IDAHO ATTORNEY GENERAL'S OPINIONS

AND

SELECTED LEGAL GUIDELINES

FOR THE YEAR

1980

DAVID H. LEROY
Attorney General

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GEORGE M. PARSONS 1893-1896
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S. H. HAYS 1899-1900
FRANK MARTIN 1901-1902
JOHN A. BAGLEY 1903-1904
JOHN GUHEEN 1905-1908
D. C. McDOUGALL 1909-1912
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T. A. WALTERS 1917-1918
ROY L. BLACK 1919-1922
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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
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ALLAN G. SHEPARD 1963-1968
ROBERT M. ROBSON 1969
W. ANTHONY PARK 1970-1974
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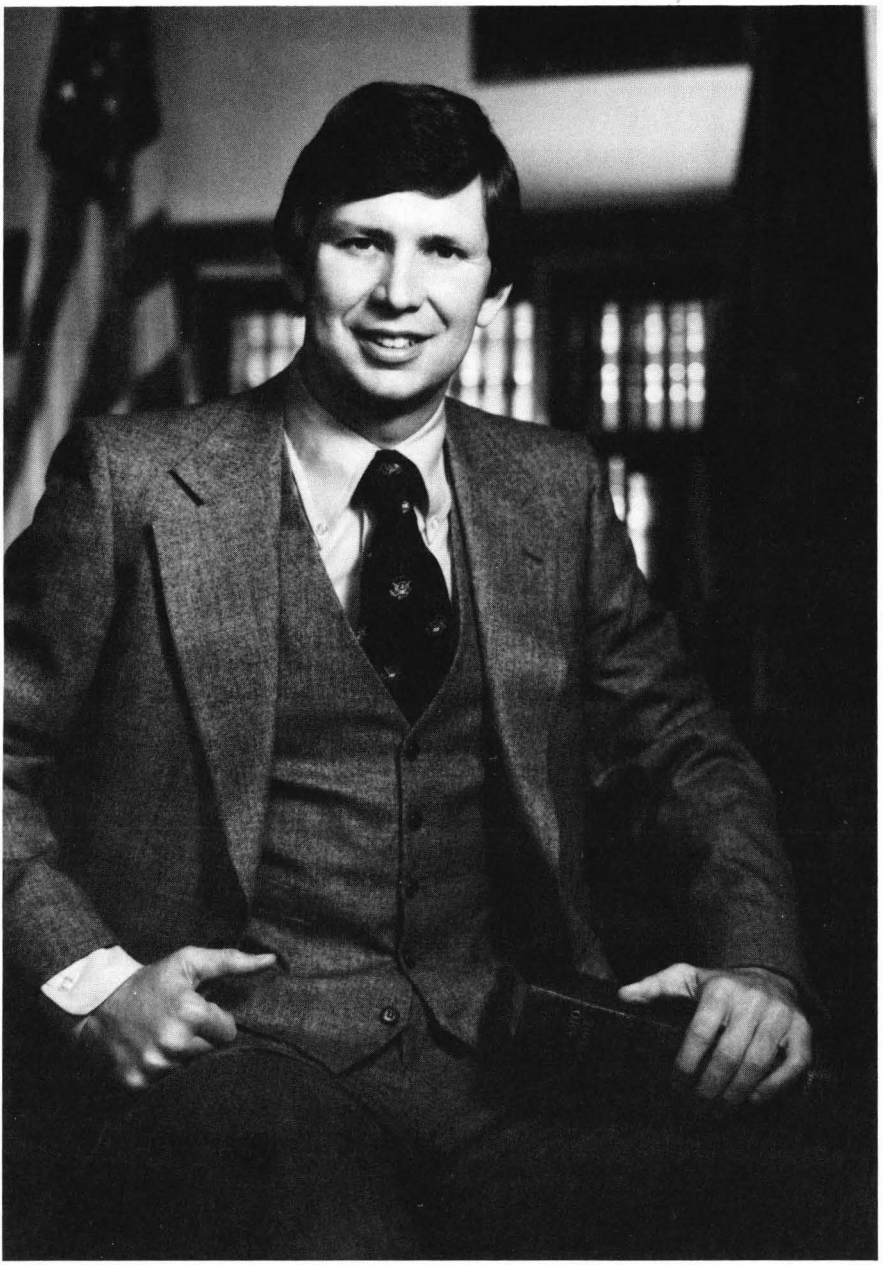

DAVID H. LEROY
Attorney General

STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

The Honorable John V. Evans
Governor of the State of Idaho

Idaho State Legislature

The issuance of official and unofficial opinions by the Idaho Attorney General is both a proud tradition and a valued service. In the early years after statehood, my distinguished predecessors were able to combine a few worthy legal objections and suggestions into their biennial reports to satisfy the necessity for opinion publication and retrieval by the courts, state agents, and the general public. During the first decade of this century opinion making had expanded so that attorneys general were printing their official letters verbatim as the major portion of that same report. As long ago as 1913, during the term of Joseph H. Peterson, the opinions were first digested, organized and indexed by topic.

In recent years, state government has grown, society is more complex, and lawsuits are far more frequent. It is now necessary to publish these collected opinions each year to help guide client agencies in avoiding expensive lawsuits and to keep the size of the printed volume to manageable proportions. In that spirit, and upon that tradition, we offer these collected observations for 1980.

A further innovation, begun last year, is continued in this book. We have not only published all of the official opinions, but have selected for inclusion certain of the informal legal guidelines that touch upon a major issue of statewide significance. I think it likely in future years that my successors will produce even thicker volumes of official opinions and devise further inventions and innovations. Although we all might wish in some respects to return to the single, slim volume of 1893-1894, 14 pages, 38 cases and a few narrative opinions in length, the legal complexities faced by the State of Idaho in 1980 did not permit anything less than the following collection.

Respectfully submitted,

David H. Leroy

DAVID H. LEROY
Attorney General
State of Idaho

OFFICE OF THE ATTORNEY GENERAL

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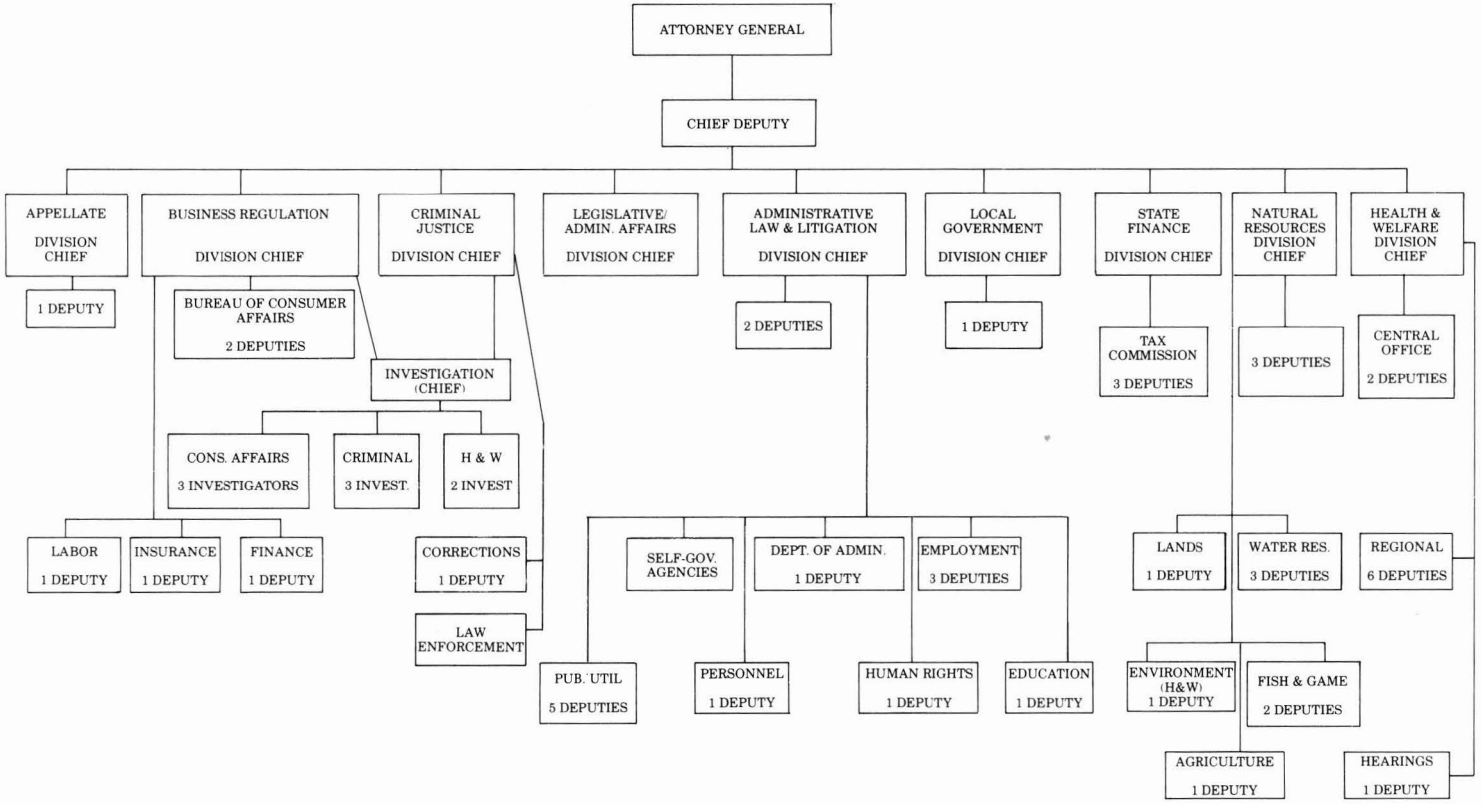

DAVID H. LEROY
ATTORNEY GENERAL

OFFICIAL OPINIONS
OF
THE ATTORNEY GENERAL
FOR
1980

David H. Leroy
Attorney General
State of Idaho

ATTORNEY GENERAL OPINION NO. 80-1

TO: T. L. Purce, Director
Department of Administration
Statehouse Mail

Per Request for Attorney General Opinion

QUESTIONS PRESENTED:

What State agencies or subdivisions of the State are entitled to the use of the Permanent Building Fund?

Specifically, can the fund be used for:

a. Elementary and secondary public or private schools?
b. Colleges and universities, public and private?
c. Hospitals, public and private?
d. Public care facilities?
e. Incorporated cities and villages?
f. Counties?
g. Health districts?
h. Junior college districts?

CONCLUSIONS:

The Permanent Building Fund may be appropriated to all agencies of the State including State colleges and universities and junior college districts, but may not be appropriated to any private entities, non-State operated public care facilities or hospitals, cities, counties or health districts.

ANALYSIS:

Idaho Code, Title 57, Chapter 11, is the Permanent Building Fund Act. This act creates a fund from legislative appropriations and various tax receipts. *Idaho Code,* §57-1105 provides in part:

> . . . The state board of examiners, upon the advice of the division of tourism and industrial development, may authorize the preparation of plans and specifications for necessary public buildings and public building improvements for the proper functioning of state government and state institutions, . . .

Idaho Code §57-1108 states:

> Permanent building fund created — Use of fund. — The permanent building fund is hereby created and established in the state treasury to which shall be deposited all revenues derived from taxes imposed and transfers authorized pursuant to the provisions of this act. All moneys now or hereafter in the permanent building fund are hereby dedicated for the purpose of building needed structures, renovations, repairs to and remodeling of existing structures at the several *state institutions* and for the *several agencies of state government.*[Emphasis added.]

Both *Idaho Code* §57-1105 and §57-1108 provide that all revenues derived from various sources and deposited to the fund are to be used for State institutions and agencies of State government. The question presented is to what extent may the funds be used or applied for the entities described in (a) through (h) above.

PRIVATE HOSPITALS AND SCHOOLS

Private hospitals and schools are not institutions or agencies of the State government. Under the present wording of the statute it is clear that the State may not appropriate money to private institutions or agencies even if they serve a State-related purpose. If the statutes were changed, the State would be able to appropriate at least to private entities which are not church-related when a State purpose is served (See *Board of County Commissioners v. Idaho Health Facilities Authority,* 96 Idaho 498, 531 P. 2d 588 (1975)).

SCHOOL DISTRICTS, COUNTIES, CITIES AND OTHER POLITICAL SUBDIVISIONS

The legislative intent respecting the furnishing of funds to school districts, counties and cities from the fund can be detected by reference to *Idaho Code* §57-1105A, which states:

> Authority of legislature to make grants from permanent building fund to junior college districts. — It is hereby declared that upon the recommendation of the permanent building fund advisory council or upon its own motion the legislature is empowered to make grants from the Permanent Building Fund to the junior college districts of the State of Idaho. Said grants may be used by said junior college districts for the construction of physical plant facilities.

Through the enactment of *Idaho Code,* §57-1105A, there is a strong indication that money appropriated from that fund for other types of governmental subdivisions is not authorized. In the case of *State v. Larson,* 84 Idaho 529, 374 P.2d 384 (1962), the court, aside from holding that counties were not agencies of the State, quoted with approval the following principles regarding statutory application:

> Where a statute enumerates the persons or things to be affected by its provisions, there is an implied exclusion of others. The maxim operates conversely where the statute designates an exception, proviso saving clause, or a negative, so that the exclusion of one thing includes all others.
>
> Where express exceptions are made the inference is a strong one that no other exceptions were intended. *State v. Larson,* at 535

By the reasoning found in *Larson,* it appears that the legislature did not intend to include as State institutions any of the governmental subdivisions for the purpose of receiving money from the Permanent Building Fund. This is strongly indicated by specific granting of the funds to the junior college districts.

To summarize this portion of your inquiry, money from the Permanent Building Fund may not be appropriated to cities, counties, primary or secondary school districts, or other political subdivisions of the State.

Health Districts. The health districts are excluded as beneficiaries of the fund by clear definition in *Idaho Code,* §39-401, which states in part:

> Legislative intent. — The various health districts, as provided for in this chapter, are not a single department of state government unto themselves, nor are they a part of any of the twenty (20) departments of state government authorized by section 20, article IV, Idaho constitution, or of the departments prescribed in §67-4202, Idaho Code.
>
> It is legislative intent that health districts operate and be recognized not as State agencies or departments, but as governmental entities whose creation has been authorized by the State, much in the manner as other single purpose districts. . . .

State Colleges and Universities. The various universities of the State of Idaho, namely Boise State University (*Idaho Code,* §33-4001), Idaho State University (*Idaho Code,* §33-3001), University of Idaho (Article IX, §10, Idaho Constitution, and *Idaho Code,* §33-2801), Lewis and Clark State College (*Idaho Code,* §33-3101) have for their source of creation, legislative enactments and/or the Idaho Constitution and, as such, are institutions of the State of Idaho. They are clearly within the purview of the Permanent Building Fund.

CONCLUSION:

In conclusion, elementary and secondary public or private schools may not receive money from the Permanent Building Fund. All State colleges and universities in the state of Idaho may receive funds from the Permanent Building Fund including junior colleges. Only State hospitals may receive money from the Permanent Building Fund. Only State public care facilities may receive money from the Permanent Building Fund. Incorporated cities, counties, and health districts are not agencies of the State government for purposes of the building fund and therefore may not receive any money from the fund.

AUTHORITIES CONSIDERED:

1. *Idaho Code,* §§33-2801, -3001, -3101, -4001, 39-401, 57-1105, -1108.
2. *Board of County Commissioners v. Idaho Health Facilities Authority,* 96 Idaho 498, 531 P.2d 588 (1975).
3. *State v. Larson,* 84 Idaho 529, 375 P.2d 384 (1962).
4. Idaho Constitution, Article IX, §10.

DATED this 9th day of January, 1980.

ATTORNEY GENERAL
State of Idaho
/s/ DAVID H. LEROY

ANALYSIS BY:

DEAN KAPLAN
Deputy Attorney General
State of Idaho

DWK:pf

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

ATTORNEY GENERAL OPINION NO. 80-2

TO: Mr. Jack Barney
Criminal Justice Specialist
L.E.P.C.
Statehouse Mail

Per Request for Attorney General Opinion

QUESTION PRESENTED:

Does a city policeman in hot pursuit of a suspect have to stop at the county line or may he proceed further to effect an arrest?[1]

CONCLUSION:

A duly authorized city policeman in Idaho, whenever in fresh pursuit of any person who has violated any law of the state or of the city while within the corporate limits of such city, may go beyond the corporate limits of the city, but not normally beyond the county line, while in such fresh pursuit; however, three exceptions permit a city policeman to properly cross the county line while in such fresh pursuit, to-wit: (1) a proper extraterritorial request for assistance is received from the neighboring political subdivision being entered, (2) the person pursued had already been arrested by said officer and had either escaped or had been rescued from custody, or (3) the said policeman assumes the pursuit and arrest as a private person, rather than a peace officer.

[1]Since comparable Idaho statutes and relevant case law use the term "fresh" pursuit, interchangeably with the terms "hot" or "close" pursuit, the term fresh pursuit will be used in lieu of the term "hot" pursuit to avoid confusion. For purposes of analysis, it will be assumed that a proper "fresh" pursuit is present. Also, Idaho's uniform act on fresh pursuit, I.C. §19-701, et. seq., which deals exclusively with the procedural aspects of *interstate* fresh pursuit for felony suspects only, will not be discussed since the question is addressed exclusively to *intrastate* fresh pursuit.

ANALYSIS:

Traditionally, the doctrine of fresh pursuit was controlled by common law. Under the common law doctrine of fresh pursuit, a peace officer was allowed to pursue a suspect, with or without a warrant, into another jurisdiction in order to effectuate an arrest. The common law doctrine followed in a majority of jurisdictions applied only to felonies, and generally prohibited the peace officer from pursuing individuals suspected of committing misdemeanors past jurisdictional boundaries. *Benally v. Marcum* 89 N.M. 463, 553 P.2d 1270 (1976); *Carson v. Pape,* 15 Wis.2d 300, 112 N.W.2d 693 (1961); *Gattis v. State,* 204 Md. 589, 105 A.2d 661 (1954); *Banks v. Bradley,* 192 Va. 598, 66 S.E.2d 526 (1951); *Wilson v. Moresville,* 222 N.C. 283, 22 S.E.2d 907 (1942); *McCaslin v. McCord,* 116 Tenn. 690, 94 S.W. 79 (1906).

According to a minority view, no clear distinction is made between misdemeanors and felonies, and the fresh pursuit doctrine permits an extraterritorial pursuit and arrest as one continuous transaction beginning within a given jurisdiction and completed anywhere within the state. *Fance v. State,* 167 Tex. Crim. 32, 318 S.W.2d 72 (1958). However, most states that have permitted extraterritorial fresh pursuit have either limited the doctrine to felonies (as cited *ante*) or relied upon some form of an "intrastate" fresh pursuit statute. *McLean v. Mississippi,* 305 U.S. 623, 59 S. Ct. 84, 83 L. Ed. 399 (5th Cir. 1938); *Reyes v. Slayton,* 331 F. Supp. 325 (1971); *State v. McCarthy,* 123 N.J.Super. 513, 303 A.2d 626 (1973).

Although in Idaho the common law controls, so far as it is not inconsistent with Idaho's judicial decisions or the state's statutory law (*Idaho Code,* §§18-303), 73-116; *State v. Iverson,* 79 Idaho 25, 310 P.2d 803 (1957); *State v. Grow,* 93 Idaho 588, 468 P.2d 320 (1970); *State v. Lawrence,* 98 Idaho 399, 565 P.2d 989 (1977)), this issue of intrastate fresh pursuit has not been addressed by the Idaho Supreme Court; consequently, it would be speculation to surmise whether Idaho would follow the majority rule or the minority rule.

However, Idaho does have a statute specifically relating to city policemen that would prevent the application of common law to the issue presented. *Idaho Code,* §50-209, provides in its relevant parts, as follows:

> The policemen of every city . . . shall have power to arrest all offenders against the law of the state, or of the city. . . . Whenever such policemen shall be in fresh pursuit of any offender against any law of the state, or of the city and the offense has been committed within the corporate limits of such city, such policemen, while in such fresh pursuit may go beyond the corporate or geographical limits of such city *but not beyond the county line* of the county in which the city is situated, for the purpose of making such arrest. I.C. §50-209 [Emphasis added.]

Consequently, §50-209 clearly prohibits a city policeman in fresh pursuit from crossing the county line, although the officer may proceed within the county across the city geographical boundaries.

In spite of the clear prohibition, through §50-209, against a city policeman's fresh pursuit border crossing into another county, three other statutes, to-wit: *Idaho Code,* §§67-2337, 19-618, and 19-604, would permit such an extraterritorial fresh pursuit to effect an arrest, providing certain statutory conditions are understood and present during the fresh pursuit and arrest.

Extraterritorial Request For Assistance:

The first statutory exception to *Idaho Code,* §50-209, is I.C. §67-2337, which is quoted as follows:

> All authority that applies to peace officers (as defined in §19-510, Idaho Code) when performing their functions and duties within the territorial limits of their respective city or political subdivisions, shall apply to them to the same degree and extent while engaged in the performance of any of their functions and duties extraterritorially in response to a request for law enforcement assistance from the chief enforcement officer of another city or political subdivision or his designee. I.C. §67-2337.

Under authority of *Idaho Code,* §67-2337, a city policeman in fresh pursuit may cross the county boundary when the following conditions are met:

> 1. The city policeman must be in the performance of his proper functions and duties (a proper fresh pursuit); and
>
> 2. The policeman must be within the territorial limits of the respective political subdivision; and
>
> 3. The policeman, while functioning as outlined in points 1 and 2 immediately *ante,* receives a request for law enforcement assistance from the chief law enforcement officer of the neighboring county or his designee; and
>
> 4. The request is for assistance in the pursuit and arrest of a suspect entering the neighboring political subdivision which is the same suspect the city policeman is already freshly pursuing.

Fresh Pursuit Of An Escaped Or Rescued Arrestee:

The second statutory exception allowing extraterritorial fresh pursuit by a city officer across the county line is *Idaho Code,* §19-618, which provides:

> If a person *arrested* escape [sic] or is rescued, the *person from whose custody he escaped* or was rescued, may *immediately pursue* and retake him at any time and *in any place within the state.* [Emphasis added.]

The threshold requirements for the operation of §19-618 and its allowance of intrastate fresh pursuit anywhere "within the state" are the following:

> 1. The person pursued had been arrested; and
>
> 2. After the arrest, the person pursued escaped or was rescued; and
>
> 3. After the person escaped or was rescued, the officer who had custody of him gave immediate pursuit.

Private Citizen Arrest:

The remaining statutory exception to *Idaho Code,* §50-209, is *Idaho Code,* §19-604, which provides:

> A private person may arrest another:
>
> 1. For a public offense committed or attempted in his presence.
>
> 2. When the person arrested has committed a felony, although not in his presence.
>
> 3. When a felony has been in fact committed, and he has reasonable cause for believing the person arrested has committed it.

The condition that must be met and understood by a peace officer who is in extraterritorial fresh pursuit, without (1) receiving an extraterritorial request for assistance under *Idaho Code,* §67-2337, or (2) pursuing an escaped or rescued arrestee by virtue of §19-618, is that the officer continues the fresh pursuit and makes the arrest as a private person, not as a peace officer. In addition to official powers, a peace officer may exercise those which he enjoys in common with any private citizen. *State v. McCarthy, supra.* Since private individuals in Idaho are given the power of arrest, by virtue of §19-604, the policeman could freshly pursue and arrest extraterritorially as a private person, even though he may have lost his powers as a policeman through the operation of *Idaho Code,* §50-209. *McCaslin v. McCord, supra.* However, he assumes the risks associated with the private citizen arrest.[2]

Albeit there appears to be some inconsistency between the limitations of §50-209 on city officers' extraterritorial arrest powers and the exceptions to such found in the three statutes cited *ante,* the rules of statutory construction harmonize all of the statutes. Indeed, in the absence of any express repeal or amendment therein to the contrary, statutes relating to the same subject matter are, so far as reasonably possible, to be construed in harmony with each other. *Christensen v. West,* 92 Idaho 87, 437 P.2d 359 (1968); *Sampson v. Layton,* 86 Idaho 453, 387 P.2d 883 (1963); 2A Sutherland, *Statutory Construction,* §51.02 (4th ed.).

In reasonably construing and harmonizing §50-209 with the applicable statutes giving rise to its exceptions, the following analytical process, although not the only basis for construing the statutes together, demonstrates there is no conflict:

> (1) *Section 50-209 and §67-2337:* These two statutes are construed in harmony together by interpreting §67-2337 as providing a procedure through which the limitations of §50-209 are bridged through the extention of the police powers of an extraterritorial requesting agency to the city officer giving pursuit.
>
> (2) *Section 50-209 and §19-618:* It is clear from a reading of §19-618 that this statute applies only to *post-arrest* escape or rescue, while it is equally clear that §50-209 applies to pre-arrest pursuit.

[2]The right of a private citizen to effectuate an arrest based upon *Idaho Code,* §19-604, has already been analyzed through a prior Attorney General's opinion, Op. No. 23-75.

(3) *Section 50-209 and §19-604:* Since §50-209 applies only to "*policemen* of every city," there could be no legal limitation from said statute imposed upon a private citizen functioning under §19-604.

AUTHORITIES CONSIDERED:

1. *Idaho Code,* §§18-303, 19-604, 19-618, 50-209, 67-2337, 73-116.
2. *Benally v. Marcum,* 89 N.M. 463, 553 P.2d 1270 (1976).
3. *Carson v. Pape,* 15 Wis.2d 300, 112 N.W.2d 693 (1961).
4. *Gattis v. State,* 204 Md. 589, 105 A.2d 661 (1954).
5. *Banks v. Bradley,* 192 Va. 598, 66 S.E.2d 526 (1951).
6. *Wilson v. Moresville,* 222 N.C. 283, 22 S.E.2d 907 (1942).
7. *McCaslin v. McCord,* 116 Tenn. 690, 94 S.W. 79 (1906).
8. *Fance v. State,* 167 Tex. Crim. 32, 318 S.W.2d 72 (1958).
9. *McLean v. Mississippi,* 305 U.S. 623, 59 S. Ct. 84, 83 L. Ed. 399 (5th Cir. 1938).
10. *Reyes v. Slayton* 331 F. Supp. 325 (1971).
11. *State v. McCarthy,* 123 N.J.Super. 513, 303 A.2d 626 (1973).
12. *State v. Iverson,* 79 Idaho 25, 310 P.2d 803 (1957).
13. *State v. Grow,* 93 Idaho 588, 468 P.2d 320 (1970).
14. *State v. Lawrence,* 98 Idaho 399, 565 P.2d 989 (1977).
15. *Christensen v. West,* 92 Idaho 87, 437 P.2d 359 (1968).
16. *Sampson v. Layton,* 86 Idaho 453, 387 P.2d 883 (1963).
17. 2A Sutherland, *Statutory Construction,* §51.02 (4th ed.).
18. Idaho Attorney General Opinion No. 23-75.

DATED this 10th day of January, 1980.

ATTORNEY GENERAL
State of Idaho
/s/ DAVID H. LEROY

ANALYSIS BY:

MICHAEL B. KENNEDY
Deputy Attorney General
Chief, Criminal Justice Division

DHL:MBK:lb

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

ATTORNEY GENERAL OPINION NO. 80-3

TO: Commissioner Don C. Loveland
Commissioner Carol M. Dick
State Tax Commission
Statehouse Mail

Per Request for Attorney General Opinion

QUESTION PRESENTED:

If taxable personal property is to be placed upon the 1980 tax roll based upon "1978 market value levels," should depreciation be allowed for the years after 1978? If not, is any depreciation to be allowed at all on property purchased during 1979 and later years?

CONCLUSION:

When valuing personal property, depreciation is a factor which must be considered under the provisions of the one percent property tax limitation statute. Valuing property at the "1978 market value level" (as adjusted for inflation at a maximum annual rate of two percent) means that personal property must be valued as it exists in the year of assessment but by applying the adjusted 1978 market values as the measure of the value. For example, personal property which was five years old in 1978 must be valued on the 1980 roll by applying the adjusted 1978 market value level for property that is seven years old.

ANALYSIS:

The relevant part of the one percent limitation statute, *Idaho Code* §63-923, provides:

> (2) (a) The market value for assessment purposes of real and personal property subject to appraisal by the county assessor shall be determined by the county assessor according to rules and regulations prescribed by the state tax commission, as provided in section 63-202, Idaho Code, but where real property is concerned it shall be the actual and functional use of the real property. All taxable property which has

not been appraised at 1978 market value levels shall be reappraised or indexed to reflect that valuation for the tax year commencing January 1, 1980. All property placed on the assessment roll for the first time after 1978, and all property which is reappraised after 1978, shall be appraised or indexed to reflect 1978 market value levels.

(b) The 1978 market values for assessment purposes of real and personal property shall be adjusted from year to year to reflect the inflationary rate but at a rate not to exceed two percent (2%) for any given year as shown in the consumer price index or comparable data for the area under taxing jurisdiction.

*An analysis of California's "Proposition 13" is not helpful. First, California's limit on taxes is constitutional, whereas Idaho's is statutory. Second, California's limit on market value applies only to real property. Idaho's one percent initiative originally also excluded personal property but was amended by the legislature to expressly include both real and personal property. See 1979 Session Laws, Chapter 18 (H.B. 166). California's practice of limiting the value of real property while valuing personal property at its full current market value is inconsistent with both Idaho's statute, *Idaho Code* §63-923, and its Constitution. *Idaho Telephone Co. v. Baird,* 92 Idaho 425, 523 P.2d 337 (1967).

For purposes of this opinion, three aspects of the statute are significant. These are:

(1) Both real and personal property are to be appraised at 1978 market values levels and that value is to be entered on the 1980 property tax roll.

(2) The value of real property is to be determined by its actual and functional use. There is no statutory requirement that actual and functional use be considered in determining the value of personal property.

(3) The 1978 market value level for both real and personal property may be adjusted annually to reflect inflation at a rate not to exceed two percent.

These statutory principles must be construed, to the extent possible, to be consistent with the constitutional provisions governing our property tax system. *Scandrett v. Shoshone County,* 63 Idaho 46, 116 P.2d 225 (1941). At the same time, it is necessary to give maximum effect to the legislative intention as expressed in the statute. *Streibeck v. Employment Security Agency,* 83 Idaho 531, 336 P.2d 589 (1962). To the extent possible, legislative intent should be found from the language of the statute and not from extrinsic sources. *Roe v. Hopper,* 90 Idaho 22, 408 P.2d 161 (1965); *State v. Berntsen,* 68 Idaho 539, 200 P.2d 1007 (1948).

The most important constitutional requirement is that all, both real and personal, property be valued uniformly so that every property owner receives equal treatment under the ad valorem tax laws. *Idaho Telephone Company v. Baird,* 91 Idaho 425, 523 P.2d 337 (1967). The result, of course, is that the same general rules used for determining the value of real property must be applied to personal property, including considering the "actual and functional use" to determine value.

An important source of legislative intent can be the language added to or stricken from a statute when it is amended. *Futura v. State Tax Commission,* 92 Idaho 288, 442 P.2d 174 (1968). The one percent statute as enacted by initiative on November 7, 1978, was amended by the 1979 legislature. See H.B. 166, 1979 *Session Laws,* Ch. 18, pg. 23. Before this amendment, the statute required all property to be valued at its 1978 "actual market value," subject to certain adjustments. After the section was amended in 1979, the statute required all property to be valued by using "1978 market value levels," subject to an adjustment for inflation. This change in language should not be considered to be an idle act by the legislature. *Richardson v. State Tax Commission,* ____ Idaho ____ (Case No. 12736, Dec. 14, 1979). By changing the language, the legislature has modified the measure by which property should be valued.

Nothing in the language of the statute precludes accounting for depreciation when determining the value of property. The value of any particular property, whether real or personal, is to be determined based upon the 1978 "market value levels," as adjusted for inflation at an annual rate not to exceed two percent. This means that each property, whether real or personal, is to be valued each year by using the adjusted 1978 market values. This market value level is to be applied to taxable property for the year 1980 and later years. However, the assessor must apply the "1978 market value levels," as adjusted, to the property as it exists in the year for which the assessment is made. Therefore, an item of personal property must have its value determined using the adjusted 1978 market value levels (as determined by regulations of the State Tax Commission) by applying those levels to the property as it exists during the tax year for which the appraisal is made.

A method of giving effect to this construction of the statute is illustrated below. The example is entirely hypothetical and is provided only as an illustration. It is the responsibility of the State Tax Commission to promulgate rules and regulations guiding county assessors' establishment of actual values of specific types or categories of personal property. *Idaho Code* §63-202.

As an example, assume a farm tractor had a 1978 market value of $10,000. In 1978, the tractor was five years old. Assume further that market analysis determines that such farm tractors generally have a useful life of twenty-five years. In 1978, the remaining useful life is twenty years. This means that the 1978 value will decrease at the rate of five percent per year. The 1980 market value for assessment purposes of the tractor should be the adjusted 1978 market value for a seven-year-old tractor. In two years the tractor has depreciated ten percent; therefore, the 1978 market value for assessment purposes should be reduced by ten percent. The result is the *un*adjusted 1978 market value level. The statute permits this level to be adjusted for inflation at a rate not to exceed two percent per year. Assuming an inflation rate equal to or greater than two percent per year, the unadjusted 1979 market value may be adjusted upward at the rate of two percent per year to determine the value to be placed on the 1980 roll. Thus, the tractor's "market value for assessment purposes" to be entered on the assessment roll in 1980 is $9,363.60. This is computed as follows:

1. 1978 Market Value = $10,000

2. 1979 Unadjusted Market Value:
   10,000 - (5% of 10,000) = 9,500

3. 1979 Adjusted Market Value:
   9,500 + (2% of 9,500) = 9,690

4. 1980 Unadjusted Market Value:
   (a) 10,000 - (10% of 10,000) = 9,000
   (b) 9,000 + (2% of 9,000) = **9,180***

   *Note that the 1980 unadjusted market value includes the 1979 inflation factor.

5. 1980 Adjusted Market Value:
   9,180 + (2% of 9,180) = $9,363.60

Note: If the $10,000 1978 market value of the five-year-old tractor is properly determined, it will include all market influences which affect that value — including, but not limited to, depreciation occurring between the original purchase and the 1978 assessment date.

Of course, this computation may be simplified by combining the depreciation rate and the inflation rate into a single factor. In our example, the 1980 market value for assessment purposes can be found by reducing the 1978 value by 6.3640%. The 1980 market value for assessment purposes of all property determined to have a remaining useful life of twenty years in 1978 can be determined by applying the same factor to the 1978 market value. Separate combined factors can be computed for property with different useful lives.

As was observed earlier in this opinion statutes must be construed in favor of constitutionality. Earlier opinions have stated that failure of the one percent statute to permit property to be valued at full current market value raises grave constitutional concerns. See Attorney General Opinions No. 78-37 dated September 15, 1978, and No. 79-16 dated July 17, 1979. The latter opinion observes that market variations occurring over a period of time and effecting different property differently may result in unjust valuation if only the two percent inflation factor is applied to the property. The construction given the statute by this opinion for the valuation of personal property will significantly diminish the problem in regard to personal property. This construction, therefore, is consistent with the principles stated at the beginning of this opinion — namely to give effect to both legislative intent and constitutional requirements.

This opinion must be tempered by emphasizing how little authority exists for the guidance given on this issue of valuing personal property under the one percent limitation statute. The variety of tangible personal property subject to tax, the often large changes in market value (both up and down) and the foreseeable fact that technology will produce new inventions for which no 1978 market value exists all combine to produce an extraordinarily treacherous legal quagmire. Nevertheless, the statutory language must be construed and applied. This opinion construes the language to the extent possible to meet the constitutional demand for just and uniform taxation while giving maximum effect to the legislative intention as expressed in the statute.

AUTHORITIES CONSIDERED:

1. *Idaho Code* §§63-923, 63-202.

2. H.B. 166, 1979 *Session Laws,* Ch. 18, Pg. 23.

3. Cases: *Futura v. State Tax Commission,* 92 Idaho 288, 442 P.2d 174 (1968); *Idaho Telephone Company v. Baird,* 91 Idaho 425, 523 P.2d 337 (1967); *Roe v. Hopper,* 90 Idaho 22, 408 P.2d 161 (1965); *Richardson v. State Tax Commission,* ____ Idaho ____ (Case No. 12736, Dec. 14, 1979); *Scandrett v. Shoshone County,* 63 Idaho 46, 116 P.2d 225 (1941); *State v. Berntsen,* 68 Idaho 539, 200 P.2d 1007 (1948); *Streibeck v. Employment Security Agency,* 83 Idaho 531, 336 P.2d 589 (1962).

DATED this 11th day of January, 1980.

ATTORNEY GENERAL
State of Idaho
/s/ DAVID H. LEROY

ANALYSIS BY:

THEODORE V. SPANGLER, JR.
Deputy Attorney General

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

ATTORNEY GENERAL OPINION NO. 80-4

TO: The Honorable T.W. Stivers
State Representative
District 25
Statehouse Mail

Per Request for Legal Opinion

QUESTION PRESENTED:

Does the continuing appropriation of sales tax funds to the capital reserve fund of the Idaho Housing Agency as required by Idaho Code § 63-3638 (e) create a debt or liability of the State of Idaho in violation of art. 8, § 1, Idaho Constitution, or pledge the credit of the State in violation of art. 8, § 2, Idaho Constitution?

CONCLUSION:

Idaho Code § 63-3638 (e), which provides for a continuous appropriation from the sales tax account to the capital reserve fund of the Idaho Housing Agency, most likely does not violate either art. 8, § 1, or art. 8, § 2, Idaho Constitution.

ANALYSIS:

Idaho Code § 63-3638, which creates in the state operating fund an account designated as the "Sales Tax Account," provides, at subsection (e), as follows:

> An amount equal to the sum required to be certified by the chairman of the Idaho housing agency to the state tax commission pursuant to section 67-6211, Idaho Code, in each year is hereby continuously appropriated and set aside and shall be paid from the sales tax account to any capital reserve fund, established by the Idaho housing agency pursuant to section 67-6211, Idaho Code. Such amounts, if any, as may be appropriated hereunder to such capital reserve fund of the Idaho housing agency shall be repaid to the sales tax account, subject to the provisions of section 67-6215, Idaho Code, by the Idaho housing agency, as soon as possible, from any moneys available therefor and in excess of the amounts which the agency determines will keep it self-supporting.

Idaho Code § 67-6211 provides that the Idaho Housing Agency shall create and establish one or more special funds to be known as capital reserve funds and further provides, at subsection (g), that, within 60 days after the close of the agency's fiscal year, the chairman of the agency shall certify to the state tax commission the amount, if any, required to maintain the capital reserve funds at the maximum capital reserve fund requirement. It further provides, however, that the chairman shall not be entitled to so certify at any time that the total principal amount of the agency's outstanding bonds exceeds the sum of two hundred million dollars. At subsection (h), the same statute provides that the agency shall not issue bonds at any time if upon issuance there will be created a capital reserve fund and the amount in the capital reserve fund securing such bonds will be less than the maximum capital reserve fund requirement, unless the agency, at the time of the issuance of such bonds, deposits in the capital reserve fund, from the proceeds of the bonds so to be issued, or from sources other than the state sales tax fund, an amount which, together with the amount then in such fund, will not be less than the maximum capital reserve fund requirement.

The issue is whether these statutory provisions, particularly the continuing appropriation from the sales tax account, violate article 8, sections 1 or 2, Idaho Constitution. Art. 8, § 1, provides, in pertinent part: "The legislature shall not in any manner create any debt or debts, liability or liabilities, which shall singly or in the aggregate . . . exceed in the aggregate the sum of two million dollars. . . ." with certain exceptions not pertinent to this issue. Art. 8, § 2, Idaho Const. provides:

> 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 the unused water power within this state.

It is a fundamental rule of statutory construction that it is presumed that legislative acts are constitutional and that the legislature has acted within its constitutional powers. *State v. Rawson,* 100 Idaho 308, 597 P.2d 31 (1979); *Board of County Cmr.'s. v. Idaho Health Facilities Authority,* 96 Idaho 498, 531 P.2d 588 (1975); *Leonardson v. Moon,* 92 Idaho 796, 451 P.2d 542 (1969). The courts will uphold legislative enactments against claims of unconstitutionality unless there is a clear violation of the constitution. *Caesar v. Williams,* 84 Idaho 254, 371 P.2d 241 (1962); *Padgett v. Williams,* 82 Idaho 114, 350 P.2d 353 (1960). When a statute is susceptible to constitutional construction, that construction must be adopted. *Nelson v. Marshall,* 94 Idaho 726, 497 P.2d 47 (1972). As to all

of the above constitutional considerations see 2A Sutherland *Statutory Construction,* § 45.11, at 33 (4th ed. 1973).

We note, first, that, in all probability, the obligations of the Idaho Housing Agency itself, including its bonded indebtedness, are not debts or liabilities of the state within the meaning of art. 8, § 1, Idaho Constitution. The Idaho Supreme Court has held that a public body which lacks the power to tax or to encumber the assets of the body which creates it is not an entity within the meaning of the constitutional prohibitions against indebtedness. *Lloyd v. Twin Falls Housing Authority,* 62 Idaho 592, 113 P.2d 1102 (1941); *Wood v. Boise Jr. College Dormitory Housing Comm.,* 81 Idaho 379, 342 P.2d 700 (1959); *Boise Redevelopment Agency v. Yick Kong Corp.,* 94 Idaho 876, 499 P.2d 575 (1972); *Board of County Comr's. v. Idaho Health Facilities Authority,* 96 Idaho 498, 531 P.2d 588 (1975). Where an independent public body cannot levy or collect taxes, encumber its property, or resort to the state's general fund, and where its bonds or other obligations are payable solely from its revenues or some source other than the general funds of the state, there is no violation of art. 8, § 1. *Idaho Water Resource Board v. Kramer,* 97 Idaho 535, 548 P.2d 35 (1976); *State v. State Board of Education,* 56 Idaho 210, 52 P.2d 141 (1935); *Wood v. Boise Jr. College Dorm. Housing Comm., supra.*

The Idaho Housing Agency is created by statute as an independent public body corporate and politic (I.C. § 67-6202), for the purpose of providing safe or sanitary dwelling accommodations for persons of low income. It has no taxing authority of its own. I.C. § 67-6224. Although the governor appoints its governing board (I.C. § 67-6203), the agency operates independently of state administrative control, in a manner similar to the governing bodies of local housing or urban renewal agencies. Cf. *Lloyd v. Twin Falls Housing Authority, supra,* and *Boise Redevelopment Agency v. Yick Kong Corp., supra,* both of which held that those entities were independent agencies and thus not subject to the debt limitation of the Idaho Constitution. The Idaho Housing Agency does have the authority to issue notes and bonds (I.C. § 67-6210), but the remedies of the bondholders are limited by law (I.C. § 67-6215A) to actions against the agency itself, not the state. I.C. § 67-6223A provides that nothing in the statutes shall be construed as authorizing the state or any political subdivision to give credit or make loans to the agency. I.C. § 67-6224 expressly provides that nothing in the statutes governing the housing agency shall be construed as authorizing the agency to levy or collect taxes or assessments, to create any indebtedness payable out of taxes or assessments, or in any manner to pledge the credit of the state or any political subdivision thereof. We find no indication in the statutes that the agency is authorized in any way to encumber or draw upon state funds beyond the amount appropriated by the Legislature under I.C. § 63-3638(e).

Based upon the foregoing analysis, it is our opinion that, although the Idaho Housing Agency is a public entity, it is not an agency of the state within the meaning of art. 8, §§ 1 or 2, Idaho Constitution, since it is independent of state administrative control, has no taxing authority, and cannot encumber the assets or general funds of the state.

There remains, however, the question whether the continuing appropriation language of Idaho Code § 63-3638(e) constitutes a form of encumbrance upon the state's funds which would constitute a prohibited indebtedness or liability of the state. In our opinion, it would not, since an appropriation of state funds for a public purpose does not constitute a debt or liability. A case closely in point is *Ada County v. Wright,* 60 Idaho 394, 92 P.2d 134 (1939), in which a continuing

appropriation from the State Highway Fund to the various counties for use by counties, cities, and highway districts was attacked as unconstitutional on the ground, among other grounds, that it created a debt or liability of the state in violation of art. 8, § 1. The Supreme Court rejected this argument and held that a continuing appropriation from an excise tax fund was valid and did not constitute a prohibited indebtedness:

> The contention, that the act violates sec. 1, art. 8, of the constitution, in that it creates a debt or liability against the state in excess of the aggregate debt limit of $2,000,000 is without merit. This act creates no debt against the state in any sum whatever. It simply appropriates and directs the expenditure of the motor fuel tax collected from the sales of gas and motor fuels paid into the State Highway Funds. . . . 60 Idaho 394, 406.

Other cases have also recognized that an appropriation for a public purpose does not constitute a debt or liability. *Gem Irrigation District v. Gallet,* 43 Idaho 519, 253 P. 128 (1927) and *Davis v. Moon,* 77 Idaho 146, 289 P.2d 614 (1955) both characterized an appropriation as a cash transaction in which the state gives or lends nothing. See also *Leonardson v. Moon,* 92 Idaho 796, 451 P.2d 542 (1969), which, like *Ada County v. Wright, supra,* dealt with and upheld a continuing appropriation from an excise tax fund.

As noted above, there is no provision in the law whereby a bondholder or other creditor of the Idaho Housing Agency, nor the agency itself, could fall back upon the funds of the state beyond the amount appropriated by it. I.C. §§ 67-6215A, 67-6224. Thus, the appropriation creates no "debt" or "liability" within the meaning of art. 8, § 1. See *Idaho Water Resource Board v. Kramer,* 97 Idaho 535, 548 P.2d 35 (1976), which stated:

> As used in art. VIII, § 1 of the State Constitution, a "debt" refers to an obligation of the state, which creates a legal duty on its part to pay from the general fund a sum of money to another, who occupies the position of a creditor, and who has a lawful right to demand payment. . . . It contemplates an obligation which is irrevocable and requires for its satisfaction levies *beyond the appropriations made available by the Legislature* to meet the ordinary expenses of state government for the fiscal year. 97 Idaho 535, 556. [Emphasis added.]

The next issue is whether the continuing appropriation to the capital reserve fund constitutes the giving or loaning of the state's credit in aid of an individual, association, municipality, or corporation in violation of art. 8, § 2, Idaho Const.

First, to the extent that the appropriation could be characterized as a "loan" to the capital reserve fund, on the theory that the funds are to be repaid under the second sentence of I.C. § 63-3638 (e), there appears to be no violation of art. 8, § 2. As was stated in *Nelson v. Marshall,* 94 Idaho 726, 497 P.2d 47 (1972), art. 8, § 2, does not prohibit the loan of state *funds;* it prohibits the loan of the state's *credit.* Secondly, the Supreme Court has consistently held that art. 8, § 2, applies only to the giving or loaning of credit to a municipality or to an individual, association, or corporation for a *private* purpose. There is no prohibition against appropriating funds for a *public* purpose. *Nelson v. Marshall, supra; Engelking v. Investment Board,* 93 Idaho 217, 458 P.2d 213 (1969). This raises the question whether an appropriation of state funds to the capital reserve fund of the Idaho Housing Agency is for a public purpose.

It does not appear that the Idaho Supreme court has ruled directly upon the specific issue of whether the functions of the Idaho Housing Agency constitute a public purpose. However, the holdings of the Supreme Court in many similar cases leave little doubt but that, if presented with the issue, the court would find an adequate public purpose. The legislature itself, at I.C. § 67-6201, has declared the functions of the Idaho Housing Agency to be a public purpose, and, while this declaration is not necessarily binding on the court [*Village of Moyie Springs v. Aurora Mfg. Co.*, 82 Idaho 337, 353 P.2d 767 (1960)], it will be accorded great weight. *Board of County Comr's. v. Idaho Health Facilities Authority,* 96 Idaho 498, 502, 531 P.2d 588 (1975) ("This legislative declaration of public purpose is entitled to the utmost consideration. . . .") *Boise Redevelopment Agency v. Yick Kong Corp.*, 94 Idaho 876, 499 P.2d 575 (1972) held an urban renewal program directed at clearance of blighted or deteriorated areas to be a public purpose, notwithstanding resulting incidental benefits to private interests. (Cf. *Nelson v. Marshall, supra.*) Numerous cases from other states have held housing authorities to constitute a public purpose. 15 McQuillin, *Municipal Corporations* § 39.21, at 44 n.14 (3d. ed. 1970). In light of the legislative declaration contained in I.C. § 67-6201, we have little doubt that our court would hold the appropriation under I.C. § 63-3638 (e) to be for a public purpose and thus not violative of art. 8, § 2, Idaho Constitution.

In summary, it is our opinion that the appropriation of funds under I.C. § 63-3638 (e) does not violate art. 8, §§ 1 or 2, Idaho Constitution.

AUTHORITIES CONSIDERED:

1. Idaho Constitution, art. 8, §§ 1 and 2.

2. Idaho Code §§ 63-3638 and 67-6201 through 67-6224.

3. Idaho Cases:

   Gem Irrigation District v. Gallet, 43 Idaho 579, 253 P. 128 (1927).

   State v. State Board of Education, 56 Idaho 210, 52 P.2d 141 (1935).

   Ada County v. Wright, 60 Idaho 394, 92 P.2d 134 (1939).

   Lloyd v. Twin Falls Housing Authority, 62 Idaho 592, 113 P.2d 1102 (1941).

   Davis v. Moon, 77 Idaho 146, 289 P.2d 614 (1955).

   Wood v. Boise Jr. College Dormitory Housing Comm., 81 Idaho 379, 342 P.2d 700 (1959).

   Padgett v. Williams, 82 Idaho 114, 350 P.2d 353 (1960).

   Village of Moyie Springs v. Aurora Mfg. Co., 82 Idaho 337, 353 P.2d 767 (1960).

   Caesar v. Williams, 84 Idaho 254, 371 P.2d 241 (1962).

   Leonardson v. Moon, 92 Idaho 796, 451 P.2d 542 (1969).

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

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

Boise Redevelopment Agency v. Yick Kong Corp., 94 Idaho 876, 499 P.2d 575 (1972).

Board of County Com'rs. v. Idaho Health Facilities Authority, 96 Idaho 498, 531 P.2d 588 (1975).

Idaho Water Resource Board v. Kramer, 97 Idaho 535, 548 P.2d 35 (1976).

State v. Rawson, 100 Idaho 308, 597 P.2d 31 (1979).

4. Other Authorities:

2A Sutherland *Statutory Construction,* § 45.11 (4th ed. 1973).

15 McQuillin, *Municipal Corporations,* § 39.21 (3d ed. rev. 1970).

DATED this 28th day of January, 1980.

ATTORNEY GENERAL
State of Idaho
/s/ DAVID H. LEROY

ANALYSIS BY:

MICHAEL C. MOORE
Deputy Attorney General
Chief, Local Government Division

WARREN FELTON
Deputy Attorney General

ATTORNEY GENERAL OPINION NO. 80-5

TO: Kenneth Stephenson
State Representative
District #12
Statehouse
Boise, Idaho 83720

Per Request for Attorney General Opinion

QUESTIONS PRESENTED:

1. In a county in which one or more independent highway districts are located, but in which the county itself maintains a county road system outside of the cities and highway districts, may the county commissioners transfer to the existing highway districts the responsibility for maintaining the county road system without the approval of the voters?

2. May a new highway district be formed from the areas which are currently outside of the existing highway district boundaries?

CONCLUSIONS:

1. Chapter 27, Title 40, Idaho Code, authorizes county commissioners to change the boundaries of highway districts to include all or part of an existing county road system. No election is required.

2. The only possibility for creating new highway districts in Idaho is the creation of county wide highway districts under Idaho Code §§ 40-2703 and 40-2706 or 40-3001, et seq. The creation or consolidation of highway districts requires an election.

3. The possibility should also be considered of the use of contracts relating to joint exercise of powers under Idaho Code §§ 67-2327 to 67-2333.

ANALYSIS:

Idaho Code § 40-2708 reads as follows:

> In areas where, according to the formula set forth in this act, highway districts shall exist in number more than one, the county commissioners shall have the duty and obligation from time to time as shall be practical and for the best interests of the county wide administration of the secondary road systems, to adjust the borders of the highway districts coexisting in the county as shall most equitably and economically permit the administration, operation and construction of the secondary road system within said county. Notice of said proposal to change the boundaries of said highway districts, within the county, shall be given by the county commissioners through the county clerk to the districts affected or to be affected, at least ten (10) days prior to the pubic meeting of the county commissioners at which time any person objecting thereto may be heard in opposition thereof, and, upon the closing of the hearing, the county commissioners shall, within ten (10) days after the hearing, notify the districts affected of the decision of the county commissioners, and any district, aggrieved thereby, shall have the right through its highway commissioners to appeal said decision directly to the district court of the county wherein said districts lie. . . .

Idaho Code § 40-2710 provides that after the initial election on county highway reorganization, no county was to have part highway districts and part county road system, except in cases where the highway districts of the county include territory in more than one county. Idaho Code § 40-2718. The statute further provides that the county commissioners are authorized to take action to re-district so that the county will not consist partially of highway districts and partially of county road systems. In 1979 an amendment was added to Idaho Code § 40-2703, which allowed for the continued existence of any presently operated method of administration of the county road system, whatever that may be. However, until that time the county road systems were either to be administered by the county commissioners or by highway districts, but not both.

Idaho Code § 40-2729 provides that the County Highway Reorganization Act is to be construed to supersede all other laws enacted before 1963 whenever there is a conflict between those laws. Thus, it is our view that the earlier system

of detachment from or annexation of territory to a highway district under Title 40, Chapter 21, Idaho Code, which provided for elections, would, to the extent that the commissioners were carrying out the terms of Idaho Code §§ 40-2708 and 40-2710, be superseded by those two sections. It should also be noted that § 40-2705 provides that it is up to the county commissioners to make the highway district units workable in size in relation to property and taxes to be derived within the districts.

Since the provisions of Chapter 27 of Title 40 supersede the provisions of other chapters, such as Chapter 21, Title 40, it appears that the legislature has plainly stated that the commissioners themselves, through the procedure outlined in Idaho Code § 40-2708, may alter the boundaries of the various highway districts. We see no reason why this should not include placing property which is not within a highway district within one or more highway districts if the commissioners choose to do so. Any resolution to accomplish this should particularly describe the property transferred. *Worley Highway District v. Kootenai County,* 98 Idaho 925, 576 P.2d 206 (1978).

Since Idaho Code §§ 40-2708 and 40-2710 make no statement at all requiring an election, it is our view that no election is required to include property within the highway districts.

Idaho Code § 40-1601 provides that there shall be no new highway districts created. However, Idaho Code § 40-2706 provides for creation of new county-wide highway districts and for consolidation of highway districts within counties and, since Idaho Code § 40-2729 states that Chapter 27 of Title 40 supersedes all other laws with which it is in conflict. It is our view that it would be possible under Chapter 27 of Title 40 to create a county-wide highway district or to consolidate highway districts. However, in either of such cases, because of the terms of § 40-2706, it would be necessary to hold an election.

The commissioners might also consider use of the provisions of Idaho Code §§ 67-2327 through 67-2333, relating to contracts for joint exercise of power, under which the county might contract with the existing districts to maintain the county road system without changing the boundaries of the districts.

AUTHORITIES CONSIDERED:

1. Idaho Code §§ 40-1601, 40-2703, 40-2705, 40-2706, 40-2708, 40-2710, 40-2729, and 67-2327 through 67-2333.

2. *Worley Highway District v. Kootenai County,* 98 Idaho 925 576 P.2d 206 (1978).

DATED this 29th day of January, 1980.

ATTORNEY GENERAL
State of Idaho
/s/ DAVID H. LEROY

ANALYSIS BY:

WARREN FELTON
Deputy Attorney General
Local Government Division

DHL/WF/dm

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

ATTORNEY GENERAL OPINION NO. 80-6

TO: Milton G. Klein, Director
Department of Health & Welfare
Statehouse
Boise, Idaho 83702

Per Request for Attorney General Opinion

QUESTION PRESENTED:

". . . whether or not the Department of Health and Welfare has any authorization for entering into a collective bargaining agreement with the Idaho Service Employees Union, Local 687."

CONCLUSION:

The Department of Health and Welfare does *not* have authorization for entering into a collective bargaining agreement with the Idaho Service Employees Union, Local 687.

ANALYSIS:

The question presented necessarily involves either an application or a reconsideration of Attorney General Opinion No. 11-75 (a copy of which is attached) which concluded in relevant part:

> . . . There is no existing authorization for the state, its departments, agencies, institutions, or political subdivisions to enter into collective bargaining agreements or to further the purposes of collective bargaining for or with their employees.

The conclusion reached in Attorney General Opinion No. 11-75 remains valid with reference to departments of the State of Idaho generally and the Department of Health and Welfare specifically for the reasons given in the following paragraphs.

To commence our analysis it is useful to define collective bargaining. Collective bargaining, when referred to in this opinion, means the process by which an employer negotiates with his employees through an exclusive representative

regarding wages, hours and working conditions, instead of individually. *Com. of Virginia v. County Bd. of Arlington Cty.,* 217 Va. 558, 232 S.E. 2d 30, 39 (1977); *State Board of Regents v. United Packing House, Etc.,* 175 N.W. 2d 110, 112 (Iowa 1970).

As was pertinently noted in Attorney General Opinion No. 11-75, states and their political subdivisions are expressly excluded from the coverage of the Federal National Labor Relations Act. 29 U.S.C. §152(2)-(3). Thus, the legality of collective bargaining by these public entities is a matter of state law.

A perusal of state statutes reveals that no state statute exists either exclusively authorizing or prohibiting collective bargaining between state agencies and labor organizations. Moreover, there are no reported Idaho cases which directly address the question presented — i.e., whether a state agency may enter into collective bargaining absent express statutory authorization. However, the Supreme Court of Idaho on several occasions has considered the question of the applicability of the state's general collective bargaining statutes to employees in the public sector. See *Idaho Code,* Chapter 1, Title 44, and particularly *Idaho Code* §§44-107, 44-107A and 44-107B. An analysis of these cases, as well as cases from other states which have answered the issues raised by your question, creates serious doubt about the existence of any authority for your department to bargain collectively.

The majority rule continues to be that a public agency can not bargain with and enter into collective bargaining agreements with labor organizations concerning wages, hours and conditions of employment in the absence of express statutory authorization to do so. *Com. of Virginia v. County Bd. of Arlington Cty.,* 217 Va. 558, 232 S.E. 2d 30 (1977); *Communication Wkrs. of Am. v. Arizona Bd. of Regents,* 17 Ariz. App.398, 498 P.2d 472 (1972): *State Board of Regents v. United Packing House, Etc.,* 175 N.W.2d 110 (Iowa 1970): *International Union of Operating Engineers, Local 321 v. Water Works Board,* 276 Ala. 462, 163 So.2d 619 (1964): *Miami Water Works, Local 654 v. City of Miami,* 157 Fla., 455, 26 So.2d 194 (1946). See also Petro, *Sovereignty and Compulsory Public-Sector Bargaining,* 10 Wake Forest L.R. 25 (1974) (and authorities cited therein).

The decision in *Miami Water Works* that a public agency has no legal authority to bargain or contract with a labor union in the absence of express statutory authority is based in part on a conclusion that the general labor laws of the relevant state concerning labor relations and collective bargaining were operative only in the private sector. The court recognized the substantial differences between the nature, purpose and power of public and private employers. The Supreme Court of Idaho has adopted in part a similar rationale in holding that the Idaho statutes relating to investigation of labor controversies and certification of employee representatives do not apply in the public sector (*Local Union 283, Int'l Brotherhood of Electrical Workers v. Robinson,* 91 Idaho 445, 423 P.2d 999 (1967) and that Idaho statutes governing the issuance of injunctive relief in labor disputes are also not applicable in the public sector (*School District 351, Oneida County v. Oneida Education Ass'n.,* 98 Idaho 486, 567 P.2d 830 (1977)). Although the issue presented is whether authority for public entities to bargain voluntarily may be implied rather than whether mandatory, statutory labor law provisions are applicable to government employers, the rationale articulated in these Idaho cases is clearly relevant and affords a basis for predicting that the Idaho courts would adopt the majority viewpoint.

It should also be reiterated that some authority still exists for the contention that the Legislature can *not* delegate or abdicate continuing legislative discretion with regard to wages, hours and working conditions by authorizing public sector collective bargaining in the form utilized in the private sector. 31 *A.L.R.2d* 1142, 1170 (and authorities cited therein). The concurring opinion in *Local Union 283, Int'l. Brotherhood of Electrical Workers v. Robinson* adopted this principle in stating that the Legislature could not amend *Idaho Code* §44-107 to include public employers. See also Attorney General Opinion No. 11-75.

The courts which have held collective bargaining in the public sector to be valid despite the absence of specific statutory authority, typically and unlike the previously cited authority, have based their decisions on the existence of implied power. The authority to bargain collectively is found to be an incident of expressly granted authority — e.g., authority to hire, contract with employees and fix salaries. *Littleton Ed. Ass'n. v. Arapahoe County School Dist. 6,* 191 Colo. 411, 553 P.2d 793 (1976); *Chicago Div. of Ill. Ed. Ass'n. v. Board of Education,* 76 Ill. App. 456, 222 N.E. 2d 243 (1966). For an exhaustive article favoring such implied authority, see Dole, *State – Local Public Employee Collective Bargaining in the Absence of Specific Legislative Authority,* 54 Iowa L.Rev.539 (1969).

Even if the Supreme Court of Idaho would engage in a search for implied power to bargain collectively, it is doubtful that the court would hold in favor of such an implied power in behalf of the Department of Health and Welfare. This is so, given manifestations of legislative intent and probable construction of relevant Idaho statutes. Approval of the concept of limited collective bargaining in such narrow and select public fields as fire fighting (Idaho Code §§ 44-1801 — 44-1811) combined with recent disapproval of various proposals to confer general collective bargaining authority on the public sector is an indication that legislative intent disfavors an implied power to bargain collectively. Moreover, your relevant, expressly granted authority appears to be more limited than that possessed by the local public entities in *Littleton Education Association* and *Chicago Division of Illinois Education Association. Idaho Code* §39-106 (b) grants you the following power:

> Employ such personnel as be deemed necessary, prescribe their duties and fix their compensation *within the limits provided by the state personnel system law.* [Emphasis added.] See also *Idaho Code* §67-2405 (9).

At the very least, the underscored limitation would preclude collective bargaining in the private sector sense.

The Idaho Legislature has provided for certain specific benefits which are traditionally the subject matter of collective bargaining in the private sector. For example, Title 67, Chapter 53, *Idaho Code* — the enabling legislation of the Idaho Personnel Commission — controls not only the salaries to be paid to employees but also vacation, sick leave, overtime and grievance procedures. Title 59, Chapter 13, *Idaho Code,* establishes a comprehensive scheme providing for a system of retirement benefits for all public employees in the state. Similarly, rather than being the subject of collective bargaining, group insurance is provided for by Title 59, Chapter 12, which establishes the authority of the office of group insurance to contract with private companies for life, health, disability and similar types of insurance. These statutes thus reflect a legislative intent disfavorable to an implied power to bargain collectively. Moreover,

Idaho Code §§39-106 (b) and 67-2405 (9) are so limited by Title 67, Chapter 53, and Title 59, Chapters 12 and 13 that collective bargaining by you with regard to the subjects covered is effectively precluded.

The legal question presented, given the lack of an Idaho decision directly on point, can not be answered with certainty short of obtaining a judicial determination. Moreover, the recent Idaho case of *Local 1494 v. City of Coeur d'Alene,* 99 Id 630, 586 P.2d 1346 (1978), has arguably undermined the rationale of the earlier Idaho decision cited in this Opinion. In *Local 1494,* the Idaho Supreme Court reviewed *Idaho Code* §§44-1801 — 44-1811 and held in relevant part that Local 1494 firefighters had the right to strike even though the right was not expressly granted by statute. Such a right had been agreed to contractually. The wording of *Idaho Code* §44-1811 was deemed particularly relevant:

> *Strikes prohibited during contract.* — Upon consummation and during the term of the written contract or agreement, no firefighter shall strike or recognize a picket line of any labor organization while in performance of his official duties.

The court reasoned:

> . . . by expressly prohibiting strikes by firefighters during the term of a contract, the legislature either impliedly recognized their right to strike after expiration of the contract or, at a minimum, opened the door to such contractual agreement as the parties might reach in that regard.

586 P.2d at 1356. In addition the Court made much of the fact that *Idaho Code* §44-1811 was passed after failure of a bill which contained an absolute strike ban. 586 P.2d at 1357.

Local 1494, however, appears to be distinguishable from the question presented. The Court in *Local 1494* did not attempt to overrule the earlier Idaho authorities but apparently limited the holding to the legislation specifically covering firefighters (and to unfair labor practice strikes). 586 P.2d at 1354 n.4. This legislation expressly authorizes and mandates collective bargaining between a public employer and the exclusive representative of firefighters. Moreover, the wording of *Idaho Code* §44-1811 in context is more susceptible to inferring the right to strike for firefighters than *Idaho Code* §39-106 (b), in view of personnel statutes, is to inferring authority for the Department of Health & Welfare to bargain collectively. Lastly, and despite the suggestion that the City of Coeur d'Alene could contract to give its firefighters the right to strike under the circumstances of the case, the issues raised in *Local 1494* are not analogous to the issues discussed in this Opinion. *Local 1494* did not involve the delegation of legislative discretion absent statutory authority to a non-governmental entity — the labor union.

For the reasons discussed, it is highly unlikely that the Department of Health & Welfare has authority for entering into a collective bargaining agreement with the Idaho Service Employees Union, Local 687. Moreover, it would be advisable for practical reasons to engage in collective bargaining only pursuant to statutory guidelines. The need to clarify the relationships between collective bargaining and the state's personnel system has already been discussed. That other necessary clarity can be provided, and unnecessary disputes avoided, by legislation has been noted by one commentator as follows:

> The existence of a statute in the field of public employee bargaining is of major significance. As has been indicated, courts may sanction voluntary bargaining in the absence of statute but this will not always insure the desired result. For instance, a statute can spell out election procedure to be used in the determination of a majority representative in an appropriate unit. It can make clear that bargaining is to be on an exclusive basis with the organization that represents the majority of the employees in an appropriate unit. It can express other intents. If there is no statute, whatever attempts are made at bargaining may break down in arguments over procedure and over such questions as exclusive representation.

Seitz, *Legal Aspects of Public School Teacher Negotiating and Participating in Concerted Activities,* 49 Marquette L.R. 487, 498-499 (1966).

AUTHORITIES CONSIDERED:

1. *Idaho Code,* Title 44, Chapter 1; Title 59, Chapters 12, 13; Title 67, Chapter 53.

   Idaho Code §§ 39-106 (b); 44-107, 44-107A and 44-107B; 44-1801 — 1811; 67-2405 (9).

2. Idaho Cases:

   Local Union 283, Int'l. Brotherhood of Electrical Workers v. Robinson, 91 Idaho 445, 423 P.2d 999 (1967).

   School District 351, Oneida County v. Oneida Education Assn., 98 Idaho 486, 567 P.2d 830 (1977).

   Local 1494 v. City of Coeur d'Alene, 99 Idaho 630, 586 P.2d 1346 (1978).

   Attorney General Opinion No. 11-75.

3. Other Cases:

   Miami Water Works, Local 654 v. City of Miami, 157 Fla. 455, 26 So. 2d 194 (1946).

   International Union of Operating Engineers, Local 321 v. Water Works Board, 276 Ala. 462, 163 So.2d 619 (1964).

   State Board of Regents v. United Packing House, Etc., 175 N.W.2d 110, 112 (Iowa 1970).

   Communication Wkrs. of Am. v. Arizona Bd. of Regents, 17 Ariz. App. 398, 498 P.2d 472 (1972).

   Com. of Virginia v. County Bd. of Arlington Cty., 217 Va. 558, 232 S.E.2d 30, 39 (1977).

4. Other Authorities:

Dole, *State & Local Public Employee Collective Bargaining in the Absence of Specific Legislative Authority,* 54 Iowa L.Rev. 539 (1969).

Seitz, *Legal Aspects of Public School Teacher Negotiating and Participating in Concerted Activities,* 49 Marquette L.R. 487, 498-499 (1961).

DATED this 19th day of February, 1980.

ATTORNEY GENERAL
State of Idaho
/s/ DAVID H. LEROY

ANALYSIS BY:

LARRY K. HARVEY
Chief Deputy Attorney General

LKH/nt

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

ATTORNEY GENERAL OPINION NO. 80-7

TO: Darrell V. Manning
Director
Idaho Transportation Department
P.O. Box 7129
Boise, ID 83707

Per Request for Attorney General's Opinion

QUESTIONS PRESENTED:

1. In light of sections 2 and 4 of art. 8, Idaho Constitution, can the State of Idaho or any of its political subdivisions provide local rail service assistance, in the form of grants or loans to private railroad companies, for track rehabilitation or other projects, if such assistance is determined to effectuate a broad public purpose and to be in the best interests of the citizens of the state?

2. If the answer to the first question is negative, are there any legal obstacles involved if the state, through the Idaho Transportation Department, acts as a conduit for federal rail assistance funds, where the local share is obtained from private business interests?

3. Could local rail service assistance be accomplished by a quasi-public agency such as a state rail authority, a local or regional economic development district, or a port district?

4. In any of the above cases, could the state provide assistance if the railroad receiving the assistance were publicly, rather than privately, owned and operated?

CONCLUSIONS:

1. In light of §§ 2 and 4 of art. 8, § 4 of art. 12, Idaho Const., and the decisions of the Idaho Supreme Court, it appears unlikely that either the State of Idaho or any of its political subdivisions could make grants or loans of public funds in aid of privately owned railroads, notwithstanding a declaration by the Idaho legislature that such assistance would effectuate a broad public purpose and be in the best interests of the citizens of the state.

2. Although there does not presently appear to be clear statutory authority for the Idaho Transportation Department to act as a conduit for federal rail assistance funds to private railroad companies, such activity, if authorized by the legislature and not involving the channeling of state or local public funds to private companies, probably would not violate the above constitutional restrictions.

3. In the absence of a constitutional amendment authorizing such activity, it appears unlikely that any public entity, either at the state or local level, could utilize state or local public funds for assistance to privately owned railroads.

4. Assuming that public ownership or operation of a railroad is valid in Idaho, there appears to be no constitutional prohibition against the state lending its aid to publicly-owned railroads.

ANALYSIS:

1. *Direct state or local aid to railroads.* As we understand the situation to which your questions are directed, the local economies of several northern Idaho areas are being adversely affected by the recent bankruptcy or receivership of a major trunk line railroad, with the resulting closure, or threat of closure, of the portions of that railroad which previously were operated in Idaho. Your letter indicates that certain federal funds are available to states for rail rehabilitation projects, but that local matching funds are required. This, as your letter notes, raises certain questions as to the constitutionality of the use of state or local public funds for such purpose.

Three sections of the Idaho Constitution are relevant to this question. The first is art. 8, § 2, which provides:

> 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 the unused water power within this state.

The second is art. 8, § 4, which provides:

> No county, city, town, township, board of education, or school district, or other subdivision, shall lend, or pledge the credit or faith thereof directly or indirectly, in any manner, to, or in aid of any individual,

> association or corporation, for any amount or for any purpose whatever, or become responsible for any debt, contract or liability of any individual, association or corporation in or out of this state.

The third, art. 12, § 4, reads, in pertinent part, as follows:

> No county, town, city, or other municipal corporation, by vote of its citizens or otherwise, shall ever become a stockholder in any joint stock company, corporation or association whatever, or raise money for, or make donation or loan its credit to, or in aid of, any such company or association. . . .

These constitutional provisions impose both direct and indirect restrictions upon the state and its political subdivisions. The direct thrust of these sections is to prevent the state and its subdivisions from giving credit or making donations in aid of private interests. More broadly, as discussed below, they limit state and local governmental activities to purposes which are primarily public in nature. An incidental or indirect benefit to the public cannot transform a private industrial enterprise into a public one, or imbue it with a public purpose. *Village of Moyie Springs v. Aurora Mfg. Co.,* 82 Idaho 337, 353 P.2d 767 (1960).

The purpose of these constitutional provisions has been variously stated. One purpose is to prohibit direct or indirect aids to corporations or other private interests through inducement or subsidy. *Atkinson v. Board of Comr's. of Ada County,* 18 Idaho 282, 108 P. 1046 (1910). Another is to prevent the public's money from passing into the control of private associations or parties; to confine municipal expenditures to public objects and public officers and agents. *Fluharty v. Board of County Com'rs. of Nez Perce County,* 29 Idaho 203, 158 P. 320 (1916). It is to protect governmental entities from lending credit to or from becoming interested in any private enterprise, or from using funds derived from taxation in aid of any private enterprise. *School District No. 8 v. Twin Falls County Mutual Fire Ins. Co.,* 30 Idaho 400, 164 P. 1174 (1917). It is to prevent the state or one of its subdivisions from aiding, promoting, or sponsoring a particular commercial or industrial enterprise to the detriment of others in the field (*Village of Moyie Springs v. Aurora Mfg. Co.,* 82 Idaho 337, 353 P.2d 767 (1960)); to prevent favored status being given to any private enterprise or individual in the application of public funds (*Boise Redevelopment Agency v. Yick Kong Corp.,* 94 Idaho 876, 499 P.2d 575 (1972)); to preclude state action which principally aims to aid private schemes (*Idaho Water Resource Board v. Kramer,* 97 Idaho 535, 548 P.2d 35 (1976)).

The provisions of the constitution embody the fundamental principle that expenditures of public funds must be for public purposes. 15 McQuillin, *Municipal Corporations,* §§ 39.19 — 39.30 (3d ed. rev. 1970). The United States Supreme Court has recognized that the "public purpose" doctrine is embodied in the 14th Amendment, in that due process of law requires that there can be no lawful taxation which is not for a public purpose. *Loan Ass'n. v. Topeka,* 87 U.S. 655, 22 L. Ed. 455 (1874); *Green v. Frazier,* 253 U.S. 233, 40 S. Ct. 499, 64 L. Ed. 878 (1920) (stating that it is settled that the authority of the state to tax does not include the right to impose taxes for merely private purposes, citing *Fallbrook Irrigation Dist. v. Bradley,* 164 U.S. 155, 17 S. Ct. 56, 41 L. Ed. 369 (1896)); *Board of County Com'rs. v. Idaho Health Fac. Auth.,* 96 Idaho 498, 531 P.2d 588 (1975); *State v. Idaho Power Co.,* 81 Idaho 437, 346 P.2d 596 (1959); although that Court has also recognized that states have broad discretion in determining what type of activity is a "public purpose." *Green v. Frazier,* supra; *Carmichael v. Southern Coal & Coke Co.,* 301 U.S. 495, 57 S. Ct. 868, 81 L. Ed. 1245 (1937).

What is a "public purpose" has been the subject of many court decisions. The test for a public purpose has been stated to be whether the expenditure confers a direct benefit of reasonably general character to a significant part of the public, as distinguished from a remote or theoretical benefit. 15 McQuillin, *Municipal Corporations,* § 39.19 (3d ed. rev. 1970). A test stated in *Visina v. Freeman,* 252 Minn. 177, 89 N.W.2d 635 (1958), and which has expressly been recognized by the Idaho Supreme Court (*Idaho Water Resource Board v. Kramer,* 97 Idaho 535, 559, 548 P.2d 35, fn. 43 (1976)) is:

> What is a "public purpose" that will justify expenditure of public money is not capable of precise definition, but the courts generally construe it to mean such an activity as will serve as a benefit to the community as a body and which, at the same time, is directly related to the functions of government.

If a proposed appropriation or expenditure meets the "public purpose" test, it is immaterial that, incidentally, private ends may also be advanced. 15 McQuillin, *Municipal Corporations,* § 39.19; *Nelson v. Marshall,* 94 Idaho 726, 497 P.2d 47 (1972); *Boise Redev. Agency v. Yick Kong Corp.,* 94 Idaho 876, 499 P.2d 575 (1972); *Engelking v. Investment Board,* 93 Idaho 217, 458 P.2d 213 (1969). Even a direct loan of state funds to private associations or individuals will be upheld if it primarily furthers a broad public purpose such as development of the state's water resources. *Nelson v. Marshall, supra.* Conversely, however, if the primary object is to promote some private end, the expenditure is illegal even though it may incidentally serve some public purpose also. 15 McQuillin, *Municipal Corporations,* § 39.19; *Village of Moyie Springs v. Aurora Mfg. Co.,* 82 Idaho 337, 353 P.2d 767 (1960); *State v. Idaho Power Co.,* 81 Idaho 487, 346 P.2d 596 (1959). As an early Colorado Supreme Court decision noted, "if the existence of a public benefit is to . . . take it [the expenditure] out of the constitutional prohibition, then the prohibition is utterly nugatory and valueless, as such consideration would exist in every probable case." *Colorado Cent. R.R. v. Lea,* 5 Colo. 192 (1879).

Clearly, then, the mere fact that the particular expenditure would benefit the public does not in and of itself make it a "public purpose"; the expenditure must also be directly related to some *governmental* function or purpose. *Idaho Water Resource Board v. Kramer, supra.* Even a finding or declaration by the legislature that a particular venture constitutes a public purpose, while entitled to considerable weight, is not determinative; "public purpose" is ultimately a judicial question. *Bevis v. Wright,* 31 Idaho 676, 175 P. 815 (1918); *Village of Moyie Springs v. Aurora Mfg. Co., supra.* See Comment, "State Constitutional Provisions Prohibiting the Loaning of Credit to Private Enterprise — A Suggested Analysis," 41 Univ. of Colo. L. Rev. 135, 150 (1969); Comment, "State Constitutional Limitations on a Municipality's Power to Appropriate Funds or Extend Credit to Individuals and Associations," 108 U. Penn. L. Rev. 95 (1959).

In applying the constitutional provisions and the "public purpose" requirements to the question before us, we note that one of the primary and express purposes of constitutional provisions such as art. 8, §§ 2 and 4, and art. 12, § 4, Idaho Constitution, was to prevent state and local governments from using public funds in direct aid of corporations, particularly railroad companies. In a recent case, *Idaho Water Resource Board v. Kramer,* 97 Idaho 535, 548 P.2d 35 (1976), the Idaho Supreme Court said:

> This history of this constitutional provision, and others of its kind adopted in our sister states is well known. As stated succinctly in one law review article:
>
> "In the nineteenth century, the United States was enjoying a rapid westward expansion. A key element in this expansion was the construction of railroads and other communication and transportation systems, the routes of which vastly influenced growth. An adjacent railroad was often crucial to the economic growth, if not the very existence, of many localities. As a result, state and local governments, in order to encourage specific routes and spurs, offered financial assistance to struggling railroads. This assistance was not entirely without precedent in light of earlier successes with similar projects such as the Erie Canal. Governmental assistance usually took the form of stock or security purchases, or co-signatures on bonds issued by railroads. Since these private ventures were at best highly speculative, many failed, leaving governmental units, and thus the taxpayer, either holding worthless stock certificates, or, even worse, liable for large inadequately secured debts.
>
> * * *
>
> "The resulting economic crisis led to the passage of constitutional provisions designed to limit state indebtedness and restrict governmental involvement in private ventures. Forty-five state constitutions contain provisions prohibiting the lending of credit. . . ." 97 Idaho 535, 560. (Citing Comment, "State Constitutional Provisions Prohibiting the Loaning of Credit to Private Enterprise — A Suggested Analysis," 41 Univ. of Colo. L. Rev. 135, 136 (1969).)

See also, *Boise Redevelopment Agency v. Yick Kong Corp.*, 94 Idaho 876, 499 P.2d 575 (1972), where the court, discussing the background and purpose of art. 8, § 4, said:

> The proceedings and debates of the Idaho Constitutional Convention indicate a consistent theme running through the consideration of the constitutional sections in question. It was feared that private interests would gain advantages at the expense of the taxpayers. *This fear appeared to relate particularly to railroads and a few other large businesses* who had succeeded in gaining the ability to impose taxes, at least indirectly, upon municipal residents in western states at the time of the drafting of our constitution. 94 Idaho 876, 883-884 [Emphasis added.] Also Gelfand, "Seeking Local Governmental Financial Integrity Through Debt Ceilings, Tax Limitations, and Expenditure Limits," 63 Minn. L. Rev. 545, 546-47 (1979).

The foregoing statements are supported by the reports of the Idaho Constitutional Convention of 1889. During a debate on a proposed provision which would have prohibited any municipal indebtedness, delegate Willis Sweet, of Latah County, noted:

> I would say, Mr. Chairman, in Nebraska and Iowa, in fact in nearly all of the western states, railway corporations and others of that character induced the people of counties and towns to vote subsidies in the way of bonds to aid them in the construction of railways, until the people in

> those states became so burdened with taxes that they turned upon all sorts and kinds of indebtedness. . . .
>
> * * *
>
> Well, all those states have turned against corporations and the voting of subsidies, and I think very justly, and I think the example of those states should be a lesson to us to avoid giving permission to municipalities to vote such subsidies; still I don't think it should extend to prohibiting towns and cities from having a reasonable indebtedness for school and sanitary purposes. I *Proceedings of the Idaho Constitutional Convention* 597.

Delegate Sweet's viewpoint prevailed at the convention. The proposed section prohibiting all municipal indebtedness was defeated. Art. 8, § 3 was adopted to limit municipal indebtedness except for certain purposes, and art. 8, §§ 2 and 4, and art. 12, § 4, which embodied his view against subsidies to railroads and other corporations, were adopted.

The Idaho Supreme Court adhered to this view in the only case dealing with public aid to railroads which has come before it, *Atkinson v. Board of Com'rs. of Ada County,* 18 Idaho 282, 108 P. 1046 (1910). In that case, the validity of a statute, enacted by the 1909 Idaho legislature, which authorized the formation of public highway districts to construct railroads, among other purposes, was in question. The court held the act to be unconstitutional under art. 8, §§ 2 and 4, and art. 12, § 4, Idaho Constitution. It noted that such a district obviously could build only a part of a railroad — a branch line or feeder to a main or trunk line, resulting in the building of a branch line for the use of or donation to the main line. It cited with approval cases from other states holding that constitutional provisions similar to Idaho's forbid the union of public and private capital or credit in any enterprise whatever. The court also noted that the 1905 Idaho legislature submitted to the voters a proposition to amend art. 8, § 4, Idaho Constitution, to authorize counties, cities, and other municipalities or subdivisions of the state, by vote of the people, to make donations to any railroad or other works of internal improvement, and that this amendment was overwhelmingly defeated by the voters.

Nearly all cases decided in other states, under similar constitutional provisions, have held that donations, aid, or subsidies to privately-owned railroad companies are unconstitutional. 15 McQuillin, *Municipal Corporations,* §§ 39.26, 39.27a; *Murphy v. Dever,* 320 Ill. 186, 150 N.E. 663 (1926); *Texas & N.D.R. Co. v. Galveston County,* 161 S.W.2d 530 (Tex Civ. App. 1942); *Minneapolis, St. P. etc. Ry. v. City of Minneapolis,* 145 N.W. 609 (Minn. 1914).

We are led to the inescapable conclusion, then, that public assistance, whether by loan, subsidy, or donation of matching funds, to or in aid of any privately owned railroad company would violate the clearly expressed intent and purpose of art. 8, §§ 2 and 4, and art. 12, § 4, Idaho Constitution.

Against this view, an argument of course could be made that times have changed since 1889, that railroad companies no longer maintain the economic power over state legislatures and local communities they once did, that the risk of incurring great municipal indebtedness for aid to railroads is no longer present, and that a public purpose could be declared by the legislature due to the economic hardships which would be inflicted upon local communities by poten-

tial loss of rail service. We find such arguments unpersuasive in light of the clearly expressed restrictions of the constitution, and we are of the opinion that the courts would be unpersuaded by them, too. Changes in economic conditions do not change the clear provisions of the constitution. As an early Michigan case held, taxation (and expenditure) for the benefit of a railroad is no more a public purpose than taxation to benefit any private business which might appear to be a local necessity. *People ex rel. Detroit & H.R.R. v. Township Board,* 20 Mich. 452 (1870).

2. *Can the Department of Transportation act as a conduit for federal funds where the local matching funds are derived from non-public sources?*

Although, as discussed above, the Idaho Supreme Court has generally taken a strict stance against involvement of public funds with private enterprises, it has not viewed the Idaho Constitution as prohibiting all public involvement with private business. The court has recognized a number of situations in which the restrictions of art. 8, §§ 2 and 4, and art. 12, § 4, are not applicable. The court has consistently held that, to constitute a violation of these sections, there must be an imposition of some financial liability upon the state or one of its subdivisions; some debt or obligation for the benefit of private enterprise or other non-public entity. *Idaho Water Resource Board v. Kramer,* 97 Idaho 535, 548 P.2d 35 (1976); *Hansen v. Kootenai County Board of Comr's.,* 93 Idaho 655, 471 P.2d 42 (1970); *Engelking v. Investment Board,* 93 Idaho 217, 458 P.2d 213 (1969); *Hanson v. City of Idaho Falls,* 92 Idaho 512, 446 P.2d 634 (1968); *Hansen v. Ind. School Dist. No. 1,* 61 Idaho 109, 98 P.2d 595 (1939).

> Article 8, section 4 and article 12, section 4, of the Idaho Constitution prohibit the lending of credit by the state and its political bodies in aid of private objectives. To constitute a violation of said provisions it is essential that there be an imposition of *liability,* directly or indirectly, on the political body. Unless the credit or faith of respondent is obligated there is no constitutional inhibition. *Hansen v. Ind. S. Dist. No. 1, supra,* 61 Idaho 109, 114. (Upholding a lease of school property to a private organization.)

Although we find no case law in Idaho dealing directly with this point, it appears likely that, as long as no public moneys or property are obligated and/or pledged, such activity on the part of the state would not violate art. 8, §§ 2 or 4, or art. 12, § 4, Idaho Constitution.

However, the particular state agency would first have to be authorized by the legislature to undertake such responsibility. An examination of the statutes creating the divisions of the Department of Transportation (I.C. §§ 21-104, 40-111) reveal no such legislative authorization at the present time. Enabling legislation would appear to be necessary.

3. *Could rail assistance be accomplished through a quasi-public agency or authority?*

A number of cases in Idaho have held that certain state-created entities are not within the restrictions of art. 8 of the Idaho Constitution. *Board of County Comr's. v. Idaho Health Facilities Authority, supra* (health facilities authority); *Barker v. Wagner,* 96 Idaho 214, 526 P.2d 174 (1974) (irrigation districts); *Boise Redevelopment Agency v. Yick Kong Corp.,* 94 Idaho 876, 499 P.2d 575 (1972)

(independent city urban renewal agency); *Wood v. Boise Jr. College Dormitory Housing Comm.,* 81 Idaho 379, 342 P.2d 700 (1959) (college dormitory housing commission); *Lloyd v. Twin Falls Housing Authority,* 62 Idaho 592, 113 P.2d 1102 (1941) (independent municipal housing authority).

The rationale of all of these cases is that (1) none of these entities are specifically enumerated in art. 8 of the Idaho Constitution, (2) none of them have any taxing power or authority of their own, and (3) none of them have any power to encumber the assets of the state or the municipality which created it. Additionally, in each case the court, either expressly or by necessary implication, found that the activities of the particular entity not only did not obligate the funds of the state or any municipality or lend or pledge the state's credit or that of the municipality, but also served a broad public purpose.

In our opinion, creation of a quasi-public body, such as a state or local rail authority or economic development district, empowered either to raise funds through taxation or to utilize funds of the state or any political subdivision thereof, would fail on two grounds, first, because the ability to tax or to encumber the credit or assets of the state or its subdivisions would bring the entity under, and in violation of, the restrictions of article 8 of the Constitution, and, secondly, because the purpose and activities of such an entity (financial assistance to privately owned railroad companies) would no more be a public purpose by reason of being conducted by a quasi-public entity than it would be if conducted by the state itself or by one of its political subdivisions.

We find support for this conclusion in many of the Idaho Supreme Court decisions mentioned above, and also in the case of *O'Bryant v. City of Idaho Falls,* 78 Idaho 313, 303 P.2d 672 (1956). In that case, the city attempted to circumvent the debt restrictions of art. 8, § 3, Idaho Constitution, by creating a quasi-public corporation to construct and operate a gas distribution system. The court held that a plan to evade and circumvent the constitutional limitation upon the creation of debt is not valid merely because the indebtedness is delcared not to be an obligation of the municipality. To the same effect is *Village of Moyie Springs v. Aurora Mfg. Co.,* 82 Idho 337, 353 P.2d 767 (1960).

A state-created agency with either the power to tax or the ability to utilize or encumber public funds of the state or its subdivisions would thus be faced with the same constitutional problems facing the state itself; i.e., the prohibition against the use of public funds to serve what is essentially a private purpose.

We have also considered the possibility of a port district accomplishing some or all of the above purposes. Port districts unquestionably have broader constitutional powers than do many other state entities. Under the 1964 amendment to art. 8, § 3, Idaho Const., port districts may issue revenue bonds to carry out purposes authorized by law without a vote of the electors, and art. 8, § 3B, approved by the voters in 1978, specifically authorizes port districts to acquire, construct, and equip facilities and projects for sale or lease to private entities and to issue revenue bonds therefor. These provisions, together with the statutory powers granted to port districts under I.C. §§ 70-1101 et seq., clearly enable such districts to carry out many functions which other public entities (including, in some instances, the state itself) may be prohibited from doing. Port-related activities have often been held to constitute a "public purpose" even where they directly benefit private interests. *Visina v. Freeman,* 252 Minn. 177, 89 N.W.2d 635 (1958).

Nevertheless, port districts are public entities. They are created by vote of the electors (I.C. § 70-1102 et seq.), are governed by a publicly-elected board of commissioners (I.C. §§ 70-1203 et seq.), are granted the power of eminent domain (I.C. § 70-1502), and have the authority to levy ad valorem property taxes (I.C. § 70-1702). We find no indication that port districts are exempt from the restrictions of Idaho Const. art. 8, § 4, or art. 12, § 4, except to the extent specifically authorized by art. 8, § 3B of the Constitution. Nor do we find any authorization in the governing statutes (I.C. §§ 70-1501, et seq.) for a port district to carry out a rail assistance program, especially outside of its own boundaries. (Port districts may create industrial development districts within their boundaries. I.C. §§ 70-1901, et seq.) Port districts, as any other public entity, are limited to functions and expenditures which are public in nature. While the concept of "public purpose" may be somewhat broader for port districts than for other governmental entities when carrying out port-related activities, we find no authorization for a port district to carry out a function, such as rail assistance, which is not directly port-related and is primarily for the benefit of a privately-owned company.

4. *Could the state provide rail assistance to a publicly-owned railroad?*

Constitutional restrictions such as Idaho Const. art. 8, §§ 2 and 4, and art. 12, § 4, are aimed at private, not public, corporations. 15 McQuillin, *Municipal Corporations,* § 39.26. Many Idaho Supreme Court decisions have held that there is no violation of the constitutional provisions where one public entity aids or lends its credit to another public entity.

> We are led to the firm conviction that only private interests were intended to fall within the strictures of those sections relating to "association," "corporation," and "joint stock company."
>
> * * *
>
> Plaintiff, being a public and not a private enterprise, does not fall within the strictures and prohibition of Article 8, Section 4 and Article 12, Section 4 of the Idaho Constitution. . . . *Boise Redevelopment Agency v. Yick Kong Corp.,* 94 Idaho 876, 884, 499 P.2d 575 (1972).

See also *Board of County Comr's. v. Idaho Health Facilities Authority,* 96 Idaho 498, 531 P.2d 588 (1975), and *Suppiger v. Enking,* 60 Idaho 292, 91 P.2d 362 (1939).

It is our opinion, then, that aid by the state to a public entity for a publicly-owned rail system probably would not be held to violate the constitutional restrictions. However, it is not altogether clear, under the decisions of the Idaho Supreme Court, whether a city or county could lawfully become owners of all or part of a railroad system. There is language in the early case of *Atkinson v. Board of Comr's. of Ada County,* 18 Idaho 282, 108 P. 1046 (1910) to the effect that it was never contemplated by the framers of the constitution that counties or other political subdivisions would or could go into railroad building, and this and other cases clearly indicate that ownership of part of a rail line in joint venture with private interests would violate the Constitution. We note that cities are specifically authorized (I.C. § 50-322) to acquire and operate transit systems, which presumably includes street rail systems. Counties do not appear to have such power. At a minimum, such general railroad ownership would probably have to be legislatively authorized, with adequate declarations and findings that such ownership constitutes a public purpose.

SUMMARY:

It is our opinion that the state and its subdivisions cannot, directly or through creation of independent "quasi-public" entities, grant financial aid through donation or loan of public funds to privately-owned railroad companies.

Many parts of the foregoing opinion are based upon the conclusion that direct financial aid to a privately-owned railroad would not constitute a "public purpose" even if the legislature were to declare it to be so. This is based upon the many statements to that effect contained in the decisions of the Idaho Supreme Court, the proceedings of the Idaho Constitutional Convention, and the cases and authorities from elsewhere in the country. In preparation of this opinion, we were not unmindful, however, either of the strong presumption of constitutionality of any legislative act or of the great weight which the courts will accord to a legislative finding or declaration that a particular activity is a public purpose. It is conceivable (although not, in our opinion, probable) that, should the Idaho legislature enact a comprehensive rail assistance plan in which it is found and declared to be an important public purpose of the state and its subdivisions to aid privately-owned railroads through grants, loans, subsidies, etc. of private funds, the Supreme Court could view such activity as being sufficiently public in nature to meet the public purpose requirement and the restrictions of Idaho Const. art. 8, §§ 2 and 4, and art. 12, § 4. In light of the history of the inclusion of those sections in our Constitution, the evils against which the framers of those provisions sought to guard, and the many statements of the Idaho Supreme Court referred to in this opinion, we view such a holding to be unlikely. Only enactment of such legislation, followed by litigation to test its validity, could determine this issue with certainty.

AUTHORITIES CONSIDERED:

1. I *Proceedings of the Idaho Constitutional Convention* 597.

2. *Idaho Constitution* art. 8, §§ 2, 3, 3B, 4; art. 12, § 4.

3. *Idaho Code* §§ 21-104, 40-111, 50-322, 70-1101 et seq., 70-1203, 70-1501 et seq., and 70-1901 et seq.

4. *Idaho Cases:*

a. *Atkinson v. Board of Comr's. of Ada County,* 18 Idaho 282, 108 P. 1046 (1910).

b. *Fluharty v. Board of Comr's. of Nez Perce County,* 29 Idaho 203, 158 P. 320 (1916).

c. *School Dist. No. 8 v. Twin Falls County Mut. Fire Ins. Co.,* 30 Idaho 400, 164 P. 1174 (1917).

d. *Bevis v. Wright,* 31 Idaho 676, 175 P. 815 (1918).

e. *Suppiger v. Enking,* 60 Idaho 292, 91 P.2d 362 (1939).

f. *Hansen v. Ind. School Dist. No. 1,* 61 Idaho 109, 98 P.2d 595 (1939).

g. *Lloyd v. Twin Falls Housing Authority,* 62 Idaho 592, 113 P.2d 1102 (1941).

h. *O'Bryant v. City of Idaho Falls,* 78 Idaho 313, 303 P.2d 672 (1956).

i. *Wood v. Boise Jr. College Dormitory Housing Comm.,* 81 Idaho 379, 342 P.2d 700 (1959).

j. *State v. Idaho Power Co.,* 81 Idaho 437, 346 P.2d 596 (1959).

k. *Village of Moyie Springs v. Aurora Mfg. Co.,* 82 Idaho 337, 353 P.2d 767 (1960).

l. *Hanson v. City of Idaho Falls,* 92 Idaho 512, 446 P.2d 634 (1968).

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

n. *Hansen v. Kootenai County Board of Comr's.,* 93 Idaho 655, 471 P.2d 42 (1970).

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

p. *Boise Redevelopment Agency v. Yick Kong Corp.,* 94 Idaho 876, 499 P.2d 575 (1972).

q. *Barker v. Wagner,* 96 Idaho 214, 526 P.2d 174 (1974).

r. *Board of County Comr's v. Idaho Health Fac. Auth.,* 96 Idaho 498, 531 P.2d 588 (1975).

s. *Idaho Water Resource Board v. Kramer,* 97 Idaho 535, 548 P.2d 35 (1976).

5. *Other Cases:*

a. *Loan Ass'n. v. Topeka,* 87 U.S. 655, 22 L. Ed. 455 (1874).

b. *Fallbrook Irrigation Dist. v. Bradley,* 164 U.S. 155, 17 S. Ct. 56, 41 L. Ed. 369 (1896).

c. *Green v. Frazier,* 253 U.S. 233, 40 S. Ct. 499, 64 L. Ed. 878 (1920).

d. *Carmichael v. Southern Coal & Coke Co.,* 301 U.S. 495, 57 S. Ct. 868, 81 L. Ed. 1245 (1937).

e. *Colorado Cent. R.R. v. Lea,* 5 Colo. 192 (1879).

f. *Murphy v. Dever,* 320 Ill. 186, 150 N.E. 663 (1926).

g. *People ex rel. Detroit & H.R.R. v. Township Board,* 20 Mich. 452 (1870).

h. *Minneapolis, St. P. etc. Ry. v. City of Minneapolis,* 145 N.W. 609 (Minn. 1914).

i. *Visina v. Freeman,* 252 Minn. 177, 89 N.W.2d 635 (1958).

j. *Texas & N. D. R. Co. v. Galveston County,* 161 S.W.2d 530 (Tex. Civ. App. 1942).

6. *Other Authorities:*

a. 15 McQuillin, *Municipal Corporations,* §§ 39.19 — 39.30 (3d ed. rev. 1970).

b. Gelfand, "Seeking Local Governmental Financial Integrity Through Debt Ceilings, Tax Limitations, and Expenditure Limits," 63 Minn. L. Rev. 545 (1979).

c. Comment, "State Constitutional Provisions Prohibiting the Loaning of Credit to Private Enterprise — A Suggested Analysis," 41 Univ. of Colo. L. Rev. 135 (1969).

d. Comment, "State Constitutional Limitations on a Municipality's Power to Appropriate Funds or Extend Credit to Individuals and Associations," 108 U. Penn. L. Rev. 95 (1959).

DATED this 19th day of February, 1980.

ATTORNEY GENERAL
State of Idaho
/s/ DAVID H. LEROY

ANALYSIS BY:

MICHAEL C. MOORE
Deputy Attorney General
Chief, Local Government Division

DHL/MCM/dm

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

ATTORNEY GENERAL OPINION NO. 80-8

TO: Jim C. Harris
Prosecuting Attorney
Ada County Courthouse
Boise, ID 83702

Per Request for Attorney General's Opinion

QUESTIONS PRESENTED:

1. Does the statute (Idaho Code §63-112) include the consumption or sale of animals (cattle, sheep, horses and other livestock) as a product of the land or as

"agriculturally produced"? Although not specifically mentioned in the statute, it has been understood in the past, or the implication has always been, that the raising of livestock is an agricultural pursuit, and that argument is certain to be presented by taxpayers seeking land reclassification under this law.

2. The phrase "actively devoted" can be easily misconstrued. This phrase appears in both (the more than and less than five acre) parts of this code section, however, one has a monetary qualification to be met, while the other does not. Would it be correct to interpret Idaho Code §63-112 (1) (a) (i) to mean that in order to be "actively devoted to agriculture" there has to be a sale of such product?

3. Subsection (3) of this statute speaks to "other animals kept primarily for personal use." Does this exclude those property owners of either over or under five acres, who raise only two or three cows, of which one or more are kept for home consumption and the rest sold?

CONCLUSIONS:

1. The better interpretation of *Idaho Code* §63-112 would include the sale or consumption of animals in the determination of what a parcel of land has agriculturally produced. However, the State Tax Commission has promulgated regulations and forms incorporating an alternative interpretation that income from livestock be excluded from the computation of agriculturally produced income. By statute, the Commission's regulation is binding on county assessors and others until revised by the Commission, revoked by the Legislature or overturned judicially.

2. No sale of a product is required to classify land as agricultural. For example, land which is part of a retirement or rotation system can qualify as agricultural land. However, each parcel of land must be classified based upon the specific facts relating to it.

3. The question whether animals are kept primarily for personal use or pleasure rather than as part of a bona fide profit making enterprise is a question of fact which must be reviewed on a case by case basis. In any event, a tract of land of five acres or less used for grazing livestock may only be classified as agricultural land if the gross revenues produced by the land — measured in accordance with the provisions of the State Tax Commission regulations — exceed either $1,000 of the preceding year or the equivalent of fifteen percent (15%) of the owners' or lessees' annual gross income.

ANALYSIS:

1. *Idaho Code* §63-112 addresses only the question of the qualifications which determine eligibility of land for appraisal, assessment and taxation as agricultural property. It does not address the methods of appraisal or evaluation to be applied to land which is found to be agricultural property. Because of the length of §63-112, the statute is attached as an exhibit to this Opinion rather than quoted in full. The distinction between the rules established by §63-112 for eligibility for classification as agricultural land and the rules established by §63-202, and the Tax Commission regulations thereunder, for the appraisal of the land so classified must be kept in mind or confusion will result. For §63-112 eligibility purposes, the better interpretation is income earned from the use or sale of livestock should be considered, even though for the purpose of determin-

ing the value of agricultural land, it is properly excluded under §63-202 and the Tax Commission's regulations. This is neither illogical or inconsistent. The purposes of the statutes simply differ. Consequently, the answer to the first question is appropriately found by analyzing the wording of §63-112. Section 63-112, on its face, appears to contemplate that land used in conjunction with a livestock operation can qualify as agricultural property. The statute provides that property is "actively devoted to agriculture" if "it is used by the owner or a bona fide lessee for grazing . . ." §63-112 (1) (a). It would seem to follow that the animals raised by grazing would be "agriculturally produced" for purposes of §§63-112 (1) (b). There is no evidence that the Legislature intended to define the term "agriculture" differently for purposes of §63-112 (1) (a) and §63-112 (1) (b). Thus the principle of statutory construction known as "whole statute" construction becomes particularly useful. 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). Thus, when §63-112 (1) (b) is read in conjunction with §63-112 (1) (a), it seems clear that the better interpretation is to include the sale or consumption of animals in the determination of what a parcel of land has agriculturally produced.

The term "agriculturally produces" is not further defined within the statute and, therefore, it must be presumed that the Legislature intended that term to have its common, ordinary meaning. *Oregon Short Line R. Co. v. Pfost,* 53 Idaho 559, 27 P.2d 877 (1933); *Cook v. Massey,* 38 Idaho 264, P.1088 (1923); *Nagel v. Hammond,* 90 Idaho 96, 408 P.2d 468 (1965); *City of Lewiston v. Mathewson,* 78 Idaho 743, 303 P.2d 680 (1956).

Webster's Third International Dictionary defines "agriculture" as follows:

> The science or art of cultivating the soil, harvesting crops, and raising livestock. . . . The science or art of production of plants and animals useful to man. . . .

This proferred definition is consistent with the definition adopted by the Idaho Supreme Court in other areas of the law. For workmen's compensation purposes, the Idaho Supreme Court has adopted the following definition of "agriculture":

> [A]griculture is the art or science of cultivating the ground, especially in fields or in large quantities, including the preservation of the soil, the planting of seeds, the raising and harvesting of crops and the rearing, feeding and management of livestock; tillage; husbandry. . . . *Smythe v. Phoenix,* 63 Idaho 585, 592, 123 P.2d 1010 (1942).

See also *Cook v. Massey,* 38 Idaho 264, 274, 220 P.1088 (1923); *Mundell v. Swedlund,* 59 Idaho 29, 80 P.2d 13 (1939); *Reedy v. Trummell,* 90 Idaho 318, 321, 410 P.2d 5654 (1966).

Thus, it is our opinion that the better interpretation of §63-112 and particularly the term "agriculturally produced" includes raising livestock resulting in either sale or home consumption of livestock or livestock products — e.g., meat, milk or butter. However, the State Tax Commission has expressed its own relevant interpretation of §63-112 — i.e., income earned from the sale or use of livestock or livestock products is excluded from the income used to measure the

productivity of land. That Commission has the statutory power and duty "to prescribe forms with relation to any duty or power of the commission, and to require their use by county boards of equalization." *Idaho Code* §63-513 (6). Additionally, *Idaho Code* §63-513 (18) imposes on the Commission the power and duty:

> To make administrative construction of ad valorem tax laws whenever requested by any officer acting under such laws; and until judicially overruled, such administrative construction shall be binding upon the inquiring officer *and all others* acting under such laws. [Emphasis added.]

Pursuant to these two statutory powers, the State Tax Commission has construed the statute and issued forms for claiming classification as agricultural land. These forms require that income earned from the sale or use of livestock or livestock products be *excluded* from the income used to measure the productivity of the land. By statute, this Tax Commission interpretation is binding on county officials. If it is erroneous, it may only be so declared and overturned by a court or by revision of the Commission itself. *Idaho Code* §63-513. Additionally, the regulations are subject to legislative review and change if the legislature finds them to be contrary to legislative intention. *Idaho Code* §§67-5217 and 67-5218. Courts grant statutory interpretations made by agencies charged with enforcement of statutes consideration and weight in reaching their own conclusions. *Ada County v. Oregon Short Line R. Co.,* 97 F.2d 666 (9th Cir., 1938) *aff'd* 18 F. Supp. 842; *State ex rel Andrus v. Kleppe,* 417 F. Supp. 417 (USDC-Idaho, 1976); *Idaho Public Utilities Commission v. V-1 Oil Co.,* 90 Idaho 415, 412 P.2d 581 (1966). Thus, the State Tax Commission's interpretation is legally effective and merits mentioning. Apparently, the Commission's construction is based upon the assumptions that consistency between §63-112 and several statutory provisions relating to the evaluation of agricultural land is necessary and that the Commission's interpretation provides such consistency. Our understanding of the analysis is that the Commission, in construing *Idaho Code* §63-112, considers it a definitional statute only. Its stated purpose is to define that land which shall be "eligible for appraisal, assessment and taxation as agricultural property. . . ." The statute does not establish any standards by which such land is to be valued by the county assessor. The Tax Commission further believes that §63-112, as a definitional statute, must be construed with other statutes relating to the appraisal, assessment and taxation of agricultural property. In their view, these statutes, because they address the same *general* subject, must be read together to determine their proper effect on agricultural property. *McCall v. Martin,* 74 Idaho 277, 262 P.2d 787 (1946); *North Idaho Jurisdiction of Episcopal Churches, Inc. v. Kootenai County,* 94 Idaho 644, 496 P.2d 105 (1972).

The other relevant statutes are *Idaho Code* §§63-105Y, 63-202 and 63-923.

Section 63-105Y is particularly important as a basis for the interpretation chosen by the Tax Commission. Since livestock is exempt from taxation pursuant to this statute, it is deemed necessary to exclude livestock from the scope of §63-112 which on its face is limited to defining property to be classified for taxation purposes as agricultural.

Sections 63-202 and 63-923 requiring that agricultural property be valued based upon the actual and functional use of the property arguably buttresses this conclusion. These sections have been interpreted by the State Tax Commis-

sion's regulations to mean that agricultural land must be valued based upon its ability to produce agricultural income rather than upon some other potential market value the land might command if it were put to some different use. Article 202, Idaho State Tax Commission Property Tax Regulations. This State Tax Commission regulation requires that land used for grazing livestock be valued by measuring the income-producing potential of the land alone, excluding any income earned from the sale or use of livestock or livestock products. Art.202, supra. To do otherwise would produce a market value for assessment purposes which includes not only the value of the land but the value of the livestock as well. Because the livestock is exempt from taxation (*Idaho Code* §63-105Y), the regulation properly requires that income earned directly from the sale of livestock or livestock products be excluded from the income considered when determining the value of the land.

The Commission's analysis further stresses that the interpretation first discussed in, and preferred by, this Opinion would result in measuring productivity at a high level for classification purposes and at a low level for valuation purposes. The analysis supporting the Tax Commission's version concludes that similar reasoning should control the interpretation of the "agriculturally produced" language of §63-112 — i.e., the method of measuring productivity must be the same whether for classification or valuation purposes.

It is nevertheless our Opinion that the first offered interpretation is the better version. The first interpretation renders the various provisions of §63-112 consistent and gives such terms as "agriculture" and "agriculturally produced" their *normal meaning*. The second interpretation, in seeking to obtain an assumed, intended consistency between §63-112 and other statutes — produces apparent conflicts between different provisions of §63-112 and seems to ignore the common definitions for key terms. In short, the second interpretation seems inconsistent with the intent of the Legislature as determined by the language of §63-112. As previously mentioned, it also does not appear to follow logically that because income from raising livestock is not considered in valuing agricultural land, it should not be considered for the §63-112 purpose of classifying land as agricultural or non-agricultural. In short, the inconsistency addressed by the analysis favoring the second interpretation appears to be a false issue. The purposes of §63-112 on the one hand, and the statutes concerning evaluation of property on the other hand, are distinguishable. It is also interesting to stress this point by noting that no real conflict would exist between *definitions* of agricultural land in §63-112 and the other statutes relied upon to support the second version should the first interpretation favoring inclusion of sales and consumption of animals be adopted. The "other statutes" have nothing to do with classification of land and thus do not purport to define agricultural land. Thus, no real inconsistency is created by the preferred definition. Lastly, any ambiguity existing in §63-112 should be construed in favor of the taxpayer and the land classified as agricultural. *Bistline v. Bassett,* 47 Idaho 66, 272 P.696 (1928); *Williams v. Baldridge,* 48 Idaho 618, 284 P.203 (1903).

2. In response to your second question, it is clear from the terms of the statute that a sale is not required before land can be classified as "actively devoted to agriculture." Subsection (1) (a) (iii) specifically provides that land which "is in a crop-land retirement or rotation program" is eligible for appraisal, assessment and taxation as agricultural land. Furthermore, in the case of land which is of five acres or less, the land may be eligible for classification as agricultural land if it "agriculturally produces for sale *or home consumption* the equivalent of fifteen percent (15%) or more of the owners' or lessees' annual gross income." [Emphasis added.] Subsection (1) (b) (i).

It is, therefore, manifestly evident from the language of the statute that a sale is not required for land to be "actively devoted to agriculture" within the meaning of the statute. Your request letter uses the example of a person who raises pasture grass on property over five acres but mows the grass down and does nothing with the grass. Such an activity could be part of a "crop-land retirement or rotation program." However, in *Smythe v. Phoenix,* 63 Idaho 585, 123 P.2d 1010 (1942), a workmen's compensation case, the Idaho Supreme Court stated:

> As pointed out in the oral argument, it is somewhat difficult to, by general rule or definition, completely and adequately cover prospectively and in detail what may or may not be agricultural pursuits or agricultural labor, and it is necessary, as in workmen's compensation cases, to decide each case upon the particular facts involved and by applying the pertinent general rules decide the individual case and place it in one category or another [citation omitted].

This pragmatic rule is as applicable to property taxes as it is to the workmen's compensation laws.

3. Subsection (3) of §63-112, *Idaho Code,* excludes from eligibility for appraisal, assessment and taxation as agricultural land that land which is:

> Land utilized for the grazing of a horse or other animals kept primarily for personal use or pleasure rather than as part of a bona fide profitmaking agricultural enterprise shall not be considered to be land which is actively devoted to agriculture.

Subsection (3) applies both to those parcels of land described in parts (a) and (b) of subsection (1) of §63-112. That is, it applies both to parcels of land larger than five acres and to parcels of five acres and less.

Whether or not animals are kept primarily for personal use or pleasure rather than as part of a bona fide profitmaking enterprise is a question of fact which must be reviewed on a case by case basis. However, it should be noted that following the Tax Commission's interpretation of §63-112 will result in a smaller amount of income being attributed to the land. Consequently, owners of parcels of five acres or less who raise only two or three cows normally will have difficulty satisfying the requirements of §63-112 (1) (b) (i) as interpreted by the Tax Commission, making it unnecessary in many situations to refer to the limitation expressed in §63-112 (3).

There is a theoretical possibility that a tract of land of five acres or less could generate income — as required to be determined by the Tax Commission regulations for valuing only land — which exceeds $1,000 in a year or exceeds the equivalent of fifteen percent of the owners' or lessees' annual gross income if livestock or livestock products are consumed in the home. To the extent a county assessor can not resolve whether the classification of a particular property is determined by subsection (1) (b) (ii) rather than subsection (3) of §63-112, the ambiguity or dilemma should be construed in favor of the taxpayer and the land classified as agricultural in conformity with the rule that ambiguities in tax statutes, other than exemption statutes, are to be resolved in favor of taxpayers. *Bistline v. Bassett,* 47 Idaho 66, 272 P.696 (1928); *Williams v. Baldridge,* 48 Idaho 618, 284 P. 203 (1930).

It is necessary to conclude this opinion by clearly stating that this opinion does not address the question of valuing land once it has been determined to be eligible for classification as agricultural land for appraisal, assessment and taxation purposes. In fact, to apply the rules stated in §63-112 (as construed in this opinion) to *Idaho Code* §63-202 and the Tax Commission regulations promulgated thereunder for valuing agricultural land would result in an erroneous conclusion. For the purpose of determining the value of agricultural land, Article 202 of the Tax Commission's property tax regulations requires a determination of the ability of the land to produce income. A capitalization rate based on market data for agricultural property is applied to the income in order to determine the market value of the land. In determining the income producing ability of the land, the regulation requires excluding income earned from the sale or use of livestock. Land which is used solely for the purpose of grazing livestock is valued based upon its "economic rent" as pasture land, not upon the income earned from the livestock operation. It is necessary to exclude the income from livestock operations in valuing such land since the livestock itself is exempt from property taxes. *Idaho Code* §63-105Y. To include in the amount to which the capitalization rate is applied the income from the livestock operation would produce a market value for assessment purposes which included not only the value of the land subject to taxation but also the value of the exempt livestock. Therefore, income earned from the sale or use of livestock is excluded when determining the value of the agricultural land upon which the livestock are grazed. Such considerations do not apply, however, when construing *Idaho Code* §63-112 which is limited to determining whether or not the land is eligible for classification as agricultural property.

AUTHORITIES CONSIDERED:

1. *Idaho Code* §§63-112, 63-202, 63-513, 67-5217, 67-5218, 63-105Y, 63-923.

2. Cases: *Jackson v. Jackson,* 87 Idaho 330, 393 P.2d 28 (1964); *Oregon Short Line R. Co. v. Pfost,* 53 Idaho 559, 27 P.2d 877 (1933); *Cook v. Massey,* 38 Idaho 264, 220 P. 1088 (1923); *Nagel v. Hammond,* 90 Idaho 96, 408 P.2d 468 (1965); *City of Lewiston v. Mathewson,* 78 Idaho 743, 303 P.2d 680 (1956); *Smythe v. Phoenix,* 63 Idaho 585, 123 P.2d 1010 (1942); *McCall v. Martin,* 74 Idaho 277, 262 P.2d 787 (1946); *North Idaho Jurisdiction of Episcopal Churches, Inc. v. Kootenai County,* 94 Idaho 644, 496 P.2d 105 (1972); *Mundell v. Swedlund,* 59 Idaho 29, 80 P.2d 13 (1939); *Reedy v. Trummell,* 90 Idaho 318, 321, 410 P.2d 5654 (1966); *Ada County v. Oregon Short Line R. Co.,* 97 F.2d 666 (9th Cir., 1938) aff'd 18 F. Supp 842; *State ex rel Andrus v. Kleppe,* 417 F. Supp.417 (USDC-Idaho, 1976); *Idaho Public Utilities Commission v. V-1 Oil Co.,* 90 Idaho 415, 412 P.2d 581 (1966); *Bistline v. Bassett,* 47 Idaho 66, 272 P. 696 (1928); *Williams v. Baldridge,* 48 Idaho 618, 284 P.203 (1930).

3. Other Authorities: State Tax Commission Property Tax Regulation Article 202; Sutherland, *Statutory Construction* §46.05; *Webster's Third International Dictionary.*

DATED this 4th day of March, 1980.

ATTORNEY GENERAL
State of Idaho
/s/ DAVID H. LEROY

ANALYSIS BY:

LARRY K. HARVEY
Chief Deputy Attorney General

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

ATTORNEY GENERAL OPINION NO. 80-9

TO: Charles P. Brumbach
Twin Falls City Attorney
P.O. Box 822
Twin Falls, ID 83301

Per Request for Attorney General Opinion

QUESTION PRESENTED:

May a city assess, as part of its monthly sewer user fee or charge, a sum of money to meet the cost of replacement or improvement of portions of an existing wastewater (sewage) treatment plant or facility in order to maintain and operate the facility at the performance standards for which it was designed and built, and which are required by applicable state and federal water quality regulations?

CONCLUSION:

An Idaho city may include within its sewer user fee or charge a sum of money to meet the cost of maintaining an existing sewage treatment plant at the standard of performance for which it was constructed, and which meets applicable state and federal water quality regulations, even though this may require not only the repair and replacement of existing facilities, but the purchase and installation of wholly new components as well.

ANALYSIS:

As presented to us, the factual background of this question is that the city of Twin Falls has for many years operated a sewage treatment facility, originally financed through bonds, which was in recent years expanded and improved through grants from the federal Environmental Protection Agency (EPA) and local matching funds. However, the new plant does not meet water quality standards under its effluent discharge permit, and extensive rehabilitation is necessary to meet EPA standards. EPA is funding a major share of the rehabilitation, but local funds may be needed for replacement of items previously funded by the original grant. Part of this is for repair or replacement of existing facilities, and part for wholly new items, but all are necessary in order to bring the existing facility into compliance with EPA standards and regulations. No expansion, enlargement, or extension of the facility is contemplated beyond that which is necessary to bring the facility into compliance. Use of revenue bonds for this purpose is not contemplated. The city contemplates acquiring the local

share through the use of user charges and fees, by including in the monthly user fee a sum designed to meet the cost of the required repair, replacement, and new items.

The only statutes which appear to govern the imposition of sewer user charges and fees are Idaho Code §§ 50-1030, 50-1032, and 50-1033, all of which are contained in the section of the municipal code governing revenue bonds. These sections expressly empower a city to charge rates, fees and tolls, and to expend such revenues, for operation, maintenance, replacement, and depreciation, including reserves therefor, in addition to payment of principal and interest on the bonds. Since the proposed expenditures appear to relate primarily to continued maintenance and operation of the existing facility, or replacement of outmoded portions or components thereof, it appears likely to us that these statutes constitute adequate authority for the city to charge such rates if they are otherwise applicable. *Cramer v. San Diego,* 164 Cal. App. 2d 168, 330 P.2d 235 (1958); *Bexar County v. San Antonio,* 352 S.W.2d 905 (Tex. Civ. App. 1961); Annotation: 61 ALR 3d 1236, 1248, § 3[c]. Since these appear to be the only statutes governing the charging of user fees for sewer services, and since the plant apparently was originally constructed and financed through the use of bonds, it appears likely to us that the Idaho courts, if presented with the question, would hold these statutes applicable and would uphold the proposed fees and charges as authorized under them.

Since a contention might be made, however, that these statutes do not apply because the city is not financing the improvement of the facility through revenue bonds, we have also examined other possible sources of authority for a city to charge the rates and fees in question. It is our opinion that, even if the provisions of Idaho Code §§ 50-1030 et seq. do not apply to Twin Falls, the city has authority to charge rates, tolls, and charges for operation and maintenance of the wastewater treatment facility, including such replacement and improvement as may be necessary to maintain it in compliance with applicable state and federal regulations, either under its implied power to charge reasonable rates or fees, or under its general police power authority to impose fees reasonably related to the cost of providing the services.

It is well established that the establishment and maintenance of a sanitary sewer system by a municipality is a valid exercise of a city's police power. 11 McQuillin, *Municipal Corporations,* § 31.10. Since the police power is granted directly to Idaho cities by art. 12, § 2, of the Idaho Constitution, a specific statutory grant of authority to provide a sewer system is not necessary. *Schmidt v. Village of Kimberly,* 74 Idaho 48, 256 P.2d 515 (1953). Furthermore, there is no inconsistency in the view that the establishment of a sanitary sewer system is an exercise of the police power, while the operation and maintenance of it may, for other purposes, be regarded as a proprietary power. *Schmidt v. Village of Kimberly, supra.*

The Idaho Supreme Court has also recognized that a grant of authority to construct sewers includes the *implied* power to construct all of the necessary and incidental works for a complete sewage system.

> The power to construct sewers is general, and where power or authority is given to municipalities, it carries with it by implication the doing of those things necessary to make such system effective and complete; and also a discretion as to the manner in which the power is to be carried out, if not specifically provided. *Veatch v. Gibson,* 29 Idaho 609, 617, 160 P. 1112 (1916).

It is nearly universally held that this implied power to do everything necessary to make the sewer system complete and effective carries with it the implied power to charge fees, rates, and tolls for sewer service, the validity of which charges is presumed. 11 McQuillin, *Municipal Corporations,* § 31.30a; *Silver Shores Mobile Home Park, Inc. v. City of Everett,* 87 Wash. 2d 618, 555 P.2d 993 (1976). There appears little doubt, then, that the general power, granted directly by the Constitution, to provide a sanitary sewer system in the exercise of the police power carries with it the power to charge such fees for the use thereof as may be reasonably necessary to maintain the sewer system.

It is also recognized, in Idaho and elsewhere, that, under its police powers, a municipality may charge fees which are reasonably related to the cost of providing the particular police power service. These are regarded, not as taxes, but as police power fees. *State v. Nelson,* 36 Idaho 713, 213 P. 358 (1923); *Foster's, Inc. v. Boise City,* 63 Idaho 201, 118 P.2d 721 (1941); *Schmidt v. Village of Kimberly,* 74 Idaho 48, 256 P.2d 515 (1953); see, generally, 9 McQuillin, *Municipal Corporations,* §§ 26.32 — 26.42. And, while such fees for sewer charges must be reasonable and not arbitrary, they may include the various factors and elements of municipal costs and expenses. 11 McQuillin, *supra,* § 31.30a; *Hayes v. City of Albany,* 7 Or. App. 277, 490 P.2d 1018 (1971); *Associated Homebuilders v. City of Livermore,* 56 Cal. 2d 847, 366 P.2d 448 (1961); *Gericke v. Philadelphia,* 353 Pa. 60, 44 A.2d 233.

Many cases have upheld sewer charges based, in part, upon the cost, not only of maintaining and operating the existing system, but of reconstructing or replacing outmoded or deteriorated parts thereof, even though these expenses might, for accounting purposes, be considered capital expenditures rather than expenses of maintenance and operation. *Cramer v. San Diego,* 164 Cal. App. 2d 168, 330 P.2d 235 (1958); *Bexar County v. San Antonio,* 352 S.W.2d 905 (Tex. Civ. App. 1961); Annotation: 61 ALR 3d, 1236, 1248, § 3[c]. In the absence of statutory prohibitions, sewer rates are not held to be excessive merely because they are not limited to providing the cost of maintaining and operating the existing system. *Antlers Hotel, Inc. v. Newcastle,* 80 Wyo. 294, 341 P.2d 951 (1959); *Billings v. Nore,* 148 Mont. 96, 417 P.2d 458 (1966). Sewer charges have been upheld even though they permit an accumulation of moneys after paying *all* expenses of the system, at least where bonds remain unpaid. *Clovis v. Crain,* 68 N.M. 10, 357 P.2d 667 (1960).

In light of these authorities, we view it as likely that that portion of a sewer charge based upon the cost of repair and replacement of existing components, and the addition of such components as are necessary to maintain the facility or system in accordance with legal standards, would be upheld. In addition, although we were not asked to address this question, we view it as probable that an indebtedness incurred for the purpose of maintaining the treatment facility at such standards would be upheld under Idaho Constitution art. 8, § 3, as an ordinary and necessary expense of the municipality. *Hickey v. City of Nampa,* 22 Idaho 41, 124 P. 280 (1912); *City of Pocatello v. Peterson,* 93 Idaho 774, 473 P.2d 644 (1970); *Board of County Commissioners v. Idaho Health Fac. Auth.,* 96 Idaho 498, 531 P.2d 588 (1975).

Each case will, of course, depend upon its own particular facts and circumstances. Local counsel must determine whether the particular sewer user charges fall within the general legal principles considered above. Based upon (and limited to) the factual background as we understand it, however, it is our

opinion that a sewer use charge based upon the cost of maintaining an existing sewer treatment facility at the performance level for which it was designed and constructed, and in compliance with applicable laws and regulations, including replacement and addition of necessary components, would be valid.

AUTHORITIES CONSIDERED:

1. *Idaho Constitution,* art. 8, § 3; art. 12, § 2.

2. *Idaho Code* §§ 50-1030, 50-1032, 50-1033.

3. *Idaho Cases:*

a. *Hickey v. City of Nampa,* 22 Idaho 41, 124 P. 280 (1912).

b. *Veatch v. Gibson,* 29 Idaho 609, 160 P. 1112 (1916).

c. *State v. Nelson,* 36 Idaho 713, 213 P. 358 (1923).

d. *Foster's, Inc. v. Boise City,* 63 Idaho 201, 118 P.2d 721 (1941).

e. *Schmidt v. Village of Kimberly,* 74 Idaho 48, 256 P.2d 515 (1953).

f. *City of Pocatello v. Peterson,* 93 Idaho 774, 473 P.2d 644 (1970).

g. *Board of County Comr's. v. Idaho Health Fac. Auth.,* 96 Idaho 498, 531 P.2d 588 (1975).

4. *Other Cases:*

a. *Cramer v. San Diego,* 164 Cal. App. 2d 168, 330 P.2d 235 (1958).

b. *Bexar County v. San Antonio,* 352 S.W.2d 905 (Tex. Civ. App. 1961).

c. *Silver Shores Mobile Home Park, Inc. v. City of Everett,* 87 Wash. 2d 618, 555 P.2d 993 (1976).

d. *Hayes v. City of Albany,* 7 Or. App. 277, 490 P.2d 1018 (1971).

e. *Associated Homebuilders v. City of Livermore,* 56 Cal. 2d 847, 366 P.2d 448 (1961).

f. *Gericke v. Philadelphia,* 353 Pa. 60, 44 A.2d 233.

g. *Antlers Hotel, Inc. v. Newcastle,* 80 Wyo. 294, 341 P.2d 951 (1959).

h. *Billings v. Nore,* 148 Mont. 96, 417 P.2d 458 (1966).

i. *Clovis v. Crain,* 68 N.M. 10, 357 P.2d 667 (1960).

5. *Other Authorities:*

a. 9 McQuillin, *Municipal Corporations,* §§ 26.32-26.42 (3d Ed. Rev. 1978).

b. 11 McQuillin, *Municipal Corporations,* §§ 31.10, 31.30a (3d Ed. Rev. 1977).

c. 61 ALR 3d 1236, 1248, § 3[c] (1975).

DATED this 4th day of March, 1980.

ATTORNEY GENERAL
State of Idaho
/s/ DAVID H. LEROY

ANALYSIS BY:

MICHAEL C. MOORE
Deputy Attorney General
Chief, Local Government Division

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

ATTORNEY GENERAL OPINION NO. 80-10

TO: GORDON C. TROMBLEY
Chairman, State Board of Scaling Practices
c/o Dept. of Lands
Statehouse Mail

Per Request for Attorney General's Opinion

QUESTIONS PRESENTED:

1. In §38-1202 (C), as amended, does the gross measurement of forest products allow for any deduction for defect (net scale)?

2. Must a mill pay by gross measurement for cull logs delivered to the point of scaling?

3. In §38-1220, as amended, is the National Forest Log Scaling Handbook mandatory, or may parties elect to scale by other standards such as rules and regulations promulgated by the Board of Scaling Practices?

4. In light of §38-1220A and §38-1221, what enforcement responsibilities does the Board have concerning payment by gross scale for logging and hauling?

CONCLUSIONS:

1. The amended scaling law requires payment for logging and hauling agreements by gross scale, which means without deduction for defect as in net scale.

2. Since a cull is determined by net scale and a cull log is a "forest product," the amended law requires mill owners to pay for culls by gross scale. Merchantability standards and bonuses and penalties are contractual, unless based upon a reduction in gross scale.

3. The legislature intended that §38-1220 be permissive rather than mandatory. Thus, a log scaling agreement may follow the National Forest Log Scaling Handbook or may adhere to other guidelines including administrative rules of the State Board of Scaling Practices.

4. The Board of Scaling Practices has surveillance and investigatory powers primarily relating to licensing of scalers, checkscaling, and revocation or suspension of scaling licenses. Also the Board has power concerning obvious attempts to violate the scaling laws and administrative rules. Violations thereof are prosecuted by county attorneys as criminal misdemeanors. Disputes involving specific contractual provisions between private parties must be resolved by the parties or by courts of law and not by the Board of Scaling Practices or the Attorney General.

INTRODUCTION:

The 1979 Legislature amended Chapter 12, Title 38, *Idaho Code,* concerning log scaling. The legislation was an attempt to resolve dissatisfaction by loggers and haulers who contended that they were not being paid fairly for logs hauled and delivered for scaling. Loggers argued that they were not paid for culls and were particularly concerned about "borderline culls." Culls are logs which contain a high percentage of defect determined by net scaling procedures. Prior to the 1979 amendments, payment for logged forest products delivered for scaling was generally by net scale. Logs determined by net scale to be culls were discarded and not paid for. Loggers complained that the net scale, or the determination of the amount of defect in a log, was an unreliable "human" factor, often resulting in disagreement over "borderline culls."

Mill owners, on the other hand, contended that they could only pay for usable material. Results of mill studies performed over the years by the U.S. Forest Service and others have shown that logs which fall below merchantability standards, usually at least 33-1/3% sound, are not economical to process. The mill owner cannot afford to process such culls. Moreover, culls are often not usable and if processed through the mill can damage the mill's system. Mill owners claimed it was not their responsibility to keep culls from being hauled and delivered for scaling.

Consequently, the law was amended to require:

> For the purpose of payment for logging or hauling logged forest products only, forest products shall be measured by gross weight or by gross volume converted to gross decimal "C." *Idaho Code,* §38-1202 (C).

ANALYSIS:

1. ANSWER TO QUESTION ONE: §38-1202 (C) now requires that logged forest products be scaled by gross measurement. The use of the word "shall" denotes a mandatory intent. The definition of "gross," "net scale," and "gross scale" will resolve the question:

"Gross" is defined as follows:

> Before or without diminution or deduction (citations omitted); whole; entire; total; as the gross sum, amount, weight — opposed to net (citations omitted). *Black's Law Dictionary,* "Gross," p. 832; *Allstate Ins. Co. v. State Bd. of Equalization,* 169 C.A. 2d 165, 336 P. 2d 961.

"Net scale" is defined as follows:

> Measurement of log content with deduction for defects. *Terminology of Forest Science, Technology, Practice & Products* (hereinafter F.S.T. & P.), Society of American Foresters, Washington, D.C., 1971, p. 177.

"Gross scale" is defined under an expressed synonym, "Full scale" as:

> Measurement of log content in logscale board feet, without deduction for defects. F.S.T. & P., p. 114. [Emphasis added.]

These definitions demonstrate that "gross" and "net" are incompatible and opposite terms. Gross scale means a measurement without deduction for defect. The amended scaling law thus allows no deduction for defects.

2. ANSWER TO QUESTION TWO: Again, definitions will be dispositive of the question. "Forest products" means: "Any raw material yielded by a forest." *F.S.T. & P.,* p. 109. In a related statute, the Idaho Legislature has partially defined "forest products":

> It shall be unlawful and constitute a misdemeanor for any person, firm, company, or business to transport on the public highways of this state any load of forest products, including coniferous trees, Christmas trees, sawlogs, poles, cedar products, pulp logs, fuel-wood, etc., without proof of ownership. . . . I.C. §18-4628 (a).

Subsection (b) excludes wood chips, sawdust and bark, suggesting that they would otherwise be included in the term "forest products." It is apparent that "forest products" in its ordinary meaning refers to all products derived from trees including but not limited to sawlogs, veneer, poles, cedar products, pulp logs, fence posts, and others. The law does not make any exceptions for particular forest products.

To determine whether a cull is a forest product as that term has been defined above, the definitions of "cull" and "defect" are helpful. "Cull" refers to:

> 1. Any item of production, e.g. trees, logs, lumber, picked out for relegation or rejection because it does not meet certain specifications, e.g. as regards usable or on-grade content.
>
> 2. The deduction made for gross timber volume to adjust for defect. *F.S.T. & P.,* p. 65.

"Defect" includes:

> In timber, any feature (whether intrinsic, e.g. Knots, or developing later, e.g. decay, splits, bad sawing) that lowers its utility and/or commercial value and may therefore lead to relegation as a cull. *F.S.T. & P.,* p. 72.

Industry practices indicate that logs which are culls for some purposes such as for saw logs are usable under varying circumstances for other purposes including pulp logs and a variety of cedar products such as shakes, rails, and pickets. Depending upon the market at a given time, a mill may not use cull logs. One mill might use culls more often than another mill.

Moreover, the legislation used the term "forest products," not "timber." Timber has been defined, in the absence of modifying terms or special trade usage, as ". . . trees of a size suitable for manufacture into lumber for use in building and allied purposes." *M. & I. Timber Co. v. Hope Silver – Lead Mines, Inc.,* 91 Idaho 638, 428 P.2d 955 (1967); *Arbogast v. Pilot Rock Lumber Co.,* 215 Oregon 579, 336 P.2d 329 (1959). Another term, "merchantable timber," would be more specific than "timber." But neither of these terms was used; rather "forest products," a much broader term than timber or merchantable timber, was used.

The above definitions and analysis lead to certain conclusions. First, the amended law requires payment for *forest products* delivered to the point of scaling by *gross measurement.* Gross means without deduction for defect. A cull is not exempted from *forest products* and is in fact usable for many forest products under varying circumstances. The result is that cull logs are forest products under the scaling law and must be paid for by gross measurement upon delivery for scaling.

The mill owner is free to negotiate a fair price for forest products delivered for scaling, including any loss or damage he may bear because he must pay for culls. Also, mill owners may negotiate by contract for quality control, utilization, merchantability standards, and bonuses and penalties to discourage delivery of culls and other unusable material, as long as the basis thereof is not determined by a reduction in gross scale.

3. ANSWER TO QUESTION THREE: Another amendment to the scaling law in 1979 concerned *Idaho Code,* §38-1220, which in part states:

> All parties to any log scaling agreement, *except logging and hauling agreements,* may elect to scale as between themselves [either] on the basis of the mensuration criteria from the National Forest Log Scaling Handbook [or from the Idaho Manual of Instruction for Log Scaling and the measurement of Timber Products], whether or not such logs are produced from federal land or measured by employees of an agency of the United States government.

For illustrative purposes, the bracketed words were deleted and the underscored words were added by the amendment. This provision was part of House Bill 237. Another version of §38-1220 was passed by the Senate as part of Senate Bill 1108. That version struck the entire portion quoted above, thus deleting reference to both the State Manual and the National Forest Handbook (hereinafter Handbook). The House version which retained the Handbook was accepted. (Section 7 of H.B. 237 calls for the adoption of the language of Section 38-1220 therein and not the version of S.B. 1108.)

The plain language and the history and purpose of the law are important factors in determining the intent of the legislature. *Knight v. Employment Sec. Agency,* 88 Idaho 262, 398 P.2d 643 (1965). Applying accepted rules of construction as to whether a statute is mandatory or permissive, the ordinary meaning of

the verb actually used is favored. *Sutherland Statutory Construction* Vol. 2A, Section 57.03, p. 415. The verb used in this statute is *may,* which is ordinarily construed as *permissive.* 26A *Words and Phrases,* "May," p. 68 through 71, "May — In Statutes," p. 71 through 75. However, the expressed language is not the sole determinant. Context and purpose are other relevant factors. *Sutherland,* §57.03, p. 415. Examining the content, the drafters of the amendment deleted reference to the State Manual and struck the word "either," leaving language which on its face is permissive. Parties to a log scaling agreement may elect to scale according to the Handbook. The logical corollary, though unstated, is that parties *may not* scale by the Handbook if they so elect. Both the House and Senate versions as well as the language codified use *may,* denoting permissive intent. Accepted rules of construction indicate:

> Ordinarily, the use of the permissive carries no mandate. It is only where the context indicates or where the object to be attained compels a construction that the imperative shall be deemed the legislative intent. *Sutherland,* Section 57.03 p. 416. [Emphasis added.]

Similarly, the rule has been stated:

> . . . the power to construe a statute permissive in form as mandatory should be exercised with *reluctance, and only where the clear intent, as shown by the context demands such construction.* 82 C.J.S. "Statutes," p. 871 [Emphasis added].

The context of §38-1220 does not compel the substitution of "shall" for "may." As written, denoting permissive language, the statute means that parties may choose to scale by Handbook or by other appropriate guidelines.

Section 38-1208 gives the Board of Scaling Practices rulemaking authority. This is in accord with the Administrative Procedures Act in Chapter 52, Title 67, *Idaho Code.* The logical alternative guidelines for scaling would be rules promulgated by the Board. The amendments to Chapter 12 did not purport to diminish the Board's rule-making authority. To construe the use of the Handbook as mandatory and exclusive would be a limitation of the Board's rule-making power. Plenary rule-making power granted expressly in the same chapter should be limited only by clear and explicit language.

Further support for a permissive construction is gleaned from a brief analysis of the Handbook. Designed to provide guidance for the selling of stumpage on land of the U.S. Forest Service and to correlate with U.S. Forest Service timber sale contracts, the Handbook is inapplicable to many phases of scaling in Idaho. There are two Regions of the Forest Service in Idaho, each with its own supplementary rules. Additionally, recent supplements to the Handbook for Region I required gross *cubic* scaling for pulp logs and net *cubic* scaling for cedar products. P. 12-2 and 12-3. The Forest Service has also considered adopting cubic measurement for all scaling. Idaho industry on the whole neither desires nor is trained in cubic scaling, which is a significantly different Mensuration Criterion than weight or gross volume converted to Scribner Decimal "C" as expressly required in §38-1202 (C). Thus, a mandatory construction of §38-1220, requiring adherence to the Handbook, would in certain instances conflict with another section of the same chapter.

It is clear from an analysis of context, history, purpose, and rules of construction that a permissive meaning for §38-1220 was intended.

4. ANSWERS TO QUESTION FOUR: The Board's enforcement power is limited to statute.

> §38-1220 (A). Inspections — Investigation — Violations. — (a) The chairman of the state board of scaling practices shall cause investigations to be made upon the request of the board or upon receipt of information concerning an alleged violation of this act or of any rule or regulation promulgated thereunder, and may cause to be made such other investigations as he shall deem advisable.
>
> (b) The chairman or his designee shall have the authority to: (1) conduct a program of continuing surveillance and of regular or periodic inspection of log scaling sites. (2) Enter at all reasonable times upon any private or public property for the purpose of inspecting or investigating to ascertain possible violations of this act or of rules and regulations adopted and promulgated by the board.
>
> (c) If an investigation discloses that there is a reasonable basis for believing that a violation exists, the director or his designee shall notify the prosecuting attorney of the county or counties in which the violation is alleged to have been committed and the prosecuting attorney shall proceed in accordance with §38-1221, *Idaho Code.* I.C. §38-1220A, as added by 1979, ch. 303, § 4, p. 822.
>
> §38-1221. Penalties — Duties of Attorney General and prosecuting attorneys. — Any person who shall practice, or offer to practice log scaling in this state without being licensed, having a temporary permit or being an apprentice, in accordance with the provisions of this act, or any person who shall attempt to use an expired or revoked certificate of registration or practice at any time during a period the board has suspended or revoked his certificate of registration, or any person who shall violate any of the provisions of this act, shall be guilty of a misdemeanor, and shall, upon conviction, be sentenced to pay a fine of not less than one hundred dollars ($100.00) nor more than five hundred dollars ($500.00).
>
> The attorney general of this state or any assistant designated by him shall act as legal advisor of the board; and all violations of the provisions of this act shall be prosecuted by the prosecuting attorney of the county or counties in which the violations of the act may be committed.

The Board's power is limited to surveillance and investigatory functions. The Board also has authority to license scalers, I.C. §§38-1211 through 38-1214, to make checkscales, I.C. §38-1215, and to revoke or suspend licenses of scalers, I.C. §§38-1218 through 38-1219. Since these functions are the primary duties of the Board of Scaling Practices in Chapter 12, the surveillance and investigatory functions of §38-1220A primarily relate to carrying out the duties of licensing and checkscaling. The Board's role concerning private logging and hauling agreements must be determined in light of its primary responsibilities regarding licensing and checkscaling. Neither the Board nor the Attorney General was intended by Chapter 12, Title 38, *Idaho Code,* to act as arbiter for private contractual disputes. Such questions must be resolved by the parties or by courts of law. However, the Board has the authority to hear specific complaints concerning obvious violations, such as an attempt to pay for logging and hauling by net

scale in defiance of the law. §38-1221 directs the Board to alert the county prosecuting attorney of such violation, who in turn shall instigate proceedings designed to obtain a conviction for a criminal misdemeanor. In the absence of proof of an intentional attempt to circumvent the scaling law, it is doubtful that a court would convict a party for a criminal misdemeanor. The better remedy is in a civil court for damages and/or injunction, to be pursued by the parties to the contract.

In summary, the amended scaling law requires that payment for forest products delivered to the point of scaling be determined by gross scale (without deduction for defects), including cull logs. Quality control, utilization and merchantability standards, and price are contractual. Specific contractual disagreements must be resolved by the private parties to the contract, although intentional attempts to defy the scaling law should be presented to the Board of Scaling Practices. Finally, parties to a log scaling agreement may elect to follow the National Forest Handbook or rules duly promulgated by the Board of Scaling Practices.

AUTHORITIES CONSIDERED:

1. *Idaho Code,* Title 38, Chapter 12 and 67, Chapter 52 and §18-4628 (A).

2. *Allstate Ins. Co. v. State Bd. of Equalization,* 169 C.A. 2d 165, 336 P. 2d 961.

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

4. *M. & I. Timber Co. v. Hope Silver – Lead Mines, Inc.,* 91 Idaho 638, 428 P. 2d 955 (1967).

5. *Arbogast v. Pilot Rock Lumber Co.,* 215 Oregon 579, 336 P. 2d 329 (1959).

6. *Black's Law Dictionary,* "Gross," p. 832.

7. *Sutherland Statutory Construction,* Vol. 2A., §57.03, pp. 415-416.

8. 26A *Words and Phrases,* "May," pp. 68-71 and "May-In Statutes," pp. 71-75.

9. 82 C.J.S. "Statutes," p. 871.

10. *Terminology of Forest Science, Technology, Practices & Products,* Society of American Foresters, Washington D.C., 1971, p. 177.

DATED this 7th day of March, 1980.

ATTORNEY GENERAL
State of Idaho
/s/ DAVID H. LEROY

ANALYSIS BY:

L. MARK RIDDOCH
Deputy Attorney General
Department of Lands

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

ATTORNEY GENERAL OPINION NO. 80-11

TO: The Honorable Patricia McDermott
Idaho House of Representatives
Statehouse
Boise, ID 83720

Per Request for Attorney General Opinion

QUESTION PRESENTED:

Whether Idaho Const., Art. IV, § 10 mandates that the Legislature reconsider bills vetoed by the Governor.

CONCLUSION:

Idaho Const., Art. IV, § 10 in relevant part provides:

> Every bill passed by the legislature shall, before it becomes a law, be presented to the governor. If he approve, he shall sign it, and thereupon it shall become a law; but if he do not approve, he shall return it with his objections to the house in which it originated, which house shall enter the objections at large upon its journals and proceed to reconsider the bill.

In preparing this legal opinion, exhaustive research was conducted in an attempt to find case authority from any of the fifty states, including Idaho, that provided guidance in our analysis of the question. In particular, case authority from the nine states that have comparable or nearly identical language to that contained in the above quoted Art. IV, § 10 was examined. In all instances, we were unable to find a conclusion on the precise question asked. As a consequence, our analysis and ultimate conclusion is predicated upon two bases: (1) precedent set by the federal legislative body, i.e. Congress and (2) the rules of statutory construction.

The only reported authority in point is provided by precedent set by the Congress of the United States. Congressional precedent, although not controlling on the question, is persuasive as to how it should be decided since the state legislative process is patterned after the Congressional model.

U.S. Const., Art. I, § 8 contains language relating to Presidential vetoes of bills passed by Congress that is identical to the gubernatorial veto provisions of Idaho Const., Art. IV, § 10. U.S. Const., Art. I, § 8 in relevant part states:

> Every bill which shall be passed the house of representatives and the senate, shall, before it become law, be presented to the President of the United States; if he approve he shall sign it, but if not he shall return it, with his objections to that house in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider it.

The language in both constitutions relative to the reconsideration of vetoed bills is identical; "*who shall* enter the objections at large on their journal, *and proceed to reconsider it.*" [Emphasis added.]

Congressional precedent on procedural matters is found in *Cannon's Precedents of the U.S. House of Representatives,* Vol. VII, § 1100 which provides:

> When a vetoed bill is laid before the House the question of reconsideration is pending, and a motion to reconsider is not required. A veto message having been read, only three motions are in order: to lay on the table, to postpone to a day certain, or to refer, which motions take precedence in the order named.

Section 1104 of *Cannon's Precedents* in relevant part provides that:

> *The constitutional mandate that the House "shall proceed to reconsider"* a vetoed bill is complied with by laying it on the table, referring it to a committee, postponing consideration to a day certain, or immediately voting on reconsideration. [Emphasis added.]

Applying the above-quoted precedents to the instant question, the conclusion that vetoed bills must be reconsidered by the house of origin is, in our opinion, inescapable. The requirement of reconsideration is a "constitutional mandate."

The same conclusion is reached by applying the generally accepted rules of statutory construction to the constitutional language found in Art. IV, § 10. The word "shall" is generally considered mandatory:

> Certain forms and types of statutes are generally considered mandatory. Unless the context otherwise indicates, the use of the word "shall" . . . indicates a mandatory intent. Sands, *Sutherland Statutory Construction* § 25.04.

In our opinion, the context of Art. IV, § 10 does not indicate an intent other than a mandatory one as provided by the language "shall enter the objections at large upon its journals and proceed to reconsider the bill."

Accordingly, on the basis of the above-listed reasons, it is our opinion that a court of law would rule that Art. IV, § 10 of the *Idaho Constitution* mandates that bills vetoed by the Governor be reconsidered by the house in which the bill originated. On the basis of Congressional precedent, it is our further opinion that the three methods by which the constitutionally mandated reconsideration can be accomplished are: (1) lay on the table, (2) postpone consideration to a day certain or (3) refer the matter to an appropriate committee.

AUTHORITIES CONSIDERED:

1. U.S. Const., Art. I, § 8.

2. Idaho Const., Art. IV, § 10.

3. *Cannon's Precedents of the U.S. House of Representatives,* Vol. VII, §§ 1100, 1105.

4. Sands, *Sutherland Statutory Construction,* § 25.04.

DATED this 17th day of April, 1980.

ATTORNEY GENERAL
State of Idaho
/s/ DAVID H. LEROY

ANALYSIS BY:

ROY L. EIGUREN
Deputy Attorney General

DHL/RLE/tr

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

ATTORNEY GENERAL OPINION NO. 80-12

TO: The Honorable Ralph Olmstead
Speaker of the House
House of Representatives

Per Request for Attorney General's Opinion

QUESTION PRESENTED:

In view of the provisions of Idaho Const., Art. III, § 9, may the Senate of the State of Idaho adjourn sine die without the concurrence of the House of Representatives?

CONCLUSION:

It is our conclusion that because of the provisions of Idaho Const., Art. III, § 9 the Senate of the State of Idaho may not adjourn sine die or for a period greater than three days without the concurrence of the House of Representatives.

ANALYSIS:

As you know, it is the general policy of this office as a member of the executive branch of government to avoid or discourage involvement in interpreting procedural rules and maneuvers controlling the legislative activities. However, in a case such as this of major constitutional dimension, we deem a legal opinion important.

In examining the issue, we find no Idaho cases, statutes, or debates at the Constitutional Convention that are useful in interpreting that portion of Idaho Const., Art. III, § 9 which reads as follows:

> . . . but neither house shall, without the concurrence of the other, adjourn for more than three days. . . .

However, our research does reveal four useful case precedents from other state supreme courts.

Nearly identical constitutional provisions have been interpreted in Alabama, Pennsylvania and Rhode Island. In the most recent of those cases, *Frame v. Sutherland,* 327 A.2d 623 (Pa. 1974) the Supreme Court of Pennsylvania on October 25, 1974 ruled that the provisions of that state's constitution which provided that "neither house shall, without the consent of the other adjourn for more than three days . . ." applied to an attempted sine die adjournment by the senate and where the house of representatives did not consent to the same, the court found that the senate's attempt to adjourn was a failure. In reviewing the constitutional concurrence provision, the Pennsylvania Court said:

> The reason of policy for this requirement is not difficult to discern. Because each house is powerless to enact legislation alone, each has a strong interest in insuring that bills passed by it are considered by the other house. The greatest threat to this interest is the possibility that the other house might adjourn, thus disabling itself from the consideration of bills. Protection against this possibility is provided each house by the Constitution in the form of a power to refuse to consent to the adjournment of the other house.
>
> An exception to the consent requirement demonstrates that protection of each house's interest in the consideration of its bills by the other is its underlying policy. Art. II, § 14 states:
>
> > "Neither House shall, without the consent of the other, adjourn for more than three days. . . ."
>
> The draftsmen foresaw that protection of the interest of each house in having its bills considered by the other, if unqualified, would be gained at the expense of flexibility in the administration of the legislative calendar. Accordingly, the Constitution provides an exception to the consent requirement for adjournments of less than four days. This exception clearly reflects the perception that adjournments of less than four days present a minimal threat to each house's interest in the consideration by the other of its bills. Pages 626, 627.

The Supreme Court of Alabama has twice ruled that Section 68 of their constitution requiring that "Neither house shall, without the consent of the other, adjourn for more than three days" prevents unilateral adjournments both sine die and for a period of longer than three days. In the case *In re Opinion of the Justices,* 47 So. 642 (Ala. 1950) the justices in an advisory opinion specifically held that because of the constitutional language the Senate could not constitutionally adjourn sine die without the concurrence of the House of Representatives. In 1972 the same court interpreted the same constitutional provision to the same general effect as applied to a motion to adjourn for an excess period of days.

The only limitation on this rule requiring constitutional concurrence is found in *In re Legislative Adjournment,* 27 A. 321 (R.I. 1893). The Supreme Court of Rhode Island held that in extreme circumstances one house of a bicameral legislature might adjourn longer than the two-day limited constitutional period without the concurrence of the other body. Among the hypothetical situations which the court said might excuse compliance with this type of constitutional language were: epidemic, after the assembly has convened; a riot, or great public disturbance; the destruction of the statehouse. In the absence of an assertion of extreme circumstances by the Senate of the State of Idaho, this precedent would not appear to be directly in point.

Obviously the laws of Pennsylvania, Alabama and Rhode Island are not controlling in Idaho. However, since they are the only reported cases in point in any of the fifty states, it could prove exceptionally persuasive if the question was taken to an Idaho Court. Accordingly, the analysis employed in reaching our conclusion is based upon a reading of the above-quoted case authority.

Three procedural considerations should also be noted:

1. Rule 10 of the Rules of the House of Representatives and Joint Rules (1978) as also adopted by the 45th Idaho Legislature specifically provides that *Mason's Legislative Manual* shall govern the House in all cases to which they are applicable. Section 445 of that reference work deals with motions to adjourn sine die. Subsection 1 thereunder provides that "when a state legislature is duly convened it cannot be adjourned sine die, nor dissolved, except in the regular legal manner."

   Thus, an issue of compliance with the legislature's own rules may be raised if concurrence, as provided by Art. III, § 9, is deemed to be the "regular legal manner." The House and Senate may wish to have their respective parliamentary authorities rule on this issue.

2. It may also be useful to the House in considering its alternative to note that the courts generally cannot issue any effective mandate against a branch of a legislature which has adjourned its regular session sine die. Thus, it may be difficult or impossible for House leadership or a majority of that body to seek relief in the Idaho courts for potential violations by the Senate of the concurrence provisions of Art. III, § 9, even should such a violation be found.

3. We also noted during our study of the cases that the Alabama House of Representatives in 1972 adopted House Resolution 109 which specifically refused to consent to the adjournment by the Senate. Should the House wish to insist upon full compliance with the Idaho Constitutional provision in point, the consideration of a specific written resolution may be useful in framing the issues.

AUTHORITIES CONSIDERED:

1. Idaho Const., Art. III, § 9.
2. *Frame v. Sutherland,* 327 A.2d 623 (Pa. 1974).
3. *In re Opinion of the Justices,* 47 So. 642 (Ala. 1950).

4. *Opinion of the Justices,* 257 So.2d 336 (Ala. 1972).

5. *Rule 10,* Rules of the House of Representatives (1978).

6. *Mason's Legislative Manual.*

DATED this 21st day of April, 1980.

ATTORNEY GENERAL
State of Idaho
/s/ DAVID H. LEROY

ANALYSIS BY:

ROY L. EIGUREN
Deputy Attorney General
DHL/RLE/tr

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

ATTORNEY GENERAL OPINION NO. 80-13

TO: Jenkin L. Palmer
Chairman
State Tax Commission
State of Idaho
Statehouse Mail

Per Request for Attorney General Opinion

QUESTION PRESENTED:

If a taxing district held an override election in 1979, as authorized by *Idaho Code* §63-2220 (1) (b), authorizing it to override the freeze imposed by subsection (1) (a) of that section, is the amount of such override actually levied in 1979 includable in the limitation imposed by §63-2220 (3) which limits the 1980 budget request to the "amount certified for the same purpose in 1979"?

CONCLUSION:

A taxing district which levies property taxes in 1980 based upon the presumption that the amount of its 1979 override is included in its frozen operating budget to be funded from property taxes may find its levy subject to challenge as an unlawful levy. There exists a credible legal basis upon which a court could conclude that the levy is excessive and, therefore, unlawful. Accordingly, we strongly advise that those taxing districts which had override authority in 1979 *not* assume that the amount of a 1979 override is included in the amount of budget for operating purposes to be funded from property taxes in 1980 that may be certified without a new override election. Instead, a prudent fiscal manager should not budget for property tax revenues for operating purposes in excess of those budgeted in 1978 for the same purpose in the absence of an override election.

ANALYSIS:

The problem you raise results from the enactment of House Bill 795, as amended by the Senate, during the most recent session of the Idaho Legislature. Chapter 390, Session Laws of 1980. That act makes several amendments to the statutes implementing the one percent property tax limitation measure. The one percent limitation was, of course, enacted by initiative of the people on November 7, 1978. The 1979 session of the Idaho Legislature substantially modified the provisions of the initiative when it enacted House Bill 166. Chapter 18, Session Laws of 1979. That act, among other things, deferred full implementation of the tax limit but substituted a limitation upon the budgeting powers of government entities relying on the property tax for operating revenues. It provided that no such taxing district could fund its operating budget from ad valorem taxes in 1979 for an amount greater than that budgeted for the same purpose in 1978. The details of this budget freeze have been discussed extensively in prior opinions from this office. See Attorney General's Opinions 79-7 (April 27, 1979); 79-12 (May 31, 1979); and 79-15 (July 11, 1979). *Idaho Code* §63-2220, as enacted by House Bill 166, allowed a taxing district to exceed the freeze in 1979 after obtaining authority to do so from the electors of the district at an election called for that purpose. However, any override election held in 1979 provided such authority only for a "fiscal year commencing in 1979 and ending in 1980." A 1979 budget freeze override election was not to authorize the override of any freeze imposed in any subsequent year.

The 1980 session of the Idaho Legislature modified §63-2220 in several respects. Specifically, that act, among other things, made the following changes to the language originally enacted in 1979. The pertinent parts of the amendment — showing the language stricken and added — are as follows (stricken language was deleted, underlined language was added):

> . . . [N]o taxing district shall certify a budget request to finance the ad valorem portion of its operating budget that exceeds ~~the lesser of~~:
>
> > (i) the dollar amount of ad valorem taxes certified for that same purpose in ~~1978~~ *1979, which amount may be increased by a growth factor not to exceed four percent (4%),* . . .
> >
> > * * *
>
> *(3) When the combined budget requests not exempted from the one percent (1%) limitation from all taxing districts levying taxes upon the same property would exceed one percent (1%) of market value for assessment purposes, each taxing district in such situation shall limit its budget request to the same amount certified for the same purpose in 1979, and the board of county commissioners may levy such amount.*

Your question arises from the legislature's description of the amount of budget limitation as the amount "certified for the same purpose in 1979." By changing the base year for the freeze from 1978 to 1979, did the legislature intend to permit a taxing district which held an override election in 1979 to include the amount of the override in the amount of the budget limitation? Of course, the revenue raised based upon the authority of an override election was spent for operating purposes. If it were not, an election to overcome the freeze would not have been necessary because the freeze applies only to the operating portion of a budget funded from property taxes. Taxing districts holding successful override

elections in 1979 certified amounts to be raised by property taxes for operating purposes in 1979 which necessarily included the amount authorized pursuant to the override election. The plain language of H.B. 795 states that a district may certify an amount to be raised from property taxes for operating purposes equal to that "certified for the same purpose in 1979." Because the amounts certified for operating purposes in 1979 included the amounts authorized by an override election and because H.B. 795 is not restrictive when it refers to the 1979 certification, the literal meaning of the language is that the entire amount certified in 1979 for operating purposes — including that authorized by an override election — is included in the amended freeze established by H.B. 795. However, to rely on such a literal reading of the statute may be an oversimplistic construction or application of the statute. The very substantial amounts of tax revenues involved (more than $7.6 million according to Tax Commission figures) requires a more careful analysis.

Analysis of the question calls for careful construction of the statutory language and reference to well-established rules of statutory construction. These rules must be applied with care. They are to be used with reason and judgment and are intended to reach the ultimate purpose of determining legislative intention. Those who are charged with construing and applying statutory expressions of the legislature should try, to the extent possible, to reach a construction which is consistent with legislative intention. Any final determinations necessarily are made by the courts. There is a strong judicial policy toward construing and applying statutes to effect legislative intention. That policy was perhaps most strongly expressed by the United States Supreme Court in the case of *Hawaii v. Mankichi,* 190 U.S. 193, 212 (1903):

> A thing may be within the letter of a statute and not within its meaning, and within its meaning though not within its letter. The intention of the lawmaker is the law.

In appropriate circumstances, Idaho courts have expressed a similar willingness to look beyond language of a particular statute to find legislative intention. For example, in *Keenan v. Price,* 68 Idaho 423, at 4387, 195 P.2d 662 (1948), the Idaho Court said:

> All statutes must be liberally construed with a view to accomplishing their aims and purposes, and attaining substantial justice, and the courts are not limited to the mere letter of the law, but may look behind the letter to determine its purpose and effect, the object being to determine what the legislature intended, and to give effect to that intent. [Citations omitted.]

See also the following cases: *Acheson v. Fujiko Furusho,* 212 F.2d 284 (9th Cir., 1954); *Knight v. Employment Sec. Agency,* 88 Idaho 262, 398 P.2d 643 (1965); *Messenger v. Burns,* 86 Idaho 26, 382 P.2d 913 (1963).

Obviously, this judicial preference for implementation of legislative intent is more readily expressed than applied. It presumes an ability to determine, with some degree of confidence, what the legislative body in fact intended. But where the intention is determinable, the strong judicial preference for the intent renders questionable a presumption that the courts will follow a mechanistic application of the language of a statute to a result contrary to that intended by the legislature. Our analysis of the indicia of legislative intention which would be available to a court leads us to the conclusion that there is evidence of a

contrary intention. A court might conclude, based upon legislative intent, that the language "certified for the same purpose in 1979" does not permit an inclusion of a 1979 budget freeze override in the 1980 dollar certification of property taxes for operating purposes in the absence of a new override election.

In determining legislative intention, courts can and will look to several sources. Some of these sources were listed in *Knight v. Employment Security Agency,* 88 Idaho 265 at 266, 398 P.2d 643 (1965):

> In construing a statute not only must the literal wording of the statute be examined, but also account must be taken of other matters, such as 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 the like. Messenger v. Burns, 86 Idaho 26, 382 P.2d 913. This court takes judicial notice of public and private acts of the legislature and the journals of the legislative bodies for the purpose of ascertaining what was done by the legislature. Keenan v. Price, 68 Idaho 423, 195 P.2d 662; Rich v. Williams, 81 Idaho 311, 341 P.2d 432; State ex rel. Brassey v. Hanson, 81 Idaho 403, 342 P.2d 706.

In addition to the language actually used by the legislature, a court may examine the legislative history of the statute, *Knight v. Employment Sec. Agency,* supra; *Messenger v. Burns,* supra; *Sunset Memorial Gardens, Inc. v. Idaho State Tax Commission,* 80 Idaho 206, 327 P.2d 766 (1958); *Young v. Wright,* 77 Idaho 244, 290 P.2d 1086 (1956); *Local 1494 of Intern Ass'n of Firefighters v. City of Coeur d'Alene,* 99 Idaho 630, 586 P.2d 1346 (1978), its relation to other statutes, *First American Title Co. of Idaho, Inc. v. Clark,* 99 Idaho 10, 576 P.2d 581 (1978); *Magnuson v. Idaho State Tax Commission,* 97 Idaho 917, 556 P.2d 1197; *Janss Corp. v. Board of Equalization of Blaine County,* 93 Idaho 928, 478 P.2d 878 (1970), contemporaneous applications and constructions given the statute by the agency charged by law with administering it, *Kopp v. State,* 100 Idaho 160, 595 P.2d 309 (1979); *Knight v. Employment Sec. Agency,* supra; *Messenger v. Burns,* supra; *Idaho Public Utilities Commission v. V-1 Oil Co.,* 90 Idaho 415, 412 P.2d 581 (1966); *Services, Inc. v. Neill,* 73 Idaho 330, 252 P.2d 190 (1953); *McCall v. Potlatch Forests,* 69 Idaho 410, 208 P.2d 799 (1949); *Breckenridge v. Johnston,* 62 Idaho 121, 108 P.2d 833 (1941), and may apply a test of reasonableness, *Lawless v. Davis,* 98 Idaho 175, 560 P.2d 497 (1977). About the test of reasonableness, the Idaho Court has said: "The intent of the legislature may be implied from the language used or inferred on grounds of policy or reasonableness." *Summers v. Dooley,* 94 Idaho 87, 89, 481 P.2d 318 (1971). Recently the Idaho court has said in *Smith v. Department of Employment,* 100 Idaho ____, 26 ICR 545 (June 25, 1979):

> When the language of a statute is ambiguous, we must consider the social and economic result which would be effectuated by a decision on the meaning of the statute. *Herden v. West,* 887 Idaho 335, 393 P.2d 35 (1974).

See also 3 Sutherland, *Statutory Construction,* Sec. 5803, p. 79. That is, where ambiguity exists in statutory provisions, a reasonable interpretation should generally be applied over an unreasonable one. *Herdon v. West,* 87 Idaho 335, 393 P.2d 35 (1964).

The first of these tools for determining the intent of the law, the language actually used by the legislature, strongly suggests the conclusion that all amounts of property tax revenues raised for operating purposes in 1979, including the amounts authorized by an override election, are included in the freeze applicable to the 1980 budgets. The Idaho Supreme Court has required plain, clear and unambiguous language to be strictly construed. *Moon v. Investment Board,* 97 Idaho 595, 548 P.2d 861 (1976); *Newlan v. State,* 96 Idaho 711 (1975), appeal dismissed 423 U.S. 993; *Swensen v. Buildings, Inc.,* 93 Idaho 466, 463 P.2d 932 (1970); *Willows v. City of Lewiston,* 93 Idaho 337, 461 P.2d 120 (1969). Where a statute is not ambiguous, it is the duty of a court to follow the law as it is written and if it is socially or otherwise unsound, the power to correct is legislative, not judicial. *Anstine v. Hawkins,* 92 Idaho 561, 447 P.2d 677 (1968). *Roe v. Hopper,* 90 Idaho 22, 408 P.2d 161 (1965). The legislature should be presumed to know the effect of the language it has used. No one should undertake lightly to construe or apply a statute to a result which is different than that expressed by its plain language in the absence of firm and convincing evidence that legislative intention, and therefore the law, is contrary. We do not in this opinion express such an absolute conclusion. We express only our belief that other valid indicia of legislative intention raise doubt about the proper construction of the statute. As a result, cautious and prudent fiscal managers for taxing districts should insulate budgets and tax revenues from a legal attack. They may do so by assuming that an override election is needed in 1980 in order to raise property taxes for operating purposes in an amount greater than that raised for the same purposes in 1978.

Tracing H.B. 795 through the Idaho Legislature reveals another significant indication of legislative intention. The Journals of the House and Senate show that the bill was introduced into the House of Representatives by the Ways and Means Committee on March 26, 1980. Under a suspension of rules, the House considered and passed the bill on the following day, March 27. On that day, the bill was sent to the Senate. It was considered on the floor of the Senate on March 31, 1980. Again pursuant to a suspension of rules, the Senate made substantial amendments to the bill and passed it as amended. Still on March 31, the bill was referred back to the House of Representatives which voted to concur in the Senate amendments. An important indication of legislative intention in regard to the issue considered in this opinion is found in the Senate amendment. The bill as originally proposed and passed by the House of Representatives contained a provision relating to districts (such as newly formed districts) which imposed no ad valorem levy during 1979. That provision stated:

> . . . [I]f no levy were made during 1979, then the ad valorem tax dollars certified for that same purpose during the last year in which a levy was made, or if the taxing district is newly created, then the actual budget request of the taxing district.

This language in the original proposal clearly expresses an intent that newly formed taxing districts or districts which for any reason made no levy in 1979 would not be totally deprived of the power to levy absent an override. Had this language been enacted, a district formed in 1980 would have been able to levy the amount it certified for its necessary first budget. Such power would be consistent with a legislative intention that newly formed districts which levied for the first time in 1979 (necessarily pursuant to an override election — see Attorney General's Opinion No. 79-7, dated April 27, 1979) would also not be deprived of the power to make a property tax levy in the absence of an override

election. It is, therefore, significant that when the Senate amended House Bill 795 the provision just quoted was entirely deleted from the bill. House Bill 795 as amended in the Senate and finally enacted into law contains no provision for levies imposed by taxing districts which imposed no levy in 1979. Accordingly, for the same reasons expressed in Attorney General Opinion No. 79-7, cited above, it is necessary for such districts to hold an override election in 1980 to be able to impose any levy at all. The internal consistency provided by the bill as first passed by the House was destroyed by the Senate amendment. The inconsistency of purpose between the Senate's deletion of the language quoted above and its failure to also amend the House of Representatives' change of the freeze base year from 1978 to 1979 creates an apparent ambiguity of intention. It is this ambiguity which opens the door to possible judicial interpretation of the statute to resolve the ambiguity. *Noble v. Glenns Ferry Bank, Ltd.*, 91 Idaho 364, 421 P.2d 444 (1966).

Further examination of the 1980 Journals of the two houses of the Idaho Legislature indicates a consistent willingness on the part of the House of Representatives to afford local taxing districts somewhat more taxing authority in 1980 than the Senate was willing to permit. For example, House Bill 749 which would have granted all taxing districts a six percent growth factor in their operating budgets funded from ad valorem taxes passed the House but failed in the Senate. In light of this history, the Senate's more restrictive treatment of taxing districts' authority (with which the House ultimately concurred) must be viewed as deliberate and intentional. It follows that a court, required to resolve any ambiguity which it finds to exist in regard to the inclusion of 1979 overrides in the freeze amount, could conclude that a restrictive resolution of the ambiguity is proper.

It is also possible, viewing House Bill 795 in conjunction with other legislation, to find a consistency of legislative purpose in the change of the base year for the property tax freeze from 1978 to 1979. Whenever possible, statutes relating to the same subject should be construed in such a manner as to give full force and effect to both. *Norton v. Department of Employment,* 94 Idaho 924, 500 P.2d 825 (1972); *Stucki v. Loveland,* 94 Idaho 621, 495 P.2d 571 (1972); *Nampa Lodge No. 1389 BPOE v. Smylie,* 71 Idaho 212, 229 P.2d 991 (1951); *Wright v. Village of Wilder,* 63 Idaho 122, 117 P.2d 1002 (1941). In 1979, the legislature amended *Idaho Code* §33-802 to reduce the levying authority of school districts from 27 to 20 mills. Chapter 258, Session Laws of 1979. When the legislature enacts or amends a statute, it is presumed to know and have in mind the law that exists at the time. *State v. Long,* 91 Idaho 436, 423 P.2d 858 (1967); *Nampa Lodge No. 1389 BPOE v. Smylie,* supra; *Idaho Mut. Ben. Ass'n v. Robison,* 65 Idaho 793, 154 P.2d 156 (1945); *Walker v. Wedgwood,* 64 Idaho 285, 130 P.2d 856 (1942). (Note also that the 1979 session and the 1980 session are separate sessions of the same — the forty-fifth — legislature.) Under that section the levy ceiling may only be exceeded by an override called for that purpose and any amount thus authorized is exempt from the budget freeze imposed by §63-2220. The reduced 20 mill ceiling was first in effect for taxes levied in 1979. Therefore, in the case of school districts, it is reasonable to conclude that the legislature intended to bring the base year for the freeze in line with the new 1979 levying authority of school districts. It makes sense that the legislature would make this change in a general statute applying to all districts when it is remembered that the vast majority of budget freeze overrides authorized by elections in 1979 related to school districts. This is true both in terms of numbers (79 to 7) and dollars ($7,508,545 to $122,544). For districts not holding override elections in 1979, of

course, the change of the base year for the freeze from 1978 to 1979 makes no difference. Such a legislative purpose is significant for another reason. When the legislature amends a statute, the courts will presume the legislature had a purpose in mind and that the statute must mean something different than it did before the amendment. *Richardson et al v. State Tax Commission,* 100 Idaho ____, 26 I.R.C. 1151 (1979); *Leonard Construction Co. v. State ex rel Tax Commission,* 96 Idaho 893, 539 P.2d 246 (1975). In the absence of some alternative, the legislature's change of the base year from 1978 to 1979 could be presumed to be only for the purpose of including the 1979 overrides into the new limitation. But the purpose explained above — that is, to coordinate the freeze with the reduced authority for school levies — provides an alternative purpose which is consistent with other indicia of intention discussed in this opinion.

Contemporaneous administrative construction is another valid guide to interpreting the intent of a statute. The State Tax Commission is constitutionally and statutorily charged with the duty of overseeing the administration of the property tax. Art. 7, Sec. 12, *Idaho Constitution;* §63-515, *Idaho Code.* It has necessarily made, formally or informally, constructions of the statutes which are useful in determining its understanding of legislative intention. Courts, as we have observed earlier in this opinion, will use such interpretations to guide their own decisions. When House Bill 166, with its new budget limitations, came into effect, the State Tax Commission required all districts to certify the dollar amounts to be raised from property taxes in separate amounts showing those which were subject to and those exempt from the budget freeze. The Tax Commission further required that the dollar amount of revenues raised pursuant to an override election be specifically identified as an amount separate from and in addition to the amount of revenues for operating purposes subject to the freeze. This action evidences an understanding by that Commission that the amount raised for operating purposes and, therefore, subject to the freeze and the amount authorized by an override were considered to be separate amounts. It is consistent with that action to conclude that the 1979 override amount is not part of the 1979 operating budget raised from ad valorem taxes. The 1979 operating budget was frozen to the 1978 level. The override was viewed as a separate and distinct amount. It follows that the 1979 operating budget funded from property taxes must be identical with that of 1978 for the same purpose. (See Attorney General's Opinion 79-15 dated July 11, 1979, for an analysis of the meaning of the phrase "for the same purpose.") A construction given a statute by an administrative body which is contemporaneous with its enactment will be given great weight by the courts when construing the statute. See the cases cited above.

The entire history of the one percent initiative and related actions taken by the Idaho legislature is one of restricting the property tax authority of taxing districts. In light of this history, application of the reasonableness canon of statutory construction suggests an intention of the legislature *not* to include 1979 overrides in the new base for the freeze. First, the overrides when authorized by election were intended only as an override authorization for a single year. §63-2220, *Idaho Code.* At the time the elections were held, the law clearly so provided and the issue was so presented to the electorate. To conclude that an override authorized by such an election is now a permanent part of the freeze base is to conclude that the legislature intended to deliberately break faith with the voters by changing the law to make the override permanent rather than temporary. We do not think it reasonable to conclude that the legislature intended such a change. Second, it is not reasonable to think that a legislature

evidencing such a history of restricting property taxation would intentionally penalize those districts which exercised fiscal restraint by not holding an override election in 1979. If those districts holding 1979 override elections are now entitled to have a permanent advantage as a result of the override, other districts may be deprived of their ability to take advantage of some or all of the four percent growth factor permitted to some districts by House Bill 795. When all of the property taxed by a district is taxed, in combination with all other districts imposing a tax on the same property, at less than one percent of the market value, the district is permitted a growth factor over its freeze base amount up to four percent. If other districts taxing the same property are allowed to include within their freeze base the amount of 1979 overrides, then taxes on the same property may reach or exceed one percent, thereby depriving all other districts taxing the same property of some or all of the growth factor in their own budgets. The effect would be to punish the fiscally restrictive districts while rewarding those who expanded their taxing authority by an override election. That is an effect clearly inconsistent with the history of the legislature and the one percent initiative. It is, therefore, unreasonable to conclude that the legislature intended such a result.

Finally, a rule particularly applicable to tax statutes has often been expressed by the Idaho Supreme Court. That is that taxing statutes (except exemption statutes) will generally be construed strictly against the taxing authority and favorably to the taxpayer. *Department of Employment v. Diamond International Corp.*, 96 Idaho 386, 529 P.2d 782 (1974); *Futura Corporation v. State Tax Commission,* 92 Idaho 288, 442 P.2d 174 (1968); *In re Potlatch Forests,* 72 Idaho 291, 240 P.2d 242 (1952); *Idaho Gold Dredging Co. v. Balderston,* 58 Idaho 692, 78 P.2d 105 (1938).

In summary, we conclude that to the extent legislative intention can be discerned a court will construe and apply a statute consistent with that intention even to the extent of sometimes sacrificing the literal language of a statute. However, the evidences of intention we have examined are conflicting. On the one hand, the court may decide the questioned language is plain and the legislature is presumed to have intended what the plain language states. Pursuant to this approach, the court would hold that the language plainly says a taxing district may levy for operating purposes in 1980 the same amount that it levied for operating purposes in 1979. However, other reliable indicators of legislative intention suggest that a court would reach the opposite conclusion — that the base amount of the freeze is the property tax revenues for operating purposes raised in 1978. To the extent that it is possible to find an ambiguity in the statutory language (and as we have pointed out there is a reasonable basis for a court to do so), a strong judicial preference favors construing a statute in the manner intended by the legislature. This preference would result in a judicial determination that the relevant base amount of the freeze is the amount raised from ad valorem taxes for operating purposes in the year 1978 and that any override amounts authorized in 1979 were not included in the new budget freeze amount.

We are inclined to the view that the legislature did indeed intend that the overrides *not* be included. This interpretation is also consistent with our practical advice that all districts should act to protect the legality of their levies. Any taxing district which sets its levy on the assumption that the amount of a 1979 override is includable in the freeze base applicable to 1980 taxes does so at the risk that it may later have been found to have imposed an unlawful levy. On the

other hand, a taxing district which proceeds on the assumption that it may not levy 1980 property taxes for operating purposes in an amount more than it levied in 1978 without a new override election will take no such risk. As a matter of practical legal advice to taxing districts, we must strongly urge that those taxing districts which wish to ensure that their 1980 property tax levies are insulated from the possibility of a legal attack at some later date should proceed based upon the latter rather than the former assumption. Accordingly, we conclude that an administrative construction by the Tax Commission to that end is preferable. The Commission is charged with the duty of promulgating regulations and making administrative constructions of the property tax laws which are binding on local taxing authorities. §63-513, *Idaho Code.* We have cited earlier a few of the cases holding that the courts will use such a construction as an aid to making its own interpretations. The rule is based on the idea that the administrative agency has some firsthand knowledge of the legislative purpose and that the agency will in good faith discharge its duty to implement the legislative desire. If the Commission finds that its own understanding is that the legislature did not intend to include the override amounts in the freeze base, we encourage the Commission to adopt regulations so providing. However, a word of caution is in order. No agency should use its regulation power in an effort to influence the courts into a construction the agency prefers over that actually intended by the legislature. The court has dealt with even the appearance of such "bootstrapping" harshly. See for example *Ware v. Idaho State Tax Commission,* 98 Idaho 477, 567 P.2d 423 (1977). The risk here is very different from that in the *Ware* case since the course we encourage the Commission to take in promulgating its regulations is the cautious rather than the risky course (although judicial preference between the alternative interpretations discussed above cannot be predicted with certainty).

We have limited our analysis and advice in this opinion to those indicators to which a court will look when called upon to discern legislative intention. Our personal knowledge of legislative expressions, debates and formal and informal actions or discussions are not matters which should weigh in our legal analysis, because they are matters to which judges cannot be privy. Nevertheless, we deem it not inappropriate to note that members of the Attorney General's staff attended numerous committee and subcommittee meetings and debates during the legislature's lengthy deliberations on the one percent measure. We are confident in our own minds that the legislature did not intend that 1979 overrides be included in the freeze base. To the extent that it enacted language which appears to say something contrary, the enactment was inadvertent.

AUTHORITIES CONSIDERED:

1. *Idaho Code* §§33-802; 63-513; 63-515; 63-2220.

2. Chapter 18, Session Laws of 1979; Chapter 258, Session Laws of 1979; Chapter 390, Session Laws of 1980.

3. Cases: *Hawaii v. Mankichi,* 190 U.S. 193, 212 (1903); *Keenan v. Price,* 68 Idaho 423, at 4387, 195 P.2d 662 (1948); *Acheson v. Fujiko Furusho,* 212 F.2d 284 (9th Cir., 1954); *Knight v. Employment Sec. Agency,* 88 Idaho 262, 398 P.2d 643 (1965); *Messenger v. Burns,* 86 Idaho 26, 382 P.2d 913 (1963); *Knight v. Employment Security Agency,* 88 Idaho 262 at 266, 398 P.2d 643 (1965); *Sunset Memorial Gardens, Inc. v. Idaho State Tax Commission,* 80 Idaho 206, 327 P.2d 766 (1958); *Young v. Wright,* 77 Idaho 244, 290 P.2d 1086 (1956); *Local 1494 of*

Intern Ass'n of Firefighters v. City of Coeur d'Alene, 99 Idaho 630, 586 P.2d 1346 (1978); *First American Title Co. of Idaho, Inc. v. Clark,* 99 Idaho 10, 576 P.2d 581 (1978); *Magnuson v. Idaho State Tax Commission,* 97 Idaho 917, 556 P.2d 1197; *Janss Corp. v. Board of Equalization of Blaine County,* 93 Idaho 928, 478 P.2d 878 (1970); *Kopp v. State,* 100 Idaho 160, 595 P.2d 309 (1979); *Idaho Public Utilities Commission v. V-1 Oil Co.,* 90 Idaho 415, 412 P.2d 581 (1966); *Services, Inc. v. Neill,* 73 Idaho 330, 252 P.2d 190 (1953); *McCall v. Potlatch Forests,* 69 Idaho 410, 208 P.2d 799 (1949); *Breckenridge v. Johnston,* 62 Idaho 121, 108 P.2d 833 (1941); *Lawless v. Davis,* 98 Idaho 175, 560 P.2d 497 (1977); *Summers v. Dooley,* 94 Idaho 87, 89, 481 P.2d 318 (1971); *Smith v. Department of Employment,* 100 Idaho ____, 26 ICR 545 (June 25, 1979); *Herdon v. West,* 87 Idaho 335, 393 P.2d 35 (1964); *Moon v. Investment Board,* 97 Idaho 595, 548 P.2d 861 (1976); *Newlan v. State,* 96 Idaho 711 (1975), appeal dismissed 423 U.S. 993; *Swensen v. Buildings, Inc., 93 Idaho 466, 463 P.2d 932 (1970); Willows v. City of Lewiston,* 93 Idaho 337, 461 P.2d 120 (1969); *Anstine v. Hawkins,* 92 Idaho 561, 447 P.2d 677 (1968); *Roe v. Hopper,* 90 Idaho 22, 408 P.2d 161 (1965); *Noble v. Glenns Ferry Bank, Ltd.,* 91 Idaho 364, 421 P.2d 444 (1966); *Norton v. Department of Employment,* 94 Idaho 924, 500 P.2d 825 (1972); *Stucki v. Loveland,* 94 Idaho 621, 495 P.2d 571 (1972); *Nampa Lodge No. 1389 BPOE v. Smylie,* 71 Idaho 212, 229 P.2d 991 (1951); *Wright v. Village of Wilder,* 63 Idaho 122, 117 P.2d 1002 (1941); *State v. Long,* 91 Idaho 436, 423 P.2d 858 (1967); *Idaho Mut. Ben. Ass'n v. Robison,* 65 Idaho 793, 154 P.2d 156 (1945); *Walker v. Wedgwood,* 64 Idaho 285, 130 P.2d 856 (1942); *Richardson et al v. State Tax Commission,* 100 Idaho ____, 26 I.R.C. 1151 (1979); *Leonard Construction Co. v. State ex rel Tax Commission,* 96 Idaho 893, 539 P.2d 246 (1975); *Department of Employment v. Diamond International Corp.,* 96 Idaho 386, 529 P.2d 782 (1974); *Futura Corporation v. State Tax Commission,* 92 Idaho 288, 442 P.2d 174 (1968); *In re Potlatch Forests,* 72 Idaho 291, 240 P.2d 242 (1952); *Idaho Gold Dredging Co. v. Balderston,* 58 Idaho 692, 78 P.2d 105 (1938); *Ware v. Idaho State Tax Commission,* 98 Idaho 477, 567 P.2d 423 (1977).

4. 3 Sutherland, *Statutory Construction,* Sec. 5803, p. 79.

5. Art. 7, Sec. 12, *Idaho Constitution.*

6. Attorney General Opinions No.'s 79-7 dated April 27, 1979; 79-12 dated May 31, 1979; and 79-15, dated July 11, 1979.

DATED this 1st day of May, 1980.

ATTORNEY GENERAL
State of Idaho
/s/ DAVID H. LEROY

ANALYSIS BY:

THEODORE V. SPANGLER, JR.
Deputy Attorney General

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

ATTORNEY GENERAL OPINION NO. 80-14

TO: Milton G. Klein
Director
State of Idaho Department of Health & Welfare
Statehouse Mail

Per Request for Attorney General's Opinion

QUESTION PRESENTED:

What is the impact of the recent United States District Court for the District of New York decisions holding the Hyde Amendments limitation for Medicaid funding of abortions unconstitutional on the Idaho Medicaid State Plan, which imposes the same limitations on funding for abortion procedures as did the Hyde Amendments?

CONCLUSION:

The Idaho Medicaid State Plan should be amended. If properly amended to conform to the existing language of Idaho Code § 56-209, the state plan should be in compliance with the recent court decisions and the resultant requirements of the United States Department of Health, Education, and Welfare.

ANALYSIS:

The medicaid program is found at Title XIX of the Social Security Act, 42 U.S.C. § 1396. This program is a joint federal-state venture to provide for at least some of the costs of assistance to eligible recipients where the state plan approved by the Secretary of Health, Education, and Welfare describes those procedures which are found to be medically necessary.

Title XIX does not describe in detail which medical services will receive financial support. However, certain services are required. 42 U.S.C. § 1396d (a). One area of required services is found at § 1396d (a) (5), Physician's Services. Thereunder, medical assistance will be provided for physicians' services as defined in § 1395x (r) (1) and § 1396d (e). These sections provide that assistance is available for those services performed by, *inter alia,* a doctor of medicine legally authorized to practice medicine within the authorized scope of medical practice. Abortion procedures are authorized to be within the scope of medical practice. *Roe v. Wade,* 410 U.S. 113; Idaho Code § 18-608. While neither the code section, nor *Roe v. Wade,* or its progeny, require or permit abortions on demand, collectively they do stand for the authority that abortion services are within the scope of authorized medical practice. Therefore, since medical services are a required element of participation in the program, and since abortion procedures fall within the scope of authorized medical practice under existing legal structures, funding for those services is required. Any failure to provide necessary funding results in federal non-compliance. Non-compliance by the state potentially results in withholding of all medicaid participation by the United States. Under this construction an eligible recipient of those services must have the services paid for by the medicaid program, *if* the services are medically necessary.

In 1977, the Congress attached the so-called "Hyde Amendments" to appropriation measures for the Department of Health, Education, and Welfare. These

amendments limited the medical assistance to eligible recipients for abortion procedures to those procedures necessary to save the mother's life or where the mother would suffer severe and long-lasting physical health damage if the fetus were carried to term. Two suits were filed in the U.S. District Court for the District of New York challenging the constitutionality of those funding restrictions for abortion procedures. These suits were consolidated. *McRae v. Secretary, HEW,* Civ. No. 76-C-1804; and *New York City Health & Hospital Corp. v. Secretary, HEW,* Civ. No. 76-C-1805.

The district court found the Hyde Amendments limiting the use of federal funds for abortions to be unconstitutional "as applied to abortions that are necessary in the professional judgment of the pregnant woman's attending physician exercised in the light of all factors, physical, emotional, psychological, familial, and the woman's age, relevant to the health-related well-being of the pregnant woman."

On January 15, 1980, the date the district court entered its orders in the two cases, it granted a thirty day stay of those orders pending appeal. On February 4, the United States moved for an extension of the stay order, which was denied. The United States then petitioned to the United States Supreme Court for an order extending the stay order pending appeal. The Supreme Court, on February 19, 1980, denied the petition. As a result of that denial, the district court's judgment became effective on that date.

We point out the procedural history for the purpose of emphasizing that the United States Supreme Court did not rule on the merits of the district court's judgment that the Hyde Amendments were unconstitutional. The Supreme Court's denial of the motion for an extension of the stay of the district court's judgment had the effect, not of validating the judgment, but of permitting the district court's judgment to take effect immediately.

Although the State of Idaho was not a party to either case, the court's order has a direct and immediate effect on this state. The operable and pertinent parts of the order to the Department of Health, Education, and Welfare require that the department:

> A. Cease to give effect to [the Hyde Amendments] so far as they forbid the making of medicaid payments for abortions performed by qualified medicaid providers in cases in which the abortions are necessary in the professional judgment of the pregnant woman's attending physician;
>
> B. Continue to authorize the expenditure of federal matching funds for medically necessary abortions provided by duly certified providers for medicaid-eligible when at the proportionate level and in accordance with the standard of medical necessity set forth [above];
>
> C. Forthwith, communicate the substance of this judgment to the regional directors of the Department of Health, Education, and Welfare, with instructions that they promptly disseminate that communication to all state medicaid authorities within their regions with instructions that they in turn communicate it to all local medicaid authorities and providers of pregnancy-related care to medicaid-eligible women.

Therefore, while the order and judgment run to the Department of Health,

Education, and Welfare, the states are called upon to give effect thereto. The court's order to the Department of Health, Education, and Welfare requires that agency to cease giving effect to the Hyde Amendments. The Department of Health, Education, and Welfare cannot give effect and approval to a state plan which imposes the same restrictions as did the Hyde Amendments. The Department of Health, Education, and Welfare, then, cannot participate with funding in any aspect of the Medicaid program if the state plan includes the same funding restrictions for abortion procedures as the Hyde Amendments. The present Idaho state plan provides that: "payment for abortion and abortion related services is limited to those abortions and abortion related services that have the recommendations of two (2) consulting physicians that an abortion is necessary to save the life of the mother, two (2) consulting physicians' recommendations that the mother will suffer severe and long-lasting physical health damage if the fetus is carried to term; that in the case of rape or incest, the incident is reported promptly to a law enforcement agency or public health agency and the pregnancy is a result of rape or incest as determined by the courts."

For purposes of this opinion, the portion of the plan to which the district court's ruling has effect is "that the mother will suffer severe and long-lasting *physical* health damage if the fetus is carried to term; . . ." [emphasis added]. This language is taken almost directly from the Hyde Amendments. The district court's objection to this language was that such limitations did not consider other medically necessary abortions, but anticipated only those procedures that were necessary to protect the life or physical health of the mother. In other words, the Hyde Amendments and the Idaho State Plan as now written do not take into account all medically necessary abortions as they may be determined by the medicaid providers. According to the court all "medically necessary" abortions and related procedures must be made available to a recipient otherwise eligible where not only the life and physical health are endangered as found by the pregnant woman's attending physician, but all other factors determining medical necessity must be taken into account as well. Among the additional considerations are: the woman's age, emotional, psychological, familial, and other factors relevant to the general health-related well-being of the pregnant woman. Therefore, to the extent that the current Idaho State Plan does not provide for payment of the procedures under those additional court-enumerated circumstances, the plan is out of compliance with federal court rulings and should be amended if federal participation is desired.

The relevant state statute, Idaho Code § 56-209c, however, is not inconsistent with the court's ruling:

> No funds available to the Department of Health and Welfare, by appropriation or otherwise, shall be used to pay for abortions, unless it is the recommendation of two (2) consulting physicians that an abortion is necessary to save the life or health of the mother, or unless the pregnancy is the result of rape or incest as determined by the courts.

The above-quoted statute states that only medically necessary abortions will be paid for out of public funds where the mother's life or health is endangered. The statute does not specifically limit the danger to the mother's "health" to her physical health, which was the unconstitutional effect of the Hyde Amendments. In *Doe v. Bolton*, 410 U.S. 179, 192 (1973) the United States Supreme Court held "[w]hether 'an abortion is necessary' is a professional judgment that

. . . may be expressed in the light of all factors — physical, emotional, psychological, familial, and the woman's age — relevant to the well-being of the patient. All these factors may relate to health. This allows the attending physician the room he needs to make his best medical judgment." Thus, to give meaning to this statute without running afoul of court rulings, "health" must be construed to mean not only physical health, but also mental and other health considerations as determined in light of all factors relevant to the health-related well-being of the pregnant woman, including physical, emotional, psychological, familial makeup, and the woman's age.

This conclusion is further supported by Idaho Code § 18-608, which, although not applicable for funding determination, does recognize availability or medically necessary abortion procedures for reasons in addition to the impaired physical health of the mother.

By enacting Idaho Code § 56-209b, the legislature in 1961 brought this state into the medicaid program, providing medical assistance in various forms to those portions of the population entitled thereto. For federal financial participation, at a ratio of about 2 to 1, the state must pay for certain services. While the state has great latitude in determining how much it will support the program, *Hayman v. State Dept. of Health & Welfare,* ____ Idaho ____, 604 P.2d 724 (1979), the availability of those services required to be performed cannot be reduced. In other words, so long as the state participates in the medicaid program, the Department of Health and Welfare, as the agency charged with the administration thereof, has no choice but to comply with the rules, regulations and court decisions involving the program, or run the risk of losing all federal financial participation in medicaid.

Therefore, we must conclude that the state plan should be amended to avoid that risk. Idaho Code § 56-209c has not been invalidated by the district court's ruling and needs no change. Any amendment offered to the state plan for this purpose will expand the definition of medically necessary procedures to become consistent with the existing statute and federal court rulings as outlined above.

AUTHORITIES CONSIDERED:

Idaho Statutes

Idaho Code § 18-608.
Idaho Code § 56-209c.

United States Statutes

42 U.S.C. § 1395x (r) (l).
42 U.S.C. § 1396.
42 U.S.C. § 1396d (a).
42 U.S.C. § 1396d (a) (5).
42 U.S.C. § 1396d (e).

Cases

1. *Doe v. Bolton,* 410 U.S. 179 (1973).

2. *Hayman v. State Dept. of Health & Welfare,* ____ Idaho ____, 604 P.2d 724 (1979).

3. *McRae v. Secretary, HEW,* Civ. No. 76-C-1804.

4. *New York City Health & Hospital Corp. v. Secretary, HEW,* Civ. No. 76-C-1805.

5. *Roe v. Wade,* 410 U.S. 113.

DATED this 2nd day of May, 1980.

ATTORNEY GENERAL
State of Idaho
/s/ DAVID H. LEROY

ANALYSIS BY:

JAMES R. HARGIS
Deputy Attorney General
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DHL/JRH/dm

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

ATTORNEY GENERAL OPINION NO. 80-15

TO: Senator Edith Miller Klein
P.O. Box 475
Boise, ID 83701

Per Request for Attorney General Opinion

QUESTIONS PRESENTED:

1. What is the meaning of the word "facility" in Idaho Code §20-242.3.?

2. Does Idaho Code §20-242 give the State Board of Correction the discretion to contract with privately run facilities in the State of Idaho which could be used to domicile prisoners during work release furloughs?

CONCLUSION:

1. The word "facility," as used in Idaho Code §20-242, means a jail or other place of confinement, owned by a governmental organization, approved by the Board of Correction, where there are security measures taken which comply with the degree of safekeeping, care and subsistence required by Idaho state law and the Rules and Regulations adopted by the Board of Correction.

2. Idaho Code §20-242 does not give the State Board of Correction the discretion to contract with privately run, non-governmental facilities which could be

used to domicile prisoners during work release furloughs as the word "facility" means a governmental facility because the legislature has not delegated the kind of authority necessary for the Board of Correction to use privately run facilities.

ANALYSIS:

Idaho Code §20-242, in general, authorizes the Board of Correction to allow prisoners to continue in their regular employment or education program if such is compatible with the requirements set forth by the Board of Correction in keeping the prisoner incarcerated when the prisoner is not employed and between the hours or periods of employment or schooling. It should be noted that the word "facility" in Idaho Code §20-242.3. is not defined in that statute. However, facility has been defined as:

> Something (as a hospital, machinery, plumbing) that is built, constructed, installed or established to perform some particular function or to serve or facilitate some particular end. Webster's 3rd International Dictionary unabridged (1966).

The word "facility" has been used in some Idaho cases. However, facility has never been defined as it has always been used in the context of the problem and case modified by an adjective. See e.g. *Coeur d'Alene and St. Joe Transportation Co. v. Ferrell,* 22 Idaho 752, 128 Pac. 565 (1912) (docking facility for steam boats); *Texas Gulf Sulfur Co. v. J. R. Simplot Co.,* 418 F.2d 793 (9th Cir. 1969) (sulphuric acid facility).

Section 20.242.3. also states that "(the prisoner) shall be domiciled in a jail or facility as directed by the Board of Correction." Thus, the statute does contemplate the use of a jail which, like the state penitentiary, is a place of incarceration indicating and implying a certain amount of security precautions and discipline with respect to the incarcerated person. Subsection 3 of §20-242 is mandatory in its language. Ordinarily, use of the word "shall" means an imperative unless a miscarriage of justice could result. *Jersey City v. Board of Tax Appeals,* 133 N.J.L. 202, 43 A.2d. 799 (1945).

It is important to note that the Board of Correction has the discretion to place a prisoner on a furlough and see that the prisoner resides in a jail or facility. This is because subsection 1 of §20-242 states ". . . the Board *may*, . . . direct that the person be permitted to continue in his regular employment or educational program. . . ." The use of the word "may" usually means a permissive intention on the part of the legislature, however, this must be derived from the legislative intent of the statute. *Driscoll v. East-West Dairymen's Ass'n.,* 52 Cal. Appl. 2d 68, 126 P.2d. 476 (1942). In this case, the intent must be implied from the language used and on the grounds of the legislative policy and reasonableness of the statute. The purpose of the statute would seem to be to protect the public when the prisoner is not working or going to school and to keep controls on the prisoner while on furlough or while housed in the jail or other facility. See, *Jacobs v. State Bar,* 141 Cal. Rptr. 812, 570 P.2d. 1230 (1977).

The word "furlough" means a leave of absence. It has been defined as "a term employed to describe an early release of selected inmate serving six (6) months or less." *Anderson v. Redman,* 429 F. Supp. 1105 (D. Del. 1977) (a remedy suggested by the court to reduce overcrowding in the Delaware Corrections

Center by releasing prisoners 20 days early when serving a two (2) month sentence and 15 days early when serving a three (3) to six (6) month sentence). However, in Idaho Code §20-242, the length of sentence does not matter. The Board of Correction may direct a prisoner such that he is allowed to continue in his regular employment or education as long as the prisoner is domiciled in a jail or facility as directed by the Board of Correction.

Regarding the above-stated legislative purpose, it should be noted that §20-242 was enacted along with Idaho Code §20-241. The statutes enacted together are presumed to be construed together when they are on the same subject matter. *State v. Bundrant,* 546 P.2d. 530 (Alaska 1976). It should be noted that the two statutes, §20-241 and §20-242 were also amended together. It has been held that when statutes are amended together, the legislature intended that the amended statutes be construed with policy in prior statutes. *Stearns v. Graves,* 61 Idaho 232, 99 P.2d. 955 (1940). This simply means that the two sections, being in *pari materia,* must be construed together. Section 20-241.4. states:

> To determine the availability of state facilities suitable for the detention and confinement of persons held under authority of state law. If the State Board of Correction determines that suitable state facilities are not available, it may enter into an agreement with the proper authorities of the United States, another state, or a political subdivision of this state to provide for the safekeeping, care, subsistence, proper government, discipline and to provide programs for the reformation and rehabilitation and treatment of prisoners. Facilities made available to the State Board of Correction made by agreement may be in this state, or any other state, territory or possession of the United States. The State Board of Correction shall not enter into an agreement with an authority unable to provide the degree of time or safekeeping, care and subsistence required by the law of this state and the rules and regulations adopted by the State Board of Correction.

Thus, §20-241.4. adds to the definition of what kind of facilities can be used for the incarceration of Idaho prisoners. The statute is mandatory in its terms stating the the Board of Correction shall not enter into an agreement with an authority unable to provide the kind of safekeeping required by the state law and Board of Correction Rules and Regulations. Furthermore, §20-241.4. only speaks of prison facilities run by governmental authorities. Furthermore, these governmental authorities and places of incarceration must meet the standards set by the State Board of Correction.

By saying "shall not" the statute indicates that the construction to be given to the statute should be viewed as mandatory as it prohibits the Board of Correction from entering into agreements with authorities unable to provide the necessary care and safekeeping. *State v. Dunbar,* 39 Idaho 691, 230 Pac. 33 (1924).

Hence, it is the duty of the Board of Correction, prior to entering into an agreement with the authorities outlined above, to determine whether the security of that prisoner will be assured by the contracting authority. Of course, §20-241 limits the Board of Correction to placing prisoners in facilities which are run by the proper authorities of the United States, other states or a political subdivision of this state.

By construing the provisions of §20-241 together with the provisions of §20-242, it is evident that the State Board of Correction has the discretionary power to enter into agreements with Federal, state and local authorities for the incarceration of prisoners, as well as the discretionary authority to arrange jobs or school. As the Idaho Supreme Court has stated in *Magnuson v. Idaho Tax Commission,* 97 Idaho 917, 556 P.2d. 1197 (1976), "we must attempt to construe this provision consistent with the primary rules of statutory construction — that all sections of the applicable statutes should be considered and construed together to determine the nature and intent of the legislature. . . ." In construing the two statutes presented here together, it is evident that the legislature intended that the kind of facility required for the incarceration of prisoners on work or educational furlough, should be similar to facilities provided by federal, state, or local authorities for the incarceration of felons. Furthermore, §20-242.3. states that the prisoner shall be domiciled in a "jail *or* facility." It has been held that the disjunctive, or, is an alternative corresponding to "either." Thus, the word following "or" would mean the same kind of subject matter as the word preceding the conjunction.

> In other words the term 'or' should ordinarily be given its normal disjunctive meaning unless such a construction renders the provision in question to other statutes, or unless it would involve an absurdity or produce an unreasonable result. *Filer Mutual Telephone Company v. Idaho Tax Commission,* 76 Idaho 256, 281 P.2d. 478 (1955).

By reading §§20-241 and 20-242 together, in this situation, the word "facility" means a building which is similar to a jail, which provides the degree or kind of safekeeping, care and subsistence required by the laws of Idaho and the Rules and Regulations adopted by the Board of Correction, and it must be run by a governmental authority.

The reason for including only governmentally run facilities is that the incarceration of prisoners is traditionally a police power function exercisable only by the legislature. The issue becomes whether the Board of Correction is able to delegate what is essentially a police power function to a private entity, no matter how good the security and supervision is.

The Idaho Constitution states that no other person may exercise legislative power unless authorized by the Idaho Constitution. Idaho Constitution, Article II, §1. The Legislature is the repository of the police power of the state and can exercise it within the parameters of the Constitution. *In re Speer,* 53 Idaho 293, 23 P. 2d 239 (1933). Additionally, it has been held that the state cannot bargain away the right and duty to adopt such measures as it may from time to time deem admissible for the promotion of the health and morals of the persons confined in its penal institutions. *Jones Hollow Ware Co. v. Crane,* 134 Md 123, 106 A. 274 (1919).

The erection of prisons and jails is purely a governmental function and an indispensable part of the enforcement of criminal law in the state. *District of Columbia v. Totten,* 5 F. 2d 374 (1925). However, the legislature can delegate authority to a private corporation or to an agency if that is the best way to accomplish the legislature's will. *Leigh v. Green,* 193 U.S. 79 (1932). In the case of the present status of Idaho Code §20-242, the Idaho legislature has not delegated the necessary power to the Board of Correction to allow the Board to place inmates in non-governmentally run institutions.

However, the Federal Government in 18 *U.S.C.* §4082 has allowed the United States Attorney General to place prisoners in both federal and state prisons. The statute goes further and allows placement of prisoners in a residential community treatment center. 18 *U.S.C.* §4082 (f). "Facility" is defined to include such community centers. Furthermore, state prisoners committed to federal prisons are eligible to be sent to residential community treatment centers. Executive Order No. 11755 of December 29, 1973, 39 Fed. Reg. 779. So, at least as to the Federal Government, it is possible for both Federal and state prisoners to participate in the work release or furlough programs in a residential community treatment center at the direction of the U.S. Attorney General.

Yet, the Idaho statutes which are construed in this opinion, do not define the word facility as the Federal Statute does. Facility must be defined in the context of §§20-241 and 20-242. Because these two statutes are in *pari materia;* both being enacted and amended together, (except for the last clause of §20-242 which was added in 1979), and because unless specifically defined by the legislature, the word "facility" must be construed to mean a governmental facility. This would include city or county jails, prisons, penitentiaries or other institutions which have proper safeguards for security and subsistence of state prisoners. Such a construction may cause the anomalous result of an Idaho prisoner, who is presently incarcerated in a Federal penitentiary, being placed on work release in a residential community treatment center. Such a result cannot be avoided as the Idaho legislature has not seen fit to provide a definition of "facility" and has not delegated the quantum of power to the Board of Correction to allow Idaho prisoners to be placed in privately run residential treatment centers. §20-242 would allow the Board of Correction to place inmates in governmental residential community treatment centers, but it is most likely that the statutory authority, granted by the legislature, does not go far enough to allow Idaho inmates to be placed in community centers run by non-governmental organizations.

SUMMARY:

To summarize, then, the word "facility" relates to a jail-like facility or at least to a building which can provide the kind and degree of safekeeping, care and subsistence required by state law and Board of Correction Regulations. Because §20-242 was enacted and amended with §20-241, these statutes should be construed together. By construing them together, it is evident that the kind of facility required must have sufficient safeguards to comply with state law and regulation while also being run by a governmental entity. The legislature has not delegated the kind of authority necessary to allow the Board of Correction to commit prisoners to non-governmentally run institutions or treatment centers. However, the Federal government has delegated that authority to the United States Attorney General. In any case, the Board of Correction can commit state prisoners to a governmentally run residential community treatment center as long as the Board of Correction is assured that the kind of facility used to house the prisoner is similar to a jail in providing the kinds of protection necessary to protect the public's interest and the prisoner's well-being.

AUTHORITIES CONSIDERED:

1. Idaho Code §20-241 (as amended 1972).

2. Idaho Code §20-242 (as amended 1972 and 1979).

3. Idaho Constitution, Article II, §1.

4. 18 *U.S.C.* §4082.

5. Executive Order, No. 11755, December 29, 1973, 39 Fed. Reg. 779.

6. *Texas Gulf Sulphur Co. v. J. R. Simplot Co.*, 418 F.2d 753 (9th Cir. 1969).

7. *Leigh v. Green,* 193 U.S. 79 (1932).

8. *Anderson v. Redman,* 429 F. Supp. 1105 (D. Del. 1977).

9. *District of Columbia v. Totten,* 5 F. 2d 374 (1925).

10. *Jersey City v. Board of Tax Appeals,* 133 N.J.L. 202, 43 A.2d. 799 (1945).

11. *Driscoll v. East-West Dairymen's Ass'n.,* 52 Cal. App 2nd for 68, 126 P.2d. 476 (1942).

12. *Jacobs v. State Bar,* 141 Cal. Rptr. 812, 570 P.2d. 1230 (1977).

13. *State v. Bundrant,* 546 P.2d. 530 (Alaska 1976).

14. *Coeur d'Alene and St. Joe Transportation Co. v. Ferrell,* 22 Idaho 752, 128 Pac. 565 (1912).

15. *Stearns v. Graves,* 61 Idaho 232, 99 P.2d. (1940).

16. *Magnuson v. Idaho Tax Commission,* 97 Idaho 912, 556 P.2d. 1197 (1976).

17. *Filer Mutual Telephone Company v. Idaho Tax Commission,* 76 Idaho 256, 281 P.2d. 478 (1955).

18. *Jones Hollow Ware Co. v. Crane,* 134 Md 123, 106 A. 274 (1919).

DATED this 5th day of May, 1980.

ATTORNEY GENERAL
State of Idaho
/s/ DAVID H. LEROY

ANALYSIS BY:

ROBERT R. GATES
Deputy Attorney General

cc: Idaho Supreme Court
Idaho Supreme Court Library
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ATTORNEY GENERAL OPINION NO. 80-16

TO: Honorable John V. Evans
Governor of Idaho
Statehouse
Boise, Idaho 83720

Per Request for Attorney General's Opinion

QUESTIONS PRESENTED:

In view of the recent declaration of a state of emergency in several northern Idaho counties due to the eruption of and resulting ash fallout from Mount St. Helens, what emergency fiscal powers are available to local governments to cope with the emergency situation? For convenience, the specific questions are stated as follows:

1. Is tax anticipation note financing available to local taxing entities, including counties?

2. Do cities and counties have any emergency funding mechanisms, including the authority to issue warrants, to meet the emergency? If so, are such mechanisms subject to the 1% or tax freeze limitations? Is the authority of counties to levy a special tax for warrant redemption purposes, as provided in Art. 7, §15, Idaho Constitution, subject to the limitations of the 1% law or the tax freeze limitations?

3. Are any emergency funding mechanisms available to highway districts, water and sewer districts, and similar special-function districts?

4. What is the governor's authority to use state resources, including state funds, to meet the emergency situation?

CONCLUSIONS:

1. Tax anticipation borrowing, as authorized by Idaho Code Sections 63-3101 et seq., is available to any taxing entity, including cities, counties, and other entities which have the power to levy ad valorem taxes. However, because of the restrictions contained in those statutes limiting borrowing to 75% of either the current or the last year's levy, this authority is probably of little practical use to taxing entities in meeting the current emergency. In addition, this authority is not available to governmental entities which are not authorized to levy ad valorem taxes.

2. Counties and cities have available to them certain statutory methods of making emergency expenditures, which expenditures are, most likely, exempt from the limitations of the 1% and tax freeze limitations. Counties' ability to levy, pursuant to Idaho Constitution, Art. 7, §15, to redeem warrants, is not subject to tax limitation legislation. Such expenses are most likely not subject to the debt limitations of Art. 8, §3, Idaho Constitution.

3. Highway districts, water and sewer districts, and the like have no emergency fiscal authority similar to that possessed by counties and cities, and we cannot advise such entities to rely upon any inherent or implied power to

make expenditures or incur indebtedness beyond their current year's budgets for such purposes. However, they may expend currently budgeted funds for such purposes, including their matching share of federal or state disaster relief funds.

4. Under Idaho Code Section 46-1008, the Governor possesses plenary power to take such actions as he deems necessary to cope with disaster emergencies, including utilization of state funds. However, such authority most likely does not include the power to suspend applicable fiscal and debt limitation provisions of local districts which are not state agencies.

ANALYSIS:

1. Idaho Code §§ 63-3101, et seq., provide that any taxing district (defined as any county, any political subdivision of the state, any municipal corporation, any school district, any quasi-municipal corporation, or any other public corporation authorized by law to levy taxes) shall have power, by resolution, to borrow money and issue tax anticipation bonds or notes to provide funds in anticipation of the collection of taxes for the current fiscal year in which such tax anticipation bonds or notes are issued. (Borrowing against taxes levied for bonded indebtedness is not permitted.) The amount authorized to be borrowed by means of such tax anticipation bonds or notes shall not exceed 75% of the taxes levied for the current fiscal year and not yet collected by the taxing district. If the tax levy for such fiscal year has not been completed, then the amount of tax anticipation bonds or notes issued in anticipation of taxes to be levied for the fiscal year shall not exceed 75% of the taxes levied by said taxing district in the previous fiscal year. Idaho Code § 63-3102. All taxes thereafter collected or received, the collection of which has been so anticipated, shall be placed in a special fund to pay the interest and principal on the tax anticipation notes or bonds, and used for no other purpose. Idaho Code § 63-3104.

These statutes authorize counties, cities, and other taxing districts to borrow on tax anticipation notes. They do not authorize borrowing by entities which do not tax, such as irrigation districts, which are financed by assessments on property rather than by taxes (under Idaho Code § 43-414, passed in 1979, irrigation districts may borrow on "interim notes" issued in anticipation of collection of assessments). However, tax anticipation borrowing is likely to be of little practical use to Idaho counties and cities to meet expenses occasioned by the volcanic activity, because tax anticipation borrowing is expressly limited at 75% of the taxes levied for the current fiscal year and not yet collected. Idaho Code § 63-3102. Tax anticipation borrowing is not authorized against *future* years' tax levies. Most counties and cities are presently operating on a cash basis and have already received at least one-half of the taxes they levied for the current (1980-81) fiscal year, and undoubtedly have budgeted the balance for other ordinary expenses for the balance of the fiscal year. Thus, it is not likely that any county or city will be able to meet any extraordinary, unbudgeted expenses occasioned by the volcanic activity by utilizing tax anticipation borrowing. It is more likely that they will have to rely upon issuance of warrants, which is discussed next.

2. Both counties and cities have been granted statutory authority to expend funds, over and above their budgeted revenues and expenditures, to meet emergencies. In the case of counties, Idaho Code § 31-1608 provides, in pertinent part:

> Upon the happening of any emergency caused by fire, flood, explosion, storm, epidemic, riot or insurrection, or for the immediate preservation of order or of *public health* or for the *restoration to a condition of usefulness of public property,* the usefulness of which has been destroyed by accident, *or for the relief of a stricken community overtaken by a calamity* . . . the board of county commissioners may, upon the adoption, by the unanimous vote of the commissioners, of a resolution stating the facts constituting the emergency and entering the same upon their minutes, make the expenditures necessary to investigate, provide for and meet such an emergency.
>
> All emergency expenditures may be paid from any moneys on hand in the county treasury in the fund properly chargeable with such expenditures, and the county treasurer is hereby authorized to pay such warrants out of any moneys in the treasury in any such fund. *If at any time there shall be insufficient moneys on hand in the treasury to pay any of such warrants, then such warrants shall be registered, bear interest and be collected in the manner provided by law for other county warrants.* [Emphasis added.]

The statute further provides that the total amount of the emergency warrants issued, registered, and unpaid be submitted to the county commissioners and included in the next appropriation. The warrants are issued in accordance with Idaho Code § 31-1514, which provides, among other things, that if the fund on which the warrant is drawn is insufficient to pay any warrant, it must be registered, and thereafter paid in the order of its registration. Idaho Code § 63-911 provides that the county shall levy up to 10 mills, for the redemption of outstanding county warrants issued prior to the first day of October in each year, which levy is collected and paid into the county treasury and apportioned to the county warrant redemption fund. Idaho Code § 63-913 provides for the transfer from other county funds of any surplus amounts existing as of October 1 to the county warrant redemption fund.

The foregoing statutes thus provide a system whereby counties which have not budgeted adequate funds to meet emergencies may nevertheless expend funds for such purpose by issuing warrants, registering the same, and levying a tax to redeem them. This system is authorized by and is in accordance with Art. 7 §15, Idaho Constitution, which 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 (10) 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.

It is our further opinion that the warrant redemption levy authorized by Art. 7, §15, is exempt from any limitations imposed by the "1% Initiative" and its

implementing legislation. In Attorney General Opinion No. 79-15, which we issued on July 11, 1979, we considered the identical question and concluded:

> It is fundamental that the Constitution prevails against conflicting statutory provisions. *Golden Gate Highway Dist. v. Canyon County,* 45 Idaho 406, 262 P. 1048 (1927); *State v. Johnson,* 50 Idaho 363, 296 P. 588 (1931). A provision of the Constitution cannot be amended or repealed by legislative action. *State v. Village of Garden City,* 74 Idaho 513, 265 P.2d 328 (1953); *State v. Malcom,* 39 Idaho 185, 226 P. 1083 (1924). This rule applies both to legislation passed by the legislature and to legislation passed by initiative. *State v. Finch,* 79 Idaho 275, 315 P.2d 529 (1957).
>
> In light of these well established principles of constitutional law, to the extent that there is or may be any conflict between a constitutional provision and the statute, the constitutional provision prevails. It is our opinion, then, that if a county has issued warrants in compliance with Idaho law, including the County Budget Act and the applicable constitutional and statutory requirements, and those warrants are outstanding and unpaid due to lack of funds, the county is authorized and required by art. 7, § 15, Idaho Constitution, to levy a special tax to redeem them, any provisions to Idaho Code § 63-2220 notwithstanding.

We continue to adhere to that opinion.

Even without Art. 7, §15, it is likely that a levy to redeem emergency warrants would be exempt from the application provisions of the 1% limitation and its implementing legislation. As amended by H.B. 795, passed by the 1980 Idaho Legislature, Idaho Code § 63-923 (the 1% law) provides that, *except as provided in section 63-2220, Idaho Code,* taxes shall not exceed 11% of market value. Idaho Code § 63-2220, as amended by H.B. 795, provides that, for the fiscal year commencing in 1980 and each year thereafter, no taxing district shall certify a budget request to finance the ad valorem portion of its *operating budget* that exceeds the dollar amount of ad valorem taxes certified for that same purpose in 1979. Thus, the tax freeze applies only to the tax funded portion of the *operating budget.* Although that term is not defined in the act, and may be subject to varying interpretations, we view it as highly unlikely that the courts would consider a levy to redeem emergency warrants issued to meet expenses occasioned by the volcanic activity as part of the operating budget. On the contrary, we view it as more likely than not that such expenses, and the levy necessary to meet them, would be viewed as extraordinary expenses outside the tax freeze limitation of Idaho Code § 63-2220, not as "operating" expenses.

This raises a further question of the applicability of Art. 8, §3, Idaho Constitution, which prohibits a county, city, school district, or other political subdivision from incurring any indebtedness or liability, in any manner or for any purpose, exceeding the revenues provided to it for that year, without approval of the voters, except for "ordinary and necessary expenses authorized by the general laws of the state." In other words, can an expense be considered extraordinary for purposes of Idaho Code § 63-2220, yet be considered "ordinary and necessary" under Art. 8, § 3? In our opinion, it can. The decisions of the Idaho Supreme Court make it clear that an expenditure, though not one which is regularly recurring, if necessary to maintain the property or to continue the normal functions of a governmental entity, will be deemed to be both ordinary and

necessary. This rule has been held particularly applicable to situations involving interruptions of vital services due to a disaster or calamity (*Hickey v. City of Nampa,* 22 Idaho 41, 124 P. 280 (1912)), or replacement of existing facilities (*City of Pocatello v. Peterson,* 93 Idaho 774, 473 P.2d 644 (1970)). In light of these and other recent decisions of the Idaho Supreme Court (*Hanson v. City of Idaho Falls,* 92 Idaho 512, 446 P.2d 634 (1968); *Board of County Commissioners v. Idaho Health Facilities Authority,* 96 Idaho 498, 531 P.2d 588 (1975)), it is our opinion that emergency expenses to replace, repair, or maintain necessary governmental property or services, occasioned by the volcanic activity, would be ordinary and necessary expenses and thus not barred by Art. 8, §3, Idaho Constitution.

We conclude, then, that the emergency procedures authorized by Idaho Code § 31-1608 are available to counties to meet the emergency situation, and that such procedures are not barred by the 1% limitation or other statutory or constitutional provision. We call attention, however, to the requirement of adoption, by unanimous vote of the county commissioners, of a resolution stating the facts constituting the emergency (Idaho Code § 31-1608), and the fact that such finding is reviewable by the courts in case of challenge. *Reynolds Construction Company v. Twin Falls County,* 92 Idaho 61, 437 P.2d 14 (1968).

Many of the foregoing powers and principles are likewise available to Idaho cities. Idaho Code § 50-1006, which generally limits cities to expending only such funds as have been duly budgeted and appropriated for the year, contains the following exception:

> . . . [P]rovided, however, that nothing herein contained shall prevent one-half (1/2) plus one (1) of the members of the full council from ordering the repair or restoration of any improvement, the necessity for which was caused by casualty or accident after such annual appropriation is made. In the event of casualty or accident, the city council may order the mayor and finance committee to borrow a sufficient sum to provide for the expense necessary to be incurred in making any repairs or restoration of improvements, for a space of time not exceeding the close of the next fiscal year, which sum and interest shall be added to the amount authorized to be raised in the next general tax levy and embraced therein.

As amended by H.B. 624 of the 1980 Idaho Legislature, the levy authorized by this section is exempt from the 1% limitation (Idaho Code § 63-923), and, since such expenses would likely not be considered part of the operating budget for the same reasons set forth under the discussion of county powers above, would probably not be subject to the tax freeze limitations of Idaho Code § 63-2220 either. Cities also have express statutory powers to maintain streets (Idaho Code §§ 50-312, 50-313) and to provide for public health and safety, and both cities and counties have constitutional police powers under Idaho Constitution, Art. 12, §2, to provide for the public health, safety, and welfare, which expenses would likely be held to be "ordinary and necessary" in light of the cases cited above. Cities are empowered to borrow money and to issue registered warrants to meet such expenses (Idaho Code §§ 50-1018, 31-2124, 31-2125), and to establish and maintain a warrant redemption fund and levy. Idaho Code § 50-1004. Again, these would most likely not be held to be part of the operating budget and thus would not be subject to the tax freeze provisions of Idaho Code § 63-2220.

We conclude, then, that both counties and cities have ample emergency fiscal powers to meet the local share of disaster relief expenses, and that these powers are, in all likelihood, not limited by the 1% law or its implementing legislation.

We also call attention to the provisions of Idaho Code §§ 31-1605 and 50-1003 which permit counties and cities, respectively, to adjust their budgets to provide for the receipt of unbudgeted Federal and state revenues. Idaho Code § 31-1605 also provides for a "general reserve appropriation" by counties to meet unforeseen contingencies. This appropriation could undoubtedly be used to meet emergency expenses.

3. In the case of highway districts, water and sewer districts, irrigation districts, and other single-function or special-purpose districts, we find no emergency fiscal authority comparable to that possessed by counties and cities. Specific statutory provisions govern each of these entities, differing in many respects from one another, and no attempt will be made here to analyze all of the statutory provisions applicable to all of the different special-purpose districts. Rather, we shall deal with a few of the statutory provisions and some of the general principles applicable to all.

It is a general principle of law that the power to borrow money and to create indebtedness is not an incident to local government, and such power cannot be exercised unless it is conferred either expressly or by necessary implications. In the absence of an express grant of power, it is generally held that a local governmental entity has no inherent power to borrow money, nor is such power implied from a general grant of power to incur indebtedness. 15 McQuillin, *Municipal Corporations,* §39.07. There are a few cases in other states which hold that local governments have implied power to borrow to meet expenditures necessary to maintain authorized services. *Athens National Bank v. Ridgebury Tp.,* 303 Pa. 479, 154 A. 791 (1931); *Maneval v. Township of Jackson,* 21 Atl. 672 (Pa. 1891); 15 McQuillin, *supra,* § 39.07. However, in light of the Idaho Supreme Court's general rule of strict construction of municipal powers (*Hendricks v. City of Nampa,* 93 Idaho 95, 456 P.2d. 262 (1969); *Shillingford v. Benewah County,* 48 Idaho 447, 282 P. 864 (1929)), and in the absence of any Idaho Supreme Court decision recognizing any inherent or implied power to borrow or spend to meet emergencies in the absence of statutory authorization, we cannot advise such entities to rely upon any general doctrine of inherent or implied powers in such matters. Such entities are creatures of statute and have such powers as the statutes give them, and no other. *Strickfaden v. Greencreek Highway District,* 42 Idaho 738, 248 P. 456 (1926).

Highway districts, for example, are governed by a statute which expressly provides that they shall have no power to incur any debt or liability whatever in excess of the express provisions of the highway district law. Idaho Code § 40-1620. That power is strictly limited by Idaho Code §§ 40-1637 and 40-1638. No power is granted to issue registered warrants in excess of anticipated revenues. Idaho Code §§ 40-1648, et seq. (warrants may be issued in anticipation of the collection of taxes, but not in excess of the amount of the levy therefor); Idaho Code § 31-2124.

Water and sewer districts may borrow money and incur indebtedness in accordance with Chapter 32, Title 42 (Idaho Code § 42-3212 (e)), but nothing in that act authorizes the issuance of warrants for emergencies.

Irrigation districts are authorized by Idaho Code § 43-414 (enacted in 1979) to borrow and to issue interim notes "in advance of permanent financing." We do not view this as authorization to borrow in excess of assessments provided for the year. Idaho Code § 43-614 authorizes an emergency fund levy for irrigation districts, but contains no authority to meet emergency expenses beyond the amount of the levy.

In general, then, the emergency expenditure authority beyond anticipated revenues provided to counties and cities has not been made available to special districts. However, because of variation in the laws governing the many different kinds of special districts in Idaho, we urge each such entity to consult with its own counsel on such questions. We will be happy to render whatever assistance we can to local counsel on questions involving specific statutory provisions.

We find no general doctrine of law which would prevent special districts from utilizing funds available under their current maintenance and operation budgets for meeting emergency situations, or from utilizing such funds to match state and Federal grants.

4. Idaho Code §§ 46-1001, et seq., especially § 46-1008, grants to the Governor certain extraordinary powers in dealing with disasters, including, specifically, disasters resulting from volcanic activity. Idaho Code § 46-1002 (3). In Attorney General Opinion No. 76-34 (July 9, 1976), this office interpreted Idaho Code § 46-1008 (5) as granting the governor "broad powers in dealing with disaster emergencies." Among other powers, he may suspend the provisions of any regulations prescribing the procedures for conduct of public business that would in any way prevent, hinder, or delay necessary action in coping with the emergency, and to utilize all resources of the state and the political subdivisions if he deems necessary to cope with the disaster emergency. That opinion concluded that the governor could legally suspend statutory bidding requirements and utilize funds appropriate to other state agencies to cope with a disaster emergency.

We concur in the conclusion of Attorney General Opinion No. 76-34 that the Disaster Preparedness Act grants the Governor broad authority to utilize state resources, including state funds, to meet a duly-declared disaster emergency. We doubt, however, that this authority includes the power to suspend the operation of laws imposing fiscal limitations upon *local* entities, as opposed to state agencies. Therefore it is our advice that the State Disaster Preparedness Act grants to you, as Governor, broad authority to utilize state resources and funds in meeting the disaster emergency, but not to suspend the spending, borrowing and debt limitations applicable to *local* governmental entities such as special districts.

AUTHORITIES CONSIDERED:

1. *Idaho Constitution,* Art. 7, § 15, Art. 8, § 3, Art. 12, § 2.

2. *Idaho Code*

   Sections 31-1514, 31-1605, 31-1608, 31-2124, 31-2125.

   Sections 40-1620, 40-1637, 40-1638, 40-1648 et seq.

   Section 42-1312 (e).

Sections 43-414, 43-614.

Sections 46-1001 et seq.

Sections 50-312, 50-313, 50-1003, 50-1004, 50-1006, 50-1018.

Sections 63-911, 63-913, 63-923, 63-2220, 63-3101 et seq.

3. *Idaho Cases*

a. *Hickey v. City of Nampa,* 22 Idaho 41, 124 P. 280 (1912).

b. *State v. Malcom,* 39 Idaho 185, 226 P. 1083 (1924).

c. *Strickfaden v. Greencreek Highway District,* 42 Idaho 738, 248 P. 456 (1926).

d. *Golden Gate Highway District v. Canyon County,* 45 Idaho 406, 262 P. 1048 (1927).

e. *Shillingford v. Benewah County,* 48 Idaho 447 282 P. 864 (1929).

f. *State v. Johnson,* 50 Idaho 363, 296 P. 588 (1931).

g. *State v. Village of Garden City,* 74 Idaho 513, 265 P.2d 328 (1953).

h. *State v. Finch,* 79 Idaho 275, 315 P.2d 529 (1957).

i. *Reynolds Construction Co. v. Twin Falls County,* 92 Idaho 61, 437 P.2d 14 (1968).

j. *Hanson v. City of Idaho Falls,* 92 Idaho 512, 446 P.2d 634 (1968).

k. *Hendricks v. City of Nampa,* 93 Idaho 95, 456 P.2d 262 (1969).

l. *City of Pocatello v. Peterson,* 93 Idaho 774, 473 P.2d 644 (1970).

m. *Board of County Commissioners v. Idaho Health Facilities Authority,* 96 Idaho 498, 531 P.2d 588 (1975).

4. *Other Cases*

Athens National Bank v. Ridgebury Tp., 303 Pa. 479, 154 A. 791 (1931).

Maneval v. Tp. of Jackson, 21 A. 672 (Pa. 1891).

5. *Other Authorities*

Attorney General Opinion No. 76-34.

Attorney General Opinion No. 79-15.

15 McQuillin, *Municipal Corporations,* §39.07.

DATED this 4th day of June, 1980.

ATTORNEY GENERAL
State of Idaho
/s/ DAVID H. LEROY

ANALYSIS BY:

MICHAEL C. MOORE
Deputy Attorney General
Chief, Local Government Division

DHL/MCM/lm

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

ATTORNEY GENERAL OPINION NO. 80-17

TO: The Honorable Marjorie Ruth Moon
State Treasurer
Statehouse Mail

Per Request for Attorney General's Opinion

QUESTION PRESENTED:

Do the changes in Sec. 67-2739 resulting from House Bill 485 (Lines 22-31 on Page 1 of the printed bill) eliminate on July 1 the effect of the current provision in regard to the removal of demand deposits "during the remainder of the current calendar year" from banks which early in 1980 refused time certificates?

CONCLUSION:

Banks which early in 1980 refused deposits under § 67-2739 Idaho Code prior to amendment, are authorized to accept deposits after July 1, 1980 pursuant to the new terms and conditions imposed by House Bill 485 of the 45th Idaho Legislature.

ANALYSIS:

Effective July 1, 1980 H.B. 485 amends Idaho Code, § 67-2739, and makes the following changes:

1. It requires the State Treasurer to deposit in each state depository an amount not in excess of the FDIC insurance coverage.

2. After each state depository acquires the maximum amount covered by FDIC insurance, any excess is apportioned among the depositories according to the capital and surplus formula described in the section.

3. It adds savings deposits to permissible deposits and clarifies "time deposits" to mean "time certificates of deposit."

4. Finally, the bill provides that if a depository refuses to accept its allocated share of savings deposits and time certificates of deposit, it will forfeit its right to its proportionate share of demand deposits in excess of the FDIC insurance amount for the remainder of the calendar year.

There are numerous Idaho cases which conclude that in construing a statute, a court is to do so in light of the purpose and intent of the legislature in enacting the statute. In *Messinger v. Burns,* 382 P. 2d 913, 86 Idaho 26, 29 (1963), the Idaho Supreme Court stated:

> In construing a statute, it is the duty of this court to ascertain the legislative intent, and give effect thereto. In ascertaining this intent, not only must the literal wording of the statute be examined, but also account must be taken of other matters, 'such as 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 the like.'

See also, In re *Gem State Academy Bakery,* 224 P. 2d 529, 70 Idaho 531; *Knight v. Employment Sec. Agency,* 398 P. 2d 643, 88 Idaho 262; *Idaho Public Utilities Commission v. V-1 Oil Company,* 412 P. 2d 581, 90 Idaho 415; *State of Idaho ex rel. Andrus v. Kleppe,* 417 F. Supp. 273; *Keenan v. Price,* 195 P. 2d 662, 68 Idaho 423.

Thus, in construing a statute, one must look at the purpose and effect of the law. Applying this principle to your question, it appears the primary purpose for this amendment was to procure additional protection for funds deposited with state depositories. To accomplish this result, the law was amended to provide that each state depository was to receive funds up to the maximum FDIC insurance limit and any excess was to be apportioned according to the capital and surplus formula. Prior to this amendment, each state depository received an amount based on the capital and surplus formula only, without regard to maximum FDIC insurance coverage. Thus, obviously, one major purpose for this amendment, if not *the* major purpose, was to increase insurance coverage for state funds to the maximum amount possible.

To accomplish the purpose and intent of this bill, it would appear only appropriate to permit deposits in banks after July 1, 1980, where banks have refused deposits prior to the enactment of House Bill 485, but now seek the deposits. Requiring the treasurer to make deposits with these banks adds additional insurance coverage to state funds, clearly a primary purpose of House Bill 485. It is also noted that Idaho Code § 67-2739 provides, in part, that:

> The Treasurer shall not give a preference to any one or more designated state depositories in the amount he may deposit, under the provisions of this chapter. . . .

If the purpose of this bill is to extend maximum insurance coverage to state funds and the treasurer is prohibited from giving a preference to any depositories, it appears entirely consistent with the legislative intent to this bill to

require the treasurer to deposit funds after July 1, 1980 in depositories desiring funds pursuant to the new Law.

Additionally, House Bill 485 created new rights for banks serving as public depositories. A bank now is entitled to receive the FDIC insurance maximum amount in savings and time certificates of deposit without regard to the capital and surplus formula. This could be of substantial importance to a particular bank and any bank that had no knowledge of these changes effective July 1, 1980, should not be denied these new rights for six months simply because it exercised an option pursuant to the old law without knowledge of these future changes.

To deny a bank these new rights on July 1, 1980 may amount to giving retroactive effect to House Bill 485, because the new rights effective July 1, 1980 for every other depository institution are denied to banks which refused to accept their allocated share of time deposits earlier in the year. Thus, the amendment tends to have a retroactive effect on these banks only.

> Provisions added by the amendment that affect substantive rights will not be construed to apply to transactions and events completed prior to its enactment unless the legislature has expressed its intent to that effect or such intent is clearly implied by the language of the amendment or by the circumstances surrounding its enactment. C.D. Sands, *Sutherland Statutory Construction* § 22.36 P. 200 (4th ed.).

We are not aware of any circumstances which indicate that the legislature intended to give retroactive operation to the new rights created by House Bill 485. There are several Idaho cases which clearly indicate the Idaho Supreme Court disfavors retroactive application of the law. See e.g. *Johnson v. Stoddard,* 526 P. 2d 835, 96 Idaho 230; *Ben Lomond Inc., v. City of Idaho Falls,* 448 P. 2d 209, 92 Idaho 595; *Edwards v. Walker,* 507 P. 2d 486, 95 Idaho 289; *Kent v. Idaho Public Utilities Commission,* 469 P. 2d 745, 93 Idaho 618.

> It is a fundamental principle of jurisprudence that retroactive application of new laws involves a high risk of being unfair. There is a general consensus among all people that notice or warning of the rules that are to be applied to determine their affairs should be given in advance of the actions whose effects are to be judged by them. The hackneyed maxim that everyone is held to know the law, itself a principle of dubious wisdom, nevertheless, presupposes that the law is at least susceptible of being known. But this is not possible as to law which has not yet been made. C.D. Sands, *Sutherland Statutory Construction* § 41.02 P. 247.

To deny some banks the rights created by this new legislation is to either apply some form of retroactive application so that the effective date of this amendment was the date the bank refused to take public deposits or, conversely, the effective date for one or two banks only is changed to January 1, 1981. Neither construction was apparently intended by the legislature.

Finally, there is a principle of statutory construction known as the "Doctrine of Equitable Interpretation" which may also apply to this situation.

> In applying the Doctrine of Equitable Interpretation American decisions usually rationalize an extended or restricted interpretation in

language to the effect that 'the spirit of a statute governs the letter.' C.D. Sands, *Sutherland Statutory Construction* § 54.03 P. 355.

The "spirit" of this statute would appear to permit banks which refused deposits prior to the effective date of this statute, without knowledge of changes to occur, to acquire deposits pursuant to the new law. This would clearly benefit the state and accomplish the objective of the statute because more state moneys would be covered by FDIC insurance.

AUTHORITIES CONSIDERED:

1. Idaho Code § 67-2739.

2. Idaho Cases:

Keenan v. Price, 198 P.2d 662, 68 Idaho 423 (1948).

In re Gem State Academy Bakery, 224 P.2d 529, 70 Idaho 531 (1950).

Messinger v. Burns, 382 P.2d 913, 86 Idaho 26 (1963).

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

Idaho Public Utilities Commission v. V-1 Oil Company, 412 P.2d 581, 90 Idaho 415 (1966).

Ben Lomond v. City of Idaho Falls, 448 P.2d 745, 92 Idaho 595 (1968).

Kent v. Public Utilities Commission, 469 P.2d 745, 93 Idaho 618 (1970).

Edwards v. Walker, 507 P.2d 486, 95 Idaho 289 (1973).

Johnson v. Stoddard, 526 P.2d 835, 96 Idaho 230 (1974).

State of Idaho ex rel Andrus v. Kleppe, 417 F. Supp. 873 (1976).

3. Other Authorities:

2A Sutherland *Statutory Construction,* § 22.36; 41.02; 54.03; (4th Ed. 1973).

DATED this 27th day of June, 1980.

ATTORNEY GENERAL
State of Idaho
/s/ DAVID H. LEROY

ANALYSIS BY:

JOHN ERIC SUTTON
Deputy Attorney General
Chief, State Finance Division

ATTORNEY GENERAL OPINION NO. 80-18

TO: Raymond L. Boland
Chairman
Idaho Endowment Fund Investment Board
Statehouse Mail

Per Request for Attorney General Opinion

QUESTION PRESENTED:

Are the investment restrictions of Section 26-1919, *Idaho Code,* applicable to the investments of the:

1. Permanent endowment funds.

2. State insurance fund.

3. Fireman's Retirement Fund.

CONCLUSION:

No. *Idaho Code* § 26-1919 does not apply to the permanent endowment funds, state insurance fund or fireman's retirement fund.

ANALYSIS:

In 1969 the Legislature amended Section 26-1919, *Idaho Code* to allow the deposit of state and public funds in savings and loan associations. The 1969 amendment to *Idaho Code* § 26-1919 provides in pertinent part:

> Notwithstanding any provisions to the contrary contained in Titles 57 and 67 of the Idaho Code as the same are now or as the same may be hereafter amended, the State of Idaho and every agency and political subdivision of the State of Idaho *and every municipal and quasi-municipal corporation and improvement district and school districts, of every kind, character or class now or hereafter created, and authorized by law to levy taxes and special assessments, for which the county treasurer does not act as treasurer and every county* may deposit its state and public funds in any savings and loan association, either state or federal, located within the geographical boundaries of the depositing unit, in either passbook accounts or time certificates of deposit in an amount not to exceed the insurance provided by the federal savings and loan insurance corporation. [Emphasis added.]

One week later, in the same session of the Legislature, the statutes governing the investment of permanent endowment funds were enacted. Section 57-720, *Idaho Code,* sets out the parameters under which the Endowment Fund Investment Board must invest the permanent endowment funds, and reads in pertinent part as follows:

> The board shall formulate investment policy regulations governing the investment of permanent endowment funds. The regulations shall pertain to the types, kinds or nature of investment of any of the funds,

> and any limitations, conditions or restrictions upon the methods, practices or procedures for investment, reinvestments, purchases, sales, or exchange transactions, *provided such regulation shall not conflict with nor be in derogation of any Idaho constitutional provision or of the provisions of this act.* [Emphasis added.]

Section 57-722 prescribes the types of securities in which the Board or its investment managers may invest and specifies, in subsection 8, that the Board may invest in time certificates of deposit and savings accounts. You have asked whether the provisions of section 26-1919, *Idaho Code* would limit the Board's investment powers under section 57-720, *Idaho Code.*

In construing a statute, the cardinal rule is to ascertain the intention of the legislature that framed it. *Jorstad v. City of Lewiston,* 93 Idaho 122, 456 P.2d 766 (1969). The intent of the legislature may be implied from the language used, or inferred on grounds of policy or reasonableness. *Summers v. Dooley,* 94 Idaho 87, 481 P.2d 318 (1971). When a statute is plain, clear and unambiguous, it speaks for itself and must be given the interpretation that the language clearly implies. *Moon v. Investment Board,* 97 Idaho 595, 548 P.2d 861 (1976). The language of section 57-720, *Idaho Code* clearly states that only the provisions of Chapter 244 of the 1969 Session Laws and the state Constitution would limit the investment powers of the board. The language is not ambiguous and is quite clear. It appears that the Legislature clearly intended that the Board should be allowed to formulate investment policies subject only to the limitations contained in the *Idaho Constitution* and the provisions of the Act creating the Endowment Fund Investment Board and providing for the investment of permanent endowment funds. We also believe that there is other evidence to indicate that the legislature intended that the board would not be limited by section 26-1919, *Idaho Code.*

We noted that the underlined portion of section 26-1919, *Idaho Code,* cited above is the same language used in Chapter 1 of Title 57, *Idaho Code* to define a depositing unit under the public depository law. The remainder of the references in that section are to the state and its agencies and political subdivisions. The requirement in § 26-1919 is that such entities may deposit their state and public funds in a savings and loan association in an amount not to exceed the insurance provided by the Federal Savings & Loan Insurance Corporation. Thus, it would appear that the legislature, in enacting § 26-1919, *Idaho Code,* and in providing that the amendment would apply "notwithstanding any provisions to the contrary contained in Titles 57 and 67 of the Idaho Code," was referring to funds subject to the state and public depository laws which are contained in Titles 57 and 67, *Idaho Code,* since those were the only statutes then existing in those titles which are relevant in the context of § 26-1919.

In enacting Chapter 7 of Title 57, *Idaho Code,* relating to permanent endowment funds, the Legislature specifically provided that permanent endowment funds were trust funds in § 57-715, *Idaho Code* which reads in relevant part as follows:

> Permanent endowment funds declared to be trust funds. Permanent endowment funds of the State of Idaho are hereby declared to be trust funds of the highest and most sacred order and shall be controlled, managed and invested by the Board and the Investment Manager(s).

The concept that the endowment funds are trust funds and not state funds is well established by judicial precedent. The Federal District Court, in *United States v. Fenton,* 27 F.Supp. 816 (1939), explained this trust concept in relation to these endowment funds as follows:

> The revenues belonging to the state in its sovereign capacity are part of its property, and so long as the state keeps within constitutional limitations it may deal with its property as it sees fit. On the other hand, the common school fund does not belong to the state, but the state merely holds such fund in trust under the conditions of the federal grant contained in the Enabling Act. The school funds were merely intrusted for the benefit of the common school, and the state pledged itself to hold such trust inviolate for the benefit of the schools. 27 F.Supp. at 819.

The Idaho Supreme Court has also recognized the trust fund theory in *State v. Peterson,* 61 Idaho 50, 97 P.2d 603 (1939). Since it is presumed that the legislature enacts statutes with full knowledge of then existing judicial decisions, *C. Forsman Real Estate Company, Inc. v. Hatch,* 97 Idaho 511, 547 P.2d 1116 (1976), we must conclude that the legislature did not intend to include the endowment funds in the class of state funds in section 26-1919, *Idaho Code.* We conclude that the permanent endowment funds managed by the Endowment Fund Investment Board are not state funds and thus would not be subject to the investment restrictions contained within *Idaho Code* § 26-1919. The question remaining, then, is whether those funds would be public funds within the meaning of that section. It is our conclusion in this regard that the legislature clearly intended at the time § 26-1919 was adopted to limit investments of state funds and of public depositing units subject to the public depository law in savings and loan associations. It is therefore our opinion that the public funds referred to in § 26-1919 do not include permanent endowment funds but include only public funds within the purview of the public depository law. It is our opinion that *Idaho Code* § 26-1919 was not intended to cover permanent endowment funds since those funds are not, in our view, state or public funds within the meaning of that statute.

You have also asked whether the Fireman's Retirement Fund or State Insurance Fund fall within the restriction contained in *Idaho Code* § 26-1919. The Fireman's Retirement Fund is established in Title 72, Chapter 14, *Idaho Code. Idaho Code* § 74-1416 provides:

> The investment board shall invest and reinvest, without limitation, surplus funds in the Fireman's Retirement Fund. Surplus funds accumulating in the said fund, and not needed for its immediate uses, shall be invested in the same securities and investments authorized under section 57-722, Idaho Code.

The State Insurance Fund has a similar provision in *Idaho Code* § 72-912, wherein it states:

> The endowment fund investment board shall at the direction of the manager invest any of the surplus or reserve funds belonging to the state insurance fund.

In *State v. Musgrave,* 84 Idaho 77, 370 P.2d 778 (1962) the Plaintiff State Auditor sued the State Insurance Fund. The Court summarized the auditor's contentions with the following:

> Plaintiff contends that the money in the fund when paid into the state treasury becomes state or public money, and that it cannot be drawn therefrom except upon an appropriation made by the legislature. 84 Idaho at 83.

The Court went on to find that funds within the State Insurance Fund are not state or public funds. The reasoning in *Musgrave* is applicable to the Fireman's Retirement Fund. Both the State Insurance Fund and the Fireman's Retirement Fund are created by the state for the purpose of carrying out a proprietary function. Additionally, *Idaho Code* § 72-1405 provides that the Fireman's Retirement Fund shall be administered by the Director of the State Insurance Fund. The two funds are also comparable in that they contain continuous appropriations. See *Idaho Code* §§ 72-1404 and 72-927. Based upon the *Musgrave* decision and the similarity between the State Insurance Fund and the Fireman's Retirement Fund, it is our conclusion that neither of said funds comes within the definition of state funds or public funds as used in § 26-1919, *Idaho Code* and that for this reason *Idaho Code* § 26-1919 is not applicable to either fund.

AUTHORITIES CONSIDERED:

1. *Idaho Code:* § 26-1919; § 57-720; § 57-715; § 57-722; § 72-912; §§ 72-1404, 72-1405; § 72-927; Chapter 1, Title 57; Chapters 57 and 67.
2. *Moon v. Investment Board,* 97 Idaho 595, 548 P.2d 861 (1976).
3. *C. Forsman Real Estate Company, Inc. v. Hatch,* 97 Idaho 511, 547 P.2d 1116 (1976).
4. *Summers v. Dooley,* 94 Idaho 87, 481 P.2d 318 (1971).
5. *Jorstad v. City of Lewiston,* 93 Idaho 122, 456 P.2d 766 (1969).
6. *State v. Musgrave,* 84 Idaho 77, 370 P.2d 778 (1962).
7. *State v. Peterson,* 61 Idaho 50, 97 P.2d 603 (1939).
8. *United States v. Fenton,* 27 F.Supp. 816 (1939).

DATED this 28th day of June, 1980.

ATTORNEY GENERAL
State of Idaho
/s/ DAVID H. LEROY

ANALYSIS BY:

JOHN MICHAEL BRASSEY
Deputy Attorney General

JMB/kh

ATTORNEY GENERAL OPINION NO. 80-19

TO: Honorable John V. Evans
Governor of the State of Idaho
Statehouse
Boise, Idaho 83720

Per Request for Attorney General's Opinion

QUESTION PRESENTED:

Does the governor, under all relevant provisions of the constitution and laws of the State of Idaho, including the state Disaster Preparedness Act, have the authority to transfer moneys from the Water Pollution Control Fund to purposes other than those delineated in the statutory provisions creating the fund?

CONCLUSION:

The transfer of moneys from the Water Pollution Control Fund by action of the executive branch of government constitutes an appropriation of public moneys as provided for by Art. 7, § 13. The appropriation of public moneys is a function exclusively reserved to the legislative branch of government and an attempt by the executive to so appropriate moneys would be violative of Idaho Const., Art. 2, § 1, which provides that one branch of government may not exercise those powers delegated to another branch.

ANALYSIS:

An analysis of the question presented requires our discussing several constitutional and statutory provisions relating to both gubernatorial powers and the appropriation of public moneys. At the outset, however, our discussion must focus upon the actual fund from which moneys are sought to be used for the purposes of the Water Pollution Abatement Act, Chapter 36, Title 39, *Idaho Code*. Pursuant to Idaho Code § 39-3606, the purposes of the act and the purposes to which the moneys in the fund are perpetually appropriated are:

> 1. To provide the state's matching share of construction grants made under the provisions of this chapter.
>
> 2. To provide revenue for the payment of general obligation bonds issued pursuant to Idaho Code § 39-3607, and general obligation refunding bonds issued pursuant to Chapter 115, 1973 laws of the State of Idaho.
>
> 3. To provide for the administration of the grants program established pursuant to this chapter.
>
> 4. To provide direct grants for the purpose of providing training for sewage treatment plant operating personnel.

On three separate occasions, the Idaho Supreme Court has ruled that special funds or revenues dedicated to a particular purpose may not be used for any other purpose. The three cases speak to actions taken by the legislative branch.

> We recognize the fundamental principle that where special funds or revenues are dedicated to a particular purpose, the same cannot be used for any other purpose, and that an act of the Legislature attempting to provide otherwise is unconstitutional. *Rich v. Williams,* 81 Idaho 311-316, 341 P.2d 432 (1959); see also *State ex rel. Moon v. Jonasson,* 78 Idaho 205, 299 P.2d 755 (1956); *Roach v. Gooding,* 11 Idaho 244, 81 Pac. 642 (1905).

Accordingly, current Idaho law precludes the legislature from diverting moneys in a dedicated fund to purposes other than those enumerated in the constitutional or statutory language creating the fund and the purposes to which it is to be put to use. It is our opinion that the Water Pollution Control Fund is composed of moneys dedicated to a particular purpose; i.e. the purposes articulated in Idaho Code § 36-3906, and that, therefore, the legislature may not divert moneys from the funds for purposes other than those contained in Section 36-3906.

The legislature created the fund under its constitutional powers and prerogatives. Idaho Const., Art. 7, § 13 provides that "No money shall be drawn from the treasury, but in pursuance of appropriations made by law." The legislature's power to make appropriations is plenary, is supreme and is limited only by the state constitution. *David v. Moon,* 77 Idaho 146, 289 P.2d 614 (1955). A legislative appropriation, as contemplated by Art. 7, § 13, is defined as (1) authority from the legislature, (2) expressly given (3) in legal form (4) to proper officers (5) to pay from public moneys (6) a specified sum, and no more, and (7) for a specified purpose, and no other. *Leonardson v. Moon,* 92 Idaho 796, 451, P.2d 542 (1969). In a nutshell, an appropriation is the setting aside by the legislature of a specified amount of money for a particular purpose. *Suppiger v. Enking,* 60 Idaho 292, 91 Pac. 362 (1939). The Idaho Supreme Court has specifically held that a continuing appropriation, that is, one where a particular portion of a special fund is dedicated to a particular purpose by statute without benefit of a yearly legislative appropriation measure providing the same, is constitutional within the requirements for an appropriation as provided by Art. 7, § 13. *McConnel v. Gallet,* 51 Idaho 386, 6 P.2d 142 (1931). In sum, the legislature, pursuant to its constitutional appropriation powers, created a special continuing appropriation known as the Water Pollution Control Fund. Only by statutorily changing the criteria contained in the purposes section of the act that creates the fund may the legislature constitutionally appropriate moneys from the fund to other purposes.

The authority of the chief executive must be analyzed against these limitations upon the legislative branch. If the legislature is without authority to divert moneys from a special dedicated fund for purposes other than those listed in the fund's statutory or constitutional dedicated language, does the governor have such authority under any relevant provisions of the constitution or laws of the state? The analysis must first focus on the general powers of the governor:

> A constitutional grant of the supreme executive authority to a governor implies such power as will secure an efficient execution of the laws, which is the peculiar province of that department, to be accomplished, however, in the manner, by the methods, and within the limitations prescribed by the constitution and statutes of the state. Since the governor is a mere executive officer, his general authority is narrowly limited by the constitution of the state, and he may not exercise any legislative function except that granted to him expressly by the terms of the constitution. 38 Am. Jur. 2d *Governor* § 4.

In Idaho, as in most states, the appropriation power is a power exclusively vested in the legislative branch of government. *In re Huston,* 28 Idaho 231, 147 Pac 1064 (1913); *Jackson v. Gallet,* 39 Idaho 382, 228 Pac. 1068 (1924); *Herrick v. Gallet,* 35 Idaho 13, 204 Pac, 477 (1922); *McConnel v. Gallet,* 51 Idaho 386, 6 Pac. 143 (1931); 81A C.J.S. *States* § 232 (1977). Idaho Const., Art. 2, § 1 prohibits one branch of government from exercising the powers constitutionally granted to another branch of government. This constitutional prohibition has been interpreted to mean that the legislature may not delegate any of its constitutional functions to any other body or authority, including the executive branch of government. *Boise Redevelopment Agency v. Yick Kong Corp.,* 94 Idaho 876, 499 P.2d 575 (19); *Idaho Savings and Loan Ass'n v. Roden,* 82 Idaho 128, 350 P.2d 255 (1960). Clearly, the governor is without the authority to appropriate moneys in the state treasury, since the constitution does not grant such power to the chief executive and because the legislature cannot delegate its appropriation power to any other branch of government.

The final question now posed in our analysis of this issue is whether a transfer of moneys from the Water Pollution Control Fund by executive action would constitute an "appropriation" as provided by the constitution and defined by the Idaho Supreme Court. As a general rule of law, the executive branch of government, in the absence of constitutional or statutory authorization, is not invested with either the right to make *or to alter* appropriations. When the authority, pursuant to constitutional or statutory dictate does exist, the executive is strictly confined to the authority so given when exercising such power. 81A C.J.S. *States* § 232 (1977).

Idaho statutory law, Chapter 35, Title 67, *Idaho Code,* allows officers and agencies within the three branches of state government to alter appropriations to the extent of transferring a limited amount of money from one program to another within a single appropriation. The statute does not give any officer or agency, including the governor, the authority to transfer moneys from one appropriation to another such as would be the case in the instant situation.

The State Disaster Preparedness Act, Chapter 10, Title 46, *Idaho Code* provides in section 46-1008, that the governor, in disaster emergencies, may:

> (5) (b) utilize all resources of the state and the political subdivisions as he deems necessary to cope with the disaster emergency.

Impliedly, this Act could be construed to give the governor statutory authority to transfer and re-allocate moneys contained in any state or local government treasury for the purpose of coping with a properly declared disaster emergency. Such a conclusion is supported by language found in Attorney General Opinions 76-34 and 80-16.

An exhaustive review of reported case authority concerning this question provides two separate considerations relevant here:

> 1. In those states where their highest appellate court has ruled on the governor's emergency appropriation powers, the courts have held that a governor, in emergencies, may alter, change, or transfer an appropriation only to the extent that he may either supplement a prior existing appropriation with monies that have been specifically appropriated to his emergency contingency fund, or he may expend monies directly

> from his emergency contingency fund for whatever emergency purpose he deems important. In short, the governor has the power to determine if an emergency exists, and may utilize state monies in response to it *only* to the extent that those state monies have been legislatively appropriated to a governor's emergency contingency fund. *Raymond v. Christian,* 24 C.A.2d 92, 74 P.2d 536, 546 (1937); *Wells v. Childers,* 196 Okla, 339, 165 P.2d 358 (1945); 81A C.J.S. *States* § 232 (1977). It should be noted that our state legislature has provided for such a fund. 1980 Session Laws, p. 810.
>
> 2. Our research finds two states which have reported case authority on the question of whether the executive branch may transfer funds from one appropriation to another. The highest appellate courts in both have replied that the executive may not constitutionally do so on the basis that statutes allowing such transfers constitute an unconstitutional delegation of legislative authority to the executive branch. In the case of *State ex inf. Danforth v. Merrell,* 530 S.W.2d 209 (Miss. 1975), the Supreme Court of Missouri held that a statutory provision giving the Commissioner of Administration and a special committee of the legislature authority to transfer funds from one appropriation to another was unconstitutional under the terms of Art. IV, Section 23 of the Missouri Constitution that in relevant part provides that "No money shall be withdrawn from the state treasury except by warrant drawn in accordance with an appropriation made by law. . . ."

In the Illinois case of *County of Cook v. Ogilvie,* 50 Ill.2d 379, 280 N.E.2d 224, 227 (1972) the Supreme Court of the state ruled that a statute allowing the governor to transfer moneys from one appropriation to another was unconstitutional.

> The question here is whether the governor can be authorized to do what the general assembly itself could do only by an act duly passed and approved, i.e., divert the funds appropriated for one particular purpose, thereby reducing one appropriation and increasing the other. While the governor possesses the power to reduce an appropriation by means of an item veto, he would not exercise, nor could the legislature constitutionally delegate to him or a department of the executive branch of government, the power to transfer funds specifically appropriated for one program.

It should be noted that the Illinois Constitution of 1870 contains provisions identically worded in relevant part to Idaho Const., Art. 2, §1, and Art. 7, §13. Idaho Const. Art. 2, § 1 provides for separation of powers among the three branches of government, while Art. 7, § 13 provides for the legislative appropriation power. The Illinois Court used the separation of powers and the appropriations articles as the constitutional underpinning for the decision they reached. The same decision was reached in a later Illinois case; *West Side Organization Health Services v. Thompson,* 73 Ill. App.3d 179, 391 N.E.2d 392 (1979).

It is our opinion that a transfer of moneys from the Water Pollution Control Fund by action of the executive branch of government would constitute an illegal appropriation as contemplated by Art. 7, § 13 of the Idaho constitution. We reach this conclusion on the basis of two factors:

1. That, although the law of our sister states is not controlling in Idaho, decisions interpreting constitutional and statutory provisions identical to our own are exceptionally persuasive to Idaho courts in reaching an opinion on similar factual situations arising in our state. Accordingly, we believe that the two Illinois cases above-cited represent the same result that an Idaho court would reach if confronted with the same question; that is, an Idaho court would find that the Idaho Disaster Preparedness Act, to the extent that it can be read as giving the chief executive the authority to transfer funds from one appropriation to another, is unconstitutional under Idaho Const., Art. 2, § 1, and Art. 7, § 13. To the extent that Attorney General Opinions 76-39 and 80-16 can be read as giving the governor such authority under the Disaster Preparedness Act, we overrule and disagree with any such conclusion therein reached.

2. That under existing Idaho law relating to appropriations, the transfer of moneys from one appropriation to another in and of itself constitutes an "appropriation" per Art. 7, § 13 in that it would encompass four of the seven elements used to define appropriation, specifically, the transfer would be (1) to proper officers, (2) to pay from public moneys, (3) a specified sum, and no more and (4) for a specified purpose, and no other. The authority to mandate these steps within the appropriation process is exclusively reserved to the legislature, and, consequently, the Governor's attempt to do so would be, in our opinion, unconstitutional.

RECOMMENDED PROCEDURE IN THE EXISTING "EMERGENCY" CONDITION

The appropriation process as this opinion details is controlled by the legislature. Accordingly we would recommend that you as chief executive consider a two-step process to meet and cover the shortfall in state revenues, as aggravated in part by Mt. St. Helens and prison riot emergencies:

1. Propose to the appropriate officers and committees of the legislature that supplemental appropriations be made to those affected agencies on the basis of need. The legislature by a properly worded and adopted bill could change the dedication language of the Water Pollution Control Fund continuing appropriation to allow moneys accumulating therein to become subject to emergency use.

2. Consider the desirability of involving the Board of Examiners in the appropriation rollback procedure heretofore attempted by Executive Order only. Idaho Code § 67-3512 provides the Board with a clear and unassailable authority to order appropriation reductions by all branches of government and all Constitutional officials. Involving the Examiners in the process would thus avoid any successful challenge inside or outside the Executive Branch to the validity of your order and also would provide a hearing process for any agency or department which alleges an inability to comply with the result.

AUTHORITIES CONSIDERED:

1. Idaho Const.: Art. 2, § 1; Art. 7, § 13.

2. Idaho Code: Chapter 67 Title 39; § 39-3606, 3607 and 46-1108; Chapter 35, Title 67 and Chapter 10, Title 46.

3. Attorney General Opinion 76-34.

4. *Rich v. Williams,* 81 Idaho 311-316, 341 P.2d 432, (1959).

5. *State ex rel. Moon v. Jonasson,* 78 Idaho 205, 299 P.2d 755 (1956).

6. *Roach v. Gooding,* 11 Idaho 244, 81 Pac. 642 (1905).

7. *David v. Moon,* 77 Idaho 146, 289 P.2d 614 (1955).

8. *Leonardson v. Moon,* 92 Idaho 796, 451 P.2d 542 (1969).

9. *Suppiger v. Enking,* 60 Idaho 292, 91 Pac. 362 (1939).

10. *McConnel v. Gallet,* 51 Idaho 386, 6 P.2d 142 (1931).

11. *In re Huston,* 28 Idaho 231, 147 Pac. 1064 (1939).

12. *Jackson v. Gallet,* 39 Idaho 382, 228 Pac. 447 (1922).

13. *Herrick v. Gallet,* 35 Idaho 13, 204 Pac. 477 (1922).

14. *McConnel v. Gallet,* 51 Idaho 386, 6 Pac. 143, 1931.

15. *Boise Redevelopment Agency v. Yick Kong Corp.,* 94 Idaho 876, 499 P.2d 575 (1972).

16. *Idaho Savings and Loan Ass'n. v. Roden,* 82 Idaho 128, 350 P.3d 255 (1960).

17. *Raymond v. Christian,* 24 C.A.2d 92, 74 P.2d 356, 546 (1937).

18. *Wells v. Childers,* 196 Okla. 339, 165 P.2d 358 (1945).

19. *State ex inf. Danforth v. Merrell,* 530 S.W. 2d 209 (Miss. 1975).

20. *County of Cook v. Ogilvie,* 50 Ill.2d 379, 280 N.E.2d 224, 227 (1972).

21. *West Side Organization Health Services v. Thompson,* 73 Ill. App.2d 179, 391 N.E.2d 392 (1979).

22. 38 Am. Jur. 2d, *Governor* § 4.

23. 81A C.J.S. *States* § 232 (1977).

DATED this 8th day of August, 1980.

ATTORNEY GENERAL
State of Idaho
/s/ DAVID H. LEROY

ANALYSIS BY:

ROY L. EIGUREN
Deputy Attorney General

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

ATTORNEY GENERAL OPINION 80-20

TO: Honorable Reed Budge
President Pro Tem
Idaho State Senate

Honorable Ralph Olmstead
Speaker of the House of
Representatives

Per Request for Attorney General's Opinion

QUESTION PRESENTED:

Does the Governor, pursuant to applicable constitutional and statutory provisions relating to gubernatorial powers and to the state budget, have the authority to order a reduction in the expenditure of moneys legislatively appropriated to the executive, legislative and judicial branches of state government?

CONCLUSION:

The State Board of Examiners, not the governor, pursuant to statutory authority, has the power to reduce the level of expenditures legislatively authorized to the three branches of government. However, as to the legislative and judicial branches, the Board of Examiners may constitutionally reduce such appropriations only to a level that does not preclude those coordinate branches of government from properly exercising their constitutional and statutory functions.

ANALYSIS:

An analysis of the question presented for resolution here necessarily first requires a discussion of the appropriation powers vested in the state government. On numerous occasions, the Idaho Supreme Court has ruled that the prerogative to appropriate monies from the state treasury is exclusively vested with the legislative branch of government pursuant to Idaho Const., Art. 7, § 13. *In re Huston,* 27 Idaho 231, 147 Pac. 1064 (1915); *Jackson v. Gallet,* 39 Idaho 382, 228 Pac. 1068 (1924); *Herrick v. Gallet,* 35 Idaho 13, 204 Pac. 477 (1922); *McConnell v. Gallet,* 31 Idaho 386, 6 Pac. 142 (1931). The exclusive power of the legislature to appropriate moneys from the state treasury is succinctly summarized by a noted legal treatise as follows:

> Authority of law is necessary to an expenditure of public funds. As a rule, money cannot be drawn from the treasury of a state except in pursuance of a specific appropriation made by law. The power of the

> legislature with respect to the public funds raised by general taxation is supreme, and no state official, not even the highest, has any power to create an obligation of the state, either legal or moral, unless there has first been a specific appropriation of funds to meet the obligation. 63 Am. Jur. 2d *Public Funds* § 45.

The most recent expression by an Idaho court of precisely what constitutes an "appropriation" as contemplated by Idaho Const., Art. 7, § 13 is found in *Leonardson v. Moon,* 92 Idaho 796, 451 P.2d 542 (1969). The Supreme Court defined an appropriation as (1) authority from the legislature (2) expressly given, in (3) legal form, (4) to public officers, (5) to pay from public moneys (6) a specified sum and no more, and (7) for a specified purpose, and no other.

Idaho Const., Art. 2, § 1 prevents the exercise of powers granted to one branch of state government by another branch. The Idaho Supreme Court has interpreted this constitutional article as precluding the legislative branch of government from delegating any of its constitutional functions to any other body or authority, including the executive branch of government. *Boise Redevelopment Agency v. Yick Kong Corp.*, 94 Idaho 876, 499 P.2d 575 (1972); *Idaho Savings and Loan Ass'n. v. Roden,* 82 Idaho 128, 350 P.2d 255 (1960). As a consequence, the legislature may not delegate any portion of its powers that can be legally defined as a part of the "appropriation" process.

As a general rule of law, the executive branch of government is not vested, in the absence of statutory or constitutional authorization, with the right to alter appropriations, or to exceed the limits set by the legislature. Then the executive is strictly confined in the exercise of such power to the precise authority given. *State v. Moore,* 40 Neb. 854, 59 N.W. 755 (1894); *State v. Erickson,* 75 Mont. 429, 244 P. 287 (1926); see generally 81A C.J.S. *States* 232. Both the federal and state judiciaries have repeatedly ruled that the executive branch cannot reduce or otherwise prevent the expenditure of legislatively appropriated moneys absent a constitutional or statutory authorization to do so. *State Highway Comm. v. Volpe,* 479 F.2d 1099 (8th Cir.); *West Side Org. Health Services v. Thompson,* 73 Ill. App.3d 179, 391 N.E.2d 392 (1979); *Oneida County v. Berle,* 398 NYS2d 600 (N.Y. 1978); see generally 27 A.L.R. Fed *Executive Impoundment of Funds* § 124. However, the courts have held that when there exists the authority for the executive to reduce legislatively made appropriations, such authorization does not violate the constitutional separation of powers doctrine, since the reduction by the executive of a previously enacted legislative appropriation is not a part of the appropriation process itself.

The Idaho Legislature has vested the executive branch of government with the power to alter an appropriation. The authorization so granted is limited solely to the power to reduce appropriations made by the legislature. The relevant authority is found in Idaho Code § 67-3512, which in its entirety states:

> Reduction of appropriations. — Any appropriation made for any department, office or institution of the state (including the elective officers in the executive, legislative and judicial departments and the state board of education) may be reduced in amount by the *state board of examiners* upon investigation and report of the administrator of the division of budget, policy planning and coordination: provided, that before such reduction is ordered the head of such department, office or institution shall be allowed a hearing before said board of examiners

> and may at such hearing present such evidence as he may see fit. No reduction of appropriations shall be made without hearing unless and until the head of such department, office or institution shall file his consent in writing thereto. [Emphasis added.]

The above articulated statute clearly evidences a statutory authorization to the executive branch to reduce a previously enacted legislative appropriation. As the case authority cited above suggests, the executive may reduce or otherwise prevent the expenditure of legislatively appropriated monies only if there exists the proper authority to do so. Such authority will be strictly construed. We conclude that on the basis of the above authority in Idaho Code § 67-3512, the board of examiners does have the power to reduce appropriations previously made by the legislature. By the language of that statute such authority is vested solely in the board and no mention is made of the governor acting alone.

Your question also raises a second issue of whether the board may reduce only the level of moneys legislatively appropriated to the executive branch, or reduce also the moneys appropriated to the legislative and judicial branch of government as well. Idaho Code § 67-3512, authorizing the board of examiners to reduce appropriations, clearly grants them the power to reduce legislative and judicial as well as executive appropriations. An analysis of this issue requires that this statutory authorization be scrutinized in light of Art. 2, § 1 of the constitution to determine whether there exists a violation of the constitutional doctrine of separation of powers. Art. 2, § 1 provides:

> Departments of government. — The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial; and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any powers properly belonging to either of the others, except as in this constitution expressly directed or permitted.

In beginning our discussion on this issue, it should first be noted that the various powers granted to the three branches of government at times necessarily overlap to some extent, and that the concept of separation of powers is not one capable of precise legal definition. *Stolberg v. Caldwell,* 175 Conn. 586, 402 A.2d 763 (1978).

> The true meaning of the general doctrine of the separation of powers seems to be that the whole power of one department should not be exercised by the same hands which possess the whole power of either of the other departments, *and that no one department ought to possess directly or indirectly an overruling influence over the others.* 16 Am. Jur.2d *Constitutional Law* § 294. [Emphasis added.]

The Idaho Supreme Court has held that since the three branches of the state government are separate, they cannot interfere with one another. *Miller v. Meredith,* 59 Idaho 385, 83 P.2d 206 (1938). Obviously, the key question becomes whether an attempted reduction in legislative and judicial appropriations by the executive branch creates an "interference" as contemplated by the *Miller* court.

We interpret the term "interference" in a legal sense as meaning an "overruling influence" by one branch of government in the affairs of another. Such

"overruling influence" must be of a magnitude that precludes the affected branch of government from properly executing its constitutional and statutory responsibilities. However, the courts have repeatedly recognized that one department may, to a properly limited extent, affect the actions of another branch. *Greenwood Cemetery Land Co. v. Routt,* 17 Colo. 156, 28 P. 1124 (1892).

> The completeness of the separation of the three departments and their mutual independence does not extend to the point that those in authority in one department can ignore and treat the acts of those in authority in another department, done pursuant to the authority vested in them, as nugatory and not binding on every department of the state government, since each department is to a limited extent affected by the action of other departments. *Such limited control over the other departments is illustrated by the power of the legislative department to enact laws by which both the other departments are controlled and bound.* 16 Am. Jur. 2d *Constitutional Law* § 298. [Emphasis added.]

As stated in the first portion of this opinion, the legislature is exclusively vested by the constitution with the power to make appropriations, but the executive branch, pursuant to the proper constitutional or statutory authority, may reduce appropriations when appropriate. Such an exercise of authority by the executive branch, however, may not alter or reduce appropriations to a level which precludes a coordinate branch of government from carrying out its constitutional and statutory functions. The Idaho statutory approach would appear, under the above cited legal provisions, to be constitutionally proper.

It is our opinion that pursuant to Idaho Code §67-3512, the state board of examiners has the authority to reduce appropriations made to the executive, legislative and judicial branches of government. However, such authority is constitutionally permissible only to the extent that the reductions made do not preclude the legislative and judicial branches from properly exercising the constitutional and statutory obligations mandated to those branches. The determination of whether a reduction constitutes such a preclusion is initially a question of fact to be determined by the board of examiners pursuant to the hearing provisions provided for by Idaho Code § 37-3512. If contested thereafter, the question would be one for decision by the courts of this state.

AUTHORITIES CONSIDERED:

1. Idaho Const.: Art. 7, § 13; Art. 2, § 1.
2. Idaho Code § 67-3512.
3. *In re Huston,* 27 Idaho 231, 147 Pac. 1064 (1915).
4. *Jackson v. Gallet,* 39 Idaho 382, 228 Pac. 1068 (1924).
5. *Herrick v. Gallet,* 35 Idaho 13, 204 Pac 477 (1922).
6. *McConnell v. Gallet,* 31 Idaho 386, 6 Pac. 142 (1931).
7. *Leonardson v. Moon,* 92 Idaho 796, 451 P.2d 542 (1969).
8. *Boise Redevelopment Agency v. Yick Kong Corp.,* 94 Idaho 876, 499 P.2d 575 (1972).

9. *Idaho Savings and Loan Ass'n. v. Roden,* 82 Idaho 128, 350 P.2d 255 (1960).

10. *State v. Moore,* 40 Neb. 854, 59 N.W. 755 (1894).

11. *State v. Erickson,* 75 Mont. 429, 244 P. 287 (1926).

12. *State Highway Comm. v. Volpe,* 479 F.2d 1099 (8th Cir.).

13. *West Side Org. Health Services v. Thompson,* 73 Ill. App.2d 179, 391 N.E.2d 392 (1979).

14. *Oneida County v. Berle,* 298 NYS2d 600 (N.Y. 1978).

15. *Stolberg v. Caldwell,* 175 Conn. 586, 402 A.2d 763 (1978).

16. *Miller v. Meredith,* 59 Idaho 385, 83 P.2d 206 (1938).

17. *Greenwood Cemetery Land Co. v. Routt,* 17 Colo. 156, 28 P. 1124 (1892).

18. 63 Am. Jur. 2d *Public Funds* § 45.

19. 27 A.L.R. Fed *Executive Impoundment of Funds* § 124.

20. 16 Am. Jur.2d *Constitutional Law* § 294.

DATED this 12th day of August, 1980.

ATTORNEY GENERAL
State of Idaho
/s/ DAVID H. LEROY

ANALYSIS BY:

ROY L. EIGUREN
Deputy Attorney General

DHL/RLE/tr

cc: Idaho Supreme Court
Idaho Supreme Court Law Library
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ATTORNEY GENERAL OPINION NO. 80-21

TO: The Honorable T. W. Stivers
State Representative
District 25
144 North Juniper
Twin Falls, Idaho 83301

Per Request for Attorney General's Opinion

QUESTIONS PRESENTED:

1. Does Idaho Code Section 63-2201A or any other provision of Idaho law grant to local taxing districts the authority to impose fees to fund an activity, service, or function of local government for which no specific statutory ad valorem levying authority exists?

2. Does any provision of the Idaho Constitution allow local taxing districts to impose non-property tax fees for the purpose of raising revenues?

3. If fees are imposed by a local taxing district under authority of Idaho Code Section 63-2201A, or any other provision of Idaho law, may the fees imposed thereunder generate more revenue for the taxing district than is required to provide the service for which the fee is imposed?

4. If the governing board of a taxing district imposes a fee for services under the authority of Idaho Code Section 63-2201A for a service or purpose which was previously funded by ad valorem tax revenues, is the governing board obligated to reduce the ad valorem property tax previously levied for the service or purpose for which the fee is imposed?

CONCLUSIONS:

1. Several provisions of Idaho law permit the charging of specific fees for particular services and functions for which no specific ad valorem levying authority presently exists. In addition, it appears to be the legislative intent of Idaho Code Section 63-2201A to permit local taxing districts to impose fees to fund, wholly or in part, any services which are currently funded by ad valorem tax revenues, whether or not a specific tax may be levied for that purpose.

2. No provision of the Idaho Constitution authorizes local taxing entities to impose fees solely for revenue purposes. However, Article 12, Section 2, Idaho Constitution, permits counties and cities, in the exercise of their police powers, to impose regulatory fees which may incidentally produce revenue.

3. It is a well-established rule of law in Idaho that fees charged for governmental services must be reasonably related to the cost of providing the service. If such fees generate substantially more revenue than is required to provide the service, such fees are regarded as taxes.

4. Idaho Code Section 63-2201A does not necessarily require a reduction in ad valorem taxes if fees are charged for a particular service. However, there may be circumstances under which a reduction in the ad valorem tax for a specific purpose would be required.

ANALYSIS:

The questions as presented to us are broad and general in nature and do not focus upon specific fees. Since Idaho Code Section 63-2201A is also phrased in general, rather than specific, terms, our discussion of the issues presented must also necessarily be general, and not related to specific fees.

The 1980 Idaho Legislature, by enactment of House Bill 680 (Chapter 290, 1980 Idaho Session Laws), created new Idaho Code Section 67-2201A, which reads as follows:

> Notwithstanding any other provision of law, the governing board of any taxing district may impose and cause to be collected fees for those services provided by the district which would otherwise be funded by ad valorem tax revenues.

The same act also created new Idaho Code Section 31-870, which grants identical authority to boards of county commissioners.

For the purposes of this opinion, the term "taxing district" means counties, cities, and other independent local governmental districts, school districts, etc., which are currently authorized by law to cause ad valorem taxes to be levied and collected. It does not include quasi-governmental entities, such as special improvement districts, which lack the authority to levy or to cause to be levied ad valorem taxes.

1. The first question relates to the power to impose fees for services or functions for which no specific ad valorem levying authority presently exists. Under current Idaho law, some taxing districts are expressly authorized to charge fees, tolls, or charges for specific services even where no specific ad valorem taxing power to fund that specific service is granted. See, for example, Idaho Code Sections 31-3201 (district court clerk's fees), 31-3201A (court fees), 31-3203 (sheriff's fees), and 31-3205 (recorder's fees). These functions are usually funded in part from the county's general ad valorem tax levy, not from levies for that particular service, which funds are supplemented by the specific fees charged. In addition, some statutes specifically authorize the charging of rates, fees, and tolls for specific services where ad valorem taxes for the same purpose are permitted (i.e., Idaho Code § 31-4404, solid waste), or where ad valorem taxes are not utilized (i.e., Idaho Code § 50-1030), water and sewer services). The Idaho Supreme Court has also upheld the charging of fees by municipalities on a cost-reimbursement basis even where not specifically authorized by statute, under a municipality's *implied* powers. *Snake River Homebuilders Association v. City of Caldwell,* 27 I.C.R. 295, 607 P.2d 1321 (March 20, 1980). And, as discussed below, the Idaho Supreme Court has upheld regulatory fees under counties' and cities' constitutional police powers, wholly apart from the power to levy ad valorem taxes for such purposes.

Idaho Code Section 63-2201A appears to be in harmony with the general policy of Idaho law to allow local governmental services to be funded from a combination of fees (where permitted, either expressly or impliedly) and ad valorem taxes. However, Idaho Code § 63-2201A contains an important limitation, which is that fees charged thereunder must be for services which would otherwise be funded by ad valorem tax revenues. Thus, it does not appear that Idaho Code § 63-2201A would provide a basis for charging fees for services which cannot currently be funded, wholly or in part, from ad valorem taxes. However, as indicated above, many governmental services are funded, at least in part, from general ad valorem taxes rather than from special levies for specific purposes. Many of the functions discussed above, for example, are funded from the current expense levies of counties. Idaho Code § 63-2201A does not appear to restrict the charging of fees only to those situations where a special or specific tax levy for a specific purpose is authorized. It is our opinion that Idaho Code § 63-2201A permits the charging of a fee (subject to several limitations, as discussed below) for a service which is funded, at least in part, from either general or special ad valorem taxes.

Since Idaho Code § 63-2201A is a general, rather than a specific, grant of authority, it is entirely possible that the Idaho courts would not read this section as granting authority to charge additional fees for those services for which specific fees are already established by statute. We caution taxing districts, then, to examine any specific proposed fee in light of existing statutory fee limitations, as for example, the specific limitation on administrative fees ($1.50 maximum) for motor vehicle registration (Idaho Code § 49-158, added in 1980).

2. The second question is whether any provision of the Idaho Constitution allows local taxing districts to impose fees, other than property taxes, for the purpose of raising revenue. The answer is, generally, no. Article 7, Section 6, Idaho Constitution, provides that the legislature shall not impose taxes for county or municipal purposes, but may by law empower such entities to assess and collect taxes for such purposes. This appears to be the only general revenue-producing authority provided for local governments by the Idaho Constitution. (Payment of excise tax funds to local governments by the state has been upheld in many cases, but are not part of the subject matter of this opinion.)

However, the Idaho Supreme Court has upheld various devices which incidentally produce revenues to local taxing entities. As already noted, the charging of fees for certain purposes on a cost-reimbursement basis has been upheld even where not specifically authorized by statute (*Snake River Homebuilders Association v. City of Caldwell, supra*), as have fees for proprietary services (*Kiefer v. City of Idaho Falls,* 49 Idaho 458, 289 P. 81 (1930) (electrical rates). More closely pertinent to this question, the Idaho Supreme Court has held that counties and cities have the power, granted directly by Article 12, Section 2, Idaho Constitution, to charge *regulatory fees* pursuant to their general police powers. This was recognized in the early case of *State v. Nelson,* 36 Idaho 713, 213 P. 358 (1923), in which the Court said:

> The authorities generally hold that municipalities may pass regulatory measures, which may incidentally raise revenue, and the implied restrictions upon the legislature contained in sec. 6 of art. 7, which limit the corporate authorities in the matter of raising revenues to the assessment and collection of taxes upon property in the usual way, do not necessarily prevent a municipal corporation from raising such revenue by license tax [fee] as may incidentally attach to regulatory ordinances. 36 Idaho 713, at 722.

The Court elaborated further upon this point in *Foster's Inc. v. Boise City,* 63 Idaho 201, 118 P.2d 721 (1941), where it said:

> Effective exercise of the police power necessarily involves expenditures in many ways. The means and instrumentalities, by and through which the supervising powers of the policing authority are brought to bear on the subject to be regulated, involve costs and expenses. It is only reasonable and fair to require the business, traffic, act, or thing that necessitates policing, to pay this expense. To do so has uniformly been upheld by the courts. On the other hand, this power may not be resorted to as a shield or subterfuge, under which to enact and enforce a revenue-raising ordinance or statute. . . . 63 Idaho 201, 218-219.

Thus the Supreme Court has recognized that, in addition to direct revenue powers of taxation and cost-reimbursement charges, counties and cities may,

under the Idaho Constitution, raise funds through regulatory charges, as long as the revenue production is incidental to a regulatory, police power purpose. As discussed next, however, that power is subject to some important limitations.

3. The third question is whether fees imposed by a local taxing district, under Idaho Code §63-2201A or other statutory authority, may generate more revenue than is required to provide the service for which the particular fee is imposed. The answer is, generally, no. However, exact mathematical equivalency is not required. It is only necessary that the fee be reasonable and bear some reasonable relationship to the cost of providing the particular service for which the fee is charged.

The cases, in Idaho as well as elsewhere, have drawn a sharp distinction between a fee and a tax. It is generally held that a license fee under the police power is such a fee only as will legitimately assist in regulation and will not exceed the necessary or probable expense of issuing the license and of inspecting and regulating the business or other subject that it covers. A tax that is not regulatory and is imposed expressly for general revenue purposes is based upon the taxing power, and even if called a fee is really a tax. 9 McQuillin, *Municipal Corporations* (3d. Ed. Rev. 1978), §§ 26.15-26.36. A license fee imposed under the power to regulate may include reasonable compensation for the expense of municipal supervision over a particular business or activity. Absolute accuracy or exactness is not required, but it must not be disproportionately high. *Red Slipper Club, Inc. v. Oklahoma City,* 599 P. 2d 406 (Okla. 1979). McQuillin, supra, § 26.36.

The Idaho Supreme Court has recognized these general principles. In *Chapman v. Ada County,* 48 Idaho 632, 284 P. 259 (1930), the Court held that a statute which, in actuality, imposed a tax in the guise of a fee, was unconstitutional. The statute in question required a $50 fee to be paid to the clerk for probating an estate. The Court held that, to be lawful, a fee must bear some relation to the value of the services rendered; otherwise, it is a tax in the guise of a fee. The court in *Foster's, Inc. v. Boise City, supra,* stated:

> The fact, that the fees charged produce more than the actual cost and expense of the enforcement and supervision, is not an adequate objection to the exaction of the fees. The charge made, however, must bear a reasonable relationship to the thing to be accomplished. . . . The spread between actual cost of administration and the amount of fees collected must not be so great as to evidence on its face a revenue measure rather than a license tax measure. 63 Idaho at 219. See, also, *State v. Nelson,* 36 Idaho 713, 213 P. 358 (1923).

Thus, even where fees are expressly authorized by law, they must bear a reasonable relationship to the cost of the service or regulation being provided. We believe that the Idaho Legislature recognized, and clearly had in mind, the distinction between a fee and a tax when it enacted Idaho Code § 63-2201A, and did not intend that fees be utilized as taxing devices.

It is our opinion, then, that fees imposed under Idaho Code § 63-2201A or other statutes may not generate substantially more revenue than is required to provide the service for which the fee is imposed.

4. The final question is whether, if a taxing district imposes a fee under Idaho Code Section 63-2201A for a service previously funded by ad valorem

taxes, must the ad valorem property tax previously levied for that service be reduced? The answer will necessarily depend upon the particular facts and circumstances. As discussed under the first and second questions above, Idaho Code § 63-2201A appears to be in accord with the general policy of Idaho law allowing governmental services to be funded from a combination of ad valorem taxes and license or service fees. Nothing in Idaho Code Section 63-2201A expressly requires a reduction in property taxes. However, the words ". . . which would otherwise be funded by ad valorem tax revenues" clearly indicates that the legislature did not intend that a taxing district be allowed to charge twice for the same service.

Perhaps an example can best illustrate the apparent intent of the statute. Suppose that a taxing district budgets $10,000 for a particular service in 1979 and raises the entire amount from taxation. In 1980 it budgets the same $10,000, but enacts a fee which it anticipates will raise $5,000 for that function. Obviously, it should either reduce its ad valorem tax by $5,000 or, if the ad valorem tax is for general operating purposes, shift $5,000 to some other part of its operating budget. However, if it budgets $15,000 for that function in 1979, $5,000 of which is to be derived from fees, we see nothing in Idaho Code Section 63-2201A which would require any reduction or shift in ad valorem taxes for that purpose.

AUTHORITIES CONSIDERED:

1. *Idaho Constitution,* Art. 7, Section 6; Art. 12, Section 2.
2. *Idaho Code* Sections 31-870, 31-3201, 31-3201A, 31-3203, 31-3205, 31-4404, 49-158, 50-1030, 63-2201A.
3. *Snake River Homebuilders Association v. City of Caldwell,* 27 I.C.R. 295, 607 P.2d 1321 (Idaho, 1980).
4. *Foster's, Inc. v. Boise City,* 63 Idaho 201, 118 P.2d 721 (1941).
5. *Kiefer v. City of Idaho Falls,* 49 Idaho 458, 289 P. 81 (1930).
6. *Chapman v. Ada County,* 48 Idaho 632, 284 P. 259 (1930).
7. *State v. Nelson,* 36 Idaho 713, 213 P. 358 (1923).
8. *Red Slipper Club, Inc. v. Oklahoma City,* 599 P.2d 406 (Okla. 1979).
9. 9 McQuillin, *Municipal Corporations* (3d Ed. Rev. 1978) §§ 26.15-26.36.

DATED this 20th day of August, 1980.

ATTORNEY GENERAL
State of Idaho
/s/ DAVID H. LEROY

ANALYSIS BY:

MICHAEL C. MOORE
Deputy Attorney General
Chief, Local Government Division

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

ATTORNEY GENERAL OPINION NO. 80-22

TO: Gordon Petrie
Prosecuting Attorney
Nez Perce County
307 19th Street, Suite B-5
Lewiston, Idaho 83501

Per Request for Attorney General's Opinion

QUESTIONS PRESENTED:

1. Does Chapter 27, Title 39, Idaho Code fully apply to the Central Orchards Sewer District, which is located entirely within the City of Lewiston?

2. What effect do city ordinances have upon the Central Orchards Sewer District with regard to plumbing standards?

CONCLUSIONS:

1. By its terms, Chapter 27, Title 39, Idaho Code, adopted the Uniform Plumbing Code for the entire state, except in cities which have, by ordinance, prescribed equal standards, requirements, and enforcement. We are informed that Lewiston has such an ordinance. The city ordinance applies within the city, including the Central Orchards Sewer District. Chapter 27, Title 39, Idaho Code, does not apply directly unless the standards, requirements, and enforcement under the city ordinance are less than the standards, requirements, and enforcement required by Chapter 27, Title 39, Idaho Code.

2. In the case of a city which has adopted its own ordinance for enforcement of the Uniform Plumbing Code, the city ordinance applies to, and must be followed by, a sewer district within the city. The city has the primary duty of enforcing it, unless it has elected to have the state do so.

ANALYSIS:

Although the general rule is "that there cannot be at the same time within the same territory two distinct municipal corporations exercising the same power, jurisdiction and privilege," this rule is limited to cases where the power, jurisdiction and privilege are substantially coextensive in scope and object. 2 McQuillin, *Municipal Corporations,* Section 7.08; 62 C.J.S., *Municipal Corporations,* Sec-

tion 143B, pages 287 and 295. In a number of cases it has been held that, under certain conditions, there may be joint authority between local governments, e.g., liquor and beer licenses, *Hess Distributing Company v. Bonneville Co.,* 69 Idaho 505, 210 P.2d 798 (1949), or different and distinct authority within the same area, 2 McQuillin, *Municipal Corporations* Section 7.08 notes 10 to 24.

Under the cases of *City of Aurora v. Aurora Sanitation District,* 112 Colo. 406, 149 P. 662; *People v. Lee,* 72 Colo. 598, 213 P. 583 it has been held that water or sewer districts are quasi-municipal corporations and are proprietary agencies, not governmental agencies.

The question of what is a governmental function as distinguished from a proprietary function has two applications to this opinion. Governmental functions mainly relate to promotion of the welfare of the state. Proprietary functions generally include those where there is some service or utility function for the betterment of a community. Here, regulation of plumbing would most likely be regarded as a governmental function whereas providing sewer service would be a proprietary function. 2 McQuillin, *Municipal Corporations,* §§ 10.05. However, mention should be made here of the fact that it is exceedingly difficult, from the case law available, to separate the governmental regulations from the proprietary functions of local governments. Each case must be determined on its own facts. What would ordinarily appear to be a governmental regulation or a proprietary function may in some cases be either or both. See *Schmidt v. Village of Kimberly,* 74 Idaho 48, 256 P.2d 515 (1953).

Cities may exercise powers in regard to sewage and similar systems under Article 12, Section 2, Idaho Constitution, and sections 50-315, and 50-332, Idaho Code, 7 McQuillin, *Municipal Corporations,* §§ 24.256 to 264, or by use of a local improvement district, § 50-1703, Idaho Code. Section 42-3202, Idaho Code, provides an alternative method of providing for water or sewer systems in that water or sewer districts may be formed and may coexist within or partially within a city or outside of cities.

Chapter 39, Title 27, Idaho Code, provides for statewide adoption and application of the Uniform Plumbing Code. It states that the Uniform Plumbing Code applies for all of the state except for cities that have adopted the Uniform Plumbing Code by ordinance. There is no mention of water or sewer districts in this chapter.

Water and sewer districts are quasi-municipal corporations, as above stated, and ordinarily have only those powers specifically granted to them or which follow by necessary implication. From reading Chapter 32, Title 42, Idaho Code, it appears that a sewer district is a quasi-municipal corporation which can be organized to provide for building, operating, and maintaining a sewer system either within a city or partially within a city, and that its purpose is not governmental, but is to provide a utility service to the residents of the district. See, *Strickfaden v. Greencreek Highway District,* 42 Idaho 738, 248 P.2d 456 (1926); *City of Aurora v. Aurora Sanitation District,* 112 Colo. 406, 149 P.2d 662 (1942).

Regulation of plumbing is within the police power of the city. Cities are specifically given constitutional power in relation to sanitation, and cities may adopt such ordinances either under Article 12, Section 2, Idaho Constitution, or under the statutes cited above, so long as such regulations do not conflict with

general law. *Hess Distributing Co. v. Bonneville County,* 69 Idaho 505, 210 P.2d 789 (1949); *In re Ridenbaugh,* 5 Idaho 371, 49 P. 12 (1897). Cities may regulate plumbing under their police power, 7 McQuillin, *Municipal Corporations,* §24.338, so long as Chapter 27, Title 39, Idaho Code, is followed. Section 39-2701, Idaho Code. Under Section 42-3212m, Idaho Code, water or sewer districts may adopt by-laws to carry out their functions, but only so long as the by-laws are not in conflict with state laws or the state constitution. The result of this is that both cities and sewer districts must follow the general state law, which provides for enforcement of the Uniform Plumbing Code, Chapter 27, Title 39, Idaho Code. Municipal corporations or quasi-municipal corporations acting in a proprietary capacity are subject to the same rules that an individual would be; e.g., they must follow the law, and they are generally treated as are private corporations or persons. *Hunke v. Foote,* 84 Idaho 391, 373 P.2d 322 (1962); *Eaton v. City of Weiser,* 12 Idaho 544, 86 P. 541 (1906).

For the purpose of this opinion, it has been confirmed by the State Labor and Industrial Department that the Lewiston city ordinance, in regard to plumbing, meets the requirements of Chapter 27, Title 39, Idaho Code.

From the above it can be seen that the following legal situation exists: cities and water and sewer districts are bound by, and must follow, state law, e.g., Chapter 27, Title 39, Idaho Code, which makes the Uniform Plumbing Code applicable to all of the state except in cities that have adopted it themselves by ordinance. If a city has adopted the Uniform Plumbing Code, the city may either enforce it itself within its area, or may do so in conjunction with the state as provided by said chapter. In any case, within the state, either the Uniform Plumbing Code, or the city ordinance which has adopted the Uniform Plumbing Code, applies. Chapter 27, Title 39, appears to state a general governmental policy that the Uniform Plumbing Code applies throughout the state.

> 39-2701. The purpose of this act is to provide certain minimum standards and requirements . . . in relation to plumbing and plumbing systems . . . all plumbing and plumbing systems shall, after the effective date [Mar. 15, 1957] of this act, be . . . in substantial accord with the Uniform Plumbing Code published by the International Association of Plumbing and Mechanical Officials . . . except as . . . to cities if such cities have or enact ordinances or codes prescribing the equal minimum standard and requirement including the enforcement thereof as provided by this act.

The water or sewer district controls and maintains its own water and sewer under Section 42-3212, Idaho Code. In this case, since the city has adopted the Uniform Plumbing Code, the city ordinance will control. The city authority in this case relates to either enforcing the Uniform Plumbing Code itself through its ordinances or to doing so in conjunction with the state. The sewer district's authority relates to managing and maintaining the sewer system but it cannot do so contrary to the city plumbing ordinance or to the state law. The city plumbing ordinance applies to the Central Orchards Sewer District. Chapter 27, Title 39, Idaho Code applies to the whole state, either directly or indirectly by requiring similar equal ordinances in any city which has adopted and carried out its own regulation of plumbing. Since our information is that the city of Lewiston has a plumbing ordinance equal to the standards, requirements and enforcement provided in Chapter 27, Title 39, Idaho Code the city ordinance applies within the entire city, including the Central Orchards Sewer District,

and Chapter 27, Title 39, Idaho Code does not apply directly to the city of Lewiston. If the city does not have a plumbing inspector, plumbing inspection would be done by State Plumbing Inspectors, applying the city ordinance.

AUTHORITIES:

1. Idaho Code: Chapter 27, Title 39; Chapter 32, Title 42; Sections 50-315, 50-332, 50-1703.

2. Idaho Constitution, Article 12, Section 2.

3. 2 McQuillin, *Municipal Corporations,* §§ 7.08; 10.05.

4. 7 McQuillin, *Municipal Corporations,* §§ 24.256 to 264, 24.338.

5. 62 C.J.S. *Municipal Corporations* § 143b, p. 287 and 295.

6. *City of Aurora v. Aurora Sanitation District,* 112 Colo. 406, 149 P. 662.

7. *Eaton v. City of Weiser,* 12 Idaho 544, 86 P. 541 (1906).

8. *Hess Distributing Co. v. Bonneville County,* 69 Idaho 505, 210 P.2d 798 (1949).

9. *Hunke v. Foote,* 84 Idaho 391, 373 P.2d 322 (1962).

10. *In re Ridenbaugh,* 5 Idaho 371, 49 P. 12 (1897).

11. *People v. Lee,* 72 Colo. 598, 213 P. 583.

12. *Schmidt v. Village of Kimberly,* 74 Idaho 48, 256 P.2d 515 (1953).

13. *Strickfaden v. Greencreek Highway District,* 42 Idaho 738, 248 P.2d (1926).

DATED this 26th day of August, 1980.

ATTORNEY GENERAL
State of Idaho
/s/ DAVID H. LEROY

ANALYSIS BY:

WARREN FELTON
Deputy Attorney General

WF/lm

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

ATTORNEY GENERAL OPINION NO. 80-23

TO: Jerry K. Woolf
Bonneville County Prosecuting Attorney
605 North Capital Avenue
Idaho Falls, Idaho 83401

Per Request for Attorney General Opinion

QUESTION PRESENTED:

Whether under *Idaho Code,* § 16-1816A, a court may expunge a juvenile's record containing an adjudication under the Youth Rehabilitation Act when such adjudication was on a cause that would have amounted to a felony or a misdemeanor involving moral turpitude if it had been committed by an adult.

CONCLUSION:

It is the clear and express intent of the Idaho legislature that juveniles adjudicated on a cause which would have amounted to a felony or misdemeanor involving moral turpitude if it had been committed by an adult, shall *not* be entitled to expungement of their juvenile records.

ANALYSIS:

In Idaho, judicial records, which include files, minutes, orders, decrees and judgments, are public writings and records. *Evans v. Dist. Ct.,* 50 Idaho 60, 64, 293 P. 323 (1930). As a general rule, every citizen has a right to inspect and copy any public writings of this state. *Idaho Code,* § 9-301. The exceptions to this general rule occur when a statute expressly provides otherwise. *Id.* One of those exceptions where citizens are provided little or no access to public writings is under the Youth Rehabilitation Act. *Idaho Code,* § 16-1801, et seq. Under § 16-1816A of the act a procedure is provided where, if certain requirements are met, a juvenile may have his record expunged and removed completely from public availability. The validity of this statutory exception to a citizen's right to inspect public writings has been acknowledged and followed by the Idaho Supreme Court. *Interest of Doe,* 98 Idaho 40, 41, n.1, 557 P.2d 634 (1976).

The statute this opinion analyzes, § 16-1816A, applies only to the situation where a juvenile has been "adjudicated" by a juvenile court under the purview of the Youth Rehabilitation Act. This adjudication is equivalent to a final judicial determination which would have amounted to a conviction had the juvenile been tried in an adult criminal proceeding. *In re Winship,* 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368, 372 (1970).

An examination of *Idaho Code,* § 16-1816A, shows that it contains three parts. The first part explains when one can apply for expungement and the procedures for setting the hearing. The third part details what the judge must do if an expungement is granted and the effect of the expungement. The second part lists the necessary criteria which must be met before an expungement can be ordered. The relevant part of the statute detailing those criteria is as follows:

> If the court finds upon the hearing that (1) the petitioner has not been adjudicated on a cause amounting to a felony or a misdemeanor involving moral turpitude if committed by an adult, *and* (2) has not been

> convicted of a felony or of a misdemeanor involving moral turpitude since the termination of the court's jurisdiction or his unconditional release from the youth training center, *and* (3) that no proceeding involving such felony or misdemeanor is pending or being instituted against him, *and* (4) if the court further finds that the rehabilitation of the petitioner has been attained to the satisfaction of the court, it *shall* order sealed all records in the petitioner's case. . . . *Idaho Code,* § 16-1816A. [Numbering and emphasis supplied.]

From the use in the statute of the conjunction "and," it is clear that four separate and cumulative criteria have been set out, each of which must be met before an expungement can be granted. *Filer Mutual Telephone Co. v. Idaho State Tax Comm.,* 76 Idaho 256, 261, 281 P.2d 478 (1955); *Sutherland On Statutory Construction,* § 24.14. Further, if all four criteria have been met, the use of the word "shall" in the statute mandates that the court grant the expungement. *Goff v. H.J.H. Co.,* 95 Idaho 837, 839, 521 P.2d 661 (1974); *Sutherland On Statutory Construction,* § 24.14.

It is the first criterion this opinion must interpret in light of the rules of statutory construction. That criterion clearly and specifically states that before the court may expunge a juvenile record, it must find that the juvenile "has not been adjudicated on a cause amounting to a felony or a misdemeanor involving moral turpitude if committed by an adult."

A few other states have passed juvenile expungement legislation similar to *Idaho Code,* § 16-1816A. Gough, *The Expungement of Adjudication Records of Juvenile and Adult Offenders: A Problem of Status,* 1966 Wash. U. Law Quarterly, 147. However, such legislation is apparently more liberal than that enacted in Idaho. Other legislatures have specifically stated that all adjudications in a juvenile's record may be expunged, whereas the Idaho legislature has apparently specifically excluded expungement of adjudications which would have amounted to a felony or misdemeanor involving moral turpitude committed by an adult. For example, *Utah Code Anno.* 78-3a-56 states:

> Any person who has been adjudicated in a children's case under this act may . . . petition the court for expungement . . . if the court finds that the petitioner has not been convicted of a felony or of a misdemeanor involving moral turpitude *since the termination of the court's jurisdiction* . . . and shall order sealed all records. [Emphasis added.]

See also for similar statutes, *California Welf & Inst. Code,* § 781; *Kansas Code Anno.,* §§ 21-4616, 38-815 (h); *Massachusetts Code Anno.,* § 100 (b); *Rev. Code Wash.,* §§ 13.50.050, 13.50.150; *Ohio Rev. Code,* § 2151.358. Therefore, even though other jurisdictions are more liberal in their expungement of juvenile records, the apparently clear intent of the Idaho legislature requires stricter standards to be met.

Application of the recognized rules of statutory construction will demonstrate the fact that the Idaho legislature intended that such a standard be complied with before expungement can be granted.

It is a general rule of statutory construction that the primary function of a court in construing a statute is to ascertain the legislative intent, and give effect thereto. *Knight v. Employment Security Agency,* 88 Idaho 262, 264, 398 P.2d 643 (1965); *N.P. R.R. Co. v. Shoshone Co.,* 63 Idaho 36, 40 (1941). Further, the

statute should be construed so that effect is given to all its provisions, so that no part thereof will be inoperative or superfluous, void or insignificant. *Norton v. Dept. of Employment,* 94 Idaho 924, 928, 500 P.2d 825 (1972); *Stucki v. Loveland,* 94 Idaho 621, 622, 495 P.2d 571 (1972). Effect should be given to the legislative intent as expressed, irrespective of the wisdom or possible results. *Florek v. Sparks Flying Service,* 83 Idaho 160, 164, 359 P.2d 511 (1961). This is because if the statute is unwise, the power to correct is legislative, not judicial. *Newlan v. State,* 96 Idaho 711, 716, 535 P.2d 2348 (1975); *Anstine v. Hawkins,* 92 Idaho 561, 563, 447 P.2d 677 (1968).

When the court is giving effect to a statute, it should keep within the terms of the language used. *State v. Hahn,* 92 Idaho 265, 268, 441 P.2d 714 (1968). Unless the result is palpably absurd, the courts must assume that the legislature meant what it said. *State Dept. of Law Enforcement v. One 1955 Willys Jeep,* 100 Idaho 150, 153, 595 P.2d 299 (1979). Additionally, the words and phrases of a statute should be given their usual, plain and ordinary meaning. *Nagel v. Hammond,* 90 Idaho 96, 100, 408 P.2d 468 (1965), and when the language of the statute is unambiguous, the clear expressed intent of the legislature must be given effect, and there is no occasion for construction. *Worley Highway Dist. v. Kootenai Cty.,* 98 Idaho 925, 928, 576 P.2d 206 (1978). This is because the statute speaks for itself and must be given the interpretation the language clearly implies. *Moon v. Investment Board,* 97 Idaho 595, 596, 548 P.2d 861 (1976).

Therefore, it must be concluded that pursuant to the above authority, the unambiguous language of *Idaho Code,* § 16-1816A, shows the clear expressed intent of the legislature to be that a court may not grant an expungement of juvenile records which contains an adjudication on a cause which would have amounted to a felony or a misdemeanor involving moral turpitude if committed by an adult.

In creating the Act, the Idaho legislature carved from the district court's original criminal jurisdiction a limited area wherein juveniles who violate Federal and state laws are dealt with in a rehabilitative manner rather than being punished as criminals. *Idaho Code,* § 16-1801; *Hewlette v. Probate Court,* 66 Idaho 690, 696-697, 168 P.2d 77 (1946); *State v. Gibbs,* 94 Idaho 908, 912, 500 P.2d 209 (1972).

Although it does not provide total confidentiality, the Youth Rehabilitation Act protects juveniles who fall within the purview of the act by restricting access to juvenile records. *Interest of Doe,* supra. They are also protected under the act because adjudications under this act are civil in nature. Juveniles are not charged with criminal violations from which may follow forfeiture of constitutional rights, but instead are provided rehabilitation and counseling. *Hewlette v. Probate Court,* supra; *State v. Gibbs,* supra; *Monroe v. Tielsch,* 84 Wash.2d 217, 525 P.2d 250, 251 (1974).

As did the legislature in *Idaho Code,* § 16-1816A, the Idaho Supreme Court in *Doe* recognized that not all juveniles coming within the purview of the Youth Rehabilitation Act would receive expungement of their records. The court recognized that expungement was to be granted only when all the criteria in *Idaho Code,* § 16-1816A were satisfied. The Federal courts have also recognized that juvenile offenders under the Federal Youth Correction Act (18 U.S.C. §5021 (1970)), are not absolutely entitled to expungement of juvenile records, *United States v. Doe,* 556 F.2d 391, 393 (6th Cir. 1977); *United States v. McMains,* 540 F.2d 387, 389 (8th Cir. 1976); *United States v. Hall,* 452 F. Supp. 1008, 1013

(S.D.N.Y. 1977); *Fite v. Retail Credit Co.*, 386 F. Supp. 1045 (Mont. 1975); *but see Doe v. Webster,* 606 F.2d 1226, 1243 (D.C.Cir. 1979).

It is true that some stigma may attach to a juvenile who is not entitled to expungement under *Idaho Code,* § 16-1816A. However, the legislature has apparently balanced the interests of law enforcement agencies and the courts in preserving the record of juveniles coming under the Youth Rehabilitation Act against the interests of delinquent juveniles, and concluded that the limited future use of such records by interested parties outweighs the juvenile's interest in total expungement. Therefore, the legislative intent being clear, the courts should uphold the intent of the legislature until the legislature determines otherwise. *In re Speers,* 53 Idaho 293, 300, 23 P.2d 239 (1933); 87 Idaho at 339; 494 P.2d at 221.

Even though the statutory language is clear, the courts are still not completely powerless to order an expungement of records under any circumstances. Several jurisdictions have held that courts have "inherent power" to deal with juvenile records and order expungement of such records when injustice occurs. *United States v. McMains,* supra; *United States v. Doe,* supra; *Doe v. Webster,* supra; *United States v. Hall,* supra; *United States v. Benlizar,* 459 F. Supp. 614 (D.C. 1978); *Bradford v. Mahan,* 219 Kan. 450, 548 P.2d 1223 (1976). However, this "inherent power" is limited to expungement of incorrect records or records containing illegal convictions which would bring about injustice if these records were allowed to go uncorrected.

> It is established that federal courts have inherent power to expunge criminal records when necessary to preserve basic legal rights. [Citations omitted.] The power is a narrow one, usually exercised in cases of illegal prosecution or acquittals and is not routinely used. *United States v. McMains, supra,* at 389-390.

See also, 66 Am Jur 2d, *Records & Recording Laws,* § 9 (1973). This "inherent power" to expunge does not extend to situations where juvenile records are accurate and contain valid adjudications under youth rehabilitation statutes. 606 F.2d at 1231 (held no inherent power to expunge valid arrest records); 556 F.2d at 393 (inherent power to expunge is only appropriate in certain cases); 459 F. Supp. at 623 (expungement allowed under inherent powers because conviction had been overturned); 452 F. Supp. at 1013 (inherent powers limited to illegal convictions or acquittals); 548 P.2d at 1231 (inherent power to expunge police records only allowed in extreme circumstances, i.e. arrests based on false reports or illegal arrests); *In re J,* 353 N.Y. Supp. 2d 695 (1974) (inherent expungement power used where charges were dismissed for lack of evidence); *Irani v. Dist. of Columbia,* 273 A.2d 849 (D.C. 1971) (expungement allowed where arrest was erroneous).

Thus, although it is a somewhat stricter requirement than is in effect in other states, the clear intent of the Idaho legislature is to require that before a court can expunge a juvenile's record it must find as one of the criteria that the juvenile was not adjudicated on a cause amounting to a felony or a misdemeanor involving moral turpitude if it had been committed by an adult.

AUTHORITIES CONSIDERED:

1. *Evans v. Dist. Ct.,* 50 Idaho 60, 64, 293 P. 323 (1930).

2. *Interest of Doe,* 98 Idaho 40, 41, n.1, 557 P.2d 634 (1976).

3. *In re Winship,* 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368, 372 (1970).
4. *Filer Mutual Telephone Co. v. Idaho State Tax Comm.,* 76 Idaho 256, 261, 281 P.2d 478 (1955).
5. *Goff v. H.J.H. Co.,* 95 Idaho 837, 839, 521 P.2d 661 (1974).
6. *Knight v. Employment Security Agency,* 88 Idaho 262, 264, 398 P.2d 643 (1965).
7. *N.P. R.R. Co. v. Shoshone Co.,* 63 Idaho 36, 40 (1941).
8. *Norton v. Dept. of Employment,* 94 Idaho 924, 928, 500 P.2d 825 (1972).
9. *Stucki v. Loveland,* 94 Idaho 621, 622, 495 P.2d 571 (1972).
10. *Florek v. Sparks Flying Service,* 83 Idaho 160, 164, 359 P.2d 511 (1961).
11. *Newlan v. State,* 96 Idaho 711, 716, 535 P.2d 2348 (1975).
12. *Anstine v. Hawkins,* 92 Idaho 561, 563, 447 P.2d 677 (1968).
13. *State v. Hahn,* 92 Idaho 265, 268, 441 P.2d 714 (1968).
14. *State Dept. of Law Enforcement v. One 1955 Willys Jeep,* 100 Idaho 150, 153, 595 P.2d 299 (1979).
15. *Nagel v. Hammond,* 90 Idaho 96, 100, 408 P.2d 468 (1965).
16. *Worley Highway Dist. v. Kootenai Cty.,* 98 Idaho 925, 928, 576 P.2d 206 (1978).
17. *Moon v. Investment Board,* 97 Idaho 595, 596, 548 P.2d 861 (1976).
18. *Hewlette v. Probate Court,* 66 Idaho 690, 696-697, 168 P.2d 77 (1946).
19. *State v. Gibbs,* 94 Idaho 908, 912, 500 P.2d 209 (1972).
20. *Monroe v. Tielsch,* 84 Wash.2d 217, 525 P.2d 250, 251 (1974).
21. *In re Speers,* 53 Idaho 293, 300, 23 P.2d 239 (1933).
22. *United States v. Doe,* 556 F.2d 391, 393 (6th Cir. 1977).
23. *United States v. McMains,* 540 F.2d 387, 389 (8th Cir. 1976).
24. *United States v. Hall,* 452 F. Supp. 1008, 1013 (S.D.N.Y. 1977).
25. *Fite v. Retail Credit Co.,* 386 F. Supp. 1045 (Mont. 1975).
26. *Doe v. Webster,* 606 F.2d 1226, 1243 (D.C.Cir. 1979).
27. *United States v. Benlizar,* 459 F. Supp. 614 (D.C. 1978).
28. *In re J,* 353 N.Y. Supp. 2d 695 (1974).

29. *Irani v. Dist. of Columbia,* 273 A.2d 849 (D.C. 1971).

30. *Bradford v. Mahan,* 219 Kan. 450, 548 P.2d 1223 (1976).

31. *Idaho Code,* §§ 9-301, 16-1801, 16-1816A.

32. *Utah Code Anno.* 78-3a-56.

33. *Calif. Welf & Inst. Code* § 781.

34. *Kansas Code Anno.* §§ 21-4616, 38-815 (h).

35. *Massachusetts Code Anno.* § 100 (b).

36. *Rev. Code Wash.,* §§ 13.50.050, 13.50.150.

37. *Ohio Rev. Code,* § 2151.358.

38. 66 Am Jur 2d, *Records & Recording Laws,* § 9 (1973).

39. *Sutherland On Statutory Construction,* § 24.14.

40. Federal Youth Correction Act (18 U.S.C. §5021 (1970)).

41. Gough, *The Expungement Of Adjudication Records Of Juvenile & Adult Offenders: A Problem Of Status,* 1966 Wash. U. Law Quarterly, 147.

DATED this 7th day of October, 1980.

ATTORNEY GENERAL
State of Idaho
/s/ DAVID H. LEROY

ANALYSIS BY:

LANCE D. CHURCHILL
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DHL:LDC:lb

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

ATTORNEY GENERAL OPINION NO. 80-24

TO: The Honorable Reed W. Budge
President Pro Tempore
Idaho State Senate
P.O. Box 804
Soda Springs, Idaho 83276

Per Request for Attorney General's Opinion

QUESTIONS PRESENTED:

1. Does Section 59-1026, Idaho Code, or any other statute allow a unit of local government to acquire various construction materials by separate individual purchases of less than $5000 each, without competitive bids, and then, using all or part of said materials and its own day labor employees, construct a public facility involving an estimated cost in excess of $5,000, without calling for bids for construction of the facility?

2. In the above circumstances, if the individual purchases were each for $5,000 or more, and were purchased under competitive bidding pursuant to Idaho Code §50-341C, could the unit of local government then construct the facility without calling for competitive bids?

3. Does Idaho Code §59-1026, or any other section of Idaho law allow a unit of local government, as owner, to put the construction of a public facility out to bid while providing an exclusion for an item or items to be accomplished by the owner, the cost of which exceed $5,000?

4. Does the term "political subdivision," as used in Idaho Code §59-1026, include (a) school districts (b) counties, and (c) highway districts?

5. Does the term "public officers" as used in Idaho Code §59-1026 include (a) a city mayor, (b) a city manager, (c) city councilmen, (d) a city engineer, (e) county commissioners, (f) commissioners of highway and good road districts?

6. Does Section 50-341B, Idaho Code, preclude a city from awarding a contract in excess of $5,000 to another unit of government, such as a county, to construct a public facility, without first calling for competitive bids?

7. Does the provision of Idaho Code §50-341B stating that "expenditure" does not include disbursements to any city employee allow a city to purchase material having a value of $4,000 and employ day labor workers which incur a labor cost of $4000 to construct a public facility having a value of $8000 without calling for bids?

8. Should Idaho Code §50-341K be interpreted as requiring that a city have factual evidence that day labor and materials and supplies purchased in the open market in combination be more economical than the bids received? Should day labor costs incurred by a city in relation to a specific project be considered as part of the "expenditure," and, if so, does this conflict with the definition of "expenditure" in Idaho Code §50-341B regarding disbursements of funds to a city employee?

9. In determining, pursuant to Idaho Code §50-341K, that the thing to be accomplished by the expenditure can be performed more economically by day labor or upon the open market, should the following factors be considered: (a) equipment maintenance and operating costs, (b) capital expense of equipment, (c) management supervision, (d) taxes (i.e., tax revenue lost), (e) lands and insurance, (f) licenses and permits, (g) mobilization?

CONCLUSIONS:

1. The answer to the first question will necessarily depend upon the factual situation of each individual case. It appears to be the clear intent of Idaho Code §59-1026 to prohibit cities or other units of local government from splitting purchases of material for a single work project into separate contracts, each under $5,000, for the purpose of evading competitive bid requirements. If, however, a city has surplus stockpiles of materials from other projects on hand, and utilizes its own regular employees to construct a facility, Idaho Code §59-1026 would not appear to prohibit such practice. The intent of the city officials, as indicated by the relevant facts and circumstances, would appear to be determinative.

2. If the city or other unit of local government has complied with the competitive bid requirements in purchasing materials, Idaho Code §50-341B would appear to allow construction of the facility by the city's own employees without letting a contract pursuant to competitive bids. However, Idaho Code §50-341B and §50-341K appear to draw a distinction between the use of a city's own regular employees and the hiring of casual employees on a "day labor" basis. In the latter situation, if the expenditure for labor would exceed $5,000, Idaho Code §50-341B would appear to require calling for competitive bids unless the finding and resolution required by Idaho Code §50-341K were complied with.

3. Nothing in Idaho Code §§50-341, 59-1026, or other statutes appears to prohibit the practice of excluding from competitive bid contracts a portion of work to be performed by a governmental entity's own employees.

4. Since the statutes governing school districts, counties, and highway districts specifically require the use of competitive bids in certain situations, the term "political subdivisions," as used in Idaho Code §59-1026, most likely includes school districts, counties and highway districts.

5. The term "public officer," as used in Idaho Code §59-1026, most likely includes all of the enumerated officials, as well as any other public officers of any unit of local government which is subject to competitive bid requirements, where such officers have the authority to enter into binding contracts on behalf of the entity which they represent. Since city contracts must be authorized or approved by the city council, however, a city engineer, city manager, or mayor would have to be authorized, or his acts subsequently ratified, by the city council.

6. Idaho law is not entirely clear as to the applicability of competitive bid requirements to work performed by one unit of government for another unit of government. The statutes providing for joint services agreements (Idaho Code §§67-2326 through 67-2333) specifically provide that any power possessed by one agency or unit of government may be exercised jointly with another agency or unit of government which possesses the same power. Since cities, counties, etc. are expressly authorized to perform work with their own employees without calling for competitive bids, it is possible that the Idaho courts, if confronted with the question, would hold that, pursuant to a joint services agreement, the employees of one unit of government could perform work for another unit of government without compliance with the competitive bid laws. However, it is also possible that the courts would adopt the view that, where the expenditure

exceeds $5,000, competitive bids would be required even where the work is sought to be performed by another unit of government. Only a court decision, or legislative clarification, could determine the answer.

7. As in the situation discussed under the first question above, the answer will depend upon the factual situation in each case. Idaho Code §59-1026 prohibits cities and political subdivisions from splitting labor and material contracts for the purpose of evading the competitive bid requirements. However, if the city already has material on hand and has not purchased it for the current project for the purpose of evading competitive bid requirements, and either uses its regular employees or hires "day labor" workers for less than $5,000, neither Idaho Code §50-341 nor §59-1026 would appear to be violated.

8. Idaho Code §50-341K provides that a city council may, *after finding it to be a fact,* pass a resolution declaring that the thing sought to be accomplished by the expenditure can be performed more economically by day labor, or the materials and supplies furnished at a lower price in the open market. In light of the decisions of the Idaho Supreme Court, it is the view of this office that such a finding must be supported by inclusion of facts, in the record, to support such finding, and that such finding is reviewable by the courts if properly brought before them. As discussed above, labor costs incurred through the use of a city's own regular employees are not an "expenditure" under Idaho Code §50-341B and need not be considered as part of the costs of the project for purposes of competitive bid requirements.

9. Idaho law does not specify what factors are to be considered in determining whether the expenditure can be performed more economically by day labor or on the open market than by bid. However, in view of the relatively sophisticated accounting methods which would be required to determine the impact of such items as lost tax revenues, we view it as unlikely that the courts would view Idaho Code §50-341K as requiring that such items be considered in determining relative costs.

ANALYSIS:

At the outset, we consider it desirable to establish a framework within which to discuss the specific questions by setting forth a few general comments upon the purpose of the competitive bid statutes, the particular wording of the Idaho statutes, and how these statutes differ in certain particulars from competitive bid requirements of some other states.

The purpose of competitive bid requirements has been said to be to invite competition, to guard against favoritism, improvidence, extravagance, fraud, and corruption, and to secure the best work at the lowest price practicable. They are enacted for the benefit of taxpayers, and not for the benefit and enrichment of bidders. 10 McQuillin, *Municipal Corporations,* §29.28; 63 C.J.S., *Municipal Corporations,* §995; *Conduit and Foundation Corp., v. City of Philadelphia,* 401 A.2d 376 (Pa. Cmwlth. 1979); *Mohave County v. Mohave Kingman Estates,* 120 Ariz. 417, 586 P.2d 978 (1978); *Miller v. McKinnon,* 20 Cal.2d 83, 124 P.2d 34 (1942). In the absence of statutory requirements, there is no legal obligation to let the contract under competitive bidding or to award the contract to the lowest bidder. 10 McQuillin, *Municipal Corporations,* §29.31; 63 C.J.S., *Municipal Corporations,* §996; *Thatcher Chemical Co. v. Salt Lake City Corp.,* 21 Utah 2d 355, 445 P.2d 769 (1968).

For purposes of this opinion, reference will be made to Idaho Code Section 50-341, which applies to cities, but it should be noted that the competitive bid laws governing counties (Idaho Code §§31-4001 et seq.) and highway districts (Idaho Code §§40-1001 et seq.), are, insofar as they pertain to the issues addressed in this opinion, substantially identical to the provisions of Idaho Code §50-341.

Section 50-341A, Idaho Code, provides that the general competitive bidding law shall apply to all cities in the state, but shall be subject to the provisions of any specific statute pertaining to the letting of any contract, purchase, or acquisition, ". . . and shall not be construed as modifying or amending the provisions of any such statute, *nor preventing the city from doing any work by its own employees.*" [Emphasis added.] Cf. Idaho Code §31-4001 (counties); Idaho Code §49-1001 (highway districts). Idaho Code §50-341C provides that when the "expenditure" contemplated exceeds $5,000, it shall be contracted for and let to the lowest bidder. However, Idaho Code §50-341B, which defines the term "expenditure" as meaning the granting of a contract, franchise, or authority, and every manner and means whereby the city disburses funds or obligates itself to disburse funds, expressly provides that "expenditure" does *not* include disbursement of funds to any city employee, official, or agent. Cf. Idaho Code §31-4002 (counties); Idaho Code §40-1002 (highway districts).

Thus the Idaho statutes specifically exempt from the competitive bid laws disbursements of funds to the entity's own employees. By necessary implication, then, the cost of payment of public funds to public employees is not to be considered in determining whether an "expenditure" exceeds $5,000.

Thus Idaho law differs in this respect from the laws of several other states which specifically require that, whenever the total cost (including the labor of public employees) exceeds a certain amount, the work shall be done by contract let pursuant to competitive bids. See, e.g., Oregon Revised Statutes §279.023, which provides that it is the legislative intent that public agencies not engage in public improvement work by use of the agency's own equipment and personnel where such work can be performed at less cost by private contractors, and Revised Code of Washington §36.32.240, which provides that counties *shall* contract on a competitive bid basis for all public works. The Washington statute was recently construed in *Ronken v. Board of Commissioners of Snohomish County,* 89 Wash.2d 304, 572 P.2d 1 (1977), as prohibiting counties from using their own road crews on projects exceeding the competitive bid requirements. See also *State ex rel. Kuhn v. Smith,* 194 N.E.2d 186 (Ohio Supp. 1963), which held that, under a statute requiring that school repair projects costing more than $4,000 be submitted to competitive bidding, a school district was required to go to bid (the statute contained a mandatory requirement of contracting; there was no exception for payments to public employees).

It is our view that, in both cases, the result would have been different in Idaho if Idaho Code §50-341 had been the applicable statute, because Idaho's statute specifically exempts payment to public employees. However, even in Idaho there are some situations where bidding and contracting are mandatory, and work cannot be done by public employees if the cost exceeds the statutory amount. For example, Idaho Code §31-1001 (counties) has been held to prohibit construction of a county building by county employees; the statute specifically requires that the work be let by contract. *Reynolds Construction Co. v. County of Twin Falls,* 92 Idaho 61, 437 P.2d 14 (1968). Another example is Idaho Code §33-601 (school districts), which provides for a school district to *contract* for public works and to

call for competitive bids when the amount is over $5,000. However, where no specific statute requires that a contract be let, we view Idaho Code §50-341 and similar Idaho statutes as not requiring that contracts be let to private contractors where the work is done by the agency's own employees, even if the cost exceeds $5,000. 64 Am. Jur.2d, *Public Works and Contracts,* §40; *Montana Chapter, NECA v. State Board of Education,* 137 Mont. 382, 352 P.2d 258 (1960). Such statutes merely require that, if the municipality chooses to have the work done by contract rather than by its own employees, the contract must be done on competitive bidding.

> The statute deals with the *procedure* to be followed *when* and *if* a contract is to be awarded. It does not set forth the instances when a contract must be let, nor does it prohibit state officers and employees from performing work on state buildings. If the Legislature had intended this statute to be a general statute requiring that all construction, repair or improvement of state properties be done only "by contract" let to the lowest responsible bidder, such could have been spelled out expressly in plain language.

Montana Chapter, NECA v. State Board of Education, supra, 352 P.2d at 259. Cf. *Perry v. City of Los Angeles,* 157 Cal. 146, 106 P.410; *Contracting Plumbers' Association of St. Louis v. Board of Education,* 238 Mo. App. 1096, 194 S.W.2d 731.

With this statutory and case background, we shall now examine the specific questions posed by your letter.

1. The first question concerns the practice of acquiring various construction materials by separate individual purchases of less than $5,000 each, without competitive bids, and, using such materials and its own day labor employees, constructing a facility, the total cost of which exceed $5,000, without calling for bids.

Idaho Code §59-1026, enacted in 1975, provides:

> It is a violation of this section for any public officer or officers of the state, a political subdivision or a city in this state to split or separate purchases or work projects for the purpose of evading any laws of the state which require competitive bidding for such purchases or work projects when the amount of the anticipated purchase or work exceeds a specific dollar amount. Any public officer or official violating this section shall be liable for civil penalties not to exceed five hundred dollars ($500) for each offense.

The Idaho Supreme Court has not yet had occasion to construe this statute. However, the statute's apparent intent is to prohibit cities and other governmental entities which are subject to competitive bid requirements from splitting purchases of materials or work projects into separate contracts *for the purpose* of evading competitive bid requirements. The question thus becomes one of the *intent* of the public officials involved. Many cases on this issue have been decided by the courts of other states. One well-recognized rule is that, where there is a recognized current need for a supply of a particular material over a period of time, and a city, without bids, attempts to meet that need through a series of separate contracts, the statute is violated. *Fonder v. South*

Sioux Falls, 76 S.D. 31, 71 N.W.2d 618 (1955); Annotation: 53 A.L.R.2d 498. Where it is apparent that the work has been split up for the purpose of evading the statute, the courts have generally held the contracts to be invalid. *Miller v. McKinnon,* 20 Cal.2d 83, 124 P.3d 34 (1942). On the other hand, if the public officials responsible for letting the contract appear to have acted in good faith, multiple contracts may be upheld even though the total involved in them in the aggregate is greater than the amount specified in the statute. 53 A.L.R.2d 498, 499, §2.

Where a city contemplates a single work project and divides the purchase of materials into separate contracts, each under $5000, it would appear that the intent of Idaho Code §59-1026 is violated. However, if the city has a stockpile of materials remaining from previous projects, or if it otherwise acts in good faith and with no intent to violate the statute, utilization of such material on a new project, without bids, probably would not violate the statute. It becomes a question of intent, dependent upon the particular factual situation arising in each case. As discussed above, the use of the entity's own employees to perform the labor would not appear to violate Idaho Code §50-341 or similar statutes. We caution, however, that "good faith" is to be determined by *objective* facts and circumstances, not by the subjective state of mind of the officials involved, and that cities and other entities may not avoid the strictures of Idaho Code §59-1026 by the device of merely proclaiming their "good faith."

2. The second question is whether, in the circumstances described above, if the city did comply with the competitive bid laws in acquiring the materials, could it then construct the facility without calling for bids for construction. Assuming that the city employees meet applicable building codes and licensing provisions, nothing in Idaho Code §50-341 or similar statutes, or in Idaho Code §59-1026, would appear to prevent such practices, since Idaho Code §§50-341A and B, as discussed above, specifically exempt work performed by a city's own employees from the competitive bid requirements.

We emphasize that we are expressing no view as to the wisdom of the *policy* of pursuing such a course as opposed to contracting with private contractors. Our opinion is limited to the question whether the applicable law *permits* such action. In our view, it does.

However, we do wish to draw a distinction between the use of an entity's regular employees, as contemplated by Idaho Code §§50-341A and B, and the use of "day labor" as provided by Idaho Code §50-341K. In the latter case, we view the term "day labor" as being the use of non-regular employees hired by the day at a fixed hourly wage for a specific project. Cf. *Copeland v. Kern County,* 105 C.A.2d 821, 234 P.2d 314; *Butchek v. Collier,* 174 Wash. 311, 24 P.2d 619. The use of such day labor, without calling for bids and making the finding required by Idaho Code §50-341K, would, in our opinion, violate the competitive bid requirements if the total labor cost exceeded $5000.

3. The third question is whether Idaho Code §§50-341C, 59-1026, or any other statute allows a local governmental unit to call for competitive bids while calling for an exclusion of an item or items to be accomplished by the owner, the cost of which exceeds $5000. Since, as discussed above, Idaho Code §§50-341A and B specifically exclude the use of a governmental entity's own employees from the operation of the competitive bid laws, and since competitive bidding is not required where the legislature has not specifically so provided, we see no

violation of the competitive bid laws where a governmental entity excludes that portion of the work to be performed by its own employees, even if it exceeds $5000. We caution, however, that the Idaho Supreme Court has not ruled on this question, nor have we located cases from other jurisdictions on this specific point. Our opinion is necessarily based upon an interpretation of the Idaho statutes.

4. The fourth question is whether the term "political subdivisions," as used in Idaho Code §59-1026, includes school districts, counties, and highway districts. The term "political subdivision" is not specifically defined in that statute, but a reasonable interpretation would appear to include all of the named entities. The clear intent of the statute appears to be to include any public entity which is subject to competitive bid laws. School districts (Idaho Code §33-601), counties (Idaho Code §§31-4001 et seq.), and highway districts (Idaho Code §§40-1001 et seq.) are all subject to such requirements. In our opinion, all three types of entities are subject to the provisions of Idaho Code §59-1026.

5. The fifth question is whether the term "public officer," as used in Idaho Code §59-1026, includes city mayors, city managers, city councilmen, city engineers, county commissioners, and commissioners of highway and good road districts. In our opinion, the statute is intended to include any official who has authority to enter into contracts on behalf of the governmental unit he represents. City councils are expressly authorized to approve contracts on behalf of cities (Idaho Code §§50-1017, 50-1018), as are county commissioners for counties (Idaho Code §§31-602, 31-604), and highway commissioners for highway districts (Idaho Code §§40-1601 et seq.). Mayors, city managers, and city engineers have no such authority absent council approval. A contract of a mayor, city manager, or city engineer would have to be authorized, or ratified, by the city council before it was effective. If effective, however, then those officials, or any other official who could legally act to bind the governmental entity, would be subject to Idaho Code §59-1026.

6. The sixth question is whether Idaho Code §50-341B precludes a city from contracting with another unit of government, such as a county, to construct a public facility, without calling for competitive bids, where the expenditure exceeds $5000. On its face, Idaho Code §50-341 would appear to require bids, since "expenditure" includes every manner and means whereby a city disburses, or obligates itself to disburse, funds other than to its own employees or for the performance of personal services to the city. However, Idaho Code §50-341A specifically provides that nothing therein shall be deemed to supersede other statutes, and Idaho Code §§67-2326 through 67-2333 (joint services agreements) grant some additional powers to units of government. Idaho Code §67-2328 (a) provides that any power, privilege, or authority held by a public agency may be exercised and enjoyed jointly with any other public agency of this state having the same powers, privileges, and authority. It is possible to construct an argument that, since a city or county individually has the authority to do work with its own employees without bids, it could do work for the other entity, pursuant to a joint services agreement, without bids. The two statutes thus appear to lead to opposite conclusions. In our opinion, only a determination by the Idaho Supreme Court, or clarification by the Legislature, could provide a definite answer to this question.

7. The seventh question is whether a city, under Idaho Code §50-341B, may purchase $4000 worth of material and employ day labor workers for a cost of

$4000 to construct an $8000 facility without competitive bids. The discussion under the first and second questions above is relevant here. If the city is using the labor of its own regular employees, no bids would appear to be required under Idaho Code §50-341B. If, however, the city is using outside "day labor" as contemplated by Idaho Code §50-341K, it should call for bids for the entire project and utilize such day labor only after rejecting all bids and making the findings required by §50-341K.

8. The eighth question concerns the requirement of factual evidence that day labor and open market purchases are more economical than competitive bidding when a city utilizes §50-341K, Idaho Code. That section provides:

> After rejecting bids, the city council may, *after finding it to be a fact,* pass a resolution declaring that the thing sought to be accomplished by the expenditure can be performed more economically by day labor, or the materials or supplies furnished at a lower price in the open market. Upon adoption of the resolution, it may have the thing sought to be accomplished done in the manner stated without further compliance with this section. [Emphasis added.]

In *Reynolds Construction Co. v. County of Twin Falls,* 92 Idaho 61, 437 P.2d 14 (1968), the Idaho Supreme Court held that a factual determination by a board of county commissioners as to the existence of an emergency was reviewable by the courts. In view of this decision, we deem it likely that the Court would also hold that a determination of a city council that an item can be acquired more economically by day labor or on the open market is also reviewable by the courts. However, it is not clear whether the council would have to include in its records the underlying facts upon which that determination is based. The great majority of courts which have considered the question have held that the reasons for rejecting bids need not be entered in the record (10 McQuillin, *Municipal Corporations,* §29.77), and that the courts will not interfere with the council's discretion unless exercised with fraudulent intent. However, these cases do not appear to have been decided under a statute, such as Idaho Code §50-341K, which expressly requires a finding of fact. Based upon the *Reynolds* case, *supra,* and the recent decisions of the Idaho Supreme Court requiring written findings of fact in rezoning proceedings, *Walker-Schmidt Ranch v. Blaine County,* 614 P.2d 960 (1980), and *Cooper v. Board of County Commissioners of Ada County,* 614 P.2d 947 (1980), we view it as probable that the Idaho courts would require express findings stating the factual basis for the council's determination.

Day labor costs, to the extent that such labor does not include the regular paid employees of the city, should be included in determining the amount of the "expenditure." However, for the reasons set forth above, payment of salaries or wages to regular employees would not have to be included in determining whether the amount of the expenditure exceeds the competitive bid limitations.

9. The final question is whether, in determining whether day labor or open market purchases would be more economical under Idaho Code §50-341K, certain factors should be included, such as equipment maintenance and operating costs, capital expense of equipment, management supervision, loss of tax revenues, bonds and insurance, licenses and permits, and mobilization.

Unfortunately, the statute provides no clear indication of exactly what cost factors are to be included in a determination under Idaho Code §50-341K, nor

has the Idaho Supreme Court had occasion to decide such a question. In the absence of specific direction from the legislature, and in light of the exclusions provided by Idaho Code §§50-341 A and B, we view it as likely that a court would not require a city to include, in determining relative costs, any costs attributable to the use, compensation, or availability of the city's own equipment or employees, or of any costs which are "on-going" to the city regardless of the particular project involved (i.e., regular salaries, fixed insurance costs, equipment availability, etc.). Since lost tax revenues would, in the absence of highly sophisticated cost accounting methods, be remote and speculative at best, we doubt that the courts would require that they be considered as a cost factor.

Again, we emphasize that we are dealing in this opinion only with the existing legal requirements, not with the policy question involved in determining whether public works should be conducted by public employees or private enterprise. As the Washington Supreme Court has stated, whether public work should be let by competitive bid or performed by public employees is a policy question which must be determined by the Legislature. *Ronken v. Board of County Commissioners of Snohomish County,* 89 Wash.2d 304, 572 P.2d 1 (1977).

AUTHORITIES CONSIDERED:

1. *Idaho Code* Sections 31-602, 31-604, 31-4001 et seq., 33-601, 40-1001 et seq., 40-1601 et seq., 50-341, 50-1017, 50-1018, 59-1026, 67-2326 through 67-2333.

2. *Other Statutes*

a. Oregon Revised Statutes §279.023.
b. Revised Code of Washington §36.32.240.

3. *Idaho Cases*

a. *Walker-Schmidt Ranch v. Blaine County,* 614 P.2d 960 (Idaho 1980).

b. *Cooper v. Board of County Commissioners of Ada County,* 614 P.2d 947 (Idaho 1980).

c. *Reynolds Construction Co. v. County of Twin Falls,* 92 Idaho 61, 437 P.2d (1968).

4. *Other Cases*

a. *Mohave County v. Mohave-Kingman Estates,* 120 Ariz. 417, 586 P.2d 978 (1978).

b. *Perry v. City of Los Angeles,* 157 Cal. 146, 106 P. 410.

c. *Miller v. McKinnon,* 20 Cal.2d 83, 124 P.2d 34 (1942).

d. *Copeland v. Kern County,* 105 C.A.2d 821, 234 P.2d 314.

e. *Contracting Plumbers' Association of St. Louis v. Board of Education,* 238 Mo. App. 1096, 194 S.W.2d 731.

f. *Montana Chapter, NECA v. State Board of Education,* 137 Mont. 382, 352 P.2d 258 (1960).

g. *State ex rel. Kuhn v. Smith,* 194 N.E.2d 186 (Ohio Supp. 1963).

h. *Conduit and Foundation Corp. v. City of Philadelphia,* 401 A.2d 376 (Pa. Comwlth. 1979).

i. *Fonder v. South Sioux Falls,* 76 S.D. 31, 71 N.W.2d 618 (1955).

j. *Thatcher Chemical Co. v. Salt Lake City Corp.,* 21 Utah 2d 355, 445 P.2d 769 (1968).

k. *Butchek v. Collier,* 174 Wash. 311, 24 P.2d 619.

l. *Ronken v. Board of Commissioners of Snohomish County,* 89 Wash. 2d 304, 572 P.2d 1 (1977).

5. *Other Authorities:*

a. 10 McQuillin, *Municipal Corporations,* §§29.28, 29.31, 29.77.

b. 63 C.J.S., *Municipal Corporations,* §§995, 996.

c. 64 Am. Jur. 2d, *Public Works and Contracts,* §40.

d. Annotation: 53 A.L.R.2d 498.

DATED this 5th day of November, 1980.

ATTORNEY GENERAL
State of Idaho
/s/ DAVID H. LEROY

ANALYSIS BY:

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MCM/lm

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

ATTORNEY GENERAL OPINION NO. 80-25

TO: Jerry L. Evans
State Superintendent of Public Instruction
State Department of Education
Len B. Jordan Building
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Per Request for Attorney General's Opinion

QUESTION PRESENTED:

What is the nature and scope of the responsibility of local school districts to provide education services to handicapped children who are residents of state institutions located within their boundaries?

CONCLUSION:

Analysis of state and federal mandates which govern the provision of education services to handicapped children reveals an apparent conflict as to the responsibility of school districts for the provision of such services to children who are residents of state institutions located within their boundaries. Pursuant to Idaho law, it appears that a local school district in which a state institution is located is responsible for the education of only those institutionalized children whose parent or guardian resides within its boundaries. In contrast, applicable federal law with which school districts receiving federal financial assistance must comply, imposes an obligation on such school districts to provide services to all those handicapped children residing at the institutions regardless of the location of residency of the parent or guardian.

While it is recognized that attempts should be made where possible to reconcile such a conflict between state and federal law, it appears that the scope of the responsibility of school districts with regard to the education of handicapped children as set forth in Idaho law is directly violative of federal mandates addressing the issue. We, therefore, conclude that pursuant to the Supremacy Clause of the United States Constitution, those school districts receiving federal moneys must comply with federal law. As noted above relevant federal law places responsibility for the education of all institutionalized children on the school district within which the institution is located.

ANALYSIS:

Our opinion has been requested as to the responsibility of local school districts to provide services for handicapped children who reside in state institutions located within their boundaries. In order to fully understand the nature of this question, it is necessary to briefly set forth the context in which it arises. It is our understanding that in the past, school districts have not provided such services to residents at the state's institutions as the educational needs of these children have generally been met at each respective institution. Furthermore, we have been advised that applicable provisions of the *Idaho Code,* namely *Idaho Code* §§33-2001 et. seq. have been interpreted at least at the administrative level to require that a school district provide education services for only those handicapped children whose parents or guardian reside within the boundaries of the school district. Such an interpretation further absolves the local school district from responsibility for the provision of services to children who are residents of those institutions located within the district but whose parents or guardian reside elsewhere.

Current developments in the law, however, require a reconsideration of such an approach to the provision of education services to handicapped children who are residents of the state's institutions. For example, amendments to *Idaho Code* §33-2001, by deleting reference to children being educated in state sup-

ported institutions, clearly place the responsibility for the education of all handicapped children, whether they be institutionalized or not, in the public school districts where they reside. Similarly, federal law, under which the local school districts and the State Department of Education must operate, now reflects the modern trend emerging with regard to the education of handicapped children that such children be placed to the extent possible in normal educational environments. Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 706, and its accompanying rules and regulations, require that recipients of federal funds operating public elementary or secondary education programs — for our purposes the local school districts — provide appropriate public education for handicapped children to the extent possible in regular educational environments. 45 C.F.R. § 84.34 (1979). Similarly, regulations implementing Part B of the Education of the Handicapped Act, 20 U.S.C. 1401 et seq. (1976), mandate that handicapped children, including those residing in public or private institutions or other care facilities, be educated where appropriate in the least restrictive environment, in other words, in normal education settings. 45 C.F.R. Part 121a (1979). Finally, federal regulations now provide that a local school district retains its responsibility for the education of a handicapped child regardless of the fact that the child has been institutionalized for non-educational purposes. 45 C.F.R. §84.54 (1979). In essence, it can no longer be assumed that institutional residence will exempt the school districts from providing education services for handicapped children, especially where less restrictive settings have been recommended.

It is still necessary, however, to determine the very scope of the responsibility referred to above for those school districts within which a state institution is located. Analysis of this question requires not only a careful consideration of Idaho law addressing the matter but cognizance of the need to reconcile any interpretation of Idaho law with those federal mandates with which entities providing education services to handicapped children must comply. With this in mind, the first stage of our analysis calls for examination of relevant Idaho statutory law. It appears that the foundation of your question finds expression in the statutory scheme established for the provision of education services to handicapped children. As noted above, *Idaho Code* §33-2001, in allocating the basic responsibility for the education of these children to the school districts, provides in relevant part: "Each public school district is responsible for and shall provide for the education and training of exceptional pupils resident therein." In order to determine the scope of the responsibility imposed by this section, it is first necessary to examine its legislative history. When first enacted in 1963, §33-2001 read in relevant part as follows:

> Each public school district is responsible for and shall provide for the education of handicapped school-age pupils resident therein, who are not being educated or eligible for education in state-supported institutions.

It appears that the legislature, in its original enactment of §33-2001, did not intend to hold school districts responsible for the education of handicapped children who were residents of the state's institutions. However, subsequent modifications of this provision, by deleting reference to children being educated or eligible for education at the state's institutions, apparently broadened the basic responsibility of the school districts to include the provision of services to all handicapped children, whether institutionalized or not. With such a broad mandate in mind, we now must examine the scope of this responsibility for each particular school district.

By the very letter of §33-2001, the concept of residency is the determining element in defining the scope of the responsibility of each particular school district for the education of handicapped children. Therefore, the question before us must necessarily center around the construction of the term "resident" as used in *Idaho Code* §33-2001.

Because the legislature and the courts of the State of Idaho have yet to define residency for purposes such as the provision of education to handicapped children, we are faced with the difficult task of determining the intent of the legislature by its usage of such language. We are given guidance, however, as to legislative intent by reference to similar statutes addressing the question of residency. Indeed, it is a well established rule of statutory construction that statutes relating to the same subject be so far as reasonably possible construed to be in harmony with each other, *Christensen v. West,* 92 Idaho 87, 437 P.2d 359 (1968). Courts often look to other statutes which incorporate similar terminology as important indicia of legislative intent. With regard to the question before us, we are guided by chapter 14, title 33 of the *Idaho Code* which addresses the payment of tuition for non-resident pupils receiving education services from a particular school district.

Idaho Code §33-1401, defines the residence of a pupil for the purpose of tuition charges and payments as the residence of his/her parent or guardian. Such a definition reflects the long accepted precept that minor children ordinarily acquire no legal residence apart from that of the parent or other legal guardian. See, e.g., *Smith v. Binford,* 84 Idaho 244, 256 P.366 (1927); accord *Adams v. Funk,* 250 N.E. 2d 619 (Ohio 1969). In determining the intent of the legislature in using such language, it should be noted that some courts in other jurisdictions have deviated from such a common law principle when presented with special facts and circumstances. For example, where a child had assumed a permanent home with some other person standing in loco parentis it has been held that the residence of the child is the same as that of the person with whom the child lives, *Crain v. Walker,* 2 S.W. 2d 654 (Ky. 1928). However, such cases did not involve a construction of a statutory definition of residency such as that provided in Idaho law. Furthermore, the legislature has addressed such special circumstances where a child's residency might not necessarily be that of its parent in its definition of "guardian" as set forth in *Idaho Code* §33-1401(10). That definition includes not only those persons designated as guardians by court order, but those persons with whom a child is residing on a full-time basis and who possess a power of attorney for the care and custody of the child. Consequently, it would appear that it was the intent of the legislature that its definition of residence be strictly construed.

We must now address the question of the applicability of such a definition of residency in defining residency for purposes of *Idaho Code* §33-2001. In so doing, we must examine the underlying purpose of each statutory scheme. It is recognized that the definition of residency may differ depending upon the purpose for which it is used, *Crain, supra,* and that courts in ascertaining the meaning of a term will consider the object and purpose of the statute in which the word is employed, *DeLeon v. Harlingen Consolidated Independent School District,* 552 S.W. 2d 922 (Tex. 1977). In this case, however, it appears that the purpose of both statutory schemes is similar, namely the provision of free education programs by the local school districts for all children who are resident therein. Indeed such a construction furthers the legislative desire to equitably allocate among the school districts the responsibility for providing free education to all of Idaho's

school aged children. It is, therefore, our conclusion that the legislature intended that the definition of residency should be consistent for both chapters of the code.

Further support for such a conclusion finds expression in the legislative history of *Idaho Code* §33-1401. As noted above, the definition of residency set forth in that section reflects the long accepted precept that minor children ordinarily acquire no legal residence apart from that of the parent or other legal guardian. Indeed, it is a well established rule of statutory construction that the legislature will be presumed not to intend to overturn long established principles of law, and a statute will be so construed unless an intention plainly appears otherwise, and the language employed admits of no other reasonable construction. *Doolittle v. Morley,* 77 Idaho 366, 292 P.2d 476 (1956) citing 50 Am. Jur., Statutes, §340. Consequently, it can only be assumed that the legislature intended to further reflect such a rule of law by its use of the term in *Idaho Code* §33-2001.

Finally, administrative construction is another valid guide to interpreting the intent of a statute. In *Idaho Public Utilities Commission v. V-1 Oil Company,* 90 Idaho 415, 412 P.2d 581 (1966), the Idaho Supreme Court stated:

> A construction given a statute by executive or administrative officers of the state is entitled to great weight and will be followed by the court unless there are cogent reasons for holding otherwise. 90 Idaho at 420.

The Idaho State Board of Education through its Department of Education is statutorily charged with overseeing the provision of education services to handicapped children. *Idaho Code* §33-2001. It has necessarily made, formally or informally, constructions of the statutes which set forth such responsibilities. These constructions are useful to the courts in determining their understanding of legislative intent. It has been demonstrated that since the enactment of §33-2001, the Department of Education has consistently interpreted the intent of that statute to limit the scope of the responsibility of local school districts to provide education to handicapped children to only those children whose parent or guardian resides within the boundaries of each respective district.

In summary, we conclude that pursuant to Idaho law local school districts are responsible for only those institutionalized children whose parent or guardian resides within their boundaries. However, our analysis must include consideration of those federal mandates with which the school districts must comply. Essential to this aspect of the question is consideration of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 706 (1973) which in essence prohibits discrimination against handicapped individuals under any program or activity receiving federal financial assistance. A reading of the rules and regulations designed to implement the act clearly indicates that local school districts as recipients of such federal financial assistance fall within its ambit and must thereby comply with its requirements. See, definition of recipient, 45 C.F.R. 84.33. The regulation with which we are most concerned for purposes of the question presented is 45 C.F.R. 84.33(a) which provides in relevant part:

> A recipient that operates a public elementary or secondary education program shall provide a free appropriate public education to each qualified handicapped person *who is in the recipient's jurisdiction,* regardless of the nature or severity of the person's handicap. [Emphasis provided.]

The extent of the responsibility of a local school district for purposes of federal law centers around the construction of the terminology "in the recipient's jurisdiction" as used in this regulation. While such a term is not specifically defined either in the statute or the regulations, guidance is given by the promulgating agency in its analysis of the final version of its rules and regulations. In that analysis, what was then the Department of Health Education & Welfare stated: "The word 'in' encompasses the concepts of both domicile and actual residence." 42 Fed. Reg. 22690 (1977). Consequently, the scope of the duty imposed on the school districts for the education of handicapped children goes beyond the definition of legal residency as provided in Idaho law, and encompasses those situations where a child's actual residence may be, in fact, different from its legal residence, for example a child who is a resident of an institution but whose parents or guardian live elsewhere. Such an interpretation has indeed been implemented by the Office for Civil Rights (OCR) — the entity charged with the enforcement of Section 504. In a case which presented a similar question as that now before us, OCR has held that a local school district clearly has an obligation to provide services to children who were residents of an institutional center located within its jurisdiction regardless of the legal residency of such children. *Digest of Significant Case-Related Memoranda,* Office of Standards, Policy and Research, Office for Civil Rights, Vol. 1, p. 14 (April and May 1979).

Furthermore, the fact that a child is institutionalized does not insulate the local school district within which the institution is located from responsibility for the education of such a handicapped child. Federal regulations, while requiring that a recipient which operates a program or activity for persons who are institutionalized because of handicap shall ensure that each handicapped person shall receive an appropriate education, clearly states that the obligation of recipients as set forth in 45 C.F.R. 84.33 is in no way altered by the requirements of that subsection. 45 C.F.R. 84.54 (1979). In other words, while the institution itself is obligated to ensure that its resident children receive appropriate education, the school district in which the institution is located is not absolved from its responsibility even though such children have been institutionalized for non-educational purposes. While the relationship between the institution and the school district in providing for the education of these children has yet to be clearly delineated, it is clear that the school district retains responsibility for the provision of services to children residing in an institution located within its boundaries regardless of the location of residency of each child's parent or guardian.

It appears from the above discussion that state and federal mandates which govern the provision of education services to handicapped children are in conflict with regard to the scope of the responsibility of school districts to provide such services to handicapped children who are residents of institutions located within their boundaries. While it is recognized that all attempts should be made, and indeed statutes so construed, to avoid conflicts between state and federal law, such a reconciliation with regard to this question does not appear to be feasible. While an argument could be made that the school district which is providing services for institutionalized children who are not residents therein, has a right of reimbursement for tuition from the school districts in which these children legally reside, a position which arguably preserves the responsibility for the education of these children in the district of their legal residence as so mandated by Idaho law, there is no provision in Idaho statutory law which would bind the latter school districts where they have not initiated the transfer of these children to the institution. *Idaho Code* §33-2004, does allow a school district in

which a handicapped child legally resides to contract with another district or institution for the education of the child. Similarly, *Idaho Code* §33-1406, provides that a receiving district may present a bill of tuition to any district which has transferred a child to it. However, these sections become operative only when action has been initiated by the school district in which the child legally resides. In the absence of such action by the home school district, as is the case with many children who have been placed in institutions, the district within which the child is actually located has no recourse against the district of the child's legal residence. Consequently, it would appear that such an approach fails to reconcile the still existing conflict between state and federal law.

It is a well established principle of constitutional law that where Congress has acted within the power and authority granted to it by the Constitution, federal law must prevail over conflicting state law. U.S. CONST. art. VI, cl. 2; for an example of the implementation of this clause, see, e.g., *Malone v. White Motor Corp.*, 435 U.S. 497 (1978). Indeed, the Idaho Supreme Court has recognized the efficacy of such a principle in those situations where failure to comply with federal regulations could result in a loss of federal funds — situations, the facts and circumstances of which are closely analogous to those of the question presented to us. *Tappen v. State Department of Health & Welfare,* 98 Idaho 576, 570 P. 2d 28 (1977). Congress, by its enactment of section 504 of the Rehabilitation Act of 1973 has merely conditioned the distribution of federal funds to ensure the provision of education services to handicapped children. It is clear that it has such authority to fix the terms upon which federal moneys shall be disbursed. *Oklahoma v. Civil Service Commission,* 330 U.S. 127 (1947). Consequently, federal requirements crucial to the implementation of the Act and in furtherance of its purposes and objectives must prevail over, and in effect render inoperative, those provisions of state law which are in conflict. Certainly provisions defining the scope of the responsibility of the school districts fall within the ambit of such a guideline. We therefore conclude that in the absence of a reconciliation, those school districts receiving federal financial assistance must comply with those federal requirements which dictate that the responsibility for the education of all institutionalized handicapped children rests with the school district within which the institution is located.

AUTHORITIES CONSIDERED:

1. *United States Constitution,* Art. VI, Cl. 2.
2. *Idaho Code*
   a. §33-1401.
   b. §33-2001.
3. Idaho Cases
   a. *Christensen v. West,* 92 Idaho 87, 437 P.2d 359 (1968).
   b. *Doolittle v. Morley,* 77 Idaho 366, 292 P.2d 476 (1956).
   c. *Idaho Public Utilities Commission v. V-1 Oil Company,* 90 Idaho 415, 412 P.2d 581 (1966).
   d. *Smith v. Binford,* 84 Idaho 244, 256 P. 366 (1927).

e. *Tappen v. State Department of Health & Welfare,* 98 Idaho 576, 570 P.2d 28 (1977).

4. *Federal Statutes*

a. Education of the Handicapped Act, 20 U.S.C. 1401 et seq. (1976).

b. §504 Rehabilitation Act of 1973, 29 U.S.C. 706 (1976).

5. *Federal Regulations*

a. 45 C.F.R. §84.33 (1979).

b. 45 C.F.R. §84.34 (1979).

c. 45 C.F.R. §84.54 (1979).

d. 45 C.F.R. Part 121 a (1979).

6. *Other Authorities*

a. *Adams v. Funk,* 250 N.E. 2d 619 (Ohio 1969).

b. *Crain v. Walker,* 2 S.W. 2d 654 (Ky. 1928).

c. *DeLeon v. Harlingen Consolidated Independent School District,* 552 S.W. 2d 922 (Tex. 1977).

d. *Malone v. White Motor Corp.,* 435 U.S. 497 (1978).

e. *Oklahoma v. Civil Service Commission,* 330 U.S. 127 (1947).

f. 42 Fed. Reg. 22690 (1977).

g. *Digest of Significant Case-Related Memoranda,* Office of Standards, Policy & Research, Office for Civil Rights, Vol. 1 (April and May 1979).

DATED this 13th day of November, 1980.

ATTORNEY GENERAL
State of Idaho
/s/ DAVID H. LEROY

ANALYSIS BY:

STEVEN W. BERENTER
Deputy Attorney General
Education

DHL:SWB/ms

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

ATTORNEY GENERAL OPINION NO. 80-26

TO: H. Reynold George
District Judge
Seventh Judicial District
Bonneville County Courthouse
Idaho Falls, Idaho 83401

Per Request for Attorney General Opinion

QUESTION PRESENTED:

Is relief under I.C. § 19-2604 (2) available to a defendant who has completed his probation?

CONCLUSION:

Relief may be granted under I.C. § 19-2604 (2) either during or after probation has been completed. Whether relief will be granted in a particular case is a matter within the discretion of the court.

ANALYSIS:

In construing a statute, it is necessary to ascertain the legislative intent and to give effect to the legislative will. In attempting to ascertain the legislative intent, one must take into account not only the literal wording of the statute but also other matters such as context, the objective sought, evils, history of times, other legislation on the same subject, public policy, contemporaneous construction, and other matters. *Messinger v. Burns,* 86 Idaho 26, 382 P.2d 913 (1963); *Local 1494 of Intern. Assn. of Firefighters v. City of Coeur d'Alene,* 99 Idaho 630, 586 P.2d 1346 (1978).

The most important indicator of legislative intent is the statute's plain language. Where the language of the statute is clear and unambiguous, the clear express intent of the legislature must be given effect, and it is not necessary to resort to interpretive devices. *Worley Highway Dist. v. Kootenai Cty.,* 98 Idaho 925, 576 P.2d 206 (1978).

The language of I.C. § 19-2604 (2) is clear and unambiguous. I.C. § 19-2604 (2) provides that:

* * *

> 2. If sentence has been imposed but suspended during the first one hundred and twenty (120) days of a sentence to the custody of the state board of correction, and the defendant placed upon probation as provided in 4 of section 19-2601, Idaho Code, upon application of the defendant, the prosecuting attorney, or upon the court's own motion, and upon satisfactory showing that the defendant has at all times complied with the terms and conditions of his probation, the court may amend the judgment of conviction from a term in the custody of the state board of correction to "confinement in a penal facility" for the number of days served prior to suspension and the amended judgment may be deemed to be a misdemeanor conviction.

The statute does not expressly limit its application to the time period when the defendant is on probation. The only possible ground for limiting its application to that time period would require a hypertechnical reading of the statute based upon the verb tense used. That type of reading would be inappropriate because it would defeat the purpose behind the statute's enactment and lead to an unreasonable result.

The rules of statutory construction also support a reading of I.C. § 19-2604 (2) which would allow it to apply to a defendant who has completed his probation. The consequences of a proposed interpretation of a statute can be considered when the statute is capable of more than one construction. Any ambiguity in the statute should be resolved in favor of a reasonable operation of the law. The statute should not be interpreted so that it works a hardship or effects an oppressive result. *Lawless v. David,* 98 Idaho 175, 560 P.2d 497 (1977).

Administration of I.C. § 19-2604 (2) would be impaired if a court adopted the hypertechnical view that the statute only applied during the defendant's probationary period because it would impair the ability of the court to determine whether relief was proper. To be eligible for relief under I.C. § 19-2604 (2), the defendant must show that he has at all times complied with the terms and conditions of his probation. By allowing relief to be granted after probation has been completed, the court is given a greater period of time in which to investigate the conduct of the defendant to see if he deserves relief. The court may also be provided with additional evidence from the period of time after probation where the defendant has been on his own without supervision. This would provide additional information to the court upon which to base its decision whether to grant relief. To adopt the hypertechnical view would have the anomolous result of allowing one who is less able to prove he deserves relief to obtain that relief while one who is more deserving of relief could not obtain it.

Allowing a defendant to apply for relief under I.C. § 19-2604 (2), once his probation was completed, is also consistent with the purpose behind the statute's enactment. For the last fifteen years there has been growing concern among the courts and commentators about the effect of a criminal record upon a defendant's ability to become rehabilitated. *See:* Gough, *The Expungement Of Adjudication Records Of Juvenile And Adult Offenders: A Problem Of Status,* 1966 Wash. U. Law Quarterly 147. A criminal record affects an ex-felon both legally and possibly more importantly, socially. I.C. § 19-2604 (2) allows a defendant to partially overcome some of these handicaps by having his felony conviction amended to a misdemeanor conviction. The facilitation of rehabilitation is one of the purposes behind the enactment of statutes like this. *State v. Miller,* 520 P.2d 1248 (Kan. 1974).

Finally, interpreting I.C. § 19-2604 (2) in the above manner makes it consistent with similar statutes enacted in other states. While there is a paucity of case law interpreting statutes identical to I.C. § 19-2604 (2), there are numerous decisions interpreting statutes similar to I.C. § 19-2604 (1). Most of these allow relief to be granted after probation has been completed. See, e.g. 8 U.S.C. § 1203.4. In fact, one commentator implicitly suggests that relief cannot be granted under I.C. § 19-2604 until probation has been completed. *The Collateral Consequences Of A Criminal Conviction,* 23 Vanderbilt L.Rev. 929 (1970).

It should be noted that I.C. § 19-2604 (2) provides that the court "may" provide relief. Clearly, whether relief is to be granted in a particular case is a discretion-

ary matter to be decided by the court in light of the purposes behind the enactment of I.C. § 19-2604 (2).

AUTHORITIES CONSIDERED:

1. *Idaho Code,* §§ 19-2604, 19-2604 (1), 19-2604 (2).
2. 8 U.S.C. § 1203.4.
3. *Messinger v. Burns,* 86 Idaho 26, 382 P.2d 913 (1963).
4. *Local 1494 of Intern. Assn. of Firefighters v. City of Coeur d'Alene,* 99 Idaho 630, 586 P.2d 1346 (1978).
5. *Worley Highway Dist. v. Kootenai Cty.,* 98 Idaho 925, 576 P.2d 206 (1978).
6. *Lawless v. Davis,* 98 Idaho 175, 560 P.2d 497 (1977).
7. *State v. Miller,* 520 P.2d 1248 (Kan. 1974).
8. *The Collateral Consequences Of A Criminal Conviction,* 23 Vanderbilt L.Rev. 929 (1970).
9. Gough, *The Expungement Of Adjudication Records Of Juvenile And Adult Offenders: A Problem Of Status,* 1966 Wash. U. Law Quarterly 147.

DATED this 26th day of November, 1980.

ATTORNEY GENERAL
State of Idaho
/s/ DAVID H. LEROY

ANALYSIS BY:

TIMOTHY M. WALTON
Deputy Attorney General
State of Idaho

DHL:TMW:lb

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

ATTORNEY GENERAL OPINION NO. 80-27

TO: Mr. Richard A. Schwartz
Chairman
Idaho Fish & Game Commission
Statehouse Mail

Per Request for Attorney General's Opinion

QUESTIONS PRESENTED:

1. Whether the Idaho Fish & Game Commission is authorized to establish a procedure for the selection of controlled hunt permitees which requires the submission of the full fees for controlled hunt permits and tags with each application;

2. Whether the process of requiring this submission of full fees with each application for a controlled hunt permit would violate the constitutional and statutory provisions of the State of Idaho relating to the establishment of lotteries;

3. If the requirement to submit full fees for permits and tags with each application is permissible under Numbers 1 and 2 above, whether an amendment to Section 36-104 (b) (5), *Idaho Code,* allowing the Fish & Game Commission to establish a reasonable processing fee to be charged each applicant (in addition to submission of the full permit and tag fees) would violate the constitutional and statutory provisions of the State of Idaho relating to lotteries;

4. If the submission of full fees with each application is not permissible under Numbers 1 and 2 above, whether an amendment to Section 36-104 (b) (5), *Idaho Code,* allowing the Idaho Fish & Game Commission to establish a reasonable processing fee to be charged each applicant and submitted with each application would violate any provision of the constitution and laws of this state.

CONCLUSION:

1. The Idaho Fish & Game Commission is authorized to establish a procedure for the selection of controlled hunt permitees which requires the submission of the full fees for controlled hunt permits and tags with each application.

2. The procedure of requiring the submission of full fees with each application for a controlled hunt permit would not violate the constitutional and statutory prohibitions relating to lotteries.

3. We advise against a requirement that each applicant for a controlled hunt permit submit a processing fee in addition to the submission of full permit and tag fees.

ANALYSIS:

I.

Section 36-104 (b) (5), *Idaho Code,* provides for the awarding of controlled hunt permits by the process of a drawing for such permits by lot and reads as follows:

> Upon notice to the public, hold a public drawing giving to license holders, under the wildlife laws of this state, the privilege of drawing by lot for a controlled hunt permit authorizing the person to whom issued to hunt, kill, or attempt to kill any species of wild animals or birds designated by the commission under such rules and regulations as it shall prescribe. There shall be no fee charged to any individual for submitting an application to participate in a controlled hunt; provided, however, a permit fee of not to exceed three dollars ($3.00) for deer, ten

> dollars ($10.00) for moose, sheep and goat and five dollars ($5.00) for elk, antelope and such other species as may be determined in the future, shall be charged to successful applicants for the privilege of participating in a controlled hunt. *All procedures under this section shall be under the control and in the discretion of the director of the department of fish and game.* It is a misdemeanor for any person to transfer any such permit issued to any other person, or for any person to make use of such permit issued to any other person.

This subsection provides, in essence, that persons desiring to participate in a controlled hunt may apply to the commission for such a permit and that successful applicants will be determined by lot at a public drawing. The statute also provides that there shall be no fee charged for submitting an application to participate in a controlled hunt but does require that a permit fee be charged to successful applicants for the privilege of participating in a controlled hunt. You have indicated in your letter that the commission wishes to institute a procedure whereby applicants for controlled hunts under Section 36-104, *Idaho Code,* would be required to submit the full fees for a permit and tag with their controlled hunt applications. The fees would be returned to unsuccessful applicants.

It is our view that the prepayment of the permit fee and the tag fee would not violate the statutory prohibition against the payment of an application fee. The procedure you have proposed does not add a fee or increase the statutory fee and the fees to be collected are returned to unsuccessful applicants. Thus there is no fee charged for the application. In addition, the legislative history of Idaho Code Section 36-104 shows that prior to its amendment in 1977 the section included a specific provision for the imposition of a one dollar fee for processing the application. The 1977 amendment eliminated this fee and created a prohibition against charging an application fee. We believe that the legislature intended to prohibit the type of fee that was eliminated by the amendment and did not intend to address the type of proposal you are making for the prepayment of permit and game tag fees.

With reference to *permit fees,* Section 36-104 (b) (5), which authorizes the controlled hunt system, provides that "all procedures under this section shall be under the control and in the discretion of the director of the Department of Fish & Game." Thus, the application procedure for controlled hunts is to be created under the control and the discretion of the director. The procedure which you have proposed does not alter the character of the fees which will be paid nor does it change the amount of the fee. The effect of the procedure is merely to change the time at which fees are paid. This type of procedure would assure that successful applicants will pay the required fees and thus that available permits will be claimed.

Since the matter of the time for submitting fees is procedural, it appears to us that the director could, under the authority of Section 36-104, require that the permit fee for a controlled hunt be tendered at the time application for a controlled hunt permit is made with the Department of Fish & Game.

As to game tags, all persons who participate in controlled hunts are also required to have a valid *game tag* for certain types of wildlife. Section 36-409, *Idaho Code,* which relates to resident and non-resident game tags, provides that "upon payment of the fees provided herein [a resident] shall be eligible to receive a resident game tag" and "upon payment of the fees provided herein, [a non-

resident] shall be eligible to receive a non-resident game tag." Thus, a person would not be eligible to receive a game tag required for a controlled hunt under Section 36-104, *Idaho Code,* unless that person had tendered the fee set out in Section 36-409, *Idaho Code.* This being the case, it is our view that the director would have the authority under Section 36-104, *Idaho Code,* to require the submission of game tag fees with an application for a controlled hunt permit if a game tag were required under Section 36-409, *Idaho Code.*

After reviewing the Fish & Game laws, it is our opinion that the commission and the director would be acting within their power to require that applicants for a controlled hunt permit under Section 36-104, *Idaho Code,* submit with their application the fees for the controlled hunt permit required by Section 36-104 and the fee for a game tag required by *Idaho Code* § 36-406.

II.

You have asked whether a requirement that applicants submit the permit fee required by § 36-104, *Idaho Code,* and the game tag fees required by § 36-407, *Idaho Code,* with the application for a controlled hunt permit would violate the constitutional and statutory provisions prohibiting lotteries. The present procedure does not require the submission of fees and it is presumed that the existing procedure would not violate the constitutional and statutory provisions against lotteries because there is no payment (consideration) for participating in the drawing. For purposes of clarity, we will consider the constitutional and statutory prohibitions separately.

The constitutional prohibition against lotteries is found in Article 3, § 20 of the *Idaho Constitution* which provides:

> The legislature shall not authorize any lottery or gift enterprise under any pretense or for any purpose whatever.

In determining the application of this provision, the fundamental object is to ascertain the intent of the framers of the constitution. *Engelking v. Investment Board,* 93 Idaho 217, 458 P.2d 213. This constitutional section (and the statute defining lotteries) has been considered in the case of *State v. Village of Garden City,* 74 Idaho 513, 265 P.2d 328 (1953) wherein the Court noted that:

> This definition in substance conforms to that of the common law which has defined a lottery as a species of gaming, wherein prizes are distributed by chance among persons paying a consideration for the chance to win; a game of hazard in which sums are paid for the chance to obtain a larger value in money or articles.
>
> All lotteries are gambling. To constitute a lottery, as distinguished from other methods or forms of gambling, it is generally held [that] there are three essential elements, namely, chance, consideration and prize.

The finding of the Court in *State v. Village of Garden City* has been noted approvingly in a later case by the Idaho Supreme Court, *Oneida County Fair Board v. Smylie,* 86 Idaho 341, 386 P.2d 374 (1963). In a previous opinion concerning lotteries, we have noted with favor a Montana case setting out the intent of a constitutional prohibition similar to Art. 3, § 20 of the *Idaho Constitution.* In that case the Montana court found the following:

> To our mind, the framers of the Montana Constitution who expressly forbade the Legislature to authorize lotteries or gift enterprises . . . were seeking to suppress and restrain the spirit of gambling which is cultivated and stimulated by chances whereby one is induced to hazard his earnings with the hope of larger winnings. The statutes which define and prohibit lotteries must therefore be interpreted with this purpose in mind. *State v. Cox,* 349 P.2d 104, 106 (Mont. 1960).

In reviewing the Idaho cases construing the constitutional prohibition against lotteries, it appears to us that the evil which the framers of the constitution were attempting to prohibit was a species of gambling where small sums are paid in the hopes of winning larger sums of money or goods. We will evaluate the status of both Idaho Code Section 36-104, and the procedures you have proposed, in the context of this constitutional setting.

The statute we are considering provides a method by which a relatively small number of licenses to be issued by a state agency will be issued to persons who have applied for those licenses. Under the procedures set out in § 36-104 (b) (5), *Idaho Code,* as it would be supplemented by your proposed procedure, a successful applicant for a controlled hunt permit will pay only the statutory fee for the permit and will pay only the statutorily required fee for a game tag. The controlled hunt permit cannot be transferred and the game tag could not lawfully be used by any person other than the purchaser. Thus, we are not dealing with a statutory scheme whereby a person may gain a larger value in money or property by risking a smaller sum of money. The amount of money paid for the permit and tag is the same amount of money which would be paid under any system of determining successful applicants.

Legislative acts are presumed to be constitutional and all reasonable doubt as to the constitutional validity of a statute must be resolved in favor of the validity of the statute. *Oneida County Fair Board v. Smylie,* 86 Idaho 341, 386 P.2d 341. The invalidity of a statute must be shown beyond a reasonable doubt. *Sanderson v. Salmon River Canal Co.,* 45 Idaho 244, 263 P. 32 (1927); *State v. Dunbar,* 230 P. 33, 39 Idaho 691 (1924). We do not believe that the procedure set out under § 36-104 (b) (5), *Idaho Code,* as supplemented by your proposed procedure is the type of procedure which the framers of the constitution intended to be covered by the constitutional prohibition against lotteries, as the procedure does not, in any way, relate to gambling. Therefore we are of the opinion that Idaho Code Section 36-104 as it would be supplemented by your proposed procedure would not be unconstitutional or in conflict with Article 3, Section 20, of the Idaho Constitution.

We are also of the view that the procedure you have proposed would not violate the statutory prohibition against lotteries as we do not believe the procedure fits within the intent of the prohibition of the definition of a lottery found in § 18-4901, *Idaho Code.*

As construed by the courts, § 18-4901, *Idaho Code,* defines a lottery as a form of gambling in which there are three essential elements, namely, chance, consideration and prize. *State v. Village of Garden City,* 74 Idaho 513, 265 P.2d 328 (1953); *Oneida County Fair Board v. Smylie,* 86 Idaho 341, 386 P.2d 374 (1963). Consideration of § 18-4901, *Idaho Code,* is relevant here only to the extent that the legislature might have intended through Chapter 48, Title 18, *Idaho Code,* to extend the prohibition against lotteries beyond those activities contemplated

by the constitution. Our courts have not been clear in their treatment of this issue, even though the statutory definition and the constitutional provision have invariably been construed together. This leads us to believe that the Idaho Supreme Court has considered the statutory definition to be identical to the constitutional prohibition. However, it is possible to argue that the legislature, in enacting the definition of lotteries contained in Chapter 49, has extended the constitutional prohibition to programs not within the intent of the framers of the constitution. The state constitution is not a grant but a limitation on legislative power and the legislature may enact any law not expressly or inferentially prohibited by the constitution. *Standlee v. State,* 96 Idaho 849, 538 P.2d 778 (1975); *Leonardson v. Moon,* 92 Idaho 796, 451 P.2d 542 (1969). For that reason we consider it prudent to consider whether the procedure you have proposed fits within the definition of a lottery provided in § 18-4901, *Idaho Code.*

Initially, for the reasons we have outlined above, we are of the opinion that the procedure you have outlined is not within the class of schemes which were intended by the legislature to be prohibited by § 18-4901, *Idaho Code.* Only species of gambling are prohibited. *State v. Village of Garden City,* 74 Idaho 513, 265 P.2d 328 (1953); *Oneida County Fair Board v. Smylie,* 86 Idaho 341, 386 P.2d 374 (1963). It also appears that the procedure would not fit the statutory definition of a lottery. There is no question but that successful applicants for a controlled hunt permit would, under the procedure envisioned by § 36-104 (b) (5), *Idaho Code,* be chosen by chance. The statute plainly indicates that successful applicants will be chosen by lot. It remains, however, that applicants must also pay consideration and receive a prize for the scheme to be considered a lottery within the provisions of § 18-4901, *Idaho Code.*

In a previous opinion (Attorney General Opinion No. 52-75) we have concluded that the consideration to which § 18-4901, *Idaho Code,* refers must be valuable consideration. Here, applicants for a controlled hunt permit pay only those statutorily required fees which would be paid regardless of the method by which successful applicants were chosen. There is no indication that a person applying for a controlled hunt permit is paying for the opportunity to participate in the drawing; they are only paying the statutorily required permit and tag fees. Because the procedure would not require applicants to pay for the "chance" of obtaining a controlled hunt permit, we do not believe that the element of consideration contemplated by § 18-4901, *Idaho Code,* exists in the case of the procedure you have outlined. It could be argued, however, that although the applicant does not specifically pay a fee to participate in the drawing, he or she has given up the use of the money and that the loss of the use of this money is consideration for the purpose of § 18-4901, *Idaho Code.* It is our view that this is not the case. In our previous opinion we have noted that, by definition, the consideration required for a scheme to be considered a lottery must be "valuable" consideration and that the consideration must be determinable in money or other items of value. The permit and tag fees with which we are involved here are small in amount. It appears to us that the potential loss in not having the use of that money or the risk of not receiving a refund are so minimal as to not be considered "valuable" consideration within the meaning of § 18-4901, *Idaho Code.*

We believe that, given an opportunity, the courts would construe the potential loss of "interest" and risk of not receiving a refund in this case as being de minimis and not within the statutory standard of valuable consideration.

The remaining element of a lottery under § 18-4901, *Idaho Code,* is that of a prize or, as the statute indicates, the element of a distribution of property. The Supreme Court, in construing § 18-4901, *Idaho Code,* has used the common law elements of a lottery which involve the concept of a prize as an item worth a larger value than the consideration given for the chance to win a prize. *State v. Village of Garden City,* 74 Idaho 513, 265 P.2d 328 (1953); *Oneida County Fair Board v. Smylie,* 86 Idaho 341, 386 P.2d 374 (1963). This is, once again, consistent with the Court's theory that lotteries are a species of gambling. In this case we are dealing with the acquisition of a license for which the successful applicant will pay no more than the statutorily required fee which would be the same regardless of the manner by which successful applicants were chosen. We do not view the permit as a prize within the meaning of the statutory definition because it does not have a larger value in money or other measurable value than the statutory fee. In the case of *State v. Fitzpatrick,* 89 Idaho 568, 407 P.2d 309 (1965), the Idaho Supreme Court had occasion to consider the application of the state's gambling statutes to pinball machines which allowed the player one or more additional balls if his score advanced sufficiently in the course of play. The Court found that:

> The machine here involved could not award a free game or any other measurable unit of credit or other representative of value. The successful player, whether by chance or by skillful operation of the flippers, could win only the right to extend the game. The successful player could take nothing away, either from the machine or the proprietor, and he could win nothing which conceivably could be exchanged for anything of value, or for any credit, or representative of value.

The Court concluded that a pinball machine of this type did not fit within statutory language which would have prohibited "any game played with cards, dice or any other device for money, checks, credit or any other representative of values." Admittedly, this case seemed to turn on the issue of whether the ability to *extend* the game by "winning" an extra ball would constitute a representative of value. The statute we are dealing with in our present context speaks not to extending the game but to playing the game at all. However, it seems to us that the situation is essentially analogous. The prohibitions against lotteries contained in our constitution and statutes essentially prohibit the risking of small amounts of money in hopes of winning larger amounts of money or property. In cases where no larger value in money or property may be won, the scheme must be beyond the intent of the legislature. Here, to the extent that the value of a controlled hunt permit and tag can be established, its value is equal to the amount paid by the successful applicant. The satisfaction of being able to participate in a controlled hunt is not, in our view, the type of value which the framers of the constitution and the legislature intended to prohibit by the provisions of § 18-4901, *Idaho Code.*

Having considered the elements which the Idaho Supreme Court has deemed necessary for a program to constitute a lottery within the meaning of the Idaho statutory prohibitions, it is our opinion that the procedure you have proposed to carry out under § 36-104 (b) (5), *Idaho Code,* would not be a lottery as defined by § 18-4901, *Idaho Code.*

III.

You have asked whether an amendment to § 36-104 (b) (5), *Idaho Code,* allowing the Idaho Fish & Game Commission to establish a reasonable processing fee to be charged each applicant and submitted with each application would

violate any provision of the constitution and laws of this state, if the commission also requires the submission of full fees with each application. As noted above, we do not believe that the requirement that an applicant submit full fees with each application would be held to be a constitutionally or statutorily prohibited lottery. In adding an administrative fee to be paid by all applicants, the commission would be charging an identifiable and valuable consideration for the chance to obtain a permit. As an alternative to providing a processing fee, the legislature could review the level at which the permit fees have been set. An adjustment in that fee might avoid potential litigation over the question of whether consideration paid for the opportunity to participate in the drawing for permits would bring the statute within the constitutional prohibition against lotteries. For this reason, we would advise consideration of alternatives other than the amendment of § 36-104, *Idaho Code,* to provide for a processing fee.

AUTHORITIES CONSIDERED:

1. Idaho Code: § 36-104 (b) (5); § 36-104; §36-409; §36-406; § 36-407.
2. Idaho Constitution, Article 3, § 20.
3. *State v. Village of Garden City,* 74 Idaho 513, 265 P.2d 328 (1953).
4. *Oneida County Fair Board v. Smylie,* 86 Idaho 341, 386 P.2d 374 (1963).
5. *State v. Cox,* 349 P.2d 104, 106 (Mont. 1960).
6. *Engelking v. Investment Board,* 93 Idaho 217, 458 P.2d 213; Motion Denied, 93 Idaho 739, 471 P.2d 594 (1969).
7. *Sanderson v. Salmon River Canal Co.,* 45 Idaho 244, 263 P. 32 (1927).
8. *State v. Dunbar,* 230 P. 33, 39 Idaho 691 (1924).
9. Idaho Code § 18-4901.
10. *Sandlee v. State,* 96 Idaho 849, 538 P.2d 778 (1975).
11. *Leonardson v. Moon,* 92 Idaho 796, 451 P.2d 542 (1969).
12. *State v. Fitzpatrick,* 89 Idaho 568, 407 P.2d 309 (1965).

DATED this 12th day of December, 1980.

ATTORNEY GENERAL
State of Idaho
/s/ DAVID H. LEROY

ANALYSIS BY:

JOHN MICHAEL BRASSEY
Deputy Attorney General

JMB:jci

ATTORNEY GENERAL OPINION NO. 80-28

TO: Bruce Balderston, CPA
Legislative Auditor
Statehouse
Boise, Idaho 83720

Per Request for Attorney General Opinion

QUESTION PRESENTED:

Sections 209 (b) and (d) of the Social Security Act, 42 USCA 409, (b) and (d), exclude from the definition of wages any payments to employees made on "account of sickness or accident disability." The Social Security Administration's Informational Release #18, dated January 19, 1979, sets forth the requirements for qualifying for the wage exemption. Does the State of Idaho's statutory and regulatory structure provide for excluding from wages the payments to employees made on account of sickness?

Assuming that the State meets the requirements or would take action to do so, what action would be needed to implement such a practice? Could the State Auditor or the Board of Examiners dictate the practice, or would it take action by the Legislature or the Governor?

CONCLUSION:

Yes, the current statutes and regulations of the state treat payments made to employees on account of illness or disability separately from the wages they receive for performing their duties, and these payments may be excluded from the Social Security Act's definition of wages.

There are three prerequisites to the state's implementing the exclusion: (1) a State Board of Examiners regulation for the exempt employees; (2) a uniform time and leave keeping system for all employees of the state; and (3) an order of the State Auditor directing the uniform system's implementation.

ANALYSIS:

The question centers around the definition of wages found in section 209 (b) and (d) of the Social Security Act:

> Section 209. Definition of wages
>
> For the purposes of this subchapter, the term 'wages' means remuneration paid prior to 1951 which was wages for the purposes of this subchapter under the law applicable to the payment of such remuneration, and remuneration paid after 1950 for employment, including the cash value of all remuneration paid in any medium other than cash; except that, in the case of remuneration paid after 1950, such term shall not include —
>
> (b) The amount of any payment (including any amount paid by an employer for insurance or annuities, or into a fund, to provide for any such payment) made to, or on behalf of, an employee or any of his

> dependents under a plan or system established by an employer which makes provision for his employees generally (or for his employees generally and their dependents) or for a class or classes of his employees (or for a class or classes of his employees and their dependents), on account of (1) retirement, or (2) sickness or accident disability, or (3) medical or hospitalization expenses in connection with sickness or accident disability, or (4) death;
>
> (d) Any payment on account of sickness or accident disability, or medical or hospitalization expenses in connection with sickness or accident disability, made by an employer to, or on behalf of, an employee after the expiration of six calendar months following the last calendar month in which the employee worked for such employer;

Idaho Code § 67-5333, Sick Leave Computation, establishes statutory parameters for the accrual and use of sick leave for the state's classified workforce. Idaho Code § 59-1605 provides the same benefits found in Idaho Code § 67-5333 for the eligible non-classified officers and employees of the state, and allows sick leave to be taken "in as nearly the same manner as possible." The Idaho Personnel Commission has been given the statutory authority to promulgate regulations with respect to sick leave for classified employees (Idaho Code §§ 67-5338, and 67-5333 [7]). These validly enacted regulations, found in Idaho Personnel Commission Rule 24, have the force and effect of law.

The above-cited statutes and regulations provide the authority required under section 209 of the Social Security Act to take advantage of the exclusion. The classified employees presently operate under an executory plan; however, such a plan for the exempt employees does not exist. Under the authority given to the State Board of Examiners in Idaho Code § 67-2024, the Board may adopt such a plan for exempt employees.

Idaho Personnel Commission Rule 24-1.4 sets forth the circumstances under which sick leave may be used:

> Sick leave shall only be used in cases of actual sickness or disability or other medical and health reasons necessitating the employee's absence from work, or in situations where the employee's personal attendance is required or desirable because of serious illness, disability, or death in the immediate family. At the employee's option, vacation leave may be used in lieu of sick leave.

Therefore, those payments to employees for "actual sickness or disability or other medical and health reasons necessitating the employee's absence from work" would be excluded from being considered wages under the terms of section 209 (b) and (d) of the Social Security Act. Those situations where the state permits the use of sick leave where the employee is not actually ill or where vacation leave may be used in lieu of sick leave would not be excluded from consideration as wages under the terms of section 209 (b) and (d) of the Social Security Act.

This question of excluding from the Social Security Act definition of wages those payments made to employees "on account of sickness or accidental disability" has arisen a number of times in Idaho, beginning in 1953.

In an Attorney General's Opinion dated July 29, 1953, Attorney General Robert E. Smylie considered the question which was asked by N. P. Nielson, State Auditor. Interpreting the section of the Social Security Act in question, it began: "It is the opinion of this office that, when a wage earner falls ill and subsequently receives payment from his employer for a period of time equal to his accrued sick and vacation leaves, such payments are wages as opposed to 'sick pay paid under a plan or system.' " This opinion was based on two considerations. First, the opinion emphasized, "[i]t appears that Mr. S's compensation accrued to him on account of having completed a certain number of months of service."

Second, the Attorney General opined "since the appropriation from which the salary payments were made is directed to salary purposes only, and, since the payments to the wage earner were from regular salary funds, these payments must be construed as wages rather than sick pay."

With regard to the first consideration, the statutes relied on by the Attorney General have changed since the opinion was issued. Under current code sections, Idaho Code §§ 67-5332 and 67-5333, a significant differentiation is made between the accumulation of credited state service and sick leave. Sick leave accrues because of the second statute and uses credited state service as the measurement. Without the separate statute, there would be no authority to pay an employee while he or she was absent from work because of illness. It is the sole right of the Idaho Legislature to create or not, benefits which accrue to the employees of the state. Idaho Attorney General Opinion 79-25. Because it has chosen to do so, the Legislature has created ". . . a plan . . . for his employees . . . on account of . . . sickness or accident disability . . . ," as required under section 209 of the Social Security Act.

With regard to the second consideration, again the statutes have significantly changed. Under the current statute, Idaho Code § 67-3508 (1) (a) moneys are appropriated for "personnel costs" and cover "salary and wages expense . . . and shall also include the employer's share of contributions related to those employees and officers, such as retirement, health and life insurance, workmen's compensation, employment security and social security." This section, prior to amendment in 1973, only recognized salaries and wages as a sub-category under maintenance and operation. It is particularly important to note that the predecessor general category has been refined under the current statute to show numerous and specific sub-categories. Idaho Code § 67-3508, coupled with the authority granted to the Idaho Personnel Commission in Idaho Code §§ 67-5333 (sick leave), 67-5334 (vacation time computation), and 67-5338 (leave — rules and regulations) establishes a legislative scheme whereby salaries and wages and other benefits, necessarily including sick, vacation, military duty, jury duty and several other types of approved leaves of absence, are seen as separate costs funded from a broad source called "personnel costs."

The above-noted statutes with respect to appropriations and leave policies set the parameters necessary to fit within the exclusion provided by the Act. To the extent they conflict with their predecessor statutes, upon which the previous opinions are based, Idaho Code §§ 67-3508, 67-5333, 67-5334, and 67-5338 have either expressly been repealed (1973 Id. Sess. L., ch. 301, Sec. 1, p. 639 or Idaho Code § 67-5315) or repealed by implication by reason that the successor statutes are specific as to subject matter and were passed later in time, thus reflecting the latest legislative intent.

Therefore, according to the current statutes, the State of Idaho has the authority to pay its employees on account of sickness or accidental disability.

A letter from Hugh F. McKenna, Director of the Bureau of Retirement and Survivors Insurance, dated July 1, 1968, addressed to Attorney General Allan Shepard, gave consideration to the question again. Relying on Attorney General Smylie's opinion, Mr. McKenna discusses the question of legal authorization for the employer to make payments on account of sickness:

> Normally, when a governmental entity makes payments from a regular salary account and from an appropriation directed solely to salary purposes, payments made pursuant to such authorization are held not to be sick pay within the meaning of section 209 (b) or (d), even though the payments are made during periods of absence from work because of illness. They are generally considered to be a continuation of salary and thus are 'wages.' Conversely, payments made by a governmental entity to an employee absent from work because of illness are held to be excluded from 'wages' if there is a statute or other legal authorization for the entity to make payments 'on account of sickness' as distinguished from authorization to merely continue salary payments during periods of absence because of illness."

Again, the rationales advanced by Attorney General Smylie and Director McKenna for including the payments in the definition of wages are no longer valid.

In 1969, state officers attempted to move toward qualifying such sick payments for the exclusion. Mr. McKenna again replied to State Auditor Joe Williams and offered the Social Security Administration's opinion that a proposed bill under consideration would exclude these payments. That bill for the purpose of the Social Security Administration, HB 184, First Session, Fortieth Legislature, specifically authorized payments to employees "on account of sickness" and established a separate sick pay account. As shown above, the present statutes are preferred to the stilted language of a bill specifically drafted only to take advantage of the exclusion provided by the Social Security Act. For the first time, however, a new consideration appeared — if employees received "sick pay" during a period, there was a possibility of a reduction in benefits to covered employees. This issue is being addressed separately by the Legislative Auditor's Office. Finally, Mr. McKenna's letter noted the administrative burden on an employer who would have to differentiate between regular wages and sick pay. While at one time the administrative burden of segregating wages and sick pay was indeed great, the State Auditor's computer capability and the new bi-weekly payroll are currently capable of making the correct calculations.

The only case to consider a question similar to the one at hand is *New Mexico v. Weinberger,* 517 F.2d 989 (10th Cir. 1975), cert. denied 423 U.S. 1051 (1976). There the court found the wages paid by the state could not be excluded under the terms of section 209 of the Social Security Act. The court relied on the interpretation of the New Mexico Attorney General which agreed with the Secretary of Health, Education and Welfare's interpretation, that a state's payment of wages during an employee's illness was a continuation of wages and not an improper and unauthorized sick leave plan. As shown by this opinion, the State of Idaho has the authorized sick leave plan which New Mexico lacked. We

are, therefore, of the opinion that the Idaho Code's current statutes provide for the exclusion allowed in the Social Security Act and that the only case in point is obviously distinguishable.

We now turn to the part of the question on the implementation of the practice of excluding sick leave payments from wages. It appears three steps are necessary before the state can implement the practice. First, as noted above, the State Board of Examiners must adopt an executory plan for the exempt employees of the state. This regulation must recognize, as the classified employee regulation does, the differentiation between sick leave for personal illness or disability and the use of sick leave for other allowable purposes. This will fulfill the Social Security Administration's requirement that the single employer, the state of Idaho, treat all of its employees equally.

Second, the adoption of a single payroll time and leave time bookkeeping procedure for all employees is necessary. When all pertinent records are kept in accordance with a uniform system, the state's accounting system will have the information necessary to perform the calculations. The current EIS-45 form being used by the agencies on the bi-weekly payroll system meets this requirement.

Finally, the State Auditor must direct the various agencies and departments of the state to implement the new accounting forms and procedures necessitated by the first two steps so that the state is able to take advantage of the exclusion.

The statutory authority to do these three steps is found in Idaho Code §§ 67-1018, 67-1036 and 67-2024. Under the authority of Idaho Code § 67-2024, the State Board of Examiners has traditionally and historically exercised its powers to regulate state employees. The adoption of a uniform time keeping, accounting and record keeping system for costs such as those associated with personnel is expressly contemplated by those sections in Title 67, Chapter 10. The administrative burden previously mentioned as a bar to the use of the exclusion is no longer a factor because of the State Auditor's current ability to handle all calculations with his computer.

It should be noted that the adoption of the sick pay exclusion policy will have no effect in two other areas. The policy will have no impact on retirement benefits or the retirement system because earnings for Social Security purposes and for retirement benefits are defined independently of each other. *See:* Idaho Code § 59-1302 (31). Similarly, the sick pay exclusion policy will have no effect on state or Federal income tax revenues. According to the Internal Revenue Service, amounts paid by employers to employees on account of sickness are not exempt from Federal income taxes, and Idaho personal income tax law follows Federal tax policy. *Federal Income Tax Guide,* IRS Publication 17 (Rev. Nov. 79).

Based on the above, we are of the opinion that if and when the State Board of Examiners adopts a regulation for the exempt employees comparable to that for the classified employees and the State Auditor mandates a uniform time keeping system for all state employees, the exclusion provided by the Social Security Act may be utilized.

AUTHORITIES CONSIDERED:

1. *Statutes*

   A. United States Code — 42 USCA 409.

   B. Idaho Code — §§ 59-1302, -1605; §§ 67-1018, -1036, -2024, -3508, -5315, -5332, -5333, -5334, -5338.

2. *Cases*

   New Mexico v. Weinberger, 517 F.2d 989 (10th Cir. 1975), cert. denied 423 U.S. 1051 (1976).

3. *Other Authorities*

   A. Idaho Attorney General Opinion 79-25, dated December 28, 1979.

   B. Idaho Personnel Commission Rule 24.

   C. Federal Income Tax Guide, IRS Publication 17 (Rev. Nov. 79).

DATED this 12th day of December 1980.

ATTORNEY GENERAL
State of Idaho
/s/ DAVID H. LEROY

ANALYSIS BY:

W. B. LATTA, JR.
Deputy Attorney General
Idaho Personnel Commission

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cc: Idaho Supreme Court
Idaho Supreme Court Library
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ATTORNEY GENERAL OPINION NO. 80-29

TO: Homer R. Garrett, Acting Administrator
Department of Probation and Parole

Per Request for Attorney General's Opinion

QUESTIONS PRESENTED:

1. Does an Idaho Court have authority to hold a "preliminary hearing" regarding allegations of a parole or probation violation against:

(a) a parolee or probationer being supervised under the Uniform Act for Out-of-State Parolee Supervision, or

(b) a parolee from the Idaho State Correctional Institution?

2. What procedure must be followed in revoking the parole or probation of a parolee or probationer being supervised under the Uniform Act for Out-of-State Parolee Supervision?

CONCLUSION:

1. (a) Although a probation violation is a part of the judicial process for *Idaho probationers,* an Idaho Court has no authority to hold a "preliminary hearing" regarding the allegations of a parole or probation violation against a parolee or probationer being supervised under the Uniform Act for Out-of-State Parolee Supervision; such a hearing should be held before one or more members of the Commission for Pardons and Parole, or before an impartial hearing officer selected by a majority of the commission.

1. (b) An Idaho Court has no authority to hold a "preliminary hearing" regarding allegations of a parole violation against a parolee from the Idaho State Correctional Institution, as such a hearing should be held before one or more members of the Commission for Pardons and Parole or before an impartial hearing officer selected by a majority of the commission.

2. The basic procedure that should be followed in revoking the parole or probation of a parolee or probationer being supervised under the Uniform Act for Out-of-State Parolee Supervision is as follows[1]:

(a) arrest and detention in the receiving state;

(b) notice, within 15 days from the arrest and detention, of the time and place of the preliminary hearing and notice of rights as prescribed by the United States Supreme Court in the cases of *Morrissey v. Brewer* and *Gagnon v. Scarpelli;*

(c) with certain exceptions, the holding of a preliminary hearing as promptly as convenient (and in any event not later than 30 days from the notice) at or reasonably near the place of the alleged violation;

(d) upon a finding of probable cause that the parolee or probationer has violated his parole or probation, a continued detention until transportation to the sending state can be arranged;

(e) upon arrival of officers from the sending state, a determination of their authority and that the parolee or probationer is the same person described in the revocation papers;

(f) with certain exceptions, the holding of a revocation hearing, after proper notice, in the sending state within a reasonable time; such a hearing may be held in a receiving state if it is the place of the violation.

[1]Due to the elaboration necessary to answer this question only a cursory outline is presented in the conclusion, with greater explanation and detail provided *post* in the analysis portion of this opinion.

ANALYSIS:

The Constitution of the United States provides that, without the consent of Congress, no state shall enter into any agreement or compact with another state. U.S. Const. Art. 1, §10. Recognizing this constitutional prohibition, the Congress of the United States has consented to the interstate compact for the supervision of parolees and probationers since June 6, 1934. *Pierce v. Smith,* 31 Wash.2d 52, 195 P.2d 112 (1948); 4 U.S.C.A. §112. The statute enacted by Congress consenting to such a compact reads as follows:

> (a) The consent of Congress is hereby granted to any two or more States to enter into agreements or compacts for cooperative efforts and mutual assistance in the prevention of crime and in the enforcement of their respective criminal laws and policies, and to establish such agencies, joint or otherwise, as they may deem desirable for making effective such agreements and compacts.
>
> (b) For the purpose of this section, the term "States" means the several States and Alaska, Hawaii, the Commonwealth of Puerto Rico, the Virgin Islands, Guam and the District of Columbia.

4 U.S.C.A. §112

Accordingly, virtually all 50 states, the District of Columbia, Puerto Rico and the Virgin Islands have enacted the Uniform Act for Out-of-State Parolee Supervision (herein also referred to as the Compact). Indeed, although there has been no reported litigation concerning the Compact in Idaho, it has existed as part of Idaho law since 1941 and is currently codified as Idaho Code §§ 20-301 and 302. Relevant parts of the Compact are quoted as follows:

> 20-301. Compacts with other states authorized. — The governor of this state is hereby authorized and directed to execute a compact on behalf of the state of Idaho with any of the United States legally joining therein in the form substantially as follows:
>
> A COMPACT
>
> Entered into by and among the contracting states, signatories hereto, with the consent of the Congress of the United States of America, granted by an act entitled "An Act Granting the Consent of Congress to any two or more states to enter into Agreements or Compacts for Cooperative Effort and Mutual Assistance in the Prevention of Crime and for other purposes."
>
> The contracting states solemnly agree:
>
> (1) That it shall be competent for the duly constituted judicial and administrative authorities of a state party to this compact, (herein called "*sending state*"), to permit any person convicted of an offfense within such state and placed on probation or released on parole to reside in any other state party to this compact, (herein called "*receiving state*"), while on probation or parole, ...

> (2) That each receiving state will assume the duties of visitation of and supervision over probationers or parolees of any sending state and in the same standards that prevail for its own probationers and parolees.
>
> (3) That duly accredited officers of a sending state may at all times enter a receiving state and there apprehend and retake any person on probation or parole. For that purpose *no formalities will be required other than establishing the authority of the officer and the identity of the person to be retaken. All legal requirements to obtain extradition of fugitives from justice are hereby expressly waived* on the part of states party hereto, as to such persons. *The decision of the sending state to retake a person on probation or parole shall be conclusive upon and not reviewable within the receiving state;* provided, however, that if at any time when a state seeks to retake a probationer or parolee there should be pending against him within the receiving state any criminal charge, or he should be suspected of having committed within such state a criminal offense, he shall not be retaken without the consent of the receiving state until discharge from prosecution or from imprisonment for such offense.
>
> (4) That the duly accredited officers of the sending state will be permitted to transport prisoners being retaken through any and all state parties to this compact, without interference.
>
> . . . .
>
> (6) That this compact shall become operative immediately upon its execution by any state as between it and any other state or states so executing. *When executed it shall have the full force and effect of law* within such state, the form of execution to be in accordance with the laws of the executing state. [Emphasis added.]

The Compact allows a state to send one of its parolees or probationers to another state if the receiving state will agree to assume his supervision. This is often done when the parolee's or probationer's family lives in the receiving state or when he has a job waiting there. However, the sending state does not lose its right to retrieve the parolee or probationer if, in its opinion, he violates his parole or probation conditions. In fact, the act provides for a very simple procedure for retrieving a violator. The sending state simply issues a warrant establishing the authority of the officer and the identity of the person to be retaken and then sends its own officer into the receiving state to secure the return of the parolee or probationer.

As the preamble to Section 1 of the Compact directs, it has been held that the Uniform Act for Out-of-State Parolee Supervision is an agreement for coopera-

tive effort and mutual assistance in the prevention of crime and the enforcement of criminal laws of each state, and is not violative of constitutional provisions prohibiting states from entering into compacts with each other without the consent of the United States. *Ex parte Tenner,* 20 Cal.2d 670, 128 P.2d 338 (1942).

The following quote is representative of judicial analysis of the purpose and philosophy behind the compact:

> The administration of parole is an integral part of criminal justice, having as its object the rehabilitation of those convicted of crime and the protection of the community. Unquestionably such rehabilitation of a parolee may often be facilitated by transferring him to another state, with new surroundings and better opportunities for employment. . . . And from the standpoint of the protection of society, there is sound reason for an agreement between states that the authority over parolees should follow them across state lines. The knowledge on the part of the out-of-state parolee that he may summarily be returned to prison for any violation of the rules which he has agreed to obey undoubtedly is an effective check on any inclination to violate parole.
>
> The compact represents . . . social policy. . . . It is an agreement for cooperative effort and mutual assistance in the prevention of crime and in the enforcement of the criminal laws of each state within the contemplation of the federal legislation. . . . *Ex parte Tenner,* supra, 128 P.2d 338, 341 (1942).

The Compact has been attacked in California, New York, Pennsylvania, Washington and the federal forum as unconstitutional. However, it has been consistently and squarely held that the Uniform Act for Out-of-State Parolee Supervision does not violate constitutional guarantees of Habeas Corpus, due process and equal protection of the law. *Ex parte Tenner,* supra; *People ex rel. Rankin v. Ruthazer,* 304 N.Y. 302, 107 N.E.2d 458 (1952); *Pierce v. Smith,* supra.

Additionally, the Compact has been held to be constitutional even though it does not permit a receiving state to review the decision of the sending state to retake a parolee, see, e.g., *U.S. ex rel. MacBlain v. Burke,* 200 F.2d 616 (CA.3 1952), and that it is not void as conflicting with the federal constitutional provisions and statutes relating to extradition. See *Ex parte Tenner,* supra; *Commonwealth v. Kaminsky,* 206 Pa. Super. 480, 214 A.2d 251 (1966); *Pierce v. Smith,* supra.

In sharp contrast with the compact's method of interstate rendition is the method of extradition provided in the United States Constitution and the federal statutes supplementing the Constitutional provision. Article IV, Section 2, Clause 2, of the Constitution of the United States provides as follows:

> A person charged in any state with treason, felony or other crime, who shall flee from justice, and be found in another state, shall on demand of the executive authority of the state from which he fled be delivered up, to be removed to the state having jurisdiction of the crime.

Congress has supplemented the constitutional provision dealing with extradition with the Federal Extradition Act which provides for a comprehensive extradition procedure. See 18 U.S.C.A. § 3182.

Although the United States Constitution and federal statutes clearly outline and control the extradition procedures involved in returning fugitives from an asylum state to a demanding state, it was early ruled that extradition is not the exclusive means of returning parolees and probationers that are supervised under the Compact.

In 1942, in its landmark decision on the Compact, the California Supreme Court, in *Ex parte Tenner,* supra, held that the extradition provisions of the federal Constitution and statutes are not for the benefit of the fugitive, and an asylum state may require the governor to surrender a fugitive on terms less exacting than those imposed by the act of Congress. Moreover, the *Tenner* court declared that states which are parties to the Uniform Act for Out-of-State Parolee Supervision have established a method to procure the return of parolees from one state to another which is entirely independent of extradition procedure.

This lead by California has been adhered to in other jurisdictions through holdings that in demanding the return of a parolee, a sending state is entitled to elect whether to proceed under the Uniform Act for Out-of-State Parolee Supervision or through the extradition procedure. See *Seward v. Heinze,* 262 F.2d 42 (C.A.9 1958); *Ogden v. Klundt,* 15 Wash, App. 475, 550 P.2d 36 (1976); *Pierce v. Smith,* supra. This judicial reaction to the Compact is totally consistent with the wording of the Compact itself which states:

> All legal requirements to obtain extradition of fugitives from justice are hereby expressly waived on the part of states party hereto, as to such persons. Idaho Code §20-301 (3).

Along this same line of judicial attitude toward the Compact, the State of New York maintains the policy that the Uniform Act for Out-of-State Parolees Supervision should be construed liberally. *LaClaire v. Oswald,* 21 A.D.2d 17, 247 N.Y.S.2d 101 (1964).

With the above foundational background of the Compact, its constitutionality and purpose, the questions addressed by this opinion may now be more properly analyzed.

1. *The authority of an Idaho Court to hold a preliminary hearing regarding allegations of a parole or probation violation against:*

> (a) *a parolee or probationer being supervised under the Uniform Act for Out-of-State Parolee Supervision.*

Breaking trail on the minimum due process rights of parolees to a preliminary hearing, the United States Supreme Court, stated in *Morrissey v. Brewer,* 408 U.S. 471, 92 S. Ct. 2593, 33 L.Ed.2d 484, 496-497 (1972):

> What is needed is an informal hearing structured to assure that the findings of a parole violation will be based on verified facts and that the exercise of discretion will be informed by an accurate knowledge of the parolees behavior.
>
> * * *
>
> [D]ue process would seem to require that some minimal inquiry be conducted at or reasonably near the place of the alleged parole violation

> or arrest and as promptly as convenient after arrest while information is fresh and sources are available. . . . Such an inquiry should be seen in the nature of a "preliminary hearing" to determine whether there is probable cause or reasonable ground to believe that the arrested parolee has committed acts that would constitute a violation of parole conditions.

Although probation and parole are traditionally distinguishable in that *probation* ". . . relates to action taken before the prison door is closed, whereas *parole* relates to action taken after the prison door has closed on a convict. . . ." See 21 Am. Jur. 2d Criminal Law, §562. The United States Supreme Court perceived no difference relevant to the guarantee of due process between the revocation of parole and the revocation of probation and extended the same minimal due process requirements to probation revocation proceedings in *Gagnon v. Scarpelli,* 411 U.S. 778, 93 S. Ct. 1756, 36 L. Ed.2d 656 (1973).

The *Scarpelli* case is quite significant to this opinion because the United States Supreme Court appears to have briefly considered the Uniform Act for Out-of-State Parolee Supervision by reference to it as the "interstate compact." See *Gagnon v. Scarpelli,* supra, 36 L.Ed.2d 656, 662n.5. Additionally, the *Scarpelli* decision does deal with *interstate* supervision and revocation of parole and probation.

With respect to the authority of an Idaho court to hold a preliminary hearing on a Compact probation or parole, it is important to note at the outset that in both the *Morrissey* and *Scarpelli* cases, the parole and probation had been revoked by an administrative penal agency. In *Morrissey,* revocation of parole was by the Iowa Board of Parole, and in *Scarpelli,* revocation of probation was by the Wisconsin Department of Public Welfare. In neither case was the necessity of a "judicial" preliminary hearing alluded to by the United States Supreme Court. In fact, the contrary is quite evident as the Court specifically directed that the "hearing body" for either the preliminary or the revocation hearing need not be composed of judicial officers.

> In our view, due process requires that after the arrest, the determination that reasonable ground exists for revocation of parole should be made by someone not directly involved in the case. . . .
>
> *This independent officer need not be a judicial officer.* The granting and revocation of parole are *matters traditionally handled by administrative officers.* In Goldberg, the Court pointedly did not require that the hearing . . . be conducted by a judicial officer or even before the traditional "neutral and detached" officer. . . . It will be sufficient, therefore, in the parole revocation context, if an evaluation of whether reasonable cause exists to believe that conditions of parole have been violated is made by *someone such as a parole officer* other than the one who has made the report of parole violations or who has recommended revocation. A State could certainly choose some other independent decision maker to perform this preliminary function. [Emphasis added.] *Morrissey v. Brewer,* supra, 36 L.Ed.2d 484, 497.
>
> At the preliminary hearing, a probationer or parolee is entitled to . . . an *independent decision maker. . . . Morrissey v. Brewer,* supra, at 487 [sic], 33 L. Ed.2d 484. The final hearing is a less summary one . . . but

the "minimum requirements of due process" include very similar elements;

> ". . . (e) *a "neutral and detached" hearing body such as a traditional parole board, members of which need not be judicial officers. . . .*" [Emphasis added.] *Gagnon v. Scarpelli,* supra, 36 L. Ed.2d 656, 664.

Since the revocation of both parole and probation by *administrative penal agencies* has been fully accepted by the United States Supreme Court as long as the due process requirements specified in *Morrissey* and *Scarpelli* are adhered to, relevant Idaho law will provide the basis for the holding of preliminary revocation hearings by either a designated administrative agency or a court.

Authority for an Idaho court to grant probation to a person *before it* is unquestionable. I.C. §19-2601; accord, Rule 33, I.C.R. Likewise, statutory authority for an Idaho court to revoke the probation of a defendant *"placed on probation by the court,"* see I.C. §19-2602, is clear. However, there is no Idaho statute or rule specifically granting authority to an Idaho court to hold a preliminary hearing regarding allegations of a parole or probation violation against a parolee or probationer being supervised under the Uniform Act for Out-of-State Parolee Supervision.

However, by statute, the Idaho State Board of Corrections is specifically charged with the duty of supervising out-of-state parolees and probationers and reporting alleged violations to the Commission of Pardons and Parole to assist in the determination of whether parole or probation should be revoked.

> The State Board of Corrections shall be charged with the duty of supervising all persons placed on probation or released from the state penitentiary on parole, and *all persons released on parole or probation from other states and residing in the State of Idaho;* of making such investigations as may be necessary; of reporting alleged violations of parole or probation in specific cases to the commission or the court to aid in determining whether the parole or probation should be continued or revoked. . . . [Emphasis added.]

Idaho Code §20-219. Compare, Idaho Code §20-227.

Albeit neither I.C. §20-219 nor I.C. §20-227 distinguishes whether the violations of parole and probation reported to the Commission and the courts are for out-of-state or in-state parolees or probationers, the only logical interpretation of the said statutes is that (1) reported violations of *in state probationers* must go to the Idaho courts for their exercise of jurisdiction over defendants "placed on probation by the court" and (2) reported violations of out-of-state parolees and probationers must be made to the Commission. Designated members of the Commission would then assume the role of the "hearing body" prescribed by the United States Supreme Court in *Morrissey v. Brewer,* supra, and *Gagnon v. Scarpelli,* supra.

If the process were otherwise, Idaho courts would be assuming the role of an "independent decision maker" or "officer" that the United States Supreme Court has already indicated need not be a judicial officer. Additionally, the courts would be attempting to assume jurisdiction over an out-of-state probationer's

preliminary revocation proceedings when the said probationer was not "placed on probation by the court" as required by I.C. §19-2602, and since there is no clear statutory authorization for such a judicial function, the application of the following constitutional section would logically bar such action:

> §1. Department of government. — The powers of the government of this state are divided into three distinct departments, the legislature, executive and judicial; and no person or collection of persons charged with exercise of powers properly belonging to one of these departments shall exercise any powers properly belonging to either of the others, *except as in this constitution expressly directed or permitted.* [Emphasis added.] Idaho Const., Art. 2, §1.

(b) *A parolee from the Idaho State Correctional Institution.*

With regard to parole revocation proceedings for parolees from the Idaho State Correctional Institution, the law is much more lucid in directing that preliminary parole revocation hearings are *exclusively* within the jurisdiction of the Commission of Pardons and Parole. The controlling statute on this point is Idaho Code §20-229, relevant parts of which are quoted as follows:

> Whenever a paroled prisoner is accused of violation of his parole, other than by absconding supervision or the commission of, and conviction for, a felony or misdemeanor under the laws of this state, or any other state, or any federal laws, he shall be entitled to a fair and impartial hearing of such charges within thirty (30) days from the time he is served with the charges of violation of conditions of his parole after his arrest and detention. The hearing shall be held before one or more members of the Commission for Pardons and Parole, or before an impartial hearing officer selected by a majority of the Commission. . . .

Therefore, an Idaho court would have absolutely no authority to hold a preliminary hearing regarding allegations of a parole violation against a *parolee* from the Idaho State Correctional Institution or an out-of-state parolee being supervised under the Compact.

2. *Procedures necessary for the revocation of parole or probation under the Compact.*

Preliminarily, it must be noted that it has been held that before the simple procedure described in the Uniform Act for Out-of-State Parolee Supervision can be used to return a parolee or probationer to the jurisdiction of his conviction, there must be evidence that the act is applicable. *Ex parte Chambers,* 525 S.W.2d 191 (1975).

Accordingly, if a parolee or probationer petitions for a writ of habeas corpus in the receiving state, a court would have jurisdiction to see if the terms of the Compact and the requirements of *Morrissey v. Brewer,* supra and *Gagnon v. Scarpelli,* supra, have been complied with. *In re Tenner,* supra; Idaho Code §19-4201.

One of the first prerequisites of a habeas corpus judicial review of the proceedings under the Compact would be for the court to judicially notice the existence of the Compact and that the Governor of the State of Idaho has entered into a

Compact on behalf of the state with the 49 other states, the District of Columbia, Puerto Rico, and the Virgin Islands. See *Stens v. Ashe,* 86 F. Supp. 317 (W.D. Penn. 1949); *White v. White,* 94 Idaho 26, 480 P.2d 872 (1971); Idaho Code §§ 9-101 (2) and (3).

Under the terms of the Uniform Act for Out-of-State Parolee Supervision, it has been held that judicial review of a demand for return under the Compact is limited to a determination of authority of the demanding officers and identity of the person to be taken; any alleged due process violations should be dealt with in the sending state, *Ogden v. Klundt,* supra; accord, *People ex rel. Rankin v. Ruthazer,* supra; Idaho Code §20-301 (3). Additionally, as established through the *Morrissey* and *Scarpelli* cases, certain basic requirements of due process have now attached to such proceedings. As will be discussed in greater detail *post,* the requirements of due process prescribed by the United States Supreme Court, with regard to parole and probation revocation proceedings, are applicable even though the alleged parole violator is also charged with a new criminal offense. *Re Valrie,* 115 Cal. Rptr. 340, 524 P.2d 812 (1974).

> (a) *Arrest and Detention in the Receiving State:* The first stage occurs when the parolee is arrested and detained, usually at the direction of his parole officer. *Morrissey v. Brewer,* supra, 33 L. Ed.2d 484, 496.

After an out-of-state parolee or probationer has been arrested upon allegations of a parole or probation violation, the first issue that normally will arise is the said parolee or probationer's right to bail. In other words, upon the parole or probation officer's initiating the revocation process, should the parolee or probationer be entitled to bail?

Although there is no reported Idaho case law on this issue, the highest courts of the most populous and litigious states in the nation have held that *parolees* being detained on charges of parole violations have no right to bail. See, *In Re Law,* 10 Cal.3d 21, 109 Cal. Rptr. 573, 513 P.2d 621 (1973) and *People ex rel. Calloway v. Skinner,* 22 N.Y.2d 23, 300 N.E.2d 716 (1973). Also see Annot., 36 L.Ed.2d 1077, §2[b].

> The question of whether a parolee is entitled to bail while in a parole hold status is of first impression in this state. The right, *if it exists at all,* must flow from one or more of three possible sources: the Eighth and Fourteenth Amendments to the federal Constitution; Article I, Section 6, of our state Constitution; or state statutory authority.
>
> . . . .
>
> [I]n *Morrissey* . . . [a]lthough the court did not directly deal with the question of bail at any time prior to revocation it clearly indicated that, as *a federal constitutional matter, such bail would not be contemplated nor mandated.* The court spoke in terms of an "arrested" parolee and based the needs for due process on the ground that his conditional liberty had been curtailed. . . . Further, the court stated that the preliminary hearing officer should determine whether there was, in effect, probable cause to believe a violation had occurred and that such determination ". . . would be sufficient to warrant the *parolees continued detention."* [Emphasis added.] *In re Law,* supra, 513 P.2d 621, 623-624.

> We conclude that a parolee is not entitled to bail. Our State Constitution does not decree a right to bail, but merely proscribes "excessive bail." . . . Right to bail is purely statutory . . . and is clearly delineated in the Criminal Procedure Law. . . .
>
> "[T]he granting of bail in a parole revocation proceeding would create insuperable problems. The court granting bail is not in control of the proceeding — that is within the power of the board of parole." . . .
>
> Hence, we are of the opinion that, *in the absence of specific legislative direction,* parolees are not entitled either to bail or to release pending a hearing before the Parole Board. [Emphasis added.] *People ex rel. Calloway v. Skinner,* supra, 300 N.E.2d 716, 720.

The California Supreme Court in the *Law* decision recognized that there is no federal constitutional right to be released on bail from a "parole hold" resulting from an alleged parole violation. Both California and New York have been joined by many jurisdictions in holding that the constitutional and statutory provisions relating to the right to bail pertain only to persons incarcerated on a charge of a commission of a criminal offense, or an appeal thereafter, and do not entitle a person subject to a "parole hold" by reason of an alleged parole violation to release on bail. See *In re Law,* supra; *People ex rel. Ayers v. Lombard,* 87 Misc.2d 355, 385 N.Y.S.2d 242 (1976); *People ex rel. Calloway v. Skinner,* supra; *People ex rel. Cordero v. Thomas,* 69 Misc.2d 28, 329 N.Y.S.2d 131 (1972); *Hardy v. Warden,* 56 Misc.2d 332, 288 N.Y.S.2d 541 (1968); *Ex parte Womack,* 455 S.W.2d 288 (Tex. Cr. App. 1970); *Ogden v. Klundt* supra, Annot., 36 L.Ed.2d 1077 §2[b].

Idaho's neighboring jurisdiction, the State of Washington, held in the case of *Ogden v. Klundt,* supra, that absent express statutory authorization, *courts are without power to release on bail or bond a parolee arrested and held in custody for violating his parole under the Uniform Act for Out-of-State Parolee Supervision.*

For the past eighteen years it has been the law of the State of Texas that, under the Uniform Act for Out-of-State Parolee Supervision, a parolee may be held in custody upon the order of the administrator of Interstate Compact until a parole revocation warrant can be obtained from the sending state, and such parolee should not be admitted to bail while the sending state is in the process of returning him to its jurisdiction. See *Ex parte Cantrell,* 172 Tex. Crim. 646, 362 S.W.2d 115 (1962). Additionally, it was squarely held in the Washington case of *Ogden v. Klundt,* supra, that *the Compact provides that a parole violater shall be held and makes no provision for bail* or bond. The *Ogden v. Klundt* court went on to hold that a person on parole remains in constructive custody until his sentence expires with the following statement:

> Whether a convicted person is in actual custody within the prison walls or in constructive custody within the prison of his parole, the rule is unchanging; there is simply no right to release on bail or bond from prison. *Ogden v. Klundt,* supra, 550 P.2d 36, 39.

The rationale behind the refusal to grant bail to interstate parolees under the Compact act is best expressed in the following quote:

> So long as the judgment of conviction remains in force and effect, the only question is whether a parolee will risk an exchange of constructive imprisonment for a renewal of actual custody of his person, inside the walls. He has a right to make a choice between two courses of conduct leading in either direction but *he has no right to liberty on bail when he is detained by reason of the lawful action of the Board of Parole, pending an ultimate determination of a charge that he has violated parole.* [Emphasis added.] *Hardy v. Warden,* supra, 288 N.Y.S. 2d 541, 543.

With respect to bail for *probationers,* Rule 33 (e), I.C.R. provides for bail pending a *probation* revocation hearing. However, with an out-of-state *probationer* in Idaho under the terms of the Compact and: (1) the fact that neither *Morrissey* nor *Scarpelli* hints that bail is a right but clearly speak in terms of "continued detention," (2) the fact that the location of the final revocation hearing will usually be in the sending state as explained *post,* and (3) the fact that Idaho Code §19-2602 allows courts to exercise jurisdiction only over defendants "placed on probation by the court," it would be a legal anomaly for an out-of-state probationer to be released on bail by the court of the receiving state pending the outcome of a charged violation.

It is safely stated that in Idaho refusal to fix bail on an in-state parolee violation warrant or an out-of-state warrant for a parolee or probationer under the Compact is not a denial of the state constitutional right to bail, as the constitutional guarantee of bail applies only before trial and conviction, and bail allowed by statute and rule after conviction is only while an appeal is pending or a probation revocation is pending for an *in-state* probationer. See *Ex parte France,* 38 Idaho 627, 224 P. 433 (1924); *In re Scriber,* 19 Idaho 531, 114 P.29 (1911); Idaho Const., Art. 1, §6; Idaho Code §19-2905; Idaho Code §19-2906; Rule 46, I.C.R.; Rule 33 (e), I.C.R. Even habeas corpus will not permit bail under such circumstances because neither the in-state parolee nor the out-of-state parolee or probationer is being "detained in custody on any criminal charge," see I.C. §19-4218, but is being detained pursuant to a parole or probation violation warrant or "hold."

> (b) *Notice of the time and place of the preliminary hearing and notice of rights as prescribed by the United States Supreme Court in the cases of Morrissey v. Brewer and Gagnon v. Scarpelli.*

The United States Supreme Court has held that due process requires that a parolee or probationer receive prior notice of the time and place of the preliminary hearing and notice of various rights guaranteed in such proceedings. Outlining the requirements of notice is the following statement from the *Morrissey v. Brewer* case:

> With respect to the preliminary hearing before this officer, *the parolee should be given notice* that the hearing will take place and that its purpose is to determine whether there is probable cause to believe he has committed a parole violation. The notice should state what parole violations have been alleged. At the hearing the parolee may appear and speak in his own behalf; he may bring letters, documents, or individuals who can give relevant information to the hearing officer. On request of the parolee, persons who have given adverse information on which parole revocation is to be based are to be made available for

> questioning in his presence. However, if the hearing officer determines that the informant would be subjected to risk of harm if his identity were disclosed, he need not be subjected to confrontation and cross examination. [Emphasis added.] *Morrissey v. Brewer,* supra, 33 L.Ed.2d 484, 497-498.

In summary outline, a parolee or probationer must be notified of the following before a preliminary hearing is held:

> 1. The time and place of the preliminary hearing and that its purpose is to determine whether there is probable cause to believe a parole or probation violation has occurred;
>
> 2. Alleged violations of parole or probation;
>
> 3. The right to appear and present evidence in his own behalf;
>
> 4. The right to confront any adverse witness, with exceptions noted herein;
>
> 5. The right to private counsel or counsel at public expense if the parolee or probationer is a needy person.[2]

[2]As to appointment of counsel, it has generally been held that the due process clause of the 5th and 14th Amendments to the Federal Constitution do not require that counsel be appointed for indigent parolees or probationers prior to *every* preliminary hearing, but this requirement must be determined on a case by case basis as further explained herein *post.* The appointment of counsel is only required in those situations where it would be fundamentally unfair to the parolee or probationer for him not to be represented by counsel if he so wishes.

As to the timeliness of the notice itself, I.C. §20-229A gives the following directions:

> *Within fifteen (15) days* from the date of the arrest and detention of the alleged parole violator, he shall be *personally served* by a state probation and parole or law enforcement officer with a copy of the factual allegations of the violation of the conditions of parole, and, at the same time shall be advised of his right to an on-site parole revocation hearing and of his rights and privileges as provided by this act. [Emphasis added.]

Notice where the conduct charged also constitutes criminal offense:

The requirement of a preliminary hearing has been held to remain even when the alleged parole or probation violation is also charged as a new crime, either by state or federal authorities. See *Re Valrie,* supra. Consequently, where the conduct which constitutes a prima facie violation of parole or probation is also independently charged as a new crime (either a felony requiring a preliminary hearing on the issue of probable cause or the trial of a misdemeanor) no purpose would be served by requiring a determination that there exists probable cause to believe that a particular act occurred which constitutes a violation of parole or probation independent of a prior determination of the existence of probable cause of the commission of a felony grounded on the same occurrence or the trial of a misdemeanor grounded on the same occurrence. See *In re Law,* supra. Due

process does require, however, that parolees and probationers have fair notice of the nature and effect of a hearing intended to serve such a dual purpose. *In re Law,* supra.

Accordingly, the use of the judicial preliminary hearing required by Rule 5.1, I.C.R. as the equivalent of a preliminary hearing prescribed by the United States Supreme Court in *Morrissey v. Brewer* would, in appropriate cases, eliminate needless duplication and preclude the possibility of a parolee or probationer being subjected to two proceedings. This same rationale would apply to the trial on a misdemeanor. See *In re Law,* supra. However, the condition of due process outlined in *Morrissey v. Brewer* and *Gagnon v. Scarpelli* would still be applicable and require that the parolee or probationer be given notice that it is intended that the criminal proceedings are to be used to satisfy the United States Supreme Court requirements for parole or probation revocation proceedings. See *Re Dunham,* 127 Cal. Rptr. 343, 545 P.2d 255, 76 A.L.R.3d 571 (1976); See also *Re Frias,* 34 Ca.3d 88, 109 Cal. Rptr. 749 (1973); *In Re Law,* supra.

As a practical matter, one difficulty may preclude effective use of such combined procedure. Absent waiver or defense delay, trial on a misdemeanor may be postponed past the time period mandated for the holding of a preliminary revocation hearing.

> (c) *With certain exceptions, the holding of a preliminary hearing as promptly as convenient (and in any event no later than 30 days) at or reasonably near the place of the alleged violation.*

Morrissey v. Brewer, supra, held that during the revocation proceedings due process requires some *minimal inquiry at or reasonably near the place of an alleged parole violation or arrest and as promptly as convenient after the arrest,* while the information is still fresh and sources are available; the United States Supreme Court labelled such an inquiry a "preliminary hearing." The *Morrissey* court went on to point out that the purpose of a preliminary hearing is to determine whether there is probable cause or reasonable grounds to believe that the arrested parolee has committed acts which would constitute a violation of parole conditions.

A preliminary hearing should be local in nature; it should be held reasonably near the place where the alleged violation was committed or where the parolee or probationer was arrested. *Morrissey v. Brewer,* supra; *People ex rel. Calloway v. Skinner,* supra; Annot., 36 L.Ed.2d 1077, § 8. Accordingly, the United States Supreme Court in *Gagnon v. Scarpelli,* supra, held that a preliminary hearing is required even when a probationer or parolee has been allowed to leave the state in which he was convicted and has been accepted for supervision in another state under the Compact.

It must be emphasized that only "minimal inquiry" is necessary to determine whether there is probable cause or reason to believe that a violation has occurred. *People ex rel. Calloway v. Skinner,* supra. Moreover, it has been held that the preliminary hearing is intended to be informal and summary in nature, see *People ex rel. Calloway v. Skinner,* supra, and, therefore, hearsay evidence is admissible in such hearings, including letters, affidavits, and other material which would not be admissible at criminal trial. *Gagnon v. Scarpelli,* supra; *People ex rel. Ayers v. Lombard,* supra.

In addition to the requirement that the preliminary hearing be held "as promptly as convenient after the arrest," Idaho has placed a 30 day outside limit on the holding of the preliminary hearing. See Idaho Code §20-229.

At the hearing, the parolee should be allowed to appear and speak in his own behalf, and to bring letters, documents, or individuals who can give relevant information to the hearing officer. Additionally, the parolee or probationer at the hearing may request the examination of persons who have given adverse information upon which the parole or probation revocation is to be based; an exception to this right is if the hearing officer determined that the informant would be subjected to risk or harm if his identity were disclosed, in which case he need not be subjected to confrontation or cross examination.

Admittedly, the "right to confront adverse witnesses" will often present insurmountable problems. However, the United States Supreme Court recognized and addressed this problem by footnote in *Gagnon v. Scarpelli,* supra, as follows:

> An additional comment is warranted with respect to the rights to present witnesses and to confront and cross examine adverse witnesses. Petitioner's greatest concern is with a difficulty and expense of procuring witnesses from perhaps thousands of miles away. While in some cases there is simply no adequate alternative to live testimony, we emphasize that we did not in Morrissey intend to prohibit use where appropriate of the conventional substitutes for live testimony, including affidavits, depositions, and documentary evidence. Nor did we intend to foreclose the states from holding both the preliminary and the final hearing at the place of violation or from developing other creative solutions to the practical difficulties of the Morrissey requirements. *Gagnon v. Scarpelli,* supra 36 L.Ed.2d 656, 662n.5.

In the *Morrissey* case the United States Supreme Court left open the question of whether a parolee is entitled to the assistance of retained counsel or to appointed counsel if he is indigent. However, the court pointed out in *Gagnon v. Scarpelli,* supra, that in some, *but not all,* preliminary hearings, due process does require the appointment of counsel for indigents. The *Gagnon v. Scarpelli* court went on to point out that due process is not so rigid as to require that the significant interests in informality, flexibility, and economy in such proceedings must always be sacrificed. On the other hand, the court maintained that despite the informal nature of the proceedings and the absence of technical rules of evidence and procedure, unskilled or uneducated probation or parole violators may well have difficulty in presenting their version of disputed facts where the presentation requires the examination or cross examination of witnesses or the offering or dissecting of complex documentary evidence. Thus, the court in *Gagnon v. Scarpelli,* supra, found no justification for a new inflexible constitutional rule with respect to the requirement of appointed counsel for indigents, but recognized that there are difficulties in proceeding on a case-by-case basis, and held that *the decision as to the need for counsel must be made on an individual basis in the exercise of a sound discretion by the state authority charged with the responsibility for parole and probation administration within the state.* Nevertheless, the court did suggest that it would normally be appropriate to provide counsel for indigent probationers or parolees who make timely requests for counsel and who claim either that they have not committed the alleged violations, or that, even if they have violated the terms of their probation or parole, there are substantial mitigating reasons which make revocation

inappropriate. In every case where a request for counsel is refused, the United States Supreme Court stated that the authority refusing such requests should state the grounds for the refusal succinctly in the record.

Then, at the conclusion of the hearing, the court held that it is the duty of the hearing officer to make a summary.

> The hearing officer shall have the duty of making a summary or digest of what occurs at the hearing in terms of the responses of the parolee and the substance of the documents or evidence given in support of parole revocation and of the parolee's position. Based on the information before him, the officer should determine whether there is probable cause to hold the parolee for final decision of the parole board on revocation. Such a determination would be sufficient to warrant the parolee's continued detention and return to the state correctional institution pending the final decision. *Morrissey v. Brewer,* supra, 33 L. Ed.2d 484, 498.

As with many other rights guaranteed by due process, there are exceptions to the requirements of a preliminary parole or probation revocation hearing. The following are generally recognized as exceptions to the requirements of a preliminary hearing, to wit: (1) a waiver, (2) admission by the parolee or probationer that he has violated the terms of his agreement, (3) a subsequent criminal conviction, (4) absconding from the jurisdiction. See I.C. §§ 20-229, 20-229A; Annot., 36 L.Ed.2d 1077, § 7.

Nothing in *Morrissey* obviates the possibility that a parolee or probationer may waive a preliminary hearing either through (1) a knowing and intelligent waiver or (2) a lack of cooperation with the proper authorities. See Annot., 36 L.Ed.2d 1077, § 7[a].

A preliminary hearing is legally unnecessary when the parolee or probationer properly admits to the hearing officer that he has violated the terms of his parole or probation. See I.C. § 20-229A; Annot., 36 L.Ed.2d 1077 § 7[c].

Additionally, if the basis for the revocation proceedings is criminal acts for which the parolee or probationer has been tried and convicted, then, as discussed *ante,* it has been held unnecessary to hold a preliminary hearing if proper notice has been given to the parolee or probationer. *In re Law,* supra; I.C. § 20-229; Annot., 36 L.Ed.2d 1077 § 7[d]. However, the courts are in disagreement on this point. See 36 L.Ed.2d 1077 § 7[d], p. 1091.

Finally, as another exception to the preliminary hearing requirement, it has been held that an absconding parolee or probationer is not entitled to a preliminary hearing during his absence from the jurisdiction to which he has been lawfully confined. Annot. 36 L.Ed.2d 1077 § 7[e]; accord, I.C. § 20-229. Accordingly, under the terms of the Uniform Act for Out-Of-State Parolee Supervision, a parolee *declared delinquent* is not entitled to have the receiving state provide a prompt preliminary hearing in connection with a revocation, absent a request from the sending state. *Marshall v. Smith,* 49 A.D.2d 808, 373 N.Y.S.2d 249 (1975); *People ex rel. Calloway v. Skinner,* supra. Compare, however, *People v. Vickers,* 8 Cal.3d 451, 105 Cal. Rptr. 305, 503 P.2d 1313 (1972), where it was held that once an absconded parolee or probationer is taken into custody, due process then requires that both the preliminary and final revocation hearings be held.

(d) *Upon a finding of probable cause that the parolee or probationer has violated his parole or probation, a continued detention until transportation to the sending state is arranged.*

This step in the revocation procedure is self explanatory, and "continued detention" was specifically sanctioned by the United States Supreme Court in *Morrissey v. Brewer.*

(e) *Upon arrival of officers of the sending state, a determination of their authority and that the parolee or probationer is the same person described in the revocation papers.*

The Compact very plainly provides the following:

> That duly accredited officers of a sending state may at all times enter a receiving state and there apprehend and retake any person on probation or parole. For that purpose no formalities will be required other than establishing the authority of the officers and the identity of the person to be retaken. I.C. § 20-301 (3).

This provision has been interpreted literally to mean what it says in *People v. ex rel. Rankin v. Ruthazer,* supra, and *Ogden v. Klundt,* supra. Both the *Ruthazer* court and the *Klundt* court held that when a sending state seeks the return of the alleged parole or probation violator it need only to be shown by the sending state that the parolee or probationer is the same person described in the relevant papers and that the officers of the sending state are authorized persons. Additionally, the court in the *Ogden v. Klundt* case held that the officers of the sending state demanding the return of a parolee under the Compact can establish their authority for such action either through direct testimony or through authenticated documents.

(f) *The holding of a final revocation hearing, after proper notice, within a reasonable time.*

If, at the conclusion of the preliminary revocation hearing, there is sufficient probable cause found to believe that a parolee or probationer has committed a parole or probation violation, there must also be an opportunity for a final hearing, if it is desired, by the parolee or probationer, prior to the final decision on revocation. In explaining the requirements of the final revocation hearing the court in *Morrissey v. Brewer,* supra, stated:

> There must also be an opportunity for a hearing if it is desired by the parolee prior to the final decision on revocation by the parole authority. The hearing must be the basis for more than determining probable cause; it must lead to a final evaluation of any contested relevant facts and consideration of whether the facts as determined warrant revocation. The parolee must have an opportunity to be heard and to show, if he can, that he did not violate the conditions, or if he did, that circumstances in mitigation suggest that the violation did not warrant revocation. The revocation hearing must be tendered within a reasonable time after the parolee is taken into custody. . . .
>
> . . . Our task is limited to deciding the minimum requirements of due process. They include (a) written notice of the claim to violations or

> parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a "neutral and detached" hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the fact finder as to the evidence relied upon and reasons for revoking parole. *We emphasize there is no thought to equate the second stage of parole revocation to a criminal prosecution in any sense.* It is a narrow inquiry; the process should be flexible enough to consider evidence including letters, affidavits, and other materials that would not be admissible in an adversary criminal trial. [Emphasis added.] *Morrissey v. Brewer,* supra, 33 L.Ed.2d 484, 498-499.

As with the preliminary revocation hearing, it is necessary that notice should be given of the final revocation hearing. See, *Rainwater v. State,* 127 Ga. App. 406, 193 S.E.2d 889 (1972); *Anderson v. Nelson,* 352 F. Supp. 1124 (D.C. Cal. 1972); *State v. Marlar,* 20 Ariz. App. 191, 511 P.2d 204 (1973); *People v. Vickers,* 8 Cal.3d 451, 105 Cal. Rptr. 305, 503 P.2d 1313 (1972).

Final revocation hearings, it has been held, are essentially administrative proceedings, not adversary proceedings, and they are not to be conducted like criminal trials. See, *People ex rel. Ayers v. Lombard,* supra. With respect to the relationship between the final revocation hearing requirement and the Uniform Act for Out-of-State Parolee Supervision, it has been held that unlike the preliminary hearing, due process does not require that the revocation hearing be held near the place of the arrest or violation, but the final hearing must be conducted within a reasonable time. *Morrissey v. Brewer,* supra; *In re Scott,* 32 Cal. App.3d 124. 108 Cal. Rptr. 49 (1973). Additionally, the Compact does not permit any assumption of power by a receiving state over a parolee's challenge to his parole revocation by the sending state; consequently the parolee must challenge his parole revocation in the sending state. *Marshall v. Smith,* 49 A.D.2d 808, 373 N.Y.S.2d 249 (1975) and *People ex rel. Crawford v. New York Parole Board,* 38 A.D.2d 725, 329 N.Y.S.2d 739 (1972). As a corollary principle, it has been held that the decision of the sending state to retake a parolee shall be conclusive upon and not reviewable by the receiving state; the courts of the sending state, exclusively, may determine whether parole has been violated. *Cook v. Kern,* 330 F.2d 1003 (W.D. Penn. 1949); *People ex rel. Marro v. Ruthazer,* 140 N.Y.S.2d 571 (1955); *People ex rel. Rankin v. Ruthazer* supra.

As with a preliminary hearing, there are exceptions to a final revocation hearing. See Annot., 36 L.Ed.2d 1077 §16. Logically, the exceptions to a final revocation hearing would encompass waiver, admission, and abscontion.

As to the evidentiary standards of the hearing itself, the United States Supreme Court unambiguously held that although a parole violation occurring in the receiving state makes it difficult to produce live witnesses at the sending state's revocation hearing, problems of proof are obviated by resort to affidavits, depositions and documentary evidence; such types of evidence serving as conventional substitutes for live witnesses. *Gagnon v. Scarpell,* supra; accord *Marshall v. Smith* supra. Not surprisingly, courts, faced with evidentiary issues created due to the impractical burden of providing a parolee or probationer a final revocation hearing in a state wherein the violation may not have occurred,

have held that hearsay evidence is admissible in parole violation hearings, including letters, affidavits and other material which would not be admissible at a criminal trial. *People ex rel. Ayers v. Lombard,* supra.

AUTHORITIES CONSIDERED:

1. *Gagnon v. Scarpelli,* 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed. 656 (1973).
2. *Morrissey v. Brewer,* 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972).
3. *Seward v. Heinze,* 262 F.2d 42 (C.A.9 1958).
4. *United States ex rel. MacBlain v. Burke,* 200 F.2d 616 (CA.3 1952).
5. *Cook v. Kern,* 330 F.2d 1003 (W.D.Penn. 1949).
6. *Anderson v. Nelson,* 352 F. Supp. 1124 (D.C.Cal. 1972).
7. *Stens v. Ashe,* 86 F. Supp. 317 (W.D. Penn. 1949).
8. *State v. Marlar,* 20 Ariz. App. 191, 511 P.2d 204 (1973).
9. *Re Dunham,* 127 Cal. Rptr. 343, 545 P.2d 255, 76 A.L.R.3d 571 (1976).
10. *Re Valrie,* 115 Cal. Rptr. 340, 524 P.2d 812 (1974).
11. *Re Frias,* 34 Cal.3d 88, 109 Cal. Rptr. 749 (1973).
12. *In re Law,* 109 Cal. Rptr. 573, 513 P.2d 621 (1973).
13. *In re Scott,* 32 Cal.App.3d 124, 108 Cal. Rptr. 49 (1973).
14. *People v. Vickers,* 8 Cal.3d 451, 105 Cal. Rptr. 305, 503 P.2d 1313 (1972).
15. *Ex parte Tenner,* 20 Cal.2d 670, 128 P.2d 338 (1942).
16. *Rainwater v. State,* 127 Ga.App. 406, 193 S.E.2d 889 (1972).
17. *White v. White,* 94 Idaho 26, 480 P.2d 872 (1971).
18. *Ex parte France,* 38 Idaho 627, 224 P. 433 (1924).
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21. *Marshall v. Smith,* 49 A.D.2d 808, 373 N.Y.S.2d 249 (1975).
22. *People ex rel. Calloway v. Skinner,* 33 N.Y.2d 23, 300 N.E.2d 716 (1973).
23. *People ex rel. Crawford v. New York State Parole Board,* 38 A.D.2d 725, 329 N.Y.S.2d 739 (1972).
24. *People ex rel. Cordero v. Thomas,* 69 Misc.2d 28, 329 N.Y.S.2d 131 (1972).

25. *Hardy v. Warden,* 56 Misc.2d 332, 288 N.Y.S.2d 541 (1968).

26. *LeClaire v. Oswald,* 21 A.D.2d 17, 247 N.Y.S.2d 101 (1964).

27. *People ex rel. Marro v. Ruthazer,* 140 N.Y.S.2d 571 (1955).

28. *People ex rel Rankin v. Ruthazer,* 304 N.Y. 302, 107 N.E.2d 458 (1952).

29. *Commonwealth v. Kaminsky,* 206 Pa. Super. 480, 214 A.2d 251 (1966).

30. *Ex parte Chambers,* 525 S.W.2d 191 (Tex. Crim. 1975).

31. *Ex parte Womack,* 455 S.W.2d 288 (Tex. Cr. App. 1970).

32. *Ex parte Cantrell,* 172 Tex. Crim. 646, 362 S.W.2d 115 (1962).

33. *Odgen v. Klundt,* 15 Wash. App. 475, 550 P.2d 36 (1976).

34. *Pierce v. Smith,* 31 Wash.2d 52, 195 P.2d 112 (1948).

35. United States Constitution, Art. I, §10.

36. United States Constitution, Art. IV, §2.

37. 4 U.S.C.A. §112.

38. 18 U.S.C.A. §420.

39. 18 U.S.C.A. § 3182.

40. Idaho Constitution, Art. I, §6.

41. Idaho Constitution, Art. II, §1.

42. *Idaho Code,* §§ 9-101 (2) & (3), 19-2601, 19-2602, 19-2905, 19-2906, 19-4201, 19-4218, 20-219, 20-227, 20-229, 20-229A, 20-301, 20-302.

43. Rule 5.1, I.C.R.

44. Rule 33 (e), I.C.R.

45. Rule 46, I.C.R.

46. *Annot.,* 36 L.Ed.2d 1077.

47. 21 Am. Jur. 2d, *Criminal Law,* §562.

DATED this 22nd day of December, 1980.

ATTORNEY GENERAL
State of Idaho
/s/ DAVID H. LEROY

ANALYSIS BY:

MICHAEL B. KENNEDY
Deputy Attorney General
Chief, Criminal Justice Division

MBK/lm

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ATTORNEY GENERAL OPINION NO. 80-30

TO: Milton G. Klein
Director
State of Idaho Department of Health and Welfare
Statehouse Mail

Per Request for Attorney General's Opinion

QUESTION PRESENTED:

Should Attorney General's Opinion No. 80-24, dated May 2, 1980, be updated and superseded as a result of the recent United States Supreme Court decision holding the Hyde Amendment's limitation for Medicaid funding of abortions constitutional, and, if so, what is the impact on the Idaho Medicaid State Plan (which imposes the same limitations on funding for abortion procedures as did the Hyde Amendment)?

CONCLUSION:

As a result of the recent United States Supreme Court decision holding the Hyde Amendment's limitation for Medicaid funding of abortions constitutional, the previous Attorney General's Opinion No. 80-14, dated May 2, 1980, is hereby updated and superseded. The Idaho Medicaid State Plan, (effective September 19, 1980) which imposes the same limitations on funding for abortion procedures as did the Hyde Amendment, is in compliance with Idaho law and the Supreme Court decision.

ANALYSIS:

Title XIX of the Social Security Act established the Medicaid program in 1965 to provide federal assistance to states that choose to reimburse certain costs of medical treatment for needy persons. This program is a joint federal-state venture which is to provide for at least some of the costs of assistance for eligible recipients where the state plan approved by the Secretary of Health and Human Services (formerly Health, Education and Welfare) describes those procedures which are found to be medically necessary.

Title XIX does not describe in detail which medical services will receive financial support. However, certain services are required. 42 U.S.C. Section 1396 (d) (a). One area of required services is found at Section 1396 (d) (a) (5),

Physician's Services. Thereunder, medical assistance will be provided for physicians' services as defined in Section 1395 (x) (r) (1) and Section 1396 (d) (e). These sections provide that assistance is available for those services performed by, *inter alia* a doctor of medicine legally authorized to practice medicine within the authorized scope of medical practice. Abortion procedures are authorized to be within the scope of medical practice. *Roe v. Wade,* 410 U.S. 113; Idaho Code Section 18-608. While neither the code section, nor *Roe v. Wade,* nor its progeny, require or permit abortions on demand, collectively they do stand for the authority that abortion services are within the scope of authorized medical practice.

However, since September, 1976, Congress has prohibited — either by an amendment to the annual appropriations bill for the Department of Health, Education and Welfare or by a joint resolution — the use of any federal funds to reimburse the cost of abortions under the Medicaid program except under certain specified circumstances. This funding restriction is commonly known as the "Hyde Amendment," after its original congressional sponsor, Representative Hyde. The present version of the Hyde Amendment, applicable to fiscal year 1980, provides:

> None of the funds provided by this joint resolution shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest when such rape or incest has been reported promptly to a law enforcement agency or public health service. PUB. L. NO. 96-123, Section 109, 93 STAT. 926. SC. PUB. L. NO. 96-86, Section 118, 93 STAT. 662.

Two suits were filed in the U.S. District Court for the District of New York challenging the constitutionality of those funding restrictions for abortion procedures. These suits were consolidated. *McRae v. Secretary HEW,* Civ. No. 76-C-1804; and *New York City Health and Hospital Corp. v. Secretary, HEW,* Civ. No. 76-C-1805.

The District Court found the Hyde Amendment's limiting the use of federal funds for abortions to be unconstitutional "as applied to abortions that are necessary in the professional judgement of the pregnant woman's attending physician exercised in the light of all factors, physical, emotional, psychological, familial, and the woman's age, relevant to the health-related well-being of the pregnant woman."

On January 15, 1980, the date the district court entered its orders in the two cases, it granted a 30 day stay of those orders pending appeal. On February 4th, the United States moved for an extension of the stay order, which was denied. The United States then petitioned to the United States Supreme Court for an order extending the stay order pending appeal. The Supreme Court, on February 19, 1980, denied the petition. As a result of that denial, the district court's judgment became effective on that date. The Supreme Court's denial of the motion for an extension of the stay of the district court's judgment had the effect, not of validating the judgment, but of permitting the district court's judgment to take effect immediately.

Therefore, per request, Attorney General's Opinion No. 80-14, dated May 2, 1980, was issued wherein it was recommended that the Idaho State Medicaid Plan should be amended. The plan at that time required the recommendation of

two physicians that an abortion was necessary to save the life of the mother or that the mother would suffer severe and long lasting physical health damage if the fetus were carried to term; and that in the case of rape or incest the incident is promptly reported to a law enforcement agency or public health agency and the pregnancy is a result of rape or incest as determined by the courts. That earlier Attorney General's Opinion recommended the portion of the Idaho state plan which required recommendation that the mother would suffer long lasting *physical* health damage if the fetus were carried to term should be amended to conform with the then-in-effect district court rulings which required all other factors determining medical necessity to be taken into account as well. Such factors included the woman's age, emotional, psychological, familial, and other factors relevant to the general health-related well-being of the pregnant woman.

Relying on that Attorney General's Opinion the Idaho Department of Health and Welfare amended the state plan to cover all medically necessary abortions if two physicians recommended that such abortion was needed.

Meanwhile the appeal of the New York District Court decision was heard before the United States Supreme Court and on June 30, 1980, the Supreme Court entered its decision in *Harris v. McRae,* No. 79-1268, ____ U.S. ____, 100 S. CT. 2671. The ruling of the United States Supreme Court reversed the ruling of the district court below and, although the State of Idaho was not a party in either case, the court's order has a direct and immediate effect on this state. The operable and pertinent parts of the Supreme Court ruling are as follows:

> 1. The funding restrictions of the Hyde Amendment do not impinge on the "liberty" protected by the due process clause of the 5th Amendment.
>
> 2. Nor does the Hyde Amendment violate the establishment clause of the 1st Amendment.
>
> 3. Appellants lacked standing to raise a challenge to the Hyde Amendment under the free exercise clause of the 1st Amendment.
>
> 4. The Hyde Amendment does not violate the equal protection component of the due process clause of the 5th Amendment.
>
> 5. Title XIX does not require a participating state to pay for those medically necessary abortions for which federal reimbursement is unavailable under the Hyde Amendment.

As a result of the Supreme Court's overruling of the earlier interim effects of the district court decision in *McRae* and the upholding of the Hyde Amendment as constitutional, the Idaho Department of Health and Welfare, on September 19, 1980, did again amend its Idaho State Medicaid Plan to conform to the current version of the Hyde Amendment applicable for fiscal year 1980.

The present Idaho state plan provides that payment for abortion and abortion related services is limited to those abortions and abortion related services that have the recommendation of two (2) consulting physicians that an abortion is necessary to save the life of the mother; or that in the case of rape or incest, the incident is reported promptly to a law enforcement agency or public health agency and the pregnancy is a result of rape or incest as determined by the courts.

A relevant state statute, Idaho Code Section 56-209 (c) provides in part as follows:

> No funds available to the Department of Health and Welfare, by appropriation or otherwise, shall be used to pay for abortions, unless it is the recommendation of two (2) consulting physicians that an abortion is necessary to save the life or health of the mother, or unless the pregnancy is a result of rape or incest as determined by the courts.

The above quoted statute states that medically necessary abortions may be paid for out of public funds only where the mother's life *or* health is endangered and is therefore broader than the current Hyde Amendment language or the present Idaho State Medicaid Plan. The Idaho statute sets an outside limit for state funding of abortions but does not prevent the State of Idaho from establishing more limited standards to conform with federal legislation such as the Hyde Amendment and the directives of the Department of Health and Human Services.

Idaho Code §56-209 (b) provides as follows:

> Medical assistance shall be awarded to persons who are recipients of Old Age Assistance, Aid to Dependent Children, Aid to the Blind, Aid to the Disabled, to such persons as mandated by Title XIX of the Social Security Act, and other persons not required to be awarded medical assistance as mandated by Title XIX of the Social Security Act when such award is to the fiscal advantage of the State of Idaho.

This statutory language, when read together with *Idaho Code* §56-209 (c) above, demonstrates the legislative intent to provide medical assistance as mandated by the Federal Medicaid program. The present Federal Medicaid program, which includes the Hyde Amendment provisions, limits the use of Medicaid funds for abortions to those where the life of the mother would be endangered if the fetus were carried to term or for the victims of rape or incest when such rape or incest has been reported promptly to a law enforcement agency or public health service. The present state plan is consistent with the Federal Medicaid program in this respect.

As stated by the United States Supreme Court in *McRae* supra, Page 2684:

> Since the Congress that enacted Title XIX did not intend a participating State to assume a unilateral funding obligation for any health service in an approved Medicaid plan, it follows that Title XIX does not require a participating State to include in its plan any services for which a subsequent Congress has withheld federal funding. Title XIX was designed as a cooperative program of shared financial responsibility, not as a device for the federal government to compel a State to provide services that Congress itself is unwilling to fund. Thus, if Congress chooses to withdraw federal funding for a particular service, a State is not obliged to continue to pay for that service as a condition of continued federal financial support of other services.

Therefore, we must conclude that the presently existing Idaho Medicaid State Plan, as amended to conform with the Hyde Amendment, is in compliance with Idaho law and the recent ruling of the United States Supreme Court in the case of *Harris v. McRae* supra.

AUTHORITIES CONSIDERED:

Idaho Statutes

Idaho Code § 18-608.
Idaho Code § 56-2096.
Idaho Code § 56-209c.

United States Statutes

42 U.S.C. § 1395x (r) (l).
42 U.S.C. § 1396.
42 U.S.C. § 1396d (a).
42 U.S.C. § 1396d (a) (5).
42 U.S.C. § 1396d (e).

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1. *Harris v. McRae,* No. 79-1268, ____ U.S. ____, 100 S.Ct. 2671.

2. *McRae v. Secretary, HEW,* Civ. No. 76-C-1804.

3. *New York City Health & Hospital Corp. v. Secretary HEW,* Civ. No. 76-C-1805.

4. *Roe v. Wade,* 410 U.S. 113.

DATED this 31st day of December, 1980.

ATTORNEY GENERAL
State of Idaho
/s/ DAVID H. LEROY

ANALYSIS BY:

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ATTORNEY GENERAL'S SELECTED LEGAL GUIDELINES FOR THE YEAR 1980

David H. Leroy
Attorney General

January 17, 1980

Mr. John O. Cossel
Shoshone County Prosecutor
Shoshone County Courthouse
Wallace, Idaho 83873

Control #1905

Re: Legal guidelines in reference to jurisdiction obtained pursuant to I.C. §16-1803

Dear Mr. Cossel:

This letter is in response to the question you have asked this office concerning whether juvenile proceedings can be commenced in the county that is the situs of the unlawful conduct.

After research, it is my opinion that jurisdiction of proceedings under the authority of the Youth Rehabilitation Act is only vested in (1) the county where the juvenile resides or (2) the county where the juvenile is physically present at the time a petition is filed, and the county in which the unlawful act(s) occurred does not have jurisdiction under the YRA unless the preceding factors of (1) or (2) are simultaneously present.

The relevant parts of Idaho's statute granting jurisdiction in juvenile proceedings are quoted as follows:

> 16-1803. Jurisdiction. — . . . the court shall have exclusive, original jurisdiction over any child . . . *found or living within the county.* . . .

Additionally, Rule 16 of the Idaho Juvenile Rules (IJR) provides that the scope and duration of jurisdiction over a child under the YRA shall be as set forth in Chapter 18 of Title 16 of the Idaho Code. Rule 54, ICR, is in complete harmony with Rule 16, IJR, when it provides that Idaho's criminal rules are not applicable to "juveniles under the Youth Rehabilitation Act." Accordingly, it would be accurate to say that proceedings under the YRA are quasi-civil in nature, not criminal proceedings, and that the Idaho Rules of Civil Procedure govern to the extent that the said rules are not inconsistent with the Idaho Juvenile Rules or Chapter 18 of Title 16, Idaho Code. Rule 28, IJR.

Since §16-1803 appears to be the only body of law, statutory or otherwise, addressed to the issue of jurisdiction in juvenile proceedings, and since there are no Idaho Supreme Court decisions interpreting the jurisdictional grant under §16-1803, precedential analysis must be obtained through examining comparative legislation and relevant case law from other states.

A jurisdiction with exemplary law on this issue is California. In 1929, California in *Ex parte Edwards,* 99 Cal.App. 541, 278 Pac. 910, ruled that ". . . in order that the juvenile court of a given county have jurisdiction over a minor, it is necessary either that *the minor be or reside within such county* (section 3, Juvenile Court Law, St. 1915, p.1225); [and where] . . . it appears that *at the time the petition was filed* therein the minor was neither a resident of nor within the county [where proceedings were commenced], the juvenile court of that county was without jurisdiction in the premises." [Emphasis added.]

The *Edwards* decision was followed by the case of *Ex parte Lukasik,* 105 Cal.2d 145, 232 P.2d 520 (1951), wherein the California court held that a county juvenile court had no jurisdiction over juveniles that were not within such county when they were taken into custody and did not reside in such county.

From those two decisions, it was clear that the California Supreme Court and the California legislature apparently deemed it necessary that venue in juvenile proceedings must be specifically granted. Thus, in 1961, and again in 1976, the California legislature amended the applicable statute granting juvenile jurisdiction to allow for the commencement of juvenile proceedings in the county wherein the unlawful act(s) occurred. Accordingly, in California venue is presently granted through §651 of the *California Code,* which reads as follows:

> §651. Venue. Either the juvenile court in the county in which a minor resides or in the county where the minor is found or in the county in which the acts take place or the circumstances exist which are alleged to bring such minor within the provisions of * * * Section 601 or 602, is the proper court to commence proceedings under this chapter.

Colorado is another state with interpretive litigation in this area. The Colorado Supreme Court, in *In re People in Interest of LTN,* 510 P.2d 476 (Colo.Ct.App. 1973), affirmed a lower court's ruling on jurisdiction in juvenile proceedings by interpreting a Colorado statute (with language similar to Idaho's) granting jurisdiction "in the county where the child resides or is present." The following language from the *LTN* case at p.478 is illuminating on the issue of when the juvenile must be present for jurisdiction to attach:

> The third error asserted by respondent is that venue in Morgan County was improper. 1969 Perm.Supp., C.R.S. 1963, 22-1-5 (1), provides that *proceedings shall be commenced in the county where the child resides or is present.* In the instant case *the child was present* in Morgan County on June 23, 1979, *the date the petition was filed;* thus, the action was properly commenced in Morgan County and jurisdiction attached. [Emphasis added.]

Another state with case law in this area is Washington. The state of Washington, since 1977, has had a statute similar to Idaho's with respect to residency requirements only, says nothing about the physical presence ("found in" requirement of Idaho's) of the child, and, like California, provides that the proceedings may be commenced in the county that is the situs of the unlawful conduct.

> 13.40.060 Jurisdiction of Proceedings — Transfer of Case and Records, When — Change in Venue, Grounds. (1) Proceedings under this chapter shall be *commenced in the county where the juvenile resides.* However, proceedings may be commenced in the county where an element of the alleged criminal offense occurred if so requested by the juvenile or by the prosecuting attorney of the county where the incident occurred. [Emphasis added.] *Rev. Code of Washington.*

Although the above section of Washington law allows jurisdiction according to the juvenile's residence or the situs of the unlawful conduct, it was not always so. It appears from relevant Washington case law that prior to 1977, Washington had a jurisdictional requirement that the juvenile be "within the county."

Although this is no longer Washington law, the Washington cases interpreting the phrase "within the county" provide valuable judicial analysis of that terminology, which is identical to Idaho's terminology in §16-1803.

The Washington case of *In re Gibson,* 4 Wash. 372, 483 P.2d 131 (1971), defined the phrase "within the county," as used in the section of Washington law granting jurisdiction to juvenile courts, as meaning the physical presence of the child in the county where the petition is filed. The court in the *Gibson* case provided the following valuable quote in its interpretation of language similar to that used in Idaho's §16-1803:

In explaining its ruling on jurisdiction the trial court stated:

> RCW 13.04.060 provides as follows:
>
> Any person may file with the clerk of the superior court a petition showing that there *is within the county or residing within the county,* a dependent or delinquent child and praying that the superior court deal with such child as provided in this chapter: * * *" It is my opinion that since *the youngsters were physically within Pierce County,* the Pierce County juvenile court did have jurisdiction of the youngsters. It is my opinion that this provision was designed to cover instances in which a youngster may physically be in one county and whose parents may physically reside in another county, and the county in which the child is present does have jurisdiction to entertain a petition to deal with that child. It is obvious from the language of the statute that this is a result that was intended or the legislature would not have used this explicit language. We accept and adopt this rationale as a correct statement of law. [Emphasis added.] *In re Gibson,* at 132.

Subsequently, the Washington courts followed the reasoning in *Gibson,* and in *Moore v. Burdman,* 84 Wash.2d 408, 526 P.2d 893 (1974), again interpreted the phrase "within the county," for purposes of juvenile court jurisdiction, to mean when a child is physically within the county.

Other comparative legislation from neighboring states makes it clear that the jurisdiction/venue of juvenile proceedings must be specifically granted, and the fact that unlawful conduct occurred in a given county is only jurisdictionally relevant when specifically made so by statute. The following state statutes are illustrative of the principle enunciated immediately *ante:*

> 78-3a-24. Venue of Children's Cases — . . . . — Proceedings in children's cases shall be commenced in the court of the district in which the child is *living or is found, or in which an alleged violation of law or ordinance occurred.* [Emphasis added.] *Utah Code Annot.*
>
> 41-5-204. Venue and Transfer. (1) The *county where a youth is a resident* has initial jurisdiction over any youth alleged to be a delinquent youth, a youth in need of supervision, or a youth in need of care. The youth court of that county shall assume the initial handling of the case. Transfers of venue may be made to any of the following counties in the state:
>
> (a) The *county in which the youth is apprehended or found;*
>
> (b) The *county in which the youth is alleged to have violated the law;*
>
> (c) The county of residence of the youth's parents or guardian. *Mont. Code Annot.*

62.040. Exclusive Original Jurisdiction of Court. 1. Except as otherwise provided in this chapter, the court has exclusive original jurisdiction in proceedings:

(a) Concerning *any child living or found within the county* who is neglected because: * * * *

(b) Concerning *any child living or found within the county* who is in need of supervision because he: * * *

(c) Concerning *any child living or found within the county* who has committed a delinquent act. A child commits a delinquent act if he: [Emphasis added] *Nev. Rev. Stat.* (There appeared to be no Nevada decisions interpreting its language which is identical to Idaho's language.)

§14-6-204. Venue; Change of Venue or Judge. Proceedings under this act may be *commenced in the county where the child is living or is present when the proceedings are commenced or in the county where the alleged delinquent act* or the misconduct showing the child to be in need of supervision occurred. Change of venue or change of judge may be had under the circumstances and upon the terms and conditions provided by law in a civil action in a district court. *Wyo. Stat. Annot.*

In conclusion, in the absence of a decision from the Idaho Supreme Court on this issue, and based upon the comparable legislation and relevant case law of other states, it is my opinion that the magistrate court of any given county has no jurisdiction over juveniles, under the authority of the YRA, who are not (1) residents of, or (2) physically present within that county at the time a juvenile proceeding is commenced.

THIS IS NOT AN OFFICIAL ATTORNEY GENERAL OPINION, AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE.

Sincerely yours,
/s/ Michael B. Kennedy
Deputy Attorney General
Chief, Criminal Justice Division

MBK:lb

January 22, 1980

The Honorable Arthur Manley
Idaho State Senate
Statehouse
Boise, ID 83720

THIS IS NOT AN OFFICIAL ATTORNEY GENERAL'S OPINION AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE.

Dear Senator Manley:

This office is in receipt of your letter dated January 14, 1980 seeking legal guidance relative to the question of whether certain actions taken by the State

Board of Health and Welfare relative to the dissolved oxygen content water quality standard subjects the standard to legislative review during the current session of the legislature.

A review of the minutes of the Idaho Board of Health and Welfare regarding the pertinent standard shows that on June 28, 1973 a rule of general applicability relating to dissolved oxygen standards was adopted by the Board of Environmental and Community Services, the predecessor to the current Board of Health and Welfare. On January 9, 1980, the Idaho Board of Health and Welfare readopted the previous Rule, Section 7B, Rules and Regulations for Waste Water Treatment Requirements, as Section 1-2250.04 (a) Water Quality Standards and Wastewater Treatment Requirements. Although the action of the Board on January 9th did not change the substantive effect of the previous rule (the standard of 6 milligrams of dissolved oxygen per liter of water remains the same) the old rule was renumbered and major concept wording changes in the rule itself were made. Accordingly, it is our opinion that there was an amendment and repromulgation of the rule as found in the provisions of Section 67-5201, *Idaho Code* relating to the amendment and repromulgation of administrative rules. Such an amendment and repromulgation makes the rule the subject of review and potential modification by the 1980 Legislature pursuant to Sections 67-5217 & 67-5218.

The question of what rules the Legislature may review and, by concurrent resolution, amend, modify or reject has been the subject of both a recent opinion of the District Court of the Fourth Judicial District and a previously issued formal opinion of the Attorney General. In the case of *American Falls Reservoir District and Idaho Power Co. v. Idaho Board of Health and Welfare,* Fourth District Case No. 68126, Judge Gerald F. Schroeder ruled that the Legislature, pursuant to Section 67-5218, *Idaho Code* could, by concurrent resolution, reject, amend or modify only those administrative agency rules and regulations promulgated since the first day of the preceding legislature:

> From a reading of Idaho Code § 67-5217 and § 67-5218 it does not appear that they were intended to authorize the legislature to conduct a general review of agency rules, but rather to authorize review of those rules that were authorized or promulgated since the first day of the preceding legislature. Memorandum Opinion, Page 4, Lines 18-23.

Formal Attorney General Opinion 78-12 reached the same conclusion as did the Court in the above referenced case. Although the question was not reached in the Court's opinion, this office in Opinion 78-12 did opine that agency rules which could no longer be amended, modified or rejected by concurrent resolution could still and always be amended, modified or rejected *in bill form* during any legislative session.

In its opinion, the court in *American Falls* discussed the two Idaho Code Sections relevant to legislative review of administrative Rules; Idaho Code §§ 67-5217 & 67-5218. Obviously, the court relied upon the following language found in Section 67-5217 as the basis for its ruling that only the rules promulgated before the first day of the regular session next following their promulgation or publication could be amended, modified or rejected by concurrent resolution. "All rules . . . authorized or promulgated . . . before the first day of the regular session of the legislature next following the promulgation or publication thereof." Although not discussed by the court, there is another portion of Section

67-5217 that is, in our opinion, relevant to the question at hand. "All rules promulgated . . . between the first day of the session and adjournment sine die thereof." That language, found in the same section as the language discussed by the court, defines the classes of administrative rules that are to be transmitted to the legislature for action pursuant to Section 67-5218.

All portions of an act or sections of an act are to be read together in one harmonious whole according to the universally accepted rule of statutory construction known as the Whole Statute Rule:

> A statue is passed as a whole and not in parts or sections and is animated by one general purpose and intent. Consequently, *each part or section should be construed in connection with every other part or section so as to produce a harmonious whole.* Thus, it is not proper to confine interpretation to the one section to be construed. [Emphasis added.] Sands, *Sutherland Statutory Construction,* § 46.05 (1973).

Accordingly, it is our opinion that, when the above rule is applied to Section 67-5217, the part that provides that "all rules promulgated . . . between the first day of the session and adjournment sine die thereof" is to be read in conjunction with the section providing that "all rules . . . authorized or promulgated before the first day of the regular session of the legislature next following the promulgation or publication thereof." Consequently, both classes of rules as defined in Section 67-5217 would be subject to the provisions of Section 67-5218 *Idaho Code,* which allows the legislature, by concurrent resolution to amend, modify or reject such rules.

As a result, the amendment and repromulgation of the dissolved oxygen content water quality rule by the Board of Health and Welfare on January 9, 1980 does, in our opinion, subject the rule to the legislative review process during the current legislative session provided that it is transmitted by the Board to the State Law Librarian, who then in turn transmits it to the Legislature pursuant to Idaho Code § 67-5217.

Finally, note should be made of the applicable time period within which the Legislature must take affirmative action on rules transmitted to it per the provision of Section 67-5217. Section 67-5217 provides that the Secretary of the Senate and the Chief Clerk of the House are to lay all rules transmitted before the respective bodies and "the same shall be referred to the respective standing committees in the same manner as bills are referred to the committees." Section 67-5218 further provides that by the 45th day following transmission by the law librarian of such rules, the standing committee to which it is referred is to prepare a report to the membership of the appropriate body concerning findings and recommendations relative to the rules. Section 67-5218 further provides that "if a committee does not report by the 45th day following transmission or prior to adjournment sine die and the adjournment is more than 21 days but less than 45 days following transmission, such failure to report shall constitute legislative approval of the rules as submitted, except that no legislative approval shall be presumed if the legislature adjourns within the 20 days of the transmission."

If you have any further questions on this or any other matter, please feel free to contact me at your convenience.

Sincerely,
/s/ ROY L. EIGUREN
Deputy Attorney General
Division Chief — Administrative/
Legislative Affairs

RLE/tr

January 22, 1980

The Honorable Morgan Munger
The Honorable Harold W. Reid
State Representatives
Statehouse Mail

Dear Representatives Munger and Reid:

The question you have posed, through Chief Deputy Harvey of this office, is whether, and under what circumstances, cities and other local governmental entities may charge user fees in order to mitigate reliance upon ad valorem taxation.

Basically, there are three types of fees or user charges which various local governmental entities may utilize. These are:

1. *Utility Service fees.*

Practically all entities which have authority to provide proprietary services (water, sewer, electricity) are authorized by statute to charge reasonable fees for such services. Such rates and fees may be established at the sound discretion of the governing body, are not subject to regulation by the Idaho Public Utilities Commission, and may be challenged in court by a user or taxpayer only if they are clearly unreasonable, or unreasonably discriminatory. *Kiefer v. City of Idaho Falls,* 49 Idaho 458, 289 P. 81 (1930).

Although there are few cases in Idaho on municipal rate-making, the general rule seems to be that rates may be sufficiently high to make the utility service self-sustaining (*Kiefer,* supra), and most cases elsewhere hold that this means that other functions of a city can be reimbursed by the utility function for services provided by the other city functions — i.e., management, billing, use of street equipment, etc. Generally, there is no law against making a profit from the utility function, as long as the rates aren't unreasonable.

Sewer districts are specifically authorized to charge rates, tolls, and charges for sewer services (Idaho Code § 42-3213), which may support all costs of operating the system. This is generally interpreted as including costs of management and administration. However, the inclusion in the fee schedule of charges to establish funds for expansion of the system may be questionable (Idaho Code § 42-3217 contemplates the use of taxes for such purpose), but this question has not been addressed by the Idaho Supreme Court.

2. *Licenses and Regulatory Fees.*

Cities and counties have direct authorization under the Idaho Constitution (art. 12, § 2) to charge regulatory fees under the police power. *State v. Nelson,* 36 Idaho 713; *Foster's, Inc. v. Boise City,* 63 Idaho 201. See also Idaho Code § 50-307 (licensing of businesses).

However, police power regulatory fees may not be used solely or primarily as a revenue-raising device, and must be used primarily for regulation, not revenue. Such regulatory fees must bear a reasonable relationship to the cost of providing the regulatory service. *State v. Nelson,* supra; *Foster's, Inc. v. Boise City,* supra. There appears to be no legal impediment to making each such regulatory function (such as building inspection) self-supporting to the extent that regulatory fees can be charged. This would permit general ad valorem tax revenues to be devoted to other general functions. See Attorney General Opinion No. 79-14 (June 15, 1979), a copy of which is attached, for an extended discussion of regulatory fees.

The power to charge regulatory fees under art. 12, § 2, Idaho Const., is probably limited to cities and counties. Legislative authorization to charge such fees would probably be required for other entities. However, this may not be constitutionally viable for other entities, since, generally, only cities and counties have the power to exercise regulatory police powers in the first place.

3. *Other User Fees.*

As a general statement, fees for other than police-power regulatory functions must be authorized by the legislature. In the case of utility charges, this authority has generally already been granted (see above). In addition, some cities and counties charge user fees for certain proprietary activities (parks, recreation) under the theory that the legislative grant of power to conduct such functions contains the implied power to charge for it. However, I find no Idaho cases on this last point, and legislative authorization to impose such charges would be useful.

4. *Enforcement of fees.*

In the case of utility charges, services may, subject to due process requirements, be withheld or terminated for failure to pay required charges, and in some instances a lien against the property served may be imposed for failure to pay (see, for instance, Idaho Code § 42-3213 (1), allowing sewer districts to impose liens for unpaid assessments).

Enforcement of regulatory fees and licenses may be enforced by withholding the license or permit and by criminal sanctions, enacted by ordinance, for operating without such permit or license.

I find no sanctions authorized by state law for non-compliance with other types of fees. Some sanctions could probably be imposed by ordinance by cities and counties, but any legislation authorizing additional fees and charges by any local governmental entity should also include provision for sanctions or enforcement by lien or otherwise.

Sincerely,
MICHAEL C. MOORE
Deputy Attorney General
Chief, Local Government Division

MCM/dm
Encl.

February 1, 1980

The Honorable Jack C. Kennevick
State Representative
District 18
Statehouse Mail

THIS IS NOT AN OFFICIAL OPINION OF THE ATTORNEY GENERAL, AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE.

Dear Representative Kennevick:

You have requested legal guidance from this office on three questions relating to specially-chartered school districts in Idaho. (1) Can the legislature repeal the special charter of such a school district and require that it operate henceforth under the general laws of the state governing common school districts? (2) Are the provisions of the 1% initiative and the budget freeze contained in last year's H.B. 166 and H.B. 306 applicable to specially-chartered school districts? (3) If a specially-chartered school district were to avail itself of the general law provisions contained in last year's H.B. 306, would this effect a revocation or forfeiture of the special charter?

We have done extensive research on each of these questions, and we have requested comments and additional research on the repeal issue from attorneys for two of the specially-chartered districts, Boise and Lewiston. Those attorneys have not yet had an opportunity to reply fully to these questions. With the understanding that we are awaiting these additional comments, and that we wish to reserve the right to comment further in light of any opinions to the contrary which we may receive from the school districts' attorneys, *our tentative conclusions are:*

(1) The legislature most likely has the authority, by special act referring specifically to the individual charter involved, to repeal such charter and to require such district to operate under the general school laws, with or without the consent of the district's governing body or electors. However, this power is subject to certain limitations, discussed below.

(2) Although there are some authorities and indications from earlier cases to the contrary, it appears more likely than not that the 1% initiative and the subsequent tax freeze legislation, being an expression of statewide policy and concern, do apply to specially-chartered school districts without the necessity of amending each individual charter.

(3) Even if the 1% legislation does not apply to specially-chartered districts, a district choosing to avail itself of the general override provisions contained therein would most likely not, merely by so doing, cause a forfeiture of its special charter.

It is a general rule of law that legislatively-granted special charters may be amended or repealed by the legislature. 2 McQuillin, *Municipal Corporations,* §§ 4.05, 9.24. The Idaho Constitution expressly recognizes and permits the

continuation of such charters (art. 11, §§ 2 and 3; art. 21, § 2), until altered, revoked, or annulled by the legislature. (This assumes that such charters were "revocable" by the territorial legislature prior to statehood. Art. 11, § 3, Idaho Const. We find no indication that such charters were not revocable.) Idaho Supreme Court decisions have consistently held that special charters may be amended by the legislature without voter approval. There is some doubt as to whether a special *city* charter can be repealed without approval of the electors under the express provisions of art. 12, § 1, Idaho Const., but we do not view this clause as applying to charters of school districts. In short, we view it as likely, although not completely certain, that a special charter of a school district may be repealed by the legislature.

However, such repeal is subject to some important limitations. First, repeal may not be accomplished in such a way as to impair existing contractual rights of other persons. Secondly, there is some authority for the view that the legislature cannot destroy a political subdivision altogether [*McDonald v. Doust,* 11 Idaho 14, 81 P. 60 (1905) (holding that an existing county could not be abolished altogether)]. Therefore, any repealing act should expressly provide that the district shall become organized under the general laws, that it shall be the successor corporation to the specially-chartered district, etc. Thirdly, the Idaho Supreme Court has consistently held that special charters may be amended only by a special law referring specifically to the special charter. *Common School Dist. No. 2 v. Dist. No. 1,* 71 Idaho 192, 227 P.2d 947 (1951); *Bagley v. Gilbert,* 63 Idaho 494, 122 P.2d 227 (1942); *Wiggin v. City of Lewiston,* 8 Idaho 527, 69 P. 286 (1902). We view it as likely that a repeal could be accomplished only in the same manner; i.e., by special act referring specifically to the charter which is being repealed.

The second question concerns the applicability of the 1% and tax freeze legislation. It is a general rule of law that general legislation dealing with matters which are primarily of local rather than statewide concern do not apply to specially-chartered entities, to the extent that the general-law provisions conflict with the provisions of a special charter. However, it is also well-established that, when the legislature declares a matter to be of general state concern and declares a public policy with respect thereto, such general state law will prevail over any special charter provisions to the contrary. *Bagley v. Gilbert,* 63 Idaho 494, 122 P.2d 227 (1942). There appears to us to be little doubt but that the 1% legislation expresses a statewide purpose and concern (limitation of property taxation), and we view it as likely that it would be held applicable to specially-chartered districts. There may be more room for argument as to the statewide policy of the tax freeze limitation. However, in H.B. 306, (Section 2, amending I.C. § 33-802), specific reference is made to levies of specially-chartered school districts, so we view it as clear that the legislature intended this legislation to have a statewide application and to include specially-chartered school districts. For these reasons, it is our view that both the 1% initiative, as amended and re-enacted by the 1979 legislature, and the tax freeze legislation do apply to specially-chartered school districts.

Your final question concerns the possible forfeiture of a special charter. In other words, assuming that the above views of the applicability of the general law are ultimately held by the courts to be incorrect, would a specially-chartered school district, by availing itself of the general-law levy override provisions, risk

forfeiting its charter? Our conclusion is that it would not. American courts have never recognized the power to forfeit a valid municipal charter even for failure to comply with applicable law. 2 McQuillin, *Municipal Corporations,* § 8.11.

Sincerely,
MICHAEL C. MOORE
Deputy Attorney General

February 4, 1980

Representative Joseph Walker
House of Representatives
Statehouse Mail

THIS IS NOT AN OFFICIAL ATTORNEY GENERAL OPINION, AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE.

Dear Representative Walker:

This is in response to your letter of January 25, 1980, requesting legal guidance concerning the statutory or common law definition of tuition as it pertains to Idaho's institutions of higher learning. You have specifically asked for advice regarding which costs of operating and maintaining Idaho's universities and colleges are properly associated with tuition.

As you know, Idaho law prohibits charging a fee for tuition to resident students attending either the University of Idaho, Idaho State University, Boise State University or Lewis-Clark State College. Idaho Code §33-3717, pertaining to Idaho State University, Boise State University and Lewis-Clark State College, provides in pertinent part that:

> Any student who shall be a full time regularly enrolled resident student in any degree granting program at . . . [Idaho State University, Boise State University or Lewis-Clark State College] shall not be required to pay tuition in said college or university, excepting in a professional college, school or department, or for extra studies or for part-time enrollment.

Similarly, Article IX, Section 10 of the Idaho Constitution, which incorporates the 1889 Territorial Act creating the University of Idaho, forbids the imposition of a fee for tuition to any resident student attending the University of Idaho.

Although both the constitutional and statutory prohibitions against tuition are well established, neither provides any guidance as to what a "fee for tuition" actually is. And, as of this date, the Idaho Supreme Court has not considered the question, either directly or indirectly. Courts from other jurisdictions, however, having similar constitutional or statutory proscriptions against tuition, have attempted to define tuition. Although the decisions of these courts would not be binding upon the Idaho courts, they would nevertheless appear to be highly persuasive precedent.

A leading case in setting forth the definition of tuition is *State ex rel. Priest v. the Regents of the University of Wisconsin,* 11 N.W. 472 (Wisc. 1882). In this case, the regents had imposed a fee upon both resident and nonresident students to contribute towards, in the words of the court:

> The payment of fuel and material to warm and light the public rooms of the university, including rooms for public exercises, literary societies, gymnasium and the like, for the services of janitors to care for such rooms, and students' rooms, and to render occasional personal services to students, and for various other expenditures naturally incident to the conduct of the university. Id. at 472.

The fee was being challenged by a student who alleged that such charge "was to compel resident students of the state to pay tuition under the name and in the guise of incidental expense." Wisconsin had a statute identical in all material respects to Idaho's constitutional and statutory prohibitions against tuition fees.

In upholding the fee as not being in contravention of the statutory prohibition, the Court stated that:

> In determining this question, the meaning of the word 'tuition' has an important bearing. Not necessarily so much the significance given to it as used and applied to district schools in the constitution, nor as defined at different periods by philologists, but as expressive of the legislative intent in the section of the statute [prohibiting fees for tuition]. Id. at 473.

After surveying the legislative history of the statute, and considering the interpretation placed upon the word by the University, the Court held that:

> [T]he words of the statute 'no student [except as stated] shall be required to pay any fees for tuition in the university,' *simply mean that no student shall be required to pay anything for instruction or teaching in the university. . . . We must, therefore, hold that the statutory prohibition against exacting 'fees for tuition,' does not include nor reach the incidental expenses for heating and lighting public halls, etc., complained of.* [Emphasis added.] Id. at 474.

Another oft-cited definition of a "fee for tuition" comes from the Supreme Court of Montana in *State ex rel. Veeder v. State Board of Education,* 33 P.2d 516 (Mont. 1934). In that case, the state board of education had imposed a student union building fee upon each student, to be paid as a condition precedent to enrollment at the university. Veeder, a student at the University of Montana, claimed that the fee was unlawful under a Montana statute providing that "tuition shall ever be free to all students who shall have been residents of the state for one year."

The Court upheld the student union fee, stating that:

> Unless these fees are for 'tuition,' they stand on no different footing than matriculation, registration, and other fees heretofore exacted. . . .
>
> 'Tuition' is from the Latin, and has the same derivation as 'tutor,' from 'tuto,' to guard; 'tutela,' watching over, protection; 'tutio,' care over, guardianship. Thus a tutor is one who teaches; usually a private in-

> structor; 'tuition,' 'the act or business of teaching the various branches of learning.' *Cook County v. Chicago Industrial School,* 18 N.E. 183, 187, 1 L.R.A. 437, 8 Am. St. Rep. 386. This definition is in accord with that given by the several lexicographers and with the common acceptation and use of the term.
>
> * * *
>
> The question as to whether fees charged students in order to defray such incidental expenses were fees charged for tuition, and thus within the prohibition of such a statute as ours, has been before the courts of a number of the states. The most recent case on the subject, and the one most nearly paralleling the present case, is *Rheam v. Board,* 161 Okl. 268, 18 P.2d 535, wherein the power of the board of regents of the University of Oklahoma to require the payment of a fee for construction, equipment, and maintenance of a student union building, and for the retirement of bonds issued for such construction, as a condition precedent to admission to the University, was upheld as not within the prohibition against a charge for 'tuition.'
>
> * * *
>
> [W]here the matter has come before the courts, generally it is held that the provisions respecting 'tuition' have no relation to fees collected in aid of defraying incidental expenses of colleges and schools, such as for heat, light, cleaning, or interest on bonds. [Citations omitted.]
>
> Under the authorities and on principle, the provision respecting free tuition does not bar the state board from collecting the fee fixed here. . . . Id. at 522-523.

It should be noted, however, that the Court in *Veeder* by way of *dictum* did suggest a caveat. The Court observed that the fees under consideration were assessed for the construction, operation and maintenance of a student union building, and remarked that:

> If the proposed building was to be for the housing of classrooms, study rooms, library facilities and the like, necessary space for the imparting and acquisition of instruction, we might not be disposed to so hold, but the main purpose of the erection of this building is to house extra-curriculum activities of the student body; special accommodations to which they are not entitled as a part of their tuition and for which they may be assessed a fee without infringing upon the provision that they shall be given free tuition. Id. at 523.

Clearly, by this statement, the Court emphasized its view that tuition may include both costs of instruction and costs of those facilities wherein such instruction takes place.

A case cited by the Montana Court in *Veeder* is *Rheam v. Board of Regents of the University of Oklahoma,* 18 P.2d 535 (Okla. 1933), which likewise held that a fee imposed for the construction and maintenance of a student union building was not a "fee for tuition" forbidden by the Oklahoma statute. In a later decision by the Oklahoma Supreme Court, *In re Board of Regents of the University of Oklahoma,* 195 P.2d 936, (Okla. 1948), the Court considered a plan by the

regents to sell bonds to build, operate and maintain "an extensive power and heating plant on the campus" and to assess student fees for the repayment of the bonds. The Court upheld the fees, stating that:

> The general authority of the Board of Regents to exact student fees for proper purposes is fully recognized and well known. *Rheam v. Board of Regents,* 161 Okl. 268, 18 P.2d 535. . . . [There is an] imperative necessity for this improvement for the comfort, convenience and welfare of the student body as a whole. It seems beyond any question that the need for this plant and system is demonstrated and that the plan and purpose is one wholly reasonable. We conclude that it is within the authority of the Board of Regents to charge and collect student fees for the purpose of paying the principal of and interest on these bonds. Id. at 939.

Although these above cited decisions do not address all the multitudinous costs of running Idaho's universities, they do provide general guidance as to what tuition is and what it is not.

A helpful approach would be to consider all costs of running the universities as a continuum. At one end of the continuum would be the salaries of professors and other teaching personnel, clearly costs of tuition. At the other end would be costs incidental or ancillary to instructional costs, i.e., costs of extra-curricular student activities; costs of intercollegiate and intramural athletics; costs of various non-instructional student services; salaries of maintenance and custodial personnel; and costs of heat, lights, and air conditioning for university buildings. Between these parameters would be a host of costs, including costs of university administration, costs of library services, costs of construction and maintenance of classrooms, and others. Whether these costs would be considered as costs of tuition would depend upon their relationship to the actual instruction of students. The more directly related to instruction, the greater likelihood of being a tuition cost. The more removed from instruction, the lesser probability of being a tuition cost. Of course, the determination of whether any given cost would be a tuition or non-tuition cost would depend upon the facts and circumstances of the particular cost and the institution involved.

Very truly yours,
/s/ KENNETH L. MALLEA
Deputy Attorney General

KLM:jr

cc: Roy Eiguren
Milt Small

February 6, 1980

Diane J. Plastino, Chairman
Deferred Compensation Committee
State of Idaho
Statehouse Mail

Re: Bid proposals for the deferred compensation program of the State of Idaho

Dear Diane:

This letter is in response to your question of Wednesday, February 6, 1980. The question you posed is whether the deferred compensation committee may consider bid proposals which were received by the Department of Administration after 4:30 p.m., MST, on February 5, 1980.

The authority for the State of Idaho to enter into a deferred compensation contract with a funding media is found in *Idaho Code,* §59-513. This section of the Code grants the authority to the State Board of Examiners to enter into contracts. This section of the Idaho Code does not require that the contracts be entered into pursuant to the competitive bidding statutes. By comparison, *Idaho Code,* §67-5718, requires that all contracts to be let for the acquisition of property in excess of $5000.00 shall be done by the Division of Purchasing, Department of Administration. Clearly, the legislature of the state of Idaho did not require the State Board of Examiners to go through this process.

The deferred compensation committee, under the authorization of the Board of Examiners of the State of Idaho, requested proposals on these funding vehicles. In the cover letter to the proposal, two paragraphs are of import and determinative of this issue. These are:

> It is not the intent of the Committee to cause disqualification of an otherwise favorable proposal on the basis of a technicality. Therefore, if the Company substantially meets the specifications, the proposal should be submitted in sufficient detail to allow proper evaluation.
>
> All proposals and amendments to proposals must be signed by an official of the proposing Company, and they must be received by Diane J. Plastino, Chairman, State of Idaho Deferred Compensation Committee, c/o Department of Administration, Len B. Jordan Building, Boise, Idaho 83720, no later than 4:30 p.m, Mountain Standard Time, Tuesday, February 5, 1980. The proposals will be opened and publicly read aloud at the time stated above.

The key question is whether or not the lateness of a bid can be classified as a technicality or a substantial variance from the specifications.

The Supreme Court of the State of Washington in *E.M. Gostovich v. City of West Richland,* 452 P.2d 737 (1969), was faced with a similar question. In this case the city had similar terms as to those quoted above. The court described the relevant facts with the following:

> Pieler Construction Company (hereinafter referred to as Pieler) had mailed a bid from Seattle (postmarked 5:00 p.m. August 17, 1961) in the amount of $273,654.05, which was not received by the city until Monday, August 21, 1961. By due course of mail this bid should have reached West Richland in time for the bid opening.
>
> The city decided that the late arrival of the Pieler bid was an informality that could be waived and, at a council meeting on August 25, opened the bid. 452 P.2d at 739.

The court held that the lateness of the bid was a mere technicality and thus could be waived by the city. The test used by the court on whether or not a variance is a technicality or a substantial irregularity is whether or not it gives the bidder a substantial advantage or benefit not enjoyed by other bidders. Also see: *Duffy v. Village of Princeton,* 240 Minn. 9, 60 N.W.2d 27 (1953). In *Gostovich,* the court reasoned that there was no added advantage or benefit to the late bidder in that his bid was in the mail and out of his control prior to the time the bid was opened. The Supreme Court of Arizona in *Rollo v. City of Tempe,* 586 P.2d 1285, cited with approval the *Gostovich* decision on the waivability of technicalities.

In *Butler v. Federal Way School Dist. No. 210,* 17 Wash. App. 288, 562 P.2d 271 (1977), the court was again faced with the late opening of a bid. In this case the late bid was through the fault of the school district (i.e. misplacement). The school district refused to consider the bid. The court held that the irregularity was a mere technicality and reversed the school district's decision. The court explained the doctrine of immaterial irregularities with the following:

> The purpose behind competitive bidding is "to prevent fraud, collusion, favoritism, and improvidence in the administration of public business, as well as to insure that the municipality receives the best work or supplies at the most reasonable prices practicable." *Gostovich v. West Richland,* 75 Wash.2d 583, 587, 452 P.2d 737, 740 (1969), quoting from *Edwards v. Renton,* 67 Wash.2d 598, 602, 409 P.2d 153, 157 33 A.L.R.3d 1154 (1965); *Platt Elec. Supply, Inc. v. Seattle,* 16 Wash.App. 265, 555 P.2d 421 (1976); 10 E. McQuillin, *Municipal Corporations* §29.29 (3d rev. ed. 1966). Operating in conjunction with the scheme of fair competitive bidding is the rule permitting waiver of immaterial irregularities when such bids are submitted. *Gostovich v. West Richland,* supra; *R.W. Rhine, Inc. v. Tacoma,* 13 Wash.App. 597, 536 P.2d 677 (1975). The test of whether or not a variance, such as the belated opening of plaintiff's timely bid here, is material is whether or not the defendant's negligent belated opening gave plaintiff a substantial advantage or benefit not enjoyed by other bidders. *R.W. Rhine, Inc. v. Tacoma,* supra; *A.A.B. Elec., Inc. v. Stevenson Public School Dist. 303,* 5 Wash.App. 887, 491 P.2d 684 (1971). Here, the irregularity gave no advantage to the plaintiff. 562 P.2d at 276.

The court went on to state that the purpose of competitive bidding is to provide a forum free of the suspicion of fraud, collusion, favoritism and improvidence.

In *King v. Alaska State Housing Authority,* 512 P.2d 887 (1973), the Supreme Court of the State of Alaska was faced with the question of whether a certain proposal had a material or technical variance. In *King,* a public entity was selling some undeveloped land. Proposals were to be submitted by March 1, 1971, and a good faith deposit equal to five percent of the purchase price was to accompany the proposal. The highest proposer did not submit the required deposit until March 30, 1971. The court first held that to invalidate the proposal in question, plaintiffs had to prove that the question proposer had gained a competitive advantage over the other proposers. The court concluded that the lateness of the deposit was a minor variance and did not require rejection of the proposal. The Alaska Supreme Court stated the relevant test as follows:

> A variance is said to be material if it gives the bidder a substantial advantage over other bidders, and thereby restricts or stifles competition. 512 P.2d at 892.

The Supreme Court of New Jersey in *Marvec Allstate, Inc. v. Gray & Fear, Inc.,* 148 N.J.Super. 481, 372 A.2d 1156 (1977), faced the question of whether a public authority could accept a bid in which the bond was more than $100,000.00 below the amount required by the notice to bidders. In classifying this as a minor defect and thus waivable (and curable), the court stated:

> As we have mentioned, the notice to bidders issued by the Authority reserved the right to waive any insubstantial or minor defect. In determining the substantiality of a defect regard must be had for its attendant consequences. The law is well settled that a public contracting unit may always waive minor or inconsequential conditions and immaterial variances in the form of the bid. *Terminal Constr. Corp. v. Atlantic Cty. Sewerage Auth.,* 67 N.J. 403, 411, 341 A.2d 327 (1975); *Kensil v. Ocean City,* 89 N.J.Super. 342, 348, 215 A.2d 43 (App.Div. 1965). In *Bryan Constr. Co. v. Montclair Bd. of Trustees, etc.,* 31 N.J.Super. 200, 106 A.2d 303 (App.Div. 1954). . . . 372 A.2d at 1158.

Based upon the above analysis, it would be my conclusion that the deferred compensation committee would be well within its discretion to classify those bids which arrived late as responsive for the reason that the lateness can be considered a technical or insubstantial variance. It should be emphasized that this is a discretionary matter with the committee.

THIS IS NOT AN OFFICIAL ATTORNEY GENERAL OPINION, AND SOLELY REPRESENTS THE VIEWS OF THE UNDERSIGNED.

Sincerely yours,
/s/ STEVEN M. PARRY
Deputy Attorney General
Administrative Law and Litigation Division

SMP:lb

cc: Ben Ysursa
Chester Graham

February 6, 1980

The Honorable Wendy A. Ungricht
State Representative
District 18
Statehouse Mail

> THIS IS NOT AN OFFICIAL OPINION OF THE ATTORNEY GENERAL, AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE.

Dear Representative Ungricht:

Your question concerning the constitutionality of authorizing certain cities to impose non-property taxes, in light of art. 7, § 6, Idaho Constitution, and the decisions of the Idaho Supreme Court under that section has been referred to me for response.

As you correctly point out, art. 7, § 6, provides that the legislature shall not impose taxes for the purpose of any county, city, or other municipal corporation, but may by law invest the corporate authorities thereof to assess and collect taxes for all purposes of such corporation. Early decisions of the Idaho Supreme Court interpreted this provision as limiting the legislature to authorizing cities, counties, and municipal corporations to assess and collect *property* taxes and no others. *State v. Nelson,* 36 Idaho 713, 213 P. 358 (1923). The court based this decision primarily upon earlier Montana cases decided under a nearly identical constitutional provision.

Many attorneys in Idaho believe that *State v. Nelson* was incorrectly decided and that the Idaho Supreme Court would, if presented with the question today, overrule the case. However, the Attorney General's one-percent task force committee reviewed such arguments last year and informally concluded that there is insufficient basis to assume that the Supreme Court would overrule *State v. Nelson*. The committee noted that, as recently as 1978, the court, in *First American Title Co. of Idaho, Inc. v. Clark,* 99 Idaho 10, 576 P.2d 581, indicated that county taxing authorities can only impose ad valorem property taxes, and cited *State v. Nelson* as authority for this statement. The court did not deal in the *Clark* case with the question of the legislature's power to authorize local excise taxation. The language of the case provides some indication, however, that the court was not inclined, in 1978, to overrule *State v. Nelson*. Only an actual court case, or a constitutional amendment to clarify the legislature's power, could determine the continued applicability of *State v. Nelson*.

Unless the Idaho Supreme Court were to overrule the doctrine of *State v. Nelson,* however, it appears very likely that statutes authorizing non-property taxes by counties and cities would be held unconstitutional.

The limitations of art. 7, § 6, have been held to apply, however, only to counties, cities, and other municipal corporations. School districts have been held to be outside these restrictions. "Resort cities," however, are clearly within the limitations of art. 7, § 6.

Sincerely,
MICHAEL C. MOORE
Deputy Attorney General
Chief, Local Government Division

MCM/dm

February 6, 1980

The Honorable Mike P. Mitchell
State Senator
District 6
Statehouse Mail

THIS IS NOT AN OFFICIAL OPINION OF THE ATTORNEY GENERAL, AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE.

Dear Mike:

I'm sorry for the delay in getting back to you on your questions concerning RS 5360, dealing with local option income taxes.

As we discussed orally, there remains a serious doubt whether the legislature has the authority to authorize cities and counties to impose any type of tax other than ad valorem property taxes. Art. 7, § 6, Idaho Constitution, provides that the legislature shall not impose taxes for the purposes of any county, city, or municipal corporation, but may by law invest in the governing bodies of those entities the power to assess and collect taxes. In early cases, the Idaho Supreme Court held thst the word "taxes" in this section means *property* taxes only. *State v. Nelson,* 36 Idaho 713, 213 P. 358 (1923). The court has never overruled this case, and we can't predict with any certainty whether the present court would be inclined to do so if presented with the question. It should be noted that the court has held that art. 7, § 6, applies only to counties, cities, and other municipal corporations. This has been held to include highway districts, but not school districts, so it is possible (but not certain) that excise taxes by or on behalf of school districts might be upheld even if *State v. Nelson* is not overruled. See the copy of our recent guideline opinion to Representative Ungricht, attached.

Assuming that the first question can be met, a second question is whether a county can be authorized by the legislature to impose *any* tax for the benefit of another taxing entity. The case of *Idaho County v. Fenn Highway District,* 43 Idaho 233, 253 P. 377 (1926), held that a statute purporting to authorize counties to levy county-wide taxes for the benefit of highway districts was unconstitutional under art. 7, § 6. However, the court later upheld a county-wide levy which was solely for the purposes of an individual school district, in *Hanson v. DeCoursey,* 66 Idaho 631, 166 P.2d 261 (1946), but did not discuss art. 7, § 6. These cases appear to support the proposition that a county cannot be authorized to impose a county-wide tax for the benefit of a particular taxing district, such as a city or highway district, but may be able to do so for a school district (education has always been treated by the court as a state-wide, and not a purely local, matter). However, the court has consistently held that the restrictions of art. 7, § 6, apply only to *property,* not excise, taxes, and it is possible that a county *excise* (such as an income) tax for the purpose of another entity of government would, if otherwise authorized under art. 7, § 6, be upheld.

A third problem area under RS 5360, closely related to the second, is the requirement that, if the governing board of any taxing district within the county petitions the county commissioners to have an income tax imposed for the benefit of that taxing district, the commissioners must impose a county-wide license tax. In other words, *all* county taxpayers would be taxed if *any* taxing district requested it, regardless of whether the taxpayers resided in or received benefits from the taxing district. Non-residents of the district would ultimately be refunded that portion of the income tax withheld for the benefit of the taxing district. However, in addition to the question of a county's authority to impose a county-wide tax for the purposes of a particular district discussed above, this raises a basic constitutional question of whether a taxpayer may be taxed and deprived, even temporarily, of income for the benefit of a taxing district of which he or she is not a resident and from which he or she receives no benefit. I find no Idaho cases which provide a ready answer to this. The refund provisions may be sufficient to save the tax from being held violative of due process of law, but, in light of many statements by the courts of a required "nexus" or connection

between a taxing entity and the taxpayer being taxed, I am inclined to doubt it. A more definitive answer to this question would require a great deal more research.

The bill itself appears to be well drafted and evidences sound and careful thinking. The constitutional issues I have discussed above are not caused by the draftmanship of the bill. Any bill authorizing local-option excise taxes would face one or more of the same questions, and only further court decisions or a constitutional amendment could answer those questions with certainty.

Sincerely,
MICHAEL C. MOORE
Deputy Attorney General
Chief, Local Government Division

MCM/dm
Encl.
cc: Senator Clemm

February 6, 1980

The Honorable Myron Jones
The Honorable Bert W. Marley
State Representatives
Statehouse Mail

THIS IS NOT AN OFFICIAL OPINION OF THE ATTORNEY GENERAL, AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE.

Gentlemen:

Your request for an opinion as to the legality and authority of county commissioners to lease or sell a county hospital to an organized hospital district has been assigned to me for response.

Two sections of the existing county law appear to be relevant to this question. Idaho Code §31-836 deals generally with the power to lease county property. It limits such leases to a term not exceeding five years, but contains the following exception:

> . . . providing, however, that any hospital or hospital equipment belonging to the county may be leased for a term not exceeding twenty (20) years; and, provided further, that the county, either as lessor or lessee, may enter into any lease or other transaction concerning any property with the Idaho health facilities authority for any term not to exceed ninety-nine (99) years.

This statute empowers any county to lease its hospital for up to twenty years (or, if the lease is to the Idaho Health Facilities Authority, for up to ninety-nine years). This section does not require approval of the voters. However, this

section must be considered in light of the provisions of Idaho Code § 31-3515, which is contained in the chapter governing county hospitals for the indigent sick, and which reads as follows:

> Such counties acting through their boards of county commissioners shall have the right to lease such hospitals upon such terms and for such a length of time as they may decide, or to sell the same, *provided, however, that no such lease or sale,* except those leases entered into between such counties and the Idaho health facilities authority as provided in section 31-836, Idaho Code, *shall be final or valid unless and until it has been approved by a majority of the qualified electors of said county voting on such question at a general or special election.* [Emphasis added.]

In addition to these two sections from Title 31, Idaho Code § 67-2322 contains a grant of power to convey or transfer real or personal property among units of government. It provides:

> In addition to any other general or special powers vested in counties, school districts, junior college districts, highway districts, fire districts, irrigation districts, drainage districts, sewer districts, hospital districts and airports for the performance of their respective functions, powers or duties on an individual, cooperative, joint or contract basis, said units of the government or districts shall have the power to convey or transfer real or personal property to another such unit or to the United States, state of Idaho, any city or village with or without consideration. Such conveyance or transfer may be made without consideration or payment when it is in the best interest of the public in the judgment of the governing body of the granting unit.

Idaho Code §§ 67-2323 and 67-2324 require a written agreement before any such transfer of property, followed by notice to members of the public. Such agreement must be approved by a two-thirds vote of the governing body of each entity which is a party to the agreement.

Neither Idaho Code § 31-836 nor Idaho Code § 67-2322 requires a vote of the people before conveying a county hospital to a hospital district, and, if it were not for the express provisions of Idaho Code § 31-3515, approval by the voters would not appear to be required. However, both Idaho Code §§ 31-836 and 67-2322 are *general* grants of authority, while the provisions of Idaho Code § 31-3575 relate specifically to leases or sales of county hospitals. It is a well established rule of statutory construction that, where both a general statute and a special or specific statute deal with the same subject matter, the provisions of the special or specific statute will control over those of the general statute. *Owen v. Burcham,* 599 P.2d 1012 (Idaho 1979); *Hook v. Horner,* 95 Idaho 657, 517 P.2d 554 (1973); *State v. Roderick,* 85 Idaho 80, 375 P.2d 1005 (1962). Where two acts deal with a common subject matter, the one which deals with it in the more particular way will prevail. *State ex rel. Taylor v. Taylor,* 58 Idaho 656, 78 P.2d 125 (1938).

Since Idaho Code § 31-3515 deals specifically with the lease or sale of county hospitals, it is my view that, to the extent that there is any conflict between the section and the other two, the requirements of Idaho Code § 31-3515 prevail. Therefore, an election would be required before a lease or sale to a hospital district could be accomplished.

Subject to this restriction, there appear to be no other legal impediments to the lease or purchase of a county hospital facility by a hospital district organized pursuant to Idaho Code §§ 39-1318, et seq.

You also inquired as to the possibility of the county commissioners closing the hospital and transferring the building, by sale or lease, to the hospital district, not as a hospital under Idaho Code § 31-3515, but as ordinary county property under Idaho Code § 67-2322. This may be legally possible, and, if the county actually was to close the facility for budgetary reasons prior to making such transfer, it appears to me more likely than not that such transfer would be upheld if challenged. (I am assuming, of course, a good-faith closure for budgetary reasons, and not a sham closure for the purpose of circumventing the statute.) However, it is probable that, before such facility could be re-opened as a hospital by the hospital district, it would have to be re-licensed by the appropriate agency of the Department of Health and Welfare. This requirement should be carefully investigated before such action is taken.

The county may also wish to consider the possibility of contacting the Idaho Health Facilities Authority to determine whether conveyance to that agency (which does not require an election) could lead to any possible means of keeping the facility open.

You have also asked what method the hospital district might adopt to fund the purchase and maintenance of the hospital. The sale, lease, or other transfer from the county may be made without consideration under Idaho Code § 67-2322. However, it would then become the hospital district's responsibility to maintain and operate the facility, unless the county also agreed to provide the funding for such purpose (which it probably could do, if it chose to do so, by joint service agreement pursuant to Idaho Code §§ 67-2326 et seq.). As I understand the particular situation about which you inquire, however, a newly-created hospital district is involved, and it will have to rely upon its own funds for operational expenses. As the Attorney General indicated in Opinion No. 79-7 last year, it is likely that a newly-created taxing district, which was not in existence and therefore did not levy an ad valorem tax in 1978, could not levy a tax thereafter without complying with the "override" provisions of H.B. 166 (1979), now codified in Idaho Code § 63-2220. This is subject to change by the 1980 legislature, of course.

The district may also want to investigate the availability of grants-in-aid or other financial resources from Federal or state sources, particularly loans from the Idaho Health Facilities Authority financed through hospital revenues.

I have discussed the above legal conclusions with the Bannock County Prosecuting Attorney, Garth S. Pincock, and am authorized to tell you that he concurs in those conclusions.

Sincerely,
MICHAEL C. MOORE
Deputy Attorney General
Chief, Local Government Division

MCM/dm
cc: Garth Pincock

February 15, 1980

Ref. #2019

Mr. L. Gorrono
Emmett City Attorney
P.O. Box 637
Emmett, ID 83617

THIS IS NOT AN OFFICIAL OPINION OF THE ATTORNEY GENERAL, AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE.

Dear Mr. Gorrono:

Your request for an opinion concerning the validity of curfew ordinances has been assigned to me for reply. Although it is not the policy of the Attorney General's office to give opinions as to the validity of existing city ordinances, since we are not in a position to be familiar with all of the facts and circumstances pertaining to the local conditions giving rise to enactment of particular local ordinances, we are happy to be of assistance by way of general legal guidelines when requested.

As a general rule, curfew ordinances making it unlawful for minors below a certain age to be in public places unless on lawful business or accompanied by a parent or adult, if carefully drawn and not unreasonable or violative of constitutional rights, are upheld under a city's general grant of police power, i.e., the power of a city to pass ordinances to regulate the conduct of persons in the interest of the public health, safety, morals, and welfare. 6 McQuillin, *Municipal Corporations,* § 24.11; 56 Am. Jur. 2d, *Municipal Corporations* § 486. Since cities in Idaho have a direct grant of police powers in all local matters, when not acting in conflict with the general laws, under art. 12, § 2, Idaho Constitution [*Rowe v. City of Pocatello,* 70 Idaho 343, 218 P.2d 695 (1950)], and since there appears to be no conflicting or preemptive state regulation of this area, an otherwise valid curfew ordinance would appear to be within a city's police power, notwithstanding a lack of specific statutory authority to cities to legislate in this area.

However, it is a well-established rule, in Idaho and elsewhere, that city ordinances must not be unreasonable or oppressive, and must not conflict with constitutional rights. 5 McQuillin, *Municipal Corporations,* §§ 18.01-18.06; *Continental Oil Co. v. City of Twin Falls,* 49 Idaho 89, 286 P. 353 (1930); *Lewiston Pistol Club, Inc. v. Board of County Commr's.,* 96 Idaho 137, 525 P.2d 332 (1974). The enforcement of an ordinance cannot be left to the will or unregulated discretion of municipal authorities. 5 McQuillin, supra, § 18.12. The same rules apply to curfew ordinances; they must not exceed the bounds of reasonableness. 6 McQuillin, supra, § 24.11; 56 Am. Jur. 2d, *Municipal Corporations* § 486. No ordinance may unreasonably or unnecessarily interfere with a person's freedom, whether it be to move about or to stand still; the right to be left alone is inviolate, and interference with such right is to be tolerated only if it is necessary to protect the rights and welfare of others. *Seattle v. Drew,* 70 Wash. 2d 405, 423 P.2d 522. Thus, an ordinance which declared it to be unlawful for any minor to be upon the streets more than 15 minutes after the ringing of curfew was held to be unreasonable, paternalistic, and an invasion of personal liberty in *Ex parte McCarver,* 39 Tex. Crim. 448, 46 S.W. 936.

It has been held that, where a curfew ordinance did not absolutely prohibit the presence of minors upon public places after curfew, did not curtail normal or necessary juvenile activities, and reasonably promoted the safety and good order of the community by reducing the incidence of juvenile criminal activity, the ordinance would be upheld. *Eastlake v. Ruggiero,* 7 Ohio App. 2d 212, 220 N.E.2d 126 (1966); *Re Carpenter,* 31 Ohio App. 2d 184, 287 N.E.2d 399 (1972); *Bykosky v. Middletown,* 401 F. Supp. 1242 (D.C. Pa.); Annotation: 59 A.L.R. 3d 321, § 5[a]. Curfew laws limited to minors have been held valid where they do not prohibit a minor's mere presence at a prohibited place, but only his staying there unnecessarily. *Thistlewood v. Trial Magistrate,* 236 Md. 548, 204 A.2d 688. However, other cases have held curfew laws limited to minors to be unduly restrictive of personal liberty, where the ordinance prohibited the minor's mere presence at a prohibited place during the curfew hours. See *Alves v. Justice Court,* 148 Cal. App. 2d 419, 306 P.2d 601 (1957), where it was stated that the general right of every person to enjoy and engage in lawful and innocent activity while subject to reasonable restriction cannot be completely taken away under the guise of police regulation, and a curfew ordinance was held invalid as unnecessarily restrictive of individual liberty. See Annotation: 59 A.L.R.3d 321, § 5[b].

The Idaho Supreme Court has frequently held that an ordinance or statute, particularly one which attempts to impose criminal penalties, must not be so vague or ambiguous as to defy ordinary meaning and construction or to punish acts which are not illegal. *State v. Barney,* 92 Idaho 581, 448 P.2d 195 (1968); *State v. Thomas,* 94 Idaho 592, 494 P.2d 1036 (1972) (holding an ordinance requiring connection to the "proper" sewer to be too vague to be enforced). Curfew ordinances, because they restrict what is otherwise a valid constitutional right to be upon public grounds and places at will, are particularly subject to this rule. 6 McQuillin, *Municipal Corporations,* § 24.111. Although we find no cases specifically involving curfew ordinances in Idaho, we have little doubt that the Idaho Supreme Court would require such ordinances to be specific in the precise criminal conduct which they prohibit. The mere presence of a minor during curfew hours, unattended by other, more specific, criminal conduct, would, in our view, be difficult to sustain, especially where an ordinance attempts to impose the burden of proving lawful conduct upon the minor or his parents. Obviously, a broadly worded, vague, and indefinite curfew ordinance could also be subject to attack as allowing "selective enforcement" or broad executive discretion by the police, in violation of the rules governing criminal ordinances.

As stated above, we do not make it a policy of offering opinions on the validity of particular city ordinances, and we must therefore decline to comment on the constitutionality of the city curfew ordinance which you enclosed. We believe that local counsel, familiar with the local situation and the particular problems which the ordinance is aimed at preventing, would be in a better position than we are to apply the foregoing legal principles to the particular facts and circumstances.

Sincerely,
MICHAEL C. MOORE
Deputy Attorney General
Chief, Local Government Division

MCM/dm
Encl.

February 20, 1980

Ref. #1983

Mr. John Aguilar
City Administrator
City of Post Falls
P.O. Box 789
Post Falls, ID 83854

THIS IS NOT AN OFFICIAL OPINION OF THE ATTORNEY GENERAL, AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE.

Dear Mr. Aguilar:

Your letter of January 18, 1980, requests an opinion as to the power of the City of Post Falls to annex an adjacent subdivision, and the power to require residents within that subdivision to hook up to the city's proposed sewer system. By way of background, you indicate that both the city and the adjacent subdivision are currently on septic tanks, but that in November, 1979, the city voters approved a $3.8 million revenue bond issue for construction of a sewer plant and collection system. The subdivision in question lies immediately east of and contiguous to the city, separated only by a public street. In addition to your question on annexation, you wish to know whether the lots in the unincorporated subdivision (after annexation, presumably) can be required to hook up to the sewer system, since the residents there did not vote on the sewer revenue bond question. Apparently, the residents of the subdivision desire sewer service but do not favor annexation.

As we discussed by telephone, we are not in a position in this office to determine questions of fact. We can, however, set forth certain controlling principles of law, to which local counsel can apply the facts of the local situation in order to determine the probable legality of the proposed action.

Briefly stated, it is our view that (1) an adjacent tract of land, subdivided into lots and blocks not exceeding five acres, or from which any sale of 5 acres or less has occurred, may be annexed by the city with or without the consent of the owners of the property being annexed, and (2) if the existing sanitary and health conditions justify such action, the owners of lots may be required to hook up to the city's sanitary sewer system, with or without their consent, and notwithstanding the fact that the residents did not vote on the original sewer bond issue.

(1) *Annexation.* Idaho cities are empowered, by Idaho Code § 50-222, to annex property under certain conditions. That section reads as follows:

> Whenever any land lying contiguous or adjacent to any city in the state of Idaho, or to any addition or extension thereof, shall be or shall have been by the owner or proprietor thereof or by any person by or with the owner's authority or acquiescence, laid off into blocks containing not more than five (5) acres of land each, whether the same shall have been or shall be laid off, subdivided or platted in accordance with any statute of this state or otherwise, or whenever the owner or proprietor or any

> person by or with his authority, has sold or begun to sell off such contiguous or adjacent lands by metes and bounds in tracts not exceeding five (5) acres or whenever the owner or proprietor or any person by or with his authority requests annexation in writing to the council, or when a tract of land is entirely surrounded by properties lying within the city boundaries, it shall be competent for the council, by ordinance, to declare the same, by proper legal description thereof, a part of such city. When any land not used exclusively for agricultural purposes is completely surrounded by the boundaries of two (2) or more cities, the district court, shall after hearing the owners of the properties involved, and the elected officials of the adjacent cities, determine which if any of the cities may annex said lands. In any annexation of adjacent territory, the annexation shall include all portions of highways lying wholly or partially within the annexed area.
>
> Railroad right-of-way property may be annexed when property within the city adjoins both sides of the right-of-way notwithstanding any other provision of this section. Provided, that the city may annex only those areas which can be reasonably assumed to be used for orderly development of the city. Provided further, that said council shall not have the power to declare such land, lots or blocks a part of said city, if they will be connected to such city only by a shoestring or strip of land upon a public highway.
>
> Notwithstanding any other provisions of law no city council shall have authority to annex property owned by a county or any entity within the county which property is used as a fairgrounds area under provisions of chapter 8, title 31, or chapter 2, title 22, Idaho Code, without the consent of a majority of the board of county commissioners of the county in which said property lies.

The statute requires that the land be contiguous or adjacent to the city, and further provides that at least one of the following requirements be met: (a) the land shall have been by the owner or proprietor, or by any person with the owner's consent, laid off into blocks containing not more than 5 acres of land each, or (b) the owner or proprietor has sold or begun to sell off such land in tracts not exceeding 5 acres, or (c) the owner requests annexation in writing, or (d) the land is entirely surrounded by properties lying within the city boundaries. In addition, the statute provides that a city may annex only those areas which can be "reasonably assumed to be used for the orderly development of the city."

The statute expressly provides that property shall not be annexed if it is connected to the city only by a "shoestring" or strip of land upon a public highway. However, where the property to be annexed is otherwise contiguous, mere separation from the city by a public street or road does not render the land non-contiguous. 2 McQuillin, *Municipal Corporations,* § 7.20 (n. 31). (See *Redford v. City of Burley,* 86 Idaho 519, 388 P.2d 996, holding that an intervening river did not break the contiguity within the meaning of the annexation statute.) Also, it has been held by the Idaho Supreme Court that several parcels or tracts may be annexed as long as one tract is contiguous to the city and the other tracts are contiguous to each other. *Hendricks v. City of Nampa,* 93 Idaho 95, 456 P.2d 262 (1969).

The second requirement would be met either if the land has been subdivided, platted, or otherwise laid off into blocks, none of which exceed 5 acres, *or* if the

owner has begun selling land in tracts not exceeding 5 acres. Once there has been even a single sale of five acres or less from the tract, whether subdivided, platted, laid off, or not, then the entire tract may be annexed, even though the remainder is greater than 5 acres. *Hendricks v. City of Nampa,* supra.

Consent of the residents or owners of land within the tract is not required; if the other requisites are met, annexation may be accomplished without their consent and even against their wishes. 2 McQuillin, *Municipal Corporations,* § 7.16; *Willows v. City of Lewiston,* 93 Idaho 337, 461 P.2d 120 (1969). This is true even though the annexed territory becomes liable for the existing debts of the city. 2 McQuillin, supra, § 7.10.

The annexation must, however, be reasonable under the existing circumstances. *Batchelder v. City of Coeur d'Alene,* 85 Idaho 90, 375 P.2d 1001. The statute itself (I.C. § 50-222, supra) limits annexation to those areas which can be reasonably assumed to be used for the orderly development of the city. This is a question of fact which is generally within the scope of the city council's legislative discretion. It is generally held that annexation is not unreasonable if the territory is necessary for present or future municipal purposes, or is substantially improved or built up. 2 McQuillin, supra, § 7.23. Annexation in order to extend sewers to adjacent territory is held to be a reasonable basis for annexation. 2 McQuillin, supra, § 7.18a; *State v. Reno,* 71 Nev. 208, 285 P.2d 551; *In re Philadelphia,* 232 Miss. 582, 100 So.2d 100.

Nothing in the statutes or case law would appear to prohibit annexation merely because the inhabitants of the annexed area had not voted on the sewer bond issue question.

(2) *Requiring sewer hookups.* It appears to be well established that a city, in the exercise of its police power (that is, the power to regulate persons and property in the interests of the public health, safety, and welfare), may require connections with its sanitary sewer system. 7 McQuillin, *Municipal Corporations,* § 24.264. This principle has been recognized by the Idaho Supreme Court in *Schmidt v. Village of Kimberly,* 74 Idaho 48 at 61-62, 256 P.2d 515 (1953), in which the court upheld the general power of a city to require connections to the sewer system.

> The power of a municipality to compel connections with the sewer is generally recognized [citing numerous cases].
>
> * * *
>
> It is admitted that a municipality may make and enforce all reasonable rules and regulations essential and appropriate to the preservation of public health, as a valid exercise of its police power. In this state that power is given to the municipalities by the constitution itself. Art. 12, § 2, Idaho Constitution. *Rowe v. City of Pocatello,* 70 Idaho 343, 218 P.2d 695. No more appropriate and potent method of promoting public health could be provided by a municipality than the establishment of an adequate sewage disposal system and requiring the discontinuance of previous unsanitary methods. The municipality, in order to effectively exercise its police power for the protection of the public health, must be clothed with authority to compel the widest use of the sanitary sewage disposal system that circumstances will reasonably permit. The power of the municipality in this respect being recognized, the validity of the particular requirement depends upon its reasonableness as applied to a particular individual or class. 74 Idaho 48, at 61-62.

The above authorities do not differentiate between situations where the residents have voted directly upon the question of imposing such controls or not. Such requirements are within the police powers delegated to city councils and can be exercised by the city council without a direct vote of the people affected. The fact that the residents of the annexed area had not voted upon the original sewer bond issue question would not, in my opinion, have any legal bearing upon the power of the city to require the property within the city, including that located within the annexed area, to be connected to the sewer system.

Sincerely,
MICHAEL C. MOORE
Deputy Attorney General
Chief, Local Government Division

MCM/dm
cc: Roy Koegen
James W. Ingalls

February 20, 1980

The Honorable John F. Reardon
House of Representatives
Statehouse
Boise, ID 83720

THIS IS NOT AN OFFICIAL ATTORNEY GENERAL OPINION, AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE.

Dear Representative Reardon:

The following is in answer to your request for legal guidance.

QUESTION PRESENTED:

Is it within the power of the State Legislature to overturn a rate schedule or other decision that has been handed down by the Idaho Public Utilities Commission?

CONCLUSION:

The Idaho State Legislature, in the exercise of its police powers, has the right to set rates for public service corporations. This power it has delegated to the Idaho Public Utilities Commission. The Legislature retains the right to exercise those powers which it has delegated and therefore may, at any time, itself set rates for public utilities situated within the State of Idaho. In doing so, however, care must be taken to safeguard constitutional rights and to avoid statutory inconsistency.[1]

[1]It should be noted that the answer responds only to that part of the Committee question addressed to the Commission's *rate-making* powers since the question arose "in connection with the hearings the State Affairs Committee is conducting in connection with the telephone rate schedule." A much broader investigation would have to be undertaken if every

"other decision" of the Commission were at issue. These other decisions include, for example, the grant of certificates of public convenience and necessity (with massive expenditures for power plants made in reliance thereon), the authorization of security issuances (with resulting contract rights of the investment community) and the enactment of regulations mandated by various Federal laws. The analysis in each of these instances would be quite different.

ANALYSIS:

The structure of public utilities commissions throughout the United States generally follows one of two separate patterns. Some states, a small minority, have commissions that owe their creation and powers to the state's constitution. Such commissions are said to have "full and exclusive" ratemaking powers:

> The Arizona Corporation Commission, unlike such bodies in most states, is not a creature of the legislature, but is a constitutional body which owes its existence to provisions in the organic law of this state [i.e., the Arizona Constitution]. . . .
>
> In the matter of prescribing classifications, rates and charges of public service corporations and in making rules, regulations, and orders concerning such classifications, rates, and charges by which public service corporations are to be governed, the Corporation Commission has full and exclusive power. In such field the Commission is supreme and such exclusive field may not be invaded by the courts, the legislature, or the executive.

Ethington v. Wright, 189 P.2d 200, 214-216 (Ariz. 1948). In states where the public service commission is a constitutional body, it may truly be said to be a fourth branch of government. Arizona again serves as a convenient example:

> It is a well-known fact that there has long existed a deep-rooted dissatisfaction with the results obtained through the Legislatures of the country in their efforts to adjust and regulate rates and classifications between the general public and public service corporations. While the power to control and regulate those matters by the lawmaking body has been frequently upheld, the lack of full information on the part of the legislator, and inadequacy of time and means of investigation, have tended to foster litigation, with the result of suspending and often of defeating the object aimed at, rather than to secure just and reasonable classifications, rates charges, and regulations. . . .
>
> The framers of the Constitution were fully informed as to the chaotic conditions existing. They knew the evil, and sought to correct it in the fundamental law of the state by constituting the Corporation Commission a body empowered and authorized by that instrument to exercise not only legislative, but judicial, administrative, and executive functions of the government. While it is not so named, it is in fact, another department of government, with powers and duties as well defined as any branch of the government, and where it is given exclusive power it is supreme.

State v. Tucson Gas Electric Light & Power Co., 138 P. 781, 785-786 (Ariz. 1914).

Idaho, like most other states, has not seen fit to create a separate constitutional body to regulate and set rates for the state's public utilities. The precise status of the Idaho Public Utilities Commission within this state's government was enunciated in great detail in the landmark case of *Idaho Power & Light Co. v. Blomquist,* 26 Idaho 222, 141 P. 1083 (1914) (hereafter *Blomquist*), one year after enactment of the Public Utilities Act of 1913. The Idaho Supreme Court there explained the source of the Legislature's power to regulate public utilities:

> The legislature has plenary power in all matters of legislation except as limited by the constitution. . . . The police power in regard thereto is sufficiently broad and comprehensive to enable the legislature to regulate public utilities in order to promote the health, comfort, safety and welfare of society.

Blomquist, 26 Idaho at 241-242. There can be no doubt, therefore, that the legislature itself has power to regulate the public utilities of this state. The Court likewise upheld the Legislature's right to exercise that power by delegation to an agent, namely, the Public Utilities Commission:

> It is too late to question the power of the legislature to regulate public utilities respecting rates, service, etc. That power presupposes an intelligent regulation. It would be almost impossible for the legislature of this state to undertake intelligent regulation of utility corporations by the legislature itself. Under the constitution there is a regular session of the legislature every two years, and such sessions are usually sixty days in length. It would not be possible for the legislature in the length of time it sits to regulate intelligently the rates, service and other matters which need regulation in connection with utility corporations. The necessity of regulating such corporations and the inability of the legislature to administer such regulation is at least a strong argument in favor of the delegation of that power to a commission under laws established by the legislature. *Blomquist,* 26 Idaho at 254.

In short, the Idaho Public Utilities Commission is not a fourth branch of government. It is a creature of the Legislature. It has "no inherent power; its powers and jurisdiction derive in entirety from the enabling statutes creating it and 'nothing is presumed in favor of its jurisdiction.' " *United States v. Utah Power & Light Co.,* 98 Idaho 665, 667, 570 P.2d 1353, 1355 (1977), quoting *Arrow Transp. Co. v. Idaho Public Utilities Comm'n,* 85 Idaho 307, 313, 379 P.2d 422, 425 (1963). In particular, the Commission's ratemaking process is said to be legislative in nature. *Petition of Mountain States Tel. & Tel. Co.,* 76 Idaho 474, 480, 284 P.2d 681, 683 (1955).

Because the Public Utilities Commission is a creature of statute, possessing no inherent powers of its own, it follows that the Legislature may, by statute, itself exercise the rate-making powers it bestowed upon the Commission in the Public Utilities Act of 1913. As the Supreme Court of New Jersey has stated in a different context:

> While the Legislature may of course delegate to a commission, or any other instrumentality of government the right to regulate a particular operation, such as utilities, it cannot be said to have divested itself of the right to enact laws which would supersede the powers given any such commission. . . . *Hill Const. Co. v. Central R. Co. of New Jersey,* 167 A. 575, 578 (N.J. 1933).

It is clear, therefore, that the Legislature retains at all times the right to exercise the ratemaking powers which it has delegated to its agent, the Public Utilities Commission. It does not follow, however, that it may do so without limit. The Legislature, like the Commission, is subject to certain constitutional and statutory constraints.

To begin with, the Legislature is faced with a constraint unique unto itself, namely, the constitutional prohibition against special legislation. As the Court noted in *Blomquist,* it was this consideration which was largely behind the decision of state legislatures to create administrative agencies with powers of particularized rulemaking and ratemaking:

> There is still another consideration which leads inevitably to the conclusion that while the power of establishing uniform rates is legislative, the exercise of the power, a standard having been prescribed, is administrative purely. Practically every state in the Union has a constitutional inhibition against special legislation in the nature of ratemaking. No one would contend that the legislature had the power to say that passenger rates on a certain railroad should be three cents a mile and on another five cents a mile. . . . *Blomquist,* 26 Idaho at 255.

In order to overcome this constitutional prohibition against special legislation, it would be necessary for the legislature

> to say that all railroad fares should be "reasonable," and after having so enacted to declare what was reasonable in one case and what in another, when acting upon proper information. *Ibid.*

A second constitutional requirement incumbent upon any ratemaking authority — including the Legislature if it chooses to serve in that capacity — is that of due process. Ratemaking, by its very nature, changes either the total revenues paid to the utility by its ratepayers or the allocation of those revenues among classes of ratepayers. Since property rights are therefore at stake in every ratemaking, it follows that the ratemaker "must faithfully observe the 'rudiments of fair play.' " These have been held to include "the right to be fairly notified as to the issues to be considered" and "a fair and open hearing" on all such issues. *Grindstone Butte Mutual Canal Co. v. Idaho Power Co.,* 98 Idaho 860, 865, 574 P.2d 902, 907 (1978).

Thus, the outcome of ratemaking by the Legislature is as subject to judicial scrutiny as is that of the Public Utilities Commission. This was made clear by Chief Justice Hughes speaking for the United States Supreme Court:

> The Constitution fixes limits to the rate-making power by prohibiting the deprivation of property without due process of law or the taking of private property for public use without just compensation. When the Legislature acts directly, its action is subject to judicial scrutiny and determination in order to prevent the transgression of these limits of power. The Legislature cannot preclude that scrutiny or determination by any declaration or legislative finding. Legislative declaration or finding is necessarily subject to independent judicial review upon the facts and the law by courts of competent jurisdiction to the end that the Constitution as the supreme law of the land may be maintained. *St. Joseph Stock Yards Co. v. United States,* 298 U.S. 38, 56 S.Ct. 720, 725, 80 L.Ed. 1033 (1936).

One final word of caution is in order. An isolated exercise of ratemaking power by the Legislature has the potential for introducing a certain lack of clarity into the existing statutory framework delegating power to the Public Utilities Commission. For one thing, the existing statute contains certain housekeeping requirements that would be impacted. As an example, the statute presently requires either a finding and Order of the Commission as a condition for implementation of any new rates or the expiration of a thirty-day waiting period and, in some instances, the need for notice and a hearing to allow interested parties an opportunity to present testimony. *Idaho Code* §§ 61-307, 61-622, 61-623. Finally, upon approval of the new rate, the utility has the obligation to file it with the Commission as a tariff. *Idaho Code* § 61-305. Should the Legislature choose to set rates, it would be important that the Commission be given clear directives as to whether or not such rates are exempt from normal Commission procedural requirements.

Second, the Idaho Supreme Court has made it clear that the Public Utilities Commission is

> not only empowered, but charged with a continuing obligation, to continue its inquiry into the rate structure. . . . because no statute limits the time of its jurisdiction, and because the Commission is authorized on an on-going basis to consider and alter rates.

Grindstone Butte Mutual Canal Co. v. Idaho Power Co., 98 Idaho at 864, 574 P.2d at 906. This statutory mandate is contained in *Idaho Code* § 61-502. Should the Legislature enact a statute setting particular rates, it would be important to indicate the precise relation of that statute to the Commission's on-going statutory duty to investigate and revise rates.

In short, the Commission's future responsibilities would be quite different depending on whether (1) the Legislature intended to state that in 1980 it found a given rate just and reasonable or (2) it intended a given rate to stay in effect indefinitely regardless of whether or not it was just and reasonable. The former instance would leave the Public Utilities Commission with its continuing responsibility to investigate and revise rates. The latter would act as a permanent partial divestiture of Commission jurisdiction over certain classes of rates. Ambiguity as to legislative intent in this regard could create future uncertainty and possible litigation.

CONCLUSION:

The Idaho Public Utilities Commission is a creature of the Idaho Legislature. The Legislature, as its creator, retains the right at all times to set rates for public service corporations located within the State of Idaho. The exercise of this right is subject to certain constitutional and statutory constraints.

AUTHORITIES CONSIDERED:

1. *Idaho Code* §§ 61-305, 61-307, 61-502, 61-622 and 61-623.

2. *Grindstone Butte Mutual Canal Co. v. Idaho Power Co.,* 98 Idaho 860, 574 P.2d 902 (1978).

3. *United States v. Utah Power & Light Co.,* 98 Idaho 665, 570 P.2d 1353 (1977).

4. *Arrow Transp. Co. v. Idaho Public Utilities Comm'n,* 85 Idaho 307, 379 P.2d 422 (1963).

5. *Petition of Mountain States Tel. & Tel. Co.,* 76 Idaho 474 284 P.2d 681 (1955).

6. *Idaho Power & Light Co. v. Blomquist,* 26 Idaho 222, 141 P. 1083 (1914).

7. *St. Joseph Stock Yards Co. v. United States,* 298 U.S. 38, 56 S.Ct. 720, 80 L.Ed. 1033 (1936).

8. *Ethington v. Wright,* 189 P.2d 200 (Ariz. 1948).

9. *State v. Tucson Gas Electric Light & Power Co.,* 138 P. 781 (Ariz. 1914).

10. *Hill Const. Co. v. Central R. Co. of New Jersey,* 167 A. 575 (N.J. 1933).

If you have any further questions in this regard, please do not hesitate to contact this office.

Very truly yours,
/s/ DAVID H. LEROY
Attorney General

/s/ JOHN J. McMAHON
Deputy Attorney General

DHL/JJM/tr

March 10, 1980

The Honorable Leon Swenson
Idaho State Senate
Statehouse
Boise, ID 83720

THIS IS NOT AN OFFICIAL ATTORNEY GENERAL OPINION, AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE.

Dear Senator Swenson:

This office is in receipt of your letter dated February 8, 1980 requesting legal guidance on the question of whether the appointment of administrators of divisions created by administrative action of the Governor within the Office of the Governor are subject to confirmation by the Senate pursuant to Idaho Code § 67-802. In addition, as a result of our research and analysis, we will also provide in this legal guideline our opinion on whether I.C. § 67-802 mandates Senate confirmation of the appointment of administrators of certain statutorily created agencies within the Governor's Office, to-wit, the Office on Aging.

The most recent edition of the official manual of state government, the Idaho Blue Book, delineates the following entities as being within the Office of the Governor:

1. Commission for the Blind
2. Division of Budget, Policy Planning & Coordination
3. Endowment Fund Investment Board
4. Commission on Human Rights
5. State Insurance Fund
6. Liquor Dispensary
7. Military Division
8. Public Employee Retirement System
9. Division of Tourism & Industrial Development
10. Commission on Women's Programs
11. Office on Aging
12. Office of Energy

Of all of the above 12 listed entities eleven are created by statute. Currently, only the Office of Energy is created by Executive Order.

Clearly, Idaho statutory law grants to the Governor the authority to create divisions and other entities within the Executive Office of the Governor by administrative action. Idaho Code § 68-802 in relevant part provides that the Office of the Governor shall be composed of:

> . . . the division of tourism and industrial development, as provided by chapter 47, title 67, Idaho Code; the state liquor dispensary, as provided by chapter 2, title 23, Idaho Code; the military division, as provided by title 46, Idaho Code; division of budget, policy planning and coordination, as provided by chapter 51, title 10, and chapters 19, 35, and 57, title 67, Idaho Code; and such other divisions and units as are established or assigned by law *or created through administrative action of the governor.*
>
> *The governor shall appoint an administrator for each division, with the advice and consent of the senate.* The administrator shall serve at the pleasure of the governor, and shall be exempt from the provisions of chapter 53, title 67, Idaho Code. Other subordinate staff necessary to accomplish the division's mission shall be subject to the provisions of chapter 53, title 67, Idaho Code. [Emphasis added.]

With the exception of the Office of Energy and the Office on Aging, the above articulated statute or a particular statute creating a certain entity within the Governor's Office provide that the appointment of the chief administrator of the entity or members of the governing board of the entity are to be confirmed by the State Senate. Specifically, the following statutory sections provide that the appointment of the following officers is subject to the advice and consent of the State Senate:

> 1. *Members of the Commission for the Blind;* I.C. 67-5403 — the governor shall appoint members to the commission subject to ratification by the senate at the next regular or special session of the legislature.

2. *Administrator, Division of Budget, Policy Planning and Coordination;* I.C. § 67-802 — the governor shall appoint an administrator for each division, with the advice and consent of the senate (division budget, policy planning and coordination is specifically included within this statutory section).

3. *Endowment Fund Investment Board;* I.C. § 57-718 — There is hereby established in the office of the governor an investment board . . . members hereinafter designated who shall be appointed by the governor subject to senate confirmation.

4. *Commission on Human Rights;* I.C. § 67-5903 — there is hereby created in the office of the governor the Idaho commission on human rights to consist of nine members, all of whom shall be appointed by the governor with the advice and consent of the senate. . . .

5. *State Insurance Manager;* I.C. § 72-902 — there is hereby created in the office of the governor the office of state insurance manager . . . said manager shall be appointed by the governor and shall serve during the pleasure of the governor . . . I.C. § 59-904, (c) Nominations and appointment to and vacancies in the following listed office shall be made or filled by the governor subject to the advice and consent of the senate for the terms prescribed by law, or in case such terms are not prescribed by law, to serve at the pleasure of the governor: Manager of the State Insurance Fund.

6. *Superintendent, State Liquor Dispensary;* I.C. § 23-201 — there shall be a state liquor dispensary . . . in the office of the governor. The dispensary shall be a division of the office of the governor for the purposes of chapter 24, title 67, Idaho Code, and the administrator of the division shall be known as the superintendent of the state liquor dispensary. I.C. 67-802, the governor shall appoint an administrator for each division, with the advice and consent of the senate. (the state liquor dispensary is specifically within this statutory section.)

7. *Adjutant General, Military Division;* I.C. § 47-111 — there shall be an adjutant general who shall be appointed by the governor and shall hold office during the pleasure of the governor and his commission shall expire with the term of the governor appointing him. I.C. § 67-802, the governor shall appoint an administrator for each division, with the advice and consent of the senate (the military division is specifically included within this statutory section).

8. *Board Members, Public Employee Retirement System;* I.C. § 59-1326 — (1) There is hereby created in the office of the governor a governing authority of the system to consist of a board of five persons known as the retirement board. Each member of the board shall be appointed by the governor to serve a term of five years. I.C. § 59-904 (c) Nominations and appointments to and vacancies in the following listed office shall be made or filled by the governor subject to the advice and consent of the senate for the terms prescribed by law, or in case such terms are not prescribed by law to serve at the pleasure of the governor: members of the board of directors of the Idaho state retirement system.

9. *Administrator, Division of Tourism and Industrial Development;* I.C. § 67-4702 — The division shall be under the control and supervision of an administrator, who shall be appointed by the governor and who shall serve at the pleasure of the governor. I.C. § 67-802, the governor shall appoint an administrator for each division, with the advice and consent of the senate. (Division of tourism and industrial development is specifically included within this statutory section.)

Accordingly, there are specific statutory requirements that provide that the appointment of the above delineated officers is subject to confirmation by the Senate. Of all the entities within the Office of the Governor, only the appointments of members of The Commission on Women's Programs, the Administrator of The Office of Aging and the Director of the Office of Energy are not specifically subject, by statute, to Senate confirmation.

Pursuant to the terms of a constitutional amendment, a new article, Art. 20, § 3, was added to the state constitution in 1972 that required a massive reorganization of the executive branch of state government no later than January 1, 1975. Accordingly, the legislature during its 1974 session passed numerous acts that reorganized a significant portion of the state's executive branch of government. As a part of the reorganization, the Office of Governor was significantly changed. The legislative act accomplishing this was House Bill 400, which became Chapter 22, 1974 Idaho Session Laws. House Bill 400 provided, among other things, the current existing statutory requirement that the Office of the Governor be composed of the Division of Tourism and Industrial Development, the State Liquor Dispensary, the Military Division, the Division of Budget, Policy Planning and Coordination, and "such other divisions and units as are established or assigned by law, or created through administrative action of the governor." (I.C. § 67-802.) In addition, the act transferred the following governmental entities to the Office of the Governor; the Retirement Board, the Commission for the Blind, the Commission on Human Rights, the Commission on Women's Programs, the Office of the State Insurance Manager, and the State Investment Board.

Since the above divisions and units were established within the Office of the Governor by the terms of House Bill 400 two additional entities have come into existence within the Office of the Governor; the Office on Aging, created by statute in 1976 (Chapter 188, 1976 Idaho Session Laws) and the Office of Energy, created by Executive Order of the Governor on February 7, 1974, and recreated at subsequent two year intervals.

In determining whether the appointment of the chief administrative officers of these two new entities is subject to confirmation by the Senate, resort must be made to established rules of statutory construction. This is so because the precise question involved has never been addressed by an Idaho court. The rules of construction are generally accepted standard rules that a court would employ in reaching a decision on the question. Accordingly, our opinion will be based upon an analysis utilizing these generally accepted rules.

Rules of statutory construction would not ordinarily be applicable in interpreting a statute if, from its face, it was unambiguous. However, ambiguity does exist in the sense that Idaho Code § 67-802 refers to "divisions and units." It therefore becomes necessary to determine whether the two "offices" in question are to be legally classified as either a "division" or as a "unit."

When resort must be made to the rules of statutory construction in attempting to determine the true meaning of a statute, the intent of the legislature in enacting the statute is the paramount or controlling factor that must be observed in any analysis:

> Accordingly, the primary rule of construction of statutes is to ascertain and declare the intention of the legislature and to carry out such intention into effect to the fullest degree. A construction adopted should not be such as to nullify, destroy, or defeat the intention of the legislature. *In the interpretation of a statute, the intention of the legislature is gathered from the provisions enacted, by the application of well settled canons of construction.* 73 Am. Jur. 2d, *Statutes* § 145, 146.

Several well established rules of statutory construction must be employed in any analysis used in reaching an opinion as to what the intention of the legislature was in enacting the various provisions of House Bill 400 during the 1974 legislative session.

The first applicable rule of statutory construction in the instant case is the "whole statute" rule of interpretation. The basic formulation of the "whole statute" rule is found in a leading legal treatise:

> A statute is passed as a whole and not in parts or sections and is intended for one general purpose and intent. Consequently, each part or section should be construed in connection with every other part or section so as to produce a harmonious whole. Thus, it is not proper to confine interpretation to the one section to be construed. Sands, *Sutherland Statutory Construction* § 46.05.

Accordingly, the "whole" of House Bill 400 (Chapter 22, 1974 Idaho Session Laws) must be read together — it is improper to confine an interpretation to only the provisions of Idaho Code § 67-802 that were amended by the bill.

In its entirety, House Bill 400 transferred 10 separate agencies of the executive branch of government to the Office of Governor. The entities so transferred were divided by the provisions of the bill into two separate classes; (1) Sections 40, 45, 46, 48 and 49 transferred the Commission for the Blind, the Endowment Fund Investment Board, the Commission on Human Rights, the State Insurance Fund, the Public Employee Retirement Board and the Commission on Women's Programs into the Office of the Governor. These agencies are the type headed by a board or commission, rather than by a single administrator, with the specific exception of the State Insurance Fund (in which the appointment of the administrator was previously subject to confirmation by the Senate, by statute). (2) The Division of Tourism and Industrial Development, the State Liquor Dispensary, the Military Division, and the Division of Budget, Policy Planning and Coordination comprised a second class of agencies under the provisions of the Bill. This second class was composed of entities (a) whose previous statute of creation did not provide that the appointment of the administrator was subject to confirmation by the Senate (b) that are headed by a single administrator as opposed to a board or commission. Only single administrator agencies were listed in the two paragraph amendment to Idaho Code § 67-802.

Under the whole statute rule, the two paragraphs of the amendment are to be read together, that is, the language of the second paragraph must be read in conjunction with the first paragraph. Accordingly, the language requiring Sen-

ate confirmation of division administrator appointments refers to only the four divisions specifically mentioned within the statute and other divisions either created by statute or executive order that are, in futero, assigned to the office of Governor. This statutory placement evidences a legislative intent that only the four enumerated divisions, or like divisions created and assigned to the Office of Governor in the future, are to have their administrator's appointments confirmed by the Senate.

Obviously, the key question to be answered here is what type of governmental entity is to be classified as a "division." In our opinion, that question can be answered by the application of several additional rules of statutory construction.

The first rule to be applied is the common meaning rule. That rule is defined as:

> Words in a statute are to be given their common meaning; or that when common terms are used in a statute they should be given their meaning. Sands, *Sutherland Construction* § 47-2A.

It should be noted that the common meaning rule as above defined has been adopted for use in the interpretation of statutes by the Idaho Supreme Court in the case of *Oregon Shortline Railroad Co. v. Pfost,* 53 Idaho 559, 27 P.2d 877 (1934).

The common meaning of "division" must be found from an examination of relevant materials that were available to the legislature in 1974 since, as previously indicated, it is vital that we attempt to determine what *the 1974 legislature* meant by the word "division."

One particular statutory section also enacted by the 1974 legislature is exceptionally relevant. As a part of the comprehensive reorganization of the executive branch of government in 1974, the legislature's executive reorganization commission suggested a specific standard, uniform system of designation of the various units of state government. That recommendation was embodied in statute by the same legislative session that passed House Bill 400, which provided for the confirmation by the Senate of divisional administrators within the Office of the Governor. Idaho Code § 67-2402 (3) in its entirety reads as follows:

> For its internal structure, unless specifically provided otherwise, each department shall adhere to the following standard terms:
>
> > (a) The principal unit of a department is a division, each division shall be headed by an administrator. The administrator of any division may be exempt from the provisions of chapter 53, title 67, Idaho Code, if declared exempt by the director of the department at the time of the creation of the division.
> >
> > (b) The principal unit of a division is a bureau. Each bureau shall be headed by a chief.
> >
> > (c) The principal unit of a bureau is a section, each section shall be headed by a supervisor.

After this statutory scheme of governmental organization was enacted, the various divisions of state government have been characterized as operating units of state government headed by a single administrator who reports directly to a department director. Accordingly, by statute and results and governmental custom, the common meaning of division in the state governmental context is that a division is a principal unit of a department whose administrator reports directly to a department head, as opposed to the governing board or commission of a department, where appropriate. This same definitional scheme is applicable to the various divisions created by statute within the Office of the Governor. The various divisional administrators (Tourism and Industrial Development, Liquor Dispensary, Military Division and Budget, Policy Planning and Coordination) are appointed by the Governor. Accordingly, their administrative reporting responsibility is to the governor.

The proposition that it was the intention of the legislature to treat the single head agency administrators relationship to the Governor exactly like a division administrator-department director relationship found in the other reorganized departments of state government is supported by certain documents provided by the Legislative Executive Reorganization Commission to the legislature in 1974. In *A Tentative Proposal for the Reorganization of Idaho State Government,* the commission recommended to the legislature a particular reorganization plan for the Office of Governor. In relevant part, that report stated:

> Four new divisions will be within the Office of the Governor: the Liquor Dispensary, Military Division, Division of Industrial Development, and Division of Budget, Policy Planning and Coordination. The Governor, with the advice and consent of the Senate, may choose a director to act as head of the four divisions. *The Director will serve at the pleasure of the Governor. The Director shall choose the administrators for the divisions. If no director is appointed the Governor shall choose the administrators. Each administrator shall serve at the pleasure of the Governor, and shall be subject to the confirmation of the Senate.* [Emphasis added.]

Although the final legislation enacted, House Bill 400, slightly modified the recommendation to exclude from the executive proposal the director of the Office of Governor, it did provide for the various divisions within the office and provided for the Governor to appoint their administrators, subject to the advice and consent of the Senate. Consequently the Governor, under the modified statute, took the place of the director.

The other remaining entities that are within the Office of the Governor operate in a different fashion. The executive officers of the various commissions and boards structured within the Office of Governor report to their respective commission or board:

> 1. *Commission for the Blind,* I.C. § 67-5405, which provides that a full-time administrator may be hired by the commission and by definition report back to the commission.
>
> 2. *Endowment Fund Investment Board,* I.C. § 57-727, provides that two-thirds of the members of the board may select an investment trustee who shall perform activities and functions as directed by the board.

3. *Commission on Human Rights,* I.C. § 67-5905 provides that the commission may select a staff director who shall serve under the general supervision of the commission.

4. *Public Employees Retirement Board,* I.C. § 59-1327 (2), provides that the board shall appoint an executive director to serve at its discretion.

Statutes are to be considered as parts of a great, connected and homogeneous system. Because the fundamental rule of construction is to determine legislative intent, one must proceed under the supposition that several statutes are to be governed by one spirit and policy. 73 Am. Jr. 2d, *Statutes* § 188. Applying this doctrine to the various statutes creating the entities within the Office of Governor the overall statutory scheme evidences, in our opinion, a legislative intent that the individuals making policy and supervising the execution of that policy within the various entities, whether they be board members, commissioners, or administrators, are to have their appointment subject to confirmation by the Senate.

An additional method of determining what the legislature believed a division to be for the purposes of Section 67-802 is to review the characteristics comprising the powers, duties and responsibilities of the four divisions listed in the statute and analyze the Office on Aging and Office of Energy to determine whether they have those same characteristics. Our reading of the pertinent statutory sections suggests that the four divisions have the following general characteristics in common:

1. The division has a single administrative officer appointed by the Governor and serving at his pleasure.

2. The division has a specifically articulated responsibility to carry out a particular program or programs, or develop and recommend certain plans or policies.

3. They compile and submit certain data and reports to the Governor when so requested, or discharge other duties when directed by the Governor.

4. Divisions employ, subject to the provisions of Chapter 53, Title 67, all necessary personnel to accomplish the mission of the agency.

5. Pursuant to the express authority of the legislature through various appropriations measures, divisions receive and expend appropriated state tax dollars.

Applying these characteristics to both the Office on Aging and the Office of Energy, I reach the conclusion that they have the same characteristics of power, duty and responsibility as the four statutorily enumerated divisions:

1. Both offices are headed by a single chief administrator appointed by the Governor.

2. Both offices are charged with a specifically articulated responsibility to implement and execute a certain program or programs (See Appendix A) or develop and recommend policies.

3. Both offices are charged with collecting and submitting certain data and reports to the Governor or discharging certain duties at the direction of the Governor.

4. The administrator of the Office on Aging by statute may specifically employ, subject to the provisions of Chapter 53, Title 67, all personnel to accomplish the agency's mission. The director of the Office of Energy does not specifically have the authority to hire personnel, but public records in the State Auditor's Office show that the director or his designee have historically hired personnel for the office.

5. The executive budgets for both FY80 and FY81 show that both offices have historically received and expended state tax dollars. The chief administrators of those offices, or their designee, and not the Governor or his designee have signed and authorized the various expenditures from appropriations, according to the records on file with the State Auditor.

Although the other entities or units in the office of the governor have some of these same characteristics, the critical point is the fact that the "offices" are program developing and executing entities headed by a single, as opposed to a plural, administrator.

Argument can be made that the function of the two "offices" is akin to the function provided by members of the immediate staff of the Governor, and that therefore the two "offices" are not operating units of government in the sense that other units, such as the Military Division, are. The immediate staff of the Governor, which by the terms of Idaho Code § 67-5303 are exempt from the classified service, do not have program functions in the sense that other divisions do. The immediate staff assists the Governor in carrying out his constitutional and statutory duties; they report directly to the Governor or his chief of staff. Members of the Office on Aging staff are not, by statute, exempt positions. Members of the staff of the Office of Energy do not report to the Governor, as do members of the Governor's personal staff, but rather report to the director of the office, just as members of the staffs of other divisions and entities report to the chief administrator of the entity. Records in the State Auditor's Office show that the appointment authority for personnel hired in the two "offices" has been the chief administrator or his designee, not the Governor or his chief of staff, who are the appointing authorities for the immediate staff of the Governor.

As previously indicated it is our opinion based on a reading of relevant statutes that it was the intent of the legislature to require that all individuals, whether they be commissioners, board members or administrators, who are charged with the management and implementation of a specific executive department program be subject to confirmation by the Senate.

Argument can also be made that the legislature, relative to the Office on Aging and the Governor, relative to the Office of Energy could have labeled the "offices" as "divisions," and that the failure to so label an "office" a "division" is evidence that the entity is in fact not a division. The legislature, in delineating the original grouping of "divisions" found in Idaho Code § 67-802 denominated certain entities as "divisions" without in fact calling them a "division." Specifically, the State Liquor Dispensary is listed as a division per the terms of Section 67-802 without benefit of being listed statutorily as division. Accordingly, we believe that argument to be without merit.

In sum, on the basis that the Office of Energy and Office on Aging are organizationally structured as are other divisions in the departments of state government, and on the basis that both offices share the same characteristics and attributes of power, duty and responsibility as do the divisions enumerated in Section 67-802, it is my opinion that both "offices" are in fact "divisions" as contemplated by Section 67-802. Accordingly, the appointment of the administrator of the Office on Aging and the director of the Office of Energy are subject to confirmation by the Senate.

Very truly yours,
/s/ ROY L. EIGUREN
Deputy Attorney General
Division Chief — Legislative/
Administrative Affairs

RLE/tr

March 7, 1980

Mr. Thomas L. Purce
Director
Department of Administration
Statehouse Mail

Control #2075

Dear Mr. Purce:

This letter is in response to your inquiry of February 11, 1980, concerning the Permanent Building Fund Advisory Council. Your first question asks whether the council is "an advisory body or a regulatory agency." In our view, it is both, depending on the particular function being carried out.

The Permanent Building Fund Advisory Council has two main responsibilities. First, the council is directed to project the building requirements for all institutions and agencies of the state of Idaho for the next fiscal year. This report is to be submitted to the Governor on or before September 1st of each year. *Idaho Code,* §67-5712. The projection of the Council is then incorporated into the executive budget of the state of Idaho and then transmitted to the legislature. The statutory duties of the Governor with regard to the executive budget state in part:

> Part II of the budget document shall present in detail for the next fiscal year, as minimum information to be included in Part II, items showing: estimates of agency needs based on the *governor's recommendations,* to meet the expenditure needs of the state from all statutory funds classified by agencies and showing the cost of each major program. Part II shall also set forth the *governor's recommendations for the capital program.* All funds, including federal and local funds and interaccount receipts received for any purpose, shall be accounted for in the budget. [Emphasis added.] *Idaho Code,* §67-3507 (2).

It is the Governor's recommendation which is submitted to the legislature for approval and appropriation. Presumably, the projections made by the Permanent Building Fund Advisory Council would be taken into consideration by the Governor when he formulates the executive budget.

Thus, insofar as this statutory duty is concerned, the function of the Permanent Building Fund Advisory Council is advisory. By way of comparison, the role of the Council is similar to any department head who submits a budget to the Governor. It is the Governor who makes the recommendation to the legislature. The legislature itself is the final decision maker on financing of state government. *Davis v. Moon,* 77 Idaho 146, 289 P.2d 614 (1955).

Another duty of the Permanent Building Fund Advisory Council concerns the planning and construction of public works. The authority of the Council is stated in the Code as follows:

> The administrator of public works and the responsible heads of the agencies for which appropriations for construction, renovations, remodelings or repairs are made pursuant to chapter 11, title 57, Idaho Code, shall consult, confer and advise with the permanent building fund advisory council in connection with all decisions concerning the administration of these appropriations and the planning and construction or execution of work or works pursuant thereto. *The approval of the permanent building fund advisory council shall be a condition precedent to the undertaking of planning or construction.* [Emphasis added.] *Idaho Code,* §67-5710.

> The director of the department of administration, or his designee, of the state of Idaho, is authorized and empowered, *subject to the approval of the permanent building fund council,* to provide or secure all plans and specifications for, to let all contracts for, and to have charge of and supervision of the construction, alteration, equipping and furnishing and repair of any and all buildings, improvements of public works of the state of Idaho. . . . [Emphasis added.] *Idaho Code,* §67-5711.

Under this framework, the function of the council is twofold. The process begins with consultation and discussion between the appropriate agency head, the administrator of the Division of Public Works, and the Permanent Building Fund Advisory Council. If the Council gives its approval to the public works project, it then directs the "director of the department of administration, or his designee," to secure plans, let contracts and supervise construction. In this sense, the role of the Permanent Building Fund Advisory Council could be classified as regulatory. It is the Council which must give its approval to any project and additionally the council must approve the securing of plans, letting of contracts and supervision of construction by the Department of Administration.

To summarize, the role of the Permanent Building Fund Advisory Council is advisory in making the projection, and regulatory in the context that its approval is a prerequisite to the construction of public works projects. The Council advises the Governor on projections for public works for the next fiscal year, and approves public works projects of the state of Idaho. Additionally, the Department of Administration must receive approval from the Council prior to the time it secures plans, lets any contracts, or supervises the construction or alteration of any public works project coming under its jurisdiction.

Your second question asks:

> What State agencies must consult, confer and advise with the Permanent Building Fund Advisory Council? And, to what degree is the Permanent Building Fund Advisory Council required to get involved in each agency's public works projects? (Do the Junior Colleges fall within the category of State agencies?)

The Permanent Building Fund Advisory Council has two grants of statutory authority. These, as quoted previously, are found in *Idaho Code,* §§67-5710 and 67-5711.

Idaho Code, §67-5710, provides that "all agencies for which *appropriations* for construction, renovations, remodelings or repairs are made *pursuant to chapter 11, title 57, Idaho Code,"* fall within the jurisdiction of the Permanent Building Fund Advisory Council. Title 57, Chapter 11, *Idaho Code,* is commonly referred to as the Permanent Building Fund. The Permanent Building Fund may have funds appropriated for the benefit of state institutions, agencies of state government, and junior college districts. *Idaho Code,* §§57-1108, and 57-1105A (for a further discussion and amplification of state agencies, state institutions and junior college districts, see Attorney General Opinion #80-1). Thus, any project which is financed out of the Permanent Building Fund, regardless of its cost or the status of the instrumentality, has to be approved by the Council.

The second sphere of influence subject to the approval of the Council comes under *Idaho Code,* §67-5711. This sections states in part:

> The director of the department of administration, or his designee, of the state of Idaho, is authorized and empowered, *subject to the approval of the permanent building fund council,* to provide or secure all plans and specifications for, to let all contracts for, and to have charge of and supervision of the construction, alteration, equipping and furnishing and repair of *any and all buildings, improvements of public works of the state of Idaho,* the cost of which construction, alteration, equipping and furnishing or repair exceeds the sum of five thousand dollars ($5,000). . . . [Emphasis added.] Idaho Code, §67-5711.

This section of the Code differs from *Idaho Code,* §67-5710, in that it speaks to all public works projects over $5,000 of the state of Idaho and is not limited to those financed by the Permanent Building Fund. Additionally, projects coming under the jurisdiction of the University of Idaho are excluded. Pursuant to this section of the Code, all agencies except the University of Idaho whose projects exceed $5,000, must receive the approval of the Council.

Your third question reads:

> What is the definition of the term "public works" and how is it to be applied to the responsibilities of the Permanent Building Fund Advisory Council?

One key to the definition of public works is found in *Idaho Code,* §67-3710:

> The administrator of public works and the responsible heads of the agencies for which appropriations for *construction, renovations, re-*

> *modelings or repairs are made pursuant to chap. 11, title 57,* Idaho Code, shall consult, confer and advise with the permanent building fund advisory council in connection with all decisions concerning the administration of these appropriations and the planning and construction or execution of work or works pursuant thereto. [Emphasis added.]

Idaho Code, §67-5711, uses similar language but adds "equipping and furnishing." As discussed earlier the Council has authority over public works projects under both sections of the Code.

In 1974 the Permanent Building Fund Advisory Council was placed within the Department of Administration as a matter of organization. See: Chapter 34, §2, 1974 Session Laws. While the legislature placed the Permanent Building Fund Advisory Council within the Department of Administration, it left intact Title 57, Chapter 11, *Idaho Code,* which provides for the Permanent Building Fund. Title 57, Chapter 11, *Idaho Code,* gives additional body and definition to the term "public works." *Idaho Code,* §57-1108, states in part:

> All moneys now or hereafter in the permanent building fund are hereby dedicated for the purpose of building needs, structures, *renovations, repairs* to and *remodeling* of existing structures at the several state institutions and for the several agencies of state government. [Emphasis added.]

Other sections of the Code which refer to "public buildings" and "public building improvements" are *Idaho Code,* §§57-1105, 57-1106.

As noted earlier, the Permanent Building Fund Advisory Council must approve of all public works projects for the state of Idaho and public works projects for junior colleges when funds are appropriated from the Permanent Building Fund. In the context of your question then, the term "public works" could best be defined with the following:

> Any expenditure from the permanent building fund without limitation as to dollar amount or institution involved or any expenditure by a state agency or institution, excluding the university of Idaho, which exceeds $5,000, for the construction, alteration, equipping, furnishing or repair of any building of the state of Idaho.

The $5,000 limitation found in *Idaho Code,* §67-5711, happens to coincide with the minimum expenditure requirement for competitive bidding found in *Idaho Code,* §67-5718.

The second part of your question is how this definition is to be applied to the responsibilities of the Permanent Building Fund Advisory Council. *Idaho Code,* §67-5710, provides, "approval of the permanent building fund advisory council shall be a condition precedent to the undertaking of planning or construction." This same theme is found in *Idaho Code,* §67-5711, which provides that the Department of Administration is to provide or secure all plans and specifications for public works and to let all contracts for the same, subject to the approval of the Council.

The second area of authority which the Permanent Building Fund Advisory Council has is found in *Idaho Code,* §67-5712, which provides that the Council,

together with the director of the Department of Administration shall prepare for the legislature and submit to the Governor, a projection of the building requirements of all institutions and agencies of the state of Idaho.

The two duties of the Permanent Building Fund Advisory Council only relate to public works as that term is defined herein.

In summary, the definition of public works for purposes of the responsibility of the Permanent Building Fund Advisory Council is twofold. The first part of the definition states, "any expenditure from the permanent building fund without limitation as to dollar amount or institution involved." This part of the definition is derived from the Council's complete authority over appropriations made out of the Permanent Building Fund. *Idaho Code,* §67-5710.

The second part of the definition states:

> Any expenditure by a state agency or institution, excluding the university of Idaho, which exceeds $5,000, for the construction, alteration, equipping, furnishing of any building of the state of Idaho.

This part of the definition differs from the first part in that it does not relate to the funding source of the expenditure, but instead places a minimum expenditure requirement and excludes the University of Idaho. *Idaho Code,* §67-5711. By way of example, the Council would have authority over a project for the University of Idaho or one of less than $5,000, if the project was financed from the Permanent Building Fund. The Council would not have authority over a University of Idaho project which was financed by non-permanent building fund revenues or of any non-permanent building fund public works project of less than $5,000.

Your fourth question states:

> In the process of establishing a projection of building requirements for all institutions and agencies of Idaho, does this encompass all funding sources? And does the Permanent Building Fund Advisory Council only prioritize agency requests or filter out unacceptable requests and send to the Governor only those requests which the Council deems as appropriate?

The relevant section of the Code states:

> Projection of building requirements report. — The permanent building fund council and the director of the department of administration works shall on or before September 1 next preceding each regular session of the legislature prepare and submit to the governor a *projection of building requirements of all institutions and agencies of Idaho.* Such projections shall include new buildings, maintenance and repair of existing state owned buildings. [Emphasis added.] *Idaho Code,* §67-5712.

This grant of legislative authority can be contrasted with *Idaho Code,* §67-5710, in that it does not limit itself to the Permanent Building Fund but instead encompasses "all institutions and agencies of Idaho."

For the reason that the above-quoted section of the Code does not limit itself to any particular funding source it would appear that the Permanent Building Fund Advisory Council's authority to make projections extends to projects whatever the source of funding. In the event that no State funds will be used for a public works project, the Council can still include it in the projection if State funds are to be used for operation and maintenance. This view is supported by the fact that these estimates are used by the Governor in formulating his recommended budget to the legislature.

The projection made by the Council, therefore, should include the building requirements of all state agencies and institutions to the extent they are state funded. Additionally, *Idaho Code,* §57-1105A provides that the legislature may make grants from the Permanent Building Fund to junior college districts for physical plant facilities. This type of grant should also be included in the Council's projection.

The second part of your question concerns whether the projection should prioritize each and every request or whether the Council should filter out unacceptable requests before submitting the projection to the Governor. As I outlined in the first portion of this letter, the projection is merely a recommendation to the Governor. The Governor in turn makes a recommendation to the legislature on capital improvements.

In this regard, it would appear that the Council should include each and every request made by state agencies and institutions to the Permanent Building Fund Advisory Council and then prioritize those requests. The language of *Idaho Code,* §67-5712, does not appear to give the Council discretion to exclude from the projection a request by a state agency or institution for a public works project. The Council could prioritize those projects it felt that funding would be warranted and then list all of the other public works projects which have been presented to the Council for consideration.

Your fifth question states:

> In the selection process for architects and engineers to do work for State agencies related to public works, must the agencies have the prior approval of the Permanent Building Fund Advisory Council? Is there a dollar limitation involved before approval (if any) is needed? And does this approval process (if any) apply to programming and planning as well as design work?

Idaho Code, §67-5711, states in part:

> The director of the department of administration . . . is authorized and empowered subject to the approval of the permanent building fund council to . . . secure all plans and specifications for . . . the construction . . . of public works of the state of Idaho.

As stated before, the Council has complete authority over expenditures out of the Permanent Building Fund. On this point *Idaho Code,* §67-5710, provides:

> The approval of the permanent building fund advisory council shall be a condition precedent to the undertaking of planning or construction.

As a practical matter, the approval authority of the Permanent Building Fund Advisory Council is tantamount to ultimate authority to select an architect or engineer for any project under its jurisdiction. It should be further noted that the legislature delegated the ministerial duty of negotiating with and entering into contracts with architects and engineers to the Department of Administration.

The second part of your question asks whether there is any dollar limitation involved before approval is needed. For projects which are funded by the Permanent Building Fund there is no dollar limitation. Thus, the selection of all architects and engineers must be approved. For projects which are funded by non-permanent building fund appropriations, approval is necessary when the project exceeds $5,000. The Council has no role in the selection process of architects and engineers for University of Idaho projects which are financed by non-permanent building fund revenues.

The third part of your question concerns the initial programming and planning stage of a construction project. This type of planning precedes any design or graphic work by an architect. Your question is, does the Permanent Building Fund Advisory Council approval process include this programming and planning process. As heretofore stated, the Permanent Building Fund Advisory Council has two grants of authority in this regard. Both grants of authority include approval at the "planning" stage of construction. *Idaho Code,* §§67-5710, 67-5711.

The Council has two main responsibilities. These are projecting the building requirements of the state of Idaho and approving of those projects which fall under its jurisdiction. The programming and planning portion of any project is a mixture of both functions. The Council could, in its discretion, order a programming and planning study, in order to properly evaluate the need for the project. This study could be used to evaluate the priority the project should have in the projection. Also, a programming and planning study could be made after the project has been funded.

In relation to the Permanent Building Fund, *Idaho Code,* §67-5710, states in part:

> The approval of the permanent building fund advisory council shall be a condition precedent to the *undertaking of planning* or construction.

In relation to other projects coming under its jurisdiction, *Idaho Code,* §67-5711, states in part:

> The director of the department of administration . . . is authorized . . . subject to the approval of the permanent building fund council to provide or secure *all plans and specifications*. . . .

In my opinion, both grants of authority include the programming and planning portion of a project which falls under the jurisdiction of the Council. Also, the Council has the authority over programming and planning in relation to its duty to project the building requirements of the state.

Your sixth question states:

> Of the various sections of the *Idaho Code,* to which are the Permanent Building Fund Advisory Council limited to developing rules and regu-

> lations that will govern the operation of the Capital facilities program, design, construction, preventive maintenance, and budgetary process for public works.

The grant of rule-making authority for the Permanent Building Fund Advisory Council is found in *Idaho Code,* §67-5711, which states in part:

> The permanent building fund council may adopt rules and regulations consistent with existing law including rules and regulations for a program of inspection and preventive maintenance, to carry out the provisions of this act.

This rule-making authority extends over the operation of the Permanent Building Fund, the approval of public works projects pursuant to *Idaho Code,* §67-5711, and projection of building requirements for the state.

If you have any further questions or you feel that a particular point needs clarification or amplification, please feel free to contact me.

Sincerely yours,
/s/ STEVEN M. PARRY
Deputy Attorney General
Administrative Law and Litigation Division

SMP:lb

May 13, 1980

The Honorable Tom Stivers, Chairman
Committee on Judiciary, Rules & Administration
Idaho House of Representatives
Statehouse
Boise, ID 83720

THIS IS NOT AN OFFICIAL ATTORNEY GENERAL OPINION, AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE.

Dear Representative Stivers:

This office is in receipt of your request for legal guidance relative to Idaho Const., Art. IV, § 9. Specifically, you have asked whether that constitutional section precludes the Idaho Legislature, when meeting in extraordinary session, from considering and enacting memorials and resolutions on topics not encompassed within the Governor's proclamation convening the extraordinary session.

Idaho Const., Art. IV, § 9 in its entirety reads:

> § 9. Extra sessions of the legislature. — The governor may, on extraordinary occasions, convene the legislature by proclamation, stating the

> purposes for which he has convened it; *but when so convened it shall have no power to legislate on any subjects other than those specified in the proclamation;* but may provide for the expenses of the session and other matters incidental thereto. He may also, by proclamation, convene the senate in extraordinary session by the transaction of executive business. [Emphasis added.]

By its terms, the above quoted constitutional article allows the Legislature, when meeting in extraordinary session, to legislate only on those subjects delineated in the Governor's proclamation. To provide an answer to your question, a definition of "legislate" as contemplated by the framers of Art. IV, § 9 is necessary.

Although the courts of Idaho have never provided a definition of "legislate," the highest courts of several of our sister states have. Succinctly stated, those courts have defined legislation as:

> The act of giving or enacting laws; the power to make laws, the act of legislating; preparation and enactment of laws; the making of laws by express decree. *State ex rel. Yancey v. Hyde,* 212 Ind. 20, 22 N.E. 644; *Eastern Oil Refining Co. v. Court of Burgesses of Wallingford,* 130 Conn. 606, 36 A.2d 586, 589; *Oklahoma City, Ok. v. Dolese,* C.C.A. Okl., 48 F.2d 734, 738.

> The Legislature at a special session has all the power it has at a regular session, except so far as restrained by the Constitution and the limitation by article 3, § 40, providing that at such sessions there shall be no "legislation" on subjects not designated by the Governor, does not preclude the appointment of an investigating committee to obtain information for future use, even on a subject not submitted by the Governor; the word "legislation" having a well-defined meaning, and including only the enactment, repeal, and amendment of laws. *Ex parte Wolters,* 144 S.W. 531, 538, 64 Tex, Cr. R. 238.

Joint Rule 2, Joint Rules of the Legislature, Forty-Fifth Idaho Legislature, provides the following definitions relevant in our analysis here:

> Resolution. — This term denotes the adoption of a motion, the subject matter of which would not properly constitute a statute.

> Concurrent Resolution. — This term denotes a resolution that originates in one house of the legislature where it is passed and is then sent to the other house for passage. It is signed by the presiding officers of both houses.

> Joint Resolution. — A joint resolution is a resolution passed by both houses of the legislature proposing an amendment to the Constitution of the state of Idaho.

> Bill. — This term denotes the draft of a law or amendment thereto submitted to the legislature for its approval or rejection.

> Joint Memorial. — A petition or representation made by the House of Representatives and concurred in by the Senate, or vice versa, addressed to whoever can effectuate the request of the memorial.

Accordingly, by the definition provided by rule, bills are the only vehicles available to the legislature to enact law or provide amendment to existing law. To "legislate" would be the act of passing "legislation." Applying the previously articulated general rule of law provided by case law, to "legislate" would, in our opinion, be the act of enacting bills — the act of making "law." Thus, the consideration and passage of resolutions, concurrent resolutions, joint resolutions, and joint memorials not the subject of any topic in the Governor's Extraordinary Session Proclamation is not, in our opinion, violative of Idaho Const., Art. IV § 9.

Very truly yours,
/s/ ROY L. EIGUREN
Deputy Attorney General
Division Chief — Legislative/
Administrative Affairs

RLE/tr

cc: Senator Reed W. Budge
Representative Ralph Olmstead

May 13, 1980

The Honorable Elaine Kearnes, Chairman
Committee on Health and Welfare
Idaho House of Representatives
Statehouse
Boise, ID 83720

THIS IS NOT AN OFFICIAL ATTORNEY GENERAL'S OPINION, AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE.

Dear Representative Kearnes:

This office is in receipt of your request for legal guidance relative to the question of whether the legislature, while in extraordinary session, may reconsider, amend or modify appropriation measures enacted during the previous regular legislative session.

Idaho Const., Art. IV, § 9 provides the constitutional basis for the governor of the state to convene the legislature in extraordinary session:

> § 9. Extra Sessions of the Legislature. — The governor may, on extraordinary occasions, convene the legislature by proclamation, stating the purposes for which he has convened it; *but when so convened it shall have no power to legislate on any subjects other than those specified in the proclamation;* but may provide for the expenses of the session and other matters incidental thereto. He may also, by proclamation, convene the senate in extraordinary session for the transaction of executive business. [Emphasis added.]

By its terms, Art. IV, § 9 allows the legislature to consider only those subjects listed in the governor's proclamation convening the extraordinary session. Courts that have interpreted constitutional provisions like Art. IV, § 9 have uniformly ruled that they are to be strictly construed:

> A constitutional provision that an extra session of the legislature shall have no power to act upon subjects other than those specially designated in the proclamation by which the session is called is mandatory, and a statute passed at such session upon a subject not specially designated is not valid. 72 Am. Jur. 2d, *States* § 59.

The manual of parliamentary law adopted by this Legislature, Mason, *Mason's Manual of Legislative Procedure* § 780, (1962), reaches the same result:

> Sec. 780. Calls for Special Sessions. (1) A constitutional provision forbidding the enactment of laws at a special session, other than those specified in the proclamation by the governor, is mandatory.

This office has reviewed both proclamations issued by the governor detailing the subjects to be considered by the legislature during the First Extraordinary Session of the Forty-Fifth Legislature. Based upon our review of those proclamations it is our opinion that language contained therein strictly and narrowly limits the subject matter to be considered by the legislature. The proclamations do not contain language specifically providing to the legislature the authority to consider appropriation measures other than (1) a measure designed to increase funding to the Aid to Dependent Children Program, (2) measures designed to increase revenues to the state highway account and (3) measures to fund the Legislative Fiscal Office, the Legislative Council, the Legislative Auditor's Office, Joint House Appropriations Senate Finance Committee, the Division of Financial Management and the Division of Economic and Community Affairs. We also believe that it cannot be reasonably inferred from the proclamations that the legislature, at this extraordinary session, has the authority to consider and enact appropriation measures other than those above delineated.

The generally accepted legal test of whether proposed legislation at an extraordinary session is within the subject matter of the governor's call is stated as:

> §5.08 — Germane Subject . . . The exact determination of what legislation is germane to a particular call will depend upon the application of reasonable judgment in each separate instance where the issue is raised, keeping in mind that the purpose of placing constitutional limitations upon the enactments of a special session is to provide notice to the public of the nature of the legislation to be considered. The test is whether the public was reasonably put on notice that legislation of the sort enacted would be considered. Sands, *Sutherland Statutory Construction,* 4th Ed. Vol. 1, § 5.08.

We believe that the public, through the governor's proclamations, was not put on notice that the legislature would consider at the extraordinary session any appropriations other than those relating to the subjects detailed in the proclamations.

Accordingly, on the basis of the "public knowledge" test, based upon the general rule of law that the proclamations are mandatory in terms of the

subjects that the legislature may consider, and in light of the fact that the proclamations narrowly limit the particular subjects that the legislature may consider appropriations for, it is our opinion that the legislature may not reconsider, amend or modify appropriation measures enacted during the Second Regular Session except those relating specifically to (1) Aid to Dependent Children (2) State Highway Account and (3) Legislative Staff agencies and Division of Financial Management and Economic Community Affairs.

Very truly yours,
/s/ ROY L. EIGUREN
Deputy Attorney General
Division Chief — Legislative/
Administrative Affairs

RLE/tr

July 8, 1980

C. W. Crowl, Director
Dept. of Corrections
Statehouse Mail

Control #2509

Re: *State of Idaho v. David Allen Osborn*
I.C. § 19-2705

Dear Director Crowl:

I am responding to your letter dated May 21, 1980, in which you have requested legal advice on the effect a stay of execution in capital cases has on the confinement requirements of *Idaho Code*, § 19-2705. Your request for advice on this matter is in response to a letter from the Deputy Public Defender of the Sixth Judicial District, Gaylen L. Box. Mr. Box, writing on behalf of David Allen Osborn, has requested that the Warden of the state penitentiary transfer Mr. Osborn from solitary confinement to the maximum security unit of the penitentiary. In his letter, Mr. Box stated:

> It is our belief that the stay of execution entered by the Supreme Court relieves the Warden of the obligation to keep David in solitary confinement. During the pendency of the appellate procedure, not only are the time periods contained in § 19-2705 suspended but, also, the requirement of solitary confinement is, likewise, suspended.

It is my conclusion that Mr. Box's analysis of *Idaho Code*, § 19-2705 is incorrect. Research clearly indicates that although the taking of an appeal in a capital case stays execution of the death penalty, it does not stay or affect the confinement requirements of *Idaho Code*, § 19-2705, which require the appellant's imprisonment in solitary confinement pending decision of his appeal.

The conclusion that the stay of execution affects the execution of the death penalty only is based upon the following analysis:

1. Pursuant to *Idaho Code,* § 18-4004, the mandated judgment for first degree murder is either imprisonment for life or death; accordingly, District Judge Arthur P. Oliver's *judgment* was that David Allen Osborn suffer the penalty of death.

> It is the . . . *judgment* of the court that said defendant suffer a penalty of death. [Emphasis added.] (R., p.105.)

2. A stay of execution pending an appeal stays the execution of the *judgment (death penalty) only,* but does not address itself to or stay the confinement requirements.

> An appeal to the Supreme Court from a judgment of conviction stays the execution of *judgment* in all capital cases. . . . I.C. § 19-2802.

3. District Judge Oliver's order staying execution did *not* concern itself with confinement requirements, but only with a stay of execution of the death penalty. (R., pp.114-115.)

4. The stay of execution issued by the Idaho Supreme Court through its Chief Justice, Charles Donaldson, on July 20, 1979, spoke only to the "execution of the death penalty," and did not stay the confinement requirements of *Idaho Code,* § 19-2705. (R., p.119.)

5. *Idaho Code,* § 19-2705 succinctly states that "The . . . warden of the state penitentiary shall keep said convicted person in solitary confinement until the infliction of the death penalty. . . ."

Logically, if the "infliction of the death penalty" is delayed by virtue of an appeal or reversed for resentencing at the conclusion of an appeal, the warden would be violating state law to keep the convicted person anywhere other than solitary confinement pending that appeal.

6. As indicated in the notes after *Idaho Code,* § 19-2705, California's Penal Code § 1217 is comparable to Idaho's § 19-2705. The California Supreme Court, when faced with a similar issue to that addressed herein, held, in its interpretation of California Penal Code § 1217, that an appeal stayed the execution of the death penalty *alone,* and did not affect the detention requirements of the capital prisoner pending the outcome of the appeal.

> The requirements of Penal Code, § 1217, . . . the Legislature intended that the taking of an appeal should automatically stay the execution of the death penalty *alone.* Ex parte Fredericks, 104 Cal. 400, 38 P. 51. Obviously, the execution of the defendant pending his appeal would render the appeal utterly valueless. . . . This consideration, however, presents no reason why the taking of an appeal from the judgment of conviction should automatically stay the execution of that portion of the death warrant which requires the detention of the defendant in a state prison pending the infliction of the death penalty. [Emphasis added.] *Ex parte Watts,* 197 Cal. 611, 241 P. 886 at 887 (1925).

THIS IS NOT AN OFFICIAL ATTORNEY GENERAL OPINION, AND IS PROVIDED SOLELY FOR LEGAL GUIDANCE.

Sincerely yours,
/s/ MICHAEL B. KENNEDY
Deputy Attorney General
Chief, Criminal Justice Division

MBK:lb

July 18, 1980

Rose Bowman
Idaho Office on Aging
Statehouse Mail

Control #2554

Dear Ms. Bowman:

In your letter of June 3, 1980, you asked our office for an opinion regarding the following: Is the Idaho Department of Health & Welfare required by *Idaho Code,* § 56-233a, to pay the entire cost of prescription drugs for Medicaid recipients in Idaho nursing homes? During our consideration of the meaning of this provision, we gathered considerable information regarding the legislative and regulatory history of this section. From the outset of the Medicaid program until 1978, the Idaho Department of Health and Welfare paid the first $20.00 of each Medicaid patient's prescription drug cost each month. This was raised to $35.00 in 1978 by the promulgation of a rule under the Administrative Procedure Act, Title 67, Chap. 52, Idaho Code. This rule is found in the Department of Health & Welfare's operating policy and procedures at 3162.1 (j) (copy attached, Exhibit A). The Department of Health & Welfare's administrative rules which outline the scope of "skilled and intermediate nursing care" are found in the Department of Health & Welfare's manual at §§ 3-1470.01 and 3-1470.02 (copy attached, Exhibit B).

The statutory mandate providing for the costs of indigent care aside from what the Department of Health & Welfare pays is found in Title 31, Chaps. 33 and 34, Idaho Code. Section 31-3302 (7), *Idaho Code,* provides that the expenses of the indigent sick whose support is chargeable to the county are charges against the county. We also note, as an incident of legislative intent, that no funds have been appropriated for this purpose by the legislature.

Section 56-233a has been twice amended. The section was originally S.B. 1373, as amended in 1974 and then became Chap. 93 in the 1974 Session Laws (copy attached, Exhibit C). The 1978 amendment required recipients to meet Federal standards of financial participation (copy attached, Exhibit D). *Idaho Code,* §56-233a took its present form as a result of the 1979 legislature (copy attached, Exhibit E), and reads:

> Costs of nonfederal share of skilled and intermediate nursing care for medically eligible persons — Source of payment. — The department of health and welfare is hereby directed to expend from its annual appropriations the amounts necessary to pay to each and every provider of medical services the full reasonable costs of the entire nonfederal share

> of skilled and intermediate nursing care for dependent, medically eligible persons after such persons have participated financially in the cost of such nursing home care to the extent mandated by the federal title XIX requirements.

In construing any statute, the goal is to determine its legislative intent. *Idaho Public Utilities Comm. v. V-1 Oil Co.,* 90 Idaho 415, 412 P.2d 581 (1966). Superficially, the words of §56-233a do allow the inference that legislative intent was for prescription drug costs to be paid by the state. However, the overly emphatic ". . . to each and every provider . . ." tends to obscure the limiting language which follows. The section is actually directed toward the payment of costs of "skilled and intermediate nursing care" as indicated by its title, when passed in 1974 and amended in 1978.

The Department of Health & Welfare has defined "skilled and intermediate nursing care" under its rule making power, § 56-202, *Idaho Code,* and in accordance with the Idaho Administrative Procedure Act, Title 67, Chap. 52, Idaho Code. Both rules dealing with nursing care, 3-1470.01 (skilled) and 3-1470.02 (intermediate), specifically exclude medications obtained by prescription (Exhibit B attached). The legislature was not only aware of the interpretation found in these rules, it also sanctioned the rules themselves as part of the process of legislative review.

Prescription drugs are, to a lesser extent than the "full reasonable costs," paid by the Department of Health & Welfare. Also in an administrative rule, the Department of Health & Welfare has provided for monthly payments of up to $35.00 for prescription medication to Medicaid recipients. Rule 3162.1 (j) (Exhibit A attached). The mere fact that prescription drugs are provided for in a different rule, reinforces the conclusion that it is not a part of either skilled or intermediate nursing care.

Great weight is given to properly promulgated administrative rules. When such rules are not arbitrary or capricious, they have the force and effect of law. *Howard v. Missman,* 81 Idaho 82, 337 P.2d 592 (1959).

The construction given to *Idaho Code,* §56-233a by the Department of Health & Welfare is entitled to considerable weight, particularly when, as in this case, the administrative interpretation by rule originated at approximately the same time as the statutory enactment, the rule has survived statutory reenactment, and has also weathered the test of time. *State ex rel. Andrus v. Kleppe,* 417 F. Supp. 873 (D.C.Idaho 1967).

The fact that the legislature has revised the pertinent section twice since the interpretive rule became effective is especially significant in determining legislative intent. The weight to be given to the agency's interpretation of the statute is increased by the legislature's reenactment of the statute without any indication that the interpretation was mistaken. *State ex rel. Wedgwood v. Hubbard,* 63 Idaho 791, 126 P.2d 561 (1942). Thus, it is apparent that the legislature, in passing and amending §56-233a, never intended to include prescription drugs within the definitions of skilled and intermediate nursing care; nor has the legislature intended to take up this resulting additional cost.

THIS IS NOT AN OFFICIAL ATTORNEY GENERAL OPINION, AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE.

Sincerely yours,
FRED C. GOODENOUGH
Deputy Attorney General
Administrative Law and Litigation
Division

FCG:lb

Attach.

December 5, 1980

The Honorable Reed Budge
President Pro Tem
Idaho State Senate
Statehouse
Boise, ID 83720

THIS IS NOT AN OFFICIAL ATTORNEY GENERAL OPINION, AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE.

Dear Senator Budge:

This responds to your request of December 2, 1980 for legal guidance on the question of what matters may be considered during the organizational session of the Idaho Legislature. Specifically, you have asked the question "Pursuant to applicable constitutional and statutory provisions, may the Idaho Legislature, during its organizational session, consider and take formal action in the nature of legislation on matters other than those deemed to be organizational in nature?"

It is a fundamental rule of law that in order for a legislative body to enact valid legislation, such legislation must be promulgated by a legally constituted institution, which is empowered to enact laws. "It is essential for the valid exercise of delegated legislative power that the instrumentality which undertakes to do so be legally established and duly constituted pursuant to valid enabling laws." Sands, *Sutherland Statutory Construction* § 6.01. Accordingly, the determination as to what actions a legislative body may take will be dependent upon the current valid enabling laws, constitutional or statutory, that grant authority to the body to enact positive law.

Sections 1 and 8 of Art. 3 of the *Idaho Constitution* provide the constitutional basis for delegation of the legislative power by the people of Idaho to the state legislature. Art. 1 in relevant part provides: "The legislative power of the state shall be vested in the senate and house of representatives." Art. 8 in its entirety states: "the sessions of the legislature shall be held annually at the capitol of the state, commencing on the second Monday of January of each year, unless a different day shall be appointed by law, and at other times when convened by the

governor." It is fundamental that the legislature may not exercise its constitutionally delegated legislative power absent clear authority to do so. "It is only when both houses are lawfully assembled that they constitute the legislature of the state. The legislature may not provide for the holding of regular sessions other than as prescribed by the constitution." 81A C.J.S. *States* § 48.

Section 8, Art. 3 of the state constitution, cited above, provides that the legislature shall meet annually beginning on the second Monday of January, unless a different day shall be appointed by law, or at other times when convened by the governor. Art. 4, § 9 of the state constitution provides that the governor may "on extraordinary occasions, convene the legislature by proclamation, stating the purposes for which he has convened it. . . ." Accordingly, the only sessions of the legislature constitutionally allowed are: (1) extraordinary sessions called by the Governor; (2) sessions that commence on the second Monday of January, or at other times "appointed by law."

Applicable Idaho law provides for two types of sessions pursuant to Idaho Code § 67-404 and Idaho Code § 67-404 (a). Section 67-404 (a) provides for an organizational session commencing on the first Thursday of December in general election years:

> Organization of House and Senate. — On the first Thursday of December in general election years, the members-elect of the house of representatives and the senate shall meet at the state capitol in Boise for the purpose of organizing their respective houses. Members elect shall each receive the sum of $25.00 per day, not to exceed three (3) days for general expenses, and shall also be reimbursed for actual and necessary travel and lodging expenses in attending such meetings, shall file, with the legislative counsel, a duly verified claim, together with paid vouchers for travel and lodging expenses actually incurred. The legislative counsel shall file all such claims with the appropriate state office for examination of payment of all just claims.

Section 67-404, in its entirety, provides:

> Sessions of Legislature. — At the hour of 12:00 o'clock p.m. on Monday, on or nearest the 9th day of January, the regular session of the legislature shall be convened. The presiding officer must call the same to order and preside. Neither house must transact any business, but must adjourn from day to day until a majority of all of the members authorized by law to be elected are present. Each legislature shall have a term of two (2) years, commencing on December 1, next following the general election, and shall consist of a "first regular session" which shall meet in the odd numbered years and "second regular session" which shall meet in the even numbered years and any extraordinary session or sessions which may be called as provided by law.

We believe sections 404 and 404 (a) must be read together. This opinion is based on the application of the generally accepted rule of statutory construction known as "in pari materia" requires that statutes dealing with the same general subjects be read in conjunction with each other. Since 404 and 404 (a) deal with sessions of the legislature, they accordingly must be read together. The statutes, when read together, provide for three types of sessions of the legislature: regular sessions, extraordinary sessions, called by the governor pursuant to constitu-

tional authority, and organizational sessions. Art. 4, § 9, providing for extraordinary sessions, specifically mandates the types of actions the legislature may take at such sessions. At those sessions the legislature shall "have no power to legislate on any subject other than those specified in the proclamation." Absent a specific statutory mandate limiting the subject matter it may consider, the legislature at regular sessions may transact any business it feels necessary to be conducted, based upon its own discretion, at that time. We believe that the limiting language found in Section 404 (a) controls in the analysis of wt may be considered at original sessions. That is to say, the language in 404 (a) that provides that the members-elect shall meet in the state capitol "for the purpose of organizing their respective houses" must be strictly construed. Accordingly, only those matters that generally may be construed to mean organizational in the sense of organizing the legislature itself, may be transacted at that particular session. We base this opinion on the application of the rule of statutory construction entitled expressio unius est exclusio alterius, which provides that all omissions in a statute are to be read as exclusions. Sands, *Sutherland Statutory Construction* § 47.23. Accordingly, the express inclusion in the statute of the authority of the legislature to consider only organizational matters infers that the consideration of non-organizational related matters is prohibited.

We further base our opinion on what we believe the legislative intent in enacting 67-404 (a) was, at the time of its passage in 1967. The language of 404 (a) is phrased in the terminology "members-elect," which would suggest that the legislature, at the point in time that it enacted this legislation, was under the belief that, during the first Thursday, Friday and Saturday of December in general election years, individuals elected to serve in the legislature at the past general election were not yet members of the body. Apparently, this belief was founded on the basis that members of the legislature formally took office under the terms of Idaho Code § 67-302, which provides for the commencement of term of office for state officers commencing on the first Monday of January next after their election. Both the constitution and Idaho statute 67-402 provide that members of the legislature shall serve from December 1st next following their election at the general election, we believe that the 1967 legislature, in enacting 404 (a), although mistakenly believing that their membership was not sworn in until January, obviously enacted 404 (a) with the belief that the membership would be composed of members-elect. By its very terminology, members-elect could take no formal actions other than organizing, since they were not fully sworn members of the legislature. Finally, we find that the title of the legislative bill passed by the 1967 legislature which enacted into law what is now codified as Idaho Code § 67-404 (a), provides guidance in articulating what the purpose was in enacting the bill. Such title would suggest that the purpose for such a meeting was strictly organizational in nature.

In sum, it is our opinion that pursuant to Idaho Code § 67-404 (a) the legislature, during its organizational session, may enact legislation on only those matters that can properly be construed as organizational of the respective houses of the legislature itself. We believe that the legislature may only consider and take affirmative action on legislation, aside from organizational matters, during regular sessions of the legislature, as defined by Idaho Code § 67-404 and at extraordinary sessions of the legislature, when so convened by the governor, pursuant to Idaho Const., Art. 4, § 9.

If we may be of further assistance in this or any other matter, please feel free to contact us.

Very truly yours,
/s/ ROY L. EIGUREN
Deputy Attorney General
Division Chief — Legislative/
Administrative Affairs

RLE/tr

cc: Honorable Ralph Olmstead
Speaker of the House of Representatives

December 11, 1980

Donald R. Bjornson, M.D., Chairman
Idaho Emergency Medical Services Committee
c/o Orthopedic Association
1748 Jeppson Avenue
Idaho Falls, Idaho 83401

THIS IS NOT AN OFFICIAL ATTORNEY GENERAL'S OPINION, AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE.

Dear Dr. Bjornson:

This responds to your letter of December 2, 1980 requesting legal guidance on the question of the potential use of motor vehicle registration fees to support the Idaho Statewide Emergency Medical Services System. Specifically, you have asked whether Idaho Const., Art. 7, § 17, which provides that gasoline taxes and motor vehicle registration fees are to accrue to a dedicated state account, precludes the appropriation and expenditure of a portion of motor vehicle registration fees for funding Emergency Medical Service programs in Idaho.

Idaho Const., Art. 7, § 17 in its entirety reads as:

> § 17. Gasoline taxes and motor vehicle registration fees to be expended on highways. — On and after July 1, 1941 the proceeds from the imposition of any tax on gasoline and like motor vehicle fuels sold or used to propel motor vehicles upon the highways of this state and from any tax or fee for the registration of motor vehicles, in excess of the necessary costs of collection and administration and any refund or credits authorized by law, *shall be used exclusively for the construction, repair, maintenance and traffic supervision of the public highways of this state* and the payment of the interest and principal of obligations incurred for said purposes; and no part of such revenues shall, by transfer of funds or otherwise, be diverted to any other purposes whatsoever. [Emphasis added.]

As emphasized above, the above quoted state constitutional provision requires that moneys received from motor vehicle registration fees be "used

exclusively for the construction, repair, maintenance and traffic supervision of the public highways of this state." The Idaho Supreme Court has, on several occasions, articulated the law of this state on the appropriation and expenditure of moneys from special dedicated funds or accounts. In the case of *Rich v. Williams,* 81 Idaho 311 (1959), the court stated:

> We recognize the fundamental principle that where special funds or revenues are dedicated to a particular purpose, the same cannot be used for any other purpose, and that an act of the legislature attempting to provide otherwise is unconstitutional. At Page 316.

The Court reached the same conclusion in several previous cases including *Roach v. Gooding,* 11 Idaho 244 (1905), *State ex. rel. Moon v. Jonasson,* 78 Idaho 205 (1956). In 1970, the court stated that:

> The plain meaning of Art. 7, § 17 of the constitution is that all moneys collected from the enumerated sources must be used for the designated purpose and may not be diverted therefrom. *Williams v. Swenson,* 93 Idaho 542 (1970).

Accordingly, our opinion here necessarily turns on an analysis of whether funding of the Statewide Emergency Medical Services Program is one of the purposes contemplated by Art. 7, § 17 of the constitution. Clearly, the operation of such a program cannot be construed as relating to the construction, repair or maintenance of public highways. The only logical basis for finding that the EMS program could be funded from motor vehicle registration fees would be from the terminology "traffic supervision of the public highways."

The State of Idaho executive budget for fiscal year 1981 shows that moneys derived from gasoline taxes and motor vehicle registration fees are diverted to two major accounts within the state treasury: The State Highway Account and the Motor Vehicle Account. State Highway Account moneys are dedicated to the Idaho Department of Transportation for highway construction and maintenance. The motor vehicle account is dedicated to the Department of Law Enforcement, a portion of which provides the entire funding for the Idaho State Police.

By statute, the Idaho State Police serve as the primary entity of state government charged with traffic supervision responsibilities on the state's public highways. The specific objectives delineating the role and mission of the state police are found on pages 11-40 and 11-41 of the fiscal year 1981 Executive Budget document. Every objective articulated relates to traffic supervision and control.

On page #13-15 of the same budget document, the objectives of the emergency medical services program of the Idaho Department of Health and Welfare are listed. Our review and analysis of those objectives suggests that all of them are directly or incidentally related to providing emergency medical and rescue assistance to the victims of traffic accidents. In sum, the department's emergency medical services program provides assistance to traffic accident victims as a part of its overall mission to develop, implement and maintain a system of emergency medical care for critically ill people throughout Idaho.

We believe that the constitutional language "traffic supervision of the public highways of this state" can be broadly interpreted as including within its terms

governmental programs and activities that relate to providing rescue and emergency medical assistance to persons involved in accidents on the public highways of this state. Accordingly, we believe that moneys collected as motor vehicle registration fees could legally be used for funding those portions of the state's emergency medical services program that directly or primarily relate to providing assistance to traffic accident victims.

What portions of the EMS statewide program within the Department of Health and Welfare that directly or primarily relate to providing assistance to traffic accident victims is a factual determination that, by law, must be made initially by the state legislature and ultimately, if appropriate, by the courts. We suggest that your committee's proposal to the legislature to create a statewide EMS community assistance fund be tailored to explicitly articulate what specific programs relating to traffic accident assistance will be provided by moneys generated from motor vehicle registration fees. To the extent that motor vehicle registration fees are used solely for such specific programs, we believe that an appropriation and expenditure of registration fee moneys for such is constitutional.

If you have further questions on this or any other matter, please feel free to contact me.

Very truly yours,
ROY L. EIGUREN
Deputy Attorney General
Division Chief — Legislative/
Administrative Affairs

RLE/t

December 18, 1980

Mr. T. F. Terrell
Executive Director
Idaho Employee Retirement System
Statehouse
Boise, ID 83720

THIS IS NOT AN OFFICIAL ATTORNEY GENERAL'S OPINION, AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE.

Dear Mr. Terrell:

This responds to your letter of November 21, 1980, requesting legal guidance on a question relating to retired firefighter participation in the Public Employee's Retirement System.

In a previous letter to you, dated April 23, 1980, we opined that a retired firefighter receiving benefits from the Fireman's Retirement Fund could subsequently be employed (after October 1, 1980) by a public employer participating in the Public Employee Retirement System and qualify as an active system

member for the purpose of accruing and earning additional retirement benefits from the system. Our opinion was based upon the general rule of law that statutes granting governmental benefits are to be broadly construed so as to allow for flexible interpretation.

In our previous opinion, we did not address the specific question of whether a firefighter, who has earned and is receiving maximum benefits under the Fireman's Retirement Fund, could continue employment as a paid firefighter and accrue additional retirement credits through participation in the Public Employee Retirement System. After an extensive review of the statutory schemes creating both the Fireman's Retirement Fund and the Public Employee Retirement Fund, we believe that a precise answer to your question cannot be found in any applicable portions of the Idaho Code.

At first blush, it would appear that Idaho Code § 59-1302 (28), which defines "retirement," would control in the instant situation. That section, in its entirety, provides:

> (28) "Retirement" means the acceptance of a retirement allowance under this act upon termination of employment.

Idaho Code § 59-1352 integrates the Fireman's Retirement System with the Public Employee Retirement System. Arguably, the integration merges the two systems into one act. As one act, the definitional provision of Idaho Code 59-1302 would apply to rights and benefits granted under either system. Accordingly, by definition, a member's "retirement" per Idaho Code 59-1302 (28) would require termination of employment with any entity that provided retirement benefits to him under either the Public Employee Retirement System or the Fireman's Retirement System. That is, a firefighter could not "retire" (which, by definition per Idaho Code § 59-1302 (28), is acceptance of retirement benefits upon termination of employment) and begin to receive benefits pursuant to the Fireman's Retirement Fund while at the same time continue employment with an entity that would ultimately provide additional retirement benefits at some later time pursuant to the Public Employee Retirement System.

Such an interpretation would obviously change the conclusion we reached in our previous opinion to you on this subject, that is, a retired firefighter receiving benefits under the Fireman's Retirement Fund could not accrue and earn additional retirement benefits per the Public Employee Retirement system if re-employed by any governmental entity that participated in the system.

In addition, an argument can be made that Idaho Code § 59-1316 (2) precludes a retired firefighter, i.e. an individual who is receiving retirement benefits after termination of employment, from becoming re-employed by a public employer participating in the Public Employee Retirement System. Again, such an argument could only be credible if Idaho Code § 59-1316 (2) can be construed as being applicable to firefighters who earned benefits pursuant to the Fireman's Retirement System created pursuant to Title 72, Chapter 14, *Idaho Code*.

We believe, however, that the general rule of broad and flexible statutory construction previously articulated would preclude such a restrictive interpretation of the existing statutory scheme. Accordingly, it is our opinion that a firefighter, retired and receiving benefits pursuant to the Fireman's Retirement System, can accrue and earn additional retirement benefits pursuant to the

Public Employee Retirement System if re-employed by any public entity, including his previous employer. In our opinion, any result contrary to this could only be affected by appropriate modification of Chapter 13, Title 59, *Idaho Code* by the legislature.

If we may be of further assistance, please do not hesitate to contact me.

Very truly yours,
/s/ ROY L. EIGUREN
Deputy Attorney General
Division Chief — Legislative/
Administrative Affairs

RLE/t

Date: December 4, 1980

LEGAL GUIDELINES REGARDING THE SENATE PROCEDURE IN CONTESTED ELECTIONS

Prepared for: Lt. Governor Phil Batt, President Pro Tem Reed Budge, and Majority Leader James E. Risch

By: Attorney General David H. Leroy, Deputy Attorney General John Sutton, Deputy Secretary of State Ben Ysursa

We have been asked by the above senate officers to respond to thirteen questions regarding the procedures to be followed by the Idaho State Senate in judging the Contest of Election which has arisen over the District #21 seat. The questions and answers are as follows:

QUESTION #1

> WHAT ACTION, IF ANY, SHOULD THE PRESIDING OFFICER OR THE SENATE TAKE REGARDING THE FILED CONTEST AT ITS DECEMBER ORGANIZATIONAL MEETING?

The Senate should seat John Peavey and read into the journal the notice of the Contest of Election.

John Peavey was issued, by the Secretary of State as required by law, a Certificate of Election on November 21, 1980. Idaho Code § 67-403 prescribes that the Certificate of Election is prima facie evidence of the right of membership in the legislature. Idaho Code § 24-2102, defines incumbent as "the person whom the canvassers declare elected." The canvassers of Legislative District #21 declared John Peavey elected.

23 Am. Jur 2nd, *Elections* § 304, (Effect and Conclusions) states:

> A certificate of election is not title to a public office, but a mere monument of title. It is only prima facie evidence of the holder's right to office. It is not conclusive of an election as against direct attack, yet it

> entitles the recipient to take the office as against an incumbent whose term has expired, notwithstanding the pendency of a proceeding to contest the election instituted by the incumbent or another. He has a right to exercise the function of the office until the true result of the election is determined in the manner authorized by law, or until the certificate is set aside in an appropriate proceeding. In other words, the certificate confers that temporary right subject to destruction by adverse decision of a tribunal having jurisdiction in the matter.

Therefore, John Peavey has temporary right to take and hold office until any adverse decision by the senate. In addition, the Lt. Governor, leadership and the senate may wish at the organizational meeting to decide which of the two basic approaches for determining the matter to employ, see question and answer #4.

QUESTION #2

> WHAT ACTION SHOULD THE SENATE TAKE REGARDING THE ELECTION CONTEST BETWEEN THE DECEMBER 1980 ORGANIZATIONAL SESSION AND THE REGULAR SESSION IN JANUARY 1981?

The senate should await receipt of the deposition papers which will be delivered on the second day of the First Regular Session of the Forty-Sixth Idaho Legislature, pursuant to Idaho Code § 34-2117. In the interim the senate may wish to designate a small bipartisan committee to:

> 1. Develop further and specific procedural rules for the consideration by the full senate in January on how the matter will be handled in detail.
>
> 2. Commence preliminary analysis of the deposition material for clarifying and amplifying the presentation of the facts to the senate.
>
> 3. Prepare proposed subpoena lists or do such other ministerial functions as will facilitate the final hearing.

QUESTION #3

> WHEN SHOULD SENATE ACTION BE COMMENCED TO DECIDE THE ELECTION CONTEST?

Idaho Code § 34-2117 prescribes that the Secretary of State shall deliver all papers relating to the contest to the presiding officer on the second day of the organization of the legislature. At the time of the enactment of the contest statute in 1890 there was not an organizational session as we know it today. The December organizational session was enacted in 1967. We therefore believe that the senate should not commence formal action on this Contest of Election until it is duly constituted the second day of the First Regular Session of 1981, or January 13, 1981, pursuant to Idaho Code § 34-2114. This conclusion is further buttressed by the fact that depositions in the contest are not scheduled to be taken until December 16, 1980.

QUESTION #4:

WHAT PROCEDURE IS FOLLOWED BY THE PRESIDENT OF THE SENATE TO COMMENCE ACTION ON THE ELECTION CONTEST ON THE SECOND DAY OF THE REGULAR SESSION?

Upon delivery by the Secretary of State to the President of the Senate of all of the papers relating to the contest, the President of the Senate, per Idaho Code § 34-2117, shall immediately give notice to the senate that such papers are in his possession. The President may then follow either of two basic approaches:

1. Reference of the matter to a standing or special committee for the review of written evidence, the taking of additional oral testimony or other explorations, and the eventual return to the full senate of a committee report and recommendation for action. This process would be similar to the confirmation of appointments process used now in the Idaho Senate; or

2. Reference of the matter to the calendar of the full senate for hearing before the entire body, of evidence both oral and written, presented by managers for and against the contest in open session, with the senate and each of its members sitting as judges and jurors, voting at the conclusion of the presentation of evidence and arguments. This device would be similar in nature to the trial process used in the United States Senate in the Andrew Johnson impeachment proceedings.

Neither senate rule nor Idaho law prefers or precludes either of these two approaches.

The Lieutenant Governor, leadership and the senate should determine *at the earliest opportunity* which method will be employed.

QUESTION #5

HOW DOES THE FULL SENATE ACT TO HEAR AND DECIDE THE CONTEST ALLEGATIONS?

Idaho Code § 34-2118 provides that:

> Papers relating to any such contest shall be opened only in the presence of the body by the presiding officer, to whom the same shall be delivered. If ballots or poll books are contained therein, they shall, after being opened, remain in the custody of such presiding officer, subject to inspection of members, unless they shall, by vote, be temporarily committed to the chairman of a committee, in which case such a chairman shall return them to the proper presiding officer; and they shall, upon the decision of the contest, be again sealed up in an envelope and returned by mail or otherwise to the office of the county auditor in which they were first required to be filed.

This statute appears to indicate that the matter may, by vote, be temporarily assigned to a chairman of a committee. It appears to contemplate, but not require, the possibility of committee action as previously discussed. The statutes and senate rules are silent on whether this may be a standing or a specially

created committee. Senate Rule 48 in discussing matters not covered by senate rules states that the general rules of parliamentary practice and procedure as set forth in the Mason's Manual of Legislative Procedure, shall govern. *Legislative Procedure* § 796, Investigation Respective Members, subsection (2), states that a legislative body has the right in an election contest concerning one of its members to conduct an investigation before the body or one of its committees and to compel the attendance of witnesses and take testimony.

These authorities appear to vest wide latitude in the president to refer the contest to either a standing or special committee of the senate.

We would recommend that the senate, after having elected to use either the committee or the full body approach, approve in the customary manner specific rules designed to control the presentation and evaluation of evidence. The Office of the Attorney General would work with the president, leadership and any designated interim committee if desired to draft these trial rules.

QUESTION #6

WHAT POWERS DOES THE SENATE HAVE IN INVESTIGATING THE ELECTION CONTEST?

Jurisdiction over contests of legislative offices is contained in Art. 3, § 9 of the *Idaho Constitution* which prescribes "each house when assembled shall choose its own officers; judge of the election, qualifications and returns of its own members, determine its own rules of proceedings. . . ."

Idaho Code § 34-2105 prescribes "the senate shall severally hear and determine the contest of the election of its respective members." Idaho Code § 67-407 provides additional subpoena power to either house of the legislature.

It is therefore clear that the senate has broad subpoena and investigative powers and can conduct an independent investigation before the body or one of its committees and compel the attendance of witnesses and take testimony if it so chooses. It may also rely upon independent efforts or other officially gathered findings such as those of the Secretary of State and the county clerk. This view is also supported by Masons' section 796 (2).

QUESTION #7

WHAT IS THE BURDEN OF PROOF IN A CONTEST OF ELECTION AND BY WHOM IS IT BORNE?

The general rules of burden of proof apply to election cases. Before the senate the contestant should prove that the result of election would have been different if illegal votes had not been received. In addition, the contestant usually also has the burden of proving for whom illegal votes were cast in order to show his or her own election would have lawfully resulted. *Jaycox v. Varnum,* 39 Idaho 78, 226 Pac. 285.

A strong showing of this type with a sufficient number of votes affected could of course entitle a contestant to favorable senate consideration. However, it is possible, especially in an instance of alleged fraudulent voting, that the individuals who voted may never be located. Thus they would not be available for testimony about whom they voted for. In our opinion, even in this event, the senate might decide that the contestant may prevail if sufficient votes are proved suspect. The Idaho Supreme Court has analyzed this possibility at some length as follows:

If the proofs show that persons voted, who are not qualified voters, but do not show for whom they voted, the illegality will, as we have seen, be disregarded, when such votes are not sufficient, in number, to affect the result of the election. But when such illegal votes are sufficient, in number, to affect the result, the case may be one of great practical difficulty. Four distinct courses will be open to the court, or tribunal, charged with its determination: (1) to reject the entire poll, (2) to disregard the illegality, (3) to make a pro rate reduction of the vote of each candidate, and (4) to take all the illegal votes from one candidate.

The adoption of the first course, as an inflexible rule, would secure to the minority an easy method of destroying a close election. The adoption of the second would secure an equally easy method of carrying a close election. The adoption of either of the other courses would be a purely arbitrary act; and the result would be, not established by the facts, but fabricated by the court; and it would, at the same time, enable the minority to carry the election, by a dexterous adjustment of the illegal vote to the real majority. For illustration, if one candidate should receive 220 legal votes and no illegal votes, but the other should receive 210 legal and 20 illegal votes, the legal majority of the first candidate would be ten votes. But the apportionment of the 20 illegal votes, between the two candidates, would secure to the second candidate a fictitious majority of not less than ten votes. Again, if the aggregate majority of a candidate, in the district, the illegal votes, being excluded, amount to twenty, and the illegal votes, twenty-one in number, to be all taken from him the will of the majority may be defeated. . . .

In the total absence of proof tending to show for whom illegal votes, sufficient in number to affect the result, were cast, the duty of the court would seem to be to choose, as wisely as possible, between a disregard of the illegality and a rejection of the entire precinct vote. There ought to be no arbitrary presumption of law, either that all the illegal votes were cast by the political party in the majority, or they were cast by different parties in proportion to their numbers. To take the illegal votes all from one candidate, or pro rate from several candidates, would be, not to decide, but to make a case for the parties.

It must be borne in mind that, in this case, there were no general irregularities, no fraud, no corruption, charged or established, and that neither appellant nor respondent was shown to have been responsible for the casting of the illegal votes. The situation is merely one in which three illegal votes were cast through honest mistake and the court found it impossible to tell for whom they were cast for the office in question. . . .

The method of rejecting the entire vote of the precinct is also favored by some authorities. In most of the cases, however, fraud or irregularities had occurred which tainted or affected the entire vote of the precinct. . . .

No sound argument can be advanced in favor of taking all the illegal votes from one candidate, another method mentioned by Paine.

There are two alternatives left: to set the election aside, or find for respondent on the ground that appellant has not made out his case. The

> first course has not been urged by either party, and we doubt the power of the court to declare an election void on any ground presented by this case. Our statutes provide that an election may be contested when illegal votes have been received, or legal votes rejected sufficient to change the result.
>
> The judgment of the court in cases of contested election shall confirm or annul the election according to the right of the matter; or, in case the contest is in relation to the election of some person to an office, shall declare as elected the person who shall appear to be duly elected.
>
> Respondent contends that the contestant had the burden of proving for whom the illegal votes were cast in order to show that he was elected. This is unquestionably the general rule. In all the cases cited by respondent it appeared that contestant had not used all means within his power to prove for whom the illegal votes were cast. It has been said that, if contestant proves the illegal votes, but is, for reasons beyond his control, unable to prove whether the votes were cast for himself or the contestee, he should not be placed at a disadvantage because of this fact. . . . *Jaycox v. Varnum,* 39 Idaho 78, 266 Pac. 285 (1924).

However, the court went on to create a judicial rule that the burden should be as follows:

> In order to overcome the prima facie effect of the returns, it would seem incumbent on appellant to prove not only the illegal votes, but also for whom they were cast. Both these elements of proof were required to show that the illegal votes affected the result, and that, but for them, appellant would have been elected. It would be neither just nor logical to put the contestee at a disadvantage, because contestant was unable to sustain the burden of proof which rested upon him, contestee who is seeking affirmative relief has the burden of proof is one which necessarily underlies all our procedure. A party may have a just cause, and lose the benefit of his evidence through causes not of his making and beyond his control; yet we hold he is not entitled to recover because of failure of proof. It is true that there is not a complete analogy between an election contest and the ordinary civil proceeding, because in the former the public have an interest, lacking in the latter. Nevertheless, we conclude that the general rule as to burden of proof must apply to election contests. Appellant did not sustain this burden, and failed to prove that the result of the election would have been different if the illegal votes had not been received. The court was therefore not in a position to declare that respondent was not duly elected and that appellant was.

Thus in the courts of Idaho a contestant must prove both sufficient doubtful votes to change the outcome and for whom the illegals voted. While a powerful guideline, this precedent is not strictly controlling upon the senate. Arguably one of the other three rationales of procedure might be adopted as the legislative burden incumbent upon the contestant if the senate so chooses. Any new amplified rules should speak to this issue in advance of the contest decision. In addition, the senate must take care that its rule is rational and logical and that neither any party's civil rights nor the public election process are procedurally prejudiced by inappropriate presumptions or burdens.

QUESTION #8

WHAT IS THE VOTING MAJORITY REQUIRED TO DECIDE AN ELECTION CONTEST?

It is our opinion that the senate may act to decide an election contest by a simple majority of the votes cast by a lawful quorum.

Although some parallels may be drawn, where a contest is lawfully filed before a member takes his or her seat, that contest can be distinguished from the expulsion of a member on cause. Idaho Const., Art. 3, § 11 provides that each house may, for good cause shown, with the concurrence of two-thirds of all members, expel a member. Idaho law and senate rules are silent on grounds for expulsion. However, Idaho Senate Rule #48 directs that Mason's Manual of Legislative Procedures shall govern in such cases. Mason's § 562 (8) prescribes that the constitutional provision that relates to expulsion of members deals only with expulsion for misconduct.

Since misconduct of Mr. Peavey is not in issue, and since an Election Contest is not expressly enumerated as a decision requiring a super-majority, Senate Rule #37 appears to control. That provision directs that a simple majority of the senators voting may make decisions on issues presented to the body.

QUESTION #9

WHAT IS THE ROLE OF THE PRESIDING OFFICER DURING THE CONTEST PROCEEDING?

Idaho Code § 34-2118 prescribes that the paper relating to the election contest along with any ballots or poll books they may contain, shall remain in the custody of the presiding officer, subject to inspection by the members until or unless temporarily committed to the chairman of a committee.

Idaho law does not enumerate special senatorial procedure for conducting an election contest. Therefore, the presiding officer should apply the Rules of the Senate.

If the "whole body" decision-making approach is adopted, the presiding officer will have to act in a quasi-judicial capacity, perhaps even ruling on evidentiary objections as was done in the Johnson proceedings. Amplified senate rules and additional research and guidelines would be desirable and necessary if this is done. In addition, it will be necessary for the chair to appoint "managers" to present the pro and con cases and summarize the evidence in argument before the vote is taken.

If the "committee report" vehicle is used then the presiding officer may assume approximately the traditional role.

QUESTION #10

WHAT IS THE ROLE OF THE COURTS, IF ANY, IN HELPING TO DECIDE THE VALIDITY OF THE ALLEGATIONS IN THE CONTEST IF EITHER JOHN PEAVEY OR MAURICE ELLSWORTH CHOOSES TO FILE LITIGATION?

The Idaho Supreme Court has ruled:

> Each house when assembled shall choose its own officers; judge of the election, qualifications and returns of its own members, determine its own rules of proceeding, and sit upon its own adjournments. . . . This provision makes each house of the legislature the sole judge of the election and qualification of its members. The candidates concerned in this proceeding being contestants for the office of state senator, the ultimate decision as to which shall be declared elected and seated, remains to be made by the state senate when assembled. Our decision herein is not binding upon that body. It may be considered, along with other pertinent data, for what weight or effect the senate may see fit to give it, in the final determination of the election of the senator for Power county, should a proceeding for that purpose be initiated in or by the state senate. *Burge v. Tibor,* 88 Idaho 149, 397 P.2d 235.

Thus our Supreme Court, when it last addressed this issue, recognized exclusive legislative jurisdiction for election contests to determine which candidate shall be declared elected and seated.

Other jurisdictions, however, have held that their Supreme Court has the power to adjudicate substantial claims of deprivation of Federal or state constitutional rights by the respective state houses in the exercise of election contest powers. *Luce v. Wray,* 254 N.W.2nd 324 (Iowa 1977).

In our opinion, Idaho court proceedings may neither eliminate nor supersede senate decision making in this contest.

QUESTION #11

> DOES THE SENATE HAVE THE POWER TO ORDER A NEW ELECTION?

Title 34, Section 24 of the *Idaho Code* which speaks to *other than legislative* contests provides that when a person whose election is contested is found to have the highest number of legal votes, but the election is deemed a nullity for other causes, the election shall be declared void and the person receiving the next highest votes *shall not* be declared elected.

Idaho Const., Art. 3, § 9 and Idaho Code § 34-2101 et. seq. which address contest of legislative elections is silent on this subject. Our research fails to indicate any specific grant of authority empowering the senate to order a new election. Additionally, Idaho Code § 59-501 appears to anticipate a vacancy of office where a member of the legislature is removed from office or forfeits the office by operation of any law of the state. A successful contest of election may induce such a result. In this event the vacancy would be filled by the procedure prescribed by Chapter 9 of Title 59, *Idaho Code.* Thereunder the governor could appoint from a list of three nominations submitted by the Democratic Central Committee of Legislative District #21.

Thus the most likely to be sustained procedure would be gubernatorial appointment to fill a "vacancy." However, if the senate wishes, in light of the above statutory vaguenesses to urge that it has the inherent authority to order a new election, this office would willingly seek declaratory judgment on an expedited

basis from the Idaho courts to concur with or reject that contention and clarify that authority.

QUESTION #12

> MAY THE SENATE SEAT MAURICE O. ELLSWORTH INSTEAD OF JOHN PEAVEY?

Chapter 21 of Title 34, *Idaho Code,* which addresses legislative election contests is again silent on this subject.

Chapter 20 of Title 34, *Idaho Code,* which addresses election contests in other than legislative offices does tangentially speak to this issue.

Idaho Code § 34-2021 states:

> Form of judgment. — The judgment of the court in cases of contested election shall confirm or annul the election according to the right of the matter; or, in case the contest is in relation to the election of some person to an office, *shall declare as elected the person who shall appear to be duly elected.* [Emphasis added.]

By analogy, under one extremely limited circumstance it can be argued that the senate would have the authority to seat the contestant over the contestee. If (1) the proponents of Mr. Ellsworth have fully met their burden of proof by clearly demonstrating that the result of the election would have been different if illegal votes had not been received and (2) have proved further for whom the illegal votes were cast per *Jaycox v. Varnum,* 39 Idaho 78, 225 Pac. 285, and (3) the proceedings before the full senate or relevant committees present a fact pattern which fully and clearly illuminates the total voting numbers and results in the District and (4) a reasonable person reviewing those facts would find that a majority of the lawful votes were cast for the contestant, then ARGUABLY the senate may seat a non-incumbent in the absence of restriction to the contrary. However, we would generally advise against this course in the absence of specific statutory or constitutional authorization. The vacancy procedure or the attempted new election route outlined above are far preferable.

QUESTION #13

> PLEASE PROVIDE ANY ADDITIONAL LEGAL OR FACTUAL OBSERVATIONS THAT MIGHT BE USEFUL TO THE SENATE IN DECIDING THIS CONTEST.

On November 4, 1980, the general election was held in Idaho. In Legislative District #21, which encompasses Blaine County, the state senate election indicated that John Peavey defeated Maurice O. Ellsworth by 54 votes. On November 21, 1980 John Peavey received a Certificate of Election as prescribed by law from the Secretary of State. During the course of that election, several allegations concerning election irregularities in Blaine County were complained of and, subsequently, an election contest was filed by Ellsworth with John Peavey. On November 24, 1980 a copy of that contest was submitted to the Secretary of State's Office and the Lieutenant Governor's Office.

The Contest of Election filed with John Peavey specified the following four grounds for the contest:

1. Illegal votes received, and legal votes rejected, at the polls sufficient to change result;

2. For error in the Board of Canvassers in counting votes, which error would change the result of the election;

3. For failure of the Blaine County Clerk to comply with the requirement of Chapter IV, Title 34, Idaho Code; and

4. For cause which shows that Maurice O. Ellsworth was legally elected.

The contest provisions for legislative offices are contained in Chapter 21 of Title 34, *Idaho Code*. Specifically, Idaho Code § 34-2101 provides:

> The election of any person to any legislative office may be contested: (1) for malconduct, fraud or corruption on the part of the judges of election in any precinct, township or ward or any board of canvassers, or by any member of either board sufficient to change the result;
>
> 2. when the incumbent was not eligible to the office at the time of the election;
>
> 3. when the incumbent has been convicted of a felony, unless at the time of the election he shall have been restored to civil rights;
>
> 4. when the incumbent has given or offered to any elector, or any judge, court or canvasser of the election, any bribe or reward in money, property or anything of value, for the purpose of securing his election;
>
> 5. when illegal votes have been received or legal votes rejected at the polls sufficient to change the result;
>
> 6. for any error in the board of canvassers in counting or declaring the result of the election, if the error would change the result;
>
> 7. when the incumbent is in default as a collector and custodian of public money or property;
>
> 8. for any cause which shows that another person was illegally elected.

To constitute an illegal vote, one must not be a qualified elector, as defined by Idaho Code § 34-402 or must possess one of the constitutional limitations prescribed in Title 5, Section 2 and Section 3 of the *Idaho Code*.

Idaho Code § 34-402 prescribes the qualifications of an elector as a citizen of the United States, eighteen (18) years old who has actually established a bona fide residence prior to the day of the election, in this state and in the county in which he or she offers to vote if registered within the time period provided by law.

Idaho Code § 34-403 prescribes that "no elector shall be permitted to vote if he is disqualified as provided in Art. 3, §§ 2 and 3 of the *Idaho Constitution*. That section prescribes that no person is permitted to vote who is under guardianship,

idiotic or insane, or convicted of treason, felony, embezzlement of public funds, bartering or selling or offering to barter or sell his vote, or purchase or offering to purchase the vote of another, or other infamous crime and who has not been restored to the rights of citizenship, or who, at the time of such election, is confined in prison on conviction of a criminal offense. . . ."

For election purposes, Idaho Code § 34-107 defines residence as:

> 1. Residence, for voting purposes shall be the place in which a qualified elector fixed his habitation and to which, whenever he is absent he has the intention of returning.
>
> 2. A qualified elector who has left his home and gone to another state or territory or county or state for temporary purposes only shall not be considered to have lost his residence.
>
> 3. A qualified elector shall not be considered to have gained a residence in any county or city of this state to which he comes for temporary purposes only, without the intention of making it his home, but with the intention of leaving it when he has accomplished the purpose that brought him here.
>
> 4. A qualified elector who moves to another state or to any other territories, with the intention of making it his permanent home, shall be considered to have lost his residence.

A good faith intent to remain indefinitely appears to be the ultimate test of "residence." Since an intent to remain permanently is subjective and perhaps not readily ascertainable by objective observation, a determination of residency, by necessity, must be left to the prospective voter.

When an elected official disbelieves the intent of an elector, that challenge should be made when an elector attempts to cast the ballot and as prescribed by Idaho Code §§ 34-304, 34-1104 and 34-1111.

In the instant case it appears to us that to determine that illegal votes were received, one must establish that there was an absence of qualified voters or that the purported electors were under a disability as prescribed by Art. 6, §§ 2 and 3 of the *Idaho Constitution* and that those electors voted for the other candidate.

Illegal votes may also be demonstrated by showing that the purported elector was without the subjective intent to be a resident. Unfortunately, this usually can be determined only through admissions by the elector himself. The problem with this procedure is that there are specific criminal penalties for violation of the election statutes such as those prescribed in Idaho Code §§ 18-2304 and 18-2306. Additionally, it is possible that these purported electors may plead the Fifth Amendment against self-incrimination. Also, since ballots are not traceable, if a deposed or subpoenaed witness, who is alleged to be an illegal elector, perjures himself as for whom he cast his ballot in the general election, that perjured testimony can neither be traced, proved or disproved.

The second ground for contest submitted by the petitioner is for error in the Board of Canvassers in counting votes, which error would change the result of the election. This ground appears to contemplate a recount. Recounts are performed by the Attorney General as prescribed in Idaho Code § 34-2303 and

pursuant to the procedure pronounced in Idaho Code § 34-2301 et. seq. It is arguable that this latter law and its procedure amends and supersedes by implication this earlier ground of election contest. However, if directed by the senate, the Attorney General could implement the recount procedure as prescribed by Chapter 23 of Title 34, *Idaho Code*.

The third ground presented in the contest of election is for failure of the Blaine County Clerk to comply with the requirements of Chapter 4, Title 34, *Idaho Code*. While this ground is not specifically enumerated in Idaho Code § 34-101, it may be presumed that this is within the purview of Idaho Code § 34-2101 (8) "for any cause that shows that another person was illegally elected." Chapter 34, of Title 34, of the *Idaho Code* speaks to the privileges, qualifications and registrations of electors. The petitioner must show that another person was legally elected or, in other words, that but for the Blaine County Clerk's failure to comply with Chapter 4 of Title 34, the outcome of the election would have been different and that Maurice Ellsworth would have been legally elected. Thus the senate must not only determine the legal qualifications of the electors of Blaine County, but that those electors were in violation of Chapter 4 of Title 34, *Idaho Code,* and in fact, voted for other than Mr. Ellsworth. This procedure again raises questions of non-traceable ballots, and undeterminable, unverifiable or perjured testimony.

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