

BIENNIAL REPORT

OF THE

ATTORNEY GENERAL

OF THE

STATE OF IDAHO

1903-1904

BOISE, IDAHO:
ARCH CUNNINGHAM, PRINTER.
1904.

ATTORNEYS GENERAL.

The office of territorial attorney general was created by an act of the territorial legislature approved January 22, 1885, and during territorial days the office was filled by appointment by the governor. When the state constitution was adopted the attorney general was made an elective officer.

TERRITORIAL ATTORNEYS GENERAL.

*D. B. P. Pride	1885-1886
Richard Z. Johnson	1887-1890

STATE ATTORNEYS GENERAL.

George H. Roberts	1891-1892
George M. Parsons	1893-1896
Robert E. McFarland	1897-1898
Samuel H. Hays	1899-1900
Frank Martin	1901-1902
John A. Bagley	1903-1904

* Deceased.

BOISE CITY, IDAHO, December 1, 1904.

TO HIS EXCELLENCY JOHN T. MORRISON,

GOVERNOR OF THE STATE OF IDAHO.

SIR: In conformance with the laws of this State, I herewith submit my report of the work of this office during the past two years.

Respectfully submitted,

JOHN A. BAGLEY,

Attorney General.

SUPREME COURT CASES

TITLE OF CASE.	COUNTY	ACTION.	DISPOSITION.
Gov. F. W. Hunt vs. D. W. Ross	Ada	Application for Mandamus	Dismissed.
State vs. Wm. Irwin	Washington	Rape	Reversed.
H. L. Holister and W. A. Clark vs. State	Lincoln	Eminent Domain	Affirmed.
State vs. Chalmer E. Shuff	Shoshone	Murder	Reversed.
State vs. Phillip Quinlisk	Idaho	Assault with a Deadly Weapon	Dismissed.
State ex. rel. Theo. Turner vs. H. N. Coffin	Ada	Application for Mandamus	Writ quashed.
Edward Stein vs. Jno. T. Morrison et. al.	Ada	Application for Writ of Prohibition	Writ denied.
State vs. James Walker	Custer	Grand Larceny	Stricken from calendar.
Jos. Mombert vs. Bannock Co.	Bannock	To collect Prisoners' Board Bill from Co., under contract with Sheriff	Reversed and case dismissed.
State vs. Geo. Levy	Ada	Murder	Affirmed.
State vs. R. D. R. Adams	Fremont	Presenting Fictitious claim against County	Reversed.
Bear Lake Co. ex. rel. Jesse Budge vs. Alfred Budge	Bear Lake	Application for Writ of Prohibition	Writ granted.
State vs. Sam A. Collett and Sam Ireland	Fremont	Grand Larceny	Affirmed.
State vs. Fletcher Ireland	Custer	Grand Larceny	Affirmed.
Albert Small vs. State		Application for Recommendory Decision	App. denied.
State vs. Jos. L. Bland	Shoshone	Murder	Reversed.
State vs. Jas. B. Crea	Shoshone	Murder	Reversed.
State vs. David Harness	Nez Perce	Rape	Reversed.
State vs. Arthur Chambers	Elmore	Foigery	Reversed.
Wash. Co. Abst. Co. Lim. vs. Board Com. Wash. Co.	Washington	Appeal from the Assessment of the Co. Board of Equalization	Reversed.
In re Kinyon	Latah	Writ of Habeas Corpus	Waived—Petitioner discharged.
Ida. Mut. Ins. Co. vs. Jno. H. Myer	Ada	Application for Mandamus	Writ granted.
In re D. C. Abel	Latah	Writ of Habeas Corpus	Denied.
State vs. Edw. A. Lancaster	Idaho	Rape	Argued and submitted.
State vs. Wm. I. Rooke	Idaho	Grand Larceny	Argued and submitted.
Kootenai Co. vs. Louis T. Dittmore et al.	Kootenai	To recover bill allowed by Def. as Co. Com.	Argued and submitted.
Kootenai Co. vs. N. Y. Scisson	Kootenai	To recover bill allowed by Def. as Co. Com.	Argued and submitted.
D. W. Ackley vs. C. S. Perrin	Ada	Application for Writ of Mandamus	Argued and submitted.
State vs. Emery Seymour	Fremont	Grand Larceny	Pending.
State vs. R. D. R. Adams	Fremont	Presenting Fictitious claim against County	Pending.
State vs. Ren Wain and Frank Turner	Washington	Robbery	Pending.
State vs. Frank Nelson	Ada	Violation of City Ordinance	Pending.

CORRESPONDENCE.

I have endeavored during the last two years to make the correspondence of this office of an official nature. However, there are a great many communications received daily from officers and individuals all over the State asking for opinions on various subjects. When it is considered how many such officers there are in the State of Idaho, it will be seen that it is impossible for this department to act as their legal adviser.

Although it is no part of my official duty, I have endeavored to answer all of these communications, but if proper attention is to be given the many official duties devolving upon this department in the future, it will be impossible to give this unofficial correspondence proper attention.

Many of the cities and villages have a city attorney. These officers should address their communications to such attorneys, and county officers and justices of the peace should address their communications to the several county attorneys who are made their legal advisers under the Statute.

SUPREME COURT.

The policy of this office has been to have appealed cases heard at as early a date as possible, and establish the rule of dispatch and that long delays in criminal cases will not be permitted. The result has been satisfactory, and it is now known in the State that all such cases will be promptly argued and decided.

All cases appealed to the Supreme Court, in which the State is interested, which have been filed, will be argued and submitted before the end of the year, thus leaving a clear calendar.

DISTRICT COURT.

In September, 1903, at the request of the District Court, I went to Oneida County and represented the State in a large number of criminal cases in which the defendants were charged with bringing sheep into the State from quarantine districts in violation of the Governor's Proclamation. These cases were the result of the "range question" and a long protracted contention between the sheep and cattle men of Idaho and the sheep men of Utah and Nevada. These differences were finally practically settled and the contending parties agreed to work together for the extermination of infectious diseases in these three States.

I conferred with the County officers of Oneida County, the officers of these sheep associations and the leading business men of that county. They all agreed that in certain cases the defendants should pay a fine, which was done, aggregating some \$1,700.00; that the remaining cases should be dismissed. This was agreed to by the defendants and was ordered by the Court. Thus the old litigation in Oneida County was terminated to the entire satisfaction of the District Court and all parties concerned, in that locality.

In May, 1903, I represented the State in the District Court of Sho-

shone County, in an action brought to test the validity of the Fish and Game laws of the State. The law was sustained.

I have made several trips to St. Anthony representing the State Insane Asylum in the District Court in the controversy regarding the waters of Snake River. The Asylum farm depends upon these waters for irrigation, and as all claimants to the use of the waters of Snake River, in Bingham County, are made parties to this action, it was important that this matter be attended to carefully in order that the Asylum secure a decree for all water.

The case will be tried January 10, 1904.

LAND CASES.

It is the duty of the Attorney General to have the State properly represented in all actions relative to State lands or timber.

The business of the State Land Department has increased to gigantic proportions, and the duties of the Attorney General, as Secretary of the State Land Board, are increased in the same ratio.

While the Attorney General is authorized to appoint counsel to represent the State in all land cases and in many other cases where it is necessary, this office has attended personally to all matters, in which the State has been interested, in the United States Courts, the State Courts, United States Land Offices and Land Departments without expense to the State, other than the regular salary and expenses of this office.

LANDS UNDER CAREY ACT.

In November, 1903, the Commissioner of the General Land Office at Washington, D. C., advised the State Land Board that all operations in the State of Idaho under the Carey Law would be suspended until certain laws of this State, which provided for the patenting of Carey lands in bulk to construction companies, should be repealed.

The following letter, stating the attitude of the administration, was forwarded to the Secretary of the Interior:

WASHINGTON, D. C., November 23, 1903.

THE HONORABLE THE SECRETARY OF THE INTERIOR,
Washington, D. C.

SIR: Referring to the recommendation of the Honorable Commissioner of the General Land Office, concerning Carey Land Matters in Idaho, given under date of October 14th, 1903, I beg to submit the following:

The State Land Board recognizes the fact that the amendment to the Idaho law, to which the Honorable Commissioner makes objection, is not in harmony with the spirit of the Carey act, and we further believe that under our State Constitution, it is not a valid law in Idaho. If it stood alone, and were a valid law, and operative, it, doubtless, would, as suggested by the Commissioner, afford the opportunity to construction companies by retarding the sale of water rights, of getting large bodies of land by methods at variance with the spirit of the Federal Laws. However, the amendment does not stand alone; moreover, there is no effort or disposition on the part of the State to give it effect. On the contrary the State Land Board is opposed to its operation, even though

valid, and will insist that all lands segregated are in trust for *actual settlers*.

The question of the issuance of patent is not one which is necessarily involved at the present stage of progress. No application is being made for patents, and it would appear that the Federal Government ought not to refuse to carry out the contracts with the State, so far as it may safely do so, in a manner to prevent the operation of the objectionable provision of the Idaho statute.

There is no reason that we can see why patents should not issue to the State upon the required proof of settlement and reclamation by *actual settlers*; nor is there any reason based upon the objectionable amendment, why the Federal Government may not continue to grant segregations.

The entire matter of the issuance of patents would appear to be thoroughly governed and protected by provisions in the contracts of segregation, and even though the State and construction companies attempted to have patents passed to said companies, under the provision of the objectionable amendment, the provisions of the contracts would prove a barrier.

We call attention to the following provisions of said contracts:

"It is further understood that said State shall not lease any of said lands, or use, or dispose of the same in any way whatever, except to secure their reclamation, cultivation, and settlement: AND THAT IN SELLING AND DISPOSING OF THEM FOR THAT PURPOSE, THE STATE MAY SELL OR DISPOSE OF NOT MORE THAN 160 ACRES TO ANY ONE PERSON, AND THEN ONLY TO BONA FIDE SETTLERS, WHO ARE CITIZENS OF THE UNITED STATES OR WHO HAVE DECLARED THEIR INTENTION TO BECOME SUCH CITIZENS; and it is distinctly understood and fully agreed that all persons acquiring title to said lands from said State prior to the issuance of patent, as hereinafter mentioned, will take the same subject to all the requirements of said acts of congress and to the terms of this contract, and shall show full compliance therewith, before they shall have any claim against the United States for a patent to said lands."

The contract then authorizes the State to enact such laws and make such contracts as may be necessary to induce reclamation of the lands, "as is required by this contract and the said Acts of Congress, BUT NO SUCH LAW, CONTRACT, OR OBLIGATION SHALL IN ANY WAY BIND OR OBLIGATE THE UNITED STATES TO DO OR PERFORM ANY ACT NOT CLEARLY DIRECTED AND SET FORTH IN THIS CONTRACT AND SAID ACTS OF CONGRESS, AND THEN ONLY AFTER THE REQUIREMENTS OF SAID ACTS AND CONTRACT HAVE BEEN FULLY COMPLIED WITH."

The contract then further provides that the proof of construction of the ditch, and of the water supply, and the reclamation of the lands shall be made "under and according to such rules and regulations as may be prescribed therefor by the Secretary of the Interior."

These provisions would appear to fully dictate the course of patents, and permit the State to issue them to *actual bona fide settlers* only. Until there is an attempt to avoid these provisions, it would appear premature to prejudice the State's intentions, and arrest all progress under the Carey Act in Idaho.

Very much to the disadvantage of the State, and to the loss of companies and individuals, who have been permitted to operate under the law, and who have made large investments, the recommendations of the Honorable Commissioner have had the effect of arresting progress under the Carey Law in Idaho.

This is a condition which we are extremely anxious to relieve as speedily as possible. The State is rapidly growing, and we have great need of the advantages afforded it under this law for providing homes for the new settlers, who are coming in rapidly increasing numbers.

Permit us, therefore, to urge a speedy ruling, to the effect that segregations may in proper cases be had, and that patents may issue to the State, according to the intent and purpose of the National Acts.

While we are clearly of the opinion that the objectionable amendment to the Idaho law cannot, because of its invalidity, its conflict with the spirit and intent of the Federal Acts, and because of the positive provisions in the contracts of segregation, be made to accomplish the purpose which the Honorable Commissioner suggests, yet we invite any limitation or rule, which will further safe guard the trust placed in the State. If deemed wise, the State will exact a waiver on the part of construction companies of any right under the Idaho Amendment, to which objection is made, and an agreement that title to lands segregated shall pass from the State to actual settlers only.

I have the honor to subscribe myself,

Yours, very respectfully,

STATE BOARD LAND COMMISSION.

The Legislature had adjourned. Telegraphic communications were received from Washington showing the necessity for the representatives of the State to attend to this matter in person in order to get prompt action and prevent a suspension of work under the Carey propositions. Accordingly, yourself and I went to Washington and took the matter up with the Secretary of the Interior, Commissioner of the Land Office and the Attorney General of the United States and assured them that the State of Idaho would not patent any of the Carey lands to construction companies under this State law; that in every instance we would limit each settler to one hundred and sixty acres; that he should apply to the United States for his patent and have it issued directly to him; that we were opposed to any methods or any law that would make it possible to defraud the Government or for these Carey lands to fall into the hands of land syndicates. The result was that the decision of the Commissioner was modified, and operations have continued in each Carey land proposition in the State.

This was made possible, and has been done, by reason of the representation and guarantee by yourself as Governor and myself as Attorney General, that no advantage would be sought by the State or permitted by it to individuals under this law, and that the Governor would recommend that the next Legislature repeal this law.

MONEY LOANED.

During the last two years the State has invested in bonds, farm loans and State warrants, nearly \$1,500,000.00. The abstracts of proceedings leading up to the issuance of bonds and the bonds themselves and the abstracts of title to farms offered as security, the regularity of the issuance of State Warrants, all devolves upon this office and with the very valuable aid of the Chief Clerk and the assistant Chief Clerk of the Land Department all of these have been very carefully examined before being approved.

OPINION.

At the beginning of the present administration it was found that practically all of the moneys arising from the sale of lands and timber

granted to the State for educational purposes, had been placed, by the Legislature, in sinking funds, there to remain for twenty years and then to be used for the payment of State bonds.

At your request this office rendered an opinion advising you that all such moneys formed permanent, irreducible funds, which should be loaned in the manner prescribed by the Constitution, and that the laws placing this money in the sinking funds were void.

Since that time this money has been invested with very gratifying results to the educational institutions of the State.

The administrations of this State in the future should guard these permanent funds carefully and see that they are kept properly and safely invested in the manner prescribed by the acts of Congress and the Constitution of the State.

BACK TAXES.

On February 15, 1904, at the request of the State Auditor, I rendered an opinion, under certain sections of the Statutes and Constitution of the State, in which I held that there were taxes due the State from the different counties. General tax levy laws have been passed by the different legislatures of the State since its admission into the Union, until the last—1903—session. But these laws have never been enforced by the officers and few of the counties have paid any of this special tax.

In this opinion I advised the State Auditor to make demand on these counties, from which taxes were due, for all back taxes due the State. Some of the counties remitted immediately, while others have failed to comply with the demand.

Preparations are now being made to bring suit against some one of the counties to determine the right of the State in this matter. I expect to have this case prepared for trial by the end of the year, pending the convening of the District Court in Ada County, in March, 1905.

COUNTY ATTORNEYS.

The work of the County Attorneys throughout the State, during the present administration, has been very satisfactory to this office. They, with the other county officers, have been tireless in their efforts to bring criminals to justice, with the effect that the crimes, so long prevalent in Idaho, and which years ago were committed with comparatively no fear of prosecution, are becoming less each year and the lawless element is being run down and convicted. The old time organizations, whose purposes were horse stealing, cattle "rustling," etc., are being broken up, and each term of Court we see some of these old offenders before the bar of justice.

The work of prosecution has been diligently carried on by the County Attorneys, assisted and encouraged by the high type of citizenship now resident in the State, which frowns down upon crime, and makes it an easy task to secure convictions, where in years past it has been almost impossible. A few years more will probably see the last of this lawless element behind the prison bars and these organizations absolutely

extinct. Too much praise cannot be given the County Attorneys whose good work is bringing about this condition in our State.

STATE LAWS.

An examination of the Fish and Game laws of the State will show that the following should be amended:

That subdivision of Section relating to the protection of turtle doves and making the season of protection from July 15th to February 15th. This should be mended, as it was evidently the intention of the legislature to protect these birds during the breeding season.

Also those subdivisions of Section 7 relating to the protection of antelope. Under one subdivision of said Section it makes it unlawful to pursue, kill or ensnare antelope at any time within the State. Under the subdivision following there is open season of four months during each year.

The intention of the legislature should be made plain on this point.

OPINIONS.

During my term of office I have rendered at least five hundred opinions. There is no provision made for printing and preserving the same for other appropriate occasions. My predecessor, Mr. Frank Martin, in his biennial report "urgently recommended the propriety of having the opinions rendered by this office compiled, printed and indexed in book form, and thus made available for distribution to the various State and County Officers."

I wish to emphasize this and also suggest the advisability of an appropriation by the Legislature to meet the expenses of having this done.