 (1967) the question presented was whether a drive-in and walk-up bank facility was actually a branch bank. The bank facility was fifteen feet away from and not connected physically to the bank building except for pneumatic tubes which ran underground. The bank facility was used for the receiving and withdrawal of deposits and for cashing checks. In holding that the bank facility was not a branch bank but rather a contiguous unit of operation, the Utah Supreme Court essentially adopted the standard laid down in Jackson v. First National Bank of Valdosta, (D.C.M.D. 1965) 246 F. Supp 134, for determining whether a bank facility was actually a branch bank. The Utah Court quoted the Maryland Federal District Court as follows:

"These factors fall roughly into four categories: (1) the distance separating the main banking house and the 'drive-in-facility', (2) the number of intervening structures,



(3) the lack of physical connection between the main banking house and the 'drive-in-facility', and (4) the economic effect of the 'drive-in-facility' on the balance of competition between the Plaintiff bank and the defendant bank'" 425 P.2d at 418.

The case of First National Bank in Plant City v. Dickinson, et al., 396 U.S. 12 L. Ed. 2d 312, 90 S. Ct. 337 (1969) reh den 396 U.S. 1047, 24 L. Ed 2d 693, 90 S.Ct. 677 (1970) involved a national bank alleged to be conducting branch bank services in Florida, a state that prohibits branch banking. The first service was that of operating an armored car which had a plate glass window, a sliding drawer, and a counter on one side where customers might be served. This service was operated six days per week in Plant City and surrounding trade areas.

The second service was a stationary off-premises receptacle for receipt of moneys intended for deposit. This facility was located in a shopping center one mile from First National's banking house and consisted of a secured receptacle for money and night bags, together with a writing table supplied with envelopes and transmittal slips. The armored car serviced this depository daily.

Transmittal slips used in conjunction with both services contained a contract that stated the bank was the agent of the customer and that currency, coin, and checks would not be deemed to be deposited until delivered into the hands of the bank's teller at the main office.

The issue before the United States Supreme Court was whether, in light of Florida's prohibition of branch banks, the two services constituted a branch bank as defined in 12 U.S.C. 36 (f) of the National Banking Act cited above.

In its decision, the court examined the contractual agreement and stated that it was satisfied that at the time a sum of money is delivered to the armored truck or the depository, the bank had, for all purposes contemplated by Congress in § 36 (f), received a deposit. The court went on to say at 24 L. Ed. 2d 322.

"Since the putative deposits are in fact 'received' by a bank facility apart from its chartered place of business, we are compelled, in construing § 36 (f), to view the place of delivery of the customer's cash and checks accompanied by a deposit slip as an "additional office, or . . . branch place of business . . . at which deposits are received."

Based upon the reasoning in the Utah case, the precedent of the Supreme Court decision, and upon the conclusion that auto-

Tom D. McEldowney  
April 2, 1974  
Page 5

mated teller machines conduct a banking business, it is the Attorney General's opinion that such machines are branch banks if they are located off-premises of an authorized main office or branch bank. However, where a machine is located on-premises it is a contiguous operation of the existing branch or main office and not a branch in itself; but, as indicated above, whether or not it is considered a branch bank it cannot be operated on Saturday or Sunday in violation of 26-1002, Idaho Code.

The above opinions, 1) that automated teller machines operated on Saturday or Sunday are in violation of 26-1002 and 2) that these machines may be deemed branches depending on their location, are supported by an opinion of the Wisconsin Attorney General, a copy of which is attached and incorporated herein, which considered the exact issues here with the same definition of banking as contained in 26-1002, Idaho Code.

It should be noted at this juncture that the Commissioner of Finance, in his discretion, may authorize state banks by regulation to engage in activities that national banks are allowed to conduct. This power is pursuant to 26-1202A, Idaho Code, and is subject to approval by the legislature; i.e., if the legislature does not also authorize the activity by statute at the next session after the date of the regulation, the activity must cease.

However, even with this authority, the Commissioner may not authorize bank activity that is directly contrary to existing Idaho laws. Thus, in the situation at hand, if national banks can operate off-premises automated teller machines without the classification as branch banks, the commissioner could allow the same activity for state banks; but could not authorize such machines to operate on weekends in violation of 26-1002, Idaho Code.

I have, in this opinion, made mention of Bank of Idaho's electronic teller "Ida". The use of this term has been for descriptive purposes only and is not meant to single out any particular bank. This opinion applies to any electronically operated teller machine that is capable of performing banking functions as defined above.

I sincerely trust that this answers your questions.

Very truly yours,

FOR THE ATTORNEY GENERAL

WAYNE G. CROOKSTON, JR.  
Assistant Attorney General

*Banking—Branch Teller Machines*—Employment of teller machines at locations other than the main office or authorized branch of a bank constitutes branch banking and use of such machines at off-premises locations is subject to the provisions of sec. 221.04 (1) (j), Stats.

October 18, 1968.

ROGER L. HEIRONIMUS  
*Commissioner of Banking*

You have requested my opinion as "to whether it is permissible for our state-chartered banks to operate teller

machines at outside locations [not within the main office or at an authorized branch], and whether such operations would be a conflict in any way with the branch banking laws."

The most comprehensive description of the services or performance of the teller machine is advanced by one of the manufacturers who states:

"\* \* \* is the first major innovation for customer convenience since drive-in banking. It offers a unique opportunity to extend banking services. Your bank can now be open for business around the clock . . . even weekends and holidays. \* \* \* will serve, 24 hours a day, as your automatic deposit stations in public buildings, shopping centers, office buildings, and industrial plants. Each \* \* \* stands ready to receive payments on loans, Christmas savings, and deposits for savings and checking accounts. It accepts combinations of bills, coins and checks, and provides a validated receipt for the bank and the customer. \* \* \* offers advantages inside the bank as well as off premises. Customers appreciate the convenience of handling routine deposits automatically rather than waiting in line at teller windows during rush hours. They readily get the \* \* \* habit, and enjoy the simplicity of automatic depositing. \* \* \* offers a new, modern way to increase deposits and extend the services of your bank. We welcome the opportunity to discuss how it can serve you and your customers.

"\* \* \* are at work as off-premises depositories in a wide variety of locations. The photographs above show typical installations in (top, l to r) a bank entrance, serving both as a teller and night depository; and in a large regional shopping center. Other installations shown include (bottom, l to r) the employee entrance of a hospital; an industrial cafeteria; and the checkout area of a chain supermarket. In each location, \* \* \* serves as a reminder to customers to make deposits and payments this new, convenient way. It gains acceptance quickly, because it's providing a unique service to both the bank and the customer. \* \* \* puts the bank on location, right where the money is."

Sec. 224.02, Stats., defines banking as:

"The soliciting, receiving, or accepting of money or its equivalent on deposit as a regular business by any person, copartnership, association, or corporation, shall be deemed to be doing a banking business, whether such deposit is made subject to check or is evidenced by a certificate of deposit, pass book, a note, a receipt, or other writing, provided that nothing herein shall apply to or include money left with an agent, pending investment in real estate or securities for or on account of his principal. Provided, however, that if money so left with an agent for investment shall not be kept in a separate trust fund or if the agent receiving such money shall mingle same with his own property, whether with or without the consent of the principal, or shall make an agreement to pay any certain rate of interest thereon or any agreement to pay interest thereon other than an agreement to account for the actual income which may be derived from such money while held pending investment, the person receiving such money shall be deemed to be in the banking business."

In comparing the statutory definition of banking with the manufacturer's representations, there can be no argument that the services offered by the teller machine are to complement or extend the banking business or particular facet of the banking business to areas or locations beyond the present business offices of the bank.

In *MacLaren v. State*, (1910) 141 Wis. 577, our court held that banking business is being conducted within the purview of the statutory definition even though the business is engaged in but one of the defined functions.

In 51 OAG 145, this office stated:

"Neither the Wisconsin statutes nor Wisconsin case law offers a definition of the terms branch bank, branch office or bank station, but the terms must mean a branch, office or station located at least some distance away from the main office of the bank, at which some banking functions or services are carried on which a banking corporation is permitted to carry on at its main office. *MacLaren v. State*, (1910) 141 Wis. 577, 124 N.W. 667. Also see 49 OAG 9, 12-14, *Commercial State Bank of Roseville v. Gidney*, (D.C., 1959) 174 F. Supp. 770 Affd., C.A. 278 F. 2d 871, 108 U.S. App.

D.C. 37. *Marvin v. Kentucky Title Trust Co.*, (1927) 218 Ky. 135, 291 S.W. 17, 50 A.L.R. 1337.

"If a facility is a part and parcel of the main office, it cannot be a branch office or branch bank."

In a somewhat earlier opinion of this office, it was stated:

"It is pointed out that this is not an isolated case where a bank might send a messenger or even an officer over to some customer with the papers to fill out to complete a loan application. Such service rendered in isolated cases as a matter of courtesy could not properly be charged to be a violation of the branch banking law or of the statutory policy that banking must be conducted at the bank office. However, when by prior arrangement such conduct is carried on as a continual course of business, a violation of the policy against doing business away from the office of the bank may result. When such activity is carried on at a stated place, such as the office of the insurance agent or insurance company, it clearly is a violation of the branch banking law." 49 OAG 9.

I am of the opinion that employment of the teller machines at locations other than at the main banking office or authorized branch constitutes branch banking.

Since the above authorities and opinions referred to, the legislature has authorized branch banking by the enactment of sec. 221.04 (1) (j) [ch. 253, Laws 1967], which reads:

"221.04 (1) (j) To establish and maintain a branch bank, upon approval by the commissioner and the banking review board, in a municipality other than that in which the home bank is located, if such municipality has no bank or branch bank at the time of application and if no bank or branch bank is located within a radius of 3 miles from the proposed site of the branch; however, such 3-mile limitation shall be computed by measuring the street or road mileage of that route which the commissioner and board find would be ordinarily and customarily traveled as the shortest distance between such bank or branch bank and the proposed site of the branch. A branch bank established under this paragraph shall be located in the same county in which the home bank is located or in a contiguous county if the

location of such branch bank is no more than 25 miles from the home bank. Such branch banks shall be subject to all laws, rules and regulations applicable to banks generally. Application for the establishment of a branch bank under this paragraph shall be made to the commissioner on a form furnished by him."

Consequently, as the services performed by the teller machine constitute banking within the statutory definition, the installation and location of a teller machine off the premises of the business offices of the bank or authorized branch, falls within the purview of our branch banking law or sec. 221.04 (1) (j), Stats. As a branch bank, the off-premises location or installation of the teller machine is subject to the approval of the banking commissioner and the banking review board and the location restrictions of sec. 221.04 (1) (j), Stats.

Further, as a branch bank, the teller machine is, by virtue of sec. 221.04 (1) (j), Stats., "\* \* \* subject to all laws, rules, and regulations applicable to banks generally. \* \* \*" In this regard, it is difficult to see how the teller machine will comply with these general regulations. For example, the teller machine will have to observe the provisions of sec. 220.29, Stats., pertaining to legal holidays. On the other hand, one of the attributes of the teller machine, as advanced by the manufacturer, is that it will be in service on such days. Moreover, as a branch bank, it will be subject to Wis. Admin. Code, Ch. Banking 8. I am without sufficient information or knowledge as to the working of the teller machine upon which to base an opinion as to whether it would or could comply with the regulations of Ch. 8 but in any event, as a branch bank, it must.

In conclusion, it may be stated that a teller machine may be authorized as a branch bank by the commissioner and banking review board provided it meets the locational requirements of sec. 221.04 (1) (j), Stats., and further provided that it is capable of meeting all the laws, rules and regulations applicable to banks generally and to branch banks specifically.

BCL:CAB

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April 4, 1974

Mr. Ron Schilling  
Prosecuting Attorney  
Clearwater County  
P. O. Box 1680  
Orofino, Idaho 83544

OFFICIAL OPINION #74-146

Dear Mr. Schilling:

We have your recent letter asking whether or not the Clearwater County Clerk of Court can employ as a Deputy Clerk a person who is a citizen of Canada.

The case of In Re Case, 20 Idaho 128, 116 P. 1037 (1911) answers your question. There an Idaho statute made it unlawful for any county government, municipal or private corporation to give employment to an alien who has failed, neglected or refused to become a citizen or to take out citizenship papers or declare his intention to become a citizen. In that case, the syllabus of the Court reads as follows:

"1. Under the provisions of sec. 1 of art. 14 of the amendments to the federal constitution, persons residing within the United States cannot be deprived of life, liberty or property without due process of law, nor shall there be denied to any person within its jurisdiction the equal protection of the laws.

"2. All persons residing within the territorial jurisdiction of the United States are within the protection of the fourteenth amendment of the constitution, without regard to differences or race, color or nationality.

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Mr. Ron Schilling  
April 4, 1974  
Page 2

"3. Where a state statute is in conflict with the provisions of the fourteenth amendment to the constitution and deprives a person of the right to labor, it deprives him of a constitutional right and is void.

"5. Held, that sec.1458, Rev.Codes, is repugnant to the constitution and laws of the United States and void."

We believe the above obviously provides the answer to your question. No other such statute has been enacted since the time of that decision. A person should not be denied employment because of his national origin.

Very truly yours,

FOR THE ATTORNEY GENERAL

WARREN FELTON  
Deputy Attorney General

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OPINION

April 9, 1974

Mr. D. F. Engelking  
Superintendent of Public Instruction  
BUILDING MAIL

OFFICIAL OPINION #74-147

Dear Mr. Engelking:

We wish to respond to your request for our opinion on whether a child who does not reach his 6th birthday until after October 15th in the year in which the child attempts to enroll may enter the first grade in that district.

The statutes concerning school-age children determine that a school-age child is one who has reached his 6th birthday by October 15th of the year in which he wishes to enroll. To enroll a child in the first grade who does not reach that age by that particular time means that the district that enrolls the child may not count that child in its average daily attendance for State distribution of funds under the foundation program.

We do not know, nor can we speak to, the wisdom of any change or exception to any school district policy, nor are we aware of any of the school districts' policy in this particular instance. The only thing we could recommend in this matter is that the school district be prepared to live with whatever decision it makes with regard to its own policy and the admission of a child who does not reach the age of six by October 15th of the year in which the child enrolls. We can only state that as far as the State of Idaho is concerned, the district that enrolls such a child may not count the child in its average daily attendance.

We hope we have been of assistance.

Very truly yours,

FOR THE ATTORNEY GENERAL

JAMES R. HARGIS  
Deputy Attorney General

STATE OF IDAHO  
OFFICE OF THE ATTORNEY GENERAL  
BOISE

April 10, 1974

SUBJECT: Interpretation of Senate Bill 1527 that appropriated moneys from the general fund for personnel costs for fiscal year 1975, prescribed distribution thereof, stated legislative intent, and prescribed additional duties of the Board of Examiners.

Mr. H. Fred Garrett  
Executive Director  
Department of Employment  
Box 35  
Boise, Idaho 83707

Official Opinion #74-148

Dear Mr. Garrett:

You have requested a legal opinion of the meaning of Senate Bill 1527, as amended, which was passed by the Second Regular Session of the Forty-second Legislature and signed into law by the Governor on April 5, 1974. The Bill deals with personnel costs of state executive agencies, both those known as general fund agencies and those known as dedicated fund agencies.

The act accomplishes several things:

Section 1 provides that the appropriations made therein are to be used to defray personnel costs in addition to, and not in lieu of, the revised compensation schedule to be effective July 1, 1974, as approved by the Personnel Commission on October 19, 1973, and as further approved by the Director of Administration, for the Governor, on December 10, 1973, or such other classification plan as may be approved by such authorities to be effective July 1, 1974.

The compensation schedule approved by the Personnel Commission and the Director of Administration accomplished these three things:

1. Raised the minimum salary to be paid to state employees to \$385.00 per month. This was accomplished by the issuance of a new compensation plan reflecting that change.

2. Reallocated employees in classes lagging farthest behind prevailing rates. This was accomplished by issuing a new classification

plan reflecting those changes.

3. After accomplishing the objectives enumerated in 1 and 2 provides for a general salary increase of 2.5 per cent effective July 1, 1974. This was accomplished by the issuance of the new compensation plan referred to in 1 above.

Section 1 also appropriates \$1,600,000 to provide for minimum salary or wage increases for certain pay grades as follows:

<u>Grade</u>	<u>Annual Dollar Increase</u>
1	\$ 720
2	516
3	444
4	348
5	312
6	288
7	252
8	216
9	168
10	144
11	84
12	36
13	00

The appropriation of the \$1,600,000 is to provide the necessary funds to those state agencies which are financed from the general fund to enable them to implement these minimum increases. The money is not appropriated to affect or interfere with the re-allocations or the 2.5 per cent general salary increase but is in addition to those two increases. Those state agencies which are not general fund agencies are to implement like minimal increases and are authorized to transfer funds from one fund to another, or from program to program or to use unappropriated or dedicated funds for such purposes. Without this specific mandate it is unlikely that those funds could be so transferred for the payment of salaries.

During debate on Senate Bill 1527 it was pointed out that many state agencies did not have the money to implement the re-allocations provided in the classification plan approved by the Personnel Commission and the Director of Administration. In response to this the Bill was amended in order to add Section 2.

Section 2 appropriates \$1,011,400 to be used by the general fund agencies to defray personnel costs incurred as a result of the revised classification plan (i.e., the re-allocations) approved by the

Personnel Commission and the Director of Administration, or such other classification plan as may be approved by such authorities to be effective July 1, 1974. Once again the non-general fund agencies are authorized to transfer funds in order to accomplish the re-allocations.

It is important to note the use of the terms "compensation plan" or "compensation schedule" and "classification plan." A compensation plan and a classification plan are not the same thing. Each state department is to develop, adopt, and make effective after approval by the Personnel Commission and the Director of Administration a compensation plan for all classes of positions covered by the Personnel System which shall include salary schedules with the salary of each position consistent with the responsibility and difficulty of the work as outlined in the job specifications. It shall be the policy of the Personnel Commission, as required in the law, to maintain pay scales comparable to compensation for equivalent grades in industry and government. The classification plan for each position covered by the act is based on an analysis of the duties and responsibilities of the position and includes an appropriate title for each class, a description of the duties and responsibilities of the positions in the classes and requirements of minimum training, experience and other qualifications suitable for the performance of duties of the position. (Section 67-5309(a) and (b), Idaho Code)

Whereas, one might argue with the application of the term "classification plan" to "re-allocations", any one who is familiar with the legislative history of Senate Bill 1527, as amended, with the debate which accompanied its passage and with the appropriation contained in Section 2 therein is led inescapably to the conclusion that the classification plan referred to in the act is meant to apply to the re-allocations approved by the Personnel Commission and the Director of Administration.

The use of the term "classification plan" cannot be considered to be an exercise in legislative futility. The legislature must be presumed to know the difference between a classification plan and a compensation plan. The legislature adopted the compensation plan, or at least by implication approved it, which was approved by the Personnel Commission which mandated a new minimum wage for state employees and a 2.5 per cent general salary increase. In addition thereto the legislature mandated a compensation plan which would reflect certain minimum annual increases in salary for specified pay grades. It also mandated the re-allocations approved by the Commission unless the Commission adopts another classification plan.

One question that might be asked is whether the legislature intended to include the 2.5 per cent increase that is to be granted to all employees within the minimum increases mandated to those within pay grades 1

April 10, 1974

through 12. The act says that the appropriation is to defray personnel costs in addition to and not in lieu of the revised compensation plan which includes the 2.5 per cent increase, and further that the appropriation is to be used to provide the minimum in salary or wages according to the schedule listed in the Bill. Therefore, the 2.5 per cent increase is to be in addition to the minimum appropriated in the \$1,600,000 appropriation. This conclusion seems justified also from the fact that some of the minimums provided for in the Bill do not amount to a 2.5 per cent increase.

One additional problem is that the classification plan (i.e., re-allocations) approved by the Commission includes re-allocations of many of the grades given a substantial increase as a result of minimal salary increases ordered by the act. Did the legislature intend these grades to receive the minimum increase, the 2.5 per cent increase and the re-allocations? It is of course possible to grant all of these increases under the provisions of the Bill. On the other hand the Commission is free to approve a different classification plan (i.e., new re-allocations) which would permit departments to use some of those funds which would go to those re-allocated grades already receiving the 2.5 per cent general increase together with a substantial increase as a result of the mandated minimum increase to provide for re-allocations for those grades not presently scheduled for re-allocations. All the Bill requires is that the grades specified therein be granted the minimum mandated and the 2.5 per cent.

One important aspect of the law must be emphasized. Each department is responsible for developing, adopting and making effective a compensation plan and therefore the department has not only the right but the duty to instigate a plan. The Commission is not to instigate the plan but rather only to approve the one submitted by the department and the disapproval is justified only if the plan proposed by the department violates the Commission policy to maintain pay scales comparable to compensation for equivalent grades in industry and government.

The compensation plan referred to in Senate Bill 1527 does not override the authority or responsibility of each department to instigate, upon approval, its own compensation plan. It does approve re-allocations and provide for uniform salary increases for all state employees within its jurisdiction in accordance with the Commission's duty and authority. The Bill itself not only acknowledges the role of the Personnel Commission but also imposes minimum standards for salary increases in specified grades.

It appears that a plan submitted to the Commission which reflects the views enunciated herein and requirements of Senate Bill 1527 should be approved. If no plan is submitted, the Bill will at least implement

Mr. Garrett

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April 10, 1974

certain minimum salary increases, the general 2.5 per cent raise, and the re-allocations already approved.

Very truly yours,

FOR THE ATTORNEY GENERAL

---

R. LAVAR MARSH  
Assistant Attorney General

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RAYMOND N. MALOUF  
Assistant Attorney General



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

W. ANTHONY PARK  
ATTORNEY GENERAL

April 11, 1974

Mr. Jerry Hill  
Deputy Secretary of State  
Office of the Secretary of State  
BUILDING MAIL

OFFICIAL OPINION #74-149

Dear Mr. Hill:

You have asked for my opinion on the meaning of certain language contained in Section 34-1807, Idaho Code, which statute outlines the requirements of the verification portion of initiative and referendum petitions. The language in question reads as follows:

State of Idaho     )  
                              : ss.  
County of \_\_\_\_\_)

I, \_\_\_\_\_, being first duly sworn,  
say: that every person who signed this  
sheet of the foregoing petition signed his  
or her name thereto in my presence; I be-  
lieve that each has stated his or her name,  
post-office address and residence correctly,  
that each signer is a legal voter of the  
state of Idaho, and county of \_\_\_\_\_.

Signed \_\_\_\_\_  
Post-Office Address \_\_\_\_\_

Subscribed and Sworn to before me this \_\_\_\_\_  
day of \_\_\_\_\_, 19 \_\_\_\_.

(Notary Seal)

\_\_\_\_\_  
Notary Public  
Residing at \_\_\_\_\_



Mr. Jerry Hill  
April 11, 1974  
Page 2

Your question concerns the requirement that the verifier of an initiative or a referendum petition swear that each signature on a particular petition that he circulated is the signature of a legal voter of the "county of \_\_\_\_\_."

If a verifier complies with the above stated form of the verification block, his petition must necessarily contain signatures of electors registered in only one county. Compliance with the above stated form would prevent the circulator of a petition from securing names of electors registered in different counties. The effect of compliance with the above stated form appears to pose a problem for circulators of petitions on a college campus, where potential signers are often registered in counties other than the one in which the college is located. Your inquiry asks whether Section 34-1807, Idaho Code, actually does pose such a problem. I regret to conclude that it does.

Although I am in sympathy with the plight of the campus petitioner, Section 34-1807, Idaho Code requires the verifier to swear to his belief that each signer of an initiative or referendum petition which the verifier has circulated lives in a particular county. The form set out in Section 34-1807, calls for the county residency information to be supplied in the verification block. While it should be noted that Section 34-1807 specifically states that the forms contained within that section are "not mandatory", that section also requires that any alternative form must substantially follow the form outlined in Section 34-1807. Information regarding the county in which a signer is registered is highly essential information, without which it would become exceedingly difficult to have the signatures on the petitions compared with signatures on the signers' registration oaths. Signature comparison, in initiative and referendum procedure as well as voter registration, is a necessary preventative against fraudulent participation in the process. Voter registration records, which contain the signatures with which the petition signatures are compared, are kept by each elector's respective county clerk. It is my opinion, therefore, that any form of verification block which does not require verification of county residency is insufficient to meet the requirements of Section 34-1807, Idaho Code.

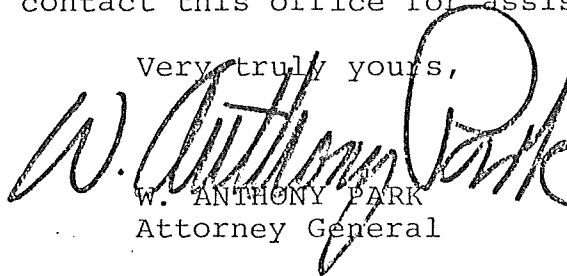
The circulators of the petitions must submit them to the county clerks of the counties in which the petitioners are registered to vote. I see for them no reasonable administrative alternative to limiting all of the signatures on a particular petition sheet to the electors of the same county.

Mr. Jerry Hill  
April 11, 1974  
Page 3

I am aware that the effect of complying with the requirements of Section 34-1807, Idaho Code, works a certain hardship on campus petitioners. I am not convinced, however, that compliance makes it "logistically impossible" to circulate initiative and referendum petitions on a college campus. I would informally suggest that the college circulators of an initiative or referendum petition prepare a series of petitions, one for each county in the State. (Ada County registrants would sign one, Benewah County registrants another, and so on.) The circulators could either carry the entire series from one campus residence to another or set up a central location to which signers could be directed. Perhaps more imaginative alternatives could be developed.

Do not hesitate to contact this office for assistance.

Very truly yours,



W. ANTHONY PARK  
Attorney General

WAP:JFG:cg

April 15, 1974

Mr. Leslie T. Lund  
Chief, Weighstation Division  
Department of Law Enforcement  
Building Mail

"OFFICIAL OPINION #74-150"

Re: Section 67-2927, Idaho Code  
Stopping & Inspection of Motor Vehicles  
at Ports of Entry or Checking Stations

Dear Mr. Lund:

I am in receipt of your request of April 8, 1974, for an Official Attorney General's Opinion as to the following question:

"Would an empty truck be required to stop at a Weighstation for inspection?"

Section 67-2927, Idaho Code, provides:

"67-2927. Stopping and inspection. - Wherever by the laws of the state of Idaho any merchandise, product or commodity being transported within the state ... is subject to the payment of a license or tax, a weight limitation, or is subject to inspection or grading by any department or agency of the state of Idaho, the owner or operator of either the motor vehicle or trailer, as defined in chapter 5, title 49, Idaho Code, transporting such merchandise, product or commodity, is hereby required to stop at such ports of entry or checking stations established by the commissioner of law enforcement and submit to inspection, grading or weighing, for compliance with the laws of the state of Idaho..." (Emphasis mine)

Section 67-2927, Idaho Code, requires only "motor vehicles" and "trailers", as defined in Chapter 5 of Title 49, Idaho Code, which include truck tractors, trucks, trailers, semi-trailers and pull trailers, transporting the commodities listed in the above quoted section and subject to inspection or grading or taxation, or the vehicle or combination of vehicles subject to weight restrictions to stop for inspection. See State v Hahn,

April 15, 1974

92 Idaho 265,267, wherein the Idaho Supreme Court held that Section 67-2927, Idaho Code, required the owner or operator of a truck to stop at a port of entry or checking station and submit to inspection for compliance with the laws in this state only if the transported commodity is subject to the payment of a license or tax or is subject to inspection or grading by any department or agency of the state.

The three primary purposes of our ports of entry and weigh stations are:

- (1) To determine whether the vehicles are over weight and could cause damage to the public highways;
- (2) For the purpose of collecting license fees and taxes, and
- (3) To inspect or grade commodities which could have a harmful effect to agriculture or livestock products being produced in the state or dangerous to public health and environment.

Thus, not every motor vehicle and trailer need stop at checking stations or ports of entry. Nor would every vehicle defined in Section 49-502, Idaho Code, be required to stop.

We recommend that an amendment be made to the Idaho Code specifying particularly those vehicles which must stop at ports of entry or weighstations irregardless whether they are loaded or not.

Very truly yours,

FOR THE ATTORNEY GENERAL,

JAMES W. BLAINE,  
Deputy Attorney General  
Assigned to the Department  
of Law Enforcement

JWB/b



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

W. ANTHONY PARK  
ATTORNEY GENERAL

April 12, 1974

Mr. Gerald L. Harrington  
Executive Secretary  
Idaho State Horse Racing Commission  
Hotel Boise, Room 319  
Boise, Idaho 83702

OFFICIAL OPINION #74-151

Re: FBI Fingerprint Cards

Dear Mr. Harrington:

Concerning your request for our evaluation of the FBI "rap sheets" with which you are concerned in trying to determine the appropriate course of action to be taken in regard to applications for licenses which contain negative responses to the question about prior convictions and/or arrests, I would offer the following:

At the outset, it should be observed that Idaho Code, Section 54-2508 provides, "No person who has been convicted of any crime involving moral turpitude shall be issued a license of any kind, . . .". This section does not refer to felonies or misdemeanors, but rather to crimes involving moral turpitude.

Crimes involving moral turpitude are defined by Ballantyne's Law Dictionary as:

"Baseness, vileness, or depravity in the private and social duties which a man owes to his fellow man or to society in general. . . . something immoral in itself, irrespective of the fact that it is punished by law.  
. . .

"The term 'crime involving moral turpitude' as found in the immigration act connotes something more than illegal or criminal. It implies an act which is contrary to the accepted and customary standard of right and duty between

Mr. Gerald L. Harrington  
April 12, 1974  
Page 2

man and man prevailing of the United States. The test is not dependent upon a classification between felonies and misdemeanors nor upon a distinction between infamous and not famous offenses.  
. . . "

It is probably safe to say that one cannot read the foregoing definition and immediately be able to differentiate between crimes for which a license may not be issued in Idaho and crimes that are not relevant to the issuance or nonissuance of an Idaho racing license. There are just not adequate definitions to be found in Idaho law to determine in every case whether the crime charged involves "moral turpitude". So, you are left with a large amount of discretion in dealing with the issuance of racing licenses to persons who have been convicted of crime. But, you ask, the people you are concerned with lied on their applications when they replied in the negative to the question, "Have you ever been arrested . . .". In response to this query, we have to consider constitutional guarantees of equal protection of the law and due process of law. If you cannot refuse a man a license because he has been arrested or convicted for speeding or overparking, can you then deny him a license if he answers no to the query has he ever been arrested for these crimes? Based on due process and equal protection arguments, our courts have almost universally said "no" to that question. You cannot deny him a license.

The conclusion to be drawn from this discussion is that discretion also must be used on your part in denying a man a license because he answered in the negative your query relative to arrests and convictions.

The FBI fingerprint records which you exhibited to me recently exhibited a number of situations where, in my opinion, it would be neither inappropriate nor incorrect for a person to respond in the negative to your arrest query. The FBI fingerprint cards are nothing more than just that, fingerprint cards. If a person is arrested for a crime and is fingerprinted by the arresting authorities, those fingerprints are forwarded to the FBI for storage and processing. If the man is held in jail in lieu of bond and is transferred from jail to jail, very often he will be fingerprinted at each new place of detention, and those fingerprints will also be forwarded to the FBI for storage and processing. If then, the man goes to trial and is convicted, generally speaking his fingerprints are again taken and again forwarded to the FBI. Now let's assume after an

Mr. Gerald L. Harrington  
April 12, 1974  
Page 3

arrest the person is held in detention for a period of time, transferred from jail to jail and eventually it is discovered that he was not guilty of the crime with which he was charged, either through the discovery of other evidence or through acquittal by a court or jury. On the FBI fingerprint card though, it would appear at first blush that he has been charged a number of times and it might well be assumed that he was convicted each time. Now, it is concluded above that you cannot deny him an Idaho racing license on the basis of this arrest record.

Based on the evidence that you can gain from the FBI fingerprint cards which you have, you have, in my opinion, several different classes of cases. The first case is where the fingerprint card shows arrests for misdemeanors only, but does not reveal whether the individual has been convicted. In those circumstances, the only permissible conclusion for you to reach is that he was not convicted. The second class of case is where the FBI fingerprint card shows arrests for felony crimes, but correspondingly does not reveal that the individual was convicted of those crimes. In those circumstances, as in the first case above, the only permissible conclusion that you can reach is that the individual was not convicted of the charged crimes. In the third set of circumstances, the fingerprint card reveals an arrest for a felony and conviction of the felony. In that case and in that case only, can you conclude that the individual was actually convicted of the charged crime. In the above cases, you must then decide whether the crime charged of which the individual was convicted is a crime involving moral turpitude. If it was, you may then deny the person a license under Idaho law and in other circumstances you may not deny him a license because of the moral turpitude section of our racing law. Whether you deny him a license because he has answered in the negative to your query whether he has been arrested or convicted is in your own discretion, but it is the opinion of this office to do so would be in violation of constitutionally protected rights of an individual.

To restate my conclusion, you may not deny a person a racing license because he has answered in the negative to your question relating to his prior arrest and conviction record unless you are satisfied from the evidence before you that he has been convicted of a crime involving moral turpitude. Then the basis of your denial of the license must be on the basis of a conviction and not the response to the question in your application. A person may not be charged or convicted of perjury because he gives a false statement on your application,

Mr. Gerald L. Harrington  
April 12, 1974  
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and so to deny him a valuable right on that basis does not measure up to our constitutional mandate of due process.

If you desire further clarification in this area, please advise.

Very truly yours,

FOR THE ATTORNEY GENERAL

CLARENCE D. SUITER  
Chief Deputy Attorney General

CDS:cg



April 12, 1974

Mr. Richard J. Hutchison  
Deputy Director  
Idaho Personnel Commission  
Building Mail

OFFICIAL OPINION #74-152

Dear Mr. Hutchison:

You have asked for opinions on three different questions which appear to arise out of a conflict between Section 67-5309A and Section 67-5316 of the Idaho Code.

Section 67-5309(j), Idaho Code, provides for the establishment of "probationary periods" during which a new employee may be discharged, or a newly promoted employee may be removed to his former position, upon an arbitrary determination by his appointing authority that he has performed in an unsatisfactory manner. Rule 15 of the Idaho Personnel Commission details the length and other particulars of the probationary periods. This opinion shall bear only upon the rights of employees serving their initial probationary periods, as none of your inquiries concern employees serving under their promotional probationary periods. Thus, a "probationary employee", for the purposes of this opinion, shall be an employee serving under his initial probationary appointment.

Section 67-5316, Idaho Code, provides grounds and procedures for the airing of an employee's complaint before the Idaho Personnel Commission. Where an employee's discharge, demotion, or suspension for over 30 days is an issue, this statute expressly limits its availability to permanent employees. On the other hand, Section 67-5309A, Idaho Code, which provides for the establishment of grievance procedures by agencies under the Idaho Personnel Commission, does not expressly limit its applicability to permanent employees; thus it appears, at first blush, that an employee serving under his initial probationary appointment might be denied the right to lodge a complaint concerning his discharge, demotion or suspension for over 30 days before the Idaho Personnel Commission, but allowed to raise the same complaint for his own agency's grievance board.

Is this truly the case? And what rights are available to the probationary employee who wishes to complain of matters other than discharge, demotion or suspension for over 30 days? After a careful reading of the applicable statutes, it is my opinion that in some instances a probationary employee may utilize his agency's grievance procedures and appeal its decision to the Idaho Personnel Commission. In some instances he may complain to his agency's grievance board but can proceed no further. In some instances he can complain to no tribunal at all. A distinction must be made between three types of complaints:

- 1) The complaint of a probationary employee who had been discharged.
- 2) The complaint of a probationary employee who has been demoted or suspended for a period of over 30 days.
- 3) All other complaints--i.e., the complaint of a probationary employee who has been disciplined to a lesser degree than that stated in "1)" or "2)" above or the complaint of a probationary employee concerning dangerous working conditions, discriminatory practices, and the like.

Your first question asks whether a State classified employee in his initial probationary appointment can be "discharged or disciplined" without cause. If the answer to that is affirmative, your second question asks whether such an employee has the right to appeal the decision to discharge or discipline him to his agency's grievance committee. If he can appeal, your third question asks whether the decision of the grievance committee is appealable to the Idaho Personnel Commission. All of your questions are answered below, but it must be noted that your questions do not distinguish between the three types of complaints outlined above. Necessarily, I have made the distinctions in the answers.

I.

DISCHARGE

The language of Section 67-5309(j), Idaho Code, is clear in its provision that State classified employees in their initial probationary appointments can be discharged by their respective agency's without a showing of cause. To put it more distinctly, Section 67-5309(j) authorizes the discharge of a probationary employee upon the arbitrary determination of his agency's appointing authority that his performance during the probationary period has been unsatisfactory. That determination is "arbitrary" since all

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that is required to discharge a probationary employee, according to the provisions of Section 67-5309(j), is an allegation by the employee's appointing authority, which allegation need not be documented or explained, that the employee has performed unsatisfactorily. Furthermore, the express provisions of Section 67-5309(j) deny an employee so discharged any right of "appeal". Additionally, Section 67-5316, Idaho Code, expressly limits the right of an employee to appeal to the Idaho Personnel Commission a discharge, demotion or suspension for a period of time over 30 days to employees that have completed their probationary period of service.

But, if the probationary employee cannot appeal a discharge to the Idaho Personnel Commission, can he nonetheless appeal such a matter to his own agency's grievance board? It is my opinion that he cannot. First of all, it must be noted that the purpose of the initial probationary period is to allow the public employer the opportunity to examine the newly hired employee on the job. In a sense, the initial probationary period is part of the merit testing system. An employee serving under an initial probationary appointment is, in actuality, taking an on-the-job examination.

The State's prerogative to discharge a probationary employee without a showing of cause is the essence of the probationary period. It affords the State a route by which it may sever an employee from employment unsuited to him without the burden of explaining why the employment was unsuitable. The probationary period represents the final phase of the testing procedure. It gives the hiring agency an opportunity to correct whatever errors may have been made in the merit testing system that placed the employee in the work slot in question. The employee's welfare is of primary concern. It should not be overlooked that before an appointing authority may discharge the probationary employee, he must first offer him the opportunity to resign. If the probationary employee should refuse to resign, the appointing authority may then discharge him. By giving the employee the opportunity to resign, the probationary period scheme actually protects the employee by preventing a firing from appearing on his record when the employee was simply unsuited to the job in which he was placed.

Secondly, Section 67-5309(j), Idaho Code, flatly denies to the probationary employee the right to "appeal" his discharge. Although the statute does not specifically refer to either the Idaho Personnel Commission or an agency's particular grievance procedures, I read Section 67-5309(j) to apply to both. It is my opinion that a discharge appeal can be taken to neither body. To read the statute otherwise would be inconsistent with the above stated purpose in creating the initial probationary period. Moreover, my interpretation of Section 67-5309(j) cannot presume such an unlikely legislative scheme whereby a probationary employee could appeal his discharge to the grievance committee of the very agency whose appointing authority had fired him, but could not appeal that body's decision

to the Idaho Personnel Commission and grievance committee appeals.

## II.

### DEMOTION, OR SUSPENSION FOR OVER 30 DAYS

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A different situation occurs where the probationary employee seeks review of his agency's decision to demote him, or suspend him for a period of over 30 days. As noted above, Section 67-5309(j), Idaho Code, denies appeal of a discharge to either the Personnel Commission or the employee's grievance board. As noted above, Section 67-5316, Idaho Code, denies to probationary employees the right to appeal a discharge, demotion, or suspension of over 30 days to the Idaho Personnel Commission. But, as noted above, Section 67-5309(A), Idaho Code does not distinguish between the rights of a permanent employee and the rights of a probationary employee. It is my opinion that a demotion or suspension of over 30 days is a matter which may be brought before the employee's grievance committee. The rationale underlying the denial of an appeal of a discharge, i.e., the protection of the probationary period itself, does not extend to demotions or suspensions. These lesser punishments, often meted out by an intermediary supervisor, ought to be reviewable by the employee's own grievance committee even though the decision of a grievance committee on such a matter is specifically prohibited from ultimate appeal to the Idaho Personnel Commission.

## III.

### WORKING CONDITIONS AND SIMILAR COMPLAINTS

A still different situation presents itself when a probationary employee attempts to bring a matter other than discharge, demotion or suspension for over 30 days to his agency's grievance committee. Nothing in the language of Sections 67-5309(j), 67-5309A, or 67-5316, Idaho Code, expressly denies to a probationary employee the right to bring complaints about working conditions, discriminatory treatment, and the like to the attention of his agency's grievance committee. While the above discussed legislative purpose can be identified in denying the probationary employee the right to appeal to his grievance committee his discharge for his own unsatisfactory performance, I can find no similar legislative purpose in denying him the right to lodge a complaint about his agency's performance. Even if the initial probationary period is characterized as an extension of a merit test, should this "on-the-job" portion of that "test" be defective, the probationary employee ought to be allowed to enter a grievance concerning the matter. It is arguable that by making the grievance procedures available to the probationary employee a risk is created that his agency might discharge such an employee who brings a grievance. In my opinion, however, a retaliatory firing

Mr. Richard J. Hutchison  
April 12, 1974  
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is unlikely at the appointing level of responsibility. Agency directors generally wish to be made aware of dangerous working conditions, discriminatory actions by lesser authorities, and similar problems within their own agency.

#### CONCLUSION

For the reasons outline above:

- 1) It is my opinion that an employee serving under his initial probationary appointment cannot utilize his agency's grievance procedures, nor carry any form of appeal to the Idaho Personnel Commission as to his discharge.
- 2) It is also my opinion that an employee serving under his initial probationary appointment can utilize his agency's grievance procedures to contest a demotion, or suspension for over 30 days, but may not carry an appeal of the grievance committee's decision to the Idaho Personnel Commission.
- 3) Finally, it is my opinion that an employee serving under his initial probationary appointment may utilize his agency's grievance procedures to complaint of working conditions and the like, and has the right to appeal the grievance committee's decision to the Idaho Personnel Commission.

Very truly yours,

W. ANTHONY PARK  
Attorney General

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April 15, 1974

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Mr. Bob J. Waite  
County Clerk  
Idaho County  
Grangeville, Idaho 83530

OFFICIAL OPINION #74-153

Dear Mr. Waite:

We have your letter asking the following question:

"Has the Board of County Commissioners, under Sec. 40-501, paragraph (4), I.C., and Sec. 50-1317, I.C., the authority to vacate an unused road adjacent to, but outside a platted, unincorporated town, said road lying within an existing highway district."

The last phrase of your question is the controlling portion of your question. Since the road is in an existing highway district, the Board of Commissioners of the Highway District are the persons who have the right to alter or abandon any public highways within the highway district. Section 40-1614, Idaho Code, reads as follows:

"The highway board shall have power to receive road petitions and lay out, alter, create and abandon public highways within their respective districts, subject to an appeal therefrom to the district court of the judicial district in which such highway district is situated, in the same manner in which appeals are taken from the board of county commissioners to the district court; provided, however, that where highways furnish public access to public lands, state or federal, and/or public waters, before the same may be abandoned the highway board must first be in receipt of a petition for abandonment

Mr. Bob J. Waite  
April 15, 1973  
Page 2

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and that no abandonment shall be made without conducting a public hearing thereon, notice of which hearing shall be published at least once a week for four (4) successive weeks in some newspaper of general circulation in a county in which the highway district is wholly or partially located, at which hearing any person may appear and show cause for or against abandonment. If it appears at such hearing that the highway does serve a public use, said highway may not be abandoned without first providing other suitable public access route or routes to said public lands and/or public waters at the expense of the party petitioning for abandonment of the highway."

As you can see from the above quoted section, the highway board is the one that has the power to alter or abandon a public highway within the highway district, not the county commissioners. Therefore, it would seem that in abandoning the road you refer to in your question, the matter should be referred to the highway district board and should be handled under Section 40-1614, Idaho Code.

Section 40-501, Idaho Code, relates to roads under the supervision and control of the county commissioners. Since there is a highway district in your county, the county commissioners do not have jurisdiction over these roads; the commissioners of the highway district have this jurisdiction. As to Section 50-1317, Idaho Code, it does not apply since the road is not in the city or township.

Very truly yours,

FOR THE ATTORNEY GENERAL

WARREN FELTON  
Deputy Attorney General

WF:cg

April 18, 1974

Colonel L. Clark Hand  
Superintendent, Idaho State Police  
Building Mail

"OFFICIAL OPINION #74-154"

Re: House Bill 444 - Maximum Speed Limit  
1974 Legislative Session Laws

Dear Col. Hand:

On January 2, 1974, the Federal Government adopted P.L. 93-239, declaring an emergency in the gasoline and oil industry and placing a maximum speed limit of 55 miles per hour upon all highways within each state. The public law requires that a state sharing in Federal highway trust funds must establish a maximum speed limit of 55 miles per hour or forfeit Federal highway funds.

The 1974 Session of the Idaho Legislature, by H.B. 444, met the requirements of P.L. 93-239 by amending Section 49-701(b), Idaho Code. A House of Representatives amendment provides that the maximum speed limit in the State of Idaho shall be 55 miles per hour on any highway within the state during the emergency declared by P.L. 93-239, and that such maximum speed limit shall continue until the President of the United States declares there is no fuel shortage or until June 30, 1975, whichever date occurs first.

The Senate further amended the bill to provide the maximum fine of \$5.00 for exceeding 55 miles per hour but not exceeding the prior posted speed limit.

In addition, the legislature declared no jail sentence shall be imposed on such speeding conviction, nor shall such a conviction result in assessment of point counts under Section 49-330, Idaho Code, nor shall such a conviction be deemed a moving traffic violation for the purpose of establishing rates on motor vehicle insurance.



Thus, when a trooper issues a citation for speeding, (over 55 miles per hour) the citation must show the alleged speed, the location of the violation and the prior posted limit. Section 49-701, Idaho Code, as amended by the 1974 Session of the Idaho Legislature, has been assigned Chapter Number 325 for the purpose of the Idaho Session Laws, effective on the 5th day of April, 1974. We are attaching a copy of the amended section and would suggest copies of this law be furnished each member of your force.

Section 49-701(a) and (b) will still apply where the speed limits are not greater than 55 miles per hour. Thus, the basic rule and reasonable and prudent (prima facie) portions of the old law would still be in effect up to 55 miles per hour, which is the present maximum limit.

Very truly yours, "

FOR THE ATTORNEY GENERAL,

JAMES W. BLAINE,  
Deputy Attorney General  
Assigned to the Department  
of Law Enforcement

JWB/b  
cc: W. Anthony Park, Attorney General  
John Bender, Commissioner, DLE



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83707

W. ANTHONY PARK  
ATTORNEY GENERAL

April 16, 1974

Mr. Joe R. Williams  
State Auditor  
Office of the Auditor  
STATEHOUSE MAIL

Mr. V. N. Richardson, P.E.  
State Highway Engineer  
Department of Highways  
STATEHOUSE MAIL

Gentlemen:

Mr. Richardson, through Mr. Williams, has requested our opinion on the following question:

"Under provisions of Idaho, 49-1231A distribution of revenue from taxation of special fuel is limited to incorporated and specially chartered cities 'which construct and maintain roads and streets.'"

"Idaho Code, 63-2432 provides for distribution of revenue from the tax on gasoline to incorporated and specially chartered cities on the basis of population only."

"It is our opinion that two distributions to cities as required above, are impractical."

In addition, Mr. Williams has asked an opinion on the following question:

"Whether incorporated and specially chartered cities must certify that they construct and maintain roads and streets in order to qualify for the distribution [of] motor fuels tax revenues."

It is our opinion that the law provides for two different distribution formulas, one for special fuels tax revenues, and the other for motor fuel tax revenues.

The special fuels tax is imposed by §49-1231, Idaho Code, and under §49-1231A(a), Idaho Code, a portion of the moneys collected under this special fuels tax are to be "... divided

Mr. Joe R. Williams  
Mr. V. N. Richardson, P.E.  
April 16, 1974  
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among incorporated and specially chartered cities of the state which construct and maintain roads and streets, in the same proportion as the population of said incorporated or specially chartered city bears to the total population of all such incorporated and specially chartered cities of the state . . ."

The motor fuel tax imposed by §49-1210, Idaho Code, was repealed by S.L. 1973, Chap. 260, effective January 1, 1974. That act in effect recodified the motor fuels tax and placed it in Title 63, Chapter 24, Idaho Code. Under the motor fuels tax act in effect until January 1, 1974, a portion of the revenues from such tax were to be "divided among incorporated and specially chartered cities of the state which construct and maintain roads and streets, in the same proportion as the population of said incorporated or specially chartered city bears to the total population of all such incorporated or specially chartered cities of the state . . ." §49-1210A(a), Idaho Code, repealed effective January 1, 1974.

§63-2432, Idaho Code, contains the post January 1, 1974, direction for distributing the cities' share of motor fuel tax revenues, and directs that the cities' portion ". . . shall be divided among incorporated and specially chartered cities, in the same proportion as the population of said incorporated or specially chartered cities bears to the total population of all such incorporated or specially chartered cities . . ." The current formula for distributing to cities a share of motor fuel tax revenues does not require that the city "construct and maintain roads and streets." Therefore, the legislature has provided two different distribution formulas for the two separate taxes.

We understand a limited number of small cities in Idaho do not construct and maintain roads and streets. Art. 7, Sec. 17, of the Idaho Constitution provides:

" . . . The proceeds from the imposition of any tax on gasoline and light motor vehicle fuels . . . shall be used exclusively for the construction, repair, maintenance and traffic supervision of the public highways of this state . . . and no part of such revenue shall . . . be diverted to any other purpose whatsoever."

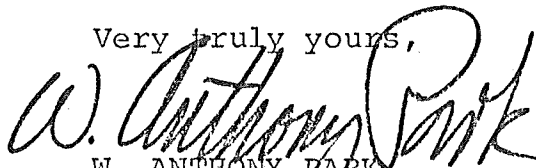
Such moneys can only be used for the purposes set forth in Art. 7, Sec. 17. State ex rel Moon v. Jonasson, 78 Idaho 205.

Mr. Joe R. Williams  
Mr. V. N. Richardson, P.E.  
April 16, 1974  
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While the cities in question do not construct or maintain roads or streets, such cities generally do have the responsibility for supervising traffic. The legislature apparently concluded that the expenses of such cities in supervising traffic will be at least equal to the amount of money allocated under §63-2432, and payment of such moneys to cities which do not construct and maintain roads and streets is not unconstitutional under Art. 7, Sec. 17 of the Constitution of the State of Idaho. While not required by statute, it might be advisable to indicate to all cities that money received under §63-2432, Idaho Code, must be used for construction, repair and maintenance or traffic supervision of public highways.

It is possible that as you indicate it would be impractical to maintain two separate formulas for distributing money to cities. Certainly in some circumstances, absolute exactness in distributing moneys down to the last penny might not be required. However, we are not aware of the specific problems involved and cannot provide you with a definitive answer. We would suggest that because special fuels tax revenues are less than \$20,000 per year and that because motor fuels tax revenues are approximately forty million dollars per year, if as you indicate you intend to use only one formula, that formula should be the formula prescribed by §63-2432, Idaho Code.

Very truly yours,

  
W. ANTHONY PARK  
ATTORNEY GENERAL

WAP:RLM:ji

April 22, 1974

Mr. Paul D. McCabe  
Attorney at Law  
P. O. Box 1338  
Coeur d'Alene, Id 83814

Re: Operation of Golf Carts  
on Public Highways

"OFFICIAL OPINION #74-156"

Dear Mr. McCabe:

This will acknowledge receipt of your letter of April 15, 1974, in which you advise you represent the City Council of the City of Hayden Lake, Idaho, and desire an opinion regarding golf carts being operated on public streets.

I would first call your attention to the fact that Title 49 of the Idaho Code is assumed by most people to be one separate motor vehicle act. This assumption is untrue and your questions involve the Uniform Registration Act, codified as Chapters 1 and 2 of Title 49, the Operator and Chauffeur's License Law, codified as Chapter 3 of Title 49, the Idaho Motor Vehicle Title Act, codified as Chapter 4 of Title 49, the uniform act regarding Traffic on Highways, codified as Chapters 5 through 11 of Title 49 and Chapter 25 of Title 49, covering the inspection of motor vehicles. The reason I direct your attention to the above stated chapters is the fact that definitions are not uniform in the various acts, making it very difficult to interpret Title 49 as a whole.

I shall attempt to answer your questions in the order submitted in your letter.

1. Do golf carts constitute a vehicle or motor vehicle within the meaning of the Idaho Code, thereby requiring registration and proper equipment before they may be operated upon public streets?

A golf cart, assuming it is propelled either by electric motors or an internal combustion engine, would be a motor vehicle under Section 49-101(a) and (b), Idaho Code, requiring the vehicle

to be licensed before it is operated upon a public highway.

2. What effect does Idaho Code, Section 49-801(a) have upon the operation of golf carts on the public streets?

Under the Uniform Motor Vehicle Act, Section 49-502(a) and (b), Idaho Code, considers a golf cart, which is self propelled either by electric power or some other means, as a motor vehicle and would therefore require the cart to be equipped as set forth in Title 49, Idaho Code, as to lights, brakes and so forth.

I would call your attention to Section 49-801A, Idaho Code, which was an amendment to the motor vehicle code in 1969, which provides for slow moving vehicles. At the time this statute was before the legislature they had in mind farm machinery, irrigating trucks and other equipment not normally used on the highway. It would be my opinion that a golf cart, if its principal normal use is upon the golf course, could be operated on a highway as a slow moving vehicle but subject to the limitations as set forth in Section 49-801A, Idaho Code, i.e., daylight hours, speeds less than 25 miles per hour and in a manner which would not obstruct the free movement of traffic upon a highway. One of the biggest objections the Idaho State Police has as to slow moving vehicles being operated upon a highway where the speed limit is up to 55 miles per hour is that a slow moving vehicle, traveling at a speed below that of the normal traffic pattern, is a traffic hazard.

If a golf cart would meet the requirements of a slow moving vehicle it would also be required to be equipped with foot brakes, mechanical signal devices and have affixed to the rear thereof a slow moving vehicle emblem.

3. Since in the City of Hayden Lake, a good many of the streets are private, can traffic laws be enforced on private roads to which the public has access by public highways?

As I understand your Question No. 3, you speak of private roads which are open to and used by the public. Without having further information such roadways probably would be considered public highways even though they are not part of the road system of the City of Hayden Lake or Kootenai County. Therefore, without further facts, I am unable to answer your question.

I can state, however, that if the roads of which you speak are private roads, it would be the policy of the state not to enforce any traffic laws thereon.

I trust this answers your inquiry.

Very truly yours,

FOR THE ATTORNEY GENERAL,

JAMES W. BLAINE,  
Deputy Attorney General  
Assigned to the Department  
of Law Enforcement

JWB/b

cc: W. Anthony Park, Attorney General ✓  
John Bender, Commissioner, DLE  
Jack Farley, Director, MVD  
L. Clark Hand, Supt. ISP

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STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

W. ANTHONY PARK  
ATTORNEY GENERAL

April 22, 1974

Mr. Pete Cenarrusa  
Secretary of State  
Building Mail

OFFICIAL OPINION #74-157

Dear Mr. Cenarrusa:

You have forwarded a proposed initiative issue to this office for ballot titling. I have drafted both short and long (general) ballot titles to the initiative proposal in accordance with the provisions of Section 34-1809, Idaho Code, and have enclosed those titles herein.

You have also asked several questions calling for interpretations of Section 34-1804, Idaho Code, the provision detailing the requirements for printing initiative petitions and signature sheets.

First, you ask whether "60 weight mimeograph paper" may be used for signature sheets. You also have indicated that the sponsors of the Idaho Presidential Preference and Primary Election Act initiative wish to print signature blocks on both the front and back of such sheets. Section 34-1804, Idaho Code, speaks neither to mimeograph paper nor the procedure of printing suggested above. Said section, enacted in 1933 and not amended since, requires all petitions for the initiative and accompanying signature sheets to be printed "on a good quality of bond or ledger paper." Zellerbach Paper Company has informed me that the weight of paper is not indicative of its quality. It was the legislature's intent in enacting Section 34-1804, Idaho Code, to assure the durability of the petition and signature sheets and the readability of the material printed thereon. I refer to such legislative intent in the selection of mimeograph paper and printing style. Thus, if the paper utilized for an initiative petition and accompanying signature sheets is durable--roughly equivalent to the durability of "good quality ledger or bond"--and the printing style does not hinder the readability of the copy, it is my opinion that the provisions of Section 34-1804, Idaho Code, have been satisfied, so far as the applicable portions of that statute are concerned.



Mr. Pete Cenarrusa  
April 22, 1974  
Page 2

A further question asks how large a type is required in printing of petition and signature sheets. Section 34-1804, Idaho Code, does not specify exact type sizes; however, I refer to the legislative intent of the statute mentioned above. It is my opinion that, since readability of the petition and signature sheets is at the heart of Section 34-1804, Idaho Code, a size of type sufficiently large enough to render the printed material reasonably readable by the average person must be utilized by the petition's sponsors.

Very truly yours,

FOR THE ATTORNEY GENERAL

A handwritten signature in dark ink, appearing to read "John F. Greenfield". The signature is written in a cursive, slightly slanted style.

JOHN F. GREENFIELD  
Assistant Attorney General

JFG:lm

SHORT AND LONG (GENERAL) BALLOT TITLE TO PRESIDENTIAL PREFERENCE  
AND SPRING PRIMARY ELECTION INITIATIVE PROPOSAL

SHORT TITLE--THE IDAHO PRESIDENTIAL PREFERENCE AND SPRING PRIMARY  
ELECTION ACT

\* \* \*

GENERAL (LONG) TITLE--Proposed act I) creates Presidential preference primary election for Idaho; II) changes month of general primary election from August to May in each even-numbered year.

Each Presidential candidate would receive allotment of delegates to his respective national convention correlative to percentage of votes received by candidate in primary election, subject to following qualification. Percentage of delegates allotted party's candidates would total 80% of delegation to which Idaho entitled at respective convention; remaining 20% selected by party itself. "80%--20%" rule designed to give voter major (80%) voice in nomination of candidate of his respective party, while reserving minor (20%) nomination power to party.

FOR THE ATTORNEY GENERAL

JOHN F. GREENFIELD  
Assistant Attorney General



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

April 29, 1974

W. ANTHONY PARK  
ATTORNEY GENERAL

Mr. Pete Cennarusa  
Secretary of State  
Building Mail

Dear Mr. Cennarusa:

My opinion to you, written April 22, 1974, #74-157, requires clarification in certain respects.

That opinion indicates that the information block form appearing on a signature sheet for an initiative petition may be printed on both the front and the back of a single sheet. But it is improper to interpret the language of Opinion #74-157 to mean that separate signature blocks for twenty names apiece may be printed on both the front and the back of a single signature sheet.

Section 34-1804, Idaho Code, requires the Secretary of State to count only twenty signatures on each signature sheet. It is my opinion that it was the legislature's intent, in enacting said section, to have only twenty signatures appear on one sheet of paper whether such signatures appear on only one side of a sheet or both sides. As I indicated in Opinion #74-157, however, it is not impermissible to print the initiative proposal itself on both sides of all the sheets of paper required for a single printing, so long as such a printing style does not, in some manner, cause the printed material to be unreasonably difficult to read.

Very truly yours,

FOR THE ATTORNEY GENERAL

*John F. Greenfield*

JOHN F. GREENFIELD  
Assistant Attorney General

JFG:lm

Ms. Mary Mech

Mr. David Warnick

April 22, 1974

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Mr. William G. Hepp  
Investment Manager  
Idaho Investment Board  
BUILDING MAIL

OFFICIAL OPINION #74-158

Dear Mr. Hepp:

This letter responds to your request of March 5, 1974, for an opinion regarding public disclosure of information concerning certain Investment Board transactions. Specifically, your inquiry pertains to investments by the Board in private loan contracts which are guaranteed by the Farmers Home Administration or the Small Business Administration, and raises three particular questions relating thereto; to-wit:

- "1. By revealing the bank which originated each loan are we not violating the confidentiality of the borrower-bank relationship?
2. Since many of these loans were purchased when the Commissioner of Finance was acting as investment officer of the funds would any, or all, of this information be under the purview of 26-812, Idaho Code? Also would the provisions of 57-721, Idaho Code place the Funds under 26-812, Idaho Code?
3. Is there any information regarding the Endowment Funds' investments, other than the reporting requirements of 57-720; 57-724 and 57-725, Idaho Code, which can be considered "of public record"?"

This opinion will address only the factual circumstances giving rise to your request, and will discuss the legal issues raised by your request generally, rather than responding directly to each question specified. This approach is taken because of the very complex legal and factual issues involved.

Mr. William G. Hepp  
April 22, 1974  
Page 2

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The factual circumstances upon which this opinion is based may be summarized as follows: In late February, 1974, Mr. Kenneth Matthews, reporter for the Idaho Statesman, requested access to Investment Board files containing information relating to investment transactions in FHA and SBA guaranteed loans. Copies of various documents were then provided to Mr. Matthews. Such documents included the 1973 Annual Audit of the Investment Board transactions, the Annual Report to the Idaho Legislature and the investment procedural materials employed by the Investment Board. By letter of March 4, 1974, Mr. Jerry Gilliland, City Editor for the Idaho Statesman, confirmed receipt of the materials and requested names of banks involved "along with any other terms pertinent" and "the dollar volume in loan purchases through" the FHA and SBA programs.

By letter of March 5, 1974, to Mr. Gilliland, Mr. Hepp, Investment Trustee, sought clarification of the request for "any other terms pertinent" and noted that the opinion of the Attorney General was being requested regarding the inquiry for names of banks. Mr. Hepp further provided the requested information relating the dollar volume of the subject transactions for 1972 and 1973. Thereafter, the Idaho Statesman retained Mr. Craig Marcus, attorney, to pursue its request for information. In a series of letters on April 3 and April 9, Mr. Marcus requested again, on behalf of the Idaho Statesman, that information relating to loan applications, dates and loan terms, including mortgages, be provided.

To date, the following information has been provided pursuant to the request of the newspaper: (1) complete audit and report to the legislature for 1973, (2) complete investment procedural materials employed by the Investment Board, and (3) all information relating to dollar volume of investments in FHA and SBA guaranteed loans for 1972 and 1973. Information which was requested, but not yet provided includes: (1) the names of banks with which borrowers on loan contracts do business, (2) the terms of loan contracts including interest rate, security interests or mortgages executed by borrowers, (3) the purpose for which borrowers obtain loans, and (4) the payment schedule and payment record of particular borrowers.

For the purpose of giving this opinion perspective, the investment procedures of the Investment Board should be outlined. The Investment Board is responsible for control, management and investment of permanent endowment funds of the State of Idaho. Chapter 7, Title 57, Idaho Code. The membership of

Mr. William G. Hepp  
April 22, 1974  
Page 3

the Board is clearly set out by statute. Section 57-722, Idaho Code. Likewise, the methods of and types of investments are clearly specified. Section 57-722, Idaho Code. The pertinent act also requires an annual audit (Section 57-720) and an annual report to the legislature (Section 57-725).

Under this statutory scheme, the Board, through its manager, invests in various private loan contracts which are guaranteed by the federal government, in this case the FHA and SBA. For purposes of investment security to the Board, the guarantee by the federal government, rather than the credit of a private borrower, is paramount. The Board invests endowment funds in contracts which are fully insured or guaranteed. See: Section 57-722, Idaho Code. Thus, the particulars of private financial transactions between banks and private borrowers is irrelevant to the security of the Board's investment. Even so, the private contract does come into the possession of the Board incident to their investment in the fully guaranteed contract. It is the terms of these private contracts that remain to be released pursuant to the request by the Idaho Statesman.

With this preliminary background, I will address the legal issues raised by your opinion request. It can be generally stated that "Every citizen has a right to inspect and take a copy of any public writing of this State, except as otherwise expressly provided by statute." Section 9-301, Idaho Code. Further, Section 59-1009, Idaho Code, provides that, "The public records and other matters in the office of any officer are, at all times during office hours, open to the inspection of any citizen of this state." The policy supporting this general rule is a sound doctrine of democratic government. A democracy demands that its citizens be informed of governmental affairs and, to this end, the Office of the Attorney General is in full agreement.

The real question to be answered, however, is not whether this policy is sound, but rather what kinds of information in possession of public entities is open to public inspection. The above quoted statutes carefully specify that "public writings" and "public records" are open to public inspection. This careful use of language is not without design. Statutorily, the legislature has declared that certain types of information in the possession of governmental entities do not fall within the general rule. Examples of statutory exceptions may be noted in Section 26-811, Idaho Code, (financial records of banking institutions); Section 63-3076, Idaho Code, (private financial

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information on state tax returns); and Section 56-211, Idaho Code, (financial records of welfare recipients). Also relevant is Section 9-203(5), Idaho Code, providing that, "A public officer cannot be examined as to communications made to him in official confidence, when the public interests would suffer by the disclosure." Such statutory exceptions voice a recognition that certain information uniquely private to individual citizens must be protected from public exposure. Thus, citizens filing tax returns need not fear public exposure of their financial affairs while being required by law to disclose such information to state government.

The law has long recognized a person's right to privacy. Warren and Brandeis, "The Right to Privacy", 4 Harvard Law Review 193; Peterson v. Idaho First National Bank, 83 Idaho 578, 367 P.2d 284, 92 A.L.R.2d 891 (1961). Of course, this right is not absolute, but must be weighed against a legitimate public or general interest in the particular subject. Restatement, Torts §867, Comment C; 62 Am.Jur.2d §16. These general principles provide guidance in resolving the present issue.

The request from the Idaho Statesman for information contained in statutorily required reports and audits cannot be questioned. Certainly such information relating to Investment Board activities is of general interest to the public and should, therefore, be accessible to the public. Information of this nature has already been provided to the newspaper.

The more difficult question arises from the request for particular information contained in private loan contracts now in the possession of the Board. Close analysis of the general or public interest in such information is in order. As already noted in this opinion, the Board looks only to the government guarantee on private loan contracts to judge the merits of potential investment. This is so by statute. Section 57-722, Idaho Code. For all purposes of interest to the State and the general public, the particulars of the underlying loan contract is irrelevant. Information relating to a private borrower's credit rating, financial statement, payment schedule, interest rate or even use of the borrowed funds is meaningless for state purposes in that the funds invested by the Board are insured 100% by the federal guarantee. Possession of this type of information by a state agency cannot, by itself, elevate otherwise confidential, private matters to the status of a public record. "The right to privacy does not prohibit any publication of matter which is of public or general interest . . . The design of the law must be to protect

those persons with whose affairs the community has no legitimate concern from being dragged into an undesirable and undesired publicity, and to all persons, whatsoever their position or station, from having matters, which they may properly prefer to keep private, made public against their will." 4 Harvard Law Review 193, 214 et seq.

Such a doctrine relating to rights to privacy is not without support in this state. The Idaho Supreme Court in 1961 took a progressive step for the preservation of a citizen's privacy in his financial affairs. In Peterson v. Idaho First National Bank, 83 Idaho 578, 367 P.2d 284, 92 A.L.R.2d 891, the Court held that a person's relationship to his bank and related affairs are of the highest order of secrecy. Therein the Court stated at Page 819:

"The legislature of Idaho has recognized the sanctity of the privacy of bank accounts by enactment of IC §26-812 which makes it punishable for an employee of the department of finance, to disclose any facts or information obtained except under limitations prescribed by the code.

"It is inconceivable that a bank would at any time consider itself at liberty to disclose the intimate details of its depositors' accounts. Inviolable secrecy is one of the inherent and fundamental precepts of the relationship of the bank and its customers or depositors."

See also: Right of Privacy, 14 A.L.R.2d 750, 18 A.L.R.3d 874; Forbidding Disclosure by Public Officer, 164 A.L.R. 1302; Confidentiality of Welfare Records, 54 A.L.R.3d 768.

Using the standards of confidentiality established by the Idaho Supreme Court, I can only conclude that information in the possession of the Board regarding the details of private loan contracts subject to this opinion may not be disclosed to the public. This peculiarly private information is not a "public writing" or "public record" because it is irrelevant to the protection of state endowment funds, they being fully guaranteed by federal agencies.

In reaching this conclusion, I have inquired as to regulations and policies of the federal agencies guaranteeing the

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Mr. William G. Hepp  
April 22, 1974  
Page 6

contracts. Both the SBA and the FHA are restricted from public disclosure of such private financial information as is now being sought from the Investment Board. Further, I have sought an interpretation of state insurance coverage for potential tort liability stemming from invasion of privacy actions by private borrowers. In his interpretation of the policy, Mr. Richard Kading of Eberle, Berlin, Kading, Turnbow & Gillespie, Chartered, states:

"Accordingly, we would have to state that disclosure, such as personal financial information, could not be made by the Investment Board; and, in view of the nature of the situation, an intentional disclosure of such facts by the Investment Board could well constitute an intentional tort with respect to those individuals. I believe you are well aware of the fact that the policy of insurance covering the State of Idaho does not provide coverage for intentional acts of officers, agents or employees of the State of Idaho, when such acts are knowingly committed."

This risk of personal liability to the Board members and/or its manager and staff, lends considerable weight to our decision to advise that private financial information of borrowers on the subject contracts be kept in strictest confidence.

Of course, written consent by the original parties to the contract to disclose specific information will suffice to permit disclosure by the Board. This may be the best method to resolve the matter, in the final analysis.

Very truly yours,

FOR THE ATTORNEY GENERAL

WAYNE V MEULEMAN  
Deputy Attorney General

WVM:cg



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

W. ANTHONY PARK  
ATTORNEY GENERAL

April 25, 1974

Mr. Pete Cennarusa  
Secretary of State  
Building Mail

OFFICIAL OPINION #74-159

Dear Mr. Cennarusa:

It has come to my attention that the long (general) titles to two initiative proposals--the "Sunshine" law on campaign and lobbyist disclosure, and the Idaho Presidential Preference Primary Act--submitted to your office earlier this week, may be possibly defective as to form. Accordingly, I have retitled those bills and have enclosed two new titles herein.

Although the Attorney General's Office has already returned the ballot titles to you on these measures and you have forwarded the titles to the proponents of the respective measures, it is my opinion that such corrections can be made. Title 34, Chapter 18, Idaho Code, is silent as to whether corrections can be made to ballot titles after such titles are released from the Attorney General's Office. Furthermore, no petitions have been circulated or even printed by the sponsors of either measure. In light of the silence of the law and the situation at hand, it is my opinion that corrections in the ballot titles may be made by the Attorney General's Office and accepted by the Secretary of State in this instance.

Very truly yours,

FOR THE ATTORNEY GENERAL

A handwritten signature in cursive script, reading "John F. Greenfield", is written over the typed name.

JOHN F. GREENFIELD

Assistant Attorney General

JFG:lm

OFFICIAL OPINION #74-160

NO OPINION IS ISSUED TO THIS NUMBER.



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

W. ANTHONY PARK  
ATTORNEY GENERAL

April 30, 1974

Mr. Roger D. Green  
Vice President  
Financial Affairs  
Boise State University  
Building Mail

OFFICIAL OPINION #74-161

Dear Mr. Green:

We wish to respond to your letter of April 11, 1974, wherein you requested an opinion from this office on the issue of whether or not "the deans of the schools in their meeting with the Directorate Affirmative Action Committee (which is comprised of the three vice presidents) need to obtain an authorization or release from the faculty members involved in order that they might freely and openly discuss faculty evaluations on performance with members of the Directorate."

In an earlier telephone conversation you described how this issue of confidentiality arose. Your Affirmative Action Committee has made a study of faculty positions at Boise State pursuant to the Affirmative Action Program. The Committee has made certain recommendations to the Directorate of the Committee which is comprised of the three university vice presidents. From what you have told us, apparently the Committee's recommendations were based on considerations other than the performance of the faculty member who holds the position studied.

Certain of your Deans disagree with the recommendations that the Committee has forwarded to the Directorate because they have made performance evaluations of the faculty members on which they have based their recommendations for salary and promotion. The committee did not have these performance evaluations when it was making its study. Now the Deans want to know if they can use the evaluations to demonstrate to the Directorate the bases for their actions and where the differences lie between the Committee recommendations and the Deans' actions without authorization from the faculty member involved.

Mr. Roger Green  
April 30, 1974  
Page 2

We should first note that the confidentiality of personnel matters at our colleges and universities is apparently based on practice and custom, rather than on either statutory or case law. This is not to say, however, that the confidentiality should not be respected or cannot be enforced. We believe the Deans were correct in not divulging the performance evaluations and other criteria, if any, to the Committee. From our understanding, review of the Deans' evaluations was not included as a function of the Committee.

However, the performance evaluations conducted by department chairmen, Deans, and others on whom that function is imposed are administrative functions which are reviewed through administrative channels of the institutions. Therefore, the evaluations are not absolutely confidential nor are they protected by some absolute privilege, even though the information contained therein should not, and as a matter of custom, is not, available to everyone who cannot demonstrate a need to know the contents.

You have described the make-up of the Directorate of the Committee, all members of which are vice presidents. These officers are obviously high up on the administrative organizational chart to whom the information in the evaluations could be made known anyway. Whether or not that information is made available to the Directorate which is made up of the present officers of the institution is an administrative decision to be made by the institution.

We trust we have been of assistance.

Very truly yours,

FOR THE ATTORNEY GENERAL

JAMES R. HARGIS  
Deputy Attorney General

JRH:lm

Count

April 30, 1974

Mr. Fred Snook  
Prosecuting Attorney  
Salmon, Idaho 83467

OFFICIAL OPINION #74-162

Re. Mailing of Tax Notices

Dear Fred:

I have your recent letter concerning mailing of tax notices. You have requested an opinion as to whether tax notices can be mailed as a group to a subdivider rather than the owners of a subdivision or whether copies of the tax notices could go to the subdivider and the originals to the owners.

In reading Section 60-1103, Idaho Code, I notice that the section says in part that the tax collector shall mail the notices to, "every taxpayer or to his agent or representative," at his last known post office address. Since it provides in the alternative for mailing the notice to the taxpayer or his agent or representative there appears to be no reason why the notices could not be mailed to the subdivider as the agent or representative of the persons who are purchasing lots in the subdivision. It will probably be necessary for the owners to in some way delegate this matter of tax notices to the agent or representative.

Here in Ada County, I know that some of my own property is handled in this manner. It therefore appears that the tax collector may mail the tax notices to the subdivider rather than to the individual lot purchasers if it is desired to do so.

Sincerely yours,

FOR THE ATTORNEY GENERAL

WARREN FELTON  
Deputy Attorney General

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STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

W. ANTHONY PARK  
ATTORNEY GENERAL

May 1, 1974

Mr. Richard L. Barrett  
State Personnel Director  
Statehouse Mail

Mr. Dennis E. Chilberg  
Director of Administration  
Department of Administrative Services  
Statehouse Mail

OFFICIAL OPINION #74-163

Dear Mr. Barrett and Mr. Chilberg:

You have asked the Attorney General's Office two questions regarding Senate Bill 1527 passed by the Second Regular Session of the Forty-second Legislature and signed into law by Governor Andrus April 5, 1974. I call your attention to Official Opinion #74-148 previously issued by this office which also deals with S.B. 1527.

You have asked the following questions:

(1) "Does the Personnel Commission and Director of Administration have the authority to adopt a new compensation schedule in lieu of the previously adopted schedule?"

(2) "Does the Personnel Commission have authority to modify its earlier action with respect to reallocations?"

At this point it becomes necessary to define the terms "classification plan" and "compensation plan or schedule" as they are used in S.B. 1527.

Section 67-5309(a), Idaho Code, after stating that the Personnel Commission shall have the power to approve classification plans submitted by each department, reads as follows:

Mr. Richard L. Barrett

Mr. Dennis E. Chilberg

May 1, 1974

Page 2

". . . The classification plan will include an appropriate title for each class, and a description of duties and responsibilities of positions in the classes and requirements of minimum training, experience and other qualifications, suitable for performance of the position."

Section 67-5309(b) authorizes the Personnel Commission and the director of administration to approve a "comprehensive compensation plan" submitted by each department and continues:

". . . The compensation plan shall include salary schedules with the salary of each position consistent with the responsibility and difficulty of the work as outlined in the job specifications."

Clearly, then, a difference exists between "compensation schedule or plan" and "classification plan". See also, Rules and Regulations of the Idaho Personnel Commission, rule 6 (classification plan) and rule 7-1.1, (compensation plan).

As was stated in the previously issued Official Opinion #74-148, at page 3:

"Whereas, one might argue with the application of the term 'classification plan' to 're-allocations', any one who is familiar with the legislative history of Senate Bill 1527, as amended, with the debate which accompanied its passage and with the appropriation contained in Section 2 therein is led inescapably to the conclusion that the classification plan referred to in the act is meant to apply to the re-allocations approved by the Personnel Commission and the Director of Administration.

"The use of the term 'classification plan' cannot be considered to be an exercise in legislative futility. The legislature must be presumed to know the difference between a classification plan and a compensation plan. The legislature adopted the compensation plan, or at least by implication approved it, which



Mr. Richard L. Barrett

Mr. Dennis E. Chilberg  
May 1, 1974  
Page 3

was approved by the Personnel Commission which mandated a new minimum wage for state employees and a 2.5 per cent general salary increase. In addition thereto the legislature mandated a compensation plan which would reflect certain minimum annual increases in salary for specified pay grades. It also mandated the re-allocations approved by the Commission unless the Commission adopts another classification plan."

The legislature did appropriate \$1,600,000 to fund salary increases through proportional raises contained in Section 1 of the Act. Further, \$1,011,400 was appropriated to fund the "classification plan", i.e., the reallocations, in Section 2 of the Act.

With this preface I will now turn my attention to the specific questions propounded. (1) It is the opinion of the Attorney General that the Personnel Commission and Director of Administration have the authority to adopt a new compensation schedule in lieu of the previously adopted schedule for the following reasons:

Section 1(1) of S.B. 1527 reads, in part, as follows:

" . . . The appropriation herein made is specifically to be used to defray personnel costs in addition to, and not in lieu of, the revised compensation schedule to be effective July 1, 1974, as approved by the Idaho Personnel Commission on October 19, 1973, and as further approved by the Director of Administration, for the Governor, on December 10, 1973, or such other classification plan as may be approved by such authorities to be effective July 1, 1974." (Emphasis added)

It is the opinion of the Attorney General that the use of the term "classification plan" in Section 1(1) of the Act was an error or oversight in drafting, and that the legislature intended to use the words "compensation schedule". Accordingly, I read the words "compensation schedule" in place of the words "classification plan" in Section 1(1) of the Act.

"A large majority of the cases permit the substitution of one word for another where it is necessary to carry out the legislative intent or express clearly manifested meaning.

Mr. Richard L. Barrett

Mr. Dennis E. Chilberg

May 1, 1974

Page 4

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"Courts have permitted the substitution of one word for another: where it is necessary to make the act harmonious or to avoid repugnancy or inconsistency, where the word being substituted can be gathered from the context of the act . . . [and] where it is obvious that the word used in the act is the result of clerical error, or mistake, where the substitution will make the act simple, or give it force and effect, or make it rational . . . Sutherland Statutory Construction, 4th Ed., Vol. 2A (1973). §47.36, at 163-164.

The Idaho Supreme Court followed the majority rule when it stated that: "obvious clerical errors or misprints in the statute will be corrected or words read into a statute or omitted therefrom if the error is plainly indicated and the true meaning is obvious, in order to make the statute express the legislative intent." State v. Witzel, 312 P.2d 1044, 79 Ida. 211 at 217; at 1048 (1957) See Keenan v. Price, 68 Ida. 423, 195 P.2d 662 (1948). To the extent that this opinion is in conflict with Official Opinion #74-148 on this issue, this opinion shall control.

The language of Section 1(1) of the Act clearly shows that the legislature intended that the I.P.C. have the power to modify, amend, rescind or replace the "compensation schedule" as it existed at the time of passage of S.B. 1527.

Section 67-5309(d), Idaho Code, also, by implication, gives the I.P.C. the power to modify its compensation plan. That subsection gives the I.P.C. the authority to promulgate . . .

"(d) A rule providing for not less than biennial review by the commission and department heads of the personnel system including classification and compensation plans, policies and procedures."

It is the opinion of the Attorney General that the I.P.C. and the Director of Administration have the authority to adopt a new compensation schedule in lieu of the previously adopted schedule.

(2) It is the opinion of the Attorney General that the Personnel Commission has the authority to modify its earlier action with respect to reallocations for the following reasons:

Mr. Richard L. Barrett

Mr. Dennis E. Chilberg

May 1, 1974

Page 5

Section 2(1) of S.B. 1527 reads, in part, as follows:

" . . . The appropriation made herein is specifically to be used to defray personnel costs incurred as a result of the revised classification plan to be effective July 1, 1974, as approved by the Idaho Personnel Commission on October 19, 1973, and as further approved by the Director of Administration, for the Governor, on December 10, 1973, or such other classification plan as may be approved by such authorities to be effective July 1, 1974." (Emphasis added)

The legislature obviously deferred to the expertise of the I.P.C. and the Director of Administration in the matter of classification of state employees and specifically allowed such authorities to alter, amend, rescind or replace the classification plan as it existed at the date of passage of S.B. 1527.

Further, Section 67-5309(d), impliedly gives the I.P.C. the power and authority to make . . .

"(d) A rule providing for not less than biennial review by the commission and department heads of the personnel system including classification and compensation plans, policies and procedures."

For the above reasons the Attorney General is of the opinion that the I.P.C. may modify its earlier actions dealing with the classification plans, i.e., the reallocation plan.

Very truly yours,

FOR THE ATTORNEY GENERAL



TERRY E. COFFIN

Assistant Attorney General

TEC:lm

May 29 1974

Mr. Weaver Bickle  
Assistant to the Director  
Driver Services Section  
Department of Law Enforcement  
Building Mail

"OFFICIAL OPINION #74-164"

Re: Assessment of Violation Point Count - Bond Forfeiture

Dear Mr. Bickle:

Pursuant to your request for a formal opinion as to the legality of assessment of violation point counts on bond forfeitures please be advised as follows: Prior to 1969 a bond forfeiture was equated with a conviction to initiate and sustain a mandatory or permissive suspension of a motor vehicle operator's license.

In 1969, the Supreme Court of the State of Idaho, in Valente vs Warner C. Mills (1969) 93 Idaho 212, 458 P.2nd 84, held that forfeiture of a bond posted on alleged offense of driving a motor vehicle while under the influence of intoxicating liquor was not a conviction.

For your ready information, the facts of the Valente Case are as follows: Valente was arrested in Coeur d'Alene, Idaho, on a charge of driving a motor vehicle while under the influence of intoxicating liquor in violation of that city's ordinance. Valente also refused to submit to a chemical test to determine the amount of alcohol in his blood. Title 49, Chapter 3, Section 52, Idaho Code, (the implied consent law) provides in part that any person operating a motor vehicle in this state shall be deemed to have given his consent to a chemical test to determine the alcohol content of his blood, if a police officer, having reasonable grounds to believe such person to have been driving in an intoxicated condition, requests submission to such a test after arrest and said person refuses to submit. Such refusal is a civil violation and, if the proof of facts established in an administrative hearing conform to the requirements of the statute, the operator's license is subject to a mandatory suspension.

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Valente, on or about the 5th day of August, 1967, posted a bail bond to procure his release pending trial for the alleged violation of the city ordinance of driving a motor vehicle while under the influence of intoxicating liquor. On August 11, 1967, the then Commissioner of Law Enforcement, Warner C. Mills, issued a notice to Valente of the proposed suspension of his operator's license under the provisions of Title 49, Chapter 3, Section 52, Idaho Code, Refusing to Submit to a Chemical Test. Valente requested an administrative hearing and such hearing was held on September 20, 1967, and thereafter the Commissioner issued an Order suspending Valente's driving privileges for ninety (90) days. Valente appealed to the District Court from the administrative determination. The District Court stayed the suspension pending hearing of the appeal. That stay continued until on or about December 1, 1967, at which time Valente voluntarily dismissed his appeal and the ninety (90) day suspension commenced to run. On or about the same day Valente forfeited the bond he had posted in police court on the original charge of operating a motor vehicle under the influence of intoxicating liquor. Some ten days later the Commissioner issued another Order further suspending Valente's driving privileges for an additional ninety (90) days based upon the forfeiture of bond. Valente requested a hearing on the Commissioner's action, said hearing was denied and Valente initiated a proceeding to set aside the second Order of Suspension on the ground that a bond forfeiture could not be equated with a conviction and thus the Order of Suspension was unconstitutional and invalid. The Supreme Court, after discussion of the viability of Title 49, Chapter 3, Section 30, Idaho Code, and the subparagraphs thereof, stated: "Valente was not convicted of any offense ... He forfeited a bond".

Analyzing Title 49, Chapter 3, Section 30, Idaho Code, the Court said that the term "bond forfeiture pertained exclusively to 'violation point court' system". The Court did not find that assessment of points on a bond forfeiture was legally sound or approved. The Court was simply addressing itself to the structure of the section.

The dichotomy as to the non-applicability of bond forfeitures to the criminal offense of driving while under the influence of intoxicating liquor or drugs and the bond forfeiture for the criminal violation of a moving traffic offense for which assessment of violation point counts misses the thrust of the objectionable double standard.

A conviction under Title 49, Chapter 11, Section 02, Idaho Code, (driving while under the influence) results in an administrative suspension or revocation of license. The point count system can, likewise, result in an administrative suspension or revocation of license following the assessment of the correct number of points. IT IS THAT END RESULT IN BOTH CASES WHICH REQUIRES CRITICAL ANALYSIS.

Accumulation of points for moving traffic offenses, where convictions are had, may result in the suspension of a motor vehicle operator's license. If a bond forfeiture cannot be used as the basis for

a suspension under facts similar to the Valente Case, suspensions predicated on bond forfeitures under the violation point count system are constitutionally irreconcilable. United States Constitution, 14th Amendment, Article I; Idaho State Constitution, Article I, Section 2.

Title 49, Chapter 3, Idaho Code, has been amended a number of times since its enactment in 1935 as the Uniform Motor Vehicle Operators and Chauffeur's License Act. (Session Laws 1935, Chapter 88, ss 1 et seq.) Unlike many legislative acts, the definitions in this act are found in a number of sections. Please refer to 49-328 (d), 49-329(5) and 49-337(a). It will be noted that the definitions as set out in the foregoing sections do not uniformly appear at the beginning or end of any such section. Ordinarily, definitions appear as an introduction into an act so that uniformity of interpretations can be made. Subparagraph (b) of 49-330 is the definition clause applicable to that section. The Supreme Court's reference to bond forfeitures relating to the violation point count system is obiter dictum. It must be remembered that the definitions in Title 49, Chapter 3 have the meanings respectively ascribed to them and uniformity of interpretation dictates a construction which effectuates the general purpose of the act.

In addition to determining the non-applicability of assessment of points in the point count system on bond forfeitures, it is well to highlight the fact that a bond forfeiture on moving traffic violations reaches exactly the same result as bond forfeitures on driving while under the influence of intoxicating liquor, that is — LOSS OF LICENSE. Thus of paramount importance is the constitutional questions.

The Supreme Court decided Valente vs. Mills, Supra, on non-constitutional grounds. That is — the equating of a bond forfeiture to the conviction and the structure of Title 49, Chapter 30, Section 30(b). Deciding the question on structure the Supreme Court did not find it necessary to reach the constitutional question.

Succinctly stated, courts "shy" away from resolving constitutional questions if cases can be decided on other grounds. The District Court, however, devoted a majority of its Memorandum Decision on the constitutional questions. The Supreme Court and the District Court's terminology was that Valente had not been convicted of any offense under the Coeur d'Alene, Idaho city ordinance. Both courts went on to say that Valente simply forfeited his bond.

To date, issuance of an operator's license is not a matter of constitutional right. It has been treated consistently as a privilege. However, notwithstanding that issuance of an operator's permit and operation of a motor vehicle is a privilege, such privilege is conferred

by law. (Title 49, Chapter 3, Section 07, Idaho Code.) The issuance of an operator's license cannot be correlated with the right of the state to suspend or revoke except through a conviction for violating the laws under which the privilege is exercised. It is interesting to note that Amendment 14, Section 1 of the United States Constitution provides in pertinent part: "No state shall make or enforce any law which shall abridge the privileges ..." without due process of law. (Emphasis added.)

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The United States Supreme Court in Bell vs. Burson, No. 5586, decided in the October Term of 1970 and issued May 24, 1971, although not exactly in point, nevertheless contains very interesting language. The Court said: "Suspension of issued license thus involves state action that adjudicates important interests of the licensees. In such cases the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment, (citing cases.) This is but an application of the general proposition that relevant constitutional restraints limit state power to terminate an entitlement whether the entitlement is dominated a "right" or a "privilege."

Article I, Section 6, Constitution of the State of Idaho, provides in part that the right to bail shall be held inviolate except for capital offenses (with certain limitations not here pertinent). The only purpose of bail is to give the State some assurance that an accused will attend subsequent proceedings involving his alleged criminal conduct as directed by the court. Bail forfeited cannot be equated with conviction in that it imposes restraints for issuance of bail in direct violation of the Federal and State Constitutions. Little credence can be given to a position advancing as a matter of law that as a condition to admission to bail forfeiture thereof is a confession of guilt. In no manner can forfeiture of bail be construed to obviate the constitutional requirements of jury trial, the right to a speedy and public trial, the right to appear and defend in person or by counsel. Amendments 6 and 7, United States Constitution and Article I, Sections 6, 7 and 13, Constitution of Idaho.

By no means is bail to be construed as a punishment. The whole concept of admission of bail, prior to trial, is to combine the administration of criminal justice with the convenience of and fairness to a person accused but not proven guilty. To rule otherwise strikes at the fundamental due process which is the touchstone of American jurisprudence.

Due process of law, if it means anything at all, is a safe guard of those fundamental rights of the citizens of this state and country. If we equate bail forfeiture to conviction every constitutional guarantee above set forth is denied an accused.

Title 19, Chapter 25, Section 5, Idaho Code, provides: "Bench Warrant to Enforce Attendance. If the defendant has been discharged on bail, or has deposited money instead thereof, and does not appear ... when his personal appearance is necessary, the court, in addition to the forfeiture of the undertaking of bail, or of the money

May 29, 1974

deposited, may direct the clerk to issue a bench warrant for his arrest". Can it be realistically argued that if an accused does not appear and the bail is forfeited that upon subsequent arrest by his sureties or upon bench warrant, or appears voluntarily that he could be heard to argue that to prosecute him would place him in double jeopardy. The fact of the matter is that the merits of the offense have not been tried, there has been no plea of guilty, there has been no trial by jury or conviction. Taken in the best light the most that can be said is that there has been an accusation made against a subject.

Anyone with a modicum of criminal trial practice knows that you cannot impeach a witness on an accusation, charge, or bond forfeiture. In short, there has been no determination of guilt.

Constitutionally and logically, POINTS ON BOND FORFEITURES MAY NOT BE ASSESSED. At the same time, it is urged that cooperation of the courts and prosecutors be elicited to assure that a bond forfeiture will not be used as a tool to avoid the well grounded public policy and statutory law of removing hazardous drivers from the highway of this state.

Very truly yours,

FOR THE ATTORNEY GENERAL

JAY F. BATES,  
Deputy Attorney General  
Assigned to the Department  
of Law Enforcement

JFB/b

cc: W. Anthony Park  
John Bender





STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

W. ANTHONY PARK  
ATTORNEY GENERAL

SOUTHEASTERN DIVISION

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(208) 233-0582

April 2, 1974

MEMORANDUM

OFFICIAL OPINION NO. 74-165

TO: Dr. John W. Harris, Administrative Director, State  
Hospital South

FROM: Don Burnett, Assistant Attorney General

RE: Authority to Receive Persons Not Voluntarily Presenting  
Themselves for Admission and Who Are Not Accompanied  
by Proper or Complete Commitment Orders

The Idaho statutes governing hospitalization of the mentally ill contain three sections authorizing the director of a facility to receive persons for observation, evaluation, care and treatment. Idaho Code §66-318 empowers the director to grant applications for voluntary admission on either "patient" or "lodger" status. As defined in Idaho Code §§66-317(e)(1)(2) a "patient" is distinguished from a "lodger" in that the former receives treatment while the latter is admitted for the narrower purposes of observation and evaluation. When a person has been a "lodger" for seven days, he must either assume "patient" status or be discharged from the facility. The second statute, Idaho Code §66-325, authorizes the director to receive any individual committed specifically to his facility or committed generally to the Board of Environmental and Community Services by a court of competent jurisdiction. Finally, Idaho Code §66-335 permits the director to receive persons serving sentences on criminal convictions, pursuant to rules and regulations adopted by the Board of Environmental and Community Services acting in conjunction with the State Board of Correction.

None of these statutory provisions furnishes guidance for the proper disposition of persons who do not voluntarily present themselves for admission and who are not accompanied by proper or complete commitment orders. A common example of such a situation is represented by the individual deposited in the facility's admissions office by relatives or law enforcement

personnel who indicate that they are acting pursuant to verbal orders from a judge or in response to conduct by the individual appearing to manifest a mental disorder. Lacking the person's consent, and in the absence of a valid commitment order, the facility is precluded, subject to an exception stated below, from affording treatment. Nevertheless, the facility's staff may deem it advisable to detain the person for observation, evaluation and care pending a diagnosis and treatment decision. Detention in this circumstance has no statutory basis. The provision of the Idaho Code relating to detention, §66-350, applies only to cases where "proceedings for judicial commitment have been commenced." However, no statute expressly prohibits such detention; consequently, the facility's proper course of action turns upon the nature and extent of its authority under the common law.

The "common law" consists of rules established by the gradual accretion of court decisions in cases not controlled by statute. One such rule provides that a person who is so mentally ill as to be dangerous to himself or to others may be detained without judicial proceedings in situations of urgent necessity. See Annotation, 92 A.L.R.2d 570. Application of this rule turns on the elements of (1) actual mental disorder, (2) immediacy of the danger and (3) the necessity of taking affirmative action to prevent harm. E.g., In re Sleeper, 147 Me. 302, 87 A.2d 115 (1952); Warner v. State, 297 N.Y. 395, 79 N.E.2d 459 (1947); Crawford v. Brown, 321 Ill. 305, 151 N.E. 911, 45 A.L.R. 1457 (1926). A mental disorder which does not render a person immediately dangerous to himself or others does not afford grounds for detention, even though the individual's behavior is otherwise abnormal. Belger v. Arnot, 344 Mass. 679, 183 N.E.2d 866 (1963); Boesch v. Kick, 97 N.J.L. 92, 116 A. 796 (1922); Maxwell v. Maxwell, 189 Iowa 7, 177 N.W. 541, 10 A.L.R. 482 (1920). Moreover, although some courts have held that detention is valid if there is a reasonable belief that the person is dangerously mentally ill, others have disapproved of detention in all cases but those where actual mental illness is demonstrated. Orvis v. Brickman, 90 App. D.C. 266, 196 F.2d 762 (1952); Christiansen v. Weston, 36 Ariz. 200, 284 P. 149 (1930); but compare Collins v. Jones, 131 Cal. App. 747, 22 P.2d 39 (1933) (subsequently overruled on other grounds).

The foregoing rule, allowing detention without judicial proceedings in certain types of urgent cases, is supplemented by another rule compelling hospitals to furnish treatment in exigent circumstances. In general, the common law does not impose a duty to act as the "Good Samaritan;" that is, it does not require one person actively to assist in the preservation of the person or property of another. E.g., Powers v. Massachusetts Homoeopathic Hospital, 109 F. 294 (C.C.A. 1st 1909). Adopting this approach,

the courts often have upheld decisions by hospitals to refuse admission to patients. E.g., Modla v. Parker, 17 Ariz. App. 54, 495 P.2d 494 (1972), cert. den. 409 U.S. 1038 (1972); Hill v. Ohio County, 468 S.W.2d 306 (Ky. 1971), cert. den. 404 U.S. 1041 (1972); LeJeune Road Hospital, Inc. v. Watson, 171 So.2d 202 (Fla. App. 1965). However, the courts have carved out an exception with respect to emergency cases. Stanturf v. Sites, 447 S.W.2d 558, 35 A.L.R.3d 834 (Mo. 1969); Wilmington General Hospital v. Manlove, 54 Del. 15, 174 A.2d 135 (1961); O'Neill v. Montefiore Hospital, 11 App. Div.2d 132, 202 N.Y.S.2d 436 (1960).

The scope of treatment afforded in an emergency context must include observation, examination by personnel able to detect problems and to arrange for treatment, and the furnishing of suitable aid reasonably and immediately necessary for preservation of life or health. New Biloxi Hospital, Inc. v. Frazier, 146 So.2d 882 (Miss. 1962). The duty to furnish emergency treatment is imposed with special emphasis on public institutions. Williams v. Hospital Authority of Hall County, 119 Ga. App. 626, 168 S.E.2d 336 (1969). In the same vein, the "Standards of the Joint Commission on Accreditation of Hospitals" require that emergency services provide "adequate medical and nursing personnel available at all times." See discussion in Powers, Hospital Emergency Service and the Open Door, 66 MICH. L. REV. 1455 (1968). A hospital and its staff may be held liable in damages for a negligent diagnosis or failure to furnish appropriate treatment in an emergency. See Annotation, 72 A.L.R.2d 396 (Supp.). Furthermore, the courts have tended to exact a particularly high standard of care from facilities specializing in treatment of mental disorders, as opposed to general hospitals. See Annotation, 11 A.L.R.2d 751, 795 (1950); cf. Mesedahl v. St. Luke's Hospital Ass'n, 194 Minn. 198, 259 N.W. 819 (1935).

Therefore, integrating the two rules examined above, it appears (1) that the staff of a public mental health facility have the authority at common law to detain a person for observation, evaluation and care if he clearly exhibits a mental disorder which poses an urgent threat of harm to himself or to others; and (2) that the staff are obligated when emergencies arise to provide treatment to the extent necessary for the immediate protection of life and health. Obviously, these determinations must be made by trained personnel. A person who is improperly detained may bring an action against those so detaining him for false imprisonment. See Annotation, 30 A.L.R.3d 523. In addition, he may bring an action for damages under 42 U.S.C. §1983. See discussion in 16 A.L.R. Fed. 440. Ordinarily, such actions will not lie if the staff have accepted the patient for treatment at the facility in reliance upon the individual's valid consent or upon a court order which appears regular on its face. E.g., Arensman v.

Brown, 430 F.2d 190 (7th Cir. 1970) (applying Indiana law); Kenney v. Hatfield, 132 F. Supp. 814 (W. D. Mich. 1955), aff'd, 232 F.2d 288 (6th Cir. 1956), cert. den., 352 U.S. 855 (1956); cf. Hansen v. Lowe, 61 Idaho 138, 100 P.2d 51 (1940). But where neither consent nor an order is available, the staff must not exceed their common law authority if potential liability is to be avoided.

Analyzed collectively, the case decisions do not provide consistent or firm guidance on the duration of permissible detention for the purposes of observation, evaluation and care prior to treatment. However, Idaho Code §66-320 is instructive. This statute prescribes a deadline of five days for releasing, or notifying the appropriate court of the need for commitment proceedings with respect to, a voluntary patient who requests his release. In the absence of another, more definitive guideline, this author recommends that the five-day limitation be adopted by analogy for the purpose of restricting the length of detention without a consent or an order. The director of the facility should, prior to the expiration of this period, obtain the patient's valid consent to treatment, notify the court to commence the necessary proceedings for commitment, or discharge the patient. As a matter of administrative policy, in order to minimize exposure to possible liability, the indicated action should be completed as soon as possible before the recommended cut-off date.

#### Summary and Recommendations

The Idaho Code sections governing hospitalization of the mentally ill do not adequately cover factual circumstances marked by the absence of a voluntary consent to treatment or a valid order of commitment. In such circumstances, the hospital staff should first attempt to ascertain whether or not the individual in question is subject to a court order which has not yet been delivered or reduced to writing. If so, the staff should contact the court directly to verify the existence of the order. Then, if it further appears to the staff from other information available that the individual suffers from a mental disturbance posing an immediate threat of harm to himself or to others, he may be detained at the hospital. The court should be notified that such detention will not extend for a period longer than five days; and that, if a written order is not received by that time, the patient will be discharged unless a valid consent to treatment has been obtained.

If the circumstances do not indicate any prior judicial proceedings, the staff should review the proposed patient's mental condition with special care, to avoid possible liability for illegal detention. At the same time, however, they should also be prepared to diagnose problems and arrange for suitable treatment if immediately necessary for the preservation of life or health in

Memorandum  
Dr. John W. Harris  
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an emergency case. If the individual is detained for evaluation, or is afforded emergency diagnosis and treatment, the staff should determine whether or not the facts would support a petition for involuntary commitment. If so, the appropriate district court should be notified. If judicial proceedings are not commenced, and the patient does not consent to treatment, he should be promptly discharged in five days or less.

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Don Burnett  
Assistant Attorney General

April 2, 1974  
(as modified May 1, 1974)

May 1, 1974

Official Opinion #74-166

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Honorable Monroe C. Gollahe  
Commissioner of Insurance  
Department of Insurance  
B U I L D I N G

RE: Request for Attorney General's Opinion

Dear Mr. Gollahe:

You have asked for an opinion as to whether:

1. Section 41-228(3) Idaho Code, would allow deduction of expenses incurred during one year in other than during the next calendar year.
2. It would be lawful for the Commissioner to allow filing of an amended return for a "next succeeding year" so that an overlooked offset might be inserted. As to this, it should be noted that all taxes have been transmitted to the State Treasurer for placement in the General Fund as is required by Section 41-406 Idaho Code, and that there is presumably no provision for refunds once this has been done.
3. A company that may have incurred eligible examination expense in excess of premium tax due in a "next succeeding year" may carry forward that portion of the unused offset to other succeeding years.

Domestic insurers are required to pay to the State of Idaho taxes on gross premiums received by the insurer on the risks written in the State. (41-402 Idaho Code) These taxes are in lieu of other taxes, such as taxes on income. (41-405 Idaho Code) A domestic insurer must pay the expenses of being

Honorable Monroe C. Gollaher  
Commissioner of Insurance  
May 1, 1974

examined by the Insurance Commissioner. (41-228 Idaho Code)  
The expense of the examination may be claimed as an offset  
against premium taxes owed. (41-228(3) Idaho Code)

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However, the offset allowed by 41-228(3) of the Idaho Code is against "premium taxes payable to the State of Idaho in the next succeeding calendar year". Premium taxes on business in a calendar year are payable by March 1 of the following year. (41-402 Idaho Code) The language of 41-228(3) entitles the domestic insurer an examination expense offset against those taxes payable by March 1 of the following year.

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If the intent of the legislature in enacting 41-228(3) had been to allow an offset against taxes incurred in years other than the year of the examination expense, the words "in the next succeeding calendar year" would have no meaning. Since it must be assumed that the legislature means to include all the language of enacted statutes, the term "in the next succeeding calendar year" cannot be ignored in the interpretation of the statute.

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We find the language of a Texas court persuasive in a similar situation. Reductions against a premium tax were not allowed for any year subsequent to the year in which the statute allowed a reduction of tax.

"We are dealing with a statute which purports to levy an annual tax. If the legislature had intended to require a refund of taxes properly paid in prior years, it is reasonable to assume that this intention would have been expressed in plain language." (State v. National Lloyds, 368 S.W.2d 765, 766 (1963))

"It is our opinion that the legislature did not intend... the recognition of a 'tax credit' which may be carried back to prior years or forward to subsequent years." (Ibid. p. 767)

Would it be lawful for the Commissioner to allow the filing of an amended return for a "next succeeding year" so that an overlooked offset might be inserted?

Again, the same argument applies. We can find no Idaho Code section that allows an amended premium tax return. Since

Honorable Monroe C. Gollaheer  
Commissioner of Insurance  
May 1, 1974

the legislature did not provide for an amended return, it must be assumed that no such return was intended to be allowed.

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It should be noted, however, that the Idaho Code does provide for the return of "excessive" taxes. A "refund fund" is available for the repaying of overpayments made under the Income Tax Act "and for the purpose of repaying any other erroneous receipts illegally assessed or collected, penalties collected without authority and taxes and licenses unjustly assessed, collected or which are excessive in amount, where the proceeds of such collection, taxes, license or receipt are credited to the General Fund...." (Section 63-3067 Idaho Code, emphasis added) A premium taxpayer would be eligible for payment from the refund fund, where such payment is justified, since premium taxes are placed in the General Fund. (Section 41-406, Idaho Code) In order to obtain the refund, the taxpayer must follow the statutory requirement for making claims against the State of Idaho. (Section 63-3067, Idaho Code)

The last question asked is whether a company that may have incurred eligible examination expense in excess of premium tax due in a "next succeeding year" may carry forward that portion of the unused offset to other succeeding years.

Section 228(3) Idaho Code allows for an offset only from the taxes payable "in the next succeeding calendar year". Premium taxes on business in a calendar year are payable by March 1 of the following year. There is no provision for offsets against taxes due after March 1 of the year following the year in which the examination expenses are incurred.

An argument can be made that the legislature by enacting Section 228(3) Idaho Code intended to place the total expense of examination on the State. However, that argument fails because the legislature specifically allowed the offset only against the taxes payable by March 1 of the next calendar year.

There is no offset provided for examination expenses in excess of the premium tax owed for the year in which the expense is incurred. Nor does there appear to be an "excessive" payment that would allow recovery under Section 63-3067 Idaho Code.

Very truly yours,

FOR THE ATTORNEY GENERAL

David B. Vaughn  
Assistant Attorney General

DBV:gc





STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83707

W. ANTHONY PARK  
ATTORNEY GENERAL

May 2, 1974

Mr. Alvin S. Marsden  
Executive Director  
Ada Council of Government  
525 West Jefferson  
Boise, Idaho 83702

OFFICIAL OPINION #74-167

Re: Request for Opinion on Surface Drainage

Dear Mr. Marsden:

By letter dated March 22, 1974, you requested the opinion of this office on the following questions:

1. Does Chapter 3, Title 43, Idaho Code, enable an irrigation district to assess property owners within the district for the construction of drainage works which the Board of Directors of the irrigation districts would deem necessary in their discretion?
2. Are drainage districts able to levy like assessments upon property owners within the individual drainage districts for more than normal storm drainage and water pollutants?
3. Are the irrigation districts and drainage districts in the State of Idaho legally capable of refusing discharge in natural waterways?

1.

It is our opinion that Chapter 3, Title 43, Idaho Code, does enable an irrigation district to assess property owners within the district for the construction of drainage works at the discretion of the Board of Directors. Section 43-306, Idaho Code, allows an irrigation district to perform certain drainage functions:

Mr. Alvin S. Marsden  
May 2, 1974  
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"43-306. Levy Authorized for Purpose of Draining Lands Within Districts.-- Any irrigation district now organized, or which may hereafter be organized, under the laws of the state of Idaho, shall have authority to construct drainage works for the purpose of draining, or reclaiming any land or lands, within such irrigation district, which authority shall be exercised by the board of directors in its discretion.

"The board of directors before levy as hereinafter provided, shall determine by resolution spread upon the minutes thereof if any of the lands within an irrigation district are in need of drainage, and should be drained to protect said land or other lands within said district from damage from seepage or other waters, subterranean or otherwise, then the board of directors of such district shall have the power and authority, at the time provided by law for levying assessments for operation and maintenance of said irrigation district. In addition to such assessments, also [to] levy an assessment against the lands of said irrigation district for drainage purposes, said levy not to exceed in any one year 40% of the total amount levied for operation and maintenance purposes. Such assessment for drainage shall in all respects be levied and collected at the same time and in the same manner as assessments for operation and maintenance.

"All funds collected for drainage purposes under the provisions hereof shall be kept in a separate fund to be known as "Drainage Fund" of said irrigation district, and the monies in said "Drainage Fund" from time to time may be expended by the board of directors of said irrigation district."

Section 43-306 authorizes an irrigation district to construct drainage works to drain lands within the district.

Mr. Alvin S. Marsden

May 2, 1974

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A decision to construct such drainage works is within the discretion of the board of directors. The statute limits the amount of money that can be expended for drainage purposes to 40% of the total amount levied for all operation and maintenance purposes by the irrigation district during any one operating year.

An irrigation district may exercise "all the functions, powers and authority of a drainage district" if it complies with the procedural mandates set out in Sections 43-308 through 43-312, Idaho Code. The right of an irrigation district to assume the responsibilities and duties of a drainage district is conferred by Section 43-307, Idaho Code. If an irrigation district complies with the mandates of these sections, it is apparent that no dollar limit nor any percentage limit is placed on spending for drainage. Such is not the case under Section 43-306, where an irrigation district performs drainage functions without procedural formalities and is limited in the amount spent for drainage works up to 40% of the total amount levied during any one year for operation and maintenance purposes.

Assuming that an irrigation district is operating drainage works under Idaho Code, Section 43-306, rather than under Section 43-307 through 43-312, said irrigation district is not a drainage district, but simply an irrigation district performing some drainage functions. Therefore, assessments for paying for drainage works must be "levied and collected at the same time and in the same manner as assessments for operation and maintenance" of irrigation functions.

Section 43-701, Idaho Code, authorizes the Board of Directors of an irrigation district to apportion assessments for operating and maintenance expense and mandates that these assessments "shall be spread upon the lands in the district and shall be proportionate to the benefits received by such lands . . ." (Emphasis added).

The principle that lands within an irrigation district shall be assessed in proportion to the benefits received appears throughout Title 43. See, for example, Section 43-404 (retirement of bond issue); Section 43-606 (refunding bonds); Sections 43-331, 43-332 and 43-334 (levy of special assessments).

For the above reasons, it is the opinion of the Attorney General that an irrigation district may, under Section 43-306, construct drainage works at the discretion of the Board of Directors and that assessments of land within the district may be made as long as not more than 40% of the assessments levied

by the district in any given year are expended on drainage works. The apportionment of assessments for drainage works must be based on the benefit accruing to each parcel of land, individually, within the district. Further, if an irrigation district complies with Sections 43-307 through 43-312 of the Idaho Code, it may thereby become a dual purpose district. It will, on the one hand, be an irrigation district with all the rights, powers and duties of an irrigation district and, on the other hand, it will also be a drainage district with all the rights, powers and duties associated therewith. If an irrigation district takes the necessary procedural steps to also become a drainage district, the 40% expenditure rule found in Section 43-306 of the Idaho Code does not apply. Therefore, once the drainage district is established, all assessments made for drainage purposes within that district may be expended for construction, maintenance and operation of a drainage system.

2.

It is our opinion that drainage districts organized under the laws of the State of Idaho, and irrigation districts qualifying as drainage district under Sections 43-307 through 43-312, are empowered to levy assessments upon land within the district for more than the "normal" storm drainage and water pollutants. All drainage district assessments must be made on the basis of benefit accruing to the particular tract of land being assessed. Sections 42-2914, 42-2915, 42-2934 and 42-2935, Idaho Code.

Each tract of land in the district pays a part of the total assessment in proportion to the benefits that, in the judgment of the Board of Directors, will accrue to that tract of land as a result of the expenditure of the monies collected through the assessment and levy. It therefore follows that if a drainage district provides for drainage of ordinary surface water from a tract of land, benefits will likely be less than when the drainage facilities are providing for drainage of more than "normal" storm runoff from another tract of land. Arguably, the more water drained from a tract of land, the more benefit to the land. It is our opinion that a drainage district may assess higher rates against property in need of drainage of more than a "normal" amount of surface water. The assessment must be based on the benefit accruing to the land in the judgment of the Board of Directors.

It is further our opinion that a drainage district may levy higher assessment rates against property contributing more than the "normal" amount of pollutants to the drainage system.

Mr. Alvin S. Marsden  
May 2, 1974  
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A drainage district under proposed federal regulations will be responsible for the water quality of district water discharged into natural streams and rivers within the State of Idaho. The cost of maintaining systems to monitor pollution factors in the final discharge into natural streams or rivers and the cost of any equipment or processes necessary to remove pollutants from said discharge will be borne by the district. Yet, a parcel of land within the district that is contributing little or no pollutants to the ultimate discharge arguably is not receiving the same benefits from pollution control devices and processes as is a tract of land which is heavily polluting the system, and the tracts should be assessed accordingly.

3.

This is the fourth time we have been asked to write on this subject. On September 13, 1972, we wrote:

"The downhill property holders have no right to abatement of natural flows of rain or other runoffs over their land from uphill sources. on the other hand, the uphill property holder cannot make these runoff flows more burdensome, by channeling the runoffs into a single stream, or otherwise. Thus, if the flow of runoffs has not been augmented or intensified, there is no right in the downhill (sic) property holder to force the canal to accept natural runoff."

On September 10, 1973, we said:

"As you can readily understand, the water in the irrigation system must eventually discharge into a natural water course. Since the irrigation district would be responsible for discharging waters that meet environmental standards, the use of its system to carry off drainage waters would impose an additional burden and cost in meeting federal and state water quality standards. We know of no law that would compel an irrigation district to accept that responsibility. Additionally, it would also make no difference to this opinion whether

Mr. Alvin S. Marsden  
May 2, 1974  
Page 6

the water was pure or not. In any event, the irrigation district system would be placed under a burden which its system was not designed to accept. Its property cannot be used without its prior consent."

In regard to the drainage of surface waters over the property of another, Idaho has adopted the so-called civil-law rule. Loosli v. Heseman, 66 Idaho 469, 162 P.2d 393 (1945); Harper v. Johannesen, 84 Idaho 278, 371 P.2d 842 (1962). We quote from the Loosli case:

"Upper land-owner has easement of drainage in land of lower proprietor to the extent of the water naturally flowing from the upper to the lower tract; but the servitude in the lower land cannot be augmented or made more burdensome by the acts or industry of the upper land owner.

\* \* \* \*

"'. . . Water seeks its level and naturally flows from a higher to a lower plane; hence the lower surface, or inferior heritage, is doomed by nature to bear a servitude to the higher surface, or superior heritage, in this: that it must receive the water that naturally falls on or flows from this latter. . . . But this rule -- this expression of the law -- only applies to waters which flow naturally from springs, from storms of rain or snow, or the natural moisture of the land. Wherever courts have had occasion to discuss this question, they have generally declared that the servitude of the lower land cannot be augmented or made more burdensome by the acts or industry of man.'" 66 Idaho at 474 and 477.

The "civil-law" rule is implicit in Section 42-2915 and Section 42-1107, Idaho Code.

In regard to drainage of surface waters into a natural water course, the rule in Idaho is broader. While making a reasonable use of his land, an upland owner may discharge artificial, "foreign", or augmented water, such as irrigation waste water, into a natural water course so long as the discharge is not injurious to the property of another. Poole v. Olaveson, 82 Idaho 496, 356 P.2d 61 (1960) and California cases cited therein.

Conversely, regarding the appropriation of public and private waters in Idaho, an upper land owner may trap or collect diffuse drainage (so-called private water), but he may not trap or collect water in a natural channel or water course (so-called public waters) to the injury of a senior downstream appropriator. Hutchinson v. Watson Slough Ditch Co., 16 Idaho 484, 101 P. 1059 (1909); Jones v. McIntire, 60 Idaho 338, 91 P.2d 373 (1939); Ward v. Kidd, 87 Idaho 216, 392 P.2d 183 (1964).

If an irrigation district has integrated a natural water course into its irrigation system, it does not lose its identity as a natural water course, even if physical alterations are made by the district. Poole v. Olaveson, supra, at 503.

Moreover, the irrigation district has a duty to make any changes in the natural water course of sufficient capacity to accommodate not only natural flows but also such high water flows as may reasonably be anticipated from heavy or protracted rains. Harper v. Johannesen, supra, at 284. The district may not alter the natural water course in such a way as to reduce its natural capacity so that a lower quantum of augmented, foreign or waste water drainage into the natural water course that will injure the district. Cheesman v. Odermott, 247 P.2d 594, 596 (Calif. Third District, 1952).

An irrigation district may be required to respond in damages for injury to person or property for negligent overflow or escape of water from its ditches. Stephenson v. Pioneer Irrigation District, 49 Idaho 189, 288 P. 421 (1930). The Environmental Protection Agency has stated that it will hold an irrigation district responsible for water quality at the outfall of the district's water into navigable waters. 40 CFR 125.1(p). We understand that the Environmental Protection Agency has not yet decided whether irrigation districts will be required to treat pollutants draining from subdivisions into the irrigation system before discharge into navigable waters, or whether the owners of subdivisions will be required to treat the drainage before it flows into the irrigation system.

Mr. Alvin S. Marsden  
May 2, 1974  
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Until such time as the artificial, foreign or augmented discharge becomes injurious in some way to the irrigation district, and the injurious discharge continues for the prescriptive period, no prescriptive easement arises. Poole v. Olave-son, supra.

To summarize, an irrigation district may refuse to allow an upland owner to drain surface waters into its ditch or canal if the surface waters have been augmented or made more burdensome by the act or industry of the upland owner. On the other hand, an irrigation district may not refuse to allow an upland owner to drain augmented or more burdensome surface waters into a natural channel or water course that has been integrated into the irrigation district's system, absent a showing that the upland owner is making an unreasonable use of his land or that the augmented or more burdensome drainage is working injury upon the district.

Application of these general rules to a particular fact pattern must be made by the parties in interest or the judiciary and not by the Office of the Attorney General.

Very truly yours,

FOR THE ATTORNEY GENERAL

MATTHEW J. MULLANEY, JR.  
Deputy Attorney General

TERRY E. COFFIN  
Assistant Attorney General

MJM:TEC:cg



May 6, 1974

Mr. Ben Cavaness  
Schou & Cavaness  
Attorneys at Law  
P. O. Box 38  
American Falls, Id 83211

"OFFICIAL OPINION #74-168"

Re: Power County Highway District  
Authority to Enact Traffic Laws  
and Provide Penalties

Dear Mr. Cavaness:

This will acknowledge receipt of your letter of April 18, 1974, on behalf of Power County Highway District addressed to the Attorney General.

From your letter and our telephone conversation it appears that a resident of Power County is constructing a new home and you expect others to be built in the same area in the near future. For ingress and egress, these persons must construct a private road connecting with a public highway administered by the highway district. As I understand, the connection being proposed by the builder would be in a location where the terrain is such as to establish a very dangerous traffic hazard. The Highway Commissioners are opposed to the construction of the entrance way of the private road, at this point, and desire to create, by ordinance, specifications establishing minimum standards and specifications for the connectors of an entrance way to a public road in the district and to provide for criminal penalties for a violation of the ordinance.

Article 12, Section 2, of the Idaho Constitution provides:

"Local police regulations authorized. Any county or incorporated city or town may make and enforce, within its limits, all such local police, sanitary and other regulations as are not in conflict with its charter or with the general laws."

Thus, a county or city may enact criminal laws so long as they are not in conflict with the general law.

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A highway district in Idaho is not a political municipality created for governmental purposes but is a quasi municipal corporation created for a special purpose, namely, that of constructing and maintaining highways in its district (with the exception of State Highways under the jurisdiction of the State Highway Department). Sections 40-1608, 40-1610, 40-1611, Idaho Code; Strickfaden, et al vs Greencreek Highway District, 42 Idaho 738, 248 P. 456; 49 ALR 1057; Shoshone Highway District of Lincoln County vs Anderson, 22 Idaho 109, 119.

The highway district has a proprietary interest in the highways under its jurisdiction. The district, when it constructs a highway, will build it according to specifications to handle certain weights and speed. It has the authority to alter size, weight and speeds upon the district highways. Section 49-906, Idaho Code. The district also has authority to raise or lower speeds under Section 49-703, Idaho Code.

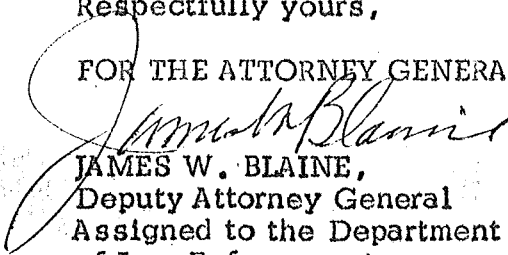
Under the statutory authority given highway districts, and coupled with the fact the district is the owner and has control of the entire highway, it is my opinion that the district may impose such standards and specifications upon a person wishing to connect to the district's highway so long as the standards and specifications are reasonable and fair to all persons in the same position. The district could require a map and specifications to be submitted to them prior to commencement of work and require the Commissioners' approval. In the event the request is denied, the builder would have to find other means of reaching the highway or agree to whatever conditions imposed by the Commissioners.

It is my feeling that it would be far easier and more successful to enjoin an encroachment based on an ordinance than it would be to use the criminal process.

Most counties have ordinances regarding their highways and I would suggest you inquire of the surrounding counties for ideas. If I may be of further assistance, please advise.

Respectfully yours,

FOR THE ATTORNEY GENERAL

  
JAMES W. BLAINE,  
Deputy Attorney General  
Assigned to the Department  
of Law Enforcement

cc: W. Anthony Park, Attorney General  
John Bender, Commissioner



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

W. ANTHONY PARK  
ATTORNEY GENERAL

May 6, 1974

Honorable Richard S. High  
Senator  
District 25  
463 Avenue H.  
Twin Falls, Idaho

OFFICIAL OPINION #74-169

Honorable William Roberts  
Representative  
District 24  
Owyhee Plaza  
Buhl, Idaho

Co-Chairmen, Joint Finance-  
Appropriations Committee  
Room 327  
Statehouse Mail

Re: Special Legislative Audit Report of  
Boise State University

Gentlemen:

We wish to respond to your Committee's resolution to transmit to this office for review, action and response the report of the Legislative Auditor on the special audit he conducted at Boise State University. As you know, the State Board of Education has also asked this office to respond to it on the same audit. It is our understanding that the Board decided to respond to your request for its reaction after we made our response. Because the Board would not be meeting until after your May 31-June 1 meeting, and since you have requested the Board's reaction to the audit at that time, we responded first to the Board's request. The substantive parts of our report to the Board are identical to this response to your committee's resolution. We accept the facts cited in the audit as all operable facts to be considered. The audit appears to be a thorough and complete investigation of certain allegations. Therefore, we will base this report only on those facts. Further, we wish to respond only to those areas of

Honorable Richard S. High  
Honorable William Roberts  
May 6, 1974  
Page 2

the audit which carry the Legislative Auditor's recommendations, inasmuch as those areas which do not carry recommendations were practices, activities or events at the institution which were changed, discontinued or happened prior to the audit or were activities, practices or events which, once stopped, discontinued or occurred, have not been reestablished or repeated. Therefore, we will make no comment on the allegations and conclusions on travel, instructional materials center investigation and building and grounds investigation.

The audit was performed as a result of certain allegations of improper activity at the university. The allegations are in such terms as "illegal appropriation of funds", "fraudulent presentation of plans", "illegal payment" of funds, "illegal" receipt of funds, all of which carry the strong implication of criminality. From the facts as found by the Legislative Auditor, we can find none which support those implications. Therefore, any suggestion or implication of criminal activity based on the facts described in the audit are held and espoused, not by this office, but by the person or persons making and supporting the allegations.

This is not to say, of course, that irregularities and improprieties did not occur at the institution or that the allegations of certain improper activity were not based on fact as found by the Legislative Auditor.

# I

We are of the opinion that the most important findings of the Legislative Auditor were the remodeling projects paid for out of the funds from the revenue bonds issued for other purposes. The facts are described on Pages 3 to 7 of the audit.

These bonds were issued under the authority of the Educational Institution's Act of 1935, Title 33, Chapter 38, Idaho Code. The indebtedness, although neither a legal nor moral obligation of the State of Idaho, is nevertheless a legal and moral obligation of the State Board of Education and the institution. Compliance with the agreement, particularly as that agreement applies to the security of the bond, is of paramount importance, since the duty of the Board and institution is to protect the bondholders. Further, to use the funds for purposes other than those called for in the agreement and to expend the funds before the sinking fund had been established and filled could cause a pall on the credibility of all future issues the Board may wish to float under the authority of the same act. This result, of course, would be reflected in a lower bond rating and higher interest rates.

We believe the State Board and the institution were fortunate that no default occurred. The civil remedy available to the bond

holders had action been brought to enforce the agreement would have been unnecessarily expensive and time consuming to say nothing of the debilitating effect such an action would have had on future issues. Therefore, we join with the Legislative Auditor in his recommendation that compliance with the bond covenants be strictly observed.

The lack of State Board authorization to expend the funds or enter into the projects is an administrative problem for the Board. We strongly advise that the Board adopt more exacting regulations on reporting and follow-up to the end that the Board can insure itself against further unauthorized expenditures such as described in the audit.

We have no comment concerning the storage rooms in the stadium used as hospitality rooms, except to observe that where the original plans called for carpet, sink, paneling and closet, and where the rooms were still designated as storage, a reasonable conclusion can be reached that the rooms were never intended to be used for storage. It is this appearance of impropriety, albeit minor, that eventually causes embarrassment to the Board and institution.

## II

The allegations suggest that wrongdoing occurred in connection with the home of the President of Boise State University. Pages 13 to 15 of the audit report. From the facts as found, we cannot find where any criminal violations occurred. Allegations of personal use of state funds, property or employees' time are not uncommon in public employment. The problem in dealing with such allegations is somewhat unusual in this matter because the home of the President is owned by him, not by the State or institution, as is the case at other institutions. Although the State Board has no control over the home of the President, it does have control over the use of university property and employees' time. Therefore, we suggest to the State Board that it issue a policy expression concerning the use of either or both, vis-a-vis the private home of the President of BSU.

We cannot pass this section of our review without commenting on the issue raised. It is one thing to express concern over the proper use of bond funds and proper authorization for the expenditure of those funds. Proper administration and fiscal responsibility require constant investigation and justification. But, it is quite another thing to attack a public officer's personal integrity and honesty without first determining the facts. The factual description of the Legislative Auditor is valuable here because he has shown how baseless those allegations were. Auditor's Report pp 13 through 15.

### III

We have nothing to add to the Legislative Auditor's findings or recommendations on the purchasing investigation. Auditor's Report, pp 16 through 19. This area is one of proper administration. Apparently, the improvements in purchasing procedures were instituted as a result of an internal audit of the institution. The Legislative Auditor's recommendations are based on that internal audit.

### IV

Section 67-2026, et seq., Idaho Code, describes the method by which public records are identified, stored, preserved and destroyed. The final administrative determination on public records lies with the State Board of Examiners. The records which were destroyed were old Boise Junior College financial records. These records were probably part of the property transferred to the State Board when Boise College was transferred to the State pursuant to Title 33, Chapter 40, Idaho Code. Therefore, the approval of the State Board of Examiners should have been obtained. However, we can find no indication that the failure to obtain approval from that Board results in any criminal or civil liability, and was anything more than an oversight. The legislature has treated the retention or destruction of records as a matter of administration, where it is expected and required to gain the approval of the Examiners before records can be destroyed. We can only echo the recommendation of the Legislative Auditor. However, we would further recommend that any institution obtain State Board of Education approval to seek the Examiners' permission to destroy the records.

### V

We find no reason to take issue with or expand on the findings and recommendations of the Legislative Auditor on the private, non-profit corporations investigation. Auditor's Report, pp 22 through 24.

### CONCLUSIONS

After reviewing the audit thoroughly, we conclude that there is no basis now for taking any legal action on the facts presented or on the allegations. Corrections of improprieties or implementation of recommendations can be and should be accomplished by administrative directives of the State Board.

We would describe the most critical administrative decision to be made by the State Board to insure against future problems of this type as concerning the audit function itself. We will recommend to

April 9, 1974

Mr. D. F. Engelking  
Superintendent of Public Instruction  
BUILDING MAIL

OFFICIAL OPINION #74-147

Dear Mr. Engelking:

We wish to respond to your request for our opinion on whether a child who does not reach his 6th birthday until after October 15th in the year in which the child attempts to enroll may enter the first grade in that district.

The statutes concerning school-age children determine that a school-age child is one who has reached his 6th birthday by October 15th of the year in which he wishes to enroll. To enroll a child in the first grade who does not reach that age by that particular time means that the district that enrolls the child may not count that child in its average daily attendance for State distribution of funds under the foundation program.

We do not know, nor can we speak to, the wisdom of any change or exception to any school district policy, nor are we aware of any of the school districts' policy in this particular instance. The only thing we could recommend in this matter is that the school district be prepared to live with whatever decision it makes with regard to its own policy and the admission of a child who does not reach the age of six by October 15th of the year in which the child enrolls. We can only state that as far as the State of Idaho is concerned, the district that enrolls such a child may not count the child in its average daily attendance.

We hope we have been of assistance.

Very truly yours,

FOR THE ATTORNEY GENERAL

JAMES R. HARGIS  
Deputy Attorney General



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

W. ANTHONY PARK  
ATTORNEY GENERAL

May 8, 1974

Honorable Tom D. McEldowney  
Commissioner  
Department of Finance  
Building Mail

OFFICIAL OPINION #74-170

Re: Section 28-3-510A, Idaho Code

Dear Commissioner McEldowney:

I am in receipt of your opinion request pertaining to the interpretation of Section 28-3-510A, Idaho Code. Your three specific questions were as follows:

- (1) Must collection costs collected under the provisions of Section 28-3-510(A) be related to the actual cost of collection rather than an arbitrary figure placed on such cost by the holder or collection agency?
- (2) If the amount of the check in question is more than \$20, is \$20 the maximum that could be collected in interest and collection costs pursuant to Section 28-3-510(A), and must that \$20 figure include both interest and collection costs?
- (3) If the face amount of the check is less than \$20, is the face amount of the check the maximum amount which may be collected for interest and collection costs and must the face amount figure include both the interest and collection costs?

28-3-510A reads as follows:

"28-3-510A. Checks dishonored by nonacceptance or nonpayment--Liability for interest--Rate--Collection costs and attorneys fees.--Whenever a check as defined by section 28-3-



Honorable Tom D. McEldowney

May 8, 1974

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104(2)(b), Idaho Code, has been dishonored by nonacceptance or nonpayment and has not been paid within fifteen (15) days and after the holder of such check sends such notice of dishonor as provided by section 28-3-510B, Idaho Code, to the drawer at his last known address, then if the instrument does not provide for the payment of interest, or collection costs and attorneys' fees, the drawer of such instrument shall also be liable for payment of interest at the rate of six per cent (6%) per annum from the date of dishonor and cost of collection not to exceed twenty dollars (\$20.00) or the face amount of the check, whichever is the lesser. In addition, in the event of court action on the check, the court after such notice and the expiration of said fifteen (15) days, shall award a reasonable attorneys' fee as part of the damages payable to the holder of the check. This section shall not apply to any instrument which has been dishonored by reason of any justifiable stop payment order.

In answer to your first question, the phrase "cost of collection" must be interpreted. "Cost" is defined in Webster's New International Dictionary, Second Addition at page 601 as the expenditure or outlay of money, time, labor or the like. This definition indicates that cost, as used in the phrase, must be interpreted as meaning the actual cost, i.e., the expenditure of time, labor, or money required to collect the dishonored check. Therefore, it is the opinion of the Attorney General that the cost of collection is the actual amount of time, labor, or money expended in the collection of the check and that an arbitrary figure cannot be used by the collector.

In answer to your second and third inquiries, the following phrase falls into question:

"... the drawer of such instrument shall also be liable for payment of interest at the rate of six per cent (6%) per annum from the date of dishonor and cost of collection not to exceed twenty dollars (\$20.00) or the face amount of the check, whichever is the lesser."

The doctrine of "last antecedent" states that relative and qualifying words, phrases, and clauses are to be applied to the

words or phrases immediately preceeding, and are not to be construed as extending to or including others more remote. This doctrine was recognized in Myer v. Ada County, 50 Idaho 39, 293 and 322 (1930). Applying this construction rule the modifying phrase of "not to exceed twenty dollars (\$20.00) or the face amount of the check, whichever is the lesser" limits only the cost of collection and not the payment of interest.

Also it is stated in the doctrine of "last antecedent" that the presence of a comma separating a modifying clause in a statute from the clause immediately preceeding is an indication that the modifying clause was intended to modify all the preceeding clauses and not only the last antecedent one. Applying this statement to the questioned clause there would have to be a comma after the word "collection" and before "not" to enable a construction that the limiting phrase of "not to exceed twenty dollars. . ." modifies both "cost of collection" and "payment of interest". Since there is no comma present it can be said that only "cost of collection" is limited by the "twenty dollar" phrase.

In determining legislative intent of one statute it is good interpretative procedure to look to other statutes dealing with the same subject matter. This is known as construing statutes in pari materia. Lloyd Corporation v. Bannock County, 58 Idaho 478, 25 P.2d 217 (1933); Union Pacific R.R. v. Riggs, 66 Idaho 677, 166 P.2d 926 (1946). With this rule in mind, it is noted that Section 28-3-510B, Idaho Code, is referred to in 28-3-510A, Idaho Code, and deals specifically with the notice required to be given when a check is dishonored. The specific notice provision provides in separate statements that the drawer of a dishonored check

" . . . may very well have to pay the following additional amounts:

- (1) Costs of collecting the amount of the check including an attorney fee which will be set by the court; and
- (2) Interest on the amount of the check which shall accrue at the rate of six per cent (6%) per annum from the date of dishonor." 28-3-510B, Idaho Code.

This notice provision indicates a legislative intent to treat the costs of collection and the interest as separate and distinct items. Carrying this intent back to Section 28-3-510A and construing the two sections together, it can be seen that costs of collection and interest are separate items each having its own limiting phrase; interest is limited to six per cent and cost of collection is limited to twenty dollars or the face amount of the check, whichever is the lesser.

Honorable Tom D. McEldowney  
May 8, 1974  
Page 4

It should also be noted that a construction allowing the twenty dollar, etc., limitation to apply also to the payment of interest would lead to an incongruous result and it is a rule of construction that absurd results should be avoided. Peters v. McKay, 238 P.2d 225 (1951). An example would be where a check for \$1,000 was dishonored and not paid by the obligor for one year. At 6% interest the holder should receive \$60 interest upon payment, but if the \$20 limitation were applicable to interest the holder would incur a \$40 loss without even considering the cost of collection.

In light of the above reasoning it is the Attorney General's opinion that the twenty dollar limitation applies only to the cost of collection and not to the payment of interest.

Therefore, the specific answers to the second and third questions are as follows:

- (1) Where the amount of the check is more than twenty dollars the maximum amount that could be collected for collection costs is twenty dollars and there is no maximum on the amount of interest that can be collected. Interest would be figured at 6% per annum, or fraction thereof, and the holder would be entitled to interest, without regard to the total sum, from the date of dishonor.
- (2) Where the check is for less than \$20 the maximum which is collectable for costs of collection is the face amount of the check. As above, there would be no maximum amount for the interest charge. The holder is entitled to 6% from the date of dishonor until payment, irregardless of the total that accumulates due to the time factor.

I trust that this answers your questions.

Very truly yours,

FOR THE ATTORNEY GENERAL

WAYNE G. CROOKSTON, JR.  
Assistant Attorney General

WGC:lm

Br. In

May 15, 1974

Mr. J. Burns Beal  
State Brand Inspector  
2226 Main Street  
BUILDING MAIL

OFFICIAL OPINION #74-171

Dear Mr. Beal:

You have asked us for an opinion in regard to House Bill 566 of the Second Regular Session of the 42nd Legislature. That bill changes the terms of the members of the State Brand Board and raises the membership from three members to five. You have asked us whether as the Bill reads all five members of the Brand Board need be appointed, including reappointment of the three existing members, or whether only the two new members need be appointed before July 1st.

In reading this bill, we notice that it changes the terms of the existing members of the State Brand Board and shortens their terms from six to five years. Since this is so, it would appear that it will be necessary to reappoint the three existing members, plus the two new members.

Very truly yours,

FOR THE ATTORNEY GENERAL

WARREN FELTON  
Deputy Attorney General

WF:cg

cc: Office of the Governor

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STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

W. ANTHONY PARK  
ATTORNEY GENERAL

May 15, 1974

Mr. D.F. Engelking  
State Superintendent  
of Public Instruction  
Department of Education  
Building Mail

OFFICIAL OPINION #74-172

Re: Sick Leave Bank

Dear Mr. Engelking:

We have received numerous inquiries from school districts, teachers, administrators, and your office on the question of whether or not negotiation agreements entered into between the district and its professional staff can, as a matter of law, include the banking of sick leave, the method for doing so and the use thereof to be governed by agreement. We do not wish to describe any one banking proposal, since to do so may create the impression that this office supports only one plan. Rather, we wish to speak only to the legality of the concept itself.

This issue has not been decided by a great number of courts. However, the very issue of the legality of banking certain number of sick leave days on the basis of negotiations was determined in the State of New York. In Syracuse Teachers Association v. Board of Education, Syracuse City School District, 345 N.Y.S. 239 (1973), the court rejected the idea that sick leave granted to and permitted to be accumulated by a teacher was personal and unassignable. Rather the court held that sick leave, even though statutorily granted and permitted to be accumulated, is a fringe benefit to employment and therefore can be a term of that employment. Further, the court explained that it could not find any authority which held that an agreement or a part thereof which spoke to a sick leave bank as illegal and void. The particular agreement under discussion in that case was arrived at through the give and take of negotiation. Maximums were established in the number of days a teacher could draw on the bank and a general application to all teachers with respect to the credit any teacher may obtain. Further, the total extent to which

Mr. D.F. Engelking  
May 15, 1974  
Page 2

the district could be charged was established. Therefore, the agreement was limited and controlled through the negotiation process. Finally, the court could find no statute which prevented the district from including the sick leave bank provision in the negotiation agreement.

We are of the opinion that the Syracuse case is applicable and controlling on the answer to the question you and others have presented. Sick leave is statutorily granted in Idaho and permitted to be accumulated. Section 33-1216 and 33-1217, Idaho Code. Districts and their professional staffs are given statutory authority to negotiate on, inter alia, terms and conditions of employment. Section 33-1217 et seq., Idaho Code. Sick leave, by definition, is a term or condition of employment. Therefore, the districts and professional staffs may negotiate on contributions of sick leave to a bank on which teachers can draw to protect them during long illness or injuries. Finally, we can find no statute or other authority which prevents a district from including such provision in the negotiations agreement.

We trust we have been of assistance.

Very truly yours,

FOR THE ATTORNEY GENERAL

JAMES R. HARGIS  
Deputy Attorney General

JRH:lm

cc Dr. Parker Woodall  
Byron Johnson  
Fred Hahn

May 17, 1974

Mr. Jerry Hill  
Deputy Secretary of State  
Building Mail

OFFICIAL OPINION #74-173

Dear Mr. Hill:

Section 34-704, Idaho Code, requires candidates for county or state office to file a declaration of candidacy between the hours of 8:00 A.M. and 5:00 P.M. during the week of June 1 through June 7 in the year of the primary election. You have asked whether this statute requires filing offices to be open on every day within this period or merely on every normal working day, i.e., Monday, Tuesday, Wednesday, Thursday, and Friday, of the period.

It is my opinion that that the filing offices must remain open on every day of the period beginning with June 1 and ending with June 7 in the year of the primary election.

In view of the short time period in which a candidate may file his declaration of candidacy, the legislature undoubtedly intended candidates to have a full seven days in which to file said declarations. The primary function in construing a statute is to ascertain the legislative intent, and to give effect thereto. Knight v. Employment Security Agency, 88 Ida. 262, 398 P.2d 643 (1965).

Very truly yours,

FOR THE ATTORNEY GENERAL

JOHN F. GREENFIELD  
Assistant Attorney General

JFG:lm

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May 17, 1974

Mr. Joe R. Williams  
State Auditor  
State of Idaho  
B U I L D I N G

Attorney General Opinion #74-174

Dear Mr. Williams:

By letter dated April 17, 1974, you requested an Attorney General's Opinion as to the legality of a Lincoln National Life Insurance Company deferred compensation plan for the employees of the State of Idaho. The first page of the brochure that you enclosed with your request describes the plan as follows:

"A recent innovation in the Deferred Compensation field is the Salary Reduction approach, whereby an employee annually elects to irrevocably reduced his current compensation by a designated sum in consideration for the employer's promise to pay the previously reduced sums (plus an investment return) at retirement or earlier death or disability. The tax deferrment (or, exclusion from income) will be achieved by the electing employee under a Salary Reduction Deferred Compensation arrangement, so long as the employee has no 'actual' or 'constructive receipt' of the income under the agreement.

To assure that the employee has no 'constructive receipt' of income, the Agreement must be entered into before the compensation is earned and the employer's promise to the employee must not be secured in any fashion. Thus, the employee stands in the shoes of any general creditor of the employer in his rights emanate from the employer's contractual promise to pay."

The plan would require the employee of the State, and the State, to enter into a contract wherein the State agreed



to withhold payment of all or part of an employee's salary until a later, specified date. The time for payment of State employees salaries is specifically provided for in Section 59-503 of the Idaho Code:

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- "(1) Salaries of all State and district officers and employees whose salaries are paid from the State Treasury, shall be paid monthly, on or before the tenth day of the month following the month for which the salary is due, out of any money in the treasury not otherwise appropriated.
  - (2) From and after June 30, 1973, the State Auditor may prescribe pay periods different from the monthly pay period prescribed in Subsection (1) above, except that any such program shall insure that payment is made on or before the tenth day following the end of the pay period for which the salaries are due. The programs prescribed by the State Auditor need not be in the form between or among agencies and departments."

Subsection (2) allows the State Auditor to establish a pay period of longer than one month. Presumably, the Auditor could effectively defer compensation by setting a pay period of an extended length of time. However, payment for the full pay period would have to be made within ten days after the end of the pay period.

There is no provision under Section 59-503 for setting a pay period of one length for a part of the employee's salary and a different pay period for another part of the salary. Chapter 13, Title 59 (Public Employees Retirement System) does allow a retirement fund deduction from salary, but this is specifically provided for by statute. No statute provides for any other reduction of salary that is to be paid at a later date. Nor is the deferred compensation plan described one of the group insurance plans for which the State may contract under Idaho Code, Section 59-1201.

Therefore, the Lincoln National Life Insurance Company's deferred compensation plan described would only be in accord

Mr. Joe R. Williams  
State Auditor  
May 17, 1974  
Page 3

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with the Idaho Code if the auditor were to use Section 59-503 of the Idaho Code to prescribe an extended length of time as the pay period for an employee's complete salary. In order for a plan to be implemented that would allow for part of a state employee's salary to be deferred until after a specified date, new legislation would be required.

Very truly yours,

FOR THE ATTORNEY GENERAL

David B. Vaughn  
Assistant Attorney General

DBV:gc



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

W. ANTHONY PARK  
ATTORNEY GENERAL

August 13, 1974

Mr. Joe R. Williams  
State Auditor  
State of Idaho  
BUILDING MAIL

Official Opinion No 74-174

Dear Mr. Williams:

This office has received several inquiries concerning the May 17, 1974 Idaho Attorney General's Opinion on Deferred Compensation Plans for state employees. Because of the widespread interest in these plans we have again examined the legality of such plans to see if a change in the Attorney General's Opinion is warranted.

On re-evaluation we have concluded that the previous opinion correctly interprets Idaho law. We can readily perceive the need for deferred compensation plans in Idaho and are well aware of their benefits for many state employees. However, after long and careful thought, we remain convinced that special legislation is needed to authorize such plans under Idaho law. We remain willing and anxious to work with your office and other persons in drafting such laws which would financially benefit many state employees.

Very truly yours,

FOR THE ATTORNEY GENERAL

A handwritten signature in cursive script, reading "Robert L. Miller".

ROBERT L. MILLER  
Chief Deputy Attorney General

RLM:cap

6790 - "INSURANCE"

May 22, 1974

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Mr. Michael C. Moore  
Lewiston City Attorney  
P. O. Box 942  
Weisgerber Building  
Lewiston, Idaho 83501

OFFICIAL OPINION #74-175

Dear Mr. Moore:

You have requested an opinion from the Attorney General upon the following question:

"The question which has arisen is whether the City, by voluntarily agreeing to bargain collectively with its employees at this time, has committed itself and future City Councils to bargain collectively in the future."

Or:

"The only question is whether the City can legally bind and obligate future City Councils, which might be of a different persuasion, to continue the collective bargaining process."

The collective bargaining laws of the State of Idaho, particularly Sections 44-107, 44-107A, 44-107B, have recently been reviewed in Local Union 283, International Brotherhood of Electrical Workers v. Robison. Therein, the Idaho Supreme Court held:

". . . that the duties of the Commissioner of Labor, pursuant to I.C. §44-107, do not extend to questions of representation in public employment, of employees in a collective bargaining unit." Local Union 283,

Mr. Michael C. Moore  
May 22, 1974  
Page 2

International Brotherhood of Electrical  
Workers v. Robison, 91 Idaho 445, 423 P.2d  
999, 1002 (1967).

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The Court stated that the effectiveness of the certification of an employee bargaining representative depended upon the statutory duty to negotiate in good faith imposed upon employer and the bargaining representative by Section 44-107A, and necessarily the enforcement of that duty pursuant to Section 44-107B. These three sections of Title 44, Chapter 1 were held to be in para materia, thus presumptively each was enacted in furtherance of a common legislative policy. Ibid. The certification statute is concomitant to the duty to negotiate in good faith and to the enforcement provision. Aware that certification would lose all practical significance without the mutual obligation to bargain in good faith, the Court had to resolve the issue of whether that duty was enforceable against the governmental employer. In so doing, it held that statutory language which did not expressly articulate the inclusion of governmental employees (Section 44-107) would not serve to establish the duty upon the governmental employer.

Of what effect then is voluntary entrance into collective bargaining by the public employer? The City of Lewiston consented to appropriate certification by the Commissioner of Labor and is presently engaged in collective bargaining toward a collective labor agreement. Assuming that willing participation by the City is not otherwise prohibited, no issue arises unless and until the City attempts to remove itself from the bargaining process short of a collective agreement.

The rationale of Robison enunciates that the egress of the municipality from collective bargaining is equally as voluntary as the ingress. Fundamentally, the premise of Robison is that a statutory duty, enforcement of which is by criminal sanction, will not lay against the governmental employer without a clear or indisputable manifestation of legislative intent. The Idaho Legislature has not subsequently amended Title 44, Chapter 1, and in particular Section 44-107, to include the governmental instrumentality. The issue narrows thusly, can the City of Lewiston subject itself to the duty to negotiate in good faith and incur criminal sanction for failure to do so in the absence of statutory authorization?

Mr. Michael C. Moore  
May 22, 1974  
Page

COPY

Municipalities may exercise only such powers as are expressly granted or necessarily implied. Hendricks v. City of Nampa, 93 Idaho 95, 456 P.2d 262 (1969). Oregon Short Line Railroad Co. v. Village of Chubbuck, 83 Idaho 62, 357 P.2d 1101 (1960). The rule's corollary is that the City of Lewiston may incur only those liabilities, or sanctions as are expressly imposed by statute or necessarily implied thereof. The Robison Court refused to subject the governmental employer to the criminal provision of the collective bargaining act upon the existing statutory language. Therefore, it is the opinion of the Attorney General that collective bargaining by the City of Lewiston may be terminated unilaterally short of a collective labor agreement without prejudice to the present City Council or future city councils.

Very truly yours,

FOR THE ATTORNEY GENERAL

CHRISTOPHER D. BRAY  
Assistant Attorney General

CDB:cg

cc: Mr. B. R. Brown

May 31, 1974

Marvin J. Snyder, Captain  
Idaho State Police  
Building Mail

"OFFICIAL OPINION #74-176"

Re: Officer Edward G. Van Winkle

Dear Captain Snyder:

I have reviewed the copy of the Edward G. Van Winkle file which you furnished me and your request as to whether or not grievance procedure is applicable to a written reprimand where classification, dismissal, suspension, demotion or loss of compensation are not involved.

Please refer to Rule 20-2.1, Matters Which May Be Brought Before The Commission. That rule provides in part: Matters of dispute which may be brought before the commission for hearing and decision shall be limited to the discharge, reduction in rank or grade, suspension for more than thirty (30) days, allocation to a particular class or a particular pay grade or step within pay grade of any classified employee who has completed his probationary period. See also Title 67, Chapter 53, Section 16, Subparagraph (b), Idaho Code. Suffice as it is to say that Rule 20-2.1 is a verbatim adoption of the Code section.

I direct your attention to the procedure for grievance solving and the introductory paragraph. In part:

Grievances may include, but are not necessarily limited to classification, annual leave, sick leave, dismissal, suspensions, involuntary transfers, promotions, and demotions. Compensation shall not be deemed a proper subject for consideration under the grievance procedure except as it applies to alleged inequities within a particular agency or department.

The purpose for establishing a personnel system is to provide a means whereby an employee of the State is selected, retained and promoted on the basis of merit and performance of duty to

effect efficiency in the administration of state government. Rules and regulations were promulgated to establish and adopt an employee's grievance procedure within the individual departments of the State of Idaho. Copies of the Grievance Solving Procedure are furnished and explained to each employee and although the introductory paragraph sets forth grievances subject to the procedure a caveat is contained therein that grievances may include certain enumerated questions but at the same time grievances are not necessarily limited to the items classified.

The thrust of the legislative intention, however, is to afford State employees a method by which their selection, retention or promotion is based upon merit and performance of duties.

There is nothing to indicate that the legislative intent nor the adoption of a grievance solving procedure was or is to cover supervisory instructions or reprimands for non-performance of duty which do not subject a State employee to discharge, loss of pay, dismissal or suspension from duties without pay. To hold otherwise would be to undermine supervisory authority to require obedience to standards established in the best interest of a department. Title 67, Chapter 53, Idaho Code.

It is my understanding that a Grievance Board has either been convened or is under consideration for convening. If the former is true the Board should be disbanded because the letter of reprimand is a matter not covered by statute, rules and regulations or the Grievance Solving Procedure. A copy of this opinion when signed by the Attorney General shall issue to Officer Edward G. Van Winkle, Superintendent Kenneth DeYoung, Lieutenant M. Lyal Hall, Sergeant Gary K. Emerson and William A. Reagan, attorney for Van Winkle.

Very truly yours,

FOR THE ATTORNEY GENERAL

JAY F. BATES,  
Deputy Attorney General  
Assigned to the Department  
of Law Enforcement

JFB/b

cc: All Parties Stated Above





STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

W. ANTHONY PARK  
ATTORNEY GENERAL

May 31, 1974

Mr. Keith H. Holve  
Route 5, P. O. Box 359  
Idaho Falls, Idaho 83401

OFFICIAL OPINION # 74-177

Re: Constitutionality of Election Filing Fees

Dear Mr. Holve:

I am in receipt of your letter of May 20, 1974, requesting this office to issue an opinion on the question of the constitutionality of election candidate filing fees. Mr. Park has honored this request from you, since it is his view that an announced candidate for public office does have standing to seek an official Attorney General's opinion.

Candidate filing fees are required pursuant to Chapters 6 and 7, Title 34, Idaho Code. Sections 34-605 and 34-705 presently require you, as a candidate for congressman for the Second Judicial District, to pay a filing fee of One Hundred Fifty Dollars (\$150.00) to the Secretary of State. As I read your opinion request, your question is whether this filing fee and others for similar public offices deprive those who are unable to pay the fees the right to seek elective office and are thus unconstitutional. The actual constitutional issue is whether the statutory filing fees as applied to indigent candidates, are in violation of the Equal Protection Clause of the Fourteenth Amendment and Article 1, Section 2, Constitution of the State of Idaho.

In deciding this question, it is necessary that the Idaho filing fee scheme and the procedure for access to the ballot be understood. Chapter 6, Title 34, Idaho Code, prescribes when an election shall be held for each office, the qualifications that a candidate for that particular office must possess, where the candidate shall file his declaration of candidacy, the number of signatures the required petition must contain, and enumerates the filing

Mr. Keith H. Holve  
May 31, 1974  
Page 2

fee for each office that shall be paid at the same time the candidate files his declaration of candidacy. The form of the declaration of candidacy shall be prescribed by the Secretary of State (34-701, Idaho Code), and each candidate for office shall file his declaration of candidacy in the proper office, (either the Secretary of State or county clerk, as the case may be; 34-705, Idaho Code), between 8:00 a.m. June 1 and 5:00 p.m. June 7, prior to the primary election.

Pursuant to Section 34-703, Idaho Code, all candidates at the general election, except those for judicial office, must be nominated at the primary election, or have their names placed on the general election ballot as provided by law (referring to the filling of vacancies in the slate of candidates pursuant to Sections 34-714 through 34-716, Idaho Code), and comply with the provisions of the election statutes. This includes write-in candidates, i.e., a write-in candidate may be nominated at the primary and be a candidate at the general election by having his name written in on primary ballots by voters. He must also receive at least the same number of votes as the minimum number of signatures required on the petition which must be attached to a declaration of candidacy for that office, and pay the required filing fee for that office within ten (10) days following the primary election. Idaho Code, 34-702.

The party candidates for each office, whether they be candidates by declaration or write-ins, who receive the highest number of votes for their particular office are issued a certificate of nomination and their name is placed on the general election ballot. Idaho Code, Sections 34-1208 and 34-1214. In the case of a successful write-in candidate, he must pay his filing fee before he can become a candidate at the general election. Idaho Code, 34-702.

From the above it can be seen that there are three procedures by which a candidate can have his name on the primary ballot: 1) through the declaration of candidacy and paying filing fees; 2) by means of write-in voting; and 3) by having a political party certify his candidacy under the provisions of Sections 34-714 through 34-716, Idaho Code. However, in all cases, if the successful primary candidate desires his name to be placed on the general election ballot, he must have paid the filing fee at some time along the route. Chapter 6, Title 34; Sections 34-701 through 34-703, Idaho Code.

With the conclusion that a candidate must at some time have paid the filing fees in order that his name be placed on the general election ballot, I now turn to the cases that shed light on the constitutionality of such an election process. These cases assume, as does this opinion, that all prospective indigent candidates are qualified for office except for their inability, not unwillingness, to pay the required filing fee.

In Bullock v. Carter, 405 U.S. 134, 92 S.Ct. 849, 31 L.Ed.2d 92 (1972), the United States Supreme Court considered the constitutionality of Texas' procedure for ballot access. Under Texas' statutes, payment of the filing fee was an absolute prerequisite to a candidate's participation in the primary election. There was no alternative procedure by which a potential candidate who was unable to pay the fee could get on the primary ballot by way of petition, and write-in votes were not permitted in primary elections. The filing fees for each office were set by the party executive committee by apportioning the cost of the primary election among the various candidates as they deemed just and equitable. This resulted in one instance of a candidate paying 99.7% of the office's annual salary as a filing fee.

The Court recognized that a state has a legitimate interest in regulating the number of candidates on the ballot and, in so doing, a state may properly seek to prevent clogging of election machinery, to avoid voter confusion and to assure that the winner is the choice of at least a strong plurality. The Court additionally stated that a state has a duty to protect the integrity of its political processes from frivolous or fraudulent candidacies. However, while recognizing these state interests, the Court held that the Texas system was unconstitutional as it resulted in a denial of equal protection. The Court stated:

"By requiring candidates to shoulder the costs of conducting primary elections through filing fees and by providing no reasonable alternative means of access to the ballot, the State of Texas has erected a system that utilizes the criterion of ability to pay as a condition to being on the ballot, thus excluding some candidates otherwise qualified and denying an undetermined number of voters the opportunity to vote for candidates of their choice."  
405 U.S. at 144, 31 L.Ed.2d at 103.

It must be noted, however, that the Court left the door open as far as the constitutionality of reasonable filing fees are concerned by prefacing their holding with the following statement:

"It must be emphasized that nothing herein is intended to cast doubt on the validity of reasonable candidate filing fees or licensing fees in other contexts." 405 U.S. at 149, 31 L.Ed.2d at 103.

This door left open in Bullock for reasonable fees was closed in Lubin v. Panish, U.S., 94 S.Ct., 39 L.Ed.2d 702, 42 L.W. 4435 (March 26, 1974). In Lubin the Court considered California election statutes that required 2% of the annual salary as a filing fee for U.S. Senator, Governor and some state and county offices and 1% of annual salary as a fee for Congressional Representative, State Senator or Assemblyman, and other county and district offices. The election statutes required that for write-in votes to be counted, the write-in candidate must file a statement stating he is such and pay the required filing fee eight days prior to the election. There was thus no alternative procedure by which a candidate could receive votes in the primary election without paying the filing fee.

In Lubin, the Supreme Court again acknowledged a state's interest in keeping its ballots manageable and limiting candidates to those that are serious and have a prospect of public support. However, the Court stated these interests must be achieved by a means that does not unfairly or unnecessarily burden a candidate's equally important interest of availability of political opportunity. Continuing, the Court commented that filing fees, however large, do not, in and of themselves, test the genuineness of a candidacy or the extent of a candidate's voter support. In concluding its decision, the Court held as follows at 39 L.Ed.2d 709:

". . . California has chosen to achieve the important and legitimate interest of maintaining the integrity of elections by means which can operate to exclude some potentially serious candidates from the ballot without providing them any alternative means of coming before the voters. Selection

of candidates solely on the basis of ability to pay a fixed fee without providing any alternative means is not reasonably necessary to the accomplishment of the State's legitimate election interest. Accordingly, we hold that in the absence of reasonable alternative means of ballot access, a State may not, consistent with constitutional standards, require from an indigent candidate filing fees he cannot pay." (Emphasis added)

The entire opinion indicates a state may not test the seriousness of a candidacy solely in terms of dollar amounts and that absent any alternative means of gaining access to the ballot a state election process that does use as a sole test the ability to pay is exclusionary as to some potential candidates. It could, however, conceivably be argued that based on the factual situation in the Lubin case that Idaho's fee system is not struck down by the decision. Such an argument would be based on the factual difference that Idaho does not require payment of the filing fee by the write-in candidate prior to the primary election whereas California does. Such an argument carries little weight due to the exact holding of the case, quoted with emphasis above, the reasoning of the decision, the trend of both the Bullock and Lubin decisions, and, importantly, to the court's feelings expressed in a footnote in the Lubin case. The footnote is as follows:

"It is suggested that a write-in procedure, under §18600, et seq., without a filing fee would be an adequate alternative to California's present filing fee requirements. The realities of the electoral process, however strongly suggest that 'access' via write-in votes falls far short of access in terms of having the name of the candidate on the ballot. It would allow an affluent candidate to put his name before the voters on the ballot by paying a filing fee while the indigent, relying on the write-in provision, would be forced to rest his chances solely upon those voters who would remember his name and take the affirmative step of writing it on the ballot. That disparity would, itself, give rise to constitutional questions and, although we need not decide the issue, the intimation that a write-in

provision without the filing fee required by \$18600, et seq., would constitute 'an acceptable alternative' appears dubious at best."

In light of the decision in Bullock v. Carter, supra, the holding in Lubin v. Panish, supra, that a state may not require from an indigent candidate filing fees he cannot pay, and the indication in the above footnote of to the Court's thinking as to the constitutionality of a write-in procedure such as Idaho's, it is the opinion of the Attorney General that the filing fee requirements contained in Chapter 6 and 7 of Title 34, Idaho Code, deny prospective indigent candidates effective access to the ballot and thereby deny those candidates the equal protection of the laws. Therefore, candidate filing fees cannot be required of indigent candidates.

Our opinion is mandated by the Idaho filing fee scheme and the effect that the Bullock and Lubin decisions have on that scheme. It should be noted, however, that only indigents are exempt from payment of the filing fee and that both indigent and non-indigent must comply with the requirement that their declaration of candidacy be accompanied by a petition containing the requisite number of signatures. The signature requirement was recognized as a lawful procedure in the Lubin decision. The Court stated as follows at 39 L.Ed.2d 710:

" . . . [A] candidate who establishes that he cannot pay the filing fee required for a place on the primary ballot may be required to demonstrate the 'seriousness' of his candidacy by persuading a substantial number of voters to sign a petition in his behalf."

Similar petitions to show support were recognized as valid in Jenness v. Fortson, 403 U.S. 431, 91 S.Ct. 91, 29 L.Ed.2d 554 (1971).

The precise holding in Lubin is, as quoted with emphasis above, that a state may not require from an indigent candidate filing fees he cannot pay. There is no indication in Lubin or Bullock that non-indigent candidates may not still be required to pay the candidate filing fees. This procedure of requiring fees of non-indigent office seekers and allowing indigents ballot status without payment of fees was also recognized in Fair v. Taylor, 359 F.S. 304 (D.C.M.D., Fla. 1973). This case was decided after Bullock but before Lubin and will be discussed below.

Due to this opinion and the time factor involved because of the approaching primary election the question arises as to the procedure for establishing who is indigent and thereby does not have to pay the filing fee. The Three-Judge District Court in Fair v. Taylor, supra, faced the same question. An examination of that case will shed light on both the procedure for establishing indigency and the reasoning for still requiring non-indigents to pay the filing fees.

The plaintiffs in Fair v. Taylor challenged the Florida election statutes which required that a candidate for his party's nomination pay a five percent qualifying fee. The Court acknowledged that prior to Bullock these election laws had been consistently upheld in both state and federal courts. However, in light of Bullock the Court held that a qualifying system that does not provide an alternative to the payment of a substantial sum of money is invalid. The Judge went on to quote extensively from Bullock and concluded at 359 F.S. 306 as follows:

"This is not to say that filing fees are invalid per se. Bullock specifically noted that 'nothing herein is intended to cast doubt on the validity of reasonable candidate filing fees or licensing fees in other contexts'. 405 U.S. at 149, 92 S.Ct. at 859.

"We adhere to the prior decisions on the Florida statute which hold that a 5% filing fee, uniformly applied, is reasonable in amount and a valid means for the state to achieve its legitimate goal of controlling the ballot. Under Bullock, however, the state must provide an alternate method of obtaining a place on the ballot that does not involve the payment of a substantial sum of money to the state."

The decision in Fair v. Taylor, supra, was written in support of an Order that the Court had issued on a prior occasion. The Order was issued July 11, 1972, the deadline for filing was July 25, 1972, and the Order provided for an alternative method to getting on the ballot other than payment of filing fees. The pertinent contents of the Order were as follows:

"The qualifying fee and party assessment of 5% of the annual salary of the office for which a candidate seeks to qualify is reasonable in all respects.

[The permissible alternative method for persons unable to pay the qualifying fee was:] . . .

A. Candidates who are able to pay the filing fee and assessments shall be required to do so at the present statutory level of 5% of the annual salary of the office sought.

B. An alternative petitioning process shall be made available to those candidates who are unable to pay the required filing fee and party assessment without imposing an undue burden on their personal resources.

C. A person seeking to avail himself of the petitioning process shall file an affidavit stating under oath that he is unable to pay the filing fee and party assessment required by Florida Statutes without imposing an undue burden on his personal resources. The affidavit shall be filled with the officer before whom the affiant would qualify for the office sought. . . ."

Due to the similarity in the situation at hand and that contained in Fair v. Taylor, we think it appropriate to follow the guidelines set out therein, particularly with respect to the filing of an affidavit of indigency. Therefore, until the Idaho legislature can reassess the filing fee requirements, the Secretary of State should require all non-indigent candidates to pay the prescribed filing fees. Also, an affidavit should be used by which an indigent candidate can swear that he is indigent, and that he is unable to pay the filing fee required by statute. Such affidavit shall be filed with either the Secretary of State or the county clerk, as the case may be. The Secretary of State should treat those candidates using the affidavit of indigency as legally qualified candidates, if other requisites are satisfied.



Mr. Keith H. Holve  
May 31, 1974  
Page 9

I trust that the above answers your question.

Very truly yours,

FOR THE ATTORNEY GENERAL

A handwritten signature in cursive script, reading "Wayne G. Crookston, Jr.", written in dark ink.

WAYNE G. CROOKSTON, JR.  
Assistant Attorney General

WGC:cp

cc Pete T. Cenarrusa  
Secretary of State

June 5, 1974

74-178  
OFFICIAL OPINION # ~~74-278~~

Mr. Don C. Loveland, Chairman  
Idaho State Tax Commission  
317 Main Street  
Boise, Idaho

Dear Mr. Loveland:

You have requested an Attorney General's opinion addressed to the issue of whether §§63-3043, 63-3044, 63-3045A, 63-3046 and 63-3051 through 63-3065, Idaho Code, incorporated into the Transfer and Inheritance Tax Act effective July 21, 1974 apply to inheritance taxes delinquent as of that date.

As you know, the foregoing statutes supplement the collection procedure adopted at the time of the enactment of the present Transfer and Inheritance Tax Act in 1972.

"It is the policy of the law to insure the collection of all taxes, and whenever it is possible on any theory to do so the courts will construe the statutes to accomplish that result". Southerland, Statutory Construction §66.06; Public Service Co of Okla v. Parkinson, 143 P.2d 125 (Okla., 1943); Clark v. Douglas County, 193 P.2d 538 (Or., 1949).

The Federal Constitution does not prohibit a state from adopting new remedies for the collection of taxes, and applying those remedies to the taxes already delinquent. A delinquent taxpayer has no vested right in an existing mode of collecting taxes. League v. Texas, 22 S.Ct. 475, 476 (1902); Cota v. McDermott, 16 N.W. 2d 54 (N.D., 1955); City of Newark v. Yeskel, 74 A. 2d 883 (N.J., 1950); O'Brien v. Ross, 394 P.2d 1013 (Mont., 1964).

Moreover, the method of procedure for the ascertainment and determination of an inheritance tax is controlled by the statute in force at the time of the institution of the proceeding, although the tax itself and the rights of the parties are controlled by an earlier statute. Ross, Inheritance Taxation, page. 54; In re Davis' Estate, 44 N. E. 185 (N.Y., 1896); In re Sloane's Estate, 47 N.E. 978 (N. Y., 1897). A mode of collection includes

Commissioner Don C. Loveland  
June 5, 1974  
Page 2

the method by which the tax is determined. Those proceedings in which a court has already determined the tax are cases in which the collection procedure has already begun, and the Commission cannot apply the new collection procedure to those proceedings.

Very truly yours,

FOR THE ATTORNEY GENERAL

J. MICHAEL KINSELA  
ASSISTANT ATTORNEY GENERAL

JMK:blh



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

W. ANTHONY PARK  
ATTORNEY GENERAL

June 6, 1974

Mr. Ralph Coates  
Board of County Commissioners  
% Clerk of the District Court  
Payette County Courthouse  
Payette, Idaho 83661

OFFICIAL OPINION #74-179

Dear Mr. Coates:

You have requested an opinion of the Attorney General,

"... concerning the new law requiring government offices to pay overtime for hours over the 40-hour week in lieu of compensatory time."

The impact of the Fair Labor Standards Amendments of 1974 upon public employment is demanding, but has no force and effect upon certain exempt personnel. Herein, the scope of the minimum wage and maximum hour provisions will be analyzed in view of your county's budgetary problems.

Effective May 1, 1974, both the minimum wage and the maximum hour provisions apply to most employees of the United States, the several states and all political subdivisions of the state. The minimum wage was established at \$1.90 per hour and increases annually as follows:

- a. Effective January 1, 1975 - \$2.00 per hour
- b. Effective January 1, 1976 - \$2.20 per hour
- c. Effective January 1, 1977 - \$2.30 per hour

Overtime pay at time and one-half is required for any hours worked over forty (40) per week, but neither the minimum wage nor the maximum hour provision applies to the following personnel:

Mr. Ralph Coates  
June 6, 1974  
Page 2

a. Those not subject to the civil service laws of the State, political subdivision, or agency which employs him;  
AND

b. Those who:

1. hold a public elective office of, as in your instance, the county;
2. are selected by the county commissioner, county judge, county tax assessor-collector, etc. (assuming all are elected officials), to be a member of the office holder's personal staff;
3. are appointed by that office holder to serve on a policy making level;
4. are immediate advisers to the office holder with respect to the constitutional or legal powers of his office.

The Federal Wage and Hour Division of the U.S. Department of Labor has served notice that a designation of exempt status will be strictly scrutinized. Thus, if one has a genuine question as to whether an employee can enjoy the exempt status, the designation should not be made prior to appropriate inquiry to the Idaho Department of Labor.

Fire protection and law enforcement personnel are specifically exempt from the maximum hour provision only, until January 1, 1975. Thus until that time, these personnel may be required to work without the possibility of overtime pay. Their dollar amount per hour nonetheless, must comply with the Federal standard. Upon January 1, 1975, governmental entities with five or more law enforcement or fire protection personnel lose their exempt status.

Maximum hours are then defined as follows:

a. Effective January 1, 1975 - 240 hours worked within 28 consecutive days;

1. for a work period of at least 7 days, but less than 28 days, the work period can be no greater than 60 hours in any 7 day work period.

Mr. Ralph Coates  
June 6, 1974  
Page 3

b. Effective January 1, 1976 - 232 hours worked within 28 consecutive days;

1. for a work period of at least 7 days, but less than 28 days, 58 hours in any 7 day work period.

c. Effective January 1, 1977 - 216 hours worked within 28 consecutive days;

1. for a work period of at least 6 days, but less than 28 days, 54 hours in any 7 day work period.

d. Effective January 1, 1978 - overtime will be paid after 216 hours in a 28 day period or for hours in excess of the average hour of duty as determined by a study to be conducted by the Secretary of Labor of the United States, during 1976.

In summary, for other than those specifically exempted, any hours worked in excess of the defined maximum hours must be compensated by pay at the rate of time and one-half. For those exempted, but not including law enforcement or fire protection personnel, current state law remains in force and effect. For law enforcement and fire protection personnel, the minimum wage provision became effective May 1, 1974, but the maximum hour provision will not apply until January 1, 1975. Thereafter, maximum hours are enumerated as herein stated excepting departments with 4 or less employees in either category.

If you have any further questions, please advise.

Very truly yours,

FOR THE ATTORNEY GENERAL

*Christopher D. Bray*  
CHRISTOPHER D. BRAY  
Assistant Attorney General

CDB:cg



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

W. ANTHONY PARK  
ATTORNEY GENERAL

June 7, 1974

Dr. James A. Bax  
Administrator  
Department of Environmental and      OFFICIAL OPINION #74-180  
Community Services  
Building Mail

Re: Interpretation of Idaho Code, Title 50, Chapter  
13, dealing with sanitary restrictions.

Dear Dr. Bax:

Your letter of May 17th in which you seek a formal opinion regarding the interpretation of Idaho Code, Section 50-1326 has been referred to me.

The relevant language of Idaho Code, Section 50-1326 is as follows:

" . . . Until the sanitary restrictions have been satisfied by the filing of said certificate, no owner shall construct any building or shelter on said premises which necessitates the supplying of water or sewage facilities for persons using such premises" (Emphasis added.)

As you are aware, subdivided land must meet certain sanitary requirements prior to its development. The referred to Code section prohibits construction of certain structures on a subdivided lot until those requirements are met. The actual procedure whereby the requirements are imposed and enforced consists of the placing of a "sanitary restriction" on the formal plat of the subdivision. This restriction is removed, thereby allowing building on the subdivision, upon receipt of a certificate from the Administration or his designee that the sanitary restriction has been satisfied. The certificate is issued only when the administration is satisfied that water and sewage facilities will be adequate.

It has been brought to our attention that a certain builder is constructing a building on a platted subdivision still subject to the sanitary restriction. He takes the position that construction of a building or shelter is permitted provided such building or shelter is not to be occupied prior to the lifting of the sanitary restriction.

It is black-letter law that words used in statutes will be given their plain, clear, and ordinary meaning. The Idaho Code section referred to uses the word "construct". By no stretch of the king's English can this be read to mean "occupy". It would appear that the builder relies upon the modifying phrase at the end of the above-quoted section. He apparently reads the section as prohibiting the construction of a building or shelter when such building or shelter necessitates the supplying of water or sewage facilities for persons using such premises". In other words, if no one is to live in it, it is not the type of construction prohibited in the Code section.

This strained interpretation seeks merely to substitute the word "occupy" for the word "construct" in the statute. It is the opinion of this office that such a construction is incorrect in regard to this section. The statute was intended to prohibit "construction" of buildings or shelters which would ultimately house people, whether such structures require immediate sewer and water facilities or not. This opinion is supported by reading the language of 50-1326 together with the language of Idaho Code, Section 50-1329. The latter section reads as follows:

"Violation a misdemeanor.--Any person, firm or corporation who constructs, or causes to be constructed, a building or shelter on a parcel . . . prior to the satisfaction of the sanitary restriction, . . . shall be guilty of a misdemeanor. Each and every day that such activities are carried on in violation of this section shall constitute a separate and distinct offense." (Emphasis added.)

There is no modifying phrase after the use of the word "constructs" or the word "constructed".

It is important that the Administrator or his designee consider the environmental effectiveness of water and sewer facilities free from the practical pressures of finished buildings representing a substantial investment standing idle while the decision is pending. Moreover, from an enforcement viewpoint, it is easier to ascertain construction of a building than occupancy following construction.




Dr. James A. Bax  
June 7, 1974  
Page 3

It is the opinion of this office that the requirements of Idaho Code, Section 50-1326 prohibit the construction of any building or shelter, when such building or shelter is to be occupied by persons who will have need of water or sewage facilities, prior to the lifting of the sanitary restriction. The prohibitions of 50-1326 are not to be limited only to the occupancy of such buildings.

Very truly yours,

FOR THE ATTORNEY GENERAL



JAMES C. WEAVER  
Assistant Attorney General

JCW:lm



STATE OF IDAHO

W. ANTHONY  
ATTORNEY GENERAL

June 10, 1974

Mr. Tom D. McEldowney  
Commissioner of Finance  
Department of Finance  
BUILDING MAIL

OFFICIAL OPINION #74-181

Re: Section 26-601, Idaho Code

Dear Commissioner McEldowney:

I am in receipt of your request for a legal opinion regarding the interpretation of that part of Section 26-601, Idaho Code which pertains to what collateral a bank may accept on loans. The exact issue is whether state banks may accept another bank's shares of stock as collateral on loans. It is the opinion of the Office of the Attorney General that a state bank may accept such stock as collateral on loans. An examination of the legislative history and a legislative interpretation leads to this conclusion.

Section 26-601, was originally enacted by Chapter 133, Section 29, Idaho Session Laws of 1925. The pertinent part of Section 29 read as follows:

" . . . No bank shall accept as collateral, nor make any loans or discounts on the security of nor purchase any shares of its own capital stock or the shares of any other bank wherever organized, or situated, except stock of Federal Reserve Banks, . . . "

This language remained the same until 1961 when the Legislature enacted Chapter 84, Idaho Session Laws, which amended that part of the statute to read as follows:

Mr. Tom D. McEldowney  
June 10, 1974  
Page 2

" . . . No bank shall accept as collateral, nor make any loans or discounts on the security of nor purchase any shares of its own capital stock nor purchase the shares of any other bank wherever organized, or situated, except stock of federal reserve banks, . . . "

This amendment indicates that a bank cannot accept as collateral, make loans or discounts on, or purchase its own capital stock. However, where the stock of another bank is involved, a bank may accept such stock as collateral or security on loans, but is prohibited from purchasing such stock. A contrary interpretation would render the amendments meaningless.

The fundamental aim in legislative interpretation is to determine the Legislature's intent in enacting the particular statute or amendment. Jorstad v. City of Lewiston, 93 Idaho 122, 456 P.2d 766 (1969); Knight v. Employment Security Agency, 88 Idaho 262, 398 P.2d 643. With this goal in mind, it is a general rule that the title to an act may be resorted to as an aid in determining the intent. Tway v. Williams, 81 Idaho 1, 336 P.2d 115 (1959); State v. Mead, 61 Idaho 449, 102 P.2d 915 (1940).

The title to House Bill No. 188, enacted as Chapter 84, Page 113, Idaho Session Laws 1961, which added to Section 26-601 the phrase "nor purchase" reads in pertinent part as follows:

" AN ACT  
  
AMENDING SECTION 26-601, IDAHO CODE,  
AS AMENDED, RELATING TO INVESTMENT  
OF FUNDS AND LOANS THAT MAY BE MADE  
BY STATE BANKS AND THEREBY ELIMINATING  
THE PROHIBITION AGAINST LOANING  
MONEY UPON THE SECURITY OF SHARES OF  
THE CAPITAL STOCK OF OTHER BANKS,  
. . . "

This clearly shows that the intent of the Idaho Legislature when it amended Section 26-601 was to allow state banks to receive as collateral on loans shares of capital stock of other banks. Therefore, it is the opinion of the Attorney

Mr. Tom D. McEldowney  
June 10, 1974  
Page 3

General that banks may accept as collateral, make loans or discounts on the security of shares of other banks, but they cannot purchase the shares of other banks.

I trust this answers your questions.

Very truly yours,

FOR THE ATTORNEY GENERAL

WAYNE G. CROOKSTON, JR.  
Assistant Attorney General

WGC:cg



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

June 12, 1974

W. ANTHONY PARK  
ATTORNEY GENERAL

Idaho Veterans' Affairs Commission  
P. O. Box 7765  
320 Collins Road  
Boise, Idaho

OFFICIAL OPINION # 74-182

Attn: Mr. Larry Laughridge  
Executive Secretary

Gentlemen:

You have sought an Attorney General's opinion on the following question:

Is "compensation", as defined by 38 U.S.C., Section 101(13), paid to a veteran as a veteran's benefit includible in the computation of "income" as that term is defined by §63-117(a), Idaho Code, in the new "Circuit Breaker Bill", H.B. 619, enacted by the State Legislature in 1974.

The Veteran's Benefits Act of 1957, Public Law 85-56 71 Stat. 83, re-enacted by Public Law 83-857, 38 U.S.C. 101-5228 consolidates into one act all the laws administered by the Veterans Administration relating to compensation, pension, hospitalization, and burial benefits. That section of the act which defines terms used in the act distinguishes between "compensation" and "pension". Thus, "compensation" is service connected [38 U.S.C., Section 101 (13)] while "pension" is nonservice connected [38 U.S.C., Section 101(15)].

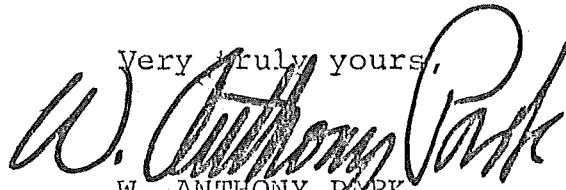
In defining "income", §63-117(a), Idaho Code, provides that it should include

". . . the gross amount of any pension or annuity (including railroad retirement benefits, all payments received under the federal social security act, state unemployment benefits and veteran's disability pensions), . . ."

Idaho Veterans' Affairs Commission  
June 7, 1974  
Page 2

The above language indicates a legislative intention to include veteran's disability pensions within the general definition of "pension", but does not exhibit any legislative intention to include veteran's "compensation" within the general definition of "pension". Since "income" includes only those classes of income specified in §63-117(a), Idaho Code, it is our opinion that "compensation" as defined in 38 U.S.C. 101(13), is not included in the computation of "income".

Very truly yours,



W. ANTHONY DARK  
ATTORNEY GENERAL

WMCD:WAP:blh

June 13, 1974

Mr. Dryden Hiler  
Deputy Secretary of State  
Building Mail

OFFICIAL OPINION #74-183

Dear Mr. Hiler:

You have asked for an opinion as to whether a notary public appointed prior to the effective date of House Bill #374, in order to "renew" his commission, must refile for his office and consequently pay the \$10.00 filing fee required by Section 51-103, Idaho Code, or whether, by virtue of House Bill #374, he is appointed for life provided only that he renew his bond every four years after his appointment.

House Bill #374, effective July 1, 1974, amended Section 51-101, Idaho Code, to provide that a gubernatorial appointment of a notary public shall henceforth be for life provided that each notary file a renewal bond every four years following his "lifetime" appointment. Prior to the amendment, Section 51-101 provided that gubernatorial appointments of notaries public ran for terms of four years, at which time notaries intending to retain their offices were required to refile for appointment. A notary refiling for a new appointment was required to pay the same \$10.00 filing fee required of him when he filed for his initial appointment (by Section 51-103, Idaho Code).

It is my opinion that House Bill #374 applies only to gubernatorial appointments made after the effective date of that bill, which is July 1, 1974. To say that a notary public appointed prior to the effective date of House Bill #374 is appointed for life is to apply the new amendment retroactively.

Mr. Dryden Hiler  
June 13, 1974  
Page 2

Idaho statutes cannot be construed to apply retroactively absent a clear legislative expression that they be so construed. Section 73-101, Idaho Code. No such expression exists in the language of House Bill #374.

Very truly yours,

FOR THE ATTORNEY GENERAL

JOHN F. GREENFIELD  
Assistant Attorney General

JFG:lm

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June 13, 1974

Mr. Jerry Hill  
Chief Deputy  
Secretary of State  
Building Mail

OFFICIAL OPINION #74-184

Dear Mr. Hill:

You have asked for an opinion on the proper construction of Section 34-435, Idaho Code, a general elections statute dealing with cancellation of registration. Section 34-435 requires each county clerk to examine his "election register" within 60 days following the date of each general election and "cancel the registration of any elector who did not vote at any election for which registration is required in the past eight (8) years."

You have inquired whether county clerks should have, within 60 days from the last general election (1972), cancelled the registration of electors who had not voted in an election for which registration was required in the past eight years. It is my opinion that they should not have so cancelled registrations and, further, should not so cancel registrations following the general election of 1974. To read Section 34-435, Idaho Code, to require them to do so is to read the statute to apply retroactively. Unless expressly declared to be construed retroactively, no Idaho statute is retroactive. Section 73-101, Idaho Code.

It is my opinion that the statute in issue should be construed to require county clerks to cancel the registration of any elector who had not voted in any election for which registration is required eight years from the effective date of Section 34-435--May 10, 1970. To construe Section 34-435 otherwise would create adverse consequences for an elector who failed to vote in any election for which registration was acquired which was held prior to the effective date of Section 34-435, Idaho Code. In other words, it is my opinion that county clerks should

Mr. Jerry Hill  
June 13, 1974  
Page 2

not carry out the provisions of Section 34-435, Idaho Code until the 60 day period following the first general election held eight years from the effective date of the statute in question, which is, as mentioned above, May 10, 1970.

Very truly yours,

FOR THE ATTORNEY GENERAL

JOHN F. GREENFIELD  
Assistant Attorney General

JFG:lm

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June 14, 1974

Mr. Homer R. Ross, Chief  
Sales Tax Division  
State Tax Commission  
Statehouse Mail  
Boise, Idaho

OFFICIAL OPINION # 74-185

Dear Mr. Ross:

You have requested an Attorney General's opinion regarding whether a private corporation operating a retail sales concession within the confines of Mountain Home Air Force Base must charge Idaho sales tax on retail sales made to military personnel and their dependents.

Such sales are subject to the imposition of the Idaho sales tax.

The United States Supreme Court has ruled that the Soldiers and Sailors Relief Act of 1940 does not exempt members of the Armed Forces from state sales and use taxes. Sullivan v. U.S., 1969, 395 U.S. 169.

The State has no taxing power over the United States or instrumentalities of the United States. McCulloch v. Maryland, 4 Wheat. 316. Accordingly, the Idaho Sales Tax Act expressly provides an exception for "The sale at retail, storage, use and other consumption of tangible personal property which this state is prohibited from taxing under the Constitution of the United States". Idaho Code §63-3622(a). The extent to which a state sales and use tax may be imposed on a federal military installation is governed by federal statute, 4 U.S.C. 105 and 107 (the Buck Act), which permits imposition of such taxes on a military reservation but does not waive the exemption of "the United States or instrumentalities thereof" from state taxes. The term "instrumentalities of the United States" has been interpreted to include such activities as post and base exchanges and officers and non-commissioned officers open messes (clubs). These entities exist under and operate pursuant to federal authority. Falls City Brewing Co. v. Reeves,

Mr. Homer R. Ross  
June 14, 1974  
Page 2

D.C. Ky. 40 F.Supp. 35; State ex rel. C.P.O. Mess (open) U. S. Naval Station Key West v. Green, (Fla.) 174 So. 2d 546. However, an otherwise private business entity whose only connection with the federal government is operating a retail sales outlet located on federal property under contract with the federal government cannot avail itself of the cloak of an "instrumentality of the United States". Buckstaff Bathhouse Co. v. McKinley, 308 U.S. 358. Therefore, when a private concessionaire makes retail sales of tangible personal property within a federal military reservation located within the State of Idaho, such as Mountain Home Air Force Base, these sales are subject to the Idaho sales tax.

Very truly yours,

W. ANTHONY PARK  
ATTORNEY GENERAL

TVS:WAP:blh



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

W. ANTHONY PARK  
ATTORNEY GENERAL

June 17, 1974

Mr. William D. Collins  
Prosecuting Attorney  
Boise County  
P.O. Box 2794  
Boise, Idaho 83701

OFFICIAL OPINION #74-186

Dear Mr. Collins:

You have asked for an opinion on the constitutionality of the durational residency requirements of Section 31-208, Idaho Code. That section requires one who would vote in an election to remove a county seat to: 1) be registered within the requirements of Title 34, Idaho Code, and 2) have resided in the county in question for six months and in the precinct in which he wishes to vote for 90 days. Section 2, Article 18 of the Idaho Constitution contains the same durational residency requirements as those underlined above.

In a previous opinion, which I enclose, the Attorney General's Office concluded that the six month durational residency requirement set out in Section 2, Article VI, of the Idaho Constitution was in conflict with the United States Constitution in light of Dunn v. Blumstein, 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed 2d 274 (1972). That case held that requiring a certain duration of residency in order to vote was violative of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution absent a compelling state interest for the existence of such a requirement.

One interest advanced by the State of Tennessee in Blumstein was the protection of the state against fraudulent voting through the operation of registration procedures. The Court, however, held that Tennessee did not need an entire year, the length of time provided by the Tennessee statute in issue, to complete registration tasks. Picking an arbitrary figure for illustration, the Court said that 30 days would not be an excessive durational residency requirement to impose for registration purposes, but that one year would be excessive. Blumstein, Supra at 405 U.S. 348. If time to complete voter registration is said to underlie the 6 month/90 day durational residency requirements of Section 31-208, Idaho Code, and Section 2,

Mr. William D. Collins  
June 17, 1974  
Page 2

Article 18 of the Idaho Constitution, it is my opinion that said durational residency requirements are far excessive of the thirty day period suggested by the Blumstein Court for this activity.

Another interest advanced by Tennessee was termed "Knowledgeable Voting". The State's one-year durational residency requirement, argued Tennessee, ought to be upheld since it affords some surety that the voter has, in fact, become a member of the community and that as such, he as a common interest in all matters pertaining to its government and is, therefore, more likely to exercise his right more intelligently. The Court, however, dismissed this interest as less than compelling, holding that a particular duration of residency is not sufficiently indicative of either bona fide residency or "intelligence" in voting to justify the denial of a fundamental right--the right to vote. Blumstein, Supra at 405 U.S. 355, 356. Should "Knowledgeable Voting" be said to underlie the durational residency requirements in issue in this case. I must defer to the Court's reasoning on the insufficiency of this governmental interest.

Upon consideration of Dunn v. Blumstein and the state statute and Constitutional provision in question, I can identify no compelling state interest underlying the lengthy durational residency requirements of Section 31-208, Idaho Code and Section 2, Article 18 of the Idaho Constitution. It is my opinion, therefore, that such requirements are in conflict with the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. Because the U.S. Constitution must prevail over a conflicting state statute by virtue of the "Supremacy Clause," Article VI, Section 2, U.S. Constitution, it is my opinion that the durational residency requirements of Section 31-208, Idaho Code and Section 2, Article 18 of the Idaho Constitution, are unconstitutional and without force or effect.

Since there is no problem about the validity of those parts of the two laws in question that require a voter in an election to remove a county seat "be registered within the requirements of Title 34, Idaho Code, I would suggest that you regard your residency standards for such an election as identical to the residency requirement of a Title 34 election. The tests for residency in a Title 34 election require only 1) that the voter is physically present, unless voting absentee, in the political subdivision in which he wishes to vote, and 2) that the voter intends to remain in that subdivision indefinitely. In short,

Mr. William D. Collins  
June 17, 1974  
Page 3

consider an elector who has properly registered to vote in a general election in Boise County, as eligible to vote in an election to remove the county seat.

Very truly yours,

FOR THE ATTORNEY GENERAL

JOHN F. GREENFIELD  
Assistant Attorney General

JFG:lm

Enclosure

July 23, 1974

OFFICIAL OPINION NO. 74-187

Mr. J. D. Hancock  
Prosecuting Attorney  
Madison County  
30 South 2nd West  
Rexburg, ID 83440

Mr. Gordon S. Thatcher  
Rigby, Thatcher & Andrus, P.A.  
Attorneys for Madison School  
District No. 321  
P. O. Box 437  
Rexburg, ID 83440

Dear Messrs. Hancock & Thatcher:

You have requested an Attorney General's opinion on the following questions:

(1) May the Board of Trustees of a school district in preparing the district's budget, which must be prepared on or before the forepart of June (see Idaho Code §§33-801, 33-802, 33-807 and 33-401), take into consideration the "actual" assessed valuation of property within the district for the calendar year in which the budget is prepared (hereinafter referred to as the "actual" current year's assessed valuation as opposed to "estimated" current year's assessed valuation)?

(2) Do the county commissioners have any lawful authority to reduce the dollar budget on the sole ground that it is based in part upon an estimate of the actual current year's assessed valuation?

In our opinion, a school district, in preparing its budget, can take into consideration the previous calendar year's assessed valuation (§63-919, Idaho Code) and its own estimate of the current year's assessed valuation but cannot consider the "actual" current year's assessed valuation for the very practical reason that the "actual" current year's valuation is unknown until



September, three months after a school district's budget has been prepared and published in accordance with and as required by law. §§33-801 and 33-401, Idaho Code. The "actual" current valuation remains an unknown factor until September for the reason that the annual process of obtaining equalized assessed valuations is in its nature no less a time consuming matter than is the annual task of establishing budgets. Additionally, the "actual" current valuation remains unknown until September for the reason that the legislature has seen fit to specifically provide time for obtaining valuations and for equalizing valuations in the sequence which is described generally as follows:

Each county assessor places property valuations on rolls which are delivered to the possession of the County Board of Equalization, for equalization, on or before the first Monday of July of the current year. §§63-322 and 63-1220, Idaho Code. Equalization, i.e. increasing or decreasing valuations, is completed and the roll is delivered by the Board to the county auditor by the second Monday of July of the current calendar year. §§63-401 and 63-412, Idaho Code. On or before the fourth Monday of July, the county auditor prepares an abstract of the rolls, showing total values of categories of property in the county, by class and category, and delivers the abstract to the State Tax Commission for statewide equalization. §§63-412, 63-413 and 63-605, Idaho Code. Such equalization is completed by the State Tax Commission on or before the fourth Monday of August. §§63-601 and 63-603, Idaho Code. Between January and the fourth Monday of August, however, the State Tax Commission, which is charged with the responsibility of assessing operating property (Chapter 7, Title 63, Idaho Code) including all property belonging to car companies (Chapter 8, Title 63, Idaho Code) determines the assessed value of all such property within the state (§§63-601, 63-707 and 63-804, Idaho Code). The Tax Commission equalizes its own valuations of operating property at the same time it equalizes valuations of property made by the county shown upon the county's abstracts which have been transmitted to the Tax Commission

(as noted above) for equalization. §§63-501, 63-611, 63-513(16), Idaho Code. The equalization of all property within the state is completed by the State Tax Commission on or before the fourth Monday of August of the current year. §§63-601, 63-603, 63-605 and 63-611, Idaho Code. The records of the State Tax Commission indicate that the assessed valuation of all operating property in Idaho has constituted, on the average during the past ten years, 24.3 percent of all property valued in the state of Idaho for ad valorem assessment purposes. It is not until the first Monday of September that the State Tax Commission certifies to each county auditor the changes it has made in the assessments by county officials of local property (§63-612, Idaho Code) and the values of operating property which are to be placed on a county's assessment roll for the current year. §63-613, Idaho Code. At this time, the county auditor enters the changes made by the Commission and adds the value of operating property to the assessment rolls and totals, for the first time, the equalized values of all properties within the county. §63-614, Idaho Code. The county auditor gives that information along with a total of each taxing district's assessed valuation to the county commissioners by the second Monday of September at which time the commissioners compute the tax rate, not exceeding the statutory maximum, in mills, to be applied to that valuation in order to raise the dollar amount of the budgets which have been approved and certified according to law. §§63-901, 63-624 and 63-625, Idaho Code.

As can be seen, the "actual" current calendar year's assessed valuation of a school district does not become available until long after a school district's budget has been prepared and published in June. Therefore, it is not possible for a school district to consider such information in fixing a budget in May and June to be presented to the county commissioners for mill levy purposes in September. See §§33-801 (last sentence), 33-807 and 63-901, Idaho Code. However, in preparing and establishing its budget, a school district may consider its own estimate of the current year's

Messrs. Hancock & Thatcher  
July 25, 1974  
Page 4

assessed valuation. Consideration of such an estimate is not prohibited by law. Therefore, answering the second question, it is our opinion that the county commissioners may not reduce a school district's certified dollar budget on the sole ground that the budget is based in part upon an estimate of current years assessed valuation.

However, the county commissioners may, in effect, circumscribe the dollars budgeted by a district if the district has over-estimated the current year's assessed valuation. This is possible because the county commissioners are proscribed from setting a mill levy in excess of the maximum authorized by law, even if the maximum levy does not raise the dollars budgeted. §§63-901, 63-626 and 33-902, Idaho Code. If the maximum levy authorized by law, when applied to the actual current year's assessed valuation (as determined in September) yields less projected revenue than required by the certified dollar budget which has been based upon an estimate (made in June) of the current year's assessed valuation, the dollar amount of the deficiency cannot be raised through the property tax. On the other hand, if the actual current year's assessed valuation is adequate to raise the dollars budgeted by application of a mill levy not in excess of the maximum authorized by law, the county commissioners may not take any action adverse to the district's certified budget upon the sole ground that it has been based in part upon the current year's assessed property valuation within the district.

Very truly yours,

FOR THE ATTORNEY GENERAL

WILLIAM McDOUGALL  
ASSISTANT ATTORNEY GENERAL

WMCD:ji

June 21, 1974

Mr. Jack Farley, Director  
Motor Vehicle Division  
Department of Law Enforcement  
Building Mail

"OFFICIAL OPINION #74-188"

Dear Mr. Farley:

When one member of a community estate passes away and the summary administration of such decedent's estate is initiated under Title 15, Chapter 3, Section 1205 by the surviving spouse, and a Decree is made by the Court to the effect that such surviving spouse and the decedent were married and the surviving spouse is the sole heir at law or devisee, I have been advised by attorneys that some county assessors are refusing to accept the Decree for purposes of transferring titles of motor vehicles to the surviving spouse.

The foregoing procedure, (15-3-1205, Idaho Code) is a summary procedure designed to transfer estate assets without the formality of either an informal or formal probate. No Letters, testamentary or administration, are issued. A Decree entered by a court in such summary procedures vests the title of all estate assets in the surviving spouse. To transfer the title of motor vehicles it is only necessary that a surviving spouse furnish to the assessor, or to the department, the title appropriately signed off together with a certified copy of the Decree.

To obviate the problem it is suggested that upon receipt of this opinion copies thereof be made and distributed to all county assessors.

For your ready reference the section reads as follows:

"15-3-1205. Summary administration of estates in which a surviving spouse is the sole beneficiary.

—(a) Upon the testate or intestate death of a person leaving a surviving spouse as the sole devisee or beneficiary, the surviving spouse (or any person claiming title to any property through or under such surviving spouse) may file a verified petition setting out marriage and the death of a person leaving a surviving spouse as the sole devisee or heir. If

the decedent died testate, the petition must be accompanied by the original of the last will and testament of the decedent. Notice as provided in Section 15-1-401, Idaho Code, requiring that all persons interested appear before the court at a time and place specified to show cause why such petition should not be granted shall be given by the petitioner at a time that is not less than thirty (30) days before the date of such hearing.

(b) If it shall appear at such hearing that the decedent and the person claimed to be the surviving spouse were duly married and that the surviving spouse is the sole heir or devisee, a decree shall be made to that effect and recorded. This decree shall thereafter have the same effect as a formal decree approving or determining distribution.

(c) In the event that the surviving spouse (or person claiming through or under the surviving spouse) shall elect to proceed under this section, the surviving spouse shall assume and be liable for any and all indebtedness that might be a claim against the estate of the decedent.

(d) Any interested person may terminate the proceeding before or at the hearing by filing a petition for formal probate.

Very truly yours,

FOR THE ATTORNEY GENERAL,

JAY F. BATES,  
Deputy Attorney General  
Assigned to the Department  
of Law Enforcement

JFB/b  
cc: W. Anthony Park  
John Bender

June 19, 1974

Mr. Colen H. Sweeten, Jr.  
Clerk of the District Court and  
Ex-Officio Auditor and Recorder  
Malad City, ID

OFFICIAL OPINION #74-189

Dear Mr. Sweeten:

You have requested an Attorney General's opinion on the following question:

Whether the collection fee authorized by §63-918, Idaho Code, to be paid into a county's current expense fund applies to disbursements by a county to a city of state sales tax monies distributed to the county in lieu of the inventory tax (which is a property tax) by the state treasurer, all of such disbursements having been made in accordance with the provisions of §§63-3638(g) and 63-3638(g)(1), Idaho Code.

In our opinion, §63-918, Idaho Code, is not applicable to disbursements made in accordance with §§63-3638(g) and 63-3638(g)(1), Idaho Code. Therefore, counties are not entitled to collect a fee of one and one-half percent of such disbursements.

In 1967, the legislature provided for the exemption of business inventory from property taxation. §63-105Y, Idaho Code; S.L. 1967, Ch. 116, pp. 229-233. For the purpose of replacing revenue lost by county taxing authorities by reason of such exemption, the legislature provided in the same act for an appropriation from the "sales tax fund" to be distributed by the state treasurer no less frequently than quarterly to each county treasurer. Such distributions to counties were, and are now, required to be redistributed by each county treasurer to each intracounty taxing authority, entitled under the act to disbursements, no less frequently

Mr. Colen H. Sweeten, Jr.  
June 19, 1974  
Page 2

than quarterly. §§63-3638(f) and (g), Idaho Code; S.L. 1967, Ch. 116, pp. 229-233, as amended by S.L. 1970, Ch. 183, pp. 531-532.

As respects these monies, the county's function is limited to (1) annually determining each intracounty taxing district's share of such funds distributed by the state to the county, (2) receiving and depositing the funds quarterly and (3) disbursing them quarterly to each intracounty taxing district including cities.

The statute, §63-918, Idaho Code, provides as follows:

"All taxes of every city, town, village, school district or other district or municipality, levied according to law and certified in accordance with the provisions of this act, shall be collected and paid into the county treasury and apportioned to such city, town, village, school district or other district or municipality; provided, that one and one-half per cent (1 1/2%) of all taxes collected and paid into the county treasury for every incorporated city, town or village and every other district or municipality having a treasurer whose duty it is to receive, keep and disburse all moneys belonging to such incorporated city, town, village, or other district or municipality, shall be apportioned to the county current expense fund, which apportionment shall be in full for all services of all county officers in the levy, computation and collection of such taxes." [Emphasis added]

\* \* \*

The language underlined indicates that the legislature intended that the county be paid for its services in levying, computing and collecting taxes imposed by the county. Money received by a county from the state treasurer in lieu of the inventory tax is clearly not revenue derived by a county's imposition of its own tax, and, since as respects such funds, the counties perform no service which could be categorized as levying or collecting, the statute does not apply to them.

Mr. Colen H. Sweeten, Jr.  
June 19, 1974  
Page 3

Receipts and disbursements by the county of state sales tax revenue as authorized by §63-3638(g), Idaho Code, does not constitute the levy or collection of a tax by a county. For that reason, counties are not entitled to collect a fee upon them.

Very truly yours,

FOR THE ATTORNEY GENERAL

WILLIAM McDOUGALL  
ASSISTANT ATTORNEY GENERAL

WMCD:ji





STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

W. ANTHONY PARK  
ATTORNEY GENERAL

June 20, 1974

Honorable Pete T. Cenarrusa  
Secretary of State  
Building Mail

OFFICIAL OPINION #74-190

Dear Mr. Cenarrusa:

Mr. Harold E. Peterson, County Clerk of Kootenai County, has informed you that he does not intend to comply with the provisions of Title 34, Idaho Code, with regard to the registration of electors. Specifically, he has stated that he intends to implement an "oath--swearing system" for the signing of the combination election record and poll book, rather than utilize the registration procedures of Title 34, Chapter 4, of the Idaho Code.

By the provisions of Section 34-201, Idaho Code you are the chief election officer of the State of Idaho and are charged with the responsibility to obtain and maintain uniformity in the "application, operation and interpretation of the election laws." In accord with that responsibility, it is my opinion that you should issue a directive to Mr. Peterson requesting that he comply with the registration requirements of Title 34, Chapter 4, of the Idaho Code.

Very truly yours,

FOR THE ATTORNEY GENERAL

A handwritten signature in cursive script, reading "John F. Greenfield", is written over the typed name.

JOHN F. GREENFIELD  
Assistant Attorney General

JFG:lm



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

W. ANTHONY PARK  
ATTORNEY GENERAL

June 26, 1974

Mr. Pete T. Cenarrusa  
Secretary of State  
Building Mail

OFFICIAL OPINION #74-191

Dear Mr. Cenarrusa:

You have asked for an opinion regarding your duties under Section 34-1802, Idaho Code.

On April 10, 1974, sponsors of an initiative issue titled "The Idaho Presidential Preference and Spring Primary Election Act" filed a petition for the initiative with your office, as required by Section 34-1804, Idaho Code.

On April 11, 1974, you forwarded two (2) copies of the initiative to the Office of the Attorney General for ballot titling, as required by Section 34-1809, Idaho Code.

On April 22, 1974, the Office of the Attorney General returned one (1) copy of the initiative to you together with "short" and "long" ballot titles, as required by Section 34-1809, Idaho Code.

On April 25, 1974, the Office of the Attorney General notified you that it wished to revise the original "long" ballot title. After securing an Attorney General's opinion that you were authorized to accept a revised title, you agreed to do so.

On or about April 30, 1974, the Office of the Attorney General notified you that it wished to offer a second revision of the long ballot title to the presidential preference election initiative. You indicated orally that you would accept a second revision if the sponsors of the initiative had not begun to print and circulate its petitions. The

Mr. Pete T. Cenarrusa  
June 26, 1974  
Page 2

Idaho College Republican League, the sponsor, reported that it had not yet printed or circulated any petitions and, consequently, you accepted the second revised long ballot title on May 3, 1974. On the same day, the Office of the Attorney General advised the Idaho College Republican League of the contents of the new text of the long ballot title and printing began soon thereafter.

On ~~May~~ <sup>June</sup> 24, 1974, the Idaho College Republican League wrote to you, complaining that its petition drive had bogged down and asking you for an extension of time beyond the four-month deadline for filing initiative issues set out in Section 34-1802, Idaho Code. The specific extension requested was ten days, the approximate length of time that printing and circulation of the initiative was postponed due to the revising of the long ballot title by the Office of the Attorney General.

On ~~May~~ <sup>June</sup> 26, 1974, you asked the Office of the Attorney General for an opinion as to whether or not you were authorized to grant such an extension and accept a late filing of the initiative in question.

It is my opinion that, under the particular circumstances presented by the facts outlined above, a filing of The Idaho Presidential Preference and Spring Primary Election Act initiative no more than ten days later than four months prior to the 1974 general election represents substantial compliance with Section 34-1802, Idaho Code. Article 3, Section 1 of the Idaho Constitution reserves the power of the initiative to the people of the state. Section 34-1802, Idaho Code, is part of an integrated series of statutes created by the Idaho Legislature, pursuant to Article 3, Section 2, Idaho Constitution, to facilitate the initiative process. Chapter 18, of Title 34, Idaho Code, is akin to Chapter 4, Title 34, Idaho Code, which contains the voter registration laws of the State of Idaho. Both chapters contain procedural machinery designed by the Legislature to implement a constitutional right.

It has long been observed that voter registration statutes are not calculated to defeat or impair the right of voting, but rather are designed to facilitate and secure the exercise of that right. Capen v. Foster, 12 Pickering (Mass.) 485 (1832). Voter registration statutes were recognized early by the Idaho Supreme Court as procedural rather than substantive in nature. See Wilson v. Bartlett, 7 Idaho 271, 62 P. 416 (1900).

Mr. Pete T. Cenarrusa  
June 26, 1974  
Page 3

Like voter registration statutes, initiative laws are generally viewed as procedural devices for securing constitutional rights, and, as such, have been liberally construed toward the securing of ballot status for initiative issues. The doctrine of substantial compliance has been utilized by California courts when considering deviations by initiative sponsors from the requirements of regulatory statutes.

"The procedures relative to circulation of petitions for initiating or referring measures could be so stringently created and construed as to impinge substantially upon these reserved powers [of initiative and referendum]. By and large, the courts have minimized this possibility. For example, a substantial compliance test is used when there are alleged deviations, such as a women's use of her husband's given name in signing a petition, or the omission or incorrect designation of a precinct number, or the addition of the date of signing by someone other than the signer. In such cases the deviations are not substantial." Donald S. Greenberg, The Scope of the Initiative and Referendum in California, 54 Cal.L.Rev. 1717, at 1743. (aug - Dec. 1966)

Washington courts have framed noncompliance problems in a jurisdictional context.

". . . curtailing the likelihood of success in obtaining judicial review to halt an initiative or referendum before the measure is enacted is a principle which calls for a liberal construction in favor of facilitating initiatives and referendums.

\* \* \*

"Perhaps one might generalize by saying that only a serious breach of statutory requirements will warrant

Mr. Pete T. Cenarrusa  
June 26, 1974  
Page 4

injunctive proceedings against a proposed initiative or referendum." (Emphasis added) Philip A. Trautman, Initiative and Referendum in Washington: A Survey, 49 Wash.L.Rev. 55, at 64-65 (1973).

A "serious" breach in Washington was committed when the Secretary of State certified an issue for printing on the ballot when there was no showing that the requisite number of signatures had been procured and presented. State ex rel Evich v. Superior Court, 188 Wash. 19, 61 P.2d 143 (1936). Another act considered a serious breach occurred when the Secretary of State permitted withdrawals of signatures after an initiative and accompanying signatures had been filed with him. State ex rel Harris v. Hinkle, 139 Wash. 419, 227 P. 861 (1924).

A breach termed not serious occurred when the Secretary of State certified an initiative even though petitions accompanying the initiative had been stolen from his office before he had the chance to canvass them. The signatures on those petitions having been counted, the Washington Supreme Court held that the validity of the signatures could be presumed. This presumption arose from the probability that most signers had not placed false information after their names or otherwise improperly signed petitions in view of the criminal penalties that lie for knowingly doing so. Rousse v. Meyers, 64 Wash.2d 53, 340 P.2d 557 (1964).

Although the Office of the Attorney General could find no Idaho case law squarely in point with the facts presented here, it notes a recent Idaho Supreme Court decision in the analogous area of recall elections. Sponsors of a recall movement against a state legislator failed to insure that petition signers listed information specifically required by Section 34-1703, Idaho Code. That statute appeared to require the listing of "post office" information among the information to be supplied by signers of petitions for the recall of state legislators. Although the recall sponsors had provided a heading titled "post office", the signers failed to fill in that information. The Secretary of State, relying on the advice of the Attorney General, refused to accept petitions without the post office information. The sponsors of the recall movement sought a writ of mandamus ordering the Secretary of State to accept the petitions, arguing that in the particular case at hand, all signers who lived in the legislative district

Mr. Pete T. Cenarrusa  
June 26, 1974  
Page 5

in question (District #34) also had the same post office address (Pocatello, Idaho). Since the signers had filled in the information regarding their legislative district, the argument went, the post office information was unnecessary in this case and, to require such information, was making a substantive hurdle of a procedural statute designed to facilitate the constitutional right to recall.

The Idaho Supreme Court held, in a unanimous decision, that "the signatures were properly identified with sufficient information under the facts of this case for the defendant [Secretary of State] to accept and file them under I.C. Sec. 34-1706(2)." West v. Cenarrusa, Idaho Capital Reports, Vol. 21, No. 31 (1974).

It is apparent from West, supra, that the Idaho court has adopted a liberal construction of statutes regulating recall elections in favor of the sponsors of the recall movement. In effect, the doctrine of substantial compliance was applied by the Court where a deviation from the recall machinery was one it considered not "serious".

The initiative and the referendum, like the recall, are extraordinary remedies for legislative inaction or efficiency. All are means of direct control over the law and law makers by the public. In view of the Idaho Supreme Court's liberal construction of recall statutes, and in view of the facts of the instant situation, it is my opinion that the late filing of The Idaho Presidential Preference and Spring Primary Election initiative by the Idaho College Republican League, such filing coming no more than ten (10) days later than the 4-month deadline for filing initiatives set out by Section 34-1802, Idaho Code, represents "substantial compliance" with that statute. Sponsors were delayed approximately ten days in printing and circulating their petitions due to acts of government officials handling their petitions, not due to acts of their own. Sponsors should not be penalized by the said delay.

I further advise you to grant a ten (10) day extension of time to opponents of this initiative to present arguments for printing, if such opponents wish to offer such arguments. Opponents are required to present arguments against initiatives by the 105th day prior to the next general election following the filing of the initiative by Section 34-1812, Idaho Code. In this case, however, if a ten day extension of time is granted

Mr. Pete T. Cenarrusa  
June 26, 1974  
Page 6

to the proponents of the measure, the opponents will be disadvantaged if they do not receive a corresponding extension of time.

Very truly yours,

FOR THE ATTORNEY GENERAL

A handwritten signature in dark ink, appearing to read "John F. Greenfield". The signature is fluid and cursive, with the first name "John" being particularly prominent.

JOHN F. GREENFIELD  
Assistant Attorney General

JFG:cg

June 27, 1974

C  
O  
P  
Y

Mr. Kent Ellis, Chief  
Grants-in-Aid Division  
Parks and Recreation Dept.  
Statehouse Mail

OFFICIAL OPINION #74-192

Re: Off-Road Motor Vehicle Fund

Dear Kent:

This is in answer to your letter of June 3, 1974, inquiring into the extent of the use of the Off-Road Motor Vehicle Fund created by the 1973 Session of the Idaho Legislature.

Chapter 297 of 1973 Idaho Session Laws states specifically that:

"The purpose for which moneys in the fund may be used shall be to acquire, purchase, improve, repair, maintain, furnish, and equip off-road motor vehicle facilities and sites in the state of Idaho."

This language clearly indicates that the fund is only to be used for off-road motor vehicle facilities and sites. It is our opinion that the legislature did not intend to make the fund available for off-road motor vehicle safety and training programs.

Very truly yours,  
FOR THE ATTORNEY GENERAL

MATTHEW J. MULLANEY, JR.  
Deputy Attorney General

MJM:cg





STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

W. ANTHONY PARK  
ATTORNEY GENERAL

June 19, 1974

Honorable Leo A. Butler  
State Representative  
District #7  
P.O. Box 501  
Orofino, Idaho 83544

OFFICIAL OPINION #74-193

Dear Mr. Butler:

After some length of time and research we are prepared to issue opinions on your questions concerning parking, traffic control, citation for violations, and withholding of transcripts, diplomas or permission to register as a means of collecting the fines imposed for cited infractions at the colleges and universities.

Within certain limitations not here pertinent, the colleges and universities have complete control over the real property to which they are title holders. Sections 33-2804, 33-3005, 33-3115 and 33-4003, Idaho Code. The institutions, then, under the direction of the State Board of Education acting as regents and trustees thereof, may designate certain real property for parking. Conversely, the regents and trustees have the authority to refuse to establish parking areas on institutional land or remove existing parking areas from that use. In light of this authority and in the absence of any pertinent restrictions on the use of land for parking, we can find nothing which would indicate that the institutions may not assign and reserve certain parking lots or portions thereof for use by certain and selected persons or for use by those who hold certain positions.

Nor can we find any requirement that the reservation of or assignment to certain lots or parking spots therein must be contingent upon the payment by the user thereof of some fee. Since the institutions are free to establish the lots, it must necessarily follow that they may also establish to whom the lots shall be available, upon what, if any, condition, and to the exclusion of all others. And since the institutions may restrict the parking lots to certain users, then the institutions may also take steps necessary to protect that restricted use.

The issue of enforcement is, we believe, the real gravamen of your request for our opinion. Since the institutions may establish parking lots and restrict and otherwise limit the use to certain persons, to certain times, and certain positions, may the institutions impose fines for violations of the restriction and limitations and withhold indicia of academic progress or deduct the amount of the fine from paychecks as means to collect the fine?

Although the nature, purposes, and roles of the institutions have recently been debated in depth, nowhere have we found any responsible person suggest that any institution is established for the purpose of providing parking for employees, students, or the public. In short, the institutions are not in the parking business. Parking for the vehicles of employees and students is a service provided by the institutions and is not a right, privilege or immunity which the institution is obligated by law to preserve and protect. The institutions are under no legal obligation to provide any parking protection for anyone. Those institutional lands now used for parking lots can be converted to different uses. With the tremendous expense of institutional expansion, converting existing lots to other institutional uses may become a very real alternative to the problems arising from enforcing violations of institutional parking regulations.

The State Board of Education and its institutions are administrative entities. As such, they have the statutory authority to promulgate rules and regulations for their own governments. Section 33-101, Idaho Code. As stated above, with Code citations, the State Board and institutions also have control over the real property to which they are title holders. The institutions, with board approval, have promulgated rules and regulations for the use of certain real property to be used for parking lots. We assume here that all the rules and regulations have been duly adopted by acceptable administrative procedures. Administrative determinations are enforceable in the manner provided by statute. 2 Am Jur. 2d 317, § 506, 507.

Section 33-2806, Idaho Code, provides that the Board:

"may prescribe rules and regulations for the management of . . . all other property of the university and its several departments, and for the care and preservation thereof, with penalties and forfeitures, by way of damages for their violations which may be sued for and collected in the name of the board before any court having jurisdiction of such action.  
(Emphasis added.)

Representative Butler  
June 19, 1974  
Page 3

Therefore, there is statutory authority for the Board to enforce compliance with parking regulation by the imposition of a monetary penalty for violation thereof.

The issue now becomes one of collection. The statute which gives the Board the authority to impose penalties and forfeitures also gives the Board a cause of action in court for the collection of more penalties or forfeitures. Does the Board have alternative methods available to collect the penalties imposed for parking violations? The answer to this question depends on who violates the parking regulations: a member of the general public, employee, or student.

A member of the general public who parks on institutional property is subject to the same regulations as is a student or employee. Parking regulations are established to regulate and control parking by the user of the service. Whoever uses the facilities is subject to the regulated use of that facility. Therefore, the Board has the authority to regulate the use of parking lots even as to members of the general public. The Board may also bring an action against the member of the general public to collect the penalty imposed for violation of the regulation. It is our understanding that the institutions have established "visitors" and "guests" parking areas and that a member of the general public may use the same by the simple method of obtaining a permit from the information center. Further, it is our understanding that availability of parking areas to the general public are clearly defined and described so that a member of the general public can know whether or not a particular area is available to him.

The regulations are also applicable to employees of the institution. Employees are subject to penalties and forfeitures for violation. Collection of fines can be effected by a court action. However, deduction from salaries and wages is permitted only in accordance with Section 45-611, Idaho Code, which prohibits deductions, except as required by law, without the written approval voluntarily given by the employee and for lawful purposes.

It is our understanding and observation that the vast majority of users of institutional parking lots are students. Therefore, restrictive use of parking areas would affect a greater number of students than employees or members of the general public. The penalties and forfeitures permitted by law are applicable enforcement tools for violations by students of parking regulations. Therefore, there is authority for the Board and institutions to impose a monetary penalty for violation of parking regulations.

Representative Butler

June 19, 1974

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In addition, the Board and institutions may adopt rules and regulations concerning standards of conduct and academic progress. This authority is inherent in the authority of the Board to establish standards for admission and graduation and for the conduct of students. Sections 33-2806, 33-2811, 33-3006, 33-3104, 33-3107, 33-3715, 33-4001, and 33-4005, Idaho Code. The Board and institutions then may take whatever action is appropriate and reasonable to insure compliance with standards of conduct and academic progress. If an institution can determine that certain conduct of a student not related to the academic standards necessary for a degree is sufficient to cause the student's suspension or expulsion, then it would appear that an institution could withhold permission to register, grant a degree or diploma, because of that proscribed conduct. Further, the institutions can and do refuse permission to register, withhold degrees and diplomas where a student fails to pay or has not paid fees, tuition, and other charges imposed by the institutions. Therefore, it is not unusual for an institution to use that withholding device as a method of collecting money. Although our Supreme Court held in Paulson v. Minidoka County School District, 93 Ida. 469, 463 P.2d 935, that a school district may not withhold the product of the student's education (a transcript of credits) to collect a fee, it did so on the basis that public education must be financially free. That case is limited to Article IX, Section 1 of the Constitution of the State of Idaho, which does not include education in institutions of higher education. There is no constitutional requirement that the legislature "establish and maintain a general, uniform and thorough system of public, free," institutions of higher education. We point out the Paulson case because it has been suggested that the holding there is applicable to our colleges and universities. At this time we are unable to extend the holding to our institutions of higher education. That is a judicial function for the courts.

In answer to your question number 5, we have been informed that there is unreported Second Judicial District case that held that there is no irrebuttable presumption that an improperly parked car was improperly parked by the owner thereof. If this is the holding of the case, then there might very well be a rebuttable presumption, which would mean that the burden shifts to the owner of the car to show that he did not park the car improperly. However, we wish to make no further comment until we have more information on that matter.

CONCLUSION

I

The State Board acting as regents and trustees and the institutions thereunder have statutory authority, both explicit and implicit, to establish parking lots, adopt regulations for the use thereof, and to enforce the regulations.

II

The University does have the authority to withhold student transcript to collect penalties for violation of those regulations, and on proper authorization, to deduct the penalty from employee paychecks.

III

We can find no requirement that before a parking space can be assigned to a particular person, such as the handicapped, or for the exclusive use of a person holding a particular position, a fee must be paid by the user thereof.

IV

Tickets issued by campus security personnel can be enforced both by the university administrative function and the Courts. Therefore, they must carry some "legal weight."

V

We wish to make no additional comment on the improperly parked vehicle attributable to the owner until we have had an opportunity to examine the decision of the court in the Second District.

VI

Unless it can be shown that the regulations and method of enforcing them are unreasonable or arbitrary, not merely inconvenient, then the courts will probably not invalidate either the regulations or methods of enforcing them. We cannot find that the regulations or the enforcement thereof are irrational, arbitrary, capricious or without authority. Because of limited space available close to where the driver wishes to go, we can certainly see where the regulations may be inconvenient. It may be that the institutions should not, as a matter of policy enforce their regulations by withholding transcripts and other indicia of academic progress. However, simply because we may disagree with the method of collecting the penalties does not render the regulation or the enforcement thereof invalid. We can

Representative Butler

June 19, 1974

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think of equally effective methods of enforcement which are also probably authorized and which could create more expense and inconvenience to the person who violates the regulation: e.g., the physical removal of a car by the use of a tow truck and impoundment thereof at the owner's expense; turning over the enforcement, on a contract basis, to law enforcement; finally, the institutions could remove the parking lots entirely and make no provision for off street parking at all, except for particular persons or positions.

We trust that we have been of some assistance in answering your questions for you.

Very truly yours,

FOR THE ATTORNEY GENERAL

*James R. Hargis*  
JAMES R. HARGIS

Deputy Attorney General

JRH:lm

cc: Jon Warren  
Sherman Carter  
Roger Green  
William J. Bartz  
Milton Small  
Gladys Huffman

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OFFICIAL OPINIONS OF THE STATE OF  
IDAHO  
W. ANTHONY PARK, ATTORNEY GENERAL

FISCAL YEAR 1975  
JULY 2, 1974 thru JAN. 6, 1975

numbers 75-1 through 75-98

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C.P.



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

W. ANTHONY PARK  
ATTORNEY GENERAL

July 2, 1974

Mr. Pete T. Cenarrusa  
Secretary of State  
Building Mail

OFFICIAL OPINION #75-1

Dear Mr. Cenarrusa:

You have asked for an opinion on whether a candidate who has properly filed for nomination for the Idaho House of Representatives, then withdrawn his candidacy, may "withdraw his withdrawal", or in any other way reinstate himself as a primary election candidate once the time for filing his candidacy has expired.

It is my opinion that:

1. A candidate who withdraws his candidacy may not "withdraw his withdrawal"; and
2. A candidate who withdraws his candidacy may not refile for any office once the deadline for filing declarations of candidacy has expired.

Section 34-704, Idaho Code provides for the filing of declarations of candidacy "in the proper office between 8 a.m. June 1 and 5 p.m. June 7 prior to the primary election." According to the information you have furnished the Attorney General, an individual properly filed his candidacy for the Idaho House of Representatives on June 6, 1974, then sent a notarized letter withdrawing his candidacy. The letter was dated June 6, 1974 and was received by the Office of the Secretary of State on June 10, 1974. On June 6, 1974, after mailing the letter of withdrawal, the candidate in question telephoned the Office of the Secretary of State and requested that Secretary not "act on the letter until the 7th of June."



Mr. Pete T. Cenarrusa  
July 5, 1974  
Page 2

On June 11, 1974, the candidate in question telephoned the Office of the Secretary of State and reaffirmed to one of the Secretary's deputies, Mr. Bruce M. Rickerson, his decision not to run for the Idaho House of Representatives. On June 13, 1974, the candidate in question again telephoned the Secretary of State, this time to announce his desire to change his mind and run for the legislature. Your request for this opinion followed.

It is my opinion that the action of the candidate in question in telephoning the Office of the Secretary of State on June 11, 1974 to affirm his decision to withdraw his candidacy constituted an effective withdrawal of candidacy. Absent statutory authority to the contrary, a candidate can withdraw his candidacy. The right to withdraw, in fact, is specifically authorized by statute in a majority of jurisdictions. 25 Am.Jur.2d §134. On the other hand, absent statutory authority to the contrary, a candidate cannot thereafter effectively withdraw his previous declination to run for office and thereby requalify himself for the primary election, since filing of the declination destroys the effect of the original declaration of candidacy. State ex rel Moon v. Annear, 253 Wisc. 257, 33 N.W.2d 634 (1948); see Brower v. State, 13 Ohio App. 259 (1920).

A candidate may withdraw his candidacy, then refile for an office provided the deadline for filing declarations of candidacy is not expired. In the instant case, however, the candidate in question withdrew his candidacy on June 11, 1974, four days after the deadline for filing declarations of candidacy provided for in Section 34-704, Idaho Code. The individual in question therefore, may not refile for office. Neither, as I have indicated above, may that individual withdraw his withdrawal of candidacy.

Very truly yours,

FOR THE ATTORNEY GENERAL

JOHN F. GREENFIELD  
Assistant Attorney General

JFG:cg



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

W. ANTHONY PARK  
ATTORNEY GENERAL

July 2, 1974

Mr. Clyde Koontz  
Legislative Auditor  
Room 114, Statehouse  
Building Mail

OFFICIAL OPINION #75-2

Dear Mr. Koontz:

This letter is in response to your request of June 7, 1974, for an opinion regarding the assessment of audit charges under Idaho Code, Section 67-450A. Section 67-450A states that:

"The annual appropriation to the office of legislative auditor from the general fund shall provide for authorized audits and services to general fund departments, agencies, commissions, or institutions without charge to the unit receiving such services. The cost and expenses incurred by the legislative auditor's office in conducting audits or in carrying out other work authorized by law in dedicated funds, shall be paid from the appropriation to the office, department, board, commission or institution and/or the dedicated funds under the control of the office, department, board, commission or institution for whom the work is done . . . .

"All moneys received from the various dedicated fund agencies shall be added to the legislative auditor's

Mr. Clyde Koontz  
July 2, 1974  
Page 2

appropriation from the general fund  
and are hereby appropriated to the  
legislative auditor . . ."

Specifically, your inquiry raises two distinct questions which are to be discussed without regard to possible complications caused by federal funding of some state agencies:

1. How should the term "dedicated funds", as used in Idaho Code, Section 67-450A, be interpreted?
2. If Section 67-450A is ambiguous, is corrective legislation necessary?

It is our understanding that the Legislative Auditor's policy has been to charge an audited agency for that proportion of the audit which does not represent an audit of the general fund appropriation for the agency. An agency which receives the entirety of its funds from sources other than the general fund would be billed for the total cost of the audit, while an agency that received 25% of its funds from the general fund would be required to defray three-quarters of the audit expenses. In effect, this amounts to an interpretation of "dedicated funds" to include all sources of funding other than the general fund.

One difficulty with this de facto interpretation is that the statutes and judicial decisions generally use the generic term "special funds" when referring to all state funds other than the general fund. See Idaho Code, Section 67-3525; State v. Musgrave, 84 Idaho 77, 370 P.2d 778 (1962); Dahl v. Wright, 65 Idaho 130, 139 P.2d 754 (1943). The phrase "dedicated funds", on the other hand, does not appear in the Constitution or the statutes, and the Idaho Supreme Court's use of the term has been confined to cases involving funds which are set aside for certain purposes by the Idaho Constitution. For example, in State v. Idaho Power Company, 81 Idaho 487, 346 P.2d 596, 612 (1959), the Court held unconstitutional the legislature's attempt to use "the dedicated State Highway Fund" to reimburse the Idaho Power Company for the cost of relocating utility facilities. See also Rich v. Williams, 81 Idaho 311, 341 P.2d 432, 434 (1959); State ex rel Moon v. Jonasson, 78 Idaho 205, 299 P.2d 755, 757 (1956); Idaho Const., Art. 7, § 17. Similarly, in Teacher's Retirement System of Idaho v. Williams,

Mr. Clyde Koontz  
July 2, 1974  
Page 3

84 Idaho 467, 374 P.2d 406, 408 (1962), the Court characterized the public school fund as "dedicated to, and held in trust for, support and maintenance of schools . . . ." See also Idaho Constitution, Art. 9, § 3.

This dichotomy between "special funds" created by statutes and "dedicated funds" which are reserved for certain purposes by the Constitution also appears in a selection from the Court's statement of the facts in Board of County Commissioners of Lemhi County v. Swensen, 80 Idaho 198, 327 P.2d 361 (1958). In that case, the Court found that:

"The State Legislature . . . appropriated \$35,000 from the Highway Fund, a dedicated fund, of the State of Idaho to the county treasurer of Lemhi County, Idaho, to be placed in a special fund and used as directed by the county commissioners of said county." Id. at 200, 327 P.2d at 361 [emphasis added].

Thus it would appear that the Legislative Auditor's interpretation of "dedicated funds" as a designation of all sources of revenue other than the general fund is inconsistent with the Supreme Court's prior use of the term. This does not mean, however, that the Legislative Auditor's interpretation is incorrect. Ambiguous statutory language must be construed in accordance with the legislature's intent, Jorstad v. City of Lewiston, 93 Idaho 122, 456 P.2d 766 (1969), and if the legislative intent does not appear in clear terms in the statute, the act will be interpreted in the light of the occasion and necessity for the law and the remedy in view. Noble v. Glenns Ferry Bank, Ltd., 91 Idaho 364, 421 P.2d 444 (1966).

The occasion for the enactment of Section 67-450A was the necessity of specifying the method of billing for services rendered by the Legislative Auditor to other agencies and departments. If the term "dedicated funds" is deemed limited to constitutionally reserved funds, Section 67-450A would not solve the problem which compelled its enactment because there would be no provision covering charges for statutorily required audits of funds which are neither "general" nor "dedicated". See Idaho Code, Section 67-449(1). Consequently, it is probable that the courts would interpret "dedicated

Mr. Clyde Koontz  
July 2, 1974  
Page 4

funds", as used in Section 67-450A, to include all sources of revenue other than the general fund.

While it would undoubtedly be possible to rewrite Section 67-450A to clarify the legislative intent, the revision is probably unnecessary. As a general rule, the interpretation of a statute by the agency charged with the enforcement thereof is entitled to great weight and will be followed by the courts unless there are cogent reasons for doing otherwise. Idaho Public Utilities Com'n v. V-1 Oil Co., 90 Idaho 415, 412 P.2d 581 (1966). This is particularly true if the construction has been long continued and consistently practiced. State ex rel Haworth v. Bernstein, 68 Idaho 539, 200 P.2d 1007 (1949). The theory is that a long-continued construction leads to the conclusion that the interpretation has received the tacit approval of the legislature. State ex rel Wedgwood v. Hubbard, 63 Idaho 791, 126 P.2d 561 (1942).

Conversely, if amendatory legislation is passed, the courts might conclude that the legislature disapproved of the existing construction of Section 67-450A by the Legislative Auditor. Moreover, it would be rather difficult to clarify Section 67-450A without also revising the existing definition of the general fund. See Idaho Code, Section 1205.

Therefore, even though Section 67-450A is somewhat ambiguous, corrective legislation is probably unnecessary.

Very truly yours,

W. ANTHONY PARK  
Attorney General

WAP:cg

cw



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

W. ANTHONY PARK  
ATTORNEY GENERAL

September 26, 1974

Donald J. Pieper  
Project Director  
Alcohol Safety Action Project  
102 South 27th Street  
Boise, Idaho 83706

OFFICIAL OPINION #75-3

Re: Imposition of Fee by Department of Health & Welfare  
to Determine Blood Alcohol Level on Tests Initiated by  
Peace Officers

Dear Mr. Pieper:

You have requested a formal opinion as to whether or not the Department of Health & Welfare may properly impose a fee or charge to the State for services to determine the blood alcohol level on tests performed by peace officers and in particular, the Idaho State Police.

It is our opinion that there is no mandatory obligation on the Department of Health & Welfare to conduct such tests. 49-1102(b)(3) requires that such tests be performed either by the Department or by a licensed facility:

"Per cent by weight of alcohol in blood shall be based upon grams of alcohol per one hundred (100) cubic centimeters of blood. Chemical analysis of blood, urine or breath for the purpose of determining the blood alcohol level shall be performed by a laboratory operated by the Idaho department of health [department of environmental and community services] or by a laboratory approved by the Idaho department of health [department of environmental and community services] under the provisions of approval and certification standards to be set by that department;"

Donald J. Pieper  
September 26, 1974  
Page 2

The underscored language was added by laws 1972, Chapter 155, Section 1; until such requirement was imposed by a law there was no requirement that the analysis of blood alcohol being done by properly qualified facility.

We feel it most reasonable to interpret the 1972 amendment as insuring that blood analysis to determine alcohol content is conducted by a qualified facility. The legislature provided that the facility either must be operated by Health & Welfare or licensed by Health & Welfare; from such a restriction it is unreasonable to infer that it imposed a permanent duty upon the Department of Health & Welfare to conduct such tests without charge.

Since we find no mandatory duty on the part of the Department of Health & Welfare to conduct such tests, we see no reason why they may not refuse to conduct such tests until they are reimbursed for the reasonable costs of conducting such tests or such other reasonable charge as they may impose.

Very truly yours,

FOR THE ATTORNEY GENERAL

ROBERT L. MILLER  
Chief Deputy Attorney General

RLM:lm

*1020*

July 9, 1974

Mr. William G. Hepp  
Investment Manager  
Endowment Fund Investment Board  
Building Mail

OFFICIAL OPINION 75-4

Dear Mr. Hepp:

This letter replies to your request on behalf of the Endowment Investment Board for an opinion "as to which of the Board's records and writings are public information and which are not." The broad scope of your request makes it virtually impossible for me to respond except in a very general manner. I certainly cannot devote sufficient time to review personally all records and documents in possession of the Board nor do I view that as an appropriate role for the Attorney General's Office to undertake.

Basically, record keeping by a public agency is an administrative as opposed to a legal function. In the capacity as administrator of permanent endowment funds, the Board is responsible for maintaining such records and documents required by law and/or required by practical administrative procedures. The Board itself decides what information must be recorded in the course of its state function and by that decision establishes the official records of the public body. Having established official records, it can generally be concluded that such records and documents are subject to public inspection in the absence of statutory or common law exception.

By opinion of April 22, 1974, I outlined one very narrow exception to that rule. The substance of that opinion is, of course, presently being litigated. In that opinion my remarks and legal conclusion were prefaced by the following language:

"It can be generally stated that 'every citizen has a right to inspect and take a copy of any public writing of this State, except



Mr. William G. Hepp  
July 9, 1974  
Page 2

as otherwise expressly provided by statute.' Section 9-301, Idaho Code. Further, Section 59-1009, Idaho Code, provides that, 'The public records and other matters in the office of any officer are, at all times during office hours, open to the inspection of any citizen of this state.' The policy supporting this general rule is a sound doctrine of democratic government. A democracy demands that its citizens be informed of governmental affairs and, to this end, the Office of the Attorney General is in full agreement."

The opinion of April 22, 1974, concludes that a particular type of document in possession of the Board is excepted from that general principle upon grounds of potential tort liability for invasion of privacy of private citizens. The prior opinion is limited to that narrow issue.

It is my judgment that documents accumulated in the normal course of the Board's administrative functions are "public records" and subject to public inspection unless clearly excepted from public access by statute or judicial decision.

Very truly yours,

FOR THE ATTORNEY GENERAL

WAYNE MEULEMAN  
Deputy Attorney General

WM: Lm

ATTORNEY GENERAL  
OPINION #75-5

July 9, 1974

Mr. D. E. Chilberg, Director  
Department of Administrative Services  
State of Idaho  
B U I L D I N G

Dear Mr. Chilberg:

By letter of June 25, 1974, you asked "whether or not self-insurance of the State's liability is legal."

"Self-insurance" is risk retention by one with an insurable interest. (Scammahorn v. Gibraltar Savings and Loan, 195 Kan. 220, 404 P2d 165, 169 (1965), U.S. v Newton Livestock Auction, 336 F2d 673, 676 (1964), Keeton, Insurance Law pp 7-8, 1971)

"Insurance" as defined by the Idaho Code is a contract of indemnification between two parties. (Section 41-102, Idaho Code) An "insurer" is the indemnitor in an indemnity contract. (Section 41-103, Idaho Code) Therefore, if the state were to self-insure its liability risk, it could do so without having to meet the legal requirements of an "insurer" under the Idaho Code since it would not be acting as an indemnitor.

Do the Idaho statutes that apply to state liability and liability insurance allow self-insurance (or risk retention) of liability risks or must the state purchase liability insurance from an insurer?

A recent statute has created the Office of risk manager (67-5733, Idaho Code) and has given the risk manager the responsibility "for acquisition and administration of all liability insurance of the state." (Section 6-919, Idaho Code) The risk manager is charged with providing a "comprehensive insurance plan for the state providing insurance coverage to the state in amounts not less than the minimum specified by Section 6-924, Idaho Code ...." (Ibid)

Section 6-919 of the Idaho Code indicates that the risk manager must include in his insurance plan liability insurance coverage. Since "insurance" is defined by the code (Section 41-102) as a contract of indemnity, it necessarily involves an insurer and an insured. The risk manager appears to have no choice but to purchase liability insurance in the amount specified by Section 6-924.

Mr. D. E. Chilberg, Director  
Department of Administrative Services

July 9, 1974

However, the risk manager may consider the omission of insurance coverage of risks for which insurance coverage costs would be "disproportionately great in reference to the amount of risk." (67-5755(1), Idaho Code) If liability insurance is available only at a cost that is "disproportionately great", the risk manager's insurance plan may omit coverage for liability risks. If no insurance coverage is purchased, the state has retained the risk, or in other words, has self-insured its liability risk.

By including Section 67-5756 in the code, the Legislature has anticipated that some risks will not be insured. This section provides for a "retained risk fund" for the payment of losses not covered by insurance.

Therefore, it appears that the Legislature has recognized that the state self-insurance (or risk retention) may be needed and has provided a risk retention fund for the purpose of self-insurance. Any liability insurance policy, covering personal injury or property damage, that is purchased by the risk manager for the state must meet the requirements of Section 6-924 of the Idaho Code. But the state may self-insure its liability risk if the cost of the coverage would be "disproportionately great in reference to the amount of risk."

Very truly yours,

FOR THE ATTORNEY GENERAL

DAVID B. VAUGHN  
Assistant Attorney General

DBV:pr

July 16, 1974

Mr. R. Keith Higginson  
Director, Idaho Department  
of Water Resources  
Statehouse  
Boise, ID 83720

OFFICIAL OPINION #75-6

RE: CAREY ACT

Dear Mr. Higginson:

You inquired whether a relative of an employee of your office could acquire lands under the provisions of the Carey Act.

The controlling statute is Idaho Code, §42-2015 which provides:

"STATE LAND OFFICIALS AND EMPLOYEES NOT TO ENTER LAND.--It shall be unlawful for any state official or state employee or appointee of this state having anything to do, directly or indirectly, with the disposal of Carey act or other public lands of this state, during his or her term of office, to enter, file upon, or make application to enter or file upon any Carey act lands of this state."

I believe the important language is the restriction against any employee dealing directly or indirectly with the Carey Act to make entry or file under the Carey Act. The language does not preclude a relative from so filing or making entry.

It would appear, however, that the intent of the act, to avoid any evidence or appearance of favoritism, would be lost if any employee could have any control over or take any action or make any recommendations concerning an application for or entry by a relative. Therefore, it would be incumbent upon your office to take such steps as would insure that no employee concerned with the Carey Act or related water rights could have any part in handling said applications or entries.

Mr. R. Keith Higginson  
Page 2  
July 16, 1974

In conclusion, there is no prohibition against a relative of any employee taking advantage of the Carey Act. The only limitation being that the employee can not have contact directly or indirectly with said application, entry or any related water right.

Very truly yours,

FOR THE ATTORNEY GENERAL

NATHAN W. HIGER  
Deputy Attorney General

NWE/alg

July 12, 1974

Commissioner Ira Ellis  
Caribou County Courthouse  
Soda Springs, Idaho 83276

OFFICIAL OPINION #75-7

Dear Commissioner Ellis:

The Governor's Office has asked us to respond to you regarding your recent letter concerning the appointment of cemetery district commissioners by the Governor's Office.

The only provision in the Cemetery Maintenance District Law as to appointment by the Governor states that upon the formation of the cemetery maintenance district, the original commissioners shall be appointed by the Governor. This is found in Section 27-109, Idaho Code.

The only other provision relating to vacancies is found in Section 27-110 and it states that any vacancy occurring in the office of the cemetery maintenance commissioner other than by expiration of term of office shall be filled by the Cemetery Maintenance District Board. There is no particular provision in this law to the effect that a cemetery maintenance district commissioner's term carries over, if another one is not elected. However, Section 59-901(6), Idaho Code relating to how vacancy occurs states that one way for a vacancy to occur is a failure to elect an officer at a proper election there being no incumbent to continue in office until his successor is elected and qualified. This Section, of course, recognizes that an incumbent may continue in office until a successor is qualified and elected. Thus, one method to partially solve your difficulties would be to determine who the incumbents in office were, and to insist that they take the action necessary, such as appointing the new members or setting up an election. If this is not practical due to death or the fact that these people may have moved away,

Commissioner Ira Ellis  
July 12, 1974  
Page 2

you may then have to proceed under Sections 59-905, 59-906 and 59-907, Idaho Code. 59-905, Idaho Code provides in part that county and precinct officers are to be appointed by the Board of County Commissioners. Section 59-906 repeats and reiterates this in stronger terms. Section 59-907 provides only that before the County Commissioners can fill such an office they must have a petition signed by at least 30 qualified electors if it is a county office or by not less than 15 qualified electors if it is a precinct or district office such as is the case here.

You might well proceed under these sections in this case if it is impossible to find the old incumbents to these offices and thus you, the County Commissioners yourselves may appointment these officers in such a situation.

Sincerely yours,

FOR THE ATTORNEY GENERAL

WARREN FELTON  
Deputy Attorney General

WF:lm

William J. Murphy  
Lieutenant Governor's Office  
Building Mail

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STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

W. ANTHONY PARK  
ATTORNEY GENERAL

July 12, 1974

Mr. Jerry Hill  
Chief Deputy Secretary of State  
Building Mail

Official Opinion No. 75-8

Dear Mr. Hill:

You have asked for opinions on several questions relating to the Secretary of State's functions under Title 34 of the Idaho Code, the title containing general election laws.

I.

Your first question asks whether it is possible under Title 34, Idaho Code, for the Secretary of State to permit county clerks in punch card voting jurisdictions to establish "absent elector voting units" for the purpose of handling and processing absentee ballots, one such unit being established for each legislative district located within a county.

It is my opinion that you may not authorize such a program. Section 34-1007, Idaho Code, reads as follows:

"34-1007. TRANSMISSION OF ABSENTEE BALLOTS TO POLLS.--On receipt of such absent elector's ballot or ballots, the officer receiving them shall forthwith enclose the same, unopened in a carrier envelope with the name and official title of such officer and the words: 'absent electors' ballot to be opened only at the polls.' He shall hold the same until the delivery of the official ballots to the judges of election of the precinct in which the elector resides and shall deliver the ballot or ballots to the judges with such official ballots." (Emphasis added.)



Mr. Jerry Hill  
July 12, 1974  
Page 2

Section 34-2403, Idaho Code, provides that all provisions of the election laws not inconsistent with the machine voting statutes--Title 34, Chapter 24, Idaho Code--shall apply in jurisdictions where machine voting is utilized. Because Section 34-1007, Idaho Code, is not inconsistent with any provision of Title 34, Chapter 24, Idaho Code, it applies to absentee voting in machine voting jurisdictions.

Section 34-1007, Idaho Code, requires that the officer receiving an absentee elector's ballot must transfer that ballot, unopened, to the election judge of the precinct in which the elector resides. To retain, handle, or otherwise process absent elector ballots in a manner which would circumvent the procedure set out in Section 34-1007, Idaho Code, is clearly unlawful. Your proposed plan for creating one absentee unit in each legislative district, each unit handling absentee ballots exclusively for that district, would not be harmonious with Section 34-1007, Idaho Code.

## II.

Your second question asks whether you may permit the "rotation" of names of candidates on absentee ballots by legislative district rather than by precinct. It is my opinion that you may not do so. Section 34-2419, Idaho Code, requires that, in a primary or general election county clerks, or the clerks of cities, districts, or other municipalities at which vote tally systems are used "shall rotate the names of candidates as directed by the secretary of state." Section 34-2419, Idaho Code, implies a duty to the Secretary of State to direct ballot rotation by the clerk of each political subdivision indicated therein, regardless of whether the voting is done by absentee ballot or at the polls. Thus, where rotation within a legislative district is required at the polls on election day, it must also be required within each district with regard to absentee ballots.

The purpose of rotation is to insure against disadvantaging candidates who do not appear first, or at the top of, the list of candidates for the same office on the ballot. To permit non-rotation of absentee ballots at the legislative district level is to defeat the purpose and the mandate of rotation embodied in Section 34-2419, Idaho Code.

Section 34-2410(2)(e), Idaho Code, requires that, in machine voting jurisdictions, "all ballots or ballot cards from one (1)

Mr. Jerry Hill  
July 12, 1974  
Page 3

precinct be of the same rotation sequence." A system permitting absentee voting without rotation in a legislative district would necessarily violate the provisions of Section 34-2410(2)(e), Idaho Code. If rotation is properly being accomplished within the legislative district, the rotation sequence in one precinct will be different from the rotation sequence of another. It is clear, then, that if the rotation sequence for all absentee ballots within a legislative district is the same, absentee ballots of some precincts will be of a different rotation sequence from the non-absentee ballots in those precincts.

### III.

Your third question asks whether paper ballots may be utilized along with voting machines or vote tally systems in order to conduct voting for precinct committeemen. Section 34-2424, Idaho Code, clearly authorizes the use of paper ballots to record votes for or against "party officers" in elections where voting machines or vote tally systems are used. Since the county and legislative district central committees of political parties are made of precinct committeemen, see Sections 34-502, 503, Idaho Code, a precinct committeeman is, of course, a party officer. I caution that although paper ballots may thus be utilized to record votes for precinct committeemen, this in no way implies that a rotation sequence for other candidates may be the same within the legislative district. As I have indicated above, non-rotation within the district is impermissible.

### IV.

Your fourth question asks whether you may permit "clerks" to "retain absent elector ballots until the day of the election when they will be transmitted directly to a central processing center thereby avoiding transmittal of such ballots to the various polling places." It is my opinion that you may not implement such a program because of the provisions of Section 34-1007, Idaho Code, discussed above.

Very truly yours,

FOR THE ATTORNEY GENERAL

JOHN F. GREENFIELD  
Assistant Attorney General

JFG:cp



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

W. ANTHONY PARK  
ATTORNEY GENERAL

July 16, 1974

Pete T. Cenarrusa  
Secretary of State  
Building Mail

OFFICIAL OPINION # 75-9

Dear Mr. Cenarrusa:

You have asked for an opinion as to whether an election judge may issue a ballot to one whose name does not appear in his precinct combination election record and poll book, utilizing the provisions of Section 34-1111, Idaho Code, which statute provides for voting by an elector who has been challenged at the polls.

The question should be rephrased as whether an election judge may issue a ballot to one who is not registered in the precinct at which he attempts to vote.

Section 34-421(b), Idaho Code, requires one to reregister upon changing his residence. Section 34-413, Idaho Code, provides exceptions for an elector who has changed his residence from one place to another within a precinct, or from one precinct to another within a county within 30 days of an election. Such an elector may vote by obtaining a "certificate of registration" from his county clerk and presenting it to the chief election judge of the precinct in which he resides on election day. Absent the applicability of Section 34-413, Idaho Code, a ballot may not issue to one who is not registered as provided by law, i.e., not registered in the precinct at which he attempts to vote. See 34-402, Idaho Code, which defines a "qualified elector."

The election judges of a precinct determine whether one is registered within that precinct by determining whether the individual asking for a ballot appears in the combination election record and poll book of the precinct. Section 34-1106(2), Idaho Code, provides the procedure to be followed:

Pete T. Cenarrusa  
Secretary of State  
Building Mail

"Before receiving his ballot, each elector shall sign his name in the combination election record and poll book following his name therein."

Your question, then, must be answered in the negative. One cannot be issued a ballot unless his name appears in the combination election record and poll book.

The only exception to the rule arises when one should have appeared in the combination election record and poll book of a particular precinct and, because of a clerical error, did not. Normally, if one is registered in a precinct, his name will appear in the combination election record and poll book held by the election judges at his precinct polling place. If one's name does not appear in the combination election record and poll book, it would be well advised for the election judges at the precinct at which that individual attempts to vote to make a thorough check to determine whether the elector's name does, in fact, appear in the election register held by the county clerk. Mistakes and omissions can sometimes be made in transferring registered voters' names from the county registry to the precinct election record and poll books. If an examination of the county register, which is now constituted by registration cards, reveals that an elector is registered within the precinct at which he attempts to vote, his name should immediately be entered into the combination election record and poll book by one of the election judges. The voter should then sign his name following his name in the combination election record and poll book. The voter should then be issued a ballot.

I caution election judges making such a check that one who appears in the county register, but is registered in a precinct different from the one at which he attempts to vote, is not registered as provided by law. A ballot should not issue to such an individual. In short, to be registered, one must be registered in the precinct at which he offers to vote.

The challenge voting system established by Section 34-1111, Idaho Code, does not apply to electors who are not registered in the precinct at which they attempt to vote. As indicated above, Section 34-1106(2), Idaho Code, requires an elector to sign his name in the combination election record and poll book following his name therein. If one is not registered in the precinct at which he attempts to vote, his name cannot and should not appear in that precinct's combination election record and poll book. It would thus be contrary to Section 34-1106(2), Idaho Code, for a ballot to issue to such an individual.

Pete T. Cenarrusa  
July 16, 1974  
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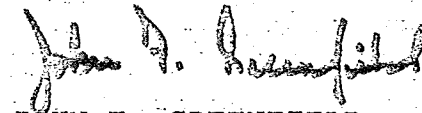
The purpose of the challenge voting statute is to allow one who is registered, but is thought by a challenging party to be too young, a convicted felon, or otherwise unqualified to vote, to obtain a ballot upon swearing his qualifications when challenged. The statute was not intended to apply to unregistered voters. Voters who are not registered in the precinct at which they are attempting to vote are simply not registered. To read Section 34-1111, Idaho Code, so expansively as to permit unregistered electors to vote merely by having them sign an oath of eligibility upon challenge is to read the general election registration procedures out of the Idaho Code. It is my opinion that such a result was not the intention of the Legislature when it enacted Section 34-1111, Idaho Code.

The registration provisions of Title 34, Chapter 34, Idaho Code, and Title 4, Section 1111, Idaho Code, must be read together to effect the object and purpose of the general election laws. Idaho statutes must be construed together to the end that various sections and provisions may be made to harmonize. State v. Montroy, 37 Idaho 684, 217 P. 611 (1923):

Moreover, Section 34-1111, Idaho Code, and most of Chapter 4, Idaho Code, were enacted at the 1970 session of the Idaho Legislature. The rule that statutes in pari materia should be construed together applies with peculiar force to statutes passed at the same session of the legislature; they are to be construed together, and should be so construed, if possible, as to harmonize and give force and effect to the provisions of each. Peavey v. McCombs, 26 Idaho 143, 140 P. 965 (1914).

Very truly yours,

FOR THE ATTORNEY GENERAL



JOHN F. GREENFIELD  
Assistant Attorney General

JFG:lm



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

W. ANTHONY PARK  
ATTORNEY GENERAL

July 16, 1974

Mr. William B. Taylor, Jr.  
Prosecuting Attorney  
Idaho County  
134 North State Street  
Grangeville, Idaho 83530

OFFICIAL OPINION # 75-10

Dear Mr. Taylor:

You have asked for an opinion regarding the proper construction of Sections 34-1002A and 34-1003, Idaho Code, and their applicability to an elector who expects to be physically present within a county on election day, but who also fears he may be physically unable to vote at his designated polling place because he lives in a remote area of your county which is subject to heavy, early winter snow storms and similar natural transportation obstructions.

Section 34-1002A, Idaho Code, contains a list of purposes for which absentee ballots may be issued by county clerks. Section 34-1002A, Idaho Code, reads in pertinent part as follows:

"34-1002A. CLASSIFICATIONS FOR ABSENT ELECTOR'S BALLOT.--For the purpose of issuing absent elector's ballot, the county clerk shall determine under which of the following subsections the applicant should be classified.

....

(4) A person who is in the county but who will be physically unable to vote at his designated polling place on day of election."

Section 34-1003, Idaho Code, directs the procedures to be followed by the county clerk with regard to absentee ballots received.

Mr. William B. Taylor  
July 16, 1974  
Page 2

Idaho County is the largest and one of the most sparsely populated counties in the state. It also contains some of the most mountainous and inaccessible land in the United States, including portions of three primitive areas. Although polling places have been designated in various outlying areas of Idaho County, even these polling places may become impossible to reach by some electors in the event of a heavy, early November storm. Such storms are not uncommon in parts of Idaho County.

The right to vote is guaranteed by Article 1, Section 19 of the Idaho Constitution. Although absentee voting is regarded as a privilege, rather than a constitutional right, 26 Am. Jur. 2d, §244, absentee voting laws are generally construed liberally so as to further their purpose of protecting and furthering the constitutional right of suffrage. 26 Am. Jur. 2d, §245.

Idaho statutes must be construed liberally "with a view to effect their objects and to promote justice." Section 73-102, Idaho Code.

In view of the above-mentioned rules of statutory construction, Section 34-1002A(4), Idaho Code, which provides that an absentee ballot be issued to a voter who will be within the county on election day but will be physically unable to vote at his designated polling place, should be read to extend to voters who reside in areas of the state so situated with respect to transportation and weather conditions that they probably will be physically unable to vote at their respective designated voting places on election day.

The Idaho County Clerk will be required to make individual assessments of each voter's request for an absentee ballot based on the claim of "probable inaccessability" to his polling place due to probable transportation and weather conditions. This new burden should not prove particularly onerous to the Idaho County Clerk, however, since deciding whether one probably will be physically unable to reach his polling place on election day is not appreciably different from other decisions the clerk is required to make in issuing absentee ballots. In all instances the clerk is required to review the facts presented by the election and make a decision as to whether those facts warrant the issuance of absentee ballots.

Very truly yours,

FOR THE ATTORNEY GENERAL

JOHN F. GREENFIELD  
Assistant Attorney General

JFG:lm  
cc Secretary of State

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STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

W. ANTHONY PARK  
ATTORNEY GENERAL

July 16, 1974

Dr. James A. Bax  
Director  
Department of Health & Welfare  
BUILDING MAIL

OFFICIAL OPINION #75-11

Dear Dr. Bax:

Your request, dated July 12, 1974, for an opinion relating to the payment by your Department of defense expenses for seven persons criminally charged on July 9, 1974, in Blaine County in relation to a program sponsored by your Department has been received. Our opinion is transmitted herewith.

The present question arises out of the death of one Jeffrey Hodgson, a participant in a survival training program conducted in a desert area of Idaho. Hodgson died of exposure after becoming lost from the group and, following a coroner's inquest, seven persons connected in various ways with the program were charged with involuntary manslaughter, the coroner's jury having rendered an opinion to the effect that "criminal negligence" of an unspecified nature was involved.

You have asked the following questions:

1. What action can we take to require the State's insurance carrier to provide legal assistance to these individuals?
2. What are the options, based on law and precedent, available to the Department to provide legal assistance to those charged?
3. What recommendations do you have regarding reasonable and prudent action in connection with these options?



Dr. James A. Bax  
July 16, 1974  
Page 2

With respect to the first question, we do not believe that the insurance carrier, which has a contract to defend the Department against civil liability, can be required to provide a defense in a criminal case. Such would appear to be outside the scope of the contract between the state and the insurance company.

For convenience, questions 2 and 3 will be discussed together and treated as bearing simply upon the question of whether the state would be justified in paying the legal expenses incurred by the state's employee-agents in defending criminal charges against them. The question, reduced to its shortest form, is "may an agency of the state government furnish funds to its employees who have been charged with criminal offenses for actions arising out of, and within the scope of, their official duties?" We make no recommendations herein, as the ultimate determination concerning the expenditure of funds must be yours.

The problem, set in the context of all of the known circumstances, has certain peculiar qualities which make the case unique and not susceptible to easy resolution by reference to existing precedent. Our research has not led to the discovery of any controlling case directly in point. Necessarily, this opinion must be predicated upon analysis of the express and implied powers of government to disburse public funds for certain purposes and analogy to those decided cases which bear some relationship to the problem presented.

Were this case one in which the defendant employee-agents stood accused of crimes in the category of offenses generally denominated malum in se, that is, crimes requiring proof of the elements of guilty knowledge and bad motive, the task would be easier in light of the general rule that state employees may not expect state assistance in defending against charges of criminal misconduct. Culliver v. State, 132 Misc. 182, 229 NYS 235, aff'd 225 App.Div. 707, 232 NYS 393, aff'd 250 NY 258, 165 N.E.2d 84.

This is not such a case, however. We have the benefit of an exhaustive investigative report of the facts and we are aware of the evidence adduced at the coroner's inquest which led to the filing of criminal charges against the agents of the state who were charged. Evidence of bad motive or criminal intent, arguably, does not appear. Thus, it is possible that the prosecution will be found by the courts to be without merit. Such a finding could have crucial significance in

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resolving the question of whether the Department of Health and Welfare is entitled to pay the legal expenses of the defendants and will be discussed later herein.

You have made reference to an existing moral obligation to the persons charged, that is, an obligation not to abandon your personnel and to assure them an adequate defense. A moral obligation of the state will support the expenditure of public funds. Davis v. Moon, 77 Idaho 146, 289 P.2d 614 (1955). The one clear distinction appearing between judicial decisions approving such expenditures and those disapproving is that in the cases where such expenditures were approved, the acts leading to the occasion for payment were directly related to a public purpose. While the "public purpose" element seems to be present, the existence of such a moral obligation is generally a matter for legislative determination.

In Davis v. Moon, supra, the legislature appropriated funds to discharge a debt morally, but not legally, owing. The state had issued bonds for the construction of a college dormitory the contractual expectation being that the bonds would be retired from dormitory revenues. However, the college was closed before sufficient revenue was generated from the dormitories and the state's creditor had no recourse except to ask the state to do what was equitable. The court found a public purpose in the appropriation inasmuch as the dormitory building had been constructed for the public good and in furtherance of the educational objectives of the State. Id., 153. Moreover, said the court:

"... the enactment is not invalidated, in the light of its public purpose, merely because the obligation of the state in relation to the subject matter of such legislation is a moral rather than a mandatory one [citations omitted] nor by the fact that a private individual or organization may benefit thereby." [citations omitted] Id., 77 Idaho 153-154.

Although the court did not specifically express such a view, the underlying implication of the opinion is that the protection of the state's credit reputation is a valid public purpose for the expenditure of public funds. By analogy to the present problem, it can be said that the state's ability to secure credit for the conduct of public business is no

Dr. James A. Bax  
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less important than its ability to secure personnel to discharge public functions. The chilling effect on employment of an arguably unmeritorious prosecution against state employees who are prosecuted for acts they are required to perform within the scope of their regular duties is as much an obstacle to the discharge of public business as would be the effect on the state's ability to obtain money as a result of the failure of the state to pay its bills.

Thus, it appears that the legislature may recognize a moral obligation and appropriate funds to discharge such. Inasmuch as the legislature has had no opportunity to pass upon the present matter, the question becomes this: "Is state payment of the legal expenses of the defendants justifiable on grounds other than the discharge of a moral obligation."

A public purpose must be served by the expenditure of state funds. The term "public purpose" is not static and inflexible. Rather, it is capable of expansion to meet the conditions created by a complex and changing society. People ex rel Adamowski v. Chicago R.R. Terminal Authority, 155 N.E.2d 311. A "public purpose" is one which has for its objective the promotion of public health, safety, morals, security, contentment and general welfare of all of the inhabitants of the state. United Community Services v. Omaha National Bank, 77 N.W.2d 576, 585; Lott v. City of Orlando, 196 So. 313, 315; Swartz v. Jordan, 311 P.2d 845, 82 Ariz. 252. It may be seen that the discharge of a moral obligation may also have a public purpose if it is carried out to effectuate the purposes of legislation. Although the cases we have cited refer to instances of legislative appropriation of public funds, we think the public purpose requirement must necessarily apply to all expenditures of public funds, including those carried out by administrative officials.

Assuming, without stating as an opinion, that the defendants are being prosecuted for acts which were ordinary and necessary functions of their state employment, the defense of the prosecution then becomes seriously affected with the public interest. It goes without saying that few persons would be willing to accept a job if good faith performance of its requirements might expose them to criminal prosecution. In such circumstances, a public agency would be hard put to find qualified personnel to carry out the duties entrusted to it by the legislature. If the Director of the Department of Health and Welfare determines that this is the case, the payment of defense costs and counsel fees could be considered a necessary act to fully carry out the purposes of the legislation creating the Department and prescribing its duties.

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The foregoing conclusion is reached, in part, because the legislature has provided that "The administrator [Director] may employ counsel or may retain private counsel. . . ." Idaho Code, 39-109. This provision is, of course, impliedly limited to cases in which the purposes of Title 39, Chapter 1 (Health and Safety, Environmental and Community Services) are implicated. Notably, however, no further limitation on the applicability of the section is stated. Inasmuch as "it is a well known rule of law that all statutes must be liberally construed with a view to accomplishing their aims and purposes and attaining substantial justice," State v. Groseclose, 67 Idaho 71, 74, 171 P.2d 863 (1946), it would appear that there is no mandatory distinction in Idaho Code, 39-109, between civil and criminal cases. Moreover, when the plain wording of the statutory language is unambiguous, the statute must be given effect according to its language. State v. Riley, 83 Idaho 346, 362 P.2d 1075.

It has been said that:

"The general rule is that a municipal corporation or other public body may indemnify public officials, acting in good faith, for legal expenses incurred in suits brought against them for acts committed in the discharge of their duties." Anno. 130, ALR 727, 736.

The rule is qualified by authority to the effect that it is not generally the duty of the public to defend or aid in the defense of a person charged with official misconduct. Roofner's Appeal, 81 Pa. Super. Ct. 482 (1923).

It is a different matter, however, when a person is charged with a criminal act in consequence of his performance of public duties. In Levine v. Miteer, 229 N.Y.S.2d 433 (1962) an attorney brought suit to recover fees for defending police officers against a conspiracy charge. In ruling on the sufficiency of the pleadings, the court said:

"It is well settled that the village could not provide funds for the defense of an official in a criminal action or even in a civil action where no benefit inures to the village. [citation omitted] It is equally

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settled, however, that where an action is defended as an official duty rather than for personal motives it is proper for the village to authorize payment of expenses.  
... if respondents establish at a trial that the defense was undertaken as an official act and that the board authorized the respondents as its agents to retain counsel therefor, the right to indemnification is clearly established." Id., 436. (Emphasis added)

In Errington v. Mansfield Township Board of Ed., 241 A.2d 271 (N.J. 1968), the court found that there was an inherent power in a public board to defend either a criminal or a civil action brought against persons for acts arising out of the performance of their official duties. The court said, quoting a New Jersey statute:

'Whenever a civil or criminal action has been brought against any person for any act or omission arising out of and in the course of the performance of his duties as a member of a board of education, and in the case of a criminal action, such action results in final disposition in favor of such person, the cost of defending such action, including reasonable counsel fees and expenses, together with costs of appeal, if any, shall be borne by the board of education.'

"Both sides agree that this law, although seemingly tailored to fit the instant case, is only expressive of the law existing prior thereto. Its purpose was merely to state expressly a power deemed to exist impliedly in boards of education prior to its enactment." Id., at 273.

In City of Birmingham v. Wilkinson, 194 So. 548 (Ala. 1940), the taxpayers suit was brought alleging fraud and conspiracy by members of the city commission. The court drew a distinction between the defense of meritorious actions and the defense of

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unfounded actions:

"That members of the governing body cannot expend the public money for counsel to shield themselves from the consequences of their own unlawful and corrupt acts goes without saying . . .

"But the power and the duty of the city to defend the members of its governing body against unfounded and unsupported charges of corruption and fraud is quite another matter. The same policy which demands the holding of public officers to strict account in matters of public trust, also demands their protection against groundless assaults upon their integrity in the discharge of public duty." Id., at 552.

The courts seem to prefer that defendants in such actions be reimbursed after they have been exonerated.

Turning next to the relationship between the employment of counsel and the purposes of the statute, the first determination to be made is whether the acts leading to prosecution arise out of an activity of the Department authorized by law. Secondly, if the acts are so related to authorized activity, is the employment of counsel to defend the parties charged an administrative action which serves the purposes of the statute?

The purposes of the Environmental and Community Service legislation are broadly stated in Idaho Code, 39-102.

"It is hereby recognized by the legislature that the protection of the environment and the promotion of personal health are vital concerns and are therefore of great importance to the future welfare of this state. It is therefore declared to be the policy of the state to provide for the protection of the environment and promotion of personal health and to thereby protect and promote the health, safety and general welfare of the people of this state." Idaho Code, 39-102.

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By virtue of Idaho Code, 39-106, the Administrator [Director] is authorized to employ such personnel as are deemed necessary to carry on programs of the Department, subserving the general purpose previously stated, and to prescribe their duties. The Administrator is also given the power to prescribe rules and regulations for the conduct of Department business and the carrying out of the Department's functions.

Therefore, assuming that the survival program for children, which lead to the acts complained of by the prosecuting authorities, was properly established in accordance with the Department's standards and regulations, it may be considered to be authorized by the legislature and to be within the scope of its general purposes.

A legislative enactment, such as Title 39, Chapter 1, of the Idaho Code, must be so construed as to give harmonious effect to the statute in its entirety. Nampa Lodge No. 1389, Benev. and P.O. of E. of U.S. v. Smylie, 71 Idaho 212, 229 P.2d 991. This in mind, the employment of defense counsel pursuant to Idaho Code, 39-109, is consistent with the purposes of the statute if the acts of the defendants for which they are being prosecuted were performed in the normal and regular course of their duties pursuant to the legislation aforementioned and, if failure to provide counsel would materially hinder the Department of Health and Welfare in the performance of its duties under the act. As noted previously, it is a serious consideration that personnel may be deterred from vigorous discharge of their duties or from even accepting positions with the Department of Health and Welfare in any other kind of outcome. These are determinations which must be made by the Director in making a final decision as to whether it is appropriate to proceed under Idaho Code, 39-109.

We therefore conclude that the Department of Health and Welfare may lawfully pay the legal expenses of the seven persons charged in Blaine County, Idaho if the Director of the Department of Health and Welfare makes the following determinations:

1. That the acts leading to the prosecution were performed within the scope of employment of the persons charged and were required as part of their normal and regular duties.
2. That the offenses charged do not involve elements of evil intent.

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July 16, 1974  
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3. That if the crime of "criminal negligence" is charged, that the prosecution has been found by the courts to be without merit, that is, that the action has been disposed of by acquittal or dismissal.

4. That the program in which the persons charged were participants served a valid public purpose and that the charges against them arose out of acts in furtherance of that purpose.

5. That failure of the Department to pay the legal expenses of the defendants would materially impair the Department's ability to attract qualified individuals to its service or would inhibit employees or agents of the Department in their vigorous and conscientious discharge of their duties in carrying out programs duly initiated under the legislation creating the Department of Health and Welfare and setting forth the purposes for its existence.

In light of the opinions in the Levine and Errington cases, we would recommend that if defense costs are paid by the Department, such payment be by way of reimbursement after the defendants have been exonerated by acquittal or dismissal.

It must be emphasized that this opinion relates only to a narrowly limited exception to the general rule that public funds may not be expended to defend state employees or agents charged with criminal misconduct. This is a case involving a concept of "negligence", and not the intent to commit what is commonly understood to be an act of criminality. We express no opinion as to whether there is any category of offense other than "negligence" which might be sufficiently lacking in elements of criminal intent or evil motive to fall within the exceptions stated.

Very truly yours,

FOR THE ATTORNEY GENERAL

LYNN E. THOMAS  
Deputy Attorney General

LET:cg

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## STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

W. ANTHONY PARK  
ATTORNEY GENERAL

BOISE 83720

July 31, 1974

James A. Bax  
Director  
Department of Health & Welfare  
Statehouse Mail  
Boise, Idaho 83720

Dear Dr. Bax:

You have requested on behalf of the Department of Health and Welfare an attorney general opinion respecting the following question:

Which newspapers in the State of Idaho meet the "general circulation" requirement established in Sections 60-106 and 67-5203, Idaho Code?

The statutes cited in your inquiry read in pertinent parts as follows:

60-106. Qualifications of newspapers printing legal notices.  
—No legal notice, advertisement or publication of any kind required or provided by the laws of the state of Idaho, to be published in a newspaper, shall be published or have any force or effect, as such, unless the same be published in a newspaper published in the county in which notice or advertisement is required to be printed, having a general circulation therein,  
\*\*\*. (Emphasis added.)

67-5203. Procedure for adoption of rules.--(a) Prior to the adoption, amendment, or repeal of any rule, the agency shall:

(1) give at least 20 days' notice of its intended action. The notice shall include a statement of either the terms or substance of the intended action or a description of the subjects and issues involved, and the time when, the place where, and the manner in which interested persons may represent their views thereon. The notice shall be mailed to all persons who have made timely request in writing of the agency for advance notice of its rule-making proceedings and shall be published in some newspaper published in and having general circulation throughout the state; \*\*\*. (Emphasis added.)

Section 60-106, Idaho Code, requires that a newspaper publishing legal notice be of general circulation within the subject county while Section 67-5203, Idaho Code, demands that the newspaper have general circulation throughout the state. Though Section 60-106, Idaho Code, is directed to publication within a county its introductory language emphasized above makes it of general applicability. The two statutes can be read in harmony; Section 67-5203, Idaho Code, merely expands the area of necessary circulation to the whole state in keeping with the scope of the Administrative Procedures Act, other requisites of Section 60-106, Idaho Code, remaining unaffected. Both statutes require that the newspaper publishing notice be of "general circulation."

Case law authority has held that general circulation is a matter of substance rather than quantity, which is to say the diversity of subscribers and content of the newspaper, not the number of subscribers are determinative, Burak v. Ditson, et al, 229 N.W. 227 (1930); Pirie v. Kamps, 229 P.2d 927 (1951).

\*\*\* a newspaper of general circulation is not determined by the number of its subscribers, but by the diversity of its subscribers. \*\*\* Even though a newspaper is of particular interest to a particular class of persons, yet, if it contains news of a general character and interest to the community, although the news may be limited in amount, it qualifies as a newspaper of "general circulation." Burak v. Ditson, supra, at p. 228.

However, it must also be noted that the term general circulation does engender a quantitative element.

We \*\*\* conclude that the term [general circulation] is not wholly devoid of a quantitative connotation. It implies a necessity for some circulation among those affected by the contents of the notice. Wahl v. Hart, 332 P.2d 195, 197.

To summarize, a newspaper of general circulation may be defined as one whose substance is of general character in interest to the community and which is circulated among those affected by the content of the notice published.

With respect to publication within a county (Section 60-106, Idaho Code) there are many papers which would likely meet the general circulation requirement and would be acceptable vehicles of publication assuming they met the other standards imposed by Section 60-106, Idaho Code. This writer will not attempt to catalogue these various tabloids inasmuch as notice provisions affecting the Department of Health and Welfare are state-wide in nature. Suffice it to say the definition of general circulation is applicable within provisions of Sections 60-106 and 67-5203, Idaho Code, on the county and state levels respectively.

In terms of Section 67-5203, Idaho Code, there is a relatively small number of publications which might qualify as newspapers of general circulation. These include the Idaho Statesman, Lewiston Tribune, Post-Register (Idaho Falls), Times-News (Twin Falls), and the Idaho State

Dr. James A. Bax

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July 31, 1974

Journal (Pocatello). Daily circulation among these newspapers runs from 18,000 with the Idaho State Journal to 60,000 in the instance of the Idaho Statesman. All print news of general interest to the Idaho community. Though numbers of subscribers are not absolutely determinative, circulation must be of sufficient magnitude to insure some circulation among those affected by the notice published. It should be noted that while Section 67-5203, Idaho Code, assumes there is one or more newspapers in the State of Idaho having general circulation throughout the state, it was adopted as part of a model act, intended for adoption by states throughout the country, and it is conceivable that there is no newspaper having general circulation throughout the State of Idaho. In fact, because of the unique geography and socio-economic structure of Idaho, it is entirely conceivable that a court might hold there is no such newspaper in Idaho. It is critical that proper publication be made, since in an analogous area the Supreme Court of Idaho has held that failure to comply with procedural rule-making requirements of Chapter 52, Title 67 renders the attempted rule-making action entirely and completely void. Williams v. State, 95 Idaho 5, 501 P.2d 203.

Because the Idaho Statesman does insure some circulation among those affected by rule-making action under the Administrative Procedures Act (Chapter 52, Title 67, Idaho Code) and because it prints news of general interest to the citizens of the State of Idaho, it is the opinion of this office that the Idaho Statesman is the single newspaper most likely to qualify as a newspaper of general circulation throughout the state. The Idaho Statesman has by far the largest circulation in the state and effects significant distribution in twenty-four of Idaho's forty-four counties. Its distribution reaches counties throughout the state.

Assurance of full compliance with Section 67-5203, Idaho Code, can be obtained by making publication in more than one newspaper. Many other state agencies follow the practice of selecting additional newspapers throughout the state, both to assure compliance with Section 67-5203, Idaho Code, and also to assure more adequate effective notice to citizens in widely scattered portions of the state. While it is impractical to make publication in every newspaper in the state, substantially more assurance of compliance with Section 67-5203 can be obtained by additional publication in one or more north Idaho newspapers, and one or more east Idaho newspapers, at a relatively small cost.

Very truly yours,

FOR THE ATTORNEY GENERAL

RICHARD C. RUSSELL  
Deputy Attorney General

RCR:RS/mh/lc



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

W. ANTHONY PARK  
ATTORNEY GENERAL

July 22, 1974

County Commissioners  
Owyhee County  
Owyhee County Courthouse  
Murphy, Idaho

OFFICIAL OPINION #75-13

Gentlemen:

In response to your request of July 10, 1974, for an opinion as to whether you can, under Section 31-3113 of the Idaho Code, pay a salary in excess of the statutory amount for a prosecuting attorney, we transmit the following:

As you state the case, you are unable to secure the services of any prosecuting attorney for the statutory amount of \$400.00 per month, the reason being that no attorney is willing to accept the job for that sum and the position is now vacant.

You are not authorized, under Section 31-3113, to pay any amount in excess of \$400.00. That does not answer the question, however, inasmuch as the legislature has enacted a different statute which is applicable to situations in which the office of prosecutor is vacant. We must begin with the assumption that the office is vacant for the sole reason that the statutory amount prescribed for the salary of the prosecutor of Owyhee County is inadequate to meet the requirements of any person who might otherwise be interested in the job.

Under those circumstances, Idaho Code, Section 31-2603(a) applies. That section provides:

"When there is no prosecuting attorney for the county, or when is absent from the court, or when he has acted as counsel or attorney for a party accused in relation to the matter of

which the accused stands charged, and for which he is to be tried on the criminal charge, or when he is near of kin to the party to be tried on a criminal charge, or when he has a business connection or kinship with the complainant or defendant, or when he is unable to attend to his duties, the district court may, upon petition of the prosecuting attorney, by an order entered in its minutes, stating the cause therefor, appoint some suitable person to perform for the time being, or for the trial of such accused person, the duties of such prosecuting attorney, and the person so appointed has all the powers of the prosecuting attorney, while so acting as such."

Your circumstance falls within the ambit of the foregoing statute. This is true because there is no prosecuting attorney for your county at the present time. Moreover, it is impossible to obtain one, as I understand it, for the salary which the legislature has prescribed. The only remedy seems to be that provided in Section 31-2603. Section 31-2603(a) makes no mention of salary. The necessary implication, however, is that any special prosecutor must be paid. Inasmuch as the county commissioners are authorized, by 31-3302(9), (10), to pay contingent expenses necessarily incurred for the public purposes of the county and to pay other sums directed by law to be raised for any county purpose, it appears that the payment of sums in excess of \$400.00 per month would be authorized by Idaho Code, 31-2603 in circumstances where no prosecuting attorney can be secured for the statutory maximum. Under 31-2603, a special prosecutor must be appointed by the district court and his compensation should be set by an order of the district court after the court has consulted with the county commissioners concerning the amount of salary to be paid.

This is an interim procedure and the county commissioners should, at the earliest practicable time, petition the legislature for an increase in the statutory salary amount for prosecuting attorney sufficient to enable the commissioners to obtain the services of a prosecuting attorney for Owyhee County.

Owyhee County Commissioners  
July 22, 1974  
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As you know, the district judge serving your jurisdiction has temporarily appointed Mr. James P. Kaufman of our office to serve as interim prosecutor. Mr. Kaufman will petition the district court, as interim prosecutor, for the appointment of a special prosecutor under 31-2603(a). Thereafter, a special prosecutor should be appointed just as quickly as possible in order that Mr. Kaufman may return to his regular duties. Regrettably, we are unable to spare Mr. Kaufman for any more than a few days.

Very truly yours,

FOR THE ATTORNEY GENERAL

LYNN E. THOMAS  
Deputy Attorney General

LET:cg



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

W. ANTHONY PARK  
ATTORNEY GENERAL

July 24, 1974

Honorable Glenn A. Phillips  
Magistrates Division, Seventh  
Judicial District  
Butte County  
P.O. Box 181  
Arco, Idaho 83213

OFFICIAL OPINION #75-14

Dear Judge Phillips:

This is in response to your letter of June 27, 1974, requesting an opinion regarding a county sheriff's jurisdiction pursuant to a fresh pursuit.

One applicable statute is the "Uniform Act on Fresh Pursuit". It is Chapter 7 of Title 19, found in Volume 4 of the Idaho Code. Idaho Code, 19-701 speaks to any member of the county Peace Unit which would include the sheriff.

Our statute authorizes people from other states to enter Idaho under the fresh pursuit conditions. Assuming the other state has enacted this same law, Idaho authorities are able to enter the other state under the same conditions.

This statute in part codifies the old concept of the "hot pursuit" exception to the general rule that a peace officer has no official power to arrest beyond the territorial boundary of the state, city, county, or bailiwick for which he is elected or appointed. Generally, the circumstances involve a warrantless arrest in which the officer must cross jurisdictional lines under conditions of hot pursuit.

Police officers have left their jurisdictional boundaries at times to meet the demands of hot pursuit. It is often illustrated by an officer entering private premises without a warrant and making an arrest. In those situations where the arrest is otherwise lawful, the fact that the officer stepped into an unauthorized area did not invalidate the arrest.

Honorable Glenn A. Phillips  
July 24, 1974  
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This concept also appears to hold true when an officer is forced to step into another county to complete an arrest made under hot pursuit conditions. The other side of a county line is normally an unauthorized area but under emergency conditions of a hot pursuit, the law allows an officer to step into the unauthorized area for the specific purpose of apprehending the person he is chasing.

In terms of this concept, the recent California case of People v. Sandoval, 419 P.2d 187 (1956), specifically recognized this concept. The defendants in that matter claimed that arrest was invalid because the arresting officers had left their jurisdictional area to make the arrest. The court found hot pursuit conditions were present and looked at the circumstances from that perspective. It was held the officers acted within the scope of their official authority under the generally recognized principle that an officer may pursue a suspected felon to another jurisdiction and may arrest him there so long as the arrest is otherwise lawful.

I cannot make any specific comments regarding the applicability of the hot pursuit doctrine to the circumstances giving rise to your request because they were not stated. As a general rule though, I believe a sheriff may cross a county line under circumstances of hot pursuit of a suspected felon. Any arrest made would not be rendered unlawful solely because of the place of arrest.

It is paramount to keep in mind that the doctrine of hot pursuit will only apply when there is a true instance of hot pursuit. The doctrine will not operate to allow a police officer to pursue crime in general by searching for criminals outside of his jurisdiction. The doctrine operates when the officer reasonably suspects a specific person has committed a felony within his regular jurisdiction coupled with a reasonable belief that person will escape unless promptly apprehended. In this situation the courts are reluctant to strip the officer of his authority to arrest and search because the pursuit suddenly crosses a jurisdictional boundary.

The doctrine of hot pursuit is a general principle of law. As with most such principles there is no black and white policy indicating applicability. A factual determination must first



Honorable Glen A. Phillips  
July 24, 1974  
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be made if a true hot pursuit exists; if so, then the doctrine may be considered. The doctrine does not exist for use by the officer when he desires, but only when the factual situation indicates the officer was acting properly and reasonably.

Very truly yours,

FOR THE ATTORNEY GENERAL

JAMES P. KAUFMAN  
Assistant Attorney General

JPK:lm

G 30.3

July 30, 1974

C  
Honorable Pete T. Cenarrusa  
Secretary of State  
BUILDING MAIL

OFFICIAL OPINION #75-15

Re: Shared Curriculum in Veterinary Medicine

O  
Dear Mr. Secretary:

We wish to respond to your request for our opinion concerning the interinstitutional agreement on shared curriculum for veterinary medicine, pursuant to Section 67-2329, Idaho Code.

P  
Y  
We have reviewed the proposed agreement and find the same to be in accordance with Chapters 219 and 287, Laws of 1974. Further, we are of the opinion that the agreement does not violate the provisions of the Constitution of the United States or the Constitution of the State of Idaho, and that the same is in accordance with the laws thereof.

We trust we have been of assistance in this matter.

Very truly yours,

FOR THE ATTORNEY GENERAL

JAMES R. HARGIS  
Deputy Attorney General

JRH:cg

cc: Governor Andrus  
Honorable William J. Lanting  
Honorable James Ellsworth  
Dr. J. P. Munson  
Mr. Milton Small  
Mr. Jon Warren  
Mr. Sherman Carter  
Dr. Floyd Frank  
Mr. Myron Schlechte

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STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

W. ANTHONY PARK  
ATTORNEY GENERAL

July 30, 1974

Mr. Robert H. Remaklus  
Prosecuting Attorney  
Valley County  
Cascade, Idaho 83611

OFFICIAL OPINION #75-16

Dear Mr. Remaklus:

This letter is in answer to your letter of July 5, 1974, which reads as follows:

" A resident tax payer of Valley County, Idaho, is threatening to bring an action requiring the County Commissioners to redistrict the County Commissioner Districts on the grounds that the same are not equal in population. Section 31-704, Idaho Code, provides that such redistricting must be done at the regular meeting in January preceding any general election. The Board of County Commissioners of Valley County took such action in January of this year, but the complaining tax payer alleges that one of our commissioner districts embraces about 50% of the total population.

" It appears that any further attempt to redistrict at this time would affect the position of candidates for election to the office of County Commissioner. That is to say, a candidate for election in District One might wind up as a candidate in District Three, with entirely different opponents, depending upon their actual place of residence. It is conceivable that a district with no candidates for election might be created.

Mr. Robert H. Remaklus  
July 30, 1974  
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" Your opinion as to whether the Board of County Commissioners of Valley County, Idaho, may or should take further action herein will be most sincerely appreciated. In view of the time frame in which we have to make a determination, we shall look forward to an immediate reply."

According to the additional information you furnished us on July 12, the County Commissioners of Valley County did, on January 15, 1974, set the Commissioner Districts' boundaries and notice of the action they had taken was published in The Star-News February 21, 1974, as required by Section 31-819, Idaho Code.

Section 31-1509, Idaho Code, reads as follows:

"Any time within twenty (20) days after the first publication or posting of the statement, as required by section 31-819, an appeal may be taken from any act, order or proceeding of the board, by any person aggrieved thereby, or by any taxpayer of the county when any demand is allowed against the county or when he deems any such act, order or proceeding illegal or prejudicial to the public interests; and no such act, order or proceeding whatever, which directly or indirectly renders the county liable for the payment of the sum of \$300.00 or over, or its equivalent, shall be valid until after the expiration of the time allowed for appeal or until such appeal, if taken, shall be finally determined; but there is expected from the operation hereof all orders for the payment of those sums specially directed by law to be paid, or payments in fulfillment of acts or proceedings made and confirmed according to the provisions hereof."

It has been held that once the appeal time has passed, the orders of the county commissioners are final and are not subject

Mr. Robert Remaklus  
July 30, 1974  
Page 3

to collateral attack. There are many, many Idaho cases on this subject, such as Harrison v. Board of County Commissioners, 68 Idaho 463; UDY v. Cassia County, 65 Idaho 385; Clay v. Board of County Commissioners, 30 Idaho 794; Dexter Horton Trust & Savings Bank v. Clearwater County, 235 F. 743, aff'd 248 F. 401; and the recent case of Bonneville County v. Hopkins, 94 Idaho 540.

The fact that the time for appeal is short should not in fact work an unbearable hardship on the complaining taxpayer. He may again address himself to this same matter in January of the next year and complain to the board of county commissioners or appeal their action if he does not think that the districts they provide for are representative.

Reynolds v. Sims, 377 U.S. 533, 12 L.Ed.2d 506 and later cases, see 25 Am.Jur.2d Elections, P. 722 indicate that the courts will endeavor to avoid a disruption of the elective process which might result from last minute demands for reapportionment and which could make unreasonable precipitative demands as to reapportionment. The taxpayer demanding the change would have to justify his waiting until just before the election to bring such action, and it would seem difficult for him to do so. The federal courts may not be bound by the Idaho limitations statute in such a case, but there would certainly be good reason in such a case for them to follow it. However, in light of Reynolds v. Sims, supra, it would certainly appear that the county commissioners would be on solid ground in refusing to take the matter up again at this late date considering the possibility of disrupting the election.

There are a great number of cases on the subject of whether local governments similar to our board of county commissioners must be equally apportioned. Some of these cases appear to be diametrically opposed to each other in their decisions. Two recent cases on the subject are Avery v. Midland County, Texas, 390 U.S. 474, 20 L.Ed.2d 45 (1968) and Abate v. Mundt, 403 U.S. 182, 291 L.Ed.2d 399 (1971). See also the annotation at 18 L.Ed.2d 1537 on this subject. Since the Idaho statute requires that the three districts are to be apportioned ". . . as nearly equal in population as may be . . ." it must certainly be assumed that there should not be too great a discrepancy in population in the various districts.

It would appear that if a taxpayer would take this matter up in a timely manner during the January meeting of the board of commissioners or within twenty days after the notice of the

Mr. Robert Remaklus

July 30, 1974

Page 4

results of such meeting have been published, the county commissioners might well be required to reapportion their districts if there was a large discrepancy in the districts. On the other hand, if as here, the notice by the board of commissioners is duly given, and there is no appeal from it, as required by statute, the results of the meeting at which the commissioner districts were set becomes final. It is our opinion that the taxpayer cannot complain about the county apportionment until next year.

Sincerely,

FOR THE ATTORNEY GENERAL

WARREN FELTON

Deputy Attorney General

WF:cg

6-30.1

August 5, 1974

COPY  
Honorable Cecil D. Andrus  
Governor of Idaho  
Office of the Governor  
BUILDING MAIL

OFFICIAL OPINION #75-17

Re: Idaho Code, Section 59-1326(2)

Dear Governor Andrus:

Attorney General Park has forwarded your opinion request of July 16, 1974, pertaining to Idaho Code, Section 59-1326(2) to me for response. Your question was:

"[M]ust an appointee (to the Public Employees Retirement System Board) retain his active membership in the system during the full five years of his term, or does the fact that he is active at the time of his appointment suffice, even though he ceases employment and becomes a 'retired member'?"

It is the opinion of the Attorney General that Section 59-1326(2), Idaho Code does not require a Board member to maintain his status as an active member throughout the duration of his five year term.

It should be noted that Section 59-1326, Idaho Code pertains to the creation of the Retirement Board, its duties and functions, and the requirements Board members must meet to qualify for a Board position. Subsection two of 59-1326 states the qualifications for two of the five Board members. It requires that at the time of appointment they be (1) "appointed from among the active members" and (2) have "at least ten years of credit service."

Honorable Cecil D. Andrus  
August 5, 1974  
Page 2

As can be seen from the reading of 59-1326(2), there is no language therein indicating that the qualifications are of a continuing nature. Also, after a perusal of the entire act, I can find no language that would indicate the requirements must be maintained throughout a Board member's term. Without such language, it can be said that the legislative intent was that the qualifications not be of a continuing nature and therefore, it is the opinion of the Office of the Attorney General that where a Board member changes his system status from "active" to "retired", he is not required to relinquish his Board position.

Very truly yours,

FOR THE ATTORNEY GENERAL

WAYNE G. CROOKSTON, JR.  
Assistant Attorney General

WGC:cg

C  
O  
P  
Y



August 12, 1974

Mr. William D. Collins  
Prosecuting Attorney  
Boise County  
P. O. Box 2794  
Boise, Idaho 83701

OFFICIAL OPINION # 75-18

Dear Mr. Collins:

You have asked for an opinion regarding the proper construction of Section 34-1710, Idaho Code, which provides:

"34-1710. CONDUCT OF SPECIAL RECALL ELECTION.--Special elections for the recall of an officer shall be conducted and the results thereof canvassed and certified in all respects as near as practicable, in like manner as general elections, except as otherwise provided; but in no case shall a special recall election be held within ninety (90) days next preceding a primary or general election." (Emphasis added)

Your question is whether the prohibition under 34-1710, Idaho Code precludes the holding of an election for the recall of an officer within ninety days of a primary or general election or simply forstalls the holding of an election during that period so that it will coincide with the primary or general election.

It is our opinion that 34-1710, Idaho Code precludes the holding of an election.

A recall election is a "special recall election". 34-1710, Idaho Code provides that if sponsors of the recall of a public

G50.1

officer obtain the requisite number of certified signatures on recall petitions, and if the public officer in question does not resign his office within five days after receiving notice of the filing of such certified signatures, the appropriate election officer shall order a "special recall election".

34-1707, Idaho Code requires that the "special recall election" must be held within thirty days of the order, and that the "special recall election" be conducted citywide, countywide, or statewide, depending on the office in issue.

Section 34-1710, Idaho Code, refers to the conduct of a "special recall election". Section 34-1711, Idaho Code provides for canvassing of votes in a "special recall election". Section 34-1712, Idaho Code, provides that general election laws control in the conduct of a "special recall election".

Nowhere in the recall statutes -- Title 34, Chapter 17, Idaho Code -- is the term recall election not preceded by the word "special". It is our opinion that the legislature, in enacting the recall statutes, intended recall elections to be held as "special elections", and that such elections may not be held within ninety days of a primary or general election. Concomitantly, it is our opinion that it was not the intention of the legislature to subject a public officer to a recall election on the primary or general election ballot, on which ballot that officer may well be running for reelection. Had the legislature intended such a result, it would not have carefully, and repeatedly, used the term "special recall election" when referring to a recall election.

Section 34-1707, Idaho Code requires that the election be held within thirty days after the recall petition is filed and approved by the appropriate election officer. Because such an election would be held within the ninety day period immediately preceding a general election, the recall action may not be held without the circulation of new petitions.

Very truly yours

FOR THE ATTORNEY GENERAL

ROBERT L. MILLER  
Chief Deputy Attorney General



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

W. ANTHONY PARK  
ATTORNEY GENERAL

August 1, 1974

The Honorable Marjorie Ruth Moon  
State Treasurer, State of Idaho  
Building Mail

OFFICIAL OPINION #75-19

Dear Ms. Moon:

You have requested our opinion on the following question:

"Can amounts included in the Personnel Benefits portion of the Personnel Costs budget be transferred to the Salaries and Wages portion of the Personnel Costs budget?"

Your concern is expressed because of 67-3511, Idaho Code, which provides that ". . . 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. . . ."

Effective July 1, 1973, 67-3508, Idaho Code provided standard classes for several purposes, including appropriations, estimates made for budget purposes, and expenditures made from appropriations of funds. Those four classes are: (a) Personnel costs, (b) Operating expenditures, (c) Capital outlay, (d) certain trustee and benefit payments.

Certain restrictions on transfers of monies appropriated are made by 67-3502, Idaho Code, and 67-3511, Idaho Code. However, these restrictions do not apply to monies appropriated for a particular class of expenditures when within the same program, which appears to be the case with your current appropriation. Consequently, it is our opinion that monies

Ms. Marjorie Ruth Moon  
August 1, 1974  
Page 2.

appropriated for personnel costs may be used for salaries and wages, personnel benefits or other expenses included within the legislative definition of "personnel costs" as provided by 67-3508(a).

Very truly yours,

FOR THE ATTORNEY GENERAL

A handwritten signature in dark ink, appearing to read "Robert L. Miller". The signature is fluid and cursive, with the first name "Robert" and last name "Miller" clearly distinguishable.

ROBERT L. MILLER  
Chief Deputy Attorney General

RLM:cg



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83707

W. ANTHONY PARK  
ATTORNEY GENERAL

August 2, 1974

Mr. Ewing H. Little  
State Tax Commissioner  
B U I L D I N G

OFFICIAL OPINION No. 75-20

Dear Commissioner Little:

You have requested an opinion addressed to the question of whether the Idaho State Tax Commission may seize and sell beer to a licensed beer wholesaler pursuant to the authority vested in it by §63-3059 and §63-3060, Idaho Code.

§63-3060, *supra*, provides as follows:

"When a warrant is issued by the tax collector for the collection of any tax, interest, penalty, additional amount or addition to such tax, imposed by this Act or for the enforcement of any lien authorized by this Act, it shall be directed to any sheriff, \* constable, or deputy collector, and any such warrant shall have the same force and effect as a writ of execution . . ."

§11-201, Idaho Code, provides as follows:

"All goods, chattels, moneys and other property, both real and personal or any interest therein of the judgment debtor, not exempt by law, and all property and rights of property, seized and held under attachment in the action, are liable to execution . . ."

Since beer is not exempt from execution by §11-205, Idaho Code, it may be seized pursuant to §63-3059 and §63-3060, *supra*. §63-3058, Idaho Code. However, the permissibility of seizing beer does not necessarily imply that the beer may also be sold pursuant to a writ of execution.

Commissioner Ewing H. Little  
August 2, 1974  
Page 2

§23-1055, Idaho Code, provides as follows:

"It shall be unlawful: . . . (c) for any person to sell beer for resale or consumption in this state or to transfer or import beer into this state for the purpose of selling such beer for resale or consumption in this state, unless such person shall hold a license or certificate of approval issued by this state pursuant to which any such sale, transportation or importation shall be authorized; . . ."

The issue thus drawn is whether the Tax Commission is a person who is required to have a license as a condition precedent to selling beer it has seized pursuant to its duty to collect the State's taxes. Because the State grants beer licenses it is anomolous to require the Tax Commission to obtain a license before selling beer pursuant to §63-3059 and §63-3060, *supra*, unless that result is clearly required by Chapter 10, Title 23, Idaho Code.

§23-1001(b), Idaho Code, defines the word "person" as,

". . . Any individual, firm, co-partnership, association, corporation or any group or combination acting as a unit, and the plural as well as the singular number unless the intent to give a more limited meaning is disclosed by the context."

It is not clear that the Legislature intended to include the Tax Commission within the foregoing definition of "person", especially when it is considered that if it had it would have required a State agency to obtain a license before selling beer. It is a widely accepted rule of statutory construction that words in a statute such as "persons" will not ordinarily be construed to include the State or political subdivisions thereof. United States v. United Mine Workers of America, 330 U.S. 258, 275; State v. Ambrose, 62 A.2d 359, 364 (Mary., 1958); Hanson v. Commonwealth, 181 NE 2d 843, 847 (Mass., 1962)

As already mentioned, the Legislature has not seen fit to adopt a policy making beer exempt from execution. A rule which aids the State in the collection of taxes rather than a rule which allows a delinquent taxpayer to dispose of his personal property at the expense of his fellow taxpayers is preferable and mandates an exception to the license requirement for the limited purpose of beer sales pursuant to a Tax Commission levy. Statutes

Commissioner Ewing H. Little  
August 2, 1974  
Page 3

affecting the sale of beer should be read as excluding from their operation sales made in execution of legal process. Mutt v. Wheeler, 30 Vt. 436 (1857); Brennan v. Pittston Brewing Corp., 26 A.2d 334 (Penn., 1942).

While the Brennan case suggests that beer sold on execution must be taxed, the State Tax Commission is clearly in a position to see that proper taxes on the beer are paid.

In conclusion, beer is not exempt from execution under Idaho statutes when sold by the State Tax Commission although it may not be sold under a sheriff levy on behalf of a private individual. Beer may be sold to a licensed beer wholesaler pursuant to §63-3059 and §63-3060, Idaho Code, because the Tax Commission is not a person required to possess a license to sell beer and because statutes requiring a seller to possess a license should be read as exempting sales made in execution on behalf of the State of Idaho itself.

Very truly yours,

FOR THE ATTORNEY GENERAL

5/  
J. MICHAEL KINSELA  
ASSISTANT ATTORNEY GENERAL

JMK:blh



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

W. ANTHONY PARK  
ATTORNEY GENERAL

August 5, 1974

Lt. Norman Ayars  
Secretary-Treasurer  
Lewiston Policemen's Retirement Fund Board  
P.O. Box 953  
Lewiston, Idaho 83501

#75-21  
OFFICIAL OPINION #25-21

Dear Mr. Ayars:

We have gone over a proposed contract with Standard Insurance Company of Portland, Oregon to have them invest, carry on, manage and pay your retirement under Sections 50-1501 through 50-1524, Idaho Code. Please excuse the time it has taken to assess this proposal and plan, but I found it necessary to have the help of experts, both from the retirement system and from the Insurance Department.

There are a number of items that I wish to point out to you in relation to the proposed group annuity contract. (1) Under 2.3 of the contract, the "contract interest rate" should be specified by completing paragraph 1.6 of the final contract. (2) Under 2.6 of the contract, it is stated that the "contract charge" is to be withdrawn under "Standard's regular rules and practices for this class of business . . . ." The regular rules and practices for this class of business should probably be made a part of the contract and set out in it. (3) There is one sentence in item 2.2 of the contract that is quite puzzling to me. It says "Contributions in any period of time may not exceed the amount necessary, under the appropriate actuarial assumptions to support the Retirement Plan for that period of time . . . ." If I read this sentence correctly, it means that if the Retirement Board for Lewiston has funds in excess of the amounts required and provided for by the contract and plan, these funds may not be deposited under the contract. On behalf of



the Retirement Fund, you may have to maintain other investments for part of your funds not covered by the contract.

(4) As stated in Mr. Merrill's letter, what happens to a person who does not have twenty years of service? (5) There is one other question you should consider. What happens if the payments required to continue the plan require more money than is available to the Board? This is not too likely, but it could happen. Also the earnings could fall off.

None of the above matters which I have pointed out to you are necessarily criticisms of the plan and contract, nor would they mean that you should not enter into it.

Section 50-1507, Idaho Code provides that the Chairman of the Board is to administer the policemen's Retirement Fund and Section 50-1504, Idaho Code provides that the Board shall provide for disbursement of the Retirement Fund and shall designate the beneficiaries of the fund under this law. Section 50-1510, Idaho Code provides that the Board and its employees are not personally liable in their private capacities for or on account of any act in an official capacity in relation to investing these funds which is performed in good faith and without intent to defraud. Section 50-1509, Idaho Code provides for employing such assistants, experts, accountants and other employees as are necessary to carry on the functions of the Board.

It appears from this law that the Board is quite free in determining what investments it will make. The ultimate choice in administering the fund is, of course, up to the Chairman of the Board and the Board as a whole.

The law is quite well settled that the Board cannot surrender its basic duties and functions to anyone else, particularly someone outside government. Here the basic duties of the Board and Chairman of the Police Retirement Board are to invest the funds for the persons to be retired and to determine retirement and to pay it. This contract and plan as it is now proposed places all of these functions in the hands, of the insurance company, See McQuillan, Municipal Corporations, §10.38 to 10.45 and 37.09, and 67 C.J.S, P. 449 and 63 Am. Jur. 2d P. 814 Public Officers Section 310.

There should however be a solution to this problem somewhat along the following lines: the contract and plan must be altered to some extent to provide that the Board and Chairman retain control of the investment function and the retirement and payment functions.

Lt. Norman Ayars  
August 5, 1974  
Page 3

Thus they should under the contract be allowed to designate and retain control of the type of investments to be made. The insurance company should obtain permission for the type of investment to be made and should report at regular intervals, perhaps monthly, as to the investments and returns. The Board should then, after receiving the reports, either approve or reject the investments made. Also before the insurance company starts a new type of investment it should consult the Board and obtain permission. The Board should know in advance what type of investment is to be made, but not the individual investments that are to be made. The Board should then later and on a regular basis either ratify and approve or disapprove and require change in the investments that have been made.

Also the payments for retirement should go the Board and should be paid by it to the persons who are retired or receiving compensation.

Since Section 50-1507, Idaho Code requires the Chairman of the Board to administer the fund, but Section 50-1509, Idaho Code provides for hiring employees, experts and such other persons as are necessary to carry on the functions of the Board, the contract and plan you contemplate could with very little alteration and change be so designed to amount to a contract whereby the Chairman and Board employ or hire Standard Insurance Company to perform the contemplated services for them, thus avoiding the contention that the Board, and particularly the chairman of the Board, are allowing a private agency to take over and administer this fund for them or him.

If this alteration, above referred to, is made in the contract, there would be no problem as to the Board or Chairman of the Board giving away control of the funds. The contract could, of course, be terminated by non-payment. The rights of the retirees appear to be adequately protected as to those funds in the hands of Standard Insurance Company if the Board should decide not to continue with the plan and contract. With a provision providing for reports on a regular basis to the Board and for consultation with the Board in relation to the type of investments of the funds that will be made by Standard Insurance Company, it will make certain that the Chairman and Board continue their administrative functions, as public officers, and are not giving these functions away to the private sector.

Lt. Norman Ayars  
August 5, 1974  
Page 4

You have also asked whether the city can borrow from such a trust fund. The sections of law heretofore cited provide that it is the policemen's Retirement Fund Board and the Chairman of the Board who determine what investments to make with the funds. The mayor is, of course, the chairman. As a practical matter, the men elected to and sitting on this Board are policemen and as such might be reluctant to disagree with the mayor or city manager. However, while they might well agree to lend the city these funds, that certainly isn't necessary or required. Conversely, neither is such a loan prohibited by law. As to the funds that would be in the hands of Standard Insurance Company, if a contract such as you contemplate were entered into, you would, of course, no longer be in a position to loan those funds to the city unless the Insurance Company and Board agreed to do so.

Sincerely yours,

FOR THE ATTORNEY GENERAL

WARREN FELTON  
Deputy Attorney General

WF:lm

Enclosure

~~6130.1~~

D200.1

August 5, 1974

Clyde Koontz  
Legislative Auditor  
Building Mail

OFFICIAL OPINION #75-22

Dear Mr. Koontz:

On behalf of the Joint Finance Appropriations Committee you have asked our opinion on whether you have authority to audit the books and records of the Idaho Investment Board. It is our opinion that such audits are authorized by Section 67-435, Idaho Code, and are not prohibited by Section 57-720, Idaho Code.

Section 57-720, Idaho Code, requires the Board to have an annual audit conducted by a recognized certified public accountant who is not an employee of the State. Section 67-435, Idaho Code, however, provides for relatively broad powers of the Legislative Auditor to conduct audits of state agencies and institutions, and it is our opinion that the Legislative Auditor is authorized to conduct an audit of the Idaho Investment Board and its books and records.

Nothing in this opinion should be construed to dispense with the requirement of Section 57-720, Idaho Code, which requires the Investment Board to cause an audit to be made by a recognized certified public accountant who is not an employee of the State. If the Legislative Auditor does not elect to proceed with the audit of the Investment Board through or by use of an auditor who is both a certified public accountant and who is not an employee of the State, the Investment Board will be required to engage an independent certified public accountant to conduct the audit required by Section 57-720, Idaho Code, as they have done in the past.

Very truly yours,

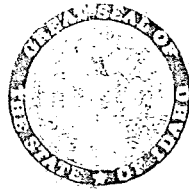
FOR THE ATTORNEY GENERAL

ROBERT L. MILLER  
Chief Deputy Attorney General

RLM:lm

CC: STEVE MEIKLE

D80



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

August 6, 1974

W. ANTHONY PARK  
ATTORNEY GENERAL

June Epstein, President  
Shirly Paulson, Vice-President  
Vivian Crozier, Secretary-Treasurer  
Officers of Idaho State Association of      OFFICIAL OPINION #75-23  
County Treasurers  
1065 "A" Street  
Coeur d'Alene, Idaho 83814

Dear Mmes.

I am in receipt of your letter of July 3, 1974, requesting an opinion from this office pertaining to investing and safeguarding county funds. You presented several questions, however, in light of the answer to the first inquiry it is not necessary to discuss the other questions. Your first question was:

"Can a county invest funds through third parties which in turn invest in U.S. Government securities?"

In answer to the above inquiry it is the opinion of the Attorney General's Office that a county cannot invest funds through third parties which in turn invest in U.S. Government Securities.

Pursuant to conversations with June Epstein and Marjorie Jonasson, of your Association, it became apparent that the type of investment program contemplated by your first question is one wherein idle and surplus county funds are to be placed in the hands of an investment company or broker and such firm invests the county money for the treasurer in those types of securities allowed by law. This removes the necessity of having the treasurer buy the securities directly and the investment firm, as compensation for its services, receives a percentage of the yield on the securities.

Officers of Idaho State Association of  
County Treasurers  
August 6, 1974  
Page 2

Several sections of the Idaho Code must be examined to determine whether this procedure for investment of county funds can be justified. Of great import is Section 31-2119, Idaho Code. This section is contained in Chapter 21, Title 31, Idaho Code, which sets forth specifically the duties and powers of County Treasurers. This section reads as follows:

"31-2119. Custody of county money.--The county treasurer must keep all moneys belonging to this state or to any county of this state in his own possession until disbursed according law. He must not place the same in the possession of any person to use the same, except as provided by law; but nothing in this section prohibits him from making special deposits for the safe-keeping of the public moneys."

As can be seen from a reading of this section, the county treasurer must keep county money in his possession unless specifically authorized by statute to place the funds in another's possession. Placement for safe-keeping is specifically authorized by Section 31-2119 and the Public Depository Law, Chapter 1, Title 57, Idaho Code was enacted to provide for the safe-keeping of county funds. Section 57-102 reads in part as follows:

"57-102. Scope of Act.--This chapter is designed to safeguard and protect the funds of all political subdivisions and of all municipal and quasi-municipal corporations of the state, . . . "

Section 57-139, Idaho Code, of the Public Depository Law, sheds additional light on the authority of the county treasurer to place county funds in another's possession and what the penalty is for misplacement of funds.

"57-139. Offenses by treasurer--Penalty.--The making of profit, directly or indirectly, by the treasurer of any depositing unit out of any money in the treasury, belonging to the depositing unit, the custody of which the treasurer is charged with, by loaning or otherwise using it, or depositing the same in any manner contrary to law, or the removal by the treasurer or by his consent,

of such moneys, or a part thereof, out of the vault or safe of the treasurer's department, after the same shall have been provided by the depositing unit, or out of any legal depository of such moneys, except for the payment of warrants, legally drawn, or for the purpose of depositing the same, under the provisions of this law, in banks which shall have qualified as depositories, shall constitute a felony, and on conviction thereof, shall subject the treasurer to imprisonment in the state penitentiary for a term of not exceeding two years, or a fine not exceeding \$5000, or to both such fine and imprisonment, and the treasurer shall be liable upon his official bond for all profits realized from such unlawful use of such funds." (Emphasis added)

Sections 31-2119, 57-139, and the entire Chapter 1, Title 57, Idaho Code, indicate that a county treasurer must keep county funds in his possession, or deposited in a designated depository, or deposited otherwise pursuant to law. Section 57-127 states where county money can be deposited or invested. It also, like Sections 31-2119 and 57-139, reveals what the treasurer is to do with all public money coming into his custody. Section 57-127 reads in part as follows:

"57-127. 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 \$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, . . . 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 short term interest-bearing bonds or other evidences of indebtedness of the United States of America and in time certificates of deposit of designated public depositories, and interest received on all such investments, unless otherwise required by law, shall be paid into the general fund of the depositing unit . . . " (Emphasis added)

Officers of Idaho State Association of  
County Treasurers  
August 6, 1974  
Page 4

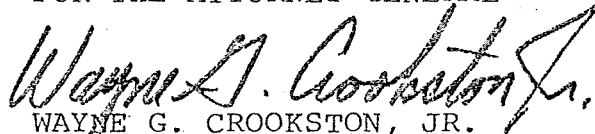
In view of the mandates of Section 31-2119 and those contained in the Public Depository Law it appears that a county treasurer must keep county funds in his possession unless they are placed with designated depositories or are invested in securities pursuant to Section 57-127.

A perusal of the statutes pertaining to county treasurers has revealed no authorization for the use of third parties to invest in allowable securities. Also, Section 57-139 indicates that a county treasurer can not loan, or otherwise use, or deposit county money in any manner contrary to law. Therefore it is the opinion of the Attorney General that a county cannot invest funds through third parties which in turn invest in U.S. Government Securities and particularly in the manner suggested.

In light of this opinion, it should be pointed out that the Endowment Investment Board of the State of Idaho has been given specific authorization to use third parties for investment purposes. Such authorization for county treasurers should be obtained through the legislature to implement third party investment.

Very truly yours,

FOR THE ATTORNEY GENERAL

  
WAYNE G. CROOKSTON, JR.  
Assistant Attorney General

WGC:lm



August 7, 1974

Mr. Lee R. Dorman  
Secretary-Treasurer  
Whitney Fire Protection District  
2035 Harrison Boulevard  
Boise, ID 83702

OFFICIAL OPINION NO. 75-24

Dear Mr. Dorman:

You have sought an Attorney General's opinion on the question whether, under Idaho law, a fire protection district must certify its annual budget to the county in dollars rather than in mills.

Title 31, Chapter 14, Idaho Code, deals with the creation, power and duties of fire protection districts. §31-1420 thereof, enacted in 1943 and amended in 1947 and 1965, expressly provides that the board of commissioners of the fire protection district shall certify to the county auditor, county assessor and state board of equalization certified copies of the district board's resolution providing for its annual levy in mills. This authority to certify to the county in mills, rather than in dollars, was withdrawn by the 1969 legislature which enacted provisions requiring all taxing districts to certify their budgets to the county in dollars rather than in mills. That enactment by the Idaho legislature is codified as §§63-621, 63-622 and 63-624 through 63-626, Idaho Code. §63-621, Idaho Code, defines the phrase "taxing district" as including fire protection districts. §63-622, Idaho Code, provides that certification by taxing districts to county and state boards and officers of mills or dollars shall be made in the manner provided in §§63-624 through 63-626. §63-624, Idaho Code provides:

" . . . the amount of money . . . shall be certified in dollars to the . . . board of county commissioners . . . After receipt of this certification, the board of county commissioners shall make a tax levy in mills which, when applied to the tax rolls to which reference is made in §63-625, Idaho Code, as amended, will meet the budget requirements certified by such taxing districts."

Mr. Lee R. Dorman  
August 7, 1974  
Page 2

§63-625, Idaho Code, provides as follows:

"It is the purpose of this act to change and amend the laws of all taxing districts as herein defined . . . so as to require the . . . governing body of said districts . . . to certify . . . the total amount of money in dollars, and not in mills or a certain number of cents on each \$100 of assessed valuation, that is necessary and required to meet the requirements of its budget . . . When the county commissioners shall fix and levy pursuant to this section, such levy will be made in mills . . ."

It is seen that the above 1969 enactments of the legislature require certification and levy in a way which is contrary to the provisions of §31-1420, Idaho Code, in that the board of commissioners of the fire protection district are required to certify a budget in dollars rather than in mills and in that the county commissioners rather than the fire district board determine the amount of the levy in mills. Although §31-1420, Idaho Code, conflicts with §§63-624 through 63-625, any question concerning which statutory provisions are to take precedence has been laid at rest by the language of §63-625 quoted and set out above and by the language of §63-626, Idaho Code, which provides as follows:

"Any act or part thereof, where it is provided that the council, trustees or other governing body of any taxing district as herein defined is required to determine and certify to any board of county commissioners, or to any other county officer, any ad valorem tax levy, in mills, or a certain number of cents on each one hundred dollars (\$100) of assessed valuation in the district, and any act, or part thereof wherein any time is fixed for any such certification shall be construed to be amended to conform to the requirements of this act, and whenever any provisions of the existing laws of any of said taxing districts are in conflict with the provisions of this act, the provisions of this act shall control and supersede all such laws, but nothing herein contained shall be construed as amending

Mr. Lee R. Dorman  
August 7, 1974  
Page 3

or repealing any mill levy limitations upon property in any such taxing district, or amending or repealing any law providing for a petition, public hearing or special election otherwise authorized by law regarding the amount of money that can be collected by a tax on property in any such district."

In conclusion, it is our opinion that, under Idaho law, a fire protection district must certify its budget in dollars, not in mills, in the time and in the manner provided by Idaho Code §§63-621, 63-622 and 63-624 through 63-626.

Very truly yours,

FOR THE ATTORNEY GENERAL

WILLIAM McDOUGALL  
ASSISTANT ATTORNEY GENERAL

WMcD:ji



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

W. ANTHONY PARK  
ATTORNEY GENERAL

August 8, 1974

Dr. John B. Barnes  
President  
Boise State University  
1910 College Boulevard  
Boise, Idaho 83725

OFFICIAL OPINION # 75-25

Dear Dr. Barnes:

We wish to respond to your letter of July 30, 1974, wherein you requested our opinion on the construction of a "scholarship box" and an elevator from private funds, the payment of which will come from donations or from the sale of seats in the box. It is our understanding that the seats in the box, or a number thereof, would be turned over by the University to the Bronco Athletic Association, who in turn would sell the same, using a portion of the proceeds therefrom to repay the private parties who originally provided the construction funds. You further indicated that you "would want this project to be one which fully has the legal endorsement of this office." Our advice to any agency must, of course, be based upon the statutory authority and case law. There can be little doubt that the State Board of Education and its institutions may lease real property and facilities where title is vested in those agencies or in which those agencies have some degree of possessory interest. Sections 33-107 and 33-4005, Idaho Code. However, these general grants of authority are tempered by Article 8, Section 2 of the Constitution of the State of Idaho, which prohibits giving or lending the credit of the State in aid of any individual, association, municipality or corporation. Further, the Supreme Court has on at least three different occasions discussed that Article in connection with leasing and selling publicly financed and owned facilities to non-public enterprises. Hansen vs. Kootenai County Board of County Commissioners, 93 Idaho 655; Moyie Springs vs. Aurora Manufacturing Company, 82 Idaho 337; Hansen vs. Independant School District No. 1, 61 Idaho 109. See also Annot. 161 ALR 518. The Kootenai County case, *supra*, is the Court's latest expression on the issues raised in part by the proposed project. There the Court held generally

D60.2

Dr. John Barnes  
August 8, 1974  
Page 2

that a municipality may lease its property to a private concern when the lease does not conflict with the public's use or need for the property. Whether or not this project would conflict with the public's use or need for the stadium is an issue which must ultimately be determined by the Court based upon the facts presented at the time of the project. Therefore, we cannot guarantee that the project will not be challenged. We can only advise you of certain elements to be considered which will minimize the risk of a successful challenge.

Therefore we wish to point out certain elements which we believe the legal authorities require:

1. Approval by the State Board of Education, acting as trustees of the University.
2. The project will not reduce or otherwise interfere with the public's access to, use of, or need for the stadium.
3. The scholarship box, elevator, equipment and furnishings are a part of the stadium and as such, title thereto is vested immediately in the University and trustees.
4. Payment for the project shall be borne by the Bronco Athletic Association or others, but excluding any legal or moral obligation to pay by the University, trustees or the State of Idaho.
5. That payment will be made to the contractor on a timely basis as required in the construction contract for that project, so that no lien or other encumbrance is created. We believe, however, that the University may act as the conduit through which the funds are paid to the contractor, but that no University funds are to be used for such payment.
6. That no encumbrance may be imposed on the project or any other property or facility of the University as security for the repayment of the construction funds provided by the lenders to the Bronco Athletic Association.
7. That the University shall have exclusive control over the number and kinds of events to be held in the stadium and to which access to the scholarship box shall be available.

Dr. John Barnes

August 8, 1974

Page 3

8. That University and trustees rules and regulations governing the attendance at and use of the facilities of the stadium apply to attendance in and use of the scholarship box.
9. That the project meet all safety standards.
10. That the Bronco Athletic Association or other borrower shall not pledge any property or facility, including this project or any part thereof, which now or hereafter is owned or controlled by the University, trustees, or State of Idaho, as security for the repayment of the construction funds, or for any portion thereof.
11. That an agreement be entered into which embodies the foregoing between the University and the Bronco Athletic Association and which provides that the University will put the Association in possession of the box on a lease basis for adequate consideration. The lease agreement must carry a terminal date, but if either the University or the Association terminates the agreement prior to the completion of repayment by the Association to its lenders, the University, trustees or State of Idaho in no way assume any legal or moral obligation for the payment of any balance due and owing.
12. That the Bronco Athletic Association will show proof of sufficient insurance to cover costs of repair and upkeep to the facility and to cover the risk of injury or death to the members or others, and by such agree to save harmless or indemnify the University, trustees and State of Idaho.

We are of the opinion that the foregoing provisions and conditions are required by law and the proper administration of the institutional property. If we can be of further service in this matter, please advise.

Very truly yours,

FOR THE ATTORNEY GENERAL

JAMES R. HARGIS

Deputy Attorney General

JRH:cap

cc: Mrs. Janet Hay  
Mr. Milton Small

August 9, 1974

W. Carl Griner  
Inspector of Mines  
Building Mail

Official Opinion #75-26

Dear Mr. Griner:

You have asked this office a question as to whether private contractors performing construction work at or near an active mine fall under the Mine Safety and Health Standards or under the O.S.H.A. Safety and Health Standards.

As I indicated to you some time earlier orally, we would suggest the following:

If the work is new construction or major construction not connected to the active parts of the mine, such as an administrative building or new above ground works which do not interfere with the mining, transportation, concentration, sand operations or other operations of the mine, such work should probably be considered as construction work coming under O.S.H.A. Standards and Regulations and not as mining coming under Mine Health and Safety Regulations, except that the new construction should be so built that it can comply with Mine Safety and Health Regulations when it is completed and becomes an active part of the mine works.

Perhaps you could work out an agreement with O.S.H.A. to do this inspection for them. You might wish to consider this matter.

On the other hand, if the construction is adjacent to or in an active mining area or interferes to some extent with active mining, such construction should comply with Mine Safety and Health Standards from the beginning.

W. Carl Griner  
August 9, 1974  
Page 2

As to both of the above outlined situations, it would probably be permissible to use both O.S.H.A. and Mine Safety and Health Standards dually if one or the other set does not cover a given situation.

Sincerely yours,

FOR THE ATTORNEY GENERAL

WARREN FELTON  
Deputy Attorney General

WF:cp

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August 8, 1974

Dryden Hiler  
Deputy Secretary of State  
Building Mail

OFFICIAL OPINION #75-27

Re: Agreement Relating to the Pullman-Moscow  
Water Resources Committee

Dear Mr. Hiler:

Pursuant to Section 67-2329, Idaho Code, this office is giving you an opinion as to the validity of the agreement relating to the Pullman-Moscow Water Resources Committee executed the 11th day of July, 1974. We notice that agreement is between the cities of Moscow, Idaho and Pullman, Washington and the University of Idaho and the Washington State University. The agreement appears to be in order and we wish only to notice one thing in relation to it.

Article I, Section 10, Clause 3 of the Constitution Of The United States provides in part that:

"No state shall, without the consent of congress,  
. . . enter into any agreement or compact with  
another state, . . ."

The cities and universities both exercise a portion of the sovereignty of the state of which they are a part and we believe that they might be covered by the above clause of the Federal Constitution.

There are a number of cases indicating that certain agreements do require the consent of Congress. See for instance Duncan v. Smith (Ky. 1953) 262 S.W.2d, 373, 42 A.L.R.2d 54; Landes v. Landes, (1956) 153 N.Y.S.2d 14, 135 N.E.2d 562; Virginia v. Tennessee (1893) 148 U.S. 503, 37 L.

Dryden Hiler  
August 8, 1974  
Page 2

Ed. 537, 13 S.Ct. 728; Louisiana v. Texas (1900) 176 U.S. 17, 44 L. Ed. 347, 20 S.Ct. 251. On the other hand there are also a few cases such as McHenry County v. Brady (1917), 37 N.D. 59, 163 N.W. 540; and Virginia v. Tennessee, *supra*, that indicate that possibly such agreements do not need congressional consent. On the whole there is little law on this subject and much of that is not conclusive. The case of McHenry County v. Brady is somewhat similar to the situation in this case.

This office sees no particular problem in relation to the proposed contract between Moscow and Pullman and the two universities. It does not appear to impinge in any way upon Federal Sovereignty. It only concerns a study of underground water in the Moscow-Pullman area. Such contract is probably valid and we therefore approve it in so far as required by Section 67-2329, Idaho Code.

Very truly yours,

FOR THE ATTORNEY GENERAL

WARREN FELTON  
Deputy Attorney General

WF:lm

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STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

W. ANTHONY PARK  
ATTORNEY GENERAL

August 8, 1974

Joe R. Williams  
State Auditor  
Building Mail

OFFICIAL OPINION #75-28

Dear Mr. Williams:

This is in reply to your letter and the letter attached to it from Junes & Sweeney, Certified Public Accountants relating to Bonner County's method of handling Federal Disaster Assistance Funds. You have asked this office as to the propriety of the county placing all Federal Disaster Assistance Funds arising due to the spring 1974 disaster into a bank account intact and requiring the signature of three persons being the Civil Defense Director, the County Auditor and one of the three county commissioners.

As stated in an earlier opinion, e.g., that of February 21, 1974, to Joe R. Williams, State Auditor, there are certain cases where funds in the hands of certain county officers do not have to be placed in the county treasury and do not have to be paid out by warrants. For instance, money in the hands of county officers belonging to the state may be paid to the state without a warrant. State v. Cleland, 42 Idaho 803, 248 p. 813.

In the instant case the request form of the Office of Emergency Planning which the county fills out for us request to receive funds, states that the county agrees to the following conditions:

- "1. That funds will be credited to a separate account.
- "2. That funds will be used solely for the work approved in the project application.
- "3. That any funds advanced, which are

Joe R. Williams  
State Auditor  
Building Mail  
August 8, 1974  
Page 2

in excess of the approved expenditures as accepted by final audit by the Federal Government, will be refunded promptly to the state."

It also appears from federal regulations that the State must return to the Office of Emergency Planning any funds which are not used.

Thus, it would appear that the county in requesting such funds agrees to keep them in a separate account and to pay back such funds agrees to keep them in a separate account and to pay back any portions not properly received or used. This indicates that these funds are not county funds. The State is also obligated as I previously stated to pay back any unused funds. Thus it would appear that these funds probably remain federal funds until actually paid out for work completed. If this is the case, the funds are subject to control of the federal government Office of Emergency Planning and must be handled in accordance with the requirements of the Office of Emergency Planning.

In our opinion there is nothing improper in this situation in placing these funds into a bank account as described in the letter of Jones & Sweeney; indeed, the county in receiving the funds has agreed to keep such funds in a separate bank account.

Sincerely yours,

FOR THE ATTORNEY GENERAL

WARREN FELTON  
Deputy Attorney General

WF:lm

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STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

August 14, 1974

W. ANTHONY PARK  
ATTORNEY GENERAL

Monroe C. Gollaher  
Director of Insurance  
Building Mail

Official Opinion # 75-29

Dear Mr. Gollaher:

By letter of July 12, 1974, you requested an official opinion from this office as to whether a proposed paid legal services program developed by the Idaho State Bar falls within the meaning of insurance as defined by Title 41, Chapter 1, Idaho Code. Extensive analysis of this program leads me to conclude that the proposed prepaid legal services program is not "insurance" within the meaning of Idaho law.

The Committee on Prepaid Legal Services of the Idaho State Bar has developed a proposal which may be described as follows:

- A. The general concept is one to provide a comprehensive open plan for the general public concentrating substantially on preventative legal services.
- B. The prepaid service plan is sponsored by the Idaho State Bar pursuant to its authority to promulgate rules and regulations in the normal course of its state functions. What is envisioned by the Idaho State Bar is the adoption of an administrative function to act as a "clearing house" for the collection of advance fees from subscribing clients and the payment of such advance fees to a chosen attorney, a member of the Bar, upon the rendering of legal services.
- C. The relationship between the "prepaid legal service clients" and their attorney is in no manner altered by the plan and each client has absolute discretion in his choice of attorneys. The plan does not, however, envision compelling a particular attorney to accept

a particular client. Attorneys shall charge their normal and usual fees for services rendered, a portion of which is to be paid from the advance fees held by the Idaho State Bar with that portion of a fee exceeding the coverage of the prepaid plan being billed directly to the client.

- D. The Idaho State Bar and its members guarantee legal services to all prepaid service clients upon qualification. Such guarantee of service entitles a prepaid legal service client to legal services to the limits of the plan and all risks relating to the solvency of the advance fee fund shall be absorbed by the Idaho State Bar and its member attorneys.
- E. The collections and accounting functions of the Idaho State Bar relating to this program shall be subject to regulation by the State in the same manner as, and in all respects of, the Idaho State Bar itself.

Your question is whether such a proposed prepaid legal service concept constitutes insurance so as to be subject to regulation by the Idaho Department of Insurance. Section 41-102, Idaho Code, defines insurance as ". . . a contract whereby one undertakes to indemnify another or pay or allow a specific or ascertainable amount or benefit upon determinable risk contingencies." Also relevant is Section 41-103, Idaho Code, which defines insurer as ". . . any person engaged as indemnitor, surety, or contractor in the business of entering into contracts of insurance or annuity." Your question compels a careful analysis of the two above cited statutes viewed in light of the proposal by the Idaho State Bar.

Few cases exist which analyze the concept of providing legal services by contract and the relation of such contract to the definition of insurance. Those cases analyzing the subject have considered the definition of insurance in light of facts distinguishable from the present proposal of the Idaho State Bar. Even so, a review of those cases may be helpful in the analysis of this opinion.

In the early 1900, a company known as Physicians' Defense Company was established for the purpose of providing legal representation to physicians in defense of malpractice suits. The provisions of the contract provide for the payment of a certain consideration by a physician in return for the company's promise to provide an attorney employed by the company and an attorney chosen by the physician to represent the physician in a suit against him for alleged malpractice. In two principal cases, courts decided that such an arrangement was in fact "insurance".

In Defense Company v. O'Brien, 100 Minn. 490, 111 N.W. 396 (1907), ruled that the company, for consideration, agrees to indemnify a physician by incurring the legal expenses within certain specified monetary limits in the event that the physician is named as defendant in malpractice litigation. The Court concluded that this type of indemnification is in fact a contract of insurance. In a later case, Physicians' Defense Company v. Cooper, 199 Fed. 576, 580 (C.C.A., 1912), the Court reaches a like conclusion in stating:

"Such a contract, in our opinion, can not be classified as a contract for personal services. The company is not itself an attorney, and does not undertake the defense as such. What it does undertake is, in case of suit, to employ a local counsel, in whose selection the holder shall have a voice, who, with the company's attorney, will defend the case, and to relieve the holder from the expense thereof, an expense which must follow the happening of the very contingency provided against." (Emphasis added) See also Allin v. Motorist Alliance, 234 Ky. 714, 29 S.W.2d 19, 71 ALR 688 (1930), State v. Bean, 193 Minn. 113, 258 N.W. 18 (1934).

The above cases are by no means the unanimous authority. The courts of Illinois and Ohio held upon similar facts that such a contract is a contract for services in the same nature as a legal retainer which has long been recognized as a legitimate instrument in the practice of law. Vredenburg v. Physicians' Defense Company, 126 Ill.App. 509 (1906); Physicians' Defense Company v. Laylin, 73 Ohio 90, 76 N.E. 567 (1905).

The facts upon which these early cases consider the issues in light of the definition of insurance differ somewhat from the proposed plan by the Idaho State Bar. A first distinction which must be drawn is that the proposal by the Idaho State Bar is designed to provide primarily for preventative legal services in return for advance fees. Unlike the early plans, the present proposal does not depend upon the client being named as a defendant in litigation for the implementation of the benefits to accrue under the contract. As indicated by my outline of the important characteristics of the present proposal, the plan is designed for the purpose of accepting advance fees from clients for their use in primarily definitive legal services. The coverage of the plan may be summarized as follows:

1. Advice and consultation - up to four visits per year with the attorney of your choice to discuss and review anything desired by the client.
2. Office work - preparation of wills, deeds, contracts, trusts and research are examples of what falls within this type of coverage.
3. Judicial and administrative procedures - hearings, pleadings and trial before any court, administration, agency, board, etc.
4. Major legal - representation in litigated matters.

In all instances, except possibly where a prepaid client is represented as a defendant in a litigated matter, such client retains absolute control and discretion over the time and purpose of his use of attorney services covered by the plan. In this respect the benefits of the present proposal, for the most part, are not dependant upon "determinable risk contingencies". I must conclude that at least that portion of the present plan wherein the client maintains absolute discretion and control over the use of services cannot be viewed as insurance within the terms of Section 41-102, Idaho Code.

A second factual distinction between the present plan and the concept considered in the earlier cases is that the Idaho State Bar is itself comprised wholly of attorneys engaged regularly in the business of providing legal services. Unlike the Physicians' Defense Company, the Idaho State Bar, through its members, undertakes to provide the direct personal legal services to the prepaid client. Upon this analysis, I am again compelled to view the present proposal as a contract for personal services in the very nature of legal retainer contracts which for the profession have long been accepted in the normal course of business. With regard to the Idaho State Bar proposal, it can hardly be viewed that the Idaho State Bar is assuming the capacity of an insurer within the definition of Section 41-103, Idaho Code. Certainly the Idaho State Bar and its member attorneys are not persons engaged regularly as indemnitors, surities or contractors in the business of entering into contracts or insurance or annuity. Thus the present proposal being considered herein cannot be viewed as insurance.

It can be argued however, that for the portion of the present plan which will provide legal services in defense of litigation, the client loses a certain amount of his absolute discretion and control over the implementation of benefits; therefore,



Monroe C. Gollaher

August 14, 1974

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certain elements of contingency may arise. But what seems more important than segmenting the proposal, is an overview of the entire concept being proposed by the Idaho State Bar. As indicated by the description of the coverages of the plan, preventative legal services dominate the proposal whereas representation of a prepaid client as a defendant in litigation appears to be insubstantial even to the extent of being incidental to the entire concept. Further, the Idaho State Bar and its members are providing direct legal services to the client as opposed to acting as an indemnitor of a client's legal fees. Viewing the present proposal in its overall concept leads to no other conclusions than that it is more closely akin to a large scale legal retainer structure than one of insurance.

Finally, it is important to view the basic intent of the legislature in enacting statutes designed to regulate insurance-type contracts. Because of the complexities of the insurance industry and because of the relative inability of the general public to fully understand and protect themselves in all respects when contracting for insurance, it becomes important for the State to regulate the industry for the protection of the general public. In the present proposal for prepaid legal services there exists some state regulation by the fact that the Idaho State Bar is in fact regulated statutorily. Title 3, Idaho Code, sets forth the regulatory provisions of the Idaho State Bar and provides for supervision of the activities of the Idaho State Bar by the Idaho Supreme Court. In light of the already existing state regulation of the Idaho State Bar, it appears that there exists no compelling reason to attempt to construe the present proposal as one for insurance merely to provide some state regulation. The client, under the present proposal, is adequately protected in that the Idaho State Bar and its members guarantee to its prepaid clients legal services to the extent contracted for regardless of the solvency of the prepaid fund.

I hope the above discussion will clarify the structure of the proposed prepaid legal services program and its relationship to the Department of Insurance. It appears that Idaho's proposal for prepaid legal services is somewhat different from those being considered in a number of states. In the event that businesses engaged in other than the legal profession consider a proposal for underwriting legal expenses, it may be necessary at that time for the Department of Insurance to review such a program as potentially being insurance and subject to your regulation.

Very truly yours,

FOR THE ATTORNEY GENERAL



WAYNE V MEULEMAN

Deputy Attorney General



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

W. ANTHONY PARK  
ATTORNEY GENERAL

August 14, 1974

Gary M. Haman  
Prosecuting Attorney  
302 Elder Bldg.  
Coeur d'Alene, Idaho 83814

OFFICIAL OPINION #75-30

Dear Gary:

This letter is in response to your request for an opinion concerning the ownership of dedicated public roads which have never been accepted or maintained by any governmental body. In particular, you wish to know who has the power to give private individuals permission to clear dead trees and brush from the dedicated land.

It is my understanding that the majority of the roads in question were included in a recorded plat. Idaho follows the majority rule that a dedication of streets and alleys indicated on a plat is perfected when lots are sold with reference to the recorded plat. Idaho Code, Section 50-1312. Boise v. Falls, 94 Idaho 840, 449 P.2d 326, 328 (1972); Boise City v. Hon, 14 Idaho 272, 94 P. 167, 168-70 (1908). Formal acceptance by the government is deemed unnecessary in such cases because individuals who purchase land in reliance on the plat are said to accept on behalf of the general public. Mochel v. Cleveland, 51 Idaho 468, 5 P.2d 549, 553 (1930). If the platted road is located within a city, the municipal authorities may grant permission for such work on the road; if the dedicated road is not within an incorporated city, permission may be given by the board of county commissioners. Idaho Code, Section 50-1317. Of course, neither the city nor the county may authorize projects which are inconsistent with the purpose for which the property was dedicated. 11 E. McQuillin, Municipal Corporations, § 33.74, at 826 (3d ed. 1964).

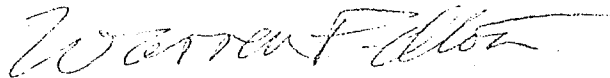
If the dedicated land was not included in a recorded plat, acceptance is generally necessary to perfect the dedication un-

Gary M. Haman  
August 14, 1974  
Page 2

less the road "has become a public highway by public use and public working for the statutory period." Worthington v. Koss, 72 Idaho 132, 237 P.2d 1050, 1952 (1951). Until acceptance occurs, title remains in the dedicator and only he can grant permission to enter upon the land. E. McQuillin, Municipal Corporations, § 33.80, at 849-50 (3rd ed. 1964).

Very truly yours,

FOR THE ATTORNEY GENERAL



WARREN FELTON  
Deputy Attorney General

WF:lm

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STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83707

W. ANTHONY PARK  
ATTORNEY GENERAL

August 16, 1974

John Bender, Director  
Department of Law Enforcement  
Building Mail

Re: No-Passing Zone

"OFFICIAL OPINION #75-31

Dear Director Bender:

On August 14, 1974, you requested an official opinion as to the application of I.C. §49-714. That statute is hereinafter set forth in full. Your question as framed is: "If a motor vehicle operator commences his pass, crossing the centerline, prior to the beginning of a solid line adjacent to a broken line indicating a sight restriction, may the operator complete his pass prior to returning to his lane of traffic?"

The applicable statute, I.C. §49-714, reads as follows:

"49-714. No-passing zones. — The department of highways is hereby authorized to determine those portions of any highway where overtaking and passing or driving to the left of the roadway would be especially hazardous and may by appropriate signs or markings on the roadway indicate the beginning and end of such zones and when such signs or markings are in place and clearly visible to an ordinarily observant person every driver of a vehicle shall obey the directions thereof, subject to penalty for violation prescribed in section 49-1103."

The sight restriction or hazardous line is used in the lane line in critical areas where it is advisable to discourage lane changing. It is axiomatic that a lane change, for purpose of passing, cannot be made after the passing driver has entered the restricted zone. That elementary principle cannot be applied in the circumstances to which this opinion is directed.

In the year 1973 the Executive Branch of the State of Idaho, acting by and through the Department of Law Enforcement, prepared, authorized and printed a new driver's handbook. That handbook provides, on Page 75: "NO PASSING LINES are the single solid yellow lines used on two-lane pavements to indicate zones where passing is prohibited. You may cross the line only to finish passing a vehicle you started to pass before the beginning of the no-passing zone, or to make a left turn into or from an alley, private road or driveway". (Emphasis Supplied)

No case on all fours with the question you propound has been found in research of the question. However, in Howard v Missman, 81 Idaho 82, 337 P.2d 592, the Supreme Court of Idaho considered the question of an accident occurring in a no-passing zone. The Supreme Court took judicial notice of the public and private judicial acts of the executive department of the State of Idaho under I.C. §9-101. The Supreme Court said: "In this case such notice (Judicial Notice) includes the "'Idaho Driver's Handbook'", published under authority of the department of law enforcement, and the "'Manual on Uniform Traffic Control Devices for Streets and Highways'", prepared by the American Association of State Highway Officials, institute of Traffic Engineers, and National Conference on Street and Highway Safety, adopted by the Idaho board of highway directors, May 19, 1955." (Citing authority)

The Court continued: "Traffic rules and regulations, signs, signals and markings, lawfully adopted and placed by administrative authority, and which are not merely arbitrary or capricious, have the force and effect of law, and motorists are charged with knowledge of the significance thereof." (Citing authority)

The Idaho Code is specific that a driver may not commence a pass with a restrictive line in his lane of traffic; however, the Code is silent where the pass is commenced prior to the beginning of the restrictive lane and completed while in a restrictive zone. Thus it would seem to be important to remember that I.C. §49-714 provides that it is unlawful to overtake, pass or drive to the left of the roadway where a no-passing zone is marked. The legislative intent appears to be that passing may not commence after entering the no-passing zone, but that a pass can be made if begun prior to entry of the no-passing zone and completed prior to coming within 100 feet of any vehicle approaching from the opposite direction. The driver's handbook which allows the finishing of a pass, such pass beginning before the entry into a non-passing zone, is an interpretation of I.C. §49-714 vested in the Executive

Branch by the legislature in order to accomplish the legislative purpose by administrative action.

I respectfully refer you to I.C. §49-712 which provides as follows:

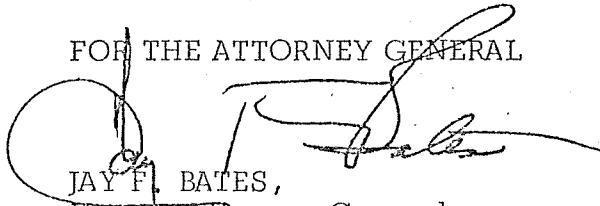
"49-712. Limitations on overtaking on the left. — No vehicle shall be driven to the left side of the center of the roadway in overtaking and passing another vehicle proceeding in the same direction unless such left side is clearly visible and is free of oncoming traffic for a sufficient distance ahead to permit such overtaking and passing to be completely made without interfering with the safe operation of any vehicle approaching from the opposite direction or any vehicle overtaken. In every event the overtaking vehicle must return to the right-hand side of the roadway before coming within 100 feet of any vehicle approaching from the opposite direction."

CONCLUSION

If an operator of a motor vehicle begins his pass prior to an entry into a no-passing zone the vehicle may finish passing without violating the provisions of I.C. §49-714. However, it is always incumbent upon an operator of a motor vehicle to assure himself that he has adequate room to pass on any highway of the state.

Respectfully submitted,

FOR THE ATTORNEY GENERAL



JAY F. BATES,  
Deputy Attorney General  
Assigned to the Department  
of Law Enforcement

JFB/b



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

W. ANTHONY PARK  
ATTORNEY GENERAL

August 15, 1974

Honorable William W. Black  
Magistrate of the District Court of  
Seventh Judicial District  
Bonneville County Courthouse  
Idaho Falls, Idaho 83401

OFFICIAL OPINION #75-32

Dear Judge Black:

This is in response to your letter of August 6, 1974, requesting this office to issue an opinion on the following question:

"Whose responsibility is it to file the necessary papers to perfect a commitment of the mentally ill to the state hospitals?"

In order to answer this question, a distinction must first be made between voluntary and involuntary commitments. Voluntary commitment requires no judicial order. Idaho Code, Section 66-318 states that the individual desiring to be admitted or that parents of the applicant if he is fourteen to 18 years of age may apply. The director of the facility then determines whether the person seeking admission to the state hospital should be admitted. Therefore, the responsibility of filing the necessary papers to perfect commitment rests with the individual seeking commitment or his parents.

Involuntary commitment of a person does require a judicial hearing. The pertinent section of the Idaho Code dealing with the question you ask is found in Section 66-329. This section states in part:

"66-329(a) Proceedings for the involuntary care and treatment of the mentally retarded or mentally ill person by the state board of environmental

protection and health [board of environmental and community services] may be commenced by the filing of a written application with a court of competent jurisdiction by a friend, relative, spouse or guardian of the individual, or by a licensed physician, prosecuting attorney, or other public official of a municipality, county or of the state of Idaho, or the director of any facility in which such individual may be. Any such application shall be accompanied by a certificate of a designated examiner stating that he has personally examined within the last ten (10) days and is of the opinion that he is mentally ill or mentally retarded and should be cared for and treated by a facility, or a written statement by the applicant that the individual has refused to submit to examination by a designated examiner.

"(d) Upon receipt of such application and designated examiners' reports the court shall appoint a time and place for hearing which may be held immediately but in any event such hearing must be held not more than five (5) days from the receipt of such designated examiners' reports and thereupon give written notice of such time and place of such hearing to the petitioner, to the proposed patient, to his legal guardian, if any, or to his spouse, parents, or nearest known other relative, if any, or friend."

It appears that the above cited statute gives the power and responsibility for filing the necessary papers to perfect an involuntary commitment of the mentally ill or retarded to a number of persons, among these, prosecuting attorneys. However, the statute does not impose a mandatory obligation upon any of the persons listed in the statute to initiate and perfect a commitment. Furthermore, neither this statute nor any other reimburses the person who filed the papers for the expense he incurred in so doing.



Honorable William W. Black  
August 15, 1974  
Page 3

It is therefore the opinion of this office that a qualified person desiring to have a mentally ill person committed to a state hospital has responsibility to file the necessary papers to perfect that person's commitment. A private person seeking an involuntary commitment would necessarily be required to bear the expense of any legal proceeding for such purpose should the county prosecutor decline to treat the matter as one of public interest by proceeding himself.

Very truly yours,

FOR THE ATTORNEY GENERAL

A handwritten signature in cursive script, appearing to read "Lynn E. Thomas".

LYNN E. THOMAS

Deputy Attorney General

LET:lm



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

W. ANTHONY PARK  
ATTORNEY GENERAL

August 18, 1974

Ms. Hazel Johnson  
Clerk of the District Court  
Butte County Courthouse  
Arco, Idaho 83213

OFFICIAL OPINION #75-33

Dear Ms. Johnson:

This letter is in response to your request for an interpretation of Chapter 157 of the 1974 Session Laws. Chapter 157 amended 31 Idaho Code, Section 3201A to require, inter alia, the payment of a \$7.50 fee by defendants found guilty of felonies, misdemeanors or specified minor violations. The disposition of the fee is governed by the following provisions of Chapter 157:

"If the magistrate court facilities are provided by the county, \$3.75 of such fee shall be paid to the county treasurer for deposit in the current expense fund of the county; and \$3.75 of such fees shall be paid to the county treasurer who shall, within five (5) days after the end of the month, pay such fees to the state treasurer for deposit in the state general fund. If the magistrate court facilities are provided by a city, \$3.75 of such fee shall be paid to the city treasurer for deposit in the city general fund, and \$3.75 of such fee shall be paid to the county treasurer who shall, within five days after the end of the month, pay such fees to the state treasurer for deposit in the state general fund. 1974 Idaho Session Laws, ch. 157(b) (Emphasis added)

Ms. Hazel Johnson  
August 18, 1974  
Page 2

Your question concerns the proper disposition of the fee when both the city and the county contribute to the payment of the magistrate court's expenses. This sharing of expenses occurs in a number of Idaho counties, but a variety of formulas are used to determine the amount of the contribution. Some cities contribute a set percentage of costs; some provide the building for the magistrate court; and others pay a percentage of particular types of expenses.

When both the city and the county share the burden of defraying the magistrate court's expenses, they likewise share in providing the court's "facilities." This is so because the word "facilities" has traditionally been construed as including any aid, advantage, or convenience which makes the attainment of a specific objective less difficult. See Knoll Golf Club v. United States, 179 F.Supp. 377, 379-80 (D.N.J. 1959); Briggs Mfg. Co. v. United States, 30 F.2d 962, 964 (D. Conn. 1292); Fraters v. Keeling, 20 Cal. App.2d 490, 67 P.2d 118, 119 (3d Dist. 1937). The "facilities" of a magistrate court include not only the building and the court equipment and fixtures, but also the employees of the court. See Cheney v. Toliver, 234 Ark. 973, 356 S.W.2d 636, 639 (1962); People v. Bunge Bros Coal Co., 392 Ill. 153, 64 N.E.2d 365, 370 (1946).

Thus, Section b of Chapter 157 is, on its face, incomplete because it does not specify the proper method of disbursing the fee when both the city and the county financially support the magistrate court. Pro-rata distribution of the disputed \$3.75 between the city and the county, or payment to the local body that provides the majority of the magistrate court's facilities, is not advisable because the courts might hold that the \$3.75 should be deposited in the general fund of the State of Idaho, pursuant to Idaho Code, Section 67-1205.

There is, however, a method of securing the payment of the \$3.75 to the local government rather than the state, even though both the city and the county are contributing financial aid to the magistrate court. Under Idaho law, public agencies may contract with other agencies to perform governmental services. See Idaho Code, Sections 67-2327, 67-2328, 67-2332. Therefore, either the city or the county should assume a contractual obligation to provide the magistrate court facilities and all contributions should be paid to the governmental unit which assumes the primary obligation. If, for instance, the city assumes the primary obligation it can then collect \$3.75 from every fee paid under Section

Ms. Hazel Johnson  
August 18, 1974  
Page 3

b, even though it is also receiving money for the magistrate court fund from the county.

Very truly yours,

FOR THE ATTORNEY GENERAL

WARREN FELTON  
Deputy Attorney General

WF:lm

cc Carl F. Bianchi  
Director  
Administrative Office of the  
Courts  
Building Mail

Cx 30.1



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

W. ANTHONY PARK  
ATTORNEY GENERAL

August 19, 1974

Mr. Jack E. Gillette  
Acting Director  
Department of Lands  
Building Mail

OFFICIAL OPINION #75-34

Dear Mr. Gillette:

The Coolin Sewer District presently includes private property and State land and it appears that the district can be enlarged to include additional land either private or publicly owned.

Idaho Code, Section 42-3218 prescribes the manner for enlarging the boundaries of any district organized under the provisions of this act and this section is not restricted to privately owned property.

Idaho Code, Section 58-336 states that land owned by the State of Idaho situated within a local improvement district may be assessed and charged in the proportional amount such leasehold contractual or possessory interest is benefited. In addition only such an interest shall be subject to a sale to satisfy the assessment lien.

Section 63-105A, Idaho Code, exempts state lands from taxation, however Idaho Code, Section 63-1223 provides that any improvements made on state land shall be assessed as personal property and entered upon the personal property assessment roll.

A petition by the State of Idaho to enlarge the Coolin Sewer District to include additional state lands should not be considered a waiver of the privileges and conditions upon state land contained in the Idaho Code.

Very truly yours,

FOR THE ATTORNEY GENERAL

TERRY E. COFFIN  
Assistant Attorney General



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL  
BOISE 83720

W. ANTHONY PARK  
ATTORNEY GENERAL

August 15, 1974

*Formal Opinion*  
*75-35*

Mr. Robert C. Arneson  
Law Enforcement Planning Commission  
Building Mail

Dear Mr. Arneson:

This is in response to your letter of August 1, 1974, requesting this office issue a formal opinion to the Law Enforcement Planning Commission regarding the following question: Is the requirement that a person be 21 years of age in order to be certified by the Peace Officers Standards and Training Accademy invalid because of age discrimination?

Pertinent sections of the federal statute concerning age discrimination are found in Title 29, Chapter 14, U.S.C.A. These sections read as follows:

"29 § 623. (a) It shall be unlawful for an employer--

"(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

"(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

"(f) It shall not be unlawful for an employer, employment agency, or labor organization--

"(1) to take any action otherwise prohibited under subsections (a), of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age. (Emphasis supplied)

Pertinent sections of the Idaho Code concerning this matter are found in Title 44, Chapter 16. These sections read as follows:

"44-1601. The opportunity for an individual to employment for which he is qualified without discrimination because of age is hereby recognized as and declared to be a civil right which shall be enforceable as set forth in this act.

"44-1602. It shall be an unlawful employment practice, except where based upon a bona fide occupational qualification, or retirement or pension plan, or upon applicable security regulations established by the United States or the state of Idaho, and except where the employee is 60 years of age or older, for any employer because of the age of any individual to refuse to hire or employ, or to bar or to discharge from employment such individual, or to otherwise discriminate against such individual with respect to compensation, hire, tenure, terms, conditions or privileges of employment, if the individual is the best able and most competent to perform the services required. "

It is apparent from the above cited state and federal statutes that discrimination is prohibited on the basis of age unless that discrimination is based on a "bona fide occupational qualification."

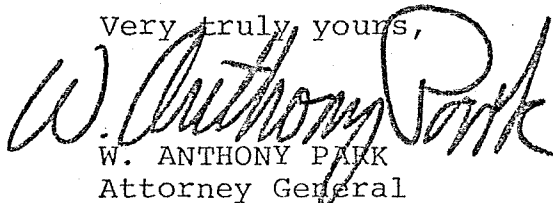
Mr. Robert C. Arneson  
August 15, 1974  
Page 3

Obviously, "bona fide occupational qualification" would be some rational purpose that would justify hiring only candidates for peace officers that are 21 years of age or older.

Any valid reason given to justify certifying only peace officers over the age of 21 must be specific and backed by specific factual findings. An example of such a rational purpose would be not allowing peace officers in Idaho to be younger than 19 years of age, as in Idaho any person under the age of 19 cannot purchase or possess alcoholic liquor, nor can they remain or loiter in or about any place licensed for the sale of liquor by the drink or sale of beer for consumption on the premises. Obviously, if a peace officer could not go into a bar, his effectiveness as a peace officer would be limited.

This office has not received any information from the Law Enforcement Planning Commission that would indicate there is a rational purpose or reason why it is necessary that all peace officers be 21 years of age or older. Until such a rational reason is shown, it is the opinion of this office that a person should not be prohibited from being certified by the Peace Officers Standards and Training Academy solely because he is under 21 years of age.

Very truly yours,

  
W. ANTHONY PARK  
Attorney General

WAP:lm





STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

W. ANTHONY PARK  
ATTORNEY GENERAL

August 20, 1974

Mr. Bruce M. Rickerson  
Deputy Secretary of State  
BUILDING

OFFICIAL OPINION #75-37

Dear Mr. Rickerson:

This office has received your request for four separate election law opinions dated August 12, 1974. In awareness of the stated immediacy of response needed regarding the durational residency issue, question two will be addressed herein. Analysis of questions one, three, and four will be deferred for research and answer as time permits.

The constitutionality of Section 34-614(2), Idaho Code is the threshold query regarding whether Mr. M. Jay Burke, candidate and nominee for state representative from legislative district 33, may be given ballot status for the general election. This statute, as well as Article III, Section 2, Idaho Constitution, prescribes a one-year residency requirement as a qualification upon the privilege of candidacy for the Idaho House of Representatives. The facts upon which these provisions are to apply have been related to this office as follows:

- (1) Legislative districts 33 and 34 are contiguous districts within and adjacent to the city of Pocatello, Idaho.
- (2) Prior to May 4, 1974, Mr. Burke had resided in legislative district 34 for a significant number of years.
- (3) On May 4, 1974, Mr. Burke transferred his residence to a point within legislative district 33 and thereafter appropriately filed his declaration of candidacy.
- (4) As per the August 6, 1974, primary election, Mr. Burke won the right to represent his party as a candidate for state representative from legislative district 33.
- (5) On August 8, 1974, Mr. Tim Erikson, Clerk of the District Court, Bannock County, Idaho, sought advice of the Secretary of State as to whether general ballot status should be afforded Mr. Burke in view of his inability to meet the one-year residency requirement.

Mr. Bruce M. Rickerson  
Deputy Secretary of State  
August 20, 1974  
Page 2

The district court of the sixth judicial district of the State of Idaho has recently had the occasion to review durational residency requirements in the case of Schulz v. Chambers, Chairman ASISU Election Board Committee, et. al. No. 31374 (March 5, 1973). Therein, the court held that a two-semester residency requirement for candidacy was constitutionally infirm as denying plaintiff equal protection under law. Plaintiff had been denied ballot status for the office of student body vice president. The basis for denial was plaintiff's inability to comply with Article IV, Section 1, Clause 2 of the "Associated Students of Idaho State University Constitution" which in part required the two-semester residency.

The Schulz v. Chambers decision is factually distinguishable from the instant case, but the legal theory upon which it relies may be viewed as dispositive of the applicable law in Bannock County. The court reasoned that the durational residency requirement as stated violated plaintiff's constitutional right to equal protection before the law.

Similar decisions have been rendered by the federal judiciary. Durational residency requirements were reviewed in Headlee v. Franklin County Board of Elections, 368 F. Supp. 999 (S.D. Ohio E.D.-1973). The court scrutinized the issue of candidacy requirements, and concluded that judgment of a candidate's necessary skill and knowledge of the community was ultimately a question for the electorate. The court's rationale is informative:

"Defendant has failed to demonstrate that the election process is inadequate to weed out incompetent, un-knowledgeable candidates, insensitive to, and unaware of, the best needs of the community. The hallowed belief in the wisdom and power of the electorate must not be sold short and may not be circumscribed by artificial residence barriers fencing in the right to vote or the right to be a candidate for public office." Ibid, p. 1003. cf., Thompson v. Mellon 9 Cal. 3rd 96, 107 Cal. Rptr 20, 507 P 2d 628 (1973).

Mr. Bruce M. Rickerson  
Deputy Secretary of State  
August 20, 1974  
Page 3

Viewing the durational residency requirements as restrictions upon one's constitutional right to travel, the Supreme Court of the United States has invalidated their imposition as a prerequisite to the right to vote. The Court's holding was not an invalidation of any or all residency requirements. Rather it was an invalidation following the state's inability to demonstrate a compelling state interest in the particular restriction. Dunn v. Blumstein, 405 US 330, 338, 92 S Ct 995, 31 L Ed 274 (1972). In definition thereof, the Court looked to the time required for processing voter registration forms, not time allegedly required for familiarization of community issues by the voters.

Citing Dunn v. Blumstein, durational residency requirements for candidates were invalidated by the United States Sixth Circuit district court in Green v. McKeon 468 F 2d 883 (6th Cir. 1972). The court held the requirement to impermissably classify residents of a city on the basis of travel.

The United States Supreme Court again reviewed restrictions upon candidacy in Bullock v. Carter, 405 US 134, 31 L Ed 2d 92, 92 S Ct 849 (1972). Holding that the State of Texas must demonstrate a compelling state interest in requiring filing fees for candidates, the Court analyzed the interrelationship of candidate to electorate:

"However, the rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters."  
Ibid, 405 US 143, 31 L Ed 2d p 9.

The Court concluded that the filing fee as implemented arbitrarily discriminated against candidates who were unable to pay those fees. Further, that those fees bore no relevance to legitimate legislative objectives; i.e., regulation of the number of candidates on the ballot, avoidance of voter confusion and assurance of the integrity of the nomination process.

In summary, federal jurisprudence evidences a strict scrutiny of durational residency requirements as they apply to aspirants for office. The Headlee decision would place ultimate review of the candidate's qualifications, knowledge and skill in the wisdom

Mr. Bruce M. Rickerson  
Deputy Secretary of State  
August 20, 1974  
Page 4

of the electorate. Dunn v. Blumstein and Green v. McKeon would require the state to show a compelling state interest to underscore restriction of the right to candidacy. Further, Dunn v. Blumstein requires that interest to be defined in objective, demonstratable terms. Bullock v. Carter perceives the right to candidacy to be inextricably intertwined with the right to vote, and that restriction of either may not be upon arbitrary grounds.

These federal decisions appear applicable to the present facts. Having spoken to the subject of durational residency requirements, the Schulz v. Chambers, Chairman ASISU Election Board Committee memorandum decision represents the applicable law in Bannock County. It is therefore the opinion of the Attorney General that Mr. M. Jay Burke be certified as a candidate for state representative from legislative district 33.

Yours very truly,

FOR THE ATTORNEY GENERAL

*Christopher D. Bray*

CHRISTOPHER D. BRAY  
Assistant Attorney General

CDB:lc



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

August 21, 1974

W. ANTHONY PARK  
ATTORNEY GENERAL

Ms. Arlene D. Warner  
State Ombudsman for Nursing Homes  
Nursing Home Ombudsman Program  
Idaho Office on Aging  
STATEHOUSE MAIL

OFFICIAL OPINION #75-38

Dear Ms. Warner:

In requesting an attorney general opinion in your capacity as the contracting state agency for the nursing home ombudsman program, you have posed the following question:

What constitutes "residence" in Idaho counties for indigents in light of Shapiro v. Thompson, 394 U.S. 618; 89 S. Ct. 1322?

Idaho law provides as follows:

31-3404. APPLICATION FOR COUNTY AID.--Any medically indigent, sick or otherwise indigent person desiring aid from any county of this state, shall make a written application to the clerk of the board of county commissioners of the county where such applicant may reside, setting forth and describing all the property, real, personal and mixed, wherever it is situated, owned in whole or in part by such applicant, or in which he or she has any legal or equitable interest; which application must be signed by the party or parties making such application and sworn to before some officer authorized by the laws of this state to administer oaths, and filed in the office of the clerk of the board of county commissioners: provided however, except in the case of a medically indigent person, emergency or extreme necessity no person shall receive the benefit of this chapter who shall not have been a resident of the state of Idaho for at least one (1) year and of the county at least six (6) months next preceding the application for county aid.\*  
S.L. 1974, Chpt. 302, Sec. 4. (Emphasis added.)

\*By and large the law respecting indigent individuals is found in Chapters 34 and 35, Title 31, Idaho Code. The second regular session of the forty-second Idaho Legislature (1974) made numerous changes in the above referenced statutes by way of House Bill 593, S.L. 1974, Chapter 302. Therefore this writer shall predicate this opinion on the law as effective July 1, 1974.

At first blush the law would seem clear; Section 31-3404, Idaho Code, as amended requires one year residency in the state and six months in the county for purposes of establishing eligibility for county assistance. However, as noted in your question Shapiro v. Thompson (hereinafter Shapiro) adds an additional variable to the eligibility equation.

October 23-24, 1968, the Supreme Court of the United States heard on reargument three appeals which had been joined for purposes of such argument. Plaintiffs had been successful on the district court level. The basis of their claims was that the relevant statutes of Pennsylvania, Connecticut, and the District of Columbia imposing a one-year durational residency requirement for receipt of categorical social security assistance (in particular AFDC) constituted a classification which created an invidious discrimination denying appellees equal protection of the laws. Each of the appellees had at one time changed the state of his or her residency and had subsequently been denied benefits due to the durational residence requirement. But for the waiting period each of the appellees would have been eligible for benefits. The states and the District of Columbia contended that section 402(b) of the Social Security Act authorized the one-year requisite.

Section 402(b). The Secretary shall approve any (state assistance) plan which fulfills the conditions specified in subsection (a) of this section, except that he shall not approve any plan which imposes as a condition of eligibility for aid to families with dependent children, a residence requirement which denies aid with respect to any child residing in the state (1) who has resided in the state for one year immediately preceding application for such aid; or (2) who was born within one year immediately preceding the application, if the parent or other relative with whom the child is living has resided in the state for one year immediately preceding birth. 42 U.S.C. §602(b).

In deciding the case, the court, Mr. Justice Brennan opining, held:

1. Since the Constitution guarantees the right of inter-state movement, the purpose of deterring the migration of indigents into a state is impermissible and cannot serve to justify the classification created by the one-year waiting period.
2. In moving from jurisdiction to jurisdiction appellees were exercising a constitutional right, and any classification which penalizes the exercise of that right, unless shown to be necessary to promote a compelling governmental interest, is unconstitutional.
3. Appellants do not use and have no need to use the one-year requirement for the administrative and governmental purposes suggested, and under

the standard of a compelling state interest, that requirement clearly violated the Equal Protection Clause.

4. The waiting-period requirement in the District of Columbia Code, adopted by Congress as an exercise of federal power, is an unconstitutional discrimination which violates the Due Process Clause of the Fifth Amendment.
5. The statutory prohibition of benefits to residents of less than a year creates a classification which denies equal protection of the laws because the interests allegedly served by the classification either may not constitutionally be promoted by government or are not compelling governmental interests.

In summary Shapiro holds that a durational residency requirement creates a classification constituting an invidious discrimination in violation of 14th Amendment rights (equal protection), thus unacceptably restricting the exercise of the right of travel, which restriction is not justified by a compelling state interest.

State interests urged as compelling by appellants included (1) preservation of the fiscal integrity of state public assistance programs (discouraging the dependent poor of other states from migrating in order to take advantage of higher welfare payments); (2) providing an objective test of residency; (3) facilitation of planning the welfare budget; (4) minimizing the opportunities for fraudulently receiving payments from more than one jurisdiction; and (5) encouraging early entry of new residents into the labor force. Each of these assertions was either held to be impermissible or unnecessary to accomplish its purported goal. The court further stated that it was not enough to show a rational relationship between the above goals and state interest, but that the state interest had to be compelling.

Subsequent to Shapiro the holding espoused therein has been applied to areas as diverse as durational residency requirements for city civil service, Eggert v. City of Seattle, 505 P.2d 801, 81 Wash. 2d 840 (1973), and state-locally financed public housing, King v. New Rochelle Municipal Housing Authority, 314 F. Supp. 427 (1970). In both Eggert and King the right to travel was held to encompass intra- as well as inter-state movement [additional authority may be found in Kent v. Dulles, 357 U.S. 116, 78 S.Ct. 1113, 2 L.Ed. 2d 1204 (1958)].

Also, distinctions have been drawn between Shapiro and later cases. In Pease v. Hansen, 483 P. 2d 720 (1971), the court distinguished Montana's one-year requirement for receipt of general assistance (on the county level) on the ground that the program was funded entirely by county levy, no federal dollars being involved. This distinction which is particularly relevant to this opinion, however, was reversed by the United States Supreme Court at 404 U.S. 70, 93 S.Ct. 318, 30 L.Ed. 2d 224, wherein it was stated:

Ms. Warner  
Page 4  
August 21, 1974

Whether a welfare program is or is not federally funded is irrelevant to the constitutional principles enunciated in Shapiro v. Thompson, \*\*\*.

As the law stands at present, then, durational residency requirements imposed as conditions for receipt of welfare assistance are not acceptable under the Constitution and the source of funds for such assistance does not bear on the constitutionality of such requirements.

Considering the provisions of Section 31-3404, Idaho Code, in the context of Shapiro it is the opinion of this office that neither the one-year nor the six-month waiting period can be sustained. In the absence of some heretofore undisclosed compelling state interest, the eligibility requirements of Section 31-3404, Idaho Code, clearly fall within the forbidden area enunciated in Shapiro and subsequent cases. This conclusion is applicable to those persons defined in Section 31-3404, Idaho Code, as "sick" or "otherwise indigent"; it is not applicable to the medically indigent, emergency cases, or cases of extreme necessity inasmuch as the durational residency requirement contained in the above statute does not apply to those persons.

In this opinion we are unable to sustain the durational residency requirement of the statute, but we interpret the statute to require that the applicant for county aid be a resident, determined by other standards, such as his physical presence in the county with an intent to remain there for an indefinite period of time.

Very truly yours,

FOR THE ATTORNEY GENERAL

RICHARD C. RUSSELL  
Deputy Attorney General

RCR:RS/zl/lS





STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

W. ANTHONY PARK  
ATTORNEY GENERAL

August 14, 1974

Dryden Hiler  
Deputy Secretary of State  
Building Mail

75-39  
OFFICIAL OPINION #75-27

Re: Agreement Relating to Planning the Quad  
Cities Regional Airport

Dear Mr. Hiler:

Pursuant to Section 67-2329, Idaho Code, this office is giving you an opinion as to the validity of the agreement relating to the Quad Cities Region of Northern Idaho and southwestern Washington. We notice that agreement is between the cities of Moscow, Idaho, Lewiston, Clarkston, and Pullman, Washington and the University of Idaho and the Washington State University. Counties of Nez Perce, Latah, Whitman and Asotin and some port districts.

Article I, Section 10, Clause 3 of the Constitution Of The United States provides in part that:

"No state shall, without the consent  
of congress, . . . enter into any agree-  
ment or compact with another state, . . . "

The cities, counties, port districts, and universities exercise a portion of the sovereignty of the state of which they are a part and we believe that they might be covered by the above clause of the Federal Constitution.

There are a number of cases indicating that certain agreements do require the consent of Congress. See for instance Duncan v. Smith (Ky. 1953) 262 S.W.2d, 373, 42 A.L.R.2d 54; Landes v. Landes, (1956) 153 N.Y.S.2d 14, 135 N.E.2d 562; Virginia v. Tennessee (1893) 148 U.S. 503, 37 L.Ed. 537, 13 S.Ct. 728; Louisiana v. Texas (1900) 176 U.S. 17, 44 L.Ed. 347, 20 S.Ct. 251. On the other hand there are also a few cases such as McHenry County v. Brady (1917), 37 N.D. 59, 163

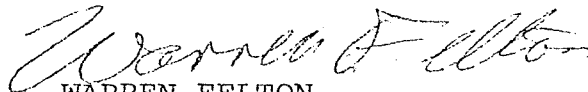
Dryden Hiler  
August 14, 1974  
Page 2

N.W. 540; and Virginia v. Tennessee, supra, that indicate that possibly such agreements do not need congressional consent. On the whole there is little law on this subject and much of that is not conclusive.

The agreement is not dated, but this does not appear to affect its validity. This office sees no particular problem in relation to the proposed contract. It does not appear to impinge in any way upon Federal Sovereignty. It only concerns a study and planning relating to air port facilities to serve the area involved. Such contract is probably valid and we therefore approve it is so far as required by Section 67-2329, Idaho Code.

Very truly yours,

FOR THE ATTORNEY GENERAL



WARREN FELTON  
Deputy Attorney General

WF:lm

D200.1



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

W. ANTHONY PARK  
ATTORNEY GENERAL

August 30, 1974

Mr. David T. Armstrong  
Twin Falls County Planning and  
Zoning Administration  
634 Addison Avenue West  
Twin Falls, Idaho 83301

Official Opinion #75-40

Dear Mr. Armstrong:

The questions raised by you in your letter to Mr. Galley of June 27, 1974, have been forwarded to this office for a formal opinion. The information contained in some of the questions is rather sketchy, which makes it difficult to respond with a specific answer. Each question will be discussed separately even though there will be some overlap and repetition.

"1. May roads be forced along section lines where there are no existing roads, in order to reach public parks, BLM land, or subdivisions?"

No, section lines are merely the abstract lines on a map representing the physical boundaries of sections within townships. Their primary purpose is the location of sections, even though they may be used in property descriptions.

Roads to reach public parks, BLM lands, or subdivisions must be established by means such as condemnation proceedings, prescriptive easements, negotiated purchase, or permissive use granted by the owner. Their location may be along the boundaries of a section determined by the location of the section line or at any other location on the property.

"2. At what point is a private road considered a public road? The City of Twin Falls uses an existing private road to get to their sewage treatment plant on the floor of the canyon. Does Their use make this road a public or private road?"

Mr. David T. Armstrong  
August 30, 1974  
Page 2

In order for a private road to be considered a public road by prescription, certain requirements must be met by the public. One of the most essential elements in obtaining such a prescriptive easement in private property is a use for the statutory period of time. Section 40-103 of the Idaho Code provides that "all roads used as such for a period of five years, provided the latter shall have been worked and kept up at the expense of the public or located and recorded by order of the board of commissioners, are highways. . . ."

This does not mean that any private road automatically becomes a public road if used by the public for the prescriptive period (5 years). Other requirements must also be met. As pointed out in a fairly recent Idaho case, Cox v. Cox, 84 Idaho 513, 373 P.2d 929 (1962), "to establish such a prescriptive right in a roadway it is essential that the use of the way must constitute some actual invasion or infringement of the right of the owner."

This "invasion" or "infringement of the right" is created by the open, notorious and uninterrupted use by the public which is adverse to the private owner and under claim of right. Mere permissive use is not sufficient because it only gives the public a license for such a use which can be revoked at any time by the owner.

Therefore, in order for the public to obtain an easement by prescription in a private road, the use of the road must be without the permission of the owner and must meet the other requirements enumerated above.

"3. If a road is blocked for one day per year, does it remain a private road?

Continuous use (five years) of property is one of the requirements for obtaining a prescriptive easement in the land of another. Generally an interruption in the use and enjoyment of this right defeats the acquisition of the prescriptive easement; but, as pointed out in Thompson On Real Property:

"The mere doing of acts on the land which renders the exercise of the claim less convenient, does not necessarily have that effect. It is as competent for one to acquire a prescriptive easement of a passway

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burdened with gates as to acquire one unburdened. What period of interruption or cessation of enjoyment will defeat the acquisition of the right by prescription depends upon the nature of the right and the attendant circumstances."

It appears that a mere blocking of the road for one day per year may not be sufficient to interrupt the prescriptive period, and the owner of the private road should do more to announce his right in the property and to stop the adverse use by the public.

"4. If a road is not used for 5 years, is it considered lost?"

The answer is no as to all roads except those acquired by prescription as provided by the 1963 amendment of Section 40-104 of the Idaho Code which now reads as follows:

"A road established by prescription not worked or used for the period of five (5) years ceases to be a highway for any purpose whatever."  
(Emphasis added).

"5. What are the statutory limitations on pioneer paths, trails, and roads which are no longer in use?"

This question is ambiguous since you do not indicate whether these pioneer paths, trails, and roads are located on private or public property.

If they are located on public property statutory limitations do not apply, since mere non-use of public roads does not wipe out their existence. Neither can an interest in a public road be acquired by adverse possession because:

"No right to the use of streets and highways for private purposes can be acquired by prescription as against the state or as political subdivisions." State v. Idaho Power Co., 81 Idaho 487, 346 P.2d 596 (1969).

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If these pioneer paths, trails and roads are located on private property and are prescriptive easements obtained by the public, non-use for 5 years (Section 40-104, Idaho Code) will extinguish their existence.

"6. Do landowners along the rim also own historical sites within that area? There is an old settlement dating back to the 1800's when Chinese lived in caves in the canyon wall while panning for gold. Would this come under the definition of historical sites, and may easements to such sites be obtained?"

Generally any historical site located on the property of a landowner belongs to that person. An historical site, in order to be proclaimed as such, must first be so officially designated. Idaho Code, Section 67-4115 gives the Governor of Idaho this authority provided however, "that if the historic or archaeological site, be so designated or selected is situated on privately owned land, or upon land owned by other than the state of Idaho, the site shall not be so designated without the permission and consent of the owner thereof."

Once a point of interest is declared an historical site, an easement to such a site can be obtained by permission of the owner, by negotiated purchase or by any other means such as prescription, permissive use, or condemnation.

"7. There are meander lines along the canyon rim established by original government surveys. What are the validity and legality of ownership of these meander lines?"

A meander line is a valid surveying line and its legal definition is stated in Johnson v. Hurst, 10 Idaho 308 at 318, 77 P. 784, 788:

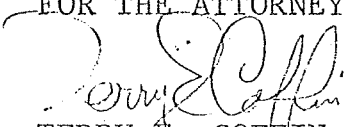
"It is conceded as a general rule of law that the meander line run in surveying public lands bordering upon a navigable river is not a line of boundary, but one designed merely to point out the sinuosity of the bank of the stream and as a means only of ascertaining the quantity of land in the fraction that is to be paid for by the purchaser; and that the water course, and not the meander line as actually run on the land, becomes the true boundary line."

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I hope that the answers to these questions are sufficient for your purposes, but due to the lack of factual data upon which to base legal conclusions, additional clarification may be necessary.

Very truly yours,

FOR THE ATTORNEY GENERAL



TERRY E. COFFIN  
Assistant Attorney General

TEC:cap

September 9, 1974

Mr. John Bender, Director  
Department of Law Enforcement  
3311 W. State Street  
Boise, Idaho 83731

"OFFICIAL OPINION #75-41"

Dear Director Bender:

You have requested an Attorney General Formal Opinion as to whether or not the Fair Credit Reporting Act applies to the Motor Vehicle Division of the Department of Law Enforcement.

The purpose of the Fair Credit Reporting Act, hereinafter referred to as the Act, is to protect a consumer from inaccurate or arbitrary information about the consumer in a consumer report that is being used in whole, or in part, in determining the consumer's eligibility for credit, insurance or employment. Congress found a "need to insure that consumer reporting agencies exercise their grave responsibilities with fairness and impartiality and a respect for the consumer's right to privacy". 15 U.S.C. §1681(a)(4). The design of the Act was to require consumer reporting agencies to "adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information in accordance with the requirements of this [Act]."

The consumer reporting industry is primarily composed of credit bureaus, investigation reporting companies and other organizations whose principal business is the gathering and reporting of information about consumers for use by others in making a decision whether or not to grant credit, underwrite insurance or employ the consumer. (Statements of General Policy or Interpretations Under The Fair Credit Reporting Act, 38 Fed. Reg. 63-84, March 9, 1973)

Because the purpose of the Act was protection of the consumer, the Act provides the mechanism by which a consumer can determine what information has been gathered and dissiminated about him and also provides the method by which any inaccurate information in the report can be corrected. 15 U.S.C. §§1681 g., h. and i.

The Act provides limitations on the use to which the accumulated information may be put.<sup>1</sup>



The Act provides a time-frame for deletion of certain information. 15 U.S.C. §1681c. The Act further provides for civil liability for willful noncompliance, (15 U.S.C. §1681n.) and negligent noncompliance, (15 U.S.C. §1681o.) both of which set out what character of damages may be awarded. A consumer reporting agency is defined in 15 U.S.C. §1681a.(f) as follows: "... any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports." To determine if the Motor Vehicle Division of the Department of Law Enforcement falls within the definition of a Consumer Reporting Agency four guidelines, set forth in the Act, must apply. Such guidelines are: (1) The Motor Vehicle Division must act for a monetary fee, dues or on a nonprofit cooperative basis; (2) Regularly engage in whole or in part in assembling or evaluating consumer credit information or other information; (3) Gather and evaluate such information for the purpose of furnishing such reports to third parties; and (4) Which uses any facility of interstate commerce for the purpose of preparing or furnishing such reports. 15 U.S.C. §1681a.(f) (Emphasis Supplied) Certain information may be furnished by a Consumer Reporting Agency to a governmental agency without exposure to the Act. 15 U.S.C. §1681f.

The Federal Trade Commission, charged with the responsibility of enforcement of the Act, filed certain Statements of General Policy or Interpretations on February 22, 1973. In §600.4 of the Interpretations, the

- 
- <sup>1</sup> 15 U.S.C. §1681b. Permissible Purposes of Consumer Reports
- A consumer reporting agency may furnish a consumer report under the following circumstances and no other:
- (1) In response to the order of a court having jurisdiction to issue such an order.
  - (2) In accordance with the written instructions of the consumer to whom it relates.
  - (3) To a person which it has reason to believe —
    - (A) intends to use the information in connection with a credit transaction involving the consumer on whom the information is to be furnished and involving the extension of credit to, or review or collection of an account of, the consumer; or
    - (B) intends to use the information for employment purposes; or
    - (C) intends to use the information in connection with the underwriting of insurance involving the consumer; or
    - (D) intends to use the information in connection with a determination of the consumer's eligibility for a license or other benefit granted by a governmental instrumentality required by law to consider an applicant's financial responsibility or status; or
    - (E) otherwise has a legitimate business need for the information in connection with a business transaction involving the consumer.

Federal Trade Commission set forth the following:

- (a) It is quite common for certain businesses such as insurance companies to request reports on a prospective (or current) insured from various State departments of motor vehicles. These reports are sold to such companies and generally reveal a consumer's entire driving record, including arrests for speeding, drunk driving, involuntary manslaughter; etc.
- (b) It is the Commission's view that, under the circumstances in which such a State motor vehicle report contains information which bears on the "personal characteristics" of the consumer; that is, when the report refers to an arrest for drunk driving, such reports sold by a department of motor vehicles are "consumer reports" and the agency is a "consumer reporting agency" when it sells such reports.
- (c) Since section 615(b), requiring the user's disclosure of information received from a third person who is not a consumer reporting agency, only applies to a denial of credit, the consumer is denied this important information when insurance is denied or the cost increased, unless the insurance company identifies the department pursuant to section 615(a), . . . .
- (d) We believe that there is no basis for granting State motor vehicle departments an exemption from the definition of "consumer reporting agency" (section 603(f)). The reports clearly contain information "bearing on a consumer's . . . character, general reputation, personal characteristics, or mode of living," and when they are used "as a factor in establishing the consumer's eligibility for . . . insurance" (section 603(d)), the FCRA should apply.

A concern expressed that a strict application of the Act would prohibit the dissemination of information on motor vehicle reports among various law enforcement agencies prompted the Commission to add Subparagraph e. to 600.4:

- (e) It should be noted that this interpretation is not intended to interfere with the legitimate law enforcement activities of State motor vehicle departments. In the Commission's view, the Act imposes the following requirements when State motor vehicle departments furnish motor vehicle reports to insurance companies:
  - (1) That the users (insurance companies) of motor vehicle reports identify (pursuant to section 615(a))

the motor vehicle department, as the source of the report when it is used as a factor in denying, canceling or increasing the cost of insurance;

- (2) That motor vehicle departments disclose the "nature and substance" of the consumer's motor vehicle record when requested to do so pursuant to sections 609 and 610;
- (3) That motor vehicle departments comply with the reinvestigation requirements of section 611;
- (4) That motor vehicle departments comply with the obsolescence requirements of section 605; and
- (5) That motor vehicle departments maintain reasonable procedures pursuant to section 607(b) to assure the maximum possible accuracy of their motor vehicle reports.

Unlike Rules and Regulations, the Interpretations of the Federal Trade Commission do not have the force and effect of law. The Commission stated:

"The interpretations are not substantive rules and do not have the force and effect of statutory provisions. They are guidelines intended as clarifications of the FCRA and, like industry guides, are advisory in nature."

A caveat, however, is added as follows: "Failure to comply with such interpretations may result in corrective action by the Commission under applicable statutory provisions".

Notwithstanding that the interpretations do not have the force and effect of law, they are accorded great deference by a court when the legal question is one involving the meaning and scope of a statute continually applied and interpreted by the executive branch.

The States of New York and Texas, through Attorney General Opinions, concluded that motor vehicle departments were not consumer reporting agencies. The New York Attorney General's Opinion was bottomed on the fact that the New York Department of Motor Vehicles did not fall within the first guideline of 15 U.S.C. §1681a.(f). The Texas Attorney General's Opinion was bottomed on Texas' "Open Records Act", which succinctly, stated makes available to the public all information collected, assembled and maintained by governmental bodies pursuant to law and in connection with official business and therefore fell within the ambit of 15 U.S.C. §1681t. Further, that because the interpretations were not substantive law, Texas was

free to interpret the Act to determine whether the dissemination of a motor vehicle report was not proscribed by the Act.

The New York and Texas Opinions, although interesting reading, failed to meet the thrust of the purpose of the Act and the reason for the interpretations. Neither opinion is persuasive as to what position should be adopted by the State of Idaho.

The Idaho legislature has adopted both a confidential (privileged) report of motor vehicle accidents submitted by operators and an "Open Records Act" for police reports of accidents. I.C.49-106(c) cloakes the operator's accident report with confidentiality as follows:

"49-106(c) The driver of any vehicle involved in an accident resulting in injuries or death to any person or damage to the property of any one person in excess of \$100.00 shall, within 5 days, forward a report of such accident to the department, except that when such accident occurs within an incorporated city, such report shall be made within twentyfour (24) hours to the police department in such city. Every police department shall forward a copy of every such report so filed with it to the department. The department may require drivers, involved in accidents, or police departments, to file supplemental reports of accidents upon forms furnished by it whenever the original report is insufficient in the opinion of the department. Such reports shall be without prejudice, shall be for the information of the department and shall not be open to public inspection. The fact that such reports have been so made shall be admissible in evidence solely to prove a compliance with this section but no such report or any part thereof or statement contained therein shall be admissible in evidence for any other purpose in any trial, civil, or criminal, arising out of such accident."

Exceptions to the confidentiality are set forth in I.C.49-1013 as follows:

"49-1013. Accident reports confidential-Exceptions. All accident reports made by persons involved in accidents or by garages shall be without prejudice to the individual so reporting and shall be for the confidential use of the department or other governmental agencies having use for the records for accident prevention purposes, or for the administration of the laws relating to the deposit of security and proof of financial responsibility by persons driving the vehicles or the owner of the motor vehicles, except that the department may disclose the identity

of a person involved in an accident when such identity is not otherwise known or when such person denies his presence at the scene of such accident, and may disclose how the person has complied with the financial responsibility laws, and if by liability insurance, the name of the insurance carrier, the agent's name and address, and the insurance policy number. No such report shall be used as evidence in any trial, civil or criminal, arising out of an accident, except that the department shall furnish upon demand of any person who has, or claims to have, made such a report or upon demand of any court, a certificate showing that a specified accident report has or has not been made to the department, solely to prove a compliance, or a failure to comply, with the requirement that such a report be made to the department."

The report forms submitted by operators perform a very fundamental and useful purpose to the State as is most clearly defined in the statute. To encourage submission of the report, I.C. 49-106(c) and I.C. 49-1013 prohibit the use as evidence in civil or criminal cases of the report. The reports are for the confidential use of the department and other governmental agencies having use for such records in accident prevention and statistical purposes. The shield of confidentiality applies to all matters contained in the operator's report.

The investigating officer's report of the motor vehicle accident filed pursuant to I.C. 49-1007(c) is a public record.

Public records are defined in I.C. 67-2031 as follows:

"67-2031. Definitions.—The term, "public records," as used in this act, means any written or printed book, or paper or document or map, or drawing which is the property of the state, not including any county, city, town, school corporation, or political subdivision thereof, and in or on which any entry has been made by law, or which any officer or employee of the state has received or is required to receive for filing."

See also I.C. 59-1009 as follows:

"59-1009. Official records open to inspection. — The public records and other matters in the office of any officer are, at all times during office hours, open to the inspection of any citizen of this state."

The Idaho Supreme Court in Bell vs. O'Connor Transport Limited, et al, 94 Idaho 406, 489 P.2d 439 (1971) reviewed the interpretation of I.C.9-316 and I.C.49-1007(c). The Supreme Court said: "The legislature has deemed official reports which are required to be made within the scope of duty admissible as evidence of the facts stated therein". The Supreme Court held that the investigating officer was required under I.C.49-1007(c) to file a written report of the accident, and that I.C.9-316 (Official Reports as Evidence Act) made such report admissible in evidence as a public record; I.C.49-1007(c) provides as follows:

"49-1007(c) Every law enforcement officer, including county and municipal officers, who, in the regular course of duty, investigates a motor vehicle accident of which report must be made as required in this section, either at the time of and at the scene of the accident or thereafter by interviewing participants or witnesses shall, within 24 hours after completing such investigation, forward a written report of such accident to the department."

See also I.C.9-316:

"9-316. Official Reports as Evidence Act.---Written reports or findings of fact made by officers of this state, on a matter within the scope of their duty as defined by statute, shall, insofar as relevant, be admitted as evidence of the matters stated therein."

I.C.49-324 provides that the Department of Law Enforcement shall:

"(a) ... file every application for a license received by it and shall maintain suitable indices containing, in alphabetical order: ..."

"(b) ... also file all accident reports and abstracts of court records of convictions received by it under the laws of this state and in connection therewith maintain convenient records or make suitable notations in order that an individual record of each licensee showing the convictions of such licensee and the traffic accidents in which he has been involved shall be readily ascertainable and available for the consideration of the department upon any application for renewal of license and at other suitable times."

"(c) ... to compile accident statistics and disseminate information thereon; ..."

The guidelines or interpretations, being advisory in nature and not possessing the status of statutory provision, the question of federal supremacy clause does not exist. Article 6, Clause 2 of the United States Constitution provides: "This Constitution and the laws of the United States which shall be made in pursuance thereof; ... shall be the supreme law of the land;" ... Any constitutional question of the Act as it relates to the Motor Vehicle Department, has not been decided by the United States Supreme Court. Thus, the statutes of Idaho and the decision of the Idaho Supreme Court in Bell vs. O'Connor Transport Limited, supra, govern, in the main, the application of the release or non release of information contained in the officer's report. The Idaho Supreme Court did not address itself to the Act. Hence, the court's opinion must be limited in its application.

### CONCLUSION

Accident reports filed by an operator of a motor vehicle, in compliance with the provisions of I.C. 49-106(a) and 49-1013, are confidential reports for the department's use for accident prevention purposes and the compiling of statistics incident to such purpose. The department may publish annually, or at more frequent intervals, such statistical information but may not disclose the confidential contents of the report; provided, however, the identity of the person involved in the motor vehicle accident, if not otherwise known, or when an operator denies presence at the scene of the accident, or certification of compliance with the financial responsibility law by the operator and if covered by liability insurance, the name of the carrier, the agent's name and address, and the insurance policy number may be disclosed by the department. The department may also certify compliance with the requirement of filing of an operator's accident report upon demand of the operator or upon demand of any court.

It is conceded that an officer in the scope of his investigation may interview one or more parties involved in an accident, as well as other witnesses, and such interviews may be included in the officer's report. The shield of confidentiality, as to an operator's accident report, extends only to the operator's report and no further. A statement made by an operator to an investigating officer may conceivably include the same information incorporated in the operator's accident report. However, such statements to the investigating officer are not cloaked with the protective shield and may be used in a court proceeding against an operator if such statements contain admissions against interest or other relevant matters.

It may be observed that the use of the officer's accident report, containing an operator's statement, at first blush, appears to permit indirectly what you cannot do directly under I.C. 49-106(a) and 49-1013. However, the law does not require that an operator involved in an accident causing injury or death, shall discuss the facts thereof with anyone including the investigating officer. The accident reports submitted by police officers may contain statements of the parties, hearsay statements, and conclusions or the officer which may or may not be supported by the facts. The admissibility of such a report is not affected by the inclusion of such statements and

conclusion. Appropriate objections at time of trial will establish both admissibility and relevancy. It would be for the court and not the department to excise the inadmissible parts of the report.

The individual motor vehicle record of an operator may contain accident reports, and abstracts of court records of convictions. The department is required by law to file such reports and records. Therefore, the motor vehicle record is a public record within the meaning of I.C. 67-2031.

Notwithstanding the public nature of the records as above indicated, compliance with the Act by the Department is required in order to avoid the possibility of exposure to litigation. Therefore, the Department must adopt reasonable procedures to prevent any violation of the Act. The Department must take the necessary precautions that an officer's report of an accident and the motor vehicle records are furnished only to those persons designated in the Act and for the precise purposes set forth in the Act. Such persons must further certify that the information will not be used for any other purpose than that permitted in the Act. The Department must adopt reasonable procedures to assure accuracy and to delete any inaccuracies or obsolete information. A request for a report on a consumer, if complied with, must be disclosed to the consumer plus the information disseminated, thus affording the consumer an opportunity to draw to the attention of the Department any inaccurate information contained in the report.

To illustrate the foregoing, if an insurer obtains a report in connection with a claim or adjustment report such are not consumer reports. The report, so obtained, would not be used to determine eligibility for insurance or in connection with the underwriting of insurance. If a claim or adjustment report is obtained, and subsequently used as a basis for, or in a decision to cancel, refuse, renew or increase a premium, the report is a "consumer report" and the applicable disclosures under 15 U.S.C. §1681i are required.

The Department of Law Enforcement, Motor Vehicle Division, is a consumer reporting agency. Although the officer's report of an accident and the motor vehicle record of an operator, upon payment of the appropriate fees, may be obtained under the safeguard provided by the Act and pursuant to the federal and state statutes, a license to conduct a "fishing expedition" is not granted. The furnishing of such reports will be made only to those persons within the meaning of 15 U.S.C. §1681b, who comply with the provisions of 15 U.S.C. §1681e.

Respectfully submitted,

FOR THE ATTORNEY GENERAL

JAY F. BATES  
Deputy Attorney General





STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL  
BOISE 83720

W. ANTHONY PARK  
ATTORNEY GENERAL

September 6, 1974

Dr. James A. Bax  
Director  
Department of Health & Welfare      OFFICIAL OPINION #75-42  
Building Mail

Dear Dr. Bax:

By letter dated July 10, 1974, you requested our opinion on the following questions:

"1. Does the Idaho 'Good Samaritan' law in any way protect persons certified by the Department of Health and Welfare as having successfully completed the 40-hour CIM (crash injury management) course or the 81-hour EMT-A (emergency medical technician-ambulance) course?

"2. Does the Idaho Good Samaritan law cover those persons having successfully completed a basic or advanced Red Cross first aid course?"

Section 5-330, Idaho Code, extends a conditional immunity to any person:

" . . . who in good faith, being at, or stopping at the scene of an accident, offers and administers first aid or medical attention to any person or persons injured in such accident . . . "

This immunity is conditional, being ineffective against alleged and proven gross negligence. This conditional immunity ceases, inter alia, "upon delivery of said injured person or persons into custody of an ambulance attendant." Qualifications for the ambulance attendant are not specified. It appears to be the formal or job position of "ambulance attendant" rather than his qualifications or certification that is germane. The mere fact that a person has completed the EMT-A, the CIM, or Red Cross training does not deprive him of the conditional immunity under Section 5-330; his position as an ambulance attendant does.

Immunity was extended, inter alia, to ambulance paramedics and ambulance intensive care paramedics by the Idaho Legislature in 1972 upon enactment of Section 39-135, Idaho Code. That section provides in pertinent part:

"No act or omission of any ambulance paramedic or ambulance intensive care paramedic, done or omitted in good faith while rendering emergency medical service under the responsible supervision and control of a licensed physician to a person who is in immediate danger of serious injury or loss of life shall impose any liability upon the ambulance paramedic or ambulance intensive care paramedic, . . . "

The qualifications for an ambulance paramedic and an ambulance intensive care paramedic are set out in Section 39-132. The ambulance paramedic is defined as a person who:

"(1) has successfully completed an emergency medical technician (EMT) training course, or its equivalent, and has successfully completed written and practical examinations for registry as an emergency medical technician; and

"(2) is trained by a licensed physician

"(a) to administer intravenous solutions under written or oral authorization of a licensed physician; and

"(b) to administer drugs under written or oral authorization of a licensed physician; and

"(c) to perform such other acts under written or oral authorization of a licensed physician as shall be authorized by the board; and

"(3) has been examined and certified as an ambulance paramedic by an authorized representative of the board."

The CIM and Red Cross courses do not appear to be as intensive as the EMT-A training and would probably not begin to qualify a person for the immunity offered by Section 39-135.

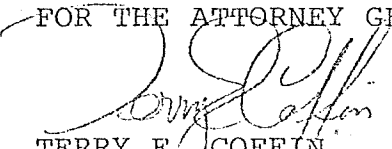
There is no doubt that a person who has no duty to stop and render assistance to an injured person is nonetheless entitled to the conditional immunity of Section 5-330 whether or not he has received the CIM, EMT-A or Red Cross Training. A more difficult question arises when a group of volunteers organized for the purpose of rendering first aid, having received training in the CIM, EMT-A or Red Cross courses, goes on call to give such assistance. It is questionable whether the conditional immunity of Section 5-330 would be extended to these volunteers. The Court could draw a distinction between the volunteer who by chance was rendering first aid and the one who organized and received training for that purpose. There is very little case law on Good Samaritan Acts in the several states, but since their purpose is to encourage trained personnel, especially physicians, who have no duty to stop and render assistance to do so without subjecting themselves to civil liability, 38 Temple L Q 418; there may be an implied exception withholding conditional immunity from any person who has such a duty, whether he be a full-time paid ambulance attendant, rescue squad crewman, law enforcement officer, volunteer ambulance attendant or Quick Response Unit Crewman. The recent case of Lee v. State, 490 P.2d 1206 (Alas. 1971) points this out. There, a police officer accidentally shot a child who was being molested by a lioness in a zoo, the officer having attempted to rescue the child by shooting the lioness. He was held not to enjoy the protection of the Alaska Good Samaritan statute since he was under a duty to attempt to rescue the child. We cannot say with certainty that this interpretation would be accepted by the Idaho courts. We can only caution you in this regard.

Dr. James A. Bax  
September 6, 1974  
Page 4

To summarize, Section 39-135 grants a conditional immunity to the ambulance attendant who qualifies as an ambulance paramedic or an ambulance intensive care paramedic as defined by Section 39-132. Section 5-330 grants a conditional immunity to persons who may coincidentally have some specialized training but who are voluntarily at the scene of an accident and not as the result of any duty to render assistance. We cannot say with certainty, however, that a law enforcement officer, rescue squad crewman, volunteer ambulance attendant or Quick Response Unit crewman, whether or not specially trained in emergency treatment procedures is entitled to a conditional immunity under Section 5-330.

Very truly yours,

FOR THE ATTORNEY GENERAL

  
TERRY E. COFFIN  
Assistant Attorney General

TEC:lm



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

W. ANTHONY PARK  
ATTORNEY GENERAL

September 12, 1974

Mr. Keith H. Holve  
Route 5, Box 359  
Idaho Falls, Idaho 83401

OFFICIAL OPINION #75-43

Dear Mr. Holve:

You have asked for an opinion as to whether political candidates' filing fees may be used as donations to a charitable institution. I regret that I must respond in the negative.

It is my opinion that Idaho law prohibits such a plan. The principle legislative purpose underlying the establishment of filing fees for political candidates is to defray the expense of printing candidates' names on ballots. Transferring filing fee revenues from the State and respective county treasuries to a charitable institution would frustrate the principle purpose for which the various filing fee provisions of the Idaho election laws were enacted.

Congratulations on your vigorous campaign. You ran well the first time out.

Very truly yours,

A handwritten signature in dark ink, appearing to read "W. Anthony Park", is written over the typed name and title.

W. ANTHONY PARK  
Attorney General

WAP:lm



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

W. ANTHONY PARK  
ATTORNEY GENERAL

September 10, 1974

J.D. Hancock  
Prosecuting Attorney  
Madison County  
30 South Second West  
Rexburg, Idaho 83440

75-44/  
OFFICIAL OPINION # ~~74-44~~

Re: Section 63-2216, Idaho Code and its  
Relationship to Counties

Dear Mr. Hancock:

You have asked a question of this office as to the meaning of Section 63-2216, Idaho Code and whether or not the six month restriction against holding a second bond election applies where a special bond election was held for the purpose of remodeling the county hospital.

The six month restriction on holding a second election for a similar purpose relates to

"... the formation of any special taxing district or for the approval of any bond issue or other proposals which would have resulted in a tax levy as authorized by law, and the proposal submitted at such election was defeated."

You also inquire about the proviso of the section which exempts municipalities or water or sewer districts when bond issues are proposed for the installation or improvement of water and sewer systems deemed necessary by the State Board of Health now the the Department of Environmental and Community Services. Since as I learned from a phone conversation with you, this bond issue does not relate to a water or

J.D. Hancock  
September 10, 1974  
Page 2

sewer system, but relates to improvements and repairs of the county hospital we do not believe the proviso above referred to has any relationship to your problem.

Although the question of whether a county is a municipality in Idaho is interesting and somewhat unsettled (Strickfaden v. Greencreek Highway District (1926), 42, Idaho, 738, 248 P. 456 and 27A Words and Phrases, p.488) it does not appear particularly decisive of the issues you raise, since the proviso relates only to water and sewer systems.

Since your county has held a bond election for improvement and repair of the county hospital, that is, as stated in the statute ". . . for the approval of any bond issue . . . that would have resulted in a tax levy . . ." we believe that another similar election may not be held for six months after the date of the previous election.

Very truly yours,

FOR THE ATTORNEY GENERAL

WARREN FELTON  
Deputy Attorney General

WF:lm

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September 17, 1974

The Honorable Pate T. Cenarrusa  
Secretary of State  
Statehouse  
Boise, Idaho 83720

OFFICIAL OPINION #75-45

Dear Secretary Cenarrusa:

You have solicited an opinion of the Attorney General regarding action upon the request of representatives of the Idaho Peoples Party for withdrawal of that party's ballot status for the 1974 general election. Specifically, I find enclosed with your request a copy of a letter to your office from Mr. Jon T. Robertson, announced party chairman of the Idaho Peoples Party, wherein Mr. Robertson declares the withdrawal of his party from the forthcoming general election. Attention should be directed to Section 34-906, Idaho Code, as dispositive of the issue before you. Therein is to be found the statutory imperative defining the contents for a general election ballot. As required, the complete ticket of each political party which shall include that party's nominee for each particular office, is to be printed on said ballot. Inferentially, if there is no candidate representation of a particular party, no reason exists for articulation of the party's banner upon the ballot.

As you are undoubtedly aware, nothing within the foregoing opinion may be construed to affect the further command of Section 34-906 that a separate column shall be made available on the ballot for write-in candidates.

Sincerely yours,

FOR THE ATTORNEY GENERAL

CHRISTOPHER D. BRAY  
Assistant Attorney General

CDB:lc

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September 17, 1974

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The Honorable Pete T. Cenarrusa  
Secretary of State  
Statehouse  
Boise, Idaho 83720

OFFICIAL OPINION #75-45

Dear Secretary Cenarrusa:

You have solicited an opinion of the Attorney General regarding action upon the request of representatives of the Idaho Peoples Party for withdrawal of that party's ballot status for the 1974 general election. Specifically, I find enclosed with your request a copy of a letter to your office from Mr. Jon T. Robertson, announced party chairman of the Idaho Peoples Party, wherein Mr. Robertson declares the withdrawal of his party from the forthcoming general election. Attention should be directed to Section 34-906, Idaho Code, as dispositive of the issue before you. Therein is to be found the statutory imperative defining the contents for a general election ballot. As required, the complete ticket of each political party which shall include that party's nominee for each particular office, is to be printed on said ballot. Inferentially, if there is no candidate representation of a particular party, no reason exists for articulation of the party's banner upon the ballot.

As you are undoubtedly aware, nothing within the foregoing opinion may be construed to affect the further command of Section 34-906 that a separate column shall be made available on the ballot for write-in candidates.

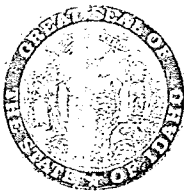
Sincerely yours,

FOR THE ATTORNEY GENERAL

CHRISTOPHER D. GRAY  
Assistant Attorney General

CDB:lc

G 50.1



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

W. ANTHONY PARK  
ATTORNEY GENERAL

September 17, 1974

Mr. Wayne Mittleder  
Administrator  
Division of General Services  
Building Mail

OFFICIAL OPINION #75-46

Dear Mr. Mittleder:

This letter is in response to your request for an official opinion on the practice of billing state agencies six months in advance for postal services. When the legislature created the central postal system in 1969 it was assumed that the system would receive the majority of its funding from the postage appropriations of the state agencies using the postal system's services. See Idaho Code, Section 67-5755. The central postal system head was directed to meter outgoing mail and

"at least monthly certify to the state auditor the amount expended on behalf of each department, agency or institution of the state, which amount shall be charged against the funds of such department, agency or institution and credited to the account of the department of administrative services for the operation of the central postal system." Idaho Code, Section 67-5755.

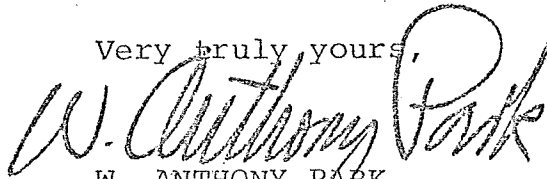
The difficulty with this method of billing was that it forced the legislature to appropriate funds to meet the current operating expenses of a division which was supposed to be funded by inter-agency billing. Consequently, the next session of the Legislature enacted Idaho Code, Section 67-5706, which states;

Mr. Wayne Mitttleider  
September 17, 1974  
Page 2

"Any division of the department of administrative services providing services to departments of state government as authorized in this chapter may charge and receive payment in advance of performance thereof for a period of time not to exceed the current appropriation of the department requesting such services. Such payments may be used for salaries and wages, travel and other current expenses of the division providing the services."

Although this statute did not expressly repeal Section 67-5755, when there is an irreconcilable conflict between two statutes the later enactment is controlling. Knudson v. Bank of Idaho, 91 Idaho 923, 435 P.2d 348, 356 (1967). Moreover, Section 67-5706 must be interpreted in a manner which best effectuates the legislative purpose. Logan Lanes, Inc. v. Brunswick Corp., 378 S.2d 212 (9th Cir. 1967), cert. denied, 389 U.S. 898 DeRousse v. Higginson, 95 Idaho 173, 505 P.2d 321 (1973). If the central postal system is denied permission to bill state agencies in advance, the remedial purpose of Section 67-5706 would be frustrated because an appropriation to meet expenses incurred prior to payment by the agencies receiving services would be necessary. The fact that the legislature failed to appropriate funds for the operating expenses of the postal system in 1970 is some indication that Section 67-5706 was intended to enable the system to charge in advance. Therefore, it is our opinion that the statutory authorization of advance billing by divisions of the Department of Administrative Services necessarily repeals the inconsistent provisions of Section 67-5755.

Very truly yours,

  
W. ANTHONY PARK  
Attorney General

WAP:lm

Opinion



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

W. ANTHONY PARK  
ATTORNEY GENERAL

September 17, 1974

Mrs. Jane K. Buser  
Personnel Officer  
Boise State University  
1910 College Blvd.  
Boise, Idaho 83725

OFFICIAL OPINION #75-47

Dear Mrs. Buser:

References made to your letter of August 19, 1974, and our telephone conversation subsequent thereto on the question of whether a Curator II employed full time by the State Historical Society and in a classified position, may also hold a full time appointment as an instructor in ~~anthropology~~ *geology* by Boise State University.

Section 67-2508, Idaho Code prohibits state employees from holding two state positions. The exception is where an employee in a department may accept additional employment in any education program conducted under the supervision of the State Board of Education and Board of Regents of the University of Idaho. However, this is permitted only if such employment is in addition to, and beyond, the hours of service required in the ordinary course of employment, with the permission of the ordinary employing department, and is not in the ordinary course of that employment. Further, the State Board of Examiners must be informed by the employing department, in this case, the Historical Society, that the additional employment is not in the ordinary course of employment and that it will be performed in addition to the statutory hours of employment.

It is our opinion that the intent of this statute is to provide educational programs with the expertise of state employees on a part time basis. For example, state accountants and engineers may teach in programs conducted by the institutions outside the

Mrs. Jane K. Buser  
September 17, 1974  
Page 2

normal hours of employment, i.e., at night and on weekends. However, the law does not contemplate the situation where a full time employee in one department is also a full time faculty member. The conflicts on an employee's time are readily apparent. Nor does the statute permit a full time faculty member accepting additional employment in any other department, whether on a full time or part time basis.

Therefore, we are of the opinion that the full time employee of the Historical Society and full time instructor at Boise State will have to make a choice of state agencies. If he is a full time faculty member, he cannot serve even on a part time basis as a curator for the Historical Society. If he is a curator for the Historical Society, he cannot be a full time faculty member, although he could perform services as an instructor to the University on a part time basis after complying with the administrative requirements of Section 67-2508, Idaho Code.

We trust we have been of assistance.

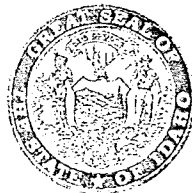
Very truly yours,

FOR THE ATTORNEY GENERAL

JAMES R. HARGIS  
Deputy Attorney General

JRH:lm

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## STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

W. ANTHONY PARK  
ATTORNEY GENERAL

September 18, 1974

Mr. Ben F. Eberhardt  
Executive Secretary  
State Commission for Pardons and Parole  
Post Office Box 7494  
Boise, Idaho 83707

OFFICIAL OPINION #75-48

Dear Mr. Eberhardt:

The State Commission for Pardons and Parole has asked for an opinion indicating the application of Section 20-223, Idaho Code, to the commutation power of the Commission.

The starting place for statutory interpretation is with the statute itself. An examination of Section 20-223 reveals that the word "commutation" is nowhere used. The statute by title and content is concerned with rules and regulations governing parole. It is thought by some that parole is an exercise of clemency and as such is equivalent to a commutation. In Section 20-223 the Legislature seems careful to avoid that conclusion by the specification of an operational definition for parole which would exclude ordinary definitions of commutation:

"A parole shall be ordered only for the best interests of society, not as a reward of clemency. It shall not be considered to be a reduction of sentence or pardon."

There being no basis for finding application of this statute to the power of commutation which is consistent with a plain reading of the language, only compelling reasons should be used to find such application. Such reasons would only be found by reference to the Idaho Constitution, the statutory setting of Section 20-223, or the laws which pertain to commutation generally.

The Idaho Constitution provides for the power of commutation at Article 4, Section 7, which reads in pertinent part as follows:

"§7. THE PARDONING POWER.--From and after July 1, 1947, such board as may hereafter be created or provided by legislative enactment shall constitute a board to be known as the board of pardons. Said board, or a majority thereof, shall have power to remit fines and forfeitures, and to grant commutations and pardons after conviction and judgment, either absolutely or upon such conditions as they may impose in all cases of offenses against the state except treason or conviction on impeachment. The legislature shall by law prescribe the sessions of said board and the manner in which application shall be made, and regulate proceedings thereon, but no fine or forfeiture shall be remitted, and no commutation or pardon granted, except by the decision of a majority of said board, after a full hearing in open session, and until previous notice of the time and place of such hearing and the release applied for shall have been given by publication in some newspaper of general circulation at least once a week for four weeks. ...."

The Constitution thus gives the Board of Pardons the power of commutation, with the Legislature having the power to designate that board. The current designation of that board is the Commission of Pardons and Paroles, as established by Section 20-210, Idaho Code:

"20-210. COMMISSION OF PARDONS AND PAROLES--APPOINTMENT--QUALIFICATIONS--TERMS--SALARY--STAFF.--The board shall appoint a state commission of pardons and parole, in this chapter referred to as the commission, which shall succeed to and have all rights, powers and authority of said board of pardons as are granted and provided by the provisions of the constitution of the state of Idaho. ...."

The general rule of law is:

"While ... the legislature may not interfere with, or control the proper exercise of, the

pardoning power where it is conferred by the constitution on the executive without express or implied limitations ... provisions may be made by legislation which will render the exercise of the power convenient and efficient."  
67 C.J.S. §3f. [footnotes omitted]

and this would extend to commutation power as it exists in the State of Idaho:

"Where the power to commute is expressly or impliedly vested in the pardoning power, it cannot be affected by legislative or judicial action, or impaired or undermined in any particular, unless the grant of the power is expressly made subject to regulation. ..."  
67 C.J.S. §15a(2) [footnotes omitted]

This result is reached through a principle of constitutional interpretation by which the Legislature is not permitted to erode an exclusive grant of power given to another branch of government in repugnance to the constitution to which it is subject.

This principle was recognized by the Idaho Supreme Court in the case of Ackley v. Perrin, 10 Idaho 531, 79 Pac 192 (1905), in a discussion of the power of the Legislature to enact regulations controlling what was then the "state prison commissioners" who received their power by the former Idaho Constitution Article 10, Section 5. The Court stated that:

"While the legislature have the undoubted right to point out a method of exercising these powers and impose special duties upon them, we are satisfied that the legislative department of the government would have no power or authority to limit or in any way interfere with the full and complete exercise of the powers and duties conferred by the constitution, ... " 10 Idaho at 535.

The grant of power at Article 4, Section 7, Idaho Constitution, does provide that "[t]he legislature shall by law prescribe the sessions of said board and the manner in which application shall be made and regulate proceedings thereon, ..." The plain import of that language is to authorize the legislature to



September 18, 1974

establish procedures which assist the board in the exercise of its power. It would be unreasonable and contrary to the overwhelming weight of authority on this subject generally to read that language as authorizing the Legislature to substantially impair the pardon or commutation power through procedural regulation.

Using the rule of construction exemplified by Ackley, supra, with the language of constitutional provision for pardon and commutation power, the conclusion must be reached that the Idaho Legislature may not restrict the commutation power granted in the Idaho Constitution which is now vested in the Commission. It would follow from this that Section 20-223, Idaho Code, cannot restrict the commutation power of the Commission. This result strikes against any attempt to extend the plain language of Section 20-223 as applying to the power of commutation of the Commission.

The last sentence of Section 20-223 purports to limit the pardon power:

"No person or persons who have been committed for the crime of murder in the first or second degree in which the crime was committed in the commission or attempt to commit any sex offense upon the person of the victim of such crime, shall be released from custody before the expiration of the full term of his or their sentence, by said board, by pardon, or parole."  
[emphasis added]

It is because commutation and pardon power are conferred together in the Idaho Constitution, and because commutation power is often thought to be included necessarily in pardon power, i.e., power to forgive the whole implies power to forgive a part, that it is appropriate for this opinion to consider the effect of that reference to pardon power just cited.

The reference to pardon seems entirely out of place in this statute which, with this single exception, speaks to rules and regulations governing parole. While the principles of constitutional and statutory construction, especially when reviewed in light of their general application to the law of executive clemency, would require the conclusion that the reference in Section

Mr. Ben F. Eberhardt

September 18, 1974

20-223 to pardon power is unconstitutional as repugnant to Article 4, Section 7 of the Idaho Constitution, a less severe approach is available.

Section 20-223 is a statute addressed to the Board of Correction, giving it powers to regulate the granting of parole and imposing restrictions upon that power. When that portion making reference to "pardon" was enacted, the Board of Correction was the Legislature's designee of the constitutional powers of the Board of Pardons. However, in 1969 the Legislature removed the constitutional powers of the Board of Pardons from the Board of Correction and placed that power in the Commission of Pardons and Parole.

Whatever may be said about the legitimacy of the purported restriction on pardon power as applied to the Board of Correction when it contained the pardon power, a narrow reading of Section 20-223 and Section 20-210 discloses no attempt by the Legislature to limit the pardon power as that power now rests in the Commission. The Commission through Section 20-210, Idaho Code, enjoys "all rights, powers and authority" of the constitutional Board of Pardons. Section 20-210 also provides that the Commission may receive such powers as relate to probation and parole as the Board of Correction may delegate. In no sense can it be contended that the Board of Correction may delegate to the Commission a limitation on its constitutional power of pardon and commutation.

Since the pardon prohibition in Section 20-223 requires that the specified convicts not be released from custody "by said board, by pardon", and this provision clearly referred to the former pardon power of the Board, it should be assumed that the provision ceased to have any effect after the Board of Correction lost its power to grant pardons.

In conclusion, the Commission is not required to apply Section 20-223, Idaho Code, to its constitutional powers to commute sentences, because the statute expressly excludes the reduction of sentence aspects of clemency which is the subject of commutation, a result which is strengthened by consideration of principles of statutory and constitutional interpretation as they generally apply to clemency law. The single reference to "pardon" at the end of the statute no longer has effect since the pardon power of the Board of Correction no longer exists.

FOR THE ATTORNEY GENERAL

*Ronald D. Bruce*

RONALD D. BRUCE

Assistant Attorney General

RDB:R

D.S.



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

W. ANTHONY PARK  
ATTORNEY GENERAL

OFFICIAL OPINION  
NO. 75-49

September 19, 1974

Dr. James A. Bax, Director  
Department of Health and Welfare  
Statehouse  
Boise, Idaho 83720

Re: Disposal of Animal Car-  
casses Deposited on Privately  
Owned Property

Dear Dr. Bax:

On September 12, 1974, you forwarded to this office the following question:

In circumstances where the legal ownership of an animal carcass cannot be determined, who is responsible for the removal and disposal of said carcass when it is deposited in privately owned streams, lakes, reservoirs, canals or other waterways of this state?

In reply thereto it is our opinion that the counties are obligated to remove and dispose of such waste pursuant to Section 31-4401 et seq of the Idaho Code.

As noted in our opinion of May 8, 1973, "The solid waste disposal laws were passed for the purpose of reducing the threat to health posed by refuse such as animal carcasses". On June 28, 1973, the Idaho Board of Environmental and Community Services (Health and Welfare) adopted Solid Waste Management Regulations and Standards in furtherance of that legislative intent.

"Public waters" are defined in the regulations and standards to include "lakes, ponds, reservoirs, springs, wells, rivers, streams, creeks, marshes, canals, drainage ditches and all other bodies of surface or underground waters, natural or artificial, public or private (except those private waters which do not combine or effect a junction with natural surface or underground waters) which are wholly or partially within or bordering the State or within its jurisdiction." (emphasis added) Page 3.

The disposal of animal carcasses is specifically treated in Part II, Section 2.26 of the rules and regulations which deals with "putrescible wastes" which are defined as "solid wastes capable of being decomposed anaerobically with sufficient rapidity as to cause nuisances from offensive odors or produce fly breeding conditions." Page 4.

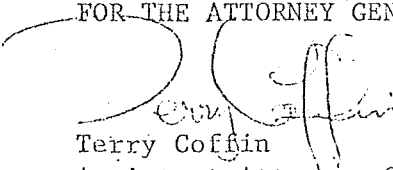
In clarification of its intent to place solid waste disposal exclusively within the responsibility of the counties the legislature required any land owner who wishes to dispose of solid waste on his own land to obtain a permit therefor from the County Board of Commissioners. Section 31-4408, Idaho Code.

It is clear from the statutes, regulations and standards applicable that the county has the responsibility to remove and dispose of animal carcasses found in privately owned waters where actual ownership cannot be determined.

Please feel free to contact this office in the event further clarification is required.

Yours very truly,

FOR THE ATTORNEY GENERAL



Terry Coffin  
Assistant Attorney General  
Environmental Services

TC:lab



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

W. ANTHONY PARK  
ATTORNEY GENERAL

September 21, 1974

City of Ketchum  
%Mr. James W. Phillips  
St. Clair, St. Clair, Hiller & Benjamin  
Christmas Tree Building  
P.O. Box 424  
Ketchum, Idaho 83340

OFFICIAL OPINION #75-50

Dear Mr. Phillips:

On behalf of the City of Ketchum, Idaho you have requested an Attorney General's opinion to resolve the question as to whether one individual may hold the office of Mayor, and as Fire Chief, be a paid fireman for the city at the same time. The inquiry is in essence whether the holding of one office is incompatible with the holding of the other.

The doctrine of incompatibility of offices is derived from common law, rather than statute. Based upon a public policy which finds repugnant the possibility of two offices being held by one person when the functions of each may be inconsistent with the other, the test of incompatibility is stated as follows:

"[The test] is found in the principle that the incompatibility is recognized whenever one is subordinate to the other in some of its important and principal duties, and subject in some degree to the other's revisory power. Thus, two offices are in compatible where the incumbent of the one has the power to remove its incumbent, even though the contingency on which the power may be exercised is remote." 63 Am. Jur 2d. Public Officers and Employees, §74, p. 676; quoted with approval in Haskins v. State Ex. Rel. Harrington, \_\_\_ Wyo. \_\_\_, 516 P.2d

1171, 1174 (1973); cf People v. Thompson,  
55 Cal.2d 147, 130 P.2d 237, 239 (1942).

It should be noted that this common law prohibition against the holding of more than one office at the same time has been logically extended to negate the attempt to distinguish "office" from public employment. In Kaufman v. Pannuccio, 121 N.J. Super. 27, 295 A.2d 639, 641 (1972) the Court held that as city employees, neither the assistant tax assessor nor a lieutenant in the police force could continue as such while being members of the city council. Focusing upon the same issue, the Wyoming Supreme Court resolved it thusly:

"Subordination is the key word. After considerable research and careful consideration of the reason and basis for the rule against incompatibility, a majority of the Court are convinced that we should not let ourselves be bound by technical definitions of the word office. . . ." Haskins v. State ex rel Harrington, supra 516 P.2d at p. 1178.

The Court went on to hold that employment as a teacher and the holding of office as member of the board of trustees of the school district were incompatible. Ibid.

In the instant case, the Mayor would have revisory power over the Fire Chief. As the administrative official for the city, Section 50-602, Idaho Code affords to a mayor "superintending control of all the officers and affairs of the city." As mayor, one acts as a trustee for the municipality. That public trust is violated if the mayor acts for himself in any matter which concerns the city. People v. Thompson, supra, 130 P.2d at p. 240. Without doubt, the exercising of "superintending control" over such matters as salary, tenure, and working conditions of city employees would place an issue of conflict before the simultaneous office holder which might resolve itself to the detriment of the public.

A review of Idaho decisions reveals no judicial analysis of the incompatibility issue although Jordan v. Pearce holds that one cannot hold both the office of county commissioner and clerk of the district court simultaneously. 91 Idaho 687, 691, 420 P.2d 419, 423 (1967). Its decision is apparently based in part upon the fact that the county commissioner

City of Ketchum  
September 21, 1974  
Page 3

had the delegated authority to fix the salary of the clerk.

The above premises considered, it is the opinion of the Attorney General that the simultaneous holding of the office of Mayor and of employment as Fire Chief by one person are inimicable to the public trust and is prohibited under the doctrine of incompatibility of offices.

Very truly yours,

FOR THE ATTORNEY GENERAL

*CDB*

CHRISTOPHER D. BRAY  
Assistant Attorney General

CDB:lm

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STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

ANTHONY PARK  
ATTORNEY GENERAL

OFFICIAL OPINION #75-51

Rendered in response  
to the request of:

Gary M. Haman  
Prosecuting Attorney  
Kootenai County

Date: September 20, 1974

This request for a formal opinion poses the following question:

"May a municipal corporation enact an ordinance regulating conduct already prohibited by state law but prescribing a lesser criminal penalty therefor?"

The question has not been specifically answered by the Supreme Court of Idaho, although the Court has considered certain other facets of the power of municipal corporations to enact ordinances on subjects already addressed by state law.

Elsewhere there is a division of authority with respect to the power of a municipal corporation to enact a penal ordinance with a less restrictive penalty covering the same topic as is covered by a state statute. Consequently, we must look for guidance to decisions of other jurisdictions read in light of the general direction indicated by our own high court.

Article XII, Section 2 of the Idaho Constitution provides that

"Any county or incorporated city or town may make and enforce, within its limits, all such local police, sanitary and other regulations as are not in conflict with its charter or with the general laws."



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This constitutional grant of power is supplemented by a state statute which provides that:

"Cities shall make all such ordinances, by-laws, rules, regulations and resolutions not inconsistent with the laws of the state of Idaho as may be expedient, in addition to the special powers in this act granted, to maintain the peace, good government and welfare of the corporation and its trade, commerce, and industry. Cities may enforce all ordinances by inflicting fines for the breach thereof, not exceeding the amount permissible in probate, justice, and courts of similar jurisdiction for any one (1) offense, or penalties of not more than thirty (30) days imprisonment in the city jail, or both such fine and imprisonment, recoverable with costs, and in default of payment, to provide for confinement in prison or jail. . ."  
Idaho Code, Section 50-302.

The foregoing constitutional and statutory provisions, taken together, authorize municipal corporations to enact penal statutes, but impose a penalty limitation upon ordinances enacted by municipal corporations. Thus, the marijuana possession ordinance enacted by the city of Post Falls would be limited by a penalty of lesser severity than that prescribed for the same offense by the Uniform Controlled Substances Act, Idaho Code, Section 37-2701 et seq. The elements of the offense of marijuana possession are essentially the same in both the Post Falls ordinance and the state statute.

The point from which this inquiry must start is the general principle that municipal corporations may enact ordinances and regulations, penal in nature, even though the offenses thus defined are also the subject of state regulation. The only qualifications are that the municipal ordinance not be in conflict with the general law and that the subject be not preempted by the legislature.

"The mere fact that an offense is made punishable by state statute does not prevent a municipal corporation from legislating on the same subject, and, generally speaking, it is within the power of such a corporation to enact

and enforce regulations penal in their nature in aid of, or not in conflict with, the penal laws of the state. However, a municipal corporation has no power to enact regulations which tend to defeat or which run counter to the penal laws of this state, whether they be laws relating to felonies or to misdemeanors. A municipality cannot repeal or override the criminal laws of the state." 62 C.J.S. Municipal Corporations, §145 P. 299.

This principle was adopted by the Supreme Court of Idaho early in the history of the state. In State v. Quong, 8 Idaho 91, 67 P. 491 (1902) a battery prosecution under a city ordinance was challenged. The court held that

" . . . The ordinance is not in conflict, but in harmony, with the general law. The authority of the city to enact police regulations, and to enforce them, where they do not contravene any general law of the state, is, under the provisions of our constitution, beyond question . . . "

8 Idaho at 194.

Quite clearly, municipalities are not restricted in their power to regulate to matters of merely local concern.

The key considerations are whether the legislature has preempted or covered the field and whether the scheme of regulation undertaken by the municipality amounts to a conflict with the general law of the state.

There is considerable disagreement over what constitutes a "conflict" or, at least, the lack of a single definition of sufficiently general applicability to cover all of the most common circumstances which might be encountered. The most commonly acceptable formulation is that

"In general, no conflict exists between a state enactment and a municipal regulation unless both contain provisions which are irreconcilable with each other. The fact that a municipal corporation imposes regulations additional to those of

the state does not necessarily create a conflict. A conflict exists, however, where an ordinance permits that which the state enactment prohibits or prohibits that which the state enactment permits." 62 C.J.S., Municipal Corporations, §43(b)(3)

In the case of Ray v. Denver, 121 P.2d 886 138 A.L.R. 1485, the court noted that

" . . . as the criterion of destructive conflict, under either the basic rule or the principle invoked by the city, it seems evident that in the final analysis the courts revert to the determination of what might be called the factual question of whether the ordinance forbids the doing of a thing which the statute authorizes . . . " Id., 138 A.L.R., 1488.

California courts, on the other hand, have taken a different and somewhat peculiar position:

" . . . If we look to the rule in California for determining whether a city ordinance is in conflict with a state law and for that reason void, the city being limited by our constitution to such police regulations 'as do not conflict with general laws,' we find it established that 'there is a conflict where the ordinance and the general law punish precisely the same acts.' " People v. Zook, 197 P.2d 851, 852 (Cal. 1948)

The foregoing formulation must be considered to have been rejected in Idaho by virtue of the courts ruling that municipalities are permitted to legislate with respect to the same topics covered by state law. State v. Quong, supra.

There is little doubt that a municipal ordinance which legalizes conduct prohibited by a state statute is invalid. In the matter of In Re Ridenbaugh, 5 Idaho 371, 49 P. 12 (1897) the court considered a municipal ordinance regulating and licensing gambling establishments in the face of a state statute which

prohibited gambling. The court held that approval of such a municipal ordinance would be tantamount to special legislation, in violation of Article III, Section 19 of the Constitution and further noted that

" . . . It was not the intention to permit or authorize the councils of incorporated cities to legalize, by ordinance, acts prohibited as criminal by the general criminal laws of the state, or to enforce ordinances in conflict with the general law. In case of a conflict, the ordinance must give way."  
Id., P. 375.

The Supreme Court of Colorado came to the same conclusion in Vick v. People, 445 P.2d 220 (Colo. 1968). Colorado is a home rule state and its constitution provides that municipal ordinances supersede state statutes on matters of strictly local concern, but not on matters of "mixed" state and local concern. The prohibition of gambling by state statute was found to be a matter of not strictly local concern and the legalization of gambling by a municipality was in direct conflict with the state law.

In Washington, which has a constitutional provision similar to Article XII, Section 2 of the Idaho Constitution, the Supreme Court has held that a city may enact ordinances for the punishment of offenses already made punishable by state law, but may not enact ordinances in conflict with the general law. Miller v. City of Spokane, 311 P.2d 165 (Wash. 1949).

A municipal ordinance which restricted the right to sell groceries on Sunday in Kansas was found to be invalid in light of the state statute granting such a right. House v. City of Topeka, 286 P.2d 180 (Kan. 1955). In Bennion v. City and County of Denver, 504 P.2d 350 (Colo. 1972) the court struck down a city ordinance which prohibited any resistance to a police officer attempting to make an arrest. At the time, Colorado had a state statute permitting resistance to unlawful arrests. The Court found that the matter was of state wide concern and held that a municipal corporation was without power to forbid what the state statute permits. The court was concerned, among other things, about the need for uniformity in such matters.

Accordingly, it may be concluded that a municipal corporation may not legalize what a state statute prohibits, nor may it prohibit what a state statute permits.

Not all questions of conflict between municipal and state legislation arise in the context of a municipality purporting to legalize what is forbidden by the state or attempting to forbid what is permitted by the state, however. The question is a more difficult one when a municipal ordinance differs from a state statute in the restrictiveness of its scheme of regulation. In New Jersey, the legislature enacted a statute regulating multiple family dwellings for the purpose, inter alia, of setting minimum standards for the construction of such housing. A municipal corporation enacted an ordinance purporting to regulate and license multiple family dwellings. The local ordinance was substantially less restrictive in its requirements than the state statute. The court found the municipal ordinance to be in conflict with the state statute and, therefore, invalid. In reaching this conclusion, the court noted that the state had preempted the field by specifically forbidding municipalities to license or regulate persons holding a state license. Furthermore, the state had provided for only one exemption, i.e., that the municipality could enact more restrictive regulations. In the court's view, the purpose of this statute was to provide minimum standards for multiple family housing and, consequently, less restrictive local provision would defeat the purpose of and be in conflict with the state statute. Boulevard Apts., Inc. v. Borough of Hasbrouck, 268 A.2d 359, 111 N.J. Super. 408 (N.J. 1970). This case is distinguishable from the present factual situation inasmuch as the attempted municipal ordinance was in direct conflict with the purpose of the statute to impose minimum standards of housing. Penal statutes which do not attempt to impose minimum standards of regulation, as opposed to penalties, do not fall within the rule of the case.

In Ray v. Denver, supra, a municipal ordinance imposing lesser standards concerning interest rates on small loans than were prescribed by the state statute was held invalid in light of the comprehensive state regulatory scheme which, the court found, was intended to preempt the entire area.

The Idaho Supreme Court has considered regulatory differences in several cases concerned with the regulation of alcoholic beverages. The power of municipal corporations and counties to impose regulatory standards differing from the state standards has been upheld. In Clyde Hess Distributing Co. v. Bonneville County, 69 Idaho 505, 210 P.2d 798 (1949), the court held that a municipality was permitted to restrict the hours for the retail sale of alcoholic beverages more greatly than the state statute. The Court found no conflict between the municipal ordinance and the state statute and found, further, that provisions in the state code permitting municipalities and

counties to "license and regulate places" for the sale of alcoholic beverages indicated that the legislature had not intended to occupy the entire field of alcoholic beverage regulation. See also Taggart v. Latah County, 78 Idaho 99, 298 P.2d 979 (1956).

In Taggart v. Latah County, *supra*, the court found that the local regulations were not so restrictive as to operate prohibitively. There is, in other words, a line beyond which a municipality or county may not go without creating a conflict with the state statute. It is clear that the policy of the state liquor regulation is to permit the sale of alcoholic beverages within the state and a municipal regulation drawn so restrictively as to defeat that purpose would be conflicting and invalid.

The same criteria apply to differences between municipal and state legislation with respect to the penalties prescribed by each for the same offenses. Generally, a municipal ordinance will be upheld if its penal provisions are not so vastly different from those of the state statute as to defeat the state regulatory scheme. Differences between state and local assault and battery statutes which were qualitatively the same as the differences between the Post Falls ordinance and the Uniform Controlled Substances Act were considered by the Supreme Court of Colorado in City of Aurora v. Martin, 507 P.2d 868 (Colo. 1973). The state assault and battery statute provided for a maximum penalty of a year in jail and a fine of \$500. The city statute, which was essentially the same with respect to the elements of the offense, prescribed a maximum penalty of 90 days in jail and a fine of \$300. The court found the municipal ordinance to be valid, believing that the regulatory question was a matter of "mixed" state and local concern and that the lesser municipal penalty created no great intrusion into state wide uniformity of regulation. The mere fact that there was a difference between the municipal and state statutes with respect to penalties was not found to create a conflict between the two.

"... If a statute provides for a substantially greater penalty than does a similar municipal ordinance, this fact may be considered in ruling whether the general assembly intended, by enactment of the statute, to preempt that field of regulation. Except in felony categories, mere difference in penalty provisions in a statute and ordinance does not necessarily establish a conflict in the sense discussed here." *Id.*, P. 870.

A local statute providing a lesser penalty than a duplicate state statute was also proved in Utah in the case of State v. Boone, 483 P.2d 238 (Utah 1971).

A municipal ordinance which conflicts with legislative grading of offenses conflicts with the general law. In Ohio, which has a constitutional provision almost identical to Article XII, Section 2 of the Idaho Constitution, a municipal ordinance making the dispensing of contraceptive devices a misdemeanor was found invalid in light of the state definition of the same offense as a felony.

"While the home rule amendment of the Ohio Constitution permits municipalities to adopt local police regulations, it is settled in this state that, if such regulations make the same conduct as proscribed by state law a misdemeanor, when the state makes it a felony, then the local police regulation is in conflict with the statutory enactment and is unconstitutional." Id., P. 281-282.

It appears to be the rule in California that a municipality may not impose a greater penalty than the legislature has imposed for the same crime, but may impose a greater penalty in the exercise of its power to impose additional qualifications in a field already covered by the general law if the municipally defined offense is not precisely the same. For example, a state statute making the use of offensive language in the presence of women or children a misdemeanor punishable by 90 days in jail and a fine of \$200 is not precisely the same as municipal ordinance making offensive language directed to a telephone operator an offense punishable by a \$500 fine and 6 months in jail and does not invalidate the municipal ordinance. Ex parte Borah, 208 P.2d 405 (Cal. 1949). The California courts consider the imposition of a vastly greater penalty by a municipality than is allowed by a state statute to be non-harmonious with the state enactment and void. Id.

In Kansas, where municipal corporations are empowered by statute to make all needful police regulations, a city ordinance which imposes a heavier penalty for the same offense than does a state statute is valid. City of Fort Scott v. Arbuckle, 196 P.2d 217 (Kan. 1948).

The question of preemption is somewhat different than a question of a conflict between municipal ordinances and a general law. The legislature may preempt the field of



regulation and thereby preclude the enactment of even those municipal ordinances which do not conflict with state law. The Idaho Supreme Court has held that police powers conferred by the state upon a municipality may be enlarged, modified or withdrawn by the state at any time. Village of Lapwai v. Alligier, 78 Idaho 124, 299 P.2d 475 (1956).

The same implication follows from the theorem that

"... A constitutional provision that municipalities shall have authority to exercise all powers of local self-government, and to adopt and enforce within their limits such local police, sanitary, and other similar regulations as are not in conflict with general laws, does not deprive the legislature of the right to exercise its police power by general laws operating uniformly throughout the state. The term 'general laws' has been held not to refer to rules of the common law, but to laws passed by the legislature which are of general application throughout the state . . ." 62 C.J.S. Municipal Corporations, §144, P. 298.

However, preemption of a field of regulation will not be implied from the mere fact that the state legislature has enacted statutes on the subject.

"The state and a municipal corporation may have concurrent jurisdiction over the same subject matter and in which event may make regulations on the subject notwithstanding the existence of state regulations thereon, provided the regulations or laws are not in conflict.

"The mere fact that the state has legislated on a subject does not necessarily deprive a city of the power to deal with the subject by ordinance. [Citations Omitted] State v. Poynter, 70 Idaho 438, 441, 220 P.2d 336 (1950) (Constructing Idaho Constitution, Article XII, §2 and I.C. 50-1109, now 50-302)

Moreover, if there is some indication in a state statute to the effect that the legislature did not cover the entire



of regulation, no preemption will be found. As noted previously, the court permitted municipal liquor regulation differing somewhat from state regulatory provisions on the basis of a state statutory provision allowing municipalities to license and regulate places where alcoholic beverages are sold. Clyde Hess Distributing Co. v. Bonneville County, supra.

In City of Aurora v. Martin, supra, the court based its finding that a municipal ordinance providing a lesser penalty for assault and battery than did the state statute constituted the regulation of an area not preempted by the state legislature on several factors. For one thing, the state statute contained no express preemption provision nor anything from which an intent to preempt could be implied. The court held that the mere enactment of a state penal statute was not tantamount to preemption of the field, as has the Idaho Supreme Court. Moreover, the court found that the difference in penalty provisions between the municipal and state statutes was not great enough that the state's interest would not be protected by a proceeding under the municipal ordinance. The court went so far as to say that the absence of a statute delegating regulatory power to municipalities was not determinative, a finding that could not be necessary in Idaho where a state statute delegating regulatory power exists apart from the constitutional provision. I.C. 50-302.

### Conclusion

After examination of the foregoing authorities, we conclude that the legislature of the State of Idaho has not, by enactment of the Uniform Controlled Substances Act, preempted the field of marijuana regulation. In this connection, we note that Section 37-2735 of the Act provides that

"Any penalty imposed for violation of this act is in addition to, and not in lieu of, any civil or administrative penalty or sanction otherwise authorized by law."  
(Emphasis Added)

Inasmuch as municipalities are clearly authorized to enact ordinances for the punishment of offenses which are also punishable under the general law, the Post Falls ordinance imposes sanction otherwise authorized by law." The legislature has, in other words, left the way open for the enactment of other local regulations governing possession of marijuana.

There are other reasons for concluding that the legislature has not wholly occupied the field of narcotics regulation by the

Uniform Controlled Substances Act. The Supreme Court indicated in Clyde Hess Distributing Co v. Bonnevillle County, *supra*, that local regulation of a particular subject was not inconsistent with state law unless it should appear that the legislature intended to occupy the entire field of regulation. In other cases, the legislature has done this by a specific preemption provision included within an enactment. See I.C. §18-1521. No such specific provision for preemption of municipal ordinances appears in the Uniform Controlled Substances Act. Instead, the legislature has provided that the act is "in addition to, and not in lieu of" other sanctions. I.C. §37-2738. Furthermore, the regulation of narcotics and marijuana is a matter of mixed state and local concern. The suppression of narcotics is as much an interest of the municipality as it is of the state.

It has been held that the detailed nature and pervasiveness of a regulatory scheme is evidence of a legislative intent to preempt the field. This was the case in Ray v. Denver, *supra*. However, in Ray the state regulatory scheme was detailed in respect to describing standards for the charging of interest on small loans. Therein, the municipal ordinance defeated the intent of the state statute by setting a different standard by which an offense would be judged. The municipal ordinance tended to legalize what the state statute prohibited. That is not the case with the Post Falls marijuana regulation which makes the same conduct an offense as does the state statute. The detail incorporated in the Uniform Controlled Substances Act, like the state liquor regulations, does not suggest a preemptive intent, especially in light of Section 37-2735.

We also conclude that there is no conflict between the municipal ordinance and the state statute. As noted, both deal with a matter of state and local concern. In addition, the difference in penalty is not such as to interfere with state regulation or to grade the offense differently than the legislature has done by the Uniform Controlled Substances Act. Both are misdemeanor statutes. The elements of the crime are the same in each case and an offender could be prosecuted under either statute in the exercise of prosecutorial discretion.

The municipal ordinance does not interfere with the uniformity of the state statute inasmuch as the elements of the crime are harmonious and the legislature has expressed no intent to make the penalties uniform throughout the state. The penalty differential here is the same as that approved by the Supreme Court of Colorado in City of Aurora v. Martin, *supra*. It may be that courts have not been willing to find a conflict in such penalty differentials for the reason that a sentencing court could impose the lesser penalty even if proceeding under the state statute.

We conclude that the Post Falls ordinance is valid.

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LYNN E. THOMAS  
Deputy Attorney General

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September 23, 1974

Mr. Richard J. Hutchison  
Deputy Director  
Idaho Personnel Commission  
STATEHOUSE MAIL

OFFICIAL OPINION #75-52

Dear Mr. Hutchison:

You have asked several questions relating to the interplay between the federal Fair Labor Standards Act of 1938, as amended, and Section 67-5327(e), Idaho Code, as the two laws affect overtime compensation for State classified employees.

I

Your first question asks whether the Fair Labor Standards Act, as it defines overtime for law enforcement and fire protection personnel, "preempts" the State law's definition of overtime for public employees. The Fair Labor Standards Act defines overtime for law enforcement and fire protection personnel in Title 29, Section 207(k), United States Code, an exception to the general overtime definition found in Title 29, Section 207(a), United States Code. Idaho law defines overtime for "public employees" in Title 67, Section 5327(e), Idaho Code, there being no separate definition for law enforcement and fire protection personnel.

The conflict in issue presents itself as follows: The above-cited State law defines overtime for public employees as any time worked in excess of eight (8) hours in a period of twenty-four (24) consecutive hours or forty (40) hours in a period of one hundred sixty-eight (168) consecutive hours. The State standards will hereinafter be referred to as "eight (8) hours per day or forty (40) hours per week." The federal Fair Labor Standards Act, on the other hand, provides, in substance, that law enforcement and fire protection personnel

accrue overtime only after they have worked over sixty (60) hours in a week. The FLSA provides for a yearly reduction of the sixty-hour figure through January 1, 1978; nonetheless, the overtime cut-off figure for law enforcement and fire protection employees will remain higher under the FLSA than the eight (8) hours per day/forty (40) hours per week standard adopted by State law.

Obviously, the State provisions defining overtime for "public employees," which apply to law enforcement and fire protection personnel, are more restrictive in favor of the employee than the federal overtime law covering the same personnel. In light of this conflict, you ask which definition prevails. It is my opinion that the State law definition of overtime for "public employees" prevails over the federal law definition covering law enforcement and fire protection personnel, for the reasons outlined below.

Section 18(a) of the Fair Labor Standards Act, Title 29, Section 213(a), United States Code, provides:

No provision of this Act or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this Act or a maximum workweek lower than the maximum workweek established under this Act, and no provision of this Act relating to the employment of child labor shall justify noncompliance with any Federal or State law or municipal ordinance establishing a higher standard than the standard established under this Act. No provisions of this Act shall justify any employer in reducing a wage paid by him which is in excess of the applicable minimum wage under this Act, or justify any employer in increasing hours of employment maintained by him which are shorter than the maximum hours applicable under this Act.

Commerce Clearing House Explanation .84 interprets Section 18(a), its legislative history, and cases involving the statute in question as follows:

The FLSA states that none of its minimum wage, maximum hours, or child labor provisions, or orders issued thereunder, shall justify non-compliance with higher labor standards established

by any federal or state law, or municipal ordinance. Thus, the Act's standards take precedence only in the event that those standards are comparatively higher. Nor are the provisions of the Act to be considered as justification for reduction of wages higher than the applicable minimum, or for extension of shorter hours to the maximum permissible. Government enforcement agents follow a similar policy with respect to the requirement of equal pay for equal work regardless of sex.

It is clear from the above-cited material that the Fair Labor Standards Act does not purport to "preempt" State law or "occupy the field" of law governing State overtime compensation, but, rather, merely defines the maximum number of hours a State employer can work a State employee during a particular period without accruing overtime. The federal law extends certain benefits to private and public employees under its jurisdiction; however, when a state law extends higher benefits to such employees, the Fair Labor Standards Act, by operation of Section 18(a) of that Act, expressly yields to state law. Specifically, since Section 67-5327(a), Idaho Code, defines overtime for State employees as any time worked in excess of eight (8) hours per day or forty (40) hours per week, law enforcement or fire protection personnel who work in excess of either of these two standards have accrued overtime.

## II

It is unnecessary to deal with your second question, since it assumes my answer to your first question was opposite from the answer given.

## III

Your third question involves hours accrued by State law enforcement and fire protection personnel in excess of eight (8) hours per day or forty (40) hours per week, but not in excess of the number of hours which may be accrued in a "tour of duty" without constituting overtime under the Fair Labor Standards Act.

It is clear that the State would be required to pay cash compensation for overtime worked in excess of the federal standard at a rate of no less than one and one-half times the employees regular rate of pay, see Title 29, Section 207(a)(1), United States Code. But what is the proper method and rate of payment for overtime when only State law applies? May

the state of Idaho pay such overtime in "compensatory time" or is the State bound by the FLSA to pay such overtime in cash at a rate of at least one and one-half times the employee's regular rate of pay?

It is my opinion that the State may pay compensatory time for such overtime hours that do not constitute overtime under the FLSA. Where State law prevails in the computation of overtime, it should also dictate the method and rate of payment of such overtime. Title 67, Section 5327(e), Idaho Code, provides that certain hours, which would not constitute overtime under the federal standards, nonetheless constitute overtime under State standards. Thus, the State law is "more restrictive" in favor of the employee than the federal law in issue.

But in addition to retaining more restrictive overtime definitions than the federal law in issue, the State law also provides for two methods of paying overtime not provided for by the federal law:

- 1) Payment of cash compensation at the employee's regular hourly rate. See Title 67, Section 5330, Idaho Code;

or, as an alternative, and subject to certain restrictions,

- 2) Payment of compensatory time. See Title 67, Section 5329, Idaho Code.

One or both of the above-cited alternatives is open to the State employer when paying hours which constitute overtime under State law but not under federal law. To summarize, if State law prevails over federal law in providing a stricter definition of overtime, it also will govern the method and rate of payment of such overtime.

## VI

Your fourth question is answered by "III," above.

## V

Your fifth question asks whether classified State employees, excluded from coverage under the Fair Labor Standards Act--specifically, "executive, administrative and professional" employees--are subject to the provisions of the Idaho Code relating to overtime compensation. The answer is yes. Accordingly, the methods and rates of overtime compensation provided for in Section 67-5327(e), Idaho Code, are applicable to such employees.

Mr. Richard J. Hutchison

September 23, 1974

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I hope that I have answered your questions satisfactorily.  
If you have further questions, do not hesitate to contact me.  
It is important that the impact of the Fair Labor Standards Act  
on State employers is properly understood in all its particulars.

Very truly yours,

FOR THE ATTORNEY GENERAL

JOHN F. GREENFIELD  
Assistant Attorney General

JFG:lc

cc B. R. Brown  
Director  
Department of Labor

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STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

W ANTHONY PARK  
ATTORNEY GENERAL

September 23, 1974

Ms. Pat Gillespie  
Executive Secretary  
Idaho State Democratic Central Committee  
Room 424  
Idaho Bldg.  
Boise, ID 83701

OFFICIAL OPINION #75-53

Dear Ms. Gillespie:

You have requested an Attorney General's opinion concerning the legality of challengers coming and going freely from the polls whose duty it is to challenge the qualifications of those thought ineligible to vote. A second issue raised is if these challengers are prohibited by law from leaving the polls until they close, may they legally transmit the names of persons who have voted to runners in order to aid a "get-out-the-vote" drive. Section 34-304 Idaho Code, should be reviewed as statutory direction for resolution of your inquiry.

In addition to election judges, designated challengers and poll watchers are authorized to be present at the polls in non-voter capacities. Section 34-304, Idaho Code. With duties separate and distinct from those obligatory to challengers, poll watchers are to watch the receiving and counting of votes. The statute further commands that the poll watchers, though not the challengers, remain at the polls until they close. In establishing these two separate positions, the statute specifies that the mechanism for challenger appointment is a timely written request by the appropriate political party to the County Clerk. As regards a poll watcher, a written request signed by the county chairman and the secretary of the appropriate political party, or by a candidate or group of candidates is required. The statute does not speak to the duties or activities of a challenger other than to

Ms. Pat Gillespie  
September 23, 1974  
Page 2

say that his (her) purpose is to assert a challenge against one felt improperly qualified to vote.

A review of Idaho decisions reveals no case in point. However, the Supreme Court of Hawaii has recently analyzed statutes similar in import to Section 34-304. In Coray v. Ariyoshi, 506 P.2d 13 (1973), Plaintiffs, poll watchers, brought an action seeking to enjoin the chief election officer of the state from prohibiting them from keeping or maintaining a record of those registered voters who voted. Admittedly, the record was kept to enable the followers of one candidate or party to know which registered partisans had not yet voted. The poll watchers sent the lists of those who voted to the party headquarters where the names of those who had voted were marked off the "get-out-the-vote" list. The court reasoned that the poll watchers were not only authorized to raise the issue of any election law violations they might observe, but were permitted to record the names of those who voted under the statutory authorization "to observe the conduct of the election in the precinct". H.R.S., Section 11-77(c), cited in Coray v. Ariyoshi, supra, at p. 17. Conceptually, the court's holding stands for the proposition that where an action is not specifically prohibited, the actor may not be held to have violated the statute. Coray v. Ariyoshi, supra, at p. 17.

Section 34-304 does not specifically prohibit challengers or poll watchers from recording the names of those who vote while performing their respective functions at the polls. Indeed, the statute does not prescribe the activities of a challenger in any manner. Therefore, it is the conclusion of the Attorney General that a challenger may record the names of those who vote and transmit it without contravention of Section 34-304.

Very truly yours,

FOR THE ATTORNEY GENERAL

CHRISTOPHER D. BRAY  
Assistant Attorney General

CDB:lm

September 23, 1974

Mr. Clyde Koontz  
Legislative Auditor  
STATEHOUSE MAIL

OFFICIAL OPINION #75-54

Dear Mr. Koontz:

This letter is in response to your request for an official opinion on the proper method of distributing funds generated by horse racing. In particular, you wish to know whether the percentage paid to the Idaho Horse Racing Commission should be based solely on the pari-mutuel "handle" or on all receipts including gate receipts and program sales.

In the United States, the amount paid to the state has traditionally been calculated as a percentage of the wagering pool. See e. g., Everhart v. People, 54 Colo. 272, 130 P. 1076 (1913). This traditional practice is presently followed in every state which authorizes pari-mutuel wagering, and there is no precedent for the inclusion of gate receipts and program sales in the pool from which the state takes its percentage. See III J. Humphreys & W. Basve, Racing Law 8 (1973).

The Idaho Legislature apparently intended to follow the practice of other states in this regard. Section 54-2513(A) of the Idaho Code states:

Each licensee conducting the pari-mutuel system shall distribute all sums deposited in any pool to the winner thereof, less an amount as prescribed in the following table:

Gross daily receipts	Licensee percentage	Public school percentage
To \$20,000.	15 1/4%	3
\$20,000. to \$30,000.	14 %	1 1/4%
\$30,000. to \$40,000.	13 %	2 1/4%
\$40,000. to \$50,000.	12 %	3 1/4%
\$50,000. +	11 %	4 1/4%

Mr. Clyde Koontz  
September 23, 1974  
Page 2

One and one-quarter per centum ( $1\frac{1}{4}\%$ ) of all gross receipts shall be paid to the Idaho state horse racing commission.

One-half of one per centum ( $1/2\%$ ) 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, and racing Appaloosas, subject to the approval of the commission. Funds not distributed as approved by the commission shall revert to the school endowment fund six (6) months after the end of the calendar year in which they were earned.  
Ch. 96, §2, 1974 Idaho Session Laws 1197.

The first sentence of Section 54-2513(A) clearly provides that the percentage due the state is to be based only on the daily receipts from pari-mutuel wagering. Although the statute authorizes the payment of "one and one-quarter per centum of all gross receipts" to the horse racing commission, the reference is to "all gross receipts generated by the mutuel handle." Any other reading would be incongruous, because the statute would then fail to allocate the entire mutuel pool.

Therefore, it is our opinion that the "one and one-quarter per centum of all gross receipts" payable to the Idaho Horse Racing Commission refers only to the pari-mutuel receipts.

Very truly yours,

FOR THE ATTORNEY GENERAL

CHRISTOPHER D. BRAY  
Assistant Attorney General

CDS:lc



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

W. ANTHONY PARK  
ATTORNEY GENERAL

September 26, 1974

Mr. Ralph Marriott  
Sheriff of Caribou County  
Caribou County Courthouse  
Soda Springs, Idaho 83276

OFFICIAL OPINION #75-55

Dear Sheriff Marriott:

This is in response to your letter wherein you requested an opinion on the following questions:

"(1) If a person is serving a jail sentence in the county and his behavior is such that the sheriff and the prosecuting attorney agree that the prisoner is entitled to five days off for each and every month served, does the magistrate judge of the county have the right to disallow the five days off for good behavior?"

"(2) Is it proper procedure for the city police department after making an arrest of a person alleged to have committed a felony to keep custody of that person until he is bound over to district court?"

Idaho Code, Section 20-621, states:

"Every person serving a jail sentence in a county jail in the state of Idaho who had a good record as a prisoner and who performs the tasks assigned him in an orderly and peaceful manner, shall upon the recommendation of the sheriff and prosecuting attorney be allowed the five days off of each and every month of his sentence, by the probate judge."

Mr. Ralph Marriott  
September 26, 1974  
Page 2

The statute plainly says that a person serving a jail sentence who has a good record as a prisoner shall be allowed five days off upon the recommendation of the sheriff and prosecuting attorney by the probate judge. It appears under this statute there is an affirmative duty placed upon the court to commute the sentence in response to the recommendation of the sheriff and prosecuting attorney. Furthermore, even though a person has been placed on probation by the magistrate judge and the party violates the probation and is brought back before the magistrate for this probation violation and is ordered to serve the original sentence, the magistrate would still have to commute the sentence in response to a recommendation of the sheriff and prosecuting attorney if the person had a good record as a prisoner.

In answer to your second question, it is our opinion that since there is no mandatory requirement in the Idaho Code that a person accused of committing a felony be kept in the county jail, the procedure your county is using is a correct one.

Please do not hesitate to contact this office if you have further questions concerning this matter.

Very truly yours,

FOR THE ATTORNEY GENERAL

ROBERT L. MILLER  
Chief Deputy Attorney General

RLM:lm

September 26, 1974

Mr. Gordon Trombley  
State Land Commissioners  
Department of Public Lands  
STATEHOUSE MAIL

OFFICIAL OPINION 975-56

RE: Corporate Purchases of Public Lands

Dear Mr. Trombley:

This letter is in response to your request for an opinion on the application of Article IX, Section 8 of the Idaho Constitution to prospective corporate purchasers of public school lands. In particular, you wish to know whether the sale of 320 acres of public school land to a corporation bars further sales to corporations affiliated with the original purchaser.

Article IX, Section 8 states that school lands shall "... be sold in subdivisions of not to exceed three hundred and twenty acres of land to any one individual, company or corporation . . . ." This section, which originally limited purchases to 160 acres, was enacted to preserve the availability of public school endowment lands for acquisition by homesteaders and to

"... cut off and estop any syndicate or any corporation, or any person or set of persons or association of persons from gobbling up more than 160 acres of land." Remarks of Mr. Mayhew, Idaho Constitutional Convention, vol. 1, at 841.

In order to effectuate the intention of the draftsmen, Article IX, Section 8 has been interpreted as an absolute, rather than a temporal, limitation. Each natural or juristic person

is eligible for only one 320-acre purchase of school lands within its lifetime. Attorney General's Opinion by George C. Detweiler, September 10, 1969 (copy attached).

Obviously, corporations must not be permitted to evade the 320-acre limitation by organizing subsidiaries to purchase additional school lands. The courts have consistently held that activities which

"cannot be done directly . . . because of constitutional limitations cannot be accomplished indirectly. That which the constitution directly prohibits may not be done by indirection through a plan or instrumentality attempting to evade the constitutional prohibition." O'Bryant v. City of Idaho Falls, 78 Idaho 313, 325, 303 P. 2d 672, 678, (1956).

Therefore, if evidence of an attempt to evade the constitutional provision is available, a sale of school land to a subsidiary corporation will be set aside as fraudulent. Webster--Soule Farm v. Woodmansee, 36 Idaho 520, 221 P. 1090 (1922).

Even if a corporation is organized in good faith, it should not be permitted to buy school lands if it is a "mere instrumentality" or agent of a parent organization which has already purchased its allotted share. Whether a corporation is the alter ego of another is primarily a question of fact which must be resolved on a case-by-case basis. Surety Life Ins. Co. v. Rose Chapel Mortuary, Inc., 95 Idaho 599, 514 P. 2d 594 (1973). There are, however, several factors which are universally deemed relevant in such cases. If the subsidiary lacks substantial business contacts other than with the parent or operates solely with capital furnished by the parent, it will ordinarily be regarded as an inseparable adjunct of the dominant corporation. See Darling Stores Corp. v. Young Realty Co., 121 F. 2d 112 (8th Cir. 1941), cert. denied, 314 U.S. 638. If the parent and subsidiary have common officers and directors or a joint accounting or payroll system, the subsidiary may be viewed as the alter ego of the parent. See Southern R. Co. v. Crosby, 201 F. 2d 373 (4th Cir. 1953). Commingling of assets by a parent and a subsidiary will also prompt the courts to disregard the separate existence of the latter, particularly if the assets vest in the parent in the event of dissolution. See O'Bryant v. City of Idaho Falls, 78 Idaho 313, 303 P. 2d 672 (1956).

An application of the tests enumerated above should resolve many cases arising under Article IX, Section 8. Individual cases may, however, require an intelligent consideration of other factors in order to effectuate the constitutional policy.



Mr. Gordon C. Trombley  
September 26, 1974  
Page 3

Therefore, the corporate structure of affiliates of the Latter-Day Saints Church should be analyzed to determine the degree of independence of each "subsidiary corporation" within Idaho. If, after applying the general tests set forth above, the "local corporations" are found to be mere instrumentalities or totally dependent subsidiaries of the Corporation of the Presiding Bishop, the 320-acre limitation would apply to the Church as a whole and the local corporations would not be entitled to purchase any land if the Church, through any of its various corporations, has purchased 320 acres.

The local corporations should, however, be granted an opportunity to demonstrate their independence from the Corporation of the Presiding Bishop. If they can establish their autonomy, they are individually entitled to purchase 320 acres of school land.

Very truly yours,

FOR THE ATTORNEY GENERAL

TERRY E. COFFIN  
Assistant Attorney General

TEC:lc

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Open

STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL  
BOISE 83720

W. ANTHONY PARK  
ATTORNEY GENERAL

September 26, 1974

Mr. H.W. Turner  
Administrator  
Division of Budget,  
Policy Planning and  
Coordination  
Building Mail

OFFICIAL OPINION #75-57

Dear Mr. Turner:

This letter is in answer to your recent memorandum to us concerning 1973 appropriations to agencies of the state for use of revenue sharing funds from the federal government.

Section 123(a)(4) of Public Law 92-512 and federal regulations thereunder state that revenue sharing funds will be provided for and entitlement to use of them will be ". . . only in accordance with the laws and procedures applicable to the expenditure of its own revenues. . . ." for the agency which will be using the revenue sharing funds.

Section 67-5309, Idaho Code states that when an appropriation bill is made without any stated time restriction, it shall be available for expenditure only for the period between July 1, of the year the bill was passed until June 30 of the following year. Appropriations which are to expire on June 30 of any year may be encumbered under the provisions of Section 67-3521, Idaho Code. If a department fails to properly encumber these funds the appropriation expires on June 30 of the year following its passage, Peck v. State, 63 Idaho 375, 381, 120 P.2d 820.

Under House Bill #122, Chapter 88, 1973, Idaho Session Laws, §4 the appropriation for the reorganization commission does not expire until the commission is terminated since that term is attached to its appropriation.

Mr. H.W. Turner  
September 26, 1974  
Page 2

As to Senate Bill 1245, Chapter 252, 1973, Idaho Session Laws the steps have been taken prior to June 30, 1974 to encumber funds, but due to a mistake in category the State Auditor returned the request to encumber to the Bureau of Mines in Moscow. It was not returned to the State Auditor until after June 30, 1974. In this case, however, we believe that the request to encumber was in the hands of the State Auditor before June 30, 1974 and that the extra time taken to correctly categorize the item does not affect it. The request to encumber was timely made and the amount of \$12,500 for the item under Senate Bill 1245 1973 Idaho Session Laws should be made.

As to other specified appropriations of the 1973 Legislature (Senate Bill 1239, House Bill 340 and House Bill 345) such amounts as were not encumbered as provided for by Section 67-3521, Idaho Code are subject to Section 67-3509, Idaho Code because no date of expiration is expressed in any of these appropriation bills. These appropriations expired and lapsed on June 30, 1974 and no funds can be expended which were not encumbered on June 30, 1974.

Sincerely yours,

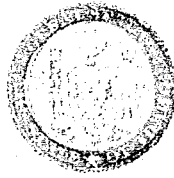
FOR THE ATTORNEY GENERAL

WARREN FELTON  
Deputy Attorney General

WF:lm

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*12-1-74*



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83707

W. ANTHONY PARK  
ATTORNEY GENERAL

October 4, 1974

Mr. Donald J. Pieper  
Project Director, Alcohol  
Safety Action Project  
102 South 27th  
Boise, Id 83706

"OFFICIAL OPINION #75-58"

Re: Reallocation of Liquor Funds

Dear Mr. Pieper:

Your position that the Legislature of the State of Idaho in HB 652 changed the allocation of the surcharge imposed by the state liquor dispensary is correct. Prior opinions referring to disposition of the proceeds of sale of alcoholic beverages were issued by this office on September 28, 1971 and August 11, 1973. HB 652, Chapter 213, 1974 Idaho Session Laws, was, of course, enacted subsequent to either of the foregoing opinions.

Only to the extent that the opinions of September 28, 1971 and August 11, 1973 are inconsistent herewith, the same are amended.

HB 652 amended I. C. 23-217(c) by reducing the surcharge from 7 1/2% to 2%. Subparagraph (d) of said section, reflects that the additional 2% surcharge shall be remitted to the State of Idaho for credit to the Alcohol Safety Action Project Fund established by HB 652.

The formula for determining the retail sale price of alcoholic liquor is affected only to the extent that a total surcharge of 12%, pursuant to HB 652, will be imposed rather than the previous 17 1/2%. An additional 1% of the retail price of alcoholic liquor for purposes of providing revenue for Liquor Law Enforcement continues to apply. I. C. 23-806.

CONCLUSION

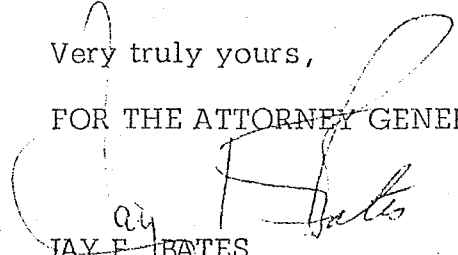
(1) For purposes of Liquor Law Enforcement, 1% of the retail sale price of all alcoholic liquor, as fixed by the Idaho Code, including surcharge, shall be segregated and credited to Liquor Law Enforcement Fund pursuant to I. C. 23-806.

(2) For purposes of credit to the Alcohol Safety Action Project Fund, 2% of the retail sale price of alcoholic liquor (less its prorated share of discount for broken or unbroken of case lot of goods sold to any licensee) shall be paid by the state liquor dispensary to the State Auditor for credit to the Alcohol Safety Action Project Fund.

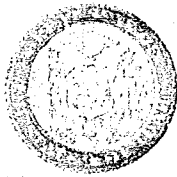
(3) Whenever a surplus exists in the liquor fund after retention and distribution as otherwise provided in the Idaho Code, said surplus will be distributed in accordance with I. C. 23-404.

Very truly yours,

FOR THE ATTORNEY GENERAL

  
JAY F. BATES  
Deputy Attorney General  
Assigned to the Department  
of Law Enforcement

JFB/b  
cc: John Bender, Director  
W. Anthony Park, Attorney General



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83707

W. ANTHONY PARK  
ATTORNEY GENERAL

October 4, 1974

Mr. Jarrold L. Harrington  
Executive Secretary, Idaho  
State Horse Racing Commission  
Building Mail

"OFFICIAL OPINION #75-59"

Re: Use of Motor Vehicles From The  
Department of Law Enforcement Motor Pool

Dear Mr. Harrington:

On September 12, 1974, you requested an official opinion on the use of state owned vehicles, furnished by the Department of Law Enforcement, for business purposes. You also posed a second question which will be the subject of a subsequent opinion.

The Idaho State Horse Racing Commission is financed by a dedicated fund which is derived from all sums of money due the Commission pursuant to Title 54, Chapter 25, Idaho Code. From the sums received and retained by the Idaho State Horse Racing Commission salaries, travel expenses, operating costs and any other expenses necessary to carry out the intent of the Act are to be paid.

I. C. 54-2514 provides that no salary, wages, expenses or compensation of any kind shall be paid by the State of Idaho for or in connection with the work of the Commission.

If I correctly understand the proposal to allow the Commission to use state vehicles under the jurisdiction of the Department of Law Enforcement, a cost factor will be established for the use of the vehicles; and the Department of Law Enforcement will bill the Commission for the expense. Incorporated within the cost factor will be such items as depreciation, maintenance, gas and oil, etc.

Mr. Jarrold L. Harrington  
Page 2  
October 4, 1974

The billing for the use of the vehicles, and payment therefore, will carry out both the spirit and intent of the law.

Further, such billing and payment is documentary evidence that the statute proscribing payment of salaries, wages and expenses or compensation of any kind has been complied with.

Very truly yours,

FOR THE ATTORNEY GENERAL

*J. F. Bates*  
JAY F. BATES,  
Deputy Attorney General  
Assigned to the Department  
of Law Enforcement

JFB/b

cc: John Bender, Director  
W. Anthony Park, Attorney General



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

W. ANTHONY PARK  
ATTORNEY GENERAL

October 8, 1974

Ms. Beverly Ragan  
Clerk of the District Court  
Benewah County  
St. Maries, Idaho 83861

OFFICIAL OPINION #75-60

Dear Ms. Ragan:

Your request for an Attorney General's Opinion outlining the procedure for filling a vacancy for the office of county commissioner has been received this date. Your inquiry raises the particular issue of how the vacancy is to be filled when first, the office in question is for a staggered term next appearing on the 1976 general election ballot; and second, when the vacancy occurs subsequent to the primary but prior to the general in the bi-annual election year of 1974? The applicable decisions of the Idaho Supreme Court as they review Sections 59-404, 59-906, 59-913, and 59-914, Idaho Code, respectively will be analyzed in response to your query.

The vacancy in question occurred September 26, 1974. Shortly thereafter, Governor Cecil D. Andrus appointed Mr. Jack A. Buell to fill the vacancy pursuant to Section 54-906, Idaho Code. Mr. Buell's appointment is an interim one, for as an appointee, he fills the vacancy only until the next general election when the vacancy must be filled by the electorate. Section 59-913, Idaho Code; Winter v. Davis, 65 Idaho 696, 699, 152 P. 2d 249, 252 (1941). His appointment is not for the unexpired portion of the four-year term, for:

"... our legislature has recognized the democratic principle which requires that elective offices, so far as possible, be filled at all times by the electors and that vacancies in elective offices should be filled at an election as soon as practical after the vacancy occurs, and appointments to fill vacancies should be effective only until the people may elect." Winter v. Davis, supra., 152 P. 2d at p. 253.



While the Winter v. Davis decision directs that the electorate fill the vacancy as soon as practical, Section 59-909, Idaho Code, specifies that a vacancy occurring thirty (30) days prior to any general election is to be filled thereat. Left unanswered by the Winter v. Davis court is the question of whether an appointee should serve to the date of the general election or the canvass of the votes thereof or until the second Monday in January succeeding said election. As concerns the office of county commissioner, an appointee serves until his successor is elected and qualified. Section 59-404, Idaho Code; White v. Young, 88 Idaho 188, 196, 397 P. 2d 756, 761 (1954). Thus Mr. Buell may serve in his appointed capacity until he or his successor is sworn into office on the second Monday in January, 1975.

Section 34-715, Idaho Code, articulates the manner in which a vacancy is to be filled when that vacancy occurs subsequent to the primary but before the general election. As it relates to the vacancy before you, the Benewah County county central committees fill the vacancy for nomination purposes for their respective political parties. The exercise of this right is incumbent upon the Democratic Party as well, notwithstanding Mr. Buell's appointment by the Governor, for the vacancy is only permanently filled by the electorate. Sections 59-906, 59-913, 59-914, Idaho Code; Winter v. Davis, supra; White v. Young, supra.

Each county central committee should therefore be officially notified of the existence of the vacancy so that it may seek candidate representation for the office in question.

Concomitant to the issue of how this vacancy is to be filled is the question when must all central committee nominations be certified to your office for paper ballot purposes. A careful scrutiny of our state's election laws produces no statutory guideline. As county clerk, you are charged with general supervisory powers to achieve and maintain a maximum degree of correctness, impartiality, efficiency, and uniformity in the administration of election laws in your county. Section 34-206, Idaho Code. Within the time remaining before the general election, you should devise and implement a procedure which will insure the filling of the vacancy pursuant to the statutory criteria stated in Section 34-206. As your paper ballots do not include the office in question, a period of time not to exceed 10 days from receipt of this opinion is recommended for certification of vacancy fillings by the respective county central committees. Within this period, your printer must prepare the ballot so as to include the particular office for county commissioner which, but for the vacancy, would not otherwise be before the

electorate. Subsequent to this ten-day period, any vacancy filling would receive ballot status pursuant to Section 34-912, Idaho Code. This statute authorizes the distributing clerk to affix stickers containing the name of a candidate properly designated to fill the vacancy to the ballot on election day. As a practical matter, it is expected that county central committees will act as expeditiously as possible so as to afford their nominee "printed" rather than "affixed" placement on the ballot. In addition, early certification is the only means to guarantee that all absentee ballots will reflect each party's nominee. As it concerns the vacancy, absentee ballots should evidence a position for each party in Benewah County, as well as a position in the write-in column. In the event of certification subsequent to the ten-day period, your office could then affix the candidate sticker accordingly. No statutory provision contemplates one other than an election official to affix a sticker to a ballot, and once the ballot is executed by the voter, it may not be altered. Section 34-1005, Idaho Code. Therefore, requests for absentee ballots received prior to the expiration of the ten-day period should, insofar as is practical, be responded to immediately after the ballot is printed to include the office now vacant. Thereafter, and assuming certification of a nominee by a county central committee after the ten-day period, absentee ballots should have a sticker affixed by your office. In the absence of statutory specification and in this instance, the last day upon which an appropriate certification should be accepted by you is to be determined by the date which you are able to receive candidate stickers from the printer for delivery to the election judges in your precincts. Section 34-912.

Should you be called upon to render decisions not reasonably contemplated within the scope of the this opinion but integral to the issue it addresses, please consult with this office or that of the Secretary of State before taking further action.

Sincerely,

FOR THE ATTORNEY GENERAL

CHRISTOPHER D. BRAY  
Assistant Attorney General

CDB:lc

cc Pete T. Cenarrusa  
Secretary of State

Senator Cy Chase

Mr. Bill Murphy

G 30.1

October 24, 1974

Dr. James A. Bax, Director  
Department of Health and Welfare  
Statehouse  
Boise, Idaho 83720

5  
OFFICIAL OPINION #76-61

Dear Dr. Bax:

By letter dated September 5, 1974, you posed the questions:

- 1) Can the term of a contract entered into under the authority of Section 31-4403, Idaho Code, exceed the two-year term of the boards of commissioners of the various counties?
- 2) What is the maximum permissible term for such a contract?

In answer thereto I submit the following for your consideration.

The answer to your first query is yes. Every county has the specific power to "make such contracts, and purchase and hold such personal property as may be necessary to the exercise of its powers." Section 31-604(3), Idaho Code.

The county boards of commissioners are empowered to "do and perform all other acts and things required by law not in this title enumerated, or which may be necessary to the full discharge of the duties of the chief executive authority of the county government." Section 31-328, Idaho Code.

In limitation of this authority is Section 31-1607, Idaho Code, which, when read together with Section 31-1604 imposes a

one-year limit on the incurring of debts by the counties. More importantly, Article 8, Section 3, Idaho Constitution provides in pertinent part:

No county. . . 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, without the assent of two-thirds of the qualified electors thereof voting at an election to be held for that purpose. . . . Any indebtedness of libability incurred contrary to this provision shall be void: Provided, that this section shall not be construed to apply to the ordinary and necessary expenses authorized by the general laws of the state. (Emphasis added.)

It is therefore obvious that only contracts for "ordinary and necessary expenses" may exceed the one-year statutory limit. The Idaho Supreme Court has stated in referring to this phrase that, ". . . the two terms are used conjunctively; hence, to come within the constitutional proviso or exception, expenditures made in excess of the revenues of any current year must not only be for ordinary expenses, such as are usual to the maintenance of the county government, the conduct of its necessary business, and the protection of its property, but there must exist a necessity for making the expenditure at or during such a year." Dunbar v. Board of Commissioners, (1897) 5 Id 407, 412, 49 Pac 409.

In trying to define this language the U.S. District Court has said, "Unfortunately this phrase does not yield itself to a comprehensive, general definition, and each case must be adjudged in the light of its own facts." Dexter v. Clearwater County (USDC, Id, 1916) 735 Fed 743, 751, aff'd at 248 Fed 401 (CCA9, 1918). The court then went on to say, "An expense is ordinary if it is in an ordinary class, if in the ordinary course of the transaction of municipal business, or the maintenance of municipal property, it may, and is likely to become necessary. It will further be assumed that if by law a specific duty is imposed, and the mode of performance is proscribed, so that due discretion is left with the officer, the expense necessarily incurred in discharging the duty is a 'necessary expense'."

Section 31-4403 provides a mandate to the board of commissioners as follows:

"It shall be the duty of the board of county commissioners in each of the several counties to acquire sites or facilities, and maintain and operate solid waste disposal systems. Such maintenance and operation may be performed through or by:

- (1) Employees, facilities, equipment and supplies hired by or acquired by the board of county commissioners;
- (2) Contracts entered into by the board to have the maintenance and operation performed by private persons;
- (3) Contracts entered into by the board to have the maintenance and operation performed by another unit of government;
- (4) Franchises, granted pursuant to law by the board, for all or any part or parts of the county;
- (5) Any combination of subsections (1), (2), (3) and (4) of this section.

Whether the contract described in your question is one for "ordinary and necessary expenses" would ultimately depend on the facts and circumstances confronting the Board of County Commissioners; however, in appropriate circumstances they could determine such expenses to be both "ordinary" and "necessary."

As to the second question, an application of the rationale of the prevailing case law indicates that once it is determined that the expense comes within the "ordinary and necessary" proviso, the length of the contract period, although not limited to one year, must be of such a period as to allow periodic review when dealing with services which will remain a necessary expense into the foreseeable future.

The length of any given contract must be a matter for the board's discretion and good judgment in its efforts to exact for the county the most advantageous terms for the service to be rendered.

Dr. James A. Bax  
October 24, 1974  
Page 4

If you have any further questions concerning this matter,  
please feel free to contact this office at your convenience.

Very truly yours,

FOR THE ATTORNEY GENERAL

TERRY E. COFFIN  
Assistant Attorney General  
Environmental Services

TEC:RMM:lc

15  
October 15, 1974

Mr. Joseph Sureck  
U.S. Department of Justice  
Immigration and Naturalization  
Los Angeles, California 90012

OFFICIAL OPINION #75-62

RE: Your File A30 009 505

Dear Mr. Sureck:

This letter is in answer to your recent letter concerning the marriage of Feliciano Negrete in Idaho on October 9, 1970, and the fact that the Mexican court had issued a divorce decree on February 14, 1970 granting a divorce to a former wife of Mr. Negrete and stating that Mr. Negrete could not marry again for a year's period.

We believe that the Idaho courts would recognize his second marriage in Idaho as valid in spite of the restriction of the Mexican court.

There are no Idaho cases exactly on point in this matter; therefore, my research has been into cases of other jurisdictions. It appears that where a restriction by statute or decree is placed upon remarriage as a part of the divorce, the question of whether another state or country will recognize this restriction upon remarriage or not depends to a great extent upon whether or not a final and absolute decree of divorce has been granted. If a final absolute decree of divorce has been granted and the restriction is in the nature of a punishment or a penalty for the guilty party in the divorce, the courts of another state or country will ordinarily disregard the restriction and allow a second marriage within the restricted period. See for instance, in re Crane (1912) 170 Mich. 651, 136 N.W. 587; Griswold v. Griswold (1913) 23 Colo. App. 365, 129 P. 560; Crowse v. Wheeler (1916) 52 Colo. 51 158 P. 1100; Thorp v. Thorp (1932) 90 N.Y. 602; VanVoorhis v. Brintnall (1931) 86 N.Y. 13 40 Am. R. 305; Warrender v. Warrender (Eng) 2 Cl. and Fin. 529530; Comm. v. Lane 113 Mass. 458.

Mr. Joseph Surack  
October 15, 1974  
Page 2

On the other hand, if the restriction on remarriage in the divorce is in a divorce which is not final, and the restriction relates to something such as time for appeal or a waiting period for the divorce to become final, and if it applies to both parties equally and is not a penalty against the guilty party, then the courts seem to agree that an attempted second marriage is void and invalid. McLennan v McLennan (1897) 31 Ore. 480, 50 P. 802, 38 LRA 863, 64 Am. St. R. 835.

In the case before us, it is clear from the Mexican decree that an absolute decree of divorce was granted to the wife in Mexico, and that as a penalty against the guilty or absent husband, it was decreed that he could not marry again for a year.

This is in the nature of a penalty. The Idaho courts would not recognize it and would hold that the second marriage was valid in Idaho in spite of the attempted restriction by the Mexican court. We also believe that the second marriage would be held valid throughout the United States in other courts.

As an aside and a possible additional reason for holding this marriage valid, Idaho presently still recognizes common law marriage, and if Mr. Negrete was still an Idaho resident claiming to be married to the second woman after the year's period was over (that is, on February 21, 1971), the marriage, in any case, would have become valid on that day. Nicholas v. Idaho Power Co. (1942) 63 Ida. 675, 125 P. 2d 321.

Sincerely yours,  
FOR THE ATTORNEY GENERAL

WARREN FELTON  
Deputy Attorney General

WF:lc

G 40.1





STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

W. ANTHONY PARK  
ATTORNEY GENERAL

October 9, 1974

Ms. Margo Wiley  
Department of Administration  
Risk Management  
Building Mail

Official Opinion #75-63

Dear Ms. Wiley:

You have asked whether funds received via interaccount billing on receipts to appropriation may be deposited in the Department of Administration's "retained risk fund." In addition, you wish to know whether insurance premiums may be paid from the retained risk fund.

The Legislature has clearly stated that the retained risk fund "shall be used solely for payment of or upon losses not otherwise insured and suffered by the state. ..." Ch. 252, §5, 1974 Idaho Session Laws 1647, 1651. Interaccount billing for the initial funding and maintenance of the retained risk fund must not be commingled with advance charges for the cost of providing insurance coverage. Ch. 252, §6, 1974 Idaho Session Laws 1647, 1652. Interaccount receipts, other than those earmarked for the retained risk fund, must be deposited in the "general interaccount fund." Idaho Code, Section 67-3516(3). Receipts to appropriation, on the other hand, must be credited into the "miscellaneous receipts fund." Idaho Code, Section 67-3516(4).

Therefore, it is our opinion that interaccount billing funds and receipts to appropriation may not be deposited in the retained risk fund and the fund may not be used to pay insurance premiums.

Very truly yours,

FOR THE ATTORNEY GENERAL

CONLEY WARD, JR.

Assistant Attorney General

CW:lm



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

W. ANTHONY PARK  
ATTORNEY GENERAL

October 15, 1974

Mike M. McGreer  
Director of Personnel and Training  
Idaho Department of Corrections  
Box 7309  
Boise, Idaho

Dear Mr. McGreer:

This letter is in reply to your request on behalf of the Idaho Department of Corrections for an opinion from this office relating to the following question:

May deadly force be used to recapture or prevent the escape of a person who has been civilly committed to the Mental Health Facility at the Idaho State Penitentiary?

Our research in this matter leads us to believe that Idaho is unique in that its Mental Health Facility is a part of the State prison facility. Therefore, statutory and case law in the area of escape from mental health centers housed within prison facilities is non-existent. Clearly the authorization to use deadly force to prevent the escape of a "convict" granted by Idaho Code 20-111 does not apply to those who are civilly committed to the Mental Health Facility.

Idaho Code 66-361 charges the State Board of Corrections and the Department of Health and Welfare to provide "custody, evaluation, and treatment" of dangerously mentally ill persons who are committed to the Mental Health Facility. Idaho Code 66-344 provides that, "every patient shall be entitled to humane care and treatment."

Such care and treatment has been dealt with in recent court cases. In the New York case of In The Matter of Israil Kesselbrenner v. Anonymous, 350 NYS 2D, 889, Judge Fuld stated: "To subject a person to a greater deprivation

Mr. McGreer  
Page 2  
October 15, 1974

of personal liberty than necessary to achieve the purpose for which he is being confined is, it is clear, violutive of due process." and, a civil committee who is "mentally ill, albeit dangerously so, ... is not a criminal and has never been involved in a criminal proceeding. His confinement is necessary for the protection of others but, to be constitutional, it must be therapeutic not punitive." (at 892) Persons who are committed to the Mental Health Facility are not criminals and the methods of preventing escape must be consistent with their civil commitment status.

It is the opinion of this office that deadly force may not be used except perhaps in circumstances where the civilly committed person poses an immediate threat to the life of another. That is to say, using an objective standard, the degree of force used must be determined by what is required under the circumstances.

Very truly yours,

FOR THE ATTORNEY GENERAL

RICHARD C. RUSSELL  
Deputy Attorney General

RCR:CE/jh/ls



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

W. ANTHONY PARK  
ATTORNEY GENERAL

October 17, 1974

Mr. Robert N. Wise  
Chief, Bureau of State Planning  
and Community Affairs  
Building Mail

OFFICIAL OPINION #75-65

Dear Mr. Wise:

In your letter of September 26, 1974, you have asked our opinion on the possibility of establishing the Executive Board of a Council of Governments as a county-wide planning commission to avoid the creation of separate planning commissions for each jurisdiction within the area represented by the board. There are two Code sections which must be analyzed to see if such a plan is possible.

Section 50-1101 of the Idaho Code grants the cities and counties the power to establish planning commissions and sets out the procedure for their establishment. One provision in this section will create a possible conflict for a Council of Government's Board to act as a planning commission by stating:

"The ordinance or resolution creating the commission shall set forth the number of members to be appointed, not more than one third (1/3) of which number may be ex-officio members by virtue of public office or position held in the city or county for which the commission is created, provided, one (1) member may be a non resident taxpayer."

By definition, an ex-officio member is a member "by virtue of the office that he holds". As required by the Department of Housing and Urban Development, a Council of Government's Board, to be eligible for planning funds, must be comprised of 2/3 elected officials who represent the various jurisdictions in the area. If the city councils and

Mr. Robert N. Wise  
October 17, 1974  
Page 2

the county commissioners in that region were to agree that the COG would become the county-wide planning commission, the membership of such a commission would be in violation of Section 50-1101 since the Executive Board of a Council of Governments is made up of more than 1/3 ex-officio members.

Section 50-1105 of the Idaho Code deals with the establishment of joint planning commissions, but again the wording of this section presents a problem for utilizing a COG as a planning commission. The section starts out by stating:

"The commissions of two (2) or more adjoining counties or the commission of any county with the councils of one (1) or more cities situated within said county are hereby empowered to cooperate in the formation of a joint planning commission for the making of regional plans for the county or region defined. ..."

This sentence indicates that prior to the establishment of a joint planning commission a county planning commission and/or city planning commissions must already be in existence and thereby empowered to create such a joint commission. The number of members and their method of appointment is not subject to Section 50-1101 of the Idaho Code and a COG could be appointed as the joint planning commission. This would defeat the purpose of using the Council of Government Board to perform the planning function and eliminate any duplication of effort since the county and city planning commissions would still be in existence.

It has been suggested that the word "commission" in the first sentence of this Code section does not refer to planning commissions, but instead refers to county commissioners. If this interpretation were correct, then the power to form joint commissions would lie with the city councils and the county commissioners who could then appoint a COG as a joint planning commission, without the prerequisite existence of other planning commissions. I don't believe that this interpretation was intended by the Legislature, but instead I believe that their intent was the creation of a Joint Planning Commission by combining existing commissions.

Mr. Robert N. Wise  
October 17, 1974  
Page 3

To establish a COG as a planning commission under the joint exercise of power provision of Section 67-2328 would pose a problem as to the extent of the Joint Commission's authority. The section restricts the joint exercise of power by stating:

" . . . but nothing in this Act shall be construed to extend the jurisdiction, power, privilege or authority of the State or public agency thereof beyond the power, privilege or authority said State or public agency might have if acting alone. . . "

Since a COG cannot be established as the planning commission under Section 50-1101 without violating the ex-officio membership restriction, and it cannot be established under Section 50-1105 without the prior existence of city and county planning commissions, a COG cannot assume the planning functions under Section 67-2328 without extending its authority beyond its granted limits.

It appears that the best solution to enable a council of government board to act as a planning commission is to revise existing legislation or enact new legislation. Section 50-1101 could be revised to eliminate the 1/3 restriction of ex-officio members and Section 50-1105 can be re-drafted to give the county commissioners and the city councils the power to create joint planning commissions. The best and preferred solution is to enact new legislation which will specifically grant a county or counties in conjunction with the cities within their jurisdictional boundaries the authority to establish the COG as the official planning commission for the entire area in question and limiting the city and county commissions to the zoning function.

Very truly yours,

FOR THE ATTORNEY GENERAL

*Ursula Kettlewell*

URSULA KETTLEWELL  
Assistant Attorney General

UK:lm

October 23, 1974

Mr. George A. Deshler  
Chairman of the Board of South  
Fork Coeur d'Alene River Sewer  
District  
408 Sixth Street  
Wallace, Idaho 83873

OFFICIAL OPINION #75-66

Dear Mr. Deshler:

In your recent letter and in your conversation with me you asked whether or not your sewer district could borrow and repay funds within a fiscal term, that is within your case a calendar year. The first portion of Article VIII, Section 3 of the Idaho Constitution reads:

"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, without the assent of two-thirds of the qualified electors. . ."

As you can see from the above statement in Article VIII, Section 3 the prohibition of this section is against incurring any indebtedness or liability exceeding in that year the income and revenue provided for it. Thus as you can see if the funds will be paid back within the fiscal year no problem arises under this section.

You intend to borrow in expectation of the federal funds. If these funds are received within the fiscal period

6200.1

Mr. George A. Deshler  
October 23, 1974  
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and if you are able to repay them in the fiscal period from revenues coming to you for that fiscal period you are in compliance with Article VIII, Section 3 of the Idaho Constitution.

Sincerely yours,

FOR THE ATTORNEY GENERAL

WARREN FELTON  
Deputy Attorney General

WF:lm

200.1



October 29, 1974

Mr. Clyde Koontz  
Legislative Auditor  
Statehouse Mail

OFFICIAL OPINION #75-68

Dear Mr. Koontz:

You have asked whether any existing board, agency, or officer of the State of Idaho has the authority to invest the Public Building Endowment Fund. We believe that your determination that this fund is "relatively impermanent" compels the conclusion that the state treasurer is solely responsible for the investment of the public building fund.

Section 67-1210 of the Idaho Code states:

"It shall be the duty of the state treasurer to invest surplus or idle funds in the state treasury, other than public endowment funds. . ."  
Ch. 130, §2; 1974 Idaho Session Laws 1371.

Even though the public building fund is often referred to as an "endowment" fund, the label is actually a misnomer. One essential attribute of an endowment fund is permanence. See e.g., Continental Illinois Bank & Trust Co. v. Blair, 45 F. 2d 345, 346 (7th Cir. 1930); Lakeside Country Day School v. King County, 179 Wash. 538, 38 P. 2d 254, 265 (1934). Since your investigation has determined that the public building fund is not a permanent fund, it is an idle fund which may be invested by the state treasurer.

Very truly yours,

FOR THE ATTORNEY GENERAL

CONLEY WARD, JR.  
Assistant Attorney General

Wlc



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

W. ANTHONY PARK  
ATTORNEY GENERAL

November 14, 1974

Mr. James Herndon  
Herndon & Slavin  
P.O. Box 789  
Salmon, Idaho 83647

OFFICIAL OPINION #75-72

Dear Mr. Herndon:

You have asked our opinion on the interpretation of Section 42-3202, Idaho Code, as amended by Laws 1974, Chapter 101, Section 1. Specifically your question is whether an out-of-state resident who owns land within a recreational water or sewer district may vote in district elections. Its answer is derived from the statute's definition of "qualified elector, to wit:

"... a 'qualified elector' of a recreational water and/or sewer district, within the meaning of and entitled to vote under this act, unless otherwise specifically provided herein, is a person qualified to vote at general elections in this state, and who has been a bona fide resident of the district for at least 30 days prior to any election or who is an owner of land situated in the district. ..."

The statute is ambiguous, however; "person qualified to vote at general elections in this state" may modify both those who seek to vote based upon bona fide residence in the district and ownership of land in the district, or only those who are bona fide residents of the district. In our opinion non-resident land owners may vote, even though they are not "qualified to vote at general elections in this state."

By definition, a recreational water and/or sewer district is:

"... a water district, or a sewer district created for a combination of water and sewer purposes, in which a majority of the property owners do not declare that property as their prime residence." Section 42-3202, Idaho Code.

As enumerated by Section 42-3212, the activities of the district may be only those related to the acquisition of water, water rights, water and sewage systems and plants. The district provides no general governmental services such as schools, housing, transportation, utilities, roads, police or fire protection. The district exists for a special limited purpose. Authority to establish voter qualifications for the district is vested solely in the State of Idaho. Muench v. Paine, 93 Idaho 473, 477, 463 P. 939 (1970). The state therefore could not be compelled to enfranchise the non-resident landowner, Idahoan or otherwise. Once the franchise is so granted, an attempt to restrict it to one class of non-residents must be consistent with the equal protection clause of the Fourteenth Amendment. Evans v. Cornman, 398 U.S. 719, 422, 26 L.Ed.2d 370, 374, 90 S.Ct. 1752 (1970). In general, the equal protection clause requires apportionment of the franchise upon a one-man, one-vote formula. Reynolds v. Sims, 377 U.S. 533, 12 L.Ed.2d 506, 84 S.Ct. 1362 (1964) enunciated this constitutional standard for state legislatures. Avery v. Midland County, 390 U.S. 474, 20 L.Ed.2d 45, 88 S.Ct. 1114 (1968) extended the Reynolds rule to encompass the election of the governing bodies of counties. Expressly reserved in Avery was the question:

"Were the [county's governing body] a special-purpose unit of government assigned the performance of functions affecting definable groups of constituents, we would have to confront the question whether such a body may be apportioned in ways which give greater influence to citizens most affected by the organization's functions." Ibid, 390 U.S. at p. 483-484, 20 L.Ed.2d at p. 53.

Salyer Land Co. v. Tulare Water District, 410 U.S. 719, 35 L.Ed.2d 659, 93 S.Ct. 1224 (1973) focused upon the issue reserved in Avery. It found that a California statute which reserved the franchise to owners of land within the district to the exclusion of non-landowning residents was not an unreasonable rejection of the popular election requirements enunciated by Reynolds as:

1. the activities of the district disproportionately affected landowners as a group.
2. the activities of the district were not of the general nature ordinarily attributed to a governmental entity.

In dicta, the court stated that the franchise was extended to landowners whether they resided in the district or not. Supra., 410 U.S. 730, 35 L.Ed.2d 667. Under the appropriate facts, ownership of land is therefore a constitutionally permissible criteria for voter enfranchisement.

In the instant case, Section 42-3202 does not give to landowners a special or unique interest in the activities of a recreational water and/or sewer district. Non-landowning residents, landowning residents, and non-resident Idaho landowners clearly have equal voter status before the district. The issue thus narrows to whether there is any justification to deny the franchise to the appropriate out of state resident. The United States Supreme Court has declared that, "[B]ecause of the overriding importance of voting rights, classifications 'which might invade or restrain them must be closely scrutinized and carefully confined' where those rights are asserted under the Equal Protection Clause." McDonald v. Board of Education, 394 U.S. 802, 807, 89 S.Ct. 1404, 1407, 22 L.Ed.2d 274 (1969); accord, Dunn v. Blumstein, 405 U.S. 330, 336, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972). Though addressing different factual situations from those proposed by Section 42-3202, the Supreme Court has recently invalidated voting statutes in three cases where each statute granted the franchise on a selective basis in violation of the equal protection clause of the Fourteenth Amendment. In Kramer v. Union School District No. 15, 395 U.S. 621, 89 S.Ct. 1886, 23 L.Ed.2d 583 (1969), the court reviewed a New York statute which limited the vote on school board elections to parents of school children and lessees and owners of real property. The

intent of the statute was to limit the vote to those "primarily interested" in the election. The court expressed no opinion as to whether in some circumstances a state might limit the exercise of the franchise to those primarily interested or affected but held that if such were permissible, the New York statute did not do so "with sufficient precision to justify denying appellant the franchise." Supra., 395 U.S. at p. 632, 23 L.Ed.2d at p. 592. In Cipriano v. City of Houma, 395 U.S. 701, 89 S.Ct. 1897, 23 L.Ed.2d 647 (1969), the court invalidated a Louisiana statute which allowed only landowners to vote on the issuance of city revenue bonds. In its analysis of a statute which ostensibly limited the franchise to "specially interested" voters, the court stated that the statute's validity depended on "whether all those excluded are in fact substantially less interested or affected than those the statute includes." Id. 395 U.S. at p. 704, 89 S.Ct. at p. 1900, 23 L.Ed.2d at p. 651, quoting Kramer v. Union School District No. 15, supra., (emphasis added). It concluded that non-property owners were as substantially affected and directly interested in the issuance of revenue bonds as the property owners. Finally, in Phoenix v. Kologziejski, 399 U.S. 204, 90 S.Ct. 1990, 26 L.Ed.2d 523 (1970), the court invalidated the constitutional and statutory provisions of the State of Arizona which permitted only landowners to vote on the issuance of city general obligation bonds. Concluding that property owners and non-property owners may have somewhat different interests, it held that there was no basis for concluding that non-property owners were substantially less interested in the issuance of the bonds. The court's decisions in Kramer, Cippiano, and Kologziejski did not address the issue of whether a state may in limited circumstances enfranchise a citizen of another state. Analyzed with Salyer Land Co., they do stand for the proposition that a state may limit the franchise to those primarily interested or affected by decisions of the district, but that any restriction of the franchise is only constitutionally permissible if those disenfranchised are substantially less interested or affected.

Section 42-3202 appears unique among Idaho statutes which create special purpose districts in that it authorizes the creation of a recreational water and/or sewer district if the majority of landowners in the district are non-residents. The district's activities are limited to particular

Mr. James Herndon  
November 14, 1974  
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non-governmental functions, Section 42-3212. Within the powers enumerated, however, is the power of the district's board to fix rates, tolls, and charges in furtherance of the district's activities. Section 42-3212(1). The power to levy and collect taxes is afforded by Section 42-3214. In the event payment of such assessments or charges is delinquent, the board may impose a lien upon the property of the recalcitrant landowner. Be the landowner a resident of Idaho or of some other state, he (she) is equally affected by any district decision to assess and its power to collect. The Idaho Legislature could have reasonably concluded that non-resident Idahoans who own land in the district would not have consented to the creation of the district and thereby subjected their land to liens for possibly large assessments without the right to determine those assessments. The right to vote is the landowners link to the districts' laws and government. Evans v. Cornman, *supra*. There is neither statutory basis nor reason to restrict the non-Idahoan who owns land in the district from having an equal voice in either creation of the district or in government thereof. It is inconceivable that Section 42-3202 would authorize the creation of the district, allow determination by the officers of the district to levy and collect taxes therefore, impose liens upon property--all for the alleged benefit of the district--without the opportunity of the landowners to be heard, solely because the landowner happens to be a non-resident of the state. Any other construction of this statute would act to deprive the landowner of the right to manage his (her) property and to determine its use and capability. People v. Parker, 118 Colo. 13, 192 P.2d 417, 1421 (1948). Denial of the franchise to the non-Idahoan resident who owns land in a district created only by majority consent of non-resident landowners would be denial to that landowner of equal protection before the law guaranteed to each citizen by the Fourteenth Amendment to the United States Constitution. It is therefore the opinion of the Attorney General that Section 42-3202 should be interpreted as extending the franchise equally to non-landowning residents, residents owning land, non-resident landowners otherwise qualified to vote in Idaho, and out-of-state residents owning land in the recreational water and/or sewer district.

Very truly yours,

CHRISTOPHER D. BRAY  
Assistant Attorney General

November 4, 1974

Honorable Monroe C. Gollaheer  
Director of Insurance  
BUILDING MAIL

Official Opinion # 75-73

Dear Mr. Gollaheer:

By letter of September 30, 1974, you requested an official opinion from this office as to:

1. Whether Chapter 248, Idaho Session Laws of 1974, may be enforced by the Department of Insurance in light of the apparent preemption of employee health care plans by Public Law 93-406.
2. If Chapter 248, Idaho Session Laws of 1974, is preempted by Public Law 93-406, in part only, what part of the Idaho law is not preempted?

In answer to your inquiry, my examination of Public Law 93-406 leads me to believe that the 93rd Congress did intend to preempt State regulation of employee health care plans effective January 1, 1975, except those areas that have been excluded from coverage by the Federal act, and which will be outlined herein. In view of the Congressional preemption, it is my opinion that commencing January 1, 1975, Idaho Session Law, Chapter 248, enacted by the 1974 Legislature, should not be enforced by the Idaho Department of Insurance except

in those areas that are excluded from coverage under the Federal act. As you are no doubt well aware, Idaho Session Law, Chapter 248, 1974 was enacted to provide a statutory basis specifically applicable to the regulation of self-funded health care service plans for employees. (See 1974 Idaho Session Laws, Chapter 248, Sections 1 and 2(6), pp 1626 and 1627.) In recent years, self-funded health care plans, which are maintained in whole or in part by the contributions from the employer, or employees or both, have increased in popularity due in part to the preferential tax treatment they are afforded under Section 501(C)(9) of the Internal Revenue Code of 1954 as amended by the Tax Reform Act of 1969. Voluntary employees' beneficiary associations which qualify under Section 501(C)(9) are exempt from income taxation.

One of the questions which had arisen in many states with respect to employee benefit plans is whether or not such plans constituted "insurance" and the "business of insurance" as those terms are usually broadly defined by the insurance codes of the various states and, therefore, subject to state regulation. (See Attorney General Official Opinion No. 73-50, dated October 18, 1972, which stated the view of this office that such plans do constitute insurance as defined by Idaho Code Section 41-102.)

We find by examining Public Law 93-406 that the 93rd Congress has also taken the initiative during 1974 to enact legislation for the regulation of employee health benefit plans under the Department of Labor and may be cited as the "Employee Retirement Income Security Act of 1974." As you are, of course, aware, the Federal act does have



broad coverage than the Idaho act in that the Federal enactment applies to employee pension benefit plans in addition to employee health benefit plans. Nevertheless, it appears to me from my examination of the Federal act, that it purports to regulate plans established or maintained by employers or employee organizations which provide participants or beneficiaries with "medical, surgical or hospital care benefits, or benefits in the event of sickness, accident, disability (and so forth) . . . ." (See Public Law 93-406, Section 3(1).) From the examination of both the "Employee Retirement Income Security Act of 1974," (Public Law 93-406), and 1974 Idaho Session Law, Chapter 248, we find that both Congress and the Idaho Legislature have intended to enact complete and comprehensive legislation for the regulation of employee health benefit plans.

The question of whether the "Employee Retirement Income Security Act of 1974" preempts the Idaho act seems to be resolved in part by the comprehensive nature of the Federal act. More convincing, however, is the fact that Congress states its intention to preempt state laws regulating employee benefit plans (including employee health care service plans) in Section 514 of Public Law 93-406. In particular, the following quotation extracted from the Federal act applies:

"Section 514. (a) Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) and not exempt under section 4(b). This section shall take effect on January 1, 1975.

(b) (1) This section shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975.

(2) (A) Except as provided in subparagraph (B), nothing in this title shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities.

(B) Neither an employee benefit plan described in Section 4(a), which is not exempt under section 4(b) (other than a plan established primarily for the purpose of providing death benefits), nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for the purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies." (Public Law 93-406, Section 514(a) and (b), (1) and (2).)

The following excerpt from House Committee Report No. 93-533 gives an insight to the intent of Congress in enacting the preemption section cited immediately above:

"Except where plans are not subject to this Act and in certain other enumerated circumstances, state law is preempted. Because of the interstate character of employee benefit plans, the Committee believes it essential to provide for a uniform source of law in the areas of vesting, funding, insurance and portability standards, for evaluation of fiduciary conduct, and for creating a single reporting and disclosure system in lieu of burdensome multiple reports. As indicated previously, however, the Act expressly authorizes cooperative arrangements with state agencies as well as other federal agencies, and provides that state laws regulating banking, insurance or securities remain unimpaired." (House Committee Report No. 93-533.)

Careful examination of Public Law 93-406 indicates that Congress intended to enact a comprehensive regulatory scheme requiring disclosure and reporting to the Secretary of Labor and to participants and beneficiaries, establishing standards of conduct and responsibility for fiduciaries of employee benefit plans, and to provide for appropriate remedies, sanctions, and ready access to the Federal courts. One is, therefore, led to conclude that Congress has intended thereby to occupy the field with respect to regulation of employee health benefit plans. (Public Law 93-406, Section 2(b).) The fact that Congress indicated its intent to establish "minimal standards," (Public Law 93-406, Section 2(a)), does not in this case appear to be an invitation to the States to concurrently regulate along with the Federal government

by imposing additional or more stringent standards because of the Federal preemption section we have just quoted in part. (Supra.) One can only conclude that if standards higher than those required by Congress or the Department of Labor are to be applied, they must be imposed by interested parties themselves other than by the various States. This is an interesting development in insurance regulation, as historically since 1945, under the McCarran-Ferguson Act, (15 U.S.C.A. Section 1012), Congress has, for the most part, left the regulation of the insurance business to the several States. Nevertheless, not since the decision in United States v. South-Eastern Underwriters Assn., 332 U.S. 533, 64 Sup. Ct. 1162, 88 L.Ed. 1440 (1944), has there been any doubt that Congress has the power to regulate the business of insurance should Congress find it appropriate to do so.

Specific exclusions from coverage under the Federal act by Section 4(b) of Public Law 93-406, are the following:

- The provisions of this title shall not apply to any employee benefit plan if --
- (1) such plan is a governmental plan (as defined in section 3(32));
  - (2) such plan is a church plan (as defined in section 3(33) with respect to which no election has been made under section 410(d) of the Internal Revenue Code of 1954;
  - (3) such plan is maintained solely for the purpose of complying with applicable workmen's compensation or disability insurance laws;
  - (4) such plan is maintained outside of the United States primarily for the benefit of persons substantially all of whom are nonresident aliens; or
  - (5) such plan is an excess benefit plan (as defined in section 3(36)), and is unfunded." (Public Law 93-406, Section 4(b)).

In conclusion, it is our opinion that the Employee Retirement Income Security Act of 1974 (Public Law 93-406) preempts Idaho Session Law 1974, Chapter 248, effective January 1, 1975, except for those

specific items excluded from the Federal act by Section 4(b) as cited herein. Commencing January 1, 1975, the legislation enacted by the 1974 Idaho Legislature to regulate employee health benefit plans should not be enforced by the Idaho Department of Insurance.

We hope we have been of assistance in clarifying the issues presented by you in your formal request. If you have further questions in this regard, or need additional clarification of this matter, kindly advise.

Very truly yours,

FOR THE ATTORNEY GENERAL

*Robert M. Johnson*

ROBERT M. JOHNSON  
Assistant Attorney General

RMJ:pr



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

W. ANTHONY PARK  
ATTORNEY GENERAL

November 4, 1974

Ron Schilling  
Prosecuting Attorney  
Clearwater County  
P.O. Box 1680  
Orofino, Idaho 83514

OFFICIAL OPINION #75-75

Re: Interest of Nominee for Office in Public  
Contracts

Dear Mr. Schilling:

We have your recent letter wherein you state as follows:

"I request your opinion on the following problem. One of the present County Commissioners of Clearwater County was defeated in the primary election in August, 1974. The victorious candidate for County Commissioner will run unopposed in the general election in November. The problem arises from a contract between Clearwater County and the candidate's brother for the maintenance and operation of a sanitary land fill and disposal of solid wastes in Clearwater County.

"The candidate himself owns the land upon which the sanitary land fill is located. The candidate's brother, pursuant to a contract with Clearwater County, manages and operates the land fill. The Contract was let to

the candidate's brother in accordance with the bidding requirements of the Idaho Code.

"I have referred to Idaho Code §59-201 and Idaho Code §31-1515, and I am of the opinion that if the candidate is elected and takes office with the present contract in effect, the contract would be voidable and the candidate's position improper."

We agree with your conclusions stated in the third paragraph of the portion of your letter above quoted.

Section 31-1515, Idaho Code states that the County Commissioners must not be interested ". . . directly or indirectly in any property purchased for the use of the county . . . nor in any contract made by the board or other persons on behalf of the county. . . ."

There is a split of authority as to whether a business relationship between a public officer and another person is prohibited by statutes substantially similar to Section 31-1515, and Chapter 2, Title 59, Idaho Code. Cases relating to this matter may be found in 73 A. L. R. §1352, and McQuillin on Municipal Corporations, Sections 29.97 through 29.99 and 12.136. If the only question was that of a family relationship, the contract would probably not be illegal, 74 A. L. R. 792.

The lead case for the above A. L. R. Annotation, Tuscan v. Smith, 153 A. 289, 73 A. L. R. 1344, a 1931 Maine case takes the position that:

"It is unnecessary to discourse on the duties of public officials. Their obligations as trustees for the public are established as a part of the common law, fixed by the habits and customs of the people. Contracts made in violation of those duties are against public policy, are unenforceable, and will be canceled by a court of equity. No definite rule can be given indicating the line of demarcation between that which is proper and that which is unlawful. In the words of this court in the case of Lesieur v. Inhabitants of Rumford, 113 Me. 317,

Ron Schilling  
November 6, 1974  
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321, 93 A. 838, 840, the question really is whether the town officer by reason of his interest is placed "in a situation of temptation to serve his own personal interests to the prejudice of the interests of those for whom the law authorized and required him to act in the premises as an official." See, as authority for the same general principle, the following: Bay v. Davidson, 133 Iowa, 688, 111 N. W. 25, 9 L.R.A. (N.S.) 1014, 119 Am. St. Rep. 650; Dillon, Municipal Corporations (5 ed.) §§ 772, 773; Lesieur v. Inhabitants of Rumford, supra.

"Guaged by the common and accepted standards defining the obligations of public officials, the lease given by the town of Skowhegan to the defendant Myron E. Smith was unconscionable and unlawful. To hold otherwise would be to repudiate the doctrine that he who holds public office is in a position of public trust."

California has also taken this same position, Moody v. Shuffleton, 203 Cal. 100, 262 P. 1095, Quatman v. Superior Court, 64 Cal. App. 203, 221 P. 666, and Stigall v. City of Taft, 25 Cal Rep. 441, 375 P.2d 289. Other citations can be found from the A L R. later case service.

The Idaho statutes appear to have been copied from California statutes, Cal. Govt. Codes, Sections 1090 and 36527.

The cases of McRoberts v. Hoar, 28 Idaho 163, 152 P. 1046, and Clark v. Utah Construction Co., 51 Idaho 587, 8 P.2d 454, and other Idaho cases although not discussing this aspect of these statutes appear to take an approach to these statutes which is very similar to that taken by the Maine and California Courts.

Thus we believe Idaho would follow these cases.

Sincerely yours,

FOR THE ATTORNEY GENERAL

WARREN FELTON

Deputy Attorney General

November 6, 1974

Mr. Will S. Defenbach, Member  
Industrial Commission  
Industrial Administration Bldg.  
317 Main Street  
Boise, Idaho 83707

OFFICIAL OPINION #75-76

Dear Mr. Defenbach:

You have requested an Attorney General's Opinion regarding whether pursuant to Section 72-526, Idaho Code, the Industrial Commission may waive in whole or part the penalty for which a surety is liable upon default in its payment of the statutory premium tax. In essence, your request seeks a determination as to whether the Attorney General's duty to seek the appropriate penalty is mandatory or directory.

The character of a statute, be it mandatory or directory, depends upon the intention of the legislature, "to be ascertained from a consideration of the entire act, its nature, its object, and the consequences that would result from construing it one way or other." Craig H. Hisaw, Inc., v. Bishop, 93 Idaho 145, 504 P. 2d 818, 821 (1972); Summers v. Dooley, 94 Idaho 37, 481 P. 2d 318, 320 (1971). The purpose of Section 72-526 is to enforce Section 72-523, which requires all those authorized to transact workmen's compensation insurance in Idaho to pay, semi-annually, a premium tax in addition to all other payments required by statute. Should the surety be delinquent in its payments, Section 72-525 places an affirmative duty upon the Attorney General to bring a civil action in the name of the state to collect the amount due. Clearly not content with the prospect of repeated litigation to obtain that which is statutorily required, the legislature enacted Section 72-526 to induce payment and facilitate collection. See State v. State Board of Equalization, 13M+ 43, 210 P. 2d 1061, 1062 (1958). This statute places a second affirmative duty upon the Attorney General, i.e., to seek the statutory penalty against one delinquent in payment ten days from due date.



Mr. Will S. Defenbach  
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These three statutes are to be read in pari materia. Craig H. Hisaw, Inc., v. Bishop, supra. Together they manifest an intention to exact a premium tax, and to require prompt payment thereof.

Therefore, it is the opinion of the Attorney General that the duty to seek the statutory penalty articulated by Section 72-526 is mandatory and may not be waived. Further, as a penalty statute, Section 72-526 is neither unreasonable nor oppressive. Gooch v. Rogers, 193 Oregon 158, 238 P. 2d 238 (1951). It's validity is presumed and any doubt as to invalidity must be shown beyond a reasonable doubt. Leonardson v. Moon, 92 Idaho 796, 481 P. 2d 542, 552 (1969). The legislature has the power to levy taxes and to provide the means to secure their prompt payment. State v. State Board of Equalization, supra.; Ada County v. Wright, 66 Idaho 394, 92 P. 2d 134, 139 (1939). Regarding the least offensive bases for delinquent payment of the premium tax, e.g., forgetfulness or innocent mistake, the Oregon Supreme Court has stated:

"In determining whether or not the penalty is excessive, we may take into consideration, so we believe, the nature of the offense for which the penalty is imposed. We think it is clear that the penalty is provided for the wrong which is done when a timber owner fails to make timely payment of the yield tax. \* \* \* If his tardy payment was due to nothing more than forgetfulness, he, nevertheless, is subject to the penalty. Evidently the legislature reasoned that a loss sustained by the public treasury through the nonpayment of the tax by a forgetful person is as costly as when any other person fails to pay his tax." State v. State Board of Equalization, supra.

The size of the penalty also acts to encourage the surety to carefully and accurately determine the sum of its net premiums independently of the Industrial Commission's power to audit that determination. Section 72-524. Failure to do so for any reason which resulted in an inaccurate payment would invoke the penalty statute. cf State v. State Board of Equalization, supra., 319 P. 2d at 1964.

Mr. Will S. Defenbach  
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For the above premises considered, Section 72-526 should be strictly construed.

Very truly yours,

FOR THE ATTORNEY GENERAL

CHRISTOPHER D. BRAY  
Assistant Attorney General

CDB:lc



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

November 6, 1974

W. ANTHONY PARK  
ATTORNEY GENERAL

Dr. John B. Barnes  
President  
Boise State University  
1910 College Blvd.  
Boise, Idaho 83725

OFFICIAL OPINION #75-77

Dear Dr. Barnes:

We wish to respond to your letter of October 21, 1974, wherein you ask for our opinion on the following questions:

1) Is the University required to obtain building permits from the city prior to commencing a construction project?

2) Is the University required to obtain conditional use permits from the city as each building is constructed as it relates to zoning?

3) Is the University required to obtain approval of the planning and zoning commission on building plans and specifications, and in certain instances, approval of the design review committee for each university building.

4) Is the University required to comply with city regulations on parking requirements as set forth by the planning and zoning commission.

In general, your questions have to do with the broad issue of whether or not local planning and zoning ordinances, with the enforcement of those ordinances by the granting or withholding of conditional use permits and building permits, are applicable and controlling where the state builds, remodels or clears buildings on state owned real property, as, in this instance, with Boise State University.

060.2

Local units of government, vis a vis, the state, are creatures of the state and administrative units thereof. With certain exceptions not here pertinent, local governments have only those powers authorized or granted by the state legislature. The legislature sets the policy in furtherance of the state's duty to protect and promote the health, morals, safety, and welfare of the people and that policy is to be carried out in large measure by local units of government, even though there might be additional administrative burdens imposed upon those units of government. Williams v. Swensen, 93 Idaho 542.

The legislature has permitted cities and counties to establish planning and zoning commissions with certain authority to recommend to the cities and counties comprehensive plans for the physical development of the cities and counties. The purpose of the commissions is to develop and recommend the comprehensive development plans to assist the cities and counties to promote the health, morals, safety and welfare of the people therein. Section 50-1104, Idaho Code.

It must be noted that this section of the code grants to commissions recommendatory authority only and then for the purpose of promoting the health, morals, safety, and welfare of the inhabitants. It does not give the commissions authority to impose its judgment in matters of aesthetics, location of buildings on state property, design, landscaping or structural materials. Nor does the act give the commissions authority to determine finally the use to which any university building or land will be put. The planning and zoning commissions may very well be able to recommend to the state certain plans for the use of its property or buildings. But we can find no authority for the proposition that the state must adopt the plans or that the state must seek the prior approval of the commissions.

A related, and perhaps paramount, issue is whether or not the state must comply with the duly adopted zoning ordinances and building codes of a city or county.

In Hunke v. Foot, 84 Idaho 391, the Supreme Court held that a municipality must comply with and was bound by its own zoning ordinances where the municipal activity was proprietary as opposed to governmental. The distinction between whether the state is acting in a governmental or a

proprietary capacity is not always easy to determine. Some legal scholars deplore the distinction at all, claiming that such a distinction is fictitious and used to arrive at a predetermined decision. This distinction apparently arose in the area of tort liability and was established to offset the burdens of sovereign immunity. Therefore, it is necessary to go to tort liability of municipal corporations to find how the courts distinguish between governmental and proprietary functions. As a general rule, governmental functions are those governmental activities which are made mandatory by the state, both as to the state and its local units of government, and which by law, constitution or court decision must be performed and to which recourse to the judicial process can compell the performance. William v. Swenson, supra; Lundahl v. City of Idaho Falls, 78 Idaho 338; Village of Lapwai v. Alligier, 78 Idaho 124; Boise Development Co. v. Boise City, 30 Idaho 675.

The question now is whether state law compels construction of buildings and development of the campus at Boise State University. Title 33, Chapter 40, Idaho Code compels the transition of Boise College to the State of Idaho, now known as Boise State University, and imposes on the State of Idaho, through the State Board of Education, the duty to operate the university. In order to do that, the state empowered the State Board to construct buildings, develop the campus, hire faculty and staff and do all other things necessary to carry out the educational functions imposed by law. Further the State Board has all the general powers that the Regents of the University of Idaho and the Trustees of Idaho State University have. Sections 33-4005, 33-2807, 33-3006, and 33-3804, Idaho Code. Since the duty to provide for the educational needs of the state are imposed by law on the state, it must then necessarily follow that this mandatory duty is a governmental function and cannot be interfered with by local zoning ordinances. Hunke v. Foot, supra. Further, should this duty of the state imposed by law conflict with local zoning ordinances, the building and campus development authorized by law must be exempt from those ordinances based on Article XII, Section 2, The Constitution of the State of Idaho, which provides that state statutes override local ordinances. To conclude otherwise would result in the anomalous situation where local ordinances could control state funded institutions, obstruct the

development of the institutions, and generally place the state educational needs in the governing boards of the cities and counties wherein the institutions are located. Such a result might very well lead to the situation where the state could not carry out its governmental function of establishing, maintaining and developing its educational institutions. We can find no authority or even suggestion that the State of Idaho has abdicated that responsibility to the local units of government and seriously doubt the constitutionality of any such authorization or suggestion even if present.

The above cited constitutional provision suggests that the state remain sovereign. Where there is delegation by law to the State Board of specific authority with respect to its buildings, such authority precludes those buildings from being subject to the local zoning and building ordinances. Board of Education of the City of St. Louis v. St. Louis, 184 S.W. 975. The State Board, pursuant to Section 33-112, Idaho Code provides:

"The state board shall authorize and approve all plans and specifications for the construction or alteration of buildings at the state educational institutions under its government and control; and shall direct and control the purchase of equipment, fixtures and supplies therefore."

Such statutory authority, then, overrides local zoning and building ordinances. Further support is found by the requirements that state buildings must be built in cooperation among the Legislature, State Board, Permanent Building Fund Council, Department of Public Works, and the Department of Labor. All these agencies are involved to insure that the buildings meet not only the educational needs of the students, but also meet the standards established by the state for protection and promotion of the health, safety, morals and welfare of the inhabitants. Since the local ordinances are established for the same purposes and those purposes are met and satisfied by the state, the Legislature apparently intends that control of the institutions, its lands and buildings, are within the exclusive control of the State Board and the State of Idaho. City of Newark v. University of Delaware, 304 A.2d 347; Rutgers, State University v. Piluso, 286 A.2d 697, Board of Regents of

Dr. John Barnes  
November 6, 1974  
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Universities & State College v. Tempe, 356 P.2d 399. The burden is on the local governments to show in any given instance that the state action with respect to the institutions buildings and campus development is unreasonable or arbitrary. Austin Independent School District v. City of Sunset Valley, 502 S.W.2d 670.

In conclusion, we are of the opinion that Boise State University and the State Board of Education are exempt and immune from the application of city and county zoning and building ordinances.

We trust we have been of assistance.

Very truly yours,

FOR THE ATTORNEY GENERAL

JAMES R. HARGIS  
Deputy Attorney General

JRH:lm

cc J. Charles Blanton



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

W. ANTHONY PARK  
ATTORNEY GENERAL

November 6, 1974

OFFICIAL OPINION #75-78

Rendered in response  
to the request of:

Ron Schilling  
Prosecuting Attorney  
Clearwater County

November 6, 1974

This opinion is addressed to the disposition of fines and forfeitures collected in consequence of the violation of state and municipal laws.

Specifically, the questions presented are as follows:

1) Where a fine and forfeiture is remitted for a violation of a misdemeanor cited under the Idaho Code and the arrest has been effected by a duly appointed city police officer, how should such fine and forfeiture be disbursed?

2) When a fine and forfeiture is remitted for a violation of an indictable misdemeanor cited under the Idaho Code, where the arrest has been effected by a duly appointed state police officer, how should such fine and forfeiture be disbursed?

3) Where a fine and forfeiture is remitted for a violation of a felony cited under the Idaho Code, where the arrest has been effected by a duly appointed city police officer, how should such fine and forfeiture be disbursed?

4) To what violations does subsection (g) of I.C. 19-4705 pertain?

5) Does the city prosecutor prosecute those cases where the city would be the recipient of the fine and forfeiture



and the county prosecutor prosecute those cases where the county would be the recipient of the fine and forfeiture?

These questions arise because of ambiguities in I.C. 19-4705 which has been recently amended. It is necessary to examine both the prior law and the statute as it exists subsequent to amendment. It is also necessary, for reasons which will become clear at a later point in this opinion, to consider the law as it relates to the prosecutorial duties of both city attorneys and county prosecutors.

Prior to 1971, the county prosecuting attorney had the duty, by virtue of I.C. 31-2604, to prosecute all criminal cases within his jurisdiction, whether they were misdemeanor or felony cases. Likewise, prior to 1971, I.C. 19-4701 provided that all fines, forfeitures and costs were to be remitted to the county for county use.

These rules were changed in 1971. That year, I.C. 31-2604, relating to prosecutor's duties, was amended to make city attorneys responsible for the prosecution of "traffic offenses and misdemeanor crimes committed within the municipal limits of a city when the arrest is made or a citation issued by a city law enforcement official. . . ." S.L. 1971, ch. 94.

Previously, in 1969, I.C. 19-4701, relating to the disposition of fines, forfeitures and costs, was superseded by I.C. 19-4705, S.L. 1969, ch. 136 which provided, so far as pertinent, that (a) for violations of any state law not involving fish and game or motor vehicles fines and forfeitures would be apportioned 10% to the state and 90% to the county where the violation occurred, (b) that for violations of county ordinances fines and forfeitures would be apportioned 10% to the state and 90% to the county, (c) that for violations of city ordinances fines and forfeitures would be apportioned 10% to the state and 90% to the city whose ordinance was violated and (d) that fines and forfeitures collected for any violation not otherwise specified would be apportioned 10% to the state and 90% to the county where the violation occurred.

I.C. 19-4705 was amended in 1971 by S.L. 1971, ch. 65 wherein it was provided, first, that where state motor vehicle violation arrests were made or citations issued by city

officers, fines and forfeitures would go 10% to the state and 90% to the city and, second, adding to subsection g a qualifying proviso that where the arrest was made by a city officer, fines and forfeitures would go 10% to the state and 90% to the city whose officer made the arrest. I.C. 19-4705 was again amended in 1972, by S.L. 1972, ch. 6 in particulars not important to the question at hand.

A literal reading of I.C. 19-4705 produces the following result:

I. For the violation of state motor vehicle laws, fines and forfeitures are disposed of thusly: a) 10% to the state general fund, b) 45% to the state highway fund, c) 22 1/2% to the state current expense fund, d) 22 1/2% to the general school fund of the county where the violation occurred. This disposition does not apply, however, in cases where a city officer makes a motor vehicle arrest, in which case fines and forfeitures are disposed of 10% to the state and 90% to the city (subsection c).

II. For the violation of any state law not involving fish and game or motor vehicles: 10% to the state and 90% to the county where the violation occurred (subsection d).

III. For the violation of county ordinances: 10% to the state and 90% to the county where the violation occurred (subsection e).

IV. For the violation of any city ordinance: 10% to the state and 90% to the city where the violation occurred (subsection f).

Inasmuch as the sections of I.C. 19-4705 mentioned above cover all of the possible violations which could be prosecuted in state courts, the statute, to this point, constitutes a complete scheme for the disposition of fines and forfeitures. The point of difficulty is that this interpretation of the statute renders subsection g either meaningless or in conflict with subsection d. Subsection g provides a scheme for disposing of fines and forfeitures "for violations not specified in this act," directing an apportionment of 10% to the state and 90% to the county, except when an arrest is made by a city officer, in which case fine and forfeiture money is apportioned 10% to the state and 90% to the city whose officer made the arrest.

Thus, there is an ambiguity on the face of the statute. In such circumstances, the courts will resort to rules of statutory construction in order to determine the intended meaning of the statute. Herndon v. West, 87 Idaho 335, 393 P.2d 35 (1964); Roe v. Hopper, 93 Idaho 466, 463 P.2d 932 (1970); Greyhound Parks of Arizona, Inc. v. Waitman, 464 P.2d 966 (Ariz. 1970).

In turning to the rules of statutory construction, we are mindful that their chief aim is to interpret legislation in such a manner as will effectuate the intent of the legislature, as nearly as such intent can be determined. Accordingly, the various provisions of the statute must be harmonized with each other, if at all possible. Norton v. Dpt. of Employment, 94 Idaho 924; State v. Alkire, 79 Idaho 334; Wright v. Village of Wilder, 63 Idaho 122; Adams Tree Service v. Transamerica Title Ins. Co., 511 P.2d 658 (Ariz. 1973); Board of Education, Etc. v. Allen, 156 P.2d 596 (Okla.); Pennington v. State, 302 P.2d 170 (Okla.); Martin v. District Court, Etc., 272 P.2d 648 (Colo.).

A related concept is that the entire act must be construed as a whole in an effort to determine legislative intent. Janss Corp. v. Board of Equalization, 93 Idaho 928, 478 P.2d 878 (1970); John Hancock Mutual Life Ins. Co. v. Neill, 79 Idaho 385, 319 P.2d 195 (1957); Nampa Lodge #1389 v. Smylie, 71 Idaho 212, 229 P.2d 991 (1951); Keenan v. Price, 68 Idaho 423; State v. Groseclose, 67 Idaho 71; Continental Cas. Co. v. Grabe Brick Co., 401 P.2d 168 (Ariz. App. 1965); Nice v. State, 507 P.2d 527 (Mont. 1973).

Subsection g of I.C. 19-4705 can be harmonized with the other subsections of the statute only if it is construed to add something to subsection d, which appears to allocate fines and forfeitures for violations of all state laws except fish and game and motor vehicle laws by an apportionment of 10% to the state and 90% to the county where the violation occurred.

To reach such a result, subsection g must be construed as modifying subsection d by providing that whenever a city officer makes an arrest for violation of a state law, fines and forfeitures shall be allocated 10% to the state and 90% to the city. In other words, an assumption must be made

that the legislature intended, by enacting subsection g and its amendment, to modify the results dictated by subsection d in order to make the application of fines and forfeitures depend upon whose officer makes the arrest or writes the citation. This criteria will be expanded at a later point when the discussion of prosecutorial responsibility is reached.

The foregoing interpretation would mean that subsection d is intended to allocate fines and forfeitures as prescribed (10% to the state, 90% to the county) only when a state or county officer makes the arrest.\* The language of the statute can thus be harmonized by considering city arrests referable to "unspecified violations" within the meaning of subsection g.

We conclude that the statute must be so interpreted. This conclusion is supported by several rules of statutory construction which have not yet been discussed.

In the first place, no part of a statute is to be construed as redundant, trivial, or meaningless. The Legislature is assumed to have intended that all sections of the statute have meaning. De Rouse v. Higginson, 95 Idaho 173 (1973); Adams v. Bolin, 247 P.2d 617 (Ariz.) Snows Mobile Homes, Inc. v. Morgan, 494 P.2d 216 (Wash. 1972); Los Angeles County v. Emme, 108 P.2d 695 (Cal. App.); Norton v. Department of Employment, *supra*; Kelly v. Bastedo, 220 P.2d 1069 (Ariz.); Campbell v. Super. Ct. Etc., 462 P.2d 801 (Ariz. 1969). Unless I.C. 19-4705 is construed as suggested above, this rule is violated because subsection g is left without meaning and effect.

Secondly, statutes relating to the same general subject matter are to be construed in pari materia, Frazier v. Terrill, 171 P.2d 438 (Ariz.); State v. Ruikes, 306 P.2d 205 (Wash.), and the legislature is presumed to have considered existing law before enacting or amending legislation. State v. Long, 91 Idaho 436; Nampa Lodge #1389 v. Smylie, *supra*; Walker v. Wedgewood, 64 Idaho 285.

In the same year it amended I.C. 19-4705 in the particulars pertinent here, the legislature also amended I.C. 31-2604 and for the first time made city attorneys responsible

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\*No distinction is made between arrests made by state and county officials because the county prosecutor prosecutes all such cases while city prosecutors have been given responsibility for cases made by city officers.

for prosecuting state traffic violations and the misdemeanors where city officers made the arrests. It is a natural inference that the contemporaneous amendment to subsection g of I.C. 19-4705 was intended by the legislature to provide compensation to cities for their increased prosecutorial responsibilities.

This interpretation, which seeks to effectuate legislative intent, would mean that municipalities are entitled to compensation only for the cases where city officers make the arrests and the city prosecutor is required to prosecute the cases.

Some reliance is placed on economic consequences in reaching this conclusion because we have concluded that the legislature's intent was to give city attorneys increased prosecutorial responsibilities and to provide additional funds to cities to defray the costs of their new obligation. The Supreme Court of Idaho has held that it may examine social and economic consequences of ambiguous statutes in the process of interpretation. John Hancock Mutual Life Ins. Co v. Neill, 79 Idaho 385, 319 P.2d 195 (1957).

We are cognizant of the rule which holds that in the event of conflict between two sections of the statute the particular prevails over the general. John Hancock Mutual Life Ins. Co. v. Neill, supra; In re M, 510 P.2d 33 (Cal. 1973); In re North River Logging Co., 130 P.2d 64 (Wash.). In this case, subsection d is the particular section while subsection g makes only a general reference to "violations not specified in this act." The rule, however, is not inflexible and must be discarded here because its application would render subsection g meaningless, thus defeating the legislative intent.

One of the more obvious rules of construction is that when a statute is amended the legislature is presumed to have intended that the statute thereafter have a different meaning. De Rousse v. Higginson, supra; Swayne v. Department of Employment, 93 Idaho 101; Futura Corp. v. State Tax Commission, 92 Idaho 288; McKenney v. McNearney, 92 Idaho 1; State v. Long, 91 Idaho 436; Hodge v. Bordan, 91 Idaho 125; Tortorica v. Western Equipment Co., 88 Idaho 534; Hawkins v. Chandler, 88 Idaho 20; Pigg v. Brockman, 79 Idaho 233.

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Prior to 1971, I.C. 19-4705 made no provision whatever for the disbursement of fines and forfeitures to cities except in those cases where judgments were collected for violations of city ordinances. The 1971 Amendment to subsection g, Session Laws, 1971, ch. 65, added language which reads:

" . . . except in cases where a duly designated officer of any city police department shall have made the arrest for any such violation, in which case ninety per cent (90%) shall be apportioned to the city whose officer made the arrest."

Unless this amendment is held to mean that 90% of fines and forfeitures collected on account of violations of state laws occurring within the municipalities where city officers make arrests, the 1971 amendment would not have affected any change in the previous statute. As we have noted, this is an impermissible result in light of the foregoing rule of construction.

Moreover, when Section 19-4705 was initially enacted in 1969, the title heading made no mention of the apportionment fines and forfeitures to cities except where violations of city ordinances were involved. S.L. 1969, ch. 136. In contrast, the title heading to the 1971 Amendment makes reference to additional circumstances wherein fines and forfeiture monies are to apportioned to cities. The inescapable inference is that the legislature intended to create additional circumstances in which such funds would go to cities.

In the same session, the Legislature included the following language in the title to its amendment to I.C. 31-2604, which imposed new prosecutorial duties upon city attorneys:

" . . . TO PROVIDE THAT THE PROSECUTING ATTORNEY SHALL NOT BE REQUIRED TO PROSECUTE TRAFFIC OFFENSES AND MISDEMEANOR CRIMES WITHIN THE MUNICIPAL LIMITS OF THE CITY WHEN THE ARREST IS MADE OR A CITATION IS ISSUED BY A CITY LAW ENFORCEMENT

OFFICIAL, IN WHICH CASE THE CITY  
ATTORNEY OR HIS DEPUTY IS RESPONS-  
IBLE THEREFORE . . . " (S.L. 1971,  
ch. 94)

Both amendments were declared emergencies and taken together the title headings manifest a legislative intent to make the disposition of fines and forfeitures to cities co-extensive with their prosecutorial responsibilities. Preambles and titles to legislative enactments are properly used as aids in the interpretation of ambiguous statutes. Idaho Commission on Human Rights v. Campbell, 95 Idaho 215; State v. Murphy, 94 Idaho 849; State v. Mead, 61 Idaho 449.

A second construction of subsection g of I.C. 19-4705 arises out of the rule that when conflicting sections of this statute cannot be harmonized the section latest in order of enactment will prevail. Schneider v. Forcier, 406 P.2d 935 (Wash. 1965); Hartford Acc. & Indemnity Co. v. City of Tulare, 186 P.2d 121 (Cal.); City of Petaluma v. Pacific Tel. & Tel., 282 P.2d 43. Application of this rule would give effect to subsection g to the exclusion of subsection d but would not change the result of the previous formulation.

#### CONCLUSION

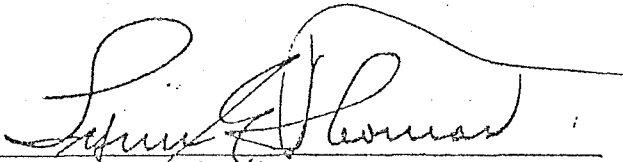
We therefore conclude that the disposition of fine and forfeiture money to cities is coextensive with the obligation of cities to prosecute traffic offenses and misdemeanors.

1) Fines and forfeitures remitted for misdemeanor violations of state law occurring within municipal limits where the arrest is made by a city officer should be apportioned ten per cent (10%) to the state and ninety per cent (90%) to the city whose officer affected the arrest.

2) Inasmuch as I.C. 31-2604 still requires the county prosecutor to conduct indictable misdemeanor prosecutions, fines and forfeitures arising out of such cases should be apportioned 10% to the state and 90% to the county, regardless of whose officer made the arrest. The same is true of felony cases.

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The answers to questions numbered 4 and 5 set out at the heading of this opinion, having been subsumed in the foregoing discussion, will not be treated separately.

A handwritten signature in cursive script, appearing to read "Lynn E. Thomas", written over a horizontal line.

LYNN E. THOMAS  
Deputy Attorney General

LET:lm



November 7, 1974

Mr. J. D. Hancock  
Prosecuting Attorney  
Madison County  
80 South 2nd West  
Rexburg, Idaho 83440

OFFICIAL OPINION #75-79

Dear Mr. Hancock:

In your letter October 1, 1974, you request a legal opinion from this office "relative to the problem created by the State of Idaho when it leases or sells state land without providing access thereto." There are two code sections which are pertinent to this issue.

First, Section 7-701(5) of the Idaho Code provides that:

"\* \* \* the right of eminent domain may be exercised in behalf of the following public uses:  
... 5. By-roads, leading from highways to residences . . ."

Second, Section 7-703 deals with private property which is subject to taking and includes as private property:

"2. Lands belonging to the government of the United States, to this State, or to any county, incorporated city, or city and county, village or town, not appropriated to some public use."  
(Emphasis added.)

Analyzing the two sections above, it is evident that the right of eminent domain can be exercised to acquire a right-of-way, easement or prescriptive right across state owned lands. As Section 7-701 indicates the right of eminent domain can only be exercised in behalf of a public use. Any act which attempts to take private property for a private use is unconstitutional.

Mr. J. D. Hancock  
November 7, 1974  
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Kompash v. Powers, et. al., 75 Mont. 493, 244 P. 298. However, under Section 7-701(5), private property can be condemned for roads leading to residences or a "private road." This has been upheld as constitutional on the theory that they are not private roads, but rather public roads, even though the road is used only by a few people and laid out upon the application by a particular individual. A "private road" as long as it can be used for any purpose to which it is adapted by the general public and by any individual thereof is not in violation of the public purpose requirement for an eminent domain proceeding. Latah County v. Peterson (1892), 3 Idaho 398, 29 P. 1099.

Once the public use for the land has been established, an eminent domain proceeding can be brought against any owner of land listed in Section 7-703. The courts have interpreted the phrase "to this state" in Section 7-703 as the state's grant of consent to a condemnation suit. Petersen v. State, 37 Idaho 361, 393 P. 2d 585 (1964). In reaching this conclusion, the court looked at Montana and California statutes which are identical to ours and which have been construed as legislative authority and consent to condemn lands held by the state. The court reaffirmed its decision in the case of Ada v. State, 93 Idaho 830, 473 P. 2d 367 (1969), by stating that "the effect of a consent given by that section was to render the state a private property owner for purposes of eminent domain condemnation actions."

Any person who is "in charge of the public use for which the property is sought," Section 7-707 of the Idaho Code, can initiate a condemnation proceeding. Whether or not the plaintiff will be successful in the condemnation suit depends on Section 7-704 of the Idaho Code which deals with facts prerequisite to taking.

In conclusion, in Idaho, by statute, a private citizen or the State has the right of eminent domain on private land which by definition includes state land in order to obtain access to certain parcels of State leased land or land sold by the State for which no access has been provided, as long as it is initiated for a public purpose.

Very truly yours,

FOR THE ATTORNEY GENERAL

URSULA KEITTEWELL  
Assistant Attorney General

UK:lc



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

W. ANTHONY PARK  
ATTORNEY GENERAL

November 12, 1974

Lowen Schuett  
Parks & Recreation Department  
Building Mail

OFFICIAL OPINION #75-80

Dear Lowen:

You have asked whether eligibility to vote in an election of a recreation district director is restricted to residents of the director's sub-district.

As you know, every recreation district is divided into three sub-districts with approximately equal population. Idaho Code §31-3203(e). Each district is governed by three directors who must reside in different sub-districts. Idaho Code, Section 31-4305. There is, however, no parallel sub-district residency requirement for recreation district electors. Idaho Code, Section 31-4307 states:

"Any person may vote at a district election who is a qualified elector and a resident of such district on the day such election is held."

Since the directors' terms in office are staggered, Idaho Code § 31-4304(f), Section 31-4307 clearly indicates that each director shall be elected by the residents of the district as a whole.

Very truly yours,

FOR THE ATTORNEY GENERAL

CONLEY WARD, JR.  
Assistant Attorney General

CW:lm



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

W. ANTHONY PARK  
ATTORNEY GENERAL

November 14, 1974

Mr. Jack C. Riddlemoser  
Attorney at Law  
333 E. Idaho Street, Box 373  
Meridian, ID 83642

OFFICIAL OPINION #75-81

Dear Mr. Riddlemoser:

Your recent request for an opinion of the Attorney General asks definition of the statutory procedure for the filling of two vacancies on a four-man city council. The possibility of such an occurrence exists as a recall election for the removal of two councilmen of the City of Kuna is to be held December 3, 1974. Section 50-704, Idaho Code, authorizes a city's mayor to fill a vacancy(ies) by appointment with consent of the city council. Your query essentially raises the following issue:

Assuming the simultaneous recall of two council members, can the requisite consent to a vacancy appointment be given by the two remaining members?

The issue is to be resolved by an ascertainment of the intent of the Idaho Legislature.

Section 50-704 is a mandatory enactment by the Legislature that a vacancy be filled by "appointment made by the mayor with the consent of the council. . . ." This statute speaks of "the council" as opposed to "the full council" from which a quorum is derived.

Mr. Jack C. Riddlemoser  
November 14, 1974  
Page 2

See Section 50-705. The composition of a "full council" is established as either four or six members. Section 50-701. Clearly, a "full council" of the City of Kuna cannot exist if one of its four offices is vacated by a council member's death, resignation, or recall. Neither, then, could there be a quorum as by definition it is a majority of the full council. As vacancies do occur, Section 50-704 was enacted to facilitate the conduct of a city's business with the least interruption by authorizing their prompt filling. Once filled, the city conducts its business as usual. Manifestly, the requisite consent may not be given at a regular or special meeting of the council as with the occurrence of one vacancy, the membership of the full council is incomplete. Thus, a quorum as statutorily defined cannot be constituted. Consent to a mayor's appointment is therefore to be given at other than a regular or special meeting.

This transaction of city business, i.e., issuance of consent, at other than a regular or special meeting is not at a variance to the purposes of Section 50-705. While it is clear that most official business is to be conducted pursuant to either the regular or special meeting, the statute is not exclusive. Section 50-708 allows the examination by committee of fiscal accounts and conduct of those managing the city's money and property or who are otherwise involved in the business of the city. Neither quorum nor public hearing is required.

A construction of Section 50-705 to permit validation of a mayor's vacancy appointment solely by consent of three or more members of the city council would impermissibly infringe upon the right of recall, guaranteed by Article 6, Section 6, Idaho Constitution and Section 34-1701, Idaho Code. Such an interpretation would circuitously affect the right of recall by framing the recall issues in terms of the election's consequence rather than the quality or lack thereof of representation given Kuna citizens by the councilmen in question. Should the voters of the City of Kuna effect a simultaneous recall by their votes in the December 3, 1974, election, such a construction would act to eliminate the council as a governing body. Section 50-705 would prevent the mayor from filling the vacancies with only two city councilmen, as no quorum could be constituted.

Mr. Jack C. Riddlemoser  
November 14, 1974  
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Without the possibility of a quorum, the city council could not conduct its business at regular or special meetings. As a governing entity, the city council would cease to function. Clearly, the Legislature never intended that the constitutional and statutory right of recall be obviated by the quorum requirements of Section 50-705. It is, therefore, the opinion of the Attorney General that Section 50-704 is not limited by Section 50-705, that consent to a mayor's vacancy appointment is to be given by the council independently of the quorum requirements as the right of suffrage in a recall election would be negated by the converse construction.

Sincerely,

FOR THE ATTORNEY GENERAL

CHRISTOPHER D. BRAY  
Assistant Attorney General

CDB:lm

*cc Lillian Wilson*

November 19, 1974

Mr. Gordon C. Trombley  
Director  
Department of Public Lands  
Room 119  
Statehouse Mail

OFFICIAL OPINION #75-83

Re: Public Inspection of Land Department Files  
and Records

Dear Mr. Trombley:

Our office is happy to respond to your request for an opinion dated June 7, 1974. I would like to apologize for the delay in answering your letter, and we hope that the following will clear up the apparent conflict between the two opinions previously issued by this office on this subject.

After reviewing the pertinent Idaho Code sections and the two previously issued opinions interpreting these sections, it is our conclusion that the criminal sanctions set out in Section 58-126, Idaho Code, regarding the release of any land department records applies only to unauthorized release of such information by the director or the land department employees. The language of Section 58-126 speaks to unauthorized disclosure and it must therefore be implied from a reading of the statute that there are certain materials which may be released if properly authorized. It is the opinion of this office that the Land Board may authorize release of any departmental records which it deems to be of a public nature.

The Land Board may release information on a piece-meal basis upon request, or may make a general determination of what information should be made available to the public and authorize the director or the employees of the department to release any

Mr. Gordon C. Trombley  
November 19, 1974  
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and all information contained within categories approved and authorized for release by the board. This release could and would be accomplished by releasing the records or type of record to the Land Board and the public then would have a right to the information.

The opinion dated July 28, 1969, dealing with Section 59-1009 of the Idaho Code, specifically concerns itself with the general interpretation of release of public documents as it would ordinarily relate within all departments. The opinion dated December 30, 1971, deals with the problems of disclosure of Land Department documents specifically, and provides a thorough interpretation of the wording used in Section 59-1009, Idaho Code. That opinion at pages 12 and 13 sets forth an approach to follow regarding the disclosure of documents; and we recommend following this approach in determining which categories of information and records the department considers to be of a public nature.

In conclusion, it is the opinion of this office that Section 58-126 of the Idaho Code and the criminal penalties found therein, apply only to release of Land Department records and information by departmental employees which has not been authorized as disclosable. The authorization as to which records and categories of records are public records and therefore must be disclosed, must come from the Land Board. Once the Land Board has authorized categories of information and records which are to be public, no criminal penalty can attach to any official or departmental employee who releases information which properly fits into one of those categories.

Very truly yours,

FOR THE ATTORNEY GENERAL

TERRY E. COFFIN  
Assistant Attorney General

TEC:lc



November 27, 1974

Mr. R. P. Peterson  
Deputy Director  
Parks & Recreation Department  
Statehouse Mail

OFFICIAL OPINION #75-84

Dear Mr. Peterson:

You have asked whether the department may use the "off-road motor vehicle fund" to purchase snowmobile trail grooming equipment. The applicable statute provides that this fund may be employed "to acquire, purchase, improve, repair, maintain, furnish, and equip off-road motor vehicle facilities and sites in the state of Idaho." Ch. 297, §2, 1973 Idaho Session Laws, 625, 626. In our opinion, the proposed purchase clearly falls within the purview of the statutory authorization of expenditures to improve, maintain, and equip off-road motor vehicle facilities.

Very truly yours,

FOR THE ATTORNEY GENERAL

CONLEY WARD, JR.  
Assistant Attorney General

CW:lc

December 2, 1974

Honorable Pete T. Cenarrusa  
Secretary of State  
Building Mail

OFFICIAL OPINION #75-86

Dear Mr. Cenarrusa:

This letter replies to your request dated November 22, 1974, for advice regarding implementation of the Sunshine Initiative. Your first question relates to the effective date of the act and will be considered first.

The Sunshine Initiative is phrased in terms of prospective application. In other words, all activities covered by the act which take place on or after its effective date must be in conformance to the provisions of the act. Thus, any person assuming the position of a "candidate" as defined by the act or a "political committee" as defined by the act on or after the effective date of the act must comply with the provisions applicable thereto. Likewise, any person who assumes the position of a lobbyist as defined by the act on or after the effective date of the act must comply with the provisions relating to registration of lobbyists. As you note in your letter, the effective date of the act is the date of the Governor's proclamation. (See: Section 34-1813, Idaho Code.)

Your particular concern relates to the required registration fee for lobbyists. Section 17(a) of the Act provides that a lobbyist must register "[b]efore doing any lobbying, or within thirty (30) days after being employed as a lobbyist, whichever occurs first, . . . ." Accompanying such registration, the lobbyist must pay a filing fee of \$10.00. Further, Section 17(d) of the Act requires that a new registration be filed each January with appropriate revisions.

Honorable Pete T. Cenarrusa  
December 2, 1974  
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It is the conclusion of this office that all persons who undertake lobbying activities on and after the effective date of the act must register and pay the filing fee. This includes those persons who continue previously existing lobbying activities after the effective date of the act. Further, since there is no provision in the act for apportioning the filing fee in relation to the period of a year in which lobbying activities take place, all those who lobby must register and pay the full \$10.00 fee. Likewise, those same persons must file a new registration statement in January and again pay the full \$10.00 fee.

Your second inquiry relates the interpretation of the definition of "lobby" and "lobbying". The act states in Section 2(9):

"Lobby" and "lobbying" each mean attempting through contacts with, or causing others to make contact with, members of the legislature or legislative committees, to influence the approval, modification or rejection of any legislation by the legislature of the State of Idaho or any committee thereof.

Further, Section 28 provides:

"The provisions of this act are to be liberally construed to effectuate the policies and purposes of this act. In the event of conflict between the provisions the provisions of this act and any other act, the provisions of this act shall govern.

You ask whether implementation of the act is dependent upon formal introduction of legislation before the Idaho Legislature. This office is of the opinion that formal introduction of legislation is not the determinative time at which the provisions of the act apply. Considering the liberal construction and the definitions of the act, it is our opinion that the legislative processes commence, in almost all cases, well before formal introduction of a bill. Therefore, any lobbying activities directed toward any stage in the processes of

Honorable Pete T. Cenarrusa  
December 2, 1974  
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formation, preparation, review, submission and consideration of legislation falls within the purview of the act.

This opinion should provide some guidance in the implementation of your new duties.

Very truly yours,

FOR THE ATTORNEY GENERAL

WAYNE MEULEMAN  
Deputy Attorney General

WM:lm

December 5, 1974

Dr. Bart Westberg  
IDA-ORE  
Regional Planning and  
Development Association  
P.O. Box 311  
Weiser, Idaho 83672

OFFICIAL OPINION 75-87

Dear Dr. Westberg:

We are in receipt of your request for an opinion dated October 31, 1974, addressing the following questions:

1. Could a city or county, after reviewing relevant data, create a single zone for the regulation of flood-prone areas? This zone would be based on specific health and safety rationale.
2. Would such a zone have to be adopted pursuant to a comprehensive plan?
3. Would such a zone have to part of an overall zoning scheme, or could the complete zoning plan be adopted at a later date, after comprehensive planning is completed?

In order to answer these questions, it is necessary to review the pertinent Idaho statutes and two Attorney General's opinions on related topics.

Idaho, like most other states, has general enabling legislation granting to cities and counties the power to zone. In order to achieve the purposes mentioned in enabling legislation, the city and county may enact legislation to achieve these goals. These regulations pursuant to Section 50-1203 of the Idaho Code shall be made in accordance with the comprehensive plan (emphasis

Dr. Bart Westberg  
December 5, 1974  
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added) and shall be designed to achieve purposes set out in this section.

A comprehensive plan is not defined by statute in Idaho, and therefore on October 9, 1973, the Attorney General's Office, upon request, issued an opinion to clarify the meaning of a comprehensive plan. As stated on Page 3 of the opinion:

"The total area in question must be included in the plan; this, in order to avoid substantive discrimination often present in piece-meal or spot zoning. In other words, the statutory requirement of a comprehensive plan is an implementation of the constitutional requirement of substantive due process, that private property shall not be taken for a public use without just compensation. A comprehensive plan or overall zoning scheme is insurance against arbitrary and capricious zoning on a case by case basis which otherwise might be "taking of property without due process."

What should be included in this type of plan is set out later in the opinion:

"Specifically, a document in which is included observations of existing development trends, physical limitations on the land itself, and other apparent and easily determined factors related to development would be sufficient, when combined with a map showing the approximate areas in which development should be encouraged, and those areas in which development should be discouraged. . . ."

In a discussion on the same topic in Regulation of Flood Hazard Areas, a report compiled by the United States Water Resources Council, Washington, D. C., the authors state at p. 349:

" . . . zoning is used to implement broad community objectives that allocating

Dr. Bart Westberg  
December 5, 1974  
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all of the community lands to particular uses. The requirement that zoning be preceded by a comprehensive plan is founded on the premise that zoning is a way to implement a comprehensive plan by control of the future development of an entire community. . . .

Case law in general has upheld the requirement that zoning be based on a comprehensive plan and that this zoning be applied to the entire community.

"The objection to partial or piece-meal zoning lies in its discriminatory effect on singling out for regulation a small area and imposing upon property owners therein restrictions not applicable to other areas having, in many instances, similar or even identical conditions and problems." 165 A.L.R., p. 324.

Summarizing zoning law in general, the enabling legislation for Idaho and most other states requires that zoning ordinances be based on a comprehensive plan to prevent piece-meal zoning. Applying this general law to your questions, it is evident that a regulation for flood-prone areas can create a single zone, if such a zone is adapted pursuant to a comprehensive plan and is a part of an overall zoning scheme. Exceptions to this general rule above have been accepted by some courts, and their application to flood plane zoning will be discussed below.

The Water Resources Council of the United States conducted a study on the regulation of land and water areas by state and local government to minimize flood losses. In the forward of this book, the authors state that this report "calls attention to the need for correlation of regulatory efforts with other programs dealing with flood hazards, and with water community objectives that make up the substance of sound land-use planning at the state and local levels." They review the general enabling legislation and how it can be utilized for flood plane zoning. They advance several arguments of why flood plane zoning is valid without the existence of a comprehensive plan for the entire community.

As pointed out, courts in general have disapproved partial zoning because of its flavor of arbitrariness and discrimination. Exceptions have been made in rural areas and small towns where

courts have upheld zoning ordinances which regulated only a single use. This is discussed in the case of National Advertising Co. v. Cooley, 126, Vt. 263, 227 A. 2d 406 (1967), where the court upheld a town zoning ordinance which regulated only billboard structures. The Defendant argued that the ordinance is not valid because it lacks comprehensiveness required by the enabling act, which stipulates that regulations be enacted in accordance with the comprehensive plan. The court held that regulations restricted only to billboards did not violate statutory requirements since:

"In some small towns building size, lot size, population density, trade or business use or location, or some of these, may require no attention now, or in the foreseeable future. Yet, in many of these small communities, billboards may represent the only significant threat to 'conserving the value of property and encouraging the appropriate use of land throughout such municipality' . . . however desirable in theory the coupling of zoning to a master plan may be, certainly it must be said to have been obvious to the legislature that master plans for some of our towns would be, for a long time to come, economically wasteful and physically unnecessary. Yet, certainly, such towns should not be required to forego so much of zoning as might be appropriate to their situation."

It appears that the same type of argument can be advanced for regulating land uses for flood loss control. Idaho has many small towns where it would be economically impractical at this time to develop a master plan which will then be utilized for comprehensive zoning. In these towns as in National Advertising Co. v. Cooley, supra., only one regulation is necessary, in our case flood plane zoning. Applying Cooley to this situation, as long as the entire community is taken into consideration for flood plane zoning, the arbitrariness of other piece-meal zoning is eliminated and the ordinance may be upheld.

The U.S. Water Resources Council discusses the result of other jurisdictions where partial zoning has been upheld



Dr. Bart Westberg

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The U.S. Water Resources Council discusses the result of other jurisdictions where partial zoning has been upheld

by the courts. Generally, zoning ordinances enacted only for flood hazard areas would fall into this category because the ordinance is limited to a specific area. Such partial zoning could be upheld because a particular need exists in this area or where the other areas in the locality do not physically lend themselves to zoning of this type. It could also be upheld on the theory that the municipality's or county's flood hazard areas are geographically comprehensive and therefore regulate all flood-prone lands. This, in itself, would then be a comprehensive plan for the flood hazard area.

The United States Water Resources Council recommends two types of ordinances for flood plane zoning. The report favors the adoption of a true district flood hazard zoning ordinance which divides the river into flood hazard areas and into flood-way and flood-way fringe district. This type of an ordinance is designed for areas with sufficient technical data to permit initial delineation into these two districts. A single district zoning ordinance is proposed for areas where the engineering data needed for a two district approach is lacking. With this approach, most open space uses are permissible as a matter of right within the single district. All other uses are specifically excepted.

#### ANSWER TO QUESTIONS

Number 1. A city or county can, after reviewing relevant data, create a single zone for the regulation of flood-prone areas. An example of such an ordinance can be found on page 551 of the report published by the U.S. Water Resources Council, Regulation of Flood Hazard Areas. This type of zone will be based on the specific health and safety standards for that community and on any other data available for the flood hazard area.

Number 2. Under Idaho law, Section 50-1203 any zoning ordinance shall be based on a comprehensive plan. As pointed out in this opinion, some jurisdictions have permitted partial zoning based on a comprehensive plan. It is much less certain whether partial zoning can be upheld that is not based on a comprehensive plan. As pointed out by James Weaver in an Attorney General's opinion of October 9, 1973, very few states have upheld an interim zoning ordinance which was passed without conformance to a comprehensive plan and/or without conformance to certain procedural requirements, in the absence of legislation allowing for an interim ordinance.

It is possible that the court will view the zoning ordinance as the comprehensive plan because of the nature of flood plane

Dr. Bart Westberg  
December 5, 1974  
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zoning. But to insure proper acceptance of such an ordinance, it should be based on a pre-existing comprehensive plan.

Number 3. According to general zoning law, a zoning ordinance should be part of an overall zoning scheme which is based on a completed comprehensive plan. As pointed out in the Attorney General's opinion of October 9, 1973, interim zoning ordinances are generally held invalid because of the lack of a comprehensive plan. However, as pointed out in this opinion, flood plain zoning contains some different zoning principles and interim ordinances or ordinances not part of an overall zoning scheme could be upheld on the basis that the flood hazard area in itself presents a comprehensive area which can only be dealt with in a specific ordinance of that area, thus creating a comprehensive zoning ordinance for that area and for that particular problem.

Again, the safe course to follow is the compliance with the comprehensive zoning scheme, but if this is impossible at this time, all indications are that a comprehensive zoning ordinance for the flood hazard area will be upheld, if based on the following:

1. That a study of the flood-prone areas exist that documents the potential hazard to life and property;
2. That the application of zoning provisions is applied uniformly throughout the total jurisdictional area; and
3. That there is a planning program in process for the purpose of preparing a comprehensive plan for the total jurisdictional area.

Very truly yours,

FOR THE ATTORNEY GENERAL

URSULA KITTLEWELL



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

W. ANTHONY PARK  
ATTORNEY GENERAL

December 6, 1974

The Honorable C.C. "Cy" Chase  
Senate Minority Leader  
Building Mail

OFFICIAL OPINION #75-88

Dear Senator Chase:

Mr. Park has referred your letter requesting an Attorney General's opinion to me for response. In your letter you asked three questions which I will treat individually.

"[1] Under 67-451(3), Idaho Code may the auditor for the State of Idaho honor any voucher or claim submitted by the legislature pursuant to this subsection if the signature of the appropriate presiding officer does not appear thereon?

Idaho Code § 67-451(3) reads as follows:

(3) The presiding officers of each house of the legislature are hereby authorized to make expenditures out of the legislative fund for any necessary expenses of the legislature and the legislative fund is hereby perpetually appropriated for any necessary expenses of the legislature. Necessary expenses of the legislature shall include, but are not necessarily limited to salaries and wages of officers, members, and employees of the legislature, consultants and other expert or professional personnel, travel expenses of officers, members, and employees of the

legislature, other current expenses incurred in any operation or function of the legislature, premiums for life, accidental death and dismemberment, hospital, medical, surgical and major medical insurance for members of the legislature during the period of their employment, and capital outlay items necessary for any operation or function of the legislature. The signature of a presiding officer on any voucher or claim for payment shall be sufficient authority for the state auditor to pay the same. Expenses for any interim activity of the legislature, legislators, or legislative committees shall be paid in the same manner, if previously authorized by concurrent resolution. (Emphasis added.)

The emphasized portion of the statute states that the signature of the presiding officer of each house of the legislature shall be sufficient authority for the auditor to pay vouchers and claims for the necessary expenses of each house, respectively.

It is the opinion of the Attorney General that the state auditor may not pay vouchers or claims under this subsection unless the signature of the presiding officer appears thereon. It is our conclusion that the emphasized portion of the statute means that the signature of the presiding officer is mandatory but that at the same time, the auditor need not require any proof other than the signature before honoring the claim.

Any other system would lend itself to the possibility of payment of the auditor of claims which may be disputed or insufficiently related to the function of the legislature.

At some point the legitimacy and necessity of claims made by the legislature under Idaho Code § 67-451(3) must be determined and validated. It appears clear that the legislature intended that the claims should be validated, if at all, by the signature on the voucher or claim, of the proper presiding officer. Without such a system, the auditor would be required himself to determine the authenticity and necessity of each claim.

The duties of the auditor are set out in Idaho Code § 67-1001. Subsection 14 of that section reads:

"To draw warrants on the treasurer for the payment of moneys directed by law to be paid out of the treasury; but no warrant must be drawn unless authorized by law. Every warrant must be drawn upon the fund out of which it is payable; and specify the service for which it is drawn, and when the liability accrued."

Idaho Code § 67-451(3) authorizes expenditures by law and § 67-1001(14) states the auditor has the authority to draw warrants to pay such claims. However, Idaho Code § 67-451(3) requires that (1) the expense must be necessary and (2) that the signature of the presiding officer is sufficient authorization.

Therefore, the auditor may not pay the claim unless the signature is found on the voucher or claim which indicates that the expense was necessary to the functioning of the legislature. If this were not the case, the auditor would be required to make an independent determination as to the "necessity" of each claim; the auditor should not be burdened with the responsibility of determining the "necessity" of any one given expense as it relates to the functions and operations of the legislature.

2. (a) In the case of the Senate, who is the appropriate "presiding officer" within the meaning of 67-451(3), Idaho Code?
- (b) Does the statute contemplate more than one presiding officer in each chamber?

The legal answer to subparts (a) and (b) of question 2 will be handled together since they hinge on the same Constitutional provision.

Idaho Constitution art. 4, § 13 reads:

"Lieutenant governor is president of senate.-- The Lieutenant governor shall

be president of the senate, but shall vote only when the senate is equally divided. In case of the absence or disqualification of the lieutenant governor from any cause which applies to the governor, or when he shall hold the office of governor, then the president pro tempore of the senate shall perform the duties of the lieutenant governor until the vacancy is filled or the disability removed."  
(Emphasis added.)

(a) It is clear from a reading of this provision that the lieutenant governor is ordinarily to be considered the president of the senate and therefore the "presiding officer" of the senate. It is the opinion of the Attorney General that the "presiding officer" of the senate as used in Idaho Code § 67-451(3), in the first instance, the duly elected lieutenant governor of Idaho.

However, if the lieutenant governor is disqualified for any of the reasons set out in Idaho Constitution art. 4, § 12, or is acting as governor of the state under the provisions of that same section, then the president pro tempore of the senate shall be the presiding officer.

(b) It appears clear that the orderly succession of officers provided for in Idaho Constitution art. 4, § 12, 13, and 14, precludes more than one presiding officer at any one time.

The lieutenant governor is the presiding officer as long as he is not serving as governor for any reason and as long as he is not disqualified from holding his office as lieutenant governor or out of the state himself.

The president pro tempore of the senate only acts as presiding officer when the lieutenant governor is acting as governor for any reason, out of the state, or disqualified from holding the office of Lieutenant governor.

It is therefore our opinion that no more than one presiding officer can legally exist at any one time.

The Honorable C.C. "Cy" Chase  
December 6, 1974  
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3. Does the presiding officer have the implied authority to direct and otherwise control the mechanics and the general process for satisfaction of expenditures as set out in Idaho Code § 67-451(3).

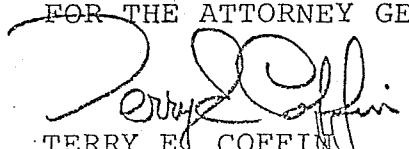
This code section gives the presiding officer the authorization to "make expenditures". The presiding officer then, it appears, must be given the power and authority to direct and otherwise control the mechanics and the general process for satisfaction of the expenditures. If the presiding officer does not, impliedly, have such power and authority then the statutory mandate that he "make expenditures" would be meaningless.

It is, therefore, the opinion of this office that the control over the mechanisms and processes contemplated under Idaho Code § 67-451(3) must remain with the presiding officer of the senate. In other words, these duties reside with the lieutenant governor. In the event the lieutenant governor cannot serve as presiding officer for the reasons mentioned above, the duties devolve upon the president pro tempore.

I trust this answers your questions. If you need further clarification, please advise.

Very truly yours,

FOR THE ATTORNEY GENERAL



TERRY E. COFFIN  
Assistant Attorney General

TEC:lm



December 11, 1974

Mr. Jarrold L. Harrington  
Executive Secretary  
Idaho Horse Racing Commission  
3311 West State Street  
Boise, Idaho 83703

OFFICIAL OPINION #75-89

Re: Revision of Rules 26.12 and 26.13 and  
Idaho Code §54-2513

Dear Mr. Harrington:

This letter is in response to your request for an official opinion on the legality of suggested amendments of rules 26.12 and 26.13 of the Commission's Rules Governing Horse Racing (1974).

The existing rules are as follows:

"26.12. For the purpose of encouraging the breeding within the State, of valuable thoroughbred, purebred and/or registered horses, at least one race each day at each race meet shall be limited to Idaho bred horses. . . . Proof that horses entered in such races were bred in Idaho rest with the owners certificate of registration."

"26.13. An 'Idaho bred' horse shall be construed to be a foal dropped by a mare in Idaho."

The National Appaloosa Racing Association, Inc., suggests the following changes:

"26.12(A). Proof that thoroughbred and quarter horses entered in such races were

bred in Idaho rest with the owners certificate of registration.

(B). Proof that Appaloosa horses entered in such a race were bred in Idaho rest with a seal issued by the Idaho Appaloosa Racing Association, Inc., on the foal certificate of registration. Only Appaloosa horses with this seal will be considered Idaho bred Appaloosa foals.

"26.13(A). An 'Idaho Bred' thoroughbred and quarter horse shall be construed to be a foal dropped by a mare in Idaho.

(B). An 'Idaho Bred' Appaloosa shall be construed to be a foal dropped by a mare in Idaho and duly recorded and stamped with a seal by the Idaho Appaloosa Racing Association, Inc."

In our opinion, the proposed amendments of rules 26.12 and 26.13 are inconsistent with the Commission's statutory "duty to license, regulate, and supervise all race meets held in this state. . . ." Idaho Code § 54-2507 (1974). This duty may not constitutionally be delegated to the Idaho Appaloosa Racing Association by allowing the association to "license" Idaho bred Appaloosas because the association has a substantial pecuniary interest in the certification of Idaho bred horses. Licensing authority cannot be vested in a private organization in the absence of an explicit statutory command.

You have also asked for an opinion on the proper method of disbursing certain funds to owners and breeders of Idaho horses. Section 54-2513 of the Idaho Code states, in pertinent part:

"One-half of one per centum (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, and racing Appaloosas,

Mr. Jarrold Harrington  
December 11, 1974  
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subject to the approval of the commission. Funds not distributed as approved by the commission shall revert to the school endowment fund six (6) months after the end of the calendar year in which they were earned."

The commission's role under this statute is twofold: It must designate the "lawfully constituted representatives of each breed" and it must approve the ultimate use of the funds to insure that the money is used "to benefit owners and/or breeders." The commission does not, however, have the power to propose a specific use of the funds. It must simply approve or disapprove specific expenditures by the lawfully constituted representatives of each breed.

Very truly yours,

FOR THE ATTORNEY GENERAL

CONLEY WARD, JR.  
Assistant Attorney General

CW:lc

December 11, 1974

Miss Marjorie Ruth Moon  
State Treasurer  
State of Idaho  
Building Mail

OFFICIAL OPINION #75-90

Dear Miss Moon:

In regard to your recent letter to us, concerning the disposition of district health department funds and in answer to the letter you included with your letter which was addressed from Grant L. Young to you and concerned Mr. William C. Cole of the Seventh District Health Department, please consider the following.

It appears from the letter attached to your letter that the Seventh District Health Department is planning to establish a building fund, and that it wants to hold this fund in a savings account in a bank, with the interest accruing to be credited to the savings account.

Section 39-422, Idaho Code, provides:

" . . . Each division within the fund shall be under the exclusive control of its respective district board of health and no funds shall be withdrawn from such division of the fund unless authorized by the District Board of Health or their authorized agencies . . . ."

In answering a similar question relating to whether Boise State University and Idaho State University could withdraw the appropriations for educational television and handle them through

Miss Marjorie Moon  
December 11, 1974  
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a bank account, on June 17, 1971, James Hargis of this office concluded that such could not be done. He indicated Funds could not be withdrawn in total and placed in a bank account to be held for later disbursement by the institution. A copy of that opinion is attached.

Section 39-422, Idaho Code does not authorize the District to withdraw all of its funds and handle them through its own bank account. It does require that funds be accounted for separately for each division; such funds must be maintained in the state treasury until spent or authorized by law.

Very truly yours,

FOR THE ATTORNEY GENERAL

ROBERT L. MILLER  
Chief Deputy Attorney General

RLM:lm

December 11, 1974

Mr. John F. Croner  
Blaine County Deputy  
Prosecuting Attorney  
P.O. Box 908  
Hailey, Idaho 83333

OFFICIAL OPINION # 75-91

Dear John:

I have been asked to answer your letter relating to whether or not the Board of County Commissioners of Blaine County are mandatorily required to have a county-wide dog license ordinance under Section 25-2801, Idaho Code.

In order to interpret what Section 25-2801 means, it is necessary to examine the history of the section. The Act was originally passed in 1927. Idaho Session Laws, 1927, Chapter 220, Section 1, page 24. The Act then read as follows:

a

"Section 1. The board of county commissioners of any county, at any meeting of any year, may make an order requiring all owners of dogs over six months old within said county, other than those belonging to residents of a municipality within said county which has enacted and is enforcing a dog license law, to pay an annual license of not more than \$2 for each male dog and each female that has been spayed, and not more than \$3 for each female dog that has not been spayed, the said tax to be paid not later than sixty (60) days from date of said meeting at which said order is noted: Provided, That where an owner keeps dogs for breeding or for

Mr. John F. Croner  
December 11, 1974  
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commercial purposes, he shall be entitled to a kennel license covering fifteen dogs for \$5. Said order shall be in force and effect for one year from its date and thereafter until rescinded by order of the board; and notice of such order shall be published in some newspaper of general circulation within the county in the two successive issues of said paper immediately following the meeting at which such action is taken by the Board of County Commissioners."

In 1955, this law was amended, 1955 Idaho Session Laws, Chapter 200, page 429, as follows:

"25-2801. COUNTY DOG LICENSE TAX.--  
The board of county commissioners of any county, at any meeting in any year, shall make an order requiring all owners of dogs over six months old within said county, other than those belonging to residents of a municipality within said county which has enacted and is enforcing a dog license law, to pay an annual license of not more than two dollars for each male dog and each female that has been spayed, and not more than three dollars for each female dog that has not been spayed, the said tax to be paid not later than sixty days from date of said meeting at which said order is voted: provided, that where an owner keeps dogs for breeding or commercial purposes, he shall be entitled to a kennel license covering fifteen dogs for five dollars. Said order shall be in force and effect for one year from its date and thereafter until rescinded by order of the board; and notice of such order shall be published in some newspaper of general circulation within the county in the two successive issues of said paper immediately following the meeting at which such action is taken by the board of county commissioners."

In 1965, this law was again amended (1965 Session Laws, Chapter 169, page 331) so that it read as follows:

"25-2801. COUNTY DOG LICENSE TAX.--

The Board of county commissioners of any county, at any meeting in any year, shall make an order requiring all owners of dogs over six months old, within certain areas to be designated by the board as requiring dog control and lying outside the corporate limits of municipalities which have enacted and are enforcing a dog license law, to pay an annual license of not more than two dollars for each male dog and each female that has been spayed, and not more than three dollars for each female dog that has not been spayed, the said tax to be paid not later than sixty days from date of said meeting at which order is voted: provided, that where an owner keeps dogs for breeding or commercial purposes, he shall be entitled to a kennel license covering fifteen dogs for five dollars. Said order shall be in force and effect for one year from its date and thereafter until rescinded by order of the board; and notice of such order shall be published in some newspaper of general circulation within the county in the two successive issues of said paper immediately following the meeting at which such action is taken by the board of county commissioners."

This law has not been further changed and presently reads as last above indicated. The law then, in substance, now says that the commissioners of any county at any meeting shall make an order setting up a dog ordinance within those areas of the county which are designated by the board of county commissioners as requiring or needing dog control, other than cities having and enforcing dog ordinances.

The title of the 1965 amendment to this Act reads in part that Section 25-2801, Idaho Code, is amended:

"... TO PROVIDE THAT SUCH LICENSE TAX (dog ordinance) SHALL BE REQUIRED ONLY WITHIN THOSE AREAS OF THE COUNTY AS ARE DESIGNATED BY ITS BOARD OF COMMISSIONERS."



Mr. John F. Croner  
December 11, 1974  
Page Four

In cases of doubt as to the meaning of a statute, the title of the Act is at times used as an aid to construction to indicate the meaning of the act. Curoe v. Spokane, etc., R.R. Company (1920) 32 Idaho 643, annotation at 37 A.L.R. 923.

There is no doubt that the law required every county to have a dog ordinance between the dates of 1955 and 1965.

The act as it now reads says that the board of county commissioners of any county shall make an order taxing dogs in areas to be designated by the county commissioners. It also, however, says that it is up to the county commissioners to determine what areas, other than cities having and enforcing dog ordinances, require dog control. The question immediately arises: Could the board of county commissioners of any county determine that the county does not require or need a dog ordinance? In our opinion, it could, so long as it did not do so arbitrarily or abuse its discretion in doing so.

By statute, the portion of the county to be so regulated (other than certain cities) is left to the sound use of discretion of the board of county commissioners. The title of the amended Act also indicates the same thing; that is, it is a discretionary act on the part of the county commissioners.

Quite probably, the county commissioners could not, except in extreme cases, be forced by legal action to designate any portion of the county as needing such regulation. In order for them to be required to do so, there would have to be a clear showing of abuse of their discretionary power.

Short of a very strong showing of abuse in discretion on the part of the county commissioners, or a showing that they had ignored the pertinent facts and arbitrarily refused to consider them, the courts would not require county commissioners to pass a particular ordinance.

In other words, this law as it now reads does require that the board of county commissioners are to consider the matter of whether the county and any particular portions of the county require a dog ordinance; but, since 1965 when the Act was amended, it is now a matter of discretion with the board of county commissioners of any county as to whether any particular portion of the county requires a dog ordinance.

Mr. John F. Croner  
December 11, 1974  
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Thus, as to the question of what portions of the county require a dog ordinance, this law cannot be said to be mandatory since 1965.

Sincerely yours,

FOR THE ATTORNEY GENERAL

WARREN FELTON  
Deputy Attorney General

WF:lc



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

W. ANTHONY PARK  
ATTORNEY GENERAL

December 24, 1974

Board of Directors  
King Hill Irrigation District  
P.O. Box 428  
King Hill, ID 83633

OFFICIAL OPINION #75-93

Gentlemen:

You asked for our opinion on the following questions:

- 1) Can the district reclassify its lands for the purpose of assessments; and
- 2) Can water of the district be used on lands outside the district.

The manner of making assessments within an irrigation district is set forth in Idaho Code, §43-701. The statute requires the secretary of the board to prepare an assessment book containing a full and accurate list and description of all of the land of the district. The board must meet between August 1 and November 8 of each year to levy an assessment upon all the lands of the district for the expense of maintaining and operating the property of the district. The amount of said assessment for operation and maintenance shall be spread upon all the lands in the district in proportion to the benefits received by such lands growing out of the maintenance and operation of the works of the district.

Thus the board is the sole authority for determining what the rate of assessment is to be for any given year. Inherent in that power is the power to reclassify land so that all lands within the district are paying its fair and proportionate share of the district's costs. As long as the method of determining the assessment is fair, reasonable and applied equally throughout the district, the board can use any method it chooses.

Board of Directors  
Page 2  
December 24, 1974

The second question is whether water of the district can be used outside the district boundaries. First of all, the district's water right is restricted to use on the lands described in the water right and the district has no authority or right to use that water on any other lands unless transferred. It has also been held that no burden can be imposed upon the district for the delivery or maintenance of canals or laterals for the delivery of water beyond the boundaries of the district. It follows that no water can be supplied to lands outside the district so long as it is needed for the proper irrigation of lands within the district. It also follows that the district can not be compelled to deliver water outside the district and can cease the delivery of water through its system that reaches those lands. This does not, however, preclude the use of waste waters outside the district. But the district always has the right to cease wasting that water and can place it to a beneficial use on lands within the district.

I trust this answers your questions. If we can be of further assistance, please write again.

Very truly yours,

FOR THE ATTORNEY GENERAL

NATHAN W. HIGER  
Deputy Attorney General

NWH/slg

December 27, 1974

Official Opinion #75-94

J. P. Munson, M.D., President  
State Board of Education  
Sandpoint, Idaho 83864

Dear Doctor Munson:

We wish to respond to your question concerning the appearance by the State Board of Education before the Joint Finance and Appropriation Committee of the Legislature, pursuant to the Committee's letter to you dated December 19, 1974, and in view of the Governor's direction that those agencies that receive appropriations from the general fund of the state are not to appear before the Committee until after the presentation of the proposed budget to the Legislature. The State Board of Education is, of course, a recipient of appropriations by the Legislature from the general fund.

The Idaho Constitution, Art. 4, Sec. 8, requires the Governor to submit a proposed budget to the Legislature. Further, the Legislature has enacted Title 67, Chapter 35, Idaho Code, which provides that the Governor shall be the chief budget officer of the State. Section 67-350, Idaho Code. Therefore, the Governor has the paramount responsibility for the projection of receipts, development of forms, and plan for expenditure of funds he believes to be necessary to operate the programs of services provided by the State, especially those programs funded from the general fund. He is required to submit the budget to the Legislature as soon after it convenes as is possible, but not later than five days thereafter. Section 67-3505, Idaho Code.

Each agency is to prepare and file with the Budget Division its report and financial needs. Section 67-3503, Idaho Code. These reports are compiled by the Division, needs assessed, and the Governor then develops the budget that is to be presented by him in the time required. 67-3505, Idaho Code. Therefore, until the Governor has presented his budget, no general fund agency has any presentation to make before the Joint Committee. It seems inconsistent to say that the law requires the Governor to present a unified and precise budget to the Legislature into which general fund agencies have

Doctor J. P. Munson  
December 27, 1974  
Page 2.

contributed, and then say that the Legislature itself can require the general fund agencies to give presentations on their contributions to and requests from the budget before the Governor presents it to the Legislature. The Legislature, of course, is free to decrease, increase, reject, or otherwise modify agency programs described in the budget. But we are of the opinion that a general fund agency has no presentation to make to anyone or anybody (except to the chief budget officer) until after the budget is presented by that officer to the Legislature. 67-3505, Idaho Code, mentioned above, mandates the timing of the presentation of that budget and may not be abrogated by legislative committee request, absent the consent of the Governor.

We are not unmindful that Section 67-3515, Idaho Code, requires the Legislature to introduce all appropriation bills no later than the 45th legislative day. The Legislature's desire to meet that deadline is to be applauded. However, it would seem that the Committee could utilize its time prior to the budget message by the Governor to call for presentations from those agencies not dependent in whole or in part on appropriations from the general fund. Indeed, it is our understanding that the Governor has specifically suggested that the committee spend its time prior to his budget message receiving the budget requests from the dedicated fund agencies. It occurs to us that this would be an expeditious course for the committee to follow, if their concern is to have their appropriation bills submitted by the 45th day of the session.

Very truly yours,

W. ANTHONY PARK  
ATTORNEY GENERAL

WAP:gmi

cc: Governor Cecil D. Andrus  
Mr. Milton Small, Executive Director  
State Board of Education

Opinion



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

W. ANTHONY PARK  
ATTORNEY GENERAL

January 2, 1974

James Baughman  
Outfitters & Guides Member  
Outfitters & Guides Board  
Building Mail

OFFICIAL OPINION #75-95

Dear Mr. Baughman:

You have asked me to determine whether a bonding plan sponsored by the Idaho Outfitters and Guides Association would comply with the bonding requirements of Section 36-5408(c)(4), Idaho Code and be an alternative to individual bonding. As I understand the above mentioned plan the Association will have a group bond under which each member of the Association shall be bonded to the State of Idaho for the benefit of persons employing the member, who must also be the holder of an outfitter's license, for five thousand dollars (\$5,000). Also, when an outfitter becomes a member of the Association he shall automatically be included under the Association's bond. The bond shall be in the same form as the sample bond which is attached hereto and incorporated herein.

It is the opinion of the Attorney General's Office that such a group bond plan would comply with the bonding requirements of Section 36-5408(c)(4), Idaho Code and therefore would be a viable alternative to individual bonding.

The only problem with the sample bond form is in whether it is for the benefit of third persons as required by 36-5408(c)(4). That Section reads as follows:

"(c) Applications shall be made to  
and filed with the Board and accom-  
panied by: . . .

"(4) A bond to the state of Idaho  
for the benefit of person or per-  
sons employing the licensee and in

James Baughman  
January 2, 1974  
Page 2

a form approved by the board in the sum of five thousand dollars (\$5,000) for outfitters, executed by a qualified surety, duly authorized to do business in this state, conditioned that for the current license year said applicant[,] his agents and employees, if said license is issued to him, shall conduct his business as an outfitter without fraud or fraudulent representation, and will faithfully perform his contracts with and duties to his patrons; said bond shall be filed with the board before issuance of the license as provided herein."

A reading of the bond sample indicates that the obligatory portion thereof reads predominantly the same as the statute does; but no portion of the bond specifically points out that the bond is for the benefit of persons employing an outfitter as the statute requires. This however is not an impediment since the law pursuant to which a bond is executed constitutes a part of the bond. United States v. Johnson, 51 F.2d 312 (D.C. Mont. 1931) Since the statute states the bond shall be for the benefit of third parties and the statute constitutes part of the bond, the bond is for the benefit of third parties.

The bond form in other respects appears to be in compliance with Section 36-5408(c)(4). The obligor, or as in the terms used in sample form, the principal, will be sufficiently identified when the list of outfitters belonging to the Association is included and incorporated in the bond. Each member of the Association is bonded for the required amount of five thousand dollars (\$5,000). The bond runs to the State of Idaho as the obligee and for the benefit of third persons, as per the above discussion. The bond is executed by a qualified surety, duly authorized to do business in the state of Idaho. And the condition of the bond is as required by Section 36-5408(c)(4).

Since the sample bond and proposed plan would comply with the requirements of Section 36-5408(c)(4) the only requirement remaining before such a bond could be used in fulfillment of that section is that it be approved by the Board which is purely an administrative decision. It should also be noted



James Baughman  
January 2, 1974  
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that individual bonding as has been accepted in the past still fulfills 36-5408(c)(4) and will be required for first year outfitters since they could not become association members without holding a license which requires prior bonding.

In response to your question as to whether the Board should adopt a rule or regulation regarding the use of the Association's group bond in fulfillment of the bond requirement such would appear to be the best way to inform outfitters that the Association's bond meets the requirements of 36-5408(c)(4) and to administer the use of the plan. Section 36-5407(2) gives the Board the power to prescribe and establish rules of procedure and regulations to carry into effect the provisions of Chapter 54, Title 36, Idaho Code. A rule or regulation regarding the fulfillment of the requirements of Section 36-5408(c)(4) would fall within this vested authority of the Board. However, until such a rule or regulation is adopted the Association's bond could be used after approval by the Board.

I trust that this answers your questions.

Very truly yours,

FOR THE ATTORNEY GENERAL

WAYNE G. CROOKSTON, JR.  
Assistant Attorney General

WGC:lm



# UNITED PACIFIC INSURANCE COMPANY

A MEMBER OF UNITED PACIFIC INSURANCE GROUP  
HOME OFFICE: TACOMA, WASHINGTON

THE SURETY DEPARTMENT

BOND NO. \_\_\_\_\_

## BLANKET OUTFITTER LICENSE BOND

KNOW ALL MEN BY THESE PRESENTS:

THAT ANY MEMBER, whose name and address appears on the attached list of members, which list is incorporated herein by this reference, of THE IDAHO OUTFITTERS AND GUIDES ASSOCIATION, INC., P. O. Box 95, Boise, Idaho 83701, as Principals, and the UNITED PACIFIC INSURANCE COMPANY, P. O. Box 7427, Boise, Idaho 83707, as Surety, are held and firmly bound unto the STATE OF IDAHO in the sum of Five Thousand and no/100 Dollars (\$5,000), applicable to each member listed, for payment of which well and truly to be made, we hereby bind ourselves, our, and/each of our heirs, executors, administrators, successors and assigns, jointly and severally by these presents.

WHEREAS, the said Principals, above named, have applied to the STATE OF IDAHO Outfitters & Guides Board for an Outfitter License;

NOW, THEREFORE, if said Principals herein named and their agents or employees shall conduct his business as an Outfitter or Guide pursuant to the terms required by Chapter 54, Title 36, Idaho Code, otherwise known as Idaho Outfitters & Guides License Law, and will faithfully perform their contracts with the duties to their patrons without fraud or fraudulent representation, then this obligation shall be void and of no effect; otherwise, to be and remain in full force and virtue, for a term ending March 31, 19\_\_\_\_.

IT IS HEREBY further agreed and understood that the Surety, UNITED PACIFIC INSURANCE COMPANY, shall automatically include as additional Principals any new members of the IDAHO OUTFITTERS AND GUIDES ASSOCIATION, INC. subsequent to the issuance date of this bond.

Signed and sealed this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_

ATTEST: IDAHO OUTFITTERS AND GUIDES ASSOCIATION, INC.  
on behalf of its Outfitter Members

\_\_\_\_\_  
Its Secretary

\_\_\_\_\_  
Its President

COUNTERSIGNED:  
HENRY-RUST & CO.

UNITED PACIFIC INSURANCE COMPANY

\_\_\_\_\_  
Martin W. Rust, II  
Idaho Resident Agent  
Boise, Idaho

\_\_\_\_\_  
Martin W. Rust, II  
Attorney-in-Fact



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

W. ANTHONY PARK  
ATTORNEY GENERAL

January 6, 1975

Honorable Cecil D. Andrus  
Governor  
State of Idaho  
Statehouse Mail

OFFICIAL OPINION #75-96

Honorable Pete T. Cenarrusa  
Secretary of State  
State of Idaho  
Statehouse Mail

Gentlemen:

I have received each of your requests for an official clarification of Section 18(d) of the Sunshine Initiative. Therein, "public officials acting in their official capacity" are rendered exempt from the registration requirements of the Initiative. Your questions ask:

1. What is a public official?
2. Is one who serves the public from an appointive or merit system within State government a "public official" within the meaning of Section 18(d)?
3. Are employees of the state, county, city, and other public entities "public officials" within the meaning of Section 18(d)?
4. Are members of the governor's staff, who at his direction, consult with legislators concerning specific pieces of legislation, acting in an official capacity for the governor and therefore exempt from registration pursuant to Section 18(d)?
5. Are employees and/or officials of the federal government within the purview of Section 18(d)?

The answer to each is found within the language of the Initiative itself.

I

The term "public official" is without explicit definition as used within the Sunshine Initiative. It is axiomatic, however, that a public official is the incumbent of a public office. As defined by Section 2(o):

"'Public office' means any state office or position, including state senator and state representative, that is filled by election."

Section 2(o) dictates the meaning of the term "public office" whenever used within the Initiative. Roe v. Hopper, 90 Idaho 22, 26, 408 P. 2d 161, 164 (1965). Construed in pari materia, Section 2(o) appropriately defines the public office to which Section 18(d) implicitly refers. cf Craig H. Hisaw, Inc. v. Bishop, 95 Idaho 145, 504 P. 2d 318, 321 (1972).

Section 2(o) restricts the scope of Section 18(d) by establishing two independent criteria for its implementation. First, one otherwise an incumbent of public office must be the incumbent of a state office or position. Second, the incumbent must accede to the public office by election thereto. The first criterion raises the question: What is a "state" office within the meaning of the Sunshine Initiative? Generally, a state office is one in which the jurisdiction, duties, and responsibilities prescribed are conferred on behalf of the state at large though they need not be exercised in a territory coextensive with the state. People v. Hersey, 69 Colo. 492, 196 P. 130, 131 (1921). Within this broad context, one might view a county official as holding a "state" office. cf Strickfaden v. Greencreek Highway District, 42 Idaho 738, 748, 248 P. 456 (1926); People v. Elliott, 115 Cal. A. 2d 410, 252 P. 2d 661, 664 (1953). Similarly, officers of municipal corporations have been held to be "state" officers. Jefferson County Fiscal Court v. Traeger, 302 Ky. 361, 194 SW 2d 851, 854 (1956); 63 Am.Jur. 2d, Public Officers and Employees, Section 20; cf Finucane v. Village of Hayden, 86 Idaho 199, 203, 384 P. 2d 236 (1963). Explicit language to support this broad construction is not found within the Initiative. To the contrary, its declared statement of purpose reflects specific focus only upon those who aspire to statewide offices. Section I declares:

"The purpose of this act is:  
(b) to promote openness in government  
and avoiding secrecy by those giving  
financial support to state election  
campaigns and those promoting or op-  
posing legislation for compensation at  
the state level." (Emphasis supplied)

Disclosure is the thrust of the Initiative. Kiethly, et al. v. Cenarrusa, Memorandum Decision entered in Idaho's Fourth Judicial District (September 9, 1974). Section 2(o) identifies those offices for which the appropriate disclosures of campaign financing are sought. Disclosure is also the single subject of the Initiative. Ibid. Necessarily, and as construed with Section 18(d), Section 2(o) identifies which public offices afford their incumbents exemption from the disclosure requirements of lobbyist registration.

In addition, analysis of Section 2(o) itself inferentially substantiates a restrictive construction of the phrase, "any state office." The offices of state senator and state representative are articulated within the definition of public office yet neither are filled by the votes of a statewide constituency. Each office is filled by the votes of electors residing within legislative districts. Section 34-614(1), Idaho Code; cf Colorado State Civil Service Ass'n. v. Love, 167 Colo. 436, 448 P. 2d 624, 631 (1968). Had the drafters intended the phrase "any state office . . . filled by election" to mean an elected office with less than a statewide constituency, the offices of state senator and state representative need not have been specified.

In my opinion, Section 18(d) exempts public officials from disclosing their endeavors to promote or discourage the passage of legislation when, in doing so, they are acting in their official capacity but only if the office held is one filled by election from a statewide constituency.

## II

One who serves the public from a merit or appointive system within state government cannot satisfy the "election" criterion of Section 2(o). Inability to meet either criterion of Section 2(o) is fatal to one seeking exemption from lobbyist registration as a public official.

III

No state, county, city or other public entity employee is a public official within the meaning of Section 18(d). Exempt status is only conferred upon the incumbent of a public office. Judicially, public office is distinguished from public employment upon satisfaction of the following indispensable criteria:

- "1. It must be created by the Constitution or by the Legislature or created by a municipality or other body through authority conferred by the Legislature;
2. It must possess a delegation or a portion of the sovereign power of government, to be exercised for the benefit of the public;
3. The powers conferred, and the duties to be discharged, must be defined, directly or impliedly, by the Legislature or through legislative authority;
4. The duties must be performed independently and without control of a superior power, other than the law, unless they be those of an inferior subordinate office, created or authorized by the Legislature, and by it placed under the general control of a superior officer or body;
5. It must have some permanency and continuity, and not be only temporary or occasional." State v. Hawkins, 79 Mont. 506, 257 P. 411, 418 (1927); quoted in State v. Hutchinson, 187 Wash. 61, 59 P. 2d 1117, 1118 (1936); cited in Jewitt v. Williams, 84 Idaho 93, 101, 369 P. 2d 590, 594 (1962); cf Smith v. Losce, 485 F. 2d 334, 347 (Tenth Cir, 1973 -- dissenting opinion).

A determination of status, official or employee, pursuant to the judicial criteria is reserved for a case-by-case analysis. Once made, the further requirements of Section 2(o) must be met for one to realize the Section 18(d) exemption from lobbyist registration.

IV

The governor exercises the supreme executive power of the state. Article IV, Section 5, Idaho Constitution; Section 67-802,

Idaho Code. It may be assumed that he will and does appoint members of his staff to aid him in the exercise of the powers and duties inherent to the office. When the appointment authorizes one to act for and in place of the governor, the appointee's status is that of a deputy. Wilbur v. Office of City Clerk of City of Los Angeles, 143 CA 2d 636, 300 P. 2d 84, 89 (1956). Further:

"A deputy is a substitute for another and is empowered to act for him in his name and behalf in all matters in which the principal may act. \* \* \* Statutory authority is not necessary to enable a public official to appoint sufficient deputies to perform the duties of his office. See 43 Am.Jur. 218, 219, Public Officers, § 460." Blackburn v. Brorein, \_\_\_\_ Fla. \_\_\_\_, 70 So. 2d 293, 296 (1954).

Within the examined context, one who consults with legislators at the direction of and who is vested with the authority of the governor acts as his deputy. It is my opinion that this deputy(ies) is then exempt from the Initiative's lobbyist registration requirement pursuant to Section 18(d). Further, that this right of appointment extends to all public officials enumerated by the Idaho Constitution as incumbents of statewide elected offices.

V

Section 18(d) affords exempt status to public officials who in the performance of their official duties, seek to promote or discourage legislation before the Idaho Legislature. The exemption may not be claimed by an employee of a governmental entity, be it federal, state, or local. As regards the incumbent of a federal office, Section 2(o) states that public office is "any state office . . . ." When used by the legislature, the word "state" generally denotes one of the members of the federal union not the Union itself. See Twin Falls County v. Hulbert, 66 Idaho 128, 156 P. 2d 319, 325 (1945); reversed 66 S.Ct. 444, 327, U.S. 103, 90 L.Ed. 560 (1946). I find nothing within the language of Section 2(o) or the Initiative itself to warrant deviating from the term's accustomed use. It is my opinion that neither federal officers nor federal employees are exempt from the lobbyist registration requirements of Section 18(d) should they attempt to affect the passage of state legislation.

The regulatory impact of the Sunshine Initiative is directed to the public as well as private sector of our state. As direct

Honorable Cecil D. Andrus  
Honorable Pete T. Cenarrusa  
January 6, 1975  
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legislation from the people of Idaho, this landmark enactment seeks disclosure of the sums expended to affect the decisions of state government and the identities of those from whom the expenditures flow. It focuses upon disclosure of campaign financing and lobbying activities. The gravity of its endeavor is unanimously perceived. The power of the initiative is one of constitutional dimension, reserved exclusively on behalf of the people. Article III, Section I, Idaho Constitution. Its successful exercise is a metamorphosis of the people's will to law. Accordingly, if the language of individual provisions may not express that will clearly, the issue should be afforded the dignity of legislative clarification. As representatives of the people, clarification in fidelity to their pronounced will would be the duty of the Legislature.

Very truly yours,

W. ANTHONY PARK  
Attorney General

WAP:lc





## STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

W. ANTHONY PARK  
ATTORNEY GENERAL

January 6, 1975

Mr. Bill Onweiler  
State Representative  
Legislative District #16

Dear Mr. Onweiler:

The inquiries set forth in a letter addressed to you regarding procedural and conflict of interest questions related to planning and zoning decisions in Ada County have been forwarded to me. I will answer each question separately in the order in which they were presented.

1) In common law, public officers could not be financially interested in contracts made by them in their official capacity. McRoberts v. Hoar, 28 Idaho 163, 152 P. 1046 (1915). In Idaho, the common law rule has been codified in Idaho Code, Section 59-201 to 59-203. Section 59-201 states:

"Members of the legislature, state, county, city, district and precinct officers, must not be interested in any contract made by them in their official capacity, over any body or board of which they are members."

Section 59-202 provides:

"State, county, district, precinct and city officers must not be purchasers at any sale nor vendors at any purchase made by them in their official capacity."

The courts have duly held that the statutes such as 59-201 and 59-202 forbid indirect, as well as direct, interest in public contracts. The common law goes one step further and provides

Mr. Bill Onweiler  
State Representative  
Legislative District #16  
Page 2

that an official may not use his official power to futher his own interests. Anders v. Zoning Commission of City of Newark, 253 A.2d 16 (1968). The court held that

"The reason for the establishment of this principle is obvious: a man cannot serve two masters at the same time and the public interest should not be entrusted to an official who has a pecuniary, personal or private interest which is or may be in conflict with the public interest. (Cites omitted)

A public official owes an undivided duty to the public whom he serves, and he is not permitted to place himself in a position which would subject him to the temptation of acting in any manner other than in the best interest of the public."

In Idaho as the statutes above indicate we have codified a pecuniary conflict of interest, but have not extended this to a personal interest of the official involved. Such a personal interest is described in Anderson v. Zoning Commission City of Newark, supra, as

"Either an interest in the subject matter or a relationship with the parties before the zoning authority impairing the impartiality expected to characterize each member of the zoning authority. ... the decision as to whether the particular interest is sufficient to disqualify is necessarily a factual one and depends on the circumstances of the particular case."

In a Washington case, Buell v. City of Bremerton, 495 P.2d 1358 (1972) the court had to deal with a conflict of interest issue in relation to zoning:

"The appearance of fairness doctrine has received recent emphasis in our decisions regarding zoning. ... Members of commissions with the role of conducting fair and impartial fact

Mr. Bill Onweiler  
State Representative  
Legislative District #16  
Page 3

finding hearings must, as far as practical, be open-minded, objective, impartial, free of entangling influences and capable of hearing the weak voices as well as the strong."

In this case the court found that the chairman of the commission was found to have a possibility of interest by virtue of the appreciation in his property values resulting from the 1971 rezoning.

"He could not be expected to hear the weak voices as well as the strong and most certainly could not appear to the public to be able to do so. ... The self interest of one member of the planning commission infects the action of the other members of the commission regardless of their disinterestedness."

These cases indicate that under the common law the fairness doctrine is applied in matters of zoning, and the disinterest of each commission member on either planning and zoning commissions or of city council members or county commissioners is of primary importance.

2) As I have pointed out in my first answer, the Idaho statutes only deal with the pecuniary interest of an official. Case law has pointed out the conflict of interest can be extended to the personal interest to be gained by the official. As pointed out in Buell v. City of Bremerton, supra, the court felt that it was not good enough for the official just to abstain from voting, but that his conflict of interest should also prevent him from entering into the discussion.

"The self interest of one member of the planning commission infects the action of the other members of the commission regardless of their disinterestedness."

Therefore the conflict of interest begins during the discussion and debate and not at the time of vote.

3) Sections 31-710 to 31-713 of the Idaho Code deal with meetings of county commissioners. Section 31-710 provides for their regular meetings and Section 31-713 states that all meetings and records must be public. During the last Legislative Session a new statute was enacted, Section 67-2340, which states:

"The people of the state of Idaho in creating the instruments of government that serve them, do not yield the sovereignty to the agency so created. Therefore, the legislature finds and declares that it is the policy of this state that the formation of public policy is public business and shall not be conducted in secret."

An open public meetings act was just passed and various definitions are listed in Section 67-2341. County commissioners fall into the category which are covered by this act. This act defines meeting as "the convening of a governing body of a public agency to make a decision or to deliberate toward a decision on any matter." Regular meetings and special meetings are also defined and Section 67-2343 states the notice requirements for these meetings. The regular meetings are held at statutory times, and the notice requirement of Section 67-2343 covers executive sessions and special meetings. It provides specifically that "special meetings may be held upon such notice as is appropriate to the circumstances, or as otherwise provided by law." Section 31-713 also deals more specifically with the notice requirement of special meetings of County Commissioner that

"The clerk of the board must give five (5) days' public notice of all special or adjourned meetings, stating the business to be transacted, by posting three (3) notices in conspicuous places, one (1) of which shall be at the courthouse door."

These statutes provide that meetings which lead to the formation of public policy are public business and must be open to the public. Notice must be given to inform the public when these meetings are held. The difficulty in applying these statutes is the definition of public policy which will vary with each factual setting.

4) There are three code sections which provide the answer to this question. Section 50-1101 of the Idaho Code states:

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"When any city or county desires to avail itself of the power conferred by sections 50-1101 through 50-1106, its council or county board of commissioners may create, in the case of a city by ordinance, and in case of a county by resolution, a planning commission ..."

Section 50-1104 of the Idaho Code states:

"It shall be the duty of a commission to recommend and make suggestion to the city council or county board as the case may be, for the adoption of a long-range comprehensive plan for the physical development of such city or county, for the formation of zoning districts, to make suggestions concerning the laying out, ... ."

Section 50-1210 deals with zoning Commissions and states:

"in order to avail itself of the power conferred in sections 50-1201 through 50-1210, Idaho Code, the city council shall appoint a commission to be known as the zoning commission to recommend the boundaries of the various districts and the regulations to be enforced herein. ... The council shall accept or reject the recommendations of the commission by a majority vote except the mayor shall have a vote when the council is equally divided. Where a city planning commission exists, it may be appointed as the zoning commission.

Section 31-3804 deals with County zoning and states in part:

"... In addition to the original recommendation of a comprehensive county plan of districts and regulations required to be made by the zoning commission to the board of county commissioners, on the zoning commission's initiative or on a request by the board of county commissioners, it shall from time to time

review and recommend amendments and additions to such plan and regulations. The board of county commissioners shall not hold public hearings nor take action upon the original plan and regulations proposed, nor amendments and additions thereto, until recommendations thereon have been received from the zoning commission."

Upon analysis of these four sections, it is clear that a city and county have the power to establish planning and zoning commissions in order to avail themselves of the police power of planning and zoning. These commissions are given the responsibility for formulating comprehensive plans for either the city or region, and are required to draft regulations in accordance with a comprehensive plan. The only requirement of a city council is to either accept or reject the recommendations of the commission, and a similar requirement is placed on the board of county commissioners by the statutory provision of Section 31-3804 which states that they can take no action until recommendations have been made by the zoning commission. Applying this information to the problem in Ada County, it is clear that each individual city council or board of county commissioners can review the recommendations made by the zoning commissions, and then have the option of either accepting them or rejecting them. There is no statutory provision which requires that these local communities concur on the Ada County Comprehensive Plan, but only that each unit of government review the plan and zoning regulations which directly affects them.

5) Various Idaho statutes deal with the disclosure requirement of public records. The most important of these statutes provides that:

"The public records and other matters in the office of any officer are, at all times during office hours, open to the inspection of any citizens of this state."  
Idaho Code, Section 59-1009.

Section 59-1009 is complemented by another section of the code which states:

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"Every citizen has a right to inspect and take a copy of any public writing of this state, except as otherwise expressly provided by statute." Idaho Code, Section 9-301.

In addition, Section 31-713 deals specifically with the meetings and public records of County Commissioners and states in part:

"All meetings of the board must be public, and the books records, and accounts must be kept at the office of the clerk, open at all times for public inspection, free of charge ..."

Public writings are in turn separated into four categories -- laws, judicial records, official documents, and "public records kept in this state of private writings." Idaho Code, Section 9-311(1-4).

The legislature has never enacted a general definition of the "public records", although the Code does contain a limited definition of the term for the purposes of Chapter 20, Title 67 dealing with the Board of Examiners. A number of courts have held that mere preliminary writings and reports are not public records unless they become the basis for some official action. Coldwell v. Board of Public Works, 202 P. 879 (Cal. 1921).

In conclusion the Idaho statutes provide that public records must be available to the public for inspection and copying, but what constitutes a "public record" is again open to interpretation and subject to the factual setting at hand.

6) Yes, because the Idaho statutes deal only with recommendations made by planning and zoning commission to city councils or a board of county commissioners. However, it seems to us that the function of a planning staff would be seriously hampered if it is not allowed to collect information, provide professional analysis and make recommendations.

7) Sections 50-1210 and 31-2804 of the Idaho Code provide that the city council and the board of county commissioners cannot act until recommendations have been made by the zoning commission.

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The statutes do not provide a time period within which they have to act once such recommendations are received. Generally a zoning ordinance contains such a provision which states that the proposal must either be accepted or rejected within a certain period of time, but absent such a provision the city council and county commissioners are not required to act within a certain period of time.

8) Section 50-1203 of the Idaho Code provides that regulations shall be made in accordance with a comprehensive plan. If there is a showing that the zoning provisions are in accordance with the "broad" comprehensive plan, the plan does not need to be amended each time that the zoning is changed. The comprehensive plan should be utilized as a broad and flexible plan which is implemented in more detail by zoning regulations.

9) There is no legal recourse against persons who have misrepresented the facts unless their testimony is given under oath. These hearings are more political in nature than legal, and the rules of a trial or legal hearing do not apply where the testimony is not given under oath.

10) The conflict of interest problem has been discussed in the answer to the first question. Common practice would require that the commission member would disclose his interest in the project, refrain from the general discussion, and abstain from voting.

11) We would prefer to refrain from responding to this request since there are inadequate facts to base an opinion on. "Harassment" is a vague term in the context of the query.

12) Sections 50-1210 and 31-3804 set forth the procedure for adopting the recommendations of the commissions. There are no standards given by which the city council or the county commissioners have to abide when they either accept or reject these recommendations. Section 50-1210 only states that such acceptance or rejection of the recommendation shall be made by a majority vote. Whether or not these plans are economically efficient and environmentally and socially sound is irrelevant as far as the statute is concerned, but are obviously desirable from a practical point of view.

13) Section 50-1101 sets out the procedure for the creation of a planning commission and its disbandment. It states that:

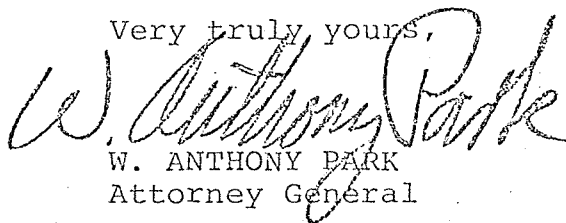


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"... members may be removed by a majority vote of the body confirming the original appointment."

This statement indicates that the entire commission can be disbanded if the majority of the body confirming the original appointments would so choose.

Very truly yours,

A handwritten signature in dark ink, appearing to read "W. Anthony Park". The signature is fluid and cursive, with the first name "W." and last name "Park" being more prominent than the middle name "Anthony".

W. ANTHONY PARK  
Attorney General

WAP:lm