

May 3, 1996

John Cline, Director
Bureau of Disaster Services
Building 600
4040 Guard Street
Boise, ID 83705-5004

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

Re: Disaster Preparedness Act

Dear Mr. Cline:

You have requested an opinion from the Office of the Attorney General regarding several issues relating to local disaster emergencies. I will attempt to answer your questions in the order in which they were set forth in your letter.

1. What is the length of a local disaster emergency declaration?

Your first question concerns the period of time a local disaster declaration is valid when the declaration has been consented to by the governing body of the local political subdivision. Idaho Code § 46-1011(1) provides in relevant part:

A local disaster emergency may be declared only by a mayor or chairman of the county commissioners within their respective apolitical subdivisions. It shall not be continued or renewed for a period in excess of seven (7) days except by or with the consent of the governing board of the political subdivision.

It is the opinion of this office that Idaho Code § 46-1011(1) requires the mayor or chairman of the county commissioners to make the local disaster emergency declaration. This declaration cannot continue, be continued or be renewed for a period in excess of seven (7) days without the consent of the governing board. If the governing board consents, there does not appear to be a limit on the length of time the declaration can be continued. The time restraints are merely restrictions on the ability of the individual mayor or chairman of the board of commissioners to issue or renew a declaration in excess of seven (7) days without the consent of the governing board. Obviously, the declaration cannot be in effect indefinitely. At all times the declaration is in effect, the local government entity must be able to demonstrate that there exists a local disaster emergency. The terms "disaster" and "emergency" are defined in Idaho Code § 46-1002.

Although such definitions may relate more to a state level declaration, they can certainly be modified to provide general guidance as to when a local disaster emergency occurs.

2. Is there a requirement that a local disaster emergency declaration be maintained or continued during a state disaster emergency declaration?

Second, you ask whether a local disaster emergency declaration should be continued or maintained when a state disaster emergency has been declared by the governor. Legally, the local governmental entity may not be required to continue or maintain a local disaster emergency declaration. However, it would be wise for it to do so, because of ambiguity in the statute, as well as for practical reasons. Idaho Code § 46-1008 allows the governor to issue executive orders or a proclamation declaring a disaster emergency when he finds a disaster has occurred or that the occurrence or the threat thereof is imminent. The state disaster emergency declaration lasts for thirty (30) days unless the governor continues it for another thirty (30) days. The effect of the state disaster emergency declaration is to “activate the disaster response and recovery aspects of the state, local and intergovernmental disaster emergency plans applicable to the political subdivision or area in question.” Idaho Code § 46-1008(3).

The effect of a state disaster emergency declaration on the local level and that of the local disaster emergency declaration are one and the same. The effect of a local disaster emergency declaration is to activate the response and recovery aspects of any and all applicable local or intergovernmental disaster emergency plans. Idaho Code § 46-1011(2). Because the effect of both declarations is the same on the local level, there appears to be no legal requirement for a local disaster emergency declaration to be continued or maintained during the duration of a state disaster declaration. However, Idaho Code § 46-1017 immunizes governmental entities against claims for personal injury or property damage when these agencies are engaging in disaster relief activities and are “acting under a declaration by proper authority.” In one sense, because the effect of the state declaration is essentially the same as the local declaration, one could argue that a state declaration alone would be a “declaration by proper authority” to successfully provide immunity to the local governmental entity. The argument could also be made that “proper authority” for local governmental action would be the mayor or chairman of the board of county commissioners. Because of this ambiguity in relation to the immunity statute, it would be advisable for local governmental units to maintain or continue their declarations to ensure that their immunity remains intact.

For practical reasons, a local governmental entity may wish to maintain or continue such local disaster emergency declaration. First, as explained above, the duration of the two separate declarations (state vs. local) are different. Second, the level of disaster to trigger the state declaration is different from that of the local declaration. The state disaster emergency declaration is generally triggered when the resources and efforts of the local area need to be supplemented by state resources. Idaho Code § 46-

1002(4). However, the local disaster emergency declaration is not necessarily premised upon the inability of the local jurisdiction to handle the disaster emergency. Rather, the local disaster emergency declaration is issued to activate the local response and recovery plans in order to properly respond to the disaster emergency. Thus, while a state disaster declaration may be terminated at some point, there still may exist a local disaster emergency which is now capable of being adequately handled by the resources of the local jurisdiction. Therefore, local jurisdiction may want to continue the local declaration for the reasons set forth above.

3. What is the authority, potential liability or immunity therefrom, of local government officials and employees acting solely under a state disaster emergency declaration?

Third, you ask about the authority, potential liability or immunity therefrom on the part of local government officials or employees acting solely under a state disaster emergency declaration. Because the effect of the state disaster emergency declaration is the same as a local disaster emergency declaration on the local level, local government officials or employees have the same authority as if they were acting only under a local disaster emergency declaration or both a state and local disaster emergency declaration. In essence, they have the powers which may be given to them by the Disaster Preparedness Act and the local disaster emergency plans in place in their jurisdiction. Thus, if a local jurisdiction needed to remove a house in responding to a disaster emergency, they would not lose that authority solely under a state disaster emergency declaration, since the state disaster emergency declaration operates to activate the local disaster emergency plans in that jurisdiction.

Unless there is willful misconduct, local government officials or employees are cloaked with immunity against personal injury or property damage complaints when engaged in disaster relief activities. The same is true for private entities under contract with the local governmental entity who are providing disaster relief, unless there is willful misconduct or gross negligence. Such immunity is set forth in Idaho Code § 46-1017, which provides:

Neither the state nor any political subdivision thereof nor other agencies, nor, except in cases of willful misconduct, the agents, employees or representatives of any of them engaged in any civil defense or disaster relief activities, acting under a declaration by proper authority nor, except in cases of willful misconduct or gross negligence, any person, firm, corporation or entity under contract with them to provide equipment or work on a cost basis to be used in disaster relief, while complying with or attempting to comply with this act or any rule or regulation promulgated pursuant to the provisions of the act, shall be liable for the death of or any injury to persons or damage to property as a result of such activity. The

provisions of this section shall not affect the right of any person to receive benefits to which he would otherwise be entitled under this act or under the workmen's compensation law or under any pension law, nor the right of any such person to receive any benefits or compensation under any act of congress.

Thus, a local government and its officials or employees are not liable absent willful misconduct, the application of workers' compensation law, or another section of the Disaster Preparedness Act. There are no other sections of the Disaster Preparedness Act which would take away from the immunity enjoyed by local governments. However, there is a section which would require the state to pay for certain damages. Idaho Code § 46-1012 provides in part that "[c]ompensation for property shall be only if the property was commandeered or otherwise used in coping with a disaster emergency and its use or destruction was ordered by the governor or his representative." Idaho Code § 46-1012(3). A claim for such property is filed with the Bureau of Disaster Services. Idaho Code § 46-1012(3). Because the use or destruction of the property must be ordered by the governor or his representative and the claim is handled by a state agency, *i.e.*, the Bureau of Disaster Services, it would appear that the state is the only entity which falls under Idaho Code § 46-1012. There is no language that would suggest that the local governmental entity would have any liability for the payment of property damage. Even in the case of a local government official, who is the express authorized representative of the governor and who ordered the use or destruction of private property, it appears that the state would still be the entity which would be liable, because the claim is filed and handled via a state agency. Further, this statute is written in the context of state-declared disaster emergencies.

4. Is a mayor or chairman of the board of county commissioners an authorized representative of the governor?

Your final question asks whether the mayor or chairman of the board of county commissioners is considered an authorized representative of the governor, as set forth in Idaho Code § 46-1012(3), regarding decisions on the use of private property, which is discussed above. Generally, the answer is "no," they would not be authorized representatives. In Marty v. State, 117 Idaho 133, 786 P.2d 524 (1990), the Idaho Supreme Court addressed a similar issue. In Marty, certain landowners filed claims against governmental entities, including the State of Idaho, regarding damage caused by flooding. The plaintiffs argued that actions taken by the governmental entities in a local and state-declared flooding disaster emergency were responsible for the flooding on the property owned by the landowners. The supreme court disallowed the inverse condemnation claim of the landowners against the state. The court recognized that under Idaho Code § 46-1012(4), the state could be liable in an inverse condemnation action relating to property taken during disaster relief activities if "ordered by the governor or his representative." The Idaho Supreme Court held that the actions taken by the Idaho

Department of Water Resources were not ordered by the governor or his authorized representative:

However, the statute does not provide for compensation unless the use or destruction of the property was ordered by the governor or his representative. The declaration of a state of emergency by the governor on June 14, 1984, did not refer to the use or destruction of the landowners' property. Neither IDWR nor any of the other governmental agencies is properly characterized as the "representative" of the governor in responding to the emergency. There is no evidence here that the governor designated any of the governmental agencies as his representative. Therefore, we hold that the landowners were not required to exhaust the remedy provided by I.C. § 46-1012, since that statute did not provide them with a remedy under the circumstances here.¹

117 Idaho at 142, 786 P.2d at 533.

It does not appear that the mayor or county commissioner would be an authorized representative of the governor, unless expressly so appointed. Therefore, any use or destruction of property authorized by them as part of disaster relief activities would not be "authorized by the governor or his representative." This merely means that compensation for such use or destruction is not allowed under Idaho Code § 49-1012. It does not mean that the governmental entity does not have the authority to make such decisions.

I hope this letter is of assistance to you. If you have any questions, please feel free to contact me.

Very truly yours,

THOMAS F. GRATTON
Deputy Attorney General
Intergovernmental & Fiscal Law Division

¹ The other governmental entities involved in the suit were a flood control district and a water district.