

**IDAHO  
ATTORNEY  
GENERAL'S  
REPORT**

**FOR THE BIENNIUM  
BEGINNING JULY 1, 1974  
AND ENDING JUNE 30, 1976  
AND**

**OPINIONS  
FOR THE YEAR  
1975**

**WAYNE L. KIDWELL  
Attorney General**



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## ATTORNEYS GENERAL OF IDAHO

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



## PREFACE

The Attorney General of Idaho is required by law to report the business and condition of his office biennially to the Governor. This volume contains the Biennial Report from July 1, 1974 to June 30, 1976 as well as all of the official opinions issued by the Attorney General during the period of January, 1975 thru December 1975.

In Idaho, the Office of Attorney General is created by Article IV, Section 1, *Idaho Constitution*, in the Executive Department of State government. The term of this office is elective, for a period of four (4) years, coinciding with the term of the Governor.

The Attorney General serves as the legal counsel for the State of Idaho, its departments, and agencies. He is charged with representing the State in every lawsuit in which the State is a party or has an interest. The duties of the Attorney General are enumerated at Section 67-1401, *Idaho Code*. Authority for issuing official opinions is found at Section 67-1401(6), *Idaho Code*. This authority reads as follows:

To give his opinion in writing, without fee, to the legislature or either house thereof, and to the governor, secretary of state, treasurer, auditor, and the trustees or commissioners of state institutions, when required, upon any question of law relating to their respective offices. It shall be his duty to keep a record of all written opinions rendered by his office and such opinions shall be compiled annually and made available for public inspection. All costs incurred in the preparation of said opinions shall be borne by the office of the attorney general. A copy of the opinions shall be furnished to the Supreme Court and to the state librarian.

In addition to those officials entitled to official opinions, as noted above, there are those officers — state and local — who seek counsel and guidance in the proper interpretation and administration of Idaho laws. Although cities and counties retain their own counsel, it has nevertheless been the policy of this office to insure that, whenever possible, such requests for information are handled by members of the staff through unofficial advisory letters which present the personal opinion of the staff member researching the particular question.

There are also many thousands of inquiries received regularly from the general public and answered by letter or telephone on an informal basis. However, it must be submitted that, except for consumer protection advice and referrals, it is not within the province of the Office of the Attorney General to give counsel or advice to private citizens relative to their personal affairs, and such persons are routinely advised to seek private counsel of their own choice.

In Idaho, the Legislature has granted the Attorney General supportive criminal law enforcement powers. Section 67-1401(5), *Idaho Code*, requires the Attorney General to exercise supervisory powers over prosecuting attorneys in all matters pertaining to the duties of their offices. In addition to this general authority, the Attorney General is authorized or required by several specific statutes to prosecute criminal offenders. The Attorney General also represents the State in all criminal appeals to the Supreme Court.

The material contained in this volume represents many hours of conscientious work by attorney deputies and assistants, investigators, secretaries, and other staff members. Their loyalty and devotion to the State of Idaho and to this office are to be greatly commended.

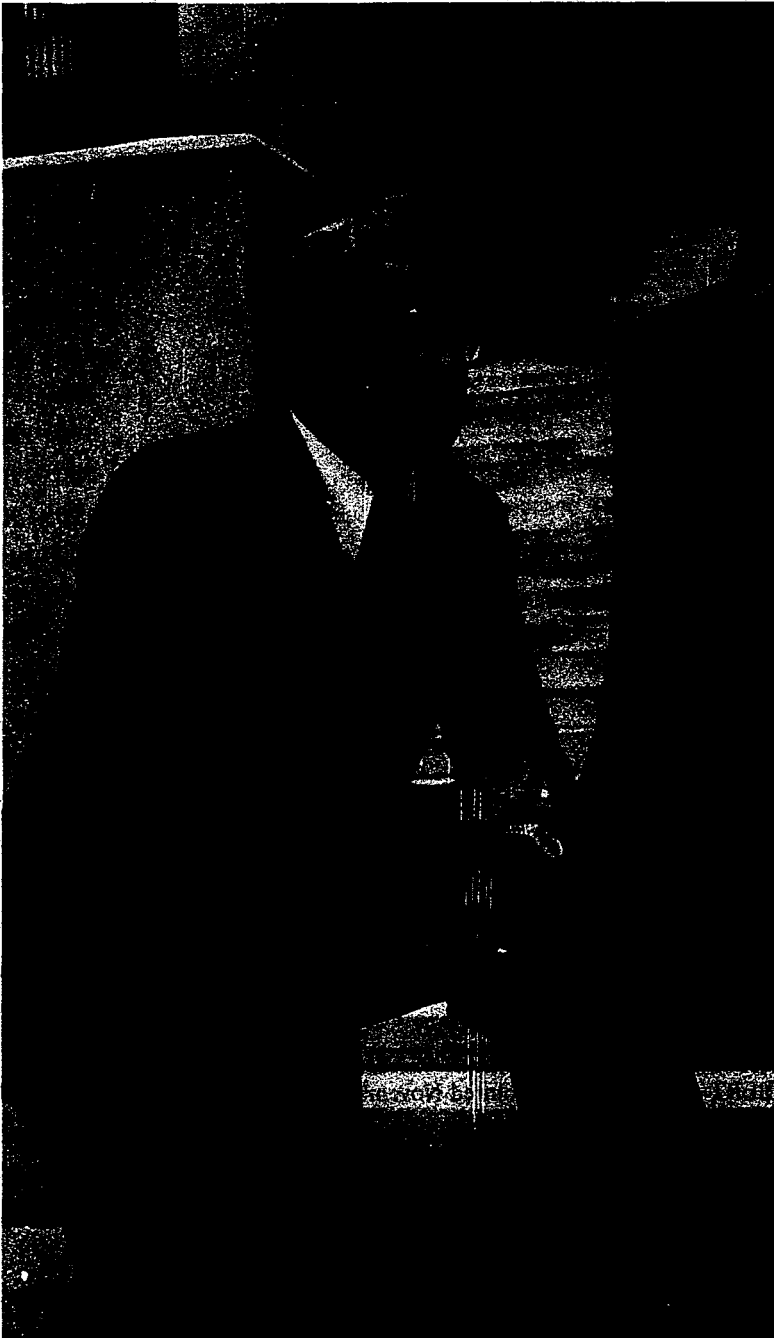
**WAYNE L. KIDWELL**  
Attorney General  
State of Idaho

**FORTY-THIRD BIENNIAL REPORT**  
**of the**  
**ATTORNEY GENERAL**  
**of**  
**IDAHO**



**For the period beginning July 1, 1974**  
**and ending June 30, 1976**

**WAYNE L. KIDWELL**  
**Attorney General**



**WAYNE L. KIDWELL**  
Attorney General

## BIENNIAL REPORT OF THE ATTORNEY GENERAL

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### CONSUMER PROTECTION/BUSINESS REGULATIONS DIVISION

The Division received approximately 800 consumer complaints during fiscal year 1974-75 and approximately 1,037 complaints in fiscal year 1975-76. Of these complaints, approximately 650 were closed in fiscal year 1974-75 and 827 in fiscal year 1975-76. Administrative action on the above complaints included office counseling, telephone and written inquiries, field investigations, and office mediation sessions with the firms involved. Where appropriate, the Division filed actions in State court. When criminal violations were indicated, complaints were referred to local prosecuting attorneys.

Ten major civil suits are pending in the courts as a result of the Division's investigations. In addition to lawsuits pending or closed, the Division has executed numerous Assurances of Voluntary Compliance aiding consumers in this State.

There are approximately 300 open files pending which fall into the following categories by the reflected percentages:

Agricultural Products	1.0%
Clothing	1.0%
Construction Home Improvements	9.0%
Credit	.5%
Education	2.0%
Food Products	.5%
Health Services	3.0%
Home Furnishings and Appliances	10.0%
Insurance	2.0%
Jewelry	1.0%
Mail Order Sales	5.0%
Mobile Homes	9.0%
Motor Vehicles	18.0%
Moving and Storage	1.0%
Professional Services	.5%
Public Accommodations and Restaurant	.5%
Publications	4.0%
Real Estate and Rentals	7.0%
Recreation	2.0%
Travel	1.0%
Miscellaneous Retail Store Sales	19.0%
Miscellaneous Services	3.0%

In addition to consumer actions, the Division had the following Business Regulation lawsuits pending as of June 30, 1976:

*Jones v. Board of Medicine* — test case to determine constitutionality of Hospital-Medical Liability Act.

## BIENNIAL REPORT OF THE ATTORNEY GENERAL

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*Jones v. General Mills, et al.* — The State of Idaho has appeared as one of several amicus curiae to defend the authority of states to enforce certain state regulations dealing with the integrity of weights and measures.

*Idaho Potato Commission v. Washington Potato Commission* — action to enjoin use of the designation "Idaho Potato" when referring to a potato grown in another state.

*State v. Chevron Chemical Corporation, et al.* — class action brought by the State of Idaho in conjunction with certain neighboring states against miscellaneous chemical fertilizer companies brought under federal anti-trust statutes.

This Division also represents some or all of the following departments and self-governing agencies:

Department of Agriculture

Department of Employment

Department of Finance

Department of Insurance

Department of Labor and Industrial Services

Department of Self-Governing Agencies

(Board of Architectural Examiners; Board of Chiropractic Examiners; Board of Cosmetology; Dairy Products Commission; Board of Dentistry; Hearing Aid Dealers and Fitters Board; Board of Medicine; Board of Morticians; Board of Nursing; Board of Outfitters & Guides; Board of Pharmacy; Potato Commission; Real Estate Commission; Board of Veterinary Medicine)

Bicentennial Commission

Corporation Division, Secretary of State's Office

Endowment Fund Investment Board

Liquor Law Bureau

Bureau of Occupational Licenses

Personnel Commission

## CRIMINAL JUSTICE DIVISION

The Criminal Justice Division provides legal counsel and representation to State agencies dealing with the criminal justice process and maintains contact with and provides assistance to local prosecutors upon request. The Division also represents the State in all criminal appeals before the Idaho Supreme Court.

Between January, 1975, and June 30, 1976, the Criminal Justice Division processed approximately 80 criminal appeals, a figure which does not include a large number of appeals which were filed but never prosecuted by the filing parties.

Many of the appeals processed resulted in the establishment of new legal principles or the clarification of existing law in a manner beneficial to the con-



## BIENNIAL REPORT OF THE ATTORNEY GENERAL

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duct of criminal prosecutions in Idaho. To name some examples, in *State v. Lewis & Robinson*, an appeal by the State, the Court expanded the State's appeal rights, reversing two prior cases imposing limitations on the right of the State to appeal from adverse holdings in trial courts. The principle established in the *Lewis* case makes possible the reversal of damaging trial court rulings which would not otherwise be remediable.

In *State v. Wright*, the Court ruled that violation of a mandatory statutory requirement does not necessarily constitute reversible error, even in cases where the violation constitutes error *per se*. The case reverses what appeared to be a tendency to consider every major error to be a cause for reversal, and now makes clear that the burden is upon an appellant asserting error, whether constitutional or otherwise, to also demonstrate that he was in some manner prejudiced by the asserted error.

In *State v. Cochran*, the Division obtained a definitive statement of the rules relating to the joinder of offenses and defendants in criminal prosecutions. The case constitutes a fairly comprehensive guideline for joinder problems, something which was previously lacking in the case law.

In *State v. Wyman*, the Court ruled that failure, by police, to take a murder suspect immediately before a magistrate for initial arraignment did not require the automatic exclusion of inculpatory statements which he later made after having received the *Miranda* warnings. The case establishes that the admissibility of statements taken during in-custody interrogation depends upon the voluntariness of the statements and not upon the automatic operation of the exclusionary rule on the occasion of a procedural violation. This case represents another step away from a judicial tendency to regard every serious procedural default as an automatic ground for reversal.

The Criminal Justice Division works with local prosecuting attorneys under our Prosecutor Assistance Program. In this area, the Division provides assistance in the preparation and conduct of trials, research and consultation and prosecutor training. Trial assistance has been provided in 13 criminal cases and numerous civil matters. These cases include:

- State v. Creech* (murder, Valley Co.)
- State v. Crawford* (murder, Cassia Co.)
- State v. Stroisch* (murder, Kootenai Co.)
- State v. Banta* (misdemeanor manslaughter, Bonneville Co.)
- State v. Smith* (lewd conduct, Gem Co.)
- State v. Harringsfeld, et al.* (manufacturing a controlled substance, Fremont Co.)
- State v. Briggs* (insufficient funds check, Ada Co.)
- State v. Murray* (embezzlement by clerk, Ada Co.)
- State v. Hofmeister* (murder, Bonner Co.)
- State v. McCoy* (misappropriation of public funds, Bingham Co.)
- State v. Clark* (forgery, Bannock Co.)
- State v. McCurdy* (DWI, Ada Co.)
- State v. Gerhardt, et al.* (robbery, Cassia Co.)

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Since January of 1975, the division has conducted four training seminars for Idaho prosecuting attorneys. Each seminar has involved a series of presentations on legal topics. Course booklets containing lecture outlines and related materials have been published in connection with the last two seminars. One edition of the monthly report on criminal law topics has been published by this division with plans to publish this report on a regular basis.

### EDUCATION

The Office of the Attorney General provides legal counsel to the State Board of Education and Board of Regents of the University of Idaho and the following divisions thereof: Department of Education, Division of Vocational Education, Division of Vocational Rehabilitation, State Library, State Historical Society, Professional Standards Commission, Eastern Idaho Vocational Technical School. The legal services provided by this office to the University of Idaho, Idaho State University, Boise State University, Lewis-Clark State College and the State School for the Deaf and Blind at Gooding depends on the nature of the work to be done. The University of Idaho and Idaho State University have either staff counsel or retained counsel. There has been a marked increase in legal services provided to Boise State University in the last 18 months.

The Office of the Attorney General also provides advice, on request, to North Idaho College and College of Southern Idaho, as well as the various public school districts.

The following cases have been or are being handled by this office during the time involved:

*Goff, et al. vs. Benoit, et al.* — law school fee case

*Lystrup, et al. vs. The Idaho State Board of Education, et al.* — architecture case at Idaho State University

*Alpha Kappa Psi vs. BSU, et al.* — involves the admission of female students into an all-male professional fraternity

*Barbara Justice vs. State Board of Education, et al.* — deals with the accessibility to a student's placement file

*ASBSU, et al. vs. The State Board of Education, et al.* — deals with the legality of a State Board policy prohibiting possession and consumption of alcoholic beverages on campus

*Monagle vs. BSU, et al.* — deals with the dismissal of an employee, now deceased

There have been no cases to which the State Board of Education has been a party in the area of public education during the period involved. However, a

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study is being done to determine whether or not school districts are denying equal educational opportunities to students because of federal categorical grants under Title I of ESEA.

### ENVIRONMENT AND LANDS DIVISION

The Environment and Lands Division represents the Board of Land Commissioners, the Land Department, the Department of Parks and Recreation, the Parks Board, the Department of Health and Welfare in air and water quality, and the Division of Budget, Policy and Planning for the Office of the Governor. Representation in a supervisory capacity is in existence between the division and the Department of Water Resources, the Department of Fish and Game and the Fish and Game Commission.

The following is a summary of major cases for the Environment and Lands Division during the reporting period:

#### LAND DEPARTMENT –

*State v. Owen Simpson* (navigable streams)

*Heckman Ranches v. State of Idaho* (quiet title, trespass, water pollution)

*Wiley v. State of Idaho* (navigable stream, bridge and fill)

*State v. Boise Project Board of Control* (leases – Hubbard Reservoir)

*State v. Old Channel Placers* (Dredge and Placer Mining Act)

*State v. Elton Willy* (fire suppression costs – control burn)

*Parkening v. State Land Board* (Wild and Scenic River Act, Pollution Control Act)

*State v. Coeur d'Alene Sailing Club* (trespass)

*State v. Dryer* (quiet title, Lake Protection Act)

*Idaho Wilderness School v. Outfitters & Guides Board* (constitutionality of denial of permit)

*State of Idaho v. Water Resources Board* (navigable lakes authority)

*State of Idaho v. Spokane International Railroad* (removal of sand and gravel from State lands)

*State v. Bilboa* (road closure – alleged county road)

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### PARKS AND RECREATION –

The Division reviews Land and Water Conservation Fund Act proposals from the Department of Parks and Recreation on a continuing monthly basis. In addition, the Division has represented the Department of Parks and Recreation in negotiations for a memorandum of understanding between the Department and the U.S. Army Corps of Engineers for recreational development of Lucky Peak Reservoir. The Division brought suit to quiet title to phase one of the Veteran's Memorial Park in *Parks and Recreation Board v. Farmers Union Ditch*.

### AIR AND WATER QUALITY –

The division represents the Department of Health and Welfare Environmental Division in this area. The division's involvement included the development of regulations regarding the emission of SO<sub>2</sub> from Bunker Hill's facility at Kellogg, Idaho, enforcement action to alleviate violations of the Fugitive Dust Emission and Control Regulation, and administrative and court actions against various industries in the State. The following were among the various actions filed for air and water quality:

Administrative action against Bunker Hill Company for violations of the sulphur dioxide emission standards and reporting requirements of State regulations.

Development of regulations concerning the sulphur dioxide emission standards to be applied to Bunker Hill Company.

Representation of the Department of Health and Welfare Environmental Division in hearings before the Idaho Public Utilities Commission on Idaho Power Company's application to build a coal-fired electrical generating plant at Orchard in Southwestern Idaho.

Administrative action against the Beker Industry phosphate plant in Soda Springs, Idaho for violations of the SO<sub>2</sub> emissions standards.

Nuisance action against the CUI Rendering Plant in Idaho Falls for generation of noxious odors.

Administrative action against R.T. French Company, a potato processor in Shelley, Idaho for violations of the State Water Quality Standards

Prosecutor assistance in filing criminal misdemeanor complaints against Magic Valley Foods of Glens Ferry, Idaho for failure to construct its waste treatment facility in compliance with State regulations.

Actions by this Division in air and water quality have had the overall effect of bringing about a growing awareness by regulated industries that the State government is committed to its regulatory procedures and that the Attorney General's office will take appropriate action to enforce the regulations when required.

## BIENNIAL REPORT OF THE ATTORNEY GENERAL

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In addition to the representation of various departments, the division filed an original jurisdiction lawsuit in the Supreme Court of the United States seeking to require members of the Anadromous Fish Compact to include the State of Idaho as a voting member and further to provide an equitable apportionment of the Anadromous fish resources in the Columbia River Basin between the states involved.

Other legal activity included a settlement of title for the Cataldo Mission site in Northern Idaho, action on private leases in Heyburn State Park, and representation of the State in actions challenging the constitutionality of the Local Planning Act of 1975, and the Idaho Forest Practices Act.

### EXTRADITIONS

Due to the increased mobility of people, there has been a significant increase in the number of extraditions processed through the Attorney General's Office, where Idaho is either the demanding or asylum jurisdiction. Although no running count is kept on numbers, this office now processes an average of 5 extraditions a week, either incoming or outgoing, or an average of 260 a year. Most of these matters of interstate renditions are routine. Approximately 10 percent raise issues of law which require research. With few exceptions, the process runs smoothly and efficiently. Prosecuting attorneys contact this office on a continuing basis for assistance in extradition problems.

### HEALTH AND WELFARE DIVISION

The Health and Welfare Division provides representation to the Department of Health and Welfare in all areas other than environmental questions. This division includes the 7 regional offices located throughout the State in Coeur d'Alene, Lewiston, Caldwell, Boise, Twin Falls, Pocatello and Idaho Falls.

This division now represents the Department in all administrative hearings, court proceedings and appeals, in all courts of this State, in the area of medical and financial assistance under the welfare programs. In the areas of child protection, youth rehabilitation, termination and criminal fraud, the division has expanded its role to give greater assistance to the county prosecutors. Assistance in these areas now includes original prosecutions, prosecutor assistance and training seminars for Department employees and prosecutors. Extensive legal services are provided in the areas of mental health, mental retardation, medicaid, employment law, child support enforcement, adoptions, guardianships, civil recoveries, foster care, liens, probates and eligibility.

The following list represents the legal activities of the 7 regional offices during the reporting period:

Support	471
Administrative hearings	354
Child Protection Act and Termination	429

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Youth Rehabilitation Act	24
Adoptions	12
Guardianships	18
Civil Recoveries	273
Criminal Fraud	297
Mental Health	93
Foster Care	21
Paternity	314
Liens	143
Eligibility	18
Miscellaneous	154

Of the activities reported, approximately one-fourth of the cases necessitated court action by the Attorney General. In addition to the activities listed, the Division provides legal counsel to the Director and Administrators of the Department of Health and Welfare. Extensive activity is devoted to the Administrative Procedures Act in promulgating rules and regulations for the Department.

Other legal representation includes State Hospital South, State Hospital North, Idaho State School and Hospital, and the Youth Service Center.

## TAXATION

The taxation section is charged with representing the Department of Revenue and Taxation. During the reporting period, this section has appeared in 65 separate lawsuits. The majority of these cases represent actions on behalf of the State Tax Commission, but includes the legal representation of other taxing agencies, such as counties and the Multi-State Tax Commission.

This office has represented the interests of the State Tax Commission before the Idaho Supreme Court in 9 separate cases and has appeared as amicus curiae in another. The section is presently providing representation for Nez Perce County in the case of *Graham v. Nez Perce County* currently pending in the Ninth Circuit Court of Appeals.

In conjunction with the State of Washington, this section is appearing as amicus curiae in the case of *Mowe v. Confederated Kootenai & Salish Tribes* in the United States Supreme Court.

An estimated 725 administrative appeals were processed through this section. These appeals involve taxpayers seeking an administrative redetermination from the Tax Commission of tax deficiencies asserted by the Commission's audit staff.

In addition to the foregoing, this section provided extensive written and oral advice to members of the Tax Commission and the Commission staff, performed general legal activity (such as drafting leases for field office buildings, preparing affirmative action employments, etc.) and assisted in responding to various tax

## **BIENNIAL REPORT OF THE ATTORNEY GENERAL**

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inquiries made by citizens and governmental and private entities on a wide variety of tax matters.

### **OTHER DEPARTMENTS, ENTITIES, AND SELF-GOVERNING AGENCIES**

The Office of Attorney General provides legal services for the Department of Administration, the Department of Correction, the Department of Fish and Game, the Department of Transportation and the Public Utilities Commission on a continuing basis. These services are provided by attorneys in the central office and assistants housed in the agencies. Upon request, this office represents any self-governing agencies desiring to use our services.

This office also provides supportive legal services to the cities and counties upon request.

### **DISTRICT COURT – CLOSED**

- 4761 Norma Ahlstorm and William H. Westwood vs. Rudy Van Order dba Moose Creek Ranch dba Teton Valley Retirement Center, an unincorporated association and State Hospital South at Blackfoot, ID
- 4766 Kenneth L. Sanders, et al. vs. C. B. Barnett, Idaho State Board of Pharmacy, et al.
- 4774 State of Idaho vs. Tri-West Construction Company, a Utah corporation, et al.
- 4780 United Pacific Insurance Company, a corporation vs. State of Idaho, et al.
- 4795 State of Idaho, ex rel. W. Carl Griner, Inspector of Mines vs. The Bunker Hill Company
- 4798 L. Max Poulter vs. Tom D. McEldowney, et al.
- 4799 State of Idaho vs. Arden Mayfair, Inc., Carnation Company, et al.
- 4800 Idaho Wilderness School, Inc., and Mickey Smith vs. Outfitters & Guides Board of the State of Idaho, et al.
- 4809 State Public Health District No. 2, Peter Gertonson, Chairman vs. State Board of Health
- 4812 State of Idaho vs. Ivan L. Perrigo
- 4825 B.R. Brown, Commissioner of Labor, ex rel Mrs. Jessie Meyer vs. Larry Gwen

## **BIENNIAL REPORT OF THE ATTORNEY GENERAL**

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- 4828 State of Idaho vs. City of Boise
- 4842 Arthur McKenzie and Lurena McKenzi, Husband & Wife vs. John F. Christensen, Director of Idaho State School & Hospital
- 4861 State of Idaho vs. James Click, Sr., et al.
- 4866 State of Idaho vs. Glenn Turner Enterprises, Inc., a Florida corporation; Dare to Be Great, Inc., a Florida corporation; and Glenn W. Turner, a person
- 4886 J. C. Beckdolt vs. Idaho State Penitentiary
- 4890 State of Idaho vs. E. R. W. Fox, M.D., et al.
- 4900 United States of America vs. 29.17 Acres of Land, more or less situated in Nez Perce County
- 4901 United States of America vs. 24.22 Acres of Land, more or less situated in Nez Perce County
- 4916 State of Idaho vs. Terry Wayne Hustead
- 4924 Terry Hadlock vs. Raymond W. May, Warden, Idaho State Penitentiary
- 4927 State of Idaho vs. Thomas King, et al.
- 4938 State of Idaho vs. Edwin Green & Lucile Green, husband and wife
- 4946 Michael Jess Aldape, et al. vs. State of Idaho
- 4955 State of Idaho vs. Bestline Products, Inc., a California corporation, and Ronald Sweeney, an individual and James Kling, an individual
- 4957 Marjorie Ruth Moon, as State Treasurer vs. the Investment Board of the State of Idaho, the Department of Finance, Tom McEldowney the Commissioner of Finance, and the State of Idaho
- 4964 Fred Boyenger and Larry Trujillo vs. State of Idaho
- 4998 Larry Trujillo vs. State of Idaho
- 5015 State of Idaho vs. State Board of Correction and State Commission for Pardons & Paroles
- 5016 State of Idaho, ex rel W. Anthony Park, Attorney General of the State of Idaho vs. Merle I. Zweifel (and Clerks/Recorders of the 44 Idaho counties)



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- 5018 Gary Russell Anspaugh vs. Raymond W. May, Director of Correction, and State of Idaho
- 5024 Harvey Pulver vs. State of Idaho
- 5036 Paula V. West vs. Pete T. Cenarrusa, Secretary of State, State of Idaho
- 5037 State of Idaho, et al. State Board of Land Commissioners vs. Heinz Zegke
- 5040 State of Idaho, ex rel, State Board of Land Commissioners vs. I. H. Bennion
- 5049 State of Idaho, ex rel State Board of Land Commissioners vs. Leroy Perry and Fred Hess
- 5050 In the Matter of Permit Application No. 37-7108, in the Name of the State of Idaho, Department of Parks
- 5052 Anthony Galaviz, Cynthia Goehring, Herbert Hensley and Robert Peterson vs. State of Idaho
- 5065 Gilbert Chapa, Jr., vs. Josef Munch, Raymond W. May, and Clarence Brewer
- 5072 Nelson-Deppe, Inc., an Idaho corporation vs. Idaho State Board of Land Commissioners, an administrative department of the State of Idaho
- 5090 Foremost Insurance Company vs. The Honorable Tom D. McEldowney, Commissioner of Finance of the State of Idaho
- 5104 State of Idaho vs. The United States of America, the United States Bureau of Reclamation, et al.
- 5123 Edna M. Gordy, individually, and as executrix of the estate of William Gordy, deceased and Burton O. Haverfield and J. Dee Fisher vs. State of Idaho
- 5128 Burke's Paint Co., Inc., a corporation vs. Idaho Board of Highway Directors of the Department of Highways of the State of Idaho, and Carl C. Moore, Lloyd F. Barron, and Roy L. Stroschein, the individual members thereof
- 5132 State of Idaho vs. Timber Movers, Inc., an Idaho corporation, et al.
- 5134 State of Idaho vs. Control Collection Agency, Inc.
- 5163 John Bone vs. Cecil D. Andrus, Otto Bramer, Wilfred J. Duclos
- 5164 L. E. Johnson and Associates, Inc., an Idaho corporation vs. State of Idaho

## **BIENNIAL REPORT OF THE ATTORNEY GENERAL**

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- 5166 David Patrick Simmons vs. State of Idaho and Board of Pardons & Parole**
- 5174 Sylvan D. Williamson and Barbara A. Williamson vs. State of Idaho**
- 5177 Danny Mojica aka Danny Denton vs. State of Idaho**
- 5191 James Price vs. Raymond W. May**
- 5192 Scott W. Jewet vs. Raymond W. May**
- 5193 Buddy Cleon Van Voltenburg vs. State of Idaho**
- 5195 Charles Sharp vs. State Commission for Pardons & Parole**
- 5197 Joseph A. Walsh vs. Raymond W. May**
- 5201 Charles Sharp vs. State Commission for Pardons & Parole**
- 5202 Walter D. Balla #12421 vs. Raymond W. May**
- 5203 Jimmy Ray Jennings vs. Idaho State Commission for Pardons**
- 5204 Federated Publications, Inc., et al. vs. S. M. Meikel, et al.**
- 5205 State of Idaho v. United Systems Collection Authority, Inc., a Minnesota corporation, and William O. Lyman, individually**
- 5206 The Bunker Hill Company, a Delaware corporation vs. The State of Idaho, et al.**
- 5216 Eddie James, Jr. vs. State Commission for Pardon & Parole, et al.**
- 5219 Donald C. McCarter, et ux, and William Reeder Chandler, et ux. vs. State of Idaho**
- 5223 Dale F. Bryant vs. State of Idaho**
- 5226 Mike Frank Lonbard vs. Donald Erickson**
- 5227 Frederick Leslie Palmer vs. State of Idaho**
- 5228 State of Idaho vs. Arnold Lee Black**
- 5230 State of Idaho vs. General Sale Corporation d/b/a True Value Meats and Bob Crawford**
- 5233 John M. Songstad, et al. vs. State of Idaho**
- 5234 Don Poindexter vs. Donald Erickson**

## **BIENNIAL REPORT OF THE ATTORNEY GENERAL**

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- 5235 Robert A. Caldwell vs. Idaho State Commission of Pardons & Parole**
- 5237 Anthony W. LaPan vs. W. Anthony Park, Attorney General of the State of Idaho**
- 5238 Clyde R. Keithly, A. L. White and Jack Claiborn vs. Pete T. Cenarrusa, Secretary of State of the State of Idaho**
- 5243 Arnold Whisman, Everett Bowers, Jack Gasper and Paul Bjornson vs. Officer Pankowski and Officer Hazard**
- 5253 Cleve Starry vs. Don Erickson**
- 5258 Lemoyne vs. Hanks, et al.**
- 5267 Jimmy R. Jennins vs. Donald Erickson**
- 5268 In the Matter of Parr, Inc., et al. vs. Neilson & Company**
- 5269 Davis Packing Company vs. State of Idaho**
- 5270 Baker vs. French, et al.**
- 5271 Walters vs. State of Idaho**
- 5280 U.S.A. vs. 11.13 Acres of Land**
- 5280 Kermit T. Neilson vs. Don Erickson**
- 5282 David S. Short vs. Investment Service Co., et al.**
- 5286 M.F.T. Mortgage Corp. vs. Salmon Syndicate**
- 5287 Carl Bowles vs. State of Idaho**
- 5288 Marvin Souther vs. State Commission for Pardons & Paroles, and each member thereof**
- 5290 Hancock, et ux., vs. Schrieber, et ux. & et al.**
- 5291 Ricks vs. C. I. Cattle**
- 5292 Park, Elmer T. vs. Park, Blaine**
- 5296 Buddy Van Voltenburg vs. State of Idaho**
- 5298 Hans C. Peterson vs. State of Idaho**
- 5299 State of Idaho vs. William Stalder and Jamie Stalder**

**BIENNIAL REPORT OF THE ATTORNEY GENERAL**

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- 5300 **Mane vs. State of Idaho**
- 5302 **Larry A. Rollyson vs. State of Idaho**
- 5311 **Dennis T. Jacobs vs. State of Idaho**
- 5312 **Charles Sharp, Christopher Ray Bearshield, Harold Bales, Thomas George Harley Carringer vs. Idaho State Penitentiary, et al.**
- 5315 **Ammerman vs. Ponderay Properties**
- 5317 **Hans C. Peterson vs. State Commission for Pardons & Parole**
- 5328 **Adrian Simon David vs. State of Idaho, Idaho State Commission for Pardons & Parole**
- 5330 **Inland Leasing & Management Co. vs. State of Idaho, Cecil D. Andrus, et al.**
- 5331 **State of Idaho vs. Sabre Systems**
- 5332 **Robert Ray Rice vs. Don Erickson, Department of Corrections, et al.**
- 5333 **Donald Wentz vs. State Commission for Pardons & Parole**
- 5334 **Doris Cox vs. State of Idaho**
- 5335 **B.R. Brown, Director of the Department of Labor, ex rel Jess Matlock, et al. vs. Fearless Farris**
- 5337 **James D. McBride vs. Ada County**
- 5341 **Alfred F. Mellinger vs. R. L. Anderson, et al.**
- 5346 **Gary Lane Crisp vs. State Commission for Pardons & Parole**
- 5348 **James Morin vs. Mary Baldwin, et al.**
- 5361 **State of Idaho vs. Mason's**
- 5362 **Danny H. Williams vs. State of Idaho**
- 5374 **The Bank of Commerce vs. Arnold, et ux, et al.**
- 5376 **Wegner vs. State of Idaho**
- 5384 **Ruth Wornek vs. State of Idaho, City of Salmon & Robert Wilson**
- 5385 **Pena & Twist vs. State of Idaho**

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- 5387 Droulard, et al. vs. Board of Medicine
- 5388 Jones vs. Board of Medicine
- 5394 State of Idaho vs. Robert Gearhardt
- 5395 The Committee to Repeal Forest Practices Act vs. Land Commissioners
- 5404 Dept. of Parks & Recreation vs. A. P. House
- 5411 U.S.A. vs. 0.23 Acres of Land
- 5415 State of Idaho vs. Renter's Aid, et al.
- 5420 Boise Water Corporation vs. Robert Lenaghen, et al.
- 5421 William Ray Steelman vs. Richard Anderson
- 5422 Robert Lee Scott vs. Richard Anderson, et al.
- 5432 Johnson v. Lewiston Orchard Irrigation District
- 5433 State of Idaho vs. Jay L. Depew
- 5450 Manning v. Board of Cosmetology, State of Idaho
- 5459 Rev. Guy S. Bell v. Andrus, et al.
- 5475 James M. S. Carlile vs. Donald Erickson, et al.
- 5477 State of Idaho vs. Dairymen's Creamery Association
- 5486 Public Health District Nos. 1-7 vs. State of Idaho
- 5490 Christopher R. Bearshield vs. State of Idaho, et al.
- 5495 John S. Dayley vs. State of Idaho, et al.
- 5496 Baldernar Gomez vs. R. L. Anderson, et al.
- 5500 Richard M. Elisondo vs. Donald Erickson, et al.
- 5502 Gary Shato vs. Richard Anderson
- 5507 Eddie James vs. State of Idaho
- 5528 Carl Bowles vs. State of Idaho
- 33-170 State of Idaho vs. Christensen

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**33-182 Tallent vs. Hurson**

**33-183 State of Idaho vs. Bahler**

**230 Coy Cooper, et al. vs. the County of Ada**

**235 Ruel and Lenore Smith vs. Idaho State Tax Commission**

**240 Shippy vs. Shurtleff**

**247 Miller, Charles H. vs. Cecil D. Andrus, et ux.**

**248 Hambleton vs. State of Idaho**

**250 U.S.A. vs. 6.25 Acres of Land**

**253 Lauby vs. State of Idaho**

**121 Westinghouse Electric Corporation; Southworth Discount Stationers, Inc. vs. State of Idaho, Department of Purchasing**

**Caldero vs. State of Idaho**

**James Lystrup, et al. vs. Idaho State Board of Education**

### **DISTRICT COURT – PENDING**

**4673 Coeur d'Alene Wildlife vs. Beauty Bay**

**4818 Pocatello School District No. 25, et al. vs. D. F. Engelking, et al.**

**4855 Eldon L. Hutchins and Reynold L. Allgood vs. Gordon C. Trombley, et al.**

**4856 Eldon I. Hutchins and Reynold L. Allgood vs. Gordon C. Trombley, et al.**

**4942 State of Idaho vs. Spokane International Railroad Company, a Washington corporation, and Union Pacific Railroad Company, a Utah corporation**

**4968 Tharon Rawson, individually and as guardian ad litem for her minor children, Seth Rawson, Cindy Rawson, heirs of John R. Rawson**

**4990 State of Idaho vs. American Campgrounds, a Washington corporation**

**5042 M. T. Jerome and Raymond Wilson vs. State of Idaho, et al.**

**5061 State of Idaho vs. Master Distributors, et al.**

## **BIENNIAL REPORT OF THE ATTORNEY GENERAL**

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- 5073 **W. Anthony Park, Attorney General, and the State of Idaho, ex rel State Board of Land Commissioners, and Gordon C. Trombley vs. Owen Simpson**
- 5089 **State of Idaho, ex rel State Board of Land Commissioners, and Gordon C. Trombley, Commissioner of Public Lands vs. Frank N. Rawlings**
- 5093 **Laura Dunbar, as guardian at litem for Rickina Rossiter and Glen Raymond Rossiter, Jr., her minor children; heirs of Glen Raymond Rossiter, deceased vs. United Steelworkers of America, an unincorporated association, and the State of Idaho**
- 5094 **Bernice Johnson, individually and as guardian at litem for Michael Wayne Johnson, Ruth Ellen Johnson and John Russell Johnson her minor children and Christine Johnson and Donald Johnson, heirs of Wayne Lyle Johnson, deceased vs. United Steelworkers of America**
- 5121 **Master Distributors, Inc., an Idaho corporation vs. Ronald M. Treat and W. Anthony Park**
- 5122 **Glenn I. Wiley, et al. vs. State Board of Land Commissioners and Idaho Department of Public Lands**
- 5130 **State of Idaho, ex rel W. Anthony Park, Attorney General vs. Factory Productions, Inc., a corporation, et al.**
- 5173 **Heckman Ranches, et al. vs. State of Idaho, et al.**
- 5207 **Crowther Brothers Milling Company, Ltd., Crowther Grain & Warehouse Company, Inc. J.W. Crowther, an individual vs. Mt. Nebo Foods, Inc., State of Idaho, et al.**
- 5208 **State of Idaho vs. Wells Barney, et al.**
- 5245 **Milas Adkins vs. Idaho State Commission for Pardons & Parole, and State of Idaho**
- 5254 **Agnes House vs. State of Idaho**
- 5257 **Ronald G. Sever vs. State of Idaho**
- 5259 **Sandy vs. State of Idaho**
- 5263 **Ronald G. Sever vs. State of Idaho**
- 5264 **Dennis "Jake" Jacobs vs. State of Idaho**
- 5266 **State of Idaho, Department of Agriculture vs. Miller National Insurance Company**

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- 5281 State of Idaho vs. Magic Valley Foods**
- 5283 State of Idaho vs. The World of Solorama**
- 5285 Phillips, et al. vs. State of Idaho**
- 5295 James Moore vs. Don Erickson**
- 5307 Hans C. Peterson vs. State of Idaho**
- 5314 State of Idaho vs. Lory Pontone, aka Jason Willaims and Robert Loya**
- 5323 Robert Atwood vs. State of Idaho, et al**
- 5336 State of Idaho vs. Jerry Roark, d/b/a Autocraft**
- 5342 James Pride vs. Donald Erickson**
- 5343 Jeffrey P. Lewellyn vs. State Commission for Pardons & Parole**
- 5344 Randall K. Watkins vs. State Commission for Pardons & Parole**
- 5345 Randall K. Watkins vs. State Commission for Pardons & Parole**
- 5347 Idaho Potato Commission vs. Washington Potato Commission**
- 5375 Lon S. Jarvis and Gerald Jarvis vs. Devil's Bedstead Ranch, Inc., et al.**
- 5379 Glen Bailey and Keith Larson vs. Four Wind Service, Inc.**
- 5390 Gold Fork Concrete Products vs. A & R Construction, State of Idaho, et al.**
- 5391 Eli Krommenhoek vs. T. Thompson, State of Idaho, et al.**
- 5409 McDonald, et ux vs. Maxwell, et ux and Maxwell, et ux (Defendant) vs. State of Idaho and Western Construction**
- 5410 Duke Parkening, et al vs. Idaho State Board of Land Commissioners, et al. (See #150)**
- 5412 State of Idaho vs. Macco Metal Buildings**
- 5413 State of Idaho vs. Jaguar Chemical Company**
- 5414 State of Idaho vs. Ornamental Industries**
- 5423 Richard Funderburgh vs. State of Idaho**
- 5425 Danny R. Powers vs. State of Idaho**



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- 5456 Gary L. Crisp vs. Donald Erickson
- 5460 State of Idaho vs. Golden Villa Spas, Inc.
- 5462 State of Idaho vs. Beneficial Hearing Aid Services
- 5468 State of Idaho vs. Coeur d'Alene Sailing Club
- 5469 State of Idaho vs. Cecil Bilboa
- 5470 Nishitani vs. Boise Valley Tractor
- 5472 Carl C. Bowles vs. D.L. Erickson, et al.
- 5476 Christopher Ray Bearshield vs. State of Idaho
- 5478 William J. Hughes vs. R.L. Anderson, Warden
- 5504 Guy Donovan Cooper vs. State of Idaho
- 5505 Delbert L. Crawford vs. Anderson, Munch, et al.
- 5506 Gary Greene vs. R.O. Anderson and Maynard Ross
- 5514 Gary Green vs. Ross, Maynard
- 5517 Thomas W. George vs. State of Idaho
- 5518 Andy W. Clark vs. State of Idaho
- 5521 William Prince vs. State of Idaho
- 5522 Mark Steinbach vs. State of Idaho
- 5523 Samuel J. Taylor vs. Donald R. Erickson
- 5527 Gary Greene vs. State of Idaho
- 5539 John G. Höcker vs. Donald Erickson
- 5556 Carl Faulkner vs. Donald Erickson
- 5557 Wess Tuttle vs. Donald Erickson
- 100 State of Idaho vs. Don J. and Joy E. Averitt
- 101 State of Idaho vs. Snake River Estates, Inc., et al.
- 103 Richard Fermin Gavica, et al. vs. Harold E. Hanson, et al.

## **BIENNIAL REPORT OF THE ATTORNEY GENERAL**

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- 109 James W. Adams vs. John Bender, Commissioner of Department of Law Enforcement, State of Idaho
- 110 Idaho County vs. State of Idaho
- 111 Sierra Life Insurance Company, Inc. vs. Air Idaho, Inc., United States of America, State of Idaho, Twin Falls Industrial Development Corp.
- 113 State of Idaho vs. George E. Stroisch
- 114 State of Idaho vs. Anthony Jolley
- 115 V-1 Oil Company, et al. vs. State Tax Commission, et al.
- 118 Kenneth Brown, et al., Plaintiffs vs. Lakeview Association, et al., Defendants, and Glenn I. Wiley, et al., Plaintiffs vs. State Board of Land Commissioners and Idaho Department of Public Lands
- 120 Associated Students of Boise State University, et al. vs. Idaho State Board of Education
- 123 State of Idaho vs. Boise Project Board of Control
- 124 Mark B. Clark vs. Daniel M. Meehl, Magistrate
- 125 State of Idaho vs. Kenneth L. Clark
- 126 State of Idaho vs. Leon E. & Norma G. Taylor
- 127 Pete T. Cenarrusa vs. Cecil D. Andrus
- 130 Kenneth E. Malone vs. Idaho State Horse Racing Commission
- 134 State of Idaho, et al. vs. Water Resources Board, et al.
- 135 State of Idaho, et al. vs. Old Channel Placers, Inc., et al.
- 140 Farmers Union Ditch Co., et al. vs. State of Idaho Department of Parks and Recreation
- 141 C. E. Bradley, C. J. Pugh, et al. vs. Idaho Personnel Commission
- 144 Robert J. Glenn vs. State of Idaho, Liquor Dispensary
- 145 Citizens for Better Government, Inc. vs. State of Idaho and Joe Williams, State Auditor
- 146 Wallace vs. the Heirs of Dale C. Wallace and the State of Idaho
- 147 John M. Tamplin vs. Judge Dar Cogswell

## **BIENNIAL REPORT OF THE ATTORNEY GENERAL**

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- 148 Elizabeth C. Allen vs. Honorable G. D. Carey
- 149 Glen Dyer vs. State of Idaho
- 150 Duke K. Parkening vs. Idaho State Board of Land Commissioners (see #5410)

### **IDAHO SUPREME COURT – CLOSED**

- 4788 State of Idaho vs. Larry Charles Bruhn
- 4841 State of Idaho vs. Earl Gerdau
- 4854 State of Idaho vs. Harold D. McClellan
- 4882 State of Idaho vs. Sam J. J. Pontier and David Gonzales
- 4884 State of Idaho vs. Ernest H. Tucker
- 4896 Vernon C. Phillips vs. District Court of the Fifth Judicial District, et al.
- 4898 State of Idaho vs. Ruben Garza Musquiz
- 4911 Ernest H. Tucker vs. State of Idaho
- 4921 State of Idaho vs. Fred V. Hodenson
- 4971 State of Idaho vs. Robert Joseph Brusseau
- 4974 State of Idaho vs. John Stanley Dayley
- 4975 State of Idaho vs. Jeffrey Michael Folson, Dennis Lee Laudon and Maurice Richard Ruddell
- 4977 State of Idaho vs. Floyd Johnson
- 4982 State of Idaho vs. Patricia Swenor
- 4983 State of Idaho vs. Cleve Starry
- 4985 State of Idaho vs. Dennis Ray Slaughter
- 4995 State of Idaho vs. Patrick Edward O'Bryan
- 4999 Lewiston Pistol Club, Inc. vs. Board of County Commissioners of Nez Perce County
- 5006 State of Idaho vs. Ronald L. Macik, William L. Burt, and Danny R. Powers

**BIENNIAL REPORT OF THE ATTORNEY GENERAL**

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- 5007 State of Idaho vs. Buddy Charles Badger and Donald Jenkins**
- 5011 State of Idaho vs. John W. Archer, Jr.**
- 5029 State of Idaho vs. John Ernest Lloyd**
- 5030 Arnold Whisman vs. Raymond W. May**
- 5031 State of Idaho vs. Gary Russell Anspaugh**
- 5032 James V. Burnham vs. Raymond May**
- 5033 Terry Burl Calkins vs. Raymond May**
- 5041 Southern Idaho Fish and Game Association, a corporation, et al. vs. Picabo Livestock, Inc., a corporation**
- 5051 Roger Alan Morris vs. State of Idaho**
- 5055 Ralph A. Crawford vs. State of Idaho**
- 5056 Terry Burl Calkins vs. State of Idaho**
- 5057 State of Idaho vs. Newell M. Lindsay**
- 5062 Frank C. Jones vs. State of Idaho**
- 5064 Alfred F. Mellinger vs. State of Idaho**
- 5067 State of Idaho vs. Harley Carringer and Harold Bales**
- 5068 State of Idaho vs. Arthur Leroy Wiggins**
- 5075 Western Beverage, Inc., an Idaho corporation vs. The State of Idaho**
- 5081 Harley Carringer vs. State of Idaho**
- 5088 Terry Burl Calkins vs. State of Idaho**
- 5109 Craig Thomas Rooke vs. State of Idaho**
- 5110 John R. Hansen vs. State of Idaho**
- 5111 State of Idaho vs. Gay Dean Standlee**
- 5112 State of Idaho vs. Duané A. Congdon**
- 5124 State of Idaho vs. David Cochran**
- 5131 State of Idaho vs. David Cochran**

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- 5137 State of Idaho vs. William Trowbridge
- 5138 Alfred F. Mellinger vs. State of Idaho
- 5140 State of Idaho vs. Richard R. Black
- 5144 State of Idaho vs. Robert William Becksted
- 5146 State of Idaho vs. Terrance Allen Hadlock
- 5147 Walter D. Balla vs. State of Idaho
- 5148 State of Idaho vs. Gary R. Anspaugh, and Maurice Ruddell and Edmund L. Gutzman
- 5149 State of Idaho vs. Vernon Joseph Bogar
- 5150 Guy Donovan Cooper vs. State of Idaho
- 5151 State of Idaho vs. Cathy B. Cochran
- 5153 Harold D. McClellan vs. State of Idaho
- 5155 Walter Dale Balla vs. State of Idaho
- 5156 State of Idaho vs. Emil Eugene Boetger
- 5157 State of Idaho vs. Ronald H. Jackson
- 5158 State of Idaho vs. Lester G. Shaw
- 5159 State of Idaho vs. Jean Louise Barchas
- 5167 State of Idaho vs. Cleo Gene Roderick
- 5169 State of Idaho vs. Warren E. Yoder, Duane E. Congden, and Edward Nied, Jr.
- 5170 Craig Thomas Rooke vs. State of Idaho
- 5171 State of Idaho vs. Eugene Zimmer
- 5172 State of Idaho vs. Jack Kraft
- 5175 State of Idaho vs. William Matthew Miller
- 5176 State of Idaho vs. Alton W. Wyman
- 5178 State of Idaho vs. Charles Cliett

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- 5179 **Lloyd Boncheau vs. State of Idaho**
- 5180 **Walter D. Balla vs. State of Idaho**
- 5181 **Robert M. Wilcox vs. State of Idaho**
- 5182 **State of Idaho vs. Jose Luis Oropeza and Gail Ann Oropeza**
- 5183 **State of Idaho vs. Wallace Rhodes, and James M. Shields**
- 5187 **State of Idaho vs. Thomas Pacheco and Guadalupe S. Pacheco**
- 5189 **State of Idaho vs. Calvin Ritchie and Dale Bryant**
- 5198 **State of Idaho vs. Harold Whitman**
- 5201 **Charles Sharp vs. State Commission for Pardons and Parole**
- 5210 **Danny Lee Johnson vs. Raymond W. May**
- 5211 **James D. McBride aka James Willson vs. State of Idaho**
- 5214 **State of Idaho vs. Delbert Crawford**
- 5221 **David Patrick Simmons vs. State of Idaho Board of Pardons and Parole**
- 5222 **State of Idaho vs. James B. Waller**
- 5224 **State of Idaho vs. Trefren, John**
- 5225 **Ronald W. Bacon vs. State of Idaho**
- 5231 **Harold D. McClellan vs. State of Idaho**
- 5239 **State of Idaho vs. Ronald Hawk**
- 5240 **State of Idaho vs. James Walker**
- 5241 **State of Idaho vs. Duane Warren Hawk**
- 5242 **State of Idaho vs. Lester R. Seiber and John Rideout Crane**
- 5244 **State of Idaho vs. Walter Dale Balla**
- 5246 **State of Idaho vs. Gerald Wilkins**
- 5247 **State of Idaho vs. Chester Lewis and Raymond Robinson**
- 5248 **State of Idaho vs. Richard Elisondo**

**BIENNIAL REPORT OF THE ATTORNEY GENERAL**

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- 5260 Abel Vialpondo vs. State of Idaho
- 5261 Audrey Tompkins vs. Chief of Idaho State Police, Attorney General of Idaho, State Police Officer Ron Gortcinsky or alias, State Police Officer Nelson or alias, and all their sureties; Commissioner of Department of Law Enforcement, et al.
- 5265 State of Idaho vs. Everett Richard Sam
- 5273 Jeffrey P. Cook vs. State of Idaho
- 5274 Harold D. Whitman vs. State of Idaho
- 5276 State of Idaho vs. Charles Rex Izatt and Monte Golden Weeks
- 5278 State of Idaho vs. Gary Norman Shatto
- 5289 State of Idaho vs. Roger Alan Morris
- 5293 Gay Dean Standless vs. State of Idaho
- 5294 State of Idaho vs. Alfred B. Froelich
- 5297 State of Idaho vs. Thomas H. Mansfield
- 5301 Ronald Burton Fesler vs. State of Idaho
- 5303 James Majors Samuel Carlile vs. State of Idaho
- 5305 State of Idaho vs. Robert Leroy Flory and Frank L. Fuller
- 5306 State of Idaho vs. Kim Bubel
- 5308 State of Idaho vs. Eddie Lee Drapeau
- 5309 Joseph Thomas Johnston vs. State of Idaho
- 5310 Harold Whitman and Dale Bryant vs. State of Idaho
- 5313 State of Idaho vs. John Joseph Lassfolk
- 5319 State of Idaho vs. James L. Miles
- 5320 State of Idaho vs. Russell Lee White
- 5321 State of Idaho vs. William Delos Campbell
- 5322 State of Idaho vs. Barrett Phillip Krull

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- 5326 State of Idaho vs. Kennit Timothy Neilson**
- 5327 State of Idaho vs. Martin P. Wyant**
- 5329 State of Idaho vs. Willie Wright**
- 5333 Donald Wentz vs. State Commission for Pardons & Parole**
- 5338 State of Idaho vs. Earl C. Manchester**
- 5339 State of Idaho vs. Lionel P. Roy and Leroy Milton Worley aka Jim Worley**
- 5340 State of Idaho vs. Phillip Wayne Gowin**
- 5349 John Jesse Ramero vs. State of Idaho**
- 5352 State of Idaho vs. Duane S. Sutliff**
- 5354 State of Idaho vs. Kenneth Allen Welder, III**
- 5355 Robert Leroy Hamrick vs. State of Idaho**
- 5356 Robert Leroy Hamrick vs. State of Idaho**
- 5357 State of Idaho vs. Barbara K. Dykes**
- 5364 Guy Donovan Cooper vs. State of Idaho**
- 5365 State of Idaho vs. Russell George Slowe, Sr.**
- 5366 State of Idaho vs. Charles Edward Loper**
- 5367 State of Idaho vs. Raymond A. Roles**
- 5369 William Loyd Burt vs. State of Idaho**
- 5370 State of Idaho vs. Leslie David Evening**
- 5373 State of Idaho vs. Steven Ray Morris**
- 5378 State of Idaho vs. Clyde Allen Courtney**
- 5387 Kenneth Droulard, et al. vs. State Board of Medicine, et al.**
- 5392 State of Idaho vs. Rudy Raymong Vigil**
- 5393 State of Idaho vs. Victor Guzman**
- 5394 State of Idaho vs. Robert Gerhardt**



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- 5395 Guy Junior Still, State of Idaho**
- 5397 State of Idaho vs. Lester J. Monroe**
- 5399 State of Idaho vs. Terry L. Billingsley**
- 5401 State of Idaho vs. Ray Allen Wood**
- 5427 State of Idaho vs. Nick Randall Calvert**
- 5429 State of Idaho vs. James R. Woolery**
- 5431 State of Idaho vs. Wayne Cunningham**
- 5434 State of Idaho vs. Robert Dalton Blair**
- 5436 State of Idaho vs. Ivan Franklin Nickerson**
- 5439 State of Idaho vs. Walter R. Pacheco**
- 5441 State of Idaho vs. Roy Arambula**
- 5452 State of Idaho vs. Allen Lynn LaMarche**
- 5453 Dale E. Thornton vs. State of Idaho**
- 5461 State of Idaho vs. Clinton Lewis Maddock**
- 5465 State of Idaho vs. John Michael Galvin**
- 5483 State of Idaho vs. Floyd Nelson**
- 5503 State of Idaho vs. James Frederick Sholes**
- 5508 State of Idaho vs. Gilbert C. Nanez**
- 5529 Guy Donovan Cooper v. Donald Erickson**
- 5551 State of Idaho vs. Michael Dean Stewart**
- 106 Marjorie Ruth Moon, as State Treasurer vs. Investment Board of the State of Idaho**
- 116 Claude E. Brown, Jr. vs. Robert M. Rowett (Magistrate)**
- 137 People of the State of Idaho on the relation of Cecil D. Andrus vs. Pete T. Cenarrusa, Secretary of State**

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**BIENNIAL REPORT OF THE ATTORNEY GENERAL**

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**IDAHO SUPREME COURT – PENDING**

- 4861 State of Idaho vs. Click
- 5051 Roger Alan Morris vs. State of Idaho
- 5067 State of Idaho vs. Harley Carringer and Harold Bales
- 5081 Harley Carringer vs. State of Idaho
- 5186 State of Idaho vs. Tom Watt (a child under eighteen years of age)
- 5248 State of Idaho vs. Richard Elisondo
- 5252 State of Idaho vs. Maria Lopez
- 5256 State of Idaho vs. Dennis L. Brown
- 5262 State of Idaho vs. Jean Goodrich
- 5277 State of Idaho vs. Dennis C. Griffith
- 5281 Lawrence C. Thomas vs. State of Idaho
- 5304 Alfred F. Mellinger vs. State of Idaho
- 5310 Harold Whitman and Dale Bryant vs. State of Idaho
- 5318 State of Idaho vs. Michael Leslie Beer
- 5320 State of Idaho vs. Russell Lee White
- 5322 State of Idaho vs. Barret Phillip Krull
- 5325 State of Idaho vs. George T. Warner
- 5350 State of Idaho vs. Paul W. Gowin
- 5351 State of Idaho vs. Edward L. Herr
- 5359 State of Idaho vs. Gary Paul Warden
- 5360 State of Idaho vs. Delbert Crawford
- 5363 Terry L. Wilcox vs. State of Idaho
- 5368 State of Idaho vs. James Pride
- 5371 State of Idaho vs. Danny J. Ward

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- 5377 Gary Westberg vs. State Commission for Pardons and Paroles, et al.
- 5388 Jones vs. Board of Medicine, et al.
- 5400 State of Idaho vs. Louis E. Phillips
- 5402 Daniel G. Goodrick vs. State of Idaho
- 5426 State of Idaho vs. Janella Wagenius
- 5428 State of Idaho vs. Ernest Chapman
- 5430 State of Idaho vs. Edward W. Chauncey
- 5437 State of Idaho vs. Roger Reese
- 5438 State of Idaho vs. William M. Prince
- 5440 State of Idaho vs. Cyrus Maxfield
- 5442 State of Idaho vs. Bobby L. Beason
- 5445 State of Idaho vs. Michael A. Hutchison
- 5448 State of Idaho vs. Annette Douglas
- 5449 State of Idaho vs. Dianne C. (David) Coffee
- 5451 State of Idaho vs. Craig S. Devoe
- 5457 State of Idaho vs. Ernest Cottrell aka Ernest Cottress
- 5458 State of Idaho vs. Lee Sistrunk and Larry Prince; and Ernest Cottrell aka Ernest Cottress
- 5466 Guy Donovan Cooper vs. State of Idaho
- 5467 State of Idaho vs. Steven Bailey
- 5471 State of Idaho vs. Louis Kevin Allen
- 5473 State of Idaho vs. Michael Floyd Colyer
- 5474 State of Idaho vs. Dale Eugene Lawrence
- 5475 James M. S. Carlile vs. Donald Erickson, et al.
- 5480 State of Idaho vs. Dallas Ray Stevens
- 5481 State of Idaho vs. Gary Thomas Landers

- 5482 State of Idaho vs. Michael Jerome Stockwell
- 5484 State of Idaho vs. John F. Nagel
- 5487 State of Idaho vs. James Wymore
- 5488 State of Idaho vs. Jose Perez and Cirilo Morin Mata, aka Chino
- 5489 State of Idaho vs. Armando Coronado
- 5493 State of Idaho vs. Gilbert Chapa
- 5494 State of Idaho vs. Jerry L. Hobson
- 5497 Roy Allen Gibbs vs. The Honorable Russell C. Shaud
- 5498 State of Idaho vs. Alan Erwin, aka "Hap" Erwin
- 5499 State of Idaho vs. Jesus Gonzalez Birrueta, aka Jesus Conzalez
- 5501 State of Idaho vs. Phillip W. Gowin
- 5509 State of Idaho vs. Edwin Bruce Crook
- 5510 State of Idaho vs. Lee Sistrunk
- 5511 State of Idaho vs. Tomasa Zarate and Frank Zarate
- 5512 State of Idaho vs. Deo R. Holtry
- 5515 State of Idaho vs. Kermit Armstrong and Clinton N. Watson
- 5516 State of Idaho vs. Patrick Kerrigan
- 5519 State of Idaho vs. Phillip Lewis Lindquist
- 5520 State of Idaho vs. Marcelina Jayo
- 5524 State of Idaho vs. Johnny Thacker
- 5525 State of Idaho vs. William Matthew Miller
- 5526 State of Idaho vs. Dale Eugene Lawrence
- 5530 State of Idaho vs. Guy Earl Ditmars
- 5531 State of Idaho vs. Thomas Eugene Creech
- 5532 State of Idaho vs. Bob Parker aka Raymond Jaynes and Tommy Petterson

**BIENNIAL REPORT OF THE ATTORNEY GENERAL**

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- 5533 State of Idaho vs. James W. Adams
- 5534 State of Idaho vs. Samuel Wallace
- 5535 State of Idaho vs. Deana Wallace
- 5536 State of Idaho vs. Robert Edward Buss
- 5537 State of Idaho vs. John Wesley Warden
- 5538 State of Idaho vs. Dianne Owens
- 5540 State of Idaho vs. Arthur Ely Maki
- 5541 State of Idaho vs. Larry A. Ruth
- 5542 State of Idaho vs. Randy S. Nalder
- 5543 State of Idaho vs. Dale Kerry Blackburn
- 5544 State of Idaho vs. Michael Hightower
- 5545 Thomas George and Carl Bowles; James Cherinwchan vs. State Board of  
Correction, State of Idaho
- 5546 State of Idaho vs. Richard DeJean
- 5547 State of Idaho vs. Alan Leroy Staggie
- 5548 State of Idaho vs. Melvin Eugene Ellis
- 5550 State of Idaho vs. Carl Lee Wilson
- 5552 State of Idaho vs. Lester Daniel Smoot
- 5553 State of Idaho vs. Sterling W. Jones and Gloria Jean Jones
- 5554 State of Idaho vs. Jack Harold Kraft
- 5555 State of Idaho vs. Roscoe A. Kellogg
- 5558 State of Idaho vs. Lloyd Clawson
- 108 Pete Oneida vs. James Cunningham (District Judge), et al. James Lystrup,  
et al. vs. Idaho State Board of Education

**BIENNIAL REPORT OF THE ATTORNEY GENERAL**

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**UNITED STATES DISTRICT COURT – CLOSED**

- 5200 William P. Balding, a minor and “T” William Balding and Barbara Balding vs. Independent School District of Boise, et al.
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- 5396 Jack Harold Kraft vs. Anthony Esquivel
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- 5251 Bobby L. Beason vs. Richard L. Anderson
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**BIENNIAL REPORT OF THE ATTORNEY GENERAL**

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- 5418 The Idaho Citizens for the Repeal of the Forest Practice Act and Jack A. Williams, President of the Organization vs. State of Idaho and Cecil D. Andrus, Governor of the State of Idaho
- 5419 Kootenai County Christian Posse Comitatus & Richard G. Butler, Marshall of Posse vs. State of Idaho and Cecil D. Andrus, Governor of the State of Idaho
- 5463 Jeff Cook vs. Donald Erickson, et al.
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Rosebud Sioux vs. Kniep

State of Wyoming vs. Hoffman

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Gordon S. Neilson - Senior Deputy  
Guy Hurlbutt - Deputy  
Bill F. Payne - Deputy  
David M. Rowe - Chief Investigator  
Lois Hurless - Administrative Assistant  
Kathleen Haynes - Fiscal Officer  
Sandra Rich - Receptionist

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Warren Felton	Theodore Spangler
James Hargis	Lynn Thomas
Anton Hohler	Faber Tway
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Michael Howell	Jeffrey Ring
Clinton Jacobs	David K. Robinson
Robert Johnson	Thomas Swinehart
Robert Jones	Mark Thompson
Dean Kaplan	Jean R. Uranga
James Kaufman	Tom Vanderford
Ursula Kettlewell	John Vehlou
James Kile	James Wickham

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Jake Hansen	Tom Williamson
Curtis Larsen	Terri Wood

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Terry Brennan	Neysa Tuttle
Lynn Clifford	Glenda Willford
Lil Nesmith	

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**ATTORNEY GENERAL'S  
OPINIONS  
for the year  
1975**



**WAYNE L. KIDWELL**  
**Attorney General**

**ATTORNEY GENERAL OPINION NO. 1-75**

TO: Richard S. High, Chairman, Senate Finance Committee  
William Roberts, Chairman, House Appropriations Committee

Per request for Attorney General Opinion.

**QUESTION PRESENTED:** Does the subpoena power of the Joint Finance-Appropriations Committee extend to state agency and departmental officials to compel their testimony during the interim period between legislative sessions concerning the budget requests of their organization.

**CONCLUSION:** The joint finance-appropriations committee's subpoena power to compel the testimony of state officials regarding financial matters concerning the organization they represent is valid and effective at any time of the year whether or not the Legislature is in session. This power to compel testimony extends to estimates of receipts and expenditures for the succeeding fiscal year (i.e. budget requests).

**ANALYSIS:** It is clear from the Idaho Constitution that the Legislature of the State of Idaho is singularly vested with the authority to provide for the financial needs of the State of Idaho, its agencies, departments, and the like. See Article III, § 1 (general legislative power); Article VII, § 2 (revenue power of legislature); Article VII, § 13 (money drawn only by legislative appropriation), *Idaho Constitution*.

As provided by Section 67-432, *Idaho Code*, the joint finance-appropriations committee was created and supplied with a means of succession of members during the interim period when the Legislature is not in session. Section 67-433, *Idaho Code*, mandates that said committee shall function during the interim between sessions and requires committee meetings at least once every three (3) months during the interim period. Thus, said committee has both the right and duty to function during the interim between legislative sessions.

Section 67-435, *Idaho Code*, sets forth the powers and duties of the joint committee, virtually all of which mandate the committee to study, review, audit and report upon the financial operations, programs, fiscal needs, and condition of the State, its departments, agencies, and institutions, together with any other agencies and institutions receiving state funds. A further duty imposed upon said committee is to report its findings and recommendations to the Legislature of the State of Idaho. Apparently as an aid to the joint committee in performing its duties, Section 67-437, *Idaho Code*, requires all departments, agencies, and institutions of state government which are required by Section 67-3503, *Idaho Code*, to submit reports of actual and estimated receipts and expenditures to the bureau of the budget to submit the same information to the joint committee no later than August 15th of each year. Thus, the preliminary informal "budget requests" of such agencies, departments, and institutions of state government should be available to the joint committee for its study by August 15th of each year.

Section 67-435 (5), *Idaho Code*, gives the joint committee the power "[t]o conduct such hearings as it may deem necessary and proper." Further, Section 67-438, *Idaho Code*, authorizes the joint committee in the exercise of its duties "to examine and inspect all properties, equipment, facilities, files, records and accounts of any state office, department, institution, board, committee, commission or agency, and to administer oaths, issue subpoenas, compel the attendance of witnesses and the production of any papers, books, accounts, documents and testimony" as well as take depositions. Any legislative subpoenas issued under § 67-438, *Idaho Code*, are enforceable under Section 67-439, *Idaho Code*, which imposes a duty upon the district courts, "on application of the [joint] committee, to compel obedience by proceedings for contempt" just as is authorized for the disobedience of the requirements of a subpoena from such court or a refusal to testify therein.

Of course, once the formal budget is submitted to the Legislature during legislative session, as provided in Chapter 35, Title 67, *Idaho Code*, the joint committee has a further duty imposed upon them by Section 67-3513, *Idaho Code*, to consider the same.

#### AUTHORITIES CONSIDERED:

1. *Idaho Constitution*, Art. III, § 1; Art. VII, §§ 2 & 13.
2. *Idaho Code*, Sections 67-432, 433, 435, 437, 438 & 439; and Sections 67-3503 & 3513.

DATED this 7th day of January, 1975.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL  
Attorney General

#### ANALYSIS BY:

PETER HEISER, JR.  
Chief Deputy

#### ATTORNEY GENERAL OPINION NO. 2-75

TO: Esther Stover  
Clerk of the District Court  
Adams County  
Council, Idaho 83612

Per request for Attorney General Opinion.

#### QUESTIONS PRESENTED:

1. Must county commissioners pay a filing fee when they are a party to a lawsuit?

2. If so, what would the procedure be for payment of such a fee?
3. Which fund must stand the cost for this payment?

#### CONCLUSION:

1. County commissioners must pay a filing fee when they are a party to a lawsuit because there are no statutory exclusions from payment of fees extending to county officials.
2. Chapter 16 of the *Idaho Code* sets out in general terms the County Budget Law and the procedure used for the payment of a filing fee should be identical to the procedure used for the payment of any other expenditure.
3. Expenditures are limited by the appropriations which were fixed and adopted as the county budget and a filing fee is an expense charged to the fund which is most closely related to the services, duties or functions upon which the lawsuit is predicated.

#### ANALYSIS:

1. There are no *Idaho Code* sections which specifically answer these questions, therefore, it is necessary to analyze the sections which deal with fee schedules to determine how this affects the payment of a filing fee by county commissioners who are a party to a lawsuit.

Chapter 32 of Title 31 of the *Idaho Code* deals with all types of fee schedules at the county level. Section 31-3201 of the *Idaho Code* sets out the fees to be charged by the clerk of the district court, and Section 31-3201(A) deals more specifically with court fees:

"The clerk of the district court in addition to the fees and charges imposed by Chapter 20, Title 1, *Idaho Code*, and in addition to the fees levied by Chapter 2, Title 73, *Idaho Code*, shall charge, demand and receive the following fees for services rendered by him and discharging the duties imposed upon him by law; (a) a fee of \$16.00 for filing a civil case of any type in the district court or in a magistrates division of the district court including cases involving the administration of decedent's estate, whether testate or intestate, and conservatorships of the persons of the estate or both with the following exceptions:

...

Section (c). A fee of \$5.00 shall be paid by any party, except the plaintiff, making an appearance in any civil action in the district court or the magistrates division of the district court . . ."

A related section, Section 31-3205, lists all the fees to be charged by the county recorder for his services rendered. Exceptions to these fee schedules are only found in Section 31-3206 which states that:

"Each county recorder shall record, free of charge, all clear lists of lands granted to the state by the United States."

Section 31-3212 which states in part:

"... nor shall any county officers charge any fee against, or receive any compensation whatever from, the state for any services rendered in any action or proceeding in which the state of Idaho, or any state board, or state officer in his official capacity, is a party."

This exemption from payment of fees by the State is more specifically set out in Section 67-2301 of the *Idaho Code* which states:

"No fees or compensation of any kind (except the regular salary or compensation pay by the state to the officer, agent, or employee individually for his services) shall be charged or received by any state board, officer, agent or employee for duties performed for services rendered to or for the state or to or for any state board, officer, agent, or employee in the performance of his or their official duties, or to or for the state or any state board, officer, agent and employees in any action or proceeding in which they or any of them are parties."

None of these sections specifically mentions an exclusion from payment of fees extending to county officials. The argument could be made that a county is a subdivision of the State, and, therefore, would be exempt under Section 31-3212 and Section 67-2301. This same argument was advanced in the case of *State v. Larson*, 84 Idaho 529, 374 P. 2d 484 (1962) where the court analyzed the definition of the state officers:

"Among the various definitions given the term 'state officer' it is stated in 49 Am. Jur. 264, § 52, that:

'They are in a general sense those whose duties are coextensive with the state or are not limited to any political subdivision of the state, and thus are distinguished from strictly municipal officers, whose functions relate exclusively to the particular municipality, and from county, town, and school district officers.'

"It is also stated in 81 C.J.S. States § 52, p 969:

'Broadly speaking, a state officer is one holding an office established by the constitution or by legislature, his powers and duties are coextensive with the state, and he is paid by the state.'

"Not only do the statutes of the state designate the Recorder as a county officer (I.C. § 31-2001) and provide for his salary to be paid from the county treasury (I.C. § 31-3101, our constitution designates the Auditor and Recorder as county officers (Art. 18, § 6). Chp. 24 of



Title 31, *Idaho Code* enumerates the duties of the Recorder and I.C. § 31-3205 prescribes the fees to be charged by him as a county officer.

"When the language used in this statute (I.C. § 67-2301) is given its usual and ordinary meaning and the interpretation it clearly implies, there is no reason to believe that county officers were intended to be included in its provisions. Boards, officers, agents or employees at the state level are affected by its provisions and no one else." 84 *Ida.* at 534.

Since these *Idaho Code* sections do not exempt county officials from the payment of fees, any exemption must be provided for by other statutes. Sections 31-3201, 31-3201(A), and 31-3205 provide an extensive list of services for which fees must be charged; and only Sections 31-3206 and 31-3212 expressly state the exceptions to these statutes. It would appear that if a county should have been entitled to the same exemptions as the State, there would have been no need for the specific exceptions listed above. The court in *State v. Larson*, *supra.*, also dealt with the statutory interpretation of these sections:

"In discussing the effect of express exceptions to the operation of a general statute, it is stated in 50 *Am. Jur.* 455, § 434:

'However, where express exceptions are made, the legal presumption is that the legislature did not intend to save other cases from the operation of the statute. In such case, the inference is a strong one that no other exceptions were intended, and the rule generally applied is that an exception in a statute amounts to an affirmation of the application of its provisions to all other cases not excepted, and excludes all other exceptions or the enlargement of exceptions made. Under this principle, where a general rule has been established by a statute with exceptions, the courts will not curtail the former, nor add to the latter, by implication. In this respect, it has been declared that the courts will not enter the legislative field and add to exceptions prescribed by statute.'

"In *Maytag Co. v. Commissioner of Taxation*, 218 *Minn.* 460, 17 *N.W.* 2d 37, the Supreme Court of Minnesota stated:

'Where a statute enumerates the persons or things to be affected by its provisions, there is an implied exclusion of others. [Citing Cases.] The maxim operates conversely where the statute designates an exception, proviso, saving clause, or a negative so that the exclusion of one thing includes all others.'

'Where express exceptions are made the inference is a strong one that other exceptions were intended.' " 84 *Ida.* at 535.

In this situation, the county commissioners have been named as parties to a lawsuit. Section 31-3201(AO (c)) states that:

"A fee of \$5 shall be paid by any party except the plaintiff, making an appearance in any civil action in the district court or in the magistrates division of the district court." (Emphasis added.)

The statutes granting specific exceptions to this payment of a fee do not include county commissioners and applying the statutory construction discussed in *State v. Larson*, supra. at 536:

"It is well settled that an exception in a statute amounts to affirmation of the application of its provisions to all other cases not excepted, and excludes all other exceptions."

The lack of a clear statutory exemption leads to the conclusion that the county commissioners as a party to a lawsuit are not exempt from the payment of filing fees.

2. Since it is our opinion that the county commissioners must pay a filing fee when they are a party to a lawsuit, it is now necessary to determine what procedure should be used to pay the fee, and what fund must stand the cost.

Chapter 16 of the *Idaho Code* sets out in general terms the County Budget Law. Section 31-1602 divides expenditures into two classifications which are: 1) salaries and wages, and 2) other expenses, which are listed as:

- "a. Services, other than personal.
- b. Materials and supplies.
- c. Debts, refunds and indemnities.
- d. Rents, contributions, and fixed charges.
- e. Capital outlay, equipment, lands, buildings, etc.

Said estimate and report shall also show the entire revenues and expenditures under each classification and subdivision thereof for the two (2) preceding fiscal years, the amount actually received and expended to the second Monday of October of the current fiscal year, and the estimated total receipts and expenditures for the current fiscal year.

It shall be the duty of the said budget officer to prepare and furnish proper forms for making the estimates and reports hereinabove provided for.

If any county official, elective or appointive, in charge of any office, department, service, agency or institution has had, or contemplates having, any expenditures, the reports of which can not be properly made under any of the above classifications, the same shall be reported in detail in addition to the information provided for in said forms."

The following section deals with the contents of a suggested budget and sets out the form to be observed by the county budget officer in the preparation of the budget.

- “1. Revenues from sources other than taxation, giving each fund, office, department, service, agency or institution separately.
2. Expenditures from:
  - Current expense fund
  - Road and bridge fund
  - Bond, interest and sinking
  - Common school, general
  - Warrant redemption
  - Emergency warrants
  - Proposed or authorized bonds
3. The proposed expenditures for each office, department, service, agency or institution for ‘Salaries and wages’ and for ‘Other expenses’ for the ensuing fiscal year and a comparison with the expenditures for the same purpose for the current fiscal year, to the second Monday of October, and for the two (2) previous fiscal years.” *Idaho Code*, Section 31-1603.

Section 31-1606 then specifically provides that the expenditures are limited by the appropriation which were “finally fixed and adopted as the county budget by said board of county commissioners . . .”

These sections reflect the general budget procedure which each county follows and provide the flexibility for each county to set up the funds tailored to their needs.

When a liability is incurred, a warrant is drawn against the fund which covers that liability. If a lawsuit is initiated which relates to a specific fund, that fund should be utilized to pay the filing fee. In your case, the lawsuit relates to a road and bridge matter, and therefore, this is an expenditure which should be charged against that fund.

The same procedure for the payment of the filing fee should be followed as the payment of any other liability. Once the fee is paid, it should be credited to the county as any other filing fee is credited.

In conclusion, the *Idaho Code* does not specifically state the funding process but allows a county to set up its own budget following the suggested budget of Section 31-1603. The expenditures are limited by the amount of the respective appropriations, and since a filing fee is an expenditure, it must be charged against the respective fund from which it is most closely related to the services, duties or functions upon which the lawsuit is predicated. The payment of the fee should be handled like the payment of any other liability, and the filing fee shall be apportioned like the filing fee generated by any other lawsuit.

#### AUTHORITIES CONSIDERED:

1. *Idaho Code*, Sections 31-3201, 31-3205, 31-3206, 31-3212, 67-2301, 31-1603, 31-1606.

2. *State v. Larson*, 84 Idaho 529, 374 P.2d 484 (1962).

DATED this 13th day of January, 1975.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL  
Attorney General

ANALYSIS BY:

URSULA KETTLEWELL  
Assistant Attorney General

**ATTORNEY GENERAL OPINION NO. 3-75**

TO: Martell L. Miller, Manager  
Department of Administration

Per request for Attorney General Opinion.

QUESTIONS PRESENTED:

1. May a refund to the State of surplus premiums on group insurance policies for State officers and employees, which was paid to one of the State's insurance carriers during the policy years 1972 and 1973, be applied by the State when received to the payment of premiums for the year 1974 should a deficit occur due to poor actuarial experience?

2. May refunds or dividends received from the State's group insurance carriers, and funds received through interaccount billings of departments of State government be maintained in a special fund, or must they be deposited in general-account and receipts to appropriation funds?

CONCLUSIONS:

1. The refund on surplus premiums paid by the State for group insurance coverages during the policy years 1972 and 1973 may be applied when received by the "personnel group insurance administrator" to the payment of premiums for the year 1974 should a deficit occur.

2. Refunds and dividends received from the State's group insurance carriers, funds received through interaccount billings of departments of State government and all other surplus funds of the group insurance program received by the personnel group insurance administrator must be deposited with the State Treasurer to be invested by the treasurer with other surplus or idle funds of the State pursuant to *Idaho Code* Section 67-1210. However, the interest or other yield on such investments shall be credited to the respective funds of the administrator from which derived.

ANALYSIS: In resolving the first issue presented, we refer to *Idaho Code* Sections 59-1205 through 59-1212 which were enacted by the 1974 legislature and note that provision is made for a "personnel group insurance administrator" who is authorized to procure group coverages of life insurance, annuities, disability insurance, and health care service for State officers and employees. We note that Section 59-1210 (1) provides that the administrator shall charge the various segments of State government the properly apportioned cost of the group coverages for the personnel under each segment of State government. In particular we note that provision is made for a "continuous appropriation" of funds received by the administrator from interaccount billings and from refunds on premiums, prepayments, experience savings and other contract returns.

"(3) Refunds on premiums or prepayments, profit-sharing, experience savings and refunds and other contract returns received by the administrator on account of group policies and group contracts shall be retained by the administrator and used for application upon future premiums and prepayments as equitably apportioned by the administrator.

(4) Funds received by the administrator under this section are hereby continually appropriated to the administrator for the uses for which charged and received, or as stated in subsection (3) above. Pending such use, surplus funds of the administrator shall be invested by the state treasurer in the same manner as provided for under section 67-1210, *Idaho Code*, with respect to other idle funds in the state treasury. All interest or other yield on such investments shall be invested by the state treasurer in the same manner as provided for under section 67-1210, *Idaho Code*, with respect to other idle funds in the state treasury. All interest or other yield on such investments shall be credited to the respective funds of the administrator from which derived".

*Idaho Code* Section 59-1210 (3) and (4).

We have observed that the *Idaho Constitution*, Art. 7, Section 13, provides that "No money shall be drawn from the treasury, but in pursuance of appropriations made by law". The term "appropriation" is defined by the *Idaho* Supreme Court as "... authority from the legislature expressly given in legal form, to the proper officers, to pay from the public moneys a specified sum, and no more, for a specified purpose, and no other." *Epperson v. Howell*, 28 *Idaho* 338, 348, 154 *Pac.* 621 (1916); *Herrick v. Gallet*, 35 *Idaho* 13, 17, 204 *Pac.* 447 (1922). However, we note that the *Idaho* Supreme Court has held on a number of occasions that the establishment of a revolving fund as a "continuous appropriation" is permissible under the provisions of Art. 7, Section 13 of the *Idaho Constitution*. *McConnel v. Gallet*, 51 *Idaho* 386, 390 *6 P.2d* 143 (1931); *State v. Musgrave*, 84 *Idaho* 77, 84, 370 *P.2d* 778 (1962); *Nelson v. Marshall*, 94 *Idaho* 726, 732, 497 *P.2d* 47 (1972). From an examination of these cases, we find that the element of specificity as to the sum is necessary only when the appropriation is made payable from the general fund and is required solely as a protection against unlimited withdrawals from such fund under

authority of a general appropriation. When, as here, the appropriation is made payable from a special fund, it is not necessary to appropriate a specific fund.

In further analysis of the first issue presented, a second question arises as to whether application of a premium refund to the payment of a premium deficit is within the scope of the "specified purpose" requirement of an appropriation as that purpose is described in *Idaho Code* Section 59-1210 (3). It is our view that refunds on premiums or prepayments toward future premiums and prepayments may be applied prospectively to coverages in the future or retrospectively to the payment of past deficits which may occur as a result of poor actuarial experience. It seems reasonable to assume that where the legislature anticipated a refund of premium or prepayment based on favorable experience on the State's group insurance coverages, that the legislature also anticipated that a deficit could occur due to unfavorable experience. It, therefore, seems reasonable to conclude that the legislature intended the "continuous appropriation" to cover either eventuality. This construction is consistent with the legislative intent as it appears in *Idaho Code* Section 59-1209 of the same Act to "procure and maintain on behalf of officers and employees the most "adequate group coverages reasonably obtainable for the money available for required premiums and prepayments". A section of a statute should be construed in the light of the purpose for which the legislature enacted the particular act of which such section is a part. *Colburn v. Wilson*, 24 Idaho 94, 102, 132 P.579 (1913); *Bush v. Oliver*, 86 Idaho 380, 384, 386 P.2d 967 (1963). The primary rule with reference to the interpretation of statute where any ambiguity exists, is to ascertain and give effect to legislative intent. *Northern Pac. Ry. Co. v. Shoshone County*, 63 Idaho 36, 40, 116 P.2d 211 (1941); *Nampa Lodge No. 1389 v. Smylie*, 71 Idaho 212, 218, 229 P.2d 991 (1951). The act should be construed in its entirety and as a whole for the purpose of ascertaining the legislative intent, and where different sections reflect light upon each other, they are regarded as in *pari materia*. *Nampa Lodge No. 1389 v. Smylie*, (Supra).

Analysis of the second issue appears to be readily resolved through examination of *Idaho Code* Sections 59-1210 (4) and 67-1210 which provide:

"Funds received by the administrator under this section are hereby continually appropriated to the administrator for the uses for which charged and received, or as stated in subsection (3) above. *Pending such use surplus funds of the administrator shall be invested by the state treasurer in the same manner as provided for under section 67-1210, Idaho Code, with respect to other idle funds in the state treasury.* All interest or other yield on such investments shall be credited to the respective funds of the administrator from which derived." (Emphasis added). *Idaho Code* Section 59-1210 (4).

#### AUTHORITIES CONSIDERED:

1. *Idaho Constitution*, Art. 7, Section 13.
2. *Idaho Code*, Sections 59-1205 through 59-1212.

3. *Epperson v. Howell*, 28 Idaho 338, 348, 154 Pac. 621 (1916).
4. *Herrick v. Gallet*, 35 Idaho 13, 17 204 Pac. 477 (1922).
5. *McConnel v. Gallet*, 51 Idaho 386, 390, 6 P.2d 143 (1931).
6. *State v. Musgrave*, 84 Idaho 77, 84, 370 P.2d 778 (1962).
7. *Nelson v. Marshall*, 94 Idaho 726, 732, 497 P.2d 47 (1972).
8. *Colburn v. Wilson*, 24 Idaho 94, 102, 132 P. 579 (1913).
9. *Bush v. Oliver*, 86 Idaho 380, 384, 386 P.2d 976 (1963).
10. *Northern Pac. Ry. Co. v. Shoshone County*, 63 Idaho 36, 40, 116 P.2d 211 (1941).
11. *Nampa Lodge No. 1389 v. Smylie*, 71 Idaho 212, 218, 229 P.2d 991 (1951).

DATED this 3rd day of February, 1975.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL  
Attorney General

ANALYSIS BY:

ROBERT M. JOHNSON

#### ATTORNEY GENERAL OPINION NO. 4-75

TO: The Honorable Edward W. Rice, Chairman  
Judiciary, Rule and Administrative Committee  
House of Representatives  
Statehouse Mail

Per request for Attorney General Opinion.

#### QUESTIONS PRESENTED:

1. Can the Committee require identification of one who testifies before it by name, address, employment, as either proponent or opponent on the subject of immediate inquiry, and whether the witness is a registered lobbyist pursuant to the Sunshine Law?
2. Can the Committee refuse to accept an appearance and testimony from a witness who declines to give the requested information?

**CONCLUSION:**

1. Article III, Section 9, *Idaho Constitution*, empowers each house of the Legislature to determine its own rules of proceeding. This power exists to facilitate orderly procedures and to expedite the disposition of the business of each house. The Judiciary, Rules and Administrative Committee properly implements this power on behalf of the House of Representatives, when pursuant to House resolution, it requires such identification from those who testify before it.

2. Pursuant to House resolution, the Committee may refuse to accept the appearance and testimony of one who declines to give the requested information.

**ANALYSIS:**

1. The *Idaho Constitution* grants to each legislative house the power to determine its own rules of proceeding. Article III, Section 9, *Idaho Constitution*. This power exists to facilitate orderly procedures and to expedite disposition of the business of each house. *Kennan v. Price*, 68 Idaho 423, 427, 195 P2d 622, 669 (1948). I find no direct authority on the issue of whether a legislative committee may implement this power independent of its parent house; however, case law from sister jurisdictions clearly indicates that a committee may ask and require answers to its questions when the inquiry is authorized by the parent body. *Buell v. Superior Court of Maricopa County*, 96 Arizona 62, 391 P2d 919 (1964); of *State v. James*, 36 Washington 2nd 882, 221 P2d 482 (1950), cert. denied 71 S.Ct. 615, 341 U.S. 911, 995 LEd 1348, rehearing denied 71 S.Ct. 851, 341 U.S. 937, 95 LEd 1365. As indicated by case law, the power of Article III, Section 9 is properly implemented by securing a resolution of the House of Representatives establishing the rules you suggest. Armed with the appropriate resolution, it is my opinion that the desired rules are reasonable requirements upon those who voluntarily seek to testify before your committee. Among considerations in support of such rules are:

1. Hearing and receiving testimony from witnesses are indispensable to the disposition of any public inquiry of the Committee. That disposition is legitimately expedited through questions which illicit facts upon which the Committee structures its hearing.
2. Identification by name and address reveals the residence of the witness and thereby establishes one's input as constituent or non-constituent, citizen of Idaho or of a sister state. As representatives of specific legislative districts, and as those who create the state's laws, each committeeman must be responsive to constituent input. Prior knowledge of witness identity and residence may provide the committee with information necessary to the establishment of a legitimate order for priority in appearance and testimony.
3. A statement of position on the merit of the inquiry, whether pro or con, would aid the Committee in structuring its reception of testimony. The Committee could exhaust its focus upon one side of an



issue before proceeding to examination of a converse position. When combined with knowledge of one's employer, a statement of position could be utilized to limit repetitious testimony. Assuming the presence of several persons sharing both a common employer and a proprietary view upon an issue related to their employment, the Committee's business is expedited by requiring designated spokesmen for the proprietary viewpoint.

4. Ascertainment of the witness's registration as a lobbyist enables the Committee to evaluate that witness as one testifying for compensation who may or may not coincidentally represent a constituent interest. In addition, it encourages thorough questioning of the non-lobbyist witness who cannot legally respond to a legislator's questions asked outside the public session. Sunshine Law, Sections 17 and 18(a).

While the appropriate answers to these questions may be helpful to the committee, it should be prepared to waive a required response to any of the five questions for cause. For example, a waiver could be entertained if in a consensus opinion of the committee, a witness who so responds subjects person, family or homestead to the likelihood of physical harm. of *People, ex rel Dunbar v. District Court of Seventh J. D.*, Colo. 494 P2d 841 (1972).

2. Pursuant to authority granted by a House resolution, your Committee may decline to hear testimony offered by a witness who otherwise refuses to answer questions required by that House resolution. The establishment of procedural rules is peculiarly within the realm of the legislature. *Keenan v. Price*, supra; *Allen v. Superior Court in and for San Diego County*, 171 C.A. 2nd 444, 340 P2d 1030 (1959). Those questions which serve to elicit facts upon which the Committee structures its hearing by way of establishing priority of testimony, for avoidance of repetitious testimony, and for encouragement of complete and thorough questioning of a particular witness may be asked pursuant to those powers authorized by Article III, Section 9 of the *Idaho Constitution*.

It is my opinion that a committee's exercise of authority granted to it to decline to hear testimony from one who refuses to supply information reasonably necessary for the orderly conduct of its business is constitutionally permissible.

#### AUTHORITIES CONSIDERED:

1. *Idaho Constitution*, Article III, Section 9.
2. *Keenan v. Price*, 68 Idaho 423, 195 P.2d 662 (1948).

DATED this 27th day of January, 1975.

## ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL  
Attorney General

## ANALYSIS BY:

CHRISTOPHER D. BRAY  
Assistant Attorney General

## ATTORNEY GENERAL OPINION NO. 5-75

TO: Robert N. Wise  
Chief  
Bureau of State Planning & Community Affairs

Per request for Attorney General Opinion.

## QUESTIONS PRESENTED:

1. Does the Planning and Zoning Commission have the right to turn down a zoning request based upon the lack of available public services in a given area?
2. If the present Planning and Zoning Commission is split into a Planning Commission and a Zoning Commission, will the Planning Commission be required to get approval from the Zoning Commission for a Comprehensive Plan amendment prior to adoption?

## CONCLUSIONS:

1. Yes, such a zoning request can be denied if the restrictions conform to the community's considered land use policy as laid out in the comprehensive plan and represent a true effort to maximize population density consistent with orderly growth.
2. No, comprehensive plan amendments are a part of the planning function which precedes zoning, but any changes in the plan should be made in conjunction with existing zoning regulation to insure proper community development.

## ANALYSIS:

1. Zoning enabling legislation (Section 50-1201) allows a city or a county to zone "for the purpose of promoting health, safety, morals or the general welfare of the community." To achieve these goals, they are empowered to "regulate and restrict the height; number of stories; the size of buildings and other structures; the percentage of each lot that may be occupied; the size of yards, court and other open spaces; the density population; the location and use of building structures and land for trade, industry, residence or other purposes." *Idaho Code*, Section 50-1201. (Emphasis added.)

Zoning law provides that a city or county is divided into districts and within such districts the "erection, construction, reconstruction, alteration, repair or use of buildings, structures or land" is regulated uniformly in order to promote "health, safety, morals or the general welfare of the community." Section 50-1203 provides that "such regulations shall be made in accordance with a comprehensive plan and shall be designed . . . to prevent the overcrowding of land, to avoid undue concentration of population, to facilitate the adequate provision of transportation, water, sewage, schools, parks and other public requirements . . ."

The comprehensive plan which has been formulated by the planning commission and adopted by the city council or county commissioners provides the basis for the regulations, restrictions and boundaries which are enacted to carry out the plan. The procedure for their adoption is set out in Section 50-1204.

These regulations once passed can be changed by applications for variances or by re-zoning requests. "Enabling legislation commonly authorizes the initiation of amendatory legislation by petition or application for amendment." Anderson, *American Law of Zoning*, § 4.33. Both Sections 50-1205 and 31-3804 provide for the amending process and state that these zoning amendment recommendations are then presented to the city council or county commissioners for adoption or rejection.

Since all zoning regulations must be based on a comprehensive plan, all zoning amendments or changes must also be in accordance with the plan. The courts have recognized that changes must be made to meet changing needs.

"To justify a reclassification, something more must be shown than a mere change of mind . . . It should not be granted merely because it would make the property more valuable . . . Changes that are consistent with a long range plan are preferable to piecemeal adjudications . . . But zoning can never be completely permanent, and reclassification which finds support in a genuine change in conditions or clear evidence of mistake, should not be stricken down, even if the reviewing court would have reached a different conclusion." *Muhly v. County Council for Montgomery County*, 218 Md 543; 147 A2d 735 (1959).

In reviewing these amendments, some of the courts:

" . . . inquire whether the amendment in question is calculated to serve the public health, safety, or welfare. They seek to determine whether the change is intended to benefit the community in general, or to serve the private interest of a property owner or group of owners. If the amendment in issue is enacted in the interest of the health, safety, or welfare of the community, most courts will find that it is enacted in accordance with a comprehensive or well-considered plan. If it was enacted to enrich a selected owner or group of owners, it may be held invalid for failure to comply with the comprehensive plan requirement." Anderson, *American Law of Zoning*, § 5.02.

Other courts have taken the position that a change or reclassification "will be sustained only if there is strong evidence of error in the original ordinance or a change in circumstances which justifies the amendment . . . Proof that population has increased, that the subject area is in transition or that increased commercial use over the years has had a cumulative effect is sufficient to support an amendment." *Anderson, supra.*, § 5.03.

On the other hand, if an individual or group of individuals requests a variance or amendment, the authority to deny such a request is also based on our enabling legislation. As pointed out by the court in a recent zoning controversy, *Golden v. Planning Board of Town of Ramapo*, 285 NE 2d 291 (New York 1972) at p. 300:

" . . . phased growth is well within the ambit of existing enabling legislation . . . Its exercise assumes that development shall not stop at the community's threshold, but only that whatever growth there may be shall proceed along a predetermined course . . . What segregates permissible from impermissible restriction depends in the final analysis upon the purpose of the restrictions and their impact in terms of both the community and general public interest. The line of delineation between the two is not a constant, but will be found to vary with prevailing circumstances and conditions."

If the restrictions conform to the community's considered land use policy as laid out in its comprehensive plan and "represent a bona fide effort to maximize population density consistent with orderly growth," then any request for amendment or variance can be turned down in order to maintain "a balanced cohesive community dedicated to the efficient utilization of land." *Golden, supra.*

2. Section 50-1104, *Idaho Code*, sets out the duties of a planning commission and states in part:

"It shall be the duty of a commission to recommend and make suggestions 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 formulation of zoning districts . . ."

Neither this section nor any other section within this chapter presents a required procedure for the adoption of a comprehensive plan. It is recommended in Attorney General Opinion dated October 9, 1973, and issued to Mr. Glenn Nichols, that the adoption of a comprehensive plan should follow the procedural steps for the adoption of an ordinance in order to insure its legality. Once this plan has been recommended and adopted, the zoning process may begin.

This planning and zoning sequence is provided for by statute in the *Idaho Code*. As stated, Section 50-1104, *Idaho Code*, provides for a planning commission which has the duty of recommending a comprehensive plan to the city

council or county commissioners. Sections 50-1210 and 31-3804, *Idaho Code*, by reference provide for the creation of a zoning commission which is empowered to enact regulations to promote the health, safety, morals and general welfare of the community. But, as Section 50-1203 and Section 31-3801, *Idaho Code*, by reference point out, these regulations "*shall be made in accordance with a comprehensive plan . . .*" (emphasis added).

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." Attorney General Opinion, dated October 9, 1973, at p. 3. Such a plan should be amended from time to time to keep in step with the developments of the community. Since the statute provides that planning precedes zoning, it is only logical that any comprehensive plan amendment can be presented to the city council for review without the necessity of approval from the zoning commission. It would be to the best interest of the community for both the planning and the zoning commission to cooperate in the recommendation of a comprehensive plan amendment in order that any existing zoning regulation can be taken into account when considering proposed comprehensive plan changes.

#### AUTHORITIES CONSIDERED:

1. *Muhly v. County Council for Montgomery County*, 218 Md 543, 147 A2d 735 (1959).
2. *Golden v. Planning Board of Town of Ramapo*, 285 NE 2d 291 (New York 1972).
3. *Idaho Code* Sections: 50-1104, 50-1201, 50-1203, 50-1204, 50-1205, 50-1210, 31-3801, 31-3804.
4. Anderson, *American Law of Zoning*, § 4.33, § 5.02, § 5.02.
5. Attorney General Opinion, October 9, 1973.

DATED this 31st day of January, 1975.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL  
Attorney General

ANALYSIS BY:

URSULA KETTLEWELL  
Assistant Attorney General

#### ATTORNEY GENERAL OPINION NO. 6-75

TO: Edward W. Rice, Judiciary, Rules and Administrative Committee,  
*et al.*

Per request for Attorney General Opinion.

**QUESTION PRESENTED:** What is "the propriety of a taxing unit to spend tax funds in promotion of a bond election; i.e., the promotional advertising expenses in the recent Auditorium District bond election."

**CONCLUSION:** A taxing unit may utilize public funds to advertise a bond election provided the funds used shall equally present the positive and negative positions of the question or issue to be voted on. Funds cannot be used strictly for promotional advertising unless legislation specifically grants this authority to the taxing unit involved in the bond election.

**ANALYSIS:** A unit of local government is a municipal corporation organized under the laws of the state of Idaho. Such units of government are taxing districts defined in § 63-621, I.C. as

...any city, school district, road district, highway district, cemetery district, junior college district, hospital district, water district, or any other district or municipality of any nature whatsoever having the power to levy taxes, organized under any general or special law of this state. The enumeration of certain districts herein shall not be construed to exclude other districts or municipalities from said definition." (Emphasis added.)

Once these taxes are collected by the various taxing districts they become public money which is defined by two Idaho statutes:

57-105. Public moneys. — "Public moneys" are all moneys coming into the hands of any treasurer of a depositing unit, and in the case of any county shall also include all moneys coming into the hands of its tax collector or public administrator.

18-5703. Public moneys defined. — The phrase "public moneys" as used in the two preceding sections includes all bonds and evidences of indebtedness, and all moneys belonging to the state, or any city, county, town or district, city or town officers in their official capacity.

There is no specific Idaho statute which establishes guidelines for the expenditure of public moneys. It is generally recognized that public funds must be spent for a public purpose. The legislature did not define public purpose, but a general definition has been adopted by the Idaho Supreme Court in *Village of Moyie Springs, Idaho v. Aurora Mfg. Co.*, 82 Idaho 337, 353 P.2d 767 (1960) as found in *Lancaster v. Clayton*, 86 Ky. 373, 5 S.W. 864:

It is true, the taxing power is a broad and liberal one, and properly so. It extends aid to public schools, because education is a public purpose; to roads, because they are necessary for travel; for police purposes, to preserve the public peace, — in short for all purposes which in a liberal sense, can be considered public . . . *Village of Moyie Springs, supra*, at 775.

Each taxing unit is given the power and authority in its organizational statutes to spend public moneys, and the purpose and limitation for the expenditures varies with each taxing district. For example § 67-4912 I.C. sets forth the express and implied powers of the Auditorium District created and organized under the authority of Chapter 49. Among these general powers are:

- (d) to enter into contracts and agreements affecting the affairs of the district.
- (e) to borrow money and incur indebtedness and issue bonds.
- (h) to have the management, control and supervision of all the business and affairs of the district.
- (i) to hire and retain agents, employees, engineers and attorneys.
- (o) to have and exercise all the rights and powers necessary or incidental to or implied from the specific powers granted herein. Such specific powers shall not be considered as a limitation upon any power necessary or appropriate to carry out the purposes and intent of this act.

Expenditures made in compliance with the statutory powers fall into the category of expenditures for a "public purpose". Expenditures not expressly authorized but made in relation to the express powers may be open to question and may constitute a misuse of public funds. Advertisement into this latter category and have been reviewed by various courts.

In the case of *Mines v. Del Valle*, 201 Cal. 273, 257 P. 530 (1927) a bond issue had been proposed and the Los Angeles Board of Public Service Commissioners authorized the expenditure of public utility revenues to finance a campaign in favor of the proposed bond issue. The taxpayers sued the commissioners for improper expenditure of funds, and the commissioners argued that the authority granted to them in the Los Angeles charter

"to use money in the power revenue fund for the purpose of 'conducting, operating, maintaining and extending the business of said department pertaining to electric power'

included the authority to do all things necessary to execute that power. Since the bond issue was necessary to extend the business of the utility, the commissioners argued, it was necessary to advertise to insure the success of the bond issue . . .

The mines court concluded that:

. . . the electors of said city opposing said bond issue had an equal right to and interest in the funds in said power fund as those who favored said bonds. To use said public funds to advocate the adoption of a proposition which was opposed by a large number of said electors would be manifestly unfair and unjust to the rights of said last-named

electors, and the action of the board of public service commissioners in so doing cannot be sustained, unless the power to do so is given to said board in clear and unmistakable language." *Mines, supra* at p. 537.

The same issue was discussed by the court in *Citizens to Protect Public Funds et. al. v. Board of Education of Parsippany-Troy Hills Tp.*, 98 A.2d 673 (N.J. 1953) where the school board spent money for the distribution of booklets advocating a favorable vote at election. The court at great length discussed the purpose of the booklet and to what extent the public funds should have been used to further this cause:

... But a fair presentation of the facts will necessarily include all consequences, good and bad, of the proposal, not only the anticipated improvement in educational opportunities, but also the increased tax rate and such other less desirable consequences as may be foreseen ...

But the defendant board was not content simply to present the facts. The exhortation "Vote Yes" is repeated on three pages, and the dire consequences of the failure so to do are over-dramatized on the page reproduced above. In that manner the board made use of public funds to advocate one side only of the controversial question without affording the dissenters the opportunity by means of that financed medium to present their side, and thus imperilled the propriety of the entire expenditure. The public funds entrusted to the board belong equally to the proponents and opponents of the proposition, and the use of the funds to finance not the presentation of facts merely but also arguments to persuade the voters that only one side has merit, giving the dissenters just cause for complaint. The expenditure is then not within the implied power and is not lawful in the absence of express authority from the Legislature. 98 A2d at 677.

A very recent Oregon case, *Porter v. Tiffany*, 502 P.2d 1385 (Oregon 1972) followed the principles stated in the above cases and held that the commissioners of a city water and electric board could not utilize public funds to promote their point of view on two election measures. The court decided that the expenditures for adversary advertising were not authorized as incident to the powers granted the EWEB to "improve, extend, enlarge and acquire water and electrical utilities' systems." The court quoted from *Mines v. Del Valle, supra*, that using the funds to advocate approval was "manifestly unfair and unjust."

As these cases point out unless there is an express provision authorizing promotional advertising of the bond election, the taxing districts are required to represent both proponent's and opponent's point of view.

"... when the program represents the body's judgment of what is required in the effective discharge of its responsibility, it is not only the right but perhaps the duty of the body to endeavor to secure the assent of the voters thereto. The question we are considering is simply the extent to and manner in which the funds may with justice to the rights of dissenters be expended for espousal of the voters' approval of the



body's judgment. Even this the body may do within fair limits . . . It is the expenditure of public funds in support of one side only in a manner which gives the dissenters no opportunity to present their side which is outside the pale." *Citizens to Protect Public Funds, et al., supra* at 677.

**CONCLUSION:** The cases clearly indicate that the use of public funds for the advertisement of a bond election is a permissible public expenditure. It should be expressly noted that the above-cited case points out that in the appropriate situation the administrative body may have the right and duty to express their opinion concerning the proposal and to secure assent of the voters thereto. The objections are only directed at the content and purpose of the advertisements. The courts have held that the electors opposing the bond election have an equal right to and interest in the fund used for advertising as do the proponents. This principle authorizes the officials in charge of the election to publish literature presenting accurate information as to the pros and cons of the bond issue; to conduct a public forum where all may appear and express their views pro and con; to conduct radio and television broadcasts taking the form of debates between proponents of the differing sides of the proposition. This type of advertising makes equal funds available to represent all points of view on the bond issue. As pointed out by the court in *Citizens to Protect Public Funds, et al. v. Board of Education of Parsippany-Tray Hills Tp.*, 98 A.2d 673 (N.J. 1953). ". . . it is the expenditure of public funds in support of *one side only* in a manner which gives the dissenters no opportunity to present their side which is outside the pale." (Emphasis added.)

**AUTHORITIES CONSIDERED:**

1. *Idaho Code* Sections: 63-621, 57-105, 18-5703, 67-4912.
2. *Village of Moyie Springs, Idaho v. Aurora Mfg. Co.*, 82 Idaho 337, 373 P.2d 767 (1960).
3. *Lancaster v. Clayton*, 86 Ky. 373, 5 S.W. 864.
4. *Citizens to Protect Public Funds, et al. v. Board of Education of Parsippany-Tray Hills Tp.*, 98 A.2d 673 (N.J. 1973).
5. *Porter v. Tiffany*, 502 P.2d 1385 (Ore. 1972).

DATED this 30th day of January, 1975.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL  
Attorney General

**ANALYSIS BY:**

URSULA GJORDING  
Assistant Attorney General

## ATTORNEY GENERAL OPINION NO. 7-75

TO: The Honorable M. B. Kennedy  
County Prosecutor, Madison County  
Rexburg, Idaho 83440

Per request for Attorney General Opinion.

## QUESTIONS PRESENTED:

1. Are the meetings of the Madison County Hospital Board subject to the open meeting law, Section 6-2341, et seq., *Idaho Code*?
2. Should financial records of Madison County Hospital be open to the public?
3. Are all minutes of the Madison County Hospital Board open to public scrutiny?
4. Regarding the above, what duty of confidentiality exists upon the Board's trustees?

## CONCLUSIONS:

1. The Madison County Hospital Board is a statutory entity, created pursuant to Sections 31-3601, 31-3602, and 31-3603, *Idaho Code*. Authority to create a county hospital board is vested in the board of county commissioners. The county hospital board is charged with the management of all county property devoted to hospital purposes. As a statutory entity performing functions on behalf of the county, the Madison County Hospital Board is a subagency of the county and therefore required to open all meetings to the public except those conducted in executive session.
2. In enumerating the duties of a county hospital board, Section 31-3607 (b) states that a board is to assume proper care of all money received by it "... and to pay out such money for valid bills and obligations of the hospital ..." The board is further required to enter into its minutes, proper records of the receipt of such moneys and accounts of those moneys, whether expended or on hand. These financial records of hospital business are then subject to public inspection.
3. Pursuant to Section 67-2345, a county hospital board is authorized to conduct limited forms of its business in executive non-public sessions. Those items of business which are not subject to public observation or review are enumerated therein, and set forth in detail in the analysis hereafter.
4. Any conflict between open meeting laws and the board's by-laws regarding confidentiality of records is to be resolved in favor of the former.

## ANALYSIS:

1. The Madison County Hospital Board is a statutory entity, created pursuant to Sections 31-3601, 31-3602, and 31-3603, *Idaho Code*. Authority to create a county hospital board is vested in the board of county commissioners. Section 31-3603. The county hospital board is charged with the management of all county property devoted to hospital purposes. Section 31-3607. As a statutory entity performing functions on behalf of the county, the Madison County Hospital Board is a subagency of the county, i.e., a public agency. Section 67-2341 (3) (d). It therefore is subject to the provisions of Section 67-2342 which requires all meetings of a governing body of a public agency, except those conducted in an executive session, to be open to the public.

2. Section 31-3607 (b) prescribes the duties of county hospital boards regarding the custody and disbursement of funds in their care or possession. Specifically, each board is required to keep records of all money paid out for valid bills and obligations of that hospital for whom the trustees serve. These records, as well as those of all other business transactions, including proper accounts of the money as originally received, are to be entered into the minutes of business conducted by the trustees. Those minutes are then subject to observation by any taxpayer and/or elector of the county.

3. Pursuant to Section 67-2345, a county hospital board is authorized to conduct limited forms of its business in executive, non-public sessions. That business may be:

- “(a) to consider the employment of a public officer, employee, staff member or individual agent. This paragraph does not apply to filling a vacancy in an elective office;
- (b) to consider the dismissal or disciplining of, or to hear complaints or charges against, a public officer, employee, staff member or individual agent;
- (c) to conduct deliberations concerning labor negotiations or to acquire an interest in real property;
- (d) to consider records that are exempt by law from public inspection;
- (e) to consider matters of trade or commerce.”

Minutes of business conducted at an executive session are to be taken but may be limited in form to a resume of the procedure followed in the conduct of the executive session rather than of its substance. Section 67-2344 (2). The minutes taken are, as are the minutes of business taken at other than executive sessions, subject to public review.

In summary, while not all of the business of a county hospital board is subject to public observation and review, that which is the immediate basis of your inquiry, is.

4. County hospital boards promulgate rules for the conduct and operation of hospital property pursuant to Section 31-3610. No specific authority is therein granted to establish a rule or regulation preventing public disclosure of hospital records. Section 67-2340, however, is a specific statement of purpose "that the formation of public policy is public business and shall not be conducted in secret." This statute together with those which generically follow, particularize this requirement of openness and avoidance of secrecy. As a statutory rule of construction, if a conflict exists between two statutes, that which is specific controls the general. *State v. Roderick*, 85 Idaho 80, 84, 375 P.2d 1005, 1007 (1962); *Koelsch v. Girard*, 54 Idaho 452, 458, 33 P.2d 816, 818 (1934). Thus, any conflict between adherence to the open meeting laws or Section 31-3607 (b) and the Board's by-laws regarding confidentiality of records is to be resolved against the latter.

#### AUTHORITIES CONSIDERED:

1. *Idaho Code*, Sections 31-3601, 31-3602, 31-3603, 31-3607, 31-3607 (b), 31-3610, 67-2340, et seq.
2. *State v. Roderick*, 85 Idaho 80, 84, 375 P.2d 1005, 1007 (1962).
3. *Koelsch v. Girard*, 54 Idaho 452, 458, 33 P.2d 816, 818 (1934).

#### ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL  
Attorney General

#### ANALYSIS BY:

CHRISTOPHER D. BRAY  
Assistant Attorney General

#### ATTORNEY GENERAL OPINION NO. 8-75

TO: The Honorable C. W. Neider  
Representative, District No. 2  
House of Representatives  
State Legislature  
Building Mail

Per request for Attorney General Opinion.

**QUESTION PRESENTED:** Does Article IX, Section 9 of the *Idaho Constitution*, or any other legal authority, prohibit expenditure of state funds to support public kindergartens, where attendance is not compulsory?

**CONCLUSION:** Not if the attendance is not mandatory.

ANALYSIS: Article IX, Section 9 of the *Idaho Constitution*, as amended by the voters on November 7, 1972, is as follows:

“Section 9. COMPULSORY ATTENDANCE AT SCHOOL. — The legislature may require by law that every child shall attend the public schools of the state, throughout the period between the ages of 6 and 18 years, unless educated by other means, as provided by law.”

This section authorized the legislature to enact legislation which would require every child between the ages of 6 and 18 years to age to attend the public schools established by law, unless those children are educated by other means as provided by law. The legislature has provided by law for the compulsory attendance of children between the ages of 7 and 16 in the public schools unless educated by other comparable means. Section 33-202, *Idaho Code*. However, Section 33-201, *Idaho Code*, provides that the services of the public schools are extended to any acceptable person between the ages of 6 and 21. The effect of this section of Article IX of the Constitution and the statutes cited is to authorize compulsory attendance legislation, to require compulsory attendance, and to require that the services of the public schools be open to persons of certain age, i.e., the schools may not exclude persons between the ages of 6 and 21 years. However, there is nothing in any of these authorities which suggests that the state or its school district could not establish educational programs and services for those persons not yet 6 years old or for those persons over the age of 21. As a matter of law, a district may provide education services for out-of-school youths and adults, and the district has specific authority to provide classes in kindergarten. Section 33-512 (2), *Idaho Code*.

This last cited section and paragraph predates the amendment to Article IX, Section 9 of the Constitution. The amendment to the article did nothing more than extend the period of time the legislature could require school attendance. Therefore, the districts have had the statutory authority to establish kindergartens at least since 1963, the date of the last general codification of statutes dealing with schools and school districts.

Since districts have the authority to establish kindergartens now, the only issue to be discussed is whether or not the legislature may appropriate funds from the State of Idaho to support kindergarten programs established by the district.

In the case of *Leonardson v. Moon*, 92 Idaho 796, 451 P2d 542 (1969) and cases cited therein, the Idaho Supreme Court held that the Constitution of the State of Idaho is a limitation of power and not a grant of power. Therefore, the court will look to see what the legislature may not do rather than to see if the legislature has a specific grant of authority to do something. The limitation imposed on the legislature by Article IX, Section 9 is that a child who is not yet 6 may not be required to attend school. We can find nothing in the Constitution which would prohibit, prevent, or otherwise limit the legislature from appropriating funds of the state to support kindergartens established by the local districts, where attendance is not required by law. Any such limitation would not be contained in Article IX, Section 9 of the *Idaho Constitution*; but rather

the limitation, if any, would be found in Article III of that document. A close reading of this article indicates that it is largely directory, except in two specific instances: 1) Section 14 requires revenue-raising legislation to originate in the House of Representatives, and 2) Section 19 prohibits the passage of local and special laws. The court has basically held that Section IXX is anti-discriminatory in purpose and that a law is general when its terms apply to all person and subjects that are in like situations. *Jones v. Power County*, 27 Idaho 656, 150 Pac. 35; *Ada County v. Wright*, 60 Idaho 394, 92 P2d 134; *Robbins v. Joint Class A District No. 33*, 72 Idaho 500, 244 P2d 1004; *Leonardson v. Moon*, supra.

Chapter 10 of Title 33, *Idaho Code* establishes the foundation program for the distribution of state funds to the local districts. Part of the formula is based on the number of students in average daily attendance. Students are those between the ages of 6 and 21 years. Therefore, a five year old is not a student within the meaning of the foundation program. A district may not count those not yet 6 or over the age of 21 in its certified average daily attendance for foundation monies. Therefore, any funds appropriated for kindergartens would have to be made outside the foundation program appropriations or that program would have to be amended to permit distribution to districts for those who attend the district's kindergartens.

Whether or not a consitutional amendment to "clarify the situation" is advisable is a matter of legislative policy on which we make no comment. We are attaching hereto a prior opinion of this office on this subject.

#### AUTHORITIES CONSIDERED:

1. *Idaho Code* Sections 33-201, 33-202, 33-512.
2. *Idaho Constitution*, Article IX, Section 9.
3. *Leonardson v. Moon*, 92 Idaho 796, 451 P.2d 542 (1969).
4. *Jones v. Power County*, 27 Idaho 656, 150 Pac. 35.
5. *Ada County v. Wright*, 60 Idaho 394, 92 P.2d 134.
6. *Robbins v. Joint Class A District No. 33*, 72 Idaho 500, 244 P.2d 1104.

DATED this 5th day of February, 1975.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL  
Attorney General

#### ANALYSIS BY:

JAMES R. HARGIS  
Deputy Attorney General

**ATTORNEY GENERAL OPINION NO. 9-75**

TO: Bartlett R. Brown, Director, Department of Labor and Industrial Services

Per request for Attorney General Opinion.

**QUESTION PRESENTED:** Under Title 45, Chapter 6, *Idaho Code* the Department of Labor is authorized to enforce payment of wages to the employee and hold hearings. Are such hearings to be held under the provisions of the Administrative Procedure Act (hereinafter referred to as APA)?

**CONCLUSION:** The hearings by the Department of Labor and Industrial Services pursuant to *Idaho Code*, Section 45-613 are not to be held under the provisions of the APA.

**ANALYSIS:** *Idaho Code*, Section 67-5201 of the APA defines "agency" as used in the act. An agency is each state board, commission, department or officer authorized by law to make rules or to determine *contested cases*, except those in the legislative or judicial branch, the state militia and the State Board of Corrections.

If the Department of Labor and Industrial Services were to conduct hearings, adversary in nature, which would amount to contested cases, then the hearings would fall within the purview of the APA. However, under the Wage Claim Act, under which the Department of Labor and Industrial Services conceives its authority to hold hearings, the hearings are not to be contested hearings; hence they are not within the scope of the APA.

*Idaho Code*, Section 45-613 authorized the Director to hold hearings and otherwise investigate violations or alleged violations of the Wage Claim Act. The Director has the power to administer oaths and examine witnesses under oath, or otherwise, issue compulsory process to compel the attendance of witnesses, and the production of papers, books, accounts, records, payrolls, documents, and testimony, and to take depositions and affidavits.

These hearings are investigatory in nature, and are not contested within the meaning of the APA. Since there is no adversary proceeding, the employer does not have the right to call witnesses and otherwise present his case. However, the Director may allow such evidence and procedure to aid in his determination, as is permitted in a contested case. The Director has not been given authority to issue findings of fact, conclusions of law or make a final order. Under *Idaho Code*, Section 45-613, the Director is empowered to become an assignee of the employee's wage claim, if under \$450, and may bring suit in a representative capacity on behalf of the employee. To aid the Director in this endeavor, *Idaho Code* Section 45-613, authorizes the Director to conduct an investigative hearing to determine the merit of the claim. Whenever the Director determines that an employee has a claim for wages, he may instigate suit in district court for unpaid wages and be entitled to recover from the defendant, as damages, three times the

amount of unpaid wages due and owing. He has the same rights as the employee with the addition of those powers enumerated in *Idaho Code*, Section 45-613.

The hearings held by the Department of Labor are not quasi-judicial in nature and a final order should not be issued. The Director may reach a decision to bring suit in district court in his capacity as an assignee of the wage claim and this decision may, of course, be communicated to the employer. *Idaho Code*, Section 45-615 authorizes the director in his capacity as an assignee to, upon written consent of the assignor, settle or adjust the claim; but there are to be no enforceable orders issued from these hearings. A determination and communication thereof is proper, but nothing stronger is authorized.

The employer is under no legal duty to accept the decision of the Director and has the right to contest the decision as a defendant in district court. The district court does not hold a trial *de novo* on the case, for there has not been a trial, contested hearing, quasi-judicial proceeding, or anything other than an investigatory hearing in the first place.

The Department of Labor and Industrial Services should not, in reality, expect that the Director's decisions will be accepted by the employer in all cases; and when conducting the investigative hearings should seek, if reasonably possible, that evidence which would be admissible in the district court. We would anticipate that if the Department of Labor and Industrial Services adopts rules and regulations which essentially provide for the type of hearings required under the APA, the subsequent determinations made by the Director would normally resolve the dispute, and action in District Court would rarely be necessary.

DATED this 19th day of February, 1975.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL  
Attorney General

ANALYSIS BY:

JAMES P. KAUFMAN  
Assistant Attorney General

#### ATTORNEY GENERAL OPINION NO. 10-75

TO: The Honorable Norma Dobler  
State Representative  
House of Representatives  
Statehouse Mail

Per request for Attorney General Opinion.

QUESTION PRESENTED: Whereas the proposal embodied within Senate Bill 1038 would require the question of ratification of any amendment to the United



States Constitution to be submitted to the people of Idaho for advisory purposes only prior to a vote upon that issue by the Idaho Legislature, is the proposal consistent with the provisions of Article V of the United States Constitution?

CONCLUSION: Yes.

ANALYSIS: Senate Bill 1038 would require the question of ratification of any amendment to the United States Constitution to be submitted to the people of Idaho for advisory purposes only, prior to a vote upon that issue by the Idaho Legislature. This proposed enactment brings into question the proper method of ratification of an amendment to the United States Constitution. Article V of the United States Constitution provides:

“The Congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the Legislatures of two-thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the Legislatures of three-fourths of the several states, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress . . .”

Pursuant to Article V, ratification of a proposed amendment is obtained by one of two methods: 1) ratification by three-fourths of the state legislatures; 2) ratification by conventions in three-fourths of the states. The present method implemented is ratification by three-fourths of the state legislatures. No alternative method thereto is constitutionally permissible. *Hawkes v. Smith*, 253 U.S. 221, 64 L.ed. 871, 40 S.Ct. 495 (1919).

Juxtaposed to Article V is Article III, Section 1 of the *Idaho Constitution* wherein the power to reject or approve any act of the Legislature is reserved to the people. This power, i.e., the referendum, is not absolute, however. It may not be implemented to approve or reject a legislative decision upon the issue of ratification of an amendment to the United States Constitution. *State, ex rel Hatch v. Murray*, Mont. 526 P2d 1369 (1974); *National Prohibition Cases*, 253 U.S. 350, 386, 40 S.Ct. 486, 488, 64 L.ed. 946 (1919). The issue presented thus resolves itself to whether Senate Bill 1038 seeks indirectly to do that which Article III, Section 1 cannot. Senate Bill 1038 would not grant to the people the power to so reject or approve ratification. Neither would it be a delegation by the Legislature of its duty to act upon a ratification issue. Rather, it would prescribe the submission of the question of ratification to the Idaho electorate for advisory purposes only. As a statement of preference, having neither legal force nor effect upon the Legislature's power of ratification, Senate Bill 1038 embodies no delegation of legislative responsibility. It is my opinion therefore that should the Legislature enact Senate Bill 1038, the proposal therein is consistent with the provisions of Article V, United States Constitution.

#### AUTHORITIES CONSIDERED:

1. *Idaho Constitution*, Article III, Section 1.

DATED this 5th day of February, 1975.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL  
Attorney General

ANALYSIS BY:

CHRISTOPHER D. BRAY  
Assistant Attorney General

ATTORNEY GENERAL OPINION NO. 11-75

TO: Robert L. Rice, Chairman  
Idaho State Board of Corrections  
P.O. Box 7309  
Boise, Idaho 83707

Per request for Attorney General Opinion.

QUESTION PRESENTED: "... is whether or not we [the Idaho State Board of Correction] have any authorization for entering into a collective bargaining agreement or whether we have any authority to allow an election to be held at this Institution?"

CONCLUSION: Public employees in the State of Idaho have no collective bargaining rights, and there is no existing authorization for the State, its departments, agencies, institutions, or political subdivisions to enter into collective bargaining agreements or to further the purposes of collective bargaining for or with their employees.

ANALYSIS: The Federal National Labor Relations Act does not apply to public employees. Section 2(2) of the National Labor Relations Act [29 U.S.C.A. § 152 (2)] defines the term "employer" to include "any person acting as an agent of an employer, directly or indirectly, but shall not include . . . any State or political subdivision thereof . . ." Compare *Trans-East Air, Inc., et al.*, 1971 CCH NLRB ¶ 22,848, 189 NLRB No. 33 (1971).

There is no law in Idaho which is similar to the National Labor Relations Act. Idaho law relating to organization and collective bargaining of labor is contained in Chapter 1, Title 44, *Idaho Code*, and more specifically in Sections 44-107, 44-107A, 44-107B, *Idaho Code*. Though these statutes, on their face, do not preclude collective bargaining by public employees, the matter has been foreclosed by the Idaho Supreme Court. In *Local Union 283, Int. Bro. of Elec. Wkrs. v. Robinson* 91 Idaho 445, 423 P.2d 999 (1967), the issue was framed thus:

The sole question presented is whether the provisions of I.C. § 44-107, concerning the State Commissioner of Labor's duties in the determination of employee representation, apply to persons engaged in public

employment. If the provisions do apply, the duties of the Commissioner are mandatory and the Commissioner must proceed to investigate and resolve the question of representation among Burley's city employees. 91 Idaho at 446.

After an analysis of Section 44-107, *Idaho Code*, and other portions of Chapter 1, Title 44, *Idaho Code*, the Idaho Supreme Court held:

The use of general language in a statute is insufficient to indicate a legislative intent that the government should fall within the statutory coverage. Legislative acts are normally directed to activities in the private sector of society and effect a modification, limitation, or extension of the private individual's rights and duties. Under our political system, the individual is relatively free to pursue his own self-interest, but the government, which is representative of the people, must act in a disinterested manner in the public interest.

We are not persuaded that the ambiguous language employed in the certification statute, I.C. § 44-107, and in the related penal sections, I.C. §§ 44-107A and 44-107B, demonstrates a legislative intent to inaugurate a mandatory system of collective bargaining in governmental employment. We hold 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. 91 Idaho at 447-448.

It should be noted that two of the five Supreme Court Justices, though concurring in the majority opinion, believed that an even more stern approach to the issue was proper and expressed their view that the decision in the case should not have rested merely on the narrow ground espoused by the other three Justices. They stated:

Thus limited, the decision tends to infer that the legislature by amending the statute could make it applicable to public employment. Such an enactment would constitute an attempt to authorize governmental officers to delegate to, or share with, a private organization, the sovereign powers and duties with which they are charged.

The legislature cannot delegate its constitutional power to any other authority. [Citations omitted.] 91 Idaho at 448.

Citing case law from other jurisdictions, the thrust of the concurring minority opinion was that even an attempt by the Legislature to provide for employee collective bargaining would have to be done within the internal structure of public employment itself and that no private organization (such as a union) would properly be involved.

In an Opinion of the Attorney General issued March 18, 1959 (a copy of which is attached hereto), it was decided that a municipality, under its corporate power to "contract and be contracted with", may enter into collective bargain-

ing agreements with its employees, provided that no local ordinance forbids it. Thus, this situation in Idaho regarding public employee collective bargaining could be construed as not mandated by any law, but permissible. At this point, it should be made clear that once a governmental entity enters into collective bargaining with its employees, it might well be decided by a court that certain employee rights have vested and that the governmental entity would not be allowed at some future date to deny or take away the collective bargaining privilege it had granted.

It should also be pointed out that there are several criminal statutes in the State of Idaho which might apply to any unauthorized attempt by public employees to threaten or coerce their employer into a collective bargaining situation. Among these are Sections 18-3907 (obstructing highways), 18-6404, 18-6405, 18-6406 (unlawful assembly), and 18-7001 (malicious injury to property), *Idaho Code*.

#### AUTHORITIES CONSIDERED:

1. *Idaho Code*, Sections 44-107, 44-107A, 44-107B, 18-3907, 18-6404, 6405, 6406, and 18-7001.
2. *Local Union 283, Int. Bro. of Elec. Wkrs. v. Robison*, 91 Idaho 445, 423 P.2d 999 (1967).
3. Opinion of the Attorney General of March 18, 1959.
4. National Labor Relations Act, § 2 (2) [29 U.S.C.A. s 152 (2)].
5. *Trans-East Air, Inc., et al.*, 1971 CCH NLRB ¶ 22,848, 189 NLRB No. 33 (1971).

DATED this 6th day of February, 1975.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL  
Attorney General

#### ANALYSIS BY:

PETER HEISER, JR.  
Chief Deputy Attorney General

#### ATTORNEY GENERAL OPINION NO. 12-75

TO: The Honorable Allan F. Larsen  
Speaker of the House  
State of Idaho

Per request for Attorney General Opinion.

**QUESTION PRESENTED:** Would a legislative enactment which authorizes local option taxation in the State of Idaho be constitutionally valid pursuant to Article VII, Section 6, *Idaho Constitution*?

**CONCLUSION:** The Idaho Supreme Court scrutinized a similar issue in *State v. Nelson* and resolved it in the negative. The legality of local option taxation legislation is therefore suspect. However, enactment of such legislation should not be deterred in reliance upon prior case law as *State v. Nelson* appears to have been decided upon what is arguably an erroneous analysis. The ultimate decision as to such legislation's constitutionality will nonetheless remain with the Idaho Supreme Court.

**ANALYSIS:** Article VII, Section 6, *Idaho Constitution*, reads:

"The legislature shall not impose taxes for the purposes of any county, city, town, or other municipal corporation, but may, by law, invest in the corporate authorities thereof, respectively, the power to assess and collect taxes for all purposes of such corporation."

Thereby, the legislature is expressly prohibited from imposing taxes for the purposes of local governments though it may invest in them certain powers of taxation through enabling legislation. The purpose of this constitutional limitation is to allow local communities to establish such tax burdens, otherwise authorized by the legislature, as they themselves determine through their governing officials. *State v. Nelson*, 36 Idaho 713, 719, 213 P. 358 (1923). Having articulated the goal, the *Nelson* court then anomalously constricted the investiture of power the Legislature could grant local governments. "Taxes", those which the Legislature was prohibited from imposing for local purposes or those which local governments could be authorized to assess and collect themselves, were defined as property taxes. *State v. Union Cent. Life Ins. Co.*, 8 Idaho 240, 67 P. 647 (1902); *State v. Nelson*, supra. Article VII, Section 6 was thus construed to divest local communities of all sources of tax revenue save real and personal property. *State v. Nelson* and its progeny present the current state of the law. The constitutionality of any subsequent legislative enactment to authorize local option taxation is, therefore, doubtful. The inevitable constitutional challenge to such an enactment is to be met, if at all, by establishing error in the landmark decision.

The *Nelson* court invalidated a legislative enactment which authorized municipal corporations to raise revenue by levying and collecting certain license taxes. It did so in reliance upon *State v. Union Cent. Life Ins. Co.* which previously invalidated a statute that imposed rather than authorized the levy and assessment of a license tax by municipal corporations. Both decisions adopted the applicable jurisprudence of Montana to define the term "taxes" as referred to in Article VII, Section 6. *State v. Nelson*, supra., 8 Idaho at page 247. In so doing, each Court failed to perceive the distinctions between Article VII, Section 6 and its Montana counterpart. As a consequence, their decisions are technically inaccurate and do not merit the conclusiveness in law each otherwise would command.

The Montana counterpart is Article XII, Section 4, which reads:

“The legislative assembly shall not *levy* taxes upon the inhabitants or property in any county, city, or town, or municipal corporation purposes, but it may by law vest in the corporate authorities thereof powers to *assess* and collect taxes for such purposes.” (Emphasis supplied).

Following an elaborate analysis of this provision, the Montana Supreme Court upheld a statute which *imposed* a license tax upon persons and corporations doing business in that state. *State v. Camp Sing*, Mont. 128,44 P.516 (1896). The proceeds generated by that tax were in part distributed to county governments. *Ibid*. The Court rejected the contention of applicability of their constitutional prohibition against any *imposition* of taxes by the legislature for purposes of local governments. It validated the license tax in question, holding that the constitutional prohibition was only applicable to the *imposition* of a property tax as:

- a. Article XII, Section 1, *Montana Constitution*, mandates taxation of property as a source of revenue for the State's support and maintenance. Further, it offers the license tax as an alternative, though not required, source. *Ibid*, 44 P. at page 516.
- b. Article XII itself prescribes those constitutional limitations existing upon the legislature's power to tax. It specifically prescribes limitations on the legislative power to tax property, yet no constitutional limitation upon the legislative power to *impose* license taxes exists unless found in Article XII, Section 4, *Ibid*, 44 P. at page 517, 518.
- c. The words “levy” and “assess”, articulated within Article XII, Section 4, are generic terms specifically connoting property taxation; the word “impose”, not found within this provision, carries an equally distinct meaning, being only adopted in reference to license taxation. *Ibid*, 44 P. at page 519, 520.

It may be stated that Article VII, *Idaho Constitution*, treats the subject of limitation of legislative power to tax property with specificity. Further, no constitutional restriction upon the power to *impose* license or per capita taxes as authorized by Article VII, Section 2 is to be found unless within Article VII, Section 6. However, one cannot afford the framers of the Idaho Constitution the same qualities of erudition as their Montana counterparts if *State v. Nelson* is to survive scrutiny. That which the Montana Constitution forbids its legislature to do is to “levy” taxes for local government purposes. That which the Montana legislature is authorized to do is invest in those government councils the power to “assess and collect” taxes. In both the limitation of power and its derivative authorization, the Montana Constitution evidences a choice of words which specifically connote taxation of property. Article VII, Section 6, *Idaho Constitution*, is identical in neither language nor import. That which the Idaho legislature is forbidden to do is to “. . . impose taxes for the purposes of any county, city, town or other municipal corporation . . .” Implementing the ra-

tional of the Montana court, this limitation or power is then properly construed as a prohibition against statutory *imposition* of license or per capita taxes, not property taxes. The second phrase is a grant of power to the Idaho legislature to "... invest in the corporate authorities thereof, respectfully, the power to assess and collect taxes for all purposes of such corporation." Fidelity to the Montana jurisprudence requires focus upon the word "assess" to enable proper definition of this second use of the term "taxes". As properly construed, the Idaho legislature may authorize that which it is prohibited from imposing directly; i.e., a property tax.

If it be found that Article VII, Section 6, in fact, only forbids the statutory imposition of license and per capita taxes for local government purposes, and authorizes ad valorem taxation of real and personal property by local governments, are not those local governments nonetheless precluded from implementing other forms of taxation by the sole authorization? Not so. The *Idaho Constitution* is a limitation, not a grant, of power. *Leonardson v. Moon*, 92 Idaho 796, 806, 451 P.2d 542, (1969). Assuming no restriction by the federal constitution, an act of the Idaho legislature must be held valid unless proscribed by the *Idaho Constitution*. *Ibid*; *Idaho Telephone Company v. Baird*, 91 Idaho 425, 423 P.2d 337 (1967); *Eberle v. Neilson*, 78 Idaho 572, 306 P.2d 1083 (1957). Article VII, Section 6, limits the power of the legislature to *impose* license or per capita taxes for local government purposes. It thereafter authorizes the legislature to invest in local governments the power to tax property. No constitutional language is present in that authorization to restrict the legislature from affording local governments the option to tap other sources of tax revenue in addition to that of ownership of property. Absent such language of limitation:

"[T] he legislature possesses plenary power with reference to all matters of taxation, . . ." *State v. Nelson*, supra, 36 Idaho at page 718.

The second phrase of Article VII, Section 6 is therefore an expansive, rather than constricted, grant of authority.

Upon the assumption that the *State v. Nelson* decision was reached in error, one must consider the present effect a judicial clarification would have. *State v. Nelson* and its progeny have been cited in support of the following principles:

- a. The legislature may not invest in local governments the power to generate revenue on a local option basis via any license tax on occupations or businesses with a municipality. *State v. Nelson*, supra.
- b. Article VII, Section 6, is inapplicable as a prohibition against a license tax *imposed* for purposes of public school districts, highway districts, or public health districts as said provision only prohibits the *imposition* of a property tax for local purposes. *Idaho Gold Dredge Co. v. Balderston*, 58 Idaho 692, 78 P.2d 105 (1938); *Ada County v. Wright*, 60 Idaho 394, 92 P.2d 134 (1939); *District Board of Health of P.H. Dist. No. 5 v. Chancey*, 94 Idaho 944, 500 P.2d 845 (1972).

- c. Article VII, Section 6, is inapplicable as a prohibition against disbursement of proceeds generated by a state sales tax for local purposes as said tax is an excise tax, not a property tax. *Leonardson v. Moon*, supra.

A review of *Nelson* progeny reveals that the result obtained in each was correct, notwithstanding the constitutional infirmity of their progenitor.

A statutory license tax, equal in amount to three percent of the value of certain mined or extracted ores, was upheld in *Idaho Gold Dredge Co. v. Balderston*, supra. The Court's rationale, in part, was that as the prohibition of Article VII, Section 6 applied only to the legislature's *imposition* of property taxes for local purposes, the constitutional provision was inapplicable to the subject of a license tax. *Ibid*, 58 Idaho at page 719, 720. The court articulated a second basis for its decision. It properly interpreted the provision as prohibiting the *imposition* of taxes for purposes of municipal corporations as therein defined. The proceeds generated by the license tax were statutorily directed to the public school fund for the benefit of public school districts. Concluding that public school districts were not municipal corporations, it held the prohibition inapplicable. *Ibid*, 58 Idaho at page 721.

Similarly, a statutory fee *imposed* for the licensing of motor vehicles was upheld in *Ada County v. Wright*, supra. Its invalidity was urged upon the fact that ninety percent of license fee proceeds went directly to the county in which the motor vehicles were registered. Citing *State v. Nelson*, the Court held that a license fee was not contemplated in the prohibition of Article VII, Section 6. It then articulated an alternative basis for disposition. It found that as distributed to the respective counties, the tax revenues were expended in part by the counties and the balance by highway districts, "... all for the purpose of carrying out and performing their duties and as *agents of the state*, . . ." *Ibid*, 60 Idaho at page 406 (emphasis found therein).

The decision in *District Board of Health of P.H. District No. 5 v. Chancey*, supra., adopts this independent justification for *imposition* of a non-property tax to the exclusion of the *Nelson* rationale. At issue there was the propriety of a per capita tax imposed for purposes of public health districts. The court rejected the assertion of applicability of Article VII, Section 6, on the sole grounds that public health districts were not municipal corporations. *Ibid*, 94 Idaho at page 944.

The three cases previously referred to were presented with a common issue; i.e., the constitutionality of a statutory tax, other than a property tax, allegedly *imposed* for local purposes.

In sustaining the validity of the respective tax, both *Idaho Gold Dredge Co., v. Balderston* and *Ada County v. Wright* regurgitated the principle of *State v. Nelson* without analysis. Each then went further, establishing an independent principle for disposition upon the common issue; i.e., the tax was not *imposed* for local purposes. In pertinent part, the *Chancey* decision projected this independent principle to primal authority. Thus, the result reached in each of these



decisions remains valid notwithstanding error in the application of *State v. Nelson* thereto. No reason then exists for our courts to exercise restraint in re-examining the progenitor. *Reynolds v. Continental Mortgage Co.*, 85 Idaho 172, 183, 377 P.2d 134 (1962); *Scott v. Gossett*, 66 Idaho 239, 334, 188 P.2d 804 (1945).

In like measure, the pertinent portion of *Leonardson v. Moon* which sustained the statutory imposition of a sales tax against alleged violation of Article VII, Section 6, did so upon the cosmetic beauty of unexamined prior judicial interpretation. The unconstitutional assumption that this provision has reference only to property taxation is one "... which no lapse of time or respectable array of opinion should make us hesitate to correct." *Higer v. Hansen*, 67 Idaho, 45, 64, 170 P.2d 411 (1946), quoting *Erie R. Co. v. Tompkins*, 304 US 64, 58 S. Ct. 817, 823, 32 L.Ed. 1188. Further, the correction may be achieved without negative effect upon the result reached in the instant case. As properly construed, Article VII, Section 6, prohibits the statutory *imposition* of a license or per capita tax for local purposes. As distinguished from either, the sales tax is an excise tax, defined as:

... being "something cut off from the original price paid on a sale of goods, as a contribution to the support of the government." *Idaho Gold Dredge Co. v. Balderston*, supra., 58 Idaho at page 721.

Being neither a license tax nor a per capita tax, a sales tax may be *imposed* by the legislature for purposes of local communities without abrogation of Article VII, Section 6, *Ibid*.

The construction afforded Article VII, Section 6 of the *Idaho Constitution* in *State v. Nelson* was predicated upon the jurisprudence of Montana. When presented with a like issue, the Montana judiciary arguably reached a proper result upon sound premises. However, the decisions reached in *State v. Union Cent. Life Ins. Co.* and *State v. Nelson* adopted the conclusion without its concomitant analysis. Juxtaposed to the Article VII, Section 6, the analysis of the Montana courts requires two distinct definitions of the terms "taxes" as referred to therein. Those taxes which the Idaho legislature may not *impose* for local purposes are license taxes and per capita taxes. As the *Idaho Constitution* is a limitation, not a grant, of power, the legislature's power to tax is restricted only thereby. The second phrase of Article VII, Section 6 is a grant of authority. No restriction is therein articulated which would compel the legislature's investiture of authority in local governments to only that of property taxation. It is my opinion that *State v. Nelson* represents the current state of the law regarding local option taxation. Should the legislature seek to invest in local governments the authority to implement additional forms of taxation other than the property tax, the foregoing analysis represents poignant justification for such an enactment.

#### AUTHORITIES CONSIDERED:

1. *Idaho Constitution*, Article VII, Section 6.

2. *State v. Nelson*, 36 Idaho 713, 213 P.358 (1923).
3. *State v. Union Cent. Life Ins. Co.*, 8 Idaho 240, 67 P.647 (1902).
4. *Leonardson v. Moon*, 92 Idaho 796, 451 P.2d 542 (1969).
5. *Idaho Telephone Company v. Baird*, 91 Idaho 425, 423 P.2d 337 (1967).
6. *Eberle v. Neilson* 78 Idaho 572, 306 P.2d 1083 (1957).
7. *Idaho Gold Dredge Co. v. Balderston* 58 Idaho 692, 78 P.2d (1938).
8. *Ada County v. Wright* 60 Idaho 394, 92 P.2d 134 (1939).
9. *District Board of Health of P.H. District No. 5 v. Chancey*, 94 Idaho 944, 500 P.2d 845 (1972).
10. *Reynolds v. Continental Mortgage Co.*, 85 Idaho 172, 377 P.2d 134 (1962).
11. *Scott v. Gossett*, 66 Idaho 329, 188 P.2d 804 (1945).
12. *Higer v. Hansen*, 67 Idaho 45, 170 P.2d 411 (1946).

DATED this 21st day of February, 1975.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL  
Attorney General

ANALYSIS BY:

CHRISTOPHER D. BRAY  
Assistant Attorney General

### ATTORNEY GENERAL OPINION NO. 13-75

TO: Tom D. McEldowney, Director, Department of Finance

Per request for Attorney General Opinion.

QUESTION PRESENTED: Do the provisions under the Idaho Securities Act apply to Cooperative Marketing Associations incorporated under Title 22, Chapter 26 of the *Idaho Code*? Are the memberships or non-voting preferred capital stock in the associations a security as defined by the Idaho Securities Act? If they are determined to be securities, are they exempted from the requirements of the Idaho Securities Act under Sections 30-1435 (7) (d) or 30-1434 (12), *Idaho Code*.

**CONCLUSION:** The provisions of the Idaho Securities Act do apply to Cooperative Marketing Associations. The membership or stock may be a security if a certain factual situation is met. The membership or stock would not be entitled to an exemption under 30-1435 (7) or 30-1434 (12).

**ANALYSIS:** The Idaho Securities Act, as with most laws, will apply if certain factual situations are existent. Analysis of the Cooperative Marketing Association must be completed before Security Act application can be made.

The associations are essentially a marketing co-op for agriculture products. They may become involved in the marketing process from harvesting through to the final handling of the product. The association may borrow money and make advances to members. The association may retain monetary reserves and invest funds as provided by its by-laws. The association may be the record title holder in real and personal property. Except where in direct conflict, the associations are subject to the general corporate laws of the state and the corporate process therein.

The associations are organized by five or more persons engaged in the production of agricultural products. They may be formed with or without stock. The persons associated with the association are called members. Whether the association admits members pursuant to a sale of a membership or affiliates people through the sale of stock it makes little difference with regard to an important end result: the people must first give money to the association to be eligible to do business in the hope that some benefit will be derived. The initial capital to form the association and cover the expenses comes from the stock or the memberships sold. The control of an association is similar to a normal corporation. There is a board of directors and corporate officers. These people have the sole authority for the running of the association and have control over it. Each member or stockholder has no more than one vote. Control, then, for the common investor is the right to combine with the majority of the voters and elect the board of directors. The association's president and vice president are from the Board and are selected by that group. The association itself has been deemed to be non-profit, inasmuch as it is not organized to make profits for itself or for its members, but it is expected that it will make a profit for its members as a producer. The person who invests his money in a membership expects to derive a benefit from the association. This benefit, hopefully, will be in monetary terms greater than the initial investment.

The term "security" is defined in the Idaho Securities Act at Section 30-1402 (12), *Idaho Code*, as follows:

"Security" means any note, stock, treasury stock, bond debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, pre-organization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, certificate of interest or participation in an oil, gas or mining title or lease or in payments out of production under such a title or lease, or, in general, any interest or instrument commonly known as a "security" or any

certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing. "Security" does not include any insurance or endowment policy or annuity contract under which an insurance company promises to pay money, either in a lump sum, or periodically for life or some other specified period.

This definition is one commonly found in security laws throughout the United States. Courts have established tests to interpret the statutory definitions and have defined security in a manner so as to express an intent to protect the public from schemes that were not at all what they were offered as or alleged to be.

The United States Supreme Court in the case of *Securities and Exchange Commission v. W. J. Howey Co.*, 328 U.S. 293, 66 S.Ct. 1100, 90 L. Ed 1244 (1946) established a test which has been the basis for the more modern definitions:

An investment contract exists whenever a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party. 90 L. Ed. at 1103.

Since the time of the *Howey* case promoters have initiated a wide variety of investment contracts and have made attempts to circumvent the definition of a security and, thus, avoid the laws governing the issuance of securities. The courts have responded in a manner fitting with their original purpose, i.e., protecting the public from entering unknowingly into schemes over which they had little or no control once the investment had been made.

Two recent state cases exemplify modern thinking by encompassing the *Howey* Test and expanding it to what has been termed as the "risk capital approach": *Silver Hills County Club v. Sobieski* 361 P.2d 906 (Cal. 1961) and *State, Com'r of Securities v. Hawaii Market Ctr., Inc.*, 485 P.2d 105 (Hawaii 1971). Both cases involved the selling of memberships in order to raise the necessary capital to start the particular association involved. Since each association was not a successful concern at the time of investment, there was, therefore, a risk involved. The risk capital approach (to the definition) is the subjection of the investor's money to the risks of an enterprise over which he exercises no managerial control. This was the basic economic reality of the transaction in each of the cases and each membership was found to be a security. The *Hawaii Market* case found an investment contract to be created whenever:

1. an offeree furnishes initial value to an offeror, and
2. a portion of this initial value is subjected to the risks of the enterprise, and
3. the furnishing of the initial value is induced by the offeror's promises or representations which give rise to a reasonable understanding that a valuable benefit of some kind, over and above the

initial value, will accrue to the offeree as a result of the operation of the enterprise, and

4. the offeree does not receive the right to exercise practical and actual control over the managerial decisions of the enterprise. *Supra* at 105.

The reasoning has been followed in substance by the U.S. Court of Appeals for the ninth Circuit in *Securities & Exchange Com'n v. Glenn W. Turner Ent., Inc.*, 474 F.2d 476 (9th Cir. 1973). In that instance the trial court's findings, fully supported by the record, demonstrated that the defendant's scheme was a gigantic and successful fraud. The defendant was selling "adventures" which were supposedly development courses. Connected thereto was what has become to be known as a pyramid sales scheme, i.e., a person who has joined is paid so much for bringing other people into the organization and so much for the people they bring in and so on.

The court quoted the *Howey* test and noted, as in *Hawaii Market*, that if taken literally, the test was too mechanical and presented an unduly restrictive view of what is and what is not an investment contract.

The problem arose because the *Howey* definition relates to a situation where the profits are to come solely from the efforts of others. The court said in answer to the problem:

We hold, however, that in light of the remedial nature of the legislation the statutory policy of affording broad protection to the public, and the Supreme Court's admonitions that the definition of securities should be a flexible one, the word "solely" should not be read as a strict or literal limitation on the definition of an investment contract, but rather must be construed realistically, so as to include within the definition those schemes which involve in substance, if not form, securities. 475 F.2d at 482.

The court thus noted that the definition of a security must be flexible so as to include schemes which would otherwise circumvent the security law with a new procedure. They found the more expensive adventures offered were indeed securities.

This application of the *Silver Hills* and *Hawaii Market* reasoning has occurred in Ada County, Idaho. In *State v. Glenn Turner Enterprises, Inc.*, (Civil No. 47773, 4th Judicial District of Idaho, Memorandum Opinion, March 28, 1972), the district court found that the *Howey* test was not an exclusive test. The court went on to note the "risk capital" approach and the late cases of *State ex rel Healy v. Consumer Business Systems*, 482 P.2d 549 (Oregon 1971), *Silver Hills Country Club v. Sobieski*, *supra*, *Hurst v. Dare To Be Great, Inc.*, Civil No. 71-160 U.S. District Ct., District of Ore. (1971) *aff'd* 474 F.2d 483 (9th Cir. 1973); and *State of Hawaii v. Hawaii Market Centers*, *supra*. Risk capital doesn't necessarily mean initial capital only, but capital which is subjected to an element of risk and it is quite possible this may occur with a firm that has been in business for some time but still presents an element of risk.

The courts are considering the economic realities of business transactions rather than formal structure. Investment contracts are being located where it is found that a group of people is seeking the use of another's money on the promise of profits. This is completely congruous with the law because of the basic goal behind the law, and that is the protection of the public. See *El Khadem v. Equity Securities Corp.*, 494 F.2d 1224 (9th Cir. 1974); *Securities and Exchange Commission v. Koscot Interplanetary, Inc.*, 497 F.2d 473 (5th Cir. 1974); *Bitter v. Hobby's International, Inc.*, F.2d 183 (9th Cir. 1974); and *Forman v. Community Services, Inc.*, 500 F.2d 1246 (2nd Cir. 1974). See also *Florida Discount Centers, Inc. v. Antinori*, 228 So.2d 693 (Fla. 1969), aff'd 232 So.2d 17 (Fla. 1970) [interest or participation in profit sharing agreement definition of security for commission scheme], accord *Frye v. Taylor*, 263 So.2d 835 (Fla. 1972).

The basic question to which this opinion responds is whether or not the memberships of the cooperative marketing associations are securities. For if they are, then the Idaho Securities Act would apply — as it applies to all securities sold to the public unless specifically exempted.

Although the *Hawaii Market* test is not exclusive it is comparably comprehensible and, therefore, has been used as a guide for the determination that the cooperative marketing associations are securities under appropriate circumstances.

1. An offeree furnishes initial value to an offeror. The memberships of the association must be purchased; see *Idaho Code* 22-2614. A person must furnish value to obtain a membership.

2. A portion of this initial value is subjected to the risks of the enterprise. At this point it is possible to differentiate between a going concern and one just beginning or, as the Idaho District Court put it in *State v. Glenn Turner Ent., Inc.*, *supra*, one that is going but unproven. The difference is risk. Those enterprises subjecting initial value to the risks of the enterprise itself are the ones contemplated. *Silver Hills* offers a good example. The enterprise was a country club. Money was solicited for memberships which was to be used to develop the grounds and otherwise get it going. The value thus given for the membership was directly dependant on the success of the enterprise itself; it was subjected to risk. On the other hand the memberships of a country club already established in operation do not meet the risk capital test. A person is not giving initial value upon which the enterprise is depending upon to get it going or to prove that its operation is not a failure.

The cooperative marketing associations sell stock and memberships to raise operating capital with which to begin and this initial capital is subjected to the risks of the enterprise. A sale of the memberships at this period of time would meet the risk capital test. After success of the enterprise has been achieved this finding would be subject to re-evaluation.

3. The promise of a valuable return on the Offeree's investment. It makes no difference that the valuable return is at a fixed rate, share of the profits, or privi-

leges which have monetary value. In *El Khadem v. Equity Securities Corp.*, *supra*, the benefit derived was an opportunity to gain a tax advantage and to acquire investment leverage. The valuable return may take many sizes and shapes; it is only important that it exist. With the cooperative marketing associations the benefit would be basically that the association could do a much better job of marketing for the producer of the crop and that would mean either more profits initially for the producer or at least more free time so as to give him the opportunity to earn more profits. There is definitely a valuable return supposedly to be derived from the initial investment.

4. The lack of managerial Control over the enterprise. The key element is real control. An enterprise cannot skirt this aspect by giving the member nominal control, as was demonstrated in the *Glenn Turner* cases.

Courts should focus on the quality of the participation. In order to negate the finding of a security the offeree should have practical and actual control over the managerial decisions of the enterprise. *Hawaii Mkt. Ctr.*, *supra*, 485 P.2d at 111.

The members of the cooperative marketing association's do not have control which would give them the opportunity to safeguard their own investment and thus obviate the need for state intervention.

In our opinion the cooperative marketing associations memberships in the initial stages do meet the risk capital test of a security and should be subject to the Idaho Securities Act. Application of the test as outlined in the *Hawaii Market* case was used in *State v. International Silver Mint* (Case No. 48488, 4th Judicial District of Idaho, July 20, 1972). Compare *State v. Glenn Turner Enterprises*, *supra*. The concepts are not novel but accurately reflect the modern thinking of the courts when confronted with enterprises and schemes so diversified in nature that anticipation of them may only be had in retrospect.

A charge is not made with this opinion that all such schemes or enterprises are undesirable. Rather, the law understands that people often need protection when solicited to invest money into an enterprise over which they have little or no control in the hopes of receiving a valuable return. This protection in its present form is the Idaho Securities Act and its application to schemes and enterprises adjudged to be securities. A finding of security status by no means condemns an enterprise. It simply means that the criteria of a security are present and that the enterprise is subject to the Idaho Securities Act and must comply therewith in order to operate legally in Idaho.

*Idaho Code* § 30-1434 (12) does not offer an exemption into which cooperative marketing associations belong. They are not organized under *Idaho Code* § 30-117A or chapter 10, title 30; and expenditures to be made from the sale of the memberships are not limited to those in the section.

*Idaho Code*, § 30-1435 (7) (d) does not exist; there is no subsection (d). Section 7 itself does not apply as it relates to transactions deemed to be an offer or sale to a bank, and other financial institutions. *Idaho Code* § 30-1434 (7) (d)

does not apply as it relates to a security guaranteed by a railroad, common carrier, public utility, or holding company which is already subject of regulation as the U.S. government, Canada, or another state.

The provisions of the Idaho Securities Act do apply to Cooperative Marketing Associations when the aforementioned risk capital test is satisfied and the memberships are not entitled to an exemption.

**AUTHORITIES CONSIDERED:**

1. Idaho Securities Act, 30-1401 *et seq.*
2. Idaho Code § 22-2601 *et seq.*
3. *Securities and Exchange Commission v. Howey*, 382 U.S. 293, 66 Sct. 1100, 90 L. Ed. 1244 (1946).
4. *Silver Hills Country Club v. Sobieski*, 361 P.2d 906 (Cal. 1961).
5. *State Com'r of Securities v. Hawaii Market Ctr.*, 485 P.2d 105 (Hawaii 1971).
6. *Securities and Exchange Com'n v. Glenn W. Turner Ent., Inc.*, 474 F.2d 476 (9th Cir. 1973).
7. *State ex rel Healy v. Consumer Business Systems*, 482 P.2d 549 (1971).
8. *Hurst v. Dare To Be Great, Inc.*, Civil No. 71-160 U.S. District Ct., Dist. of Ore. (1971).
9. *El Khadem v. Equity Securities Corp.*, 494 F.2d 1224 (9th Cir. 1974).
10. *Securities and Exchange Com'n v. Koscot Interplanetary, Inc.*, 497 F.2d 473 (5th Cir. 1974).
11. *Bitter v. Hoby's International, Inc.*, 498 F.2d 183 (9th Cir. 1974).
12. *State v. International Silver Mint*, Case No. 48488, 4th Judicial District of Idaho, July 20, 1972.
13. *Florida Discount Centers, Inc. v. Antinori*, 228 So.2d 693 (Fla. 1969), *aff'd* 232 So.2d 17 (Fla. 1970).
14. *Fry v. Taylor*, 263 So.2d 835 (Fla. 1972).

DATED this 12th day of February, 1975.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WA NE L. KIDWELL  
Attorney General



## ANALYSIS BY:

JAMES P. KAUFMAN  
Assistant Attorney General

## ATTORNEY GENERAL OPINION NO. 14-75

TO: Mr. Bob J. Waite  
County Auditor

TO: Mr. Bob J. Waite  
County Auditor  
Idaho County  
Idaho County Courthouse  
Grangeville, ID 83530

Per request for Attorney General Opinion.

## QUESTIONS PRESENTED:

1. Do the provisions of ~~ss~~ 63-3638 (g) and 63-3638 (g) (1), *Idaho Code*, that each taxing district within a county shall benefit from the sales tax fund in the same manner and in the same proportion as revenue from ad valorem taxation, require a county auditor to apportion a proportionate share of the sales tax fund to cities according to the formula provided by § 40-2709 (1), *Idaho Code*?

2. If not, what is the formula for determining the amount of revenue a city is entitled to receive by reason of the levy authorized by § 40-2709 (1), *Idaho Code*?

## CONCLUSIONS:

1. Since the levy provided for by *Idaho Code* § 40-2709 (1) is not imposed by a city, the provisions of that statute do not operate to entitle a city to receive any monies from the sales tax fund. Therefore, a county auditor does not take either the sales tax fund or the sales tax fund formula into consideration in determining either a city's share of the levy imposed under § 40-2709 (1), *Idaho Code*, or a city's share of the sales tax fund.

2. A city whose boundaries are within a highway system, highway district or a good roads district receives, by reason of the imposition of the levy authorized to be imposed by the Commissioners of such systems or districts under § 40-2709 (1), *Idaho Code*, revenue in an amount equal to 50 percent of the total amount raised by the imposition of that levy upon property located within the boundaries of that city.

**ANALYSIS:****1. The Idaho statutes cited above provide as follows:**

**40-2709. Authority and procedure for tax levies.** — The county commissioners of a county highway system, the commissioners of a county-wide highway district, and the commissioners of highway districts or good roads districts are hereby empowered and authorized, for the purpose of construction and maintenance of roads and bridges under their respective jurisdiction, to make the following highway tax levies as applied to the assessed valuation of their districts:

(1) One dollar (\$1.00) on each one hundred dollars (\$100) of assessed valuation for construction and maintenance of roads and bridges; provided that if such levy is made upon property within the limits of any incorporated city, town or village, fifty per cent (50%) thereof shall be apportioned to such incorporated city, town or village.

**63-3638. Sales tax fund — Creation — Sales tax refund fund — Appropriations.** —

(g) The state tax commission 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 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 counties in the state. Such percentage so determined for each county shall be applied to the amount of sales tax fund appropriated under subsection (f) herein and the resulting sum shall be paid to the county treasurer of each county for distribution to each taxing district in the county as follows:

(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. The percentage 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.

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 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 and the county auditor 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 levies applied in the formula by county commissioners under § 63-3638 (g) (1), *Idaho Code*, are not used in the manner or for the purpose they are ordinarily used, that is, in a property 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.

The intracounty taxing district levies, which include the levy for a city, fixed in September of the current calendar year are required factors to be used by the County Commissioners in the formula for determining under § 63-3638 (g) (1), *Idaho Code*, each intracounty taxing district's proportionate share of state sales tax fund monies. An intracounty taxing authority, such as a city, school district, the county itself, cemetery district, etc., may receive benefits from the sales tax fund to the extent they, the city in this instance, impose a levy. Since a city is not authorized to impose the levy under § 40-2709 (1), *Idaho Code*, neither the formula provided by §§ 63-3638 (g), 63-3638 (g) (1), *Idaho Code*, nor the sales tax fund itself enter into the computation of the amount of either sales tax fund monies a city is entitled to receive by reason of that levy or into the computation of the amount of money a city is entitled to receive by reason of the imposition of the levy authorized to be imposed under § 40-2709 (1), *Idaho Code*, by a highway system or district. These two sections of the *Idaho Code*, i.e., §§ 63-3638 (g) and 40-2709 (1) operate independently of each other. Therefore, it is our opinion that the levy provided for by § 40-2709 (1), *Idaho Code*, does not authorize a city to receive any monies from the sales tax fund and the county auditor does not take the sales tax fund into consideration in determining the city's share of the levy imposed under § 40-2709 (1), *Idaho Code*.

2. Since it is our opinion that the county auditor does not take the sales tax fund into consideration in determining the city's share of the levy imposed under § 40-2709 (1), *Idaho Code*, and that such code section operates independently of the sales tax fund formulas provided by §§ 63-3638 (g) and 63-3638 (g) (1), *Idaho Code*, we need only look to § 40-2709 (1), *Idaho Code*, in order to determine the amount of money a city receives by reason of the imposition of that levy.

It is our opinion that § 40-2709 (1), *Idaho Code*, expressly and clearly provides that a city whose boundaries are within a highway system, highway district or a good roads district receives, by reason of the imposition of the levy authorized to be imposed under § 40-2709 (1), *Idaho Code*, revenue in an amount equal to 50 percent of the total amount raised by the imposition of that levy upon property located within the boundaries of that city.

This opinion is not intended to concern itself with or to provide legal guidelines in regard to whatever additional revenue a city may lawfully budget and raise through its own budgeting and property tax levy authority for construction and maintenance of its roads and bridges. Likewise, this opinion is not concerned with the formulas for determining the amount of sales tax fund monies a city should receive from the county in which it is located. For guidance on these questions, please see Official Opinions No. 74-137, dated March 11, 1974, to Don C. Loveland from W. Anthony Park; No. 74-187, Dated July 25, 1974, to J. D. Hancock from William McDougall; and No. 74-24, dated August 7, 1974, to Mr. Lee R. Dorman from William McDougall, copies of which are enclosed.

#### AUTHORITIES CONSIDERED:

1. *Idaho Code* Sections 40-2709 (1); 63-3638 (g); 63-3638 (g) (1); and 63-105Y.

2. Former Idaho Attorney General's Opinions: (a) No. 74-137; (b) No. 74-187; and (c) No. 75-24.

3. Idaho Session Laws Considered: (a) S.L. 1967, Ch. 116, pp. 229-233, as amended by S.L. 1970, Ch. 183, pp. 531-532.

DATED this 7th day of April, 1975.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL  
Attorney General

ANALYSIS BY:

WILLIAM McDOUGALL  
Assistant Attorney General

## ATTORNEY GENERAL OPINION NO. 15-75

TO: Governor's Council on Criminal Justice  
William L. Price, Executive Director  
Ben Kehr, Research Consultant

Per request for Attorney General Opinion.

**QUESTION PRESENTED:** Does legislation providing for the issuance of search warrants pursuant to telephoned petitions and affidavits from police officers meet constitutional requirements?

**CONCLUSION:** There is no constitutional prohibition against the use of telephoned petitions and affidavits for the issuance of search warrants. No general answer can be given with respect to the constitutionality of particular legislation; each proposed enactment would necessarily have to be examined and its constitutionality considered on the basis of its specific provisions.

**ANALYSIS:** The Fourth Amendment to the *Constitution of the United States* and Art 1, Sec. 17, of the *Idaho Constitution*, which contain the proscriptions against unreasonable searches and seizures, do not address themselves directly to the question of what procedure is to be followed in order to obtain a search warrant. The Fourth Amendment to the federal constitution provides that:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The *Idaho Constitution*, allowing for minor differences in wording, is essentially the same.

The body of case law construing these constitutional provisions is generally consistent on the point that the constitutional requirements are not to be hyper-technically defined. Rather, the *Constitution* is to be construed in such a way as to give effect to the substantive requirements of the prohibition against unreasonable searches and seizures. Thus, it has been said that a policeman's affidavit is not to be judged as an entry in an essay contest. *United States v. Harris*, 403 US 573, 29 L.ed. 2d 723 (1971); *Spinnelli v. United States*, 393 US 410, 21 L.ed. 2d 637 (1969). What is important is that probable cause be shown before a magistrate who can make a detached and neutral evaluation with respect to whether the material presented to him affords ground for believing that there is probable cause to search.

Assuming that the customary requisites of probable cause are shown, however, the Supreme Court of Idaho has not required especially rigid adherence to formalities in the issuance of search warrants. In the case of *State v. Badger*, No. 11227, 21 ICR 661 (1974), the Court held that the affidavit which is required to support a search warrant need not be reduced to writing but may be

taken under oath and electronically recorded. The case is decided consistently with Rule 41 of the Rules of Criminal Practice and Procedure, which abrogates previous statutory requirements for written affidavit. The *Badger* case appears to clear the major hurdle to receiving telephoned petitions and affidavits. As long as such petitions and affidavits are recorded and transcribed, there is little practical difference between an affidavit electronically recorded under oath in the courtroom and one electronically recorded over the telephone. No distinction of constitutional importance between these two kinds of procedures comes to mind.

From a practical point of view, any legislation which is considered to implement telephonic submission of affidavits and petitions for search warrants should clearly provide for a permanent record of the petition and affidavit.

In any case where the sufficiency of a search warrant is challenged, a strong burden falls upon the State to demonstrate the reasonableness of the search, and, for this purpose, the State must rely upon the record of information submitted under oath to the magistrate. Enabling legislation should also clearly specify who is responsible for recording and transcribing the telephonic conversation, whether the magistrate or the petitioning law enforcement officer. Moreover, guidelines should be set out by law enforcement agencies specifying the occasions when the telephone procedure should be used. Otherwise, law enforcement officers might be tempted to over-use this procedure. The telephonic procedure is more cumbersome than the standard practice of submitting written affidavits and offers greater opportunity for confusion and error. Telephone procedure should be used only when time limitations preclude resort to the standard methods of obtaining search warrants.

DATED this 19th day of March, 1975.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL  
Attorney General

ANALYSIS BY:

LYNNE E. THOMAS  
Deputy Attorney General  
Criminal Justice Division

**ATTORNEY GENERAL OPINION NO. 16-75**

TO: Mr. Harold Blain  
Administrator  
Idaho Dry Pea and Lentil Commission  
P.O. Box 8566  
Moscow, Idaho 83843

Per request for Attorney General Opinion.

**QUESTION PRESENTED:** Section 22-3506, *Idaho Code*, provides that members of the Pea and Lentil Commission are to serve for terms of three (3) years, though they may not serve for more than two (2) such terms. Query – Does a vacancy filling to complete eight (8) months on the unexpired term of a commission member constitute a “term of office” within the meaning of Section 22-3506 so as to statutorily preclude the vacancy appointee from serving two (2) terms, independent of that of his predecessor?

**CONCLUSION:** No. A gubernatorial appointment to fill a vacancy on the Pea and Lentil Commission does not affect the eligibility of the vacancy appointee from serving two (2) full three-year terms.

**ANALYSIS:** A vacancy filling has as its purpose to appoint one to complete the unexpired portion of the predecessor’s statutory term of office. A “term of office” is that period fixed by statute not the unexpired portion of that term. *State v. Yelle Washington*, 121 P.2d 948, 949 (1942). In the instant case, Mr. Jerry Johnson was appointed by Governor Cecil D. Andrus on November 10, 1971, to fill the vacancy occurring through the resignation of Commissioner John Kuhlman. Mr. Kuhlman’s term expired June 30, 1972. As the vacancy appointee, Mr. Johnson served to complete his predecessor’s term. On July 1, 1972, Mr. Johnson was then appointed by the Governor for a full three-year term to expire June 30, 1975. By such appointment, Mr. Johnson began his first term on July 1, 1972. It is, therefore, my opinion that upon completion of this term, Mr. Johnson is eligible for reappointment by the Governor to a second, three-year term notwithstanding his eight-month’s service as a vacancy appointee.

**AUTHORITIES CONSIDERED:** Section 22-3506, *Idaho Code*.

DATED this 3rd day of April, 1975.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL  
Attorney General

ANALYSIS BY:

CHRISTOPHER D. BRAY  
Assistant Attorney General

**ATTORNEY GENERAL OPINION NO. 17-75**

TO: Mr. C. A. “Pete” Peterson  
Nez Perce County Assessor  
County Courthouse  
Lewiston, Idaho 83501

Per request for Attorney General Opinion.

**QUESTION PRESENTED:** What is the criteria for implementation of the depreciation schedule regarding licensing of pleasure boats pursuant to Section 49-218 (d), *Idaho Code*?

**CONCLUSION:** Section 49-218 (d) articulates depreciation schedules for licensing purposes on all inboard, outboard and sail boats used for pleasure. Four schedules exist therein allowing progressive depreciation according to enumerated age categories. The appropriate depreciation schedule is allowed upon the criteria of age of the boat, only. Thus, no allowance for the appropriate depreciation may be made unless and until the statutory age criteria is met.

**ANALYSIS:** Section 49-218 (d), *Idaho Code*, reads:

"The following depreciation shall be allowed on all inboard, outboard and sail boats:

4 to 6 years old, inclusive, 15% of the above fees;

7 to 10 years, inclusive, 30% of the above fees;

11 to 15 years old, inclusive, 40% of the above fees;

16 years and older, 50% of the above fees.

Each of the four categories specifies age groupings to trigger the appropriate depreciation schedule.

Section 49-218 (d) should be construed in conjunction with Section 49-217, *Idaho Code*. Section 49-217, *Idaho Code*, requires the annual licensing of such craft. One may contend that by virtue thereof, the depreciation schedules of Section 49-218 (d) should be implemented upon the appropriate application for license. For example, a depreciation allowance of 15 percent should be allowed following the application for a fourth annual boating license.

Scrutiny of these two statutes does not support such a contention. It is conceivable that upon one's application for a fourth annual license that the boat to be licensed would be of the age, three years and one day. In such an instance, the criteria of the depreciation schedule could not be met as the boat would not be four years old until the termination of the fourth licensing year. No conflict is perceived between the application of Section 49-217 and Section 49-218 (d). The former prescribes annual licensing of pleasure craft. The latter allows for a depreciation, i.e., a reduction in the licensing fees upon the criteria of age of the boat only. It is my opinion that notwithstanding the annual license requirement of Section 49-217, the appropriate reduction in those licensing fees does not accrue to the benefit of the boat's owner until said boat is of the actual age prescribed in the four depreciation schedules found within Section 49-218 (d), *Idaho Code*.

**AUTHORITIES CONSIDERED:** Section 49-217, *Idaho Code*; Section 49-218 (d), *Idaho Code*.



DATED this 7th day of April, 1975.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL  
Attorney General

ANALYSIS BY:

CHRISTOPHER D. BRAY  
Assistant Attorney General

**ATTORNEY GENERAL OPINION NO. 18-75**

TO: Mr. Roy C. Holloway  
Assistant Prosecuting Attorney  
Cassia County  
1419 Overland Avenue  
Burley, Idaho 83318

Per request for Attorney General Opinion.

**QUESTION PRESENTED:** You have asked this office the following question: "Do the laws of the State of Idaho require the Board of County Commissioners to appoint a Zoning Commission and, therefore, establish a county zoning plan; or is this discretionary with the County, and may they refrain from zoning activities."

**CONCLUSION:** It would seem that Section 31-3804, *Idaho Code*, is written in such a manner as to be mandatory; each county is required to have a "zoning commission."

It would also seem that Section 31-3801, *Idaho Code* is not mandatory. The county commissioners may zone. This is discretionary. Also July 1, 1975, a new law goes into effect that requires planning and zoning and other things. It is Chapter 188 of the 1975 Session Laws, Senate Bill 1094. It will completely replace and repeal previous laws on the subject.

**ANALYSIS:** In 1957 the Legislature enacted Chapter 225 which was compiled as Section 31-3801, et. seq., granting certain counties the right to zone and plan.

The grant of this right to zone was given directly to the Boards of county commissioners. The section incorporated by reference the powers then existing in cities and in villages (such powers had been granted to cities and villages in 1925, Chapter 174, Section I, page 310).

Attached is a copy of Chapter 4, Title 50, *Idaho Code*. At that time (1957) the power to zone was granted only to urban counties and only after a referendum type election as set forth in Section 2 of the legislative act of 1957 (Chapter 22, compiled as Section 31-3802).

Section 4 of the act of 1957, Chapter 225 provides for a "zoning commission" for appointment by the county commissioners. This is somewhat of an anomaly. The section by reference states that the urban counties shall appoint a commission as authorized by Sections 50-2701 through 50-2708, *Idaho Code*. Sections 50-2701 through 50-2708, *Idaho Code*, gave cities power to appoint "planning commissions" with powers to make comprehensive plans for land use and development, and plans for zoning, etc., as spelled out in Section 50-2705, *Idaho Code* (1935, 1st ex. sess., Chapter 51, Section 5, page 134). This type commission is not allowed to do the actual passage of zoning ordinances. That power is given to the county commissions under Section 31-3801, *Idaho Code*. The function of the commission is planning and preliminary hearings for zoning and proposals for changes in plans or zoning. However, it may be a realistic approach to call it the "zoning commission" and to have only one such commission rather than to have separate planning and zoning commissions since proposals for changes to it and since under Section 50-406, *Idaho Code*, it may be given the powers of the zoning commission by the county commissioners or city council.

In 1967 all of the Idaho laws relating to cities (Title 50, *Idaho Code*) were repealed and a new law relating to cities was passed (1967, Chapter 429, page 1249). In this new city law were chapters somewhat similar but not the same as the former zoning and planning laws (Chapters 11 and 12 of Title 50, *Idaho Code*).

The new planning law, Sections 50-1101, et. seq., *Idaho Code*, provides that "when any city or county desires to avail itself of the power conferred by . . ." the chapter, the county may create a commission, etc. The old chapter 50-2701, et. seq., had provided for cities and villages and counties and that they could create boards. The old law required that the appointive members of a commission had to be residents and taxpayers of the district; that they served without compensation. They could only be removed after public hearing. The above matters are different than under the 1967 law, and the duties were somewhat differently worded under the old and new laws.

The old planning law was passed in 1935 (1935, 1st sess., Chapter 51, and Section 50-2701, et. seq., page 34).

Thus, counties have since 1935 had the power to plan. In 1957 the "urban counties" were given the power to zone and in 1961 all counties were given power to zone but this power to zone was limited by the necessity of calling a special election to determine whether or not the county should zone. The 1961 change allowed urban counties to zone without elections but required special elections in all other counties before zoning. Previous to 1961, urban counties had been required to hold special elections before zoning. Then in 1965, Chapter 12 and 20, the law was again amended to do away with the election provision and provide that all boards of county commissioners had the powers of Chapter 4, Title 50, *Idaho Code*, and to provide that "the board of county commissioners of each county shall appoint a commission as authorized by Sections 50-2701 through 50-2708, *Idaho Code*."

Also, it should be noticed that in 1967 when the new city codes were adopted, Section 50-11-1, *Idaho Code* (1967, Chapter 429, Section 203, page 1314), it was permissively provided that counties could take advantage of the new planning commission law, but on the other hand, it was not provided that counties could take advantage of the new zoning law, Section 50-1201 (1967), Chapter 429, Section 209, page 1316). It thus appears that counties were intentionally excluded from Sections 50-1201 through 50-1210, *Idaho Code* (1967, Chapter 429, §§ 209-218) since sections on both sides of sections 209 to 218 dealt with counties, e.g., 1967, Chapter 429, §§ 203-208 and § 222, 223 and 216.

A new statute may refer to another statute and make the latter applicable to the subject of the new legislation.

50 Am.Jur., Statutes, Section 36

*Gillesby v. Board of County Commissioners*  
17 Idaho 586  
107 Pac. 71

*Hodges v. Tucker*  
25 Idaho 563, 576  
138 Pac. 1139

*Nampa and Meridian Irrigation District v. Barker*  
38 Idaho 529  
223 Pac. 529

*Boise City v. Baxter*  
41 Idaho 368  
238 P.2d 739

*In Re Garrett Transfer Co., Inc.*  
53 Idaho 200  
23 P.2d 739

*Beverly v. Webb*  
58 Idaho 118  
70 P.2d 337

American Jurisprudence at 50 *Am.Jur.*, Statutes, Section 36, says that the purpose of such a practice is to incorporate into new acts the provisions of other statutes without encumbering the statute books by unnecessary repetition.

The operation and effect of a reference statute adopting a particular provision of some other statute is as follows:

"The repeal or amendment of the adopted statute in no way changes the operation of the adopted statute in the adopting statute." *Beverly v. Webb*, supra; *Nampa-Meridian Irrigation District v. Barker*, Supra.

Another method of stating this is the following quote from the *Nampa-Meridian Irrigation District v. Barker* case, Supra:

"Such adoption takes the statute as it exists at the time of adoption and does not include subsequent additions or modifications of the statute so taken."

*Beverly v. Webb*, Supra. makes the following statement:

"Where a specific provision or direction of a statute is referred to and adopted by a subsequent enactment, the repeal of the former statute does not work a repeal of the specific provisions thereof adopted in the latter, so far as the same is requisite or applicable to the operation or enforcement of the subsequent statute."

Thus, as to counties, it appears that the older statutes are still in effect and that zoning by a county must be done under the older statute whereas the "zoning commission" of the county may be following either the older statute or the newer one.

Section 31-3804, *Idaho Code*, as it now reads, provides that "each county shall appoint a commission." There is not complete agreement in this office as to whether this is mandatory or not since Section 50-2701, *Idaho Code* and Section 50-1101, *Idaho Code* are both permissive.

However, "shall" is usually a mandatory term especially when it is used in statutes. See Webster's New Collegiate or New International Dictionaries.

Also, the term "shall" has to the best of this writer's knowledge always been construed as mandatory in Idaho case law. *Pierce v. Vailponde*, 78 Idaho 274; *Hollingsworth v. Koelsch*, 76 Idaho 203; *Moscow Vetr. Club v. Bishop*, 69 Idaho 348; *State, ex rel Sweeley v. Brown*, 62 Idaho 258.

On the other hand, "may" is sometimes construed to be permissive and sometimes construed to be mandatory. *State, ex rel Parson v. Burley Trade Co.*, 58 Idaho 617; *Wall v. Basin Mining Co., Ltd*, 16 Idaho 313; *Barton v. Schmershall*, 21 Idaho 562.

Perhaps the best statement of the matter is found in 59 Corpus Juris 1079-1080:

"As a general rule, the word 'may' when used in a statute is permissive only and operates to confer discretion while the word 'shall' is imperative operating to impose a duty which may be enforced."

Thus, the term "shall" in Section 31-3804, *Idaho Code*, is in all likelihood meant to be mandatory. It should also be noticed, however, that a new 1975 law, Senate Bill 1094 (1974 Session laws, ch. 188) takes over this matter and that it repeals and replaces all of the earlier laws on the subject. A copy of that law is included for your information. There are a number of cases holding that

a statute may be continued, extended, or changed by a reference statute and any appropriate language for the purpose.

**AUTHORITIES CONSIDERED:**

1. Section 31-3801, *Idaho Code*.
2. Section 31-3804, *Idaho Code*.
3. Section 50-11-1, *Idaho Code*.
4. Sections 50-2701, et. seq., *Idaho Code*.
5. 50 Am.Jur., Statutes, Section 36.
6. *Gillesby v. Board of County Commissioners*, 17 Idaho 586, 107 p. 71.
7. *Hodges v. Tucker*, 25 Idaho 563, 476, 138 P. 1139.
8. *Nampa and Meridian Irrigation District v. Barker*, 38 Idaho 529, 223 P. 529.
9. *Boise City v. Baxter*, 41 Idaho 368, 238 P. 1029.
10. *In Re Garrett Transfer Co., Inc.*, 53 Idaho 200, 23 P.2d 730.
11. *Beverly v. Webb*, 58 Idaho 118, 70 P.2d 337.
12. *Pierce v. Vailponde*, 78 Idaho 274.
13. *Hollingsworth v. Koelsch*, 76 Idaho 203.
14. *Moscow Vetr. Club v. Bishop*, 69 Idaho 348.
15. *State, ex rel Sweeley v. Brown*, 62 Idaho 258.
16. *State, ex rel Parson v. Burley Trade Co.*, 58 Idaho 617.
17. *Wall v. Basin Mining Co., Ltd.*, 16 Idaho 313.
18. *Barton v. Schmershall*, 21 Idaho 562.

DATED this 9th day of April, 1975.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL  
Attorney General

## ANALYSIS BY:

WARREN FELTON  
Deputy Attorney General

## ATTORNEY GENERAL OPINION NO. 19-75

TO: Clyde Koontz, CPA, Legislative Auditor

Per request for Attorney General Opinion.

## QUESTIONS PRESENTED:

1. Must the greater Boise Auditorium Board, under the conditions now existing, notify the Idaho Liquor Dispensary to cease the distributions from the liquor fund or
2. Can the Idaho Liquor Dispensary cease making its distribution from the liquor fund of its own volition, in view of the facts which are known or can be transmitted as a public information?

**CONCLUSION:** The greater Boise Auditorium Board, or any other auditorium board, under the conditions now existing, must notify the Idaho Liquor Dispensary to cease the distribution from the liquor fund upon the retirement of all obligations and indebtedness, other than ordinary operating expenses, even though their 50% allocation of the county funds has not been reached.

**ANALYSIS:** The Idaho Legislature in 1974 enacted § 67-4927, *Idaho Code* to provide funding for the auditorium districts which have incurred bonded indebtedness, or prior to the 1975 amendment of this section, "any other outstanding obligation other than ordinary operating expenses . . ." This section provides that ". . . there shall be allocated to each such auditorium district and paid to the treasurer thereof *fifty per cent (50%)* of all moneys apportioned to any county . . . out of the liquor fund of the State of Idaho . . ." (Emphasis added.) It further provides that "upon the retirement of all obligations and indebtedness other than ordinary operating expenses, or before such date at the discretion of the board the *board shall again notify* the Idaho Liquor Dispensary in writing to cease such distribution and all such moneys thereafter shall be distributed according to law." (Emphasis added.)

The mandatory language of this section clearly indicates that once an auditorium district qualifies for a distribution from the Liquor Dispensary, it is entitled to 50% of all monies apportioned to the county. It is also clear that once their indebtedness is retired the board must notify the Liquor Dispensary to cease further distribution. However it is not clear how much money the Liquor Dispensary should distribute if the indebtedness is less than 50% of the money apportioned to the county. In order to eliminate the inconsistency of the wording of this section, it is necessary to consider the purpose of the provision and the legislative intent.

It is obvious that Section 67-4927, *Idaho Code* was intended to provide funds for auditorium districts to meet their financial obligations, especially a bonded indebtedness which is necessary to finance an auditorium. The requirement that the board notify the liquor dispensary once that indebtedness is retired, indicates that this funding is made available for the amount of the indebtedness only. If such indebtedness should be less than the maximum 50% allocation, then the distribution from the liquor dispensary should only be in the amount of the indebtedness.

In conclusion, § 67-4927, *Idaho Code* authorizes the Liquor Dispensary to distribute to a qualified auditorium district the amount of their indebtedness up to 50% of the moneys apportioned to the county. In turn the auditorium board is required to notify the Liquor Dispensary once their indebtedness is retired, in order that any further distribution from the fund may cease.

**AUTHORITY CONSIDERED:**

1. Section 67-4927, *Idaho Code*.

DATED this 8th day of April, 1975.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL  
Attorney General

**ANALYSIS BY:**

URSULA GJORDING  
Assistant Attorney General

**ATTORNEY GENERAL OPINION NO. 20-75**

TO: Mr. R. Keith Higginson  
Director, Idaho Department of Water Resources  
State Capitol  
Boise, ID 83720

Per request for Attorney General Opinion.

**QUESTION PRESENTED:** Whether, for the purposes of the permit applied for by the U.S. Bureau of Reclamation for Ririe Dam, Willow Creek is tributary to the Snake River; and if so, would that permit be subject to earlier Snake River rights.

**CONCLUSION:** It would appear evident that Willow Creek is tributary to the Snake River, and as such the prior rights on the Snake have the right to call upon Willow Creek to satisfy those prior needs. Thus, any permit issued to the Bureau of Reclamation for storage or other use, would have to be subject to call down to satisfy Snake River main stream rights (such as main stream reservoir

storage). If this is not done, the main stream rights would lose the protection to which they are entitled.

**ANALYSIS:** The application (copy attached hereto) is for the storage of 90,000 acre feet per season in Ririe Dam for irrigation. The storage facility is located on Willow Creek. The diversion in question would occur primarily in the early run-off season. Based upon the maps and description in the memorandum attached hereto, and made a part hereof by reference thereto, there could be no question that Willow Creek is physically tributary to the Snake River. Since it is well settled in Idaho law that water that reaches a natural stream is part of that stream, the only real question is the effect this has on the application for permit to appropriate filed by the Bureau of Reclamation.

In those cases decided by the Idaho Supreme Court dealing with this question, the trier of fact had found that one stream was physically tributary to the other and then proceeded to answer the question presented here.

In *Josslyn v. Daly*, 15 Idaho 137 at 148-149, the Court said:

"The only question of serious importance that occurs to us in this connection is as to whether or not this spring and lake are tributary to Seaman's Creek. If they are, then the waters thereof were covered by the agreement . . . and the decree . . . (*Malad Irrigation Company v. Campbell*, 2 Idaho 411, 18 Poc, other citations omitted) . . ."

As the Idaho Court held in *Malad Irrigation Company*, *supra*:

"Prior appropriations of all the waters of a stream applied to a useful purpose gives the better right to the tributaries and all the direct and immediate sources of supply of the stream, and when this right once vests it must be protected and upheld." (Court syllabus, emphasis added)

Thus, the Court has held that a stream that is in fact tributary to a main stream, is also subject to prior appropriations on that main stream and can call upon the tributaries to satisfy those rights. In this connection, your attention is called to the following language in *Josslyn*, *supra*, at page 149:

"It seems self-evident that to divert water from a stream or its supplies or tributaries must in a large measure diminish the volume of water in the main stream, and where an appropriator seeks to divert water on the grounds that it does not diminish the volume in the main stream or prejudice a prior appropriator, he should . . . produce 'clear and convincing evidence showing that the prior appropriator would not be injured or affected by the diversion.' The burden is on him to show such facts." (emphasis added)

#### AUTHORITIES CONSIDERED:

1. *Josslyn v. Daly*, 15 Idaho 137 at 148-149.



2. *Malad Irrigation Company v. Campbell*, 2 Idaho 411, 18 Poc. 52.

DATED this 14th day of April, 1975.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL  
Attorney General

ANALYSIS BY:

NATHAN W. HIGER  
Special Assistant Attorney General

### ATTORNEY GENERAL OPINION NO. 21-75

TO: Tom D. McEldowney  
Commissioner of Finance  
State of Idaho  
Building Mail

Per request for Attorney General Opinion.

#### QUESTIONS PRESENTED:

1. Whether automated tellers, specifically the Bank of Idaho's "Ida", are in violation of *Idaho Code*, Section 26-1002, since they operate 365 days a year;
2. Whether such machines constitute branch banking.

**CONCLUSION:** Automated tellers, or even individual tellers who perform the same functions, do not violate Section 26-1002, *Idaho Code*, when teller operations are conducted after hours or on Saturday, Sunday, or legal holidays so long as these tellers do not provide direct information or direct connection to the bank's records or computer during non-banking hours, nor can such tellers be classified or defined as branch banks or the performance of branch banking.

**ANALYSIS:** Automatic tellers, and in particular "Ida", perform portion of the following functions:

1. Permit a customer to drop a deposit in a container for verification and entry on the books of the bank owning the device on the following business day as a credit to an account or as a payment on an indebtedness;
2. Receive instructions to rearrange the bank's indebtedness to the customer from one account to another on the books of the bank on the following business day;

3. Permit a customer to secure an envelop of prepackaged cash and debit his account on the following business day.

However, a customer cannot, for example, open an account with the bank, apply for a loan, purchase savings bonds, obtain money orders, cashiers checks, or travellers checks, maintain a safe deposit box, cash travellers checks, exchange currency, or engage in any of a large number of other common retail banking transactions. Indeed, only an existing customer of the bank may use its services. There are no negotiations. At most, it operates only as a temporary receptacle for documents which may later become a proper deposit. In other words, the machine is only a conduit used much as a credit card, air travel card or the United States Postal Service.

Bank use of automatic tellers has grown at a rapid pace and continues to do so, serving BankAmericard, Master Charge and other customers at numerous banks throughout the country. There are currently over 2,000 such machines in operation seven days a week in over 40 states throughout the United States. The machines are a comparatively new and significant convenience for the banking public. Often, working people cannot conveniently effect many routine banking transactions during normal banking hours. Rather than require a special trip during working hours, automatic tellers enable customers to initiate certain transactions at their convenience. The machines also provide a quick and secure source of cash in the event of an emergency, thus reducing the demand for certain retail stores to engage in "check cashing" activity.

Automatic tellers enable an individual to complete his portion of a number of routine type transactions not requiring any negotiations with the bank. Transactions are not consummated until the bank actually is notified of the customer's instructions, and the amount of funds necessary to implement the instruction are received and verified. This notification, receipt, and verification takes place at the bank after collection from the automated teller of the funds left there and of a tape or other medium upon which all instructions have been recorded. The bank cannot give credit for these funds prior to receipt and verification any more than it could give credit for items sent by mail to the bank and not yet received. These funds do not become deposits for any purpose until received and accepted at the banking premises. Thus the customer's offer to create a deposit relationship is not accepted, and the contractual debtor-creditor deposit relationship does not arise, until the funds are received, counted, and accepted at the bank. See, e.g., *Bernstein v. Northwestern National Bank*, 157 Pa. Super. 73, 41 A.2d 440; *In re Farmers State Bank of Amheerst*, 67 S.D. 51, 58-59, 289 N.W. 75, 78-79.

*Idaho Code*, Section 26-1002 reads in pertinent part as follows:

**26-1002. TRANSACTION 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, and any act appointed by law or contracts, or in any other way, to be performed on

Saturday, . . . may be performed upon the next succeeding business day . . .

Section 73-108, *Idaho Code*, includes Sunday as a legal holiday.

Automatic tellers do not violate Section 26-1002, *Idaho Code*. The bank itself is not open for the transaction of business and is, in fact, closed. No transaction accepted and occurring after regular banking hours is completed and recorded until the next regular business day. If the maximum daily withdrawal is made after the close of business on Friday, and then again on Saturday and Sunday, the bank debits the total amount against the customer's account as if all withdrawals had occurred on the following Monday. The same holds true for all other transactions. The bank is not open for the transaction of business. It is legally "closed". Note, however, that if the automated teller (or a real teller performing the same services) is directly connected (or has access) to the bank records or computer, then the service goes beyond mere initiation of a transaction, and would be in violation of Section 26-1002, *Idaho Code*.

Although automatic tellers only initiate banking transactions, they are performing a banking service, eventually resulting in a completed transaction. As such, they are involved directly in the banking business and, therefore, under the regulation of the Commissioner of the Department of Finance of the State of Idaho.

Turning now to the question of whether an automated teller is in reality a branch bank, it is generally conceded that so long as the device is on the premises of a bank, it is lawful and may be used to its fullest extent.

Since the use of the device is simply a mechanical means of communicating with the bank, the placing of the device off the physical premises of the bank would not constitute banking nor constitute the device to be a branch bank.

A branch bank is commonly considered to be a building containing teller's windows, desks and chairs, customer counters, and bank personnel with whom the banking public may transact a full range of banking services. An automated teller is obviously not an "office", and only a very few of the kinds of transactions normally associated with a banking office or place of business can be initiated at such a machine. It is more closely analogous to a mail box or a telephone through which a customer may communicate with his bank to accomplish certain routine transactions.

The Comptroller of the Currency of the United States has advised that an automatic teller would not constitute branch banking, or be considered a branch office, branch agency, additional office, or branch place of business within the common understanding of those terms. Advisory opinion (December 12, 1974). In addition, the Attorneys General of Texas, Kansas, and Florida have author-

common understanding of those terms. Advisory opinion (December 12, 1974). In addition, the Attorneys General of Texas, Kansas, and Florida have author-

ized the use of automatic tellers, although branch banking is prohibited in each of these states.

An automatic teller is merely a mechanical communication device enabling an established customer of a bank to initiate a routine banking transaction at his convenience. The same limited mechanical functions could be performed by a live teller without violation of statute and in accordance with the same theory. If a transaction occurs when the bank is "closed", it is processed and legally completed on the next succeeding business day. Therefore, the purely mechanical transactions executed by an automated teller, or the same transactions executed by a live teller, on Saturdays or legal holidays do not violate the statutory prohibition of *Idaho Code*, Section 26-1002, and cannot be considered branch banking.

**AUTHORITIES CONSIDERED:**

1. *Idaho Code*, Sections 26-1002, 73-108.
2. *Bernstein v. Northwestern National Bank*, 157 Pa. Super. 73, 41 A.2d 440.
3. *In re Farmers State Bank of Amhearst*, 67 S.D. 51, 58-59, 289 N.W. 75, 78-79.

DATED this 16th day of April, 1975.

ATTORNEY GENERAL OF IDAHO

WAYNE L. KIDWELL  
Attorney General

**ANALYSIS BY:**

BILL F. PAYNE  
Business Regulations Division

**ATTORNEY GENERAL OPINION NO. 22-75**

TO: West Bonner Water District No. 1  
c/o Tom Cooke, Esq.  
P.O. Box 788  
Priest River, Idaho 83856

Per request for Attorney General Opinion.

**QUESTION PRESENTED:** Is it legal to transport Idaho water to the State of Washington without specific statutory authority?

**CONCLUSION:** Appropriation of Idaho water outside the State is subject to reciprocal legislation of that state, and Washington having enacted such recipro-

cal legislation is entitled to appropriate Idaho water for use within the State of Washington.

ANALYSIS: In 1915 the Idaho Legislature enacted Chapter 4 of Title 42 of the *Idaho Code* which deals with the subject of appropriations for use outside the State. Section 42-405, *Idaho Code*, sets out the basic law of appropriations of water and reads in part:

Appropriations of water made under the provisions of this chapter shall be subject to the laws of the state of Idaho relative to administration, control and distribution of public waters, so long as said waters appropriated in accordance herewith *shall remain within the state of Idaho: . . .* (Emphasis added.)

The Legislature at the same time enacted an exception to the general rule of appropriation and § 42-408 provides the following:

*Appropriation subject to reciprocal legislation* — Certain waters excluded. — No permit to appropriate the public waters of the state of Idaho shall be granted by the department of reclamation, unless the sister state, to which it is desired to divert such water, *shall have enacted legislation generally similar in purport to the provisions of this chapter, whereby water may be appropriated within such sister state for use within the state of Idaho: . . .* (Emphasis added.)

These two statutes read together clearly indicate that the waters of the State of Idaho can only be appropriated for use within Idaho, unless the adjoining state which desires to appropriate Idaho water has reciprocal legislation which authorizes the diversion of its water for use within the State of Idaho. Section 42-408 excepts certain Idaho waters from out-of-state appropriations.

Due to the lack of such reciprocal legislation in the States of Oregon, Wyoming and Nevada, the Idaho Legislature passed specific legislation authorizing the appropriation of Idaho water for use within those states. Nevada in 1957 did enact a general reciprocity statute which antedates § 42-410 of the *Idaho Code*.

On the other hand, the State of Washington in 1917 enacted three statutes — R.C.W. 90.03.300, 90.16.110 and 90.16.120 — which authorize appropriations of Washington water for use outside their state. These statutes are very similar to § 42-408, *Idaho Code*, and it would appear that under Idaho and Washington Legislation a Washington citizen can appropriate Idaho water for use within his state.

In 1970 the Idaho Legislature enacted specific legislation for the State of Washington to authorize the appropriation of Idaho water for use in the area of Pullman, Washington. In light of § 42-408 and Washington's reciprocity statutes, this section, § 42-411 of the *Idaho Code*, seems superfluous. If by this legislation the Idaho Legislature intended to limit reciprocal agreement to a specific area within the State of Washington, then the repeal or amendment of § 42-408

would have been necessary to conform with the intent of §42-411. It would be unreasonable to assume that the specific provision of § 42-411, *Idaho Code* impliedly repeals § 42-408 of the *Idaho Code* eliminating reciprocity (unless authorized by specific legislation.) In addition the repeal of statutes by implication is not favored, and normally only takes place when the new law contains provisions which are contrary to, but do not expressly repeal those of a former law making the two laws totally irreconcilable. C.J.S., *Statutes* § 286, page 477. *State v. Davidson*, 78 Idaho 553, 309 P.2d 211 (1957); *Rydalch v. Glauner*, 83 Idaho 108, 357 P.2d 1094 (1961).

Sections 42-408 & 42-411 of the *Idaho Code* are not irreconcilable, nor are they inconsistent, but the Legislature merely granted specific authority for the appropriation within that area. Section 42-408, *Idaho Code* is still in existence, and authorizes the appropriation of Idaho water for use within a state which has reciprocal legislation. Such an appropriation must be made in accordance with the laws of the State of Idaho as set out in Chapter 4 of Title 42.

In conclusion the State of Washington is authorized to appropriate Idaho water and use it within the State of Washington pursuant to §42-408 of the *Idaho Code* and subject to our appropriation laws, and likewise an Idaho citizen may appropriate Washington water for use within our state. Only a repeal of §42-408 or an amendment to that section will effectively limit the appropriation of Idaho water for use in limited areas of the State of Washington.

#### AUTHORITIES CONSIDERED:

1. *Idaho Code* § 42-405.
2. *Idaho Code* § 42-408.
3. *Idaho Code* §42-411.
4. *State v. Davidson*, 78 Idaho 553, 309 P.2d 211 (1957);
5. *Rydalch v. Glauner*, 83 Idaho 108, 357 P.2d 1094 (1961);
6. C.J.S., *Statutes* § 286.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL  
Attorney General

#### ANALYSIS BY:

URSULA GJORDING  
Assistant Attorney General

## ATTORNEY GENERAL OPINION NO. 23-75

TO: Sheriff Thor Fladwed  
Kootenai County Courthouse  
Coeur d'Alene, Idaho 83814

Per request for Attorney General Opinion.

QUESTION PRESENTED: When may a private person execute an arrest within the powers and rights granted by Section 19-604, *Idaho Code*?

CONCLUSION: Section 19-604, *Idaho Code*, will be strictly construed, therefore, before any private citizen executes an arrest, he must be able to present, by sufficient evidence, proof that a public offense was committed or attempted in his presence and that the person arrested is guilty of the offense; that the person arrested has, in fact, committed a felony although not in his presence; or that a felony has, in fact, been committed and he has reasonable cause to believe the arrested person committed it. Such an arrest should only be executed when the assistance of law enforcement officials is not readily available.

ANALYSIS: An arrest by anyone other than a peace officer without a warrant is always unlawful except as provided in Section 19-604, *Idaho Code*. That section reads as follows:

"19-604. WHEN PRIVATE PERSONS MAY ARREST" — A private person may arrest another:

1. For a public offense committed or attempted in his presence.
2. When the person arrested has committed a felony, although not in his presence.
3. When a felony has been in fact committed, and he has reasonable cause for believing the person arrested to have committed it."

As a general rule, in order to justify a private person in arresting another without a warrant, he must have at least reasonable grounds for believing the person guilty of the charge. It must be such that any reasonable person, acting without passion or prejudice would have suspected that the person arrested committed the offense. One does not have reasonable cause to believe the person arrested has committed an offense unless he has information or facts which, if submitted to a judge or magistrate having jurisdiction, would require the issuance of a warrant of arrest. See *Malinciemi v. Gronlung*, 92 Mich. 222, 52 N.W. 627 (1892); *Suell v. Derricott*, 161 Ala. 259, 49 So. 895, 23 ORA (NS) 996, 18 Ann. Cas. 636 (1909).

Under the common law a private person could arrest for an offense committed in his presence. If he made an arrest otherwise, he did so at his peril. See *Graham v. State*, 143 Ga. 440, 85 S.E. 328 (1915). Section 19-604, *Idaho Code*, is somewhat broader in its scope, however, the peril remains.

Looking first to Subsection 1 of Section 19-604, *Idaho Code*, "a private person may arrest another for a public offense committed or attempted in his presence." A "public offense" has been held to mean any act or omission for which the law has prescribed a punishment. The term itself is used interchangeably with the word "crime." Therefore, Subsection 1 authorizes a private person to arrest when a "crime" has been committed or attempted in his presence. Crime would include any felony or misdemeanor punishable by fine or incarceration or both. See *Stratton v. Com., Ky.*, 263 S.W.2d 99, 100; *Ford v. State*, 35 N.E. 34, 35, 7 Ind. App. 567; *West v. Territory*, 36 P. 207, 208, 4 Ariz. 212; *Oleson v. Pincock*, 251 P. 23, 25, 68 Utah 507; *People v. Wilkins*, 104 Cal. Rptr. 89, 92, 27 CA.3d 763.

Exercising the authority granted under Subsection 1 is the right and privilege of every citizen, but in doing so, the person takes this risk, to-wit: if it should turn out that the man whom he has arrested was not guilty of a crime or that no crime has, in fact, been committed, the person causing the arrest is liable in a civil action for whatever damages the arrested party sustained in consequence of his arrest and imprisonment. Thus, to prevent breaches of the peace and even bloodshed, private persons must exercise a high degree of care under the rights granted by Subsection 1 of Section 19-604 *Idaho Code*. Such rights are limited and qualified further by Subsections 2 and 3.

Subsection 2 states that a private person may arrest another when the person arrested has committed a felony, although not in his presence. Therefore, information, belief, suspicion or reasonable cause of any degree, of the arresting person does not justify arrest, unless the person arrested was, in fact, guilty. See *Go-Bart Importing Co., v. United States*, 282 U.S. 344, 75 L.ed. 374, 51 S.Ct. 153 (1931).

Subsection 3 further qualifies these powers and states that a private person may arrest another when a felony has been *in fact* committed, and he has reasonable cause for believing the person arrested to have committed it. Therefore, a private individual is not justified in arresting for a felony which has not been committed in his presence unless a felony has, *in fact*, been committed and the person arresting shall have reasonable cause to believe that the person arrested is the guilty party. See *Brady v. United States*, 300 F. 540, 266 U.S. 620, 69 L.ed. 472, 45 S.Ct. 99 (1924); *State v. Hum Quock*, 89 Mont. 503, 300 P. 220 (1931).

The power granted under Subsection 3 appears to be the rule most commonly recognized in other jurisdictions with respect to the right of a private person to arrest without a warrant. This power and privilege is supported by Section 119, Volume 1, of the American Law Institute Restatement of the Law of Torts, which provides that a private person is privileged to arrest another without a warrant for a criminal offense, if an act or omission constituting a felony has, *in fact*, been committed and the actor reasonably suspects that the arrested party committed such act or omission. See *Lander v. Miles*, 3 Oregon 35 (1868); *People v. Coughlin*, 13 Utah 58, 44 P. 94 (1896); *State v. Morgan*, 22 Utah 162, 61 P. 527.



Thus, it should be restated, that Section 19-604, *Idaho Code*, grants the right and privilege of arrest to private persons when a crime is committed or attempted in his presence or when the arrested person has, in fact, committed a felony although not in his presence or when a felony has, in fact, been committed and he has reasonable cause to believe that the arrested person committed it. These are the *only* powers of arrest granted private persons and any execution under this section will be strictly construed by the courts. The right of personal liberty is a direct grant to private citizens by the Constitutions of the United States and the State of Idaho. Therefore, the right of a private citizen to arrest will not be extended beyond the strict wording of the statute.

In order to further qualify and interpret the authority conveyed to private persons by Section 19-604, *Idaho Code*, the statute must be construed in connection with the authority of arrest granted peace officers by Section 19-603, *Idaho Code*. Section 19-603 reads as follows:

**"19-603. WHEN PEACE OFFICER MAY ARREST.** A peace officer may make an arrest in obedience to a warrant delivered to him, or may, without a warrant, arrest a person:

1. For a public offense committed or attempted in his presence.
2. When a person arrested has committed a felony, although not in his presence.
3. When a felony has in fact been committed and he has reasonable cause for believing the person arrested to have committed it.
4. On a charge made, upon a reasonable cause, of the commission of a felony by the party arrested.
5. At night, when there is reasonable cause to believe that he has committed a felony."

It must be noted that the first three subsection of Section 19-603 and Section 19-604, *Idaho Code*, are identical in content. However, a peace officer is entitled to arrest upon a charge alone and is not restricted to his own personal knowledge. It is even more significant that peace officers, by the very nature of law enforcement, have been granted powers of arrest over and above that of a private citizen.

A peace officer may arrest any person who he, upon reasonable grounds, believes has committed a felony, though it afterwards appears that no felony was actually perpetrated. It follows that a cause of action for false imprisonment accrues whenever a person is arrested and detained by one not an officer acting without a warrant when no crime has in fact been committed, no matter what good faith the party who caused the arrest acted. Nothing but the absolute fact that a crime has actually been committed will suffice to justify and protect the person making such an arrest. Suspicion without cause can never be an excuse for such action. The two must both exist and be reasonably well founded. See

*People v. Hockdsim*, 36 Misc. 5 62, 73 NYS 626 (1901); *Ashleys*, 12 Coke 90, 77 Eng. Rpr. 1366, (1611); 4 Am.Jur. 15-26, Arrest, Sec. 22-38.

In general, similar statutes in other jurisdictions, conferring powers of arrest without a warrant on private persons have been more strictly construed than those giving similar powers to officers. The authority of an officer to arrest embraces and exceeds that of a private citizen. An arrest by a private individual may give rise to an action for damages even though an officer would have been justified in making the arrest under similar circumstances. See *Martin v. Houck*, 141 N.C. 317, 54 S.E. 291; *Graham v. State*, 143 Ga. 440, 85 S.E. 328; *Ross v. Leggitt*, 61 Mich. 445, 28 N.W. 695; *People v. Martin*, 225 Cal.App. 2d 91, 36 Cal. Rptr. 924.

It should also be noted that pursuant to Section 19-614, *Idaho Code*, a private person who has arrested another for the commission of a public offense must, immediately, take the person arrested before a magistrate or deliver him to a peace officer. This section is further qualified by Section 19-615, *Idaho Code*, requiring that the arrested person be taken immediately before the nearest or most accessible magistrate in the county in which the arrest is made.

In conclusion, it is the policy of this State and the United States to delegate the powers of law enforcement and related powers of arrest, to authorized peace officers in the various governmental entities. Private persons must not be permitted to take the law into their own hands by making arrests on mere suspicion. Section 19-604, *Idaho Code*, will be strictly construed; therefore, before any private citizen arrests, he must be able to prove, by sufficient evidence, that a public offense was committed or attempted in his presence and that the person arrested is guilty of the offense; that the person arrested has in fact committed a felony although not in his presence; or that a felony has in fact been committed and he has reasonable cause to believe the arrested person committed it. The arresting person must then deliver the arrested person to the nearest magistrate or peace officer without delay. If a private citizen was not required the burden of observing these formalities of law, he would be able to constitute himself an officer and jailor upon mere suspicion of guilt thereby placing in the hands of the vicious or ill-disposed, power, the exercise of which might result in a greater evil than might arise from the occasional escape of guilty parties before officers can be called or the forms of law observed.

#### AUTHORITIES CONSIDERED:

1. *Idaho Code*, Sections 19-603 and 19-604.
2. Section 119, Volume I, Am. Law Institute Restatement of the Law Torts.
3. 4 Am.Jur. 15-26, Arrest, Section 22-38.
4. *Malinciemi v. Gronlung*, 92 Mich. 222, 52 N.W. 627 (1892).
5. *Suell v. Derricott*, 161 Ala. 259, 49 So. 895, 23 LRA (NS) 996, 18 Ann. Cas 636 (1909).

6. *Graham v. State*, 143 Ga. 440, 85 S.E. 328 (1915).
7. *Stratton v. Com., Ky.*, 263 S.W.2d 99, 100 (1953).
8. *Ford v. State*, 35 N.E. 34, 35 7 Ind. App. 567 (1893).
9. *West v. Territory*, 36 P. 207, 208, 4 Ariz. 212 (1894).
10. *Oleson v. Pincock*, 251 P. 23, 25, 68 Utah 507 (1926).
11. *People v. Wilkins*, 104 Cal. Rptr. 89, 92, 27 C.A. A.3d 763 (1972).
12. *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 75 L.ed. 374, 51 S.Ct. 153 (1931).
13. *Brady v. United States*, 300 F. 540, 266, U.S. 620, 69 L.ed. 472 45 S.Ct. 99 (1924).
14. *State v. Hum Quock*, 89 Mont. 503, 300 P. 220 (1931).
15. *Lander v. Miles*, 3 Oregon 35 (1868).
16. *People v. Coughlin*, 13 Utah 58, 44 P. 94 (1896).
17. *State v. Morgan*, 22 Utah 162 61 P. 527 (1900).
18. *People v. Hockdsim*, 36 Misc. 5 62, 73 NYS 626 (1901).
19. *Ashleys*, 12 Coke 90, 77 Eng. Rpr. 1366 (1611).
20. *Martin v. Houck*, 141 N.C. 317, 54 S.E. 291 (1906).
21. *People v. Martin*, 225 Cal.App. 2d 91, 36 Cal. Rptr. 924 (1964).

DATED this 29th day of April, 1975.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL  
Attorney General

ANALYSIS BY:

BILL F. PAYNE  
Business Regulations Division

## ATTORNEY GENERAL OPINION NO. 24-75

TO: Don Burnett  
Chubbuck City Attorney  
P.O. Box 4645  
Pocatello, Idaho 83201

Per request for Attorney General Opinion.

**QUESTION PRESENTED:** Pursuant to Title 57, Chapter 1, *Idaho Code*, is the branch bank currently located within the City of Chubbuck the only designated depository currently eligible for receiving deposits of funds from the City of Chubbuck?

**CONCLUSION:** Yes. The branch bank currently located within the City of Chubbuck is the only designated depository currently eligible for receiving deposits of funds from the City of Chubbuck.

**ANALYSIS:** Pursuant to Section 57-104, *Idaho Code*, every municipal and quasi-municipal corporation is considered to be a depositing unit. Section 57-127, *Idaho Code*, requires the depositing unit to deposit funds in designated depositories by stating that except where the public moneys of a depositing unit in the custody of the treasurer are at any one time less than \$1,000, the treasurer shall deposit in designated depositories, all public moneys, unless funds are diverted to certain other permitted investments.

Section 57-111, *Idaho Code*, qualifies those that may become depositories, reading, in pertinent part, as follows:

"Any national bank or any state bank or trust company . . . and any banking office of any such bank or trust company operating branches at which offices, deposits are received, complying with the provisions of section 57-128, and engaged in the business of a bank deposit in any depositing unit, may become a depository of public funds."

As cited in Section 57-111, *Idaho Code*, Section 57-128 governs the situation where there is more than one designated depository within the depositing unit and prohibits preferences among them as to the placement of deposits.

Since a municipal corporation is defined as a depositing unit by Section 57-104, *Idaho Code*, and such depositing unit is required by Section 57-127, *Idaho Code*, to deposit moneys over \$1,000 in designated depositories, it follows that pursuant to Section 57-111, *Idaho Code*, a municipal corporation is required to deposit funds in the approved depositories within the depositing unit. Therefore, pursuant to Title 57, Chapter 1, *Idaho Code*, the Chubbuck Municipal Corporation is the depositing unit and any bank, within that unit, meeting the requirements of Section 57-111, *Idaho Code*, may qualify as a depository of public funds. It thereby follows that the branch bank currently located within the City of Chubbuck is the only designated depository currently eligible for

receiving deposits of funds from the City of Chubbuck, if it meets the requisites of Section 57-111, *Idaho Code*.

**AUTHORITIES CONSIDERED:** Title 57, Chapter 1, *Idaho Code* (Sections 57-104, 57-111, 57-127, 57-128).

**DATED** this 1st day of May, 1975.

**ATTORNEY GENERAL OF THE STATE OF IDAHO**

**WAYNE L. KIDWELL**  
Attorney General

**ANALYSIS BY:**

**BILL F. PAYNE**  
Business Regulations Division

**ATTORNEY GENERAL OPINION NO. 25-75**

**TO:** Tom D. McEldowney  
Director  
Department of Finance  
Statehouse Mail

Per request for Attorney General Opinion.

**QUESTION PRESENTED:** The Investment Board has invested monies of the permanent endowment fund through a broker who is also a member of the Board and purchased some federally guaranteed loans from a bank in which another Board member is a stockholder. **QUERY** — Does the Board violate Article VII, Section 10, *Idaho Constitution*, if it purchases securities or investments from a bank or broker-dealer in which a member of the Board owns an interest or by whom a member of the Board is employed?

**CONCLUSION:** Article VII, Section 10, *Idaho Constitution*, deems the making of profit out of public funds by any public officer to be a felony. Its proscription charges the public official who serves as a trustee of public funds with utmost fidelity to that public trust. The Investment Board itself is a statutory entity, not a "public official," and thus cannot be in violation of this constitutional provision. However, Investment Board members are "public officials" within the meaning of Article VII, Section 10. Therefore, any member is subject to criminal sanction if that member exploits an otherwise proper purchase with or investment of permanent endowment funds for private advantage or gain.

**ANALYSIS:** Article VII, Section 10, *Idaho Constitution*, reads:

"The making of profit, directly or indirectly, out of state, county, city, town, township or school district money, or using the same for

any purposes not authorized by law, by any public officer, shall be deemed a felony, and shall be punished as provided by law."

A threshold question arises as to whether this provision is self-executing or whether it requires ancillary legislation to enforce the duty of integrity and fidelity to the public trust it clearly seeks to impose. Its answer is without judicial articulation. However, the principles for resolution of the issue have been enumerated by the Idaho Supreme Court. Generally, in order that a constitutional provision be self-executing, it must supply "... a sufficient rule by which the right given may be enjoyed and protected, or the duty imposed may be enforced . . ." *David v. Burke*, 179 U.S. 399, 21 S.Ct. 210, 212, 45 L.ed. 249 (1900), quoted in *Haile v. Foot*, 90 Idaho 261, 409 P.2d 409 (1965). Without question, the constitutional framers had the power to make Article VII, Section 10 self-executing. *Haile v. Foot*, supra. A determination of their intent is to be drawn upon consideration of the express language of Article VII, Section 10, and of the intrinsic nature of the provision itself. *Cleary v. Kincaid*, 23 Idaho 789, 131 P. 1117 (1913). Its language is negative and prohibitory. See *State v. Village of Garden City*, 74 Idaho 513, 265 P.2d 328 (1953). Its intrinsic nature is a proscription, criminal in character, upon the making of personal gain or advantage by those charged with a public trust in the handling of public funds. See *Raymound v. Larson*, 11 Utah 2d 371, 359 P.2d 1048 (1961). The fact that Article VII, Section 10, authorizes the legislature to articulate the punishment for the crime deemed to be a felony does not negate the provision's self-executing character. *Haile v. Foot*, supra., 90 Idaho at page 267. (See Section 18-112, *Idaho Code*.) Neither would statutes which sought to supplement a self-executing provision. *Ibid*. Its duty of utmost fidelity to the public weal is an explicit standard, unfettered in its simplicity, for all those who choose to accept the public trust. cf *In re Breene*, 28 P. 3 (Colo., 1890).

This provision imposes two separate duties, either of which, if violated, subjects the violator to criminal liability. First, as a public officer, one may not make a profit, directly or indirectly, out of public funds. Second, one may not use public funds for any purpose not authorized by law. Pursuant to the former, an authorized expenditure of public funds is presumed else the latter provision is meaningless by repetition. For purposes of analysis, this opinion will assume that all investments or purchases by the Investment Board have been properly authorized pursuant to statute and/or rules and regulations of the Board. In addition, the Board is a statutory entity, the action of which is predicated upon the collective judgment of its members. Section 57-718, and Section 57-720, *Idaho Code*. The proscription articulated by Article VII, Section 10, *Idaho Constitution*, is directed at those who would implement the authority of the Board for personal gain. It would not invalidate the action of the Board, and as a public entity, the Board cannot be subject to criminal liability. Thus, the sole question to be considered is whether an Investment Board member is subject to criminal liability for "the making of profit" on an investment properly authorized by the board in which he is a member. The answer is a categorical "yes."

A definitive statement regarding criminal liability must be reserved to the courts as the inquiry implicitly is one of fact, not law. However, the breadth of

Article VII, Section 10, *Idaho Constitution*, is of sufficient scope and clarity to define permissible conduct thereunder as a legal proposition. Its parameters may be cogently perceived through an analysis of legal decisions which scrutinize comparable constitutional and statutory language. A constitutional counterpart to Article VII, Section 10, was recently construed by the Utah Supreme Court to apply to the fiduciary relationship extant between the public entity and the public official entrusted with the administration of public funds. *Brockbank v. Rampton*, 22 Utah 2d 19, 447 P.2d 376 (1968). Concurrence with the Utah decision is warranted upon an analysis of the relationship held by members of the Investment Board to the State of Idaho. They are public officers inasmuch as:

- a. The office they hold was created by the Idaho Legislature, Section 57-718, *Idaho Code*.
- b. Statutorily, they exercise a portion of the sovereign power of governments, i.e., invest the permanent endowment funds of the state, and formulate investment policies. Section 57-720 and Section 57-722, *Idaho Code*.
- c. The powers conferred and duties to be discharged are defined by the Legislature. Section 57-722, *Idaho Code*.
- d. The duties performed by each Board member are performed independently and without control of a superior power, *save the law*, except by the collective judgment of the members themselves. Title 57, Chapter 7. (Note that though designated positions are to be filled by appointment of the governor, no member serves at the pleasure of the governor and may only be removed for cause by two-thirds vote of the full board. Section 57-719, *Idaho Code*.)
- e. The office held by each is both permanent and continuous subject to expiration of statutory terms. Section 57-719, *Idaho Code*. See *State v. Hawkins*, 79 Mont. 506, 257 P. 411, 418 (1927); cited in *Jewitt v. Williams*, 84 Idaho 93, 101, 369 P.2d 590, 594 (1962).

They act in a fiduciary capacity for the state of Idaho, as they are statutorily charged with the duties of investment and/or authorization of investments of permanent endowment funds. Section 57-722, Section 57-723 and Title 68, Chapter 5, *Idaho Code*.

The Idaho Supreme Court analyzed the duty imposed upon the public official who serves in a fiduciary capacity in *McRoberts v. Hoar*, 28 Idaho 163, 152 P. 1046 (1915). Asked to construe a civil statute, Section 255 Rev. Codes (Section 59-201, *Idaho Code*), the court declared:

"An official's duty is to give to the public service the full benefit of a disinterested judgment and the utmost fidelity. Any agreement or understanding by which his judgment or duty conflicts with his private interest is corrupting in its tendency.

The fact that acceptance of such [profit] was without fraud and prejudice to the interest of the taxpayer is immaterial." *Ibid.*, 28 Idaho at page 174-5.

Absent fraud or prejudice to the taxpayer of Idaho, the first clause of Article VII, Section 10, *Idaho Constitution*, embodies a constitutional recognition of the fact that the impartial judgment of public servants can be impaired when their personal economic interests are affected by the business they transact on behalf of the state. It admonishes those who would prostitute the public good for private gain that they may not do so with impunity. Illustrative of that conduct proscribed by Article VII, Section 10 are the facts in *People v. Elliott*, 115 Cal.App. 2d 410, 252 P.2d 661 (1953). Defendant, president of the Board of Education of the City of Los Angeles voted to authorize the execution of certain contracts with a company who utilized the professional services of the defendant via retainer agreement. The defendant stood to profit by the board's affirmative vote in two ways. One, the continuance of his retainer agreement would be assured as his services were needed in the execution and performance of the contracts. Second, defendant received a 10 to 14 percent commission on the gross receipts of those contracts with the company, purportedly for services rendered in obtaining the board of education contracts. He was subsequently convicted pursuant to a criminal statute prohibiting a school board member from being interested in any contract made by the board. The jurisprudence of California as well as Idaho establishes the proposition that a public office is a public trust created for the benefit of the people. As trustee of public funds, a public officer may not exploit or prostitute his public responsibilities for private gain. *Terry v. Bender*, 300 P.2d 119, 125 (1956); *McRoberts v. Hoar*, *supra*.

Article VII, Section 10, *Idaho Constitution*, proscribes a public official acting in a fiduciary capacity from using public monies for private gain, regardless of the question of monetary loss to the public. The focus of this analysis, therefore, narrows to a determination of the facts requisite for implementation of the constitutional provision.

The pertinent portion of Article VII, Section 10, reads:

"The making of profit, directly or indirectly, out of state . . . money . . . by any public officer, shall be deemed a felony . . ."

The term "directly or indirectly" declares a singular offense, i.e., the making of profit *in any manner whatsoever* out of state money by a public official. See *State v. Kuehnle*, 85 NJL 220, 88A 1085, 1087 (1913); *School District No. 8 v. Twin Falls, etc., I. Co.*, 30 Idaho 400, 164 P. 1174 (1917). One could argue that the constitutional framers could not have intended to make a public officer criminally liable if the profit in question inures to the official's benefit by virtue of ownership of a single share of stock or status as an employee of a bank or brokerage firm doing business with the Investment Board. The profit to either might be so slight as to be imperceptible. I do not imply that criminal liability is determined solely upon the relationship of stockholder/employee to the corporation/company. Criminal liability is to be found upon the additional evidence of



a criminal intent to so profit. *State v. Robinson*, 71 ND 463, 2NW2d 183, 140 ALR 332, 339 (1942); *State v. Kuehrle*, supra., 88 A at page 1088. However, once that criminal intent is established, the constitutional sanction is equally applicable to the single share stockholder or employee as to the controlling stockholder of a corporation, should either exploit their public responsibilities for private gain.

Article VII, Section 10 does not articulate a specific criminal intent as an element of the offense it deems a felony. Absent a specified criminal intent, the proscription of the constitutional provision implies a general criminal intent. *State v. Stewart*, 35 Idaho 530, 207 P. 1071 (1922); *State v. Parish*, 79 Idaho 75, 310 P.2d 1082 (1957). Proof thereof need not be demonstrated by showing that the public officer was aware that his acts were unlawful. *United States v. Crimmins*, 123 F.2d 271, 272 (2 Cir. 1941); *State v. Wilson*, 41 Idaho 598, 603, 242 P. 787 (1925). Rather, the requisite criminal intent is shown upon evidence which establishes an awareness by the public officer of all those facts which make his conduct criminal. *Ibid.* Affirmative participation by a member in the authorization of investments or purchases by the Board with firms whose economic interests are shared in part or in whole by the member may infer an awareness of those facts by which he ultimately stands to profit.

"That awareness is all that is meant by the mens rea, the 'criminal intent,' necessary to guilt as distinct from the additional specific intent required in certain instances." *United States v. Crimmins*, 123 F.2d at page 272.

The inference of "awareness" is doubtfully rebuttable given facts showing an acceptance of a commission by a Board member upon investments of state funds. Similarly, the Board's purchase of federally guaranteed loans through a bank having a substantial stockholder serving simultaneously as a board member has little ring of coincidence.

The New Jersey Supreme Court cited the foregoing proposition in *State v. Lamberton*, 110 N.J. supra., 137, 264 A.2d 729 (1970). There, the defendant, one of a three-member public board, was a 10 percent stockholder and employee of a corporate entity contracting with the board for goods and services. Construing statutory language similar in scope to Article VII, Section 10, the court required more than a violation of the letter of the statute for conviction. It held that though the statutory language evidenced no specific intent as an element of the crime, it nonetheless implicitly required a showing of a criminal intent. *Ibid.*, 264 A.2d at page 731. However, it refused the contention that proof of a specific "corrupt intent" was obligatory for conviction, stating:

"To incorporate such a requirement would constitute impermissible judicial legislation." *Ibid.* See *State v. Wilson*, supra.

The duty imposed by Article VII, Section 10, *Idaho Constitution*, is the standard by which all public officers are measured in the performance of their official responsibilities. The responsibilities of office of the respective members of the Investment Board are those of properly utilizing the assets of the per-

manent endowment funds in the interest and for the benefit of the citizens of Idaho. Those responsibilities are to be exercised with fidelity and integrity. The making of profit, no matter how circuitous, from the use of endowment funds by an Investment Board member inherently conflicts with the integrity and fidelity demanded of his service. One cannot serve two masters, "else he will hold to one and despise the other." Matthew 6:24. Faced with an apparent conflict, a board member acts at his peril should he do other than to disqualify himself from participation in the issue at hand. It is the public policy of this state, articulated by Article VII, Section 10, *Idaho Constitution*, that public officers such as members of the Investment Board may not make a profit out of public funds. Should one do so, notwithstanding that the investment or purchase was properly authorized, one acts in a spirit repugnant to the Constitution and becomes subject to the criminal sanctions imposed thereby.

**AUTHORITIES CONSIDERED:**

1. Constitution: Article VII, Section 10.
2. Statutes: Section 18-112; Section 255 Rev. Codes (Section 59-201); Title 57, Chapter 7.
3. *Haile v. Foot*, 90 Idaho 261, 409 P.2d 409 (1965).
4. *Cleary v. Kincade*, 23 Idaho 789, 131 P. 1117 (1913).
5. *State v. Village of Garden City*, 74 Idaho 513, 265 P.2d 328 (1953).
6. *Jewitt v. Williams*, 84 Idaho 93, 369 P.2d 590 (1962).
7. *McRoberts v. Hoar*, 28 Idaho 163, 152 P. 1046 (1915).
8. *State v. Wilson*, 41 Idaho 598, 242 P. 787 (1925).
9. *School District No. 8 v. Twin Falls, etc., I. Co.*, 30 Idaho 400, 164 P. 1174 (1917).
10. *State v. Stewart*, 35 Idaho 580, 207 P. 1071 (1922).
11. *State v. Parish*, 79 Idaho 75, 310 P.2d 1082 (1957).

DATED this 30th day of April, 1975.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL  
Attorney General

ANALYSIS BY:

CHRISTOPHER D. BRAY  
Assistant Attorney General

**ATTORNEY GENERAL OPINION NO. 26-75**

**TO:** D. F. Engelking, Chief Deputy, State Superintendent of Public Instruction

Per request for Attorney General Opinion.

**QUESTION PRESENTED:** What are the necessary qualifications to be an eligible elector in a school district election?

**CONCLUSION:** An eligible elector in a school district election must be eighteen years of age and a resident of the district. In the election for trustees of the district, the elector must also be a resident of the trustee zone from which a trustee is to be elected.

**ANALYSIS:** Section 33-404, *Idaho Code*, establishes qualifications for school electors as follows;

"Any person voting, or offering to vote, in any school election must be, at the time of such election:

1. An elector within the meaning of Article 6, Section 2, of the Constitution of the State of Idaho;
2. A resident of the district and, in the case of election of trustees, a resident of the same trustee zone as the candidate or candidates for school district trustees for whom he offers to vote;

In addition to the foregoing qualifications, a school elector shall have executed, in writing and immediately before voting, a form of elector's oath attesting that he or she possesses the qualifications of a school elector prescribed in this section. The forms of electors' oaths shall be included in the records and returns of the school election."

Article 6, Section 2 of the Constitution of the State of Idaho defines an elector as:

"... every male or female citizen of the United States, twenty-one years old, who has actually resided in this state or territory for six months, and in the county where he or she offers to vote thirty days next preceding the day of election, if registered as provided by law, is a qualified elector;..."

Two authorities have altered these constitutional requirements to be qualified electors. The 26th Amendment of the Constitution of the United States provides "The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any state on account of age." Since Article 6 of the United States Constitution provides that the Constitution thereof is the supreme law of the land, Article 6, Section 2, of the *Idaho Constitution* cannot be in conflict therewith. Therefore,

Article 6, Section 2 of the *Idaho Constitution* has been effectively amended to permit every male and every female citizen of the United States, eighteen years of age and older who are otherwise qualified voters to vote in an election.

The second authority which has amended Article 6, Section 2 of the *Idaho Constitution* is *Dunn v. Blumstein*, 405 U.S. 330, 31 L.Ed. 2nd 274, 92 S.Ct. 995, (1972). In that case the United States Supreme Court declared unconstitutional a Tennessee requirement that before an otherwise qualified elector could vote in an election in that state, he or she must have been a resident of Tennessee for one year next preceding the election. The court held that such durational residency requirement violated the equal protection clause of the 14th amendment of the United States Constitution. The Court did state that a state could impose registration requirements and could close registration books up to 30 days before the election. The durational residency requirement of Article 6, Section 2 of the *Idaho Constitution*, which requires a person to be a resident of the state for six months and of the county thirty days next preceding the election, is then also unconstitutional according to the holding in *Dunn v. Blumstein, supra*. The impact of these two authorities on Article 6, Section 2 of the *Idaho Constitution* results in voter qualifications to be any male or female citizen of the United States, eighteen years of age or older, who is a resident of this state and who is registered as required by law. See *Dredge Mining Control - Yes!, Inc. v. Cenarrusa*, 92 Idaho 480, 445 Pac. 2nd 655.

The legislature has not provided by law for elector registration in school district elections. Therefore, Section 33-404, *Idaho Code*, on elector qualifications must now be read to state that any male or female citizen of the United States who is eighteen years of age or older and who is a resident of the state and of the school district (and of the trustee zone in the case of trustee elections) and who executes in writing immediately before he offers to vote, an elector's oath that he possesses the qualifications as required.

The issue of residency is a question of fact, based in large part on voter intent. If a person presents himself to vote and is willing to execute the sworn elector's oath, the judges and clerks of the polling place would be ill advised to deny that person a ballot even if the judges and clerks may doubt that the person is a resident of the district or zone. However, the clerk or judge is certainly free to inform the prospective voter that his vote will be challenged. The judges should then make their doubts concerning residency known to the board of trustees as the board of canvassers. If the board finds that a person who voted is not a resident, then the board should turn the matter over to the prosecuting attorney for evaluation and possible prosecutorial action under Sections 18-2302, 18-2303, 18-2306, 18-2307, or any other section of the *Idaho Code*, making such action a crime.

DATED this 9th day of June, 1975.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL  
Attorney General

## ANALYSIS BY:

JAMES R. HARGIS  
Deputy Attorney General

## ATTORNEY GENERAL OPINION NO. 27-75

TO: Monroe C. Gollaher, Director of Insurance

Per request for Attorney General Opinion.

**QUESTION PRESENTED:** Does the term "liability insurance" as defined in Section 41-506 (1) (c), *Idaho Code*, including insurers covering such perils, in multiperil package policies as provided in Section 3 (1) of S.B. 1229 (1975 Idaho Legislation) include automobile liability insurance?"

**CONCLUSION:** The term "liability insurance" as defined in Section 41-506 (1) (c), *Idaho Code*, clearly includes the liability portion of automobile liability insurance. Therefore, for the purposes of S.B. 1229, Section 3 (1) as enacted by the 1975 Idaho Legislature, the liability portion of automobile liability insurance is included in the term "liability insurance" as defined in Section 41-506 (1) (c), *Idaho Code*, including insurers covering such perils in multiple peril packages.

**ANALYSIS:** The 1975 Idaho Legislature (Forty-third Legislature, First Regular Session) enacted Senate Bill No. 1229 which included the legislative findings that "an emergency exists because of the high cost and impending unavailability of medical malpractice insurance . . ." (*Senate Bill No. 1229, Section 1.*) The legislation was enacted during the last few days of the legislative session to provide a two year interim solution to the emergency situation, and to allow the legislature a period of time to study methods of dealing on a more permanent basis with the underlying causes of the emergency. The purpose of the act was to assure that during the two year interim period the public would be adequately protected against losses arising out of medical malpractice by providing licensed physicians, hospitals, and etc., with medical malpractice insurance, and to equitably spread the risks of such insurance through a temporary Joint Underwriting Association.

Section 3 (1) of Senate Bill No. 1229 created the temporary Joint Underwriting Association and provided for its membership in the following language:

"A temporary Joint Underwriting Association is hereby created, consisting of all insurers authorized to write, and engaged in writing within this state, on a direct basis, liability insurance as defined in Section 41-506 (1) (c), *Idaho Code*, including insurers covering such perils in multiple peril package policies. Every such insurer shall be a member of the association and shall remain a member as a condition of its authority to continue to transact such kind of insurance in this state." Senate Bill No. 1229, Section 3 (1).

Chapter 5 of the *Idaho Insurance Code* (Title 41, Chapter 5, *Idaho Code*) provides definitions of various kinds of insurance coverages. Furthermore, Section 41-501 of the *Idaho Insurance Code* provides that the definitions of the various kinds of insurance are not mutually exclusive.

"It is intended that certain insurance coverages may come within the definitions of two or more kinds of insurance as defined in this chapter, and the inclusion of such coverage within one definition shall not exclude it as to any other kind of insurance within the definition of which such coverage is likewise reasonably includable." *Idaho Code* Section 41-501.

We note through examination of the definitions of kinds of insurance listed under the definition of "casualty insurance" (*Idaho Code* Section 41-506) that vehicle insurance and liability insurance are defined respectively as follows:

"Vehicle insurance. Insurance against loss of or damage to any land vehicle or aircraft or any draft or riding animal or to property while contained therein or thereon or being loaded or unloaded therein or therefrom, from any hazard or cause, *and against any loss, liability or expense resulting from or incidental to ownership, maintenance or use of any such vehicle, aircraft or animal; and provision of medical, hospital, surgical, disability benefits to injured persons and funeral and death benefits to dependents, beneficiaries, or personal representatives of persons killed, irrespective of legal liability of the insured,* when issued as an incidental coverage with or supplemental to insurance on the vehicle, aircraft, or animal. (emphasis added). *Idaho Code* Section 41-506 (1) (a).

and

"Liability insurance. *Insurance against legal liability for the death, injury, or disability of any human being, or for damage to property; and provision of medical, hospital, surgical, disability benefits to injured persons and funeral and death benefits to dependents, beneficiaries or personal representatives of persons killed, irrespective of legal liability of the insured,* when issued as an incidental coverage with or supplemental to liability insurance. (emphasis added). *Idaho Code*, Section 41-506 (1) (c).

We observe that vehicle insurance, as defined in *Idaho Code* Section 41-506 (1) (a) can be broken down into three separate areas only the second of which appears to provide for elements of liability coverages.

1. The first area provides for insurance against loss or damage to any (a) land vehicle; (b) aircraft; (c) draft or riding animal; or (d) to property contained therein, or which is being loaded or unloaded.

2. The second area provides for insurance against loss, *liability* or expense resulting from or incidental to ownership, maintenance or use of any such vehicle, aircraft or animal.
3. The last area provides for insurance against medical, hospital, surgical, disability benefits to injured persons and funeral and death benefits to dependents, beneficiaries, or personal representatives of persons killed, *irrespective of legal liability of the insured*, when issued as an incidental coverage with or supplemental to insurance on the vehicle, aircraft or animal.

We also observe that liability insurance as defined in *Idaho Code* Section 506 (1) (c) may be broken down into two separate areas, only the first of which actually contains elements of liability insurance.

1. The first area provides against *legal liability* for the death, injury, or disability of any human being, or for damage to property;
2. The second area provides for insurance for medical, hospital, surgical, disability benefits to injured persons and funeral and death benefits to dependents, representatives of persons killed, irrespective of legal liability of the insured, when issued as an incidental coverage with or supplemental to liability insurance.

We note that "vehicle insurance" as defined is broader than "liability insurance" as defined to the extent that it covers loss or damage to any land vehicle, aircraft, or draft or riding animal without consideration of legal liability. To this extent "vehicle insurance" is mutually exclusive from "liability insurance" as defined. On the other hand, we note that "liability insurance" as defined is broader than vehicle insurance to the extent that it is "insurance against legal liability for the death, injury or disability of any human being, or for damage to property," [*Idaho Code* Section 506 (1) (c)], whereas the liability provisions for vehicle insurance only extends to liability "resulting from or incidental to ownership, maintenance or use of any such vehicle, aircraft or animal." [*Idaho Code* Section 506 (1) (a)]. Furthermore, with respect to the liability coverages, it appears that "liability insurance" as defined is broader than and includes the liability coverages provided for in "vehicle insurance." They are not mutually exclusive. The liability portion of "vehicle insurance" can be reasonably considered to be included within the definition of liability insurance within the meaning of *Idaho Code* Section 41-501.

The above reasoning appears consistent with the legislative intent in Senate Bill No. 1229, Section (1), "to establish an association to equitably spread the risks for such (medical malpractice) insurance; . . ." (parenthesis added). It appears that the "pending unavailability" and "high cost" of medical malpractice insurance is due in part to the reluctance of individual insurers to underwrite this class of business due to the difficulty of estimating losses many years in the future, and the corresponding difficulty of establishing rates for such insurance which are neither excessive nor inadequate for the coverages provided. In view of the foregoing, it seems reasonable to assume that the legislature intended to

spread the risks inherent to malpractice insurance to as wide a base as possible among the insurers authorized to write, and who are writing liability insurance in the state. Therefore, we conclude that the legislature clearly intended that insurers writing motor vehicle liability insurance in this state would be included as members of the Joint Underwriting Association for medical malpractice insurance.

#### AUTHORITIES CONSIDERED:

1. *Senate Bill* No. 1229, Sections 1 and 3 (1) as enacted by the First Session of the Forty-third Idaho Legislature. (*Idaho Session Laws*, 1975, Chapter No. 163.)

2. *Idaho Code* Sections 41-501, 41-506 (1) (a) and 41-506 (1) (c).

DATED this 6th day of May, 1975.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL

Attorney General

#### ANALYSIS BY:

PETER HEISER, JR.

Chief Deputy Attorney General

#### ATTORNEY GENERAL OPINION NO. 28-75

TO: Pete T. Cenarrusa, Secretary of State

Per request for Attorney General Opinion.

#### QUESTIONS PRESENTED:

1. Under the Sunshine Law, as passed and approved by the voters at the General Election on November 5, 1974, must the candidates and/or the political committees for the general election of 1974, pursuant to Section 7 (a) and (b), file a statement of all contributions received and expenditures made by the candidate or political committee during the campaign and ending on the tenth day after election, and also show under Section 8 the unexpended balances?

2. What is a political committee under Section 2 (m) of the Sunshine Law and who determines the primary purpose of such an organization? Further, what is the meaning of the words "primary purpose?"



3. Assuming that some party committees are political committees as defined in Section 2 (m), what is the statutory deadline for certifying their political treasurers to the Secretary of State pursuant to Section 3 of the Sunshine Law?

4. Must a candidate's political committee, formed for the purpose of electing an individual November 5, 1974, in the general election, certify a political

4. Must a candidate's political committee, formed for the purpose of electing an individual November 5, 1974, in the general election, certify a political treasurer before spending money to pay debts incurred prior to the effective date of the Sunshine Law?

#### CONCLUSIONS:

1. Neither the candidate nor a political committee is obligated under Section 7 or 8 to make any filings of receipts or expenditures concerning the 1974 General Election or unexpended balances from the said General Election.

2. A political committee under Section 2 (m) of the Sunshine Law is any person having as a primary purpose the receipt of contributions or the making of expenditures in support of, or the opposition to a candidate or candidates or any measure. The act specifically includes political parties (groups) as a political committee. The committees themselves first determine whether they fall within the meaning of the act relating to primary purpose and then the responsibility falls with the Secretary of State to make the determination of who or what is a political committee. (i.e. if the person has as its primary purpose the support of a candidate or measure, supra.) The District Courts can also determine as part of the injunctive process the primary purpose of an organization.

3. The statutory deadline for certifying a political treasurer to the Secretary of State by political committees is that point in time before any contribution is received or expenditure made on behalf of a candidate or political committee on or after November 27, 1974.

4. A candidate for political committee formed for the purpose of electing a candidate in November 5, 1974 General Election need not certify a political treasurer before spending money to pay debts incurred prior to the effective date of the Sunshine Law so long as those debts were for the 1974 General Election purposes.

#### ANALYSIS:

The Act as approved by the public as the "Sunshine Initiative" at the General Election on November 5, 1974, was proclaimed law by the Governor of the State of Idaho on November 27, 1974, after certification of the votes by the Secretary of State's office. (34-1803 *Idaho Code* vote certified by Secretary of State)

Section 7 of the Act deals with Reports of Contributions and Expenditures. Section 7 (a) states: "The political treasurer for each candidate and political treasurer of each political committee shall file with the Secretary of State: (3) not more than thirty (30) days after the date of an election in which the candidate or political committee is involved, a statement of contributions received and all expenditures or encumbrances made by or on behalf of the candidate or political committee during the period of the campaign and ending on the tenth day after the election."

Section 8 states: (a) "if a statement filed under paragraph (3) of subsection (a) of Section 7 of this Act shows an unexpended balance of contributions or an expenditure deficit, the political treasurer for the candidate or political committee shall file with the Secretary of State . . ."

Section 25 of the Act speaks of the penalties for failing to comply with the Act: Section 25 (a) states:

Any person who violates the provision of Section 3, 4, 5, 6, 7, 8 . . . of this Act is guilty of a misdemeanor and upon conviction, shall be punished by a fine of not more than Two Hundred Fifty dollars (\$250.00) etc . . . When the violation consists of the failure to file a report or statement or to register on or before a specified date, each day during which such violation continues shall be deemed a separate violation. (b) . . . is guilty of a misdemeanor and upon conviction, in addition to the penalties set forth in subsection (a) of this Section may be imprisoned for not more than six (6) months or be both fined and imprisoned."

Thus, the penalty for violation of Section 7 and 8 is a misdemeanor, a criminal act. The Constitution of the United States prohibits Ex Post Facto laws, as does Article 1, Section 16 of the *Idaho Constitution*. Black's Law Dictionary defines Ex Post Facto at page 662:

"A law passed after the occurrence of a fact or commission of an act which retrospectively changes the legal consequences or relations of such fact or deed" . . . "An 'ex post facto law' has been defined as (1) every law that makes an action, done before the passing of the law, and which was innocent when done, criminal, and punishes such . . . (Citing *Cummings v. Missouri*, 4 Wall 277, 18 L. Ed. 356).

Section 7 of the Act speaks of actions both before an election and after the election. To apply Section 7 of the Act, which did not become effective until November 27, 1974, to the election on November 5, 1974, and forty days before, would make this an Ex Post Facto law. Therefore, the filings required by Section 7 are Ex Post Facto, and of no effect as to the general election of November, 1974.

Section 8 (a) referring to unexpended balances is directly connected with Section 7 in that the reports filed are only necessary if there is a statement filed

under paragraph 3 of subsection (a) of Section 7. Since no statement can be required under 7 (a) (3), there need be no reports under Section 8.

On the date of the certification of the Sunshine law, November 27, 1974, thirty days had not passed since the General Election of 1974. Numerous questions have been raised about reporting funds under Section 7 (a) (3) and 7 (b) by the political candidates and the political committees. To say that there must be a report, since the law went into effect on November 27, 1974, and there were still eight days for a report to be made, does not take into account the fact that the criminal penalty applies to each late day, and each late date constitutes a separate crime. Thus, on December 6, 1974, more than thirty days had expired since the election, and lack of filing on that day would constitute a criminal act, with each subsequent late day, also being a crime. However, on November 6, 1974, it was not a criminal act not to report contributions and expenditures. Therefore, on December 7, 1974, there can be no crime, because the Statute contemplates a thirty day period after the election. Therefore, I conclude that the law would be prohibited as Ex Post Facto if attempted to be applied to the General Election of November, 1974.

What is a political committee under Section 2 (m) of the Act; Section 2 (m) of the Act defines a political committee: "Political committee" means any person having as a primary purpose the receipt of contributions or the making of expenditures in support of, or opposition to, a candidate or candidates, or any measure, and is specifically intended to include parties as defined in Sections 34-109 and 34-501 *Idaho Code*." 2 (b) "Person means: an individual, corporation, association, firm, partnership, committee, club or other organization or group of persons." 34-109 *Idaho Code* provides "Political party means an affiliation of electors representing a political group under a given name as authorized by law." 34-501 *Idaho Code* provides: "(1) A political party, within the meaning of this Act is an organization of electors under a given name."

A political party is formed with the State Central Committee heading the organization. The Party is then divided into Central Committees of each Legislative District. The powers and duties of County Central Committees and Legislative District Central Committees are those prescribed by State law and rules and regulations are promulgated and adopted by the State conventions or the State Central Committee.

The answer to the question of whether the County Central Committee and the Legislative District Committee are themselves a political committee can only be answered with the rules and regulations promulgated and adopted by the State conventions and/or State Central Committee. If the primary purpose of the central county or legislative committee is the receipt of contributions or the making of expenditures in support of, or opposition to, a candidate, or candidates, OR ANY MEASURE, then it is a political committee and must designate a political treasurer who must be certified to the Secretary of State . . . "

If the political committee (party) receives or expends funds prior to the appointment of a political treasurer, then the committee may have committed a misdemeanor under Section 25. (Of course, a problem arises as to who might be

guilty of such a crime if the committee is indeed a committee instead of a person in as much as only persons are answerable for crimes.)

Who determines the primary purpose of a political committee under the Sunshine Act? The persons, or organization itself, must have the first responsibility to determine if they are political committees under the definition of law. These persons or organizations would be in the best position to know whether the primary purpose is the receipt of contributions or the making of expenditures in support of, or opposition to, a candidate or candidates, or any measure.

The Secretary of State has the secondary duty as an obligation of his office to determine what a person's primary purpose is. This action must be taken to review a decision by a person that his primary purpose does not make him a political committee under Section 2 (m).

The Secretary of State has the duty to enforce the provisions of the Act under Section 23. Section 23 (d) states: "[it shall be his duty] to make investigations with respect to statements filed under the provisions of this act, and with respect to alleged failures to file any statement required under the provisions of this act, and upon complaint by any person with respect to alleged violations of any part of this act; (e) to report suspected violations of law to the appropriate law enforcement authorities. It therefore is the duty of the Secretary of State to determine whether any organization or person is a political committee whenever the organization or person has not so decided."

The third method for determining primary purpose is review by a District Court by means of a citizen's action brought for injunctive relief under Section 26 of the Act:

"The district courts of this state shall have original jurisdiction to issue injunctions to enforce the provisions of this act upon application by any citizen of this state or by the Secretary of State."

Therefore, the district courts of the State of Idaho in contemplating and issuing injunctions will have the authority to determine who is a political committee; since before they can issue an injunction pursuant to Section 26 of the Act, they would first have to determine whether the organization has the required purpose of a political committee as defined in Section 2 (m).

Defining what the words "a primary purpose" means involves understanding the statutory purpose of the Act, and examination of the questioned activities in light of the total organizational activity. In close cases each situation will have to be determined on its own merits.

"Primary purpose" being a generic expression in the law, case law applying it is not extremely helpful. The usual definitions are "first in intention" and "fundamental." *State v. Erickson*, 44 S.D. 63, 182 N.W. 315, 13 A.L.R. 1189, is the case usually referred to in support of those definitions. That case dealt with the situation of whether a parsonage should be exempt from taxation as property used exclusively for religious purposes. These definitions are less adequate

when the purpose is to decide not what the exclusive interest of an organization is, but whether a given activity is reflective of a primary purpose among several purposes.

In *Board of Governors of Federal Reserve System v. Agnew*, 329 U.S. 441, the issue was whether a bank officer's side business in securities was significant enough to be the type of primary business interest which would result in a violation of the 1933 banking laws. That law prohibited those whose primary business involved security transactions from being bank officers.

Justice Douglas' writing for the majority stated:

The Court of Appeals concluded that when applied to a single subject, "primary" means first, chief or principal; that a firm is not "primarily engaged" in underwriting when underwriting is not by any standard its chief or principal business. Since this firm's underwriting business did not by any quantitative test exceed 50 percent of its total business, the court held that it was not "primarily engaged" in the underwriting business within the meaning of Section 32 of the Act.

We take a different view. It is true that "primary" when applied to a single subject often means first, chief, or principal. But that is not always the case. For other accepted and common meanings of "primarily" are "essentially" (Oxford English Dictionary) or "fundamentally" (Webster's New International). An activity or function may be "primary" in that sense if it is substantial. If the underwriting business of a firm is substantial, the firm is engaged in the underwriting business in a primary way, though by any quantitative test underwriting may not be its chief or principal activity." 91 L. Ed at 413.

Justice Douglas reasoned that a professional man who holds himself out to all the public for business in that profession, could be primarily engaged in that profession notwithstanding the fact that the bulk of his income is derived from stock dividends.

The essential thrust of this case supports the view that an organization or person may be considered as having a "primary purpose" qualifying as a political committee under Section 2 (m) of the Sunshine Law, despite the fact that it has other purposes which may appear to be substantial or also primary.

An example of this is the County Central Committees. The apparent primary purpose of the Committees is to promote politics, promote political philosophies, and obtain the election of its party members to public office. Its primary purpose may not appear to be that of receiving or expending funds for the support of candidates, but the total picture includes the activity of using the funds they receive to support and elect candidates.

Another example is that of a group of citizens who desire to support a person for political office. They may be united in their voluntary work, but at some point may collect funds.

Therefore, we conclude that the words, "primary purpose" has a broad meaning, and if one of the substantial purposes of the committee is the support of a candidate or candidates or a measure, either directly or indirectly, then that support would fall within the meaning of primary purpose. The meaning of primary purpose can only be determined after the Secretary of State has all the facts about the committee, its purposes and organization, and only then can the words "primary purpose" be used in a case by case analysis.

If we assume that some party committees are political committees as defined in Section 2 (m), the statutory deadline for certifying their political treasurers to the Secretary of State pursuant to Section 3 of the Sunshine Law is that point in time before any funds are received or expended. Section 3 (c) of the Act states:

"No contribution shall be received or expenditure made by or on behalf of a candidate or political committee (1) until the candidate or political committee appoints a political treasurer and certifies the name and address of the political treasurer to the Secretary of State, or in the event of a vacancy in the office of political treasurer, has certified the name and address of the successor as provided therein; and (2) unless the contribution is received or expenditure made by or through the political treasurer for the candidate or political committee."

The Sunshine Law was effective on November 27, 1974. This means that any political party, (assuming that they are a political committee as aforesaid) should certify a political treasurer under Section 3 before it receives or expends any funds on or after November 27, 1974. Failure to certify is a violation of the Act.

A candidate is defined by this Act through Section 2 as an individual who is taking an affirmative action to seek nomination or election to public office. It is incomprehensible to believe that after the election November 5, 1974, a person who was a candidate for election on November 5, 1974, has not returned to the status of an individual, not a candidate, since the Sunshine Initiative was not effective prior to November 5, 1974, the group or committee operating to pay debts for the election of 1974 is not a political committee under the definition under Section 2 (m) in that the person is no longer a candidate and therefore does not have to certify a political treasurer for expending money to pay debts.

If that same person or persons, becomes again a candidate for some office under the definition of 2 (a) and such funds are expended in anticipation of further political action; then before such funds are expended, the committee should certify a political treasurer.

#### AUTHORITIES CONSIDERED:

1. Sunshine Initiative, Section 2, 3, 7, 8, 23, 25, 26.
2. *Idaho Code*, Section 34-109, Section 34-501.

3. Black's Law Dictionary.
4. *State v. Erickson*, 44 S.E. 63, 182 N.W. 315, 13 A.L.R. 1189.
5. *Carlson v. Carpenter Contractor's Assn*, 244 Ill. App. 430, 447.
6. *Board of Governors of Federal Reserve System v. Agnew*, App. D.C. 329 U.S. 441, 67 S. Ct. 411, 91 L.Ed. 408.

DATED this 7th day of May, 1975.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL  
Attorney General

ANALYSIS BY:

GORDON S. NIELSON  
Senior Deputy Attorney General  
Chief, Criminal Justice Division

### ATTORNEY GENERAL OPINION NO. 29-75

TO: Commissioner Don C. Loveland  
Idaho State Tax Commission  
5257 Fairview  
P.O. Box 36  
Boise, ID 83722

Per request for Attorney General Opinion.

**QUESTION PRESENTED:** Is portable sprinkler pipe leased by a farmer and used by him to convey water for the irrigation of his lands taxable to the owner (lessor) as personal property or is it exempt from the ad valorem tax?

**CONCLUSION:** Portable sprinkler pipe leased by a farmer and used by him to convey water for the irrigation of his land is not taxable to the owner (lessor) and is exempt from the ad valorem tax.

**ANALYSIS:** Answering the question presented requires consideration of the general rules of construction of tax exemption statutes and the legislative history of § 63-1051 (2), *Idaho Code*, the statute under which exemption must be sought.

The pertinent part of § 63-1051 (2), *Idaho Code*, provides as follows:

"2. Canals, ditches, pipelines, flumes, aqueducts, reservoirs, dams, and any other necessary facility used primarily for the conveyance, storage, or providing of water for the irrigation of lands, are exempt

from taxation to the extent irrigation water is thereby conveyed, stored or diverted; provided that if any portion of such property is used for purposes other than irrigation of lands or the conveyance, storage, or providing of water to a nonprofit irrigation company or irrigation district, the assessor shall determine the entire value of such property so used and assess the proportionate part of such property that is devoted to such use." (Emphasis supplied)

On the face of this statute the prerequisites to exemption are:

1. That the facility claimed to be exempt is described in the statute;
2. That the facility be used primarily for the conveyance or providing of water for the irrigation of land or for the conveyance, storage or providing of water to a nonprofit irrigation company or irrigation district.

Since portable sprinkler pipe falls within the common meaning ascribed to the word "pipeline" and since the question presented assumes that the portable sprinkler pipe is used primarily for the purpose of conveying water for the irrigation of a farmer's lands, all of the requirements for exemption appear to have been met.

However, since the owner of property rather than his lessee is liable for the ad valorem tax on personal property unless otherwise provided by statute, one might presume that the exemption is not applicable unless the owner, here a lessor, puts the property to the prescribed use. Under the statute, that use is, "... primarily for the conveyance ... or providing of water for the irrigation of lands ... ." The question presented assumes that the farmer (lessee) meets this "use" test, but it is obvious that the lessor himself does not so use the sprinkler pipelines after he has given up possession of them under the lease to a farmer.

The earliest statute exempting irrigation facilities from the ad valorem tax required the facility claimed as exempt to be owned by owner of the lands served by the facility. In other words, both ownership and use were required to reside in the same person. *Swank v. Sweetwater Irrigation & Power Co., Ltd*, 15 Idaho 353, 359, 98 P. 297 (1908); *Spokane Valley Land & Water Co. v. Kootenai County*, 199 F. 418 4851 (D. Idaho, 1912); R.S., Idaho, Sec. 1402 (S.L. 1899, p. 221). The latter statute provided as follows:

"The following property is exempt from taxation:

"All irrigating canals and ditches and water rights appurtenant thereto, when the owner or owners of said irrigating canals and ditches use the water thereof exclusively upon land or lands owned by him, her or them; Provided, in case any water be sold or rented from any such canal or ditch, then, in that event, such canal or ditch shall be taxed to the extent of such sale or rental." (emphasis supplied)



Under this earliest statute, Idaho's Federal Court held in 1912 that where the corporate owner of the canals, which were claimed as exempt, had deeded Idaho land to individuals with the obligation to deliver water without charge to the land but retained legal title to the canals and their management and control, including the obligation to maintain and operate them, they were not exempt. The landowners had no property interest in the canal, either legal, equitable or beneficial upon which the court could find coextensive ownership of the canals and lands served by the canals. *Spokane Valley Land & Water Co. v. Kootenai County*, supra. In that case, Judge Dietrich made the following observations:

"If we take cognizance of the several classes of irrigating systems prevailing in Idaho, *it must be admitted that the language of the statute was not aptly chosen to make the distinction which it is reasonable to suppose was intended by the Legislature.* There are small itches, and possibly a few large canals, where, strictly speaking, the ownership of the irrigating works and the ownership of the lands irrigated rest in the same person or persons; but generally in the maintenance and operation of systems of considerable magnitude associational or joint ownership is found to be unwieldy, if not wholly impracticable, and incorporation is resorted to as furnishing a more efficient and satisfactory method of administration and control. From an early day, a common, if not the most common, type of ownership in Southern Idaho, where irrigation almost universally prevails, is a species of corporation, the stockholders in which are the farmers who actually use the water upon their farms, each share of stock entitling the holder to the use of a certain amount of water, or water sufficient for the irrigation of a certain amount of land, and the assessments or dues upon such stock are sufficient only and are levied for the sole purpose of defraying the expenses of maintaining and operating the system. *Hall v. Eagle Rock & Willow Creek Water Co.*, 5 Idaho 551, 51 Pac. 110.

"In the case of such corporations, strictly speaking, the legal title to the canal and appurtenant water right is in the corporation, whereas the water is used upon land belonging severally to the individual stockholders, and therefore there is not absolute identity of ownership of the irrigating system and the irrigated lands. No reason, however, is apparent why such a canal should, for the purposes of taxation, be differentiated from a canal directly held by the water users as joint owners thereof. The corporation but holds the naked legal title in trust for its stockholders, and the owners of the land as stockholders are therefore the beneficial owners of the canal, possessing all the powers of control and disposition incident to the full ownership. It is therefore thought that, under a fair construction of the statute, such canals must be held to be exempt from taxation. *But obviously there are material distinctions between such a system of ownership and one like that described in the amended complaint . . .*" (Emphasis supplied)

In reaction to the decision of Judge Dietrich in *Spokane Valley Land & Water Company*, supra., the Idaho legislature, in 1913, amended the statute by eliminating the requirement that the owner of the canal must own the land irrigated

by it. The statute as amended, Session Laws 1913, pg. 173, C.S. 1919, Section 3099 (14), provided as follows:

"14. Irrigation canals and ditches and water rights appurtenant thereto when no water is sold or rented from any such canal or ditch, only to the extent that the water conveyed by such canal or ditch is used to irrigate lands within this state; *Provided*, That in case any water be sold or rented from any such canal or ditch to irrigate lands within this state, then, and in that event, such canal or ditch shall be assessed for taxation to the extent that such water is so sold or rented."

This statute remained in effect and unchanged until its amendment in 1961 [Session Laws of 1961, Chapter 42, p. 62, § 63-105I, *Idaho Code*] which was technically amended again in 1973 [Session Laws 1973, Chapter 140, Section 1, p. 271, § 63-105I, *Idaho Code*]. The eliminated requirement has never been reinstated. The exemption provision in its current form as amended in 1973, § 63-105I, *Idaho Code*, provides:

"63-105I. Property exempt from taxation — Irrigation water and structures — Operating property of irrigation districts or canal companies. —

"1. Water rights for the irrigation of lands are exempt from taxation.

"2. Canals, ditches, *pipelines*, flumes, aqueducts, reservoirs, dams, *and any other necessary facility used primarily for the conveyance, storage, or providing of water for the irrigation of lands, are exempt from taxation to the extent irrigation water is thereby conveyed, stored or diverted*; provided that if any portion of such property is used for purposes other than irrigation of lands *or the conveyance, storage, or providing of water to a nonprofit irrigation company or irrigation district*, the assessor shall determine the entire value of such property so used and assess the proportionate part of such property that is devoted to such use.

"3. The operating property of all organizations, whether incorporated or unincorporated, heretofore organized or which shall hereafter be organized, for the operation, maintenance, or management of an irrigation project or irrigation works or system or for the purpose of furnishing water to its landowners, members or shareholders, the control of which is actually vested in those entitled to the use of the water from such irrigation works or system for the irrigation of lands to which the water from such irrigation works or system is appurtenant, is exempt from taxation. The term 'operating property' as used in this section shall include all real and personal property owned, used, operated or occupied primarily for the maintenance and operation of such irrigation project or irrigation works and system or in conducting its business of furnishing water to its landowners, members or shareholders and shall include all title and interest in such property as owner, lessee, or otherwise; provided, that if any portion of such operating property is used for commercial purposes by others than its landowners, members or

shareholders, the assessor shall determine the entire value of such portion of the operating property so used and assess the proportionate part of such operating property that is used for commercial purposes." (Emphasis supplied)

Subsection "2" of the above statute is the current version of the statute originally enacted in 1899 and amended in 1913 both of which are hereinabove reiterated. The 1961 and 1973 amendments extend the exemption to include pipelines, flumes, aquaducts, reservoirs, dams and any other necessary facility used primarily for providing water to irrigate lands. It contains no provision requiring the owner of the pipeline to also use it to irrigate the land. Therefore, this statute is as silent now as it was after its 1913 amendment on the question whether the owner of the canal or pipeline claimed as exempt must himself put the canal or pipeline to the required use. Wisdom dictates an examination of some of the general rules of construction of tax exemption statutes:

1. All property within the state of Idaho is liable to ad valorem taxation unless expressly exempt, and where exemption is claimed, it must be clearly defined and founded upon plain language, without doubt or ambiguity, and must come within the plain wording of the statute. *Malad Second Ward of the Church of Jesus Christ of Latter Day Saints v. State Tax Commission*, 75 Idaho 162, 269 P.2d 1077 (1954).
2. The basis of tax exemptions is the accomplishment of a public purpose and not the favoring of particular persons or corporations at the expense of taxpayers generally. *Sunset Memorial Gardens, Inc. v. Idaho State Tax Commission*, 80 Idaho 206, 327 P.2d 766 (1958).
3. Exemption from taxation is never presumed. *Kootenai County v. Seven-Seven Company*, 32 Idaho 301, 182 P. 529 (1919).
4. The statutes granting tax exemptions, as a matter of legislative grace, are strictly construed against the taxpayer and in favor of the state; they cannot be extended by judicial construction so as to create an exemption not specifically authorized. *Sunset Memorial Gardens, Inc. v. Idaho State Tax Commission*, supra; *Malad Second Ward of the Church of Jesus Christ of Latter Day Saints v. State Tax Commission*, supra.
5. Statutes granting exemptions from taxation are not to be read so literally as to thwart their purpose or destroy their spirit. *Spokane Valley Land & Water Co. v. Kootenai County*, 199 F. 481 4851 (D. Idaho, 1912).

Even though the statute on its face is as silent now as it was after its 1913 amendment, in view of the facts that exemption was once legislatively conditioned upon use by the owner of the irrigation facility (canal, pipeline, etc.) to irrigate his land and that subsequently, as the result of a court decision pointing out the inaptness of that condition to the accomplishment of any valid pur-

pose, the legislature eliminated the condition, the legislature's intent and purpose becomes perfectly clear. Ownership of the canal or pipeline and its use for irrigation are not required to reside in the same person. A contrary conclusion would thwart the obvious purpose of the 1913 amendment. In the intervening period, the legislature has not indicated any intention to change the purpose of the exemption.

The recent case of *Clair Kracaw & Sons, Inc. v. Goodwin*, 94 Idaho 465, 491 P.2d 182 (1971), is not directly in point because the property there claimed to be exempt, portable pipelines equipped with sprinkler heads, was owned and used for irrigation by the same person. The case is persuasive, however, because the lands, exempt Indian lands, were leased by the owners of the portable pipelines so that coextensive ownership of both pipelines and land was not present. The court held that the pipelines were clearly exempt.

#### AUTHORITIES CONSIDERED:

1. Idaho Statutes: R.S. Sec. 1402 (S.L. 1899, p. 221); C.S. 1919, Sec. 3099 (14) (S.L. 1913, p. 173); § 63-105I, *Idaho Code* (S.L. 1961, Ch. 42, p. 62 as amended by S.L. 1973, Ch. 140, pg. 271).

2. *Malad Second Ward of the Church of Jesus Christ of Latter Day Saints v. State Tax Commission*, 75 Idaho 162, 269 P.2d 1077 (1954).

3. *Sunset Memorial Gardens, Inc. v. Idaho State Tax Commission*, 80 Idaho 206, 327 P.2d 766 (1958).

4. *Kootenai County v. Seven-Seven Company*, 32 Idaho 301, 182 P. 529 (1919).

5. *Lewiston Orchards Irrigation District v. Gilmore*, 53 Idaho 377, 23 P.2d 720 (1933).

6. *Spokane Valley Land & Water Co. v. Kootenai County*, 199 F. 481 4851 (D. Idaho, 1912).

7. *Swank v. Sweetwater Irrigation & Power Co. Ltd.*, 15 Idaho 353, 359, 98 P. 297 (1908).

8. *Clair Kracaw & Sons, Inc. v. Goodwin*, 94 Idaho 465, 491 P.2d 182 (1971).

DATED this 19th day of June, 1975.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL  
Attorney General

## ANALYSIS BY:

WILLIAM McDOUGALL  
Assistant Attorney General

## ATTORNEY GENERAL OPINION NO. 30-75

TO: Robert Lenaghan  
Idaho Public Utilities Commission  
Statehouse

Per request for Attorney General Opinion.

QUESTION PRESENTED: Will the provisions of Senate Bill 1111 be applicable to applications filed by public utilities prior to the effective date of Senate Bill 1111 (March 21, 1975) to "... raise any rates, fare, toll, rental or charge or so alter any classification, contract, rule or regulation as to result in an increase in any rate, fare, toll, rental or charge ...?"

CONCLUSION: No, Senate Bill 1111 is to be given a prospective application only.

ANALYSIS: Senate Bill 1111 amends Section 61-622, *Idaho Code*, to allow the Idaho Public Utilities Commission to hold in-suspension any action by a public utility which would effectively raise the rate, fare, toll, rental or charge imposed by that public utility for a period of 30 days from the date such action is to take effect. The Commission may thereafter extend the period of suspension for a period not to exceed 5 months. The practical effect of this amendment is to sustain a utility's unilateral raise of any rate, fare, toll, rental or charge should the Idaho Public Utilities Commission be unable or otherwise omit to establish "just and reasonable" rates within 6 months from the Commission's order of suspension. A retroactive application of this statute would constrict this 6-month period. Should the Commission have a scheduled rate increase under investigation and that investigation presently extending beyond the 6-month period, a retroactive application of Senate Bill 1111 would effectively moot any further inquiry and deem the rate in question to be in full force and effect. Any such construction of Senate Bill 1111 would vitiate the requirements of that enactment as stated therein.

The Idaho Supreme Court has repeatedly held that statutory enactments are to have prospective applications unless the enactment in question clearly shows that a retroactive construction was intended by the Legislature. *Application of Forde L. Johnson Oil Company*, 84 Idaho 288, 297, 372 P.2d 135 (1962); *Kent v. Idaho Public Utilities Commission*, 93 Idaho 618, 621, 469 P.2d 745 (1970). No such intent is manifested in the language of Senate Bill 1111. It is therefore my opinion that Section 61-622 as amended by the Forty-third Legislature in the form of Senate Bill 1111 is to be given prospective application only.

## AUTHORITIES CONSIDERED:

1. Section 61-622, *Idaho Code*.
2. *Application of Forde L. Johnson Oil Company*, 84 Idaho 288, 297, 372 P.2d 135 (1962).
3. *Kent v. Idaho Public Utilities Commission*, 93 Idaho 618, 621, 469 P.2d 745 (1970).

DATED this 30th day of May, 1975.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL  
Attorney General

## ANALYSIS BY:

CHRISTOPHER D. BRAY  
Assistant Attorney General

## ATTORNEY GENERAL OPINION NO. 31-75

TO: Mr. James Kimball, Supervisor  
Regional Division of Environment  
P.O. Box 608  
Coeur d'Alene, Idaho 83814

Per request for Attorney General Opinion.

QUESTION PRESENTED: Is the Hayden Lake Irrigation District a "public water supply" as defined in Section 39-103 (15), *Idaho Code*?

CONCLUSION: The Hayden Lake Irrigation District is a "public water supply" within the meaning of Section 39-103 (15), *Idaho Code*, and therefore subject to the provisions of the *Rules and Regulations for the Protection of Public Water Supplies in the State of Idaho* and the *Idaho Drinking Water Standards*, both adopted by the Idaho State Board of Health on November 5, 1974.

ANALYSIS: The facts in this matter are summarized as follows: Hayden Lake for many years has suffered increasing levels of pollution as the result of direct sewage disposal into its waters, seepage from septic tanks on adjacent lands and a wide variety of recreational uses. Hayden Lake Irrigation District takes its water directly from the lake and pumps it to its customers. Until recently this water was untreated, but approximately one and one half years ago the District added a simple chlorination device, one of the components of which was sited in violation of the applicable Idaho Public Drinking Water Regulations. Since that time there have been occasional instances when the water in the system was below the state's minimum quality required for drinking water.

The governing body of Hayden Lake Irrigation District has consistently maintained that it is an *irrigation* district and not a public water supply as insisted by the Idaho Department of Health and Welfare. They have therefore refused to institute the changes in the system that would make it acceptable as a public water supply.

During the period of this controversy there has been no other community-wide source of water within the district. Hayden Lake Irrigation District has published notices that its water is intended for irrigation purposes, however there are approximately 1,000 families being served domestically. It is also worthy of note that the district charges for both irrigation and "farmstead" water and that at least one trailer court is served in this manner as well as a school and many public buildings and private businesses.

Among the powers and duties delegated by the legislature to the Director of the Department of Health and Welfare is the authority to enforce standards, rules and regulations relating to public water supplies. Section 39-205.3.e, *Idaho Code*. "Public water supply" is defined as "... all mains, pipes and structures through which water is obtained and distributed to the public, including wells and well structures, intakes and cribs, pumping stations, treatment plants, reservoirs, storage tanks and appurtenances, collectively or severally, *actually used* or intended for use for the purpose of furnishing water for drinking or general domestic use in incorporated municipalities; or unincorporated communities where ten (10) or more separate premises or households *are being served* or intended to be served; *or any other supply which serves water to the public and which the Department of Health and Welfare declares to have potential health significance.*" (Emphasis added.) Section 39-105 (15), *Idaho Code*.

With specific reference to the last phrase of Section 39-103 (15), *supra*, the Director of the Department of Health and Welfare declared the Hayden Lake Irrigation District's water distribution system to have "an actual and potential health significance" by letter addressed to Mr. George Richmond dated September 24, 1973. A copy of said letter is attached hereto.

In addition to the Director's letter to Mr. Richmond a review of the facts in this matter reveals that the facilities of the Hayden Lake Irrigation District are "actually used" for the distribution of water for "drinking or general domestic use." Indeed no other water supply exists for this purpose. The district also utilizes a separate billing category termed "farmstead" for water used domestically, as opposed to the category of water used solely for irrigation. The district is therefore subject to the applicable rules and regulations adopted by the Idaho Board of Health and Welfare for the supervision of public water supplies. The professed refusal of the district's governing board to accept designation as a public water supply carries no weight in the face of the fact that actual distribution of drinking water is occurring. (See Section 39-103(15), *supra*.)

I hope the above will aid you in settling the continuing dispute with the irrigation district. If I may be of further service please do not hesitate to contact me.

DATED this 20th day of May, 1975.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL  
Attorney General

ANALYSIS BY:

R. M. MacCONNELL

**ATTORNEY GENERAL OPINION NO. 32-75**

TO: Gordon C. Trombley, Director  
Department of Lands

Per request for Attorney General Opinion.

QUESTION PRESENTED: A portion of § 58-314, *Idaho Code* dealing with the sale of state owned lands reads:

Provided that the conveyance by said deed shall be subject to reasonable easements for all roads used by the public which exist at the time of sale, unless the county commissioners of the county in which the roads are situated approve the release of such easements and the deed expressly conveys said easements.

roads are situated approve the release of such easements and the deed expressly conveys said easements.

Query: Is it possible that easements may be prescriptively acquired against state land, thus allowing County Commissioners to claim existing roads without paying reasonable compensation?

CONCLUSION: No, Art. IX, § 8 of the *Constitution of the State of Idaho* provides that all dispositions of land shall be made in such a manner as to "secure the maximum possible amount", thus state land dedicated to a public use or school endowment land cannot be acquired by prescription or adverse possession.

ANALYSIS: Section 58-314, *Idaho Code* provides that all deeds for land purchased from the state shall be issued in fee simple, unless easements exist at the time of the sale or unless the county lawfully retains the easement rights. Since title to state land may not be obtained by prescription, then it is not possible for a county to adversely possess state land for right of way purposes. *Hellerud v. Hauck*, 52 Idaho 226, 13 P.2d 1099 (1932). Thus any adverse use would be considered a trespass and no legal rights would thereby vest in the trespasser.

Section 5-202, *Idaho Code* provides for a ten year statute of limitations for adverse possession against the government. This section would not apply to pos-



sessions of state land dedicated to public use or to school endowment land because Article IX, Section 8 of the *Idaho Constitution* requires compensation for the disposition of state land. In a recent case, *Rutledge v. State*, 94 Idaho 121, 482 P.2d 515 (1971), the Idaho Supreme Court ruled that state owned property which formerly constituted a navigable river bed could lose its status as immune from adverse possession when the reasons for holding property in trust for the public benefit cease to exist, then the land loses its unique and special benefits to the general public and therefore may be adversely possessed. In the specific question presented, concerning prescriptive easements for county highway purposes, the status of the state land has not been altered so as to destroy its "public use", therefore *Rutledge* is not controlling, thus full compensation would be constitutionally necessary.

In order for County Commissioners to obtain legal title to state land they must purchase rights of way as per § 58-603, *Idaho Code*. Compensation for such rights is determined by the State Board of Land Commissioners, but in no instance may public school land be sold for less than ten dollars (\$10) per acre. (Art. IX, 2 8, *Idaho Constitution*)

It would appear, therefore, that private individuals or counties may only obtain fee title in state land by purchase in fee or the purchase of an easement. Naturally, during the period of time that the state owns the land, the counties or any individual or group of individuals may utilize roads on state land with permission of the state. However once such permission is denied they become trespassers on the state land. In any conveyance of state owned land to a purchaser, the State of Idaho cannot convey by deed, that portion of the land which has been previously conveyed to others for value in the form of an easement. The state may, however, prior to sale, wish to negotiate with private individuals, or counties that may have an interest in purchasing an easement for an existing road on the state land. They may then sell an easement to those parties and then convey the tract of state land to the purchaser subject to the newly negotiated easement. Further, the state may exempt out any portion of a proposed land sale, thus conveying only that portion of the public land involved in the sale which was not exempt thereby. However, the title to that land still does remain in the state and therefore no problem with lack of compensation is involved. Should the State of Idaho at a later date determine that the road should be maintained as a county road or that the county is in need of utilizing that road, the state must charge those individuals or the county for the use of the land exempted from the original sale.

Simply because a road resulting from either trespass or permissive use by the public exists on a parcel of state land which is to be placed up for sale does not mean that an "easement" exists and does not negate the state's duty to require the maximum possible reimbursement for the disposal of any and all state-owned land.

It is therefore my opinion that full compensation is required for the sale of all types of state land. This would include both state land and existing roads which pass through state land and are presently being used in trespass or by reason of permissive use. County Commissioners may be given first option to pur-

chase an easement for existing roadways, if they fail to do such, then fee simple title shall pass to the purchaser of the entire tract.

**AUTHORITIES CONSIDERED:**

1. *Idaho Constitution*, Art. 9, § 8.
2. *Idaho Code*, § 58-314.
3. *Idaho Code*, § 58-603.
4. *Idaho Code*, § 5-202.

DATED this 4th day of June, 1975.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL  
Attorney General

**ANALYSIS BY:**

ARTHUR J. BERRY  
Legal Intern

**ATTORNEY GENERAL OPINION NO. 33-75**

TO: Mrs. Virginia Rickets  
Secretary-Treasurer  
Idaho Association of Clerks and Recorders  
c/o Courthouse  
Jerome, ID 83331

Per request for Attorney General Opinion,

**QUESTION PRESENTED:** In all computations for tax reduction in Title 63, Chapter 1 [Secs. 63-117 — § 63-125, *Idaho Code*] is the current year's assessed valuation and the preceding year's levy to be used; or, is the amount of actual tax reduction to be recomputed after the current year's levies are set by the County Commissioners the second Monday in September?

**CONCLUSION:** The preceding year's levy is to be used in all computations of tax reduction under Sections 63-117 through 63-125, *Idaho Code*, the "Circuit Breaker" tax relief measure.

**ANALYSIS:** Sections 63-117 through 63-125, *Idaho Code*, which make up what is popularly known as a "Circuit Breaker Bill", grant tax relief by way of tax reduction to persons 65 years of age and older (and to other persons) if their "household income" does not exceed \$5,000.00. The amount of the reduction

is graduated and is based upon the amount of the household income of a "household", the maximum amount of annual reduction being the sum of \$200.00.

The issue raised by the question presented is whether under Idaho's Circuit Breaker legislation, the previous year's mill levy is the only levy used in the computation of the amount of tax reduction or whether the amount of the tax reduction is finally arrived at through a second computation made five months later by using the current year's mill levy after it has been determined in September of the taxable calendar year. If the latter alternative is correct, the first computation, which is made by May 1 of the calendar year, will be discarded in favor of the second computation. In analyzing the issue it is important to keep in mind the fact that the amount of the current year's levies for all property tax districts in the state of Idaho are not known and therefore are not available for use in any computation, until after the second Monday of September of each year when they are fixed in accordance with law by the boards of county commissioners. Section 63-901, *Idaho Code*.

The question presented assumes the correctness of making the April 1st computation of tax reduction by applying the previous year's levy to the current year's assessed valuation. That conclusion is correct as indicated by the provisions of Sections 63-120 (3) (a) and 63-122 (1) (d) which provide the sole (and identical) formula for the May 1st computation of tax reduction. The pertinent parts of Sections 63-122 and 63-120, *Idaho Code*, are as follows:

"63-120. AMOUNT OF TAX REDUCTION. — (1) Each claimant qualifying for and applying for a reduction in taxes under the provisions of sections 63-117 through and including 63-125, *Idaho Code*, shall be allowed a reduction in taxes for the current year only, in the amounts provided by subsection (4) of this section.

(2) All taxes continue to be the responsibility of the individual taxpayer, all taxes continue to be liens against the property against which assessed, and all taxes may be collected and enforced in the usual manner, if the taxpayer does not receive any tax reduction as provided under the provisions of sections 63-117 through and including 63-125, *Idaho Code*, or if the taxpayer receives less tax reduction than the whole amount of taxes he is charged with.

(3) The amount of tax reduction that each claimant may receive shall be initially estimated by the county assessor by: (a) Estimating the amount of taxes due for the current year by applying last year's mill levies to the current year's assessed value of the property of the claimant; (b) Calculating a reduction in the estimated taxes otherwise due.

(4) Reductions shall be allowed as follows:

When claimant's household income is:                      The reduction may be:

Under \$3,000	\$200, or <i>actual taxes</i> , whichever is less;
\$3,001, but not more than \$3,500	\$17, or <i>actual taxes</i> , whichever is less;
\$3,501, but not more than \$4,000	\$150, or <i>actual taxes</i> , whichever is less;
\$4001, but not more than \$4,500	\$125, or <i>actual taxes</i> , whichever is less;
\$4,501, but not more than \$5,000	\$100, or <i>actual taxes</i> , whichever is less;
(Emphasis supplied)	

“63-122. PROCEDURE AFTER CLAIM APPROVAL. — (1) Immediately after claims have been approved by the board of equalization, the county assessor shall prepare a property tax reduction roll, which shall be in addition to the real property assessment roll, and the personal property assessment roll, which property tax reduction roll shall show: (a) the name of the taxpayer; (b) the description of the property for which a reduction in taxes is claimed, suitably detailed to meet the requirements of the individual county; (c) the property's current market value, and current assessed value; (d) *the current year's taxes, calculated by using current year's assessed values and last year's mill levies;* (e) *the amount of the tax reduction.*

“(2) As soon as possible, but in any event by no later than the fourth Monday of July, an abstract of the property tax reduction roll shall be certified to the state tax commission in the manner prescribed by section 63-413, *Idaho Code*. The abstract shall be accompanied by a copy of the approved claims form signed by each claimant. . .” (Emphasis supplied)

To obtain circuit breaker tax relief a claimant must file his claim with the county assessor by March 15 of the taxable calendar year. Section 63-121, *Idaho Code*. If the claim establishes to the assessor's satisfaction that the claimant is eligible for relief the assessor computes the amount of tax reduction to which claimant is entitled in accordance with the provisions of Section 63-120, *Idaho Code, supra*. Section “(1) of that code section provides that each claimant shall be entitled to a reduction in taxes in the amount provided by subsection (4)”. Subsection (4) provides that “reductions” shall be allowed in stated maximum amounts or actual taxes, whichever is less. Obviously no one has a problem determining the amount of the statutory maximum. No computation is required for its determination. The problem is in determining what is meant by the phrase “actual taxes”. One view is that it means taxes computed by applying the current year's levy after such levy becomes known on the second Monday of September to the current year's assessed value. The other view is that it means taxes computed by applying the previous year's levy to the current year's assessed valuation.

The latter view is the most acceptable one.

These statutes provide a solitary formula for computing an otherwise unknown amount. They further require that the unknown amount be determined and fixed within a given time frame (by April 1 of each year). That formula in express terms requires the use of the previous year's levy. Although it is true that the product of the use of that formula is variously referred in the statutes as an estimate of the amount of taxes due for the current year [Section 63-120 (3) (a), *Idaho Code*], the current year's taxes [Section 63-122 (d), *Idaho Code*] and actual taxes [Section 63-120 (4), *Idaho Code*], it is the determination of the amount which is in question and only one formula is authorized for the computation of that amount. No one would agree, for example, that "current taxes" are as a general rule computed by applying the previous year's levy to the current year's assessed valuation. But that is precisely what is provided for computing tax reduction for the purpose of circuit breaker tax relief. Section 63-122 (d), *Idaho Code*. The phrases "current year's taxes", "estimating . . . taxes" and "actual taxes" are used synonymously and interchangeably in Sections 63-117 through 63-125, *Idaho Code*. The amount of the "tax reduction" referred to in Sections 63-120 (1), 63-120 (4) and 63-122 (e) is the lesser of the stated maximum reduction found in Section 63-120 (4) or the amount of taxes computed by applying the previous year's mill levy to the current year's assessed valuation.

Without intending to detract from the reasons already given for the above conclusion, we note that a contrary conclusion, that is one to the effect that the amount of tax reduction should be recomputed some 5 months later, after the current year's levy is known, would be repugnant to many of the expressed provisions of this tax relief measure. Among other things such a conclusion would render negatory the taxpayer appeal provisions of Sections 63-121 (1), 63-121 (2) and 63-122 (5).

AUT O ITIES CONSIDERED:

1. *Idaho Code*, Sections 63-117 through 63-125.

DATED this 4th day of June, 1975.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL  
Attorney General

ANALYSIS BY:

WILLIAM McDOUGALL  
Assistant Attorney General

ATTORNEY GENERAL OPINION NO. 34-75

TO: Mr. Don C. Loveland  
Tax Commissioner  
5257 Fairview  
Boise, Idaho 83722

Per request for Attorney General Opinion.

**QUESTION PRESENTED:** Must a religious body be incorporated under state law in order to obtain exemption from the ad valorem tax under § 63-105B, *Idaho Code*?

**CONCLUSION:** A religious body need not be incorporated under state law in order to qualify for tax exemption under § 63-105B, *Idaho Code*.

**ANALYSIS:** Insofar as pertinent to the question presented, the statutes of the state of Idaho granting exemption from property tax to religious bodies has taken two forms. The first, enacted in 1887, revised statutes, § 1401 (2), provided as follows:

“Section 1401. The following property is exempt from taxation: . . .

2. Churches, chapels and other buildings, with the lots of ground appurtenant thereto and used therewith, belonging to any church organization or society and used for religious worship, and from which no rent is derived; with their furniture and equipments; also public cemeteries; . . .”

The second form of the statute was enacted by the legislature in 1913 and provided:

“ . . . Section 4. The following property is exempt from taxation: . . .

B. Property belonging to any religious corporation or society of this State, used exclusively for and in connection with public worship, and any parsonage belonging to such corporation or society and occupied as such.” (Session Laws, 1913, Chapter 58, Section 4B Page 175).

The exemption in its 1913 form is substantially the same today. It provides:

“63-105B. PROPERTY EXEMPT FROM TAXATION – RELIGIOUS CORPORATIONS OR SOCIETIES. – The following property is exempt from taxation: *Property belonging to any religious corporation or society of this state*, used exclusively for and in connection with public worship, and any parsonage belonging to such corporation or society and occupied as such, and any recreational hall belonging to and used in connection with the activities of such corporation or society; and this exemption shall extend to property owned by any religious corporation or society which is used for any combination of religious worship, educational purposes and recreational activities, not designed for profit.” (Emphasis added).

The 1887 version of the statute extended the exemption to property owned by “any church organization or society”. At that time it was not necessary for the religious body to be incorporated to obtain exemption. Since 1913 the word “corporation” has been substituted for the word “organization” but the exemp-

tion continues to apply to "societies" and uses that word in the disjunctive. "Property belonging to any religious corporation *or* society of this state" is exempt from taxation. § 63-105B, *Idaho Code, supra*. It appears rather conclusively that since 1887 the exemption granted to property owned by religious bodies has extended to religious societies as distinguished from religious corporations. A religious corporation is one which receives its status as a corporation with powers to act from the state by a bona fide attempt to comply with the incorporation laws of the state. On the other hand, a society is a voluntary association of individuals for common ends; an organized group living or working together or periodically meeting for worship together because of a community of interests or beliefs or a common profession without reliance upon the state for the conditions of its organization or for an express grant of power to act. (Black's Law Dictionary; Websters Third International Dictionary, 1968). Therefore, incorporation under the laws of the state of Idaho is not a precondition to exemption from property tax under § 63-105B, *Idaho Code*.

We render no opinion on what is meant by the phrase "religious society". For some guidance see 158 A.L.R. 1222, 1227. Nor do we render an opinion on the question whether corporations and societies organized in other states may qualify for the exemption.

#### AUTHORITIES CONSIDERED:

1. *Idaho Code* § 63-105B.
2. Revised Statutes, Sec. 1401 (2).
3. Session Laws, 1913, Chapter 58, Section 4B, Page 175.
4. Black's Law Dictionary.
5. Websters Third International Dictionary, (1968).
6. 168 A.L.R. 1222, 1227.

DATED this 18th day of June, 1975.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL  
Attorney General

#### ANALYSIS BY:

WILLIAM McDOUGALL  
Assistant Attorney General

## ATTORNEY GENERAL OPINION NO. 35-75

TO: Larry G. Looney  
Commissioner  
State Tax Commission

Per request for Attorney General Opinion.

**QUESTION PRESENTED:** Does the Idaho State Tax Commission have the right to request and receive death lists from the Bureau of Vital Statistics, Department of Health and Welfare?

**CONCLUSION:** Yes.

**ANALYSIS:** There is no Idaho judicial authority which speaks directly to this issue. The statute which directly governs the release of information by the Bureau of Vital Statistics is *Idaho Code* § 39-264 (b) which provides:

“36-264. Disclosure of information. — . . .

(b) A complete copy, or any part of a certificate, may be issued to any applicant who can show direct and tangible interest in the record he applies for; and subject to such provisions as the board may prescribe, data contained on records may be used by federal, state or municipal agencies for the purpose of verification of data . . .”

The question of whether the Tax Commission may obtain information pursuant to this statute turns on the question of whether or not the State of Idaho — as whose agent the Commission acts — is an applicant with a “direct and tangible interest in the record” which it seeks.

Since the Commission seeks the death lists for the purpose of determining whether inheritance tax returns have been filed, the second part of § 39-264 (b) does not apply. The Commission is not seeking, in most instances, to verify data but rather to obtain information not otherwise known to it. (The second clause would, of course, apply to those instances where the Commission does seek mere verification of data already available to it.)

Taxes are the means by which the costs of government are apportioned to those who receive the benefits of government. *Welch v. Henry*, 305 U.S. 134 at 146, 147. Unequal and arbitrary enforcement of tax statutes results in a disproportionate distribution of the costs of government. Those who voluntarily comply with the requirements of the tax laws are more heavily burdened than those who undetected shirk their responsibilities. Consequently, courts have recognized that limiting a taxing authority's ability to obtain information is tantamount to limiting its ability to enforce tax statutes. [See e.g., *State Tax Commission v. Union Carbide Corporation* (U.S.D.C.-Idaho) 386 F.Supp. 250.]

In the case of the Idaho Transfer & Inheritance Tax Act (*Idaho Code* § 14-401, et seq.), lack of knowledge of the identity of deceased persons directly re-



sults in a lessened ability of the Commission to enforce the requirements of the Act. That in turn directly results in decreased revenues to the state, decreased ability of the state to provide services to its citizens, and an increased burden on those who voluntarily file returns and pay state transfer and inheritance taxes. In the specific instance of the Transfer & Inheritance tax, 85 percent of the proceeds are perpetually appropriated to the State Water Pollution Control Fund [Idaho Code § 14-425 (b)] for administration of the Water Pollution Abatement Act of 1970. (Idaho Code §§ 39-3601 – 39-3607). The declaration of policy contained in that Act clearly states the Legislature's conclusion that control of water pollution is of direct and vital interest to the State of Idaho and to its citizens. It states in part:

"The legislature, recognizing that water is one of the state's most valuable natural resources and, realizing that some waters of the state are becoming polluted to an intolerable degree, which is inconsistent with the public interest of the state of Idaho, has adopted water quality standards and authorized the director of the Department of Health and Welfare to implement these standards . . . In consequence of the benefits resulting to public health, welfare and economy, it is hereby declared to be the policy of the state of Idaho to protect this natural resource by assisting and preventing and controlling water pollution; . . ." (Idaho Code § 39-3601.)

The information which the State Tax Commission seeks from the Department of Health and Welfare will, by enabling that increase the funding available to the Department of Health and Welfare for its water pollution control activities. Those activities have been deemed by the legislative declaration just quoted to be of vital interest to the State of Idaho. We conclude, therefore, that the State of Idaho – acting through the agency of its Tax Commission – is a party with a direct and tangible interest in the records of the Bureau of Vital Statistics which it seeks.

The relevant regulation of the Department of Health and Welfare interpreting § 39-264 (b) appears on its face to be ambiguous. That regulation states:

"For furtherance of this act, certified copies of certificates may be issued to federal, state, or municipal representatives. A lawful applicant is considered to be the individual, his parent, guardian, close relatives, or the court."

Although this regulation does not clearly address itself to the particular situation presented here, to the extent that it may be inconsistent with the requirements of the statute, the statute must control. (*Caushland v. Halvering, Commissioner of Internal Revenue*, 298 U.S. 441, 56 S.Ct. 767, 80 L.Ed. 1268; *Mahatten General Equipment Company v. Commissioner of Internal Revenue*, 297 U.S. 129, 56 S.Ct. 397, 80 L.Ed. 528; *Macomber v. State Social Welfare Board*, 346 P.2d 808 (Cal., 1959).

We need not address, in detail, the question of the extent of the powers of the State Tax Commission to examine books and records. *Idaho Code* §63-3042

is incorporated into the Transfer & Inheritance Tax Act by § 14-418 (c). It gives to the Commission power to issue mandatory summonses to examine records. *Idaho Code* § 14-416 also grants to the State Tax Commission extensive powers to examine books and records for the purpose of determining the existence of inheritance tax liability. The precise scope of these powers need not be analyzed here. Their existence, however, lends credence to our conclusion that the legislature recognizes the Tax Commission's need for information in order to supervise and enforce self-reporting and self-assessing tax systems such as the Transfer and Inheritance Tax.

*Idaho Code* § 39-264 (b) evidences concern on the part of the legislature that the information obtained by the Bureau of Vital Statistics not be treated as a generally available public record. Our conclusion here will not obviate that legislative intention. The information obtained by the Commission will become subject to the confidentiality provisions of *Idaho Code* § 63-3076. That section is incorporated into the Transfer & Inheritance Tax Act by § 14-418 (c) and, therefore, subjects the information to the same confidentiality safeguards as is provided for information obtained by the Tax Commission under the Income Tax Act.

#### AUTHORITIES CONSIDERED:

1. *Idaho Code* §§ 39-264 (b); 14-401, et seq; 14-425 (b); 39-3601 thru 39-3607; 63-3042; 14-416.
2. *Welch v. Henry*, 305 U.S. 134 at 146, 147.
3. *State Tax Commission v. Union Carbide Corporation* (U.S.D.C.-Idaho) 386 F.Supp. 250.
4. *Caushland v. Halvering, Commissioner of Internal Revenue*, 298 U.S. 441, 56 S.Ct. 767, 80 L.Ed. 1268.
5. *Mahatten General Equipment Company v. Commissioner of Internal Revenue*, 297 U.S. 129, 56 S.Ct. 397, 80 L.Ed. 528.
6. *Macomber v. State Social Welfare Board*, 346 P.2d 808 (Cal., 1959).

DATED this 2nd day of September, 1975.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL  
Attorney General

ANALYSIS BY:

THEODORE V. SPANGLER, JR.  
Deputy Attorney General

## ATTORNEY GENERAL OPINION NO. 36-75

TO: Honorable Patricia L. McDermott  
Minority Leader, Idaho House of Representatives  
P.O. Box 3  
Pocatello, Idaho 83201

Per request for Attorney General Opinion.

**QUESTION PRESENTED:** Does the Idaho State Bar Association have the legal authority to collect an "interim billing" based on the provisions of H.B. 100 as amended in the House and as contained in Ch. 257, 1975 Session Laws? Said "interim license billing" represents an attempt by said Idaho State Bar Association to apply the provisions of said legislation retroactively.

**CONCLUSION:** The Idaho State Bar Association does not have the authority to collect an "interim billing" during 1975 as to lawyers already licensed in Idaho for the 1975 calendar year inasmuch as the legislation in question is only entitled to prospective application.

**ANALYSIS:** It is first necessary to carefully analyze the substance of the amendment to § 3-409, *Idaho Code*, as contained in Chapter 257 (H.B. 100), 1975 Session Laws for legislative intent concerning whether said amendment was to have retrospective application. That portion of the law which requires payment of a license fee each year prior to engaging in the practice of law, as amended, requires payment "prior to the first day of March of each year, commencing with the year 1975". On its face it would appear that this phrase, standing alone, would make the amendment effective as of March 1, 1975. Other considerations, however, mitigate against such a conclusion.

H.B. 100 was passed without an "emergency clause" and, thus, becomes law in Idaho only on July 1, 1975, and thereafter. Nowhere in the Act is there specific language indicating clear legislative intent that the Act be applied retrospectively. Further, it is clear that the Act was neither passed nor approved by the Governor (March 31, 1975) until *after* the statutory deadline for issuance of licenses for lawyers for the year 1975 inasmuch as all payments for licenses must be made "prior to the first day of March of each year".

We are also informed both by the Chairman of the Idaho House of Representatives Judiciary, Rules and Administration Committee (the Committee through which H.B. 100 was introduced) and ranking Minority member thereof that when officials of the Idaho State Bar initially as RS 2109 requested the said amendment that a further request was made for retrospective application and use of an "emergency clause". The Committee informed the Bar that it would not introduce the Bill with the "emergency clause" and would not allow retrospective application, thus the "emergency clause" was deleted from the Bill before it was introduced in the House.

As we recently noted in Attorney General Opinion No. 30-75, addressed to the question of retrospective application of S.B. 1111 of the 1975 Legislative

Session, the Idaho Supreme Court has repeatedly held that statutory enactments are to have only prospective application unless the enactment in question *clearly* shows that a retrospective construction was intended by the Legislature. *Application of Forde L. Johnson Oil Company*, 84 Idaho 288, 297, 372 P.2d 135 (1962) [with numerous cases cited therein]; *Kent v. Idaho Public Utilities Commission*, 92 Idaho 618, 621, 496 P.2d 745 (1970). Since no such clear legislative intent is expressed in the Act itself or its history, it is my opinion that the recent amendment to § 3-409, *Idaho Code*, be given only prospective application.

A further barrier to retrospective application of the Act occurs with regard to the fact that the Idaho State Bar has already issued to all its members in good standing a "Certificate of 1975 Membership" indicating that each such person "is an active member of the Idaho State Bar for the year ending December 31, 1975." Though a license has been held not to create a property right in its holder, the issuing authority cannot arbitrarily, capriciously, or unreasonably impair, interfere with, or eradicate the same. *O'Conner v. City of Moscow*, 69 Idaho 37, 44, 202 P.2d 401, 9 A.L.R.2d 1031 (1949). Certainly it must be concluded that a contractual obligation exists by virtue of the issuance of licenses valid through December 31, 1975, between the Idaho State Bar and each of its members under the terms of which the member has the right, subject to other rules and regulations of the Idaho State Bar and Idaho Supreme Court, to practice law for the entire calendar year without the payment of additional fee. See, for example, the rationale of the Idaho Supreme Court in *State v. Barchas*, No. 11560 (Idaho; decided April 1, 1975). It cannot logically be maintained that Chapter 257 (H.B. 100), 1975 Session Laws, created an express or implied revocation of existing validly issued licenses, nor an authorization to bill members of the Idaho State Bar for additional fees on a pro-rata basis. This is not to imply, however, that those persons who applied for membership in the Idaho State Bar after July 1, 1975, (including judges who previously have been exempt from the payment of license fees) could not be charged the entire fee authorized by the 1975 Act.

Finally, § 3-405, *Idaho Code*, defines a member of the Idaho State Bar "[a]ll persons . . . duly admitted to practice law . . . who shall have paid the license fee in this Act provided for . . ." The currently licensed lawyers in Idaho having paid the currently applicable fees under § 3-409, *Idaho Code*, are duly licensed and acting members of the Idaho State Bar through December 31, 1975, without the payment of additional fee.

#### AUTHORITIES CONSIDERED:

1. Chapter 257 (H.B. 100), 1975 Session Laws; Sections 3-405 & 3-409, *Idaho Code*.
2. *State v. Barchas*, No. 11560 (Idaho; decided April 1, 1975).
3. *Kent v. Idaho Public Utilities Commission*, 93 Idaho 618, 469 P.2d 745 (1970).
4. *Application of Forde L. Johnson Company*, 84 Idaho 288, 372 P.2d 135 (1962).

S. O'Conner v. City of Moscow, 69 Idaho 37, 202 P.2d 401, 9 A.L.R.2d 1031 (1949).

DATED this 18th day of June, 1975.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL

Attorney General

ANALYSIS BY:

PETER HEISER, JR.

Chief Deputy Attorney General

### ATTORNEY GENERAL OPINION NO. 37-75

TO: The Honorable Gary Ingram, Idaho House of Representatives

Per request for Attorney General Opinion.

QUESTION PRESENTED: You have requested an opinion concerning 1975 House Bill 253, Chapter 103, 1975 Idaho Session Laws which appropriates \$149,000.00 of general fund money for matching with \$2,372,400.00 of federal funds to carry out the Economic Opportunity Program, the Senior Citizens Program, the Work Training Program and Administration of these programs. The appropriation is to "the Department of Special Services" to be expended by it for the above programs. You point out that under the Article IV, Section 20, Idaho Constitutional Executive and Administrative Reorganization and the legislative action based on upon this section, the "Department of Special Services" is not mentioned or in any way dealt with. You ask

Did the legislature err and make an appropriation that is not legal or constitutional?

CONCLUSION: The legislative intent to authorize and fund these programs is unmistakably clear. However, you raise a valid inquiry about the technical legality of the appropriation. Because of the lack of authority in case law, the question is not susceptible to a definitive conclusion. The continued existence of the Idaho Department of Special Services as an executive department of the State of Idaho is legally in question. It appears that this appropriation fails for the reason that no Department of Special Services lawfully exists under strict legal interpretation. Only the courts can authoritatively answer such a question because of the nature of the problem and the equities involved in it.

ANALYSIS: It is the general rule that there cannot be a *de facto* officer without a *de jure* office. This is the principle that distinguishes the case of *Shibla v. Township Committee of Wall Township*, 136 N.J.L. 506, 56 A.2d 734 (Sup. Ct. 1948), affirmed 137 N.J.L. 692, 61 A.2d 242 (E. & A. 1948). The appointment of one to an office or position having no legal being ordinarily gives no color of

existence to the supposed office or position or color of authority to the appointee. *Toomey v. McCaffrey*, supra; *United States v. Royer*, 268 U.S. 394, 45 S.Ct. 519, 69 L.Ed. 1011 (1928); *Buck v. City of Eureka*, 109 Cal. 504, 42 P. 243, 30 L.R.A. 409 (1895); *Snyder v. Hylan*, 212 N.Y. 236, 106 N.E. 89, Ann.Cas. 1915D, 122 (1914). There is no reason of public policy for a deviation from the rule here. The local creative authority is exercisable only by ordinance; this process is a condition prerequisite to the existence of an office or position. *Handlon v. Town of Belleville*, 71 A.2d 624, 4 N.J. 99, 16 A.L.R.2d 118.

In *Moon v. Mayor*, 214 Ill. 40, 73 N.E. 408, the same insistence was made, and we there said: "Nor can an office be legally established by the appropriation of the public money, by ordinance, to the payment of the salary or compensation of the person acting as an officer." An information in the nature of quo warranto will not lie to try the title of the relator to an alleged office which in fact and in law has no legal existence. 23 Am. & Eng. Ency. of Law (2d Ed.) 632; 17 Ency. of Pl. & Pr. 403.

*Hedrick v. People Ex Rel Ball*, 77 N.E. 441, 221 Ill. 374, 5 Am. Cas. 562.

An office is created by law only as a result of an act passed for that purpose. The mere appropriation by the General Assembly of money for the payment of compensation to the incumbent of a specified position does not have the effect of creating an office or of giving such incumbent the character of an officer (*People v. McCullough*, 254 Ill. 9, 98 N.E. 156, Ann. Cas. 1913B, 995), as an office cannot be created by an appropriation bill. *Fergus v. Russel*, 110 N.E. 130, 270 Ill. 304, Am. Cas. 1916B 1120.

In 1970 Governor Don Samuelson "created" and established the Idaho Department of Special Services. See Executive Order 70-2 which reads as follows:

NOW, THEREFORE, I, DON SAMUELSON, GOVERNOR OF THE STATE OF IDAHO, by powers and authority vested in me by law, do hereby establish an Idaho Department of Special Services as a separate administrative office of the State of Idaho with specific and primary responsibility for implementing the Economic Opportunity Act of 1964 as Amended; the Older Americans Act of 1965 as Amended; and the State Anti-Discrimination Act, and such other related responsibilities as may be assigned.

A public office or department can exist only through its creation by Constitution or statutory enactment. The following is a quotation from an opinion of Homer Holmgren, Attorney General for Utah dated October 29, 1969 which is particularly pertinent to this case since it relies upon Idaho case law as well as that from other states.

A question has arisen as to the power of the Governor to create such an office. Involved is the question whether this order is to be construed as an attempt by the Governor to create an office in the state government. If the answer to this

question is in the affirmative, then it must follow the Governor does not have the power to create the office. The power is legislative and belongs solely to the Legislature.

In 43 A.Jr., Sec. 31, p. 901, Public Officers, is the following:

"In the United States, except for such offices as are created by constitution the creation of public offices is primarily a legislative function. Insofar as the legislative power in this respect is not restricted by constitutional provisions, it is supreme and the legislature may decide for itself what offices are suitable, necessary or convenient. When in the exigencies of government it is necessary to create and define new duties, the legislative department has the discretion to determine whether additional offices shall be created or these duties attached to and become ex officio duties of existing offices."

In 67 C.J.S., Sec. 9, p. 119, Officers, it is said:

"A public office can be created only by the constitution, or as a result of an act passed for that purpose, it cannot be created by a mere concurrent resolution, by legislative order, by contract, or by a mere appropriation for the payment of compensation to the incumbent of a specified position. Subject to the power to create an office is vested in the legislative department of government."

In *Nigard v. Barker*, 27 Ida. 124, 147 P. 293, the court said:

"The power to create an office, unless otherwise provided by the constitution, is vested in the legislative department of the government. The method of filling the office is to be determined by the legislature, in the absence of constitutional provisions."

Section 6 of Article 4 of the Constitution provides:

"The Governor shall nominate and, by and with the consent of the Senate, appoint all officers whose offices are established by this Constitution, or which may be created by law and whose appointment or election is not otherwise provided for.

Under this Constitutional provision, the Legislature has the power to create an office and provide the filling of the same whenever such office is not established by the Constitution."

The decision in this case was cited with approval in *Smylie v. Williams*, 81 Idaho 335, 341 P.2d 451. The language of the *Idaho Constitution* above quoted is practically identical with the language of Section 10, Article VII of the Utah Constitution.

In *Stapleton v. Frohmler*, 53 Ariz. 11, 85 P.2d 49, the court said:

"After considering the matter fully, we are of the opinion that an 'office', as distinct from an 'employment', may be created only by the legislative branch of the government, either directly or by necessary implication, for such branch alone has the power to make 'law', and that any position which is established by the administrative department cannot be considered as an office within the meaning of the constitution, but rather is a mere employment."

The court refers to 22 R.C.L. p. 381, Sec. 12, as stating the chief elements of a "public office" as follows:

"The specific position must be created by law; there must be certain defined duties imposed by law on the incumbent, and they must involve the exercise of some portion of the sovereign power. A position which has these three elements is presumably an 'office' while one which lacks any of them is a mere 'employment'."

In *Swanson v. State*, 132 Neb. 82, 271 N.W. 264, the court held that the constitution is not a grant of power, but a restriction on legislative power. "... This necessarily includes the proposition that, subject to limitations and restrictions expressly imposed by constitutional provisions, the power to create or continue an office is vested in the legislative department of government."

Section 1, Article V of the Utah Constitution provides for the powers of government to be divided into three departments, legislative, executive and judicial, "and no person charged with the exercise of powers properly belonging to one of these departments shall exercise any functions appertaining to either of the others, except in cases herein expressly directed or permitted."

Under Section 1, Article VI the legislative power is vested in the legislature and the people.

It is our opinion that what the Governor has created by this Executive Order is not merely a position of employment, but is an office or agency of the government of the state. The order expressly creates the office, the Office of Local Affairs, as an agency responsible to the Governor. The order then provides for an executive director of the office. It also defines the duties and functions of the office or agency. The office exercises sovereign power in coordinating state activities and programs having a major impact on community development. Furthermore, the order provides that six separate programs of the state shall be administered under the direction of the Office of Local Affairs, and the divisions, offices, and personnel within the state government currently responsible for the administration of such programs are transferred to the Office of Local Affairs. The effect is an attempt by the executive department to invade the area of the legislative department.

A decision in this matter centers around the Idaho Constitutional Section on separation of powers, Article II, Section 1 of the Idaho Constitution. Article IV, Section 20 of the Idaho Constitution relating to limitation of the number of departments of state government and Article III, Section 16 of the Idaho Con-



stitution relating to the fact that each separate enactment of the legislature shall embrace but one subject and matters properly connected therewith which subject shall be expressed in the title. Simply stated, the problem is that the Idaho Legislature has pursuant to Article IV, Section 20 of the Idaho Constitution reorganized the Idaho state government executive and administrative offices in nineteen departments and the existing constitutional offices. No mention was made of the Department of Special Services in this reorganization. An appropriation bill is not a sufficient expression of legislative intent to create a new department of state government. Also, any act of the Legislature must contain one subject which must be expressed in its title, and no appropriation bills relating to the Department of Special Services, either in the title or body of the acts, in any way create or organize the Department of Special Services. They only appropriate to it. And lastly the creation of Departments of state government is a legislative function.

Section 67-3605, *Idaho Code* indicates that appropriations shall be available only as allotted and in conformity with the provisions of the Idaho Budget Law, §§ 67-3516 through 67-3523, *Idaho Code*.

**AUTHORITIES CONSIDERED:**

1. *Handlon v. Town of Belleville*, 71 A.2d 624, 4 N.J. 99, 16 A.L.R.2d 1118.
2. *Hedrick v. People Ex Rel Ball*, 77 N.E. 441, 221 Ill. 374, 5 Am. Cas. 562.
3. *Fergus v. Russel*, 110 N.E. 130 270 Ill. 304, Am. Cas. 1916B 1120.
4. Executive Order 70-2.
5. Opinion of Homer Holmgren dated October 29, 1969.

DATED this 7th day of July, 1975.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL  
Attorney General

**ANALYSIS BY:**

WARREN FELTON  
Deputy Attorney General

**ATTORNEY GENERAL OPINION NO. 38-75**

TO: D. E. Chilberg  
Director  
Department of Administration  
Building Mail

Per request for Attorney General Opinion.

## QUESTIONS PRESENTED:

1. Are District Health Departments required to comply with state purchasing laws?
2. If the District Health Departments are in fact not a part of State government, can the Division of Purchasing legally supply services to the Districts?
3. If the District Health Departments are in fact not a part of State government, can the Bureau of Risk Management legally procure insurance and supply its services to the Districts?

CONCLUSION: District health departments are mandated by law to provide the basic health services of public health education, physical health, environmental health and public health administration to the citizens of Idaho. Each department functions within the geographic confines of its respective statutory district. All income and receipts received by the district departments for the implementation of such services and to implement the duties as prescribed in Title 39, Title 4, *Idaho Code*, must be deposited in a public health district fund. This fund is established in the state treasury as a special fund for which the state treasurer acts as custodian. Statutorily, receipts in the fund in part consist of general state aid derived from state appropriations. The presence of state tax dollars in a legislatively created fund established in the state treasury creates a state property interest in that fund. This property interest, together with the declared state activity of providing basic health services brings the fund under the control of the State Board of Examiners pursuant to Article IV, Section 18, *Idaho Constitution*.

In addition, monies in the fund are in the state treasury within the meaning of Article VII, Section 13, *Idaho Constitution*. Expenditures from the fund by the respective district boards are pursuant to appropriation. Though the term "appropriate to the public health districts" is not to be found within Title 39, Chapter 4, *Idaho Code*, or any appropriations bill, the legislature's intent to so appropriate is clear. No reasonable doubt can exist as to the creation of the fund, how the monies for the fund are to be raised, where they are to be deposited, or by whom and for what purpose they are to be dispersed. As such, those monies are "appropriated" to a specific fund for a specific purpose.

As a legislatively created entity, subject to these restrictions of the Idaho Constitution, district health departments are agencies of the state. They are therefore subject to the state purchasing laws unless specifically excepted therefrom.

Questions two and three are rendered moot by the answer to question one.

ANALYSIS: Title 39, Chapter 4, *Idaho Code*, declares that four basic health services are to be provided for the citizens of Idaho. These services are those of public health education, physical health, environmental health, and public health education. Section 39-409, *Idaho Code*. Their implementation is delegated to the respective departments of seven statutory public health districts, the geo-

graphic confines of which are coterminous with that of the State. Sections 39-408, 39-409, 39-410, *Idaho Code*. Though the departments are not limited to performance of the enumerated health services, they are mandated to that performance. The funding thereof is both the responsibility of the State and of the individual counties within each district. Sections 39-424, 39-425, *Idaho Code*. The State's contribution is a percentage general state aid to be not less than "... sixty-seven percent (67%) of the amount of ad valorem tax contributed by each county from the levy made as provided by Section 31-862, *Idaho Code*." Section 39-425, *Idaho Code*. The appropriate sums of tax revenue are required to be deposited in a statutory fund known as the "Public Health District Fund." *Ibid*; Section 39-414 (5), *Idaho Code*. The fund is established in the state treasury with the state treasurer serving as its custodian. Section 39-422, *Idaho Code*. The status of the fund is critical to any determination regarding the character of district health departments. If the monies therein are found to be state monies, withdrawals from that fund must then be passed upon by the State Board of Examiners pursuant to Article IV, Section 18, *Idaho Constitution*. If state monies, their expenditure must be subject to appropriation pursuant to Article VII, Section 13, *Idaho Constitution*. Public health departments would then be state agencies in the sense that constitutional restrictions upon state government would apply to them. *Board of County Com'rs v. Idaho Health Fac. Auth.*, 96 Idaho 498, 531 P.2d 588, 597 (1975). However, should the fund be found to be a private one, though the districts be state created entities, they would not be subject to all the constitutional restrictions otherwise placed upon state agencies. *Ibid*.

The identical issue has twice been before the Idaho Supreme Court. In *State v. Musgrave*, 84 Idaho 77, 370 P.2d 778 (1962), the status of the state insurance fund was before the court. It was held to be private in character, though established in the state treasury with the state treasurer acting as custodian. Decisive to that holding were the facts that no tax monies were deposited in the fund and that the liability of the State was specifically limited by Section 72-901, *Idaho Code*, to the amount of monies within the fund itself. *Ibid*.

Thus, payments could be made from the fund to meet claims against the state without meeting the constitutional requirement of approval by the State Board of Examiners under Article 4, § 18, and could be drawn from the treasury without an appropriation as required under Article 3 [sic], § 13. *Board of County Com'rs v. Idaho Health Fac. Auth.*, *supra*.

The court in *State v. Robinson*, 59 Idaho 485, 83 P.2d 983 (1938), cited with approval but distinguished by the *Musgrave* court, was similarly called upon to determine the status of an unemployment compensation fund. However, that fund consisted in part of state monies derived from an excise tax. The tax revenue represented ten percent (10%) of the total fund, the remainder being contributed by the federal government. This sum was nonetheless held to represent a sufficient property interest of the State to bring the fund within the purview of Article IV, Section 18. *Ibid*, 59 Idaho at p. 490, 83 P.2d at p. 985. In addition, the court found the purposes for which the fund was created, i.e., a statutory endeavor to ameliorate unemployment and to employ certain classes of persons,

indicative of a state activity. It therefore held that the State had a personal interest in seeing that the fund was properly collected and dispersed. *Ibid.*

The public health district fund likewise falls within the purview of Article IV, Section 18. The amount of monies in the fund is not a declared limitation upon the liability of the State. Title 34, Chapter 4, *Idaho Code*; see, *State v. Musgrave*, supra. The State does have a property interest in the fund as an amount of general state aid not less than sixty-seven percent (67%) of the ad valorem tax contributed by the counties within each district must be deposited to the public health district fund. Section 39-425 (1), *Idaho Code*. The total funds are in a sense held both by the State and the respective counties, but when deposited into the state treasury, "... title must necessarily rest in the State since it can nowhere else, and a claim thereto is, therefore, a claim against the State even though only as trustee." *State v. Robinson*, supra., 59 Idaho at p. 491, 83 P.2d at p. 986.

Without doubt, the monies so contributed effect state participation in a statutory endeavor to provide basic health services for the benefit of all Idaho citizens. Moreover, the mandated performance of those services represents a state activity, not a local one. Statutorily, the respective departments of the seven public health districts are directed to implement these services. The creation of the districts is at the discretion of neither the counties therein nor the residents within the districts. Rather they are statutorily created entities whose geographic confines conform in the aggregate to that of the State itself. Section 39-408, *Idaho Code*. The fact that the legislature has delegated the implementation of those services to boards elected by local officials does not reduce the whole of the endeavor to that of its individual parts.

The personal interest held by the State in this instance is to insure that all recipients of these services receive them equally. By virtue of the two mill maximum levy for county participation in the funding of the prescribed health services, the potential exists for some counties to generate larger sums of tax revenue for health services than others. By virtue of the state match which is computed on an individual county basis the potential exists to further exacerbate the dichotomy in funding ability between the wealthier and poorer counties. Section 39-425 (1), *Idaho Code*. However, that potential is mitigated by the authority of the director of the department of health and welfare to *selectively* authorize or grant additional funds to individual districts in excess of that otherwise required by the statutory formula. Section 39-425 (2), *Idaho Code*. This authority allows the State to respond to unexpected needs within individual districts. Further, it provides for coordination of health services at the state level to insure that the quality of those basic health services is not determined by the relative wealth or lack thereof of the individual county. Statutorily, the State has both a sufficient property interest and personal interest in a mandated state activity to bring the public health district fund within the provisions of Article IV, Section 18, *Idaho Constitution*. Claims against the fund must therefore be passed upon by the State Board of Examiners. *State v. Robinson*, supra.

Concomitant to the determination that claims against the health districts are claims against the State is the finding that monies deposited to the fund are

in the state treasury, within the meaning of Article VII, Section 13, *Idaho Constitution*. This provision reads:

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

The *Musgrave* court held that the money in the state insurance fund was not in the state treasury within the meaning of the Constitution as the fund consisted of premiums paid by private employers for the purpose of insuring them against liability for workman's compensation losses, of penalties paid by those employers, and of investments and interest derived and earned upon monies belonging to the fund. Section 72-901, *Idaho Code*; *State v. Musgrave*, supra. As distinguished from the state insurance fund, the public health district fund monies are derived from tax revenue contributed directly from the State and its participating counties, indirectly from the federal government and from other governmental entities contracting for special programs. Sections 39-425, 39-424, 39-414 (8), 39-409, *Idaho Code*. As tax revenue deposited to a fund established in the state treasury, the public health district fund is in the state treasury within the meaning of the Constitution. *State v. Robinson*, supra; *State v. Musgrave*, supra.

It must be noted, however, that the fund moneys are not state moneys in the sense that they are subject to appropriation other than as provided by Title 39, Chapter 4, *Idaho Code*. An analysis of this act clearly reveals a legislative intent to provide monies for the implementation of basic health services by the district departments and for that purpose only. Sections 39-424, 39-425, *Idaho Code*. In order to carry out that purpose, the state and county contributions are deposited in the state treasury to a statutory fund specifically designated for such receipt. Section 39-422 (2), *Idaho Code*.

Subject only to constitutional restriction,

Each division within the fund will 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 agent. Section 39-422 (1), *Idaho Code*.

Further, a specific appropriation for the departments of the public health districts is to be found in Section G, Chapter 198, Session Laws of the Forty-Third Idaho Legislature (1975). Though the term "appropriate to the public health districts" is not found in this appropriation act nor in Title 39, Chapter 4, *Idaho Code*, both legislative enactments appropriate general state aid to the public health districts by "substantial and effective language." *Dahl v. Wright*, 65 Idaho 130, 139 P.2d 754 (1943). Their language leaves no reasonable doubt as to how the money for the public health district fund is to be raised, where it is to be deposited, or by whom and for what purpose it is to be dispersed. This amounts to as complete an appropriation of the specific fund for the statutory purposes of Title 39, Chapter 4, as if the term "appropriate to the public health districts" had been used. *Ibid*.

Moreover, should there be any balance in the fund at the end of the fiscal year, the monies do not revert to the general fund of the State. See, *Gillum v. Johnson*, Cal. 62 P.2d 1037, 1043 (1936); cited in *State v. Robinson*. Rather, the language of Sections 39-409, 39-422, and 39-425, *Idaho Code*, is sufficient to constitute a continuing appropriation of said funds to be administered by the respective district boards subject to the authority granted them by Title 39, Chapter 4, *Idaho Code*, and the Constitution. *Ibid. State v. Musgrave*; supra; *Daugherty v. Riley*, Cal. 34 P.2d 1005 (1934).

Public health departments are agencies of the State in the sense that constitutional restrictions upon other entities of state government apply to them. Each district serves to provide an effective means of cooperation among its counties with respect to health problems. *Bacus v. Lake County*, Mont. 345 P.2d 1056, 1058 (1960). The districts themselves are departments of the state or agencies of the executive branch of the state government. *Ibid.* The term "agency" for purposes of the state purchasing law is defined in Section 67-5716 (15), *Idaho Code*, as amended by the Forty-Third Idaho Legislature. It reads:

Agency. All officers, departments, divisions, bureaus, boards, commissions and institutions of the state, including the public utilities commission, but excluding other legislative and judicial branches of government, and excluding the governor, the lieutenant governor, the secretary of state, the state auditor, the state treasurer, the attorney general, and the superintendent of public instruction.

The language is expansive, clearly indicative of a legislative intent to include all those "agencies" of the State within its scope unless specifically excluded by definition. Reference is made to Section 39-414 (9), *Idaho Code*, which in part authorizes the district boards of health to "... obtain such other personal property as may be necessary to its functions." The recent amendments to the purchasing laws and Section 39-414 (9), *Idaho Code*, are in pari materia. There appears to be an irreconcilable conflict between the two enactments inasmuch as the latter would allow a district board of health to procure personal property without compliance with the former. Where there is an irreconcilable conflict between two statutes in pari materia, the statute most recently enacted controls. *Employment Security Agency v. Joint Class "A" Sch. Dist. No. 151*, 88 Idaho 384, 389, 400 P.2d 377, 380 (1965); *Engelking v. Investment Board*, 93 Idaho 217, 221, 458 P.2d 213, 217 (1969). The enactment of the purchasing laws as amended by the Forty-Third Idaho Legislature is most recent in time, therefore, the conflict is to be resolved to require the district boards of health to comply with the state's purchasing laws.

It should be finally noted that subject only to constitutional restraint, the legislature may exclude the boards and departments of the public health districts from any requirements otherwise imposed upon state agencies. That is not to say that the legislature could obviate the requirement that all claims against the public health district fund must be passed upon by the State Board of Examiners, pursuant to Article IV, Section 18, *Idaho Constitution*. See, *State v. Musgrave*, supra., 84 Idaho at p. 88, 370 P.2d at p. 784. Neither can the requirements of Article VII, Section 13 be ignored. However, and in acknowledgment of the

unique role health district departments and boards play, legislation could be promulgated to exclude them from statutory requirements otherwise applicable to other state agencies. The form and wisdom of such legislation is the domain of the legislature. If promulgated, the purpose for so doing would be to affect a more effective means of providing basic health services for Idaho citizens.

**AUTHORITIES CONSIDERED:**

1. Constitution: Article IV, Section 18; Article VII, Section 13.
2. Statutes: Title 39, Chapter 4, *Idaho Code*.
3. *Board of County Com'rs v. Idaho Health Fac. Auth.*, 96 Idaho 498, 531 P.2d 588 (1965).
4. *State v. Musgrave*, 84 Idaho 77, 370 P.2d 778 (1962).
5. *State v. Robinson*, 59 Idaho 485, 83 P.2d 983 (1938).
6. *Dahl v. Wright*, 65 Idaho 130, 139 P.2d 754 (1934).
7. *Employment Security Agency v. Joint Class "A" Sch. Dist. No. 151*, 88 Idaho 384, 400 P.2d 377 (1965).
8. *Engelking v. Investment Board*, 93 Idaho 217, 458 P.2d (1969).

DATED this 28th day of July, 1975.

**ATTORNEY GENERAL OF THE STATE OF IDAHO**

**WAYNE L. KIDWELL**  
Attorney General

**ANALYSIS BY:**

**CHRISTOPHER D. BRAY**  
Deputy Attorney General

**ATTORNEY GENERAL OPINION NO. 39-75**

**TO:** The Honorable Roy Truby  
Superintendent of Public Instruction  
Building Mail

Per request for Attorney General Opinion.

**QUESTION PRESENTED:** May the attendance of kindergarten pupils as provided in H.B. No. 105, first regular session, 43rd Legislature, be included within the school district's total average daily attendance for computing the school emergency levy as provided in Section 33-805, *Idaho Code*?

House Bill No. 105 has now been established as Chapter 42, Idaho Session Laws, 1975.

CONCLUSION: No.

ANALYSIS: Section 33-805, *Idaho Code*, authorizes the Board of Trustees to request of the County Commissioners a school emergency levy. The standard for establishing the levy is based upon the formula provided in the statute. Basically it provides that a school may request the imposition of the levy where the number of pupils in average daily attendance for the current year is above the number in average daily attendance for the same period of the school year immediately preceding. Section 63-907, *Idaho Code*, provides that the Board of County Commissioners shall make such an emergency levy.

The Session Law above cited provides for the authority to establish kindergarten programs within the school district. Further, the Session Laws amended Section 33-201, *Idaho Code*, providing that the ages for school age children shall be between the ages of five and twenty-one years of age.

The central question then, is whether the individual school districts establishing kindergarten programs and thereby increasing the number of school age children in average daily attendance over the same period of time of the school year immediately preceding creates an emergency within the meanings of Sections 33-805 and 63-907, *Idaho Code*.

In the case of *Board of Trustees v. Board of County Commissioners*, 83 Idaho 172, 359 P.2d 635 (1961), the court noted that the levy provided for in *Idaho Code* 63-907 is authorized to provide funds with which to defray "unanticipated expenses of educational and transportation programs brought about by reason of increase in pupil attendance. It is the nature of an emergency measure to provide funds for new classroom units, the number of which could not be determined until pupil enrollment at the beginning of the term."

The standard, then, by which the imposition of the levy must be measured is found in the definition of the word "emergency". The establishment of kindergartens is a positive act on the part of the individual school districts. Therefore, it appears that the increase in school attendance brought about thereby can not be considered "unanticipated". Further, there is nothing to suggest that the number of kindergarten pupils could not be determined prior to the time of enrollment at the beginning of the new school term. It is, therefore, our opinion that a school district may not create its own emergency by the establishment of a kindergarten program in the district. Before the kindergarten program in any district is established, practice has shown us that the district studies thoroughly the needs and numbers of those pupils who would be enrolled in the kindergarten program. Therefore, the number of pupils in average daily attendance cannot be considered as unanticipated nor can they be considered to be such an influx onto the school enrollment that the emergency can exist. We do not deny, however, that the creation of a kindergarten program in a school district may very well create physical problems for the district. But those problems are not of an emergency nature similar to the issue determined in *Board of Trustees*, supra.



It is our conclusion, that the increase in attendance brought about by kindergarten pupils pursuant to Chapter 42 of the 1975 Session Laws cannot be considered as an emergency. Therefore, those pupils may not be included within the individual school district's average daily attendance to authorize the Trustees to request the imposition of the school emergency levy as provided in Sections 33-805 and 63-907, *Idaho Code*.

DATED this 29th day of July, 1975.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WA NE L. KIDWELL  
Attorney General

ANALYSIS BY:

JAMES R. HARGIS  
Deputy Attorney General

#### ATTORNEY GENERAL OPINION NO. 40-75

TO: Joe R. Williams, Auditor  
Martell L. Miller, Department of Administration

Per request for Attorney General Opinion.

This office has recently received formal opinion requests from your offices which are closely interrelated with regard to House Bill No. 41 as enacted by the Forty-Third Idaho Legislature, first session (*Idaho Session Laws*, Ch. 270, p. 723, 1975). This, of course, is the bill which purports to authorize governmental entities of the State of Idaho to enter into deferred compensation programs with their employees to obtain favorable federal income tax treatment. We are combining our response into one opinion due to the interrelated nature of the subject matter, and to enable us to respond more conveniently and with greater detail to each of your questions.

#### QUESTIONS PRESENTED:

1. We have noticed that a discrepancy exists in the act between the title and the body of the act with respect to a twenty-five percent (25%) limitation on the amount of money an employee may put into the plan. In interpreting the act, is an employee limited to a contribution of no more than twenty-five percent (25%) of his/her salary?

2. What is an employee? Of particular concern here is the latitude to offer participation in a deferred compensation plan to persons associated with the State on a basis other than a normal salary arrangement; i.e., physicians receiving reimbursements from Medicaid, legislators, persons on contract with the State, etc.

3. Does an employer-employee relationship exist between the State of Idaho and the elected members of the legislature?

4. What is meant by the term 'compensation' and, specifically, would this include or exclude reimbursements to those groups of persons mentioned in the previous question (Question 2)?

5. Does the "expense allowance" for legislators cited in *Idaho Code*, § 67-412 (5) qualify as taxable income or salary?

6. (1) In the design and implementation of a deferred compensation plan, is the State limited to plans underwritten by life insurance companies licensed in the State of Idaho, thereby excluding any plans available through financial institutions? (2) Is the State limited to utilizing only those funding vehicles mentioned in the act: fixed annuity, variable annuity, and life insurance; or, could we also look to those plans using some other approach as the investment vehicle; i.e., savings? (3) Does the State have to offer all three of the aforementioned funding vehicles, or could the plans utilize just one or two of them? (4) Does the State have the flexibility to limit the number of life insurance companies involved in a deferred compensation plan?

7. (1) Does the administrator as appointed by the State Auditor in compliance with the law, have complete administrative authority over deferred compensation plans made available to State employees? (2) Are payments for contractual services to firms or individuals legislatively intended to be included under the provisions of House Bill No. 41?

#### CONCLUSIONS:

1. The act in question would probably be construed to be null and void if tested for validity in a court action because it appears to violate Article 3, Section 16 of the *Idaho Constitution*, for the reason that the body of the act directly contradicts a specific provision in the title of the act in a manner which is misleading.

2. The test usually applied in this state to distinguish between an "employee" and an "independent contractor" is as follows:

The general test is the *right* to control and direct the activities of the employee, or the power to control the details of the work to be performed and to determine how it shall be done, and whether it shall stop or continue, that gives rise to the relationship of employer and employee.

An independent contractor is not an employee, and inasmuch as a physician receiving reimbursements from Medicaid is an independent contractor, he therefore is not an employee. The issue of whether a legislator is an employee is treated in the next question presented.

3. An employer-employee relationship does exist between the State of Idaho and the elected members of the legislature.

4. The term "compensation" includes allowance for personal expenses, commissions, expenses, fees, an honorarium, mileage or traveling expenses, payments for services, restitution or balancing of accounts, and includes reimbursements to those groups of persons mentioned in Question 2. The Legislature apparently intended the term "compensation" to cover "taxable income" as defined by the Internal Revenue Code Section 63 for purposes of *Idaho Session Laws* § 1975, Chapter 270.

5. The reimbursement for actual expenses necessarily incurred by legislators in attending meetings and in the performance of their official duties under the *Idaho Code*, Sections 67-412 (5) and 67-431 is not taxable income if incurred while the legislator is "away from home" which for tax purposes means "away from the taxpayer's principal place of business." On the other hand, the allowance of thirty-five dollars (\$35.00) per day to legislators for each day traveling to and from meetings or in attendance at meetings pursuant to the provisions of *Idaho Code*, Sections 67-412 (5) and 67-431 is included in taxable income.

6. (1) In the design and implementation of a deferred compensation plan, the State is limited by the terms of the act under consideration to plans underwritten by life insurance companies licensed in the State of Idaho. (2) The State is limited to utilizing those funding vehicles mentioned in the act; i.e., life insurance or fixed and/or variable annuity contracts. (3) The state may utilize any or all of the aforementioned funding vehicles. (4) Any life underwriter licensed by the State who represents an insurance company licensed to do business in the State may present his program to governmental employees subject to the discretionary authority of the employer to approve or disapprove and to agree or to refuse to purchase the life insurance policy or annuity contract presented.

7. (1) The administrator may be delegated the authority by the state auditor to assist the state auditor in making deductions from the salaries of State employees, but the administrator's authority can extend no further under the act. (2) The payment for service contracts is contemplated under the act when such contracts are necessary for the due and efficient performance of duties contemplated to be performed under the act, but supervision must be maintained over the performance of a services contract.

#### ANALYSIS:

1. The first issue to be considered relates to a serious discrepancy between the title and the body to the act under consideration. One of the opinion requests pointed out that the title to House Bill No. 41 (*Idaho Session Laws*, 1975, Ch. 270, p. 723) specifically limits the amount of an employee's compensation which may be deferred to twenty-five percent (25%). The body of the act, however, specifically provides only that the total payment for the purchase of life insurance or fixed and/or variable annuity contracts and the employee's nondeferred income not exceed his total salary or compensation under the existing salary schedule or classification plan applicable to such employee in

such year. Therefore, under the body of the act, all of the employee's annual compensation rather than twenty-five percent (25%) of it would be subject to deferral. The question presented asked whether the title to the act would take priority to limit the amount of an employee's salary which may be deferred to twenty-five percent (25%). Unfortunately, the problem appears to be more serious.

The title to House Bill No. 41 reads as follows:

AN ACT

RELATING TO COMPENSATION OF PUBLIC EMPLOYEES; PROVIDING THAT ANY GOVERNMENTAL ENTITY MAY CONTRACT WITH ITS EMPLOYEE TO DEFER A PORTION OF THAT EMPLOYEE'S COMPENSATION UP TO TWENTY-FIVE PER CENT TO OBTAIN FAVORABLE FEDERAL INCOME TAX TREATMENT; AND DECLARING AN EMERGENCY. (Emphasis added.) Title to House Bill No. 41, *Idaho Session Laws*, 1975, Ch. 270, p. 723.

The pertinent portion of the body of the act provides:

... In no event shall the total payments made for the purchase of said life insurance contract, or fixed and/or variable annuity contract and the employee's nondeferred income for any year *exceed the total annual salary or compensation* under the existing salary schedule or classification plan applicable to such employee in such year. (Emphasis added.) *Idaho Session Laws*, 1975, Ch. 270, Section 1, p. 723.

It seems clear beyond question that the discrepancy between the title and the body of the act is obvious and substantial. The provisions of the title and the body of the act are contradictory in that the title indicates that twenty-five percent (25%) of an employee's compensation may be deferred whereas the body of the act indicates one hundred percent (100%) of the same salary or compensation may be deferred. Also, the title is misleading in that members of the legislature or the general public reading the title would specifically be led to believe that the act enabled the State of Idaho or departments, divisions, separate agencies or political subdivisions thereof to defer twenty-five percent (25%) of an employee's salary or compensation, whereas the body of the act purports to allow the described governmental employers to defer all of a given employee's annual compensation or salary. An individual reading the specific twenty-five percent (25%) limitation in the title to the act under consideration would be misled if he did not read the body of the act, and upon subsequently reading the body of the act, would most likely be surprised at the discrepancy. Even if the offending sentence from the body of the act quoted herein were to be deleted from the act, the remainder of the body of the act still would not support the twenty-five percent (25%) limitation specifically required by the title.

In considering the effect of the discrepancy between the title and the body of the act, Article 3, Section 16 of the *Idaho Constitution* becomes pertinent:

Every act shall embrace but one subject, and matters properly connected therewith, which subject shall be expressed in the title; but if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be embraced in the title. *Idaho Constitution*, Art. 3, § 16.

The Idaho Supreme Court has construed the foregoing provision of the Idaho Constitution on numerous occasions:

So far as this court is concerned, it has been determined that the title should indicate the general scope and purpose of the legislative enactment, and be so comprehensive as to give notice of such proposed legislation. *The title should not be of such a character as to mislead or deceive*, either the lawmaking body, or the public, as to the legislative intent. *It should not cover legislation which is contradictory* or not connected with or related to the general subject stated in the act . . . (Emphasis added.) *Federal Reserve Bank v. Citizens Bank & Trust Co.*, 53 Idaho 316, pp. 324, 325, 23 P.2d 735 (1933).

The purpose of said constitutional provision is to prevent fraud and deception in the enactment of laws; to prevent log-rolling legislation and to reasonably notify legislators and the people of the legislative intent to be enacted in the law. *State of Idaho v. Pioneer Nurseries Co.*, 26 Idaho 332, 336, 143 P. 405 (1914).

A title need not be an index of the contents of an act; it is sufficient if it expresses the subject, and all the provisions germane and incidental to the subject are covered thereby; provisions *not incongruous*, and having a proper relation to the subject may be included in the act without mention in the title, and before the court will hold any title defective or any provision not properly included under the title, *the defect or departure must be plain and manifest*. (Emphasis added.) *Idaho Gold Dredging Co. v. Balderston*, 58 Idaho 692, 704, 78 P.2d 105 (1938).

and

To warrant the nullification of a statute because its subject or object is not expressed in its title, the violation must not only be substantial but plain, clear, manifest and unmistakable. *Golconda Lead Mines v. Neill*, 82 Idaho 96, 193, 350 P.2d 221 (1960).

As a general rule, when a statute is attacked as violating the constitution on the ground that the subject of the statute is not clearly expressed in the title, the title will be liberally construed for the purpose of upholding the statute. *State, ex rel v. City of Wichita*, 335 P.2d 786, 789, 184 Kan. 196 (1959). However, it appears that the rule of liberal construction does not apply when the provisions of the body of the act directly conflict with specific provisions in the title.

The title should not be misleading or give rise to surprise or deception . . . If it is specific, it is not entitled to the liberal interpretation which would prevail otherwise. *In Re West Highway Sanitary & Improvement Dist.*, 317 P.2d 495, 500, 77 Wyo. 384 (1957).

Applying the principles excerpted from the foregoing cases to the consideration of the validity of the act under consideration leads us to conclude that a strong possibility exists that House Bill No. 41 (*Idaho Session Laws*, 1975, Chapter 270, p. 723) would be ruled null and void if tested before the Idaho Supreme Court. The title to the act specifically provides for a limitation to the extent to which the act will permit a governmental employee's income to be deferred. The body of the act is directly inconsistent and incongruous to the specific provisions of the title of the act in that the body of the act permits a governmental employee to defer all of his salary. The discrepancy reaches materially to the very crux of the act. If the act were not considered null and void as violating Article 3, Section 16 of the *Idaho Constitution*, it would allow a governmental employee to defer four times the amount of his compensation which was specifically limited by the title with a resultant impact on state as well as federal income tax revenues. While it is perfectly plausible that none of the members of the legislature or general public were actually misled by the contradictory provisions in the title, it is equally plausible that individuals serving in the legislature or the general public had time only to read the title to the bill and subsequently were misled. Otherwise, it seems reasonable that the obvious discrepancy would have been noticed, attention called to the error, and an appropriate correction made. The foregoing considerations lead to the conclusion that should the act under consideration be tested for validity, that it would be found to be null and void as violating Article 3, Section 16 of the *Idaho Constitution*, for the reason that a specific and material provision in the body of the act directly contradicts a specific provision in the title in a misleading manner. Inasmuch as this is an Attorney General's Opinion, however, rather than a decision by a court authorized to actually rule on the validity of the act in question, this office will proceed to respond to the other issues presented in the two opinion requests.

2. In analysis of the issues of (1) "What is an employee?", and (2) "Do contracts for professional services, particularly contracts with physicians receiving reimbursements from Medicaid, result in an employer-employee relationship?", we find that the Idaho Supreme Court has on a number of occasions applied the following rules to determine whether an employer-employee relationship has arisen as opposed to a contract for personal services with an independent contractor:

The general test is the *right* to control and direct the activities of the employee, or the power to control the details of the work to be performed and to determine how it shall be done, and whether it shall stop or continue, that gives rise to the relationship of employer and employee, and when the employee comes under the direction and control of the person to whom his services have been furnished, the latter becomes his temporary employer. . . ." *Ohm v. J.R. Simplot & Co.*, 70 Idaho 318, 321, 216 P.2d 952 (1950); *Lamb v. Meyer, Inc.*, 70

Idaho 224, 227, 214 P.2d 884 (1950); *Pinson v. Minidoka Highway District*, 61 Idaho 731, 737, 106 P.2d 1020 (1940).

and

An independent contractor represents his employer only as to the results of his work and not as to the means whereby it is to be accomplished. The fact that the work is to be done under the direction and to the satisfaction of representatives of the employer, does not, of itself, change the relationship to that of master and servant. *Ohm v. J.R. Simplot Co.*, 70 Idaho 318, 322, 216 P.2d 952 (1950); *Lamb v. Meyer, Inc.*, 70 Idaho 225, 228, 214 P.2d 884 (1950).

The Idaho decisions are quite consistent with the general rule of determining the existence of an employer-employee relationship as stated in the *Law of Torts*, 4th Ed. Ch. 12, § 460 by Prosser.

The traditional definition of a servant is that he is a person employed to perform services in the affairs of another, whose physical conduct in the performance of the service is controlled, or is subject to a right of control, by the other.

This is, however, a great over-simplification of a complex matter. In determining the existence of 'control' or the right to it, many factors are to be taken into account and balanced against one another — the extent to which, by agreement, the employer may determine the details of the work; the kind of occupation and the customs of the community as to whether the work usually is supervised by the employer; whether the one employed is engaged in a distinct business or occupation, and the skill required of him; who supplies the place and instrumentalities of the work; the length of time the employment is to last; the method of payment; and many others . . . but it is probably no very inaccurate summary of the whole matter to say that the person employed is a servant when, in the eyes of the community, he would be regarded as a part of the employer's own working staff, and not otherwise.

Whether a contract for professional services gives rise to an employer-employee relationship or constitutes a contract with an independent contractor necessarily depends to a great extent to the factual elements of each particular case as applied to the principles just discussed. Either eventuality is possible. Once it is determined that an individual is an independent contractor in the performance of given duties, it necessarily follows that he is not an employee, and, of course, the converse would also be true.

Applying the foregoing principles to physicians who receive reimbursement from Medicaid for the treatment of patients, it appears that such physicians are clearly independent contractors rather than State employees. Such physicians normally treat Medicaid patients along with all their other patients in conjunction with their private practice of medicine. The physician is certainly pursuing a distinct occupation, which requires a high degree of skill and discretion, the

treatment of the patient is not subject to the immediate supervision or control by the State. Furthermore, the contract usually entered into between physicians and the Department of Health and Welfare states that:

The CONTRACTOR and any agents and employees of the CONTRACTOR, shall act in an independent capacity and not as officers or employees or agents of the State in the performance of this contract. *LONG FORM PURCHASE OR SERVICE CONTRACT* p. B7. Legal Services Division of the Idaho Department of Health and Welfare.

The other form of contract which is occasionally used by the Department of Health and Welfare when procuring services from an individual physician states:

The PROVIDER in performing service under this agreement is not acting as agent of the DEPARTMENT; neither the State nor the DEPARTMENT shall assume any liability for his actions.

In conclusion, it would appear from the foregoing analysis that to determine whether a contract for professional services constitutes a contract for employment or a contract with an independent contractor depends upon the facts of each case which indicate the degree of control exercised by the party procuring the services over the individual providing the services. It does appear clear that a physician rendering services under a contract with the Department of Health and Welfare, and receiving reimbursement from Medicaid is an independent contractor rather than an employee of the state.

3. With regard to whether an employer-employee relationship exists between the State of Idaho and the elected members of the legislature, or any of the duly elected or appointed offices of the State for that matter, an interesting issue of law arises. There appears to be no question that duly elected or appointed State officials are employees of the State. As Chief Justice Marshal speaking for the Circuit Court, D. Virginia, aptly stated in 1825:

An office is defined to be 'a public charge or employment,' and he who performs the duties of an office is an officer . . . Although an office is 'an employment,' it does not follow that every employment is an office. A man may certainly be employed under a contract, expressed or implied, to do an act, or perform a service without becoming an officer. But if a duty be a continuing one, which is defined by rules prescribed by the government, and not by contract, which an individual is appointed by government to perform, who enters on the duties appertaining to his station, without any contract defining them, if those duties continue, though the person be changed, it seems very difficult to distinguish such a charge or employment from an office, . . . *United States v. Maurice*, 2 Brock. 96, Fed. Case No. 15747 (1823); *Ft. Smith v. Quinn*, 174 Ark. 863, 296 S.W. 722, 58 ALR 921, 923 (1927).

Further,



An office is a public station or employment, conferred by the appointment government. The term embraces the ideas of tenure, duration, emolument and duties. *United States v. Hartwell*, 6 Wall (U.S.) 385, 18 L.Ed. 830, 832 (1868).

There is a serious question, however, as to whether the term "employee" as used in House Bill No. 41 can be construed to include elected or appointed officials. The majority of cases in which the question of whether the term "employee" as used in a constitutional or statutory provision, includes "public officers" have construed the term "employees" as not including public officers or officials. While there are exceptions (and the determination in each instance depends upon the stipulations of the particular provisions under consideration), the term "employee" used in a constitutional or statutory provision in referring to persons performing services for a state or political subdivision is seldom construed so as to include public officers unless the provision in question expressly so stipulates. (See *American Law Reports*, 2nd Series, Vol. 5, ANNOTATION: "Constitutional or statutory provision referring to 'employees' as including public officers," p. 416.)

We feel, however, that a deferred compensation plan can be closely analogized to a pension or a retirement plan in which the following rule of construction can be applied:

It is a firmly established principle of judicial construction that pension statutes are to be liberally construed. *O'Dea v. Cook*, 176 Cal. 659, 169 P. 366 (1917). See also, *Walton v. Cotton*, 60 U.S. 355, 15 L.Ed. 658 (1957).

Furthermore, if a deferred compensation plan can be compared to a retirement or pension plan, it appears that the following language of the California Supreme Court in *Knight v. Board of Administration* would be persuasive:

The arguments in favor of a retirement plan are equally applicable to all persons who are servants of the state, whether they are elected or appointed officers in the strict sense, or the lowliest workmen. One of the purposes of a retirement system is an inducement which will enable the government to secure and retain a more qualified government personnel. That purpose is more important in the case of officers than ordinary employees when we consider the more important functions they perform. It must be recognized that among the state officers there are none whose duties are more vital to the state than those imposed upon members of the Legislature. *Knight v. Board of Administration*, 32 Cal.2d 400, 196 P.2d 547, 5 ALR 2d 410, 414 (1948).

and

If one word is chosen to embrace all persons serving and paid by the state, 'employee' would come nearest to being an all inclusive term. *Knight v. Board of Administration*, supra.

4. In response to the questions, "What is meant by the term 'compensation?'" and "Would this include reimbursement to physicians receiving reimbursements from Medicaid, legislators, persons on contract with the State, etc.," we observe that the term "compensation" has been defined to mean "an equivalent, recompense, or remuneration; pay; payment for value in money; a recompense or reward for some loss, injury or service, especially when it is given by statute." *State v. Pitzenbarger*, 214 N.E.2d 849, 852, 6 Ohio Misc. 134 (1965). We also note that the term "compensation" has been defined to include allowance for personal expenses, commissions, expenses, fees, an honorarium, mileage or traveling expense, payments for services, restitution or balancing of accounts. *State v. Pitzenbarger*, supra. (Also see, *Corpus Juris Secundum*, Vol. 15, Compensation, p. 654). Compensation in its broadest sense comprehends money allowances for a wide variety of purposes. *Lowden v. Washita County Excise Board*, 13 P.2d 370, 372 (Oklahoma, 1941), and, it has been held that "The word 'compensation' in common general usage is broad enough to include recompense of expenses." *Tierney v. Van Arsdale*, 332 S.W.2d 546, 549 (Kentucky, 1960.) (Citing cases.) For purposes of *Idaho Session Laws*, 1975, Chapter 270, it appears that the legislature intended the term "compensation" to be co-extensive with the term "taxable income" as defined in the Internal Revenue Code, Section 63, as the specific intent of the act is to enable employees to defer such income for favorable federal income tax treatment.

5. The next issue to consider is whether the "expense allowance" for legislators cited in *Idaho Code*, Section 67-412 (5), qualifies as taxable income or salary. This section reads as follows:

Members of the legislature shall receive the same per diem allowances and be reimbursed for actual expenses necessarily incurred in attending meetings or performing services previously authorized by the legislature and held during the interim between legislative sessions in the same manner and in the same amounts as is provided by members of the legislative council, including *Idaho Code*, Section 67-412 (5).

Further, *Idaho Code*, Section 67-431, as amended in *Idaho Session Laws*, 1975, Ch. 245, p. 657, makes provision for the compensation of members of the legislative council while attending meetings as follows:

**Compensation and expenses.** — Members of the council and the committees thereof shall be reimbursed for actual expenses necessarily incurred in attending meetings and in the performance of their official duties, and they shall receive the sum of thirty-five dollars (\$35.00) for each day spent in traveling intra-state to or from regular council meetings by the most direct route and in attendance at meetings or in the performance of other duties directed by the council, and may, subject to rules adopted by the legislative council, receive the sum of thirty-five dollars (\$35.00) for each day spent in traveling to or from intra-state meetings. *Idaho Code*, Section 67-431.

The rules adopted by the legislative council with regard to the per diem allowance can be found in "Monthly Matters, June, 1975, p. 29 'Appendix A', Rules of the Legislative Council," and reads as follows:

- A. Each member of the Legislature, when attending any meeting authorized by the Legislative Council, shall receive the sum of \$35.00 for each day or portion thereof spent in attendance at such meeting.
- B. Each member of the Legislature, when traveling to attend any meeting authorized by the Legislative Council, shall receive the sum of \$11.66 for each one-third of a day spent away from his home, except for the day or days of the meeting, beginning with the time of departure from home and ending with the time of arrival back at home.
  - a. One-third parts of a day shall be determined:
    - i. Midnight to 8:00 a.m. = first one-third;
    - ii. 8:00 a.m. to 4:00 p.m. = second one-third;
    - iii. 4:00 p.m. to midnight = third one-third
  - b. Not more than one full calendar day shall be allowed for traveling to a meeting, and not more than one full calendar day shall be allowed for traveling from a meeting.
- C. The maximum amount that may be paid to any member for any one calendar day shall be \$35.00, irrespective of travel on the day of the meeting.
- D. Travel must be scheduled to provide the lowest possible cost to the state.

In addition to the per diem allowances described above, members of the legislature are reimbursed for actual expenses necessarily incurred in attending meetings and in the performance of their official duties as previously stated in *Idaho Code*, Section 67-431, *supra*. We understand that the practice followed by the legislative council is to accept receipts for expenses actually incurred by members of the legislature and to reimburse them in an amount equal to the expenses incurred.

The Internal Revenue Code of 1954 defines "taxable income" by two alternatives depending on whether the individual elects to use the standard deduction:

*Taxable Income Defined:*

- a. *General Rule.* — Except as provided in subsection (b), for purposes of this subtitle the term 'taxable income' means gross income, minus the deductions allowed by this chapter, other than the standard deduction allowed by part IV (sec. 141 and following).

b. *Individuals Electing Standard Deduction.* — In the case of an individual electing under section 144 to use the standard deduction provided in part IV (sec. 141 and following), for purposes of this subtitle the term 'taxable income' means adjusted gross income, minus —

1. such standard deduction, and
2. the deductions for personal exemptions provided in section 151.

I.R.C. (Internal Revenue Code of 1954), Section 63.

We observe that the terms "gross income" and "adjusted gross income" as used in I.R.C. Section 63 are often defined respectively as follows:

*Gross Income Defined:*

a. *General Definition.* — Except as otherwise provided in this subtitle, gross income means all income from whatever source derived . . . I.R.C. Section 61.

and

*Adjusted Gross Income Defined:*

For purposes of this subtitle, the term 'adjusted income' means, in the case of an individual, gross income, minus the following deductions:

1. . . .
2. *Trade and Business Deductions of Employees.* —

A. . . .

B. *Expenses for Travel Away from Home.* — The deductions allowed by part VI (sec. 161 and following) which consist of expenses of travel, meals, and lodging while away from home, paid or incurred by the taxpayer in connection with the performance by him of services as an employee.

I.R.C. Section 62.

There seems to be no question but what both the thirty-five dollar (\$35.00) per diem allowance and the expenses reimbursed to legislators under *Idaho Code*, Section 67-431 constitute "gross income" within the meaning of I.R.C. Section 61. There does remain the question as to whether either the thirty-five dollar (\$35.00) per diem or the actual expenses reimbursed are deductible under I.R.C. Section 162 (a) (2) to compute (1) "taxable income" within the meaning of I.R.C. Section 63 (a) or (2) "adjusted gross income" as an intermediate step to arriving at "taxable income" under I.R.C. Section 63 (b).

I.R.C. Section 162 (a) (2) provides:

a. *In General.* — There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including —

1. . . .

2. traveling expenses (including amounts expended for meals and lodging other than amounts which are lavish or extravagant under the circumstances while away from home in the pursuit of a trade or business; . . .

I.R.C. Section 162 (a) (2).

Code Section 162 (a) (2) of the I.R.C. is further modified by I.R.C. Section 274 (d) which provides:

d. *Substantiation Required.* — No deduction shall be allowed —

1. under section 162 or 212 for any traveling expenses (including means and lodging while away from home),

2. . . .

3. . . .

unless the taxpayer substantiates by adequate records or by sufficient evidence corroborating his own statement (A) the amount of such expenses or other item; (B) the time and place of the travel, or (C) the business purpose of the expenses or other item, . . . *The Secretary or his delegate may by regulations provide that some or all of the requirements of the preceding sentence shall not apply in the case of an expense which does not exceed an amount prescribed pursuant to regulations. I.R.C. Section 274 (d). (Emphasis added.)*

Under the authority of I.R.C. Section 274 (d), the following Internal Revenue Service Regulation Sections 1.274 (e) (2) (i) and (ii) were adopted:

*Reporting of expenses for which the employee is required to make an adequate accounting to his employer — (i) Reimbursements equal to expenses.* For purposes of computing tax liability, an employee need not report on his tax return business expenses for travel, . . . paid or incurred by him solely for the benefit of his employer for which he is required to, and does, make an adequate accounting to his employer . . . and which are charged directly or indirectly to the employer (for example, through credit cards) or for which the employee is paid through advances, reimbursements, or otherwise, provided that the total amount of such advances, reimbursements, and charges is equal to such expenses.

*(ii) Reimbursements in excess of expenses.* — In case the total of the amounts charged directly or indirectly to the employer as advances, reimbursements, or otherwise, exceeds the business expenses paid or incurred by the employee and the employee is required to, and does,

make an adequate accounting to his employer for such expenses, the employee must include such excess (including amounts received for expenditures not deductible by him) in income. I.R.S. reg. Section 1.274 (e) (2) (i) and (ii).

It would seem safe to conclude from the foregoing analysis, and particularly from I.R.S. Reg. Section 11274 (e) (2) (ii), that in most instances, the equal reimbursement to legislators from the legislative council for actual expenses incurred under the provisions of *Idaho Code*, Sections 67-412 (5) and 67-431 would not be included in "taxable income." On the other hand, the thirty-five dollar (\$35.00) per diem allowed to legislators under these sections and the rules adopted by the legislative council under the authority of *Idaho Code*, Section 67-431 would not be deductible as an "ordinary and necessary business expense" within the meaning of I.R.C. Section 162 (a) (2) and consequently, must be included in "taxable income."

By way of caveat, we mention that it is possible under certain circumstances for the reimbursement of actual expenses to legislators under *Idaho Code*, Sections 67-412 (5) and 67-431 to be included in "taxable income." In *Commissioner of Internal Revenue v. Flowers*, the United States Supreme Court laid out the following test as to whether traveling expenses may be deducted under provisions similar to I.R.C. Section 162 (a) (2):

- (1) The expenses must be a reasonable and necessary traveling expense as that term is generally understood. This includes such items as transportation fares and food and lodging expenses incurred while traveling.
- (2) The expense must be incurred 'while away from home.'
- (3) The expense must be incurred in pursuit of business. This means that there must be a direct connection between the expenditure and the carrying on of the trade or business of the taxpayer or of his employer. Moreover, such an expenditure must be necessary or appropriate to the development and pursuit of the business or trade. *Commissioner of Int. Revenue v. Flowers* 326 U.S. 465, 470, 90 L.Ed. 203, 207 (1946).

The *Flowers* decision (*supra*.) did not indicate what was intended by the term "while away from home," and this phrase has been the subject of a great deal of litigation. The question frequently arises whether the term "away from home" means away from the taxpayer's place of business, or away from his "home" in the more traditional sense, i.e., place of residence. The Tax Court has consistently taken the position that "away from home" means "away from the taxpayer's principal place of business" and the United States Supreme Court indicated that it accepted that position in *Commissioner v. Stridger*, 386 U.S. 287, 18 L.Ed.2d 53, S.Ct. 1065 (1967). Thus, in *Montgomery v. Commissioner of Internal Revenue*, 64 T.C. No. 14 (1975), it was held that a legislator who maintained his legal residence in Detroit, Michigan, but whose principal business activities were that of a legislator in the State Capitol at Lansing, Michigan, was therefore not "away from home" while in Lansing, and therefore, could not deduct traveling expenses while in Lansing.

This example would probably have little application to members of the Idaho legislature as our legislative sessions are generally of short duration and the members of the legislature principally employed in other occupations, but it does serve to illustrate that before traveling expenses may be deducted under I.R.C. Section 162 (a) (2) such expenses must be "away from home" which in most instances, is construed to mean away from the taxpayer's principal place of business.

Finally, it appears that the foregoing analysis would be equally applicable in determining whether the "expense allowance" for legislators as provided in *Idaho Code*, Sections 67-412 (5) and 67-431 would be included in "taxable income" as defined in *Idaho Code*, Section 63-3022 of the "Idaho Income Tax Act." Taxable income is defined in the Idaho Income Tax Act as follows:

**Taxable income.** — The term 'taxable income' means 'taxable income' as defined in Section 63 of the Internal Revenue Code adjusted as follows: . . . *Idaho Code*, Section 63-3022.

None of the adjustments listed under *Idaho Code*, Section 63-3022 are related to the issue of deductions for travel expenses.

6. In response to the questions, (1) "Is the State limited to plans underwritten by life insurance companies licensed in the State of Idaho?", (2) "Is the State limited to utilizing only those funding vehicles mentioned in the act: fixed annuity, variable annuity, and life insurance; or could we also look to those plans using some other approach as the investment vehicle?", (3) "Does the State have to offer all three of the aforementioned funding vehicles, or could the plans utilize just one or two of them?", and finally (4) "Does the State have the flexibility to limit the number of life insurance companies to be involved in a deferred compensation plan?", we present the following analysis:

House Bill No. 41, Section 1, specifies that:

The state of Idaho, or any department, division or separate agency of the state, and any county, city, or political subdivision of the state acting through its governing body, is hereby *authorized* to contract with an employee to defer a portion of that employee's income, and *may* subsequently with the consent of the employee, purchase *a life insurance or fixed and/or variable annuity contract*, for the purpose of funding a deferred compensation program for the employee, from any life underwriter duly licensed by this state who represents an *insurance company* licensed to contract business in this state. In no event shall the total payments for the purchase of said *life insurance contract, or fixed and/or variable annuity contract* and the employee's nondeferred income for any year exceed the total salary, or compensation under the existing salary schedule or classification plan applicable to such employee in such year . . . (Emphasis added.) House Bill No. 41, Section 1, *Idaho Session Laws*, 1975, Chapter 270, Section 1, p. 723.

The use of the word "may" as emphasized in the foregoing provision indicates that the statute is directory rather than mandatory with regard to the purchase of life insurance or fixed and/or variable annuity contracts. The statute is directory because it "authorizes" rather than requires the employer to defer a portion of the employee's income and provides the employer with discretion on whether or not to purchase a life insurance of fixed and/or variable annuity contract by use of the word "may." However, it also appears that the statutory rule of construction "expressio unius exclusio alterius est" (expression of one thing is the exclusion of another) applies in this situation to limit the employer's exercise of discretion to the alternatives explicitly listed in the act. "It is a universally recognized rule of construction that, where a constitution or statute specifies certain things, the designation of such things excludes all others." *Poston v. Hollar*, 132 P.2d 142 64 Idaho 322 (1942). Also, "Where a statute grants authority to do a thing and prescribes the manner of doing it, the rule is clear that the provision as to the manner of doing it is mandatory, even though the doing of it in the first place is discretionary." *Sutherland Statutory Construction*, 4th Ed. Vol. 2A, "Mandatory and Directory Construction - Expressio Unius", Section 57.10, p. 428, and "Whenever a power is conferred upon a municipality and the mode of its exercise is pointed out, this mode must be pursued." *Carlson v. City of Helena*, 39 Mont. 82, 102 P. 39 (1909). Applying the rule of "expressio unius exclusio alterius est" to the statute under consideration leads to the conclusion that the State is limited to plans underwritten by life insurance companies licensed in the State of Idaho, and is further limited to plans funded by life insurance or fixed and/or variable annuities by such companies.

In response to the question, "Does the state have to offer all three of the aforementioned funding vehicles, or could the plans utilize just one or two of them?", we would draw attention to the fact that the act provides that the employer may, with the consent of the employee, "purchase a life insurance or fixed and/or variable annuity contract, for the purpose of funding a deferred compensation program for the employee." *Idaho Session Laws*, 1975, Chapter 270, Section 1, p. 723. The Idaho Supreme Court has held that "... the term 'or' should ordinarily be given its normal disjunctive meaning unless such a construction renders the provision in question repugnant to other provisions of the statute, or unless it would involve an absurdity, or produce an unreasonable result." *Filer Mutual Telephone Company v. Idaho State Tax Commission*, 76 Idaho 256, 261, 281 P.2d 478 (1955). Therefore, we conclude that the State could utilize any or all of the three aforementioned funding vehicles.

In response to the issue of whether the State has the flexibility to limit the number of life insurance companies to be involved in a deferred compensation plan, we note that the act provides that "The State of Idaho, or any department, division, or separate agency of the state, and any of the county, city, or political subdivisions of the state acting through its governing body, ... may ... with the consent of the employee, purchase a life insurance, or fixed and/or variable annuity contract with *any* life underwriter duly licensed by this state who represents an insurance company licensed to do business in this state ..." *Idaho Session Laws*, (1975), Chapter 270, Section 1, p. 723. (Emphasis added.) It appears from the foregoing language that the act contemplates that "any" life under-



writer licensed by the State who represents an insurance company licensed to do business in the State may present his program to governmental employees subject to the approval of the employer. Inasmuch as the act is "directory" rather than "mandatory", the employer has the discretionary authority to approve or disapprove any given plan, and to agree or refuse to agree to purchase the life insurance policy or annuity contract as presented by the life insurer through its representative.

7. In response to the inquiries: (1) "Does the administrator, as appointed by the State Auditor in compliance with the law, have complete administrative authority over any deferred compensation plans made available to State employees?" and (2) "Are payments for contractual services to firms or individuals legislatively intended to be included under the provisions of House Bill No. 41?", we present the following analysis:

In this regard, *Idaho Session Laws*, 1975, Chapter 270, Section 1, p. 723 (House Bill No. 41) provides only that:

For the purpose of this act the state auditor is authorized to make such deductions from salary when requested by the governing officer or body of the state of Idaho, or any department, division or separate agency of the state. The auditor shall also designate an administrator. *Idaho Session Laws*, 1975, Chapter 270, Section 1, p. 723.

We observe that under the act there are no powers and duties enumerated on behalf of the administrator. We further observe that under the act the state auditor is "authorized to make such deductions from salary when requested by the governing officer or body of the state of Idaho, or any department, division, or separate agency of the state." The auditor is also directed to appoint the administrator.

As a general rule, the powers and authority of public officers are usually fixed and determined by the law. Subject to such limitations as may be imposed by the constitution, the legislature with power to create an office may prescribe and limit its powers, and may from time increase or diminish them . . . Public officers have only such power and authority as are clearly conferred by law or necessarily implied from the powers granted, and as a general rule, usage and custom will not serve to enlarge such power and authority . . . An officer may not do everything not forbidden in advance by some legislative act. 67 *Corpus Juris Secundum*, Officers, Section 102, p. 366, 367.

The act under consideration neither prescribes nor limits the authority of the administrator, which necessarily leads us to conclude that the administrator was granted no further authority under the act than that which may be delegated to the administrator by the state auditor. Also, our examination of the act leads us to conclude that the state auditor is authorized only "to make such deductions from salary when requested by the governing officer or body of the state of Idaho, or any department, division, or separate agency of the state." *Idaho Session Laws*, 1975, Chapter 270 (supra). Also, it seems reasonable to assume that

the authority which is delegated to the administrator by the auditor under the act may not exceed that which was granted to the auditor in the first instance. The foregoing analysis necessarily leads us to conclude that the administrator may be delegated the authority by the state auditor to assist the auditor to make deductions from the salaries of State employees, but that the administrator's authority can extend no further under the act.

With regard to whether payments for contractual services to firms or individuals is legislatively intended to be included under the provisions of House Bill No. 41, the general rule is that although "public power may not be delegated to private persons or corporations, over whom no supervision is maintained," 67 *Corpus Juris Secundum*, Officers, Section 148, p. 449, an officer nevertheless "has by implication such powers as are necessary for the due and efficient exercise of those expressly granted, or such as may be fairly implied therefrom. Acts may be done within the scope of official authority without being prescribed by statute . . . It is sufficient that such acts are done by an officer with respect to matters committed by law to his control or supervision, or that they have more or less connection with the general matters committed by law to his control or supervision . . ." 67 *Corpus Juris Secundum*, Officers, Section 102 (b), pp. 368, 369. Furthermore, "A public officer can make such contracts or agreements or (as) are expressly or impliedly authorized, and persons contracting with him must take notice of the extent of his authority." 67 *Corpus Juris Secundum*, Officers, Section 102 (c), p. 370. The Idaho Supreme Court has favorably quoted the following in regard to the implied powers of public officers:

In addition to powers expressly conferred upon him by law, an officer has by implication such powers as are necessary for the due and efficient exercise of those expressly granted, or such as may be fairly implied therefrom. But no powers will be implied other than those which are necessary for the effective exercise and discharge of the powers and duties expressly conferred and imposed, and where the mode of performance of ministerial duties is prescribed no further power is implied.

and

Wherever a power is given by statute, everything lawful and necessary to the effectual execution of the power is given by implication of law. *Cornell v. Harris*, 60 Idaho 87, 93, 88 P.2d 498 (1939).

To conclude, it appears that although supervision must be maintained over the performance of a services contract to make payment for such contracts is nevertheless contemplated, under the act when such contracts are necessary for the due and efficient performance of duties contemplated to be performed under the act.

#### AUTHORITIES CONSULTED:

1. *Idaho Constitution*, Article III, Section 16.

2. Statutes: *Idaho Session Laws*, 1975, Chapter 270, p. 723 and Chapter 245, p. 657; *Idaho Code*, §§ 67-412 (5), 63-3022; and Internal Revenue Code of 1954, §§ 61, 62, 63, 162 and 274 (d).
3. *Income Tax Regulations*, §§ 1.275-5 (e) (2) (i) and (ii).
4. *Ohm v. J.R. Simplot & Co.*, 70 Idaho 318, 216 P.2d 952 (1950).
5. *Lamb v. Meyer, Inc.*, 70 Idaho, 224, 214 P.2d 884 (1950).
6. *Pinson v. Minidoka Highway District*, 61 Idaho 731, 106 P.2d 1020 (1940).
7. *United States v. Maurice*, 2 Brock. 96, Fed. Case No. 15747 (1823).
8. *Ft. Smith v. Quinn*, 174 Ark. 863, 296 S.W. 722 (1927).
9. *United States v. Hartwell*, 18 L.Ed. 830, 73 U.S. 385 (1968).
10. *State v. Pitzenbarger*, 214 N.E.2d 849 (1965).
11. *Lowden v. Washita County Excise Board*, 13 P.2d 372 (1941).
12. *O'Dea v. Cook*, 176 Cal. 659, 169 P. 366 (1917).
13. *Walton v. Cotton*, 60 U.S. 355, 15 L.Ed. 658 (1957).
14. *Knight v. Board of Administration*, 32 Cal. 2d 400, 196 P.2d 547 (1948).
15. *Tierney v. Van Arsdale*, 332 S.W.2d 546 (1960).
16. *Commissioner of Int. Revenue v. Flowers*, 326 U.S. 465, 90 L.Ed. 203 (1946).
17. *Commissioner v. Stidger*, 386 U.S. 287, L.Ed.2d 53 (1967).
18. *Montgomery v. Commissioner of Internal Revenue*, 64 T.C. No. 14 (1975).
19. *Poston v. Hollar*, 132 P.2d 142, 64 Idaho 322 (1942).
20. *Carlson v. City of Helena*, 39 Mont. 82, 102 P. 39 (1909).
21. *Filer Mutual Telephone Co. v. Idaho State Tax Commission*, 76 Idaho 256, 281 P.2d 478 (1955).
22. *Federal Reserve Bank v. Citizens Bank & Trust Co.*, 53 Idaho 316, 23 P.2d 735 (1933).
23. *State of Idaho v. Pioneer Nurseries Co.*, 206 Idaho 332, 143 P. 405 (1914).

24. *Idaho Gold Dredging Co. v. Balderston*, 58 Idaho 692, 70 P.2d 105 (1938).

25. *Golconda Lead Mines v. Neill*, 82 Idaho 96, 350 P.2d 221 (1960).

26. *In Re West Highway Sanitary & Improvement Dist.*, 77 Wyo. 384, 317 P.2d 495 (1957).

27. *W. Prosser, Laws of Torts*, 4th Ed., p. 460.

28. *Sutherland Statutory Construction*, 4th Ed., Vol. 2A, p. 428.

29. *Corpus Juris Secundum*, Vol. 67, Officer, pp. 368, 369, 370, 449.

DATED this 4th day of August, 1975.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL  
Attorney General

ANALYSIS BY:

ROBERT M. JOHNSON  
Assistant Attorney General

# ATTORNEY GENERAL OPINION NO. 41-75

TO: Representative William Onweiler  
Idaho District Number 16  
3710 Cabarton Lane  
Boise, Idaho 83704

Per request for Attorney General Opinion.

QUESTION PRESENTED: Your letter of July 15, 1975, posed the following:  
"I wish to inquire about the meaning of Section 59-511 of the *Idaho Code*:

1. Please elaborate on the meaning of 'executive and administrative officer.'
2. Please elaborate on 'devote his entire time to the duties of his office and shall hold no other office or position of profit.' "

CONCLUSION:

1. Although the Constitution of the State of Idaho defines several executive officers, the line between executive and administrative officers within Section 59-511, *Idaho Code*, is not clearly marked.

2. A rational and sensible Construction of § 59-511 would be to limit the prohibition, forbidding executive administrative officers therein from holding other offices or positions of profit, to outside direct employment of incompatible subordinate positions which interfere with the actual performance of the duties of the said officers.

3. § 59-511 should be applied in a manner consistent with the other statutes that make up the *Idaho Code*, so as to treat executive and administrative officers therein equally with other state employees with reference to hours of employment.

#### ANALYSIS:

1. An executive officer, in the proper sense of the term, is one in whom is vested the power and duty to cause the law to be executed, such as the Governor, Lieutenant Governor, Secretary of State, State Treasurer, Attorney General, Superintendent of Public Instruction and those other classes of officers which also belong to the executive branch of government. Art. IV, § 1 of the Constitution of the State of Idaho provides:

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

In addition to the foregoing Constitutional class of executive officers, the law also recognizes another classification which is composed of administrative or ministerial officers and which may be regarded as a subdivision of that class of officers which in a general way belong to the executive branch of government. What characterizes an administrative officer is that he has no power to judge the matter to be done, and usually must obey some superior. Whether, therefore, a person is or is not an administrative officer depends, not so much on the character of the particular act which he may be called upon to perform or whether he exercises judgment or discretion with reference to such an act, but rather the general nature and scope of the duties devolving upon him are determinative.

There are numerous and varied definitions of the classes of executive and administrative officers which encompass terms of vague and varying import if used without reference to the intention of the statute in question and the specific matter to which the terms are addressed. These terms are not defined in Title 59, Chapter 5 of the *Idaho Code*, and no precise legal or technical definition

would be correct absent a definitive statute or a controlling Idaho Supreme Court interpretation. Therefore, at best, the powers and functions attached to each executive and administrative position would seem to manifest its definitional character when one is attempting to determine if a certain public officer has such attributes as to become an "executive or administrative officer" within the meaning of *Idaho Code*, § 59-511.

2. Generally, one employed in public service is subject to reasonable supervision and restriction whether by Constitution, statute, or by an authorized governmental body or officer, to the end that proper discipline may be maintained, and activities among such employees may not be allowed to disrupt or impair the public service. Irregardless, such provisions and regulations have frequently been challenged when they constitute an unwarranted encroachment upon the domain of individual liberty within the protection of Constitutional guarantees.

Therefore, although it is within governmental authority, in creating a public office or providing for public employment, to attach reasonable conditions as it chooses and that one who accepts such office or employment is bound by the conditions attached thereto so long as he continues therein, it should be stated at the outset that the existence and extent of such regulatory power is affected by the nature of the office, duties, or employment in question. As a result, the reasonableness of a regulation depends upon its purpose and the scope that it seeks to control.

The statutory language of *Idaho Code*, § 59-511, if strictly or narrowly construed, is indeed far reaching. *Idaho Code*, § 59-511 provides:

Officers to devote entire time to official duties — Exceptions. — Each executive and administrative officer shall devote his *entire time to the duties of his office and shall hold no other office or position of profit*: provided, that an elective or appointive state officer may be appointed to any office herein created, in which event he shall receive no salary other than by virtue of the appointive office, or in the case of an appointive state officer, he shall receive no salary other than by virtue of the appointive office held by him at the time of his appointment to an additional office.

If the above stated statute is read literally, then an executive and administrative officer within the meaning of the said statute would not, without fear, be able to own stock in a public or private corporation, be a trustee to a trust, or a personal representative to an estate, or even fulfill his public duty to serve upon a jury since such activities constitute possible positions of profit in violation of *Idaho Code*, § 59-511.

A literal interpretation of words of a statute should not prevail if it creates a result which is overly broad and unreasonable. When such a result occurs, courts often have refused to apply a statute on the grounds that its terms are too indefinite and uncertain. *U.S. v. Evans*, 33 U.S. 483 (1948), *U.S. v. Harriss*, 347 U.S. 612 (1954). It is said to be a well-established principle of statutory interpretation in that the law favors a rational and sensible construction of statute.

*Higgins v. Higgins*, 146 So.2d 122 (Fla. 1962). A statute is a solemn enactment of the state acting through its legislature and it must be assumed that this process achieves an effective and operative result. It cannot be presumed that the legislature would do a futile thing. Therefore, it would seem that the mandate of *Idaho Code*, § 59-511, requiring an executive or administrative officer to "devote his entire time to the duties of his office and hold no other office or position of profit", should be interpreted in a manner which would represent the intent of the legislature to create such a reasonable, effective and operative result.

Statutes, ordinances, and administrative regulations generally forbidding outside employment (commonly called "moonlighting") of public officers have generally been upheld as valid. *Schell v. City of Aberdeen*, 28 Wash.2d 335, 183 P.2d 466 (1947), *Croft v. Lambert*, 228 Ore. 76, 357 P.2d 513 (1960). And, even the common law recognizes that the same person may not at the same time hold two incompatible public offices. Frequently, therefore, when the right of a public officer to accept and hold another office was challenged, a question of whether the two offices were compatible or incompatible was presented. Offices are generally considered incompatible when such duties and functions are inherently inconsistent and repugnant, so that because of the contrariety and antagonism which would result from the attempt of one person to discharge faithfully, impartially, and effectively the duties of both offices, considerations of public policy render it improper for an incumbent to retain both.

After a lengthy consideration of Section 59-511, *Idaho Code*, it would seem that a reasonable interpretation of the legislative purpose behind statute would be to secure efficient, mentally and physically alert executive and administrative officers for the benefit of the public at large. Such a construction seems much more appealing than the unwarranted encroachment upon the domain of individual liberties of such executive and administrative officers which can result if the statute is narrowly or strictly read. For this reason, it appears that the scope of Section 59-511, *Idaho Code*, should not be all-encompassing. And, the statute is rather, in effect, a regulation which likely seeks to prohibit outside employment or the incompatibility which can arise from public officers holding subordinate offices or positions of profit. Such a construction would be consistent with the said purpose of the statute and can be supported by plethora of well established case and statutory law. See *Croft v. Lambert*, *supra*. Furthermore, it seems also reasonable to assume that § 59-511 should be construed harmoniously with the rest of the statutes of the *Idaho Code* if possible. Section 67-5326, *Idaho Code*, provides:

Hours of work — State policy — Over-time. — It is hereby declared to be the policy of the legislature of the state of Idaho that all employees of the several departments of the state government shall be treated equally with reference to hours of employment, holidays, and vacation leave. The policy of this state as declared in this act shall not restrict the extension of regular work hour schedules on an overtime basis in those activities and duties where such extension is necessary and authorized, provided that overtime work performed under such extension is compensated for as hereinafter provided.

Therefore, since it is the general policy of the State of Idaho that all employees should work between the hours of 8:00 A.M. and 5:00 P.M. and all state employees are required to be treated equally, it would seem that an executive and administrative officer, within the meaning of § 59-511, should not be required to "devote his entire time to the duties of his office" beyond those regular hours of work which are specified for all state employees. Certainly it would be manifestly unreasonable to construe § 59-511 as requiring an executive or administrative officer therein to devote 24 hours a day, seven days a week, 365 days a year towards the duties of his office. See also Section 59-1007, *Idaho Code*, which states that office hours of state officers for the transaction of business are "from eight o'clock A.M. until 5 o'clock P.M. each day except upon Saturdays, Sundays and holidays."

**AUTHORITIES CONSIDERED:**

1. *Idaho Constitution*, Article IV, § 1.
2. Statutes: Chapter 5, Title 9, *Idaho Code*; Section 59-511, *Idaho Code*; Section 59-1007, *Idaho Code*; Section 67-5326, *Idaho Code*.
3. *U.S. v. Harriss*, 347 U.S. 612, (1954).
4. *U.S. v. Evans*, 333 U.S. 483 (1948).
5. *Higgonson v. Higgonson*, 146 So. 2d 122 (Fla. 1962).
6. *Croft v. Lambert*, 228 Ore. 76, 357 P.2d 513 (1960).
7. *Schell v. City of Aberdeen*, 28 Wash. 2d 335, 813 P.2d 466 (1947).

DATED this 29th day of July, 1975.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL  
Attorney General

**ANALYSIS BY:**

PETER HEISER, JR.  
Chief Deputy Attorney General  
and  
TOM LINVILLE  
Legal Intern

**ATTORNEY GENERAL OPINION NO. 42-75**

TO: Honorable Pete T. Cenarrusa  
Secretary of State  
State of Idaho  
Building Mail



Per request for Attorney General Opinion.

**QUESTION PRESENTED:** Of what immediate effect is Senate Bill No. 1110 on the registration of those electors registered prior to July 1, 1975?

**CONCLUSION:** Senate Bill No. 1110 will have no immediate effect.

**ANALYSIS:** Senate Bill No. 1110 amends Section 34-435, *Idaho Code*, which formerly required each county clerk to examine his election register within sixty (60) days following each general election and cancel the registration of any elector who did not vote at any election within the past eight years for which registration was required. Senate Bill No. 1110 amends Section 34-435 by changing the duration which an elector must have voted from eight (8) to four (4) years.

The issue presented is whether or not Senate Bill No. 1110 may be applied retroactively or whether it must be applied prospectively only. To require county clerks to cancel the registration of those electors not having voted within the last four (4) years following the next general election is to apply the amendment retroactively. The Idaho Supreme Court has held repeatedly that a statute should have a prospective operation only unless its terms clearly show a legislative intent that it should operate retroactively. *Application of Forde L. Johnson Oil Company*, 84 Idaho 288, 372 P.2d 135 (1962). Furthermore, Section 73-101, *Idaho Code*, states that no law shall be applied retroactively unless expressly so declared.

The language of Section 34-435, as amended by the Forty-Third Idaho Legislature, reads:

Within sixty (60) days following the date of any general election, the county clerk shall examine the election register and the signed statements of challenge made at that election. After this examination, the county clerk shall immediately cancel the registration of any elector who did not vote in any election for which registration is required in the past four (4) years.

While the word "past" is used as an adjective in the term "past four years," it does not clearly indicate an intent that the statute apply retroactively. It could be construed to mean that any elector is subject to having his registration cancelled following the next general election who has not voted within the last four years. However, it could also be construed to mean that any elector is subject to having his registration cancelled for not having voted during a four year period, said period commencing on the effective date of this statute. Due to this ambiguity and lack of clear intent that it should be applied retroactively, Senate Bill No. 1110 must be applied prospectively only.

**AUTHORITIES CONSIDERED:**

1. *Idaho Code*, Sections 34-435, 73-101.

2. *Application of Forde L. Johnson Oil Company*, 84 Idaho 288, 372 P.2d 135 (1962).

DATED this 8th day of August, 1975.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL  
Attorney General

ANALYSIS BY:

CHRISTOPHER D. BRAY  
Deputy Attorney General

WILLIAM E. LITTLE  
Legal Intern

### ATTORNEY GENERAL OPINION NO. 43-75

TO: Ms. Susan Stacy, Senior Planner  
Ada Council of Government  
525 West Jefferson Street  
Boise, Idaho 83702

Per request for Attorney General Opinion.

#### QUESTIONS PRESENTED:

1. If not otherwise required by a (local zoning) ordinance, is it necessary for a city council to hold a public hearing when a change in the zoning ordinance is being considered?
2. Can individuals dwelling outside the city limits of Eagle, be appointed to the Planning and Zoning Commission of the city of Eagle?

#### CONCLUSIONS:

1. Yes.
2. Yes.

#### ANALYSIS:

1. The Legislature has specifically provided that a city council must conduct a public hearing whenever a zoning ordinance is subject to amendment regardless of whether its planning and zoning commission has already conducted hearings on the proposed amendment. The pertinent section of the *Idaho Code*, Section 67-6511, states that a "governing board" may adopt or reject any proposed amendment, whether or not it conforms to the comprehensive plan, as long as

the "governing board" conforms to the notice and hearing requirements in Section 67-6509, *Idaho Code*.

The Eagle City Council meets the definition of a "governing board" as per Section 67-6504, *Idaho Code*. Therefore, it must comply with Section 67-6509, *Idaho Code* which requires that:

"the governing board prior to adoption, amendment, or repeal of the plan, shall conduct at least one public hearing using the same notice and hearing procedures as the commission." (Emphasis added)

The specific notice and hearing procedures that are required of the governing board, i.e., the Eagle City Council, are detailed in Sections 67-6509 (a), *Idaho Code*. Thus, the *Idaho Code* clearly requires that the Eagle City Council hold a public hearing on any proposed amendment of its zoning ordinance.

2. The purpose of Title 67, Chapter 65, *Idaho Code*, is to codify "local planning" legislation in the State of Idaho. The criteria for membership upon planning, zoning, or planning and zoning commissions at either the city or county level is articulated by Section 67-6504 (a), *Idaho Code*. This section states in pertinent part:

"An appointed member of a commission must have resided in the county for five (5) years prior to his appointment, and must remain a resident of the county during his service on the commission. Not more than one third (1/3) of the members of any commission appointed by the chairman of the board of county commissioners may reside within an incorporated city in the county."

Statutorily, all members of such commissions are subject to the residency requirement of county residency. Thus all members of a city planning, zoning, or planning and zoning commission must be residents of the county in which the appropriate city is situated. However, no criteria exists to mandate residency within the city as an additional requirement for membership upon any such city commission.

County "local planning" commissions do have an additional criteria imposed upon their membership selection process not otherwise required of their city counterparts. The requirement of county residency is accompanied by the statutory proscription that not more than 1/3 of the membership of any county commission be residents of any city within that county. Presumptively, this "1/3 formula" seeks to limit the representation of urban interests upon a commission whose jurisdiction may predominantly encompass rural areas.

The Legislature's concern for a possible imbalance of urban interests upon county commissions is not reflected in the converse. Therefore a mayor is free to name a person to a city planning, zoning, or planning and zoning commission whose residence is not within the city's boundaries but who otherwise meets the residency requirements enumerated in Section 67-6504 (a), *Idaho Code*.

## AUTHORITIES CONSIDERED:

1. *Idaho Code*, Sections 67-6511 (b) and (c), 67-6509, 67-6504, and 67-6504 (a).

DATED this 31st day of August, 1975.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL  
Attorney General

## ANALYSIS BY:

CHRISTOPHER D. BRAY  
Deputy Attorney General

JORDAN SMITH  
Legal Intern

## ATTORNEY GENERAL OPINION NO. 44-75

TO: William Webster, Superintendent, Idaho State Liquor Dispensary  
Roy Truby, State Superintendent of Public Instruction

Per request for Attorney General Opinion.

## QUESTIONS PRESENTED:

1. Whether the adjustment of estimated surplus funds in the Idaho State Liquor Dispensary is to be made retroactive over the past fiscal year or whether it should be applied to the next fiscal year.

2. What is the distribution format for excess funds in the Idaho State Liquor Dispensary once the fixed-amount distribution required by § 23-404, *Idaho Code*, has been met?

3. Whether the whole or any part of the more than \$1,000,000 surplus in the Idaho State Liquor Dispensary Fund should have been paid into the Public School Income Fund at the close of Fiscal Year 1974.

## CONCLUSIONS:

1. The pertinent provision of § 23-404, *Idaho Code*, relating to adjustments requires that any funds in excess of the estimated surplus be distributed according to the statutory formula at the close of the fiscal year. This requirement could be met by making a fifth "adjustment payment" after quarterly payments have been made during the year.

2. Assuming that quarterly payments amounting to 57½% of estimated and available surplus funds have been made to counties and cities during the fiscal year, and that fixed-amount distributions totaling 2.57 million dollars have been made from surplus funds, and there is an excess remaining in the liquor dispensary fund at the close of the same fiscal year it is to be distributed as follows: 50% to the various counties in the state according to population; 7½% to incorporated and specially chartered cities in the state according to population; 42½% to the Public School Income Fund.

3. The Public School Income Fund should have received a payment of surplus funds from the Idaho State Liquor Dispensary at the close of fiscal year 1974. The mathematical formula for this annual distribution would provide as follows:

Distribution (to Pub. School Income Fund) = 42½% of surplus (total excess funds realized) - \$2.5 million (fixed-amount distributions).

ANALYSIS: Section 23-402, *Idaho Code*, provides:

No distribution of any surplus from the Liquor Fund shall be made as provided in the following section, unless there shall be monies in said fund after setting aside and reserving the following:

- (a) Funds sufficient to pay all current obligations of the dispensary.
- (b) A cash reserve of \$50,000 over and above all other assets.

Section 23-404, *Idaho Code*, in pertinent part states:

Whenever the amount of money available on an annual basis from the liquor fund shall exceed the amounts provided for retention by the foregoing section, such excess shall be distributed on an annual basis as follows: Fifty per cent (50%) to the various counties of the state in the same proportion as the population of said counties bears to the total population of the state as shown by the last federal census, provided, however, that fifty per cent (50%) of all the money apportioned to any county embracing all or any part of a junior college district shall be distributed and paid to the treasurer of such junior college district, as provided by section 33-2133, *Idaho Code*, or to a city which has a board of performing arts commissioners as provided for by section 23-408, *Idaho Code*; seven and one-half per cent (7½%) to incorporated and specially chartered cities of the state in the same proportion as the population of said cities bears to the total population of all incorporated and specially chartered cities of the state as shown by the last federal census; four hundred thousand dollars (\$400,000) of the remaining amount in the liquor fund shall be deposited to the credit of the permanent building fund; one million dollars (\$1,000,000) of the remaining amount in the liquor fund shall be distributed to the incorporated and specially chartered cities of the state in the proportion and manner above provided, and at such time as the superintendent shall

determine; one hundred twenty thousand dollars (\$120,000) of the remaining amount in the liquor fund shall be remitted to the state law enforcement planning commission to match federal block grants under the Omnibus Crime Control and Safe Streets Act of 1968 (P.L. 90-351); four hundred thousand dollars (\$400,000) of the state liquor fund shall be distributed one-forty-fourth ( $1/44$ ) to each of the several counties of the state and shall be paid directly to such counties, and this one-forty-fourth ( $1/44$ ) shall be kept by the counties in the county current expense fund without being subject to further division of the redistribution required by section 23-405, *Idaho Code*; and six hundred fifty thousand dollars (\$650,000) of the state liquor fund shall be paid to the cooperative welfare fund. The remainder of the state liquor fund shall be paid into the public school income fund defined by section 33-903, *Idaho Code*. Available amounts including surplus funds shall be distributed periodically but no less often than quarterly; *for this purpose estimates of surplus funds shall be made subject to adjustment at the close of the proper annual period.* (Emphasis added).

Although the language of the underlined portion of § 23-404 could be interpreted in two ways, it seems more in keeping with the probable intent of the Legislature to require that annual surplus funds be distributed within the same fiscal year as they accrue. Otherwise, there would be a carry over of funds from one year to the next and there would also be a need to revise each year's estimate of surplus. An estimate of around \$6,000,000 has been used for the past several years and it has been worked out mathematically so that  $42\frac{1}{2}\%$  of this amount equals the fixed amount expenditures. Once  $57\frac{1}{2}\%$  of this estimated amount has been paid quarterly to counties and cities, and the other  $42\frac{1}{2}\%$  has been used to meet fixed-amount obligations on a quarterly basis, there should be a fifth annual distribution or "adjustment payment" made to counties, cities and the Public School Income Fund. This "adjustment payment" would place surplus funds more quickly into the hands of state institutions and programs which are in need of them, than would a carry over method with quarterly payments in the following fiscal year.

In mathematical theory, the dollar distribution to the named state agencies would be the same regardless of which of the two possible statutory interpretations is followed. However, the interpretation rendered in this Attorney General Opinion seems preferable for two reasons. First, it allows for more simple computations by the Idaho State Liquor Dispensary since the annual estimate will not have to be adjusted every year. The present estimate may continue to be used as long as a fifth, end-of-the-fiscal-year "adjustment payment" is made to bring the distribution percentages in line with statutory requirements. Second, surplus funds will be put to their intended uses by state agencies and political subdivisions more quickly under this interpretation.

The Idaho State Liquor Dispensary has failed to make a distribution to the Public School Income Fund since 1972. Partly to blame for this shortcoming is the imprecise language of § 23-403, *Idaho Code*. The term "current obligations" is left largely undefined. Does it mean all obligations to pay for purchase orders under an accrual system of accounting, or does it mean only those obligations

which must be met before the close of the fiscal year? The Code is silent on this question; however, the use of the word "current" seems to indicate that an obligation must be due before the end of the fiscal year before it can be reserved by the Liquor Dispensary and excluded from being counted as surplus funds.

Another factor having a direct bearing on the failure of the Liquor Dispensary to distribute funds to the Public School Income Fund is the accounting system used by the Dispensary. Generally, the Liquor Dispensary uses an accrual method of accounting. However, the Dispensary does not enter purchase orders into "accounts payable" nor does it enter liquor on order into "assets" on Dispensary ledgers. This is a deviation from standard accounting methods under the accrual system. The rationale for this deviation is simple — the Dispensary feels it can have the advantage of lower shipping charges under a "F.O.B., Shippers Plant" arrangement and assume none of the typical liabilities for loss or damage of the liquor while it is in transit, since the liquor has not been entered into the accounting books. As will be discussed below, this may be a faulty rationale and more commonly accepted methods of preventing risks of loss or damage should be used. The deviation from proper methods of accrual accounting has led to complications when the time arrives to compute surplus funds. Although purchase orders are not reflected in the books as "accounts payable", the Dispensary has maintained that they are "current obligations" nonetheless and, as such, must be reserved according to statute. Consequently, annual audit reports which are based on the books have reflected a greater amount of surplus funds than the Dispensary states that it has.

In FY 1974 the audit reflected a surplus of approximately \$1.2 million dollars. However, the Dispensary stated that much of this amount was "encumbered" and had to be used to pay current obligations. Even though the Dispensary accounts did not reflect these obligations, the Dispensary held to its view that there were no substantial surplus funds and did not make a distribution to the Public School Income Fund. The question of whether there were or were not surplus funds has a direct bearing on Superintendent Truby's question concerning the right of the Public School Income Fund to have received a distribution in FY 1974.

If, indeed, there were surplus funds subject to distribution to the Public School Income Fund at the close of FY 1974, it would appear that they were in some manner carried over into FY 1975. That being the case, these funds now comprise part of the existing surplus which is soon to be distributed in the manner outlined above. It seems that if the Public School Income Fund receives 41½% of this existing surplus, it will not be put to any disadvantage financially. If the Income Fund had received its distribution in FY 1974, the amount of surplus carried over into FY 1975 to be used as operating funds by the Dispensary would have been less and then, the FY 1975 surplus would have been less than it presently is as well. Mathematically, one may take 42½% of "X" and add it to 42½% of "Y" and achieve the same result that would be arrived at by taking 42½% of "X" plus "Y". It is recommended that Dispensary officials compute the actual figures involved and determine if mathematical theory holds true in practice with given facts. If it does, there would seem to be no need to go back and determine what amount should have been distributed at the close of

FY 1974, make this particular distribution, revise all the accounts for FY 1975 and make a downward adjustment of that fiscal year's surplus, and then distribute the proper amount to the schools from the revised surplus. Rather, the Dispensary could just compute what percentage of the existing surplus should be distributed and make one simple distribution to the Public School Income Fund.

It is not the intention of the Office of the Attorney General to mandate one type of accounting system as opposed to another for the Liquor Dispensary. However, a more reliable bookkeeping system than that presently used is necessary if there is ever to be common agreement as to the actual amount of surplus funds. At present, the Dispensary reviews all outstanding purchase orders to determine which orders are likely to fall due before June 30 of each year. The amount of money encumbered by these orders is then deducted from the "free-fund balance" to determine the surplus available for distribution. There is no common agreement that this is the best method or the method intended by the statute.

The deviation from standard accounting procedures is based on the faulty premise that what is reflected, or not reflected, in the ledgers can afford a measure of legal protection to the Dispensary. The attention of Dispensary officials is directed to § 28-2-319, *Idaho Code*, which deals with the term "F.O.B." and its meaning under the sales law. It should be noted that this entire section is prefaced by the phrase "unless otherwise agreed". At the root of the Uniform Commercial Code is the theory that explicit agreements between buyer and seller will take precedence over the provisions of the Code. It therefore seems advisable for the Idaho State Liquor Dispensary to draft purchase agreements for its dealings with distillers and shippers which explicitly afford protection to the Dispensary in the event that a liquor shipment is lost or stolen. Also to be noted is § 28-2-401 (4), *Idaho Code*, which deals with the transfer of title to goods. This section states:

A rejection or other refusal by the buyer to receive or retain the goods, whether or not justified, or a justified revocation of acceptance reverts title to the goods in the seller. Such reversion occurs by operation of law and is not a "sale".

This right of the buyer to reject goods once they arrive or even refuse to receive goods operates independently of bookkeeping procedures.

The attention of the Idaho State Legislature is directed to § 23-403 and § 23-404, *Idaho Code*, and the need to review these sections with an eye toward revising them. The term "current obligations" needs to be defined in such a way that the Idaho State Liquor Dispensary is guided in its choice of bookkeeping procedures and its method of reserving funds. In addition, it should be noted that the Dispensary's volume of sales has grown considerably since legislation creating the Dispensary was enacted in 1939. Perhaps the \$50,000 reserve fund mandated by § 23-403 should be increased to reflect the Dispensary's overall growth and need for a sizable reserve. Finally, the present distribution formula should be scrutinized to determine if it is sufficiently clear in establishing prior-



ities among distributees, in describing the proper procedure for making distributions, and in describing how often and in what manner annual estimates of surplus are to be made.

**AUTHORITIES CONSIDERED:**

1. *Idaho Code*, § 23-403.
2. *Idaho Code*, § 23-404.
3. *Idaho Code*, § 28-2-319.
4. *Idaho Code*, § 28-2-402 (4).

DATED this 3rd day of September, 1975.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL  
Attorney General

**ANALYSIS BY:**

URSULA GJORDING  
Assistant Attorney General

PAULA HAWKS  
Legal Intern

**ATTORNEY GENERAL OPINION NO. 45-75**

TO: Matthew J. Mullaney, Jr. Special Assistant to the Governor

Per request for Attorney General Opinion.

**QUESTION PRESENTED:** What liability, if any, may arise as to the State of Idaho regarding Barber Dam considering the present state of the title to that structure?

**CONCLUSION:** The State of Idaho has no legal liability to repair Barber Dam nor could the State of Idaho be found legally liable should the dam fail causing damage or injury. The liability for maintaining the dam and for damages caused as a proximate result of its failure would be with the legal title holder, owner, of the dam structure itself.

**ANALYSIS:** Barber Dam is a deteriorating rock crib dam located two miles east of Boise on the Boise River in Ada County. A short review of the background surrounding Barber Dam is necessary.

In approximately 1904, the Barber Lumber Company was granted the right to build a dam on the Boise River. The company subsequently built the dam and

later discontinued use of the dam and other related facilities in the area in the 1930's. In 1936 the tract of land surrounding the dam was transferred from Ruth Ear Rand, et al. to the Boise Payette Lumber Company. Boise Payette Lumber Company was subsequently absorbed into the Boise Cascade Corporation system. Sometime later, Boise Cascade transferred title to the dam and surrounding area to the Idaho Power Company but retained the reservoir and pool area and an island behind the dam in the name of Boise Cascade Corporation. In 1956, a portion of this retained land was transferred to Oliver Gregerson.

There appears at this point to have been a lapse in the chain of title to the dam itself until Fenwick Realty, a Boise real estate agency, transferred the land surrounding the dam and the dam itself to Dallas Harris. In December of 1965, title was transferred from Dallas Harris to Edward Harris. Subsequently, sometime after November 17, 1961, Edward Harris transferred his title to Cecilia Danfer of Les Bois Realty. At this time, the Idaho Department of Water Resources issued an oral order directing Ms. Danfer to repair the dam structure. No written order was directed to Ms. Danfer. For a reason which at this time remains unclear, Ms. Danfer allowed a foreclosure action to be brought against the property and subsequently the mortgage on the property was foreclosed before the ordered repairs were accomplished by Ms. Danfer. The dam and the property surrounding it were purchased at a sheriff's sale by the Boise River Conservancy, Inc. on June 12, 1974, for a bid of \$3,000.00. The so-called Barber Dam property purchased at the sheriff's sale by the Boise River Conservancy purports to be ten acres of land, more or less including the land underlying the dam and powerhouse, part of which would be the bed of the Boise River. The property description indicates that the Boise River Conservancy acquired title, by reason of the purchase at the sheriff sale, to the dam, some adjacent land, and at least ostensibly, to certain portions of the submerged lands upon which the dam is built.

The legal description of the property which passed to the Boise River Conservancy states in part, that the conveyance included "all of the old dam structures, powerhouse, residential house and garage, well and well house, and any or all other improvements on the property."

Prior to analyzing any potential state liability as to Barber Dam, it is important to note the decision in the case of *Idaho Department of Water Administration v. Harris*, Civil No. 49232, decided April 4, 1975, by Idaho Fourth District Judge Alfred C. Hagan. Judge Hagan ruled that the Harrises could not be held liable for the cost of repairs on the dam. The basis for that decision was that the state had not met its burden to initiate action against the owners to make the necessary repairs as required by § 42-1717 and § 42-1718, *Idaho Code*. The Water Resource Department, formerly the Department of Water Administration, had only made oral demands of the Harrises to repair the dam structure. These oral demands were held to be insufficient to fix liability under the applicable statutes which implies that had written notice been given pursuant to § 42-1717, *Idaho Code*, the owner of the dam, the Harrises could have been held liable. Written notice to repair the dam was served on Boise River Conservancy, Inc. November 1, 1974, by the Director of the Department of Water Resources. (Exhibit A copy following this opinion).

Section 42-1711 (d) (5), *Idaho Code*, states that an "owner" of a dam may be a "person, firm, association, organization, partnership, business, trust, corporation of company". Title to Barber Dam presently resides in a corporation, the Boise River Conservancy, Inc., as allowed by § 42-1711 (d) (5) of the Code. Boise River Conservancy, Inc., is a non-profit cooperative association organized under Title 30, Chapter 10, *Idaho Code* and general corporate law is applicable. Section 30-1002, *Idaho Code*.

The State of Idaho has police power regulatory and supervisory authority over privately owned dams as set out in § 42-1717, *Idaho Code* as follows:

Supervision over the maintenance and operation of dams and reservoirs insofar as necessary to safeguard life and property from injury by reason of the failure thereof is vested in the director of the department of water resources. The director shall at state expense inspect or cause to be inspected, as often as he thinks advisable, every dam used for holding water in the state; however, all dams twenty (20) feet or more in height shall be inspected at least once every two (2) years, and if after such inspection such dam, in the opinion of the director, is unsafe, and life or property liable to be endangered by reason thereof, the director shall give written notice and order by certified mail or by personal service upon the owner or owners to remove or repair the same so as to make it safe. If such owner or owners shall neglect or refuse to remove or repair the same after notice to that effect has been given in writing by the director, the director may draw off all or part of such water from behind such dam or embankment and keep said water drawn off until such time as the order shall be complied with. In determining whether or not a dam or reservoir or proposed dam or reservoir constitutes or would constitute a danger to life or property, the director shall take into consideration the possibility that the dam or reservoir might be endangered by overtopping, seepage, settlement, erosion, cracking, earth movement or other conditions which exist or might occur in any area in the vicinity of the dam or reservoir.

Barber Dam is 30 feet high, and therefore by statute must be inspected every two years. It must however be noted that the statute was enacted in 1969 and has not existed over the entire period of time that Barber Dam has been in place.

Although the above-quoted portion of § 42-1717 gives the Department of Water Resources *supervisory and regulatory jurisdiction over privately owned dams*, it does not indicate any liability as to the state for dam failure. To the contrary, the second paragraph of that statute virtually absolves the state from liability arising out of the failure or partial failure of a privately owned dam. That paragraph reads:

No action shall be brought against the state, the director, or the department or its agents or employees for the recovery of damages caused by the partial or total failure of any dam or reservoir or through the operation of any dam or reservoir upon the ground that such defendant is liable by virtue of any of the following:

- (a) The approval of the dam or reservoir.
- (b) The issuance or enforcement of orders relative to maintenance or operation of the dam or reservoir.
- (c) Control and regulation of the dam or reservoir.
- (d) Measures taken to protect against the failure during an emergency.
- (e) The use of design and construction criteria prepared by the department.

*Nothing in this part shall be construed to relieve an owner or operator of a dam or reservoir of the legal duties, obligations or liabilities incident to the ownership or operation of the dam or reservoir. (Emphasis added.)*

As can be seen from the foregoing, the state and its agencies, departments and employees are not amenable to suit for the failure of a privately owned dam even though supervisory and regulatory authority are vested by statute in the Department of Water Resources. Further, the emphasized portion of the above-quoted material indicates that the "owner" or "operator" of the dam is not in any way relieved of the legal duties, obligations or liabilities arising out of the ownership or operation of the dam. Section 6-904, *Idaho Code*, comprising part of the Idaho Tort Claims Act in part 1, which reads as follows:

Exceptions to governmental liability. — A governmental entity shall not be liable for any claim which:

1. Arises out of any act or omission of an employee of the governmental entity exercising due care, in the execution of a statute or regulation, whether or not the statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a governmental entity or employee thereof, whether or not the discretion be abused.
2. Arises out of the assessment or collection of any tax or fee, or the detention of any goods or merchandise by any law enforcement officer.
3. Arises out of the imposition or establishment of a quarantine by a governmental entity, whether such quarantine relates to persons or property.
4. Arises out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

5. Arises out of the activities of the Idaho national guard when engaged in training or duty under sections 315, 502, 503, 504, 505 or 709, title 32, United States Code, and the claim arising therefrom is payable under the provisions of the National Guard Claims Act (Section 715, title 32, United States Code) except that a claimant not compensated in whole or part under the National Guard Claims Act may assert his claim under this act.
6. Arises out of the activities of the Idaho national guard when engaged in combatant activities during a time of war.
7. Arises out of or results from riots, unlawful assemblies, public demonstrations, mob violence and civil disturbances.
8. Arises out of a plan or design for construction or improvement to the highways, roads, streets, bridges, or other public property where such plan or design is prepared in conformity with standards in effect at the time of construction, previously approved in advance of the construction or approved by the legislative body of the governmental entity or by some other body or administrative agency, exercising discretion by authority to give such approval.

The aforementioned exceptions to the Idaho Tort Claims Act would also appear to relieve the State of any tort liability should the dam fail.

Section 42-1717 allows the Director of the Department of Water Resources to effect remedial work to prevent dam failure and to recover the expenses of the work and materials from the owner. The language is permissive and does not place a duty on the state to perform the work. Moreover, since Barber Dam is legally owned by the Boise River Conservancy, Inc., a private organization, the State of Idaho is constitutionally prohibited from expending public funds for maintenance of the dam. Article VIII, § 2, *Idaho Constitution*. The case of *Engelking v. Investment Board*, 93 Idaho 217, 458 P.2d 213 (1969) spoke to Article VIII, § 2, *Idaho Constitution*, at page 222, as follows:

The word "credit" as used in this provision implies the imposition of some new financial liability upon the State which in effect results in the creation of State debt for the benefit of private enterprises.

Clearly, should the State repair the dam the State would have incurred a new liability for the State for the benefit of a private enterprise. Especially when the State has full warning that the private enterprise would probably not be in a position to repay the obligation any debt incurred would violate the provisions of Article VIII, § 2. If the Idaho Legislature were to determine that a *public purpose* would be served by *appropriating* money for repairs that section would not be violated. The Legislature has wide discretion in determining what is a "public purpose". However, the mere fact that the Legislature, by appropriation, *could assume a duty* does not mean that any duty exists at this time nor could Boise River Conservancy, Inc., force the Legislature to assume that duty or make the appropriation.

It appears from the foregoing that no duty exists, and in fact, should the state assume the duty it would be violating Article VIII, § 2, *Idaho Constitution*. It is the basic law of torts that where no duty does nor can exist, no liability may exist.

It is axiomatic that the State of Idaho has title to the bed of the Boise River between the natural and ordinary high water mark pursuant to the "Equal Footing Doctrine". See *Shively v. Bowlby*, 152 U.S. 1, 14 S.Ct. 548, 38 L.Ed. 331 (1894) for the proposition that upon the admission of a state to the Union the "Equal Footing Doctrine" causes title to the beds of navigable waters to the natural or ordinary high water mark to vest in the state.

The Idaho Admission Bill states that Idaho is "admitted to the Union on an equal footing with the original states in all respects whatever". 26 Stat. L. 215, Chapter 656, § 1. Idaho's judicial system recognized the "Equal Footing Doctrine" in the case of *Callahan v. Price*, 26 Idaho 745, 146 P. 732 (1915) and the doctrine was reaffirmed as applicable in Idaho in *Gasman v. Wilcox*, 54 Idaho 700, 35 P.2d 265 (1934) which stated at page 703 that:

It is the settled law in this jurisdiction that the state holds title to the beds of all navigable lakes and streams below the natural high-water mark for the use and benefit of the whole people, subject always to the rights of the public in such waters and to the paramount power of Congress to control their navigation so far as may be necessary for the regulation of commerce among the states and with foreign nations.

See also: *West v. Smith*, 95 Idaho 550, 511 P.2d 1326 (1973); *Bonelli Cattle Co. v. Arizona*, 94 S.Ct. 517 (1973).

Idaho undoubtedly, holds title to the bed of the Boise River between the natural or ordinary high water mark. This title in *no way alters or affects the title to the dam structure itself*. Although the State of Idaho Department of Lands through the Board of Land Commissioners may, in their discretion, issue easements for use of the beds of navigable streams such as the Boise River. No such easement or right of way has ever been granted for the construction and location of Barber Dam. Further, no sale of the land upon which the Barber Dam structure exists has ever been made. Therefore, the title to the land underlying the dam structure itself resides totally in the State of Idaho. Even though the property description of the land purchased by the Boise River Conservancy, Inc. at the sheriff's sale could be interpreted to include the underlying land, this would not, as a matter of law, be the case since state land, i.e., the riverbed, may not be adversely possessed, *Hellerud v. Hauk*, 52 Idaho 226, 13 P.2d 1099 (1932); *West v. Smith*, 95 Idaho 550, 511 P.2d 226 (1973) as to navigable waters, highways, nor has an easement been issued nor has the land been sold.

The siltation which has built up over a period of years behind Barber Dam has accumulated as a result of many "private" sources of silt and debris. The debris and silt has built up from such things as dredge mining and logging operations conducted over the past years. Other debris has been washed downstream as a result of natural erosion and as silt and debris from erosion caused by overgraz-

ing. Still more of the siltation has been caused by the activities of the public sector such as road construction and presumably the building of upstream dams. In view of the various sources of the silt which is deposited behind the dam, the State of Idaho could have maintained suits against the private parties for the cost of removing the silt from state-owned submerged lands. The state could have taken action against the private parties for trespass, nuisance, or possibly negligence. (For analogous suits between private parties see *Ravndal v. Northfork Placers*, 60 Idaho 305, 91 P.2d 368 (1939). In *Gold Dredging Corp. v. Boise Payette Lumber Co.*, 52 Idaho 766, 22 P.2d 147 (1933) the court found that stream pollution was a nuisance, and as such was governed by § 5-224 of the *Idaho Code*, with a four-year statute of limitations, rather than by § 5-218 with its provisions for a three-year statute of limitations. Regardless of which statute could or would be applied in the instant case, the time has long past for the State of Idaho to bring a lawsuit against the parties responsible for the deposition of this silt and debris within the riverbed.

Some of the general law pertaining to deposits of alluvium would indicate that the State of Idaho is now the owner of the riverbed between the natural or ordinary high water mark *as well as* the silt deposits below the natural or ordinary high water mark. "The new formation arising from the bed of a river belongs to the owner of the bed". *Intfen v. Hutson*, 145 Kan. 389, 65 P.2d 576, see also 54 A.L.R.2d 648. In all jurisdictions except California, the courts disregard whether accretions such as are found behind Barber Dam have been caused by natural or artificial conditions and look only to the fact that they have been formed by the flow of water in a gradual and imperceptible way, *County of St. Clair v. Lovington*, 90 U.S. 46, 23 L.Ed. 59 (1874); see also Note, "Alluvium", 33 Am. Dec. 376. The state generally loses title to an accretion only when water no longer flows over the area so that it is no longer a riverbed and has become instead solid land, 63 A.L.R.3d 249.

Thus, it would be difficult for the state at this point in time to assert the present owners of Barber Dam are also the owners of the silt which the dam has caused to accumulate. However, this does not mean that the state is liable for the damage caused by the washing away of the silt should the dam fail. Case law has developed in other jurisdictions which would subject dam owners to strict liability for a failure of a dam and subsequent damages to others while other states, including California, Washington and Montana, require a showing of negligence. See annotation, *Strict Liability - Failure of Dam*, 51 A.L.R.3d 965.

The state *may* be the "owner" of the silt behind the dam but it is apparent that this would only apply to the silt which has accumulated below the natural or ordinary high water mark and not to *all* of the silt behind the dam. Also, it must be remembered that general tort law requires that "causation" be established in any lawsuit seeking to establish liability for damages. It is reasonably obvious that the "dangerous" build-up of silt would not have accumulated but for the existence of the dam, and any damage caused by the silt would not happen but for the failure or partial failure of the dam. The state has no part in the chain of causation as to either point.

Generally, however, a dam owner is not an insurer of the condition of a dam and is not liable unless negligence in the maintenance of a dam is proved. In Idaho, it seems reasonable to believe that this burden of proof might be met if a plaintiff in an action against the owners of a dam which has failed could demonstrate that the owners had ignored orders from the Department of Water Resources, issued pursuant to § 42-1717, *Idaho Code*. Unfortunately, no case law exactly on point exists within this jurisdiction and the statute regarding dam maintenance was passed in 1969 and no cases of definitive interpretation other than the *Harris* case, *supra*, exist on the statute.

At this point it should be taken into account that the Boise River Conservancy, Inc., is an incorporated non-profit cooperative association under the federal tax laws and organized as a non-profit corporation authorized to carry on business within the State of Idaho. Corporation bylaws state that no corporate stock will be issued and further that stockholders and officers of the corporation will not be personally liable for debts of the corporation.

As a practical matter then, should the dam fail, any actions brought against the corporation or against the corporate members or officials could have access *only* to the *corporate* funds. The corporation itself may not have the financial reserves or investment with which to make good on any judgment which could be had against them for damages caused by the failure or partial failure of the dam. However, where such a unity of ownership and interests between the members of the corporation (Boise River Conservancy issues no stock, only membership certificates) as to make them indistinguishable or where the officers and members are the alter ego of the corporation, *personal liability* is a possibility. *Metz v. Hawkins*, 64 Idaho 386, 133 P.2d 271 (1943); *Tom Nakamura, Inc. v. G. & G. Produce Co.*, 93 Idaho 183, 457 P.2d 422 (1969). Section 52-202, *Idaho Code*, allows criminal actions, civil actions and abatement actions to be brought against anyone maintaining a public nuisance. Further, the individual officers *may* be held criminally liable in some instances.

Corporate officers may be criminally liable for their own acts although performed in their official capacity as such officers. Fletcher, *Cyclopedia Corporations*, Vol. 3 § 1348.

It would follow that if a crime was committed by omission, such as failing to abate a nuisance, the officer could be held criminally liable.

In conclusion, the State of Idaho has no liability as to Barber Dam since title to the dam resides in Boise River Conservancy, Inc. and not the state.

#### AUTHORITIES CONSIDERED:

1. *Idaho Constitution*, Art. VIII, § 2.
2. *Idaho Code*, §§ 5-218, 5-224, 6-904, 30-1022, 42-1711, 42-1717, 42-1718, 52-202.
3. *Idaho Admission Bill*, 26 Stat. L. 215, Ch. 656, § 1.



4. *Idaho Department of Water Administration v. Harris*, April 4, 1975, Fourth Dist. Ct.

5. *Engelking v. Investment Board*, 93 Idaho 217, 458 P.2d 213 (1969).

6. *Shively v. Bowlby*, 152 U.S. 1, 14 S.Ct. 548, 38 L.Ed. 331 (1894).

7. *Callahan v. Price*, 26 Idaho 745, 46 P. 732 (1915).

8. *Gasman v. Wilcox*, 54 Idaho 700, 35 P.2d 265 (1934).

9. *West v. Smith*, 95 Idaho 550, 511 P.2d 1326 (1973).

10. *Bonelli Cattle Co. v. Arizona*, 94 S.Ct. 517 (1973).

11. *Hellerud v. Hawk*, 52 Idaho 226, 13 P.2d 1099 (1932).

12. *Ravndal v. Northfork Placers*, 60 Idaho 305, 91 P.2d 368 (1939).

13. *Gold Dredging Corp. v. Boise Payette Lumber Co.*, 52 Idaho 766, 22 P.2d 147 (1933).

14. *Intfen v. Hutson*, 145 Kan. 389, 65 P.2d 576 (1937).

15. A.L.R.2d 648.

16. *County of St. Clair v. Lovington*, 90 U.S. 46, 23 L.Ed. 59 (1874).

17. 63 A.L.R.3d 249.

18. 51 A.L.R.3d 965.

19. *Metz v. Hawkins*, 64 Idaho 386, 133 P.2d 721 (1943).

20. *Tom Nakamura, Inc. v. G. & G. Produce Co.*, 93 Idaho 183, 457 P.2d 422 (1969).

21. *Fletcher Cyclopedia Corporations*, Vol. 3 § 1348.

DATED this 2nd day of September, 1975.

ATTORNEY GENERAL OF THE STATE OF IDAHO

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Attorney General

ANALYSIS BY:

TERRY E. COFFIN  
Deputy Attorney General

**EXHIBIT A**

**BEFORE THE DEPARTMENT OF WATER RESOURCES  
OF THE  
STATE OF IDAHO**

IN THE MATTER OF UNSAFE )  
CONDITIONS AT BARBER DAM: )  
BOISE RIVER CONSERVANCY, INC., ) **ORDER**  
PERMIT NO. 63-2010 )  
)

**WHEREAS**, Section 42-1717 of the *Idaho Code* states that the Department of Water Resources is responsible for regulating the maintenance and operation of all dams to insure safety; and,

**WHEREAS**, Barber Dam located on the Boise River in Section 29, Township 3 North, Range 3 East, B.M., Ada County, Idaho was found to be significantly deteriorated and in a hazardous condition when inspected by this department in January 1974; and,

**WHEREAS**, Boise River Conservancy, Inc. assumed title to the dam in June 1974; and,

**WHEREAS**, a recent inspection by this Department on October 22, 1974, revealed that deterioration has increased since the January 1974 inspection at a rate much greater than for any like period between inspections conducted over the past few years; and,

**WHEREAS**, the current condition of the deteriorated structure and the accelerated rate of deterioration noted indicate that complete failure of the timber crib overflow section could be reasonably anticipated in the near future; and,

**WHEREAS**, failure of the structure would result in significant damage downstream because of the large volume of sediment being retained at this time;

**THEREFORE, IT IS HEREBY ORDERED** that Boise River Conservancy, Inc. commence repair or replacement of this structure within 30 days and complete restoration of the dam to a safe condition on or before March 1, 1975, to insure that the facility will be capable of handling high river flows next spring.

Dated this       day of October 1974.

**A. KENNETH DUNN**  
Administrator, Operations Division

November 1, 1974

**CERTIFIED MAIL**

Boise River Conservancy, Inc.  
c/o John S. Chapman; Attorney  
Idaho Building  
Boise, Idaho

Dear Mr. Chapman:

I know you are aware that our recent inspection of Barber Dam indicates that deterioration is progressing at an accelerated, and alarming, rate. The Department realizes that you have been attempting to find the means to repair the structure since your purchase of it last June.

While we understand the problems of repairing Barber Dam and the financial requirements it demands, the present condition of the structure prohibits us from waiting any longer to seek repair of the structure. For this reason, the enclosed order is necessary.

Please let me know if you have any questions regarding this matter. The Department will be glad to cooperate with you in any way possible to achieve the stable conditions necessary to prevent downstream damage, and would be more than willing to be of assistance in obtaining the necessary funding needed to repair the dam.

Sincerely,

WILLIAM R. GOSSETT, P.E.  
Supervisor, Technical Section

**ATTORNEY GENERAL OPINION NO. 46-75**

Void.

**ATTORNEY GENERAL OPINION NO. 47-75**

TO: Armand Bird  
Executive Director  
Board of Medicine  
Statehouse Mail

Per request for Attorney General Opinion.

## QUESTIONS PRESENTED:

1. Are retired physicians required under the "Hospital-Medical Liability Act," Chapter 42, Title 39, *Idaho Code*, to purchase medical malpractice insurance in order to maintain a license to practice medicine and surgery in Idaho?
2. Are federally-employed and military physicians, excluding physicians employed by the Veteran's Administration, required under the "Hospital-Medical Liability Act," Chapter 42, Title 39, *Idaho Code*, to purchase medical malpractice medicine and surgery in Idaho?
3. Are physicians employed by the Veteran's Administration required under the "Hospital-Medical Liability Act," Chapter 42, Title 39, *Idaho Code*, to purchase medical malpractice insurance in order to obtain or maintain a license to practice medicine and surgery in Idaho?

## CONCLUSIONS:

1. Retired physicians who wish to maintain an Idaho license to practice medicine and surgery, are required under the "Hospital-Medical Liability Act" to comply with the malpractice insurance provisions of the Act; but, in the alternative, the Board of Medicine could establish an inactive or affiliate member status for Idaho physicians who do not actively practice medicine in the State of Idaho.

2. Federally-employed and military physicians, excluding physicians employed by the Veteran's Administration, must be divided into three classes in order to determine the respective applicability of the malpractice insurance provisions of the "Hospital-Medical Liability Act."

First, federally-employed (except by the Veteran's Administration) and military physicians licensed to practice medicine and surgery by a state other than Idaho, but who are stationed or working in Idaho, are exempt from Idaho's licensing requirements, and hence, are not required to comply with the malpractice insurance requirements of the Act, unless also involved in a private Idaho practice.

Second, federally-employed (except by the Veteran's Administration) and military physicians who are licensed *only* in Idaho to practice medicine and surgery, and who are stationed or working in Idaho, must comply with the malpractice insurance provisions of the Act, unless applicable federal statutes and regulations exempt such physician from personal liability or allow such physician to be eligible for practice with the federal government or the military while holding an inactive license.

Third, federally-employed (except by the Veteran's Administration) and military physicians who are licensed *only* in Idaho to practice medicine and surgery, but who are not stationed or working within Idaho, must comply with the malpractice insurance requirements of the Act, unless applicable federal statutes and regulations exempt such physician from personal liability or

allow such physician to be eligible for practice with the federal government or the military while holding an inactive license.

3. Physicians employed by the Veteran's Administration, whether licensed by Idaho or a sister state, are not required to comply with the malpractice insurance requirements of the Act, except that any such physician who conducts any private practice in the State of Idaho must comply with the malpractice insurance requirements of the Act.

ANALYSIS: Initially, it should be noted that the "Hospital-Medical Liability Act," Chapter 42, Title 39, *Idaho Code*, is effective for only two years, from June 1, 1975 to June 1, 1977. Section 14 of S.L. 1975, ch. 162. The major purpose of the Act is to provide a temporary solution to medical malpractice problems with more permanent legislation contemplated. Thus, this opinion applies only for the effective dates of the Act.

The language and provisions of the "Hospital-Medical Liability Act" indicate that the Act is intended to cover *all* physicians licensed to practice medicine and surgery in the State of Idaho. The general provisions of *Idaho Code* 39-4203, provide for a limitation of liability of "licensed physicians," and *Idaho Code* 39-4204 more specifically limits the civil liability of "licensed physicians" to specified amounts.

In addition, the Act creates a new prerequisite to the initial grant or renewal of a license to practice medicine in the State of Idaho.

*Any physician licensed to practice medicine in this state shall, at the time and as a condition of securing or renewing such license, place on file with the Idaho board of medicine a certificate of insurance from a licensed insurance company authorized to do business in this state, certifying that liability insurance of the scope and limits required by this act is in effect for such licensee and shall remain in effect for such period of licensure unless notification of cancellation is first given to the board at least thirty (30) days in advance of cancellation. Idaho Code 39-4208. (Emphasis added.)*

The provisions of *Idaho Code* 39-4206 further state:

*Every acute care hospital and physician licensed to provide health care in this state shall, as a condition of securing and maintaining such licensure, unless the requirement therefor has been waived as provided in section 39-4311, secure liability insurance underwriting the exposure to loss referred to in sections 39-4204 and 39-4205 and shall file an appropriate certificate of insurance as hereinafter provided, confirming the existence of such insurance with at least such limits of liability at all times during which licensure remains valid. The liability of any such physician or hospital which has complied with or obtained a waiver of the insurance requirements of this act at the time of provision of any health care from which a claim for liability arises shall be limited as provided in this act, but any such physician or hospital in violation*

of this act in providing such care in this state under the authority and image of a licensed physician or hospital without having complied with or obtained a waiver of the insurance requirements of this act shall, as respects any claim arising from such care or conduct, have unlimited liability upon any legal theory recognized as common law. (Emphasis added.)

In sum, the malpractice insurance provisions of the "Hospital-Medical Liability Act" apply to *all* physicians licensed to practice medicine in the State of Idaho, with no express exception made for retired, federally-employed and military physicians. Thus, proof of adequate malpractice insurance or a waiver thereof is required before a license to practice may be granted or renewed.

Nonetheless, it is not required that medical malpractice insurance be obtained only through a licensed insurance company. The Act provides five methods for complying with the insurance requirements. First, a physician may obtain full liability coverage from a licensed insurance company authorized to do business in Idaho. Second, a physician may purchase liability coverage from a licensed insurance company, which policy may include a deductible or self-insurance provision. *Idaho Code* 39-4207 (a). Third, a cash or other bond may be used. *Idaho Code* 39-4207 (b). Fourth, members of an organized professional society may join together to maintain a reciprocal insurance program. *Idaho Code* 39-4209. Fifth, a physician may apply to the Director of the Department of Insurance for a waiver of the insurance requirements, upon a showing of inability to comply with the requirements. *Idaho Code* 39-4211.

The "Hospital-Medical Liability Act" places authority upon the Director of the Department of Insurance to promulgate provisions and procedures for the showing necessary to obtain a waiver of the insurance requirements. *Idaho Code* 39-4212. A check with the Department of Insurance reveals that no such provisions and procedures have yet been promulgated. Consequently, each application for waiver will be determined on its own facts; but, it should be noted that the Director of the Department of Insurance has denied a blanket waiver of the insurance requirements for all retired, military and federally-employed physicians.

1. Based upon the foregoing, retired physicians who wish to maintain an Idaho license to practice medicine and surgery must comply with the provisions of the "Hospital-Medical Liability Act;" but, in the alternative, the Board of Medicine could create an inactive or affiliate member status, similar to that used by the Idaho State Bar, available to physicians who do not actively practice medicine in the State of Idaho. Rule 116 (B) of the Idaho State Bar Commission Rules provides:

Any member of the Idaho State Bar, who, after admission ceases to be a bona fide resident of the State of Idaho, or though a resident, ceases the practice of law in the State of Idaho, or who does not pay the annual license fee allowing such member to practice law, may maintain an affiliate membership in the Idaho State Bar upon payment to the Idaho State Bar of an affiliate membership fee of \$25.00 per year.

*Such affiliate membership of the Idaho State Bar shall not entitle the affiliate member to engage in the practice of law in this state.* An affiliate member of the Idaho State Bar shall be entitled to attend and participate in all meetings of the Idaho State Bar but shall not have the right to vote as a member of the Idaho State Bar in any matter referred to in Rule 185 of the Bar Commission Rules nor in the election of Commissioners. Such affiliate member shall receive all publications of the Idaho State Bar which are generally disseminated to attorneys licensed to practice in this state. (Emphasis added.)

If the Board of Medicine were to adopt a similar affiliate status, the insurance requirements of the "Hospital-Medical Liability Act" could be avoided, since the language and provisions of the act refer exclusively to "physicians *licensed to practice* medicine." Consequently, it is the opinion of this office that the malpractice insurance requirements of the act would not apply to a physician who is not authorized to practice medicine, but rather maintains only an inactive affiliation with the Board of Medicine.

Regarding the legal possibility of creating such a status, a review of the statutes governing the Idaho State Board of Medicine, and a comparison with the statutes governing the Idaho State Bar Commission, reveal no statutory impediment to the creation of an inactive or affiliate status. First, both the act regulating the Bar Commission and the act regulating the Board of Medicine include an almost identical legislative purpose. For example, *Idaho Code* 54-1801 provides:

Recognizing that the practice of medicine and surgery and Osteopathic medicine and surgery and osteopathy is a privilege granted by the state of Idaho and is not a natural right of individuals, it is deemed necessary as a matter of state policy in the interests of public health, safety, and welfare to provide laws and provisions covering the granting of that privilege and its subsequent use, control and regulation to the end that the public shall be properly protected against unprofessional, improper, unauthorized and unqualified practice of medicine and surgery and osteopathic medicine and surgery and osteopathy and from unprofessional conduct by persons licensed to practice medicine and surgery and osteopathic medicine and surgery and osteopathy.

Second, the act governing the Board of Bar Commissioners gives them the power to adopt rules and regulations establishing the qualifications and requirements for the admission to practice law, governing the conduct of persons admitted to practice, ". . . and generally for the control and regulation of the business of the board and of the Idaho State Bar." *Idaho Code* 3-408. In like manner,

[t]he state board of medicine shall have the authority to prescribe and establish rules and regulations to carry into effect the provisions of this act, particularly section 54-1801 hereof, including, *but without limitation*, regulations prescribing all requisite qualifications of education, residence, citizenship, training and character for admission to examina-

tion for the license herein required, . . . *Idaho Code* 54-1806 (a). (Emphasis added.)

Third, both acts respectively make it unlawful *to practice* medicine, *Idaho Code* 3-104, without a license, as issued by the appropriate board.

Fourth, neither act expressly allows nor expressly excludes the Creation of an inactive license or affiliate member status.

Bases upon the foregoing, it is the opinion of this office that the Idaho State Board of Medicine is not precluded from creating an inactive or affiliate member status. But, the creation of such a status can be used to avoid the medical malpractice insurance requirements of the "Hospital-Medical Liability Act" only if it expressly prohibits the holder from practicing medicine.

2. In determining the applicability of the malpractice insurance requirements of the "Hospital-Medical Liability Act," federally-employed and military physicians, excluding physicians employed by the Veteran's Administration, must be divided into three classes. These include: (1) federally-employed and military physicians who do not receive their license to practice medicine from the State of Idaho, but who are stationed or working in Idaho; (2) federally-employed and military physicians who do receive their license to practice medicine in Idaho, and who are stationed or working in Idaho; and (3) federally-employed and military physicians who do receive their license to practice medicine in Idaho, but who are *not* stationed or working in Idaho.

Regarding federally-employed and military physicians of the first class, *Idaho Code* 54-1813 exempts from the Idaho licensing requirements: "... commissioned medical officers of the armed forces of the United States, the United States public health service and medical officers of the Veteran's Administration of the United States, *in the discharge of their official duties* . . ." (Emphasis added.) Consequently, any federally-employed or military doctor stationed or working in Idaho (licensed outside of the state) need not be licensed to practice medicine in the State of Idaho, and hence, need not comply with the medical malpractice insurance provisions of the Act. (If such a doctor were to "moonlight" in Idaho, he would, of course, then have to comply with the Act.)

In contrast, as previously discussed, the malpractice insurance requirements of the "Hospital-Medical Liability Act" apply to *all* physicians licensed to practice medicine and surgery in Idaho. As a result, federally-employed and military physicians of the above-mentioned second and third classes (who are licensed *only* in Idaho) must comply with the malpractice insurance requirements of the Act in order to obtain or maintain an Idaho license, unless applicable federal statutes or regulations exempt such physician from personal liability or allow such physician to be eligible for practice with the federal government or the military while holding an inactive license.

3. Regarding physicians employed by the Veteran's Administration, in light of 38 U.S.C.A. § 4116, a different rule applies. Initially, it must be emphasized that 38 U.S.C.A. § 4116, entitled "Defenses to certain malpractice and negli-



gence suits," applies *only* to physicians employed by the Veteran's Administration. It does not apply to other military and federally-employed physicians.

The gist of 38 U.S.C.A. § 4116 is that Congress had immunized any physician employed by the Veteran's Administration from being sued as an individual for malpractice occurring during the course of his employment. Rather, in consequence of 38 U.S.C.A. § 4116, the exclusive remedy of such a malpractice victim is to sue the United States under the Federal Tort Claims Act. The exclusiveness of this remedy for medical malpractice claims has been upheld in two cases. *Wright v. Doe*, 347 F.Supp. 833 (M.D. Fla. 1972) and *Smith v. DiCara*, 329 F.Supp. 439 (E.D. N.Y. 1971).

Actions against all other military and federally-employed physicians may also be based upon the Federal Tort Claims Act, but they are not afforded the immunity given to Veteran's Administration physicians. By way of background information, the purpose of the Federal Tort Claims Act is to abrogate federal governmental immunity to tort suits, and the effect is that the United States may be sued:

. . . for injury or loss of property, or personal injury or death caused by the negligence or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. 28 U.S.C.A. § 1346 (b).

But, the Federal Tort Claims Act does not generally preclude suit against the government employee as an individual. Consequently, an injured party may sue either the employee (except one employed by the Veteran's Administration) and/or the United States, even though an injured party may obtain only one satisfaction of judgment. *Adams v. Jackel*, 220 F.Supp. 764 (E.D. N.Y. 1963).

In conclusion, it is the opinion of this office that one of the inherent purposes of Idaho's "Hospital-Medical Liability Act" is to guarantee protection to patients, who might be injured by medical malpractice, by requiring proof of insurance as a prerequisite to licensing, in exchange for a limitation upon a physician's liability. Thus, a duplicity of this purpose would arise if a physician employed by the Veteran's Administration was required to obtain his own malpractice insurance in situations where an injured patient's only remedy is to sue the United States. Additionally, it is the further opinion of this office that to require physicians employed by the Veteran's Administration to purchase medical malpractice insurance, after they have been immunized from liability by Congressional enactment, would violate the supremacy and pre-emptive powers of the federal government, as defined by the Constitution of the United States.

Notwithstanding, a physician employed by the Veteran's Administration who "moonlights" in private practice must comply with the Idaho licensing and malpractice insurance requirements. In addition, 38 U.S.C.A. § 4116 covers only the malpractice of a Veteran's Administration physician which occurs "while in the exercise of his duties." For example, a Veteran's Administration

physician hired as a psychiatrist who, while on a frolic, conducts unauthorized open heart surgery, may be precluded from involving the immunity provisions of 38 U.S.C.A. § 4116. Consequently, if a malpractice injury occurs while a Veteran's Administration physician is acting beyond his authorized duties, he may be sued as an individual, and he may wish to purchase malpractice insurance to protect himself against this contingency.

In granting a license to a physician employed by the Veteran's Administration, the Board of Medicine should note on the license of such physician that his practice is restricted to employment with the Veteran's Administration. Such restriction would, of course, be lifted upon proof of compliance with the "Hospital-Medical Liability Act." Alternatively, any physician employed by the Veteran's Administration seeking a license should be required to sign an acknowledgment, to be kept on file with the Board of Medicine, that such physician will not practice medicine outside of his official employment with the Veteran's Administration unless and until he furnishes proof of compliance with the Act.

**AUTHORITIES CONSIDERED:**

1. *Idaho Code*, Chapter 42, Title 39.
2. *Idaho Code*, Sections 3-104, - 408; and Sections 54-1801, -1803 (a), -1806 (a), - 1813.
3. Section 14 of S.L. 1975, ch. 162.
4. Rules of the Supreme Court and the Board of Commissioners of the Idaho State Bar, Rule 116 (B).
5. 28 U.S.C.A. § 1346 (b); 38 U.S.C.A. § 4116.
6. *Adams v. Jackel*, 220 F.Supp. 764 (E.D. N.Y. 1963).
7. *Smith v. DiCara*, 329 F.Supp. 439 (E.D. N.Y. 1971).
8. *Wright v. Doe*, 347 F.Supp. 833 (M.D. Fla. 1972).

DATED this 18th day of September, 1975.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL  
Attorney General

ANALYSIS BY:

RUDOLF D. BARCHAS  
Deputy Attorney General

JEAN URANGA  
Legal Intern

## ATTORNEY GENERAL OPINION NO. 48-75

TO: Representative E. V. McHan  
District No. 21  
P.O. Box 126  
Ketchum, Idaho 83340

Per request for Attorney General Opinion.

QUESTIONS PRESENTED: As we understand your request, you have asked the following questions:

1. Which officer, public office or department has the ability or right to authorize expenditure or to expend Fund No. 194?
2. What is the proper way or method of spending these funds?
3. What power or control does the State Legislature have in relation to this fund, and what, if anything, could or should be done by the Legislature to stop the immediate use of this fund.

CONCLUSION: The State Treasurer has the authority and duty to safeguard these funds and handle and invest them until the Legislature has definitely spoken otherwise. It is also up to the legislature to provide a proper way or method of expending these funds. The Legislature may not, however, attempt to broaden or decrease the use to be made of these funds inasmuch as this area is pre-empted by the Idaho Admission Bill, as amended. Since the entire fund may be expended, it is not properly deemed an "endowment" fund and it is likely that the Legislature could not interfere with this status, either.

Section 67-1401 (4), *Idaho Code*, provides that the Attorney General's office may supervise and protect public trusts. Therefore this office could stop improper uses of such funds. It is, however, most probable as to past uses of these funds (if they were in fact expended for a proper purpose) that courts would not grant relief.

PRELIMINARY: Under Section 6 of the Idaho Admission Bill (26 Statutes at Large, 215, Chapter 656) a federal law, fifty sections of public lands were granted to the State of Idaho for the purpose of erecting public buildings at the capital of the State, for legislative, executive, and judicial purposes, including construction, reconstruction, repair, renovation, furnishings, equipment, and any other permanent improvement of such buildings and acquisition of land for such buildings and payment of principal and interest of bonds issued for these purposes. Section 12 of the same law provides such land shall be held, appropriated and disposed of, exclusively for the purposes above mentioned in such manner as the legislature may provide. Upon the above basis and from sale of these lands, the Public Buildings fund, Fund No. 194, arose in the State Treasury.

ANALYSIS: The informal memorandum (attached hereto) of the Attorney General of June 20, 1972, to the Department of Administrative Services, upon

this subject is an incorrect statement of the law, and to the extent of its conflict with this Opinion, is expressly overruled and withdrawn. That memorandum stated, in effect, that Fund No. 194 was by Section 67-3607, *Idaho Code*, perpetually appropriated and that under Section 67-3203, *Idaho Code*, the Building Services Division of the Department of Administration had control of the fund and could expend its income for the maintenance of the Capitol Building at Boise. (The Building Services Division is now the Division of Public Works in the Department of Administration, under Sections 67-5707, 67-5709, and 67-5711.) Under present law, the Idaho Division of Public Works under the Idaho Building Council is given control of public buildings and the Capitol Building and grounds and the Capitol Mall and appropriations relating to these areas, but the Legislature has been silent regarding its ability to use Fund No. 194. It is our conclusion that the Division of Public Works is neither entitled to the control or use of Fund No. 194 under existing law.

No specific mention of Fund No. 194 is made in either the prior laws relating to the Building Services Division, or to the present laws relating to the Division of Public Works and the Idaho Building Council. The only legislative reference we have found in considering the matter of Fund No. 194 is a 1905 Idaho law (*Idaho Session Laws*, 1905, H.B. 138, page 155). There may be other references to Fund No. 194, but to date this office has not been able to find any such law. The 1905 law provides for a Capitol Building Board consisting of the Governor, Secretary of State, State Treasurer and two other competent citizens appointed by the statutory members of that Board. This Act appropriated certain particular fund amounts from Fund No. 194 for modification, enlargement, improvement or building of a new Capitol building and provided for bonds, etc. Curiously enough, no repeal of this law has been found. As a speculation only, and not based upon any case law or statutes which we can find, it could well be that, since the Capitol Building Board was created to build or enlarge the Capitol, when the task was completed the Board considered its role at an end and informally disbanded. This we cannot say with certainty inasmuch as the Legislature itself never acted to disband the Board. Under the 1905 legislation, Fund No. 194 was handled and administered by the Treasurer of the State of Idaho. See also, Sections 67-1201 (1) and 67-1301, *Idaho Code*, which require the Treasurer of the State of Idaho to receive and keep all monies belonging to the State which are not required to be received and kept by some other person or entity. Cf. *State v. Yelle*, 31 Wash. 2d 87, 201 P.2d 172 (1948). We conclude that custody of Fund No. 194 (as established by 26 Stat. 215, as amended by Public Law 85-84) should rest with the Treasurer of the State of Idaho until and unless otherwise provided by the Idaho Legislature. (In Montana, for instance, such provision is statutory. See, Section 78-503, *Revised Code of Montana*, and Section 12 of the Enabling Act of Montana.)

Sections 6 and 12 of the Idaho Admission Bill provide as follows:

**§ 6. GRANT OF LAND FOR ERECTION OF PUBLIC BUILDINGS.**

— Fifty sections of the unappropriated public lands within said state, to be selected and located in legal subdivisions as provided in section 4 of the act, shall be, and are hereby, granted to said state for the purpose of erecting public buildings at the capital of said state for legisla-

tive, executive, and judicial purposes, including construction, reconstruction, repair, renovation, furnishings, equipment, and any other permanent improvement of such buildings and the acquisition of necessary land for such buildings, and the payment of principal and interest on bonds issued for any of the above purposes.

**§ 12. LIMITATION ON LAND GRANTS AND THEIR USE.** — The state of Idaho shall not be entitled to any further or other grants of land for any purpose than as expressly provided in this act. And the lands granted by this section shall be held, appropriated and disposed of exclusively for the purpose herein mentioned, in such manner as the legislature of the state may provide.

Fund No. 194 differs from the school endowment funds provided for in Sections 4, 5, 8, 9 and parts of Sections 10 and 11 of the Idaho Admission Bill, in that, as to the educational endowment funds, the Admission Bill allows only the interest from the sale of the lands to be spent. See, *Roach v. Gooding*, 11 Idaho 244, 81 P. 642 (1905), where it was held that the limitation of the Idaho Admission Bill as to the use of the interest of lands granted for educational purposes applied to all *educational* land grants granted by or previous to the Idaho Admission Bill. In that case, however, there was no mention of Fund No. 194 and its different status. Since there is no limitation to the effect that only the interest from Fund No. 194 can be spent, it would appear that the principal of that fund may also be spent as was done in 1905 and thereafter in relation to the Capitol Building. (See also, Attorney General Official Opinion No. 75-68 attached hereto.)

Section 12 of the Idaho Admission Bill provides that all funds granted by the Idaho Admission Bill shall be held, appropriated, and disposed of exclusively for the purposes mentioned therein, in such manner as the legislature of the State may provide. This sentence has been interpreted by several Idaho cases, such as *Roach v. Gooding*, supra., *Evans v. VanDeusen*, 31 Idaho 614, 174 P. 122 (1918), *Melgard v. Eagleson*, 31 Idaho 411, 172 P. 655 (1918), and *State v. State Board of Education*, 33 Idaho 415, 169 P. 201 (1921). From these cases certain principles can be derived. The land grant funds are trust funds; the purposes or uses to be made of these funds are provided for by the grants themselves. The legislature cannot appropriate these funds inasmuch as their appropriation has already been accomplished by the grants themselves and acceptance thereof by the State. Such funds can be spent out of the State Treasury without any appropriations acts. The legislature is required to provide the method by which these funds are to be made available for expenditure for the purposes specified in the Idaho Admission Bill. The regulations which may be prescribed by the Legislature and which would have to be observed should refer to method of expending the funds and relate to matters such as the conduct of business and accounting to authorized officers in relation to the funds. The courts are not concerned with the methods so provided other than to prevent any diversion of these funds to other purposes or objects than those prescribed by the grants. Claims against such funds need not be passed upon by the State Board of Examiners and, based upon *State v. State Board of Education*, supra., and the other cases therein cited, there is a strong argument that the legislature *cannot* legally

provide that only the interest of Fund No. 194 can be spent since such a limitation would be an interference with the granted terms of the trust. It should also be noticed, as before stated, that under the 1905 legislative act, the principal of this fund was expended. The legislature can certainly provide how the funds are to be handled. In a situation such as with Fund No. 194 where no particular recipient or managing agent of the fund is named, the legislature can certainly provide for the same.

Section 67-3607, *Idaho Code*, provides as follows:

**MONEYS ACCRUING TO INTEREST FUNDS.** — The moneys accrued to interest funds arising from endowment and land grants are hereby perpetually appropriated therefor, and shall not be placed in the general fund of the state of Idaho, nor confused therewith, but shall remain inviolable in the respective interest funds, for the sole use of the designated beneficiary thereof.

Section 67-3607, *Idaho Code*, relates to *interest* funds. Since Fund No. 194 is not an interest fund, it would appear logically that Section 67-3607 cannot relate to it.

Chapter 7, Title 57, *Idaho Code*, relates to investment of permanent endowment funds. However, because of the nature of this chapter, it appears probably that it was only meant to apply to those endowment funds where the principal of the fund is to be held intact to be invested and only the interest is to be spent. However, no case law or statutes have been found interpreting this matter. The legislature should certainly speak to the relationship of Fund No. 194 to other endowment funds in dealing with Fund No. 194. Fund No. 194 should be handled somewhat differently than other endowment funds if it were to be invested, however, since the principal of the fund could also be spent.

Since this office can find no law directing the method of spending Fund No. 194, and who is to spend it (House Bill 93 of First Regular Session of the Forty-Third Legislature having been vetoed) it is suggested that the State Treasurer continue to handle Fund No. 194 until the Legislature has spoken otherwise in relation to it. Chapters 12 and 13 of Title 67, *Idaho Code*, make it the duty of the State Treasurer to act as custodian of all public moneys not otherwise provided for by law. (See, again, Official Opinion No. 75-68 which so states.) Until the Legislature has spoken in relation to Fund No. 194, it is not at all clear who can spend Fund No. 194 and what method is to be used in doing so.

It should also be noted that under the terms of Section 67-1401 (4), *Idaho Code*, the Attorney General has the power and duty to supervise public trusts and to prevent unauthorized uses or misuses of such trusts. In this case, any legal action at this time until the Legislature has acted, other than to stop existing or future unauthorized or misuse of these funds, would undoubtedly fail in relation to past uses of Fund No. 194 where the money was spent for the stated purpose of the trust that is, erecting public buildings, construction, reconstruction, repair, renovation, furnishings, equipment, land acquisition, and other permanent

improvements of buildings at the State Capitol. The courts would in all likelihood treat such past matters as a *fait accompli* as they did in the case of *Reynold Construction Co. v. Twin Falls County*, 92 Idaho 61, 437 P.2d 14 (1968). In that case, county funds were used to build a new building. The methods of handling the funds were questionable. But, the building had already been built and paid for and the court thus treated the matter as a fact accomplished.

#### AUTHORITIES CONSIDERED:

1. *Idaho Code*, Sections 67-1301, 67-1210 (1), 67-1401 (4), 67-5711, 67-5709, 67-5707, 67-3203, and 67-3607.
2. Idaho Admission Bill, 26 Statutes at Large, 215 ch. 656.
3. *Idaho Session Laws*, 1905 H.B. 138, page 155.
4. *Revised Code of Montana*, Section 78-503; Section 12 of the Enabling Act of Montana.
5. Attorney General Official Opinion No. 75-68.
6. *State v. Yelle*, 31 Wash. 2d 87, 201 P.2d 172 (1948).
7. *Roach v. Gooding*, 11 Idaho 244, 81 P. 642 (1905).
8. *Evans v. VanDeusen*, 31 Idaho 614, 174 P. 122 (1918).
9. *Melgard v. Eagleson*, 31 Idaho 411, 172 P. 655 (1918).
10. *State v. State Board of Education*, 33 Idaho 415, 169 P. 201 (1921).
11. *Reynold Construction Co. v. Twin Falls County*, 92 Idaho 61, 437 P.2d 14 (1968).

DATED this 23rd day of September, 1975:

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL  
Attorney General

#### ANALYSIS BY:

PETER HEISER, JR.  
Chief Deputy Attorney General

WARREN FELTON  
Deputy Attorney General

**ATTORNEY GENERAL OPINION NO. 49-75**

TO: The Honorable Dick Eardley  
Mayor  
City Hall  
Boise, Idaho 83702

Per request for Attorney General Opinion.

**QUESTIONS PRESENTED:**

1. In allocating the funds as provided in *Idaho Code*, Section 23-404 and Section 23-405, may a city use a more recent certified United States Bureau of the Census Current Population Report in lieu of an older federal census?

2. In allocating the funds referred to in *Idaho Code*, Sections 23-404 and 23-405, may a city update the Current Population Report to allow for annexations via a city certification to include certification of data by the State of Idaho, Department of Revenue and Taxation, *Ad Valorem* Section?

**CONCLUSIONS:**

1. Cities may use a more recent certified United States Bureau of the Census Current Population Report in lieu of an older federal census in allocating the funds as provided in *Idaho Code*, Section 23-404 and Section 23-405 pursuant to the specific language of Section 23-405 allowing the use of any subsequent special census conducted by the United States Bureau of the Census.

2. There is no provision in *Idaho Code*, Sections 23-404 or 23-405 allowing a city to update the Current Population Report to allow for annexations via a city certification to include certification of data by the State of Idaho, Department of Revenue and Taxation, *Ad Valorem* Section. Such annexations should be included within annual Current Population Reports and may not be added after release of the current report.

ANALYSIS: Section 23-404, *Idaho Code*, reads in pertinent part as follows:

Whenever the amount of money available on an annual basis from the liquor fund shall exceed the amounts provided for retention by the foregoing section, such excess shall be distributed on an annual basis as follows: Fifty per cent (50%) to the various counties of the state in the same proportion as the population of said counties bears to the total population of the state as shown by the last federal census, provided, however, that fifty per cent (50%) of all the money apportioned to any county embracing all or any part of a junior college district, as provided by section 33-2113, *Idaho Code*, or to a city which has a board of performing arts commissioners as provided by section 23-408, *Idaho Code*; seven and one half per cent (7½%) to incorporated and specifically chartered cities of the state in the same proportion as the population of said cities bears to the total population of all incorpor-



ated and specially chartered cities of the state as shown by the last federal census; four hundred thousand dollars (\$400,000) of the remaining amount in the liquor fund shall be deposited to the credit of the permanent building fund; one million dollars (\$1,000,000) of the remaining amount in the liquor fund shall be distributed to the incorporated and specially chartered cities of the state in the proportion and manner above provided, and at such time as the superintendent shall determine; . . . (Emphasis added.)

Section 23-405, *Idaho Code*, states as follows:

Out of the moneys allocated to a county (after deduction, if any, of the amount allocated to a junior college district or to a city which has a board of performing arts commissioners if qualified and certified as provided in Section 23-408, *Idaho Code*) fifty per cent (50%) thereof shall be by the board of county commissioners apportioned to the general

vided in Section 23-408, *Idaho Code*) fifty per cent (50%) thereof shall be by the board of county commissioners apportioned to the general fund of the county and the remaining fifty per cent (50%) shall be allocated to incorporated and specially chartered cities and villages situated therein in such proportion as the population of each bears to the total population of all cities and villages in the county, as shown by the last federal census, or any subsequent special census conducted by the United States bureau of the census, provided, that in case of a municipality incorporated subsequent to the last federal census, a certification of the population thereof by its governing board shall be accepted in lieu of the federal census. (Emphasis added.)

It is clearly stated in Section 23-405, *Idaho Code*, that moneys allocated to the cities, out of moneys distributed to the counties pursuant to Section 23-404, *Idaho Code*, may be allocated according to the "last federal census, or any subsequent special census conducted by the United States bureau of the census." As can be seen, this section does not limit itself to the last federal census but is expanded to include any subsequent special census conducted by the United States Bureau of the Census.

Your question refers to the usage of population data compiled by the Bureau of the Census and styled "Current Population Report." Such reports are used for United States Revenue Sharing Programs to provide current and more accurate population data as opposed to the last federal census.

In viewing Current Population Reports in conjunction with the requirements of Section 23-405, *Idaho Code*, it is clear that such a report is without question a subsequent special census and is conducted by the United States Bureau of the Census. As such, these reports may, without reservation, be used in computing the allocations to the cities as provided in Section 23-405, *Idaho Code*.

The problem arises in determining whether or not such reports may be used in allocating moneys to the counties and cities pursuant to the language of Sec-

tion 23-404, *Idaho Code*. This statute specifically states that fifty per cent (50%) of the surplus belonging to the liquor fund shall be distributed proportionately to the counties according to *the last federal census*; seven and one half per cent (7½%) to incorporated and specially chartered cities and villages within the state proportionately according to *the last federal census*; and two million dollars (\$2,000,000) of the remaining amount of the liquor fund distributed to incorporated and specially chartered cities and villages proportionately in the manner provided previously, which would be according to *the last federal census*.

The moneys flowing to allocations under Section 23-405, *Idaho Code*, are totally dependent upon the manner of computing allocations to the counties under Section 23-404, *Idaho Code*. What is allowed by statutory language in Section 23-405, *Idaho Code*, is omitted in Section 23-404, *Idaho Code*. As a result, the statutes have dependent, but conflicting provisions. When such a conflict arises between statutes, the statute with the most specific language will control over the more general statute. Thus, the specific and broader provisions of Section 23-405, *Idaho Code*, should be incorporated into Section 23-404, *Idaho Code*, in allowing the usage of a subsequent special census conducted by the United States Bureau of the Census. It is therefore logical to conclude that the Current Population Reports may be used in allocating moneys under Section 23-404, *Idaho Code*. In fact, it is even probable that such current population reports conducted by the Bureau of the Census may be accorded the status of the last federal census. They are complete and accurate population reports and are certified as such by the United States Bureau of the Census.

To require the usage of an older and less accurate federal census would allow a disproportionate share of surplus liquor funds to be allocated to cities without respect to current population growth. It is obvious that these statutes were instituted to provide assistance to the cities proportionately according to the population. Therefore, according to the intent of the legislature, the most current population reports, as allowed by statute, should be used.

The second part of your question deals with including updatings of the current population reports to allow for annexations via a city certification to include the certification of data by the State of Idaho, Department of Revenue and Taxation, *Ad Valorem* Section. Such updatings are required in compiling the data for Current Population Reports of the Bureau of the Census. They are included within the Report itself.

There is no provision in Sections 23-404 or 23-405, *Idaho Code*, allowing the usage of such data coming into existence *after* a subsequent special census, which in this instance is the Current Population Report. Such subsequent reports may only be used in the case of a municipality incorporated subsequent to the last census pursuant to Section 23-405, *Idaho Code*, not as to the subsequent annexations. Therefore, Section 23-405, *Idaho Code*, would specifically omit the updating of the Current Population Report to allow for annexations via a city certification to include certification of data by the State of Idaho, Department of Revenue and Taxation, *Ad Valorem* Section. Such allowances may only be made pursuant to legislative amendment to the statutes.

DATED this 9th day of September, 1975.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL  
Attorney General

ANALYSIS BY:

BILL F. PAYNE  
Business Regulations Division

### ATTORNEY GENERAL OPINION NO. 50-75

TO: John V. Evans, Lieutenant Governor

QUESTIONS PRESENTED: If a weather modification district is approved by the voters of Oneida County prior to September 1, 1975,

1. when can it be certified to go to the county tax roll,
2. when could the first taxes be collected and
3. when could the first funds be made available for a distribution?

#### CONCLUSION:

1. A weather modification district approved by the voters of the county in 1975 may be certified to go to the county tax rolls after the approval of the budget in 1976 and prior to the second Monday in September of that year.
2. The first taxes may be collected for the weather modification district after approval by the board of county commissioners in September, 1976. At least a portion of the taxes to be collected pursuant to the levy are due not later than December the 20th of that year.
3. Distribution of funds to the weather modification district may not occur until taxes are collected pursuant to the levy. Any funding prior to that date must depend on available interim funding mechanisms, if any.

ANALYSIS: The law establishing the procedures for weather modification districts is codified in § 22-4301 and § 22-4302, *Idaho Code*. Section 22-4302, *Idaho Code*, provides that:

The board of trustees of a weather modification district shall conduct the affairs of the district. The board of trustees shall certify a budget to the board of county commissioners to fund the operation of the district. The budget preparation, hearings and approval shall be the same as required for any county budget. The certification of the budget to

the board of county commissioners shall be as required for other taxing districts.

Procedures to be followed by taxing districts are found in Title 63, *Idaho Code*. Initially, no taxes for a weather modification district may be levied during the year in which it is created. Under § 63-921, *Idaho Code*:

*Code*. Initially, no taxes for a weather modification district may be levied during the year in which it is created. Under § 63-921, *Idaho Code*:

No taxing district formed or organized after the first day of January, in any year, shall be authorized to make a levy for the year, nor shall the auditor of any county in which the taxing district may be situated be required to extend any levy on behalf of the taxing district upon the county rolls extended by him for the year.

Technically, the actual "levy" is made by the board of county commissioners following certification by the taxing district. However, as used in the Taxing Districts Law, Title 63-621, *et seq.*, *Idaho Code*, "levy" applies to the action of the taxing district. This is apparent from § 63-625, *Idaho Code*, providing that:

It is the purpose of this act to change and amend the laws of all taxing districts as herein defined, *with respect to the making of tax levies and the certification thereof to the board of county commissioners . . .* (Emphasis added).

Therefore, a levy may not be certified to the board of county commissioners until 1976.

The weather modification law provides that certification shall be as required for other taxing districts. Section 63-625, *Idaho Code*, requires the trustees of the district to:

. . . determine and certify to the boards of county commissioners of their respective counties, by the second Monday of September of each year, the total amount of money in dollars, and not in mills or a certain number of cents on each one hundred dollars (\$100) of assessed valuation, that is necessary and required to meet the requirements of its budget which has been prepared and approved during the same year and to provide that the levy necessary to produce the requirements of the several budgets shall be determined by the county commissioners . . .

Although this provision may not totally coincide with other procedures in the county tax laws, any other laws affecting certification and procedures for taxing districts are superseded to the extent that they conflict with the Taxing District Act. See § 63-626, *Idaho Code*.

In summary, though the weather modification district may be approved by the voters of the county during 1975, it cannot be certified to the board of

county commissioners until 1976. Specifically, the certification must be made during 1976 and prior to the second Monday in September of that year.

The second question presented is when taxes may be collected to fund the district. Section 22-4302, *Idaho Code*, the weather modification law, provides that "[T]he budget preparation hearings and approval shall be the same as required for any county budget." Following certification by the board of trustees of the district, the board of county commissioners will, on the second Monday in September, consider the levy as certified, after which time it may appear on the county tax rolls. See: § 63-901, *Idaho Code*.

The final funding for the district depends on the time for collection of taxes pursuant to the levy. Section 63-1102, *Idaho Code*, concerning real property taxation, provides:

All taxes extended on the real property assessment roll shall be payable to the tax collector without penalty on or before December the 20th of the year in which the taxes were extended on the roll. The taxes may be paid in two equal installments, the first on or before December the 20th and the second on or before June 20th of the following year.

Section 63-1302, *Idaho Code*, concerning personal property taxation contains slightly different provisions, but the bulk of the taxation under this section is also due by December the 20th of the year in which the levy was approved. Since approval of the budget by the board of county commissioners occurs in September, 1976, the first taxes are due in December of that year. The district may expect its first funds in late December, 1976, or early January, 1977, therefore.

The answer to the question concerning distribution of funds is that no funds will be available for distribution until taxes are collected pursuant to the levy of the board of county commissioners in September of the applicable year. Funding prior to that date must depend on available interim funding mechanisms, if any.

#### AUTHORITIES CONSIDERED:

1. *Idaho Code*, §§63-921, 621, 625, 626, 901, 1102, & 1302.

2. *Idaho Code*, §§ 22-4301, 4302.

DATED this 11th day of September, 1975.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL  
Attorney General

## ANALYSIS BY:

TERRY E. COFFIN  
Deputy Attorney General

GUY G. HURLBUTT  
Legal Intern

## ATTORNEY GENERAL OPINION NO. 51-75

TO: D. E. Chilberg, Director  
State of Idaho  
Department of Administration  
Building Mail

Per request for Attorney General Opinion.

**QUESTION PRESENTED:** Whereas, "The State of Idaho has opportunities to enter lease-purchase agreements, particularly with respect to providing office space for State agencies;" Whereas, "These opportunities often are to the advantage of the State;"

Therefore, "I respectfully request an official opinion from your office regarding the legality of lease-purchase contracts."

**CONCLUSION:** The issue raised by your inquiry is whether a lease purchase contract for state office space violates the debt limitation provisions of the *Idaho Constitution*. Its resolution requires scrutiny of the individual terms of the contract in question. If its terms are characteristically those of a deferred payment plan, the contract can be invalidated as contravening Article VII, Section 9 and 11, and Article VIII, Section 1, *Idaho Constitution*. However, a contract executed in good faith which neither provides for a penalty upon proper lease cancellation nor creates an obligation beyond that authorized by a department's designated portion of its annual appropriation would not contravene the referenced provisions of the Constitution.

**ANALYSIS:** All contracts executed on behalf of the State of Idaho are subject to the debt limitation provisions of the *Idaho Constitution*. Specifically, the language of Article VII, Section 11 reads:

"No appropriation shall be made, nor any expenditure authorized by the legislature, whereby the expenditure of the state during any fiscal year shall exceed the total tax then provided for by law, and applicable to such appropriation or expenditure, unless the legislature making such appropriation shall provide for levying a sufficient tax, not exceeding the rates allowed in section nine of this article, to pay such appropriation or expenditure within such fiscal year. This provision shall not apply to appropriations or expenditures to suppress insurrection, defend the state, or assist in defending the United States in time of war."

Article VII, Section 9, *Idaho Constitution* establishes the rate of taxation of real and personal property for state purposes and the means by which that rate may be properly increased. Article VIII, Section 1, *Idaho Constitution* reads in pertinent part:

The legislature shall not in any manner create any debt or debts, liability or liabilities, which shall singly or in the aggregate, . . . , exceed in the aggregate the sum of two million dollars . . . unless the same shall be authorized by law . . .

These three constitutional provisions are to be construed as articulating an intent that the business of the State be transacted upon a cash basis. *Lyons v. Bottolfson*, 61 Idaho 281, 292, 101 P.2d 1, 5 (1940). Fidelity to that intent is the principle issue in any analysis of a lease-purchase contract entered into on behalf of the State of Idaho.

The Supreme Court of California scrutinized constitutional debt limitation provisions similar to those of Idaho in *City of Los Angeles v. Offner*, 19 Cal 2d 483, 122 P.2d 14 (1942), stating:

"It has been held generally in the numerous cases that have come before this court involving leases and agreements containing options to purchase that if the lease or other agreement is entered into in good faith and creates no immediate indebtedness for the aggregate installments therein provided for but, on the contrary, confines liability to each installment as it falls due and each year's payment is for the consideration actually furnished that year, no violence is done to the constitutional provision. [citing cases] . . . If, however, the instrument creates a full and complete liability upon its execution, or if its designation as a "lease" is a subterfuge and it is actually a conditional sales contract in which the "rentals" are installment payments on the purchase price for the aggregate of which an immediate and present indebtedness or liability exceeding the constitutional limitation arises against the public entity, the contract is void."

Thus a contract for lease which includes an option to purchase at a predetermined price would not create an indebtedness in contravention of the Constitution when the terms of payment confine liability to the annual term of lease. *Ibid*: *Jefferson School Twp. v. Jefferson Twp. School Bldg. Co.* 212 Ind 542, 10 NE2d 608 (1937); *Hall v. Baltimore*, 252 Md 416, 250A2d 233 (1969). The well established rule is that the aggregate amount of future rent is not an immediate debt or liability. See *Clayton v. Kervick*, 52 N.J. 138; 244 A2d 281 (1968); cf. *City of Pocatello v. Peterson*, 93 Idaho 774, 473 P.2d 644 (1970) (dissenting opinion). Similarly an option to purchase would not create a present debt or liability as no obligation to purchase would exist unless and until the State chose to exercise its option. See *Bulman v. McCrane*, 123 N.J. Super. 213, 302 A2d 163 (1963).

Lease-purchase agreements can be effectuated by contract documentation which is faithful to the intent of the debt limitation provisions. Suggested guidelines are:

- a. that the lease payments for an annual period reflect reasonable compensation for *use*, not acquisition of the office space.
- b. that no penalty be imposed upon the State for proper cancellation of the lease.
- c. that no obligation beyond that authorized by a department's designated portion of its annual appropriation be created.
- d. that the exercise of an option to purchase be at the sole discretion of the State.
- e. that the amount of purchase, should the option be exercised, be a reasonable value for the property at the time.

*Los Angeles v. Offner*, supra; *Bulman v. McCrane*, supra.

Judicial articulation of these or similar guidelines reflects a careful scrutiny of contract terms which seek to enlarge the scope of permissible conduct otherwise sanctioned by debt limitation provisions. Terms providing for annual payments which exceed reasonable consideration for *use* as opposed to acquisition of real or personal property have been held to indicate a purchase contract. *Hively v. Nappanee*, 202 Ind 28, 169 N.E. 51 (1929). Clauses that provide for acceleration and forfeiture for nonpayment clearly indicate a purchase, *Dorman v. Fisher*, 31 N.J. 13, 155 A.2d 11 (1959). Courts have held that a transaction closely resembles a purchase when the lessor recaptures his whole investment costs and profit during the term of the lease and a building still usable goes to the State without further consideration or for only nominal consideration. *Mahoney v. San Francisco*, 201 Cal 248, 257 P.49 (1927); *Alamogordo Municipal School Dist. Authority*, 81 N.M. 196, 465 P.2d 79 (1970); *Bachtell v. City of Waterloo*, 200 N.W. 2d 548 (Iowa S. Ct. 1972). However, if the transaction appears to be one where the lessor is satisfied by simply recovering his investment, the lease may be sustained, as:

"... there is nothing anomalous in the present builder-developer being permitted to collect as rental sufficient to recover his total investment including the depreciation inherent in his reversion as a wasting asset destined to become devoid of economic value at the end of the term. The fact that acquiring title to a potentially useful building as the residue of a transaction otherwise faithful to the theory of a lease (certainly so from the viewpoint of the lessor) represents no good reason for judicial assiduity in laying hold of that circumstance to destroy the transaction as an unconstitutional debt." *Bulman v. McCrane*, 64 N.J. 105, 312 A.2d 857 (1973).



A contract alleged to be a lease but which provides that title to the property in question would automatically vest in the lessee at the close of the lease term is a purchase contract, void pursuant to the debt limitation provisions of the Constitution. See 405 *Monroe Corp. v. Asbury Park*, 70 N.J. Supra 293, 175 A2d 267, 272 (1971); cf. *Dean v. Kuchel*, 35 Cal 2d 444, 218 P.2d 521 (1950). Where an option to purchase does exist, the amount at which the option is to be exercised should be one which closely reflects the value of the property at that time. *Bulman v. McCrane*, 123 N.J. Super 213, 302 A2d 163 (1973); *Phoenix v. Phoenix Civic Auditorium & Concert Assoc.*, 99 Ariz. 270, 408 P.2d 818, 830 (1965).

The guidelines reviewed are those most commonly offered by the courts to determine the integrity of the lease aspects of a lease purchase contract. Any clause that would more likely be found in an installment contract is suspect, e.g., a clause denying the lessee any power of revocation. Each lease will have terms or facts peculiar to its particular circumstances, which makes it difficult to prescribe precise legal guidelines. The weight given by courts to assertions of violations of debt limitation clauses has often depended upon the court's view of the evils sought to be avoided by the clauses, balanced against the requirement for flexibility in financing much needed public facilities. Nevertheless, the closer the transaction resembles a leasing arrangement, the more likely the court is to sustain it. The constitutional limitations are not designed to prevent the acquisition of office space, but to prescribe the means of so doing in order that the business of the State be transacted upon a cash flow basis. If the property can be acquired without obligating the State beyond designated annual appropriations, then a lease purchase contract may be permissible. However, if the essence of the contract is that of a deferred payment plan, the contract is void. *McFarland v. Barron*, 83 S.D. 639, 164 N.W. 2d 607 (S. Ct. 1969); *Corhran v. Middletown*, 14 Del. Ch. 295, 125 A. 459 (1924).

#### AUTHORITIES CONSIDERED:

1. *Idaho Constitution*, Article VII, Sections 9, 11; Article VIII, Sections 1, 3.
2. *Lyons v. Bottolfson*, 61 Idaho 281, 101 P.2d 1 (1940).
3. *City of Pocatello v. Peterson*, 93 Idaho 774, 473 P.2d 644 (1970).

DATED this 9th day of September, 1975.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL  
Attorney General

#### ANALYSIS BY:

CHRISTOPHER D. BRAY  
Deputy Attorney General

JORDAN SMITH  
Legal Intern

## ATTORNEY GENERAL OPINION NO. 52-75

TO: Tom D. McEldowney  
Director  
Department of Finance  
Building Mail

Per request for Attorney General Opinion.

**QUESTION PRESENTED:** Does a violation of the Idaho Anti-Lottery Statute (Section 18-4901, *Idaho Code*) occur when property or any other prize is awarded or distributed on the basis of lot or chance to one or more participants in an open promotional scheme or contest, such as a sweepstakes, raffle, drawing, or similar gift enterprise?

**CONCLUSION:** No violation of the Idaho Anti-Lottery Statute occurs unless a participant (or his agent) in one of the above-described open promotional "give-away" programs has paid or promised to pay a valuable consideration — which is a consideration having economic or monetary value, as opposed to mere inconvenience — for the chance of obtaining the prize. However, if participants who make no purchase or who part with nothing of value are not given an equal opportunity to win the prize, then the contest is a lottery.

**ANALYSIS:** The Idaho prohibition against lotteries finds its roots in Article 3, Section 20, *Idaho Constitution*, which provides:

The legislature shall not authorize any lottery or gift enterprise under any pretense or for any purpose whatever.

The Idaho Supreme Court has ruled that "[T]his provision of the Constitution . . . is negative and prohibitory, is self-acting and needs no legislation to carry it into effect . . ." *State v. Village of Garden City*, 74 Idaho 513, 526; 265 P.2d 328 (1953).

The Legislature has chosen to statutorily define a lottery. Section 18-4901, *Idaho Code*, provides in pertinent part the following:

A lottery is any scheme for the disposal or distribution of property by chance among persons who have paid or promised to pay any valuable consideration for the chance of obtaining such property, or a portion of it, or for any share or interest in such property, upon any agreement, understanding or expectation that it is to be distributed or disposed of by lot or chance, whether called a lottery, raffle, or gift enterprise, or by whatever name the same may be known . . .

While it could conceivably be argued that the above statutory definition is too liberal and therefore a legislative violation of the proscription contained in Article 3, Section 20, *Idaho Constitution*, this office is not prepared to declare Section 18-4901, *Idaho Code*, unconstitutional — or to declare any statute unconstitutional — in the absence of a patent defect. The prerogative to accept

a different standard to determine the constitutionality of statutes rests solely with the judiciary. However, in defense of the legality of the statute, it should be noted that the concept of "valuable consideration" as an element of a lottery was not unknown at the time of the promulgation of the *Idaho Constitution*, which is silent in defining a lottery. In addition, Montana, which has identical statutory language and a similar constitutional prohibition, has held the statute constitutional:

To our mind, the framers of the Montana Constitution who expressly forbade the Legislature to authorize lotteries or gift enterprises . . . were seeking to suppress and restrain the spirit of gambling which is cultivated and stimulated by chances whereby one is induced to hazard his earnings with the hope of larger winnings. The statutes which define and prohibit lotteries must therefore be interpreted with this purpose in mind. *State v. Cox*, 349 P.2d 104, 106 (Montana, 1960).

The above-quoted statutory definition requires that *all* three of the following elements must exist in order to find a lottery: (1) The opportunity to win a prize; (2) Upon a set of events determined by chance; (3) In favor of one who has paid or agreed to pay a *valuable consideration* for the chance of obtaining the prize. The existence of the first two elements, namely "prize" and "chance" are not generally difficult to determine, and the applicability of his opinion is limited to promotional schemes or contests in which those elements are present. The third element of "consideration" or "valuable consideration", however, presents considerable ambiguity and confusion, and it is the interpretation of this latter element to which this opinion is primarily directed. To this end, we must determine whether Idaho requires mere "consideration" or "valuable consideration" to support the finding of a lottery, and whether there is a legal distinction between these terms.

The Idaho Supreme Court has approvingly quoted Section 18-4901, *Idaho Code*, in the case of *State v. Village of Garden City*, supra. As heretofore noted, said statute uses the term "valuable consideration" in defining a lottery. Following the statutory quote, the Court states in reference to Section 18-4901, at 74 Idaho 520:

This definition in substance conforms to that of the common law which has defined a lottery as a species of gaming, wherein prizes are distributed by chance among persons *paying* a consideration for the chance to win; a game of hazard in which *sums are paid* for the chance to obtain a larger value in money or articles. (Emphasis supplied).

Citing from *Corpus Juris Secundum* and from *American Jurisprudence* — but not from any specific cases — the Court continues in the next paragraph:

. . . to constitute a lottery, it is generally held there are three essential elements, namely, chance, consideration and prize. When these three elements are present, the scheme is a lottery. 54 C.J.S., Lotteries, § 2 (a), p. 845; 34 Am.Jur. 647 Sec. 3.

The Court makes no effort to distinguish between "consideration," as used in the legal encyclopedias, and "valuable consideration" as used in Section 18-4901, *Idaho Code*. The *Village of Garden City* case, however, did not turn on the issue of "consideration" or "valuable consideration." Rather, the issues in that case were whether certain gambling-type mechanical devices could be legislatively authorized in view of the lottery prohibition of Article 3, Section 20, *Idaho Constitution*, and if not, whether said devices could be judicially abated as moral nuisances. The question of "consideration" or "valuable consideration" was not at issue, inasmuch as it was clearly necessary to pay money in order to use the machine. It would appear that the use of the term "consideration" without further qualification on the part of the Court was casual, particularly since every "valuable consideration" is a "consideration" (although the converse would not necessarily follow). Both the Supreme Court and the Legislature recognized that the consideration contemplated is one in which "sums are paid" (74 Idaho at 520) or in which a participant or his agent has "paid or promised to pay" (Section 18-4901, *Idaho Code*) for the chance to win the prize. This is more than the common law "consideration" required to support a simple contract.

It is, therefore, our opinion that the standard in determining that a lottery exists must include provision for a finding of "valuable consideration." The same opinion has been reached by the majority of courts of other states where the question has presented itself. Indeed, although a judicial determination has been made in a handful of states that simple "consideration," as used in the law of contracts, is sufficient to find that a lottery exists, we are aware of only two states having a statute similar to § 18-4901, *Idaho Code*, that have done so. See, *Knox Industries Corp. v. State*, 258 P.2d 910 (Oklahoma, 1953); and *State v. Safeway Stores, Inc.*, 450 P.2d 949 (Washington, 1969) (wherein the statute was held unconstitutional). Approximately fifteen states have ruled that something more than simple "consideration" is necessary to support the finding of a lottery; although most of those states do not have statutes as liberal as the Idaho statute, in which the term "valuable consideration" is used in the definition of a lottery. For cases involving a statute similar to that found in Idaho, see, for example, *California Gasoline Retailers v. Regal Petroleum Corp.*, 330 P.2d 778 (California, 1958); *State v. Cox*, supra; *People v. Psallis*, 17 2d 796 (New York, 1939). Other relevant cases from several different jurisdictions are cited in an annotation entitled "Promotional Schemes of Retail Stores as Criminal Offense Under Anti-Gambling Laws," 29 ALR3d 888.

In construing the concept of "consideration" as used in the lottery context, most courts have held that it is the giving of something of economic or pecuniary value, which can be translated into dollars and cents. For example, in *Cudd v. Aschenbrenner*, 377 P.2d 150 (Oregon, 1962), the court held at page 155:

... Unless a scheme requires that (1) a participant part with a consideration, and (2) the consideration be something of economic value to him, participation therein can rob him neither of purse nor his accumulated worldly goods. We must conclude, therefore, that the anti-lottery provisions of our statute are directed at schemes in which participants are obligated to contribute something which is of economic value to

them as a condition of participation. We do no violence to the law of contracts when we hold that a lottery contemplates a greater consideration than is generally required to support a contract . . . We merely hold that a lottery is a special kind of contract which requires a special kind of consideration — consideration which can impoverish the individual who parts with it.

The Oregon case is significant, because Oregon, like Idaho, has a constitutional prohibition against lotteries, yet, unlike Idaho, has no statutory definition of a lottery. The case for "valuable consideration" is stronger in Idaho, where the statute specifically incorporates the concept of "valuable consideration."

California, which has both a constitutional provision and a statutory provision similar respectively to the *Idaho Constitution* and statute, has held in the case of *California Gasoline Retailers v. Regal Petroleum Corp.*, supra, at pages 788-89:

In view of our statute (Pen. Code, § 319) defining a lottery and which provides that the consideration necessary is a 'valuable one' paid, or promised to be paid by the one receiving the ticket, the fact that a ticket holder must go to the place of business of the sponsor of the scheme to deposit the ticket stub cannot be considered the necessary consideration.

We believe that we are in accordance with the overwhelming majority of jurisdictions that have defined "consideration" and "valuable consideration" in the lottery context, when we state that the "valuable consideration" required to be "paid" (§ 18-4901, *Idaho Code*) is a detriment to the participant (or his agent) that has an economic or monetary value. Mere physical inconvenience engendered by participation in a promotional scheme does not constitute such "consideration". Rather, the element of "consideration" necessary to bring a promotional scheme within the purview of the anti-lottery laws must be in money or other items of value.

Potential benefit to the promoter of a "give-away" is not sufficient to support a finding of a lottery. See, for example, *Federal Communications Commission v. American Broadcasting Co.*, 347 U.S. 284, 74 S.Ct. 593, 98 L.Ed. 699 (1954), in which the United States Supreme Court held, in interpreting a federal anti-lottery broadcasting statute (which does not define a lottery) that the potential benefit to a broadcasting station or its sponsors in requiring one to listen to a particular "give-away" program in order to be potentially able to win a prize, does not make the scheme a lottery. In Idaho, the case is even stronger, because the wording of the statute directs us to look at what the participant must pay for the ticket or chance, and not to the benefit, direct or indirect, that the promoter may receive:

A lottery is any scheme for the disposal or distribution of property by chance among persons who have paid or promised to pay any valuable consideration for the chance . . . (Emphasis supplied). § 18-4901, *Idaho Code*.

This interpretation is not inconsistent with the rationale behind the lottery prohibition, which is to protect the individual from squandering his resources in the dim hope of realizing profits.

We are, therefore, of the opinion that mere registration for a sweepstakes, without purchase of goods or services; or mere physical attendance at places or events, without payment of an admission price or fee; or listening to or watching radio and television programs; or answering the telephone or making a telephone call; and acts of like nature which involve mere inconvenience arising from participation in the promotional scheme — but not economic or pecuniary detriment — are not acts which can be deemed the payment of a “valuable consideration” to support the finding of a lottery, even if such acts are of benefit to the promoter of the contest. Nor is the purchase of a postage stamp to mail a contest form the payment of a “valuable consideration,” because the payment is not made to the promoter or his agent for the chance to win the prize, but rather to an independent third party (the United States Post Office) for delivery of a letter which could conceivably have been hand-carried or sent by other means. The use of the mails would present an entirely different problem, however, if it were required by the promoter as part of the bargain.

Obviously, this office cannot attempt to define the myriad of acts which would constitute the giving of “valuable consideration.” Each case must be analyzed on its own facts. However, any attempt — direct or indirect — to link a ticket or chance with the purchase or possession of a commodity or the purchase of a service, or with the requirement that the entrant part with something of value, will be viewed by this office as a violation of law, and will be dealt with accordingly.

For example, it is an unlawful gift enterprise or lottery when one gives or deposits money, and as a result, he receives a ticket or chance in a promotional scheme, even when said money will ultimately be refunded with interest, because one has parted with the use of the money during the interim. To like effect, the payment of money for the purchase of a commodity or service, accompanied by receipt to the purchaser or a ticket or chance in a promotional scheme, amounts to the giving of a “valuable consideration,” even when there is no increase in purchase price, because the scheme might induce the participant to purchase the commodity or service when he otherwise would not. See, *State v. Cox*, supra, and cases cited therein.

We are in agreement with, and hereby adopt, the below-quoted provisions of the 1969 Ruling of the Federal Communications Commission (promulgated after the Supreme Court decision of *F.C.C. v. American Broadcasting Co.*, supra) entitled “Applicability of Lottery Statute to Certain Contests and Merchandise Sales Promotions” (F.C.C. 69-611):

Clearly, consideration is present when the contestant is required to pay money or give something else of value for the chance to win a prize. Therefore, the promotional scheme must not require a purchase or the risking of money or other things of value . . . However, the availability of free chances must be real and not illusory; i.e., free chances must be

available on a basis which is reasonably equal to that on which contestants who purchase a product may obtain them.

. . . Although the adequacy of supply may be difficult to foresee, it is the responsibility of the sponsor of the promotion to deliver a sufficient quantity of chances to insure that everyone who asks will be able to obtain them . . .

. . . In order to eliminate the element of consideration, non-purchasing and purchasing contestants must be accorded an approximately equal opportunity in the number of chances to be obtained; otherwise, the scheme amounts to a lottery.

. . . Any announcement of a promotional scheme . . . should adequately describe the availability of such free chances and the locations, times and manner in which they may be obtained. Such cryptic messages as 'No purchase necessary' or 'Nothing to buy' do not meet this requirement.

We would add that to insure that there is no intimidation to purchase or that there is no unnecessary inconvenience to one wishing to participate in a "give-away" promotion, a person cannot be restricted from obtaining a ticket or chance by mail, providing that his request is accompanied by a stamped, return envelope.

We are not unmindful that this Opinion represents a departure from the 1969 Opinion of the Idaho Attorney General. On the basis of that Opinion, promotional schemes and sweepstakes were deemed to be illegal in Idaho when there was any inconvenience to the participant in such a contest. Effectively, all promotional sweepstakes were thereupon deemed to be "void" in Idaho. We believe, however, that the 1969 Opinion was erroneous in failing to distinguish between "consideration" and "valuable consideration," and we believe that the cases cited in support of the substantive portion of that Opinion represent a minority viewpoint. We accordingly reverse the 1969 Opinion, to the extent that it is inconsistent with the views expressed herein.

#### AUTHORITIES CONSIDERED:

1. *Idaho Code*, Section 18-4901.
2. Article 3, Section 20, *Idaho Constitution*.
3. Attorney General Opinion, dated September 11, 1969.
4. Annot: "Promotional Schemes of Retail Stores as Criminal Offense under Anti-Gambling Laws", 29 ALR3d 888.
5. 1969 Ruling of F.C.C., "Applicability of Lottery Statute to Certain Contests and Merchandise Sales Promotions" (F.C.C. 69-611).

6. *State v. Village of Garden City*, 74 Idaho 513, 526; 265 P.2d 328 (1953).
7. *Knox Industries Corp. v. State*, 258 P.2d 910 (Oklahoma, 1953).
8. *State v. Safeway Stores, Inc.*, 450 P.2d 949 (Washington, 1969).
9. *California Gasoline Retailers v. Regal Petroleum Corp.*, 330 P.2d 778 (California, 1958).
10. *State v. Cox*, 349 P.2d 104, 106 (Montana, 1960).
11. *People v. Psallis*, 17 N.Y.S.2d 796 (New York, 1939).
12. *Cudd v. Aschenbrenner*, 377 P.2d 150 (Oregon, 1962).
13. *Federal Communications Commission v. American Broadcasting Co.*, 347 U.S. 284, 74 S.Ct. 593, 98 L.Ed. 699 (1954).

DATED this 10th day of September, 1975.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL  
Attorney General

ANALYSIS BY:

RUDOLF D. BARCHAS  
Deputy Attorney General

### ATTORNEY GENERAL OPINION NO. 53-75

TO: Idaho State Board of Land Commissioners  
Statehouse  
Boise, Idaho 83720

Per request for Attorney General Opinion.

**QUESTION PRESENTED:** Does the Governor of the State of Idaho, as a member and chairman of the State Board of Land Commissioners have an obligation to cast his vote, except in matters involving personal conflict, rather than assuming only the role of a tie-breaker?

**CONCLUSION:** Each of the five members of the State Board of Land Commissioners has an equal right under the Idaho Constitution to vote on all matters coming before the Board. In addition, by statute, the governor acts as President of the Board.

**ANALYSIS:** Article 9, Section 7, *Idaho Constitution*, as originally enacted provided that the governor, superintendent of public instruction, secretary of state,



and attorney general constituted the four members of the State Board of Land Commissioners. In 1910, Article 9, Section 7, *Idaho Constitution*, was amended to include the state auditor as a fifth member of the State Board of Land Commissioners.

Obviously, prior to the 1910 amendment it would have been impossible for the governor, acting both as a member and chairman of the State Board of Land Commissioners, to have cast his vote only in a tie-breaking situation inasmuch as there were only four members of the entire Board. Although the possibility emerges after the 1910 constitutional amendment enlarging the Board to five members that the governor, as chairman of the board, could act merely as a tie-breaker, such a role lacks both historical and legal precedence. In the case of *Balderston v. Brady*, 17 Idaho 567, 107 P. 493 (1910), the Idaho Supreme Court noted:

The state board of land commissioners is a constitutional body. It is composed of four members, *each of whom has a vote on all matters coming before the board*. This board is as distinct and separate from all other offices as is the office of governor or judge of this court. It is created by the same instrument which created the office of governor and the judicial department of the state. The individuals who compose the board and discharge its duties happen to be state officers, and it so happens that the governor of the state by reason of being governor is chairman of the board. When acting and voting at a meeting of the state board of land commissioners and discharging the particular and special duties devolving upon the board, he is not acting as the chief executive, but, on the contrary, he is acting as one of the four members of a board in the discharge of certain ministerial and quasi-judicial duties imposed on such board by the constitution and statutes. 17 Idaho at 476-577.

Thus, it is clear, that the Governor of the State both as member and chairman of the State Board of Land Commissioners, has a constitutional right to cast his vote on all matters coming before the Board unless, of course, abstention from voting is in order due to personal conflict. The analogy might well be made to the role of the Speaker of the House of Representatives of the Idaho State Legislature who, as a member of the body over which he presides, is both entitled and obligated to vote on matters coming before the House of Representatives. A contrary situation is presented by the role of the Lieutenant Governor as President of the Senate of the Idaho State Legislature, who is not a member of the body over which he presides, and whose vote is *only* allowed in the case of a need to break a tie vote among the members of that body.

Finally, a review of the minutes of meetings of the State Board of Land Commissioners from the time of statehood to date indicates that all 21 governors of the State of Idaho, prior to the incumbent, have actively voted as members and chairmen of the State Board of Land Commissioners and have in no instance merely assumed the role of a tie-breaker in voting on matters which have come before the Board.

## AUTHORITIES CONSIDERED:

1. *Idaho Constitution*, Article 9, Section 7.
2. *Balderston v. Brady*, 17 Idaho 567, 107P. 493 (1910).
3. Minutes of Meetings of the State Board of Land Commissioners from 1890 to date.

DATED this 10th day of September, 1975.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL  
Attorney General

## ANALYSIS BY:

PETER HEISER, JR.  
Chief Deputy Attorney General

## ATTORNEY GENERAL OPINION NO. 54-75

Void.

## ATTORNEY GENERAL OPINION NO. 55-75

TO: Clyde Koontz  
Legislative Auditor  
Room 114  
Building Mail

Per request for Attorney General Opinion.

Please excuse our delay in answering your letter of February 25, 1975. As you know, the scope of your questions is rather wide and we scaled our research accordingly. A synopsis of your questions and the results of our study are detailed below.

## QUESTIONS PRESENTED:

1. Whereas, "The Idaho State Liquor Dispensary (hereinafter referred to as ISLD) has a policy of selling damaged liquor bottles . . . at a reduced price."

Therefore, "Is this policy of selling bottles with broken seals in conflict with § 23-311, *Idaho Code*?"

2. Whereas,

"For the past several years, the N.C.O. Club at the Mountain Home Air Force Base has received a 20% discount on case purchases of liquor from the Idaho State Liquor Dispensary. All other licensed retailers receive a 5% case lot discount."

Therefore, "is the 20% discount allowed only to the N.C.O. Club in conflict with § 23-207, *Idaho Code*?"

3. Whereas

"In fiscal year 1975, the retail price of liquor includes the current price (costs + federal tax + freight + markup) plus a 10% surcharge, (§ 23-217 (a), *Idaho Code*) plus a 2% surcharge (§ 23-217 *Idaho Code*). A 5% rebate is given for the purchase of unbroken cases of liquor (§ 23-217 (a), *Idaho Code*). It is obvious from the section involved that the 5% rebate is computed on the price after adding the 10% and 2% surcharges. However, it is not clear to us whether the 5% rebate is to be computed before or after adding the 1% addition.

Therefore, should the 1% additional be added to the current price and the surcharges prior to computing the 5% rebate;

4. Whereas,

It is also quite clear that the revenue raised by the 2% surcharge must be reduced by the pro rata share of the discount before being remitted to the state auditor. However, it is not clear if this same procedure is to be followed in regard to the 10% surcharge or the 1% addition, is applicable." (sic)

Therefore, should the 10% surcharge and the 1% addition be reduced by the pro rata share of the 5% discount?

CONCLUSIONS:

1. No.
2. No.
3. Yes.
4. Yes.

ANALYSIS:

1. The ISLD presently disposes of bottles of liquor that are imperfect for any reason, e.g., torn labels or cracked and leaking caps, by selling them at reduced prices in "distressed merchandise sales."

Your question asks specifically whether the sale of bottles with broken seals is in violation of *Idaho Code*, § 23-311, which reads:

**Containers and Labels.** — No alcoholic liquor shall be sold to any purchaser except in sealed container with the official seal or label prescribed by the dispensary and no such container shall be opened upon the premises of any state warehouse, store or distributing station.

Pertinent to the question is the proper definition of the term "sealed container", because if the term means that a tight seal is required, the sale of leaking bottles is forbidden. However, the ISLD construes the term as referring to the federal stamp that immobilizes the cap of each bottle. Great weight is given to the construction of a statute by the administrative officers of the state. *Breckenridge v. Johnston*, 62 Idaho 121, 108 P.2d 833 (1940). Representatives of the ISLD also assert that the trade employs their interpretation of "sealed container," and commercial or trade terms used in a statute are construed in the sense in which terms are generally used in the trade. *O'Hare v. Luckenbach*, Cal., 46 S. Ct. 157, 269 U.S. 364, 70 L.Ed. 313 (1926). We therefore conclude that "sealed container" means a bottle secured by a federal stamp. Since the seal that you refer to is the federal stamp, there is no need to consider whether *Idaho Code*, § 23-311, is applicable, because the sale of bottles of liquor without intact federal stamps is prohibited by federal law, i.e., 26 U.S.C.A. 7209. Any sale by the ISLD of bottles with a disturbed federal stamp would be in violation of the law.

From a policy point of view, it should also be noted that the sale of leaking bottles represents a substantial profit to the State. Under the present procedure, the ISLD holds distressed merchandise sales wherein bottles are sold that are low in content either from short fill from the distillery or evaporation due to loose or cracked caps. Curtailment of these sales would result in a net loss. Discolored bottles or those with cracked caps cannot be charged back to the supplier because of the impossibility of establishing fault, resulting in a total loss. Bottles that are defective or with loose caps are the responsibility of the supplier and may be returned, but the State only recovers its purchase price and not its costs for handling, freight, and paperwork. Therefore, it is more lucrative to sell them. In short, the ISLD has converted a portion of its operations from a loss to a profit.

2. The statute that you refer to, *Idaho Code*, § 23-207, reads in pertinent part:

Without attempting or intending to limit the general powers of the superintendent of the dispensary contained in Section 23-206, *Idaho Code*, such powers shall extend to and include the following:

(h) From time to time to fix the sales prices, which shall be uniform throughout the state, of the different classes, varieties, or brands of alcohol liquor, and to issue and distribute price lists thereof.

The issue that you raise is whether the discount granted to the N.C.O. Club contravenes the requirement that prices be uniform throughout the state. For the reasons enunciated below, we believe that the discount is valid.

Although the ISLD has been selling liquor to the military for many years, the discount was first granted in 1973. At that time a dispute arose between the N.C.O. Club and the ISLD concerning the immunity of federal activities from state regulations, the main issue centering on whether the military was subject to state taxation. Seeking to avoid an expensive lawsuit in which the outcome was speculative, the Supervisor of the Dispensary exercised his discretion and granted the 20% discount. Thereupon, a member of the staff of the Attorney General testified before the Joint Appropriations Committee of the Idaho Legislature and disclosed the details of the discount transaction to its members. It is highly significant that the Legislature, once apprised of the discount and the exercise of the discretionary powers of the Supervisor, made no effort to rescind the discount. The failure of that body, with knowledge of the transaction, to rescind or amend the transaction is equivalent to an implied endorsement of the discount. See: *United Pacific Ins. Co. v. Bates*, 57 Idaho 537, 67 P.2d 1024 (1937).

The reasonableness of the discount is another factor in favor of its validity. The ISLD has a unique business relationship with the N.C.O. Club, because the military, unlike any other customer, takes receipt of its liquor at the warehouse in Boise and delivers it at the base. This results in large savings to the state, which avoids expenditures for freight, storage and handling costs. It can be argued that the savings thus created by doing business with the N.C.O. Club greatly offset the discount that is granted. In other words, the discount, in actual practice, represents in large part only the savings created by cutting overhead. Thus, the "bottom line" is only partially affected by the discount. More significantly, a major customer was retained by granting the discount. The loss of the military as a customer would represent a considerable financial loss for the state. For example, gross sales to the N.C.O. Club in 1973 totaled \$199,783.91, approximately 50% of which was profit.

Since the Legislature has impliedly acquiesced in the discount structure, which is reasonable in view of the savings engendered by dealing with the N.C.O. Club, we conclude that the discount is valid.

3. Your question focuses attention on the pricing formula used by the ISLD for allocating its income. Statutory authority for allocating funds is found in two statutes, which in pertinent part are:

23-806. . . . 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, and said sum shall be segregated, designated and held in the state treasury for use as provided herein.

23-217. . . . (a) The superintendent of the state liquor dispensary is hereby authorized and directed to include in the price of goods here-

after sold in the dispensary, and its branches, a surcharge equal to ten per cent (10%) of the current price per unit . . .

(c) In addition to the surcharge imposed by subsection (a) . . . , the superintendent . . . is . . . directed to include in the price of goods hereafter sold . . . , a surcharge equal to two per cent (2%) of the current price . . .

The pricing formula has been a source of great confusion for many years. Much of the confusion stems from an erroneous conclusion reached in Attorney General Opinion No. 74-47, issued on October 11, 1973. At issue at that time was whether the 1% figure in § 23-806, *Idaho Code* was to be computed in the same manner as the surcharges authorized in § 23-217, *Idaho Code*. The author of the opinion concluded that the 1% figure was a unique tax and not a "surcharge" and should be computed on a retail price fixed by taking the basic cost of a bottle of liquor, adding the markup, and further adding the surcharges of Section 32-317, *Idaho Code*. The author misread the statutes. This interpretation, for which no authority was cited, led to tortured accounting and the recurring problems evidenced by your letter. In construing a statute, one should aim to give it a sensible construction which will effectuate the legislative intent, and if possible, avoid an absurd conclusion. *Hartman v. Meier*, 39 Idaho 261, 227 P. 25 (1924). The more logical approach is that the Legislature intended to deduct the 10%, 2% and 1% credits in a like manner. In other words, the 1% credit is not placed in a special class, separate and apart from the other surtaxes. Statutes must be construed together to the end that various sections may be made to harmonize. *State v. Montray*, 37 Idaho 684, 217 P. 611 (1923). Accordingly, the prior opinion is reversed, to the extent that it is inconsistent with the views expressed herein.

Once it is established that the 1% figure is to be treated as a surcharge, it becomes clear that the 5% rebate is computed on a bottle price that includes the 1% credit. The authorizing language is found in § 23-217 (a), *Idaho Code*:

. . . Provided, however that after any surcharge or surcharges have been included the superintendent of the state liquor dispensary is hereby authorized and directed to allow a discount of five per cent (5%) from the price . . .

This conclusion is not only a clearer expression of the legislative intent, it also supports a more acceptable accounting procedure. See: *An Audit Report, State Liquor Dispensary, State of Idaho*, Recommendation No. 18, p. 43, June 9, 1975.

4. The issue presented by your final question is whether the 5% rebate authorized in § 23-217 (a), *Idaho Code*, should be deducted from the 10% surcharge credited to the general fund and/or the 1% addition credited to Liquor Law Enforcement. Under the present remittance schedule employed by the ISLD, only the 2% tax credited to the Alcohol Safety Action Program (ASAP) Fund is reduced by the 5% rebate. That is a correct procedure because it is expressly authorized in § 23-217 (d), *Idaho Code*. However, the present formula fails to deduct

the 5% rebate from the 1% and 10% taxes because the statutory scheme concerning those taxes omitted the specific authority that was granted in § 23-217(d), *Idaho Code*. Thus, under the present remittance schedule the amount of the rebate is computed on a price that includes the surcharges, but when the surcharges are distributed to the respective agencies, only the 2% credit to ASAP is reduced by the rebate.

The remittance formula, however, is based on an incorrect construction of the statutory scheme. In order to determine the meaning of a statute, it is necessary to examine and construe together all the sections of the statutes in point. *Lebrecht v. Union Indem. Co.*, 53 Idaho 228, 22 P.2d 1066 (1933). A more reasonable interpretation of the statutory scheme would be that the 5% rebate is deducted from the 1% and 10% taxes as well as the 2% tax credited to ASAP. That conclusion is based on the language in § 23-217 (a), *Idaho Code*, which states:

... Provided, however that after any surcharge or surcharges have been included the superintendent of the state liquor dispensary is hereby authorized and directed to allow a discount of five percent (5%) from the price ...

Since the rebates are given *after* the additional surcharges are added to the price, it is only logical that the surcharges should also be reduced by the rebate. Otherwise, a remittance formula is retained that is based on an incomplete statutory interpretation, and which employs unnecessarily convoluted accounting procedures. When construing a statute, the goal should be a sensible construction that will carry out the legislative intent, and if possible, avoid an absurd conclusion. *Hartman v. Meier, supra*. That goal is best accomplished by deducting the 5% rebate from the 10% and 1% taxes as well as from the 2% tax already being reduced. This conclusion is in accord with the recommendation of the Office of the Legislative Auditor. See: *Audit Report, State Liquor Dispensary, State of Idaho*, Recommendation No. 17, p. 42, June 20, 1975.

I trust that this answers your questions in full, but should you have further questions, please do not hesitate to ask.

#### AUTHORITIES CONSIDERED:

1. *Idaho Code*, § 23-207, § 23-217, § 23-311, § 23-806.
2. 26 U.S.C.A. 7209.
3. Official Attorney General Opinion No. 74-47.
4. *An Audit Report, State Liquor Dispensary, State of Idaho*, Recommendation No. 17, No. 18, pp. 42-43, June 9, 1975.
5. *Breckenridge v. Johnston*, 62 Idaho 121, 108 P.2d 833 (1940).

6. *O'Hare v. Luckenbach*, Cal., 46 S.Ct. 157, 269 U.S. 364, 70 L.Ed. 313 (1926).

7. *United Pacific Ins. Co. v. Bates*, 57 Idaho 537, 67 P.2d 1024 (1937).

8. *Hartman v. Meier*, 39 Idaho 261, 227 P. 25 (1924).

9. *State v. Montray*, 37 Idaho 684, 217 P. 611 (1923).

10. *Lebrecht v. Union Indem. Co.*, 53 Idaho 228, 22 P.2d 1066 (1933).

DATED this 17th day of October, 1975.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL  
Attorney General

ANALYSIS BY:

JORDAN P. SMITH  
Assistant Attorney General

#### ATTORNEY GENERAL OPINION NO. 56-75

TO: Roger B. Wright  
Prosecuting Attorney  
P.O. Box 557  
Idaho Falls, Idaho 83401

Per request for Attorney General Opinion.

**QUESTION PRESENTED:** Pursuant to Title 57, Chapter 1, *Idaho Code*, a depositing unit is required to deposit its public funds in a designated depository within the confines of the depositing unit. However, must the depositing unit deposit its public funds in excess of \$100,000.00 in a designated depository if that depository can provide FDIC insurance only to the extent of \$100,000.00 for each account of public funds of the depository unit?

**CONCLUSION:** Yes. The depositing unit is still required under the law to place its funds in the designated depository. The maximum FDIC insurance any custodian of public accounts can provide is \$100,000.00.

**ANALYSIS:** Section 57-121, *Idaho Code* requires the depositing unit to deposit its funds with designated depositories, all public monies coming into its hands. Section 57-111, *Idaho Code* states the qualifications for becoming a depository of public funds. One such qualification is that the depository be located within the depositing unit. This indicates that if in any depositing unit there exists only one qualified depository, the depositing unit must deposit all of its public monies with that one depository.



The Attorney General, in Opinion No. 24-75, addressed to Don Burnett, Chubbuck City Attorney, dated May 1, 1975, dealt specifically with the situation of one depository in a depositing unit. The facts presented to the Attorney General showed within the city of Chubbuck, the depositing unit, there existed only one branch bank that qualified as a depository of public funds. The Attorney General concluded:

"It thereby follows that the branch bank currently located within the City of Chubbuck is the only designated depository currently eligible for receiving deposits of funds from the City of Chubbuck, if it meets the requisites of Section 57-111, *Idaho Code*." Attorney General Opinion No. 24-75.

If only one depository of public funds exists within the depositing unit then the depositing unit is required under the law to deposit all of its public funds with the one eligible public depository. The question of security for the funds on deposit does not change this basic requirement.

Up until 1969, Title 57, Chapter 1, *Idaho Code* provided that the depositing unit shall receive security for its deposits. Such security could be in the form of deposit securities, bonds, or FDIC insurance. Deposits insured by FDIC needed no additional security but funds without the FDIC needed either the deposit securities or bonds as security. (See Section 57-111, repealed). Then in 1969 this section of the code was repealed and Section 57-127 was amended to read thusly:

"... and it is hereby made the duty of said supervising board not less than once every six (6) months to certify to the treasurer the capital and surplus of each public depository, a copy of which certificate shall immediately be served upon the treasurer by the supervising board or its clerk; provided that with the approval of the supervising board of the depositing unit, the treasurer is authorized and empowered to invest surplus or idle funds of the depositing unit in 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...

The term "surplus or idle funds" is defined in Section 57-131, *Idaho Code*:

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

A depositing unit having surplus or idle funds is free to purchase U.S. securities and certificates of deposit and thus secure the funds in that manner. Therefore, if the depositing unit has funds in excess of the FDIC limits which are surplus or idle funds, it may insure their safety as mentioned.

Funds that do not come under Section 57-127, *Idaho Code*, that is, funds other than surplus or idle funds, may not be used to purchase U.S. bonds and certificates of deposit. At this point, the code does not require that all public funds on deposit be insured. In other words, the depositing unit is required to use the sole public depository for all of its deposits regardless of the FDIC limitations. FDIC insurance is no longer a subject mentioned in Title 57, Chapter 1, *Idaho Code*; it is simply not a part of it. If the depositing unit has \$200,000.00 in working funds which must be deposited, then they must be deposited pursuant to law whether FDIC insurance covers the entire amount or not. With the \$200,000.00 figure and a \$100,000.00 limitation on the FDIC insurance, then \$100,000.00 would not be covered with the FDIC.

This result is not unreasonable. The former requirement of a combination of deposit securities, bonds and FDIC insurance was becoming quite cumbersome for the people involved. Therefore the legislature did away with burdensome requirements and provided for the safety of public deposits in another manner. As mentioned, the surplus or idle funds may be used to purchase U.S. securities or certificates of deposit. The working funds could of course not be tied up in this manner. So to protect those funds, the legislature enacted those sections of Title 67, Chapter 27, *Idaho Code* which provide for periodic audits and rules and regulations regarding the public depositories.

The legislature apparently found this to be the best solution to the problems that were developing with the larger municipal budgets and deposits. The law, as it now stands, provides that the funds of a depositing unit be placed with a local public depository if one exists. The cumbersome security requirements have been removed, while at the same time, a system has been devised to insure proper handling of the funds by the public depositories. A limitation on the amount of public deposits corresponding to the limitations of FDIC insurance would not have solved the former problems connected with the security arrangements and would have tended to force depositing units to utilize public depositories outside of the locality in addition to those within.

The answer to your question is yes, your depositing unit must deposit its public monies in the public depository located within its boundaries; and yes, the deposits must be made notwithstanding the fact that FDIC insurance covers only to the extent of \$100,000.00 for each account of public funds of the depositing unit.

#### AUTHORITIES CONSIDERED:

1. Title 57, Chapter 1, Chapter 67 and Chapter 27, *Idaho Code*.
2. Attorney General Opinion No. 24-75 and FDIC Rules and Regulations Section 330.8 (2).

DATED this 10th day of October, 1975.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL  
Attorney General

ANALYSIS BY:

JAMES P. KAUFMAN  
Assistant Attorney General  
Department of Finance

**ATTORNEY GENERAL OPINION NO. 57-75**

TO: D. E. Chilberg, Director  
Department of Administration

Per request for Attorney General Opinion.

**QUESTION PRESENTED:** Whether a State employee or any citizen who volunteers as a 4-H leader or assistant is covered under the State of Idaho Comprehensive Liability policy which affords liability coverage to volunteers.

**CONCLUSION:** Any person who volunteers as a 4-H leader or assistant is covered under Endorsement No. 3 to the Comprehensive General Liability Insurance policy covering the State of Idaho, which became effective July 1, 1974, to extend to June 30, 1977.

**ANALYSIS:** In 1914, the United States Congress enacted legislation, known as the Smith-Lever Act, to provide for cooperative extension work between federal land grant colleges and the United States Department of Agriculture to diffuse practical information on subjects relating to agriculture and home economics, and to encourage the application of the same. The pertinent provisions of the United States Code Annotated as enacted on May 8, 1914, and amended June 26, 1953, reads as follows:

"In order to aid in diffusing among the people of the United States useful and practical information on subjects relating to agriculture and home economics, and to encourage the application of the same, there may be continued or inaugurated in connection with the college or colleges in each State, Territory, or possession, now receiving, or which may hereafter receive, the benefits of Sections 301-305, 307, 308, 321-326 and 328 of this title, agricultural extension work which shall be carried on in cooperation with the United States Department of Agriculture: *Provided*, that in any State, Territory, or possession in which two or more such colleges have been, or hereafter may be established, the appropriations hereinafter made to such State, Territory, or possession shall be administered by such college or colleges as the legislature

of such State, Territory, or possession may direct." *U.S.C.A.*, Title 7, Section 341.

and

"Cooperative agricultural extension work shall consist of the giving of instruction and practical demonstrations in agriculture and home economics and subjects relating thereto to persons not attending or resident in colleges in the several communities, and imparting information on said subjects through demonstrations, publications, and otherwise and for the necessary printing and distribution of information in connection with the foregoing; *and this work shall be carried on in such manner as may be mutually agreed upon by the Secretary of Agriculture and the State agricultural college or colleges or Territory or possession receiving the benefits of Sections 341-343 and 344-346 and 347a-349 of U.S.C.A., Title 7, Section 342.*

The Idaho Legislature subsequently enacted provisions in 1919 to take advantage of the Smith-Lever Act as follows:

*"Cooperation with agricultural extension work.* — The board of county commissioners of the several counties within the State of Idaho are hereby authorized and empowered to provide funds for demonstration work in agriculture and home economics within said counties and for the employment of extension agents in agriculture and home economics *in cooperation with the University of Idaho* and the United States department of agriculture." (Emphasis added). *Idaho Code* Section 31-836.

and the following section which was also enacted in 1919, but amended in 1929:

*"Extension agents - Salaries and expenses.* — The salary and expenses of such extension agents shall be fixed by the director of the University of Idaho extension division acting in cooperation with the board of county commissioners. The commissioners of said counties are hereby authorized and empowered to make provision for the payment of such salary and expenses out of the general tax fund of the county, or out of the county fair fund, or out of other available funds not otherwise appropriated." *Idaho Code* Section 31-840.

The effect of the foregoing federal and state legislation is to establish a cooperative extension service in which the United States Department of Agriculture, the State of Idaho through the University of Idaho, and the various counties participate. The 4-H is the youth phase of the Cooperative Extension Service. It is conducted in Idaho by the University of Idaho in cooperation with the United States Department of Agriculture, and participating counties. Cooperative Extension work is financed through appropriations from the U.S. Congress, the Idaho State Legislature, and the respective Boards of County Commissioners. The job descriptions provided to the County Extension Agricultural Agents and the County Extension Home Economists by the University of Idaho Cooperative

Extension Service states that their purpose is as follows: "Plans, conducts, reports and evaluates youth and adult extension educational programs to the assigned subject and geographic area, within the framework of the policies and directives of the U.S.D.A., the University of Idaho, the Idaho Cooperative Extension Service, and the board of county commissioners," and that they are responsible to – "Appropriate specialists and program leaders for leadership and assistance in specific areas of program development." (4H, C&RD, Home Economics, ENP, etc.). Nevertheless, the job description provides that the county extension agent and the county home economist "is loyal to the University of Idaho and the Cooperative Extension Service." *JOB DESCRIPTIONS*, University of Idaho, Cooperative Extension Service.

The 4-H leaders are volunteers who are either selected by Extension personnel, or who are recruited to fill a particular need which the Extension Service might have. A 4-H leader is frequently the parent of some of the members of the 4-H Club. As for direction, 4-H leaders are advised that their county extension agents are one of their principal resources as follows:

"Your county Extension agents are the nearest representatives of the University of Idaho. It is their responsibility to conduct 4-H and other Extension programs in your county. All agents have a contribution to make to the 4-H program. They

1. Administer and coordinate the county 4-H program
2. Assist leaders in organizing 4-H clubs
3. Provide information and educational literature for members and leaders
4. Conduct, or arrange for, leader training
5. Coordinate county, district and state activities."

(IDAHO 4-H LEADERS GUIDE, University of Idaho, College of Agriculture, Cooperative Extension Service.)

The Extension service maintains a 4-H leadership card on each 4-H leader in the appropriate county office. It seems clear that the Extension service is authorized to refuse to accept an application for volunteer leadership in 4-H, although as a practical matter, this rarely occurs. Also the Extension service maintains Standard 4-H Club Enrollment sheets which are filled out annually, a copy of which is turned in to the county office and another copy sent to the State 4-H office. Further, the United States Department of Agriculture and the University of Idaho issue a 4-H Club Charter to the 4-H clubs, although this latter provision is not required, and apparently the club charter is not intended to be a "legal" document, but rather just gives additional recognition to a club.

U.S.C.A., Title 18, § 916 in particular gives a strong indication that the 4-H clubs are legally connected with and entities of the State of Idaho through the University of Idaho.

*"4-H Club members or agents*

Whoever, falsely and with intent to defraud, holds himself out as or represents and pretends himself to be a member of, associated with, or an agent or representative for the 4-H Clubs, an organization established by the Extension Service of the United States Department of Agriculture and the land grant colleges, shall be fined not more than \$300.00 or imprisoned not more than six months, or both." *U.S.C.A.*, Title 18, §916.

See also *U.S.C.A.*, Title 18 § 707 which makes the fraudulent or unauthorized use of the 4-H emblem or the words "4-H Club" or "4-H Clubs" unlawful.

A Utah case, *Bailey v. Van Dyke*, 66 Utah 173, 240 P.454 (1925), by way of analogy, appears pertinent as an indicator that Extension work (including 4-H club work) is of a public and general character designed and intended for the public welfare. Although this case dealt specifically with an agreement entered into by the Weber County Farm Bureau, the Agricultural College of the State of Utah, and the director of the United States Extension Service (Department of Agriculture) for the provision of extension services in Weber County, the following quote from this case seems significant to this opinion:

"The system of agricultural extension work thus defined has no feature of private enterprise, but is of a public and general character, designed and intended for the public welfare. It is a branch of popular education for the benefit of those not reached by schools and colleges, and is not only a lawful, but a most commendable purpose for which public funds may be expended." *Bailey v. Van Dyke*, 66 Utah 173, 240 P.454, 457 (1925).

Another significant case, although again not precisely in point, is *Cloud County Farm Bureau v. Board of Commissioners*, 176 Kan. 322, 268 P.91 (1928). This case dealt with county farm bureaus, rather than 4-H clubs, and with a state cooperating act specifically providing for financial aid to qualifying farm bureaus in conjunction with the Smith-Lever Act. This case held that the farm bureau in question "... was duly organized under the provisions of the statute, ... (and) being legally organized under the statute, it was a public organization, somewhat similar to a school district or other municipality ... (and further) These bureaus are under the supervision of the dean of the division of extension of the State Agricultural College." *Cloud County Farm Bureau v. Board of Commissioners*, 176 Kan. 322, 268 P.91, 92 (1928).

Although the Idaho cooperating act cited herein (*Idaho Code* Sections 31-836 and 31-840 *supra.*) does not specifically deal with 4-H clubs, it seems clear from the foregoing analysis that the 4-H clubs are state entities rather than private, and that they are under the supervision of the Cooperative Extension Service of the University of Idaho, Department of Agriculture. Accordingly, the 4-H club volunteer leaders are performing voluntary services on behalf of the State of Idaho and the Cooperative Extension Service under the supervision of the county extension agents and home economists. Therefore, we conclude that

4-H volunteer leaders are persons insured within the meaning of Endorsement No. 3 of the current Comprehensive General Liability Insurance policy which provides in part:

**"II. PERSONS INSURED**

- (e) Any volunteer worker while performing services on behalf of the named insured.

The term 'volunteer worker' shall mean a person designated and authorized by the governing body of the named insured to perform voluntary services on behalf of the named insured or an enrolled member in good standing of an organization or association designated and authorized by the governing body of the named insured to perform voluntary services on their behalf."

By way of caveat, however, we do direct attention to the specific exclusion from coverage in Endorsement No. 3 of the current Comprehensive General Liability Insurance policy for the State which excludes "volunteer workers" from coverage for liability arising from a number of specified circumstances.

**AUTHORITIES CONSIDERED:**

1. *United States Code Annotated*, Title 7, Section 341; Title 7, Section 342; Title 18, Section 916; Title 18, Section 707.
2. *Idaho Code* Sections 31-836, 31-840.
3. *Bailey v. Van Dyke*, 66 Utah 173, 240 P.454, 457.
4. *Cloud County Farm Bureau v. Board of Commissioners*, 176 Kan. 322, 268 P.91, 92.

DATED this 7th day of October, 1975.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL  
Attorney General

ANALYSIS BY:

ROBERT M. JOHNSON

**ATTORNEY GENERAL OPINION NO. 58-75**

TO: Richard L. Barrett  
State Personnel Director  
Idaho Personnel Commission  
Statehouse Mail

Per request for Attorney General Opinion.

**QUESTION PRESENTED:** Are there any statutory prohibitions against an incentive award program for employees of the State of Idaho?

**CONCLUSION:** An employee incentive award program in the State of Idaho is prohibited if the suggestion which gives rise to the award results from services performed by an employee in the ordinary course of his employment.

**ANALYSIS:** The above conclusion is based upon three factors. First, *Idaho Code* 67-2508, in the chapter regulating the conduct of civil state departments, states:

No employee in the several departments, employed at a fixed compensation, shall be paid *for any extra service* performed by such employee in the ordinary course of his employment, *unless expressly authorized by law* . . . (Emphasis added.)

This statutory prohibition was adopted in 1970, and has never been repealed. (An identical statutory provision, *Idaho Code* 59-512, adopted in 1974, prohibits state elected and appointed officers from receiving compensation for extra services.) It is our opinion that incentive awards for deserving suggestions and ideas submitted to promote economy and efficiency in the operation of state agencies would be considered "extra service" pursuant to *Idaho Code* 67-2508.

Second, Chapter 61, Title 67 of the *Idaho Code*, previously authorized an "Incentive Savings Award Suggestion System" administered by an Incentive Savings Award Suggestion Board. Chapter 61, Title 67 of the *Idaho Code* was repealed by S.L. 1974, ch. 22 § 1. At this time, there is no other law expressly authorizing the creation of an incentive award system; and the explicit repeal of the Act creating an "Incentive Savings Award Suggestion System" indicates a legislative intent to prohibit the creation of a similar incentive award system.

Third, the Act establishing the Idaho Personnel Commission, Chapter 53, Title 67, *Idaho Code*, does not give the Idaho Personnel Commission authority to create an incentive award program by rules and regulations which would have the force of law required by *Idaho Code* 67-2508. *Idaho Code* 67-5301 establishes the Idaho Personnel Commission and authorizes them to administer a personnel system for Idaho employees, and states:

. . . The purpose of said personnel system is to provide a means whereby employees of the state of Idaho shall be selected, retained and promoted on the basis of merit and their performance of duty, thus effecting economy and efficiency in the administration of state government . . .

Further, *Idaho Code* 67-5309 empowers the Idaho Personnel Commission "to adopt, amend, or rescind such rules and regulations as may be *necessary* for proper administration of this act." (Emphasis added.) *Idaho Code* 67-5309 then enumerates various subject matters upon which rules and regulations must be



adopted by the Idaho Personnel Commission. These provisions require rules and regulations on such matters as a classification plan for civil service employees, a comprehensive compensation plan for all classes of civil service positions, including maximum rates of pay and step increases, requirements that similar classes of positions have the same titles, minimum requirements and compensation, hiring procedures, disciplinary procedures, and:

(r) other rules not inconsistent with the foregoing provisions of this section as may be *necessary* and proper for the administration and enforcement of this act. (Emphasis added.)

There are no provisions in this section dealing with the creation of an incentive award system, and it is the opinion of this office that an incentive award

There are no provisions in this section dealing with the creation of an incentive award system, and it is the opinion of this office that an incentive award system cannot be considered necessary to the administration and enforcement of the personnel system. Additionally, it is our opinion that an incentive award system created by the Idaho Personnel Commission would be inconsistent with the provisions of *Idaho Code* 67-5309 since a monetary award to one employee would, in effect, conflict with the state compensation plan required by *Idaho Code* 67-5309 (b), and would give that employee a higher compensation than the compensation received by other employees of the same class, in conflict with *Idaho Code* 67-5309 (c). In sum, the Idaho Personnel Commission is not empowered to create an incentive award program by rules and regulations which would have the force of law required by *Idaho Code* 67-2508.

Based upon the foregoing, it is the opinion of this office that *Idaho Code* 67-2508 represents the controlling law in this area, and that it is unlawful to give incentive awards for deserving suggestions and ideas, if such suggestions and ideas arise from and relate to an employee's ordinary course of employment. In contrast, it does not appear that it would be unlawful to establish an incentive award system for deserving suggestions and ideas which do not arise from or relate to an employee's ordinary course of employment.

#### AUTHORITIES CONSIDERED:

1. Section 59-512, *Idaho Code*.
2. Section 67-2508, *Idaho Code*.
3. Chapter 53, Title 67, *Idaho Code*.
4. S.L. 1974, ch. 22 § 1.
5. Chapter 61, Title 67, *Idaho Code* (repealed 1974).

DATED this 17th day of October, 1975.

## ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL  
Attorney General

## ANALYSIS BY:

RUDOLF D. BARCHAS  
Deputy Attorney General

JEAN R. UR NGA  
Assistant Attorney General

## ATTORNEY GENERAL OPINION NO. 59-75

TO: Honorable Richard S. High  
Senator  
Co-Chairman, Joint Finance and Appropriations Committee

Honorable William Roberts  
Representative  
Co-Chairman, Joint Finance and Appropriations Committee

Honorable Art Manley  
Senator  
Member, Joint Finance and Appropriations Committee

Honorable Emery Hedlund  
Representative  
Member, Joint Finance and Appropriations Committee

Per request for Attorney General Opinion.

## QUESTIONS PRESENTED:

1. In general, what is the extent of the authority, responsibility, and control of the State Board of Education over the public junior colleges of the State of Idaho?

2. Specifically, can the State Board of Education require compliance from the junior colleges with the budget procedures required by it of other agencies and institutions under its supervision, government and control?

## CONCLUSIONS:

1. Although the precise relationship between the State Board of Education and the public junior colleges of the State of Idaho has never been described by either the courts or the legislature, we are of the opinion that the relationship is analogous to that which exists between the State Board of Education and the public school districts of the State.

2. Yes.

ANALYSIS:

1. Section 33-101, *Idaho Code*, in part provides:

“For the general supervision, government and control of all state educational institutions, to wit: University of Idaho, Idaho State University, Boise State University, Lewis-Clark State College, School for the Deaf and Blind, and any other state educational institutions which may hereafter be founded, and for general supervision, government and control of the public school system of the State, including public junior colleges, the State Board of Education is created. The said board shall be known as the state board of education and board of regents of the University of Idaho . . .”

From the language of the statute, it is clear that the legislature intended that public junior colleges are to be considered as essential elements in the general public educational process of the State of Idaho. But without legislation, we cannot describe exactly the relationship between the State Board of Education and the junior college boards of trustees. The above cited code section and other sections of the code cited in part (b) hereof, however, do establish a relationship between the junior college districts and the State.

2. One area of the relationship between the State of Idaho, vis-a-vis, the State Board of Education and the junior college districts which can be described is the area of budget and appropriations.

In 1967, the legislature created the state junior college fund in the State Treasurer's Office. (Section 33-21 through 39, *Idaho Code*.) Appropriations by the legislature, and apportionment and allocations of other monies provided by law, are deposited in that fund. Disbursements from the fund are made to the junior college districts on order of the State Board of Education according to the allocation and distribution formula provided for in Section 33-2140 and 33-2141, *Idaho Code*.

Since the junior college fund is a fund in the State Treasurer's Office and monies deposited therein are either state general fund monies or other monies which have been or must be appropriated by the legislature, the process established by law for budgeting and appropriations must be followed.

It is not our purpose here to describe in detail the appropriation process. However, we do wish to point out that the governor is the chief budget officer of the state. (Section 67-3501, *Idaho Code*.) The director of the budget is required to distribute to all departments and institutions of state government, including the elective offices in the executive department, the judicial department and the State Board of Education, the forms necessary for preparation of the budget estimates. (Section 67-3602, *Idaho Code*.) The information thus required is used by the budget director and the governor to prepare and present the state budget to the legislature. (Section 67-2505, *Idaho Code*.) Included in the budget

presented by the governor is the governor's recommended appropriation to the junior college fund. Included in the forms distributed to the agencies, including to the State Board of Education, are the forms for acquiring information to determine the recommended appropriation to the junior college fund.

It is at this point that a close analogy may be drawn between the junior districts and the public school districts. Neither public agency is a state department, office or institution within the meaning of Section 67-3502, *Idaho Code*. Both types of districts are financially supported in part by legislative appropriations, not made to the treasurers of the individual districts, but rather through a state fund from which disbursements are made on the order of the State Board based on statutory formula. (Sections 33-903, 33-2140, and 33-2141, *Idaho Code*.) Appropriations by the legislature are made to the State Board to order the funds to be drawn on by the state treasurer.

The process, then, would appear to require that the State Board of Education determine the anticipated financial requirements of both the junior college districts and the public school districts. To do this, the State Board must, by necessary implication, be able to acquire the information it believes necessary to reach a decision on the anticipated requirements. The information must also be in the form required by the State Board that will give it that information. The junior college districts are required to submit to the State Board all reports which the State Board may from time to time require. (Section 33-2114, *Idaho Code*.) If the State Board can require certain reports, it must follow that the forms and contents of those reports can also be determined and required by the State Board.

We would emphasize at this point that while the State Board has the ability and authority to reach a recommended figure in dollars to be appropriated, that recommendation is transmitted not to the legislature but to the governor. Whether or not that figure is included in the budget which is presented to the legislature is a decision to be made by the governor as chief budget officer of the state. Whether or not the figure in the budget is appropriated is the sole and final function of the legislature.

We must conclude, then, that the State Board of Education may require of the junior colleges whatever information the State Board finds necessary on the forms the State Board finds will provide it with that information, so that it may comply with the budget laws of the state, and whereby the junior college district may receive the benefits of the appropriation of the legislature. We do not know, nor do we believe it is germane whether or not the budget procedures required by the State Board of other agencies and institutions under its supervision, government and control are the same as the budget procedures required by the State Board from junior college districts. We must conclude, however, that the State Board may require of junior colleges whatever information it believes necessary so that the State Board can comply with the budget requirements of the State of Idaho.

DATED this 20th day of October, 1975.

## ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL  
Attorney General

## ANALYSIS BY:

JAMES R. HARGIS  
Deputy Attorney General

## ATTORNEY GENERAL OPINION NO. 60-75

TO: John P. Molitor, Registrar  
Public Works Contractors'  
State License Board

Per request for Attorney General's Opinion.

**QUESTION PRESENTED:** You have asked whether the duly licensed prime contractor performing a public works contract may legally award a subcontract for work on that project to a speciality contractor who did not hold a public works contractor's license at the time bids were submitted upon the project?

**CONCLUSION:** No.

**ANALYSIS:** The question presented turns primarily on the construction given to *Idaho Code*, Section 54-1902 which provides in pertinent part:

It shall be unlawful for any person to engage in the business or act in the capacity of a public works contractor within this state without first obtaining and having a license therefor, as herein provided, unless such person is particularly exempted as provided in this act, . . .

Thus, if an unlicensed sub-contractor, by bidding on a project, is engaging in the business or acting in the capacity of a public works contractor, then such bidding is prohibited. Whether such bidding constitutes public works contracting is determined by the definition of "public works contractor" given by *Idaho Code*, Section 54-1901 (b) which provides:

"Public works contractor," which term is synonymous with the term "builder," "Sub-contractor" and "specialty contractor," and in this act referred to as "contractor" or "licensee," *includes any person who, in any capacity, undertakes to, or offers to undertake to, or purports to have the capacity to undertake to, submit a proposal to, or enter into a contract with, the state of Idaho, or any county, city, town, village, school district, irrigation district, drainage district, sewer district, fire district, or any other taxing subdivision or district of any public or quasi public corporation of the state, or with any agency of any thereof, or with any other public board, body, commission, department or agency, or officer or representative thereof, authorized to let or award*

contracts for the construction, repair or reconstruction of any public work. (Emphasis Supplied.)

The statutory definition makes clear that the term public works contractor includes specialty contractors and sub-contractors. Since sub-contractors contract with prime contractors, rather than directly with the State, I construe this language to mean that it is not necessary to contract directly with the state in order to be a public works contractor. Otherwise the use of the term "sub-contractor" in the definition would be meaningless. *Wells-Stewart Construction Co. v. Martin Marietta Corp.*, 103 Ariz. 375, 442 P.2d 119 (1968); *Thorsheim v. State of Alaska*, 469 P.2d 383 (Alaska 1970); *Manhattan Construction Co. v. District Court of Oklahoma County*, 517 P.2d 795 (Okl. 1973).

The remaining portion of the definition, beginning with the work "includes", indicates that the essence of acting in the capacity of a public works contractor is the acting in connection with a governmental project as opposed to a private project. The definition also makes clear that one is not acting as a public works contractor merely at the contracting stage; rather, the term includes *all* of the preliminary stages of activity, such as bidding. The above emphasized portion of Section 54-1901 (b), *Idaho Code* makes this conclusion inescapable.

By bidding on a project, one "purports to have the capacity to undertake . . ." a proposal or contract. Thus, a specialty contractor who makes a bid to a prime contractor in connection with a public works project is acting "in the capacity of a public works contractor" and is holding himself out as such. If the specialty contractor is unlicensed at the time of bidding, he, therefore, violates the first prohibition of *Idaho Code*, Section 54-1902, which states:

It shall be unlawful for any person to engage in the business or act in the capacity of a public works contractor within this state without first obtaining and having a license therefor, . . .

This reading of *Idaho Code*, Section 54-1902, is reinforced by the Idaho Supreme Court's treatment of the section in the recent case of *Nielsen & Co. v. Cassia and Twin Falls County Joint Class A School District 151*, 22 I.C.R. 395, 536 P.2d 1113 (1975). The Court in that instance was considering a different question than presented herein. Nevertheless, the Court said in footnote 1:

Plan specifications contained the following language: "This Public Works project is not financed in whole or in part by federal-aid funds." The import of this is that *Idaho Code* 54-1902 allows only licensed contractors and subcontractors to bid public works projects not financed with federal funds. *Ibid*, 536 P.2d at 1114.

The Court thus reads the statute to require a license by subcontractors at the bidding stage of public works projects.

In view of the above, we conclude that the Public Works Contractors State License Board may not allow bidding by unlicensed subcontractors.

## AUTHORITIES CONSIDERED:

1. Sections 54-1902, & 54-1901 (b) *Idaho Code*.
2. *Nielsen & Co. v. Cassia and Twin Falls County Joint Class A School District 151*, 22 I.C.R. 395, 536 P.2d 1113 (1975).

DATED this 20th day of October, 1975.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL  
Attorney General

ANALYSIS BY:

DAVID G. HIGH  
Assistant Attorney General

## ATTORNEY GENERAL OPINION NO. 61-75

TO: Lucinda Weiss  
Bonner County Prosecutor  
P.O. Box 216  
Sandpoint, Idaho 83864.

Per request for Attorney General Opinion.

**QUESTION PRESENTED:** Is there any authority in Idaho which would allow city, county, or state police officers to place a person in protective custody prior to, and in anticipation of, possible involuntary commitment proceedings?

**CONCLUSION:** Only upon court order.

**ANALYSIS:** There are two Acts which govern the involuntary commitment of a person for the purpose of mental treatment: The Public Assistance Law (56-235 through 56-239 *Idaho Code*) and Hospitalization of the Mentally Ill (66-317 through 66-364 *Idaho Code*). The former Act allows for the involuntary commitment of a mentally retarded or mentally deficient person. (56-236 *Idaho Code*). The latter Act allows for the involuntary commitment of mentally retarded or mentally ill individuals. [66-329 (a) *Idaho Code*] A mentally retarded person may be committed under the provisions of either Act whereas a mentally ill person may be committed involuntarily only under the provisions in Title 66, *Idaho Code*. [Compare 56-201 (p) *Idaho Code* with 66-317 (b) and (c), *Idaho Code*].

In the event of an anticipated involuntary commitment proceeding, it is possible under either Act to have the potential patient taken into custody before hearing, but only upon an order of the court. Under the pertinent provision of Title 66, a person may be taken to a facility upon certain conditions:

"If the designated examiner's certificate states a belief that the individual is mentally ill or mentally retarded and likely to injure himself or others if allowed to remain at liberty, the judge of such court shall issue an order authorizing any health officer, peace officer, or director of a facility to take the individual to a facility in the community in which he is residing or to the nearest facility to await hearing." (66-329 (c) *Idaho Code*).

A person may be taken into custody in anticipation of involuntary commitment also under the provisions of Title 56:

"If such application (for involuntary commitment) states a belief that the individual is likely to injure himself or others if allowed to remain at liberty, the judge of such court shall issue an order authorizing any peace officer, or the director of the State Department, or either of them, to take the individual into protective custody to await hearing." [56-237 (c) *Idaho Code*].

Thus, we are of the opinion that Idaho law allows a person to be taken into custody prior to an involuntary commitment hearing only where it is ordered by the court and there is belief by petitioner that the person is mentally ill or retarded and likely to injure himself or others if allowed to remain at liberty.

**AUTHORITIES CONSIDERED:**

1. *Idaho Code* 56-201 (p), 56-237 (c), 66-317 (b) and (c), 66-329 (c).

DATED this 22nd day of October, 1975.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL  
Attorney General

**ANALYSIS BY:**

CURTIS EATON  
Assistant Attorney General

**ATTORNEY GENERAL OPINION NO. 62-75**

TO: Richard L. Barrett  
State Personnel Director  
Idaho Personnel Commission  
Building Mail

Per request for Attorney General Opinion.



**QUESTION PRESENTED:** You have asked our opinion as to whether various classes of hourly employees are entitled to compensation for holidays. Specifically, you asked for an opinion as to each of the following examples:

1. Temporary hourly employees working 8-5, Monday through Friday, the holiday falls on Friday and the office is closed. All the salaried employees receive regular compensation for that day. Would the hourly employee also be eligible for eight hours of pay at the normal hourly rate?

2. The employee works part time, 8-5, Monday through Wednesday of each week. Again, the holiday falls on Friday. Would the employee be eligible for a full day's pay at the normal hourly rate for Friday?

3. The employee works part time, half days only, on Mondays, Wednesdays, and Fridays. The holiday falls on Friday and the office is closed. Should the employee be paid for the holiday, and if so, for how much? One-half day which he normally works? or a full day as would be the case with the salaried employee?

**CONCLUSION:**

1. Yes.

2. The employee would not be eligible for holiday pay.

3. The employee should be compensated for the one-half day which he normally works.

**ANALYSIS:** The answers to the questions presented turn primarily on the construction given to Section 67-5336, *Idaho Code* which provides:

**PAID HOLIDAYS — EXEMPTION FROM HOLIDAY WORK —** All holidays as defined herein are declared to be *days worked for the normal work week of employees*. Employees shall be exempt from work in state service on days declared by this act to be a holiday, subject to the provisions of Sections 67-5328 and 67-5329, *Idaho Code*. (Emphasis supplied).

Literally construed, the first sentence of this statute deems a holiday to be a day worked solely on the basis that the holiday in question falls within an employee's normal work week. Critical in its absence is any standard by which the term "normal work week" may be measured. No variable is referenced which contemplates the fact that normal work weeks are "normal" only to the person working them, i.e., a three day, twelve hour work week may be just as normal to one employee as a five day, forty hour week is to another.

The second sentence of the statute affords some clarity by exempting employees from working on the holiday in question. Inferentially, the employees' normal work week must include a work day on which the holiday falls or else there is nothing to which the exemption can attach. Therefore one who nor-

mally works five days a week, Monday through Friday, is exempt from working any of the days in question on which the holiday falls. The holiday is deemed to be a work day, both for purposes of compensation that day and for any computation of total hours worked as a foundation for the requirement of overtime pay.

This construction of Section 67-5336, *Idaho Code*, advances the legislative policy declaration of Section 67-5326, *Idaho Code* which provides in pertinent part:

It is hereby declared to be the policy of the legislature of the state of Idaho that all employees of the several departments of the state government shall be treated equally with reference to hours of employment, holidays, and vacation leave . . .

Arguably, this could be read to mean that the employee who works a half-day one day a week i.e., four hours, should receive eight hours of pay for each holiday as would his counterpart who works five days a week, eight hours a day. In any given week in which a holiday occurs, the part time employee would be working ½ hour for each hour of holiday pay whereas, his full time counterpart would be working four hours for each hour of holiday pay. Any implementation of Section 67-5336, *Idaho Code* which would give vitality to the preceeding hypothetical must be suspect. Inherently, the policy declaration of *Idaho Code*, Section 67-5326 that all state employees "shall be treated equally with reference to . . . holidays . . .", calls for some method of determining holiday pay which reflects actual time worked by an employee.

Regarding your specific questions, example number 2 involves an employee who works 8-5, Monday through Wednesday. The holiday falls on a Friday. Construing Section 67-5336 and 67-5326, *in pari materia*, the employee would receive no holiday pay since Friday would not be a day worked in his "normal work week".

Applying the same reasoning, the employee in your example number 3 who works half days on Mondays, Wednesdays and Fridays, would be entitled to one-half day holiday pay.

Your example number 1 involves a temporary employee working 8-5, Monday through Friday. Because he is a temporary employee, a somewhat different legal analysis is required.

Section 67-5303, *Idaho Code* provides in pertinent part:

All departments of the State of Idaho and all employees in such departments, except those employees specifically exempt, shall be subject to this act and to the system of personnel administration which it prescribes. Exempt employees shall be:

... (m) Temporary employees.

Thus Section 67-5336, *Idaho Code*, which provides that holidays are "days worked for the normal work week of employees", is not directly applicable to temporary employees. Nevertheless, temporary employees should, be paid for holidays if those holidays fall upon days they would otherwise have worked as a part of their normal work week. This result follows from the policy directives of the legislature contained in Section 67-5326 and Section 67-5303A, *Idaho Code*.

Section 67-5326, *Idaho Code* provides in pertinent part:

It is hereby declared to be the policy of the legislature of the state of Idaho that *all* employees of the several departments of the state government shall be treated equally with reference to hours of employment, holidays, and vacation leave . . . (Emphasis supplied).

And Section 67-5303A provides:

All state employees exempt from the personnel commission shall be compensated at a level as close as is practical to comparable classifications in classified service.

These directives indicate a clear legislative policy that all employees be treated equally, as much as possible, with regard to conditions of employment, including holidays.

Thus the rule for temporary employees should be the same as that for other employees. For purposes of holiday pay, all employees should be paid a sum equal to that which would have been earned on the day in question even though they were in fact excused from work to observe a legal holiday.

#### AUTHORITIES CONSIDERED:

1. Sections 67-5303, 67-5326, and 67-5336, *Idaho Code*.

DATED this 28th day of October, 1975.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL  
Attorney General

#### ANALYSIS BY:

CHRISTOPHER D. BRAY  
Deputy Attorney General

DAVID G. HIGH  
Assistant Attorney General

## ATTORNEY GENERAL OPINION NO. 63-75

TO: David H. Leroy  
Ada County Prosecutor  
103 Courthouse  
Boise, Id 83702

Per request for Attorney General Opinion.

## QUESTIONS PRESENTED:

1. *Idaho Code* Section 63-207, which became effective July 1, of this year requires the County Assessor to penalize an owner who attempts to evade taxation by doubling the assessment of the property when the property is discovered. The statute requires the double assessment in cases where the evasion took place "for the current year, or the preceding year or years." This seems to be in direct conflict with *Idaho Code* Section 63-1204 which states "taxes on personal property will not be subject to assessment or collection at any time after the second calendar year following the year for which such tax is imposed". Assuming discovery by the county assessor of property, the owner of which purposely evaded taxation for several years, can the assessor act under 63-207, for the purpose of the double assessment, or does 63-1204, limit the liability of the evading taxpayer?

2. *Idaho Code* Section 63-207, was amended by the recent legislative session and the assessment penalty was changed from a three time assessment to a two time or double assessment figure. The problem arises in trying to decide what the threshold date for the penalty is for the purpose of deciding whether a time or double assessment should be made. In other words what is the threshold date for penalty purposes; is it the date that the discovery is made (which might well be prior to the effective date of the new revisions of 63-207) or is it at the time that the assessment for the current year is made (which would be after the effective date of the new 63-207)? In most cases the property has been discovered prior to July 1, 1975, the effective date of the new 63-207 provisions, however the assessments are being done after the effective date of statute.

3. *Idaho Code* Section 63-208, was also adopted by the recent legislative session. This provision allows for a penalty upon non-resident property owners for failure to provide the assessor with a Taxpayers Declaration of Taxable Property. The penalty is a lump sum One-Hundred Dollars, plus ten percent of the assessed value of the property. This statute also went into effect July 1, 1975. The question here is when does the 63-208 penalty become available to the assessor? Is it available to the assessor only as to property discovered after July 1, 1975? Or in the alternative, is the penalty available to the assessor on any property which has been discovered prior to the date of assessment?

4. Finally, are *Idaho Code* Sections 63-207 and 63-208, and the penalties provided therein, alternative in nature or may an assessor penalize a non-property owner under both provisions of the code?

## CONCLUSIONS:

1. With regard to personal property only, the penalty imposed by *Idaho Code* § 63-207 is limited to those years which are not barred by the statute of limitations contained in § 63-1204.

2. The 1975 amendment to *Idaho Code* § 63-207 applies only to property assessed after July 1, 1975. Therefore, it only applies to property placed on the subsequent roll and personal property assessed between July 1 and July 7, 1975.

3. The penalty provided by § 63-208 also applies only to property assessed after the effective date of the amendment – July 1, 1975.

4. The duties required of the assessor by *Idaho Code* § 63-207 are mandatory and ministerial only. That penalty must be assessed by the assessor when the prescribed conditions precedent are met. The § 63-208 penalty is discretionary but may be imposed in proper cases. The Board of Equalization may exercise discretion to excuse liability for good and sufficient cause in either case.

**ANALYSIS:** The questions you pose result from several amendments made by the 1975 legislature to §§ 63-207, 63-208 and 63-1204. It is a general rule of statutory construction that laws enacted by the same session of the legislature and relating to the same subject matter should be construed together. See *Peavy v. McCombs*, 26 Idaho 143; *State v. McBride*, 33 Idaho 124; *State ex rel Mitchell v. Dunbar*, 39 Idaho 691. In *Peavy* (supra.) the Idaho court said:

“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 construed, if possible to harmonize and give force and effect to the provisions of each.”

If two acts are irreconcilable, only then will the latter act repeal the earlier act. *Good v. Boyle*, 67 Idaho 512; *Ada County v. State*, 93 Idaho 830; *State v. Roderick*, 85 Idaho 80; *State v. Bell*, 84 Idaho 153. We have applied these rules of statutory construction in reaching our conclusions.

The penalty for willfully concealing or otherwise secreting property from the assessor has existed for many years. § 63-207 was originally enacted in 1913 (Session Laws, 1913, Chapter 58, § 20) and not amended until 1975 (Session Laws, 1975, Chapter 216, § 2). Originally, the section provided that property upon discovery must be assessed at three times its value for each year it has escaped assessment. This penalty could not be abated. The 1975 amendment reduced the assessment from a treble to a double assessment and granted to the County Boards of Equalization discretion to excuse the penalty for good cause. The language relating to assessment for prior years was not addressed in the 1975 amendatory act. During the same session, the legislature amended § 63-1204 (Session Laws, 1975, Chapter 235) to provide a period of limitation for assessment and collection of taxes on personal property. The section was amended to provide, “Taxes on personal property shall not be subject to assess-

ment or collection at any time after the second calendar year following the year for which such taxes were imposed." The legislature's intention to impose a period of limitation is reflected in the title of the act. The title is an appropriate aid to ascertaining legislative intent. E.g. *Leonard Construction Company v. State Tax Commission*, 96 Idaho 893 (1975). The title of the act provides:

#### AN ACT

AMENDING SECTION 63-1204, *IDAHO CODE*, RELATING TO THE COLLECTION OF TAXES ON PERSONAL PROPERTY 'TO STRIKE REFERENCES TO ANY PARTICULAR YEAR, AND TO IMPOSE A LIMITATION PERIOD FOR ASSESSMENT AND COLLECTION OF TAXES ON PERSONAL PROPERTY.'" (Emphasis supplied).

We conclude that the amendment to § 63-1204 was intended and should be construed as a statute of limitations. Therefore, to the extent that § 63-207 may authorize the assessment of property willfully concealed for past years, that authority is limited, as to personal property, by the statute of limitations now imposed by § 63-1204. It must be noted that all of Chapter 12 of Title 63 and this section in particular (i.e., 63-1204) applies only to the assessment of *personal property*. Chapter 2 of Title 63, however, contains general provisions relating to the assessment of both real and personal property. Consequently, the limitation prescribed by § 63-1204 does not affect any authority granted pursuant to § 63-207 to impose the punitive assessment for any prior years during which *real property* may have escaped assessment because of the owner's willfull concealment of that property or by a willfull failure to report it.

As previously noted, the 1975 amendment to § 63-207 reduced the willfull concealment penalty from a treble to a double assessment. The section provides that willfully concealed property shall be assessed at two times its value. The effective date of the amendment is July 1, 1975. (§ 67-510) However, § 63-306 provides that the assessment of real property shall be completed on or before the fourth Monday in June. Since the statute provides that real property assessment must be completed prior to the effective date of the amendment to § 63-207, the amendment cannot apply to 1975 real property assessments (with the exception of real property placed on the subsequent roll — discussed infra.). Regarding personal property, § 63-1203 provides that the assessment must be completed prior to the first Monday in July. In 1975, the first Monday in July was July 7, 1975. The 1975 amendment to § 63-207 would apply to personal property actually placed upon the assessment roll between July 1, 1975 and July 7, 1975. In other words, property which was willfully concealed, etc., by the taxpayer, discovered by the assessor and subsequently assessed by him during the period July 1 through July 7, 1975, would be assessed at two times rather than three times its actual assessed value.

Both real property and personal property may, in appropriate circumstances, be placed upon a subsequent roll. Real property discovered after the fourth Monday of June to have been "inadvertently omitted" from the real roll may be entered on a subsequent roll. (§ 63-306) Certain classes of personal property may also be entered onto a subsequent roll. (§ 63-1203) Property which may be en-

tered on the subsequent personal property roll includes, "all personal property which has during the year escaped assessment." (§ 63-1203) Property which is subject to entry on either the real or personal property subsequent roll would be subject to the newly amended provisions of § 63-207. That is, if it was willfully concealed, etc., it would be assessed at two times its appraised value. In other words, the amendment is effective only as to property entered on the roll on or after July 1, 1975. It must also be noted, however, that § 63-1203 only permits the entry of personal property on the subsequent roll for the current year.

Your third question is directed to the new penalty created by the legislature's 1975 amendment to *Idaho Code* § 63-208. The section as amended states:

"in the event the assessor fails to receive the taxpayer's declaration as required, the property owner *may* be assessed in addition to tax the sum of one hundred dollars (\$100) plus ten percent (10%) of the assessed value of such property, the addition to tax to be distributed to the current expense fund of the county." (Emphasis supplied).

The newly amended § 63-208 is contained in the same act as is the amendment to § 63-207. As previously observed, that act became effective on July 1, 1975. The penalty, therefore, may be applied to property assessed on or after July 1, 1975. As we have seen from the previous discussion, only real property entered on the subsequent roll can be affected since the assessment of all other real property must be completed prior to the fourth Monday in June. As to personal property, the penalty could only be applied to property entered upon the personal roll between July first and the first Monday in July (July 7, 1975) or to property properly entered on the subsequent personal property roll. In short, the effective date for the imposition of penalty is the same as the effective date for the modification of the willful concealment penalty.

Your last question asks whether the penalties prescribed in §§ 63-207 and 63-208 are alternative penalties. The circumstances to which the two penalties apply are similar but distinguishable. The § 63-207 penalty applies to property which is willfully "concealed, removed, transferred, misrepresented, or not listed or declared by the owner . . ." If this circumstance exists, the assessor "must" upon discovery assess the property at two times its value. The assessor's duty is, therefore, not discretionary but is the mere ministerial obligation to multiply the assessed value of the property by two. (Even though of necessity the assessor must exercise some discretion in the determination of whether the owner's acts were "willful"). This like all procedures prescribed by the legislature for levying, assessing and collecting taxes must be strictly observed. (*Tobias v. State Tax Commission*, 85 Idaho 250). The Board of Equalization, however, has now been granted the authority to review and, for proper cause, excuse the penalty. Prior to 1975, this discretion was specifically denied to the Board of Equalization. The assessor's duty, however, is clearly mandatory.

It must be observed at this point that the double assessment penalty may be applied to circumstances where the owner willfully refuses to declare his property. The 1975 session of the legislature specifically added the words "or declared" to the list of acts requiring imposition of the penalty. As the statute now

reads, if the owner has willfully not listed or declared his property, the double assessment must be made by the assessor.

The penalty provided by § 63-208 is somewhat different. In marked contrast to the mandatory § 63-207 penalty, the assessor is granted discretionary authority to impose or not to impose the 63-208 penalty in the first instance. It applies only to circumstances where the assessor has failed to receive the declaration. Therefore, the factual circumstances under which the 63-207 penalty must be imposed. But there is overlap between them. For example, a taxpayer may submit his declaration to the assessor and, therefore, avoid the imposition of the 63-208 penalty; however, he may willfully fail to list or declare all of his property on his declaration and thereby subject himself to the penalty prescribed in 63-207. The opposite circumstance would arise in the case of a taxpayer who failed to submit a declaration but whose failure was not willful. This taxpayer could (at the discretion of the assessor) be subjected to the \$100 plus ten percent penalty. The third possible circumstance is the taxpayer who willfully conceals his property and willfully fails to submit a list or declaration to the assessor. This factual circumstance would meet the conditions precedent required for both penalties. The assessor would have no choice but to apply the mandatory double assessment penalty of 63-207. He would also have authority to add \$100 plus ten percent of assessed valuation (prior to doubling) if in the exercise of his sound discretion he felt it appropriate to do so. Whether or not the imposition of both penalties would be an abuse of discretion could only be determined in light of specific factual circumstances relating to a specific taxpayer. However, the statute provides a safeguard. Both penalties may be reviewed and for good and sufficient cause excused by the Board of Equalization. Additionally, the decision of the Board of Equalization is subject to review by the Idaho Board of Tax Appeals (*Idaho Code* § 63-2210) and ultimately by the courts of this state (*Idaho Code* § 63-3812).

#### AUTHORITIES CONSIDERED:

1. *Idaho Code*, §§ 63-207; 63-108; 63-306; 63-1203; 63-1204; 63-2210; 63-3812; 67-510.
2. *Peavy v. McCombs*, 26 Idaho 143.
3. *State v. McBride*, 33 Idaho 124.
4. *State ex rel Mitchell v. Dunbar*, 39 Idaho 691.
5. *Good v. Boyle*, 67 Idaho 512.
6. *Ada County v. State*, 93 Idaho 830.
7. *State v. Roderick*, 85 Idaho 80.
8. *State v. Bell*, 84 Idaho 153.
9. *Leonard Construction Company v. State Tax Commission*, 96 Idaho 893 (1975).



10. *Tobias v. State Tax Commission*, 85 Idaho 250.

DATED this 3rd day of November, 1975.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL  
Attorney eneral

ANALYSIS BY:

THEODORE V. SPANGLER, JR.  
Deputy Attorney eneral

**ATTORNEY GENERAL OPINION NO. 64-75**

TO: Representative Edward W. Rice  
1214 Johnson Street  
Boise, ID 83705

Per request for Attorney General Opinion.

QUESTIONS PRESENTED: We interpret your letter of September 8, 1975, as asking two questions.

1. You ask whether or not use taxes may be assessed upon the purchases by physicians of (a) professional publications, (b) magazines and publications of general readership, (c) professional cassettes, (d) professional instruments, and (e) medical supplies and specifically prescribed and compounded medicines for patients not obtainable locally through pharmacies or hospitals.

2. You ask that if use taxes can be assessed on the above items, would the use tax liability extend to magazine subscriptions purchased by individuals as well as members of other professions.

**CONCLUSIONS:**

1. The use tax levied by § 63-3621, *Idaho Code*, applies to each of the items listed in (a) through (e) above subject to an offsetting credit for any sales taxes actually paid or specific exemptions contained in § 63-3622.

2. Purchases by individuals or members of other professions are generally treated no differently than purchases made by physicians.

ANALYSIS: The Idaho Sales Tax Act (Title 63, Chapter 36, *Idaho Code*) levies both a sales and a use tax. (§ 63-3619 and § 63-3621) It is generally accepted that the purpose of the Sales Tax Act is to impose a tax upon the consumptive use of tangible personal property in Idaho. To achieve this, the Act imposes a tax upon the retail sale of tangible personal property within Idaho, subject to certain exemptions. The tax is levied upon the sale (not upon the

property sold) and is imposed upon the purchaser. The retailer is charged with the duty of collecting the tax and remitting it to the State of Idaho by filing a return with and paying the money over to the State Tax Commission. Idaho, in common with every other state imposing a sales tax, also imposes a concurrent use tax upon the privilege of using, storing and consuming tangible personal property within the State of Idaho. (§63-3621) This tax is also imposed directly upon the consumer. The Act states:

“Every person storing, using, or otherwise consuming, in this state, tangible personal property is liable for the tax. His liability is not extinguished until the tax has been paid to this state except that a receipt from a retailer maintaining a place of business in this state or engaged in business in this state given to the purchaser is sufficient to relieve the purchaser from further liability for the tax to which the receipt refers.” [Idaho Code § 63-3621 (a)].

The purpose of a use tax is to enable a state to impose a tax upon the consumption of property which was not or could not be subjected to a sales tax at the time of purchase. (CHH All-State Sales Tax Reporter p 126). Most commonly, the use tax applies to property which is purchased outside the state. If a sale occurs outside the state, then Idaho cannot impose a tax on that sale. Similarly, if the seller has no place of business or other contact with the State of Idaho, it cannot be required to collect and remit sales taxes even though the property sold may be shipped to an Idaho resident and consumed by the Idaho resident within the state. These principles were established a number of years ago by the United States Supreme Court. (*Miller Bros. Co. v. Maryland*, 347 U.S. 340). Following the decisions of the Supreme Court, states which imposed sales taxes enacted statutes imposing use taxes upon the privilege of consuming property within the state. In order to comply with the requirements of the Interstate Commerce Clause and to prevent double taxation, taxpayers could receive a credit against the use tax for any sales taxes paid to the state in which the sale took place. However, as a matter of comity between the states, the majority of sales tax states permit a “freeport exemption” — this is, property purchased in the state for immediate shipment and use outside the state will be exempt from the sales tax. [e.g., s 63-3622 (5)]. This permits the state in which the property is actually consumed to impose the complementary use tax upon the use of the property.

The net result of the foregoing is that the storage, use or other consumption of tangible personal property in Idaho is subject to a use tax. If a sales tax was paid by the purchaser at the time of purchase either to Idaho or to another state, the use tax liability will be extinguished to the extent of the sales taxes paid. [See § 63-3621 (c) & (1)]. Otherwise, all tangible personal property used, stored or consumed in Idaho is subject to a use tax unless one of the specific exemptions contained in the Sales Tax Act applies.

There are two sources of exemptions found within the Sales Tax Act.

The first exemption is for those sales which are not “retail sales” within the definition of the Act. [§ 63-3609 & § 63-3620 (c) & § 63-3621 (f)]. If a sale is

made to a purchaser who is himself a retailer and will resell the property which is the subject of the sale at retail, then no sales tax applies to the sale. This "resale exemption" is necessary to insure that the tax is paid by the ultimate consumer as intended and not by a purchaser who is purchasing inventory for resale. The only circumstance under which this exemption would apply to a physician would be a physician who actually sells medicines, medical supplies and other items of tangible personal property to his patients. Such a physician, however, would be required to register as a retailer under the Sales Tax Act and to charge his patients sales tax and remit it to the State Tax Commission. (§ 63-3620) In such an instance, no use tax would apply.

The second source of exemptions from the Idaho Sales Tax Act are those specific exemptions enumerated in § 63-3622. More than twenty exemptions to both sales and use taxes are enumerated therein. Most of them are obviously inapplicable to the situations which you pose. The other exemptions usually would not apply to a physician.

Some of the exemptions deserve specific comment. Subsection (p) exempts:

"Sales of drugs, sold by a registered pharmacist, and the sale of oxygen, all upon prescription of a practitioner licensed to prescribe drugs to human beings in the course of his professional practice."

Drugs purchased by a physician from a registered pharmacist would be exempt from both sales and use taxes if purchased upon prescription. However, drugs sold by a physician, even if sold pursuant to prescription, would not be exempt since a physician is not normally also a registered pharmacist. Oxygen, however, would always be exempt if sold by prescription.

Subsection (r) exempts:

"Sales to and purchases by hospitals, educational institutions, and canal companies which are nonprofit organizations. As used in this subsection, these words shall have the following meaning:

(1) ...

(2) Hospital as used herein shall include nonprofit institutions licensed by the state for the care of ill persons. It shall not extend to nursing homes or similar institutions or organizations."

All sales to and purchases by a nonprofit institution licensed for the care of ill persons will be exempt. However, most doctor's offices or clinics would not qualify as nonprofit institutions. Therefore, they enjoy no exemption from either sales or use taxes under this provision.

Some special comments should also be made in regard to publications such as magazines. Magazines are tangible personal property within the definition of that term in the Sales Tax Act. Consequently, their use, storage or other consumption within this state is subject to the use tax unless an appropriate sales

tax was paid at the time of purchase or one of the specific exemptions contained in the Sales Tax Act applies to it. The only exemption relating to periodicals is that contained in *Idaho Code* § 63-3622 (k) which refers only to religious literature published and sold by a bona fide church denomination. Therefore, in the absence of an express exemption, the purchase of the periodicals is subject to a sales tax. Unless a sales tax is imposed upon the purchase, the storage, use or other consumption of the magazine within the State of Idaho is subject to a use tax. We note that this application of the use tax is not unique. Although 21 states expressly exempt from sales and use taxes the subscription purchase of magazines, virtually every state not having an express exemption (approximately 16 states) imposes a use tax on the use of magazines within the state — the tax being measured by the subscription price.

Turning finally to your second question regarding magazine subscriptions purchased by individuals as well as members of other professions, we find that the question is too broad to be specifically answered. The possible exemptions which a specific purchaser in a specific circumstance may enjoy will influence the determination of whether or not a sales or use tax is due. However, the Sales Tax Act contains no general exemption from either sales or use taxes for magazines and other periodicals purchased by consumers not entitled to a specific exemption. An examination of the Act does not reveal any general exemption to be enjoyed by individuals or by professionals such as lawyers or accountants.

#### AUTHORITIES CONSIDERED:

1. *Idaho Code*, Sections 63-3609; 63-3619; 63-3620 (c); 63-3621 (a), (c), (f), (i); 63-3622 (k), (p), (r), (s).

2. *Miller Bros. Co. v. Maryland*, 347 U.S. 340.

DATED this 4th day of November, 1975.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAY E L. KIDWELL  
Attorney General

#### ANALYSIS BY:

THEODORE V. SPAGLER, JR.  
Deputy Attorney General

#### ATTORNEY GENERAL OPINION NO. 65-75

TO: Mr. Alfred E. Barrus  
Prosecuting Attorney  
Cassia County, Idaho  
1419 Overland Avenue  
Burley, Idaho 83818

Per request for Attorney General Opinion.

**QUESTION PRESENTED:** Since the Idaho Legislature inadvertently failed to re-enact the "felony-murder" rule after the Model Penal Code was repealed, may the Idaho courts and prosecutors look to the common law for handling of such offenses?

**CONCLUSION:** No, the Idaho courts and prosecutors may not look to the Common Law for the felony-murder rule.

**ANALYSIS:** The premise that the Idaho Legislature inadvertently failed to re-enact the "felony-murder" rule after repealing the Model Penal Code is incorrect. The Legislature specifically re-enacted the felony-murder doctrine in 1972, S.L., ch. 336, p. 844, 928, but the felony-murder provisions were repealed in 1973 and cannot be revived as part of the Common Law.

1. In 1972, the *Idaho Code*, § 18-4003 defined first degree murder to include the "felony-murder rule."

All murder which is . . . committed in the perpetration of, or attempt to perpetrate arson, rape, robbery, burglary, kidnapping of mayhem, is murder of the first degree . . . All other kinds of murder are of the second degree. 1972 Session Laws, ch. 336, p. 844, 928.

The punishment for murder was left to the jury's determination by *Idaho Code*, § 18-4004.

Every person guilty of murder in the first degree shall suffer death or be punished by imprisonment in the state prison for life, and the jury may decide which punishment shall be inflicted. Every person guilty of murder in the second degree is punishable by imprisonment in the state prison not less than 10 years and the imprisonment may extend to life.

In 1973, the legislature amended both § 18-4003 and § 18-4004 by specifically defining the acts which constitute first degree murder and providing for a mandatory death sentence for those convicted of first degree murder.

All murder which is perpetrated by means of poison, or lying in wait, torture, or by any other kind of wilful, deliberate and premeditated killing is murder of the first degree. Any murder of any peace officer of this state or of any municipal corporation or political subdivision thereof, when the officer is acting in line of duty, and is known or should be known by the perpetrator of the murder to be an officer so acting, shall be murder in the first degree. Any murder committed by a person under a sentence of murder of the first or second degree shall be murder in the first degree. All other kinds of murder are of the second degree. 1973 Session Laws, ch. 276, p. 588.

Every person guilty of murder in the first degree shall suffer death. Every person guilty of murder in the second degree is punishable by

imprisonment in the state prison not less than ten (10) years and the imprisonment may extend to life. 1973 Session Laws, ch. 276, p. 588.

It would appear that the legislative changes in these statutes were made in response to the United States Supreme Court's decision in the case of *Furman v. Georgia*, 408 U.S. 238, 33 L.Ed. 2d 345 (June 29, 1972), which held that the discretionary authority of the jury in determining whether or not the death penalty should be imposed was unconstitutional.

The intent in changing the statute appears to be that the Idaho Legislature wished to correct its murder statute to conform to the ruling in *Furman* and proscribe certain acts which warranted a mandatory sentence of death.

A brief review of the background of the felony-murder rule may be helpful in analyzing the Idaho law.

Under the laws of England, which form the basis of this nation's Common-Law, murder was described as: "when a person of sound memory and discretion, unlawfully killeth any reasonable creature in being, and under the King's peace, with malice aforethought, either express or implied." 4 *Blackstone's Comm.*, 195, 21st Ed., 1844.

The Common-Law also provided that the element of malice in the definition of murder could be implied in many cases where no malice was expressed. Thus, a "felony-murder" doctrine was recognized. The accepted view of the rule was stated by Blackstone in the 1700's: "And if one intends to do another felony, and undesignedly kills a man, this is also murder". 4 *Blackstone's Comm.* 200.

Such broad language, however, was somewhat modified by Blackstone in illustrating the rule with three examples. "Thus if one shoots at A and misses him, but kills B, this is murder; because of the previous felonious intent, which the law transfers from one to the other. The same is the case where one lays poison for A; and B, against whom the prisoner had no malicious intent, takes it, and it kills him; this is likewise murder. So also if one gives a woman with child a medicine to procure abortion, and it operates so violently as to kill the woman, this is murder in the person who gave it." 4 *Blackstone's Comm.* 200-201.

The felony-murder rule in the sweeping form declared by Blackstone was modified by later cases and does not represent the ultimate position of the English Common Law. Analysis of later case law would suggest that the felony-murder rule in England came to be this: Homocide resulting from a felony committed in a dangerous way, is murder. *Perkins on Criminal Law*, 2Ed, 1969, p. 39.

In the United States, the felony-murder rule originated by statute in 1794 in the Commonwealth of Pennsylvania, with the essential language used in today's statutes taken from the Pennsylvania statute of 1860. *Perkins on Criminal Law*, p. 88-89.

The statutory provisions in this country have followed the Pennsylvania model and have modified the Common Law by applying the felony-murder doctrine to only certain felonies which are "inherently dangerous" to human life; i.e., arson, rape, robbery, burglary.

The history of the rule in Idaho dates back to the time Idaho was governed by territorial law. In 1864, the Territorial Legislature first enacted the "felony-murder" statute.

All murder which shall be perpetrated by means of poison, or lying in wait, torture, or by any other kind of wilful, deliberate, and premeditated killing, or which shall be committed in the perpetration, or attempt to perpetrate, any arson, rape, robbery, or burglary, shall be deemed murder of the first degree; and all other kinds of murder shall be deemed murder of the second degree . . . *Laws of the Territory of Idaho* 1864, Criminal Practice Act, s 17, p. 438.

The form of this statute remained largely in this condition until the 1973 amendments. In 1887, the statute was amended changing "shall be" to "is" and adding the crime of mayhem to the felony-murder rule. *Revised Statutes of Idaho Territory* 1887, Title VII, ch. 1, § 6562 (p. 726). In 1935, the Idaho State Legislature amended the felony-murder rule to include the crime of kidnapping. 1935 S.L., ch. 24, p. 41.

The original purpose of the felony-murder rule was to deter felons from killing negligently or accidentally by holding them strictly responsible for the killings that are the result of a felony or an attempted felony. *Payne v. State*, 406 P.2d 922, 924 (Nev., 1965).

Under the felony murder doctrine, malice is not a necessary requirement. *People v. Fortman*, 64 Cal. Rptr. 669, 675 (Cal. App., 1967).

Under the "felony-murder" rule, when one person kills another in the perpetration of a common law felony, the element of legal malice is supplied to the homicide so as to make the homicide a murder. If the felony is one of the class enumerated in the state's degree of murder statute, the murder becomes one of the first degree. *Commonwealth v. Carter*, 152 A2d 259, 261 (Penn., 1959); *State v. Gruber*, 19 Idaho 692, 299 (1911).

Since the Idaho statute has changed the common-law definitions of both "murder" and "felony-murder" by dividing murder into the first and second degree and restricting felony-murder to only inherently dangerous felonies, deference must be given to the statutory language rather than to the common-law.

Since the statute has narrowed and qualified the general definition of murder by a distinct and substantive definition of murder of the first degree, a charge of murder must follow the statutory language. *People v. O'Callaghan*, 2 Idaho 156, 158 (1886).

It is well settled in Idaho that when a statute is amended by the legislature a presumption arises that a change in application of the statute was intended. *DeRousse v. Higginson*, 95 Idaho 173, 176 (1973).

2. Reviewing the Legislative amendment of § 18-4003 of the *Idaho Code*, it is apparent that during the last days of the 42nd Legislative Session of 1973, the Legislature intended to do away with the felony-murder doctrine in the State of Idaho. The legislation was originally introduced in the House of Representatives by House Bill No. 195. There were two changes in the previous law; the additional designation of first degree murder committed by a person under a sentence for murder of either the first or second degree and the punishment of death for any person convicted of first degree murder. The House passed this version of the new law.

The Senate amended House Bill No. 195 by striking reference to the death penalty and substituting a mandatory penalty of life imprisonment. This amendment failed, however.

Another amendment was proposed in the Senate which eliminated reference to the "felony-murder" rule and mandated a sentence of death for every person guilty of first degree murder. This amendment passed the Senate and the House concurred in the amendment.

The amended Legislation then passed the House on March 13, 1973, which was the day of adjournment. House Bill No. 195 with Senate amendments, 1st Regular Session of 42nd Legislature, 1973.

When such a deletion is clear and unambiguous, it must be presumed the legislature intended a change from the previous law. It is also to be presumed that the legislature in enactment of a statute consulted earlier statutes on the same subject matter. *State v. Long*, 91 Idaho 436, 411 (1967).

3. Arguably, the legislature may have intended to lower the degree of murder of the "felony-murder" rule to that of second degree since § 18-4003 defines all other kinds of murder as being of the second degree.

In view of the action on this statute during the 1973 Legislative Session, it is apparent that the Idaho State Legislature intended to specifically exclude such a provision from the laws of this State. Such a clear indication of intent to eliminate a certain portion of a statute cannot be regarded lightly.

Since the Legislature chose to redefine the Common-Law crimes of murder and felony-murder, it is clear that the Legislature has chosen to control the subject of murder by statute and not rely on the Common-Law.

Further, since the common-law "felony-murder" doctrine has been changed by statute, the doctrine may also be retracted by statute.

"An obvious legislative change of a common law rule or term cannot be ignored. Furthermore, when a statute is amended it is presumed that a



change in application and meaning was intended." *Swayne v. Department of Employment*, 93 Idaho 101, 105 (1969).

With no statutory provision for felony-murder, the doctrine has been repealed and cannot be classified, or revived, under the general provision of second degree murder.

4. The exact status of the Idaho criminal law in this area is not without confusion, however.

A companion doctrine to the felony-murder rule is the so-called "misdemeanor-manslaughter" rule. In essence it is this: Homicide resulting from perpetration or attempted perpetration of an unlawful act, less than an inherently dangerous felony, is manslaughter. It is apparent that such a rule clarifies the nature of the prohibited acts that come within the scope of manslaughter. When the statutes also contain a provision for felony-murder, this "misdemeanor-manslaughter" rule makes it clear that homicide resulting from dangerous felonies is to be treated only as murder.

Such a rule has been recognized within the Idaho manslaughter statute since the Territorial Legislature first enacted the provision in 1864. This early statute provided:

Involuntary manslaughter shall consist in the killing of a human being, without any intent to do so in the commission of an unlawful act, or a lawful act which probably might produce such a consequence in an unlawful manner: Provided, That when such involuntary killing shall happen in the commission of an unlawful act, which, in its consequences, naturally tends to destroy the life of a human being, or is committed in the prosecution of a felonious intent, the offense shall be deemed and adjudged to be murder. *Laws of the Territory of Idaho* 1864, Criminal Practice Act, § 21, p.439.

Although the scope of involuntary manslaughter has been enlarged through the years, that portion of the statute pertaining to this rule has remained unchanged. The statute § 18-4006, *Idaho Code*, in its present form reads in pertinent part:

*Manslaughter defined.* — Manslaughter is the unlawful killing of a human being, without malice. It is of two kinds:

1. Voluntary —

2. Involuntary — in the perpetration of or attempt to perpetrate any unlawful act, other than arson, rape, robbery, kidnapping, burglary, or mayhem; . . . 1972 Idaho Session Law, ch. 336, p. 844, 929.

The confusion arises because the criminal statutes retain a provision which is closely associated with the felony-murder doctrine even though the latter doc-

trine has been repealed. Because the changes in the murder statute were not completed until the last day of the 1973 Legislative Session, the Legislature may have inadvertently failed to consider corresponding changes in the manslaughter statute.

To resolve the problem and clarify the Legislative intent, the felony-murder provision should be re-enacted within the murder statute or the misdemeanor-manslaughter provision should be amended in the manslaughter statute.

**SUMMARY:** At the present time, Idaho law does not include the felony-murder rule within its statutory definition of first degree murder. Consequently, Idaho prosecutors, in charging first degree murder, must prove either that the killing was wilful, deliberate, and premeditated; or prove that the killing was of a peace officer acting in the line of duty; or prove that the killing was by a person under a sentence for first or second degree murder.

#### AUTHORITIES CONSIDERED:

1. *Idaho Code* § 18-4003; § 18-4004; § 18-4006.
2. 1972 Session Laws, ch. 336, p. 844, 928, 929.
3. 1973 Session Laws, ch. 276, p. 588.
4. *Furman v. Georgia*, 408 U.S. 238, 33 L.Ed.2d 346.
5. 4 *Blackstone's Comm.* 200-201.
6. *Perkins On Criminal Law*, 2nd Ed. 1969, pp.39, 88-89.
7. *Laws of the Territory of Idaho* 1864, Criminal Practice Act, s 17, s 21, pp. 438-439.
8. *Revised Statutes of Idaho Territory* 1887, Title VII, ch. 1, s 6562, p. 726.
9. 1935 Session Laws, ch. 24, p. 41.
10. *Payne v. State*, 406 P.2d 922, 924 (Nev., 1967).
11. *People v. Fotman*, 64 Cal. Rptr. 669, 675 (Cal.App., 1967).
12. *Commonwealth v. Carter*, 152 A2d 259, 261 (Penn., 1959).
13. *State v. Gruber*, 19 Idaho 692, 699 (1911).
14. *People v. O'Callaghan*, 2 Idaho 156, 158 (1886).
15. *DeRousee v. Higginson*, 95 Idaho 173, 176 (1973).
16. *State v. Long*, 91 Idaho 436, 411 (1967).

17. *Swayne v. Dept. of Employment*, 93 Idaho 101, 105 (1969).

18. House Bill No. 195 with Senate amendments, First Regular Session of Forty-second Legislature, 1973.

DATED this 28th day of October, 1975.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL  
Attorney General

ANALYSIS BY:

GORDON S. NEILSON  
Senior Deputy Attorney General  
Chief, Criminal Justice Division

JAMES F. KILE  
Assistant Attorney General  
Criminal Justice Division

#### ATTORNEY GENERAL OPINION NO. 66-75

TO: Merlyn W. Clark  
Prosecuting Attorney  
Nez Perce County  
Lewiston, ID 83501

Per request for Attorney General Opinion.

QUESTION PRESENTED: Whether real property purchased by the City of Lewiston in fee simple is subject to past property taxes and liens therefor.

CONCLUSION: When a municipal corporation obtains complete unconditional title to lands, the title is freed by Article 7, Section 4 of the Constitution of the State of Idaho from all past property taxes and liens therefor.

ANALYSIS: During the year 1973, the City of Lewiston acquired by purchase certain tracts of land for various public purposes. As of January 1, 1973, the real property so purchased was not exempt from taxation, and, in each case, the City acquired title in fee simple.

The general rule is that when title to property is not acquired by an exempt landowner until after the date upon which current tax becomes a lien thereon, the property is held subject to such taxes. *Manly v. Gibson*, 14 Ill. 136 (1852); *Thompson v. St. Francis Xavier Female Academy*, 84 N.E. 55 (Ill., 1908); *McCullough v. Ladies of Loido*, 92 N.E. 908 (Ill., 1910); *McCullough v. Logan Square Presbyterian Church*, 94 N.E. 155 (Ill., 1911); *Jefferson Post No. 15 American Legion v. Louisville*, 280 S.W. 2d 706, 54 A.L.R. 2d 922 (Ky., 1955);

*McHenry Baptist Church v. McNeal*, 38 So. 195 (Miss., 1905); *St. Louis Provident Association v. Gruemer*, 199 S.W. 2d 409 (Mo., 1947).

In the instant case, the property became subject to a lien for the taxes due for 1973 on January 1, 1973, and, since the property was not exempt from taxation on that date, the property became subject to the taxes due for the entire year of 1973. Section 63-102, *Idaho Code*.

However, such taxes are not enforceable against municipal corporations. Article 7, Section 4 of the Constitution of the State of Idaho provides as follows:

"... The property of the United States, except when taxation thereof is authorized by the United States, the state, counties, towns, cities, villages, school districts, and other municipal corporations and public libraries shall be exempt from taxation."

The Idaho Supreme Court has, on three previous occasions, been called upon to determine the validity of a lien for taxes upon property purchased by the State of Idaho. In doing so, it has stated as follows:

"... Every reason that requires the exemption of the public from taxes imposed after its acquisition not only justifies but necessitates the holding that, while owned by the state, no proceeding may be taken to enforce the lien of any tax imposed against it. And the authorities are generally agreed that when the state acquires title to property, subject to the lien of a tax therefor imposed against it, further proceedings to enforce the lien are without effect..." *State v. Reed*, 47 Idaho 131, 134, 272 P.1008 (1928).

Since the lien is without effect, it must be cancelled upon the purchase of the property by the state or municipal corporation. *State v. County of Minidoka*, 50 Idaho 419, 430, 298 P. 366 (1931); *State v. Canyon County*, 67 Idaho 366, 368, 181 P.2d 196 (1947).

#### AUTHORITIES CONSIDERED:

1. Article 7, Section 4, Constitution of the State of Idaho.
2. *Idaho Code* §63-102.
3. *Manly v. Gibson*, 14 Ill. 136 (1852).
4. *Thompson v. St. Francis Xavier Female Academy*, 84 N.E. 55 (Ill., 1908).
5. *McCullough v. Ladies of Lorado*, 92 N.E. 908 (Ill., 1910).
6. *McCullough v. Logan Square Presbyterian Church*, 94 N.E. 155 (Ill., 1911).

7. *Jefferson Post No. 15 American Legion v. Louisville*, 280 S.W. 2d 706, 54 A.L.R. 2d 992 (Ky., 1955).

8. *McHenry Baptist Church v. McNeal*, 38 So. 195 (Miss., 1905).

9. *St. Louis Provident Association v. Grunner*, 199 S.W. 2d 409 (Mo., 1947).

10. *State v. Reed*, 47 Idaho 131, 134, 272 P. 1008 (1928).

11. *State v. County of Minidoka*, 50 Idaho 419, 430, 298 P. 366 (1931).

12. *State v. Canyon County*, 67 Idaho 366, 368, 181 P.2d 196 (1947).

DATED this 17th day of November, 1975.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL  
Attorney General

ANALYSIS BY:

J. MICHAEL KINSELA  
Assistant Attorney General

#### ATTORNEY GENERAL OPINION NO. 67-75

TO: David H. Leroy  
Prosecuting Attorney  
Ada County Courthouse  
Boise, ID 83701

Per request for Attorney General Opinion.

**QUESTION PRESENTED:** The Boise Independent School District has certified to Ada County an amount of taxes which has been challenged as being beyond a maximum amount that the School District can levy. The County Commissioners have been warned to seek a legal interpretation before they "consent to levying the requested assessment." The county, therefore, seeks an opinion as to whether it can or should include the School District's levy in its assessment notices.

**CONCLUSION:** The county neither levies nor consents to levy amounts which are requested by the School District. The taxes are levied by the School District and collected by the county. For the purpose of collecting the School District's levy, the county is the mere agent of the School District. The county has no authority to review, modify, or reject the School District's levy.

**ANALYSIS:** Pursuant to Idaho Code § 63-918, Ada County is charged with the duty of collecting taxes levied by every city, town, village, school district or other district or municipality located within the county when such taxes are

levied according to law and certified to the counties in the manner provided by law. The Boise Independent School District is a chartered school district existing within the boundaries of Ada County. The district is empowered under the provisions of its Charter [Sec. 9 (17)] to levy taxes for the purpose of raising an amount of money required to meet its budget. The district, by its Charter, is required to certify such taxes to the auditor of Ada County. Nothing contained within the language of the Charter places a minimum limitation upon the amount of taxes which the district may levy. However, *Idaho Code* § 33-802 was amended in 1973 to provide in pertinent part as follows:

"The privilege of a charter notwithstanding all chartered districts shall reduce their school district levy for maintenance and operation purposes by at least three (3) mills from the levy made for the 1972-1973 school year. No increase shall be made in excess of the 1972-73 levy minus three (3) mills for maintenance and operation purposes of chartered school districts unless such a levy increase in a specified amount be first authorized through an election held pursuant to §§ 33-301 - 33-406, *Idaho Code*, and approved by a majority of the district electors voting in such an election."

The question has arisen as to whether Ada County can collect and remit to the Boise Independent School District taxes levied by the school district in excess of the 1972-73 levy minus three (3) mills.

In analyzing this question, an important principle must be kept in mind. The power to actually levy taxes is given only to the school district. Under § 9 (17) of its Charter, it is the district itself which determines the amount of revenue to be raised and sets the necessary levy upon the property located within the district. These amounts are then certified by the district to the county auditor for collection. The county, therefore, when it mails out assessment notices to its residents which contain a billing for the school district levy among other levies is only collecting and not levying these taxes. The county possesses no power to levy taxes on behalf of the school district. (The school district levy is not to be confused with the county school fund levy.) The principle that the county is acting only as a collection agent and not levying taxes is reflected in the statute and has been recognized by the Idaho Supreme Court. § 63-918 in pertinent part provides:

"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 . . ."

The Idaho Supreme Court has held that under this section county officials merely act as agents of the taxing authority for the purpose of collecting the tax levy. In *Hamilton v. Village of McCall*, 90 Idaho 253, 409 P.2d 393 (1965) the Idaho Court said:

"It is further contended by defendant that under the existing laws of this state the duties of assessing, levying and collecting municipal taxes have been transferred from the municipality to the county officers and for that reason the Village of McCall had no control over the levying, assessing or collecting of its real property taxes. This contention is disposed of by the decision of this court in *Bagley v. Gilbert*, 63 Idaho 494, 122 P.2d 227, wherein it was stated the county officials in collecting the city taxes merely act as agents of the city in the performance of the duties required by them."

The *Bagley* case cited by the Court is even more closely related to the question posed here. That case related to taxes levied by the City of Boise which at that time was operating under a charter just as the Boise Independent School District operates under a charter. The Idaho Supreme Court in the *Bagley* case (63 Idaho at 503) stated:

"We have concluded that the amendment to Boise City's charter (1901 S.L., P. 109) is valid and not unconstitutional; that it can only be amended by special act; that Boise City is required to pay Ada County for services of its officers in assessing, collecting, equalizing and paying over said city taxes one-half of one percent of the amount so collected 'as fast as the same are collected'; there is no inhibition in the Constitution or otherwise that would prohibit the legislature from transferring the duties of the collection of Boise City taxes and other duties, as provided by the amendment of 1901 Act [sic] heretofore referred to, from the city officials to the county officials. *The county officials in collecting the Boise City taxes merely act as agents of the city in the performance of duties required of them.*" (Emphasis added).

We think it clear, therefore, that the county acts only as the agent for the school district for the purpose of collecting the District's taxes. The obvious legislative purpose is to simplify and make more efficient the burden of administering and collecting taxes levied by the several cities and taxing districts located within a county.

We do not think special significance should be placed upon the language in § 63-918 to the effect that "taxes . . . levied according to law and certified in accordance with the provisions of this act, shall be collected [by the county]." To conclude that Ada County should not collect the taxes certified by the school district to it would be to say that every county must review in detail the legality of all taxes levied by every city or taxing district located within its boundaries. This conclusion cannot be drawn from the *pro forma* phrase used in this one section. We think that the statutes relating to ad valorem taxes when read in *para materia* and as a whole clearly contemplate that no such supervisory or quasi-judicial authority is granted to the various boards of county commissioners. The statutes, for example, provide no remedy or procedure to be applied in the event that the county commissioners were to determine that the school district's levy is unlawful. We conclude, therefore, that the proper course of action for the Ada County Commissioners and other county officials is to proceed to collect, in the manner provided by the statutes, the amount of taxes

certified to it by the Boise Independent School District. The question of the legality of the school district's levy can and should be resolved in other forums. Since we are advised that there is currently pending in the Ada County Court an action brought against the Trustees of the Boise School District questioning the same levy on the same grounds, we shall refrain from expressing an opinion as to whether or not the 1973 amendment to *Idaho Code* § 33-802 can be said to have effectively amended the Charter of the Boise Independent School District or otherwise have limited the powers granted to the school district by its Charter.

**AUTHORITIES CONSIDERED:**

1. Charter of the Independent School District of Boise City, State of Idaho, as amended to May 10, 1955.
2. *Idaho Code* § 33-802 as amended by the 1973 Session Laws, Chapter 296; *Idaho Code* § 63-918.
3. *Hamilton v. McCall*, 90 Idaho 253, 409 P.2d 393.
4. *Bagley v. Gilbert*, 63 Idaho 494, 122 P.2d 227.

DATED this 18th day of November, 1975.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL  
Attorney General

**ANALYSIS BY:**

THEODORE V. SHANGLER, JR.  
Deputy Attorney General

**ATTORNEY GENERAL OPINION NO. 68-75**

TO: Honorable S. Albert Johnson  
Representative, State of Idaho  
Route 2 North, Box 219  
Pocatello, Idaho 83201

Per request for Attorney General Opinion.

**QUESTION PRESENTED:** Is Section 34-614A, *Idaho Code*, (the so called "head to head" election statute for State Representatives) a legally enforceable statute pursuant to the Idaho Constitution?

**CONCLUSION:** In the opinion of the undersigned, this statute contains provisions contrary to the Idaho Constitution. Our recommendation is for the legis-



lature to either modify the statute or pursue an immediate court test of its provisions prior to its utilization for election of State Representatives.

ANALYSIS: Section 67-202, *Idaho Code* mandates the creation of thirty five (35) legislative districts within the State of Idaho. Further, that each such district shall elect two members to the Idaho House of Representatives. Having so extended the right of suffrage, the legislature has prescribed the manner in which that suffrage is to be exercised through the enactment of Section 34-614A, *Idaho Code*. Its language requires candidates for the office of State Representative to file their declarations of candidacy by position. Commonly known as the "head to head" statute, it determines ballot status by declaration of candidacy either against an incumbent or for the position vacated by an incumbent. Further, electors may cast only one vote per declared position. The legitimacy of this statute is to be tested pursuant to Article I, Section 19, *Idaho Constitution*. This provision guarantees to each elector the free and lawful exercise of the right of suffrage. Careful scrutiny of this provision suggests that Section 34-614A is legally defective.

As enacted by the Forty Third Session of the Idaho Legislature, Section 34-614A requires all candidates for the state house of representatives to declare their candidacy with the secretary of state by filing for one of the two representative positions for the legislative district in question. Each district and its concomitant representation is statutorily created.

The state is divided into thirty five (35) legislative districts. One (1) senator shall be elected from each legislative district. Two (2) representatives shall be elected from each legislative district. . . . Section 67-202, *Idaho Code*.

Each district assumes a multi-member character for purposes of electing representatives to the Statehouse. Two representatives are to be elected from every district, each being elected at large by the electors therein. The right of suffrage, i.e., the right to determine elected representation, has been statutorily extended in proportion to the number of representatives to be elected. Each elector may vote twice. *Ibid*, Section 34-614 (1), *Idaho Code*. Having so conferred the suffrage, Section 34-614A, affects the manner in which this right may be exercised. It reads:

Candidates for house of representatives. — A candidate for the house of representatives, when filing for such office, shall declare the office to which he desires to succeed, to-wit: ". . . a candidate to succeed representative \_\_\_\_\_, incumbent or retiring representative (insert applicable words)."

An incumbent representative who is a candidate for reelection must file to succeed himself.

Each of the two representative positions in each district shall be separately and distinctly placed on the primary and general election ballots, and for each position to be filled the ballot shall state: "Vote for One."

The candidate receiving the greatest number of votes for the position he seeks shall be declared nominated, or elected, as the case may be.

It has the following effects:

1. Candidates for the House of Representatives may not simply file for the office of representative but must file for either position A or B thereto, though neither position represents a subdistrict within the parent legislative district.
2. Incumbents who seek reelection must file for one of the two positions but not either one. They may only file to succeed themselves.
3. Ballot status is determined by a candidate's declaration for position A or B.
4. An elector's right to cast two votes is restricted to the confines of those declarations. He may exercise one vote only among those candidates who declared for position A. He may exercise his second vote among only those candidates who declared for position B.

Presumptively, Section 34-614A, *Idaho Code* was enacted pursuant to the authority of Article VI, Section 4, *Idaho Constitution*.

The legislature may prescribe qualifications, limitations, and conditions for the right of suffrage . . .

However, the right of suffrage is specifically guaranteed by Article I, Section 19, *Idaho Constitution*:

No power, civil or military, shall at any time interfere with or prevent the free and lawful exercise of the right of suffrage.

Thus the threshold question is whether the application of Section 34-614A, *Idaho Code* would in some manner restrict the constitutional guarantee of the "free and lawful exercise of the right of suffrage", such right having been conferred by Sections 67-202 and 34-614 (a), *Idaho Code*. If so, this implementation of the *authority* conferred upon the legislature would conflict with the *guarantee* made to each elector. The legitimacy of Section 34-614A, *Idaho Code* would thereby depend upon the resolution of that conflict.

The "head to head" statute will act to inhibit the free exercise of the franchise by affecting the manner in which two lawful votes may be cast. One vote only may be cast for a candidate who declares for position A and one for a candidate who declares for position B. Declarations of candidacy will be influenced by the following considerations. First, given two incumbents of identical party affiliation who both seek reelection, challengers within the party are calculated to declare against the "weaker" of the two incumbents. The statute forces a conscious decision by each challenger to seek out the most vulnerable incumbent. Having induced challengers to declare against the incumbent perceived to

be most vulnerable, Section 34-614A secures minimal challenge for the "stronger" incumbent and produces a multiple challenge to the "weaker" incumbent. Those who would vote for one such challenger are thereby precluded from voting for any other who declared for the same position, including the incumbent. Those who would cast ballots for any two candidates among those declaring for a single position are disenfranchised to the extent of their second choice. Though they may *lawfully* cast a second ballot, the *free* exercise thereof is circumscribed.

Second, given a primary election with two incumbents from separate parties, the probabilities outlined above are compounded. The likelihood is that the incumbents will face little or no challenge for their respective party's nomination. Conversely, the open position in each primary election will evidence the vast majority of candidates. Thus the effect of a "head to head" requirement in this instance is to discourage challenges to the incumbents and encourage declarations to the unoccupied positions. The elector who as a consequence, finds his two choices to have declared for the unoccupied position is prevented from voting his conviction as regards the candidate of second choice.

Third, given a primary election with no incumbents, the vices of Section 34-514A, are less pronounced though no less real. Challenger declarations for position are not affected by the presence of an incumbent but rather by the actual or imagined strength of the respective challengers. Those challengers who perceive their strength to be greater are likely to file their declarations first. These surrogate "incumbents" are then those persons who candidacies intimidate or excite the remaining challengers. Ballot position becomes as important as credible issues. Jockeying therefore can produce the bizarre result that those who sign two nominating petitions may be able to vote for only one such nominee. The language of Section 34-614, *Idaho Code* requires nomination by petition, said petition to evidence the signatures of at least fifty electors from the district. It does not require declaration for position for purposes of the nominating petition. The possibility therefore exists that those who sign two nominating petitions may find that their candidates ultimately declare against each other. In that event or in any other where the elector's two choices have declared for the same position, the vote for the candidate of second choice is prevented solely by the artifice of ballot position.

Fourth, should two incumbents from the same district seek reelection, each must declare to succeed themselves. Should the incumbents be of a different party affiliation or hold divergent philosophical beliefs, neither may personally seek to address the views of the other through head to head candidacy. Section 34-614A allows only for a confrontation between an incumbent and challenger(s), or between two or more challengers.

Fifth, the primary election theoretically culminates the process of bringing the most viable candidates to the electorate. However the practical consequences of the "head to head" statute are to enhance the prospects of some while diminishing those of others. It does so by establishing two "vote-one" situations. The elector may vote for only those slated within one ballot position though there are two positions to fill. This forced bifurcation of the exercise of two law-

ful votes compels the elector to choose *between* the candidates of either position rather than voting for any two such candidates who sought to carry the party's banner. Critical at the general election is the effect the two "vote-one" situations can have on the ultimate selection of candidates by an elector. The number of candidates in a primary election has typically been reduced to four for the general election. This reduction will inevitably eliminate candidates who were first, or second, or both first and second choices of some electors. Having less identification with the victors of the nomination process, one must ask what effect will ballot position have upon the framing of an elector's new choice(s) for district representation. Given the opportunity to vote for any two of four candidates, an elector may cast his two votes differently than those cast given the head to head requirement. Pursuant to Section 34-614A ballot position can weigh as heavily in the elector's selection of candidates as any other criteria implemented. Thus the substantive issue here as well as in the four preceding critiques is whether such an impediment to the free exercise of the right of suffrage is constitutionally permissible.

This issue is resolved by an analysis of the relationship of Article I, Section 19 with that of Article VI, Section 4. The Idaho Supreme Court has recently examined these two constitutional provisions in *American Ind. Party of Idaho, Inc. v. Cenarrusa*, 92 Idaho 356, 442 P.2d 766 (1968). Concerned with the right of citizens to give expression and effect to their political views through the formation of political parties, the Court held that this right was inherent to the right of suffrage as guaranteed by Article I, Section 19. *Ibid*, 92 Idaho at page 358, 442 P.2d at page 768. The statute in question required a political organization, through individual candidacy for state office, to receive at least ten percent (10%) of the vote for such office in order to constitute the organization as a "political party". The Court found that to do so was a "practical impossibility" and declared the statute unconstitutional as contravening the right of suffrage guaranteed by Article I, Section 19. *Ibid*, 92 Idaho at page 359. It expressly rejected the contention that the statute was a proper implementation of constitutional authority to limit the right of suffrage holding that this *guarantee* of Article I, Sections 2 and 19. *Ibid*, 92 Idaho at page 360, 442 P.2d at page 770. Implicitly this authority conferred by Article VI, Section 4 is restricted to subjects which are not inherent to the right of suffrage.

The language of Section 67-202, *Idaho Code* establishes that each of the thirty five legislative districts shall be represented by two officers in the House of Representatives. Both Section 67-202 and 36-614 (1) require each of these two representatives to be elected in and by their respective districts. These statutes define an elector's suffrage for purposes of the election of officers to the House of Representatives. Inherent to that suffrage must be the ability to exercise it without legal restraint. The constitutional guarantee found within Article I, Section 19 is the embodiment of this fundamental precept. Should statutory implementation of the authority granted pursuant to Article VI, Section 4, act to impair the free exercise of the second vote, then that statute conflicts with the guarantee of Article I, Section 19. Given such a conflict, that statute is fatally defective. *American Ind. Party of Idaho v. Cenarrusa*, supra.

In reaching this decision, consideration has been given to Sections 34-615, 34-616, and 34-1217, *Idaho Code*. These statutes establish the electoral process for district court and supreme court justices. That process is nonpartisan, allowing for the primary election to not only nominate but elect justices who receive the requisite number of votes as prescribed in Section 34-1217. These factors present considerations which are dissimilar to those attendant to Section 34-614A, *Idaho Code* to which this opinion speaks.

The limitations of Section 34-614A became effective July 1, 1975. However, these limitations will have nothing upon which to attach until the primary and general elections of 1976. As the Forty-Fourth Session of the Idaho Legislature will convene prior to those elections, opportunity exists to amend this statute by creating subdistricts to give substance to the "head to head" requirement. In the alternative, the legislature should consider its repeal, or immediately instituting legal proceedings to determine the statute's validity. Failure to take appropriate action could render various elements of the election process for State Representatives subject to legal challenge. Should it be asked, the Office of the Attorney General would willingly assist in correcting any deficiency which might endanger the election of members to the legislature.

#### AUTHORITIES CONSIDERED:

1. Article I, Section 19; Article VI, Section 4, *Idaho Constitution*.
2. Statutes: Sections 67-202, 34-615 (1), 34-614A, 34-615, 34-616, 34-1217, *Idaho Code*.
3. *American Ind. Party of Idaho, Inc. v. Cenarrusa*, 92 Idaho 356, 442 P.2d 766 (1968).

DATED this 19th day of November, 1975.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL  
Attorney General

#### ANALYSIS BY:

CHRISTOPHER D. BRAY  
Deputy Attorney General

#### ATTORNEY GENERAL OPINION NO. 69-75

TO: Mr. Ben Cavaness  
Schou, Cavaness & Beebe  
P.O. Box 70  
American Falls, Idaho 83211

Per request for Attorney General Opinion.

**QUESTION PRESENTED:** You have asked "whether or not the Board of Highway District Commissioners has ordinance making powers for matters within the province of the maintenance and operation of the County road system."

**CONCLUSION:** Yes.

**NALYSIS:** The general powers and duties of the Board of Highway District Commissioners with respect to highways are enumerated in Section 40-1611, *Idaho Code* which provides in pertinent part:

General powers and duties of board of commissioners. — The highway commissioners in such highway district shall constitute the highway board, and shall have except as provided in section 40-1665, *Idaho Code*, exclusive general supervision and jurisdiction over all highways within their district, with full power to construct, maintain, repair and improve all highways within the district, whether directly by their own agents and employees or by contract; *and except as otherwise provided in this chapter, 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; provided that where any highway within the limits of such highway district has been designated as a part of the state highway system of the state of Idaho or as a state highway, then the Idaho transportation board shall have exclusive supervision, jurisdiction and control over the designation, location, maintenance, repair and/or reconstruction of the same . . .

Regarding areas of a highway district, which are not part of an incorporated municipality, Section 40-1612, *Idaho Code* states:

In respect to all highways included within such district, the power and jurisdiction of the highway board shall be inclusive [exclusive] . . .

These two sections make clear that in respect to highways within a highway district, the highway board has exclusive jurisdiction. Further, jurisdiction includes all those powers which the County Commissioners would have had in respect to highways. For example, the county commissioners have the power to erect traffic control devices for county roads pursuant to Sections 40-132 and 40-135, *Idaho Code*. Thus, the Board of Highway District Commissioners may assume this same power with respect to highways within their district. Section 40-1611, *Idaho Code*.

As a natural adjunct to the powers enumerated above, the highway board may, pursuant to various provisions of Title 49, *Idaho Code*, adopt regulations regarding use of highways within its jurisdiction. For example, Section 49-906, *Idaho Code* provides:

Special regulations and notice thereof. Whenever in the judgment of the Idaho transportation board or public authorities in charge of, or

having jurisdiction over a public highway, the operation on any state highway or section of highway of vehicles of the sizes and weights and at the rates of speed permissible by law will cause damage to the road by reason of climatic or other conditions or will interfere with the safe and efficient use of such highway by the traveling public, the said Idaho transportation board or *other public authorities* in charge of, or having jurisdiction over a public highway shall have authority to make regulations reducing the permissible sizes, weights or speeds of vehicles operated on such highway for such periods as may be necessary for the protection of the road or for public safety, and shall erect and maintain signs designating such regulations at each end of such highway or section and at intersections with main traveled roads and highways. (Emphasis supplied) . . .

We read this statute as a delegation of powers to highway districts to regulate traffic for the primary purpose of protecting highways rather than for the primary purpose of protecting the public. Additionally however, a number of other sections in Title 49, *Idaho Code* authorize "local authorities" to regulate traffic in various ways for the primary purpose of public safety. "Local authorities" are defined by Section 49-513, *Idaho Code* as:

Every county, municipal, and other local board or body having authority to enact laws, resolutions, or ordinances relating to traffic under the constitution and laws of this state.

A board of highway district commissioners clearly comes within this definition. First, a highway board comes within a strict reading of the definition since it is a local board which is authorized to enact resolutions to regulate traffic pursuant to Section 49-906, *Idaho Code*, supra. Second, the definition makes clear that "local authorities" are not limited to general governmental units such as municipalities and counties. Rather, it includes "other local board(s)" or bodies. Third, the statutes relating to powers of local authorities, when read as a whole, contemplate that highway districts are "local authorities" as defined above. For example, Section 49-529, *Idaho Code* provides in part:

Powers of local authorities. — (a) The provisions of this act shall not be construed to prevent local authorities *with respect to street and highways under their jurisdiction* and within the reasonable exercise of the police power from:

1. Regulating the standing or parking of vehicles;
2. Regulating traffic by means of police officers or traffic control signals; . . .
10. Altering the prima facie speed limits as authorized herein;
11. Adopting such other traffic regulations as are specifically authorized by this act . . .

(Emphasis supplied).

The section thus limits its grant of traffic regulation powers to local authorities "with respect to streets and highways under their jurisdiction". However, a highway board has exclusive jurisdiction over non-municipal highways within its highway district pursuant to Section 40-1613, *Idaho Code*. Thus, "local authorities" as used in Section 49-529, *Idaho Code* must include highway districts. Otherwise there would be no local authority within a highway district which could exercise the traffic regulation powers enumerated in this section.

In sum, we believe that a fair reading of Titles 40 and 49, *Idaho Code* dictates the conclusion that highway districts are "local authorities" and as such have ordinance making powers for matters within the province of the maintenance and operation of the County road system.

We do not believe, however, that this power extends to the power to establish criminal sanctions for the disobedience of traffic regulations adopted. A highway district 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. *Strickfaden v. Greencreek Highway Dist.*, 42 Idaho 738, 248 Pac. 456 (1926); *In Re Rogers, Randall & Pitzen*, 56 Idaho 521, 57 P.2d 342 (1936); *Dalton Highway Dist. of Kootenai County v. Sowder*, 88 Idaho 556, 401 P.2d 813 (1965). A highway board's regulation of the use of its highways is a part of this special purpose since reasonable traffic regulation is a necessary part of providing a safe highway system.

However, determination of criminal sanction, is properly handled by general governmental units. Thus, there are no provisions in the *Idaho Code* granting to highway boards the power to determine criminal sanctions to be imposed for violation of traffic regulations. Rather, cities and counties have been granted this power when acting consistently with State law. Article 12, Section 2, *Idaho Constitution*; Sections 50-302 and 31-714, *Idaho Code*.

#### AUTHORITIES CONSIDERED:

1. *Idaho Constitution*, Article XII, Section 2.
2. Statutes: *Idaho Code* Sections 31-714, 40-107, 40-1611, 40-1613, 40-1665, 49-513, 49-529, 49-703, 49-906, and 50-302.
3. *Strickfaden v. Greencreek Highway Dist.*, 42 Idaho 738, 248 Pac. 456 (1926).
4. *In Re Rogers, Randall & Pitzen*, 56 Idaho 521, 57 P.2d 342 (1936).
5. *Dalton Highway Dist of Kootenai County v. Sowder*, 88 Idaho 556, 401 P.2d 813 (1965).

DATED this 11th day of December, 1975.



## ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL  
Attorney General

## ANALYSIS BY:

DAVID G. HIGH  
Assistant Attorney General

## ATTORNEY GENERAL OPINION NO. 70-75

TO: D. E. Chilberg, Director  
Department of Administration  
Building Mail

Per request for Attorney General Opinion.

## QUESTIONS PRESENTED:

1. Can the Division of Purchasing enter into contracts on the basis of multiple awards? For example, in a contract for the purchase of automobiles, can the State award a contract for fifty compact sedans to the lowest dealer of brand A, the lowest dealer of brand B, and the lowest dealer of brand C, and then let the using agency select the award for their use? Another example of multiple award contracting is typewriters. Can the State award a contract for 100 typewriters to the lowest dealer for brand X, the lowest dealer for brand Y, and the lowest dealer for brand Z?

2. Can the Division of Purchasing award contracts on the basis of using agency preference? For example, two bids are received for room dividers. Company F bids \$4,800. Company G bids \$4,850. Both bids appear to meet the bid specifications. The using agency wants to purchase the dividers from company G because of personal preference. Can the award be made to company G?

## CONCLUSION:

1. No.

2. No.

ANALYSIS: The language of Section 67-5718, *Idaho Code* reads in pertinent part;

Contracts shall be awarded to and orders placed with the lowest responsible bidder.

The term "lowest responsible bidder" is defined by Section 67-5716 (12), *Idaho Code*. Therein the term is defined as one whose bid reflects the lowest acquisition price to be paid by the State;

except that when specifications are valued or comparative performance examinations are conducted, the results of such examinations and the relative score of valued specifications will be weighed, as set out in the specifications, in determining the lowest acquisition price.

Neither of your two questions raise the issue of comparative performance examinations. Therefore, the assumption is made that the products of either the automobile vendors or the typewriter vendors all meet bid specifications. In regard to your first hypothetical, a further assumption is made that the bid specifications for compact sedans or typewriters do not specify a specific manufacturer's product, e.g. Chrysler or I.B.M. Were the specifications to do so, they would be vulnerable to challenge as restrictive specifications in restraint of trade. Given specifications which prescribe functional criteria, bid award must be placed with the vendor whose product meets the appropriate criteria and whose bid reflects lowest acquisition price to the State.

Your second hypothetical states that two bids for room dividers are received, both bids appearing to meet bid specifications. Further, that the product of the higher bidder is desired by personal preference of the agency. Viewing these facts, no basis in law exists to award a contract to a bidder whose bid does not reflect the lowest acquisition price. Sections 67-5718 and 67-5716 (12), *Idaho Code*.

**AUTHORITIES CONSIDERED:**

1. *Idaho Code*, Sections 67-5718 and 67-5716 (12).

DATED this 18th day of December, 1975.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL  
Attorney General

**ANALYSIS BY:**

CHRISTOPHER D. BRAY  
Deputy Attorney General

**ATTORNEY GENERAL OPINION NO. 71-75**

TO: Honorable Monroe C. Gollaher  
Director of Insurance

Per request for Attorney General Opinion.

**QUESTION PRESENTED:** Are licensed Idaho resident brokers as defined in Section 41-1024, *Idaho Code*, required to comply with the countersignature provisions of Section 41-337, *Idaho Code*?

CONCLUSION: Yes.

ANALYSIS: The terms "agent" and "broker" are defined by the *Idaho Insurance Code* respectively as follows:

"*Agent*' defined. — An 'agent' is an individual, firm or corporation appointed by an insurer to solicit applications for insurance or annuity contracts or to negotiate for such contracts on its behalf, and if authorized to do so by the insurer, to effectuate, issue and countersign insurance contracts." *Idaho Code* §41-1021.

"*Broker*', '*general lines broker*', '*life broker*', defined. — (1) A 'broker' is an individual, firm or corporation who, *not being an agent of the insurer*, as an independent contractor and on behalf of the insured solicits, negotiates or procures insurance or annuity contracts or the renewal or continuation thereof for insureds other than himself." (Emphasis added.) *Idaho Code* §41-1024.

The particular statute to which this opinion is directed, [*Idaho Code* §41-337 (1)], reads as follows:

"*Resident agent, countersignature law*. — (1) *Except as provided in section 41-338*, no authorized insurer shall make, write, place or cause to be made, written or placed, any policy or contract of insurance or indemnity of any kind or character, or a general or floating policy covering risks on property located in Idaho, liability created by or accruing under the laws of this state, or undertakings to be performed in this state, *except through its resident insurance agents licensed as provided by this code, who shall countersign all policies or indemnity contracts so issued*, and who shall keep a record of the same, containing the usual and customary information concerning the risk undertaken and the full premium paid or to be paid therefor, to the end that the state may receive the taxes required by law to be paid on premiums collected for insurance on property or undertakings located in this state. When two or more insurers issue a single policy of insurance the policy may be countersigned on behalf of all insurers appearing thereon by a licensed agent, resident in this state of any one such insurer." (Emphasis added.) *Idaho Code* §41-337 (1).

Referring to § 41-338, *Idaho Code*, to the exceptions mentioned in § 41-337 (1), we observe that no exception is listed for insurance business produced by resident brokers. Therefore, it would seem that the familiar statutory rule of construction "*expressio unius exclusio alterius est*" (the expression of one thing implies the exclusion of another) would be applicable here. Particularly, this would appear to be the case here where we note that the latest amendment to *Idaho Code* § 41-338 was in the year 1975 (*Idaho Session Laws* 1975, Ch. 261, p. 708) and subsequent to the legislation authorizing the licensure of brokers which was enacted in 1972, (*Idaho Session Laws* Ch. 164, pp 380, 382). It seems safe to assume that had the legislature intended to make an exception to exclude business produced by brokers from the countersignature provisions of

*Idaho Code* § 41-337 (which was most recently amended in 1969) that it would have so provided when § 41-338, *Idaho Code*, listing the exclusions to § 41-337 was amended in 1975.

"In terms of legislative intent, it is assumed that whenever the legislature enacts a provision it has in mind previous statutes relating to the same subject matter, wherefore it is held that in the absence of any express repeal or amendment therein, the new provision was enacted in accord with the legislative policy embodied in those prior statutes, and they should all be construed together." Vol. 2A. C.D. SANDS, SUTHERLAND STATUTORY CONSTRUCTION, § 51.02, p.290 (4th ed.)

Historically, it appears that the rationale behind requiring a resident agent's countersignature upon all policies issued by insurers authorized to do business in the state is to promote the active use of resident agents for "servicing" policies covering local risks as was stated by the United States Supreme Court as follows in *Osborn v. Ozlin*:

"It is claimed that the requirement that not less than one-half of the customary commission to be retained by the resident agent is a bold exaction for what may be no more than the perfunctory service of countersigning policies. The short answer to this is that the state may rely on this exaction as a mode of assuring the active use of resident agents for procuring and 'servicing' policies covering Virginia risks. These functions, when adequately performed, benefit not only the company, the producer, and the assured. By minimizing the risks of casualty and loss, they redound in a pervasive way to the benefit of the community. At least Virginia may so have believed. And she may have concluded that an agency system, such as this legislation was designed to promote, is better calculated to further these desirable ends than other modes of 'production'." *Osborn v. Ozlin*, 84 L.Ed 1074, pp 1078, 1079, 310 U.S. 58 pp 64, 65 (1940).

It would seem that the foregoing rationale would still apply to the instance under consideration where it would appear that a duly licensed and appointed "agent" as a representative of the insurer may have a greater interest in servicing the policy in such a manner as to reduce the risks of the insurer, than would a "broker" who acts solely on behalf of the insured. In view of the foregoing rationale, it is doubtful that the courts would overturn *Idaho Code* § 41-337 (1) upon review.

"The subject matter . . . being within the police power, and properly belonging to the legislative department of government, the courts will not interfere with the discretion, nor inquire into the motives or wisdom, of the legislators. . . (and) if the act is not clearly unreasonable, capricious, arbitrary or discriminatory, it will be upheld, as proper exercise of the police power . . . (and) speaking of legislative discretion, this court said: 'Every presumption is to be indulged in favor of the exercise of that discretion, unless arbitrary action is clearly disclosed'." (Paren-

theses added.) *Rowe v. City of Pocatello*, 70 Idaho 343, 350, 218 P.2d 695 (1950).

**AUTHORITIES CONSIDERED:**

1. Statutes: Sections 41-1021, 41-1024, 41-337 and 41-338.
2. *Osborn v. Ozlin*, 84 L.Ed 1074, pp 1078, 1079, 310 U.S. 58 pp 64, 65 (1940).
3. *Rowe v. City of Pocatello*, 70 Idaho 343, 350, 218 p.2d 695 (1950).
4. Treatises: Vol 2A. C.D. SANDS, SUTHERLAND, STATUTORY CONSTRUCTION, § 51.02 p. 290 (4th ed.).

DATED this 22nd day of December, 1975.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL  
Attorney General

**ANALYSIS BY:**

ROBERT M. JOHNSON  
Assistant Attorney General

**ATTORNEY GENERAL OPINION NO. 72-75**

TO: Mr. W. J. Anderson, Esq.  
Sharp, Anderson & Bush  
Attorneys at Law  
P.O. Box 158  
Idaho Falls, Idaho 83401

Per request for Attorney General Opinion.

**QUESTION PRESENTED:** The city of Ammon currently contracts with Bonneville County for law enforcement services which are provided by the Bonneville County Sheriff's Office. You have asked whether it would be legally permissible for the City to pay directly to the County Sheriff a sum of money as a supplement to his normal salary as a means of compensating him for any additional time and effort required of him as a result of the law enforcement service contract with the City.

**CONCLUSION:** The *Idaho Constitution* prohibits a county officer from receiving payment beyond his authorized salary for services rendered in his official capacity.

**ANALYSIS:** Article XVIII, Section 7 of the *Idaho Constitution* provides:

County officers — Salaries. — *All county officers and deputies when allowed, shall receive, as full compensation for their services, fixed annual salaries*, to be paid monthly out of the county treasury, as other expenses are paid. All actual and necessary expenses incurred by any county officer or deputy in the performance of his official duties, shall be a legal charge against the county, and may be retained by him out of any fees which may come into his hands . . .

Thus, the *Idaho Constitution* makes clear that the fixed annual salaries paid by the county to county officers are to be the “full compensation for their services”.

In construing Article XVIII, Section 7, *Idaho Constitution*, the Idaho Supreme Court has consistently held that the annual salary of county officials is the only compensation allowed for services they render while acting in their official capacity, regardless of whether the services are ordinary or extraordinary. This is true regardless of whether the extra services provided are required by law. *McRoberts v. Hoar*, 28 Idaho 163, 152 Pac. 1046 (1915); *Givens v. Carlson*, 29 Idaho 133, 157 Pac. 1120 (1916); *Nez Perce County v. Dent*, 53 Idaho 787, 27 P.2d 979 (1933). Thus, it does not matter whether the extra services required of the sheriff by the contract with the city of Ammon are duties required of the sheriff by law. Whether required or not, additional compensation would be unlawful. The case of *Nez Perce County v. Dent* presented a fact situation substantially similar to your situation. In that case, Harry Dent, while acting as Sheriff of Nez Perce County, transported prisoners from Lewiston to the penitentiary at Boise. The warden paid him money in addition to the salary paid to him as sheriff. In construing Article XVIII, Section 7, *Idaho Constitution*, the Idaho Supreme Court held that such additional compensation was unconstitutional. The court said:

. . . Considerable space in the briefs is occupied by a discussion of whether it is a duty of a sheriff to convey prisoners to the penitentiary, or whether that is a duty devolving exclusively on traveling guards from that institution. This contention is beside the question. It is grounded on the erroneous theory that money received by an officer, for performing a duty the performance of which may be exacted of him by law . . .

In summary, the *Idaho Constitution* prohibits the receipt by the county sheriff of additional compensation from the city of Ammon for performance of the county law enforcement service contract.

It should be made clear, however, that the county commissioners are not precluded by the *Idaho Constitution* from raising the sheriff's salary as a result of the contract with the city of Ammon. Rather, the county Commissioners may establish whatever salary they deem appropriate in the absence of an abuse of discretion. *Planting v. Board of County Commissioners of Ada County*, 95 Idaho 484, 511 P.2d 301 (1973).

Therefore, we recommend that the Bonneville County Sheriff make any request for additional compensation directly to the County Commissioners. The

commissioners, should exercise their discretion in determining whether or not the sheriff should receive additional compensation as a result of the expanded county law enforcement effort.

**AUTHORITIES CONSIDERED:**

1. *Idaho Constitution*, Article XVIII, Section 7.
2. *McRoberts v. Hoar*, 28 Idaho 163, 152 Pac. 1046 (1915).
3. *Givens v. Carlson*, 29 Idaho 133, 157 Pac. 1120 (1916).
4. *Nez Perce County v. Dent*, 53 Idaho 787, 27 P.2d 979 (1933).
5. *Planting v. Board of County Commissioners of Ada County*, 95 Idaho 484, 511 P.2d 301 (1973).

DATED this 22nd day of December, 1975.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL  
Attorney General

**ANALYSIS BY:**

DAVID G. HIGH  
Assistant Attorney General

**ATTORNEY GENERAL OPINION NO. 73-75**

TO: Vernon E. Coiner, D.V.M.  
Chief  
Bureau of Meat Inspection  
Department of Agriculture  
Building Mail

Per request for Attorney General Opinion.

**QUESTIONS PRESENTED:**

1. Does a sale of uninspected beef for custom slaughter constitute an unlawful sale of uninspected meat if the final purchase price is determined on a rail weight basis? That is, when is such a sale completed?
2. Is it legal to sell one animal to four different individuals for custom slaughter? If this answer is yes, must you have a bill of sale stating the names of each of the individuals who are to receive the carcass prior to slaughter of the animal?

3. If you have a mobile unit killing several animals (6-9 head per week) at a saleyard or feedlot, would this constitute a fixed place of slaughter?

**CONCLUSIONS:**

1. Where the final purchase price is determined on a rail weight basis, a sale of beef for custom slaughter is completed when the parties reach an agreement as to all essential terms, and not necessarily when the rail weight is determined.

2. It is legal to sell one animal to four different individuals for custom slaughter. Where a bill of sale is used, the bill of sale should state the names of each of the individuals who are to receive the carcass prior to slaughter of the animal.

3. As long as a mobile unit remains located in a vehicle or van, it does not become a fixed place of slaughter merely by parking it at a specific site and then killing several animals at this site.

**ANALYSIS:** By way of introduction, *Idaho Code* 37-1915 provides that animals which are custom slaughtered and meat which is custom prepared, as opposed to animals slaughtered and meat prepared for commercial sale, are exempt from state meat inspection requirements. This exemption applies only if the animal is owned by the person requesting the custom slaughter and only if the meat prepared is used exclusively by the owner, his family and/or nonpaying guests and employees.

1. In order to create a contract for sale, the parties must reach an agreement as to all essential terms, but:

[e]ven though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy. *Idaho Code* 28-2-204 (3).

In a contract for sale of beef on a rail weight basis, assuming the parties have identified the animal and have agreed to the price per pound, the only term left open is the actual quantity.

Indefiniteness as to the final quantity will not invalidate the contract for sale if the quantity may be reasonably fixed.

Accordingly, although an agreement of sale is for an indefinite amount of a commodity, if the amount may be reasonably fixed by extraneous matters referred to in the agreement, it is not invalid for uncertainty. . . . The view has also been taken that if the intention is clear, mere uncertainty of the quantity involved does not prevent the arising of an obligation, however it may affect the possibility of proving damages for a breach. 67 Am.Jur. 2d Sales §65 (1973) at 177-178.

A contract for sale then becomes a completed sale when title passes to the buyer. *Idaho Code* 28-2-106 (1) states:



A "sale" consists in the passing of title from the seller to the buyer for a price (section 28-2-401). A "present sale" means a sale which is accomplished by the making of the contract.

It should be noted that the term "price" refers only to the agreement to pay, rather than the actual payment of the price. 67 Am.Jur.2d Sales § 103 (1973). Regarding the passage of title, *Idaho Code* 28-2-401 (3) then provides:

Unless otherwise explicitly agreed where delivery is to be made without moving the goods,

- (a) if the seller is to deliver a document of title, title passes at the time when and the place where he delivers such documents; or
- (b) if the goods are at the time of contracting already identified and no documents are to be delivered, title passes at the time and place of contracting.

In conclusion, where the final purchase price is determined on a rail weight basis, a sale of beef becomes a completed sale if the following requirements are met. First, the parties have reached an agreement as to the essential terms of the contract of sale, including an identification of the animal and an agreement on the price per pound. Second, the buyer is entitled, but not necessarily required, to immediately remove the purchased beef from the saleyard or feedlot. Third, if a document of title is used, the document of title has been delivered. If these requirements are met, the sale of beef on a rail weight basis where the beef is purchased for custom slaughter does not constitute an unlawful sale of uninspected meat.

Note: Consideration of passage of the risk of loss appears to be irrelevant to the present issue because the UCC definition of sale specifically speaks in terms of "passage of title."

2. Under the Uniform Commercial Code, more than one person can legally enter into a binding sale contract. "Several persons may, of course, become the co-purchasers of property and thereby render themselves jointly and severally liable for the price." 67 Am.Jur.2d Sales § 94 (1973) at 210. Thus, more than one person can legally purchase a beef for custom slaughter.

Even though more than one person can jointly purchase beef without creating an unlawful sale of uninspected meat, each participating individual should be named as a party to the sale contract, since identification of the parties is an essential term of any contract of sale. Thus, if a bill of sale is used to evidence the sale contract, each participating individual should be named. In contrast, if all co-purchasers are not named in either the contract of sale or in the bill of sale, an unlawful sale of uninspected meat would arise.

3. Mobile slaughter units owe their existence to regulations adopted by the Idaho State Department of Agriculture. By this regulation, mobile slaughter unit is defined as: "A vehicle, van and all related equipment used in the slaughter of

animals.” There is no regulation defining “fixed place of slaughter” nor any regulation comparing mobile units and fixed slaughter houses. In addition, there is no Idaho or federal case or statutory law distinguishing the two. Consequently, based upon the regulation of the Idaho State Department of Agriculture, a mobile slaughter unit remains such as long as it is located in a vehicle or van, regardless of the length of time or quantity of beef it slaughters at a fixed location.

Notwithstanding, the distinction between mobile units and fixed places of slaughter is irrelevant where only custom slaughtering is involved. Both mobile units and fixed places of slaughter are subject to the same inspection requirements when they perform custom slaughtering. That is, in both cases the place of slaughter is subject to inspection for sanitation, and in neither case is the meat subject to inspection. Thus, since mobile units are authorized only to do custom slaughtering, and mobile units and fixed places of slaughter are subject to identical inspection requirements when custom slaughtering is performed, a distinction between the two is unnecessary.

**AUTHORITIES CONSIDERED:**

1. Sections 28-2-106 (1), 28-2-204 (3), 28-2-401 (3), 37-1915, *Idaho Code*.
2. Department of Agriculture, “Regulations Governing Mobile Slaughter Units in the State of Idaho,” (1970).
3. Am.Jur.2d Sales ~~5~~65, 94, 103 (1973).

DATED this 29th day of December, 1975.

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