OFFICIAL OPINIONS
OF
THE ATTORNEY GENERAL
FOR
1978

Wayne L. Kidwell
Attorney General
State of Idaho

OFFICIAL OPINIONS
OF
THE ATTORNEY GENERAL
FOR
1978

Wayne L. Kidwell
Attorney General
State of Idaho

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. SMYLIE (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	1971-1974
WAYNE L. KIDWELL	1975-1978
DAVID H. LEROY	1979

PREFACE

This fourth volume of Opinions during my tenure in office is offered as a service to those persons interested in the official legal opinions of Idaho's chief legal officer.

The Opinions of the Attorney General have played an important role in the enforcement and administration of our laws. In many instances they have saved money for the taxpayers and time for the State administrators by steering them clear of possible legal pitfalls.

It is my hope that this and subsequent books of Opinions of the Attorney General will prove to be a valuable manual for finding answers to many of our governmental problems.

WAYNE L. KIDWELL
Attorney General
State of Idaho

OFFICE OF THE ATTORNEY GENERAL

Administrative

Wayne L. Kidwell — Attorney General

Guy G. Hurlbutt — Chief Deputy

Gordon S. Nielson — Senior Deputy

Bill F. Payne — Senior Deputy

Larry K. Harvey — Special Assistant

David M. Rowe — Chief Investigator

Lois Hurless — Administrative Assistant

Kathleen Haynes — Fiscal Officer

Neysa Tuttle — Administrative Secretary

Sandra Rich — Admin. Receptionist-Secretary

Deputy Attorneys General

Rudolf D. Barchas
James Blaine
Warren Felton
James Hargis
Anton Hohler
John McMahon
Robert M. MacConnell
LaVar Marsh
Hugh O'Riordan
Dan Poole
Richard Russell
Theodore Spangler
Lynn Thomas

Assistant Attorneys General

James T. Baird
Josephine Beeman
Arthur Berry
William L. Bird
Stuart Carty
Mike Dotten
Patrick Fanning
James Fell
Fred Frahm
Thomas Frost
Gavin Gee
Michael Gilmore
Leslie Goddard
Clinton Jacobs
Mary Ann Johnson
Robert Johnson
Dean Kaplan
James Kaufman
Ursula Kettlewell
James Kile
Michael Kinsela
William Latta
Roger Madsen
Susan Mauk
William Morrison
Gary Osborne
Phillip J. Rassier
Morgan Richards
Eugene Ritti
Mark Riddoch
David K. Robinson
Kari Smith
Myrna Stahman
John Sutton
Thomas Swinehart
Mark Thompson
Jean R. Uranga
Tom Vanderford
John Vehlow

Don Harris
David High
Michael Howell
Steve Parry
Sam Petrillo
James Raeon
Bob Wallace
James Wickham
Roy Eiguren

Law Interns

Barbara Jo Bentley
Thomas High

Non-Legal Personnel

Larry Broadbent
Allan Ceriale
Neal Custer
Jake Hansen
Chester Johnson
Curtis Larson
Richard LeGall
Warner Mills
Donald Todd
Tom Williamson
Terri Wood
L. J. Pendlebury

Secretaries

Lora Boone
Lynn Clifford
Carole Davis
Linda Fortmeyer
Madonna Lengerich
Diana Mannila
Lillian Nesmith
Laura Przytula
Glenda Willford

(Includes all staff with service during any portion of the year)

CONTENTS

ATTORNEY GENERAL'S OPINIONS FOR THE YEAR 1978

Wayne L. Kidwell
Attorney General

ATTORNEY GENERAL OPINION NO. 78-1

TO: Martell Miller
Chairman of Deferred Compensation Committee
Department of Administration
Building Mail

Per request for Attorney General Opinion.

QUESTION PRESENTED: Would there be a violation of Idaho Constitution, Article 8, Section 2, if the State of Idaho invested, for the purpose of funding a deferred compensation program for its employees, in any of the funding media as listed below?

(1) Common stock
(2) Preferred stock
(3) Corporate bonds
(4) Governmental bonds
(5) Mutual funds
(6) Variable annuities
  (a) from a stock company
  (b) from a mutual company
(7) Life insurance
  (a) an assessable policy
  (b) a non-assessable policy
  (c) from a stock insurer
  (d) from a mutual insurer
(8) Savings and Loan associations, organized as "stock" companies
  (a) passbook accounts
  (b) certificates of deposit
(9) Savings and Loan associations, organized as "mutual" companies
  (a) passbook accounts
  (b) certificates of deposit
(10) Credit Unions (state and federal)
  (a) share accounts
  (b) public unit accounts
  (c) certificates of deposit
(11) Banks
  (a) passbook accounts
  (b) certificates of deposit

CONCLUSION: Article 8, Section 2 of the Idaho Constitution prohibits the State from investing in common stock, preferred stock, mutual funds and assessable insurance policies to fund a non-qualified deferred compensation plan. The state may invest in savings and loan associations, credit unions, and banks to fund its deferred compensation plan as long as it does not become a shareholder in any such institution. The State may also fund its deferred compensation plan through non-assessable insurance policies issued by either stock or mutual insurers, fixed or variable annuities, and corporate or government bonds.

ANALYSIS:

I

An unqualified deferred compensation plan is one where the employer and employee have contracted that the employee's compensation will be paid at a

future date. If the employee utilizes a cash basis accounting system and participates in a deferred compensation program, it will have the effect of also deferring his income tax liability until such time as he actually realizes his deferred compensation. The employer and employee have an ordinary debtor-creditor relationship until the deferred compensation is paid, and the cash basis taxpayer does not incur an income tax liability until he reduces the debt to actual income. However, if the employee receives a constructive receipt of the deferred compensation, or derives an "economic benefit" (sometimes referred to as the doctrine of cash equivalence), then the deferred compensation will be taxable to him. (Note: See 1978 Commerce Clearing House "Standard Federal Tax Reporter, 1978 Index," paragraph 204.03 for an explanation of the constructive receipt and economic benefit problems of a deferred compensation plan.) The economic benefit problem does not prohibit the employer from funding a deferred compensation plan, but it does require that the employee can have no vested right in the fund. The employee's right to the fund must be subject to a substantial risk of forfeiture rather than held in trust, for example for the employee. The employer, rather than the employee, must own the fund.

II

The Idaho Constitution, Article 8, Section 2, reads:

> *Loan of state's credit prohibited – Holding stock in corporation prohibited – Development of water power.* – The credit of the state shall not in any manner be given, or loaned to, or in aid of any individual, association, municipality or corporation, nor shall the state directly or indirectly become a stockholder in any association or corporation, provided that the state itself may control and promote the development of unused water power within the state. Idaho Constitution, Art. 8, § 2.
>
> (Note: The last clause was added by amendment in 1920 to permit the State to control and develop unused water power in the State.)

The foregoing provision of the Idaho Constitution has been construed a number of times in a manner pertinent to the issues here under consideration. Particularly, *Atkinson* v. *Board of County Commissioners,* 18 Idaho 282, 108 P. 1046 (1910); *School District No. 8 in the County of Twin Falls, State of Idaho* v. *Twin Falls County Mutual Fire Insurance Co.,* 30 Idaho 400, 164 P. 1174 (1917); *Engelking* v. *The Investment Board of the State of Idaho,* 93 Idaho 217, 458 P. 2d 213 (1969); *Nelson* v. *Marshal,* 94 Idaho 726, 497 P.2d 47 (1972).

The statute which gives rise to the issue under consideration is found in *Idaho Code* § 59-513 which was enacted in 1977 to authorize a non-qualified deferred compensation plan for the employees of the State of Idaho with the proviso that "the legislature of the state of Idaho desires that the state board of examiners adopt a deferred compensation program which provides for investment in all types of funding media." 1977 Idaho Session Laws, Ch. 195, § 3, p. 530.

The Idaho Supreme Court held in *Engelking* v. *The Investment Board, supra,* that an act to authorize the State to invest its permanent endowment funds through an investment board was partially in violation of Article 8, Section 2 of the Idaho Constitution and, therefore, unconstitutional to the extent that it authorized investment in:

> (6) Corporate obligations designated as corporated convertible debt securities, but within the limits hereinafter provided for the investment of stock, upon conversion.

and

> (8) Common or preferred stocks of corporations, provided that no more than twenty-five percent (25%) of the principal amount of any one permanent endowment fund may be invested in common or preferred stock of corporations in the first year following the enactment hereof. Thereafter, the percent of the principal amount of the fund invested in common or preferred stock of corporations may be increased at the direction of the investment board by no more than ten percent (10%) in any one calendar year except that at no time shall the percent of the principal amount of any endowment fund invested in common or preferred stock of corporations exceed fifty percent (50%). In computing the percent of the principal amount of the fund which may be invested in common or preferred stock of corporations, the board shall consider the cost of common or preferred stocks which the fund is holding at the time of computation and not the current market value thereof. 1969 Idaho Session Laws, S.B. No. 1277, § 9 (6) and (8), pp. 767-768.

The Court also held that investment by the State in bonds, notes or obligations secured by mortgages would not be in violation of Article 8, Section 2 with the following rationale:

> . . . Idaho Const., art. 8, § 2, does not prohibit the loans of State funds. 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. This was the evil intended to be remedied by Idaho Const. Art. 8, § 2 and similar provisions in other state constitutions. Yet that particular evil is not presented by the investment of existing funds of the State, for no new State debts are created by such action.
>
> Moreover, not only is the State action proposed by S.B. 1277 not a loaning of credit, but also such action is not in aid of private associations in the sense intended to be prohibited by the constitutional provision. The loaning of endowment fund assets envisioned by S.B. 1277 *involves an effort to aid the State by increasing the earnings of endowment funds. That is its predominant and public purpose.* The credit clause of Idaho Const. Art. 8, § 2 is intended to preclude only State action which principally aims to aid various private schemes. As the parties have noted, the loaning of funds by the State is always presumably of some benefit to the recipient of the funds. However, where such a benefit is merely an incidental consequence of efforts to effectuate a broad public purpose, then it cannot be said to violate the credit clause of Idaho Const. Art. 8, § 2. . . (Emphasis added.) *Engelking* v. *The Investment Board,* 93 Idaho 217 at 221-222.

It is significant to note that the proposed investment in corporate obligations designated as corporate convertible debt securities, common stock and preferred stocks which was prohibited in *Engelking v. The Investment Board, supra,* would also have been an effort by the State to promote "its predominant, and public purpose" rather than to "aid in various private schemes." Nevertheless, the Court found any investment by the State in corporate common stock,

preferred stock or corporate convertible debt securities to be contrary to Idaho Constitution, Article 8, Section 2. We must conclude from this that Idaho Constitution, Article 8, Section 2 is an absolute prohibition without exception to the State of Idaho from becoming a stockholder for any purpose without regard to whether the State or private enterprises would be the primary beneficiary of the investment. As the Supreme Court said in *Atkinson* v. *Board of County Commissioners,* 18 Idaho 282, 285, 108 P. 1046 (1910):

> Section 2 prohibits the state in any manner ever becoming interested with any individual, association or corporation in any business enterprise, and it likewise prohibits the state in any manner loaning its credit to the aid of such an enterprise or becoming a stockholder therein. *Atkinson* v. *Board of County Commissioners of Ada County, supra.*

Some state constitutions of other states which have similar provisions, but not precisely the same as Idaho Constitution, Article 8, Section 2, would permit the state in certain circumstances to become a stockholder. For example, Utah's constitution provides that "the legislature shall not authorize the State . . . lend its credit or subscribe to stock or bonds in aid of any railroad, telegraph or other private individual or corporate enterprise or undertaking." Utah Constitution, Article 6, Section 31. The Utah Supreme Court held in *Utah State Land Board* v. *Utah State Finance Commission,* 365 P.2d 213 (1961) that Utah's constitutional convention considered the advisability of investing in stocks and bonds and had as its only object the prevention of the use of State funds or credit "in aid of any railroad, telegraph or other private individual or corporation enterprise or undertaking." However, the Utah Supreme Court held that the provision permitted investment by the state for the benefit of the state. In contrast is Oregon's constitutional provision which more closely resembles Idaho's and was construed by the Oregon Supreme Court in *Sprague* v. *Straub*, 451 P.2d 49 (1969). Oregon's constitution read:

> The state shall not subscribe to or be interested in the stock of any company, association, or corporation, but, as provided by law, may hold and dispose of stock, including stock already received, that is donated or bequeathed. Oregon Const. Art. XI, § 6.

The Oregon Supreme Court held:

> Putting together all of the evidence and factors bearing upon the meaning of Article XI, § 6 we have concluded, not without difficulty, that Article XI, § 6 constitutes a general prohibition against the purchase of corporate stocks by the state of Oregon. *Sprague* v. *Straub*, 451 P.2d 49 at 55 (1969).

We note that the State of Michigan expressly amended its constitution to provide for investment of public employee retirement funds in the stock of a company, association or corporation so that it now reads:

> The state shall not subscribe to, nor be interested in the stock of any company, association or corporation, except that funds accumulated to provide retirement or pension benefits for public officials and employees may be invested as provided by law; and endowment funds created for charitable and educational purposes may be invested as provided by law governing the investment of funds held in trust by trustees. Michigan Const. Art. 9, § 19.

III

We have concluded that the *Engelking* case precludes the investment by the State in common or preferred stocks. This would also preclude the purchase by the State of stock in what is known as "mutual funds." For the purposes of this opinion, we adopt the definition for the term "mutual fund" used by the United States Supreme Court in footnote 11 of its decision in *Investment Company Institute* v. *Camp*, 401 U.S. 617, 91 S.Ct. 1091, 1096 (1971) as follows:

> A mutual fund is an open-end investment company. The Investment Company Act of 1940 defines an investment company as an "issuer" of "any security" which "is or holds itself out as being engaged primarily * * * in the business of investing * * * in securities * * *." 15 U.S.C. §§ 80 a-3 (a) (1). An open-end company is one "which is offering for sale or has outstanding any redeemable security of which it is the issuer." 15 U.S.C. § 80 a-5 (a) (1). An investment company also includes a "unit investment trust": an investment company which, among other things, "is organized under a * * * contract of * * * agency * * * and * * * issues only redeemable securities, each of which represents an undivided interest in a unit of specified securities * * * ." 15 U.S.C. § 80 a-4 (2).

The United States Supreme Court stated in *Investment Company Institute* v. *Camp, supra,* that:

> One would suppose that the business of a mutual fund consists of buying stock "for its own account" and of "issuing" and "selling" "stock" or "other securities" evidencing an undivided and redeemable interest in the assets of the fund. *Investment Company Institute* v. *Camp,* 91 S. Ct. 1091 at 1096.

IV

Regarding whether the State may fund its deferred compensation program through savings and loan associations or credit unions, we refer to *Michigan Savings & Loan League* v. *Municipal Finance Commission of the State of Michigan,* 79 N.W. 2d 590 (Michigan 1956), in which the Michigan Supreme Court recognized that "investors in savings and loan associations are subscribers to, or purchasers of, stock therein." *Michigan Savings & Loan League* v. *Municipal Finance Commission of the State of Michigan, supra,* at 595. The Michigan Supreme Court noted that Michigan Constitution, Article X, Section 13 contained no exception to investments in the stock of savings and loan associations and further stated that "the conclusion may not be avoided that it (Article X, § 13) was intended to place investments in the stock of all corporations, associations and companies in the same category insofar as purchases thereof by the State . is concerned." *Michigan Savings & Loan League* v. *Municipal Finance Commission of the State of Michigan, supra, at* 596.

We feel that the decision of the Michigan Supreme Court in *Michigan Savings & Loan League* v. *Municipal Finance Commission of the State of Michigan, supra,* is persuasive as to the limitations imposed by Article 8, Section 2 of the Idaho Constitution. Therefore, we conclude that Article 8, Section 2 prohibits the State from purchasing "share accounts" or otherwise becoming a stockholder in a state or federally chartered savings and loan association. Extending the decision of *Michigan Savings and Loan League* v. *Municipal Finance*

Commission of the State of Michigan, supra, to its logical conclusion further leads us to conclude that Article 8, Section 2 would preclude the State from becoming a member of a state or federal credit union as the rights of ownership and privileges of members of credit unions are substantially similar to those of members of savings and loan associations. Members of credit unions and savings and loan associations each purchase "share accounts" or "membership shares" which earn dividends which are declared by officers elected by the members. Share accounts in savings and loan associations and membership shares in credit unions each represent ownership and a voice in the management of the respective corporation. However, Article 8, Section 2 does not prohibit the State from depositing funds in a state or federally chartered savings and loan association or credit union if it does so without purchasing "stock," "share accounts" or "membership shares." For example, a permissible investment in a credit union regulated by the State of Idaho would be "nonmembers certificates of indebtedness" as defined by *Idaho Code* § 26-2194 (i) which pay a guaranteed rate of interest rather than dividends.

Speaking of the similarities and differences of the stockholders of an ordinary business corporation and the holders of what amounts to a share account in a savings and loan association, the Court of Appeals in Maryland stated:

> . Although possessing some of the attributes of a shareholder in an ordinary corporation, such as the right to vote for the election of officers and directors, as well as the right to share proportionately with their respective interests in its profits and losses, the savings share depositor in a savings and loan association possesses other characteristics not shared by investors in an ordinary corporation. First, the depositor in a savings and loan association may usually pay for his shares by installment deposits in his account, whereas in an ordinary business corporation they must be paid for in full at the time of purchase, and secondly, a savings share depositor has the right to withdraw the amount he has deposited dollar for dollar at any time up to insolvency or dissolution. In deciding whether these savings share depositors are creditors, the most relevant difference between ordinary stockholders and the shareholders in a savings and loan association is the right to withdraw the funds placed in the association which gives the depositor hybrid creditor-owner characteristics. Commenting on the right of withdrawal, on the first appeal Judge Prescott said for this Court, at 430 of 232 Md., at 121 of 194 A.2d:
>
> > "This latter right makes the shareholder in the association, at least under certain circumstances, a creditor of the association as well as a shareholder thereof. As stated by Justice Holmes in Atwood v. Dumas, 149 Mass. 167, 21 N.E. 236, 3 L.R.A. 416: 'But the interest of a member of a corporation of this kind [a cooperative savings fund and loan association] is of a peculiar nature, and it does not follow, because the defendant is a member, that she may not be a creditor also in respect of her money paid in.' (Citing authorities.)" *Family Savings & Loan Association Shareholder's Protective Committee* v. *Stewart,* 215 A.2d 726 at 728-729 (Maryland 1966).

ATTORNEY GENERAL OPINION NO. 78-2

TO: Mr. Kenneth A. Hall
Administrator
Division of Public Works
Department of Administration

Per Request for Attorney General's Opinion:

QUESTIONS PRESENTED:

1. Can the Division of Public Works award a contract in an amount exceeding $5,000.00 to the Idaho Board of Corrections without going through the bid process?

2. If inmate labor is used on the construction of public works projects, what pay scale must be used and are the inmates covered by Workmen's Compensation during their labor on the project?

3. How will the award of a prison construction contract to the Idaho Board of Corrections be affected by the state public works contractor's licensing requirements and the requirement for a surety bond found in section 54-1926, *Idaho Code*?

4. If awarded a contract, must the Idaho Board of Corrections meet statutory requirements for licensed electricians and plumbers?

5. Is it legal to hire out or lease prison inmate labor to a private contractor?

CONCLUSIONS:

1. The bid procedure referred to in section 67-5711 must be followed by the Division of Public Works when awarding a contract in an amount exceeding $5,000.00 even if the contracting party is another state agency.

2. The amount of pay to be given inmates for work on public works projects, with the exception of work done for the Idaho Transportation Board, is at the discretion of the Idaho Board of Corrections. While working on these projects, the convicts are not covered by Workmen's Compensation.

3. The public works contractor's licensing requirement does not apply to an authorized representative of the State who is supervising and in charge of the construction of a building within the penitentiary grounds. However, the Idaho Board of Corrections when working on such a project must comply with the bond requirements found in the statutes.

4. Any person installing electrical or plumbing systems in a building used for the housing or shelter of humans is required to meet the licensing and permit requirements imposed upon electricians and plumbers.

5. Although no law in Idaho speaks directly to the question it appears that the legislature has expressed its displeasure at the practice of hiring out or leasing of convict labor to a private contractor.

ANALYSIS:

This request for an Attorney General's Opinion arose because of the desire of the Department of Corrections to construct a new dormitory building on the grounds of the Idaho State Penitentiary using inmate labor. Upon being consulted regarding this project the director of the Department of Public Works submitted the above questions for research and answer.

In awarding a contract in an amount exceeding $5,000.00 the Division of Public Works must comply with the bid procedures mentioned in section 67-5711, *Idaho Code.* This statute was adopted by the legislature in 1974 and amended in 1976. The statute's language encompasses " . . . the construction, alteration, equipping and furnishing and repair of any and all buildings, improvements of public works of the state of Idaho. . " This language limits the apparent authority granted the Board of Corrections in section 20-245, *Idaho Code,* last amended in 1957, and also found in section 20-413, adopted in 1974 which authorizes the board to utilize inmates " . . . within or without the walls of the penitentiary and on all public works done under the control of the state; . . .". When construing a statute which conflicts in all or in part with another of a later date, the earlier enactment must give way to the latter, whether or not this effect is foreseen by the legislature. The prior law must yield to the extent of the conflict. See 1A Sutherland Statutory Construction, *Repealing Acts,* section 23.09. See also *Florek* v. *Sparks Flying Service, Inc.* (S.Ct. Idaho 1961) 83 Idaho 160. Thus, when taken together the three statutes above cited authorize the Board of Corrections to use convict labor on state buildings including penitentiary buildings, but when contracting with the Division of Public Works for a project valued in excess of $5,000.00, the bid process must be followed.

The Idaho law concerning compensation of prisoners is set out in Section 20-412, *Idaho Code,* which provides:

> each prisoner who is engaged in productive work in the institution under the jurisdiction of the Board of Corrections as a part of the Correctional Industries work program may receive for his work *such compensation as the commission shall determine* to be paid out of any funds available in the correctional industries betterment fund. Such compensation, if any, shall be in accordance with a graduated schedule based on quantity and quality of work performed and skill required for its performance. Compensation shall be credited to the account of the prisoner and paid from the Correctional Industries Betterment Fund.
>
> Nothing in this section or in this act is intended to restore in whole or in part the civil rights of any inmate. No inmate compensated under this act shall be considered an employee of the state or the Board of Corrections, *nor shall any inmate come within any of the provisions of the Workmen's Compensation Laws, or be entitled to any benefits thereunder whether on behalf of himself or any other person.*" (emphasis added).

It is therefore my conclusion that the pay scale allowed convicts on any work project is within the discretion of the Board of Corrections, with the exception of instances when the convicts are working on state highways pursuant to sections 40-2202 and 40-2203, *Idaho Code.*

The Supreme Court of Idaho held in *Shain* v. *Idaho State Penitentiary,* (1955) 77 Idaho 292 that " . . . rewards to the prisoner are a matter of grace and are at the discretion of the Board of Corrections. They are not wages paid by the state to the prisoner giving rise to the relationship of employer and employee." The provisions of Workmen's Compensation laws are therefore not intended for the benefit of state penitentiary inmates.

Pursuant to the terms of section 54-1902, *Idaho Code,* no person may act as a public works contractor without first obtaining a license from the state. Section 1901 of that Title defines a "Public Works Contractor" as any person who contracts with the State of Idaho, among others, for "public works construction". "Public Works Construction" is defined in subsection (C) (3) of section 1901 as "all work in connection with any structure now built, being built, or hereafter built, for the support, shelter, and enclosure of persons . . . requiring in its construction the use of more than two unrelated building trades or crafts." Section 54-1903 provides that the Act shall not apply to "an authorized representative of the . . . State of Idaho . . ." section 54-1903 (a). The legislature empowered the director of the Division of Public Works to "have charge of and supervision of the construction . . . of any and all buildings, improvements of public works of the state of Idaho . . ." section 67-5711, *Idaho Code.* Therefore, if the director of the Division of Public Works chose to exercise the authority thus granted, no Public Works Contractor's License would be required.

No exception has been provided, however, for compliance with the bond requirement of section 54-1926, *Idaho Code.* This statute requires the posting of two bonds in the amount of no less than 50% of the contract amount. The first is for faithful performance of the contract and the second is for the protection of persons providing labor or materials to the project. The section by its terms applies to " . *any contract* for the construction, alteration or repair of any public building or public work or improvement of the State of Idaho." (emphasis added). It should be noted here that jails or penitentiary buildings are included in the definition of "*public buildings*". See 35 Words and Phrases, Permanent Edition, *Public Building.*

In addition to the above, anyone who worked on the installation of electrical or plumbing systems in the project would be required to comply with the licensing or permit provisions of sections 54-1002 and 39-2715, *Idaho Code*, respectively. The language of these statutes is broad and encompasses the installation of electricity or plumbing in any building excepting only in certain instances the homeowner who does his own work. The purpose of such statutes is to protect the future residents of the building from shoddy and dangerous installation. Exceptions to these statutes would not be in the public interest.

With the exception of sections 44-1005 and 20-413, *Idaho Code*, no present Idaho law addresses the question of the use of convict labor by a general contractor. Section 1005 allows the employment of a state prisoner within the state prison grounds " . . as provided in Section 3, Article XIII of the Constitution." That provision of the Idaho Constitution limited the use of convicts off the penitentiary grounds to public works under the direct control of the state. It should be noted here that this section of the Constitution has since been repealed. Section 20-413 empowers the Correctional Industries Commission to employ state prison inmates for services to "any public institutions or agencies of the state or any political subdivision thereof ". The statute also allows the commission to utilize inmate labor to render services to federal departments, agencies or corporations. This section appears to modify somewhat the terms of

an earlier section, section 20-402, *Idaho Code,* which was repealed in 1974. The earlier statute forbade the contracting or arrangement with private persons for the labor of state prison inmates. The present section 20-413 makes a somewhat more liberal allowance to benefit other federal, state and local entities. It is my opinion that the legislature has expressed its intent to disapprove of the leasing or hiring out of convict labor to private individuals. This position is further supported by the trend in modern law and the fact that many other states and the federal government have abolished the practice. 60 AmJur 2d, *Penal and Correctional Institutions,* section 39.

In summary, it is my opinion based upon the above analysis that although the Board of Corrections may contract with the State to build the penitentiary dormitory in question, it must participate in the bid procedures required in section 67-5711, *Idaho Code.* If the contract is awarded to the Board of Corrections and inmate labor is used on the project under the direct supervision of an authorized representative of the State, no Public Works Contractor's License will be required. However, the Board will have to comply with other statutory requirements including the filing of both a performance bond and a payment bond and the licensing of any persons installing electrical or plumbing systems in the proposed facility.

Although no Idaho law expressly forbids the hiring out or leasing of convict labor, historical abuses of the practice and the intent of the legislature expressed in sections 44-1005, and 20-413, *Idaho Code*, lead me to conclude that the practice is not permissible in Idaho.

AUTHORITIES CONSIDERED:

1. *Idaho Constitution*, § 3, Article XIII (repealed).

2. *Idaho Code*, § 65-5711; §§ 20-245, 20-413, 20-412; § 20-402 (repealed); §§ 40-2202 and 40-2203; §§ 54-1901, 54-1902, 54-1903, and 54-1926; § 54-1002; § 39-2715; and § 44-1005.

3. *Florek* v. *Sparks Flying Service, Inc.* (S.Ct. Idaho 1961), 83 Idaho 160.

4. *Shain* v. *Idaho State Penitentiary,* (S.Ct. Idaho 1955), 77 Idaho 292.

5. 1A *Statutory Construction*, Repealing Acts, § 23.09 and § 23.10.

6. 35 *Words* and *Phrases,* Permanent Edition, *Public Buildings.*

7. 60 AmJur 2d, *Penal and Correctional Institutions,* § 39.

DATED this 24th day of January, 1978.

ATTORNEY GENERAL
State of Idaho

WAYNE L. KIDWELL

ANALYSIS BY:

ROBERT M. MacCONNELL
Deputy Attorney General

RMM/dm

cc: Idaho Supreme Court
Supreme Court Law Library
Idaho State Library

ATTORNEY GENERAL OPINION NO. 78-3

TO: WILSON KELLOGG, DIRECTOR
Idaho Department of Agriculture
4696 Overland Road
P. O. Box 790
Boise, Idaho 83701

Per Request for Attorney General Opinion

QUESTION PRESENTED:

Should interest from the Rural Rehabilitation Loan Fund revert to that fund or should it be paid into the General Fund.

CONCLUSION:

Chapter 14, Title 57, *Idaho Code*, known as the Idaho Rural Rehabilitation Act is silent as to the investment and accompanying income of such funds. As a result, the State Treasurer is not required to invest these funds, thereby mooting the question since no income exists.

ANALYSIS:

Rural rehabilitation funds flow to the State of Idaho from the federal government under Public Law 499, known as the Rural Rehabilitation Corporation Trust Liquidation Act. This Act, in summary, states that the assets and income from funds as forwarded to the states will be used only for such rural rehabilitation purposes. It appears from the language of this law that it was the intent of the United States Congress to retain assets and income, from such funds forwarded to the states, specifically in rural rehabilitation funds established by the states. Unfortunately, the Idaho Rural Rehabilitation Act, found at Chapter 14, Title 57, *Idaho Code*, does not address the question of investment or interest, as is normally found in such agency asset funds created by the State. It therefore provides no authority or direction to the State Treasurer for such investment or for the use of income which might be derived therefrom.

In pertinent part at §57-1404, *Idaho Code*, the Rural Rehabilitation Act says that these funds are to be deposited by the Director of the Department of Agriculture "in the state treasury in a special fund for obligation and expenditure by the director for the purposes of §57-1403, *Idaho Code* or for use by the director for such of the rural rehabilitation purposes permissible under the charter of the now dissolved Idaho Rural Rehabilitation Corporation as may from time to time be agreed upon by the director and the Secretary of Agriculture of the United States." The statute closes by saying that such is subject to the applicable provisions of Public Law 499. This is the only section in this Act dealing with the State Treasurer and directing that funds be deposited with that office. No mention is made of investment of the fund by the State Treasurer.

In your letter you state that interest from the fund is being paid into the State General Fund pursuant to §67-1210, *Idaho Code*. This is a misconception. To explain, please consider the three financial structures of the State: (1) the fund structure; (2) the banking structure; and (3) the investment structure. Funds flowing into the fund structure of the State, such as the Rural Rehabilitation Fund, are credited to that specific fund and transferred into the banking

structure of the State by deposit. Unless the particular fund transferred requires investment by statute, it loses its identity in the total of State deposits. If an investment is required by statute it flows into the investment structure of the State and retains its identity for that purpose, with income being paid back into that fund.

As for funds such as the Rural Rehabilitation Fund, the identity is lost in the banking structure and becomes a part of the moneys which may or may not be considered "idle money" under §67-1210. Idle moneys in that section are defined as "the balance of cash and other evidences of indebtedness which are accepted by banks as cash in the ordinary course of business, in demand deposit accounts, after taking into consideration all deposits and withdrawals, on a daily basis."

In applying this definition, rural rehabilitation funds are deposited in State demand deposit accounts along with a volume of other State deposits. They then lose their identity in those deposits. Taking into consideration all deposits and withdrawals on a daily basis, the balance is then considered idle money and is invested as allowed under § 67-1210. The interest is not identified as going to any particular fund making up the deposits and therefore by §67-1210 is required to be paid into the General Fund.

It should also be noted that although the implication is made in Public Law 499 that the intent was to retain the assets and income from such funds specifically for rural rehabilitation purposes, such an intent, to become effective on the states, would require specific legislation for such investments and accompanying income.

It is the suggestion of this office that the Department of Agriculture propose legislation amending the Rural Rehabilitation Act to require the investment of such funds and the return of income from these investments to that fund. Otherwise investments cannot be made by the Treasurer for the benefit of the Rural Rehabilitation Fund.

AUTHORITIES CONSIDERED:

1. *Idaho Code*, §57-1403, 57-1404.

2. *Idaho Code*, §67-1210.

3. Public Law 499

DATED this 26th day of January, 1978.

ATTORNEY GENERAL
State of Idaho

WAYNE L. KIDWELL

ANALYSIS BY:

BILL F. PAYNE
Deputy Attorney General
State of Idaho

WLK:BFP:lb

cc: Idaho State Library
Idaho Supreme Court
Idaho Supreme Court Library

ATTORNEY GENERAL OPINION NO. 78-4

TO: CLYDE KOONTZ
Legislative Auditor
Room 114
Statehouse Mail

Per Request for Attorney General Opinion.

QUESTIONS PRESENTED:

(1) What is the meaning of the following phrase which is contained in Section 2, Article 8 of the Idaho Constitution: "the credit of the state shall not, in any manner, be given, or loaned to, or in aid of any individual, association, municipality or corporation; . . ."?

(2) Would the sale of an item or the providing of service and the subsequent billing at the end of the month violate Section 2, Article 8 of the Idaho Constitution?

(3) Would the sale of an item or the providing of service and the subsequent billing at the end of the month violate Section 2, Article 8 of the Idaho Constitution if the transaction is secured by a bond, real estate, or similar item of value?

CONCLUSION:

Article 8, Section 2 of the Idaho Constitution forbids the loaning of the state's credit. The term "credit," as used in this section, means the imposition of a new financial liability upon the State. The sale of an item or the providing of service and the subsequent billing at the end of the month does not impose a new financial liability upon the State, regardless of whether the transaction is secured or unsecured, and thus does not come within the prohibition of Article 8, Section 2, of the Idaho Constitution.

ANALYSIS:

We must look at history to understand the meaning of Article 8, Section 2 of the Idaho Constitution. In the early 19th century, it was the practice of states to encourage the building of railroads, permitting the state to purchase stock in railroad corporations, to issue bonds or lend credit in aid of railroads or to make outright donations to them. A number of railroads became insolvent, caused either by economic conditions or fraud, and states found themselves heavily indebted. As a result of this, states began adopting constitutional provisions prohibiting stock subscriptions or other forms of aid to corporations. The evil to be prevented by such a constitutional provision was the state's participation in a private corporation or association whereby the state would incur pecuniary expense or liability. Annot., 152 ALR 495 (1944).

The writers of the Idaho Constitution wished to see the State of Idaho operate on a pay-as-you-go basis. They did not wish the State to borrow funds for its operations. Article 8, Section 2 was written for the purpose of prohibiting state officials from creating a monetary liability upon the State when funds had not been appropriated for the expenditures. *Dexter Horton Trust & Savings Bank*

v. *Clearwater County*, 235 F. 743 (1916); *County of Ada* v. *Bullen Bridge Co.*, 5 Idaho 79, 47 P. 818 (1896).

The Idaho Supreme Court, in the case of *D. F. Engelking* v. *Investment Board*, 93 Idaho 217, 458 P.2d 213 (1969), stated that the loaning of credit clause of the Idaho Constitution, Article 8, Section 2, prohibits only the loaning of the state's credit and does not prohibit the loaning of state funds. "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." 93 Idaho at 221-222. This position was again adopted by the Idaho Supreme Court in *Nelson* v. *Marshall,* 94 Idaho 726, 497 P. 2d 47 (1972).

It is necessary to distinguish between the State operating on credit and businesses which deal with the State operating on credit. In the case at hand where the State provides goods or services to private businesses and bills the businesses on a periodic basis, the State is not giving or loaning its credit to aid the individual businesses. No financial liability is created on the part of the State of Idaho, rather, financial liability on the part of the private businesses is created. Thus, the practice of allowing individuals and companies to receive items such as specifications or maps throughout a month and then be billed at the end of the month does not violate Article 8, Section 2 of the Idaho Constitution.

AUTHORITIES CONSIDERED:

1. Constitution of the State of Idaho, Article 8, Section 2.

2. *Nelson* v. *Marshall*, 94 Idaho 726, 497 P.2d 47 (1972).

3. *D. F. Engelking* v. *Investment Board,* 93 Idaho 217, 458 P.2d 213 (1969).

4. *County of Ada* v. *Bullen Bridge Co.,* 5 Idaho 79, 47 P. 818 (1896).

5. *Dexter Horton Trust & Savings Bank* v. *Clearwater County,* 235 F. 743 (1916).

6. Annot., 152 ALR 495 (1944).

DATED This 2nd day of February, 1978.

ATTORNEY GENERAL FOR IDAHO

WAYNE L. KIDWELL

ANALYSIS BY:

MYRNA A. I. STAHMAN
Assistant Attorney General

cc: Idaho Supreme Court
Supreme Court Law Library
Idaho State Library

ATTORNEY GENERAL OPINION NO. 78-5

TO: REPRESENTATIVE NOY E. BRACKETT
House of Representatives
State of Idaho
Statehouse Mail

Per Request for Attorney General Opinion

QUESTION PRESENTED:

You have requested that we advise you as to the validity of RS 3090. One of the proposed provisions of this bill would provide for three types of registration fees for motorcycles — off-road registration, dual purpose registration and road use only registration, and it would provide that a percentage of the funds from each type of registration would go to the State Highway Fund or Motor Vehicle Account, and that a percentage of the funds would go to a motorcycle recreation account which would be different than the Highway or Motor Vehicle account.

CONCLUSION:

We believe that the proposed §49-2711, *Idaho Code*, would violate Art. VII, § 17, Idaho Constitution which provides that the registration for motor vehicles in excess of the necessary costs of collection and administration shall be used exclusively for the construction, repair, maintenance and traffic supervision of the public highways of the State and that no part of such revenues shall by transfer of funds or otherwise be diverted to any other purpose whatsoever.

ANALYSIS:

The proposed §49-2711 reads as follows:

> "CREATION OF ACCOUNT — DISTRIBUTION OF FEES. (1) There is hereby created in the dedicated fund the motorcycle recreation account."
>
> (2) The registration fees collected by each county shall be allocated as follows:
> (a) 'Off-road use only.' Five percent (5%) shall be retained by the county for deposit in the county general fund, and ninety-five percent (95%) shall be remitted to the state treasurer. Of this amount, the state treasurer shall deposit fifteen percent (15%) in the motor vehicle account, and eighty-five percent (85%) in the motorcycle recreation account.
> (b) 'Dual purpose.' Five percent (5%) shall be retained by the county for deposit in the county general fund, and ninety-five percent (95%) remitted to the state treasurer. Of this amount, the state treasurer shall deposit fifty percent (50%) in the state highway account, and fifty percent (50%) in the motorcycle recreation account.
> (c) 'Road use only.' Five percent (5%) shall be retained by the county for deposit in the county general fund, and ninety-five percent (95%) shall be remitted to the state treasurer for deposit in the state highway account.

(3) All moneys shall be transmitted to the state treasurer on or before the 10th day of each month."

Art. VII, §17, Idaho Constitution provides in pertinent part that

". . . the proceeds from the imposition of any tax on . . . motor vehicle fuels sold or used to propel motor vehicles . . . and from any tax or fee for the registration of motor vehicles, in excess of the necessary costs of collection and administration . . . shall be used exclusively for the construction, repair, maintenance and traffic supervision of the public highways of this state . . . and no part of such revenues shall, by transfer of funds or otherwise, be diverted to any other purposes whatsoever."

There are a number of Idaho cases which have construed this section of the Constitution, such as *State ex rel Moon v. Jonasson*, 78 Idaho 205, 299 P.2d 755, *Rich v. Williams,* 81 Idaho 311, 341 P.2d 432; *State ex rel Rich v. Idaho Power Co.,* 81 Idaho 487, 346 P.2d 596, *Williams v. Swenson,* 93 Idaho 542, 467 P.2d 1, and *Bd. of County Commissioners of Lemhi County v. Swenson,* 80 Idaho 198, 327 P.2d 361. All of these cases indicate that funds arising from taxes on registration of motor vehicles and from taxes on motor fuels must be used exclusively for the purpose stated in the above State constitutional provision.

AUTHORITIES CONSIDERED:

1. *State ex rel Moon v. Jonasson,* 78 Idaho 205, 299 P.2d 755

2. *Rich v. Williams*, 81 Idaho 311, 341 P.2d 432

3. *State ex rel Rich v. Idaho Power Co.,* 81 Idaho 487, 346 P.2d P.2d 596

4. *Williams v. Swenson,* 93 Idaho 542, 467 P.2d 1

5. *Bd. of County Commissioners of Lemhi County v. Swenson,* 80 Idaho 198, 327 P.2d 361

6. Art. VII, §17, Idaho Constitution

7. Proposed §49-2711, *Idaho Code*

DATED this 3rd day of February, 1978.

ATTORNEY GENERAL
State of Idaho

WAYNE L. KIDWELL

ANALYSIS BY:

WARREN FELTON
Deputy Attorney General
State of Idaho

WLK:WF:lb

cc: Idaho State Library
Idaho Supreme Court
Idaho Supreme Court Library

ATTORNEY GENERAL OPINION NO. 78-6

TO: Gordon Trombley
Director
State of Idaho
Department of Lands
Statehouse Mail

Per Request for Attorney General Opinion:

QUESTION PRESENTED:

Can the Land Board authorize competitive bidding for the awarding of oil and gas leases under existing statutes at Bear Lake?

CONCLUSION:

The State Board of Land Commissioners is authorized by statute to establish rules governing the issuance of oil and gas leases. Courts of law considering the question have concluded that in the absence of the express or implied prohibition a Board of Land Commissioners should be given broad discretion pursuant to rule making power. The State Board of Land Commissioners can promulgate a rule authorizing the competitive bidding for oil and gas leases.

ANALYSIS:

Idaho Code, Title 47, Chapter 8, concerning oil and gas leases on state and school lands, neither authorizes nor prohibits competitive bidding for oil and gas leases. The precise question, whether the State Board of Land Commissioners can change the pre-existing state policy of granting leases on a "first come first served" basis to a competitive bidding requirement through its rule making authority under section 47-802 has not been considered by the Idaho Supreme Court. It has been concluded that state land commissioners may adopt a procedure of competitive bidding in their discretion. 58 C.J.S. section 129, *Mines and Minerals,* p. 197. The basis for this conclusion is the decision by the Supreme Court of Wyoming, *Wyodak Chemical Co.* v. *Board of Land Commissioners of Wyoming,* 51 Wyoming 265, 65 P.2d 1103 (1939). In that case the court considered the renewal of a lease for the exploration of mineral rights. The question was whether the statutorily required preferential right of renewal meant renewal upon the identical terms of the previous lease or upon new terms as determined by the land commissioners. The Wyoming Court concluded that in the absense of express directives from the legislature, the exact terms were left open to be decided within the discretion of the land commissioners. The court stated:

> This court is not authorized to fix the conditions which the legislature has not fixed; that must be left to the board which under the constitution and the laws has the management of the lands of this state. Having the management, it [the board of land commissioners] necessarily has the right, insofar as not limited by the constitution and the statutes, to use its own discretion as to the manner of leasing and the terms and conditions thereof.

The court held that there was nothing which would hinder the Board from selling the leasehold interest at auction.

In a similar case before the Idaho Supreme Court, *Allen* v. *Smylie*, 92 Idaho 846, 452 P. 2d 343 (1969) the court quoted the constitutional directive to the State Board of Land Commissioners, " . . to provide for . rental of all the lands . . . under such regulations as may be prescribed by law, and in such manner as will secure the *maximum possible amount therefor.*" *Idaho Constitution*, Article 9, Section 8. The court stated:

> This enjoins a duty upon the board to lease for maximum return under procedural regulation of the legislature. The constitutional duty of the board is self-executing. Therefore, *if the legislature has not specified the procedure the board may adopt appropriate procedures to carry out its constitutional duties.*

The *Allen* case concerned terms of the lease rather than competitive bidding. Nevertheless, the case demonstrates the broad discretion afforded the state board of land commissioners in the leasing of mineral rights on state land. The Idaho Supreme Court concluded:

> In the absence of statutory prohibition, the board's determination of lease terms will not be disturbed by the court unless clearly discriminatory, capricious or unreasonable.

To authorize the competitive bidding for oil and gas leases would provide a procedure for securing the maximum possible return therefor.

Turning to the question of whether the land board may change its past policy of granting such leases upon a "first come first serve basis", the Supreme Court of Utah has ruled on a related question. That court has held that because the State Land Board had in the past followed the policy of granting oil and gas leases upon land after expiration of federal leases on a basis of a priority of filing, did not estop the board from requiring competitive bids for the lease in question. *Colman* v. *Utah State Land Board,* 17 Utah 2d 14, 403 P.2d 781 (1965). Another case which affirms the broad discretion of the land commissioner's rule making authority relating to oil and gas leases on state land is *Kelly* v. *Zamarello,* 486 P.2d 906 (Alaska 1971).

The cases cited above established the principle that in the absence of an express or implied prohibition the State Board of Land Commissioners may, within its discretion, promulgate an administrative rule authorizing the competitive bidding for oil and gas leases on state lands. Such rule making should follow the administrative procedure as set forth in *Idaho Code*, Title 67, Chapter 52.

AUTHORITIES CONSIDERED:

1. *Idaho Code*, Title 47, Chapter 8.

2. 58 C.J.S., *Mines and Minerals,* §129, p. 197.

3. *Wyodak Chemical Co.* vs. *Board of Land Commissioners of Wyoming,* 51 Wyoming 265, 65 P.2d 1103 (1939).

4. *Allen* v. *Smylie*, 92 Idaho 846, 452 P.2d 343 (1969).

5. *Idaho Constitution,* Article 9, Section 8.

6. *Colman* v. *Utah State Land Board*, 17 Utah 2d 14, 403 P.2d 781 (1965).

7. *Kelly* v. *Zamarello,* 486 P.2d 906 (Alaska 1971).

8. *Idaho Code*, Title 67, Chapter 52.

DATED this 6th day of February, 1978.

ATTORNEY GENERAL
State of Idaho

WAYNE L. KIDWELL

ANALYSIS BY:

L. MARK RIDDOCH
Assistant Attorney General
Natural Resources Division

cc: Idaho Supreme Court
Supreme Court Law Library
Idaho State Library

ATTORNEY GENERAL OPINION NO. 78-7

TO: Representative Lyman Winchester
State of Idaho
House of Representatives
Statehouse Mail

Per Request for Attorney General Opinion:

QUESTION PRESENTED:

Would the repeal of Chapter 65, Title 67, *Idaho Code* void comprehensive plans, zoning ordinances, subdivision ordinances, or any other ordinance adopted pursuant to this chapter?

CONCLUSION:

A repeal of Chapter 65, Title 67 would automatically repeal, and thus void all ordinances adopted pursuant to that chapter.

ANALYSIS:

Chapter 65, Title 67, *Idaho Code*, commonly know as the Local Planning Act of 1975, *grants* to the cities and counties the power and authority to engage in the planning process. Pursuant to this Act, these governing boards are required to adopt comprehensive plans, zoning ordinances and subdivision ordinances for their communities. The Act also requires that each governing board appoint itself or by *ordinance* appoint a planning and zoning commission to exercise the powers conferred by this Act.

The comprehensive plans are prepared, and after public input and recommendations to the governing board, are then adopted either by ordinance or resolution. The majority of these plans, if not all of them, have been adopted by resolution as authorized by §67-6509 (c). Once the plan has been adopted, a zoning ordinance is prepared based on that plan, adopted by *ordinance* only after the hearing process set out in §67-6509 (a) and (b). The Act also requires that each governing board adopt a *subdivision ordinance.* A separate ordinance may also be enacted to provide standards for items listed in §67-6518, *Idaho Code*. All these ordinances are adopted pursuant to the enabling legislation, Chapter 65, Title 67, *Idaho Code*.

The general rule on the *repeal of such enabling legislation* is set out in 6 McQuillan, Municipal Corporations, §21.44 at p. 295 (1969):

> The repeal of a statute under which an ordinance was enacted impliedly repeals the ordinance,

This general rule is also stated in 4 Shephards Ordinance Law Annotations, Repeal of Ordinances §16 p. 365; Sutherland, *Statutory Construction* §23.18; *Subscribers at Casualty Reciprocal Exchange* v. *Sims* (Okla. 1956) 293 P.2d 578.

A repeal of Chapter 65, Title 67, *Idaho Code*, would repeal the enabling legislation allowing governing boards to engage in the planning process. Therefore in accordance with the general rule set out above, such a *repeal* would also repeal *all ordinances* enacted pursuant to that Chapter.

AUTHORITIES CONSIDERED:

1. Chapter 65, Title 67, *Idaho Code*.

2. 6 McQuillan, Municipal Corporations, §21.44 at p. 295 (1969).

3. 4 Shephards Ordinance Law Annotations, Repeal of Ordinances, §16 p. 365.

4. Sutherland, *Statutory Construction,* §23.18.

5. *Subscribers at Casualty Reciprocal Exchange* v. *Sims* (Okla. 1956) 293 P.2d 578.

DATED this 9th day of February, 1978.

ATTORNEY GENERAL
State of Idaho

WAYNE L. KIDWELL

ANALYSIS BY:

URSULA KETTLEWELL
Assistant Attorney General

cc: Idaho Supreme Court
Supreme Court Law Library
Idaho State Library

ATTORNEY GENERAL OPINION NO. 78-8

TO: B. R. Brown, Director
Department of Administration
Building Mail

Per Request for an Attorney General opinion.

QUESTIONS PRESENTED:

1. Can state employees participate in the bidding at state held public auctions?

2. Can a state employee participate if he either belongs to the agencies involved in selling the materials or if the state employee is helping to conduct the sale?

3. If state employees can participate in these sales, can they do so while on state time?

CONCLUSIONS:

1. A state employee is prohibited from purchasing state property by bidding at state held public auctions if the sale resulting from the auction is made by, through or on behalf of the Department in which he is an employee. Other state employees may participate in such auctions.

2. A state employee is prohibited from purchasing state property by bidding at state held public auctions if he either works for the agency (department) involved in selling the materials or if the state employee is helping to conduct the sale.

3. It is improper for a state employee to participate as a bidder at state held public auctions *while on state time* even though participation is not prohibited by §67-5726, *Idaho Code*.

ANALYSIS:

The primary authority for the first two conclusions is §67-5726 of the *Idaho Code* which provides in pertinent part that:

> . . . *No* member of the legislature or any officer or *employee* of any branch of *the state* government *shall* directly *himself*, or by any other person in trust for him or for his use or benefit or on his account, *undertake, execute, hold or enjoy,* in whole or in part, *any contract* or agreement *made or entered into by or on behalf of the state of Idaho, if made by, through or on behalf* of the *department in which he is an* officer or *employee;* or if made by, through, or on behalf of any other department unless the same are made after competitive bids. (Emphasis added).

In construing the above language, it is clear that by purchasing state property by bidding successfully at a state held public auction, an employee would be undertaking, executing, holding or enjoying a contract made or entered into by or on the behalf of the state of Idaho. It has been recognized generally that a

contract results from bidding successfully at an auction. The bid constitutes an offer and the acceptance of the offer (bid) at an auction is signified by, and is the result of, the fall of the auctioneer's hammer or by the auctioneer's announcement "sold" Upon such an acceptance, a contract exists between the state and successful bidder. Corbin, *Contracts,* §§24 and 108 (West 1963); 7 C.J.S., Auctions and Auctioneers, §8, P. 1263. The Idaho Supreme Court specifically adopted this common characterization of a public auction in *State* v. *Clinger,* 72 Idaho 222, 238 p.2d 1145 (1951) by holding that the acceptance of a bid at public sale by the auctioneer conducting the sale gave rise to a contract between the state or its relevant subdivision and the successful bidder.

Moreover, it is apparent that the legislature in adopting §67-5726, *Idaho Code*, had in mind, and intended to include within the relevant prohibitions of the section, this very form of contract as well as other forms. Not only are the general terms of "contract" and "agreement" used without qualification but the legislature expressly excluded contracts resulting from competitive bidding under circumstances not posed by your request for Attorney General opinion by including within §67-5726, *Idaho Code* the language that:

> . . . ; or made by, through or on behalf of any other department unless the same are made after competitive bids.

The qualifying language — "unless . . . made after competitive bids" — modifies only the phrase or clause following the semicolon based upon normal rules of statutory construction and assumed legislative intent. With reference to rules of statutory construction, punctuation may be resorted to if legislative intent is uncertain and if punctuation affords some indication of intention. Sutherland, *Statutory Construction,* §47.15. The use of a semicolon suggests an intent to distinguish between the language which precedes and the language which follows the semicolon. Moreover, qualifying words, where no contrary intention appears, refer solely to the last antecedent, which consists of "the last word, phrase, or clause that can be made an antecedent without impairing the meaning of the sentence". *In re Kurtzman's Estate*, 396 P.2d 786, 790 (Wash. 1964). See also Sutherland, *Statutory Construction,* §47.33. This second rule of construction even more clearly supports the interpretation given for §67-5726, *Idaho Code*.

The qualifying language is necessary (and is afforded reasonable meaning) only if the terms "contract or agreement" (as used in the portion of §67-5726, *Idaho Code*, preceding the semicolon) are construed to include all contracts and agreements including those resulting from competitive bidding. Moreover, the usual rule is that where there is an express exception or proviso, it comprises the only exception or limitation and no others will be implied. Sutherland, *Statutory Construction,* §47.33. Thus, purchases at auctions are not excepted or excluded from the relevant prohibition.

Apparently the legislature intended to remove any possible appearance of conflicts of interest, self-dealing or other impropriety with regard to state held public auctions. Such an appearance is possible where there is participation by employees of departments in any way involved or interested in an auction. Such an appearance was considered unlikely where participation is limited to employees of other departments participating successfully in competitive bidding. Thus, their participation was not prohibited in the context of competitive bidding only.

The scope of the prohibition *does* include employees of the Department of Administration with regard to the many auctions administered by its Division of Purchasing. The auction and resulting contract would be a contract "made by" or at least "through" the Department based upon the common meaning of these terms. The prohibition also includes employees of the department on the behalf of which an auction is conducted.

A state employee helping conduct an auction not only falls within the prohibition of §67-5726, *Idaho Code*, but, depending upon the *specific* duties conducted, may be precluded from bidding successfully at an auction by Executive Order No. 76-5 entitled "Setting Forth a Code of Ethical Conduct for Employees of the Executive Department of Idaho State Government". The Executive Order in pertinent part provides:

> State employees must avoid self-dealing in any purchase or sale made in their official capacity.

An employee helping conduct an auction could be construed as being involved in a sale made in his or her official capacity. The only ambiguity is whether in the context of an auction there is "self dealing". That this Executive Order prohibition should be broadly construed is evident from the language of the Executive Order, and, in particular, from the General Purpose section of the document. For example, the General Purpose section in part provides:

> It shall be a paramount concern of state employees that they engage in no conduct which might reasonably be interpreted by the people of Idaho as tending to influence or adversely affect the performance of their official duties.

Note should also be made of the following: (1) violations of §67-5726, *Idaho Code*, prohibitions discussed in this opinion constitute a misdemeanor, §67-5734 (1), *Idaho Code* and (2) §67-5726, *Idaho Code*, precludes an employee from circumventing the section and its prohibitions by asking another person in trust for him or for his use and benefit or on his account to undertake, execute, hold or enjoy, in whole or in part, any contract.

The third issue raised by your request is more difficult to answer with a degree of specificity. This is so due to the almost unlimited variations in state working conditions and the absence of Idaho case law, statutes or Personnel Commission Regulations covering the relevant problem specifically.

Nevertheless, if the question is construed to cover those state employees who have set working hours and who have *not* taken comp. time, a leave of absence or a normal, authorized break (e.g., coffee and lunch breaks) to attend an auction, attendance of or participation in a state held public auction for personal purposes would be improper. This is so even though bidding is not otherwise prohibited by statute or regulation. First, attendance or participation at an auction for personal purposes and while on state time is the antithesis of employment. In other words, there is an implied if not explicit agreement that an employee has worked the hours and performed the duties for which he is employed and paid. Of course, minor deviations do occur. The greater the time devoted to personal matters, the greater the problem for the state and more reprehensible the conduct. This leads to the second rationale.

Secondly, attendance at a state held auction for personal purposes while on state time is comparable to any other form of short changing the state by devoting working time to personal matters. Such an incident of attendance in combination with other circumstances might well result in one or more bases for discipline under rule 19-3.1 of the Idaho Personnel Commission. This is true particularly with reference to the subsections of this Rule covering failure to perform duties (Rule 19-3.1 (A)); inefficiency, incompetency or negligence (Rule 19-3.1 (B)); insubordination or conduct unbecoming a state employee or conduct detrimental to the good order and discipline in the department (Rule 19-3.1 (E)); an habitual pattern of failure to report for duty at the assigned time and place (Rule 19-3.1 (K)). *Consolidated Statutes and Rules and Regulations, Idaho Personnel Commission.* See also, §67-5309 (n), *Idaho Code*. Thus, attending state auctions as above described would be improper because it, in combination with similar conduct, might constitute a basis for discipline.

Lastly, it is quite possible that employees attending auctions on state time would be in violation of rules and regulations promulgated by their own department. For example, the Personnel Policy Manual of the Department of Transportation has detailed provisions which cover in part the issues raised by your letter.

Due to the many possible variations in state working conditions, the absence of specific rules covering the particular concern and problems inherent in ascertaining whether or not an employee is on state rather than personal time, consideration should perhaps be given to reducing the assumed problems by conducting most state held auctions during evenings or on weekends. This change in scheduling practice conceivably would also promote a more favorable attendance by the general public. Consideration also should be given to raising this problem through administrative channels to assure that the subject of performance of personal business by state employees while on state time is covered more adequately and expressly by Executive Order, Personnel Commission Rules and Regulations and/or departmental rules.

AUTHORITIES CONSIDERED:

1. *Idaho Code*, §67-5309 (n).

2. *Idaho Code*, §67-5726.

3. *Idaho Code*, §67-5734 (l).

4. *State* v. *Clinger*, 72 Idaho 222, 238 P.2d 1145 (1951).

5. *In re Kurtzman's Estate*,396 P.2d 786, 790 (Wash. 1964).

6. *Consolidated Statutes and Rules and Regulations, Idaho Personnel Commission,* Rule 19-3.1 (A), Rule 19-3.1 (B), Rule 19-3.1 (E) and Rule 19-3.1 (K).

7. Executive Order No. 76-5

8. C.J.S., Auctions and Auctioneers, §8, P. 1263.

9. Corbin, *Contracts,* §§24 and 108 (West 1963).

10. Sutherland, *Statutory Construction,* §§47.15 and 47.33.

DATED This 15th day of February, 1978.

ATTORNEY GENERAL OF IDAHO

WAYNE L. KIDWELL

ANALYSIS BY:

LARRY K. HARVEY
Special Assistant to the
Attorney General of Idaho

WLK:LKH:lp

cc: Idaho Supreme Court
Idaho Supreme Court Law Library
Idaho State Library

ATTORNEY GENERAL OPINION NO. 78-9

TO: Darrell V. Manning
Director
Idaho Transportation Department
3311 State Street
Boise, Idaho 83720

Per Request for Attorney General Opinion.

QUESTION PRESENTED:

"We would like an Attorney General's opinion with respect to the collection of use fees on motor vehicles used by construction companies."

"Some of these companies lease the trucks they use from companies or individuals. They sometimes refuse to pay the use fees due under §49-127 (e) and §49-127 (f) of the Idaho Code on the ground that they are not the "owner" under §49-128 (b) of the code. The lessor, in turn, refuses to pay the use fees on the ground that the lessee is the "owner" under §49-101 (q) Idaho Code. Who is the responsible party in these cases?"

CONCLUSION:

The Idaho Transportation Department may hold lessee construction companies legally responsible for license, registration and use fees on leased vehicles operated upon Idaho highways.

Title 49, Section 101, subsection (q), Idaho Code, provides that legal responsibility of "owner" of a motor vehicle may rest in one other than title holder.

ANALYSIS:

The Legislature may in the exercise of the police power enact reasonable regulations requiring the licensing or registration of motor vehicles.

Those regulations may include private motor carriers of property, as well as public carriers of persons or property. To effect regulation, the State may exact a fee or impose a tax.

The State may impose a fee or tax for revenue purposes, as well, in which case, it is not limited to the cost of regulation.

The State may also impose a tax on motor vehicles to construct and maintain public highways.

The Idaho Legislature has chosen to regulate motor vehicles operating upon highways of Idaho by enactment of Title 49, Idaho Code.

This law requires operators of motor vehicles, trailers or semitrailers to meet registration, license and use fees, depending upon class of vehicle, gross weight and mileage traveled upon Idaho highways.

The applicable law regulating construction companies, and to which they do not take issue, is Title 49, Section 127, subsection (e), which reads in part as follows:

> "An applicant for registration of a commercial vehicle, a non-commercial vehicle . hereof shall set forth the maximum gross weight of such vehicle or combination of vehicles and the applicant shall pay any annual registration fees and any annual license fees on trailers and semitrailers required herein at the time he makes application for registration; provided, no part of any such registration or license fees shall be subject to refund. Said use fee payment of which is herein required, shall be computed "according to the schedule . . . on the mileage operated over the highways of the State of Idaho and the owner of any vehicle against which a use fee is assessed, shall at the time of making his next quarterly report pay said use fee, if any, for the three (3) calendar months immediately prior thereto. In determining the mileage subject to such use fee, payment of which is required . ., there shall be deducted the miles traveled on roadways maintained with private funds by agreement with the public agency or agencies having jurisdiction over the same; provided, that in no event shall the total money credited to the owner for such mileage exceed the actual cost of maintenance expended by him."

and subsection (f):

> "The license, registration and use fees as hereinbefore set forth shall not be applicable to utility trailers hereby defined as trailers or semi-trailers whose 'light' or 'unladen weight' is three thousand (3,000) pounds or less, designed primarily to be drawn behind passenger cars or pickup trucks for domestic and utility purposes, nor shall said fees be applicable to rental utility trailers hereby defined as utility trailers offered for hire to operators of private motor vehicles. The registration fees for utility trailers and rental utility trailers shall be in accordance with the following schedule:

Light or Unladen Weight (Pounds)	Annual Registration Fee Utility Trailers	Rental Utility Trailers
0-1,000	$2.50	$5.00
1001-2,000	5.00	10.00
2001-3,000	8.00	15.00"

These two sections of the law are read in conjunction with Title 49, Section 128, subsection (b), Idaho Code, which states:

> "Every owner whose registration fees are computed under subsection (e) or (f) of section 49-127, Idaho Code, shall maintain records and purchase documents to substantiate and justify the use of such schedule and shall permit the director or a duly authorized representative to inspect the same upon demand."

Together these statutes impose license registration and use fee obligations on "owners" of vehicles used upon the highways of Idaho.

Title 49, Section 101, subsection (q) defines "owner" as follows:

> "The term 'owner' shall mean the person legally responsible for the operation of a vehicle upon the highways of the state of Idaho, whether as owner, lessee or otherwise."

It is with this definition the construction companies take issue.

These companies contend "owner" has but one definition; the person or entity in whom legal title of a vehicle vests.

This view assumes that any incidence of tax is on the right of ownership and thus a property tax.

While motor vehicles may be taxed as property, the charge made relevant to licensing and registration of motor vehicles is generally a license fee or tax for the privilege of using the public highways rather than a property tax.

Title 49, Section 27 and Section 28, Idaho Code, predicate license, registration and use fee upon vehicle class and gross weight of a vehicle in relation to miles traveled on Idaho highways not upon legal title.

A motor vehicle license or registration fee or tax in the nature of a revenue measure may properly be graduated according to the weight of the vehicle without rendering the fee or tax unconstitutional. A statute providing for such a fee or tax is not based on unreasonable classifications, since the differences between the classes has a fair and substantial relation to the object of the legislation; regulation based upon the wear and tear on roads by licensees.

It is compensation for this wear and tear to which Idaho roads are being subjected that is the object of Title 49, Section 27 and Section 28, Idaho Code.

The motor vehicle, which in this instance is inflicting the wear and tear, is operated and controlled exclusively by lessee construction companies.

Title 49, Section 101, subsection (q), Idaho Code, clearly contemplates this situation wherein it defines "owner" " . the person legally responsible for the operation of a vehicle upon the highways of the state of Idaho, *whether as owner, lessee or otherwise.*" (Emphasis ours).

If the Legislature had intended to establish liability for use fees only upon title holders, it could have so said. It did not. The plain meaning of this statute indicates legal responsibility may be placed upon one other than the title holder, namely, the lessee.

In today's economy it is reasonable to say a larger percentage of motor vehicles are not owned by their operators, but are leased.

The exact cargo, weight and miles traveled upon Idaho highways is generally not available from the lessor.

To require this information always be maintained by the lessor for license, registration and use fee responsibility would be extremely burdensome and could prevent effective regulation of motor vehicles. This was not the apparent intent of the Legislature.

AUTHORITIES CONSIDERED:

1. Idaho Code, §49-101 (q)

2. Idaho Code, §49-127 (e) (f)

3. Idaho Code, §49-128 (b)

4. Re. Schuler, 167 Cal. 282, 139 P. 685 (1914)

5. Continental Baking Co. v. Wooding, 286 U.S. 352, 52 S. Ct. 595, 81 ALR 1402 (1932)

6. Re. Kessler, 26 Idaho 764, 146 P. 113 (1915)

7. Carter v. State Tax Commission, 98 Utah 96, 96 P. 2d. 727 (1939)

8. 7 Am. Jur. 2d. 362, et seq.

DATED this 22nd day of February, 1978.

ATTORNEY GENERAL
STATE OF IDAHO

WAYNE L. KIDWELL

ANALYSIS BY:

JOHN ERIC SUTTON
Assistant Attorney General
State of Idaho

WLK/JES/vs

cc. Idaho State Library
Idaho Supreme Court
Idaho Supreme Court Library

ATTORNEY GENERAL OPINION NO. 78-10

TO: HONORABLE MONROE C. GOLLAHER
Director of the Department of Insurance
State Office Building
BUILDING MAIL

Per Request for Attorney General Opinion

QUESTION PRESENTED: Would a bank or other lending institution be transacting insurance as an insurer within the purview of *Idaho Code* §§41-102, 41-103 and 41-305 if for an additional consideration the lender entered into a "service contract" with a borrower upon issuing a loan for the purchase of a consumer product in which the lender promised to repair or replace the purchased consumer product due to specified internal defects or to reimburse the purchase money borrower for such repair or replacement?

CONCLUSION: Yes, a bank or other lending institution would be transacting insurance as an insurer within the purview of *Idaho Code* §§41-102, 41-103 and 41-305 if for an additional consideration the lender entered into a "service contract" with the borrower of a consumer product in which the lender promised to repair or replace the purchased consumer product due to specified internal defects or to reimburse the purchase money borrower for such repair or replacement.

ANALYSIS:

Idaho Code §41-102 provides:

> " *'Insurance' defined.* — 'Insurance' is a contract whereby one undertakes to indemnity another or pay or allow a specified or ascertainable amount or benefit upon determinable risk contingencies."
> *Idaho Code* §41-102.

Idaho Code §41-103 reads:

> " *'Insurer' defined.* — 'Insurer' includes every person engaged as indemnitor, surety, or contractor in the business of entering into contracts of insurance or of annuity."
> *Idaho Code* §41-103.

and *Idaho Code* §41-305 provides:

> "*Certificate of authority required.* — (1) No person shall act as an insurer and no insurer or its agents, attorneys, subscribers, or representatives shall directly or indirectly transact insurance in this state except as authorized by a subsisting certificate of authority issued to the insurer by the director, except as to such transactions as are expressly otherwise provided for in this code.
>
> (2) No insurer shall from offices or by personnel or facilities located in this state solicit insurance applications or otherwise transact insurance in another state or country unless it holds a subsisting cer-

> tificate of authority issued to it by the director authorizing it to transact the same kind or kinds of insurance in this state."
> *Idaho Code* §41-305.

The definition of "insurance" as found in *Idaho Code* §41-102 (supra) is similar to the definition of "insurance" as commonly found in the statutes for the regulation of insurance in most states. However, the courts have generally held that it was never intended that the state insurance statutes should govern every contract in which there is an incidental element of risk. For example, the Idaho Supreme Court applied the "primary purpose" test in determining whether two "pre need" funeral service contracts sold by a corporation offering for sale to the public vaults, caskets, memorial markers, interment spaces and other incidental burial services were insurance contracts in *Messerli v. Monarch Memory Gardens, Inc.*, 88 Idaho, 88, 103, 397 P.2d 34 (1964), as follows:

> "That an incidental element of risk distribution or assumption may be present should not outweigh all other factors. If attention is focused only on that feature, the line between insurance or indemnity and other types of legal arrangement and economic function becomes faint, if not extinct. This is especially true when the contract is for the sale of goods or services on contingency. But obviously it was not the purpose of the insurance statutes to regulate all arrangements for assumption of risk. That view would cause them to engulf practically all contracts, particularly conditional sales and contingent service agreements. The fallacy is in looking only at the risk element to the exclusion of all others present or their subordination to it. The question turns, not on whether risk is involved or assumed, but on whether that or something else to which it is related in the particular plan is its principal object or purpose."
> *Messerli v. Monarch Memory Gardens, Inc.*, 88 Idaho, 88, 103, 397 P.2d 34 (1964).

The Idaho Supreme Court then went on to say:

> "Whether there are sufficient elements in a contract such as risk or benefits . to render the entire contract one of insurance depends upon the facts of a particular case."
> *Messerli v. Monarch Memory Gardens, Inc.*, (supra) (P.105).

After analysis of the two contracts in question, one of which was entitled "Family Security Agreement" and the other a "Professional Services Agreement", the Idaho Supreme Court concluded that the two contracts under consideration were insurance. (See *Messerli v. Monarch Memory Gardens, Inc.*, 88 Idaho, 88 p. 105 for the Supreme Court's analysis and conclusion.)

II.

We are advised by the Department of Insurance that they have been made aware that the Federal Trade Commission has adopted a regulation which reads in pertinent part as follows:

> *"Preservation of consumers' claims and defenses, unfair or deceptive acts or practices.*

In connection with any sale or lease of goods or services to consumers in or affecting commerce as 'commerce' is defined in the Federal Trade Commission Act, it is an unfair or deceptive act or practice within the meaning of section 5 of that Act for a seller, directly or indirectly, to:

(a) Take or receive a consumer credit contract which fails to obtain the following provision in at least ten point, bold face type:

ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.

or, (b) Accept as full or partial payment for such sale or lease, the proceeds or any purchase money loan (as purchase money loan is defined here), unless any consumer credit contract made in connection with such purchase money loan contains the following provision in at least ten point, bold face type:

ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER."

16 C.F.R. §433(2).

It has been suggested to the Insurance Department that a lender may incur a risk of loss upon becoming a holder of such a "consumer credit contract" due to internal defects in the goods which a consumer purchases with funds borrowed from the lender. It has also been suggested that because the lender has a risk of loss, the lender should be able to recoup its loss by selling a "service contract" to the purchase money borrower. We would point out, however, that the lender has other means available to protect itself from the risk through the purchase of casualty insurance as defined in *Idaho Code* §41-506 (1) subsection (j).

There is a vast difference between a seller or manufacturer issuing a "warranty" or a "service contract" in connection with the sale of goods, and a lender selling a "service contract" to service goods purchased with the proceeds of a loan from a lender. The purchaser of goods, particularly of motor vehicles, mechanical goods, appliances, etc., has come to expect that the seller or manufacturer of the goods will be able to service or repair the goods sold. Most auto dealers employ mechanics to service the products the auto dealers sell. Sellers of other goods commonly have customer service departments where personnel are employed to service or repair goods that are sold. Many of the "service contracts" include a periodic inspection and servicing of the goods sold. The Uniform Commercial Code provides that generally warranties of clear title, merchantability, and occasionally fitness for a particular use are

implied in the sale of goods (*Idaho Code* §§28-2-312, 28-2-314, 28-2-315). Further, *Idaho Code* §28-2-313 provides that express warranties can be made by affirmation, promise, description, or sample if such affirmation, promise, description, or sample becomes part of the basis of the bargain. Due to the fact that warranties and service agreements are commonly made by sellers of goods as an inducement to the purchase of goods, it is reasonable to consider that the sellers may give such warranties or sell service agreements provided that (1) the seller gives the warranty or enters into the service agreement contemporaneously with the contract of sale of the goods, and (2) the warranty or service agreement does not promise indemnity broader in scope than against loss resulting from defects in the goods sold. It may not insure against risk or loss extrinsic to and unrelated to defects in the goods sold.

Lenders, unlike sellers or manufacturers of goods, are not in a position to issue a warranty of goods sold inasmuch as the warranty must be made incidental to a sale. *Guaranteed Warranty Corp. Inc. v. State of Arizona, ex. rel. Humphrey*, 23 Ariz, App. 327, 533, P.2d 87, 90 (1975). Nor is the lender commonly in a position to service the wide range of goods which may be purchased with the proceeds of a purchase money loan. Of course, it simply is not feasible for a lender to maintain a service department to service or repair virtually any electric typewriter, computer, television set, automatic washer, lawn mower, automobile, etc., which a consumer may purchase. The only reasonable alternative open to a lender would be for the lender to contract with a third party to service or repair the goods pursuant to the service contract. This would probably occur on an ad hoc basis. In such a case, the "service contract" as sold by a lender is nothing more than an indemnity agreement rather than a true "service contract" and is too remote from the loan agreement itself to be considered incidental to it.

> "Whether a company is engaged in the insurance business depends not on the name of the company, but on the character of the business that it transacts, and whether that business constititutes an insurance business subject to regulation as such *is determined by the usual course of the business*, and whether the assumption of the risk, or some other matter to which it is related is the principal object and purpose of the business." (Emphasis added.)
> 44 C.J.S. Insurance §59, p. 528.

We, therefore, conclude that a bank or other lending institution would be transacting insurance as an insurer within the purview of *Idaho Code* §§41-102, 41-103 and 41-305 if for an additional consideration, the lender entered into a "service contract" with the borrower upon issuing a loan for the purchase of a consumer product in which the lender promised to repair or replace the purchased consumer product due to specified internal defects or to reimburse the purchaser for such repair or replacement.

AUTHORITIES CONSIDERED:

1. *Idaho Code* §§41-102, 41-103, 41-305, 41-506 (1) (j), 28-2-312, 28-2-313, 28-2-314, 28-2-315;

2. *Guaranteed Warranty Corp. Inc. v. State of Arizona, ex. rel. Humphrey*, 23 Ariz. App. 327, 533 P.2d, 87 (1975); *Messerli v. Monarch Memory Gardens, Inc.*, 88 Idaho 88, 397 P.2d 34 (1964);

3. 16 C.F.R. §433 (2);

4. 44 C.J.S. Insurance §59, p. 528.

DATED This 22nd day of February, 1978.

ATTORNEY GENERAL OF IDAHO

WAYNE L. KIDWELL

ANALYSIS BY:

ROBERT M. JOHNSON
Assistant Attorney General

cc: Idaho Supreme Court
Supreme Court Library
Idaho State Library

ATTORNEY GENERAL OPINION NO. 78-11

TO: Senator Leon H. Swenson
Idaho State Senate
Statehouse Mail

Per Request for Attorney General Opinion

QUESTION PRESENTED:

Do the Human Rights Rules and Regulations fit into the concept governing the Human Rights Commission.

CONCLUSION:

Although Chapter 59, Title 67, *Idaho Code*, does not specifically allow back pay awards, Idaho Human Rights Commission Rule 7.3(c) does not violate the concept governing the Human Rights Commission.

ANALYSIS:

The request received is very broad in nature, begging conclusions on all the rules and regulations of the Human Rights Commission. In the interest of time this opinion will concentrate on Commission Rule 7.3(c) which has served as the catalyst for the question raised.

To place the question in its proper perspective, a brief historical comment is necessary in determining the origins of the rule. The Idaho Anti-Discrimination Act was passed by the legislature and signed into law in 1969. The Act was codified as Chapter 59, Title 67, *Idaho Code*, and styled Commission on Human Rights. During the 1976 legislative session amendments were made to various sections of the Act including changes in the powers and duties of the Commission, to strike references to duties of prosecuting attorneys, to provide that the Commission could apply to the district courts for process, and to provide that the Commission could issue orders. The amendments became effective on July 1, 1976.

On March 15, 1976, prior to the effective dates of the amendments, the Idaho Human Rights Commission received a Mailgram from the U.S. Equal Employment Opportunity Commission advising Idaho of a proposal to withdraw its designation as a 706 agency. This was supported by a letter from EEOC on September 1, 1976, stating in pertinent part as follows:

> The 1976 amendments to the Idaho statute take away the Human Rights Commission's authority to grant or seek back pay or other monetary awards for the victims of unlawful employment discrimination. It has been this Commission's position since its inception that appropriate relief means that the victims of discrimination are entitled to be made whole. The United States Supreme Court has fully endorsed this interpretation in *Moody v. Albemarle Paper Co.*, 422 U.S. 405 (1975). Citing the legislative history, the court noted that the scope of relief is intended to make the victims of unlawful discrimination whole and that attainment of this objective rests not only upon the elimination of the particular unlawful employment practice complained of, but also requires that persons aggrieved by the con-

> sequences and effects of the unlawful practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination.

On September 22, 1976, counsel from this office submitted a written brief in support of the Idaho Human Rights Commission's status as a deferral agency. As a part of this brief counsel argued that the Commission was empowered to grant or seek relief from employment practices found to be illegal and in particular to award back pay.

On December 6, 1976, as a result of this brief, EEOC voted to retain the designation of the Idaho Human Rights Commission as a 706 agency and agreed that Idaho did have the authority to grant and seek enforcement of back pay awards as a result of the new amendments to the Code.

Rule 7.3(c) of the rules and procedures of the Idaho Human Rights Commission reads as follows:

> An order issued by the Commission under §67-5906(8), *Idaho Code*, may include any of the following provisions, or any other provision the commission may determine to further the purposes and policies of Chapter 59, Title 67, *Idaho Code*:
>
> c. requiring the respondent to make back pay awards of actual wages lost, in cases where the commission has found unlawful employment discrimination, but such back pay liability shall not accrue from a date more than two (2) years prior to the filing of a complaint with the commission;

This rule is apparently written as an extension of §67-5906(8) to effectuate the purposes and policies of the Anti-Discrimination Act and to assure requirements of EEOC.

Section 67-5906(8), *Idaho Code*, vests in the Idaho Commission on Human Rights, the power and duty "to receive, initiate, investigate, seek to conciliate, hold hearings, make findings and recommendations and issue orders." Although this power is given, it does not say specifically what types of findings or orders it may make. To be more specific, the statute is silent as to whether or not the Commission may make an order awarding back pay where unlawful employment discrimination is found. The statutes must therefore be scrutinized with the overriding purpose or concept, as you would have it, controlling.

The Statement of Purpose of the Act is found in the opening section at §67-5901, *Idaho Code*. This section reads as follows:

> Purpose of act. — The general purposes of this act are: (1) To provide for execution with the state of the policies embodied in the federal Civil Rights Act of 1965 and to make uniform the laws of those states which enact this act;
>
> (2) To secure for all individuals within the state freedom from discrimination because of race, color, religion or national origin in connection with employment, public accommodations, education and real property transactions, and discrimination because of sex in connection with employment, and thereby to protect their interest in

> personal dignity, to make available to the state their full productive capacities, to secure the state against domestic strife and unrest, to preserve the public safety, health, and general welfare, and to promote the interests, rights and privileges of individuals within the state.

It should be noted that the Civil Rights Act referred to was incorrectly codified and should read "1964." The Act of 1964 states that if a respondent has intentionally engaged in an unlawful employment practice, he may be enjoined from engaging in such practice and affirmative action may be ordered, which may include, but is not limited to, reinstatement or hiring employees, *with or without back pay* or any other equitable relief. It further says that back pay shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Title 42, §2000e-5(g) U.S.C.A. (Civil Rights Act of 1964). It is obvious that Rule 7.3(c) is taken directly from this section of the federal Act.

Rule 7.3(c) is therefore mandated by the Civil Rights Act of 1964 which the legislature has conceptualized as the guiding purpose of the Idaho Act. To refer back to *Moody v. Albemarle Paper Co.*, the purpose of discrimination actions is to make victims of unlawful discrimination whole — to restore them to the position they would have been in but for the discriminatory practice.

Section 67-5901, *Idaho Code*, goes on to state that its purpose is to secure all individuals in the state freedom from discrimination. If the Human Rights Commission is unable to award back pay to victims, then it is impotent to place individuals of this state, as nearly as possible, in the situation they would have been in but for the discriminatory practice.

If it then is within the purpose of the Act to issue such orders, does the Commission have the authority to promulgate regulations specifically allowing back pay awards where the statutes are silent?

Section 67-5906(12), *Idaho Code*, allows the Commission the power, and in fact the duty, to promulgate rules to *effectuate* the purposes and policies of the Act so long as it is in accordance with Chapter 59, Title 67, *Idaho Code*. The Commission has therefore been given the power to write regulations to effectuate the purpose of the Act. It therefore follows that the Commission may define what orders it may issue so long as they are within the purpose of the Act. It is further obvious that the policies of the Civil Rights Act of 1964 are specifically incorporated in the Idaho Act and that the federal Act specifically allows such back pay awards. The intent of both Acts is to avoid discrimination. Discrimination cannot be avoided unless unlawful practices are penalized.

Finally, has the Idaho Human Rights Commission usurped legislative authority by promulgating such regulations.

> . It is an accepted rule of judicial decision that the legislative function has been complied with, where the terms of the statute are sufficiently definite and certain to declare the legislative purpose and the subject matter meant to be covered by the act; and that the legislature may constitutionally leave to administrative agencies the selection of the means and the time and place of the execution of the legislative purpose, and to that end may prescribe suitable rules and

> regulations. 88 Idaho at 205. See also, *State v. Taylor*, 58 Idaho 656, 78 P.2d 125 (1938).

The Idaho Supreme Court has also ruled that the legislature in enacting a law complete in itself, designed to accomplish the regulation of particular matters, may expressly authorize an administrative agency, within definite limits, to provide rules and regulations for the complete operation and enforcement of the law, and:

> [S]uch authority to make rules and regulations to carry out an express legislative purpose or to effect the operation and enforcement of the same is not exclusively a legislative power, but is administrative in its nature. *State v. Heitz*, 79 Idaho 107, 112, 238 P.2d 439 (1951). See also, *Abbot v. State Tax Commission*, 88 Idaho 200, 298 P.2d 221 (1965).

It is the opinion of the Attorney General that the legislature has spoken at Chapter 59, Title 67, *Idaho Code*, with the overriding concept of avoiding discrimination; that it has specifically referred to and incorporated the policies of the Civil Rights Act of 1964 which allows the awarding of back pay and that the legislature has specifically given the Idaho Human Rights Commission the authority to make rules and regulations to carry out the legislative purpose of the Act. Rule 7.3(c) is within the concept, as established by the legislature, governing the Human Rights Commission.

If it is the intent to limit the Commission in this realm then specific legislation should be proposed qualifying the concept.

AUTHORITIES CONSIDERED:

1. *Moody v. Albemarle Paper Co.*, 422 U.S. 405 (1975)
2. *State v. Taylor*, 58 Idaho 656, 78 P.2d 125 (1938)
3. *State v. Heitz*, 79 Idaho 107, 238 P.2d 439 (1951)
4. *Abbot v. State Tax Commission*, 88 Idaho 200, 298 P.2d 221 (1965)
5. *Idaho Code*, §67-5901, 67-5906(8), 67-5906(12)
6. U.S.C.A. Title 42 §2000e-5(g)
7. Civil Rights Act, 1964
8. Human Rights Commission Rules and Regulations, No. 7.3(c)

DATED this 24th day of February, 1978.

ATTORNEY GENERAL
State of Idaho

WAYNE L. KIDWELL

ANALYSIS BY:

BILL F. PAYNE
Deputy Attorney General
State of Idaho

WLK:BFP:lb

cc: Idaho State Library
Idaho Supreme Court
Idaho Supreme Court Library

ATTORNEY GENERAL OPINION NO. 78-12

TO: Patricia L. McDermott
House Minority Leader
House of Representatives
State of Idaho
STATEHOUSE MAIL

Per Request for Attorney General Opinion

QUESTIONS PRESENTED:

1. Once the legislature has approved a rule or regulation of an executive agency when said rule is submitted in accordance with correct statutory procedure, is the legislature then permitted at a later time to revoke or amend said administrative rule or regulation?

2. Does the last sentence in 67-5218 refer only to those rules and regulations adopted during the legislative interim or does it vest authority in the legislature to reject, amend or modify a rule previously permitted to stand?

CONCLUSIONS:

1. Under 67-5218, *Idaho Code*, the legislature may not revoke or amend an administrative rule or regulation which has previously been approved by that body unless such action is instituted under the bill process.

2. The last sentence in 67-5218 refers only to those rules and regulations adopted during the legislative interim and does not vest authority in the legislature to reject, amend or modify a rule previously permitted to stand.

ANALYSIS:

Section 67-5218, *Idaho Code*, providing for legislative review of executive agency rules was passed and became law in 1969. In 1976 the statute was changed to read as follows:

> 67-5218. EFFECT OF COMMITTEE ACTION. *By the* forty-fifth day *of any regular session, the committee to which rules have been referred shall report to the membership of the body its findings and recommendations concerning its review of the rules. The report of the committee shall be printed in the journal. If the committee does not report by the forty-fifth day, such failure to report shall constitute legislative approval of the rules as submitted.* If the committee to which any rule shall have been referred, or any member of the legislature, shall be of the opinion that such rule is violative of the legislative intent of the statute under which such rule was made, a *concurrent* resolution may be adopted rejecting, amending or modifying the same. Every rule promulgated within the authority conferred by law, and in accordance with the provisions of chapter 52, title 67, Idaho Code, shall be in full force and effect until the same is rejected, amended or modified by the legislature. 1976 S.L., Ch.185, §2, p. 671.

The statute as amended provides a mechanism whereby all rules and regulations from the various executive agencies are forwarded to legislative commit-

tees for review. This review is to concentrate on the legislative intent of the statute under which each rule is made, and if such rule is found to violate the legislative intent of the statute a concurrent resolution may be adopted rejecting, amending or modifying that rule.

The above section must be read in conjunction with §67-5217, *Idaho Code*, dealing with the transmittal of rules for legislative action. The first sentence of that statute reads as follows:

> "All rules heretofore or hereafter authorized or promulgated by any state agency, including all rules kept and maintained by the state law library, as provided in chapter 52, title 67 Idaho Code, shall be transmitted to the secretary of the senate and the chief clerk of the house of representatives by the law librarian of the state law library before the first day of the regular session of the legislature next following the promulgation or publication thereof . . . ."

The question now arises as to which rules are to be transmitted? Is the law librarian required to transmit all rules and regulations regardless of their year of adoption or is she only required to forward those rules which have been promulgated and published during the year preceding the current legislative session?

In its simplest form §67-5217 says that rules shall be transmitted to the legislature. But which legislature? — the one *next following* the rules' promulgation or publication. Thus, those regulations promulgated or published after the first day of the 1976 legislative session but before the first day of the 1977 session should have been presented to the legislature *next following* the promulgation and publication thereof, which in this instance would be the 1977 legislature. Likewise, those rules promulgated and published after the first day of the 1977 session but before the first day of the 1978 session should have been presented to the 1978 session. This sequence should be followed ad infinitum until the legislature repeals this section of the Code.

Section 67-5218 must be read in conjunction with 67-5217, *Idaho Code*. As a result, the rules referred to in 67-5218 are those rules which were transmitted to the legislature by the State Law Library. It therefore follows that the only rules which could be rejected, amended or modified by the legislature under this section, are those rules that were promulgated or published since the first day of the preceding legislature.

The last sentence of 67-5218 must obviously be read as a part of the total section. It emphasizes that rules promulgated and published since the first day of the preceding legislature are deemed to be in full force and effect, if the agencies have properly followed the Administrative Procedures Act found at Chap. 52, Title 67, *Idaho Code*, and until they have been presented to the "next following" legislature and approved, rejected, amended or modified.

In view of the fact that §§67-5217 and 67-5218 allow the legislature to review only those rules promulgated or published since the first day of the preceding legislature, it is apparent that the legislature may not revoke or amend a rule which has been approved by a prior legislature since that previously approved rule would never be presented to a subsequent legislature under these statutes. More firmly stated, the legislature may not use a concurrent resolution to revoke or amend a rule which has previously been approved by the legislature.

This is not to say that the legislature may not repeal or amend a rule which has been previously approved. The legislature has the inherent authority to repeal or amend any law of this state. However, to do so, the legislature could not rely on the concurrent resolution procedure as allowed in 67-5218, but would be required to follow the bill process.

AUTHORITIES CONSIDERED:

1. *Idaho Code*, §§67-5212, -5217, -5218

2. Session Laws '76, Ch. 185, §2, p.671

DATED this 9th day of March, 1978.

ATTORNEY GENERAL
State of Idaho

WAYNE L. KIDWELL

ANALYSIS BY:

BILL F. PAYNE
Deputy Attorney General
State of Idaho

WLK:BFP:lb

cc: Idaho State Library
Idaho Supreme Court
Idaho Supreme Court Library

ATTORNEY GENERAL OPINION NO. 78-13

TO: HONORABLE MONROE C. GOLLAHER
Director of the Department of Insurance
Department of Insurance
BUILDING MAIL

Per request for Attorney General Opinion

QUESTION:

(1) Should the insurance department follow the decision of the Missouri Supreme Court in *State v. Monsanto Company*, 517 S.W. 2d 129, which holds that payment of sickness and disability benefits by an employer to employees through an employer's "self-funded" sickness and medical benefits plan is not insurance and, therefore, not subject to regulation by the insurance department?

QUESTION:

(2) Is the tax levied by *Idaho Code* §41-4012 upon self-funded plans a valid tax in light of the preemption provisions of the Employee Retirement Income Security Act of 1974 (29 USC §1144)?

CONCLUSION:

(1) Yes. The insurance department should follow the decision of the Missouri Supreme Court in *State v. Monsanto Company*, 517 S.W. 2d 129, which holds that payment of sickness and disability benefits by an employer to employees through a bona fide employer's "self-funded" sickness and medical benefits plan is not insurance and, therefore, not subject to regulation by the insurance department.

CONCLUSION:

(2) The tax levied by *Idaho Code* §41-4012 upon self-funded plans which are required by the terms of Title 41, Chapter 40 to register with the Director of the Department of Insurance may not be imposed against any self-funded employee benefit plan which is exempted from state regulation (and, therefore, the registration requirements) because of the preemption provisions contained in 29 USC §1144 of ERISA. However, the self-funded employee benefit plans which are excepted from regulation by ERISA under 29 USCA §1003(b) are required to register and pay the tax levied by *Idaho Code* §41-4012 unless they are excepted from the registration requirements of *Idaho Code* §41-4003.

ANALYSIS:

I.

The Missouri Supreme Court in *State ex. rel. Farmer, Superintendent of Insurance v. Monsanto Company*, 517 S.W. 2d 129, gave the following facts which we deem pertinent and restate for the purposes of this opinion:

> "Monsanto is a Delaware Corporation qualified and authorized to do business in Missouri. It is engaged in manufacturing and selling a

> variety of chemical, petroleum, plastic, fiber and electronic products. It is not qualified or authorized to do or transact insurance in Missouri.
>
> For many years Monsanto has provided a program of employee benefits, frequently referred to as 'fringe benefits'. As a part of that program Monsanto maintained a 'Sickness and Medical Benefits Plan' under which it provided for payments to employees for temporary disability and for reimbursement for hospital, medical and surgical expenses incurred by the employees and their dependents."
>
> and,
>
> "Monsanto has entered into a written agreement with labor organizations representing its hourly paid employees in which the Sickness and Medical Benefits Plan is a part, and which also provides that Monsanto 'reserves the right to provide for the benefit of the Plan through an insurance policy or policies with the insurance company underwriting the prior plan or with another insurance company or companies, or by such other method or methods as shall be determined by the Corporation.' "
>
> and,
>
> "Prior to January 1, 1964, all claims paid under the Sickness and Medical Benefits Plan were paid by draft drawn by Monsanto upon Metropolitan through the latter's bank. After that date all such claims payable by the 'other medium' have been paid by Monsanto by its check drawn on its bank account."
>
> *State ex. rel. Farmer v. Monsanto Co.*, 517 S.W. 2d 129 pp. 130, 131.

Missouri had an insurance regulatory statute which read "No company shall transact in this state any insurance business unless it shall first procure from the superintendent (of insurance) a certificate . . authorizing it to do business " R.S. Mo. 1969, §375, 161, V.A.M.S.

The Missouri Supreme Court applied the following general rule as found in 44 C.J.S. Insurance §59:

> "Whether a company is engaged in the insurance business depends on the character of the business that it transacts, and whether that business constitutes an insurance business subject to regulation as such is determined by the usual course of business, and whether the assumption of a risk, or some other matter to which it is related is the principal object and purpose of the business."
>
> 44 C.J.S. Insurance §59; *State ex. rel. Farmer v. Monsanto Company*, 517 S.W. 2d 129, 132.

The Missouri Supreme Court then cited another leading case on the issue of whether a bona fide employee benefit plan is insurance, i.e.; *Mutual Life Insurance Co. of New York v. New York State Tax Commission*, 298 N.E. 2d 632 (1973). In that case, Mutual Life Insurance Company of New York provided for its employees and field agents benefits payable upon death, illness and disability. The expense was borne principally by the company as an employer, as part of its cost of doing business. The balance of the expense was contri-

buted by the company's employees through periodic deductions from wages and commissions.

At issue was whether or not the costs of life and health insurance benefits for the employees of such a life insurance corporation, on a nonprofit and noncommercial basis, are taxable as premiums received within the sense of that statute. The New York Court of Appeals held in *Mutual Life Insurance Co. of New York* (supra):

> " . . Quite obviously, the petitioner's program, pursuant to which it grants insurance benefits to its employees, is not the doing of an insurance business under its franchise and, therefore, is not subject to the tax imposed by section 187. In other words, the coverage of the petitioner's own employees is not the result of solicitation of business or of the petitioner's holding itself out or doing business as a commercial insurer."

The Court then commented:

> "The relationship involved, then, is not commercial, nor one of seller and purchaser, with profit or contribution to surplus accruing to the former; rather, it is an incident of its employer-employee relationship, no different from that of any other employer not subject to the premium tax. Concededly, noninsurance company employers who provide insurance benefits similar to those provided by the petitioner are not subject to the taxing provision of section 187. Such employer-sponsored programs do not constitute the doing of an insurance business within the meaning of the statute, and we agree with the petitioner that what constitutes a nontaxable employer-employee relationship for noninsurers — rather than the doing of an insurance business — is not transformed into a taxable insurance business merely because the employer is licensed to conduct such a business."
> *Mutual Life Insurance Company of New York v. New York State Tax Commission*, 32 N.Y. 2d 340, 298 N.E. 2d, 632, pp. 634 and 635 (1973).

As a general rule, an employer that is providing its employees sickness and disability benefits as a fringe benefit incidental to the employment contract is not doing an insurance business.

The Idaho Supreme Court has applied the "principal purpose test" in determining whether an entity was transacting insurance in *Messerli v. Monarch Memory Gardens, Inc.*, 88 Idaho 88, 103, 397 P.2d 34 (1964). We can assume the Court would apply the "principal purpose test" to a bonafide sickness and benefit plan offered as a fringe benefit by an employer to its employees as an incident of employment and rule that such a fringe benefit does not constitute insurance.

We are aware that the decision in this opinion contradicts an opinion to the Commissioner of Insurance which was issued on October 18, 1972. However, we have reviewed the cases relied upon in the 1972 opinion, and in light of the more recent cases cited in this opinion, we feel the correct rule to follow is set forth in the *Monsanto* decision as heretofore discussed (supra). The decisions supporting the 1972 opinion are not as closely in point on the issue of whether the providing of sickness and disability benefits to employees by employers as

a fringe benefit incidental to their employment is insurance. For example, *Haynes v. United States*,353 U.S. 81, 77 S.Ct. 649 (1957) which was relied upon earlier, decided only that sickness disability benefits paid by an employer to an employee were exempt from taxable income under the 1939 Internal Revenue Code as "amounts received through accident or health insurance" *State v. Memorial Benevolent Society of Texas*, 384 S.W. 2d 776 (Tex. 1964) is not in point as there was no employer-employee relationship in that case, but rather there was an association that provided a $300 to $600 death benefit to its members when they died and assessed the costs from the other members. *National Federation of Post Office Clerks v. District of Columbia,* 173 Atl. 2d 483 (D.C. 1961) turned on an interpretation of a statute enacted by Congress in 1940 which repealed an earlier provision that would have allowed an association of federal employees an exemption from the District of Columbia's insurance statutes. *People v. California Mutual Association*, 441 P.2d 97 (Cal 1968) determined that an alleged "health care service plan" in which indemnity rather than service was a significant feature of the plan, was in fact an insurer. The question of an employer-employee relationship was not an element of the case. Finally, *Bost v. Masters,* 361 S.W. 2d 272 (Ark. 1962) involved an action to collect an accidental death benefit under a program provided and administered by a union. Once again, there was no employer-employee relationship involved except to the extent that the union executed collective bargaining agreements with employers and also to the extent that the employers, rather than the employees, were the sole contributors to the trust fund out of which the death benefits were paid. The court held that the trust fund came within the definition of an insurance company and that service of process would have to be made through the Arkansas Unauthorized Insurers Process Act.

Due to the more recent decisions which are more directly in point, and which have been decided since the October 18, 1972, opinion, i.e. *Mutual Life Insurance Co. of New York, v. New York State Tax Commission* (supra) and *State v. Monsanto Company* (supra), we are revising our opinion to conform with these more recent cases. An employer providing a negotiated benefit incident to the employer-employee relationship cannot be construed to be conducting an insurance business in the usual, ordinary and customary manner. There is no solicitation or advertising. The profit motive is absent. The contract is not founded on a purchaser-seller basis. It is a concession or grant by an employer to its employees to cement the employer-employee relationship and thus hopefully, promote employee loyalty and good will with the expectation of a resultant increase in employee efficiency. (See *Danna v. Commissioner of Insurance*, 228 So. 2d 708, p. 713 (La. 1969)).

II.

The second question presented for consideration is whether the tax imposed upon self-funded plans by *Idaho Code* §41-4012 is still a valid tax in light of the preemption provisions of the Employee Retirement Income Security Act of 1974 (29 USC §1144). *Idaho Code* §41-4012 provides in subsection (1) that:

> "(1) There is hereby levied upon self-funded plans the tax provided for in this section. Each *registered* self-funded plan and each formerly *registered* plan with respect to beneficiaries in this state *while so registered*, shall coincidentally with the filing of its annual statement with the director pay to the director a tax computed at the rate of one cent (1¢) per month per beneficiary covered by the plan during the

fiscal year of the annual statement with respect to beneficiaries working or resident in this state." (Emphasis added.)
Idaho Code §41-4012(1).

A "self-funded plan" was defined in *Idaho Code* §41-4002(6) as "any plan under which payment for any disability income benefits not otherwise provided for under title 72, Idaho Code (workmen's compensation and related laws — industrial commission), medical, surgical, hospital, and other services for prevention, diagnosis, or treatment of any disease, injury, or bodily condition of an employee is, or is to be, regularly provided for or promised from funds created or maintained in whole or in part by contributions or payments thereto by the employer, or by the employer and the employees, and not otherwise covered by insurance or contract with a health care service corporation, health maintenance organization, or similar other third party pre-payment plan"

Idaho Code §41-4003(2) excepted the following self-funded plans from registration as follows:

"(2) No registration shall be required of:

(a) Any self-funded plan established for the sole purpose of funding the dollar amount of a deductible clause contained in the provisions of an insurance contract issued by an insurer duly authorized to transact disability insurance in this state if the deductible does not exceed an amount applicable to each beneficiary of five hundred dollars ($500) per annum and the total of all obligations to all beneficiaries insured under the plan arising out of the application of such a deductible does not exceed the aggregate amount of fifty thousand dollars ($50,000) in any one (1) year.

(b) Any plan established and maintained for the purpose of complying with any Workman's Compensation Law or Unemployment Compensation Disability Insurance Law.

(c) Any plan administered by or for the federal government or agency thereof.

(d) Any plan which is primarily for the purpose of providing first aid care and treatment, at a dispensary of an employer, for injury or sickness of employees while engaged in their employment.

(e) Any employer's self-insured health plan or service established and maintained solely for its members and their immediate families, or to any self-insured health plan or service established, maintained, and insured jointly by any employer and any labor organization or organizations if such health plan or service has been in existence and operation for fifteen (15) years immediately preceding the effective date (July 1, 1974) of this act."
Idaho Code §41-4003(2).

The tax imposed by *Idaho Code* §41-4012(1) is an excise tax inasmuch as it is neither a poll tax or a property tax.

> " In its modern sense an excise tax is any tax which does not fall within the classification of a poll tax or a property tax, and embraces every form of burden not laid directly upon persons or property."
> *Diefendorf v. Gallet*, 51 Idaho 619, 633, 10 P.2d, 307 (1932). (See also 71 Am. Jur. 2d. *State and Local Taxation*, §28 pp. 360 and 361.)

Further,

> " . . The obligation to pay an excise is based upon the voluntary action of the person taxed in performing the act, enjoying the privilege, or engaging in the occupation which is the subject of the excise, and the element of absolute and unavoidable demand is lacking. It is said that an excise tax is a charge imposed upon the performance of an act, the enjoyment of a privilege, or the engaging in an occupation, a tax laid upon the manufacture, sale, or consumption of commodities, and upon corporate privileges, a tax upon a pursuit, trade or occupation, which generally takes the form of an exaction for a license fee to pursue the particular occupation; a direct tax laid upon merchandise or commodities, which may or may not have an ad valorem factor, and a duty levied on articles of sale or manufacture, upon licenses to pursue certain trades or deal in certain commodities."
> 71 A. Jr. 2d *State and Local Taxation*, §29 p. 361.

In the instant case, the excise tax provided for in *Idaho Code* §41-4012(1) is imposed by its terms only upon "registered" self-funded plans. The self-funded plans excepted from the requirement of registration by *Idaho Code* §41-4003, of course, would not be subject to the tax. Moreover, upon referring to 29 USC §1144 of the Employee Retirement Income Security Act of 1974, we find that Congress has preempted any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in 29 USC §1003(a) and not exempt under 29 USC §1003(b). The employee benefit plans which were exempted under 29 USC §1003(b) from the provisions of the Employee Retirement Income Security Act of 1974 are:

> 1. "Governmental plans" as defined in 29 USC §1002 (32) and which includes the government of the United States, and the government of any state or political subdivision thereof, and etc.;
>
> 2. "Church plans" as defined in 29 USC §1002(33);
>
> 3. A plan maintained solely for the purpose of complying with applicable workmen's compensation laws or unemployment compensation or disability insurance laws;

4. A plan maintained outside of the United States primarily for the benefit of persons substantially all of whom are nonresident aliens; or

5. A plan which is an "excess benefit plan" as defined in 29 USC §1002(36) and which is unfunded.
(See 29 USC §1003(b).)

Therefore, the employee benefit plans which are regulated under the Employee Retirement Income Security Act of 1974, and which, therefore, do not have to register under *Idaho Code* §41-4003 are not subject to the tax levied by *Idaho Code* §41-4012. However, self-funded employee benefit plans which are excepted from regulation under the Employee Retirement Income Security Act of 1974 by 29 USC §1003(b) *and* which are not excepted from the registration requirement of *Idaho Code* §41-4003(1) by subsection (2) of said section must still register with the Director of the Department of Insurance and still pay the tax imposed by *Idaho Code* §41-4012(1). An example would be a "church plan" as defined in 29 USC §1002(33) which is exempted from regulation under ERISA, and yet is not excluded from registration in the State of Idaho under *Idaho Code* §41-4003(2).

AUTHORITIES CONSIDERED:

1. *Idaho Code* §§41-4012(1) and 41-4003(1) and (2);

2. 29 United States Code §§1144 and 1003(b);

3. *State ex. rel. Farmer, Superintendent of Insurance v. Monsanto Company*, 517 S.W. 2d 129; *Mutual Life Insurance Company of New York v. New York State Tax Commission*, 298 N.E. 2d 632; *Messerli v. Monarch Memory Gardens, Inc.*, 88 Idaho 88, 397 P.2d (1964); *Danna v. Commissioner of Insurance*, 228 So. 2d 708 p. 713 (La. 1969); *Haynes v. United States*, 353 U.S. 81, 77 S.Ct. 649; *Bost v. Masters*, 361 S.W. 2d 272 (Ark. 1962); *National Federation of Post Office Clerks v. District of Columbia*, 173 Atl. 2d 483 (D.C. 1961); *State v. Memorial Benevolent Society of Texas*, 384 S.W. 2d 776 (Tex. 1964); *People v. California Mutual Association*, 441 P.2d 97 (Cal. 1968); *Diefendorf v. Gallet*, 51 Idaho 619 10 P.2d 307;

4. 71 A. Jur. 2d *State and Local Taxation*, §28 pp. 360 and 361.

DATED This 10th day of March, 1978.

ATTORNEY GENERAL FOR IDAHO

WAYNE L. KIDWELL

ANALYSIS BY:

ROBERT M. JOHNSON
gc

cc: Idaho Supreme Court
Supreme Court Library
Idaho State Library

ATTORNEY GENERAL OPINION NO. 78-14

TO: Gary Ingram, State Representative
District No. 2
Kootenai County
State Mail

Per Request for Attorney General Opinion

QUESTION PRESENTED:

Is Article 22 of the Agreement entered into between the Kootenai County Fire Protection District #1 and the district employees represented by Local #1494, International Association of Fire Fighters, legal and binding? Specifically:

(a) Can an agreement between a fire protection district and fire fighters vary the requirements found in Chapter 18, Title 44, *Idaho Code*, governing procedures to be followed in collective bargaining?

(b) Can an agreement between a fire protection district and fire fighters require binding compulsory arbitration?

CONCLUSION:

The provisions of Article 22 of the Agreement entered into between the Kootenai County Fire Protection District #1 and the district employees represented by Local #1494, International Association of Fire Fighters, are not legally binding insofar as they do not comply with the procedures required by Chapter 18, Title 44, *Idaho Code*. Specifically: (a) an agreement between a fire protection district and district employees cannot vary the fact finding procedures required by Chapter 18, Title 44, *Idaho Code*; (b) an agreement between a fire protection district and district employees cannot require binding compulsory arbitration.

ANALYSIS:

Chapter 18 of Title 44, *Idaho Code*, governs the employment of fire fighters. This Chapter provides fire fighters with the right to bargain collectively, and to be represented by a bargaining agent in the collective bargaining process. When an agreement cannot be reached between the bargaining agent and the corporate authorities within thirty days from the first meeting, all unresolved issues must be submitted to a fact-finding commission. The fact-finding commission is to be composed of three members. The bargaining agent and corporate authority each select a member of the fact-finding commission. The two members selected are to agree upon and appoint a third member. If an agreement upon the third member cannot be reached, the Director of the Department of Labor and Industrial Services shall appoint a third member. No provision is made in Chapter 18 of Title 44 *Idaho Code* for binding compulsory arbitration.

Article 22 of the Agreement entered into between the Kootenai County Fire Protection District #1 and the district employees represented by Local #1494, International Association of Fire Fighters, provides that when an im-

passe exists the articles of impasse are to be submitted to a mediator appointed by the Federal Mediation and Conciliation Service. If an impasse exists after ten days, the remaining issues are to be submitted to binding compulsory arbitration. The bargaining agent and corporate authority shall each select one member of the arbitration panel. The two arbitrators shall then select a third party who shall be chairman of the board. If the parties are unable to agree upon a third member, they are to request a list of seven names from the Idaho State Commissioner of Labor. The two parties then alternately strike a name from the list until the last name remains — a toss of the coin determines who shall strike the first name.

To determine whether the agreement entered into between the Kootenai County Fire Protection District #1 and the district employees represented by Local #1494, International Association of Fire Fighters is valid, it must be established what powers a fire protection district possesses. Fire protection districts are bodies politic and corporate created by statute. Statutory bodies, whether corporations or governmental entities, are controlled by the specific statutory provisions creating them. The powers of such organizations are derived from a grant by the State. Such organizations have only those powers that are expressly or impliedly granted or confirmed by the granting authority. Unless somewhere in the law there is an express or clearly implied grant of power, the power does not exist. (*Fidelity Savings State Bank* v. *Grimes*, 156 Kan. 44, 131 P.2d 894 (1942); *Sanderson* v. *Salmon River Canal Company, LTD*, 45 Idaho 244, 263 P. 32 (1927); 82 C.J.S. *Corporations*, §§933-945.)

The corporate powers of the fire protection district are enumerated in *Idaho Code* Section 31-1415. section 31-1415, *Idaho Code* provides that each fire protection district has the power, among other powers, to make such contracts as may be necessary or convenient for the purpose of the fire protection district law. The purpose of the fire protection district law is stated in *Idaho Code* section 31-1401 to be the protection of property against fire. There is no provision in Chapter 14, Title 31, *Idaho Code*, concerning collective bargaining or employment contracts of fire fighters.

In 1970, the Idaho legislature enacted Chapter 18, Title 44, *Idaho Code*, which regulates the employment of fire fighters. This chapter statutorily established the collective bargaining rights of fire fighters and specified the methods to be followed in negotiating an employment agreement. Because the Chapter directs the methods by which the collective bargaining agreement is to be negotiated, the use of a method which differs from that specified is by implication prohibited. A general rule of statutory construction is that where a statute directs the performance of certain things by specified means or any particular manner, it implies that it shall not be done otherwise. (*Clayton* v. *Barnes*, 52 Idaho 418, 16 P.2d 1056 (1932); *Knapp-Monarch Co.* v. *Commissioner of Internal Revenue*, 139 F.2d 863 (1944); *Botany Worsted Mills* v. *United States*, 278 U.S. 282, 49 S.Ct. 129, 73 L.Ed. 379 (1929); 82 C.J.S. *Statutes*, §333.)

In specifying the procedure for collective bargaining, the Idaho legislature, at I.C. 44-1807, provided that "Any agreements *actually negotiated* between the bargaining agent and the corporate authorities whether before or within thirty (30) days after the fact finding commission's recommendation shall constitute the collective bargaining contract " This, by implication, pro-

hibits binding compulsory arbitration, as the agreement must be *actually negotiated* between the bargaining agent and the corporate authorities.

AUTHORITIES CITED:

1. *Botany Worsted Mills* v. *United States*, 278 U.S. 282, 49 S.Ct. 129, 73 L.Ed. 379 (1929).

2. *Knapp-Monarch Co.* v. *Commissioner of Internal Revenue*, 139 F.2d 863 (1944).

3. *Clayton* v. *Barnes*, 52 Idaho 418, 16 P.2d 1056 (1932).

4. *Sanderson* v. *Salmon River Canal Company, LTD.*, 54 Idaho 244, 263 P.32 (1927).

5. *Fidelity Savings State Bank* v. *Grimes*, 156 Kan. 44, 131 P.2d 894 (1942).

6. *Idaho Code*, §§44-1801 through 44-1811.

7. *Idaho Code*, §§31-1401 through 31-1437.

8. 19 C.J.S. *Corporations*, §§933-945.

9. 82 C.J.S. *Statutes*, §333.

DATED This 17th day of March, 1978.

ATTORNEY GENERAL
State of Idaho

WAYNE L. KIDWELL

ANALYSIS BY:

MYRNA A. I. STAHMAN
Assistant Attorney General

MAIS/cm

ATTORNEY GENERAL OPINION NO. 78-15

TO: The Honorable John Evans
Governor of Idaho
Building Mail

Per Request for an Attorney General's Opinion.

QUESTION PRESENTED:

Under the terms of Art. IV, §10 of the Idaho Constitution, what is the number of days within which those bills presented to me *prior to* adjournment must be acted upon?

CONCLUSION:

Those bills presented to the Governor while the Legislature is in session must be acted upon within five (5) days *after presentment*, Sundays excepted. However, if the Legislature adjourns sine die prior to the expiration of the five (5) day period, the Governor has an additional ten (10) day period after adjournment to take action on the legislation.

ANALYSIS:

The relevant portion of Art. IV, §10, *Idaho Constitution* provides as follows:

> Any bill which shall not be returned by the governor to the legislature within five days (Sundays excepted) after it shall have been presented to him, shall become a law in like manner as if he had signed it, unless the legislature shall, by adjournment, prevent its return, in which case it shall be filed, with his objections, in the office of the secretary of state within ten days after adjournment (Sundays excepted) or become a law.

Two different time frames are created by this constitutional provision. Prior to adjournment, the Governor has five (5) days (Sundays excepted) *after presentment* to act upon the legislation. After adjournment, a ten (10) day period of time is allowed. In the case of a bill where adjournment occurs less than five (5) days following its presentment, the "new" ten (10) day period after adjournment should be applied.

These time computations may be clarified by the following examples. The Second Regular Session of the Forty-Fourth Idaho Legislature adjourned sine die on Saturday, March 18, 1978. A bill presented to the Governor on Wednesday, March 1, 1978 would have to be acted upon not later than March 7, 1978. A bill presented on the last day of the session, March 18, 1978 must have action taken by the Governor not later than March 30, 1978, which is ten (10) days following adjournment, Sundays excepted. Finally, a bill presented to the Governor on March 16, 1978 which was not acted upon by the time of adjournment sine die, could be acted upon as late as (but no later than) March 30, 1978.

The situation where a bill is presented to the Governor after adjournment is still in litigation and, therefore, not subject to a definitive answer in this opinion. Prior to a final ruling by the Courts, the safest procedure for the Governor to follow in such a case would be to act upon all bills within ten (10) days *following adjournment* (Sundays excepted).

AUTHORITIES CONSIDERED:

1. Article IV, §10, *Idaho Constitution.*

DATED This 20th day of March, 1978.

WAYNE L. KIDWELL
Attorney General of Idaho

ANALYSIS BY

GUY G. HURLBUTT
Chief Deputy Attorney General
State of Idaho

WLK/GGH/lp

cc: Idaho Supreme Court
Idaho Supreme Court Law Library
Idaho State Library

ATTORNEY GENERAL OPINION NO. 78-16

TO: Richard L. Barrett
State Personnel Director
Idaho Personnel Commission
700 West State Street
Boise, Idaho 83720

Per request for Attorney General Opinion

QUESTION PRESENTED:

The Idaho Personnel Commission is required by the State to develop new job classifications. These jobs are evaluated under the Hay Associates' job classification methodology and assigned a point value which translates into a pay grade. Where the job is created prior to the annual submission of the State pay plan to the Legislature, if they are to be reallocated, a job classification can be included for legislative review. If, however, the job is created subsequent to the legislative review, and jobs worth equal point values will move up or down as the Legislature mandates, may these new jobs' pay grades change to reflect the legislative action?

CONCLUSION

The Idaho Personnel Commission, in view of the dictates of §67-5309(a)-(c), *Idaho Code*, may change the pay grade to which a job is assigned only if the classification is created subsequent to the report submitted to the Legislature as required by §67-5309B(d), *Idaho Code*, and only in accordance with the legislative action on the report.

ANALYSIS

Part of the duties of the Idaho Personnel Commission are to develop, adopt and make effective job classifications based on the analysis of the duties and the responsibilities of particular jobs in the State classified service. Section 67-5309(a), *Idaho Code*, Idaho Personnel Commission Rule 6. This process is a continual, on-going one. Where an appointing authority feels the need for a position to be created, due to the particular duties imposed by statutes and regulations for which they are responsible, they will ask the Idaho Personnel Commission staff to make such a review as is necessary to determine the need to create the new position. Where such a need is found, the Idaho Personnel Commission staff develops the job description, minimum qualifications and sets the level of pay by analyzing the job in view of the Hay Associates' job classification methodology. Section 67-5309B(a)-(c), *Idaho Code*. This information is submitted to the Idaho Personnel Commission and the Budget Administrator for approval. Idaho Personnel Commission Rule 6-4.4.

From this factual context arises the problem of the timing of such an analysis and creation of a new job classification to be addressed by this Opinion. Where a job is requested, developed and adopted prior to the annual submission of the pay line report required by §67-5309B(d), *Idaho Code*, it may, obviously, be included in the report for action by the Legislature regarding reallocations. Where, however, the date of the establishment of the new classification is subsequent to the proposed reallocation report to the Legislature, a

problem is apparent. By way of illustration, under the pay policy in effect this year, FY 1978, job classifications worth 500 points are paid at pay grade 28. Section 67-5309C, *Idaho Code*. In its report to the Forty-fourth egislature, Second Regular Session, the Idaho Personnel Commission proposed reallocating most jobs worth 320 points or more up one pay grade. If the 500 point job is created and made effective prior to the submission of the annual report to the Legislature, as noted above, it can be included for consideration for reallocation. With the passage of Senate Concurrent Resolution 120, the Idaho egislature has approved the report of the Commission for FY 1979. On July 1, 1978, most job classifications worth 320 points will move up one pay grade. Because the new 500 point job could not be included in the report, on July 1, 1978, all similarly rated (500 point) jobs would move to pay grade 29, while the new job will remain at pay grade 28. The earliest date this new job could be reallocated would be the next legislative session and would not be effective until July 1 following the session.

From this, one real problem to the employee in such a newly created job classification is apparent. The loss of pay for the employee having been underpaid could not be recouped retroactively under reallocation.

It must be understood that the choice of the mathematical formula is a question of State pay policy as recommended by the Idaho Personnel Commission and as accepted or modified by the Idaho Legislature under §67-5309B(d), *Idaho Code*. The Idaho Legislature, having decided to be an average market place salary level employer, adopts that mathematical formula which is most likely to allow them to maintain this chosen salary level. This policy decision is equal to, if not greater than, the decision to approve or disapprove changes proposed to specific job classifications under reallocation. Because the vast majority of reallocations occur with changes in the pay policy formula, it would appear inconsistent and very much inequitable to say that jobs of a certain type (i.e., submitted for reallocation) are worth more than certain others (i.e., newly created jobs).

The inequity thus created may be handled in one of two ways. Although public employees have no vested rights to a given level of compensation, Attorney General Opinion 76-48, *Personnel Division of Executive Department v. St. Clair*, Or. App., 498 P.2d 809, (1972), an equity within an agency may be appealed, §67-5316, *Idaho Code*. The path for resolution of the obvious inequity through the appeal process is unduly cumbersome to the employee and the appointing authority. And, in any event, the result would be the same; the Idaho Personnel Commission would propose to the next legislative session that the job classification be reallocated. The undue hardship on the employees and the appointing authorities regarding newly created job classifcations can be avoided in conformance with the Idaho Code.

In order to avoid the possibility of inequities which might be created by not considering newly created classes when the pay line package is reviewed, it is recommended that those reallocations which would result from the adoption of new job classifications be called to the attention of the Legislature. This can be done by reviewing the statutory duty to create and develop new classifications and requesting, as was done in 1978 for the outstanding Hay appeals brought under §67-5309B(e), *Idaho Code*, their approval, effective the July 1 following the egislative session.

Any conflict which might appear between §67-5309(a)-(c), *Idaho Code*, (establishing new classes) and §67-5309B(a)-(d), *Idaho Code*, (legislative review of reallocations) must be construed in light of the practical necessity to perform both of these legislatively mandated functions. This can be done by recognizing the dictates of the Idaho Code requiring the Personnel Commission to establish such new classifications as are found necessary and to evaluate these in context of the Hay Associates' methodology. When these requirements are seen in light of the policy to move the State employee compensation level in accord with the legislative decision to be an average market level salary employer, as discussed above, it is both consistent and equitable to allow pay grades to change as a result of the Legislature's action on the yearly salary report. The Idaho Personnel Commission may change the pay grade of a job classification when the classification is created subsequent to the submission of the pay line report required by §67-5309B(d), *Idaho Code*, and only in accordance with the Legislature's approval, rejection or modification of that annual report.

Except to the extent that this Opinion modifies Attorney General Opinion 76-48 as it regards classes created subsequent to the reallocations proposed to the Legislature by the Idaho Personnel Commission, Attorney General Opinion 76-48 remains in full force and effect.

AUTHORITIES CONSIDERED:

1. *Idaho Code*, Sections 67-5309(a), 67-5309A(1), 67-5309B(a)-(e), 67-5309C, 67-5316.

2. Rules, Idaho Personnel Commission, 6.

3. Other Authorities: Attorney General Opinion 76-48; *Personnel Division of Executive Dep't v. St. Clair*, Or. App., 498 P.2d 809 (1972).

DATED this 27th day of March, 1978.

ATTORNEY GENERAL
State of Idaho

WAYNE L. KIDWELL

ANALYSIS BY:

W. B. LATTA, JR.
Assistant Attorney General

WLK/WBL/ls

cc: Idaho Supreme Court
Supreme Court Library
Idaho State Library

ATTORNEY GENERAL OPINION NO. 78-17

TO: Mr. Donald R. Erickson, Director
Board of Corrections
State of Idaho
Statehouse Mail

Per Request for Attorney General Opinion

QUESTIONS PRESENTED:

1. "Can a court make probation conditional upon the performance of non-compensated, public service work?"

2. "If the preceding question is answered affirmatively, what compensation, if any, would be provided for persons suffering job related injuries while performing the work upon which their probation was made conditional?

a. Would these probationers be covered by Workmen's Compensation or by any other form of public insurance?

b. If injured while providing labor for the State or any agency or subdivision thereof, what is the scope of the employer's potential tort liability?"

3. "What is the extent of potential vicarious liability for negligent and intentional acts committed by the probationer within the scope of his employment?"

CONCLUSION:

Probation conditioned upon non-compensated public service is allowable provided the terms of such probation can be classified as "rehabilitative." The probationers would probably not be covered by workmen's compensation, but a basis for common law tort liability exists both for the negligent, and possibly the intentional, acts of any "voluntary probationer."

ANALYSIS:

1. Probation is not a matter of right, it is a discretionary function of the sentencing court. *Idaho Code*, §19-2601(2), states that a court may place a defendant on probation under "such terms and conditions as it deems necessary and expedient." This is not an absolute uncontrolled grant of power to sentencing courts. Rather, a court is subject to review for abuse of discretion if a condition of probation is not reasonably related to the rehabilitation purpose of probation. *State v. Sandoval*, 92 Idaho 851, 452 P.2d 350 (1969). The conditions of probation are also limited to conditions which are reasonably possible to perform. *State v. Sandoval, supra.*

It should also be known that a defendant may decline probation if he feels the conditions of probation are not satisfactory. In the event this occurs he may demand to be sentenced by the court. *Franklin v. State*, 87 Idaho 291, 392 P.2d 552 (1964).

Considering the above, it would be logical to conclude that a court could make probation conditional upon performance of non-compensated public service work provided such work was in fact "voluntary" and provided such work could be justified as being beneficial to rehabilitation of the probationer.

2. At the outset the distinction between prisoners or convicts under the custody and control of a penal system and a mere probationer subject to the jurisdiction of the court and not incarcerated in a state penitentiary should be noted. In the former instance the Idaho Supreme Court has made specific rulings as to the tort liability involved. Concerning the latter, no Idaho case law is present.

The Idaho Supreme Court in the case of *Shain v. Idaho State Penitentiary*, 77 Idaho 292, 291 P.2d 870 (1955) held that "rewards to a prisoner are a matter of grace and are at the discretion of the Board of Corrections. They are not wages paid by the State to a prisoner giving rise to the relationship of employer and employee." It can be concluded from this case that the provisions of the workmen's compensation laws are therefore not intended for the benefit of State penitentiary inmates. See also: *Miller v. City of Boise*, 70 Idaho 137, 212 P.2d 654 (1949). Furthermore, a person who is "volunteer" is excluded from the definition of "employee" contained in the workmen's compensation Code section definition outlined in I.C. 72-102(9). Also, a probationer may be exempted from coverage under the provisions of I.C. 72-212 which excludes (2) casual employment and (5) employment which is not carried on by the employer for the sake of pecuniary gain.

The concurring opinion in *Shain* sets forth a well written argument establishing reasons why prisoners should be included within the Workmen's Compensation Act. A possible change in policy since these above-noted cases were decided could influence how matters involving probationers may be resolved. Also, the legitimate distinction which can be drawn between prisoners and probationers would lead one to believe the law is far from settled in the area of declaring benefits under the Workmen's Compensation Act.

Should a person not be included as a recipient for benefits under the Workmen's Compensation Act, then that person may resort to common law tort remedies to obtain relief. By the adoption of Title 6, Chap. 9, *Idaho Code*, commonly referred to as the Idaho Tort Claims Act, the State of Idaho has consented to allow recovery against the State in instances of negligence by employees of the State. *Idaho Code*, 6-902(4) defines employee to include even persons who are performing work for the State "without compensation." For this reason, it could be concluded that a person who is performing some service on behalf of the State of Idaho or any of its governmental subdivisions, particularly if that person is performing such tasks at the direction of the court and under the supervision and control of some court-authorized governmental body, such person would be classified as an "employee" of the State. For this reason, the "volunteer probationer" would be treated as any other State employee for liability purposes.

Without getting into specific factual situations, it would be safe to conclude that the implementation of probationers' "voluntary" work programs sponsored by the State, could probably subject the State to both liability for the negligent actions of such volunteers, and for liability under common law theories for any injury that the probationer may incur while performing acts within the scope of such voluntary employment.

Furthermore, the State probably incurs liability in two ancillary instances. Firstly, the supervising State employee to which any volunteer probationer is responsible could possibly incur liability on behalf of the State for allowing such "volunteer probationer" to perform certain actions in which the probationer did not possess sufficient qualifications to act in a reasonable manner. Secondly, in a remote instance the State could incur liability for knowingly authorizing the implementation of a program which places unqualified, or otherwise dangerous persons in a known situation in which damage is likely to occur. In other words, the State possibly could be termed negligent in conducting certain programs with the use of "volunteer probationers" who have known dangerous propensities.

Obviously there is no single definitive answer to question #2. It should be noted that the potential for liability is present by the implementation of any type of "voluntary probationer assistance" program. The probability of occurrence of a tortious act, the magnitude of potential liability, and the likelihood of preventing such liability by the implementation of an insurance program, should all be considered in deciding to establish this program.

3. The concept of vicarious liability, that being a situation in which a master (such as the State of Idaho), is liable for the acts of a servant (such as an employee) is inherently set forth in the discussion of tort liability in question #2 above. I.C. 6-903 provides that the concept of vicarious liability exists when employees of the State of Idaho perform negligent actions while acting within scope of their employment. Furthermore, there is a presumption that the acts of an employee when performed within the time and place of employment or within the scope of his employment are without malice or criminal intent. For this reason, if a factual relationship is established, vicarious tort liability would be present for the negligent acts of any "volunteer probationers."

The intentional actions of an employee of the State of Idaho present another problem. The generally accepted interpretation of the Idaho Tort Claims Act is that "intentional" torts committed by employees are not within the scope of employment of an employee and thus incur no liability for the State of Idaho. This general concept is supported by the exceptions to governmental liability provisions of I.C. 6-904(4). It should be noted, however, that a basis for liability may also be present for intentional torts if the State, or any supervising authority of the State can, or should reasonably have, determined the substantial likelihood of the occurrence of an intentional tort in a given factual situation.

AUTHORITIES CONSIDERED:

1. *State v. Sandoval*, 92 Idaho 851, 452 P.2d 350 (1969)

2. *Franklin v. State*, 87 Idaho 291, 392 P.2d 552 (1964)

3. *Shain v. Idaho State Penitentiary*, 77 Idaho 292, 291 P.2d 870 (1955)

4. *Miller v. City of Boise*, 70 Idaho 137, 212 P.2d 654 (1949)

5. *Idaho Code*, §§6-902(4), -903, -904(4); 19-2601(2); 72-102(9), -212

DATED this 28th day of March, 1978.

ATTORNEY GENERAL
State of Idaho

WAYNE L. KIDWELL

ANALYSIS BY:

ARTHUR J. BERRY
Assistant Attorney General
State of Idaho

WLK:AJB:lb

cc: Idaho State Library
Idaho Supreme Court
Idaho Supreme Court Library

ATTORNEY GENERAL OPINION NO. 78-18

TO: The Honorable John V. Evans
Governor
State of Idaho
STATEHOUSE MAIL

Per Request for Attorney General Opinion

QUESTIONS PRESENTED:

1. Has House Bill 480, as approved by the Legislature, ever been presented to me for approval as required by §10, Art. IV, Idaho Constitution?

2. If the answer to the above is in the affirmative, what effect, if any can be given to the bill as presented to me and signed by me.

3. If the answer to (1) above is in the negative, may a properly engrossed bill be presented to me for my signature as set forth in §10, Art. IV, Idaho Constitution?

4. May a properly enrolled bill be prepared and submitted to the Secretary of State and be physically substituted for the incorrect version of House Bill 480 without a further presentment or signature requirement?

CONCLUSION:

1. Yes, a bill identified to you as House Bill 480 was presented to you for approval as required by Art. IV, §10, Idaho Constitution. Therefore, under the theory of substantial presentment, House Bill 480 as passed by the Legislature, has been presented to you.

2. The draft version of the bill which was never introduced into the Legislature is null and void.

3. No answer is necessary.

4. House Bill 480 as passed by both houses of the Legislature should be submitted to the Secretary of State and substituted for the incorrect version without the necessity of any further presentment or signature.

ANALYSIS:

To clarify and analyze the questions presented, the facts should be fully restated as they have been related to this office. In proposing his legislative package to the 1978 session, the Governor submitted a proposal, which we shall call Bill "A" Prior to Bill "A's" introduction extensive revision was completed and the proposal was formally introduced into the Legislature as House Bill 480, which we shall call Bill "B". Bill "B" was passed by the House and sent to the Senate where minor amendments were added. The Senate passed Bill "B" as amended.

Bill "B" was then sent to the Legislative Data Center to be enrolled and engrossed, however the Center, through a clerical mistake, enrolled and en-

grossed Bill "A". Bill "A" was identified as House Bill 480 and sent to the President of the Senate and Speaker of the House for signature. The enrolled bill was then presented to the Governor as required by Art. IV, §10, Idaho Constitution. The Governor then signed what he believed to be House Bill 480, forwarding the same to the Secretary of State.

The following should be noted:

(1) Bill "A" was never introduced into the Legislature.

(2) Bill "B" was introduced into the Legislature as House Bill 480 and was passed by both houses.

(3) Due to a clerical error Bill "A" was substituted for Bill "B" and identified as House Bill 480.

(4) The Speaker of the House, President of the Senate and Governor signed a bill identified as House Bill 480.

This is not the first instance involving such errors. Similar cases have arisen in other jurisdictions, and the Idaho Supreme Court has resolved corresponding questions.

The majority rule would appear to say that when a bill approved by the Governor and properly authenticated is materially different from the bill passed by the two houses, the enrolled bill will not control. *Simpson v. Union Stockyards Co. of Omaha*, 110 F. 799 (1901); *Stein v. Leeper*, 78 Ala. 517 (1885); *State ex rel Brassey v. Hanson*, 81 Idaho 403, 342 P.2d 706 (1959); *Jessup v. Mayor and City Council of Baltimore*, 121 Md. 562, 89 A. 103 (1913); *Rode v. Phelps*, 80 Mich. 598, 45 N.W. 493 (1890); *State v. Naftalin*, 246 Minn. 181, 74 N.W.2d 249 (1956); *State v. Liedtke*, 9 Neb. 462, 4 N.W. 68 (1880); *Ritzman v. Campbell*, 93 Ohio St. 246, 112 N.E. 591, LRA 1916E 1251, AnnCas 1918D 248 (1915); *State v. Hagood*, 13 SC 46 (1879); *Charleston Nat. Bank v. Fox*, 119 W. Va. 438, 194 S.E. 4 (1937); *State v. Wendler,* 94 Wis. 369, 68 N.W. 759 (1896); *State v. Swan*, 7 Wyo. 166, 51 P. 209, 75 Am.St.Rep. 889 (1897). Likewise, if the error is merely in spelling or immaterial or unimportant words which occur between the journal and the enrolled bill, it will not invalidate the act. In such cases the rule of de minimus applies in favor of the enrolled bill. *Stein v. Leeper*, 78 Ala. 517 (1885); *State ex rel Landis v. Thompson*, 121 Fla. 561, 163 So. 270 (1935); *State v. Doherty*, 3 Idaho 384, 29 P. 855 (1892); *Illinois Cent. R. Co. v. People*, 143 Ill. 434, 33 N.E. 173, 19 LRA 119 (1892); *Stow v. Grand Rapids*, 79 Mich. 595, 44 N.W. 1047 (1890); *Miesen v. Canfield*, 64 Minn. 513, 67 N.W. 632 (1896); *In re Application of Fisher*, 80 N.J.Super. 523, 194 A.2d 353 (1963); *Frazier v. Bd. of Com'rs, Guilford County*, 194 N.C. 49, 138 S.E. 433 (1927); *Price v. Moundsville*, 43 W.Va. 523, 27 S.E. 218, 64 Am.St.Rep. 878 (1897); *Integration of the Bar Case*, 244 Wis. 8, 11 N.W.2d 604 (1943). Certainly the error involved in the above cited factual situation cannot be considered de minimus. A bill which was not even introduced into the Legislature let alone passed by both houses has supposedly been signed into law by the Governor.

The most recent cases speaking to this subject in Idaho are *State v. Hanson*, 81 Idaho 403, 342 P.2d 706 (1959) and *Worthen v. State*, 96 Idaho 175, 525 P.2d 957 (1974. In *Hanson* the enrolling clerk erroneously copied 3.5% as the percentage to be applied to the first $1000.00 of taxable income in a

revenue bill when in fact the legislature had lowered the rate to 3%. In deciding that the 3% rate as passed by both houses should be the controlling law the Court reasoned that

> "It appears that the governor knew the bill as passed by the legislature provided for a rate of 3%, not a rate of 3.5% It is therefore obvious that his approval was of the 3% rate and not of the 3.5% rate. It is presumed that the governor approved only what he could constitutionally approve, that is, the bill as passed by the legislature. He did not, and could not, approve the 3.5% rate, erroneously copied into the bill by the enrolling clerk."

In the present facts before us it is obvious that the Governor was aware of the content of House Bill 480 as passed by both houses of the Legislature. The Governor had, in fact, proposed the legislation and had specifically failed to introduce Bill "A" which had been found to be defective. With the decision in the *Hanson* case it would appear that the Court would say that the Governor could only sign into law that bill which had been passed by both houses of the Legislature. It would be further logical to presume that since Bill "B" was a part of the Governor's package and proposed by the Governor, that he determined, when presented, that the bill as enrolled and identified as House Bill 480 could only be that bill which had been proposed by the Governor and passed by both houses of the Legislature. It should therefore be presumed under a theory of substantial presentment that the Governor signed into law House Bill 480 or Bill "B" as opposed to Bill "A"

In the *Worthen* case the Court was more limiting in saying that

> "This Court has held that obvious clerical errors or misprints in the statutes will be corrected, or words will be read into a statute or omitted therefrom, if the error is plainly indicated, and the true meaning is obvious, but there is a limit to how far this Court can go in correcting legislative errors. It is provided in art. 4 §10 of the Idaho Constitution that, 'Every bill passed by the legislature shall, before it becomes a law, be presented to the governor.' Everything contained in House Bill 789 as enrolled by the legislative clerks, and submitted to and approved by the Governor, was affirmatively approved by both the House and Senate. That portion which was inadvertently in the enrolling process, i.e., the provision eliminating the requirement to report inventory values, while approved by both the House and Senate, was not approved by the Governor because of the inadvertent omission. Therefore, the omitted portion did not become the law of the State of Idaho. It is separable from the other matters in the bill."

The *Worthen* case can be easily distinguished from our present facts. In that instance the Court was dealing with a bill which had in fact been introduced into the Legislature. Only a small portion of the bill had been omitted through clerical error which could easily be separated from other matters in the bill. In the situation before us the content of House Bill 480 cannot be easily separable. House Bill 480 or Bill "B" is not even a part of Bill "A" We are talking about two separate and distinct bills. To allow Bill "A" to control would open the door to fraud in allowing such occurrences to establish the law of our state.

We are therefore of the opinion that the majority rule should control and that Bill "B", the bill passed by the two houses, has been signed into law by the Governor. We are further of the opinion that Bill "B" should be substituted for Bill "A" and submitted to the Secretary of State.

Naturally this opinion is only advisory in nature in that we are not a court of law. Any final resolution of the questions raised must be the subject of appropriate litigation. In the meantime this opinion may be used as guidance in correcting the existing problem.

AUTHORITIES CONSIDERED:

1. *State v. Hanson*, 81 Idaho 403, 342 P.2d 706 (1959)

2. *Worthen v. State*, 96 Idaho 175, 525 P.2d 957 (1974)

3. Other Cases: *Simpson v. Union Stockyards Co. of Omaha,* 110 F. 799 (1901); *Stein v. Leeper,* 78 Ala. 517 (1885); *State ex rel Brassey v. Hanson,* 81 Idaho 403, 342 P.2d 706 (1959); *Jessup v. Mayor and City Council of Baltimore*, 121 Md. 562, 89 A. 103 (1913); *Rode v. Phelps*, 80 Mich. 598, 45 N.W.493 (1890); *State v. Naftalin*, 246 Minn. 181, 74 N.W.2d 249 (1956); *State v. Liedtke*, 9 Neb. 462, 4 N.W. 68 (1880); *Ritzman v. Campbell*, 93 Ohio St. 246, 112 N.E. 591, LRA 1916E 1251, Ann.Cas. 1918D 248 (1915); *State v. Hagood*, 13 SC 46 (1879); *Charleston Nat. Bank v. Fox*, 119 W.Va. 438, 194 S.E. 4 (1937); *State v. Wendler*, 94 Wis. 369, 68 N.W. 759 (1896); *State v. Swan*, 7 Wyo. 166, 51 P. 209, 75 Am.St.Rep. 889 (1897); *Stein v. Leeper*, 78 Ala. 517 (1885); *State ex rel Landis v. Thompson*, 121 Fla. 561, 163 So. 270 (1935); *State v. Doherty*, 3 Idaho 384, 29 P. 855 (1892); *Illinois Cent. R. Co. v. People*, 143 Ill. 434, 33 N.E. 173, 19 LRA 119 (1892); *Stow v. Grand Rapids*, 79 Mich. 595, 44 N.W. 1047 (1890); *Miesen v. Canfield*, 64 Minn. 513, 67 N.W. 632 (1896); *In re Application of Fisher*, 80 N.J.Super. 523, 194 A.2d 353 (1963); *Frazier v. Bd. of Com'rs, Guilford County*, 194 N.C. 49, 138 S.E. 433 (1927); *Price v. Moundsville*, 43 W.Va. 523, 27 S.E. 218, 64 Am.St.Rep. 878 (1897); *Integration of the Bar Case*, 244 Wis. 8, 11 N.W.2d 604 (1943)

4. Art. IV, §10, Idaho Constitution

5. 1978 Session, House Bill 480

DATED this 28th day of April, 1978.

ATTORNEY GENERAL
State of Idaho

WAYNE L. KIDWELL

ANALYSIS BY:

BILL F. PAYNE
Deputy Attorney General
State of Idaho

WLK:BFP:lb

cc: Idaho State Library
Idaho Supreme Court
Idaho Supreme Court Library

ATTORNEY GENERAL OPINION NO. 78-19

TO: Representative Emery E. Hedlund
Chairman, Permanent Building Fund
Advisory Council
1746 Main Avenue
St. Maries, Idaho 83861

Per Request for an Attorney General Opinion.

QUESTION PRESENTED:

Would the Permanent Building Fund Advisory Council violate the provisions of Idaho law by instructing the Administrator of Public Works to utilize the "design-build" method of constructing facilities for public agencies from specifically appropriated funds?

CONCLUSION:

The "design-build" method for construction of public facilities violates the provisions of Idaho law pertaining to public works.

ANALYSIS:

The conclusion reached in this Opinion is based on the definition of the "design-build" approach to public construction as presented in the letter of Representative Emery E. Hedlund dated April 11, 1978. The relevant portions of that letter provide:

> Basically, the "Design-Build" approach requires the State to prepare a proposal that includes planning, program and scope, size, function, material preferences, site criteria, mechanical criteria together with contract documents and requirements to request proposals from developers.
> The contract would then be let to the low bidder and the architect and contractor would proceed to construct the building and install their version of equipment or materials to meet "or equals" clauses in the contract proposal. This could conceivably open the door to the state acquiring buildings loaded with obsolete or discontinued mechanical or electrical equipment and/or off brand, foreign manufactured equipment for which replacement parts or maintenance is unobtainable.

Prior to turning to the legalities involved in this approach, we observe in passing that "design-build" appears to be administratively unsound even if found to be legally permissible. This Opinion, of course, is confined to the legal ramifications of the "design-build" concept.

The "design-build" approach as defined above places considerable flexibility in the contractor and architect selected by the State for construction of public works. In other words, the proposal prepared by the State prior to acceptance of bids leaves a certain amount of discretion open to the contractor or architect in selection of materials and equipment. As a result, specifications, even if in existence, must be general enough in nature to permit the required flex-

ibility on the part of the selected architect and contractor. This type of specification, we believe, is contrary to the legislative intent expressed in §§67-5710, 67-5711, and 67-2309, *Idaho Code*. §67-5710, *Idaho Code* places primary responsibility for construction of public works in the Permanent Building Fund Advisory Council. Also, this section requires close cooperation between the Administrator of Public Works and the head of the Agency for whom the construction is designed. The responsible officer of the affected Agency must be fully apprised of the construction to take place and must give in advance his approval to this construction. This implies at the very least a full understanding by the appropriate administrator of the construction which can be expected.

Applicable language may also be found in §67-5711, *Idaho Code*. This statutory provision authorizes and empowers the Director of the Department of Administration or his designee to secure *all* plans and specifications for public works construction in the State of Idaho provided that such construction exceeds the value of $5,000.00 Both this statutory language and the provisions of §67-5710, *Idaho Code*, suggest that specific specifications are to be drafted by the State for construction of public works.

The obligation of the State of Idaho to prepare its own specifications for construction of public works is unquestionably mandated by the terms of §67-2309, *Idaho Code*. This language, as supplemented by the statues quoted above, renders inappropriate any procedure which allows nebulous specifications that permit unfettered discretion on the part of the contractor and architect on the public works project. §67-2309, *Idaho Code*, reads in part as follows:

> All officers of the state of Idaho . required by the statutes of the State of Idaho to advertise for bids on contracts for the construction, repair or improvement of public works, public buildings, public places or other work, shall make written plans and specifications of such work to be performed or materials furnished, and such plans and specifications shall be available for all interested prospective bidders therefore providing that such bidders may be required to make a reasonable deposit upon obtaining a copy of such plans and specifications; all plans and specifications for said contracts or materials shall state, among other things pertinent to the work to be performed or materials furnished, the number, size, kind and quality of materials and service required for such contract and such plans and specifications shall not specify or provide the use of any articles of a specific brand or mark, or any patented apparatus or appliances when other materials are available for such purpose and when such requirements would prevent competitive bidding on the part of dealers or contractors in other articles or materials of equivalent value, utility or merit.

This language obviously requires the preparation of detailed specifications by the State of Idaho. Of course, the State is not permitted by this statute to designate specific brands of equipment. In other words this statutory language encourages the submission of "equal products" by bidders within the parameters of rules and regulations promulgated by the Department. The language does not suggest, however, that the primary responsibility for the specifications may be turned over to non-state employees such as the contractor or architect on the project.

In summary, public works contracts require preparation of specifications by the State of Idaho which enhance and encourage the competitive bidding process. The specifications must be clear enough to provide a clear understanding on the part of State officials as to the quality of workmanship, equipment and materials to be obtained. Products which a bidder feels are "equal" to those required by the specifications may be submitted in accordance with promulgated procedures of the State of Idaho. Finally, we must emphasize again that this Opinion hinges on the term "design-build" as defined in the letter from Representative Emery E. Hedlund dated April 11, 1978.

The letter requesting this Opinion raised the question of a possible conflict with the "design-build" concept and regulations of the United States Department of Commerce and Economic Development. A definitive answer to this question must come from the federal agency itself. They alone are in a position to interpret their rules and regulations. However, our cursory review of these regulations suggests some potential problems which should be carefully considered. See particularly, "Requirements for Approved Project" 6th Ed., August, 1974, p. 19, Item IV, (b) (2), which provides that "the grantee/borrower should be alert to organizational conflicts of interest or non-competitive practices among contractors which may restrict or eliminate competition or otherwise restrain trade". See also, Item IV (b) (3) (b) providing that "invitations for bids or requests for proposals shall be based upon a clear and accurate description of the technical requirements for the material, product or service to be procured". Of course, due to the difficulties raised under State law, further inquiry into possible problems with federal regulations may not be necessary.

AUTHORITIES CONSIDERED:

1. *Idaho Code*, §67-5710.

2. *Idaho Code,* §67-5711.

3. *Idaho Code,* §67-2309.

4. Item IV (b) (2), Regulations for Approved Project, 6th Edition, August, 1974.

5. Item IV (b) (2) (b), Regulations for Approved Project, 6th Edition, August, 1974.

DATED This 28th day of April, 1978.

WAYNE L. KIDWELL
Attorney General of Idaho

ANALYSIS BY:

GUY G. HURLBUTT
Chief Deputy Attorney General
State of Idaho

WLK/GGH/lp
cc: Idaho Supreme Court
Idaho Supreme Court Law Library
Idaho State Library

ATTORNEY GENERAL OPINION NO. 78-20

TO: Representative Jack C. Kennevick
1 Mesa Drive
Boise, Idaho 83705

Per Request for an Attorney General opinion.

QUESTIONS PRESENTED:

1. Does the three year participation requirement proposed by Art. I, §8 and Art. VII, §4 of the Bylaws of the Idaho Hospital Liability Insurance Trust violate Art. VIII, §3 of the Idaho Constitution?

2. Would acceptance of both hospitals in varying degrees owned or controlled by a church or "religious sect" and county hospitals into membership of the Idaho Liability Trust violate Art. IX, §5 of the Idaho Constitution?

CONCLUSIONS:

1. The three year participation requirement proposed by the Bylaws of the Idaho Hospital Liability Insurance Trust does *not* violate Art. VIII, §3 of the Idaho Constitution.

2. Participation by county and other public hospitals together with church related hospitals in the Idaho Hospital Liability Insurance Trust should not be precluded by Art. IX, §5 of the Idaho Constitution. However, this question can only be resolved with absolute certainty by the courts.

ANALYSIS:

This Attorney General opinion is issued for the purpose of formalizing the legal advice rendered by letter dated December 20, 1977 to Representative Jack Kennevick with regard to the above-stated questions.

1. *Three Year Participation Requirement.*

It is our understanding that the above-mentioned bylaws and the participation agreement which have been drafted for the purpose of establishing a hospital liability trust as authorized by Ch. 37, Title 41 of the *Idaho Code* require that each hospital becoming a member shall be committed to participate for an initial period of three (3) years. After the initial three (3) year period, participation is essentially on a one (1) year basis. Such participation necessarily involves the annual payment of a premium, the amount of which will be computed each year based on actuarial computations. It is also our understanding that such an initial three (3) year requirement is necessary in order for the trust and any contract between the trust and a hospital to be sound actuarially as required by §41-3707(4) of the *Idaho Code.*

The key issue is whether such a commitment on the part of a county or other subdivision of the State would violate the constitutional prohibition found in Art. VIII, § 3 of the *Idaho Constitution* which reads in relevant part:

> No county, city, board of education, or school district, or other subdivision of the state, shall incur any indebtedness, or liability, in any manner, or for any purpose, exceeding in that year, the income and revenue provided for it for such year, without the assent of two thirds of the qualified electors thereof voting at an election to be held for that purpose, nor unless, before or at the time of incurring such indebtedness, provisions shall be made for the collection of annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof, within thirty years from the time of contracting the same.

It should be noted and stressed that this prohibition includes the following important exception:

> Provided that this section shall not be construed to apply to the *ordinary and necessary expenses authorized by the general laws of the state* (Emphasis supplied).

There well may be several reasons why Art. VIII, §3 does not preclude requiring the desired three (3) year commitment on the part of the counties or other subdivisions of the State. It is unnecessary, however, to develop these arguments because it is relatively clear that the liability incurred in promising to participate for the second and third year is an "ordinary and necessary expense authorized by the general laws of the state". The specific facts of our case have not been decided by the Idaho Supreme Court. However, an analysis and reasonable extension of existing case law and statutes support, as mentioned, the conclusion that the desired commitment falls within the exception to the Art. VIII, §3 prohibition and, thus, may be required and enforced.

Two conditions must be satisfied to fall within the above exception — the expense or liability must be *authorized by law* as well as *ordinary and necessary*. The establishment of hospitals and the procurement of relevant liability coverage by counties are authorized by law. For example, county commissioners are authorized to provide and maintain hospitals by §§31-3501 and 31-3503 of the *Idaho Code*. Moreover, county hospital boards have the power to contract and pay for all services necessary or convenient for the efficient, economical and successful operation of county hospital properties. Section 31-3615, *Idaho Code*.

This leaves the question of whether the establishment and maintenance of hospitals generally, and the acquisition of liability insurance for such hospitals, by counties or subdivisions of the State, are ordinary and necessary expenses as well as authorized by law. The decision of the Idaho Supreme Court in *Board of County Comm'rs* v. *Idaho Health Fac. Auth.*, 96 Idaho 498, 531 P.2d 588 (1975) is very helpful to the resolution of this issue. In that 1975 case, the Idaho Supreme Court made much of the scarcity and importance of hospitals and concluded in part that the operation of the hospital by Twin Falls county and expenditures made for improving the structure of the Twin Falls County hospital were ordinary and necessary expenses. The Court held that there was no violation of Art. VIII, §3 of the *Idaho Constitution* even though payment of the construction costs was assumed to extend for several years and exceed revenues for the relevant year. It is our opinion that the liability insurance or its equivalent is as necessary and ordinary to the operation of a hospital as adequate facilities, given the frequency of lawsuits. Moreover, the fol-

lowing statutes are very useful in support of the proposition that the cost of such protection is an ordinary and necessary expense: §39-4209, *Idaho Code*, which requires the filing of a certificate of insurance by an accute care hospital (participation in the hospital liability trust would satisfy the certificate requirement. Section 47-3727, *Idaho Code)*. §§39-4202 and 39-4205, *Idaho Code*, which provide limits on hospital liability; and the Idaho Hospital Liability Trust Act., Ch. 37, Title 41, *Idaho Code*. Both the passage and language of these statutory sections demonstrate the importance of liability protection to the operation of hospitals. The insurance certificate requirement and the Idaho Hospital Liability Trust Act are also relevant to the proposition that the liability represented by the three (3) year requirement is one authorized by law.

There are a number of cases which have construed Art. VIII, §3 upholding the incurrence of liability and expenses which extend over several years. They include, but are not limited to, *Boise Redevelopment Agency* v. *Yick Kong Corp.*, 94 Idaho 876, 499 P.2d 575 (1972); *City of Pocatello* v. *Peterson*, 93 Idaho 774, 473 P.2d 644 (1970); *Hanson* v. *City of Idaho Falls*, 92 Idaho 512, 446 P.2d 634 (1968); *Lloyd* v. *Twin Falls Hou. Au.*, 62 Idaho 592, 113 P.2d 1102 (1941); and *Corum* v. *Common School Dist. No. 21*, 55 Idaho 725, 47 P.2d 889 (1935). Several of these cases relied upon the Art. VIII, §3 exception in upholding the liability or expenses incurred. Assuming that actuarial soundness of the Idaho Hospital Liability Trust is, in fact, dependent upon a three (3) year commitment, a persuasive comparison can be made between the commitment expected from hospitals and the liability approved in *Hanson* v. *City of Idaho Falls*, *supra.*

The Idaho Supreme Court in *Hanson* considered the constitutionality of the Policeman's Retirement Fund Act and indirectly the validity to the Policeman's Retirement Fund established by the City of Idaho Falls as permitted by the Act. The Plaintiffs who were city policemen asserted the Act was unconstitutional and sought recovery of the amounts deducted from their salaries for the Fund. As with most retirement funds, both the city, as employer, and the police employees were to make contributions. One of the key issues was whether the City's duty to make future contributions to the fund created a "liability" within the scope and prohibition of Art. VIII, §3 of the *Idaho Constitution.* Comparable to the premiums for liability coverage in this case, the amount of the future contributions to the Policeman's Retirement Fund were uncertain but were to be determined periodically through actuarial study. The Court concluded that the city had incurred a "liability" within the scope of Art. VIII, §3, but that the liability and the Policeman's Retirement Fund Act fell within the exception provided for "ordinary and necessary expenses". The fact that the retirement plan could only be established on an actuarially sound basis by having a commitment to follow through with the contributions of unspecified amounts in future years, no doubt, influenced the Court in reaching an appropriate decision.

A review of these many relatively recent cases which have found a number of expenses to fall within the exception leads to a general conclusion that the prohibition of Art. VIII, §3 has been greatly reduced. The end result reminds one of the old adage that "the exception has become the rule"

Based on the facts given and the above analysis, we advise that the requirement that hospitals must initially commit to participate for three (3) years does not violate Art. VIII, §3 of the *Idaho Constitution.*

2. *Participation By Church Related Hospitals.*

The second legal issue submitted for consideration is more difficult, particularly due to the absence of case law which can be relied upon by analogy or extension in support of membership by hospitals owned or controlled in varying degrees by churches or "religious sects" Thus, our advice must be limited to offering what we deem to be the most reasonable interpretation of Art. IX, §5 of the *Idaho Constitution.*

Art. IX, §5 of the *Idaho Constitution* provides in relevant part:

> . . neither the legislature nor any *county* . . . or other *public corporation*, shall ever . . . pay from any *public fund or monies* whatever, *anything* in aid of any church or sectarian religious society . . or *to help support or sustain any . . scientific institution, controlled by any church, sectarian or religious denomination whatsoever* . . . (Emphasis supplied).

A cursory review of the Idaho decisions construing Art. IX, §5 might suggest that the prohibitions are insurmountable in this case. Article IX, §5 is clearly applicable to public monies paid to hospitals owned or operated by churches or sectarian religious societies and the terminology "public monies" has been very broadly construed. *Board of County Com'rs* v. *Idaho Health Fac. Auth, supra.* Moreover, it is relatively clear that the prohibition includes such payments when paid to persons or entities other than the church or hospital owned or operated by the church or "religious sect" under certain circumstances where the payment indirectly aids, supports or assists the church or hospital. *Epeldi* v. *Engelking*, 94 Idaho 390, 488 P.2d 860 (1971). In *Epeldi*, the Supreme Court held public busing of parochial students to be unconstitutional. Even though the services at public cost were provided to parochial students and not directly to the church school, the Court thought that the school was receiving support or assistance contrary to the prohibition of Art. IX, §5. The Idaho Supreme Court in both cases construed Art. IX §5 as placing a much greater restriction upon the power of the State and its subdivisions to aid activities undertaken by religious sects than does the First Amendment to The Constitution of the United States.

A closer reading of these two cases and Art. IX, §5 suggests several possible ways to distinguish the cases as well as a construction of Art. IX, §5 which would permit membership by relevant hospitals which for lack of a better short description will be referred to as "church-related"

Central to most of the distinctions and analyses proferred in the following paragraphs is a favorable characterization of the trust which is being established. It is important that the trust be considered analogous to the other forms and types of insurers authorized under the Idaho Insurance Code (and similarly the protection provided by an Idaho Hospital Liability Trust be considered analogous to other insurance contracts). Several provisions of the Idaho Hospital Liability Trust Act could be relied upon by a court to support such characterization. E.g., the trust is restricted in the investments it might make, somewhat similar to other insurers based on a comparison of §41-3712, *Idaho Code* (particularly §41-3712(e)) with §§41-707 — 41-722; such a trust is deemed a domestic insurer for liquidation purposes under specified circumstances, §41-3722, *Idaho Code*; and numerous other provisions of the Insur-

ance Code are applicable if not in conflict with the express provisions of the Idaho Hospital Liability Trust Act. Section 41-3723, *Idaho Code*. It would follow that the trust and relationships based on trust membership are analogous to any situation in which both public and church-related hospitals purchase liability coverage from the same domestic insurer. It is inconceivable that a Court would hold that premiums paid by county hospitals or the payment of claims by the insurer to former patients of Church-related hospitals violate Art. IX, §5. The point is that the Trust Act only authorizes another, albeit more advantageous, form of insurance coverage. In reaching a contrary conclusion, the Court arguably would raise questions about the validity of participation by church-related hospitals and their employees in workmen's compensation and unemployment benefit programs. Surely a Court would want to avoid such far reaching implications.

Additional support for the characterizations of liability insurance offered by the Hospital Liability Insurance Trust as conventional insurance and of the Trust as private rather than a public body is found in the Idaho cases which have held that the State Insurance Fund, §72-901, *et seq.*, *Idaho Code*, has the status of a private insurance company. *Atwood* v. *State*, 80 Idaho 349, 330 P.2d 325 (1958); *Rivera* v. *Johnston*, 71 Idaho 70, 225 P.2d 858 (1951).

With the above characterizations in mind, we suggest the two cases cited in this subdivision are distinguishable from the issues raised with regard to the Trust Act and the Liability Insurance Trust. The most relevant case is *Board of County Com'rs* v. *Idaho Health Fac. Auth., supra,* in which the Idaho Supreme Court held that the Idaho Health Facilities Authority, by contracting to provide financing to hospitals owned or operated by a religious sect, violated Art. IX, §5. The principal hospital affected by the decision was St. Benedicts. The Court reached its decision despite the fact the funds to be received by the church-related hospital came entirely from the issuance of bond anticipation notes repayable by the church-related hospital out of its own revenues. No tax money apparently was involved. The authority was simply the mechanism through which tax exempt revenue bond financing was made available to hospitals. It is important to emphasize, though, that the bonds were issued by and in the name of the Authority because the Court in reaching its decision construed the monies to be received by St. Benedicts as "public" since their source is the "proceeds of the sale of a bond of a 'public body politic and corporate'" 96 Idaho 509.

Unlike the Health Facilities Authority, the Trust does not seem to be a "public body politic and corporate". The Idaho Hospital Liability Trust is not created by the State Legislature. The formation of such a trust is simply permitted or authorized by the Idaho Hospital Liability Trust Act. See §41-3701, *Idaho Code*. In contrast, the Health Facilities Authority was created by the Idaho Legislature. Sections 39-1442 through 39-1444, *Idaho Code*. A similar distinction can be made between the trust and the school boards involved in *Epeldi supra*. In this context the characterization of the trust as a garden variety insurance carrier as discussed above can be utilized to support the proposition that the trust is not a public body. Thus, the trust is not among the entities prohibited from paying from a fund or monies anything in aid of or to help support or sustain any hospital controlled or operated by a church or religious sect.

The second possible and related distinction is that "public funds or monies" — the sources covered by Art. IX §5 — are not involved in the trust arrange-

ment. As already proposed the monies distributed by the trust to claimants are not rendered public by the mere act of being passed through or administered by the Trust. The Trust is not a public body for purposes of Art. IX, §5.

Perhaps there is a question whether the payments made by the counties might fall within the constitutional prohibition under the indirect benefit rule of *Epeldi*. Relying upon the characterization developed above, the monies paid by a county hospital in the form of premiums surely cease to be public monies, if they ever were, when paid to the trust for insurance coverage. As with the purchase of other forms of insurance from other insurers, the money should lose its characterization as public money when the insurer is not a public body. With regard to the premium payments made by counties or other subdivisions, we think two other points could be emphasized. First, unlike the payments and the busing service involved in the *Health Facilities Authority* and *Epeldi* cases, the premium payments are made by the counties or subdivisions of the State to obtain protection against liability — for the benefit of the counties and subdivisions — and not for any other purpose such as directly or indirectly aiding, helping, supporting, or assisting a church or church related hospital. The church related hospital will pay the same consideration for the same form of protection. The financial aid, help, support, or assistance received by a church related hospital is properly limited to insurance protection paid for by such a hospital. The second point is that the sequence of payment is substantially different in the case at hand. The payments paid by the counties obviously are not made directly to the church related hospital as in the *Health Facilities Authority* case. Moreover, the case at hand is not analogous to *Epeldi* for the counties are not making payments directly to claimants who are former patients of church related hospitals. Thus, it is at least clear that it would take a considerable and, we think, an unnecessary extension of the two cases to enshroud the trust arrangement with an aura of unconstitutionality. Again, our analogy to any other common insurance situation is helpful.

Lastly, the commonly recognized presumption favoring the constitutionality of legislation helps save the validity of the Trust Act. When a statute is susceptible to two constructions, one of which would render it invalid and the other which would render it valid, normally the construction which sustains the statute is adopted by the Courts; *Leonardson* v. *Moon*, 92 Idaho 796, 451 P.2d 542 (1969). However, the primary issues relate to the trust which does not benefit from this presumption rather than the Act itself.

For these reasons we advise as follows: (1) the existing case law after close scrutiny does not clearly invalidate trust participation by both public and church related hospitals. (2) Article IX §5 and the Idaho Hospital Liability Trust Act, are probably susceptible to a construction sustaining the statute and participation by both public and church-related hospitals in the Trust. As mentioned, however, the above construction of Art. IX, §5 has not been approved (or disapproved) by the Courts. Other interpretations will no doubt be offered. As there are no Idaho cases on point adopting the construction offered, the issues raised can only be resolved ultimately, and with absolute certainty, by a judicial determination.

AUTHORITIES CONSIDERED:

1. *Idaho Constitution*: Article VIII, §3; Article IX, §5.

2. *Idaho Code*: Chapter 37, Title 41, Idaho Liability Trust Act; §41-3707(4); §31-3501; §31-3503; §31-3615; §39-4209; §47-3727; §39-4202; §39-4205; §§41-

3712 and 41-3712(e); §§41-707 through 41-722; §41-3722; §41-3723; §72-901; §41-3701; §§39-1442 through 39-1444.

3. *Cases*; *Board of County Comm'rs* v. *Idaho Health Fac. Auth.*, 96 Idaho 498, 531 P.2d 588 (1975); *Boise Redevelopment Agency* v. *Yick Kong Corp.*, 94 Idaho 876, 499 P.2d 575 (1972); *City of Pocatello* v. *Peterson*, 93 Idaho 774, 473 P.2d 644 (1970); *Lloyd* v. *Twin Falls Hou. Au.*, 62 Idaho 592, 113 P.2d 1102 (1941); *Hanson* v. *City of Idaho Falls*, 92 Idaho 512, 446 P.2d 634 (1968); *Corum* v. *Common School Dist. No. 21*, 55 Idaho 725, 47 P.2d 889 (1935); *Epeldi* v. *Engelking*, 94 Idaho 390, 488 P.2d 860 (1971); *Atwood* v. *State*, 80 Idaho 349, 330 P.2d 325 (1958); *Rivera* v. *Johnson*, 71 Idaho 70, 225 P.2d 858 (1951); *Leonardson* v. *Moon*, 92 Idaho 796, 451 P.2d 542 (1969).

4. *Other Authorities*: By Laws of the Idaho Hospital Liability Trust Act, Art. I, §8 and Art. VII,§4.

DATED This 1st day of May, 1978

WAYNE L. KIDWELL
Attorney General
State of Idaho

ANALYSIS BY:

LARRY K. HARVEY
Special Assistant to the
Attorney General of Idaho

WLK/LKH/lp

cc: Idaho Supreme Court
Idaho Supreme Court Law Library
Idaho State Library

ATTORNEY GENERAL OPINION NO. 78-21

TO: John W. Barrett, Secretary
Judicial Council of the State
of Idaho
P.O. Box 829
Boise, Idaho 83702

Per Request for an Attorney General opinion.

QUESTION PRESENTED:

There will be, pursuant to legislative enactment, a new District Judgeship in the Fourth Judicial District of the State of Idaho commencing July 1, 1978. What is the appropriate procedure for filling this new judicial office and what is the term of the person filling that vacancy, if appointed by the Governor prior to the time of the next general election for judges?

CONCLUSION:

The Governor has a constitutional duty to appoint a qualified person to fill the newly created judicial position. However, this appointment is only effective until he or his successor is elected and qualified at the next general election for District Judges on August 8, 1978. Since the filing date for this election ends on June 7, 1978, the Governor should appoint the person to fill this vacancy prior to that date in order to permit compliance with the procedures for challenging an incumbent district judge.

ANALYSIS:

The Second Regular Session of the Forty-fourth Idaho Legislature enacted into law Senate Bill No. 1339 amending §1-805, *Idaho Code* by creating a new District Judgeship in the Fourth Judicial District. The Act becomes effective on July 1, 1978. Pursuant to §1-2102, *Idaho Code*, the Judicial Council is currently screening applications in order to submit a list of not less than two or more than four qualified candidates to the Governor to fill the newly created vacancy. The unusual nature of this appointment arises from the fact that the newly created position becomes effective in an election year.

Prior to considering the problems that may be created by Senate Bill No. 1339, we must consider the constitutional provisions relevant to the appointment of State District Judges. Article V, §11, *Idaho Constitution* limits District Judges to a four year term of office. Also important to the question presented here are the provisions of Art. IV, §6, *Idaho Constitution*, reading in part as follows:

> If the office of a justice of the supreme or district court, . . . shall be vacated by death, resignation *or otherwise*, it shall be the duty of the governor to fill the same by appointment, and the appointee shall hold his office until his successor shall be elected and qualified in such a manner as may be provided by law. (Emphasis added).

Whether or not this newly created position is a "vacancy" within the meaning of Art. IV, §6, *Idaho Constitution*, must first be determined. Cases in this and other jurisdictions answer this question in the affirmative. In *Fields* v. *Fong Eu*, 556 P.2d 729 (Calif. 1976), the Court, faced with a similar issue, concluded that:

> [A] vacancy is simply a state of being empty, unoccupied, or unfilled, without regard to when or how the condition arose. To cite an example often given in the cases, "A new house which has never been occupied is no less vacant than an old one which has been occupied, but whose tenant had removed from it. So a new office, which has never been filled is vacant when there is no incumbent, as much so as if it had an incumbent, and he had resigned or died." [Yates v. McDonald, (Ky. 1906) 96 S.W. 865, 866-867.] 556 P.2d at 732.

This same conclusion was reached by the Supreme Court of New Mexico in *State* v. *Mechem*, 265 P.2d 336 (N.M. 1954) and by the Supreme Court of Idaho in *Tway* v. *Williams*, 81 Idaho 1 (1959).

Since Senate Bill No. 1339 creates a vacancy within the meaning of Art. IV, §6, *Idaho Constitution*, the Governor has not only the right but the constitutional duty to fill the vacancy which occurs on July 1, 1978. As the court said in *Budge* v. *Gifford*, 26 Idaho 521 (1914):

> Under that provision of the constitution [Art. IV, §6] whenever a vacancy occurs in the office of the justice of the supreme court, it becomes the *duty* of the governor to fill the same by appointment. This is an absolute grant of appointive power to the governor by the constitution itself and does not depend upon legislative action or legislative sanction. That power given the governor is not limited or controlled in any manner by the provisions of said §19 of Art. V If that were so, the legislature might provide that when a vacancy occurs in the office of a justice of the supreme court, *or any other office named in said §6*, such vacancy should be filled by special election or by the legislature or in any other manner than by appointment by the governor, and thus deprive him of that power, *the exercise of which is not merely permitted but is made mandatory by the provisions of said section.* [Emphasis supplied]. 26 Idaho at 529.

The foregoing analysis reveals that a vacancy will exist in the Fourth Judicial District on July 1, 1978. Article IV, §6, *Idaho Constitution*, places a mandatory duty on the Governor to fill that position by appointment. Under Art. V, §11, *Idaho Constitution*, the term of the newly created position is limited to four years. Of course, these constitutional provisions provide merely the framework for State judicial positions. The answers to the questions presented depend equally on a full understanding of the relevant statutory law.

The initial and perhaps most important statutory provision is §1-702, *Idaho Code*, providing as follows:

> The district court is presided over by district judges chosen by the qualified electors of their respective districts for a term of four years, except, that upon the creation of a new district judgeship in any district, *such judge shall be appointed to hold office until the next general election for district judges*, unless otherwise provided in the act creating such judgeship, and until his successor is elected and qualified. [Emphasis added].

Senate Bill No. 1339, which is the Act creating the judgeship, is totally silent on the procedures for filling the new vacancy. Therefore, any logical reading of §1-702, *Idaho Code*, requires the conclusion that the appointment by the Gov-

ernor expires when the incumbent or his successor is elected and qualified at the next general election for district judges. Since the vacancy comes into being on July 1, 1978, the next general election for judges applicable to this office will be held on August 8, 1978. The successful candidate in this election will assume his office on January 1, 1979 pursuant to §67-302, *Idaho Code*. Under this authority, the Governor's appointee must stand election as an incumbent for his office at the general election for judges on August 8, 1978. If he is successful, his appointed term ends and his elected term begins on January 1, 1979. However, if he is not successful in the election for judges, he must relinquish his office to the newly elected judge on January 1, 1979. In effect, this places the appointee in the same position as all other district judges whose terms expire this year.

We believe the parameters for the term of the newly created office are quite well defined by existing statutory law. But the procedure becomes less clear when the filing requirements are considered.

According to §34-616, *Idaho Code*, each candidate for the office of district judge must file his declaration of candidacy with the Secretary of State, attaching thereto a petition with 200 qualified signatures and the necessary filing fee for deposit to the general fund. This declaration of candidacy must be filed between June 1 and June 7, 1978. See §34-704, *Idaho Code*.[1] The difficulty presented by this filing deadline readily becomes apparent. On the last day for filing, June 7, 1978, the new district judgeship technically does not exist. That position, as we have earlier seen, is effective on and after July 1, 1978. Additionally, §34-905, *Idaho Code*, which establishes the requirements for the non-partisan ballot, requires that the names of all candidates for each District Judge position "shall be listed under the proper office title by the secretary of state" This section also requires that "the ballot for each judicial office shall contain the words: 'to succeed (Judge, Justice) _,' inserting the name of the or of each incumbent candidate for reelection . . . ." Obviously, the literal interpretation of these statutes requires that the incumbent appointee be known prior to the expiration date of June 7, 1978 and prior to the time ballots must be prepared by the Secretary of State. Otherwise, the literal requirements of the Idaho Election Laws pertaining to these positions could not be complied with.

We recognize the tenuous nature of this particular appointment. However, we believe that the problem can best be rectified by the Governor's selection of a candidate prior to June 1, 1978. Although there is no statutory requirement of the Governor to do so, such an announcement would allow the appointee to timely file his petition for the general election. This would also permit any challenging candidate to file his candidacy to succeed the incumbent under the requirements of Idaho statutory law. Accordingly, the filing dates could be legally complied with, the ballots could be properly prepared, and the newly appointed judge would find himself in the same position as all other district judges whose terms expire this year. This, we think, is fair.

The final question which must be answered in this opinion is whether it is legally permissible for candidates to file for an office which does not come into existence until approximately three weeks after the filing deadline for

[1] §34-704, *Idaho Code*, appears to contain an ambiguity. Although non-partisan offices are specifically referred to, the section as drafted seems only to apply to political party candidates. This opinion, of course, does not address this problem. We assume that the filing period set forth in this statutory section is applicable to the position of state district judge.

that position. The procedure, though unusual, is within the bounds of law. By analogy, filing declarations of candidacy for an office which has not yet come into being is no different than the advance selection of an applicant to be appointed to fill the vacancy. It is a recognized and legal fact that this judgeship, created by statute, will come into being on July 1, 1978. The only unknown at this time is who the incumbent will be. This can easily be cured by announcing the appointee prior to June 1, 1978. (Of course, the appointee will not assume his duties until the office comes into being July 1, 1978). Furthermore, at the time of the general election for judges, which is the critical date, the office will definitely be in existence and filled by an incumbent judge.

AUTHORITIES CONSIDERED:

1. Article V, §11, *Idaho Constitution*.

2. Article IV, §6, *Idaho Constitution*.

3. §1-702, *Idaho Code*.

4. §67-302, *Idaho Code*.

5. §34-616, *Idaho Code*.

6. §34-704, *Idaho Code*.

7. §34-905, *Idaho Code*.

8. §1-2102, *Idaho Code*.

9. S.B. 1339, amending §1-805, *Idaho Code*, 44th Idaho Legislature, effective July 1, 1978.

10. *Fields* v. *Fong Eu*, 556 P.2d 729 (Cal. 1976).

11. *State* v. *Mechem*, 265 P.2d 336 (N.M. 1954).

12. *Tway* v. *Williams*, 81 Idaho 1 (1959).

13. *Budge* v. *Gifford*, 26 Idaho 521 (1914).

DATED This 2nd day of May, 1978.

WAYNE L. KIDWELL
Atttorney General
State of Idaho

ANALYSIS BY:

GUY G. HURLBUTT
Chief Deputy Attorney General
State of Idaho

WLK/GGH/lp

cc: Idaho Supreme Court
Supreme Court Law Library
Idaho State Library

ATTORNEY GENERAL OPINION NO. 78-22

TO: CAROLYN S. COSTELLO, Clerk
City of Dietrich
Dietrich, Idaho

Per Request for Attorney General Opinion

QUESTIONS PRESENTED:

(1) Whether or not a city is exempt from the provisions of the workmen's compensation law due to *Idaho Code* §72-212 which reads in pertinent part: "*Exemptions from coverage.* — None of the provisions of the law (workmen's compensation law) shall apply to the following employments unless coverage thereof is elected as provided in section 72-213:

(1) . . . .

(2) . . . . etc.

(5) Employment which is not carried on by the employer for the sake of pecuniary gain." etc. (Parenthesis added.)

(2) Whether a city is exempted from the workmen's compensation law when the city employees are unpaid volunteers.

CONCLUSIONS:

(1) A city is not exempt from the provisions of the workmen's compensation law due to any of the provisions of *Idaho Code* §72-212 because this section applies to the exemption of private employment only and does not apply to public employment.

(2) Volunteers in the service of a county, city, or any political subdivision thereof, or of any municipal corporation are deemed employees in public employment and subject their employers to the workmen's compensation act when the other indicia of an employer-employee relationship exists, such as the right to select the employee, the power to remove and discharge him, and to direct both what work shall be done and the way and manner in which it shall be done.

ANALYSIS:

Idaho Code §72-203 reads:

> "*Employments covered.* — This law (workmen's compensation law) shall apply to all public employment and to all private employment not expressly exempt by the provisions of section 72-212." (Parenthesis added.)
> *Idaho Code* §72-203

The Idaho Supreme Court held in 1934 that statutory language similar to *Idaho Code* §§72-203 and 72-212 did not exempt public employment which is not for pecuniary gain from the workmen's compensation act as follows:

"Appellants insist respondent cannot recover because the employer had not, prior to the accident, elected that the provisions of the workmen's compensation law shall apply to Bocock's employment. They rely on I.C.A. sec. 43-904, which provides: 'None of the provisions of this act shall apply to . . . Employment which is not carried on by the employer for the sake of pecuniary gain: Unless prior to the accident for which the claim is made the employer had elected in writing filed with the board, that the provisions of the act shall apply.'

No election was filed with the board and the employment was not carried on by the employer for pecuniary gain. Sec. 43-903 provides: 'This act shall apply to employees and officials of the state . . . .', and sec. 43-901 is as follows: 'This act shall apply to all public employment as defined in sec. 43-903 and to all private employment not expressly excepted by the provisions of sec. 43-904.' Sec. 43-904, which excepts certain employment from the operation of the act, applies to private employment and not to that of the state." (Citing authorities.)

Bocock v. State Board of Education, 55 Idaho 18, p.20, 37 P.2d 232. (See also *Crowley v. Idaho Industrial Training School*, 53 Idaho 606 pp. 611 and 612, 26 P.2d 180.)

The Supreme Court could be expected to come to the same conclusion under the present draft of §72-203 of Idaho workmen's compensation statute, particularly because there is no indication of legislative intent to provide that *Idaho Code* §72-212 be applicable to exclude certain public employments from the workmen's compensation act.

"Referential and qualifying words and phrases, where no contrary intention appears, refer solely to the last antecedent, which consists of the last word, phrase, or clause that can be made an antecedent without impairing the meaning of the sentence."

Sutherland Statutory Construction, 4th Ed. Vol. 2A, §47:33 p. 159.

Applying the foregoing rule of construction to the issue at hand, it appears clear that the phrase "not expressly exempt by the provisions of section 72-212" as found after the antecedent "all private employment" was intended to qualify only that last antecedent and not the preceding phrase of "all public employment"

Moving on to Question (2) of whether a city is exempted from the workmen's compensation law when the city employees are unpaid volunteers, we refer first to *Idaho Code* §72-205 which reads:

"*Public employment generally – Coverage*. — The following shall constitute employees in public employment and their employers subject to the provisions of this law:

(1) Every person in the service of the state or any political subdivision thereof, under any contract of hire, express or implied, and every official or officer thereof, whether elected or appointed, while performing his official duties.

(2) *Every person in the service of a county, city, or any political subdivision thereof, or any municipal corporation.*

(3) Members of the Idaho national guard while on duty and participants in the Idaho youth conservation project under the supervision of the Idaho state forester.

(4) Every person who is a member of a volunteer fire or police department shall be deemed, for the purposes of this law, to be in the employment of the political subdivision or municipality where the department is organized.

(5) Every person who is a regularly enrolled volunteer member or trainee of the department of disaster and civil defense, or of a civil defense corps, shall be deemed, for the purpose of this law, to be in the employment of the state." (Emphasis added.)
Idaho Code §72-205.

It would appear from *Idaho Code* §72-205(2) that the legislature intended to include every person who is in the service of a county, city, or any political subdivision thereof with the scope of "employees in public employments", and to subject their employers to the provisions of the workmen's compensation law.

We do note that there is considerable authority which indicates that gratuitous workers or "volunteers" are not covered under the workmen's compensation statutes.

"The word 'hire' connotes payment of some kind, by contrast with the common law of master and servant, which recognized the possibility of having a gratuitous servant, the compensation decisions uniformly exclude from the definition of 'employee' workers who neither receive nor expect to receive any kind of pay for their services."
Larson's Workmen's Compensation Law, Vol. 1A §47.41

"It has also been stated by the Supreme Court of Ohio that: 'It is impossible to have a contract of hire without the obligation that the person denominated the employer pay the person employed.' Thus a person voluntarily and gratuitously acting as a servant cannot recover as if he were indeed a servant."
SCHNEIDER, William R., *Schneider's Workmen's Compensation,* 3rd or Permanent Edition, Vol. 2 §227, p. 595. (See also *Coviello v. Industrial Commission of Ohio,* 196 N.E. 661, p. 662; and *Bingham City Corporation v. Industrial Commission of Utah,* 243 P. 113, p. 114 (Utah 1926).

Note: An observation of *Coviello v. Industrial Commission of Ohio,* and *Bingham City Corporation v. Industrial Commission of Utah* (supra) indicates that these cases turned on the definition of the term "employee" in each of the workmen's compensation statutes of the respective states. The workmen's compensation statutes in question defined "employee" as a person "under a contract of hire".

In 1954 the Idaho Supreme Court held in *Seward v. State* (infra) that a volunteer who had gratuitously assisted a deputy state brand inspector was not an employee within the scope of the workmen's compensation act.

"Services gratuitously and voluntarily performed for another or for the employee of an employer are, subject to certain exceptions not pertinent here, not covered by the Workmen's Compensation Act." (Citing authorities.)
Seward v. State, Idaho, 75 Idaho 467 p.471, 274 P.2d 993.

However, we do not believe the decision of *Seward v. State* (supra) would be controlling to the question as presented here for a number of reasons. The Seward decision was rendered in 1954 and the statute defining public employee has been significantly amended since 1954. It appears to have been specifically amended to include as "public employees" persons who are employees only as a result of statutory definition.

Note: In 1954 the definition of "public employment" appears to have been insofar as pertinent here as follows:

"*Public employment.* — This act shall apply to employees and officials of the state and of all counties, cities, cities under special charter or commission form of government, villages, offices of county boards of education, school districts, including school districts under special charter, irrigation districts, drainage districts, highway districts, road districts and other public municipal corporations within the state . . . etc."

Idaho Code §72-103 (as last amended in 1949 prior to its repeal in 1971).

"*Public employment – Relief work.* — Whenever any public or municipal corporation mentioned in section 72-103, shall accept, sponsor, take charge of and/or manage any work or project for the purpose of relief or assisting unemployment, wherein any part or all of the funds used on such project are granted by the United States of America and/or by the state of Idaho, the persons so working upon such project shall be deemed employees of the public or municipal corporation so sponsoring, accepting, taking charge of and/or managing such work or project.

The terms of the Workmen's Compensation Act of this state shall apply to all such employees."
Idaho Code §72-104 (as enacted in 1935 and repealed in 1971)

"Liability for workmen's compensation is statutory, and it is essential to a recovery that the person for whose injury or death an award of compensation is made be within the fair terms of the statute which creates the right."
Bingham City Corporation v. *Industrial Commission of Utah*, (supra) p. 114

In the *Bingham City Corporation v. Industrial Commission of Utah* (supra) decision p. 114, a volunteer fireman who followed other lines of regular employment was killed while performing his duties as a volunteer fireman under the jurisdiction of the Bingham City Corporation. The volunteer fireman's

family was not compensated because he was an "employee" which was defined to be "every person in the service of the state, and of every county, city, town or school district including regular members of lawfully constituted police and fire departments of cities and towns, under any *appointment or contract of hire* . . . . ."

In contrast is Idaho's present definition of public employment which includes as public employees "every person in the service of the state or of any political subdivision thereof *under any contract of hire*" (*Idaho Code* §72-205(1)) and in addition, "*Every person in the service of a county, city or any political subdivision thereof, or of any municipal corporation*" (*Idaho Code* §72-205(2)).

The state of Colorado has interpreted their definition of "employee" which is similar to Idaho's for the purposes of their Workmen's Compensation Act as follows:

> "We note that in the statutory definition of 'employee' there is no requirement that a salary be paid for the service rendered. Everyone knows that many persons 'in the service of the state' as members of various boards and commissions perform their statutory duties without salary or monetary consideration. Had the legislature intended to exclude such persons from coverage under the Workmen's Compensation Law, certainly language other than the words actually used would have been employed."
>
> *Lyttle v. State Compensation Insurance Fund*, 322 P.2d 1049, 1051 (Colorado 1958).

The requirement that a person be under a "contract of hire" is obviously excluded from *Idaho Code* §72-205(2) for persons in the service of a county, city, or of any municipal corporation. The requirement that a person be "under a contract of hire" is also excluded from members of the national guard while on duty, and participants of the Idaho youth conservation project (*Idaho Code* §72-205(3)), and for members of volunteer fire and police departments (*Idaho Code* §72-205(4)), and for regularly enrolled volunteer members or trainees of the department of disaster and civil defense, or of a civil defense corps (*Idaho Code* §72-205(5)).

It appears that the legislative intent in enacting *Idaho Code* §72-205 subsections (2), (3), (4) and (5) was to include within the scope of coverage under the workmen's compensation act persons who are in the service of the state or its political subdivisions who are not otherwise under a "contract of hire, express or implied" within the language of *Idaho Code* §72-205(1).

In any event, the express statutory language of *Idaho Code* §72-205(2) is clear and controlling. All persons in the service of a county, city, or any political subdivision thereof, or of any municipal corporation is in public employment and their employers are subject to the provisions of the workmen's compensation law. No exception is made for gratuitous volunteers who are not under "any contract of hire".

The Idaho Supreme Court stated in *Brewster v. McComb*, 300 P.2d 507, p.510 that:

> "There can be no recovery under the Workmen's Compensation Act by an injured person unless the relationship of employer and employ-

> ees exists, either actually *or by statute*." (Emphasis added.)
> *Brewster v. McComb*, 300 P.2d 507, p.510

And as was stated by the United States Court of Appeals, ninth circuit, in 1956:

> "Under the Idaho Workmen's Compensation Act, Idaho Code §§72-101 to 72-1103, there are two classes of employers covered by the Act. One is the normal common law type of employer and the other is an employer as defined by statute." (Citing authorities.)
> *Beedy v. Washington Water Power Co.*, 238 F.2d 123 p.125

In the case of a volunteer providing services for a city, the relationship of employer and employee exists by statute (*Idaho Code* §72-205(2)) even though there is not a subsisting contract of hire as long as the other indicia of an employer-employee, or master-servant relationship exists, including the right to select the employee, the power to remove and discharge him, and to direct both what work shall be done and the way and manner in which it shall be done.

> "The definition of an employee or workman at common law is applicable in determining who is an employee or workman under Workmen's Compensation Acts."
> (Citing Authorities.) *Larson v. Independent School District No. 11J*, 53 Idaho 49, p.57, 22 P.2d 229 (1953)

and

> "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 is to be done, and whether it shall stop or continue, that gives rise to the relationship or employer and employee, ..."
> *Cloughley v. Orange Transportation Co.*, 80 Idaho, 226, 235, 327 P.2d 369.

However, the Idaho cases indicate that the knowledge and consent of the employer is required before an employer-employee relationship may arise.

> "Before one can become the employee of another, the knowledge and consent of the employer, express or implied is required." (Citing authorities.)
> *In Re SINES*, 82 Idaho 527, p.531, 356 P.2d 226

AUTHORITIES CONSIDERED:

1. *Idaho Code* §§72-212, 72-203, 72-205

2. *Bocock v. State Board of Education*, 55 Idaho 18, p.20, 37 P.2d 232

3. *Crowley v. Idaho Industrial Training School*, 53 Idaho 606, pp. 611 and 612, 26 P.2d 180

4. *Coviello v. Industrial Commission of Ohio*, 196 N.E. 661, p.662

5. *Bingham City Corporation v. Industrial Commission of Utah*, 243 P.113, p.114 (Utah 1926)

6. *Seward v. State*, 75 Idaho 467, p.471, 274 P.2d 993

7. *Lyttle v. State Compensation Insurance Fund*, 322 P.2d 1049, 1051 (Colorado 1958)

8. *Brewster v. McComb*, 300 P.2d 507, p.510 (Idaho 1956)

9. *Beedy v. Washington Water Power Co.*, 238 F.2d 123, p.125

10. *Larson v. Independent School District No. 11J,* 53 Idaho 49, p. 57, 22 P.2d 229 (1953)

11. *Cloughley v. Orange Transportation Co.*, 80 Idaho 226, p.235, 327 P.2d 369

12. *In Re SINES*, 82 Idaho 527, p.531, 356 P.2d 226

13. *Larson's Workmen's Compensation Law*, Vol. 1A §47.41

14. SCHNEIDER, William R., *Schneider's Workmen's Compensation*, 3rd or Permanent Edition, Vol. 1 §227, p. 595

15. *Sutherland on Statutory Construction*, 4th Ed. Vol. 2A, §47:33 p.159

DATED This 12th day of May, 1978.

ATTORNEY GENERAL
State of Idaho

WAYNE L. KIDWELL

ANALYSIS BY:

ROBERT M. JOHNSON
Asistant Attorney General
State of Idaho

gc

cc: Idaho State Library
Idaho Supreme Court Library
Idaho Supreme Court

ATTORNEY GENERAL OPINION NO. 78-23

TO: Mr. Milton J. Cram, Mayor
City of Middleton
P.O. Box 155
Middleton, Idaho 83644

Per Request for Attorney General Opinion

QUESTION PRESENTED:

Do city councilmen have the right to review and examine the confidential portions of personnel records of regular and reserve police officers?

CONCLUSION:

The confidential portions of police personnel records are not to be considered a "public record" or "public writing" within the meaning of the *Idaho Code* and thus are not the subject of disclosure to the general public. The question of whether or not a city councilman has the authority to examine the confidential personnel records on policemen cannot be answered without specific data concerning the powers and duties of Middleton city councilmen.

ANALYSIS:

The question at hand presents the classic confrontation of "an individual's right to privacy versus the public's right to know." The question also presents the issue of the scope of power of Middleton city councilmen, along with the ethical considerations involved in public officials disclosing private information which may be detrimental to the public good.

Two primary Code sections in the area of public disclosure of documents are I.C. 9-301 and 59-1009.

I.C. 9-301 states:

> Public writings — Right to inspect and take copy. — Every citizen has a right to inspect and take a copy of any public writing of this state, except as otherwise expressly provided by statute.

I.C. 59-1009 states:

> Official records open to inspection. — The public records and other matters in the office of any officer are, at all times during office hours, open to the inspection of any citizen of this state.

The threshold question at issue here is determining whether material such as confidential disclosures in police personnel files is the type of material which would constitute "public record and/or public writings." This question can best be analyzed if we examine I.C. 9-311, which defines public writings into four classes. These classes include (1) laws, (2) judicial records, (3) other official documents, and (4) public records kept in this state of private writings. From a reading of Chapters 3 and 4, Title 9, *Idaho Code*, one gets the impression that "public writings" are writings made by a lay person as opposed to writings made by officials acting in the capacity of State officers. "Other public docu-

ments" are private writings which become public records if such writings are required by statute to be made and are of such a nature as can be retained by the State as official memoranda. Case law from other jurisdictions supports this definition of public record. *State v. Brantley*, 211 P.2d 668 (Ore. 1954); *Emmertson v. State Tax Comm.*, 72 P.2d 467. On the other hand, every memoranda made by a public officer is not a public record. *Steiner v. McMillan*, 195 Pac. 836.

Previous Attorney General opinions have addressed the question of disclosure of public and/or private records. An Attorney General's opinion issued on January 6, 1972, concerning information contained on public assessor roles, stated that tax assessor information was subject to public disclosure. This opinion is distinguishable from the fact situation at hand because, (1) the assessor is required by law to record certain official information (I.C. 63-307, 63-308), and (2) the tax information relates to public property and can be obtained from other sources.

Another Attorney General opinion issued on December 30, 1971, suggests a "balancing of interest approach" by which agencies of government are to determine on a case by case basis whether information constitutes a public writing and therefore should be disclosed to the public. This opinion cites cases from a California statute identical to I.C. 59-1009. Such cases hold that preliminary matters recorded by public officers do not constitute a public record. *Coldwell v. Bd. of Public Works*, 202 Pac. 897 (Cal. 1921); *MacEwan v. Holm*, 359 P.2d 413 (Ore. 1961).

Furthermore, the Idaho legislature has indicated a policy that privileged communications between governmental officials should not be the subject of public disclosure. I.C. 9-203(5) states: "Public officer cannot be examined as to communications made to him in official confidence, when the public interest would suffer by disclosure."

For the above-noted reasons, it is the opinion of the Office of the Attorney General that confidential data contained in personnel files of police officers is not data which is subject to public disclosure.

AUTHORITIES CONSIDERED:

1. *State v. Brantley*, 211 P.2d 668 (Ore. 1954)

2. *Emmertson v. State Tax Comm.*, 72 P.2d 467

3. *Steiner v. McMillan*, 195 Pac. 836

4. *Coldwell v. Bd. of Public Works*, 202 Pac. 897 (Cal. 1921)

5. *MacEwan v. Holm,* 359 P.2d 413 (Ore. 1961)

6. *Idaho Code*, §§9-203(5), 9-301, 9-311, 59-1009, 63-307, 63-308

DATED this 17th day of May, 1978.

ATTORNEY GENERAL
State of Idaho

WAYNE L. KIDWELL

ANALYSIS BY:

ARTHUR J. BERRY
Assistant Attorney General
State of Idaho

WLK:AJB:lb

cc: Idaho State Library
Idaho Supreme Court
Idaho Supreme Court Library

ATTORNEY GENERAL OPINION NO. 78-24

TO: JUDGE GERALD D. SCHROEDER
Chairman, Fourth District Magistrates Commission
Ada County Courthouse
Boise, Idaho 83702

Per request for an Attorney General's Opinion.

QUESTION PRESENTED:

Is a magistrate who has been retained by election, but thereafter resigns well prior to the mandatory time for filing a declaration of candidacy in order to assume a higher judicial office, thereafter ineligible for appointment to a *different* magistrate position within the same judicial district less than two years after the expiration of what would have been his full term had he not resigned? If the answer to the above question is that such a magistrate would be ineligible for a different appointment, could he preserve his eligibility by filing a declaration of candidacy prior to assuming the higher judicial office?

CONCLUSION:

If the magistrate's effective date of resignation is more than sixty (60) days prior to the general election in which he would ordinarily run for retention, then he is eligible for appointment to *any* magistrate position for which he is otherwise statutorily qualified, including (if it is still available) the position which he has previously vacated. A resignation in the sixty-day period next preceding the general election would produce a contrary result, but we need not concern ourselves with the ramifications of such a resignation since the facts in the instant case do not lend themselves to that possibility.

ANALYSIS:

This opinion request arises in the context of a magistrate who has been appointed, effective July 1, 1978, to fill a new district judgeship. To do so, he is required to resign his magistrate's position prior to July 1, 1978, since the two offices are incompatible. See 46 Am.Jur.2d *Judges* §58, at p. 132. On the basis of Attorney General Opinion 78-21 (issued May 2, 1978), the new district judgeship is subject to the judicial election to be held in August, 1978. If the district judge-select were to lose the August election (which is contested), would he be qualified, *without having to wait for two years following the expiration of his last magistrate term*, to seek appointment to the same or to a different magistrate position which might be available?

This situation is governed by *Idaho Code* §1-2220, hereinafter referred to as "the statute." To avoid the risks inherent in editing a statute, the statute is set forth below in its entirety:

> *Retention or nonretention of magistrate by vote.* — Any magistrate appointed pursuant to the provisions of section 1-2205, Idaho Code, may, not less than sixty (60) days prior to the holding of the general election next preceding the expiration of an initial two (2) year term of office, or the expiration of an appointment to fill not less than two (2) years of the balance of an unexpired term of an elected magistrate,

file in the office of the county clerk of the county for which he is a resident magistrate, accompanied by a filing fee of forty dollars ($40.00), a declaration of candidacy to succeed himself. If a declaration is not so filed by any magistrate, the vacancy resulting from the expiration of his term of office shall be filled by appointment as herein provided, *except that any magistrate who does not file shall be ineligible for appointment within the same judicial district until two (2) years following the expiration of his last term of office have expired.* If such a declaration is filed, his name shall be submitted at the next general election to the voters eligible to vote within the county for which he is appointed, on a nonpartisan judicial ballot, without party designation, which shall read:

> "Shall [the] Magistrate . . . . (Here insert the name of the magistrate) of . . . . (Here insert the name of the county) County of the . . (Here insert the judicial district number) Judicial District be retained in office?" (Here provision is to be made for voting "Yes" or "No.")

The votes shall be canvassed as provided in chapter 12, title 34, Idaho Code.

If a majority of those voting on the question vote against retaining him in office, upon the expiration of his term of office, a vacancy shall exist which shall be filled by appointment as provided in section 1-2205, Idaho Code, *except that the magistrate not retained in office shall be ineligible for appointment within the same judicial district until two (2) years following the expiration of his last term of office have expired.*

If a majority of those voting on the question vote for retaining him in office, the county clerk shall issue him a certificate of election as provided in section 34-1209, Idaho Code, and said magistrate shall, unless removed for cause, remain in office for an additional term of four (4) years, and at the expiration of each such four (4) year term shall be eligible for retention in office by election in the manner herein prescribed. (Emphasis supplied.)

This opinion request concerns itself with the applicability of the two-year waiting period noted in the statute. (It is assumed that the applicant for magistrate would meet other statutory qualifications for office, such as residence.) This is a matter of first impression in Idaho, and we are not aware of decisions from other jurisdictions which would shed light on the issue. The Idaho statutes for the selection and retention of magistrates are patterned on the so-called "Missouri Plan." However, *Idaho Code* §1-2220 is distinguishable from its Missouri counterpart, Mo. Const., Art. 5, §§29 (a) and 29 (c) (1), in that neither the original nor amended Missouri provisions contain the said two-year prohibition. However, we believe that the Idaho statute — while not drafted to specifically anticipate every possible situation — is nevertheless susceptible to meaningful interpretation in the light of the facts on hand.

The two-year prohibition noted in the statute becomes applicable on the happening of two events: (1) If a magistrate does not make a timely filing of a declaration of candidacy to succeed himself; and (2) If, after making such a filing, a majority of those voting on the question of his retention vote against retaining him.

At first blush, as suggested in the attachment to the opinion request, it might appear that the statute is not even applicable when a magistrate seeks appointment to a magistrate's position other than the one succeeding himself, or when he seeks appointment to a different position. However, since the two-year prohibition, which appears twice in the statute, is couched in identical language with respect to both the failure to file and the failure to obtain a majority of affirmative votes on the question of retention, we find it difficult to believe that the Legislature intended any distinction between re-appointment to one's own position and appointment to a different position. Either possibility would equally lend itself to evasion of the elective requirements set forth in the statute. Furthermore, the statute clearly states *both* with respect to a failure to file a timely declaration of candidacy and with respect to a failure at the election to be retained in office that the effected magistrate "shall be ineligible for appointment *within the same judicial district* until two (2) years following the expiration of his last term of office have expired." (Emphasis supplied.) It is difficult to argue with language as clear as that set forth. The Legislature was mindful (by specific reference in the opening part of the statute) of *Idaho Code* §1-2205 which authorizes multiple magistrate positions in each judicial district.

Nor do we believe, as is suggested in the attachment to the opinion request, that the two-year prohibition is in any way triggered or not triggered on the basis of the motive surrounding the magistrate's resignation. Whether the magistrate has a lofty motive, such as the acceptance of a higher judicial position, or an entirely different motive, such as the intent to avoid the verdict of the people at an election, the applicability of the two-year provision is not affected. The statute makes no such distinction. Motive or intent is obviously susceptible primarily to subjective criteria, and the place for consideration of such criteria is in the subjective selection process itself, rather than in the objective standards of eligibility for selection.

Nor do we believe that there is compliance with the statute if a magistrate files a declaration of candidacy to succeed himself immediately prior to his resignation. First, such a declaration, which is subscribed to under oath, would not be submitted in good faith, particularly if it was submitted after the filing of an incompatible Petition for Candidacy by the same applicant for the position of District Judge; and second, the declaration of candidacy to succeed oneself would be of no legal effect if the magistrate subsequently forfeited his incumbency through resignation. Only an incumbent has the power to succeed himself, and resignation would, in that respect, be indistinguishable from any other cause of vacancy after the filing of a declaration of candidacy, such as the death or involuntary removal of the incumbent magistrate.

Although our above analysis gives support to the broad reach of the two-year prohibition once it is triggered, nevertheless, as noted above, we believe that the prohibition is only triggered when there is a failure to make a timely filing of a declaration of candidacy, or when there is a loss by the incumbent at the general election. The latter possibility is not applicable in the instant case, and we are therefore only now concerned with whether the magistrate fails to make a timely filing.

As noted earlier, *Idaho Code* §1-2220 provides in pertinent part that a magistrate "may, not less than sixty (60) days prior to the holding of the

general election next preceding the expiration of" his current term "file a declaration of candidacy to succeed himself." A magistrate does not become delinquent in his filing, and thereby trigger the two-year prohibition, unless he waits to file until the passing of the sixtieth day prior to the general election. But, if the magistrate has vacated his office through resignation (or otherwise) prior to the said sixtieth day before the election, then he has rendered himself incapable to file to succeed himself, since the statute specifically reserves such a filing only to an incumbent magistrate. When the office is vacated, for whatever reason, there is no incumbent, and there is accordingly no election for retention, unless a new incumbent has been timely selected. The former incumbent would have no more authority to file after his resignation than any other person. Accordingly, since the magistrate who resigns more than sixty days before the election is not delinquent in his failure to file at the time of resignation, and since the filing provisions would not apply to him after his resignation, he is not subjected to the two-year prohibition which is triggered upon a non-compliance with the filing provisions of the statute. Conversely, if the magistrate's resignation were within the sixty day period, then his failure to have made a timely filing would bring about the operation of the two-year prohibition, but the instant case does not present such a factual situation.

We recognize that a hypothetically devious magistrate could attempt to circumvent the election requirement by resigning sixty-one days before the election, and then by seeking a re-appointment. As we have noted earlier, the magistrate's motive would not render him ineligible to reapply for the position. However, there are three distinct checks and balances on the system. First, in contrast with the retention election, the magistrate would be forced to compete directly with any other persons seeking to fill the position. Second, the District Magistrates Commission, created pursuant to *Idaho Code* §12203, would presumably consider the magistrate's motive when deliberating on the selection. Third, *Idaho Code* §1-2205 would permit a majority of the district judges within the judical district to veto any selection made by the District Magistrates Commission. In view of the fact that the district judges are periodically subjected to a contested election, it is doubtful if they would be sympathetic to a newly re-appointed magistrate who had attempted to evade an uncontested election for his retention.

AUTHORITIES CONSIDERED:

1. *Idaho Code* §§1-2203, 1-2205 and 1-2220.

2. Attorney General's Opinion No. 78-21.

3. Mo. Const., Art. 5, §§29 (a) and 29 (c) (1).

4. 46 Am.Jur.2d *Judges* §58.

DATED THIS 9th day of June, 1978.

WAYNE L. KIDWELL
Attorney General

ANALYSIS BY:

RUDY BARCHAS
Deputy Attorney General

lc

cc: Idaho Supreme Court
Supreme Court Law Library
Idaho State Library

ATTORNEY GENERAL OPINION NO. 78-25

TO: Ernest A. Hoidal
Legal Counsel
Association of Idaho Cities
3314 Grace St.
Boise, Idaho 83703

Per Request For Attorney General Opinion

QUESTION PRESENTED:

"Considering the provisions of Idaho Code 50-602 and 50-902, if the City Council has before it as an item of business the adoption of an ordinance, or a resolution to enter into a contract, and the final vote on said ordinance or resolution to enter into a contract results in roll call vote of three (3) in favor and three (3) opposed, is the Mayor authorized and impowered to break said tie vote by casting a tie breaking vote either in favor of or in opposition to said ordinance or resolution to enter into a contract?"

CONCLUSION:

Yes. Under the terms of §50-602, *Idaho Code*, the mayor of a city is authorized to vote in the case of a tie vote in the city council. He has the casting vote. If, however, less than the full council is present and the matter requires a vote of one half of the full council plus one, as some matters do, there is not such a tie as the mayor may break to pass such a matter.

ANALYSIS:

Section 50-321, *Idaho Code*, has had little change since 1893 when it was originally passed. 1893 Idaho Session Laws, p.97, §10. This section states that the mayor shall preside over meetings of the city council and ". shall have a casting vote when the council is equally divided and none other . . " In 1967, when the city laws were recodified this section was amended to provide that other than in the case of a city manager plan of city government the mayor is the chief administrative officer of the city, that he shall preside over the city council meetings, determine the order of business under the council's rules and shall ". . . and have a vote only when the council is equally divided, . . ." Section 59-602, *Idaho Code*. The situation is different under the city manager plan. See §50-810, *Idaho Code*.

There are no Idaho cases on the subject of the mayor's "casting" or "tie breaking" nor are there any Idaho cases on the "tie breaking" vote of State officers such as the Lieutenant Governor acting as President of the Senate under Art. IV, §13, Idaho Constitution.

Section 50-902, I.C., requires a majority vote of the council to pass an ordinance. An ordinance shall be read on three different days unless one half plus one of all members of the council suspend such rule. We do not believe that the first part of this section qualifies or changes the mayor's "tie breaking" ability.

In dealing with §50-602, I.C., one notices immediately that the "tie breaking" vote of the mayor is not by the words therein restricted by any particular subject, but is a general power to break ties. This is the only case where the mayor may vote at a council meeting. The mayor can, of course, under §50-611, I.C., veto any ordinance passed by the council.

We believe that the mayor's "tie breaking" vote is meant to carry on or continue the same power that he had under the previous Idaho laws and that the wording was amended in 1967 to clarify it rather than to change it. There are quite a number of cases on the subject of tie breaking votes in other jurisdictions. No cases have been found in which general words such as used in the Idaho Statute have been restricted to "tie breaking." See the cases cited in Exhibit A and B, and in the *West Digest System*. Where the wording is general and not restrictive as to what ties can be broken by the mayor's vote, all of the cases seem to agree that the mayor may break any real tie in the votes of the city council. *4 McQuillan on Municipal Corporations*, §13.25a, pp.504-505; *West's Digest System*, Municipal Corporations Key #98. A copy of a portion of *McQuillan* is included as part of this opinion, see Exhibit A.

The rules as to quorum or the numbers necessary for passage of particular items of business before a council need to be considered in regard to this matter.

The pyramid edition of *Robert's Rules of Order*, 1967-1971, p.159, states that among the duties of the president or presiding officer is "to put all matters to vote and give results; to decide a tie vote or not to vote at all . . " Also see *Mason's Manual of Legislative Procedure*, 1962 ed., §§513, 514, 515. The Idaho legislature has adopted *Mason's* which deals at length with the "tie breaking" or "casting" vote, and gives many examples from decided case law. A copy of several sections of *Mason's* is included as part of this opinion. See Exhibit B.

In Idaho, a majority of all members of the city council constitutes a quorum to conduct business under §50-705, I.C., and a majority of the quorum may take most actions allowed to the council. However, certain ordinances or actions require the affirmative vote of one half plus one of the entire council, or more than one half of the whole council, e.g., Franchise Ordinances, §50-329, I.C.; Calling a Special Meeting of the Council, §50-706, I.C.; The Necessity of Reading an Ordinance on Three Different Days, §50-902, I.C. (This list is not meant to be exhaustive but is here for example purpose only.) Some other statutes such as §67-2345 I.C., relating to executive sessions in the Open Meeting Law requires a two thirds (⅔) affirmative vote. These latter rules are mentioned here for the reason that they must be considered in determining when a tie exists.

An ordinance or contract with certain exceptions, such as a franchise ordinance or contract, under §50-329, I.C., can be passed by a simple majority or the majority of a quorum. These cases could lead to ties which a mayor could break.

Some other examples of these rules are as follows: If you had a council of six, one half plus one of the full council would be four. If you have a council of four, one half plus one of the full council would be three. A quorum to conduct business would be the same in either case. We believe that where the council members are all present and are equally divided, in either of these cases, the mayor could break the tie and pass a matter that requires one half plus one for pas-

sage. But, if a matter requires one half plus one of the full council for passage and only a quorum of four (council of six) or three (council of four) were present, the mayor's vote would not pass the matter. In the case of a matter requiring one half plus one of the full council for passage (council of six) and if only a quorum is present (four), a vote of two for a matter and two against a matter would not be such a tie as the mayor could break. On the other hand, in the council of six, with only a quorum of four present, the mayor could break any vote of two for a matter or two against a matter not requiring one half plus one of the full council, or more than one half of the full council.

AUTHORITIES CONSIDERED:

1. *Idaho Code*, §§50-321, -329, -602, -611, -705, -706, -810, -902, 67-2345

2. *Idaho Code Annot.*, §49-321

3. 1893 Session Laws, p.97, §10

4. Idaho Constitution, Art. IV, §13

5. *4 McQuillan on Municipal Corporations*, §13.25a

6. *West's Digest System*, Municipal Corporations Key 98

7. *Robert's Rules of Order*, 1967-1971

8. *Mason's Manual of Legislative Procedure*, 1962 ed., §§513, 514, 515

DATED this 12th day of June, 1978.

ATTORNEY GENERAL
State of Idaho

WAYNE L. KIDWELL

ANALYSIS BY:

WARREN FELTON
Deputy Attorney General
State of Idaho

WLK: WF:lb

cc: Idaho State Library
Idaho Supreme Court
Idaho Supreme Court Library

Municipal Corporations

§13.25a. — Vote only to break tie.

The mayor's or presiding officer's right to vote is frequently restricted to the right of casting a vote for the purpose of breaking a tie,[32] as where he is merely the executive or presiding officer and not a member.[33] He gives the casting vote, where he is empowered to do so, only in the event of a tie vote,[34] e.g., when there are four votes for and four votes against.[35] His vote cannot be counted in determining whether or not there is a majority vote,[36] nor can he vote so as to make a tie and then give the casting vote.[37]

Under a charter which recited that "the mayor shall preside at all meetings of the city council, and shall have a casting vote when the council is equally divided, and none other," and also provided for "a concurrence of a majority of the whole number of members elected to the council, to pass any by-law, ordinance," etc., it was held that an ordinance required the concurrent vote of a majority of all of the councilmen elected. Thus where the council consists of four members and two vote yea and two fail to vote, and the mayor votes yea, this is not sufficient, the court saying that "the vote of the mayor added nothing to the significance of the proceeding."[38] Under substantially the same charter provisions, however, a contrary conclusion has been reached.[39]

It has been said that the right of a mayor to vote in case of a tie must be challenged at the time of the vote.[40]

---

[32]Iowa. Griffin v. Messenger, 114 Iowa 99, 86 NW 219.

New Jersey. Grimes v. Miller, 113 NJL 553, 175 A 152.

New York. People v. Batchelor, 22 NY 128.

Ohio. Babyak v. Alten, 106 Ohio App 191, 154 NE2d 14.

Oregon. State v. Common Council of City of North Bend, 171 Ore 329, 137 P2d 607.

Utah. Taylor v. Gunderson, 107 Utah 437, 154 P2d 653; McCain v. Church, 76 Utah 170, 289 P88.

Casting vote by presiding officer, § 13.25, ante.

[33]Georgia. Palmer v. Claxton, 206 Ga 860, 59 SE2d 379, quoting McQuillin text

Louisiana. Reynolds v. Baldwin, 1 La Ann 162; Bierhorst v. Prieto (La App), 131 So2d 308; Strawitz v. Town of Marksville (La App.), 77 So2d 597.

Maine. Brown v. Foster, 88 Me 49, 33 A 662, 31 LRA 116.

Maryland. Mayor and City Council of Havre de Grace v. State Board of Health, 234 Md 222, 198 A2d 732, citing McQuillin text.

New York. Lake Shore & M. S. R. Co. v. Dunkirk, 65 Hun 494, affd 143 NY 660, 39 NE 21.

North Carolina. Markham v. Simpson, 175 NC 135, 95 SE 106, 108, citing McQuillin text.

Ohio. State v. Allen, 170 Ohio St. 375, 165 NE2d 644; Babyak v. Alten, 106 Ohio App. 191, 154 NE2d 14.

Utah. McClain v. Church, 76 Utah 170, 289 P88

[34]Connecticut. Sullivan v. Mortensen, 132 Conn. 289, 43 A2d 731; Wooster v. Mullins, 64 Conn 340, 30 A 144, 25 LRA 694.

Georgia. Gostin v. Brooks, 89 Ga 244, 15 SE 361.

Illinois. Hazelcrest v. Lambert, 343 Ill. 105, 174 NE 868; Carrollton v. Clark, 21 Ill App 74.

Maryland. Havre de Grace v. Bauer, 152 Md 521, 137 A 344 (but not applicable to tax ordinances.)

Missouri. Grant City v Salmon, 221 Mo App 853, 288 SW 88; Mound City v. Shields, 220 Mo App 798, 278 SW 798

Ohio. State v. Snyder, 149 Ohio St 333, 78 NE2d 716 (statutes empower president of city council to vote in case of any tie irrespective of whether regarded as member of council.)

Texas. Robinson v. Hays (Tex Civ. App), 62 SW2d 1007, 1009.

Utah. McClain v. Church, 76 Utah 170, 289 P88, citing McQuillin text.

Failure of mayor to act following tie vote of council on resolution for appointment of mayor as member of water commission. Grimes v. Miller, 113 NJL 553, 175 A 152.

[35]Oregon. McCourt v. Beam, 42 Ore 41, 69 P 990.

[36]See §§13.31b, 13.34b, post.

[37]Mississippi. Bousquet v. State, 78 Miss 478, 29 So 399.

Where, for example, three of five councilmen voted for proposition and two opposed, mayor voting with two does not create tie. Johnson v. Arnold, 176 Ga 910, 169 SE 505; Lewis v. McWhorter, 176 Ga 914, 169 SE 507.

Where five aldermen voted for one candidate and four for another, mayor could not vote for minority candidate and then cast deciding vote to elect such candidate. Ott v. State, 78 Miss 487, 29 So 520.

[38]Nebraska. State v. Gray, 23 Neb 365, 369, 36 NW 577.

[39]Oregon. State v. Common Council of North Bend, 171 Ore 329, 137 P2d 607.

[40]Arkansas Carr v. El Dorado, 217 Ark 423, 230 SW2d 485.

Sec. 513. Tie Votes and Casting Votes

1. When the vote for and the vote against any proposition are equal there is a tie vote. A tie vote decides nothing but leaves the situation unchanged. The voice of the majority decides, for the *lex majoris partis* is the law of all legislative bodies and elections where not otherwise expressly provided. But if the body be equally divided, *semper presumatur pro negante,* the former law is not changed because no affirmative action can be taken except by a majority. A decision of the presiding officer is not overruled on appeal by a tie vote.

2. It has been thought, in many instances, that some provision should be made to "break" a tie. This is accomplished by giving the presiding officer a vote in case of a tie. This vote is called a "casting" vote. Such a vote can be cast only when it will decide the tie. When, for example, a lieutenant governor with a casting vote presides over a senate with 40 members where 21 votes are necessary to pass a bill. The lieutenant governor would have a casting vote if the vote were 20 to 20 on a bill but not if the vote were 19 to 19 because the vote of the lieutenant governor would not decide the question.

3. The casting vote is usually given to a presiding officer, like a lieutenant governor or mayor, when he is not a regular member of the body and does not otherwise have a vote. It is occasionally given to a presiding officer who is a regular member and may first vote as a member and may vote again to break a tie.

4. In 37 states the lieutenant governor presides over the senate and he presides over the single house in Nebraska. In 31 states the lieutenant governor has a casting vote, in five he has no vote, and in Rhode Island he is a member and votes as a regular member.

5. When the presiding officer is not a member of the organization he can cast a vote only when expressly authorized to do so.

6. By the common law a casting vote sometimes signifies a single vote of the person who never votes except in the case of an equality and sometimes a double vote of a person who votes first with the rest and then upon an equality creates a majority by casting a second vote. A presiding officer who is a member of the body and has already voted as such has no power to cast a second vote to break a tie unless such right is given by rule or statute expressly so providing.

Section 513 —

Paragraph 1 —
Jefferson, Sec. XLI; Cushing's Legislative Assemblies, Sec. 412; Sturgis, pp. 56, 57.

Paragraph 2 —
Hansen v. Town of Anthon (1919), 187 Iowa 51, 173 N.W 939, Merriam v. Chicago R. Company (1908), 130 Mo. App. 247, 111 S.W. 876; City of Croswell v. Helm (1938), 284 Mich. 404, 279 N.W. 879; State v. Cresswell (1918), 117 Miss. 795, 78 So. 770.

Paragraph 3 —
State v. Chapman (1878), 44 Conn. 595, Launtz v. People (1885), 113 Ill. 137, 55 Am. Rep. 405; Carroll v. Wall (1868), 35 Kan. 36, 10 Pac. 1, Small v. Orne (1887), 79 Me. 78, 8 Atl. 152; People v. Church of the Atonement (1866), 48 Barb. (N.Y.) 603, Reeder v. Trotter (1919), 142 Tenn 37, 215 S.W. 400.

Paragraph 4 —
Book of the State, 1952, pp. 90, 100, 580, 581.

Paragraph 5 —
Reeder v. Trotter (1919), 142 Tenn. 37, 215 S.W.400; Carrollton v. Clark (1886), 21 Ill App. 74, People v. Wright (1902), 30 Colo. 439, 71 Pac. 365.

Paragraph 6 —
O'Neil v. O'Connell (1945), 300 Ky 707, 189 S.W. 2d 965; People v. Church of the Atonement (1866), 48 Barb. (N.Y. 603; Reeder v. Trotter (1919), 142 Tenn. 37, 215 S.W 400.

Sec. 514. When a Casting Vote Is in Order

1. A casting vote is in order only when there is a tie vote as when the votes are equally divided between two candidates or when there is an equal number for and against a proposition.

2. A casting vote is not in order in an election to give one candidate a majority where the other votes are scattered among other candidates. A casting vote would be in order where the vote was four to four but not where the vote was three for one candidate, two for another and one for a third. A casting vote is not in order to give one candidate a plurality where two or more have an equal number of votes.

3. When two candidates for election by a city council receive the same number of votes and there is a blank vote, there is not a tie which will permit the presiding officer to give a casting vote.

4. Where the presiding officer is a member of a body and as such member entitled to vote with the other members, the fact that he was chosen to act as presiding officer will not deprive him of the privilege of voting as a member but gives him a second vote as presiding officer in case of a tie.

5. Where the mayor is entitled only to a casting vote, a person serving as mayor pro tem, even though he is a member of the council presiding in the absence of the mayor, is not entitled to a casting vote in case of a tie.

6. When voting in case of a tie, the presiding officer may give his reasons for the vote and have them entered in the journal the same as a regular voting member.

7. Where the presiding officer gives a casting vote he should definitely cast his own vote. The mere announcing of the vote, adding his own, has been held sufficient in some cases but disputed in others.

Section 514 —

Paragraph 1 —

Wooster v. Mullins (1894), 164 Conn. 340, 30 Atl. 144, 25 L. R. A. 694; Gostin v. Brooks (1892), 89 Ga 244. 15 S.E. 361; Carrollton v. Clark (1886), 21 Ill. App. 74; Beaver Creek v. Hastings (1884), 52 Mich. 528, 18 N.W. 250; Kelley v. Secretary of State (1907), 149 Mich. 343. 112 N.W. 978; State ex rel. v. Gurney (1879), 26 Minn. 313, 3 N W. 977; Rich v. McLaurin (1903), 83 Miss. 95, 35 So. 337; State v. Yates (1897), 19 Mont 239, 47 Pac. 1004; Grant City v Salmon (1926), 221 Mo. App. 853, 288 S.W. 88; McClain v. Church (1930), 76 Utah 170, 289 Pac. 88; State v. Mott (1901), 111 Wis. 19, 86 N.W. 569.

Paragraph 2 —

State v. Yates (1897), 19 Mont. 239, 47 Pac. 1004; State v. Mott (1901), 111 Wis. 19, 86 N.W. 569; McCourt v. Beam (1902), 42 Ore. 41, 69 Pac. 990; City of Croswell v. Helm (1938), 284 Mich. 404, 279 N.W. 879.

Paragraph 3 —

State v. Chapman (1878), 44 Conn. 595.

Paragraph 4 —

Reeder v. Trotter (1919), 142 Tenn. 37, 215 S.W. 400.

Paragraph 5 —

Harris v. People (1912), 18 Cal. App. 160, 70 Pac 699; Shugars v. Hamilton (1906), 122 Ky. 606; Freint v. Dumont (1931), 108 N.J.L. 245; Herring v. Mexia (Tex. Civ. App. 1926-27) 290 S.W 792.

Paragraph 6 —

Cushing's Legislative Assemblies, Sec. 311; N.Y. Manual, 1948-49, p. 443.

Paragraph 7 —

Cases not requiring separate casting of vote are: Launtz v. People (1885), 113 Ill 137, 55 Am. Rep. 405; Rushville Gas Co. v. Rushville (1889), 120 Ind. 206, 23 N.E. 72; Small v Orne (1887), 79 Me. 78, 8 Atl 152, State v Armstrong (1893), 54 Minn. 457, 56 N.W. 97; People ex rel. v. Rector (1866), 48 Barb. (N. Y.) 603.

Cases requiring separate casting of vote are: Hornung v. State (1888), 116 Ind. 458, 19 N.E. 151; Lawrence v Ingersoll (1889), 88 Tenn. 52, 12 S.W 422; Casler v. Tanzer (1929), 234 N Y. Supp. 571.

8. When voting on an appeal, although the question is "Shall the decision of the president (or speaker or chairman) stand as the judgment of the senate (or house, or council)," the presiding officer, when a member, may vote, and a tie vote, even though his vote made it a tie, sustains the presiding officer upon the principle that the decision of the presiding officer can be reversed only by a majority.

ATTORNEY GENERAL OPINION NO. 78-26

TO: Jenkin L. Palmer, Chairman
State Tax Commission

QUESTION PRESENTED:

May the State Tax Commission enter into contracts with cities for the collection of the recently authorized city hotel/motel room occupancy taxes or liquor by the drink taxes? If so, may the Tax Commission spend the funds received since such funds are not a part of the legislative appropriation to the Commission?

CONCLUSION:

The State Tax Commission is not currently authorized by legislation to enter into such a contract to collect these taxes for other governmental entities.

ANALYSIS:

The recently adjourned session of the Idaho legislature enacted House Bill 373 which authorizes resort cities with a population under 20,000 to impose, if approved by election, either a hotel/motel room occupancy tax or a liquor by the drink tax or both.

Section 5 of the bill provides in part:

> A city may contract with any person for the collection of any non-property tax authorized by this act and approved by city voters in accordance with the provisions of this act, provided that provisions may be made for reimbursement of all actual costs of rendering such services.

This section, therefore, empowers the city to contract with others for the collection of the tax. However, we have found no similar legislative provision authorizing the State Tax Commission to enter into such a contract.

The powers of the State Tax Commission are limited to those powers expressly or impliedly delegated to it by the Constitution and laws of the State. Article VII, Sec. 12, *Idaho Constitution*, provides in pertinent part:

> The duties heretofore imposed upon the state board of equalization by the Constitution and laws of this state shall be performed by the state tax commission and said commission shall have such other powers and perform such other duties as may be prescribed by law; including the supervision and coordination of the work of the several county boards of equalization.

Upon a review of the statutory powers and duties delegated to the State Tax Commission, we have been unable to find legislative authorization for such a contract with a city.

Section 67-2332, *Idaho Code*, provides:

> Any one or more public agencies may contract with any one or more other public agencies to perform any governmental service, activity, or undertaking which *each* public agency entering into the contract is authorized by law to perform, including, but not limited to joint contracting for services, supplies and capital equipment, provided that such contract shall be authorized by the governing body of each party to the contract. Such contract shall set forth fully the purposes, powers, rights, objectives and responsibilities of the contracting parties.

Both a city and the State Tax Commission are "public agencies" as defined in the act.

Section 67-2333, *Idaho Code*, goes on to provide:

> Nothing in this act shall be interpreted to grant to any state or public agency thereof the power to increase or diminish the political or governmental power of the United States, the state of Idaho, a sister state, nor any public agency of any of them.

These sections make clear that the type of contract contemplated is authorized only when each of the public agencies involved has legal authority to perform the contract.

The chapter goes on in Section 67-2339, *Idaho Code*, to authorize certain mutual aid agreements between state agencies and cities or other political subdivisions. However, we understand that the contemplated agreement is in the nature of a contract for services rather than a mutual aid agreement. Consequently, Section 67-2332, *Idaho Code*, would apply, and the contract would not be authorized.

If the State Tax Commission or the cities involved believe that such a contract would be desirable, we would urge you to seek legislative authorization for such a contract.

AUTHORITIES CONSIDERED:

1. Article VII, Section 12, *Idaho Constitution*.

2. Sections 67-2332, 67-2333, 67-2339, *Idaho Code*.

3. House Bill 373, 1978 Idaho Legislature.

DATED this 12th day of June, 1978.

WAYNE L. KIDWELL
Attorney General
State of Idaho

ANALYSIS BY:

DAVID G. HIGH
Assistant Attorney General
State of Idaho

WLK:DGH:ji

cc: Idaho Supreme Court
Idaho Supreme Court Library
Idaho State Library

ATTORNEY GENERAL OPINION NO. 78-27

TO: Glenn W. Nichols
Director, Department of Employment
Boise, Idaho

Per Request for Attorney General Opinion

QUESTION PRESENTED:

"Is legislation required to change the provisions of the Public Employees Retirement System Act, Section 59-1301, et seq., *Idaho Code*, to conform with 29 CFR Parts 98.24 and 98.25."

CONCLUSION:

The Idaho Public Employees Retirement System law, Section 59-1301, et seq., and the federal regulations implementing 29 *U.S.C.* 801, et. seq., the Comprehensive Employment and Training Act (CETA), are in conflict as the state statute provides that persons employed in programs such as CETA are not eligible for entrance into the system and the regulations require their participation. In addition, the technical program operation of the state does not meet the technical program requirement imposed by federal regulation. There is, therefore, a conflict and such conflict can be resolved only by amending the state law or altering the federal regulations.

ANALYSIS:

Chapter 13, Title 59, *Idaho Code,* sets forth the definitions and requirements for participation in the public employees retirement system. Section 59-1302 (14) (B) (c) contains the definitions of those who are *not* employees for the purpose of the statute. Its pertinent language as to the issue at hand is as follows:

> §59-1302(14)
>
> (B) "Employee" does not include:
> . . . (c) persons provided . . madework by a public employer in an employment or industries program maintained for the benefit of such persons;

The statute has exempted those persons from participation in the system who are involved in government sponsored and created madework employment such as that created by the Comprehensive Employment and Training Act (CETA). The Department of Employment which operates the program concedes that the type of activities involved herein are in fact madework for the purposes of §59-1302(14)(B)(c).

By federal regulation, 29 CFR Part 98.24, the Department of Labor requires that a participant in a CETA funded program be assured of ". . . benefits at the same levels and to the same extent as other employees similarly employed. . ." These regulations implement 29 U.S.C. 801, et seq.

This has been construed by the Department of Labor to mean that CETA participants must be provided the benefits of a retirement system if other similarly situated non-subsidized employees have access to it.

There is, therefore, a conflict between the state statute which denies entry into the system to persons participating in the CETA program and the federal regulations which require CETA participants to be given the same retirement benefits.

Even if there was not a conflict between the foregoing statute and regulation there remains a conflict between the state statutory scheme and 29 CFR Part 98.25.

In 29 CFR Part 98.25 is included the following language:

> (3) .
>
> (b) Examples of methods of administering such retirement system accounts are as follows:
>
> (1) Payments are made first into a reserve account and are not paid into the retirement fund until the participant obtains a status described in paragraphs (a) (1) through (3) of this section. The amount held in the reserve account is then adjusted quarterly to reflect the turnover of participants and the projected funds needed to cover current participants; or
>
> (2) Payments are made first into a reserve account for the actuarily determined number of participants who can be expected to obtain a status described in paragraphs (a) (1) through (3) of this section, and the payments are not paid into the retirement fund until the participants obtain that status. If this method is used, the amount held in the reserve account and the actuarial rate shall be adjusted or determined at least annually; or
>
> (3) Payments are made directly into the retirement fund for the actuarily determined number of participants who can be expected to obtain a status described in paragraphs (a) (1) through (3) of this section. The amount held in the fund shall be adjusted or redetermined at least quarterly to reflect the actual number of participants who have acquired a status described in paragraph (a) (1) through (3) of this section. If this method is used, the amount of accumulated principal and interest earned on contributions made on behalf of participants not described in paragraphs (a) (1) through (3) of this section who terminate their program participation or who, for whatever reason, are no longer considered members in the retirement program must be retrievable.

None of these alternative schemes set out in the regulations are possible under the Idaho system. There are no provisions in the statute for a reserve account as described, nor may any employer recover the amount of the employee's contribution to the system.

Therefore, there is a conflict between both of the above cited regulations and the state statutory scheme and such conflicts can only be resolved by amending the state law or altering the federal regulations if the CETA program is to operate in Idaho.

AUTHORITIES CONSIDERED:

1. *Idaho Code*, §§59-1301 — 1350

2. 29 *United States Code* 801, et. seq.

3. 29 *Code of Federal Regulations*, Parts 98.24, 98.25

DATED this 28th day of June, 1978.

ATTORNEY GENERAL
State of Idaho

WAYNE L. KIDWELL

ANALYSIS BY:

GUY G. HURLBUTT
Chief Deputy Attorney General
State of Idaho

WLK:GH:

cc: Idaho State Library
Idaho Supreme Court
Idaho Supreme Court Library

ATTORNEY GENERAL OPINION NO. 78-28

TO: Mr. Clyde Koontz, C.P.A.
Legislative Auditor
Statehouse Mail

Per Request for Attorney General Opinion:

QUESTION PRESENTED:

Whether or not the reasonable amount (not more than 10%) provided for in Section 58-140, *Idaho Code*, can be used to pay the costs of fire protection.

CONCLUSIONS:

The "ten percent fund" of §58-140, *Idaho Code,* was intended to be used for projects which would enhance production on or rehabilitate state owned timber-lands and was not intended to include fire suppression costs.

ANALYSIS:

Your question refers to §58-140, *Idaho Code*, which in relevant part reads as follows:

> 58-140. Special fund for the maintenance, management and protection of state owned timber, grazing, and recreational site lands. — A reasonable amount, not to exceed ten percentum (10%) of the monies received from the sale of standing timber, . . . shall constitute a special fund, which is hereby created to be used for maintenance, management, and protection of state-owned timber lands .: provided, that any monies constituting part of such funds received from a sale of standing timber or from leases of lands which are a part of any endowment land grant, shall be used only for the maintenance, management, and protection of lands for the same endowment grants. Provided further, that all such funds collected from timber sales shall be expended solely for the purpose of management, protection, and reforestation of state lands.

The section also declares that the special fund shall consist of monies from grazing leases and recreational site leases. Your question concerns account 1288 which is the portion of the special fund relating to timber-lands.

Section 58-140 refers to the "protection of state owned timber-lands" but does not give the precise meaning of the phrase. Although the term "protection" would appear to include protection from forest fires, Gordon Trombley, Director of the Department of Lands for the past 11 and one-half years, maintains that the legislature did not intend that the "ten percent fund" be used for fire suppression costs. Mr. Trombley, closely involved with the drafting, legislative consideration, and enactment of §58-140, emphasizes that this section was intended to establish a fund to be used for projects which would enhance future production on state owned timber-lands or to rehabilitate the land. Hence, "protection" refers to management, reforestation, erosion control, etc., but does not include protection against forest fires.

The Idaho Supreme Court has declared that in construing statutes one should look not only to the literal wording of the statute but also to the context, the object in view, the evils to be remedied, the history of the times and of the legislation upon the same subject, public policy, contemporaneous construction, and other relevant matters. *Knight* v. *Employment Sec. Agency*, 88 Idaho 262, 398 P.2d 643 (1965). There is no formal legislative history available from which to ascertain the precise intent of Section 58-140, *Idaho Code*. As stated above, the meaning of the word "protection" within the statute is not clear. However, the Idaho Supreme Court has held that a continued and consistently practiced interpretation of an ambiguous statute by the enforcement official will be given weight by courts interpreting that statute. *State ex rel Haworth* v. *Berntsen*, 68 Idaho 539, 200 P.2d 1007 (1949). The Federal District Court of Idaho, in the case of *State of Idaho ex rel Andrus* v. *Kleppe*, 417 F.Supp. 873 (1976), has stated that an administrative interpretation of a statute is an important construction aid to identifying the legislative intent and is entitled to "considerable weight" where administrative interpretation is close in time to the passage of the statute and has endured the passage of time.

For many years, the Department of Lands has consistently followed the practice of paying the state's pro-rata share for fire protection from the general fund pursuant to §38-114, *Idaho Code*. That section authorizes the State Board of Land Commissioners to issue "deficiency warrants" for the purpose of defraying fire protection costs. The statute further states: "such monies as the state shall thus become liable for shall be paid as part of the expenses of the State Board of Land Commissioners out of appropriations which shall be made by the legislature for that purpose". This, of course, refers to supplemental budgets. It is noted that the express authority for the issuance of deficiency warrants for fire protection costs was re-codified in 1972 as §38-114, *Idaho Code*, subsequent to the enactment of §58-140, establishing the "ten percent fund". It is presumed that in passing a statute, the legislature is cognizant of the existing laws. Thus, the recodification of §38-114, *Idaho Code*, indicates that the legislature intended that fire protection costs be paid from the general fund, including deficiency warrants when necessary, rather than from the "ten percent fund" in §58-140.

A final consideration concerning the application of the "ten percent fund" to fire suppression costs is a potential increase in administrative costs. §58-140, *Idaho Code*, requires that monies from a given endowment be expended upon the same endowment. Since forest fires often spread across many acres of land, it is probable that a given fire will burn the lands of one or more endowments as well as private lands. If the state were to make payments for fire protection from account 1288 of the "ten percent fund", the state would be required, after a fire, to separate the damage to the various endowments, such as school and penitentiary lands, from other state-owned land and private acreage. §58-140, *Idaho Code,* reserves account 1288 solely for the specific endowment land from which the money accrued. The end result would be an increase in administrative costs.

The foregoing analysis supports the conclusion that the "ten percent fund" of §58-140, *Idaho Code*, was not intended to be used for fire protection.

AUTHORITIES CONSIDERED:

1. *Idaho Code*, Title 58, Chapter 1.

2. *Idaho Code*, Title 38, Chapter 1.

3. *Knight* v. *Employment Sec. Agency*, 88 Idaho 262, 398 P.2d 643 (1965).

4. *State ex rel Haworth* v. *Berntsen*, 68 Idaho 539, 200 P.2d 1007 (1949).

5. *State ex rel Andrus* v. *Kleppe*, 417 F.Supp. 873 (1976).

DATED this 5th day of July, 1978.

ATTORNEY GENERAL OF THE
STATE OF IDAHO

WAYNE L. KIDWELL

CHIEF DEPUTY ATTORNEY GENERAL
STATE OF IDAHO

GUY G. HURLBUTT

ANALYSIS BY:

L. MARK RIDDOCH
Assistant Attorney General
Natural Resources Division

LMR/dm

cc: Idaho Supreme Court
Supreme Court Law Library
Idaho State Library

ATTORNEY GENERAL OPINION NO. 78-29

TO: HONORABLE PETE T. CENARRUSA
Secretary of State
State of Idaho
Statehouse Mail

Per Request for Attorney General's Opinion.

QUESTION PRESENTED:

Under what circumstances, if any, is it permissible for an architect and an engineer to incorporate for the purpose of providing both engineering and architectural services through one corporation?

CONCLUSION:

The *Idaho Code* provides for two types of domestic profit-making corporations. These are a general business corporation and a professional service corporation. *Idaho Code*, §30-102 provides that a general business corporation may not have for its purpose the carrying on or practice of any profession. This code section would preclude an engineer and an architect from forming a general business corporation to render professional services. The Professional Service Corporation Act provides that only members of one profession may incorporate a professional service corporation and the sole purpose of said corporation would be to render the same and specific professional service. Therefore, it is the conclusion of the Attorney General that under no circumstances can an architect and an engineer form a single corporation to provide professional services of both professions.

ANALYSIS:

The *Idaho Code* provides for two types of domestic profit-making corporations. These are a general business corporation (Title 30, Chapter 1, *Idaho Code*) and a professional service corporation (Title 30, Chapter 13, *Idaho Code*). These are the only two corporate firms in which an architect and an engineer could possibly try to incorporate for profit-making purposes.

Idaho Code §30-102 provides the purposes for which a general business corporation can be incorporated. This code section allows qualified incorporators to incorporate for any lawful business purpose. There are three exceptions enumerated in this code section. The first exception created by this section of the *Idaho Code* is:

> . . . for the carrying on or practice of any profession, . . and accepting that professional service corporations may be created as provided by the Professional Service Corporation Act, and excepting the practice of engineering by a corporation through individual registered professional engineers as provided by title 54, chapter 12, *Idaho Code*.

This limitation on the purposes of incorporation disallows any general business corporation from being formed for the sole purpose of rendering professional services.

The legislature in adopting the Professional Service Corporation Act declared the legislative intent as follows:

> It is the legislative intent to provide for the incorporation of an individual or group of individuals to render the same professional service to the public for which such individuals are required by law to be licensed or to obtain other legal authorization. I.C. §30-1301.

Idaho Code §30-1303 (2) states:

> The term "professional corporation" means a corporation organized under this act for the sole and specific purpose of rendering professional service and which has as its shareholders only natural persons who *themselves are duly licensed or otherwise legally authorized* within the State of Idaho to *render the same professional service as a corporation.* (Emphasis added.)

In discussing who may be incorporated under the Professional Service Corporation Act, *Idaho Code* §30-1304 reiterates that a professional corporation may be incorporated only "for the sole and specific purpose of rendering the same and specific professional service." *Idaho Code* §30-1304.

The Professional Service Corporation Act does not allow two licensed professionals of different professions to incorporate in the same professional corporation. The general business corporation statutes do not allow professions to incorporate as general business corporations. Based upon the foregoing, it is the conclusion of the Attorney General that there are no circumstances in which an engineer and an architect could incorporate in one corporation to provide professional services of both professions.

AUTHORITIES CONSIDERED:

1. *Idaho Code* Title 30, Chapter 1; *Idaho Code* Title 30, Chapter 13.

DATED This 14th day of July, 1978.

ATTORNEY GENERAL OF IDAHO

WAYNE L. KIDWELL

ANALYSIS BY:

STEVEN M. PARRY
Assistant Attorney General

lc

cc: Idaho State Library
Idaho Supreme Court
Supreme Court Law Library

ATTORNEY GENERAL OPINION NO. 78-30

TO: Glenn W. Nichols
Director, Department of Employment
Statehouse Mail

Per Request for Attorney General Opinion

QUESTION PRESENTED:

Are the directors and staffs of the Regional Law Enforcement Planning Commissions employees of the State Law Enforcement Planning Commission or are they employees of the Regional Law Enforcement Planning Commissions for purposes of the Employment Security Law?

CONCLUSION:

The directors and staffs of the Regional Law Enforcement Planning Commissions *are* employees of the Regional Commissions and *are not* employees of the State Commission for purposes of the Employment Security Law.

ANALYSIS:

The State Law Enforcement Planning Commission, hereinafter referred to as State Commission, was created in order to secure the full benefits available to this state under the Omnibus Crime Control and Safe Street Act of 1968 (*U.S.C.* Title 42 §§921, et seq., 2510 et. seq., 3501, 3502 and Title 42 §§3701, 3721, et. seq.,) and any amendments thereto and under the Juvenile Justice and Delinquency Prevention Act of 1974 (*U.S.C.* Title 42 §§5601, et. seq.) and any amendments thereto, and in so doing is to cooperate with the federal and state agencies, agencies private and public, interested organizations, and with individuals to effectuate the purposes of those enactments and any and all amendments thereto. The statute creating it mandates that the state commission develop a comprehensive statewide plan and establish priorities for the improvement of law enforcement, the prevention, reduction and treatment of juvenile delinquency, and the improvement of the juvenile justice system throughout the state and is to define, develop, and correlate programs and projects for the state and the units of general local government, and public or private agencies within the state or for combinations of such units and/or agencies or in combination with other states for improvement in law enforcement in prevention and reduction of juvenile delinquency and to improve the juvenile justice system, to apply for, receive, disburse, allocate and account for all funds, grants-in-aid and any other funds or properties available pursuant to those enactments, and to receive applications for financial assistance from units of general local governments and combinations of such units and disburse available state and federal funds to the applicant or applicants pursuant to the state plan for the improvement of law enforcement and the federal law. (Section 19-5109, *Idaho Code*)

The federal law mandates the foregoing requirements and provides for state and regional commissions within the state and provides that state and regional planning commissions shall, within their respective jurisdictions, be representative of the law enforcement and criminal justice agencies, including agencies directly related to the prevention and control of juvenile delinquency,

units of general local government, and public agencies maintaining programs to reduce and control crime, and shall include representatives of citizens, professional, and community organizations directly related to delinquency prevention, and provides that the regional planning units within the state shall be comprised of a majority of local elected officials. States may utilize the boundaries and organization of existing general purpose regional planning bodies within the state in establishing regional planning units under the law. (Title 42, §3723 *U.S.C.)*

At an organizational meeting the State Commission created three Regional Law Enforcement Planning Commissions, hereinafter referred to as Regional Commissions. The Regional Commissions either employ in their own right or contract for services performed in carrying out the plan for the improvement of law enforcement. The Regional Commissions submit an annual budget to the State Commission and periodically request transfer of funds from the state Auditor to their own account so that they can make payment on expenses incurred.

On August 5, 1975, an Appeals Examiner for the Department of Employment issued a decision to the effect that the director and staff of the Regional Commissions are employees of the State Commission and not the Regional Commissions for the purposes of the Employment Security Law. While conceding that the federal law authorized the creation of Regional Commissions by the states and that these individuals would normally be considered to be employees of the Regional Commissions since he found no evidence of legal authority for creation of the Regional Commissions in Idaho, he concluded that the individuals in question could not be considered employees of a, legally speaking, non-existent agency of the state.

On January 1, 1978, the Employment Security Law was extensively amended to provide coverge for the first time for governmental units other than the state itself which has been covered for a number of years. In doing so, the definition of covered employer was amended, in pertinent part, to read as follows:

> "72-1315. COVERED EMPLOYER. — The term 'covered employer' means:
>
> * * *
>
> (i) Any governmental entity as defined in section 72-1322C, Idaho Code.
>
> * * *
>
> Section 72-1322C provides:
>
> "72-1322C. GOVERNMENTAL ENTITY DEFINED. — When used in this act the term 'governmental entity' means a state, or any political subdivision of a state, or an instrumentality of a state or a political subdivision thereof."

Therefore, an instrumentality of the state or a political subdivision of the state is now an employer within the meaning of the Employment Security Law. An instrumentality of the state or a political subdivision thereof is any

organization authorized by statute which is used by them in lieu of their own facilities to carry out one of their statutory programs and which performs a public service for the benefit of the public. (*Association of Idaho Cities v. Department of Employment*, 95 Idaho 846, 521 P.2d p. 25 (1974))

The law creating the State Commission authorizes local units of government or combinations thereof to be used in accomplishing the purposes contemplated by that law. The Regional Commissions constitute a combination of units of general local government and are used to perform a public service for the benefit of the public and they constitute an instrumentality of those local units of government and are covered employers within the meaning of the Employment Security Law.

In summary, the Regional Commissions are contemplated by §19-5109, *Idaho Code,* as a means of accomplishing the purpose established by that statutory section which is to improve law enforcement, the improvement of law enforcement is a public purpose and the Regional Commissions are therefore instrumentalities of the political subdivision of the state and hence are covered employers within the meaning of §72-1315, *Idaho Code.*

Unless it can be shown by the Regional Commissions that the services of the individuals involved come within the exemptions provided in §§72-1316(d) and 72-1316A(e), *Idaho Code,* then the services of the director and staff of the Regional Commissions must be considered to be in covered employment and the Regional Commission shall be considered to be their employer, not the State Commission.

AUTHORITIES CONSIDERED:

1. *Idaho Code*. §§72-1315, 72-1316, 72-1316A, 72-1322C, 19-5109

2. *U.S.C.* Title 42, §§3723, 5601 et. seq., 921 et. seq., 2510 et. seq., 3501, 3502, 3701, 3721 et. seq.

3. *Association of Idaho Cities v. Department of Employment*, 95 Idaho 846, 521 P.2d 1025 (1974)

DATED this 14th day of June, 1978.

ATTORNEY GENERAL
State of Idaho

WAYNE L. KIDWELL

ANALYSIS BY:

R. LAVAR MARSH
Deputy Attorney General
State of Idaho

WLK:RLM:bs

cc: Idaho State Library
Idaho Supreme Court
Idaho Supreme Court Library

ATTORNEY GENERAL OPINION NO. 78-31

TO: MR. RICHARD S. HIGH
State Senator, District 25
802 Sunrise Boulevard North
Twin Falls, Idaho 83301

MR. PAUL S. BOYD
Attorney at Law
418 First Security Building
P.O. Box 358
Boise, Idaho 83701

Per Request for Attorney General's Opinion.

QUESTIONS PRESENTED:

1. What effect, if any, does the 1978 amendment to *Idaho Code* §72-1432B have on cost-of-living adjustments in the retirement benefits of firemen who retired prior to the effective date of the amendment?

2. What effect, if any, will the 1978 amendment to *Idaho Code* §72-1432B have on cost-of-living adjustments in the retirement benefits of firemen who were employed prior to the effective date of the amendment, but who have retired or will retire after the effective date of the amendment?

CONCLUSION:

1. With respect to firemen who had retired prior to the effective date of the 1978 amendment to *Idaho Code* §72-1432B, the amendment is inapplicable and cannot be used to limit or place a ceiling on cost-of-living increases or decreases in their retirement benefits.

2. With respect to firemen who were actively employed prior to the effective date of the 1978 amendment and who have retired or will retire after the effective date of the 1978 amendment to *Idaho Code* §72-1432B, the legislature may modify the retirement benefits if the modifications are reasonable and are necessary to maintain the integrity of the retirement fund. Thus, the validity and effect of the modification in cost-of-living adjustments of retirement benefits will depend upon factual findings and determinations.

ANALYSIS:

In order to analyze these questions, it is necessary to look at the applicable statutes. *Idaho Code* §72-1432B was adopted in 1976, but since 1963, a similar statutory scheme has been used to calculate cost-of-living adjustments in retirement benefits. *Idaho Code* §72-1432B was amended in 1978 and now reads:

> In addition to the monthly sums provided for under this act, any retired fireman or his or her surviving spouse, child, or children drawing benefits shall be entitled to receive adjustments to such benefits, calculated on the percentage of increase or decrease in the average paid firefighter's salary or wage, in this state, as computed under the terms of section 72-1411, Idaho Code. *In any one (1) year the cost of*

> *living adjustment in monthly sums provided in this chapter shall not exceed a three percent (3%) per annum increase or decrease. In any one (1) year the retirement or disability benefits received by a fireman or his or her survivors shall not increase or decrease by more than three percent (3%) per annum, notwithstanding any other provision of law.* (Underlined material added by 1978 amendment.)

The effective date of the amendment was July 1, 1978. Looking next at *Idaho Code* §72-1411, that section provides that each paid fireman shall make contributions to the Firemen's Retirement Fund in an amount equal to a percentage of the average paid fireman's salary or a percentage of each individual fireman's salary. (The determination of whether to use the average salary or the individual salary as the basis for calculating the contribution depends upon the fireman's classification established pursuant to I.C. §72-1432.) In addition, *Idaho Code* §72-1411 goes on to provide:

> . Said average paid or individual fireman's salary or wage shall be determined annually on October 1 by the director, as defined in section 72-1412, Idaho Code, from the payroll period reports submitted to him on or before September 1 by the cities, towns or fire districts; . . .

Idaho Code §72-1412 contains no express definitions, but *Idaho Code* §72-1412 does provide that the "average paid fireman's salary or wage" refers to the *annual* salary or wage whereas the "individual fireman's salary or wage" refers to the *monthly gross* salary or wage. For purposes of calculating the cost-of-living adjustments, pursuant to *Idaho Code* §72-1432B, the figure which is used is the percentage of increase or decrease in the "average paid fireman's salary or wage."

It should also be noted that when a fireman retires each fireman enters into a separate, individual retirement contract with the Fireman's Retirement Fund which contract takes into account their years of service and other factors in calculating the benefits to which each individual fireman is entitled. Nonetheless, even though each fireman has his own retirement contract, since 1963 the cost-of-living adjustments for all firemen have been calculated in the same manner.

The procedure established by these statutes for calculating cost-of-living adjustments in retirement benefits is as follows. The Director of the Fireman's Retirement Fund calculates the annual average fireman's salary from the payroll reports submitted to the Director by the cities, towns and fire districts. The Director then compares the annual average for the present year with the annual average of the preceding year and calculates the percentage of increase or decrease in the annual average salary. Since 1963 and prior to the 1978 amendment of *Idaho Code* §72-1432B, the cost-of-living increases or decreases in retirement benefits went up or down in a percentage *equal* to the percentage increase or decrease in the average salary paid to employed firemen. For example, if the average paid fireman's salary went up 10 percent in one year, retirement benefits would also go up 10 percent. The purpose and effect of the 1978 amendment is to attempt to limit both future increases and future decreases by providing that both cost-of-living increases and decreases in retirement benefits shall not be more than 3 percent in any one year.

With respect to firemen who have retired prior to the effective date of *Idaho Code* §72-1432B, it is the opinion of the Attorney General that the amendment is inapplicable to such retired firemen and cannot be used to limit or place a ceiling on cost-of-living adjustments in their retirement benefits to which they might be entitled. While there are no Idaho cases directly on point, it is well settled law that:

> . . pension payments are in effect deferred compensation to which the pensioner becomes entitled upon the fulfillment of the terms of the contract and which may not be changed to his detriment by subsequent amendment. *Terry* v. *City of Berkeley*, 41 Cal.2d 698, 263 P.2d 833, at 836. (1953).

See also, *Allen* v. *City of Long Beach*, 45 Cal.2d 128, 287 P.2d 765 (1955); *Bakenhus* v. *City of Seattle*, 48 Wash.2d 695, 296 P.2d 536 (1956). Thus, once an employee has fulfilled all of the conditions necessary to become entitled to receive a pension, including for example, reaching a certain age or having been employed for a specified period of time, and once an employee has retired and begun receiving his benefits, his pension payments cannot later be changed to his detriment. *Kern* v. *City of Long Beach*, 29 Cal.2d 848, 179 P.2d 799 (1947). To allow such detrimental changes would unconstitutionally impair the retired fireman's pension contract. U.S. Const. Art. 1, §10; *Kern* v. *City of Long Beach, supra*; *Terry* v. *City of Berkeley, supra.*

With respect to firemen who were employed prior to the effective date of the amendment, but who have retired or will retire after the effective date, the legislature may modify the retirement benefits if the modifications are reasonable and are necessary to maintain the integrity of the retirement fund. It will be acknowledged that, even prior to retirement, employees have vested rights in pension plans, but the Idaho Supreme Court has held:

> . . . This court has adopted the rule "the rights of the employees in pension plans such as Idaho's Retirement Fund Act are vested, subject only to reasonable modification for the purpose of keeping the pension system flexible and maintaining its integrity." *Lynn* v. *Kootenai Fire Protective District No. 1*, 97 Idaho 623, 627, 550 P.2d 126 (1976).

See also, *Hansen* v. *City of Idaho Falls*, 92 Idaho 512, 446 P.2d 634 (1968); *Engen* v. *James,* 92 Idaho 690, 418 P.2d 977 (1969). In this regard, Idaho has adopted and followed the identical California and Washington rules. See; *Abbot* v. *City of Los Angeles,* 50 Cal.2d 438, 326 P.2d 484 (1958); *Allen* v. *City of Long Beach, supra; Terry* v. *City of Berkeley, supra; Bakenhus* v. *City of Seattle, supra.* As a result of this rule, the validity of the modification in cost-of-living adjustments of retirement benefits with respect to currently employed firemen will require factual findings and determinations regarding the reasonableness of the modification and its necessity for maintaining the integrity of the retirement fund.

While there are apparently no Idaho cases establishing the criteria to be considered in making such factual determinations, California and Washington cases provide helpful guidance. In those states, it has been held:

> An employee's vested contractual pension rights may be modified prior to retirement for the purpose of keeping a pension system flex-

> ible to permit adjustments in accord with changing conditions and at the same time maintain the integrity of the system. [Citations omitted.] Such modifications must be reasonable, and it is for the courts to determine upon the facts of each case what constitutes a permissible change. To be sustained as reasonable, alterations of employees' pension rights must bear some material relation to the theory of a pension system and its successful operation, and changes in a pension plan which result in disadvantage to employees should be accompanied by comparable new advantages. [Citations omitted.] *Allen* v. *City of Long Beach*, 287 P.2d at 767.

See also, *Abbott* v. *City of Los Angeles*, supra; *Bakenhus* v. *City of Seattle*, supra.

AUTHORITIES CONSIDERED:

1. *Idaho Code* §§72-1411, 72-1412, 72-1432B.

2. U.S. Const., Art. 1, §10.

3. *Terry* v. *City of Berkeley*, 41 Cal.2d 698, 263 P.2d 833 (1953).

4. *Allen* v. *City of Long Beach*, 45 Cal.2d 128, 287 P.2d 765 (1955).

5. *Bakenhus* v. *City of Seattle*, 48 Wash.2d 695, 296 P.2d 536 (1956).

6. *Kern* v. *City of Long Beach*, 29 Cal.2d 848, 179 P.2d 799 (1947).

7. *Lynn* v. *Kootenai Fire Protective District No. 1*, 97 Idaho 623, 550 P.2d 126 (1976).

8. *Hansen* v. *City of Idaho Falls*, 92 Idaho 512, 446 P.2d 634 (1968).

9. *Engen* v. *James*, 92 Idaho 690, 418 P.2d 977 (1969).

10. *Abbott* v. *City of Los Angeles*, 50 Cal.2d 438, 326 P.2d 484 (1958).

DATED This 3rd day of August, 1978.

ATTORNEY GENERAL FOR IDAHO

WAYNE L. KIDWELL

ANALYSIS BY:

JEAN R. URANGA
Assistant Attorney General

cc: Supreme Court Law Library
Idaho Supreme Court
State Library

ATTORNEY GENERAL OPINION NO. 78-32

TO: Joe R. Williams
State Auditor
STATEHOUSE MAIL

Per Request For Attorney General Opinion

QUESTION PRESENTED:

Would the provisions of Executive Order #77-11 dated December 1, 1977 and *Idaho Code* §67-1910(4) be applicable to the elective offices, and particularly to the Auditor's office in view of the Idaho Supreme Court case of *Wright vs. Callahan*, 61 Idaho 167.

CONCLUSION:

Yes. The provisions of Executive Order #77-11, dated December 1, 1977, and *Idaho Code*, §67-1910(4) are applicable to the Auditor's Office. This Executive Order does not constitute a usurpation of constitutional powers held by the Auditor at the time of the Constitution, and therefore the case of *Wright v. Callahan* is inapplicable.

ANALYSIS:

1. *Applicability of Executive Order #77-11 to State Auditor – Generally*

Pursuant to Art. IV, §5, of the Idaho Constitution and §67-802, *Idaho Code*, the Governor by Executive Order #77-11, dated December 1, 1977, established the State Data Processing Committee to act in an *advisory* capacity to the Division of Budget, Policy Planning and Coordination, and to assist the Division in the development and coordination of data processing in the state. To this end Executive Order #77-11 requires the creation of a statewide master plan with State agencies being required to submit reports, as requested, on the use and cost of existing data processing systems and installations, and on the anticipated use and estimated cost of proposed systems, to the Division.

Furthermore, as provided by Executive Order #77-11,

> All proposals for the purchase, rental or other acquisition or disposal of data processing equipment, acquisition of data processing software or services, or initiation of systems development projects affecting more than one agency, shall be subject for the approval of the administration of the division . . .

The Order falls within the authority granted the Governor by §67-802, *Idaho Code*. Section 67-802 provides that the Governor's Office shall be composed, *inter alia*, of the Division of Budget, Policy Planning and Coordination, "and such other divisions and units as are . . . created through administrative action of the Governor." The Governor is required to appoint an administrator for each division, and can provide other subordinate staff as is necessary to accomplish a division's mission, subject to the provisions of Chap. 53, Title 67, *Idaho Code*.

Furthermore, in order to exercise the power vested in his office by Art. IV, §5, of the Idaho Constitution, the Governor is empowered to issue executive orders which are to have the force and effect of law. The Governor also has the power to supervise the official conduct of all executive and ministerial officers, may require any officer to make special reports, and has "such other powers and may perform such other duties as are devolved upon him by any law of this state."

In light of the rather broad powers conferred upon the Governor via §67-802, it would appear Executive Order #77-11 was within the scope of those powers, especially when viewed in light of §§67-1910(4) and 67-1911, discussed *infra*.

2. *The Applicability of Callahan To The Present Situation*

To the extent that Executive Order #77-11, as supported by §§67-1910(4) and 67-1911, *Idaho Code*, *infra*, is consistent with the duties of the State Auditor as provided by §67-1018, *Idaho Code*, then the Executive Order will be binding and will *not* fall within the scope of *Wright v. Callahan*, 61 Idaho 167, 99 P.2d 961 (1940).

In *Wright v. Callahan*, *supra*, the court was called upon to determine whether Session Laws 1939, Chap. 113, p.191, creating the Office of the Comptroller, whose duties were virtually synonomous with the "implied" and express duties of the State Auditor, constituted an unconstitutional usurpation of the Auditor's duties. The court held that, having determined the powers of the State Auditor were impliedly those held by the territorial comptroller, subsequent legislation conferring those powers upon an appointed comptroller was unconstitutional as an inappropriate usurpation of the Auditor's powers.

In the present situation, Executive Order #77-11, as supported by §§67-1910(4) and 67-1911, *Idaho Code,* does not appear to usurp the powers of the State Auditor as expressed in *Idaho Code,* §67-1018.

The State Auditor is empowered via §67-1018, *Idaho Code,*

> to prescribe and install, to modify from time to time, and to enforce, *an accurate and modern system of accounting and bookkeeping for the State of Idaho*. [Emphasis added]

The purpose of §67-1018, *Idaho Code*, has been interpreted to authorize the State Auditor to prescribe and enforce a modern and accurate *system of accounting, bookkeeping and reporting relative to financial transactions, funds and property of the state. Smylie v. Williams*, 81 Idaho 335, 341 P.2d 451 (1959).

The Division of Budget, Policy Planning and Coordination in the Office of the Governor, is authorized and directed by §67-1910(4), *Idaho Code*,

> to approve the leasing, purchasing or installing of any electric data processing equipment and facilities for any officer, board, department, agency or institution of state government.

Furthermore, the Divisions is required to coordinate the development of physical, economic and human personnel programs and promote the efficient utilization of federal, state, local and private resources. Furthermore, the

agency is required to prepare a statewide comprehensive plan, and to coordinate planning activities of State agencies so that comprehensive statewide programs are consistent and non-duplicative. *Idaho Code*, §67-1911, 1974.

Wright v. Callahan is further inapplicable in that there is no evidence in the territorial laws that the Auditor held such powers as expressed in Executive Order #77-11, and therefore the Auditor cannot retain such powers unless expressly granted by the Constitution or statute. As regards any conflicts in statutes after the constitutional provisions, it is a well known rule of statutory construction that it is assumed that whenever the legislature enacts a provision, it has in mind previous statutes relating to the same subject matter and that, in the absense of any express repeal or amendment therein, the new provision (here §67-1018) was enacted in accord with the legislative policy embodied in the prior statutes, and they should be construed as consistent. *Homeowners Loan Corp. v. Phoenix*, 51 Ariz. 455, 77 P.2d 818; *Stearns v. Graves*, 61 Idaho 232, 99 P.2d 955 (1940). This being the rule, §§67-1910(4), 67-1911 and 67-1018 should be construed as consistent so far as is reasonable.

Fairly read, §§67-1910(4) and 67-1911, *Idaho Code*, do not impinge upon the State Auditor's power to create an *accounting and bookkeeping system*. Executive Order #77-11 merely requires the conformity of State agencies to procedures established to assist the Division of Budget, Policy Planning and Coordination in the creation of a comprehensive plan regarding *data processing systems*.

In summary, *Wright v. Callahan*, is inapplicable to the present situation since there is no evidence of such powers as identified above resting in the Auditor's Office during territorial days and at the time of the constitutional provision. In addition, *Idaho Code*, §§67-1910(4) and 67-1911 do not usurp any powers conferred upon the Auditor by *Idaho Code*, §67-1018.

AUTHORITIES CONSIDERED:

1. *Wright v. Callahan*, 61 Idaho 167, 99 P.2d 961 (1940)

2. *Smylie v. Williams*, 81 Idaho 335, 341 P.2d 451 (1959)

3. *Homeowners Loan Corp. v. Phoenix*, 51 Ariz. 455, 77 P.2d 818

4. *Stearns v. Graves*, 61 Idaho 232, 99 P.2d 955 (1940)

5. *Idaho Code*, §§67-802, -1018, -1910(4), -1911

6. Art. IV, §5, Idaho Constitution

7. Executive Order #77-11

8. 1939 S.L., Chap. 13, p.191

DATED this 4th day of August, 1978.

ATTORNEY GENERAL
State of Idaho

WAYNE L. KIDWELL

GUY G. HURLBUTT
Chief Deputy Attorney General

ANALYSIS BY:

BILL F. PAYNE
Deputy Attorney General
State of Idaho

REX BLACKBURN
Legal Intern

BFP:lb

cc: Idaho State Library
Idaho Supreme Court
Idaho Supreme Court Library

ATTORNEY GENERAL OPINION NO. 78-33

TO: PETE T. CENARRUSA
Secretary of State
Statehouse Mail

Per Request for Attorney General Opinion

QUESTIONS PRESENTED:

1. Can a corporation, by its articles of incorporation, create non-voting common stock?

2. Are *Idaho Code* §§30-103(e), 30-117 and 30-134 constitutional insofar as they authorize creation of non-voting common stock?

CONCLUSIONS:

1. A corporation can, by its articles of incorporation, create common stock with restricted voting privileges, but a corporation cannot remove or impair the constitutional right of holders of common stock to vote in all elections for directors or managers of the corporation.

2. *Idaho Code* §§30-103(e), 30-117 and 30-134 are not unconstitutional since these statutory sections can be construed in a manner consistent with Idaho Const. art. XI, §4.

ANALYSIS:

Idaho Const. art. XI, §4 was amended in 1972 and now reads:

> The legislature shall provide by law that in all elections for directors or managers of incorporated companies, every stockholder shall have the right to vote in person or by proxy for the number of shares of *voting or common* stock owned by him, for as many persons as there are directors or managers to be elected, or to cumulate said shares, and give one candidate as many votes as the number of directors, multiplied by the number of his shares of stock, shall equal, or to distribute them on the same principle among as many candidates as he shall think fit, and such directors shall not be elected in any other manner. *In the issue, advertisement, and sale of non-voting shares of stock, provision shall be made for clearly identifying the non-voting character of the shares by clearly stating in the largest print on the certificate, on the prospectus or offer for sale, and in the record and receipt of the transaction the words 'non-voting.'* (Underlined material added by 1972 amendment.)

Prior to the 1972 amendment, Idaho Const. art. XI, §4 was similar to constitutional provisions of other states, and various cases have considered the meaning of such constitutional provisions.

In two cases wherein courts have construed constitutional provisions virtually identical to Idaho Const. art. XI, §4, the courts considered only the effect of the constitutional provisions with respect to cumulative voting. In *E.K. Buck Retail Stores* v. *Harkert*, 157 Neb. 867, 62 N.W.2d 288 (1954), the Nebraska Supreme Court stated:

> . . . It is clear to us that the purpose of the constitutional provision and statute enacted pursuant thereto was to provide for cumulative voting in the election of directors or managers of incorporated companies in order to secure to minority stockholders a greater representation in the management of the corporation's business. In order to do this, it was necessary that the law state the number of votes to which each stockholder was entitled and to insure against an involuntary loss of the right conferred. In the accomplishment of the latter, the Constitution provides that "such directors or managers shall not be elected in any other manner". The latter prohibition, as we view it, operates to prevent a corporation by its articles of incorporation, by-laws, or any act of its directors or stockholders from depriving a stockholder of the right to vote his stock in the manner specified in the Constitution and statute . . . . 62 N.W.2d at 294.

The ruling in this case was also quoted and adopted with approval by the Montana Supreme Court in construing a provision of the Montana Constitution which was virtually identical to Idaho Const. art. XI, §4. *Sensabaugh* v. *Polson Plywood Co.*, 342 P.2d 1064 (Mont. 1959).

In two other cases, it was held that such constitutional provisions not only guarantee the right of cumulative voting, but also guarantee the constitutional right of shareholders to vote in all elections of directors and managers. In *People ex rel Watseka Telephone Company* v. *Emmerson*, 302 Ill. 300, 134 N.E. 707 (1922), the Illinois Supreme Court considered the question of whether a corporation has the right and power to create non-voting preferred stock in light of an Illinois constitutional provision virtually identical to Idaho Const. Art. XI §4. The Illinois Supreme Court state:

> . In our opinion, the natural meaning of these words is that the Constitution secures to each stockholder the right to vote in person or by proxy for as many persons as there are directors or managers to be elected, and also secures to him the right, if he wishes, "to cumulate such shares, and give one candidate as many votes as the number of directors multiplied by the number of his shares of stock shall equal, or to distribute them on the same principle among as many candidates as he shall think fit." 134 N.E. at 710.

As a result, the Illinois court ruled that a corporation may not deprive any of its stockholders of the right to vote for corporate directors or managers.

A like result was reached by the Supreme Court of Appeals of West Virginia in the case of *State ex rel Dewey Portland Cement Co.* v. *O'Brien*, 142 W.Va. 451, 96 S.E.2d 171 (1956). In *O'Brien*, the West Virginia Court also ruled that a constitutional provision similar to Idaho Const. art. XI, §4, guaranteed to stockholders not only the constitutional right to cumulative voting, but also the constitutional right to vote in all elections for directors or managers. The West Virginia Court went one step further and held:

> . . It should be emphasized that while Article IX, Section 4, of the Constitution, is a clear, emphatic command to the Legislature that every stockholder shall have the right to vote for the number of shares of stock owned by him in all elections for directors or managers of incorporated companies, *it makes no provision as to the right of shareholders to vote upon any other action of a corporation* 96 S.E.2d at 179-180. (Emphasis added.)

These four cases all construed constitutional provisions which were virtually identical to Idaho Const. art. XI, §4, prior to the amendments in 1972. As a result, it is now necessary to consider the effect of the 1972 amendments. There appears to be no question that the second sentence of Idaho Const. art. XI, §4, which was added by the 1972 amendments, now constitutionally authorizes the issuance of non-voting stock, but there still remains a question of whether only preferred stock, as opposed to common stock, may be totally non-voting. This question arises because of the amended wording of the first sentence of Idaho Const. art. XI, §4, which now provides:

> . . . [I]n all elections for directors or managers of incorporated companies, every stockholder shall have the right to vote in person or by proxy for the number of shares of *voting or common* stock owned by him, . . . (Emphasis added.)

There are, of course, two primary classifications of stock — common stock and preferred stock. 11 Fletcher's Cyclopedia *Corporations* §5086 (1971). Based upon the cases discussed above and applying a clear and unambiguous meaning to the language "voting or common stock," it is the opinion of the Attorney General that a corporation can, by its articles of corporation, create common stock with restricted voting privileges, but a corporation cannot remove the constitutional right of holders of common stock to vote in all elections for directors or managers of the corporation. Conversely, it is the opinion of the Attorney General that only preferred stock can be totally non-voting.

With respect to the second question presented in the opinion request, there are three applicable statutes. *Idaho Code* §30-103 (1) (e) provides that articles of incorporation shall include, among other things:

> A description of the classes of shares, if the shares are to be classified, and a statement of the number of shares in a class, and the relative rights, *voting power*, preferences and restrictions granted to or imposed upon the shares of each class; . (Emphasis added.)

Idaho Code §30-117(1) similarly reads:

> The shares of a corporation formed under this act may be divided into classes with such rights, *voting power*, preferences and restrictions as may be provided for in the articles of incorporation. (Emphasis added.)

Finally, and more specifically, *Idaho Code* §30-134 states:

> 1. *Except as otherwise provided in the articles of incorporation,* every shareholder of record shall have the right at every shareholders' meeting to one (1) vote for every share standing in his name on the books of the corporation . . .
>
> 2. In all elections for directors or managers of incorporated companies every shareholder shall have the right to vote in person or by proxy for the number of shares of stock owned by him for as many persons as there are directors or managers to be elected or to cumulate such shares and give one (1) candidate as many votes as the

number of directors multiplied by the number of his shares of stock shall equal, or to distribute them on the same principle among as many candidates as he shall think fit; and such directors shall not be elected in any other manner. (Emphasis added.)

It is a well-settled rule of statutory construction that statutes are presumed valid and all reasonable doubts as to constitutionality must be resolved in favor of the validity of the statutes. *Leonardson* v. *Moon*, 92 Idaho 796, 451 P.2d 542 (1969); *State* v. *Wymore*, 98 Idaho 197, 560 P.2d 868 (1977). As a result, it is the opinion of the Attorney General that all of these statutory sections are not unconstitutional since these statutory sections can be construed in a manner consistent with Idaho Const. art. XI, §4. *Idaho Code* §§30-103 (1) (e) and 30-117(1) merely provide corporations with the discretion to classify their shares. These statutory sections do not provide corporations with a substantive, unlimited right to remove or impair voting privileges. Rather, these statues can be construed to provide that if voting rights are constitutionally and legally restricted, the restrictions must be stated in the articles of incorporation.

With respect to *Idaho Code* §30-134, it is interesting to note that *Idaho Code* §30-134(2) is identical to Idaho Const. art. XI, §4, prior to the 1972 amendments. If *Idaho Code* §30-134(1) is read in isolation, it appears to unconstitutionally allow corporations an unrestricted right to remove or impair voting rights if such restrictions are so stated in the articles of incorporation. Nonetheless, it is the opinion of the Attorney General that *Idaho Code* §30-134(1) cannot be read in isolation and when read in conjunction with *Idaho Code* §30-134(2), the statute as a whole is constitutional. That is, while *Idaho Code* §30-134(1) allows corporations to impose some restrictions on voting rights, when read in conjunction with *Idaho Code* §30-134(2), it is clear that restrictions cannot be placed on the right of holders of common stock to vote in elections for directors or managers.

It should be noted that in a prior Attorney General Opinion No. 73-203, dated June 1, 1973, it was generally stated that an Idaho corporation may issue non-voting corporate stock provided that the corporation, in its articles of incorporation, specifically states which class or classes of stock will be non-voting. That opinion did not specifically consider the impact of the 1972 amendments to Idaho Const. art. XI, §4, with respect to the voting rights of common stock in elections for directors and managers. As a result, Attorney General Opinion No. 73-203 is hereby withdrawn and superseded by this present opinion.

AUTHORITIES CONSIDERED:

1. Idaho Const. art. XI, §4.

2. *Idaho Code* §§30-103 (1) (e), 30-117 (1), 30-134

3. Attorney General Opinion No. 73-203.

4. 11 Fletcher's Cyclopedia *Corporations* §5086 (1971).

5. *E.K. Buck Retail Stores* v. *Harkert*, 157 Neb. 867, 62 N.W.2d 288 (1954).

6. *Sensabaugh* v. *Polson Plywood Co.*, 342 P.2d 1064 (Mont. 1959).

7. *People ex rel Watseka Telephone Company* v. *Emmerson*, 302 Ill. 300, 134 N.E. 707 (1922).

8. *State ex rel Dewey Portland Cement Co.* v. *O'Brien*, 142 W.Va. 451, 96 S.E.2d 171 (1956).

9. *Leonardson* v. *Moon*, 92 Idaho 796, 451 P.2d 542 (1969).

10. *State* v. *Wymore*, 98 Idaho 197, 560 P.2d 868 (1977).

DATED This 16th day of August, 1978.

ATTORNEY GENERAL OF IDAHO

WAYNE L. KIDWELL

ANALYSIS BY:

JEAN R. URANGA
Assistant Attorney General

ATTORNEY GENERAL OPINION NO. 78-34

TO: REX E. LANHAM, Chairman
Idaho Outfitters & Guides Board
Building Mail

Per Request for an Attorney General Opinion.

QUESTION PRESENTED:

Are universities, colleges, and other educational institutions outfitting or guiding within the meaning of the Idaho Outfitters and Guides Act when they conduct courses in outdoor recreational activities involving hunting, boating, fishing or hazardous mountain excursions in the boundaries of this State?

CONCLUSION:

1. The Idaho Outfitters and Guides Act does not exempt educational institutions from its requirements.

2. If the activities of such an organization constitute outfitting or guiding as those terms are defined in the Act, an appropriate license and payment of fees under the Act would be required.

3. Whether an educational institution's program actually involves outfitting or guiding is a question of fact which must be resolved on a case by case basis.

4. Even if the outdoor-oriented courses of an educational facility do not constitute "outfitting", individuals instructing or leading such courses may be "guiding" if they receive compensation for their services.

ANALYSIS:

The Idaho Outfitters and Guides Act is a legislative attempt to protect the natural resources of this State while encouraging safe use and enjoyment of those resources by members of the public. The furtherance of these goals is accomplished by regulating and licensing "those persons who undertake for compensation to provide equipment or personal service to such persons, [the public], for the explicit purpose of safeguarding the health, safety, welfare and freedom from injury or danger of such persons, in the exercise of the police power of this state." See §36-2101, *Idaho Code*. Outfitters and Guides as defined by the Act must first secure an appropriate license from the Idaho Outfitters and Guides Board. [Hereinafter referred to as the Board].

Not all outdoor activities constitute "outfitting" or "guiding". Section 36-2102, *Idaho Code*, defines an "outfitter" as:

> Any person who, in any manner, advertises or *holds himself out to the public for hire* providing facilities and services, for the conduct of outdoor recreational activities *limited to the following: hunting animals or birds; float or power boating on Idaho rivers and streams; fishing; and hazardous mountain excursions* and maintains, leases or otherwise uses equipment or accomodations for such purposes. Any firm,

> partnership, corporation or other organization or combination thereof operating as an outfitter shall designate one (1) or more individuals as agents who shall conduct its operations and who shall meet all of the qualifications of a licensed outfitter. [Emphasis supplied]. §36-2102 (b), *Idaho Code.*

The term "guide" is defined in §36-2102 (c), *Idaho Code* as:

> Any natural person who, for compensation or other gain or promise thereof, furnishes personal services for the conduct of outdoor recreational activities limited to the following: hunting animals or birds; float or power boating on Idaho rivers and streams; fishing; and hazardous mountain excursions, except any employee of the state of Idaho or the United States when acting in his official capacity. Any such person must be employed by an outfitter and anyone offering or providing such services who is not so employed shall be deemed to be an outfitter.

Additionally, §36-2102, *Idaho Code*, defines "person" to include organizational entities such as firms, partnerships, and corporations. No exclusion or exception is made for universities, colleges or other educational institutions.

In order to determine whether or not an educational facility is "outfitting" within the meaning of the Act, the exact nature of the course or activity offered must be analyzed within the definition of the term "outfitter". As can be seen from the definition, the institution would not be "outfitting" if it does not advertise or hold itself out to the public for hire. Also, the recreational activity would not fall within the provisions of the act unless it included at least one of the following: Hunting animals or birds, floating or power boating on Idaho rivers and streams, fishing, or hazardous mountain excursions in the boundaries of this State.

In our opinion, each educational institution and each course offered would have to be reviewed on a case by case basis to determine whether it falls within the definitions of the Act. For example, a course offered by a bona fide university would not fall within the terms of the Act if it is specifically limited to full-time students and is not generally offered to members of the public. On the other hand, an organization could not escape the provisions of the Act simply by calling itself an educational institution. In other words, an "outfitter" does not escape such classification simply by chartering himself as an educational facility and by allowing all members of the public to utilize his services by paying some sort of a "registration fee"

After considering the activity under the requirement that the public must be involved for hire, the Board should next consider whether the activity relates to any of the items covered under the Act. Again, these are limited to hunting, float or powerboating, fishing, and hazard mountain excursions. Quite obviously, field trips in courses such as dendrology, botany, geology, and numerous other related courses would not require a license in order to proceed. However, if the course involves one of the enumerated activities, a license would be required.

Problems related to courses provided by educational institutions which include hunting, fishing, raft trips or power boating or hazardous mountain excursions could still arise even though the institution itself may not be "out-

fitting" as defined. This is because any person employed to instruct or lead such a course may himself be considered a "guide" within the meaning of the Act. The activities regulated under the definition of "guide" are the same as those for an outfitter. Also, the person must first receive some compensation or gain for his services. But if a person does receive compensation or gain, and instructs or leads a course related to hunting, fishing, raft trips or power boating or hazardous mountain excursions, he would need a guide license before engaging in such activity. Furthermore, such a person would have to be employed by an outfitter or be deemed to be an outfitter himself. See §36-2102 (c), *Idaho Code.*

In light of the definition of "guide", an educational institution could run afoul of the Act even though it does not hold itself out to the public for hire. If the instructor used for the course is paid, and if one of the covered activities is engaged in, the instructor himself would be violating the provision of the Act if he did not have a license for his activity. This would not involve the institution directly, but the result would be the same. The situation could be avoided by confining the course to outdoor activities not involving hunting, fishing, float or power boating or hazardous mountain excursions. It could also be avoided through volunteer instructors or leaders who would conduct the course with no compensation or other promise of gain.

As we concluded above, the applicability of the Act to any given educational institution or instructor thereof will depend upon a comparison of the factual elements with the requirements of the Act. The letter requesting this opinion provides a factual example concerning activities offered by Ricks College. This opinion will review those activities in light of the Act to determine whether "outfitting" or "guiding" is taking place. We recommend that the Board use a similar analysis in the future for other universities, colleges and educational facilities.

According to the opinion request, Ricks College conducts tours during the summer season for regularly registered students. Credit is received by the student for the course. Additionally, any member of the family of any student registered with the college may participate in the activity. Thus, the course is expanded to allow persons other than students to participate provided that they are related to a registered student. The college charges approximately $425.00 for each registrant for each tour. The fee paid includes any necessary tuition, food, lodging, camping facilities, transportation, and all otther necessary equipment for the course.

The courses offered by Ricks College include instruction and training in most aspects of outdoor activities, including conservation of resources, the impact of civilization on the environment, and items of geological and historical significance. Training in safety factors related to boating, canoeing, hiking and backpacking in wilderness terrain is also given. No instruction or training involves hunting or fishing.

The tours are conducted by instructors. These are salaried instructors employed by the college who serve the school under a nine month contract. Additional compensation and a contract extension is given these professors for the summer tours. All persons in the program, including students and family members, are covered under the school's blanket liability insurance policy.

According to the opinion request, the college now proposes to purchase approximately 200 acres of land in Idaho for a base of operation for future outdoor activities.

In determining whether Ricks College is "outfitting" within the meaning of the Act, the facts must first be viewed in light of the requirement that the college must be holding itself out to the public for hire. In our view, this would not be the case if the institution carefully limits the course to full-time students and their families. However, if any member of the public can take the tour by simply enrolling for the course on a part-time or one-time basis, the university would, in our opinion, be holding itself out to the public for hire.

Secondly, in order to determine whether Ricks College is "outfitting" within the meaning of the Act, it must be determined whether the course includes hunting, fishing, float boat or power boating, or hazardous mountain excursions. Apparently, there is no hunting or fishing, but there does seem to be some activity related to boating and hazardous mountain excursions. The university could avoid the requirements of the Act if the course were limited to activities not involving these areas.

Relevant also to the outdoor courses offered by Ricks College is the Act's definition of "guide" found in §36-2102 (c), *Idaho Code*. This analysis must be made separate from the question of whether the institution itself is an "outfitter" under the Act. The fact situation presented reveals that the instructors for the tours or courses are salaried professors of the college who serve under a contract extension for additional annual compensation. Therefore, they definitely fall within those persons who conduct outdoor services for compensation or other gain. The remaining question then must be whether the services provided are related to hunting, fishing, float or power boating or hazardous mountain excursions. Again, it would seem that at least some of the activities are related to these subjects. If so, the instructors could not perform the services unless they were working under the jurisdiction of a licensed outfitter or if they were, themselves, licensed as an outfitter. This could be remedied, once again, by confining the courses or tours to areas not within the scope of those defined in §36-2102, *Idaho Code*.

Interestingly, the problem related to guides may not be present for State colleges, universities, and educational facilities in Idaho. Section 36-2102 (c), *Idaho Code*, in defining "guide," excepts out of the definition "any employee of the State of Idaho or the United States when acting in his official capacity." Although the exact intent of this phrase is somewhat questionable, the literal wording would mean that a State employed instructor, such as a University of Idaho professor, could conduct courses and tours through the University where he is employed, because this would be acting in his official capacity. Thus, we must conclude that State employed instructors would be considered differently from those employed by the private sector.

In summary, educational institutions conducting courses in outdoor activities must be licensed outfitters or employ licensed outfitters when they are holding themselves out tot he public for hire *and* when the activities relate to hunting, fishing, float or power boating or hazardous mountain excursions. If either of these two tests is absent, the institution would not need to comply with the Idaho Outfitters and Guides Act. Even if the institution itself is exempt from the Act, the instructors employed to conduct the tours and courses may find themselves within the provisions of the Act due to the definition of

"guide" found in §36-2102 (c), *Idaho Code*. Once again, an instructor would be a "guide" if he is receiving compensation or other gain *and* is involved in courses relating to hunting, fishing, float and power boating, or hazardous mountain excursions. If such be the case, the instructor would have to be employed by a licensed outfitter or be an outfitter himself. As for Ricks College, the facts presented in your opinion request reflect that they may avoid the requirements of the Idaho Outfitters and Guides Act by either limiting enrollment in the tours to full-time students and their families *or* by avoiding the four recreational activities itemized in §36-2102 (b). An instructor employed by Ricks College for this purpose could avoid the licensing requirements of a "guide" by either volunteering his services for no compensation or, again, by avoiding the four itemized recreational activities found in §36-2102 (c), *Idaho Code*.

AUTHORITIES CONSIDERED:

1. Section 36-2101, *Idaho Code*.

2. Section 36-2102, *Idaho Code*.

DATED This 23rd day of August, 1978.

WAYNE L. KIDWELL
Attorney General of Idaho

ANALYSIS BY:

GUY G. HURLBUTT
Chief Deputy Attorney General
State of Idaho

WLK/GGH/lp

cc: Idaho Supreme Court
Idaho Supreme Court Law Library
Idaho State Library

ATTORNEY GENERAL OPINION NO. 78-35

TO: HONORABLE MONROE C. GOLLAHER
Director of the Department of Insurance
State Office Building
BUILDING MAIL

Per request for Attorney General Opinion.

You have requested an official Attorney General's Opinion on two questions regarding an interpretation of *Idaho Code*, Title 41, Chapter 43.

QUESTIONS PRESENTED:

(1) Does the Idaho Life and Health Insurance Guaranty Association owe an obligation to all certificate holders under group policies issued to residents of Idaho, regardless of the residence of such certificate holder?

(2) Does the Idaho Life and Health Insurance Guaranty Association owe an obligation to certificate holders who are residents of the State of Idaho if the group policy itself was issued to a group policyholder who is not a resident of Idaho?

CONCLUSIONS:

(1) Yes, the Idaho Life and Health Insurance Guaranty Association owes an obligation to all certificate holders under group policies issued to residents of Idaho, regardless of the residence of such certificate holder.

(2) Yes, the Idaho Life and Health Insurance Guaranty Association owes an obligation to certificate holders who are residents of the State of Idaho if the group policy itself was issued to a group policyholder who is not a resident of Idaho.

ANALYSIS:

I am informed through review of this matter through the Department of Insurance that your concern is focused upon the duties imposed upon the Idaho Life and Health Insurance Guaranty Association through the insolvency of a foreign "member insurer" rather than a domestic member insurer under Title 41, Chapter 43, *Idaho Code*.

I.

First, we refer to *Idaho Code* §41-4308 which describes the powers and duties of the Idaho Life and Health Insurance Guaranty Association as follows:

> "*Powers and duties of the association.* — In addition to the powers and duties enumerated in other sections of this act,
>
> (1) If a domestic insurer . .
>
> (2) If a domestic insurer . . . .

(3) If a *foreign or alien insurer* is an insolvent insurer, the association shall, subject to the approval of the director:

(a) Guarantee, assume, or reinsure, or cause to be guaranteed, assumed, or reinsured, the covered policies of *residents*;

(b) Assume payment of the contractual obligations of the insolvent insurer to *residents*; and

(c) Provide such moneys, pledges, notes, guarantees, or other means as are reasonably necessary to discharge such duties.

Provided, however, that this subsection shall not apply where the director has determined that the foreign or alien insurer's domiciliary jurisdiction or state of entry provides, by statute, protection substantially similar to that provided by this act for *residents of this state.*

(4) . . . .

(5) . . ", etc. (Emphasis added.)
Idaho Code §41-4308

The term "resident" is defined for purposes of the act as follows:

"*Definitions.* — as used in this act:

(11) 'Resident' means any person who resides in this state at the time a member insurer is determined to be an impaired or insolvent insurer, and *to whom contractual obligations are owed.*"
(Emphasis added.) *Idaho Code* §41-4305(11)

We can also refer to the statutory rule for the construction of Chapter 43, Title 41, *Idaho Code*, for assistance which reads as follows:

"*Construction.* — This act shall be liberally construed to effect the purpose under section 41-4302, Idaho Code, which shall constitute an aid and a guide to interpretation."
Idaho Code §41-4304

And *Idaho Code* §41-4302 reads:

"*Purpose.* — The purpose of this act is to protect policyowners, insureds, beneficiaries, annuitants, payees, and assignees of life insurance policies, health insurance policies, annuity contracts, and supplemental contracts, subject to certain limitations, against failure in the performance of contractual obligations due to the impairment of (sic) the insurer issuing such policies or contracts. To provide this protection, (1) an association of insurers is created to enable the guaranty of payment of benefits and of continuation of coverages, (2) members of the association are subject to assessment to provide funds to carry out the purpose of this act, and (3) the association is authorized to assist the director in the prescribed manner, in the detection and prevention of insurer impairments or insolvencies."
Idaho Code §41-4302

Therefore, from the foregoing we can determine that *Idaho Code* §41-4308(3) applies and provides for the protection of "residents to whom contractual obligations are owed" rather than just strictly for the protection of policyholders in the event a foreign "member insurer" becomes insolvent.

II.

Next, it becomes important to determine to whom "contractual obligations" are owed on a policy of group insurance. In this regard, *Couch on Insurance*, 2nd. Volume 1, §1:51, p. 68, gives a helpful description of group insurance as follows:

> "Group insurance is a contract of insurance whereby the individual lines of a group of persons usually employees of a business concern, are, in consideration of a flat periodical premium based upon an average age, and paid either by the employer in whole, or partially by both employer and the employee, insured each in a definite sum so long as he or she remains in such employment and the premiums are paid . . . .
>
> *While a group insurance policy falls within the class of contracts commonly called contracts for the benefit of third parties,* it differs from most of the contracts thus classified in the fact that the third party, that is the employee whom the contract purports to protect, is usually entitled to the benefits provided by the contract only upon the payment of a consideration, namely, the premiums." (Emphasis added).
>
> *Couch on Insurance,* 2nd, Vol. 1, § 1:51, p. 68

Couch on Insurance, 2nd, Vol. 18, §§ 74:616 and 74:617, pp. 559 and 560 further describes the right of a person insured under a group insurance contract to enforce the obligation owed under the contract.

> "Since the purpose of group insurance is to insure the lines of employees for their benefit, they are the real parties in interest, and even though the employer is the nominal beneficiary, he is merely a trustee of the employees, or an agent for distribution, and the beneficiary or his personal representative is the real party in interest, and *may sue on the contract in his own name without the joinder of the employer as a plaintiff.* Thus an employee holding a certificate of group insurance or the beneficiary named is entitled to maintain an action against the insurer to recover the benefits provided by the contract of insurance." (Emphasis added.)
>
> *Couch on Insurance,* 2nd, Vol. 18, § 74:716, pp. 559 and 560

Nevertheless, even though the insured or beneficiary of the group policy has a right to enforce the contractual obligations owed on the contract, the contract is between the policyholder and the insurer.

> "Since a contract for group insurance *is between the employer and the insurer* for the benefit of the employee, the right of action by the employee or his beneficiary or representative is against the insurer, and not against the employer, between whom and the employee there is no contract of insurance, and therefore the insurer may be sued alone without joining the employer as a defendant." (Emphasis added.)
>
> *Couch on Insurance,* 2nd, Vol. 18, § 74-617, p. 566

From the foregoing and particularly from the references quoted from *Couch on Insurance*, 2nd, it is readily apparent and we can conclude that residents of Idaho who are certificate holders of an insolvent foreign "member insurer" are third party beneficiaries to whom contractual obligations are owed. Whether or not the policyholder is also a resident of another state is irrelevant as the certificate holder may enforce the obligation owed him directly and without having to join the policyholder as a party.

Of course, the group policyholder (the promisee) of the insurance contract also has a contractual obligation owed to him as a party to the contract.

> "The rights of parties in the enforcement of a contract are, as a rule, determined by its terms. A promise may, of course, be enforced by the promisee and his right to enforce the promise extends to a promise made for the benefit of a third person . . . ."
> 17 *Am. Jur.* 2d., Contracts, § 297, pp. 713 and 714

> "Of course, a party may have a legal capacity to sue and not be a real party in interest. Generally, a party to a contract not having parted with its interest therein may sue to enforce or prevent a violation thereof. 17 CJC, Contracts, § 518, 39 Am. Juris. p. 876, Sec. 20."
> *Payette Lakes Protective Ass'n. v. Lake Reservoir Co.*, 68 Idaho 111, p. 119, 189 P.2d 1009 (1948)

The Idaho Rules of Civil Procedure provide that the party who is a promisee of a contract made of the benefit of another may bring an action to enforce the obligation owed to him as a party to the contract without joining the party for whom the contract was made.

> "*Real party in interest.* — Every action shall be presented in the name of the real party in interest. An executor, administrator, personal representative, guardian, conservator, bailee, trustee of an express trust, *a party with whom or in whose name a contract has been made for the benefit of another*, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought; . . . . " (Emphasis added.)
> *Idaho Rules of Civil Procedure*, Rule 17 (a)

From the foregoing quotations cited from 17 *Am. Jur.* 2d, Contracts, § 279, pp. 713 and 714; Payette Lakes Protective Ass'n. v. Lake Reservior Co., 68 Idaho 111, p. 119 (1948); and Idaho Rules of Civil Procedure, Rule 17 (a), it is apparent, and we can conclude that the policyholder of a group policy, as a promisee to the contract, has an obligation owed to him by the member insurer which the policyholder may enforce if he is a resident of the state at the time the member insurer becomes impaired or insolvent.

The only exception we can find to the obligations of the Idaho Life and Health Insurance Guaranty Association to residents to whom a foreign insolvent "member insurer" owes contractual obligations is stated in the last paragraph of *Idaho Code* § 41-4308 (3) (c) which reads:

> " . Provided, however, that this subsection shall not apply where the director has determined that the foreign or alien insurer's domiciliary jurisdiction or state of entry provides, by statute, protection substantially similar to that provided by this act for residents of this state."
> *Idaho Code* §41-4308 (3) (c)

AUTHORITIES CONSIDERED:

1. *Idaho Code* §§ 41-4308, 41-4305 (11), 41-4304, 41-4302.

2. *Couch on Insurance,* 2nd Vol. 1, § 1:51, p. 68, *Couch on Insurance,* 2nd Vol. 18, §§ 74-616 and 74-617, pp. 559, 560 and 566.

3. 17 *Am. Jur.* 2d., Contracts, § 297, pp. 713 and 714.

4. *Payette Lakes Protective Ass'n. v. Lake Reservoir Co.,* 68 Idaho 111, p. 119, 189, P.2d 1009 (1948).

5. *Idaho Rules of Civil Procedure*, Rule 17 (a).

DATED This 24th day of August, 1978.

ATTORNEY GENERAL OF THE STATE OF IDAHO

WAYNE L. KIDWELL

ANALYSIS BY:

ROBERT M. JOHNSON
Assistant Attorney General
State of Idaho

cc: Idaho Supreme Court
Idaho State Library
Idaho Supreme Court Library

ATTORNEY GENERAL OPINION NO. 78-36

TO: Stephen A. Bywater
Deputy Prosecuting Attorney
Cassia County, Idaho
P.O. Box 487
Burley, Idaho 83318

Per Request For Attorney General Opinion

QUESTIONS PRESENTED

1. Does the limitation on accumulated balances contained in subsection (2) of §31-867 apply only to funds received under a special levy for courts provided for in (1) of that section, or does that limitation apply to the accumulated balance in the District Court fund from all sources including fines, fees, etc., as well as the special revenue?

2. In a case where the accumulated balances in the District Court fund exceed 60% of the total budget for the court functions for the current year, can the excess be transferred to the current expense fund of the county?

3. If the answer to question 2 is in the affirmative, and if such transfer to the current expense fund is made, are there any restictions placed upon it by law for the use of such funds?

4. If the answer to question 2 is in the negative, what alternatives does the county have in bringing the District Court fund in compliance with the provisions of (2) of §31-867 when the accumulated balance in the District Court fund exceeds the 60% limitation?

CONCLUSIONS:

1. The limitation on accumulated balances contained in subsection (2) of §31-867, *Idaho Code*, applies to all of the accumulated balances in the District Court fund from whatever source including fines, fees, etc.

2. In cases where the accumulated balances in the District Court fund exceed the budget for the current year plus 60% of that budget, the excess may be transferred to the current expense fund of the county.

3. Present Idaho law does not contain any restrictions upon use by the counties of excess moneys transferred from the District Court fund to the current expense fund of a county.

4. No answer to question 4 appears to be necessary.

ANALYSIS:

Prior to 1976 passage of Chapter 307 which contains §31-867 and amended §31-3201A, all court fees went into the county current expense fund. There does not appear to be any indication in either of these sections, or that we can find anywhere in the law, that such fees are dedicated to any particular use or purpose, and §31-867 is a part of the same act. Subdivision (2) of §31-867, *Idaho*

Code, clearly states that the balances, that is, all balances in the District Court fund to be carried over, shall not exceed 60% of the current year's budget for court functions.

There is no indication as to other uses or where the excess over the 60% is to go. Thus we must relate this matter back to the general requirements as to county budgets under Chapter 16, Title 31, *Idaho Code*. Section 31-1609, I.C. provides that all appropriations shall lapse and become null and void at the end of the fiscal year, that is September 30th, and under §31-1601, I.C., there is an exception for payment of claims for incomplete improvements incurred during the fiscal year, which payments may be made after September 30th. Section 31-1610 provides that the county budget officer is to submit to the county commissioners a complete statement for the proceding fiscal year showing expenditures together with unexpended balances. The full budget procedure is set out in Chapter 16, Title 31, *Idaho Code*, particularly in §§ 31-1602, 31-1603, 31-1604, and 31-1605. Section 31-1605A, *Idaho Code*, provides that counties may accumulate fund balances at the end of a fiscal year and carry over such balances in amounts sufficient to achieve or maintain operations on a cash basis, and a fund balance is defined as "the excess of the assets of a fund over its liabilities and reserves."

Construing these sections together so as to harmonize them, if at the end of the fiscal year, September 30th, (§31-1601, I.C.), all balances in the District Court fund, except for claims for incomplete improvements incurred during the fiscal year, exceed 60% of the total court function budget (§31-867A, I.C.), for the year just ending, then the amount of funds above this 60% figure will be used in computing the next year's general county budget as provided for by Chapter 16, Title 31, *Idaho Code*. The carry over provided for by §31-1605A to preserve continuity and a cash basis is in the case of the court function budget under §31-867A, limited by this 60% figure.

Since §31-867, *Idaho Code*, says that the balances in the District Court fund are not to exceed 60% of the total budget, enough funds may be accumulated in the District Court fund to cover the appropriations for the current year plus 60% of year's appropriations as a carry over for the succeeding year, and any amounts above this total figure could be transferred to the current expense fund from time to time.

AUTHORITIES CONSIDERED:

1. *Idaho Code*, §§31-867; 31-3201A; and Chapter 16, Title 31.

2. 1967 Idaho Session Laws, Chapter 307.

DATED this 11th day of September, 1978.

ATTORNEY GENERAL
State of Idaho

WAYNE L. KIDWELL

ANALYSIS BY:

WARREN FELTON
Deputy Attorney General
State of Idaho

WLK/WF/dm

cc: Idaho State Library
Idaho Supreme Court
Idaho Supreme Court Library

ATTORNEY GENERAL OPINION NO. 78-37

TO: The Honorable John V. Evans
Governor of Idaho
Building Mail

Representative Gary Ingram, Chairman
Committee on SCR 119
3350 Highland Drive
Coeur d'Alene, Idaho 83814

Per Requests for an Attorney General Opinion

QUESTIONS PRESENTED:

1. Does Section One of the one percent property tax initiative limit the tax on any property for each taxing district to a maximum of one percent or does it limit the "summed taxes" for all taxing districts to one percent of actual market value of any property?

2. Under the proposed statute, a taxing district will be required to reduce the mill levy on any property whose property tax burden now is more than one percent of market value so that the level will be lower than one percent. Does the initiative also require the taxing district to reduce by a proportionate amount the mill levy on that property within the territorial jurisdiction that now is taxed at a level less than one percent ceiling? If not, does the initiative conflict with any provision of the Idaho Constitution or with other provisions of State law?

3. The second sentence in Section One, paragraph one, of the initiative authorizes the counties to apportion taxes according to law to the taxing districts within the county. In what manner would this apportionment occur? Does this provision empower the counties to reduce the budgets of the taxing districts located within the county?

4. Does Section Two of the initiative allow a parcel of property which has been sold to be placed on the tax rolls at a value higher than that of a similar piece of property that has not been sold? If so, does the provision comply with the provisions of the Idaho Constitution that requires uniform treatment of property within the same class.

5. Under the initiative proposal, what circumstances, other than those set forth in Section Two, paragraph one, permit a change in property values from the established 1978 base level? Does the initiative or any other provision of State law offer a guideline in the determination of any maximum change permitted? Is the increase in value of all property in a county's tax base limited to the inflation rate not to exceed two percent; or is the increase in value for each piece of property that is not purchased, newly constructed, or subject to a change of ownership limited to the change in the inflation rate not to exceed two percent; or is all property limited to 1978 assessment levels unless the property is purchased, newly constructed or subject to a change in the inflation rate not to exceed two percent; or is some other interpretation suggested?

6. If the initiative is approved in the 1978 general election, on what date or dates will the several sections take effect and which tax roll would first be affected by the statute?

7. What other portions or areas of the initiative would create conflicts with Idaho's Constitution?

CONCLUSIONS:

1. Section One of the one percent property tax initiative limits the *summed* taxes for all taxing districts to one percent of the actual market value of any real property.

2. The initiative does not *expressly* require a taxing district to reduce the mill levy on property within its jurisdiction that is taxed at less than one percent equally/proportionately to the reduction of the mill levy on any property within its jurisdiction which would bear a tax burden exceeding one percent but for a reduction. Sections 2 and 5, Art. VII, *Idaho Constitution,* require that the mill levy (tax burden) on both such properties in the same taxing district be reduced equally/proportionately. This requirement of Art. VII can be satisfied by corrective legislation.

3. Existing Idaho statutes and case law do not provide the authority, manner or formula by which counties would apportion taxes to taxing districts. Section One, paragraph one of the initiative authorizing counties to apportion taxes according to law does not by itself empower a county to reduce the budgets of the taxing districts located within the county. It is recommended that implementing legislation providing for apportionment be introduced during the next legislative session.

4. Section Two of the initiative *does allow* property which has been sold to be placed on the tax rolls at a value higher than that of a similar piece of property that has not been sold. That portion of Section Two providing for this discriminatory result violates Art. VII, §§2 and 5, *Idaho Constitution.*

5. Under the initiative, only the circumstances set forth in Section Two (subsection one) and the inflation rate not to exceed two percent provided for in Section Two (subsection two) permit a change in property values from the established 1978 base level. With reference to the alternative interpretations listed in Question Five for Section Two of the initiative, the interpretation most likely to be adopted is that the increase in value for each piece of property that is not purchased, newly constructed, or subjected to change of ownership is limited to the change in the inflation rate not to exceed two percent.

6. The conflicts and ambiguity contained in the language of initiative Section Five providing for an effective date are irreconcilable. As absolute certainty is necessary for tax and budget purposes, remedial legislation is necessary. January 1, 1980 is suggested as the most sensible new general effective date.

7. In addition to the portions of the initiative which are discussed in conclusions two and four, the constitutionality of subsection two of Section Two (two percent inflation limitation) may be challenged in the future based upon Art. VII, §§2 and 5, *Idaho Constitution.* Article VII embodies the constitutional limitations most important to the initiative. Other initiative provisions which

might conflict with the *Idaho Constitution* include the portions of initiative section three which require a two-thirds vote of the legislature and preclude the legislature from imposing new ad valorem taxes. (Art. III, §§1 and 9 and Art. VII, §§2 and 5, *Idaho Constitution*.

ANALYSIS:

1. *1% Limit Based on "Summed Taxes".*

Subsection one of Section One of the initiative provides that the "maximum amount of *any* ad valorem *tax*" (emphasis added) on any property is one percent of actual market value. The word "any" in combination with the word "tax" — i.e., adoption of the singular rather than the plural form — on first reading might leave some doubt as to whether the section limits the tax of each taxing district to a maximum of one percent or the "summed taxes" for all taxing districts to one percent. Deliberate construction of the above language, however, leads to the conclusion that the one percent limitation is based upon, and is to be applied to, "summed taxes". Thus, the maximum amount of all ad valorem taxes on any property from all (but excepted) sources shall not exceed one percent of the actual market value of the property. This conclusion is supported by the definition of the word "any" and canons of statutory construction.

Any can be construed to mean all as well as one. For example, one of the definitions given the word any by *Webster's New Collegiate Dictionary* (Merriam, 1974) is : "all—used to indicate a maximum or whole . . . . " *Black's Law Dictionary* (West, Rev. 4th ed., 1968) includes such explanations of the word any as:

> (1) [any] is given the full force of . . . "all"; and
>
> (2) "any" does not necessarily mean only one . . but may have reference to more than one or to many.

Two principles of statutory construction are particularly relevant to the resolution of this question — the rules of reasonable interpretation and whole statute interpretation. The first, as its title suggests, favors a rational and sensible result. Sutherland, *Statutory Construction* §45.12. The process of whole statute interpretation is described in Sutherland, *Statutory Construction* §46.05 as follows:

> . each part or section should be construed in connection with every other part or section so as to produce a harmonious whole.

This process of interpretation is commonly exercised in Idaho. E.g., *Jackson* v. *Jackson,* 87 Idaho 330, 393 P.2d 28 (1964).

When the relevant quoted language is read in conjunction with the balance of the initiative (particularly with the second sentence of subsection one, Section One and all of subsection two, Section One), it is clear that any means all — i.e., the "summed taxes" for all taxing districts are limited to one percent. The second sentence of the same subsection would be rendered meaningless and subsection two less necessary by the adoption of the other alternative interpretation. The interpretation offered is, thus, a more sensible result.

2. *Uniform Reduction.*

The initiative, on its face, does not require a taxing district to reduce the mill levy on property within its jurisdiction that is taxed overall at less than one percent proportionately to the reduction of the mill levy on any property which would bear a tax burden exceeding one percent but for a reduction. It is impossible to ascertain the intent of the drafters of the initiative by reading its provisions or predict with any degree of certainty the construction which would be adopted by the courts in this regard. The initiative clearly states a general policy of tax limitation but leaves unanswered and virtually unanswerable the problems of interpretation and implementation raised by the second question considered by this Opinion. The constitutional requirements in this context, however, can be anticipated.

Parcels of taxable property are normally subjected to several levies. Normally, parcels in a common taxing district will be subject to yet other different taxing districts. Due to this difference in the applicable number of taxing districts (mill levies), the common taxing district will frequently have within its jurisdiction parcels taxed at over one percent overall as well as parcels taxed at less than one percent overall.

If it is assumed that the initiative is construed by the courts (or implementing regulations are adopted or legislation passed) to the effect that the amount of a mill levy (tax burden) is reduced *only* for the property in a taxing district with would bear an overall ad valorem tax burden exceeding one percent but for the reduction, the one percent limitation as applied would result in disuniformity in property taxation within the common taxing district. This is so because the taxes levied by the common taxing district do not fall equally by value upon all property within the district. Thus, this result and the initiative, regulation or legislation would violate the provisions of Art. VII, §§2 and 5, *Idaho Constitution.*

Article VII, §2, *Idaho Constitution*, provides in relevant part:

> The legislature shall provide such revenue as may be needful, by levying a *tax by valuation,* so that every person or corporation shall pay a tax in *proportion to the value* of his, her or its property . . . (Emphasis added).

Article VII, §5 affords additional relevant guidance as follows:

> *All taxes shall be uniform* upon the same class of subjects *within the territorial limits of the authority levying the tax,* and shall be levied and collected under general laws, which shall prescribe such regulations as shall secure a *just valuation* for taxation of all property (Emphasis added).

The Supreme Court of the State of Idaho has had several opportunities to construe and apply Art. VII, *Idaho Constitution.* E.g., *Idaho Telephone Company* v. *Baird,* 91 Idaho 425, 423 P.2d 337 (1967); *Boise Community Hotel, Inc.* v. *Board of Equalization,* 87 Idaho 152, 391 P.2d 840 (1964); *Chastain's Inc.* v. *State Tax Commission,* 72 Idaho 344, 241 P.2d 167 (1952); *Anderson's Red & White Store* v. *Kootenai County,* 70 Idaho 260, 215 P.2d 815 (1950). The most important and pertinent of these applications is the decision entitled *Idaho Telephone Company* v. *Baird, supra.,* (hereinafter *Idaho Telephone*).

In *Idaho Telephone*, the Supreme Court considered whether the then existing §§63-101A and 63-101B, *Idaho Code*, which respectively classified property in Idaho as real, personal or operating property and imposed a higher assessment ratio against operating property than real and personal classes of property were constitutional. The Court construed Art. VII, (§§2, 3 and 5 in particular) and held that the imposition of a higher rate of assessment against operating property was unconstitutional. Several portions of the Court's decision and rationale deserve emphasis.

The Court in *Idaho Telephone* considered §§2, 3 and 5 together *in pari materia* and construed the language of Art. VII, §2 — "every person . . shall pay a tax in proportion to the value of his, her or its property . " — as meaning the following:

> [*E*] *very property owner shall receive equal treatment* under ad valorem tax laws; for example, if owner A possesses $100.00 of property which is taxed $1.00 then owner B with $400.00 of taxable property shall be taxed in the same proportion, or $4.00. The constitutional requirement may not be evaded by disparate rates of assessment between A and B, or by imposition of different tax rates against A's and B's property. 91 Idaho at 429. (Emphasis added).

The Court specifically rejected the arguments of the State Tax Commission that Art. VII only required that property within the same class be treated uniformly — i.e., that the discriminatory classification was permitted. Reiterating the overriding nature of the rule of uniformity, the Court held that classification was only permissible and the constitutional mandate satisfied when the method of classification did not produce discriminatory burdens upon different classes of property.

Application of the underlined language of §§2 and 5, Art. VII, *Idaho Constitution,* and the holding in *Idaho Telephone* to the assumed implementation can only lead to one conclusion. The classification inherent in and disuniformity which can result under the assumed implementation would violate the mandate of Art. VII. This is so, as previously suggested, because the taxes levied by the common taxing district do not fall equally upon all property within the district as required by Art. VII.

Legislation which would insure a proportionate/equal reduction of the mill levy for property within a common taxing district is advisable to safeguard the one percent initiative and its implementation from constitutional attack.

3. *Apportionment.*

> The separate questions raised by question number three will be answered in reverse order.

The second sentence of subsection one of Section One of the initiative authorizing counties to apportion taxes collected *according to law* does not by itself empower the county to reduce the budgets of the taxing districts located within the county. Any apportionment, as stated in the initiative, clearly must be made *according to law.* Perusal of the many pages of Idaho law setting forth the process by which counties collect and distribute ad valorem taxes has failed to disclose any law supporting or providing for such a reduction of taxing district budgets by a county. For example, §31-1605, *Idaho Code*, grants county

commissioners the power to fix the county budgets (which obviously includes the power to modify the budget requests of its subdivisions) but does not grant the commissioners power to modify the budgets of other taxing districts within the county. In fact, the existing Idaho precedent relating to multi-county health districts precludes a county member from indirectly reducing a health district budget. *District Board of Health of P.H. Dist. No. 5* v. *Chancey,* 94 Idaho, 944, 500 P.2d 845 (1972).

Thus, pursuant to existing practice and law, separate taxing districts within a county certify to the county commissioners how much revenue they will need pursuant to budget. The county sets (within mill levy limitations established by law) and applies the mill levy necessary to raise the revenue needed and distributes it to each taxing district. The Idaho Supreme Court has generally characterized counties as collection agents for taxing districts. *Rutledge* v. *State,* 94 Idaho 121, 482 P.2d 515 (1971); *Hamilton* v. *McCall*, 90 Idaho 253, 409 P.2d 393 (1965); and *Bagley* v. *Gilbert,* 63 Idaho 494, 122 P.2d 227 (1942). As the existing law does not grant counties the power to review and modify taxing district budgets or provide for apportionment other than by mere distribution, implementing legislation is necessary to provide such budget power and/or the precise means of apportionment.

The question asking in what manner apportionment will occur calls for pure guesswork at this time as well as administrative and legislative ingenuity in the future. Not only is there no relevant law in existence, but no approach is clearly more sensible than competing alternatives. Moreover, it is unlikely that any approach or rule will prove to be entirely satisfactory or free from defect.

Several competing approaches have been advanced in California for apportionment:

1. Distribute available revenues to districts to achieve an equal proportionate decrease in *total* revenues, or

2. Distribute available revenues to districts to achieve an equal proportionate decrease in *property* revenues, or

3. Distribute available revenues to first fund those districts without substantial alternative taxing power, (this policy and approach is not particularly viable or relevant to Idaho), or

4. Distribute available revenues according to a schedule of priorities established by the legislature for the mill levies of all taxing districts.

One additional alternative mentioned in Idaho embodies the following concepts and steps:

1. Reduce all mill levies applicable to the property which would be taxed at more than one percent overall but for a reduction proportionately/equally to the extent necessary to bring the "summed" relevant taxes within one percent;

2. Within and for each taxing district reduct the mill levy applied by the district to property taxed at less than onepercent overall

proportionately/equally to the reduction given to the property which would have been taxed over one percent; and

3. Apply the mill levy as adjusted for each property within the taxing district and thereby compute the amount of tax to be collected for and distributed to each taxing district.

Of course, the viability of this method is dependent upon acceptance of the interpretation of Art. VII, §§2 and 5 stated in the portion of the analysis section of this Opinion entitled "2. *Uniform Reduction.*

Selection of the precise method of apportionment is a policy rather than a legal decision provided the method adopted is consistent with constitutional limitations. The last mentioned method, unlike several others listed, would seemingly satisfy the mandate of Art. VII, *Idaho Constitution,* and avoid most of the political chaos and difficulties which would inevitably result from choosing among or implementing most other alternatives. Moreover, the need for implementing legislation is reduced. The proffered form of apportionment might be justified upon the reasoning that the county has collected and distributed all the taxes which can be produced by application of the maximum mill levy allowable by State law. It is generally recognized that counties are limited to the maximum mill levy allowable by State law. See §63-901, *Idaho Code*. Nevertheless, implementing legislation is highly advisable because of the probable and justifiable hesitation on the part of county commissioners and other officials to assume responsibility and potential liability for reducing district levies (tax monies) without express statutory authority.

4 and 5. *Reappraisal and the Two Percent Inflation Limitation.*

It is helpful for purposes of analysis to condense and rearrange the order of the many issues posed by questions numbered four and five. This is so due to the interrelationships among sub-questions.

Under the initiative, only the circumstances set forth in Section Two, subsection one and the two percent inflation rate provided for in Section Two, subsection two permit a change in property values from the established 1978 base level. With reference to the alternative interpretations of Section Two of the initiative listed in Question Five, the interpretation which is the most likely to be adopted given the words utilized and entire context of the initiative (and the most commonly mentioned in public discussion) follows:

> Under Section Two of the one percent property tax initiative, the increase or decrease of the 1978 base value for each parcel of property that is not purchased, newly constructed, or subjected to a change in ownership *is limited to* the change in the inflation rate not to exceed *two percent.* A new unlimited appraisal of a parcel of property is permitted only when the property is purchased, newly constructed, or subjected to a change in ownership. Such a new appraisal apparently is to be made based on then existing values — i.e., *not limited* to inflation not exceeding two percent.

The only additional guideline discovered by research for determining the maximum change permitted is the requirement that valuation for tax purposes be just. (E.g., Art. VII, §5, *Idaho Constitution*). Generally, valuation pursuant to an appraisal must relate to then present values and property can not be substantially overvalued.

Given the above proffered interpretation, Section Two of the initiative is patently and impermissibly discriminatory because a parcel of property which has been purchased, newly constructed or subjected to a change in ownership will be placed on the tax rolls at a value higher than that of a similar parcel which has not experienced one of these circumstances. Article VII, §§2 and 5, *Idaho Constitution* and the holding of *Idaho Telephone* are the bases for this conclusion. Attention is again directed to that portion of the Analysis section of this Opinion entitled "2. *Uniform Reduction.*"

The disparity of values and the unconstitutional disuniformity of taxation which results can be graphically illustrated as follows: Assume the 1978 base value of each of two identical residences was $60,000. Ten years pass, the houses remain identical except that House A has been sold in the tenth year for $110,000 — a compound annual growth rate of 6.5%. At the then present value, House A owner pays $1,100 in property taxes (assuming maximum of 1% is imposed). House B now carries a value for taxation purposes of $73,000 (including the maximum 2% inflation rate which is permitted but apparently not required by the initiative). House B owner, again assuming the maximum, pays only $730.00 in taxes. The disparity is accentuated further with the passage of additional time and the occurence of additional sales of House A.

This discriminatory result clearly falls within the prohibition of Art. VII, §5, *Idaho Constitution,* as construed by the Idaho Supreme Court in *Idaho Telephone, supra.* Again, the taxes levied do not fall equally upon similar property within the taxing district.

Moreover, the legislature, unlike the Art. VII problem encountered in connection with Section One of the initiative, can not protect the concept favoring property not purchased, newly constructed or subjected to ownership change from constitutional attack by corrective legislation. The only sensible and certain safeguard is that of deleting the distinction made in Section Two of the initiative between property purchased, newly constructed or subjected to change of ownership on the one hand and property which has not experienced any of these circumstances on the other hand.

6. *Effective Date.*

Irreconcilable ambiguity exists with regard to the effective date of all provisions of the initiative except Section Three and the first tax rolls to be affected. Section Five states the initiative shall take effect "for the *tax year* beginning on October 1 following the passage of this statute." (Emphasis added). The ambiguity results from the fact that there is no "tax year beginning on October 1." In essence, the tax year begins on January 1 of each year. See §63-102, *Idaho Code*. Moreover, several key decisions dependent upon property valuation and important to the collection of taxes (including the setting of tax rates) must be made prior to October 1 of each year. See §63-901, *et seq.,* §63-624 and §63-624A, *Idaho Code.* It seems doubtful that the process of setting and collecting taxes should be interrupted in midstream. However, given the October 1 date set forth in the initiative this is a possible result. The fiscal year for counties commences on October 1. Section 31-1601, *Idaho Code*.

Thus, the question remains whether the effective date of the initiative is January 1, 1979; October 1, 1979; January 1, 1980; or the less likely alternative of some other date. The question of the effective date can not be resolved with the certainty necessary for budget preparation by applying the normal

canons of statutory construction. Given the uncertainty of any predicted date which might be produced by statutory construction, the ambiguity in Section Five should be cured by simple remedial correction in the form of legislation. January 1 should be substituted for October 1. Moreover, considering the lead time necessary for tax planning and budgetary adjustments, "1980" would seem to be the preferred substitute for the language "following the passage of this statute". This would mean that the initiative, if approved by the voters and so amended by the legislature, would be effective the tax year commencing January 1, 1980. Thus, its impact would first appear on the 1980 tax rolls and in the tax bills first payable on December 20, 1980 (without penalty). The first budget affected could be the fiscal period beginning October 1, 1980.

7. *Other Constitutional Issues.*

Initiative Section Two (subsection two) which provides for a two percent inflation limitation raises a constitutional issue not directly discussed in the preceding analysis. This subsection as written seems to limit the change in the 1978 base value of property not purchased, newly constructed or subjected to change in ownership to the change in inflation not to exceed two percent. On its face, this provision limits and provides for all similar property equally. It thus appears to be constitutional. However, with the passage of time, it is predicted that the provision as applied may be attacked under certain circumstances as being in violation of Art. VII, §2 and 5, *Idaho Constitution.* The reason for this concern is that "real life" may subsequently prove the basic and necessary underlying assumption of the provision erroneous. This assumption seems to be that all property will actually change in value approximately at the same rate. Thus, the imposition of a fixed maximum inflation rate on the change in value of all properties will have a fair and equal impact. This may not be what is in fact experienced in the next few years. Given such factors as change in the desirability of location, two parcels of property which begin with identical characteristics and values may well in fact have considerably different characteristics and/or values in subsequent years. Although the disuniformity produced may be less obvious and will be experienced less frequently than that produced by subsection one of Section Two of the initiative, the tax burden will apparently not always fall equally on the properties considering their fair and actual values. It would take only a slight extension of the holding in *Idaho Telephone*, *supra.*, to determine that such a result is impermissibly discriminatory under Art. VII, §§2 and 5, *Idaho Constitution.*

Lastly, other initiative provisions which might conflict with the *Idaho Constitution* include the portions of initiative Section Three which require a two-thirds vote of the legislature and preclude the legislature from imposing new and valorem taxes. Reasonably construed, these limitations conflict with the authority granted and responsibility assigned to the legislature by Art. III, §§1 and 9 and Art. VII, §§2 and 5, *Idaho Constitution.* These limitations thus can only be imposed effectively by amending the *Idaho Constitution.* In any event, initiated legislation including these limitations may be repealed or amended by the legislature. *Luker* v. *Curtis,* 64 Idaho 703, 136 P.2d 978 (1943).

AUTHORITIES CONSIDERED:

1. *Idaho Constitution:* Art. III, §§1 and 9; Art. VII, §§2 and 5.

2. *Idaho Code*, §31-1601, §31-1605, §33-701, §63-101A, §63-101B, §63-102, §63-624, §63-624A, §63-901, *et seq.*

3. *Cases:*

Jackson v. *Jackson,* 87 Idaho 330, 393 P.2d 28 (1964). *Idaho Telephone Company* v. *Baird,* 91 Idaho 425, 423 P.2d 337 (1967).

Boise Community Hotel, Inc. v. *Board of Equalization,* 87 Idaho 152, 391 P.2d 840 (1964).

Chastain's Inc. v. *State Tax Commission,* 72 Idaho 344, 241 P.2d 167 (1952).

Anderson's Red & White Store v. *Kootenai County,* 70 Idaho 260, 215 P.2d 815 (1950).

Rutledge v. *State,* 94 Idaho 121, 482 P.2d 515 (1971).

District Board of Health of P.H. Dist. No. 5 v. *Chancey,* 94 Idaho 944, 500 P.2d 845 (1972).

Hamilton v. *McCall,* 90 Idaho 253, 409 P.2d 393 (1965).

Bagley v. *Gilbert,* 63 Idaho 494, 122 P.2d 227 (1942).

Luker v. *Curtis,* 64 Idaho 703, 136 P.2d 978 (1943).

4. Other Authorities:

Webster's New Collegiate Dictionary (Merriam, 1974).

Black's Law Dictionary (West. Rev. 4th ed., 1968).

Sutherland, *Statutory Construction,* §45.12

Sutherland, *Statutory Construction,* §46.05.

DATED This 15th day of September, 1978.

WAYNE L.KIDWELL
Attorney General of Idaho

ANALYSIS BY:

LARRY K. HARVEY
Special Assistant to the
Attorney General of Idaho

WLK/LKH/lp

cc: Idaho Supreme Court
Idaho Supreme Court Law Library
Idaho State Library

ATTORNEY GENERAL OPINION NO. 78-38

TO: Gordon Trombley
Director
Department of Lands
Statehouse Mail

QUESTION PRESENTED:

Whether land sale contracts reinstated after the passage of *Idaho Code*, 58-316, on May 8, 1923, conveyed a fee simple or reserved mineral rights to the State of Idaho.

CONCLUSION:

Land Sale Certificates, reinstated after May 8, 1923, did not convey a fee simple interest but rather reserved mineral rights to the State of Idaho.

ANALYSIS:

Idaho Code, §58-316, declares that a forfeiture shall result when a purchaser of state land fails to make any payments and such delinquency continues for thirty days. The same statute explains the legal effect of a forfeiture in emphatic language. The state board of land commissioners " . . will declare all rights of the purchaser in and to said land *forfeited* and the certificate and contract relating thereto *annulled*." [Emphasis added.] Moreover, the Board, " . shall declare such forfeiture and shall annul said contract and certificate." Once a forfeiture has been declared by the Board and entered in the official minutes, ". . . all rights of such purchaser in and to said land shall be and are *extinguished* and, the State Board of Land Commissioners may sell the land again. ." [Emphasis added.] In paragraph 2 of the same section further explanation is given: ". . . the title and right of possession to such land shall be in the state as if no sale had ever been made." Clearly, any land sale contract which is forfeited and therefore annulled by the Board pursuant to §58-316, *Idaho Code*, is completely extinguished and all rights of the purchaser therein are forfeited. The delinquent purchaser is made aware of these consequences by letter prior to forfeiture. If forfeiture nevertheless occurs, the extinguished contract is removed from the fiscal officer's rolls and the board is empowered to sell the land again. This legal effect is consistent with case law. For example, as noted in *Anderson* v. *Morse,* 110 Or. 39, 222 Pac. 1083 (1924):

> declaring a forfeiture for breach of the conditions of a contract is not recision of the contract. *It puts an end to the contract, and extinguishes it in pursuance of its terms* just as performance extinguishes it. (Emphasis supplied.)

In *Grant* v. *Utah State Land Board,* 485 P.2d 1035 (Utah, 1971), the court interpreted the term "forfeiture" in the context of state land sale contracts. The court defined the word in its ordinary usage as the taking away or loss of property rights. Emphasizing that the purchaser had no absolute right to reinstatement, the court distinguished the term forfeiture from suspension or abeyance.

Both case law and the language of *Idaho Code,* §58-316 clearly declare that the contract is void and all rights of purchaser are at an end.

The legislature's purpose in the forfeiture statute obviously was to provide the board with a procedure for terminating land sales in the event of delinquent payments. This is consistent with the board's constitutional and statutory mandate for efficient direction, control and disposition of the public lands of the state. *Idaho Constitution,* Art. IX, §7, and *Idaho Code,* §58-101. It should be emphasized that the Board's duty to declare a forfeiture is precipitated by a purchaser's delinquency.

Before considering the procedure and effect of reinstatement, it is relevant to examine *Idaho Code,* §47-701, which reserved mineral rights in all state owned lands to the State. This section is both a mandatory and a limiting directive to the State Board of Land Commissioners. It declares:

> [Mineral rights] . . . in lands belonging to the state are hereby reserved to the state and are reserved from sale except upon a rental and royalty basis . . . and the purchaser of any land belonging to the state shall acquire no right, title or interest in or to such deposit, and the right of such purchaser shall be subject to the reservation of all mineral deposits . . .

This law was passed on May 8, 1923. The language quoted above is indicative of a mandatory directive. Furthermore, since the board is only authorized "to perform legislative functions not inconsistent with law . ." *(Idaho Code,* §58-104.4), the enactment reserving mineral rights to the State of Idaho limited the authority of the Board. After May 8, 1923, the Board was powerless to convey mineral rights except by royalty. Moreover, from the date of enactment of this statute, mineral rights in state land vested in the state, " reserved from sale except upon a rental and royalty basis . . ."

The crux of the question at hand is the legal effect of reinstatement. Keeping in mind the significance of the above statutes concerning forfeiture and reservation of mineral rights, *Idaho Code,* §58-316, provides:

> Unless other disposition has meanwhile been made of the land, said state board of land commissioners *may,* upon application of the former purchaser, *if* such application is made within two years after the certificate *upon compliance* by the purchaser *with such conditions* as the board may impose

Several important factors are evident from this language. First, reinstatement is entirely discretionary with the Board. This is clearly different from the rule of some states regarding the reinstatement of insurance policies. For instance, the Seventh Circuit Court of Appeals, applying Illinois law, adhered to the "revival of the lapsed policy" approach to reinstatement. *Funk* v. *Franklin Life Insurance Co.,* 392 F.2d 913 (1968). The basis of this doctrine is that the right to reinstate the policy after lapse is guaranteed to the insured by the policy itself, which right survives the lapse of the policy. In the case of Idaho Land Sale Certificates, the contract does not contain a reinstatement clause. Rather, reinstatement is an option of the Board upon application of the delinquent purchaser within two years after cancellation of the original certificate. The Utah Supreme Court, construing similar language, has held that the Land Board has discretion whether a land sale contract which has once been forfeited should be reinstated. *Grant* v. *Utah State Land Board, supra.*

Furthermore, the original purchaser must agree to comply with conditions imposed by the board. These conditions ". . . shall include the funding of delin-

quent installments, but the Board may, in its discretion, impose other conditions . . ." Since reinstatement is entirely discretionary with the Board, and since the Board has broad discretion regarding conditions, reinstatement constitutes a separate agreement or contract between the Board and the original purchaser. The consideration therefor is the purchaser's promise to comply with the conditions of the Board.

A well established rule of law declares that statutory provisions which exist at the time and place of the making of a contract enter into and form a part of it. *Wood* v. *Lovett,* 313 U.S. 362, 61 S.Ct. 983, 85 L.Ed. 1404 (1941). The Supreme Court of Idaho has stated, "it is axiomatic that extant law is written into and made a part of every written contract." *Fidelity Trust Company* v. *State,* 72 Idaho 137, 237 P.2d 1058 (1951). Thus, any pertinent statutes existing on the date of reinstatement becomes a part of any contract reinstating a cancelled certificate. As stated in *United States* v. *Lewin,* 29 F.Supp. 512 (1939):

> When a statute exists giving special force and effect to a specific contract, the parties who enter into such contract are held to assent to the force and effect attributed to it by such statute.

And, in *Saffore* v. *Atlantic Casualty Insurance Co.,* 21 N.J. 300, 121 A.2d 543 (1956), the Court held:

> A specific provision integrated into the contract by force of a statute, as a matter of public policy, 'must be interpreted and given effect in accordance with the intention of the legislature, irrespective of how the contractors understood it. Exactly the same result is reached even though the the parties know nothing of the statute and do not include the provision, and even though they know of it and expressly agree upon the exact contrary. Quoting 3 Corbin on Contracts, §551, p. 200-201 (1960).

Consequently, a Land Sale Certificate reinstated after May 8, 1923, would include as one of its terms, §47-701, *Idaho Code,* which reserves from sale mineral deposits in lands belonging to the State.

As stated above, mineral rights in state lands vested in the State of Idaho from May 8, 1923, the date of passage of §47-701, *Idaho Code.* Thereafter, the State Board of Land Commissioners lacked the power to sell mineral rights conjointly with surface rights. Even if the Board intended to sell or reinstate mineral rights, the State would not be bound by such action. Courts have declared that the State will not be bound by the unlawful acts of its officials. *Letora* v. *Riley,* 57 P.2d 140 (1936); *People* v. *District Court In and For Chaffee County,* 255 P.2d 743; *In Re Taylor's Estate,* 107 P.2d 217 (1940); and *Seward* v. *State Brand Division,* 75 Idaho 467, 274 P.2d 993.

The final step in the analysis of the effect of a reinstatement is derived from the last sentence of §58-316:

> any agreement reinstating a cancelled certificate, as herein provided, shall be deemed a part of the original sale certificate.

The result of this language is an administrative convenience in that the original certificate is reinstated, rather than a new land sale certificate being issued. The legal effect of this administrative convenience is a new agreement which becomes a part of the original certificate as a substantive modification thereof.

In summary, a land sale certificate that is forfeited and annulled pursuant to §58-316, *Idaho Code,* is extinguished and all rights of the purchaser in and to the land cease. The State Board of Land Commissioners may thereafter sell the land to another. However, the Board in its discretion upon application of the original purchaser and upon compliance with conditions established by the Board, may reinstate the cancelled land certificate. The reinstated certificate constitutes a separate agreement or new contract which becomes a part of the original certificate as a substantive modification thereof. Thus, certificates reinstated after the passage of *Idaho Code,* §47-701, on May 8, 1923, reserved mineral rights to the State of Idaho.

AUTHORITIES CONSIDERED:

1. *Idaho Constitution,* Article IX, §7;
2. *Idaho Code,* §47-701;
3. *Idaho Code,* §58-101;
4. *Idaho Code,* §58-104.4;
5. *Idaho Code,* §58-316;
6. *Anderson* v. *Morse,* 110 Or. 39, Pac. 1083 (1924);
7. *Fidelity Trust Company* v. *State,* 72 Idaho 137, 237 P.2d 1058 (1951);
8. *Funk* v. *Franklin Life Insurance Co.,* 342 F.2d 913 (1968);
9. *Grant* v. *Utah State Land Board,* 485 P.2d 1035 (1971);
10. *In Re Taylor's Estate,* 107 P.2d 217 (1940);
11. *Letora* v. *Riley,* 57 P.2d 140 (1936);
12. *People* v. *District Court In and For Chaffee County,* 255 P.2d 743;
13. *Saffore* v. *Atlantic Casualty Insurance Co.,* 21 N.J. 300, 121 A.2d 543 (1956);
14. *Seward* v. *State Brand Division,* 75 Idaho 467, 274 P.2d 993;
15. *United States* v. *Lewin,* 29 F.Supp. 512 (1939);
16. *Wood* v. *Lovett,* 313 U.S. 362, 61 S.Ct. 983, 85 L.Ed. 1404 (1941);

DATED this 18th day of September, 1978

ATTORNEY GENERAL
State of Idaho

WAYNE L. KIDWELL
Attorney General

ANALYSIS BY:

L. MARK RIDDOCH
Assistant Attorney General

WLK/LMR/dm

cc: Idaho State Library
Idaho Supreme Court
Idaho Supreme Court Library

ATTORNEY GENERAL OPINION NO. 78-39

TO: Richard L. Barrett
State Personnel Director
Idaho Personnel Commission
700 West State Street
Boise, Idaho 83720

Per Request for Attorney General Opinion

The 1977 Legislature amended certain sections of Title 67, Chapter 53, Idaho Code, to provide an hourly basis for "purposes of payroll, vacation or annual leave, sick leave and other applicable purposes." (Section 67-5332, Idaho Code.) At the same time, they left undisturbed the monthly basis for determining employees' eligibility for an in-grade increase, and the basis for determining longevity increase eligibility. (Section 67-5309C, Idaho Code.) Can the two statutes be viewed as standing alone, or did the 1977 passage of Idaho Code 67-5332 modify Idaho Code 67-5309C?

CONCLUSION:

There is no conflict between the two statutes. Each speaks to separate issues. The various agencies of state government with classified employees should use the month-of-service method for determining the date at which an employee completes the probationary period, and becomes eligible for in-grade increases and longevity increments. The hourly accrual method is to be used for leave and payroll purposes as set forth in Idaho Code 67-5332.

ANALYSIS:

There are two different methods in law for keeping track of the time a classified state employee spends working for the state as the time regards two separate areas. Idaho Code 67-5332(1) states, "For the purposes of payroll, vacation or annual leave, sick leave and *other applicable purposes,* credited state service shall be earned by: classified officers and employees . ." Section 67-5332(3) states, "One *hour* of credited state service shall be earned by each eligible state officer or employee for each *hour*, or major fraction thereof, that the officer or employee is present for duty . " Idaho Code 67-5309C(b) states, "Each employee in the classified service shall . . . receive two and one half per cent (2½%) of his base salary for each complete five (5) *year* period of service with the state." Idaho Code 67-5309C(c) (ii) states, "Each employee's work performance shall be evaluated six *months* after initial appointment or promotion and annually thereafter by his or her immediate supervisor. Employees shall advance to step B of the salary schedule upon completion of six *months* of satisfactory performance upon certification of satisfactory performance Employees shall thereafter advance to steps C through E of the compensation schedule on an *annual* basis upon certification of satisfactory performance . . " (Emphasis added)

With regard to the above cited statutes, two things must be remembered. Idaho Code 67-5309C(c) was enacted in 1976 (Idaho Sessions Laws, chapter 366 page 1205, 1976). Idaho Code 67-5332 was adopted in 1977 (Idaho Sessions Laws, chapter 307, page 856, 1977). It should be noted that this latter section was added to the Code in anticipation of conversion to a computer-based, biweekly payroll system which would automatically accrue credited state service on an hourly basis. This was to have gone into effect on July 1, 1977.

In anticipation of credited state service being accrued on an hourly basis, the Idaho Personnel Commission drafted rules to implement the change. This change abrogated the old month-of-service accrual methods and put virtually everything on an hourly basis. When, on July 1, 1977, the Auditor's Office did not convert to the bi-weekly pay period, it became obvious that the differences between the hourly accrual method and the month-of-service accrual method would raise problems. When the Personnel Commission was apprised of the problem, it promulgated a Policies and Procedures Bulletin which waived the hourly accrual methods in three specific areas, and temporarily returned to the month-of-service idea in calculating in-grade increases, longevity increases, and probationary periods along the lines of the language in 67-5309C. Upon a challenge by the Legislative Auditor, this waiver was rescinded. As will be seen below, the rules must be waived, as they are in conflict with the applicable statute, Idaho Code 67-5309C.

Idaho Code 67-5332 directs an hourly computation for payroll, vacation leave and sick leave. This is currently being done. Idaho Code 67-5309C directs the use of the month-of-service concept for longevity, probation and in-grade increases. It is a basic tenet of statutory construction that a specific statute will control, rather than a general statute when their terms are in conflict, *State* v. *Roderick*, 85 Idaho 80 (1962). Similarly, when statutes are in conflict the most recently enacted will control, *Employment Security Agency* v. *Joint Class "A" School District #151,* 88 Idaho 384 (1965).

While Idaho Code 67-5332 was enacted more recently than Idaho Code 67-5309 C, as it regards probationary, longevity and in-grade time periods, it is general in nature. The older of the statutes, Idaho Code 67-5309C, is specific in nature and, therefore, controlling.

It would, therefore, appear that your Policies and Procedures Bulletin 77-2 waiving the hourly accrual for the areas treated in 67-5309C is well taken and should be continued. As we understand the Bulletin has been rescinded, we would therefore urge you to reinstate it as soon as possible to bring your rules in line with the mandate of the statute.

AUTHORITIES CONSIDERED:

1. *Idaho Code,* Sections 67-5309C and 67-5332.

2. Rules, Idaho Personnel Commission, 7 and 15.

3. Other Authorities: *State* v. *Roderick,* 85 Id. 80 (1962); *Employment Security Agency* v. *Joint Class "A" School District #151,* 88 Id. 384 (1965).

DATED this 18th day of September 1978.

ATTORNEY GENERAL
State of Idaho

WAYNE L. KIDWELL

ANALYSIS BY:

W. B. LATTA, JR.
Assistant Attorney General
WLK/WBL/is

cc: Idaho Supreme Court
Supreme Court Library
Idaho State Library

ATTORNEY GENERAL OPINION NO. 78-40

TO: The Honorable Steven F. Scanlon
State Representative

Mr. James C. Morfitt
Canyon County Prosecuting Attorney

Per request for Attorney General's Opinion.

QUESTIONS PRESENTED

1. Should the tax levy to be certified by counties in September, 1978, be certified to apply to the 1977-1978 fiscal year or to apply to the ensuing 1978-1979 fiscal year?

2. If the levy is to apply to the ensuing 1978-1979 fiscal year, what methods are available and which one should be used to repay tax anticipation notes issued in anticipation of the tax levy for the 1977-1978 fiscal year? In September of 1977, Canyon County certified the tax levy to apply to the nine month 1977 transitional fiscal period. If the tax levy is certified this September to apply to the 1979 fiscal year, there will have been no tax levy for the 1978 fiscal year and therefore no levy with which to repay our currently outstanding tax anticipation notes.

3. If your office advises that the tax anticipation notes be repaid with registered warrants and these registered warrants be repaid with a warrant redemption fund, what procedure should be used to include this warrant redemption fund in the fiscal year 1979 budget which has already been published and will come up for public hearing on September 5, 1979?

4. If a tax anticipation redemption fund is to be used instead, what procedures should be used to include this fund in the Canyon County fiscal year 1979 budget? Neither of these funds are currently included in the Canyon County fiscal year 1979 budget.

5. If your office advises that Canyon County may certify the tax levy in question to apply back to fiscal year 1978, is there any time frame within which a county must adjust its finances in order to begin certifying tax levies for the ensuing fiscal year, rather than certifying them back to apply to the fiscal year ending at the time of certification?

6. What procedures can be used to make this change-over in finances besides over-budgeting, which is in violation of Idaho law?

7. What is the definition of "Cash basis"?

CONCLUSIONS

1. The tax levy to be certified by counties in September of 1978 should be certified to apply to the ensuing 1978-1979 fiscal year.

2. When taxes collected for any fiscal year are insufficient to pay tax anticipation notes outstanding at the end of the fiscal year, a county should make a tax levy sufficient to provide for repayment of the notes pursuant to §63-3105, *Idaho Code*.

3. We do not recommend the use of registered warrants to repay the tax anticipation notes outstanding. Such a procedure does not appear to be authorized by Idaho's statutes.

4. The statutes do not make clear the budget procedure to be used in implementing the mandatory levy for redemption of tax anticipation notes required by §63-3105, *Idaho Code.* Consequently, any choice of action involves some risk of being held to be erroneous. Two alternatives, nevertheless, would appear to give effect to the legislative intention of placing the county on a "cash basis" for the ensuing fiscal year, and of informing the public of the nature and purpose of the County's expenditures.

First, a county may include in its 1979 fiscal year budget for the various funds for which tax anticipation notes were issued, budget items to retire those tax anticipation notes. Levies should then be made, sufficient to fund the budget as adopted.

Alternatively, a levy may be made to fund the Tax Anticipation Bond or Note Redemption Fund as provided by §63-3105, *Idaho Code.*

5. As stated in response to question Number 1, above, the current tax levy certified should apply to the ensuing 1978-1979 fiscal year.

6. As stated in response to Question 2 and 4, above, the county should make a sufficient levy to retire the outstanding tax anticipation notes. By doing so, the county will avoid over-budgeting and will be able to operate on a "cash basis."

7. It is the purpose of Article 7, Section 15, *Idaho Constitution,* and the County Budget Law to place and keep counties on a cash basis, by means of a balanced budget, and to accomplish that purpose annual expenditures must be kept within annual income.

ANALYSIS

1. In 1976, the Idaho Legislature amended the County Budget Law, to provide, among other things, that the fiscal year of counties would begin on the first day of October rather than on the second Monday in January. Chapter 45, 1976 Session Laws, §31-1601, *Idaho Code.*

Prior to the 1976 Act, the January to January fiscal year budget was funded primarily from property taxes received in December of the fiscal year and June of the succeeding year. Thus, the property tax revenues were received during the twelfth month of the fiscal year and the fifth month following the fiscal year.

The title to Chapter 45, 1976 Session Laws provides in part:

> Providing for fiscal years and cash basis accounting for cities and counties; .

The title, thus, reflects an intention that counties move toward cash financing of operations, rather than debt financing of operations.

The Act changed the date for the beginning of public budget hearings on the ensuing year's budget to the Tuesday following the first Monday in September. §31-1605, *Idaho Code,* was also amended to provide in pertinent part:

> Thereafter, at the time provided by law, [the second Monday of September] the board of county commissioners shall fix the levies *for the ensuing fiscal year* necessary to raise the amount of expenditures as determined by the adopted budget, less the total estimated revenues from sources other than taxation, including available surplus, not subject to the provisions of section 31-1605A, Idaho Code, as determined by the board, and such expenditures as are to be made with the proceeds of authorized bond issues. [Emphasis added]

Therefore, the amendment requires levies to be set for the ensuing year's budget, rather than the current year's budget as had formerly been the case.

Also, Section 31 of the 1976 Act provided for a transitional budget and levy in changing to an October 1st fiscal year. However, that section provides in part:

> Prior to October 1, 1977, and every year thereafter, all cities and counties in the state of Idaho shall adopt a budget for the ensuing fiscal year, October 1 through September 30.

It appears from the Act that the legislature intended to change the fiscal year so that property tax revenues to fund the budget would be received during the fiscal year, rather than at the end of the fiscal year and during the following fiscal year.

2. Section 63-3105, *Idaho Code,* provides:

> Tax levy to cover deficiency in bond or note payments. — In the event that the taxes collected for any fiscal year prior to date on which final instalment of such taxes becomes delinquent shall not be sufficient to pay the tax anticipation bonds or notes issued in anticipation of the collection of taxes of such fiscal year, the taxing district shall [,] in providing for the levy of taxes for the succeeding fiscal year, include in such tax levy for the succeeding fiscal year the amount necessary to cover such deficiency in the collection of such taxes, such levy in the succeeding year to be in an amount which, together with the amount of taxes then in such "Tax Anticipation Bond or Note Redemption Fund" shall be sufficient to provide for the payment of principal of and interest on the tax anticipation bonds or notes issued in anticipation of such taxes and payable out of such fund.

This section is mandatory by its terms. Consequently, tax anticipation notes owing by the county must, to the extent not otherwise provided for, be provided for by a levy sufficient to repay them.

3. Section 31-1506, *Idaho Code*, provided in part:

> The board of commissioners must not hear or consider any claim in favor of an individual against the county unless an account properly made out, giving all items of the claim, duly certified as to correctness, and that the amount claimed is justly due, is presented to the board within one year after the last item of the account accrued.

If a claim is allowed, warrants are drawn to pay the claim. If funds are insufficient to pay the warrants, the warrants are registered and thereafter paid in the order of their presentation. Section 31-1514, *Idaho Code*.

It is our understanding, however, that the tax anticipation notes are due in February of 1979, and have not been presented for payment. Consequently, it does not appear that registering warrants to repay the tax anticipation notes would be authorized.

4. As stated in response to Question 2, above, the county should make a tax levy sufficient to provide for repayment of tax anticipation notes owing by the county, payment of which is not otherwise provided for. Such a levy is necessary if the county is to operate on a "cash basis."

Presumably, repayment of the notes could be accomplished by including in the 1978-1979 fiscal year budget an allocation of funds from tax levies, revenue sharing monies or other unappropriated funds of the county. We do not read §63-3105, *Idaho Code*, as requiring a special levy where repayment of the funds is otherwise provided for.

Section 63-3104, *Idaho Code*, requires the creation of a "Tax Anticipation Bond or Note Redemption Fund" when tax anticipation notes are issued. However, that section goes on to provide:

> . . [P]rovided, however, that nothing in this section shall be construed to limit the payment of the principal of and interest on said tax anticipation bonds or notes solely to the taxes, in anticipation of which said bonds or notes were issued, but such bonds or notes shall be the direct and general obligation of the taxing district.

Consequently, if other funds are available for repayment of the notes, we do not believe a levy is required to redeem the notes.

Nevertheless, where other funds are not sufficient to repay the tax anticipation notes, it is our opinion that a levy sufficient to repay the notes is required.

We are advised that the tax anticipation notes were issued to provide funds for expenditures properly budgeted in September of 1977. Consequently, it can be argued that since the expenditures paid from the principal amount of the tax anticipation notes were previously budgeted, inclusion of the principal amount of the notes in the 1978-1979 budget would overstate the total amount of county expenditures made during the two fiscal years.

Recognizing that a major purpose of the County Budget Law is to apprise the public of the amount of county expenditures, it may be argued that the 1978-1979 budget should not include the principal amount of tax anticipation notes, the proceeds of which were expended and budgeted in the preceding year.

If this approach is used, interest accruing on the tax anticipation notes outstanding on October 1, 1978, would, nevertheless, be an expense properly attributable to the 1978-1979 fiscal year and should necessarily be budgeted in that year.

It should be noted that chapter 31, Title 63, *Idaho Code*, which deals with tax anticipation notes, does not address the question of budget procedure to be used in connection with the notes. Nor could the 1933 legislature, which adopted that Chapter, have reasonably anticipated the question of how to budget for tax anticipation notes issued during a nine month transitional budget period not clearly intergrated into either the old or the new levy structure. It is

apparent, nevertheless, that the legislature, in adopting the 1976 Act, intended to put counties in a position in which their operations could be conducted on a "cash basis" rather than a debt basis.

Either of the above options will give effect to that legislative intention.

5. As discussed in response to Question Number 1, above, the current tax levy certified should fund the budget for the ensuing 1978-1979 fiscal year.

6. As discussed in response to Questions 2 and 4, above, the county should make a sufficient levy to retire outstanding tax anticipation notes owed by the county. By doing so, the county will avoid over-budgeting and will be able to operate on a cash basis.

7. Article 7, Section 15, *Idaho Constitution,* provides:

> The legislature shall provide by law, such a system of county finance, as shall cause the business of the several counties to be conducted on a cash basis. It shall also provide that whenever any county shall have any warrants outstanding and unpaid, for the payment of which there are no funds in the county treasury, the county commissioners, in addition to other taxes provided by law, shall levy a special tax, not to exceed ten mills on the dollar, of taxable property, as shown by the last preceding assessment, for the creation of a special fund for the redemption of said warrants; and after the levy of such special tax, all warrants issued before such levy, shall be paid exclusively out of said fund. All moneys in the county treasury at the end of each fiscal year, not needed for current expenses, shall be transferred to said redemption fund.

In *Garrity v. Board of County Commissioners,* 54 Idaho 342, 34 P.2d 949 (1934), the Idaho Supreme Court discussed the meaning of the provision, stating:

> In 1927 the legislature made the first serious attempt to provide a system of county finances having for its purpose placing the several counties of the state on a cash basis, in direct response to the mandate of section 15 of article 7, *supra*. From the experience obtained from the operation of the system of county finances provided for by earlier legislation, the legislature, in 1931, enacted a most comprehensive County Budget Law. The sole purpose of that County Budget Law is to provide such a "system of county finances" that the business of the several counties shall be conducted on a balanced budget, and on sound business principles, and as far as practicable, on the same basis that a successful private business is conducted, and that is likewise the purpose of section 15, *supra.* So that we find the Constitution and the County Budget Law in complete harmony. [sic] 54 Idaho at 352.

Thus, "cash basis" as used in the Idaho Constitution is intended to require balanced budgets. The Court went on to point out that to accomplish that purpose expenditures must be kept within income.

The above quoted language in *Garrity, supra,* has subsequently been quoted with approval by the Idaho Supreme Court in the cases of *Magoon v. Board of County Commissioners,* 58 Idaho 317, 323, 73 P.2d 80 (1937), and *Iverson v. Canyon County,* 69 Idaho 132, 138, 204 P.2d 259 (1949).

In adopting Chapter 45, 1976 Session Laws, the Idaho Legislature adopted a budget procedure consistent with the Constitution's "cash basis" requirements. However, the legislature went further than this in changing the fiscal year of counties. By changing to an October 1st through September 30th fiscal year, property tax receipts are received during the fiscal year in which the monies are to be expended. This results in a reduction of interest expenses for the counties.

The Act also added a new section, §31-1605A, *Idaho Code*, which provides:

> Counties may accumulate fund balances at the end of a fiscal year and carry over such fund balances into the ensuing fiscal year sufficient to achieve or maintain county operations on a cash basis. A fund balance is the excess of the assets of a fund over its liabilities and reserves.

While this section is permissive rather than mandatory, it is evident that the legislature intended to allow accumulation of cash balances in order to reduce the debt costs of counties.

Thus, while the Idaho Constitution requires balanced budgets, the County Budget Law also is aimed at encouraging the reduction of interest charges of counties.

AUTHORITIES CONSIDERED:

1. Article 7, Section 15, *Idaho Constitution*

Chapter 45, 1976 Session Laws

Chapter 31, Title 63, *Idaho Code*

Idaho Code Sections:
31-1506
31-1514
31-1601
31-1605
31-1605A
63-3104
63-3105

2. Cases:

Garrity v. Board of County Commissioners, 54 Idaho 342, 34 P.2d 949 (1934)

Magoon v. Board of County Commissioners, 58 Idaho 317, 73 P.2d 80 (1937)

Iverson v. Canyon County, 69 Idaho 132, 204 P.2d 259 (1949)

DATED this 19th day of September, 1978.

ATTORNEY GENERAL
State of Idaho

WAYNE L. KIDWELL

ANALYSIS BY:

DAVID G. HIGH
ASSISTANT ATTORNEY GENERAL

cc: Idaho Supreme Court
Supreme Court Law Library
Idaho State Library

ATTORNEY GENERAL OPINION NO. 78-41

TO: C. JULIAN WELKE
Executive Secretary
Idaho Real Estate Commission
633 North 4th Street
Statehouse Mail

Per Request for Attorney General Opinion.

QUESTION PRESENTED:

A real estate broker, in an attempt to sell undeveloped land, either his own or for a client, requires that the purchaser give the broker exclusive rights to resell the land after it is developed. Does the requiring of handling the sale of the real property once it is developed constitute a combination in restraint of trade under *Idaho Code* §48-101?

CONCLUSION:

Yes. An arrangement whereby a real estate broker offers for sale undeveloped property (either his own or a client's) on the condition that the real estate broker have the exclusive right to sell the developed land, is illegal under *Idaho Code* §48-101. This conclusion is conditioned upon the fact that the land to be developed is more than one parcel upon which one building will be placed. In other words, to show economic injury, there must be some type of subdivision involved and not a single parcel of land.

ANALYSIS:

Idaho Code §48-101 is the state counterpart to Section 1 of the Sherman Act (15 U.S.C. §1). This section of the *Idaho Code* states in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce, within this state, is hereby declared to be illegal.

Except for the requirement of interstate commerce in the Sherman Act, *Idaho Code* §48-101 and Section 1 of the Sherman Act are exactly the same.

It is the conclusion of the Attorney General that the above-quoted factual situation constitutes a contract in restraint of trade or commerce. This type of restraint of trade is commonly known as a tie-in.

Tie-ins involve a seller's refusal to sell one product (the tie-in product) unless the buyer also purchases another (the tied product). These types of arrangements are presumptively illegal and no specific showing of anti-competitive effect is needed. *Northern Pacific Railroad Co.* v. *United States,* 356 U.S. 1, 78 S.Ct. 514, 2 L.Ed.2d 545 (1958). Services come within the definition of Section 1 of the Sherman Act. *Fortner Enterprises, Inc.* v. *U.S. Steel Corp.,* 429 U.S. 610, 97 S.Ct. 861, 51 L.Ed.2d 80 (1977). Hereinafter, the term "products" shall also mean services. The Idaho statute has not been interpreted in relation to tie-in arrangements. In issuing this opinion, the Attorney General has assumed that the Idaho courts will interpret *Idaho Code* §48-101 consistently with the fed-

eral statute. This assumption is bolstered by the fact that tie-in arrangements are per se illegal under Section 1 of the Sherman Act.

Under Section 1 of the Sherman Act, there are three elements of proving a tie-in arrangement. First, there must in fact be a tie-in arrangement between two distinct products or services. Second, the defendant must have sufficient economic power in the tie-in market to impose significant restrictions in the tied product market. Third, the amount of commerce of the tied product market must not be insubstantial.

Tie-in Arrangement and Two Products:

The first criterion requires two levels of inquiry. First, it must be shown that there are two distinct products. I have not been able to find a tie-in arrangement which involved two separate services or which involved facts similar to this opinion. But, there are several cases dealing with the tie-in of a service with the sale of a product; and by analogy, they should be applicable to the facts of this situation. In the area of condominium sales, the courts have found that the sale of a condominium cannot be conditioned on the purchase of a management service contract for maintenance of the condominium. This type of arrangement has been found to be two distinct products and services under Section 1 of the Sherman Act. See, *Miller* v. *Granados*, 529 F.2d 393 (5th Cir. 1976); *Jones* v. *247 East Chestnut Properties*, 75-2 CCH Trade Reg. Rep. §60,491 at 67, 160 (N.D.Ill. 1974). In *Fortner Enterprises* v. *U.S. Steel Co., supra,* the United States Supreme Court found that an arrangement U.S. Steel had with customers for its aluminum, prefabricated homes was a tie-in arrangement. U.S. Steel was providing 100 percent credit financing for the development of subdivisions which only used U.S. Steel's prefabricated homes. The court found that the financing and the sale of prefabricated homes were two separate products. Thus, the court concluded that this was an illegal tie-in arrangement under Section 1 of the Sherman Act.

In *Moore* v. *Jas. H. Matthews & Co.*, 550 F.2d 1207 (9th Cir. 1977), the court found an illegal tie-in where a cemetery required that when a person purchases a lot, that person also purchase the services of the cemetery in installation. The court stated that there might be some economic efficiency in allowing this type of arrangement, but concluded that for purposes of the Sherman Act, this type of arrangement is a per se violation.

Several of the cases have used a "dual market" test to determine whether or not there are two products or services involved. For example, in *Times-Picayune Publishing Co.* v. *United States*, 345 U.S. 594, 73 S.Ct. 872, 97 L.Ed. 1277 (1953), the Supreme Court dismissed a tie-in allegation because the requirement that advertisements be placed in both morning and afternoon newspapers under a single owner involved "products which are identical in the same market." 345 U.S. at 614. In *Washington Gas Light Co.* v. *Virginia Electric & Power Co.*, 438 F.2d 248 (4th Cir. 1971), the plaintiff alleged that the defendant electric company's practice of providing builders with inexpensive underground service installations on the condition that the builder erect a primarily electricity-served home was not an unlawful tie-in. The Fourth Circuit Court of Appeals found that a lack of two separate markets tends to show a single product and thus no tie-in.

The distinction that can be drawn from these cases is that there will be no tie-in if the seller can show a legitimate cost savings or that the services are

used as a unit. In the factual situation of this case, it would be the conclusion of the Attorney General that the products which the real estate broker is offering are two different and distinct products. One product is the undeveloped land and the second is his professional services in selling the land after it has been developed.

The second level of inquiry under the first criterion for finding a tie-in arrangement is whether the land can be purchased separate and apart from the services offered by the real estate broker. If the purchaser of the land has no choice but to agree that if he so chooses to sell any of the improved land in the future, he will use the professional services of that particular broker exclusively, then the first criterion would be met.

Significant Restrictions in the Tied Market:

The second criterion for proving a violation of Section 1 of the Sherman Act in relationship to a tie-in arrangement is the real estate broker must have sufficient economic power in the tie-in market to impose significant restrictions in the tied product market. The focus of inquiry in this second criterion is whether the real estate broker has sufficient power to raise the price of the undeveloped land or impose onerous terms "that cannot be expected in a completely competitive market. In short, the question is whether the seller has some advantage not shared by his competitors in the market for the tie-in product." *Fortner* v. *United States, supra.* The case closest to this factual situation is *Northern Pacific Railroad Co.* v. *United States, supra.* In *Northern,* the railroad was selling real property. In order to purchase the property, the purchaser had to agree to certain preferential routing clauses in the contract. These clauses provided that the purchasers of the land were required to use the services of the railroad to ship all commodities produced or manufactured on the land, provided that the railroad's rates were equal to those of competing carriers. The railroad claimed that they would have sold the land for the same price without the preferential routing clauses in the contract. The court discounted this argument and concluded that the primary purpose of these contracts was to fence out competition. The court went on to find that "common sense makes it evident that this particular land is often priced by those who purchased or leased it and was frequently essential to their business activities." 2 L.Ed.2d at 551.

Real property is a unique item, with a limited supply. Any restraint on the availability of competition between real estate salesmen could be construed as an illegal restraint of trade. In a hypothetical situation such as this, it is difficult to draw precise lines on how large a development must be before it reaches the level of "significant restrictions in the market." If a single lot and a single one-family dwelling are involved, the Attorney General is of the opinion that this would not have a significant impact on the market. On the other hand, if the sale of the undeveloped real property is in contemplation of development of a subdivision, then the tie-in arrangement could be considered illegal per se under Section 1 of the Sherman Act.

This rationale is bolstered by the fact that in *U.S.* v. *Loew's, Inc.,* 371 U.S. 38, 83 S.Ct. 97, 9 L.Ed.2d 11 (1962), the defendant Screen Gems had done only $60,000 in relevant business. In *Fortner Enterprises, Inc.* v. *U.S. Steel Corp, supra,* the purchases under the tie-in arrangement amounted to $190,000. In both of these cases, the United States Supreme Court said such arrangements

could not be regarded as insubstantial. The relevant market in both of these cases was the continental United States. Based upon these two cases, it would seem that any tie-in arrangement in which the undeveloped land was to be subdivided could be considered as a restraint of trade. Again, it should be emphasized that in proving a tie-in arrangement, the plaintiff does not have to show a monopoly power or an actual diminution of competition.

Amount of Commerce in the Tied Product is not Insubstantial:

The third and final criterion to be examined is whether the amount of commerce in the tied product is not insubstantial. This third requirement can be shown if the seller has the power in the tie-in market to raise prices; or if the seller requires the purchaser to accept burdensome terms that could not be exacted in a competitive market. The tied product in this factual situation is the professional services of the real estate broker in selling the developed land.

This criterion overlaps somewhat with the second criterion; but, the inquiry is shifted from the tie-in product to the tied product (i.e., from the sale of undeveloped land to the sale of professional services). The United States Supreme Court has stated the relevant test as follows:

> . . whether a total amount of business, substantial enough in terms of dollar-volume so as not to be merely *de minimis* is foreclosed to competitors. *Fortner, supra,* 394 U.S. at 501.

This test will be met if the tie-in arrangement involves more than one dwelling. Again, it is hard to draw precise lines in a hypothetical situation. It should be pointed out that the courts treat real property as unique; and thus, the required showing of effect on commerce will be lessened.

AUTHORITIES CONSIDERED:

1. *Idaho Code* §48-101.

2. 15 U.S.C. §1.

3. *Northern Pacific Railroad Co.* v. *United States,* 356 U.S. 1, 78 S.Ct. 514, 2 L.Ed.2d 545 (1958).

4. *Fortner Enterprises, Inc.* v. *U.S. Steel Corp.,* 429 U.S. 610, 97 S.Ct. 861, 51 L.Ed.2d 80 (1977).

5. *Miller* v. *Granados,* 529 F.2d 393 (5th Cir. 1976).

6. *Jones* v. *247 East Chestnut Properties,* 75-2 CCH Trade Reg. Rep. §60,491 at 67, 160 (N.D.Ill. 1974).

7. *Moore* v. *Jas. H. Matthews & Co.,* 550 F.2d 1207 (9th Cir. 1977).

8. *Times-Picayune Publishing Co.* v. *United States,* 345 U.S. 594, 73 S.Ct. 872, 97 L.Ed. 1277 (1953).

9. *Washington Gas Light Co.* v. *Virginia Electric & Power Co.,* 438 F.2d 248 (4th Cir. 1971).

10. *U.S.* v. *Loew's Inc.,* 371 U.S. 38, 83 S.Ct. 97, 9 L.Ed.2d 11 (1962).

DATED This 19th day of October, 1978.

ATTORNEY GENERAL OF IDAHO

WAYNE L. KIDWELL

ANALYSIS BY:

STEVEN M. PARRY
Assistant Attorney General

ATTORNEY GENERAL OPINION NO. 78-42

TO: Milton G. Klein
Director
Department of Health and Welfare
Statehouse Mail

Per Request for Attorney General Opinion:

QUESTIONS PRESENTED:

1. Whether the Department of Health and Welfare acting alone or in conjunction with another board or agency, has statutory authority to adopt regulations to implement a mandatory motor vehicle emissions inspection and maintenance program necessary to comply with the State Implementation Plan requirements of the Clean Air Act, 42 U.S.C. §§7401, et seq. (Supp. I, 1977).

2. Whether any local government unit within Ada County presently has the statutory authority to implement mandatory motor vehicle emissions inspection and maintenance regulations established by the Department of Health and Welfare as part of the Idaho State Implementation Plan.

3. Whether the Department of Health and Welfare has the statutory authority to establish fee schedules and to assess fees as a condition for the issuance of permits pursuant to a State Implementation Plan. If so, are there any restrictions on the amount the Department may charge for a permit?

CONCLUSIONS:

1. The Department of Health and Welfare has been given broad powers by the legislature to regulate all sources of air pollution in order to guarantee the integrity of statewide air quality. The Department of Health and Welfare, however, lacks practical enforcement ability to implement the inspection and maintenance program requirements of the Clean Air Act, 42 U.S.C. §§7401, et seq. (Supp. I, 1977). No other state agencies have authority to regulate automobile traffic for pollution control purposes.

2. Local governmental units within Ada County need express legislative authority to inspect motor vehicles to insure compliance with federal and state air pollution standards.

3. Permit programs undertaken by the Department of Health and Welfare may include reasonable fee schedules.

ANALYSIS:

I.

INTRODUCTION

The 1977 amendments to the federal Clean Air Act require certain states, which include regions that have been designated "non-attainment areas," to develop additional programs to reduce air pollution. Regions designated "non-

attainment" contain contaminants exceeding those allowed by federal ambient air quality standards. The City of Boise and vicinity was found by the State of Idaho and the federal Environmental Protection Agency to be a non-attainment area because the federal health standards for carbon monoxide (CO) found in 40 C.F.R. §50.8 (1975) were being exceeded. This area therefore was designated a CO non-attainment area. 42 U.S.C. §7407 (b), 43 F.R. 8962, 8985 (March 3, 1978).

A central requirement of the federal Clean Air Act is that State Implementation Plans (SIP's) for CO non-attainment areas include programs for inspection and maintenance (I&M) of motor vehicle emission controls. See, 42 U.S.C. §§7410 (a) (2) (I), 7502 (a) and 7502 (b) (11).[1] This analysis inquires whether existing State laws, procedures and institutions are available as the means for implementing a federally required I&M program. See *N.R.D.C.* v. *Train,* 421 U.S. 60, (1975).[2]

II.

EXISTING POLLUTION CONTROL AUTHORITY

The Environmental Protection and Health Act of 1972, *Idaho Code*, §§39-101 to 39-119 grants the Department of Health and Welfare the power to regulate all sources of air contaminant emissions and to enforce a system to preserve air quality. Since carbon monoxide is a normal by-product of the operation of motor vehicles, and constitutes a "contaminant" differing from the normal components of the atmosphere, regulations necessary and feasible for the prevention, control or abatement of CO emissions from automobiles is clearly authorized by the Environmental Protection and Health Act of 1972. *See, Idaho Code,* §§39-105 (2), 39-105 (3) (j). The Department of Health and Welfare therefore has a broad legislative mandate to promulgate standards for an inspection and maintenance program.[3]

While the Department of Health and Welfare's authority to impose air pollution source permit requirements upon the operation of all motor vehicles is broad, it does not contain an adequate enforcement mechanism. For example, the extensive record keeping and enforcement program already set forth in the Uniform Registration Act (URA), *Idaho Code*, §49-101, et seq., which involves coordinated actions of the State Department of Law Enforcement, local law enforcement personnel, and county assessors, is not concerned with the air pollution effects of automobiles[4] and does not constitute an existing permit

---

[1]The "mandatory I&M program requirement" mentioned throughout this analysis is really an option, rather than a mandate. However, its alternative is a SIP requirement prohibiting major stationary source construction in non-attainment areas. If the absence of an I&M program in a proposed Idaho SIP caused EPA disapproval of Idaho's SIP, it is likely that EPA would choose to impose an I&M program upon Idaho, rather than to prohibit stationary source construction in Idaho's CO non-attainment area. Therefore, it is stated that an I&M program is a "required" provision for any Idaho SIP.

[2]All provisions of State SIP's must be approved by the federal Environmental Protection Agency. *Utah International v. E.P.A.*, 478 F.2d 126, 1278 (10th Cir. 1973), 42 U.S.C. §7410 (c) (1). If states cannot themselves impose the various detailed requirements set forth in the Clean Air Act, Congress has directed that the federal Environmental Protection Agency must implement those provisions instead See 42 U.S.C., §7413 (a) (2).

[3]Many functions common to inspection and maintenance programs — for example, permit requirements and authority to inspect — are specifically provided for in the Idaho Code. See *Idaho Code*, §39-108 (2) and §39-115.

program designed to regulate automobile pollution. The Idaho Department of Law Enforcement could not, on its own initiative, implement a program of inspection or maintenance of automobiles based upon pollution control criteria imposed by a Department of Health and Welfare regulatory program.[5]

The legislature has specifically withdrawn from the Department of Law Enforcement the enforcement mechanisms of vehicle inspection. The commissioner of law enforcement no longer has authority to inspect motor vehicles as a condition of registration.[6] The Idaho Legislature clearly intended that the inspection of an automobile should not be a condition precedent to registration of that vehicle by the Department of Law Enforcement. Indeed, it can be argued that this legislative action impliedly repealed the inspection provisions of the Environmental Protection and Health Act as they apply to automobiles.

Not only has the legislature withdrawn the ability of the Department of Law Enforcement to inspect motor vehicles, but it has restricted that Department's ability to mandate pollution control equipment on automobiles it registers.[7] Therefore, the equipment regulations for vehicle registration under the URA, *Idaho Code* Section 49-124 (a), no longer mandate functioning emission control devices.

III.

ANTI-TAMPERING AND INSPECTION REQUIREMENTS: LOCAL GOVERNMENTS

Chapter 53 of 1974 Session Laws also removed any state requirements that vehicle owners refrain from disabling their emission control devices (federal prohibitions are still in force against tampering with emission control devices by manufacturers, dealers or fleet owners, 42 U.S.C. §7522 (a) (3). Consequently, for both anti-tampering prohibitions and control equipment requirements, legislative approval is needed. This is the case despite *Rules and Regulations for the Control of Air Pollution in Idaho,* Regulation "M" [now codified as Title 1, Chapter 1, DHW *Rules,* §1-1552] which purports to prohibit the removal or disabling of automobile emission control devices by any person.

Based upon the foregoing analysis, the Department of Law Enforcement could not independently promulgate regulations for inspecting vehicles, nor could it deny registration to vehicles without emission controls as an inducement that such autos comply with equipment requirements. *Grayot* v. *Summers*, 75 Idaho 125, 130-131, 269 P.2d 765 (1954). If vehicle registration is to be conditioned upon performance or equipment requirements not mentioned presently in the *Idaho Code*, or if alternate registration conditions such as

---

[4]Except for the general prohibition regarding "excessive smoke," *Idaho Code*, §49-835

[5]There are some indications in the *Idaho Code* that the Department of Law Enforcement could impose other agencies' regulatory requirements, but these are not indicative of legislative intent. See footnotes 6 and 8, *infra*

[6]*See*, 1976 Session Laws, Chapter 59, page 199, which repealed *Idaho Code*, §§49-2501 et seq., the vehicle inspection law enacted by the 1967 Session Laws, Chapter 239, page 698, effective March 29, 1967.

[7]A 1974 amendment to *Idaho Code*, §49-835 struck all references to "emission" control devices in the antitampering law applicable to automobiles. *See* 1974 Session Laws, Chapter 53, pages 1115-1116.

submission to an inspection are to be imposed, Department of Law Enforcement and its deputies will need legislative direction to perform such functions.[8]

If a local government entity in Ada County sought to implement an automobile inspection and maintenance program, the limitations noted above upon the Department of Law Enforcement make registration sanctions impractical, since such a local governmental entity would have to use its own administrative resources. But practical limitations aside, local authorities have been specifically denied the power to regulate the equipment and performance aspects of highway traffic. *Idaho Code*, §49-582 (1). Therefore, local governments cannot implement mandatory inspection and maintenance programs absent legislation delegating to them the statewide concern for air quality established by the Environmental Protection and Health Act.[9] *Idaho Code*, §50-302.

IV.

FEES FOR PERMITS

Idaho Code, §39-119 authorizes the Department of Health and Welfare to collect fees for services it renders, if regulatory standards exist. Therefore, existing law allows permit fees to be exacted by the Department of Health and Welfare. The only restriction on amounts charged is that such fees must bear a reasonable relation to the costs of providing the service, and not simply operate to raise general revenue. *Craig* v. *City of Macon,* 543 S.W.2d 772, 774 (Mo. 1976), *Los Angeles Brewing Co.* v. *City of Los Angeles,* 8 Cal.App.2d 391, 48 P2d. 71, 73 (1935).

AUTHORITIES CONSIDERED:

1. 42 U.S.C. §§7401 et seq. [Clean Air Act, as amended by P.L. 95-95, August 7, 1977.]

2. 43 F.R. 8962 (March 3, 1978).

3. *Department of Health and Welfare Rules*, Title 1, Chapter 1, §1-1552 [formerly entitled "Rules and Regulations for the Control of Air Pollution in Idaho," Regulation M].

4. *Session Laws of Idaho,* 1976 (Chapter 59, p. 199), 1967 (Chapter 239, p. 698), and 1974 (Chapter 53, p. 1115).

5. *Idaho Code*, §§39-101 to 39-119 [Environmental Protection and Health Act of 1972].

---

[8]Neither would institutional coordination be authorized by an agreement for the joint exercise of powers as provided by *Idaho Code*, §67-2326, et seq. "Any power, privilege or authority authorized by the Idaho Constitution, statute or charter, held by the State of Idaho or any public agency of said state, may be exercised and enjoyed jointly with the State of Idaho or any public agency of the state *having the same powers, privileges and authority, but never beyond the limitation of such powers, privileges or authorities . . .*" *Idaho Code*, §67-2328 (a) [Emphasis added.] Since Department of Law Enforcement's authority, as noted above, does not contemplate inspection of vehicles for pollution control purposes, it would be unable to agree with the Department of Health and Welfare to assist it in implementing a mandatory inspection and maintenance program, under its existing law.

[9]This is not to say that, in administration of its own programs under the Environmental Protection and Health Act, the State Board of Health and Welfare could not enlist the aid of local governments in statewide pollution control regulation not requiring the regulation of traffic. See *Idaho Code*, §§39-105 (3) (h) and 39-105 (5).

6. *Idaho Code*, §§49-101 to 49-157 [Uniform Registration Act, as amended], and §§49-801 to 49-849.

7. *Idaho Code*, §§49-501 to 49-918 [Traffic on Highways, etc.; Equipment; Weight, etc.].

8. *Idaho Code*, §50-302.

9. *Idaho Code*, §§67-2326 to 67-2333 [Joint exercise of powers].

10. *Craig v. City of Macon,* 543 S.W.2d 772, 774 (Mo., 1976).

11. *Grayot v. Summers,* 75 Idaho 125, 130-131, 269 P.2d 765 (1954).

12. *Los Angeles Brewing Co. v. City of Los Angeles,* 8 Cal.App.2d 391, 48 P.2d 71, 73 (1935).

13. *N.R.D.C. v. Train,* 421 U.S.60, 95 S.Ct. 1470, 43 L.Ed. 2d 731 (1975).

14. *Utah International v. E.P.A.,* 478 F.2d 126 (10th Cir. 1973.)

DATED this 22nd day of November, 1978.

ATTORNEY GENERAL
State of Idaho

WAYNE L. KIDWELL

ANALYSIS BY:

L. MARK RIDDOCH
Assistant Attorney General

ROBERT W. WALLACE
Assistant Attorney General

cc: Idaho State Library
Idaho Supreme Court
Idaho Supreme Court Library

ATTORNEY GENERAL OPINION NO. 78-43

TO: Clyde Koontz, C.P.A.
Legislative Auditor
Room 114
Statehouse

Per Request for Attorney General's Opinion

QUESTION PRESENTED:

In your recent letter you asked for an opinion on the following question: Is it legal for the State Treasurer to incur a loss from the sale of investments? You stated in the same letter that your office is auditing the State Treasurer's Office and that "the current investment policy of idle funds (§67-1210, I.C.) includes certain investments with the maturity several years in the future. If idle funds would decrease suddenly, forcing a sale of these investments, there is a possibility such a sale would result in a loss of principal."

CONCLUSION:

Section 67-1210, *Idaho Code*, makes it the duty of the State Treasurer to "invest idle monies" in certain listed bonds, notes and other securities. The State Treasurer, nevertheless, does not have the right or authority to sell the investment securities prior to maturity either at a gain or at a loss unless the right or authority to sell is granted by statute (specifically or by necessary implication). The few cases permitting a public official to deviate from such restrictions relate to unusual situations or necessities such as national depression. No facts are given which would support a conclusion that the required unusual situation exists. Section 67-1210, *Idaho Code*, and other relevant portions of the *Idaho Code* do *not* specifically give the State Treasurer any right or power to sell securities. Moreover, it is unlikely that the right or power would be necessarily implied. However, this question, with regard to idle funds, can only be resolved with absolute certainty by the Courts.

This opinion is based primarily on commonly accepted definitions of the term "invest"; the 1933 Idaho decision of *Parsons* v. *Diefendorf,* 53 Idaho 219, 23 P.2d 236 (1933); and several analogous cases from other states.

ANALYSIS:

§67-1210, *Idaho Code*, provides that it shall be the duty of the state treasurer to *invest* idle monies in the state treasury, other than public endowment funds, in a specified list of securities and types of securities. The section lists these securities at length, goes on to define the term "idle monies" and provides that the interest received from such investments is to be paid into the State General Fund unless otherwise specifically provided by law.

The term "invest" has been defined as follows:

> To commit money for a long period in order to earn financial return; to place money with a view to minimizing risk rather than speculating for large gains at a greater hazard; to make use of with particular thought of future benefits and advantages; something of intrinsic value. *Webster's Third New International Dictionary* (1971).

> To loan money upon securities of a more or less permanent nature, or to place it in business ventures or real estate or otherwise lay it out so that it may produce a revenue or income. *Black's Law Dictionary, Revised Fourth Edition* (1968).

The Black's Law Dictionary definition relies upon three cases, *Drake* v. *Crane*, 29 S.W. 990, 127 Mo. 85, 27 L.R.A. 653; *Stramann* v. *Scheeren,* 42 Pac. 191, 7 Col.App. 1, and *Una* v. *Dodd*, 39 N.J.Eq. 186. Also a large number of cases defining the terms "invest" and "investment" are found in Volume 22a, *Words and Phrases*, beginning at page 232. From reading those cases it appears that unless there are other specific words included with the term "invest" that "invest" generally means "laying out money or capital in business with a view of obtaining an income or profit such as to invest money in bonds or stocks" while on the other hand the term "speculate" means "to buy and sell with expectation of profiting by a rise or fall in price" and that the term "invest" does not ordinarily include sale of stocks or bonds, etc. For instance, see the case of *Clucas* vs. *Bank of Montclair,* 110 N.J.L. 394, 166 Atl. 311, 88 ALR 302.

The Idaho case of *Parsons* v. *Diefendorf,* 53 Idaho 219, 23 P.2d 236 (1933), dealt with a question similar to the one posed. That case was a suit for a writ of prohibition by the State Auditor to prevent the Commissioner of Public Investments from selling certain bonds and other securities that had been purchased with the permanent endowment funds of the State. The Supreme Court examined the statutes and constitution and determined that the Commissioner of Public Works had the duty to invest these funds in certain named bonds and securities but that he could not sell such bonds and securities. The Court stated in the opinion

> . . . we are forced to the conclusion that there is a strict and positive limitation on the department of public investments to invest the fund in certain designated and authorized securities *and only upon payment thereof* to reinvest the principal in like, authorized and designated securities and none other. 53 Idaho at 225. (Emphasis added).

The Court further stated:

> The commissioner of public investments has the limited and restricted authority to invest the funds in the specific designated constitutional and statutory securities and the care and custody of such securities when so invested, and the authority to collect and receive payment thereof when paid, but has *no authority express or implied to exchange or sell* or hypothecate or under any circumstances to change or modify said investments when once made, except on payment thereof, . 53 Idaho at 226. (Emphasis added).

The state auditor was successful in obtaining a writ of prohibition to prevent the Commissioner of Public Investments from selling any of the securities.

Careful analysis suggests that *Parsons* v. *Diefendorf* is applicable to the facts presented by and provides the answer for your opinion request. That *Parsons* v. *Diefendorf* involved permanent educational funds and this case involves general idle funds probably will not serve to distinguish the two for purposes of producing a different result. The statutory language construed in *Parsons* v. *Diefendorf* is essentially the same as that set forth in §67-1210. Moreover, that

the legislature intended not to authorize the State Treasurer to sell, prior to maturity, investments purchased with idle funds such as bonds is demonstrated by the policy specifically reflected in §67-2742, *Idaho Code*, which reads in relevant part:

> All deposits in state depositories shall be subject to payment when demanded by the state treasurer on his check *except time deposits of idle moneys* (Emphasis added).

It would seem that the legislature, in the public interest, wanted to limit the power of the State Treasurer with regard to idle funds. The provisions of "The Prudent Man Investment Act.", Title 65, Ch. 5, *Idaho Code* do not contradict this conclusion. The Act purports to govern the exercise of power otherwise granted and does not itself grant the power to sell.

It is also persuasive, if not controlling, that the few decisions of other States which have construed statutes granting county treasurers the power to invest sinking funds are all consistent with this analysis. E.g., the Oklahoma Supreme Court has twice held that the statutory authority to invest sinking funds does not give the county treasurer authority to trade an investment so acquired (or, by dictum, authority to sell) prior to maturity. *National Surety Co.* v. *State for use of Board of Comm'rs of Comanche County,* 111 Okla. 180, 239 P.257 (1925); *National Surety Co.* v. *State ex rel. Richards et al.*, 111 Okla. 185 239 P.262 (1925).

A considerable amount of case law has been written generally on this subject. Much of that law is summarized in 104 *American Law Reports* which contains at 623 the following statement:

> Directions for the care of public funds in the control of boards or officials are provided in nearly all jurisdictions, generally by statutes which specifically regulate such control. The question of the power of such boards or officials to depart from the literal requirements in respect of deposits, loans, or investment of such funds has been before the courts quite frequently, but in most cases the courts have adhered quite closely to the rule that such power can be exercised only where the surrounding circumstances appear to justify such departure, in the view that the purpose of the statute will be more nearly fulfilled thereby.
>
> Boards and officials in control of public funds are governed by strict regulations in regard to depositories and deposits of such funds therein or in banks other than designated depositories, and they have generally been held to be without power to deviate from the letter of the governing statutes except where such action appeared, in the eyes of the court, to be justified by the necessities of the occasion.

The few cases that have supported deviation from regulations in this context relate to emergency situations such as a national depression and general failure to pay taxes. Another annotation on this subject is found in 65 *American Law Reports* 811 at 813 where it is stated that

> It is generally held that custom or usage does not so enlarge a public officer's statutory powers as to enable him to perform his duties in a manner other than that prescribed by statute.

The Annotation then goes on to make clear that public officers are bound to strict conformance with the statutes describing their duties, particularly in relation to public monies.

Volume 63, *AmJur 2d, Public Officers,* §§328, 329, 330, 331 and 332 also deals generally with this subject and lists many cases and a number of annotations. Public officers entrusted with public monies are bound to keep them safely and they perform this duty at their peril and it has been held that they cannot go beyond the statutes and they are ordinarily held to a much stricter liability then other fiduciaries handling private funds. In fact, in many, many instances they have been made absolutely liable as insurers for the safekeeping of such funds. Even under public depository laws public officers are required to strictly and completely follow the statutes related thereto, and not go beyond them.

Consideration of §18-5702, *Idaho Code*, which reads as follows also seems relevant:

> Failure to keep and pay over money — Every officer charged with the receipt, safe keeping or disbursement of public moneys who neglects or fails to keep and pay over the same in the manner prescribed by law, is guilty of felony.

§18-5702, *Idaho Code*, as interpreted by Idaho cases requires strict accountability in regard to public funds. *State* v. *Taylor,* 59 Idaho 724, 87 P.2d 454, and *Bonneville County* v. *Standard Accident Insurance Co.,* 57 Idaho 657, 67 P.2d 904.

Much of Chapter 10, Title 59, *Idaho Code*, and of chapter 10, Title 67, *Idaho Code*, deal with deficiencies and defaults by public officers in regard to public monies and they require such officers to handle such monies very cautiously. These statutes and the cases make public officers strictly accountable.

In short, all of the cases relating to public officers and public funds proceed on the idea that the public officer owes a high degree of care and duty to the public in dealing with public monies. They are not allowed to stretch or go beyond the law at all but must adhere to the exact letter of the law.

Diligent search has failed to disclose any statements in Idaho statutes or constitution which would allow the State Treasurer to sell investments, whether at a loss or at a gain. Moreover, considering the statutes and the above cases (particularly *Parsons* v. *Diefendorf, supra,*) the State Treasurer lacks any real basis for claiming a power to sell securities purchased for investment under §67-1210, *Idaho Code*, based upon implication. The Treasurer can invest in a certain named list of securities and at the maturity of such investment the treasurer may obtain return of the principal represented by such investments and reinvest the same if the money is still "idle funds" within the statute.

AUTHORITIES CITED:

1. Chapter 10, Title 67, *Idaho Code*.
2. Chapter 10, Title 59, *Idaho Code*.
3. Chapter 5, Title 68, *Idaho Code*.

4. §18-5702, *Idaho Code*.

5. §67-1034, *Idaho Code*.

6. §67-1210, *Idaho Code*.

7. §67-2742, *Idaho Code*.

8. *Bonneville County* v. *Standard Accident Insurance Co.,* 57 Idaho 657, 67 P.2d 904 (1937).

9. *Clucas* v. *Bank of Montclair,* 166 Atl. 311, 110 N.J.L. 394.

10. *Drake* v. *Crane,* 29 S.W. 990, 127 Mo. 85, 27 L.R.A. 653.

11. *Parsons* v. *Diefendorf,* 53 Idaho 219, 23 P.2d 236.

12. *State* v. *Taylor*, 59 Idaho 724, 87 P.2d 454 (1939).

13. *Stramann* v. *Scheeren,* 42 Pac. 191, 7 Col.App. 1.

14. *Una* v. *Dodd,* 39 N.J.Eq. 186.

15. *National Surety Co.* v. *State for Use of Board of Comm'rs of Comanche County,* 111 Okla. 180, 239, P.257 (1925).

16. *National Surety Co.* v. *State ex rel Richards et al.,* 111 Okla. 185, 239 P.2d P. 262 (1925).

17. Vol. 63, *AmJur 2d*, Public Officers, §§328, 329, 330, 331 and 332.

18. 65 ALR 811.

19. 88 ALR 302

20. 104 ALR 623

21. *Black's Law Dictionary,* 4th Revised Edition.

22. *Webster's Third New International Dictionary* (1971).

23. Vol. 22A, *Words & Phrases,* 232.

DATED this 4th day of December, 1978.

ATTORNEY GENERAL
State of Idaho

WAYNE L. KIDWELL

ANALYSIS BY:

WARREN FELTON
Deputy Attorney General

cc: Idaho State Library
Idaho Supreme Court
Idaho Supreme Court Library

ATTORNEY GENERAL OPINION NO. 78-44

TO: Donald L. Burnett, Jr.
Chubbuck City Attorney
Post Office Box 4645
Pocatello, Idaho 83201

Per Request for Attorney General Opinion

QUESTION PRESENTED:

You asked if it was proper for public employees to use public funds for expenditures for Christmas parties.

CONCLUSION:

Without express authority, a municipal corporation may not appropriate the public revenue for celebrations, entertainments, sports and games, etc. Such power cannot be implied. *McQuillin on Municipal Corporations,* Vol. 15, §39.22, p. 55.

ANALYSIS:

In many states it has been held that a town cannot appropriate money for celebrations, etc., or other parties, even though this had been a custom. The same rule has been followed in most other states. Municipal appropriations for celebration have, for like reason, been declared illegal. Municipal expenditures for entertainments of official visitors, or to provide a ball and banquet have been declared illegal.

Authority to make such appropriations cannot rest upon the doctrine of implication, but it may be and often is granted, sometimes permissively. By statute, towns in Massachusetts are authorized to appropriate money "for the purpose of celebrating any centennial anniversary of its incorporation." And cities of that state may appropriate limited sums for armories, for the celebration of holidays, "and for other public purposes." Under such statute a city may furnish money for public concerts by a band. Certain municipal charters expressly authorize appropriations to commemorate events of public interest, the entertainment of guests and like purposes. 15 *McQuillin on Municipal Corporations,* §39.22.

Further, Vol. 15, *McQuillin on Municipal Corporations,* at §69.19, p. 31, states that appropriations or expenditures of public money by municipalities and indebtedness created by them, must be for a public and corporate purpose, as distinguished from a private purpose, at least, unless the powers of the particular municipality in regard thereto have been enlarged by the legislature, which is itself limited in its power to authorize expenditures or indebtedness for other than public purposes. This includes indebtedness created by the issuance of bonds. So taxes levied by a municipality must be for a public purpose.

Municipalities have no power, unless expressly conferred by constitutional provision, charter or statute, to donate municipal moneys for private uses to any individual or company, not under the control of the city and having no

connection with it, although a donation may be based upon a consideration. And in several of the states, constitutional provisions exist which prohibit the giving of any money or property by a municipality, or the loaning of its money or credit to or in aid of any individual, association or corporation or embarking upon any private enterprise. The test is whether the work is required for the general good of all the inhabitants of the city.

While the question of what is and what is not a public purpose is initially a legislative responsibility to determine, in its final analysis it is for the courts to answer. Each case must be decided with reference to the object sought to be accomplished and to the degree and manner of which that object affects the public welfare.

Taxes cannot be imposed other than for public purposes. This is elementary and applies to taxes by municipal corporations as well as other taxes. The authority of the local corporation to raise revenue by taxation is limited to taxation for municipal or corporate purposes, namely, purposes which are germane to the objects of the creation of the municipal corporation or which have a legitimate connection therewith.

Hardly any project of public benefit is without some element of peculiar personal profit to individuals, hardly any private attempt to use the taxing power is without some colorable pretext of public good. Each case must be judged on its own facts, and any attempt at fixed definition must result in confusion and contradictions.

In deciding whether, in a given case, the object for which municipal taxes are assessed is or is not a public purpose, courts must be governed mainly by the course and usage of the government, the objects for which the taxes have been levied, and the objects or purposes which have been considered necessary to the support and for the proper use of the municipal government. 16 *McQuillin on Corporations,* §44.35.

A very recent Idaho case had this to say on a similar subject:

> Art. 3 of the Constitution of Idaho does not specifically mention a requirement of a public purpose for legislation authorizing a state-created public entity to expend funds. However, in the case of Village of Moyie Springs, Idaho vs. Aurora Manufacturing Co., supra, this court declared that 'municipal corporations . . . are limited to functions and purposes which are . . public in character as distinguished from those which are private in character . . .' If this rule is a restriction upon the cities' powers, it must be so because it is also a restriction upon the state's power, for the cities are not singled out for unique treatment in this regard by statute or constitutional provision. Therefore, this restriction must be inherent throughout state government and must be a fundamental limitation upon the power of state government under the Idaho Constitution, even though not expressly stated in it. Thus, no entity created by the state can engage in activities that do not have primarily a public, rather than a private purpose, nor can it finance or aid any such activity . .
> *Bd. of County Commissioners v. IHFA,* 96 Idaho 498, 502.

As one can see from pursuing the words "public purpose" in Volume 35 *Words and Phrases,* there are many, many definitions for "public purpose." To this office, it appears that some of the better considered definitions are as follows:

> To constitute a 'public purpose' for which money in a state treasury may be appropriated, the purpose must not only be affected with a public interest, but must be performed by the state in the exercise of its governmental functions. *Veterans of Foreign Wars of the United States, Department of Oklahoma v. Childers,* 171 P.2d 618, 197 Okla. 331.

A decision by the Federal Supreme Court along this line states as follows:

> Though the line which distinguishes the public purpose for which taxes may be assessed from the private use for which they may not be assessed is not always easy to discern, yet it is the duty of the courts, where the case falls clearly within the latter class, to interpose, when properly called on, for the protection of the rights of the citizens, and aid to prevent his private property from being unlawfully appropriated to the use of others. In deciding whether, in a given case, the object for which the taxes are assessed falls upon the one side or the other of this line, the courts must be governed mainly by the course and usage of the government, the objects for which taxes have been by long usage levied, what objects and purposes have been considered necessary for the support of the proper use of the government, whether state or municipal. *Citizens Savings & Loan Ass'n. v. Topeka,* 87 U.S. 655, 22 L.Ed. 455, 20 Wll. 665.

In *Gem Irrigation District* v. *VanDuesen,* 31 Idaho 779, 176 Pac. 887, the State Supreme Court quotes with approval from a Kentucky case:

> 'Appropriations of public funds and levying taxes to raise funds for the same end rest upon the same principle. If an object cannot have a tax levied for it . . . then no appropriation of public money can be made to it. Where the constitution forbids the levying of a tax for a given purpose, it must be held that it withholds the power of making appropriations for that purpose . . .' *Agricultural and Mech. College v. Hager, Auditor,* 121 Ky. 1, 876 S.W. 1125.

Sections 50-301 and 50-302, *Idaho Code* provide that cities may exercise all powers and perform all functions of local self government not specifically prohibited to them or in conflict with the general laws or the constitution. It also provides that they may make rules, regulations and ordinances to maintain the peace, good government, trade, commerce, and industry of the city. However, we do not believe that this section was meant to grant general power to use tax funds for parties or entertainment.

Public funds must be used for a public or governmental purpose. Without express legislative authorization, parties, celebrations or entertainments do not fall within this category.

AUTHORITIES CONSIDERED:

1. *Board of County Commissioners v. IHFA,* 96 Idaho 498, 502.

2. *Citizen's Savings & Loan Ass'n. v. Topeka,* 87 U.S. 655, 22 L.Ed. 455, 20 Wll. 665.

3. *Gem Irrigation District v. VanDuesen,* 31 Idaho 779, 176 Pac. 887.

4. 15 *McQuillin on Municipal Corporations,* §§39.22 and 69.19.

5. 16 *McQuillin on Municipal Corporations,* §44.35.

6. Volume 35, *Words and Phrases.*

DATED this 15th day of December, 1978.

ATTORNEY GENERAL
State of Idaho

WAYNE L. KIDWELL

ANALYSIS BY:

WARREN FELTON
Deputy Attorney General

WLK/WF/dm

cc: Idaho State Library
Idaho Supreme Court
Idaho Supreme Court Library

ATTORNEY GENERAL OPINION NO. 78-45

TO: STATE BOARD OF EXAMINERS
John V. Evans, President
Statehouse

Per Request for Attorney General's Opinion.

QUESTION PRESENTED:

Which members of the State judiciary and their staff personnel, if any, are exempt from the state statutory travel and per diem allowances?

CONCLUSION:

The only members of the State judiciary and their staff personnel which are exempt from the State statutory travel and per diem allowances are the five justices of the Supreme Court and the clerk of the Supreme Court. Other members of the judiciary and staff personnel for both the Supreme Court and other members of the judiciary are not exempt from the State statutory travel and per diem allowances.

ANALYSIS:

The applicable general statute which relates to the question presented is *Idaho Code* §67-2007, which provides:

> This act may be cited as the "Standard Travel Pay and Allowance Act of 1949." It is the express intention of this act that the provisions hereof *shall supersede and control* the language of any statute heretofore enacted relating to the allowance of requests for reimbursement for travel and/or subsistence, *including,* but without limitation, *statutes which provide for the payment of actual and necessary expenses* to any officer, agent, employee, clerk, board or commission of the state; and it is further intended that the provisions of this act, and regulations issued hereunder, shall apply to and govern all acts authorizing the payment for travel and/or subsistence which may be enacted hereafter *unless the same shall be expressly exempted* from the terms of this act. Such acts shall be construed as being subject to the provisions of this act unless an express exemption shall be set forth in such subsequent act. (Emphasis added.)

As the title of the act indicates, *Idaho Code* §67-2007 was adopted in 1949. It is the clear, express intent of the legislature, pursuant to *Idaho Code* §67-2007, that the provisions of the "Standard Travel Pay and Allowance Act of 1949" supersede any prior statutes relating to travel and subsistence allowances, including "statutes which provide for the payment of actual and necessary expenses." Further, the legislature intended that the provisions of the "Standard Travel Pay and Allowance Act of 1949" apply to and govern any statutes which might be enacted after the 1949 Act and which relate to travel and subsistence allowances, unless such persons are expressly exempted from the 1949 Act.

Looking at the statutes relative to the various members of the state judiciary, the statute applicable to the Idaho Supreme Court is *Idaho Code* §1-211, which provides:

> There must be paid to each of the justices of the Supreme Court, and to the clerk of the Supreme Court, out of the state treasury, for each term of the Supreme Court held away from Boise City, his actual expenses for subsistence, and in addition thereto his expenses of travel; also his actual expense for subsistence, and expense of travel in attendance of his other official duties as authorized by the Supreme Court.
>
> The provisions hereof relating to payment of actual expenses for subsistence shall be expressly exempted from, and relating to expenses of travel shall be expressly governed by, the provisions of section 67-2008, Idaho Code, as amended.

The latter paragraph of *Idaho Code* §1-211 was added by amendment in 1955. Pursuant to *Idaho Code* §1-211, it is clear that the five justices of the Idaho Supreme Court and the clerk of the Idaho Supreme Court are specifically exempted from the "Standard Travel Pay and Allowance Act of 1949" with respect to subsistence allowances, but are subject to the 1949 Act with respect to travel expenses. In addition, it is the opinion of the Attorney General that such exemption applies only to the five Supreme Court Justices and the clerk, but the exemption does not apply to any other staff personnel with the Idaho Supreme Court. This conclusion is based upon the fact that *Idaho Code* §1-211 expressly refers to each of the "justices" and the "clerk," but does not refer to other staff personnel, and thus, does not create an express exemption for such other personnel.

With respect to the expenses of district judges and their staff personnel, *Idaho Code* §1-711 provides:

> There shall be paid to each of the judges of the district courts, out of the state treasury, *his actual and necessary expenses for subsistence and travel incurred while absent from the city of resident chambers and attending to perform his official duties.* (Emphasis added.)

The underlined language was added by amendment in 1963. This statute provides that district judges shall be paid their "actual and necessary expenses," and as previously discussed, pursuant to *Idaho Code* §67-2007, the provisions of the "Standard Travel Pay and Allowance Act of 1949" govern such subsequently enacted statutes unless the subsequent statute contains an express exemption. Since *Idaho Code* §1-711 includes no such express exemption, it is the opinion of the Attorney General that district judges are not exempt from the statutory travel and subsistence allowances.

The only statute relating specifically to staff personnel of the district courts which the Attorney General has found is *Idaho Code* §1-1102 which provides for payment to district court reporters of their "actual and necessary expenses for traveling and attending each term." Similarly to the statute relative to district judges, there is no express language in the statute exempting such court reporters from state statutory travel and per diem allowances. Further, the Attorney General has found no other statutes which relate to the payment of travel expenses for other district court staff personnel, and as a result, it is

the conclusion of the Attorney General that such staff personnel are bound by and subject to the provisions of *Idaho Code* §67-2007 and other provisions of the "Standard Travel Pay and Allowance Act of 1949."

AUTHORITIES CONSIDERED:

1. *Idaho Code* §§1-211, 1-711, 1-1102 and 67-2007.

DATED This 19th day of December, 1978.

WAYNE L. KIDWELL
Attorney General

ANALYSIS BY:

JEAN R. URANGA
Assistant Attorney General

lc

cc: Supreme Court Law Library
Supreme Court
Idaho State Library

IDAHO CONSTITUTION

TABLE OF STATUTES CITED

INDEX